

Change the Culture

Change the System



**Top 10 Cultural Shifts
Needed to Create the
Courts of Tomorrow**





Change the Culture, Change the System

Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow

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October 2015

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

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Message to Readers



Every change identified in this publication is important. But, before we get to the trees, I want to talk about the forest.

In order for change to be successful, each of us, as judges and lawyers, must recommit ourselves to the spirit of our work—the reason why we chose the law: the pursuit of justice. In this effort, we are talking about a system of justice in civil disputes, not the result in particular cases. We must rebuild the system such that it inspires pride and respect, not just for those of us who live in it, but most importantly, for those who observe, utilize, and, indeed, depend upon it.

It is easy to hide behind cynicism and defeatism. The system is huge; the problems are pervasive. However, the stakes are even bigger. For our society to prosper, we *must* have a system of civil justice that is accessible, fair, trustworthy, and respected. We at IAALS believe that over the course of modern history, the integrity, honesty, and predictability of the American legal system has distinguished our country from nearly all of the rest of the world, and has contributed substantially to the prosperity we have enjoyed.

Yet, our research, and the research of others over the last nearly ten years, leads us to the conclusion that there is a widespread belief that our present civil justice system fails to deliver on its first promise: “...the just, speedy, and inexpensive determination of every action and proceeding,” Rule 1 of the Federal Rules of Civil Procedure—and the consequence is that the preeminence of the American civil justice system is in serious jeopardy. In America, law protects freedom. That freedom is not realized when people feel abandoned by the court system or forced to abandon justice. And when presented with the choice, people would rather flee our system for alternatives. Our goal at IAALS is to reestablish the preeminence of the American civil justice system. This goal is so important that none of us can stand mute. We must act.

Over the course of recent generations, the practice of law has moved from a selfless profession to a business. Many lawyers still think of themselves as professionals, but we must face the fact that an increasing number see the practice of law more from the entrepreneurial perspective than the professional. Thus, it is too easy to line up on either side of the “v.” We too often fall into thinking that a change that might be good for defendants would never be acceptable to plaintiffs; or vice versa. No change could be good for both. What agenda is hidden beneath the changes? What unseen troll lurks under the bridge? Or, why not parlay new changes into new procedural gamesmanship? That is how lawyers are trained—to harness the process for the benefit of their clients.

Judges are not without responsibility for this predicament. Especially at the trial court level, crushing caseloads mean that moving the docket can become the top priority, yet, as always, judges are the only ones who can neutralize the brinksmanship, control the cost, and deliver the outcome in a speedy manner.

So, what about justice? What about the system? What about the level of confidence our citizenry has in the law’s protection of their freedoms? Bit by bit, we have allowed it to be eroded into gamesmanship. We let that happen. And now we can reverse course.

Being a lawyer or a judge is a calling of sorts. Many of us chose it because we wanted to change something in society. Many of us chose it because we wanted to be part of something bigger, something important. We were in search of a place to do good and do well: a place where our heads and our hearts would be engaged. There is reason for pride in our profession, which we must reclaim: a basis for joy, pride, and optimism. But there is also a responsibility to deliver on our promise of a just, speedy, and inexpensive resolution of every case. To achieve that, we must truly elevate our sights and focus on the preeminent goals of access, fairness, the search for the truth, and trustworthiness.

For this new reform movement to have traction, each of us must participate: on a case by case level, doing our best to achieve fairness; and on a systemic level, being part of the “change team.”

If we stand shoulder to shoulder, united in our common vision, proud to be lawyers and judges, and committed to achieving a great system, we will succeed.

Rebecca Hale Kowlis

Preface

Almost ten years ago, in January 2006, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, opened its doors with a mission to improve the civil justice system. The goal was to provide original empirical research to identify the issues, develop solutions in partnership with some of the brightest minds in the country, and then support implementation and change. Ten years later, momentum toward change has built in our civil justice system at both the state and federal level. We are on the cusp of rule amendments to the Federal Rules of Civil Procedure, focused on proportionality, case management, and cooperation. Recommendations are also forthcoming at the state level from a committee appointed by the Conference of Chief Justices, intended to increase access at the state court level, where we see the vast majority of cases in the United States.

It took much hard work to get this far, but achieving the full impact of these recommendations and reforms ultimately comes down to implementation. How do we ensure that the positive changes intended by the reforms come to fruition? How do we tap into this momentum to create the just, speedy, and inexpensive courts of tomorrow? The answer to this question is as important as the recommendations themselves, for without positive implementation, the efforts thus far will be wasted.

We have posed these questions to many over the last year in order to gain input from judges, court administrators, and lawyers on both sides of the “v.” We have conducted focus groups with lawyers, general counsel, and plaintiffs’ counsel, and we have had individual conversations with an equally diverse group. There has been a consistent theme across these discussions—the agreement that culture change is an essential component of civil justice reform. Rules alone are not enough. And while case management is critical as well, we cannot rest this effort on the shoulders of the courts and our judges alone.

The top ten cultural shifts enumerated in this article represent a compilation of the themes across all of our discussions.¹ It is our intention that by having these conversations, and then identifying these themes, we will bring the elusive concept of “culture change” into focus so that we can move from dialogue to action.



¹ My gratitude to the following individuals, who served as an ad-hoc focus group via individual conversations. I greatly appreciate their time and thoughts on culture change: Thomas Y. Allman, Michael Arkfeld, Hon. Thomas A. Balmer, John Barkett, Jason Baron, Daniel J. Becker, William P. Butterfield, Hon. David G. Campbell, Gilbert A. Dickinson, Hon. Jeremy Fogel, Steven S. Gensler, Daniel C. Girard, Hon. Paul W. Grimm, William C. Hubbard, Hon. John G. Koeltl, Robert Levy, Mary C. McQueen, Tommy Preston, Jonathan M. Redgrave, Hon. Lee H. Rosenthal, William A. Rossbach, Paul C. Saunders, Hon. Craig B. Shaffer, Linda Sandstrom Simard, Jordan M. Singer, Hon. Jeffrey S. Sutton, Francis M. Wikstrom, Kenneth J. Withers, and Hon. Jack Zouhary.

Introduction

In 2014, Merriam-Webster declared the word *culture* the “Word of the Year.” Merriam-Webster noted that “[t]his year, the use of the word *culture* to define ideas in this way has moved from the classroom syllabus to the conversation at large, appearing in headlines and analyses across a wide swath of topics.”² As Peter Sokolowski, Editor at Large for Merriam-Webster, explained, “Culture is a word that we seem to be relying on more and more. It allows us to identify and isolate an idea, issue, or group with seriousness. And it’s efficient: we talk about the ‘culture’ of a group rather than saying ‘the typical habits, attitudes, and behaviors’ of that group.”³

The concept of culture was originally used by anthropologists to describe the formal and informal customs, beliefs, rules, and rituals of a particular society. The concept has since been adopted by many other disciplines. In particular, organizational researchers and managers have used it over the past several decades to describe the norms and practices of organizations. The legal community extends beyond organizations and comprises a greater legal macroculture.⁴ While legal culture can be broken down into many different and overlapping subcategories—lawyers, judges, courts, court staff, state bars—there is nevertheless an overall legal culture to which these subcategories all belong. Thus, for the same reasons noted by Merriam-Webster, the term *culture* provides an efficient way for us to speak with a common language about the habits, attitudes, and behaviors of the lawyers and judges in the United States.

Thomas Church, an early researcher in the area of “legal culture,” defines legal culture broadly as the set of “expectations, practices, and informal rules of behavior” of judges and lawyers.⁵ The idea of “local legal culture” has its genesis in the attempts in the 1970s to explain civil case delay. At the time, the overwhelming majority of efforts to improve civil case disposition time had either “failed completely, achieved only short-term benefits or produced marginal results.”⁶ To further understand the causes of civil case delay, Church undertook an ambitious project that looked at trial court delay and its causes.⁷ He found that the courts with the highest caseloads were not the courts with the slowest disposition times, nor were the relatively underworked courts speedier.⁸ Thus, the fundamental causes of delay were not the typical factors suggested by scholars, such as overworked courts with high trial rates, or a large proportion of serious or complex cases. Rather, case processing time was most strongly related to the informal attitudes, expectations, and practices of the legal community. Church concluded that “both speed and backlog are the result of a stable set of expectations, practices, and informal rules of behavior which is termed ‘local legal culture.’”⁹

Another important observation from early research on courts as organizations suggests that “it is the interaction among the workgroup members, more than the formal rules of procedure, which determines the outcome. Potential reforms . . . must confront the organizational realities of a court. Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members.”¹⁰ Thus, “‘local legal culture’ is not an explanation as much as it is a convenient restatement of the problem. It merely applies

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- 2 Words at Play: 2014 Word of the Year, #1: Culture, Merriam-Webster.com, <http://www.merriam-webster.com/top-ten-lists/2014-word-of-the-year/culture.html> (last visited 9/24/2015).
 - 3 Press Release, Merriam-Webster, Merriam-Webster Announces “Culture” as 2014 Word of the Year (Dec. 15, 2014), *available at* <http://www.merriam-webster.com/word-of-the-year/2014-word-of-the-year.htm>.
 - 4 *See generally* EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 2 (4th ed. 2010).
 - 5 THOMAS CHURCH, JR., ALAN CARLSON, JO-LYNNE LEE & TERESA TANN, NATIONAL CENTER FOR STATE COURTS, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS, EXECUTIVE SUMMARY 14 (1978).
 - 6 David R. Sherwood & Mark A. Clarke, *Toward an Understanding of “Local Legal Culture,”* 6 THE JUST. SYS. J. 200, 201 (1981).
 - 7 *See generally* CHURCH ET AL., *supra* note 5.
 - 8 *Id.* at 2-9.
 - 9 *Id.* at 14.
 - 10 Joel B. Grossman, Herbert M. Kritzer, Kirstin Bumiller, & Stephen Dougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86, 91-92 (1981).



a label to what is generally accepted: that the practices and attitudes toward court processing of lawyers and court personnel play a significant role in determining the pace of litigation in a particular court.”¹¹

An important take-away from these studies is that legal culture—defined broadly as the shared norms and values that define the behavior of judges and lawyers, beyond the more formal rules and structure of our legal system—is pivotal to the administration of justice in our country and should be recognized as an important factor in civil justice reform. Church recognized that it is these established expectations and practices that result in considerable resistance to change.¹²

Perhaps the most intriguing aspect of culture as a concept is that it points us to phenomena that are below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious. . . . In another sense, culture is to a group what personality or character is to an individual. We can see the behavior that results, but we often cannot see the forces underneath that cause certain kinds of behavior. Yet, just as our personality and character guide and constrain our behavior, so does culture guide and constrain the behavior of members of a group through the shared norms that are held in that group.¹³

Thus, in order to make significant changes to the system, we must make changes in the pervasive legal culture.¹⁴

11 *Id.* at 112.

12 *See generally* CHURCH ET AL., *supra* note 5, at 15.

13 *See* SCHEIN, *supra* note 4, at 14.

14 THOMAS CHURCH, JR., ALAN CARLSON, JO-LYNNE LEE & TERESA TANN, NATIONAL CENTER FOR STATE COURTS, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 81 (1978) (concluding that “the most important and most difficult change to be made is in the long-term expectations and practices of the individual judges and attorneys practicing in the court”).



“The purpose of our system is to resolve the disputes in litigation that the parties were not able to resolve outside of litigation. The object of litigation should be to define as efficiently as possible the issues in the case for resolution, and then to resolve them. Discovery should be there to find information to assist in settling the case or resolving the case through trial. The costs of discovery shouldn’t be so large that it distorts this process for either side. This is the optimal system.”

Hon. John Koeltl
District Judge, U.S. District Court,
Southern District of New York

The Case for Change

IAALS and others have catalogued and documented the case for civil justice reform over the past ten years, and as part of that effort, have set out to gather empirical data, nationwide in scope, to better understand the civil justice system and ways to improve it.¹⁵ Corina Gerety, Director of Research at IAALS, has summarized the results of multiple nationwide surveys of different individuals, conducted by different organizations, finding broad areas of substantial agreement among the diverse respondents: cost is too high and it affects court access; delay increases cost; and discovery is responsible for much of the unnecessary cost and delay.¹⁶

Together, these studies suggest a plausible theory: cost inefficiencies in the civil justice process reduce court access, delay contributes to unnecessary cost, and discovery procedure is a key factor with respect to both cost and delay. The survey results provide a starting point for further research on such a theory and on how the process might be improved without affecting fairness. As stewards of the American civil justice system, legal professionals should support a consistent effort to better understand it, appropriately evolve it, and ultimately protect it.¹⁷

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- 15 See CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., TRIAL BENCH VIEWS: FINDINGS FROM A NATIONAL SURVEY ON CIVIL PROCEDURE (2010); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 7, 51 (2009); KIRSTEN BARRETT ET AL., MATHEMATICA POLICY RESEARCH, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT (2008) [hereinafter ACTL FELLOWS SURVEY]. See also EMERY G. LEE III, FED. JUDICIAL CTR., EARLY STAGES OF LITIGATION ATTORNEY SURVEY: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2012); THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 27-29 (2010); REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT’L EMP’T LAWYERS ASS’N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 (2010) [hereinafter NELA SURVEY]; AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (2009) [hereinafter ABA LITIGATION SURVEY]. See generally Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. KAN. L. REV. 877 (2013).
- 16 CORINA GERETY, INST. ADV. OF THE AM. LEGAL SYS., EXCESS AND ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 8 (2011).
- 17 *Id.* at 2.

The challenge in addressing these issues lies not only in crafting solutions—it is also overcoming lawyers’ and judges’ strong and well-documented resistance to change. Efforts to reduce cost and delay face inertia and attachment to the status quo.¹⁸ In addition, anecdotal evidence clearly establishes that “a strong cultural bias limits the ability of individuals to look at an old problem in a new way.”¹⁹

Thus, “culture change” is a shorthand way of identifying what needs to happen. The term also resonates with extensive research on the topic of culture change as part of the larger study of organizational management conducted over the last several decades. Past studies recognize that the impetus for culture change is often external challenges exerting pressure on the organization. In a business context, those challenges are largely economic: “Powerful macroeconomic forces are at work here, and these forces may grow even stronger over the next few decades. As a result, more and more organizations will be pushed to reduce costs, improve the quality of products and services, locate new opportunities for growth, and increase productivity.”²⁰

The legal system is certainly not immune from these forces. Civil caseloads are falling as people choose alternative means of resolving disputes, including new online dispute resolution methods. From a business perspective, courts are losing their market share. Court budgets are being cut; civil jury trials are almost non-existent; access to the civil courts is more and more expensive, and thus not feasible for a significant portion of the public; and, relatedly, public trust and confidence in the civil justice system are waning. Certainly, if not already upon us, a crisis is brewing.

However, change is never easy, and the legal system represents a long-established and mature organization, which makes it even more difficult to change.²¹ For such mature organizations, many basic assumptions are strongly held, despite the fact that such assumptions can be increasingly out of line with the *actual* assumptions by which they operate.²² Even where such assumptions are challenged, the legal community will want to hold on to the assumptions because they may justify the past and are a source of pride and self-esteem.²³ It is the strength of the culture itself, and the illusion that these values define how the system operates, that makes culture change so difficult.²⁴ For mature organizations, “[m]ost executives will say that nothing short of a ‘burning platform,’ some major crisis, will motivate a real assessment and change process.”²⁵

When such a crisis occurs, basic assumptions are brought to the surface, and the organization is faced with a choice between some type of “turnaround” or destruction of the organization and its culture through total reorganization.²⁶ Many have argued the civil justice system is the verge of such a crisis.²⁷ The question becomes whether we can achieve a turnaround before complete destruction and rebirth, and if so, whether that turnaround can be managed in a way that leads to positive change.

18 Cf. Thomas W. Church, Jr., *Examining Local Legal Culture*, 1986 AM. B. FOUND. RES. J. 449, 508 (1986) (speaking of the same hurdles in the criminal context).

19 Sherwood & Clarke, *supra* note 6, at 214.

20 JOHN P. KOTTER, *LEADING CHANGE* 3 (2012).

21 SCHEIN, *supra* note 4, at 289.

22 *Id.* at 290.

23 *Id.*

24 *Id.* at 291.

25 *Id.*

26 *Id.* at 293.

27 See, e.g., Chief Justice John T. Broderick, Jr., Remarks to the National Association of Court Management, *The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management 2* (March 10, 2009), available at <http://www.courts.state.nh.us/press/2009/CJ-Brodericks-March-10-2009-speech-to-NACM.pdf> (“In my view, it is imperative that we redouble our efforts, judges and court managers alike, to sustain and creatively adapt our state justice system to meet the real world needs of the 21st Century. Change will come even if we do nothing but it will not be the change we want. Time and current economic realities do not make our task easier, but they certainly provide powerful incentives for change. Change we create and manage.”).

To achieve such positive success, we need to keep in mind the following eight important steps from John Kotter, a well-known thought leader on change:²⁸

- **Establish a Sense of Urgency**

Transformations will fail where complacency is high

- **Create a Guiding Coalition**

It is essential that the head of the organization be an active supporter, but also that the effort go far beyond a single leader

- **Develop a Vision and Strategy**

It must direct, align, and inspire action

- **Communicate the Change Vision**

Communication is an essential step to create buy-in

- **Empower Broad-Based Action**

- **Generate Short-Term Wins**

Real transformation takes time, which makes short-term goals and wins all the more important

- **Consolidate Gains to Produce Additional Change**

- **Anchor New Approaches in the Culture**

Change needs to sink in over time to become “the way we do things around here”

In short form, we need to first establish urgency and motivation to change, then develop a vision and communicate it. Next, we must empower action. And, to achieve long term culture change, it is critical to anchor these changes by incorporating the new approach into our concept and identity as a legal culture: a reason to be proud of the new direction and a way to trace it to our roots as a system.²⁹ We must also be realistic about resistance to change. Behavior that has become dysfunctional may nevertheless be difficult to give up because it still serves other positive functions.³⁰

One leading expert on culture change has posited a core belief that “[e]ither you will manage your culture, or it will manage you.”³¹ In our efforts to create the just speedy, and inexpensive courts of tomorrow, we cannot ignore the important role of legal culture in our system.

28 KOTTER, *supra* note 20, at 3-17.

29 SCHEIN, *supra* note 4, at 300.

30 *Id.* at 301.

31 ROGER CONNORS & TOM SMITH, *CHANGE THE CULTURE, CHANGE THE GAME 1* (2011).

Change the Culture, Change the System: A Top 10

The research on culture change, and legal culture in particular, suggests that culture change for the legal system is an uphill battle. While we have a clear challenge ahead, that does not mean that it is impossible. We propose the following ten culture shifts for the purpose of promoting that national dialogue. We recognize some commentators may push back on this list as merely aspirational, impossible, or even a bit controversial. Yet we are of the view that the time for bold action has come.

1. Back to Our Professional Roots

Law needs to be a collegial and civil profession first and foremost.

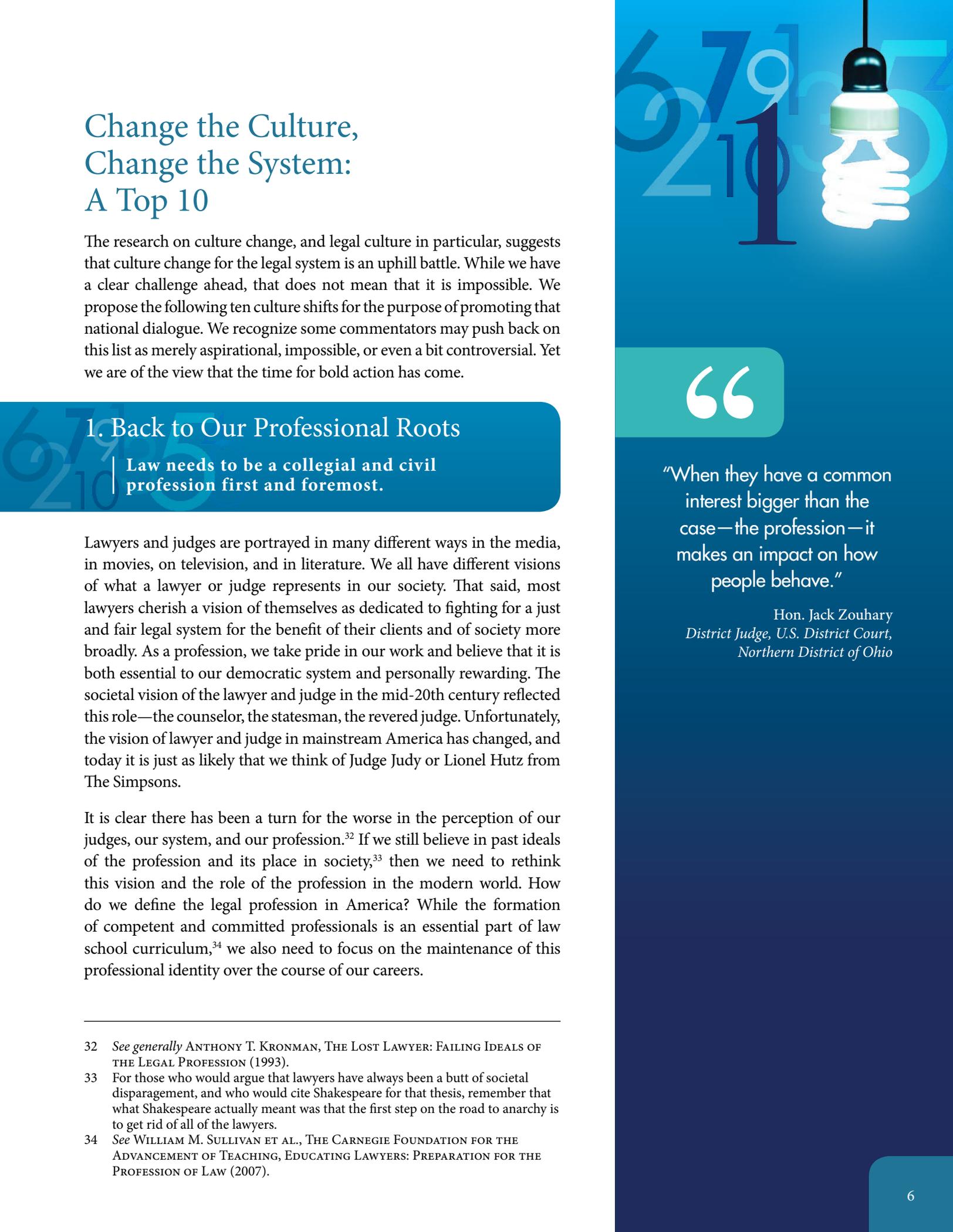
Lawyers and judges are portrayed in many different ways in the media, in movies, on television, and in literature. We all have different visions of what a lawyer or judge represents in our society. That said, most lawyers cherish a vision of themselves as dedicated to fighting for a just and fair legal system for the benefit of their clients and of society more broadly. As a profession, we take pride in our work and believe that it is both essential to our democratic system and personally rewarding. The societal vision of the lawyer and judge in the mid-20th century reflected this role—the counselor, the statesman, the revered judge. Unfortunately, the vision of lawyer and judge in mainstream America has changed, and today it is just as likely that we think of Judge Judy or Lionel Hutz from *The Simpsons*.

It is clear there has been a turn for the worse in the perception of our judges, our system, and our profession.³² If we still believe in past ideals of the profession and its place in society,³³ then we need to rethink this vision and the role of the profession in the modern world. How do we define the legal profession in America? While the formation of competent and committed professionals is an essential part of law school curriculum,³⁴ we also need to focus on the maintenance of this professional identity over the course of our careers.

32 See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

33 For those who would argue that lawyers have always been a butt of societal disparagement, and who would cite Shakespeare for that thesis, remember that what Shakespeare actually meant was that the first step on the road to anarchy is to get rid of all of the lawyers.

34 See WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).



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“When they have a common interest bigger than the case—the profession—it makes an impact on how people behave.”

Hon. Jack Zouhary
District Judge, U.S. District Court,
Northern District of Ohio

Legal periodicals, business journals, and the internet are filled with articles discussing the “business of law.” Law firms around the country are focused on how to make the business of law profitable. Partners are defined by it, and associates feel the pressure more than ever to bring in clients to make the case for their value to the firm. This is particularly challenging for mid-career lawyers who are striving to define themselves. At a time that is critical to their professional development, they are shifting away from involvement in the legal profession through bar associations, Inns of Court, and law firm collegiality to maximizing the number of billable hours to prove their worth.

The impact of this shift in focus is made all the more pronounced given changes in the practice of law and in technology. We have seen a dramatic decline in the number of jury trials.³⁵ We also have seen a significant decline in the time that most lawyers spend in the courthouse, and the time that judges spend on the bench.³⁶ New lawyers have taken the brunt of this change, with fewer and fewer opportunities for court appearances, leading to a significantly different legal career. At the same time, technology has resulted in an increase in the amount of information that is produced, thereby dramatically increasing the time and energy spent on discovery in civil litigation. Technology has also provided alternate means of communication, such that many lawyers can communicate with opposing counsel entirely by electronic means, without picking up the phone or meeting in person. The law has become a lone, time-intensive profession.

When lawyers regularly met in person—be it at the courthouse, across the table, or at a bar event—the result was a level of accountability and collegiality. The same is true for lawyers who regularly appeared before a particular judge or judges, and for judges who regularly appeared before lawyers. Repeat in-person interactions are important for relationship building and in creating a climate of cooperation. The term “cooperation” has received much attention over the last ten years, in large part because of The Sedona Conference’s Cooperation Proclamation®. There has been debate about the extent to which cooperation is consistent with the adversarial nature of our system. If we step back from the recent focus on the term, however, and think about our profession 25 years ago, when lawyers would call opposing counsel as a matter of habit to resolve or clarify issues, or would chat with one another at the court house, cooperation was not a matter of debate, but rather a critical component of representing a client well.

Judge Paul M. Warner, a U.S. magistrate judge in the District of Utah, recently wrote *Ten Tips on Civility and Professionalism*.³⁷ He notes “It’s a long road without a turn in it. Put another way, what goes around, comes around. This is the best reason for civility.” He also suggests that incivility almost always results in wasted resources, in terms of both time and money—for lawyers, clients, and the court. Warner proposes a new Golden Rule of Civility:

“Be courteous to everyone, even to those who are rude. Not because they are ladies or gentleman, but because you are one.” It’s not about an eye for an eye, a tooth for a tooth. It’s not even about you. It is about doing what’s best for your client. In conclusion, civility is the mark of a real professional and a true lawyer. It is not about quid pro quo. It is about having self-respect, respect for others, and the self-confidence to not respond in kind, and in the process, continuing to build your own character, credibility, and reputation.³⁸

It is also about building the character, credibility, and reputation of the legal profession as a whole.

The nature of our practice has changed, and there is no way to put the genie back in the bottle. Lawyers do not get the same opportunities to meet each other in person and work across the aisle. But it is important that we do not lose our professional identity in the process. We are professionals, we are dedicated to the rule of law and to a fair system, and we must work together not only on a case-by-case basis, but also more broadly to achieve the common goal of a just, speedy, and inexpensive determination in every action.

35 See Mark Galanter & Angela Frozema, Pound Civil Justice Inst., *The Continuing Decline of Civil Trials in American Courts* (2011)

36 Jordan M. Singer & Hon. William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012*, 118 PENN. ST. L. REV. 243, 244 (2013).

37 Hon. Paul M. Warner, *Ten Tips on Civility and Professionalism*, THE FED. LAW. 42 (2015).

38 *Id.*

2. Guided by Justice

The focus should be on justice,
not on winning.

Along the same lines, we need to get away from trial by combat, and return to a focus on the needs of the clients and the case. Lawyers tend to elevate winning over achieving a just outcome. This affects the entire process, but can be seen most prevalently in the area of discovery, where lawyers talk about “winning at discovery.” For many, litigation has become about getting absolutely every document that exists and winning every discovery dispute. Referring back to Judge Paul Warner’s *Ten Tips*, he notes that “[j]ust because the other side wants it, doesn’t mean your automatic response should be to oppose it.”³⁹ There is such a thing as a win-win, and lawyers should not be so concerned with winning the battle that they lose the war.⁴⁰ What gets lost in the process is the vision of our system as a whole.

The issue with the word “adversarial” is that for some lawyers it serves as an invitation to battle, rather than an invitation to implement a procedurally fair, measured system. As lawyers and officers of the court, we have an obligation to use the system in order to find the truth, seek justice, and achieve fair and efficient outcomes for our clients. Focusing on achieving justice, rather than “winning,” can shift the representation and the goals to a positive effort that is more professional, more objective, and more consistent with the longer term good for the system. We need to train lawyers to be counselors to their clients, and problem solvers, first and foremost.

Achieving procedural fairness for clients is an essential component of this shift. Procedural fairness has been called “the organizing theory for which the 21st-century court reform has been waiting.”⁴¹ This theory is based on research illustrating that “how disputes are handled has an important influence on people’s evaluation of their experiences in the court system.”⁴² In fact, researchers have shown that public attitudes regarding our justice system are driven more by how litigants are treated in the process rather than by the outcome. While this seems like a simple concept, lawyers do not incorporate it into their strategy and objectives. To the contrary, lawyers may employ every procedural device they can

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Hon. Steve Leben, *The Procedural-Fairness Movement Comes of Age*, TRENDS IN STATE COURTS 59, 59 (2014).

⁴² *Id.*



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“Lawyers—you have an independent duty to make the system just, speedy, and inexpensive. If you haven’t thought about it, you need to.”

Hon. Craig Shaffer
Magistrate Judge, U.S. District Court,
District of Colorado

to stall the case, or to run up the costs; they may seek every document, every deposition whether or not they will be seminal to the case. Clients may, in fact, encourage these approaches: win by any means may be the marching orders the client gives. But, the clients and the system are ill-served by lawyers who act on those marching orders. Costs become exorbitant and may have little relationship to good outcomes. Lawyers may blame the system, the rules, the judge, and the court staff for unfairness, expense, and delay. Judges blame the rules, the lawyers, and the lack of staffing. That effort to shift blame is itself an indication of an unwillingness to take responsibility for making the system work in a cost-effective, procedurally fair way.

How the system functions is the result of how the actors within a particular case comport themselves. Those who are engaged in finger pointing are seldom visionary, innovative, and proactive. Both lawyers and judges need to remember that the system serves the litigants, who care little about the rules or case management principles; rather, they care about procedural fairness and cost-effectiveness. Lawyers and judges need to recognize the importance of procedural fairness for litigants and make it a guiding star throughout the process.



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“All this goes back to how we think about the law. We are trained to be advocates and not problem solvers, within a particularly rule-bound system. If someone is coming to a lawyer with a life problem, what they are looking for is help with their life problems.”

Hon. Jeremy Fogel
Federal Judicial Center

“A major change happened when winning became more important than justice. If it is only about winning, the cost to the system will be great. We need to focus on training lawyers about the difference.”

John Barkett
Shook, Hardy, & Bacon LLP

3. Dig Deep, Earlier

Lawyers need to develop a deep understanding of their case early in the process.

In order to achieve justice for clients, lawyers need to understand the issues in their case and work with opposing counsel and the judge to tailor the process in a way that is designed to identify and resolve the real issues. Litigation has become something like the game of “gossip”: litigants start with one idea and it morphs over the course of the process into something quite different. The complaint and the answer serve as just the first version of the case. With the continued growth of discovery, lawyers have gotten into the habit of seeking broad discovery that is neither tailored nor focused. Instead, lawyers ask for everything they can think of, putting off the difficult questions and analysis of the issues for later in the case. Lawyers also ask for more time than necessary to complete discovery because they haven’t considered what is actually needed, or the time that it will take to complete the necessary discovery in the individual case. With regard to motions practice, lawyers file motions, including motions for summary judgment, without questioning whether to file the motion or to do so in a more tailored way. The result is increased expense for clients and wasted resources for courts.

Thus, it is often the norm that lawyers are unprepared at the initial stages of a case. For many lawyers, such an approach is purposeful: they are balancing numerous cases and need to focus on those that demand attention; early preparation comes at a cost to the client, which needs to be explained and justified; the reality is that many cases settle; and, doing the same thing in every case seems more efficient than reinventing the wheel. While these are all legitimate considerations, lawyers also need to recognize that to serve their clients, they need to stop and think about the issues in the case and the needs of the client.

In addition, the legal world is changing—for many reasons, including significant rule changes and technology. Doing things the “same old way” is not good enough. Just like judges, lawyers need to work smarter, not harder.⁴³ Showing up unprepared to a Rule 26(f) conference will result in a conference that falls far short of its intended purpose. When both sides are unprepared and neither is engaged, the result is what is often called a “drive-by conference.” The consequence is cost and delay down the road. The same is true at the initial pretrial conference. Where the parties haven’t focused on the needs of their specific case, the initial

43 Natalie Anne Knowlton & Richard P. Holme, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES (2014).



pretrial conference likewise will not be as effective. The result is that lawyers often only get a handle on their case after discovery, when much time and money has already been expended. This can occur even when discovery has not unearthed anything new or revelatory, simply because lawyers have not prioritized crystallizing or simplifying the case at an earlier point in time.

Lawyers must focus on the case at the very beginning, identifying the issues in the case and then developing a pretrial plan focused on those specific issues. When this approach is employed, lawyers can determine the extent to which it would be more efficient to phase discovery, dispense with depositions or motions practice, or otherwise proceed in a way that gets to resolution for their clients. Understanding the case as much as possible as early in the process as possible allows a lawyer to design the process in a way that best serves the client and the system.



4. A New Approach to Discovery

| We need to change how we view discovery.

Discovery has taken on a much different role in civil litigation than it held 30 years ago. Today, the discovery phase of litigation can actually be the “end game.” Cases are won and lost in discovery; it embraces procedural objectives beyond merely the search for the truth; and it has become grossly expensive for clients—and very profitable for lawyers. This presents challenges for change, because it goes against the economic incentives for lawyers and requires hard decisions about what is really needed. That said, an essential component of changing the system is changing the way we view discovery.

Technology has contributed to the expansion of discovery; there are more documents, more data, and more information to discover now than ever before. At the same time that the amount of information has grown, so too has our approach to discovery. There was a time when lawyers took a look at their case, took a few depositions, talked with opposing counsel, and then either settled or took the case to trial. The standard today is to spend time gathering broad information, and to turn over every stone. It has become an important part of our culture—a constant quest for the “smoking gun,” for perfection in the search, and for complete risk assessment prior to settlement or trial. Technology is allowing us to see more and more the extent to which discovery is not perfect. And as risk-averse people, we want to perfectly quantify the risk at trial before we get there. Discovery helps both sides figure out how to proceed, but it comes at a cost. The whole approach has become so engrained in our system that we don’t even consider alternative approaches.

We need to change this “discovery until the ends of the earth” mentality. It is costly for clients, it is costly for the system, and it has bloated our civil justice system in the United States to the point where many are simply not able to access the system at all. Surveyed lawyers have quoted \$100,000 as the threshold amount in controversy below which it is not economically feasible for them to provide representation.⁴⁴ Anecdotal reports suggest that this threshold continues to rise. This is in large part a result of the cost of discovery in our system today. We need to get away from the notion that every stone must be turned over because of the possibility that something might be unknown and

⁴⁴ See AM. BAR ASS’N, ABA LITIGATION SURVEY, *supra* note 15, at 172-73; HAMBURG & KOSKI, NELA SURVEY, *supra* note 15, at 45 (considering only those who work in a private law firm environment); KIRSTEN BARRETT ET AL., ACTL FELLOWS SURVEY, *supra* note 15, at 83.



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“It comes down to how much money we are willing to spend to have an adversarial system. Can we continue to have a system where we aggressively pursue discovery and aggressively defend production? . . . As long as there is discovery out there to be ‘won,’ things won’t change.”

Daniel Girard
Girard Gibbs LLP

unquantified. The problem with casting a broad net over everything potentially relevant is the mass of documents that are swept into this net, and the resulting time and expense for all parties. This goes back to the need for lawyers to understand their case at an early point in the process and design discovery tactically to get the information they need.

There is a culture that supports objecting to everything, and turning over nothing. The culture supports deposing everyone without a hard look at whether the deposition is necessary or even helpful versus harmful. In addition, many take the approach to discovery of making the other side “earn it.” This is particularly true with initial disclosures, where there is a culture of failing to provide initial disclosures, even if they are mandated. Counsel do not take the time to compile and review initial disclosures, but rather take refuge behind the assumption that if the other side really needs the information, they will ask for it. We need to get away from using litigation as a punishment in and of itself—a way of beating one’s opponent over the brow through sheer process. Scorched earth litigation needs to be a thing of the past.

Instead, we need to shift to focused, efficient, “laser” discovery rather than flood light discovery. Lawyers need to use the rules in a creative way and think about how best to approach the case before them (rather than taking a rote approach in every case). We need to work toward trial—changing the orientation of the effort and focusing it back on the issues—even if most cases do not go to, or are not intended to be resolved by, trial. Instead of asking “What do I need to discover generally?” lawyers should be asking “What do I need to discover in order to prove my case?” Rather than beginning with a template set of interrogatories and requests for production, how about beginning with the jury instructions that specify what will be needed to prove the case—and work backward from there?

An important aspect of this culture change is that lawyers need to recognize and to apply appropriate limits in their own cases, and not just in the abstract. Lawyers often agree that limits on “discovery until the ends of the earth” are necessary, but then they push back vehemently when those limits are applied in their case. Moreover, to the extent clients call on lawyers to do everything possible up to the absolute limits of the rules, we need to remind them of our role as counselors.

We live in a very complex world, which makes change both challenging and increasingly important. We need a system where counsel and clients work through the fundamental issues early in the case, and then tailor discovery accordingly. As one lawyer puts it, we need to move from a smorgasbord of “all you can eat” to a menu where you get what you need.⁴⁵ This requires judgment, and for that reason it is challenging for those who are inexperienced. In addition, the lack of technical competence poses real challenges to lawyers facing rapidly evolving technology. Every case should represent an opportunity for innovative, case-specific application of the rules in way that is best designed to discover the facts and prepare the case for trial—or settlement on the merits.

⁴⁵ See Press Release, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *Creating Momentum for Change: IAALS’ Final Evaluation of Colorado Court Rule Changes* (Oct. 2, 2014), *available at* <http://iaals.du.edu/blog/creating-momentum-change-iaals-final-evaluation-colorado-court-rule-changes> (quoting Skip Netzorg).



“Zealous advocacy doesn’t mean you have to turn over every stone. We need more professional judgment in the practice of law. For example, good doctors know which test to use. They don’t recommend that we try every test. I would like to convince lawyers that more isn’t always better.”

Prof. Linda Simard
Suffolk University Law School

“Our American tradition of zealous advocacy needs to be balanced against the imperative of reasonableness when it comes to discovery. Proportional discovery offers one way to solve this dilemma.”

Hon. Jeffrey Sutton
Judge, U.S. Court of Appeals, Sixth Circuit

“There is an economic case for reducing the burden. Cooperation and early disclosures help reduce that burden. Discovery should be exchanged and then the parties can argue the merits of the case.”

William Butterfield
Hausfeld LLP



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“We need to get beyond the directive for judges to ‘rule faster’ and get deeper into the issues in our system.”

Hon. Lee Rosenthal
*District Judge, U.S. District Court,
Southern District of Texas,
Houston Division*

“Discoverable information today is unlimited. Discovery no longer can be. Justice, speed, and reasonable cost depend on an engaged judge—from the beginning of, and throughout, a case.”

John Barkett
Shook, Hardy, & Bacon LLP

5. Engaged Judges

Judges need to be engaged, accessible, and guided by service.

Judges play a critical role in achieving change, as they are in a unique position to help recognize system-wide ideals and tip the scales in favor of those ideals.

Just as lawyers need to own their cases, ask the hard questions, and engage with their clients, so too do judges need to be accessible and available to hear and resolve disputes.⁴⁶ They need to be accountable for timely and efficient resolution. They need to pose the difficult questions to lawyers—particularly at the beginning of cases—and be available to resolve disputes knowledgeably. Lawyers do not necessarily behave in a manner that prioritizes the incentives or objectives of the system. For that reason, leaving ultimate responsibility for progress of the case to the lawyers often leads to cost and delay. In order to ensure that cases are managed efficiently and effectively, judges must take on the role of managing cases toward resolution.

Judges have a fierce allegiance to independence, and just as with lawyers, there is deep resistance to change. But just as technology has changed litigation for lawyers, so too has it changed litigation for our judges. More than ever, it is important for judges to understand the issues in the case and work with the parties to develop a proportional discovery plan for the case. In order to do this, judges need to engage with the parties on the issues in the case and the technical aspects of discovery. If the amount of proposed discovery is disproportionate to the case, the judge needs to recognize that fact early so as to prevent it from getting out of control. Judges need to be sufficiently engaged to see the problem and then take action to correct it.

Some judges have resisted these changes on the grounds that hands-on management is making their jobs more managerial. But, in fact, these changes go to the heart of judicial function: applying the law, serving the litigants, and ensuring justice. Judges also play a critical role in fostering and setting the tone for civility and cooperation. They are the stewards of our system, and the key in achieving culture change.

⁴⁶ See generally Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013).

6. Courts Taking Ownership

The courts need to be accessible, relevant, available to serve, and responsible for every case.

Beyond individual judges, the courts as a whole play an equally important role in our civil justice system. As the system becomes more complex—including all the possible efficiencies and inefficiencies that can come with technology—it is critical that the courts are managed to be accessible, relevant, available to serve, and responsible for the cases that come before the court. This is different than individual judicial management, at the case level. This is about management by the court of the entire docket so as to ensure that the court itself is maximizing access and effectiveness.

Courts must recognize that cases are “public property” in the sense that they consume public resources and showcase the public dispute resolution system. It is in the system’s best interest to move the case along, monitor expenditures, and work toward procedural fairness.

In addition, the make-up of the court’s constituency is changing. Today, there are more self-represented litigants than ever before. And, society has become accustomed to technology and information. Society expects more from the court system than ever before, and it is clear litigants are willing to take their business elsewhere if the court cannot meet expectations.





“There needs to be a change in mindset about jobs and roles within the court system.”

Hon. Thomas Balmer
Chief Justice, Oregon Supreme Court

7. Efficiency Up the Court Ladder

We need to utilize everyone within the court structure more effectively and efficiently.

A critical way in which courts can make a difference in the provision of court services is to rethink the court structure so as to utilize everyone in the most efficient and effective way. With the advent of electronic filing and electronic case management systems, there are different staff needs in our courthouses today than there were 20 years ago. The modern court must be staffed in a way that employs each person in the most efficient way possible.

Moreover, we need to rethink how we utilize the entire court infrastructure. Starting with judges, we need to recognize when a task requires a judge’s deliberative function and when the task can be done by someone else. Judges have the most experience and education. They should be doing the work that requires that experience and education, and other tasks should be more efficiently allocated to others who can provide support for the judges—be it law clerks, staff lawyers, etc. Certain aspects of case processing can clearly be undertaken by non-judicial or quasi-judicial personnel. It is critical that everyone work as a team, recognizing the valuable roles that everyone plays at all levels. We should not be cabined by the traditional positions or responsibilities of court staff. We need to rethink how best to allocate the work of the court in this modern age. Just as law firms are being moved in this direction by the market, so too must courts adjust to the needs of modern society. We need to think with openness about the best way to do what court systems do.

8. Smart Use of Technology

We need to use technology for efficiency, effectiveness, and clarity—in the courts, in law practice, and in ensuring the legal system is accessible for non-lawyers.

Building on the use of people in the most efficient way possible, we also need to utilize technology to increase efficiency, effectiveness, and clarity. This is true for our courts, but it is equally true for law firms. The entire system needs to harness technology so as to create a system that is relevant in the 21st Century.

For much of the 20th Century, our role as lawyers was to provide information, counsel our clients, and guide them through the civil justice system toward resolution of their disputes. Lawyers still fill these roles, but it is also important to note that information is much more freely available and the number of companies that are delivering legal services is growing exponentially. LegalZoom, an online legal technology company, provides online legal document preparation services nationwide and was named by Forbes as “One of the 10 best digital tools for entrepreneurs in 2012.” There is also RocketLawyer, providing online legal services for individuals and small- to medium-sized businesses; Avvo, an online legal services marketplace whose tagline is “Legal. Easier.,” and Axiom, which provides tech-enabled legal services and asks consumers to “[f]orget everything you thought you knew about legal services.” The market for such legal services will only grow.

Even within more traditional lawyer roles, technology is having a profound impact. Electronically stored information is everywhere, and it is now a part of every case. The California State Bar recently issued a final opinion weighing in on the question of a lawyer’s ethical duties in handling the discovery of electronically stored information.⁴⁷ This opinion highlights the instrumental and evolving role that technology now plays in our profession:

⁴⁷ See The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (2015), available at <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf>.



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“Lawyers used to be the purveyors of information. Now technology has leveled the playing field and we need to think about how to add value differently.”

Jonathan Redgrave
Redgrave LLP



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“There are huge changes in dialogue now related to security and privacy. The law needs to be adroit and flexible enough to respond to changes. If judges are just in wigs and robes and can’t keep up with the times, then it will undermine the courts because they won’t be a relevant place to resolve issues.”

Hon. Paul Grimm
District Judge, U.S. District Court,
District of Maryland

An attorney’s obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including the discovery of electronically stored information (“ESI”). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney’s duty of confidentiality.⁴⁸

The impact of technology is just as real for judges. Judicial competence in the area of electronically stored information is critical, particularly as judges take a more active role in working with the parties to ensure a fair and proportionate discovery process. And as technology influences our world more and more, it will likewise influence the law. Neither judges nor lawyers want to admit what they do not know. But in a world where technology will only become more important, not less, it is critical for judges and lawyers to remain relevant—and that requires in depth knowledge of technology.

Just as importantly, this cultural shift requires *utilization* of technology. Lawyers, judges, and the courts need to harness technology to better meet the needs of a “just, speedy, and inexpensive” determination in every case. We must not use technology just to paper over outdated systems, or just to pave the cow paths. We actually need to think about how the system could be better and then utilize technology to get there. With the rising numbers of self-represented litigants, we also need to think about how best to utilize technology to meet their needs and ensure that the legal system is accessible to all.

48 *Id.*

9. Valuing Our System

We need to value our court system,
our judges, and our juries.

Courts all over the country have struggled over the last five years with budget cuts. This has created many challenges, as courts are forced to justify their budgets while struggling to provide more with less. While budget constraints can force efficiencies, they also come at a cost. It is essential that we have courts with open doors and available judges so that divorces are handled promptly in the best interests of the families, so that businesses can enter into contracts knowing that there is a system of civil justice in place to provide protections if there are issues, and so that individuals are ensured basic protections and fairness in the face of potentially devastating events in their lives or claims against them. Moreover, for our system of civil justice to remain relevant in the 21st Century, it is critical that funding be available to facilitate the use of technology and innovation, and support our courts through the transition.

While funding is critical, the issue is deeper than adequacy of funding for our civil justice system. It goes to the extent to which we value our court system and our judges. We need to recognize the important role that courts, judges, and juries play in our society and value them accordingly. As Chief Justice John Roberts stated in his 2006 Year-End Report on the Federal Judiciary, “Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded.” He noted that some associates, fresh out of law school, earn more in their first year than the most experienced federal district court judges before whom they hope to practice. We need to compensate our judges with a salary that recognizes them as the executives they are.

The same is true for our courts—funding is essential for the courts to move into the 21st Century and meet the challenges of growing docket pressures, the needs of self-represented litigants, the competition from external dispute resolution services, and what will be a growing expectation that courts utilize technology to meet litigant needs. And, we cannot forget the jurors. We need to value them, and think of their needs when incorporating technology into the system and scheduling trials.

Much of this comes down to a lack of civic knowledge in our society, and a corresponding lack of understanding and value for our civil justice system and all of its components. The more society appreciates the important role our civil justice system plays, and the more individuals connect the system’s value to their lives, the more likely it is that we will invest in that system and view it as essential.





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“We need other work
arounds in the short term,
but in the long term we
need to stop bailing out the
sinking ship and repair
the boat.”

Kenneth Withers
Deputy Executive Director,
The Sedona Conference®

10. Realign Incentives

We need to focus on the incentives driving lawyers and work to align them with our goals for improvement of the system as a whole.

There is a tension in our system between the adversarial model in which the parties are pursuing their own interests/client interests in individual cases and the good of the system as a whole. While there can be tension between individual and system interests, the two are not mutually exclusive, and good lawyers and judges recognize this is true. The more we can create a system that fosters and values these overlapping interests, the better. For example, in a small legal community where everyone knows each other and sees the same judges and colleagues case after case, it is in the interest of the lawyers and their clients to act cooperatively. They recognize that familiarity breeds accountability. There are many jurisdictions around the country where this is not the case, though. Most lawyers no longer practice in small legal communities—their practices are national and varied. We need to recognize the benefits of accountability and collegiality and work to recreate these climates for all lawyers, wherever they may practice.

In addition, we need to recognize that current economic incentives do not line up with the goals of our system. The current economic incentives tend to work against, rather than for, many of the changes discussed above. Instead, we need to align incentives at the individual case level with the overarching goals of system. We need to consider the actual incentives that motivate people to comply with change when changes are being adopted. This is an important take away from past research on local legal cultures, and it must be a central consideration in future reform efforts.⁴⁹

⁴⁹ Grossman et al., *supra* note 10, at 93 (“[S]uccessful reform efforts must be based, in substantial part, on creating different kinds of incentives for the main actors in the system.”).

Realizing Change

So how do we achieve these cultural shifts? It is particularly challenging given that, even within the legal culture, there are cultural variations across the country. With these variations in culture come challenges that are unique to each jurisdiction. And while we recognize that we need to value our system, including by assuring additional funding, the reality is that many of our courts around the country have a lack of resources and funding.

Rules changes provide an important avenue for change. Rules changes can change the “rules of the road” and can allow the process to evolve over time to meet the present day needs of our civil justice system, even reflecting empirical research and best practices. Rule changes create a window of opportunity where judges and lawyers are more receptive to education and culture change.

At the same time, for the culture to change as we propose, rule changes alone are inadequate. As Judge Craig Shaffer has said, without more, lawyers and judges can just overlay old behavior over the new rules, leading to few actual changes. This is because change cannot be imposed from above—an important reality that is true at the state and federal level.

In David R. Sherwood and Mark A. Clarke’s article *Toward an Understanding of ‘Local Legal Culture*,⁵⁰ the authors employ the example of an ordinary household thermostat to illustrate the challenges of change. When the weather outside changes, the thermostat’s internal system kicks on and regulates the house back to the original temperature setting. No matter how radical the changes outside, the internal system self-regulates back to the original setting. This is the “bias” of the system, and any initial impact as a result of external temperature change is merely first order change with no long-term effects. What is needed is for the individuals who live in the house to deactivate the automatic controls, resulting in a change to the “bias” of the system and second order change. According to Sherwood and Clarke, “[t]his is a much more fundamental change than first order change because the bias in the system itself has been altered.”⁵¹

So how do we change the temperature in our civil justice system? It cannot be based on imposed external change alone, or the system will simply readjust. We need to utilize the empirical research and experiences around the country to inform our aspirations. We need to

50 Sherwood & Clarke, *supra* note 6, at 200.

51 *Id.* at 212; *see also* Grossman et al., *supra* note 10, at 92 (“Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members.”).



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“We need people who believe in change to get out and demonstrate and show that it works.”

Gil Dickinson
Dickinson Prud’homme Adams LLP

“Change is coming. You can be ahead of the curve or behind it. If we make the changes ourselves, we have more control over the outcomes.”

Hon. Thomas Balmer
Chief Justice, Oregon Supreme Court

“The culture is changing. There is growing recognition that lawyers need to be part of the solutions.”

William Hubbard
Nelson Mullins Riley & Scarborough LLP



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“Heretofore we haven’t challenged judges and lawyers to use the rules in a creative way. We have simply overlaid the past mindset over the new rules. Nothing will change if we continue to do this. We need to encourage all to use these rules in a creative way. Use these new rules as opportunities for culture change.”

Hon. Craig Shaffer
*Magistrate Judge, U.S. District Court,
District of Colorado*

“Changing litigation norms for judges and lawyers alike is not easy. Rule changes offer one method for changing civil litigation. No less importantly, however, education and pilot projects provide an important supplement to those efforts.”

Hon. Jeffrey Sutton
*Judge, U.S. Court of Appeals,
Sixth Circuit*

utilize advanced technology. And fundamentally, we need to change the bias in the system—we need meaningful change from within.

While such change cannot be solely from the top down, nevertheless, change does require champions. Such champions need to be highly regarded persons who can lead and manage the change from within, rather than forced from outside. Judges are in a natural position to be leaders and champions, because they set the tone in the cases before them. That said, the job cannot be left entirely to judges. For lawyers, while change needs to start in law school, we cannot focus solely on new lawyers. We need to focus on lawyers at every level.

As previously noted, we first need to establish urgency and motivation to change, develop a vision, and communicate it to those who are able and inspired to join and lead the effort. As lawyers and judges, we are trained to focus on the evidence. For this reason, empirical research and experience are important in making the case for change. Pilot projects can provide both, and they have been instrumental in recent civil justice reform efforts at the state and federal levels. We also need to walk in each other’s shoes—as lawyers, clients, and judges. While that is often not possible, engaged dialogue between these stakeholders provides an important opportunity for sharing perspectives.

Finally, we must empower action. We need to support a strong and engaged local and national legal community, as this supports the positive changes proposed above. Whether it be through Inns of Court, bar associations, *pro bono* programs, or formal and informal mentors, the more that lawyers and judges engage in their community, the better. In Utah, for example, all judges are engaged in the greater work of the court through involvement in a committee or other activity. The judges are part of a community and aware of their role in the overall system. To the extent we can achieve the same involvement for every lawyer and judge in states across the country, we might just change the culture, and the system, such that we can all be proud of the system itself and of the role we play in it.

Conclusion

In 1981, Sherwood and Clarke summed up the challenges of reform:

To talk about how slow civil cases move, about the need to change the situation, about how difficult it is to effect change, to recount the long list of workshops, symposia and crash programs that have not produced permanent change—these become comfortable topics of conversation in much the same way that the weather provides a focus for empty discussion. Like the weather, everyone talks about civil case delay, but no one does anything about it. *To produce any real change, the system itself has to change. People's attitudes toward discovery, settlement, continuances, etc., have to change. More importantly, the behavior of individuals would also have to change dramatically.* These changes in behavior would be fairly profound; they would appear impolite, rash or irrational and would cause a great deal of discomfort to those affected. It is far easier merely to talk about the need for change.⁵²

The same can be said about civil justice reform today. It is far easier merely to talk about the need for change than actually to change. Enough talk. Now is the time for each of us to take responsibility for changing our own approach and biases, and to join in a common mission to achieve a truly just, speedy, and inexpensive dispute resolution system.

52 SHERWOOD & CLARKE, *supra* note 6, at 213-14 (emphasis added).





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