



Change the Culture, Change the System: A Top 10

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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. Recent amendments to the Federal Rules of Civil Procedure focus on proportionality, case management, and cooperation. Recommendations are also forthcoming from a committee, appointed by the Conference of Chief

Justices, to address cost and delay and increase access at the state court level, the area 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

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the positive changes intended by the reforms come to fruition? How do we tap into this momentum to create the just, speedy, and affordable 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.

An important takeaway from the efforts around the country toward civil justice reform over the last 10 years is that rule changes are not enough to change our system. 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—plays a pivotal role in the administration of justice in our country. We must recognize the importance of culture in achieving our goals for a better system, and in failing to achieve them. Thomas Church, an early researcher in the area of “legal culture,” recognized that it is these established expectations and practices that result in considerable resistance to change.¹

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.²

Thus, to make significant changes to the system, we must make changes in the pervasive legal culture.³

We have spoken with judges, court administrators, and lawyers on both sides of the “v” over the course of the past year to gain input on the cultural changes that are needed, the challenges, and possible solutions. 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. We have boiled the consistent themes from these conversations down to the following “Top 10.”

1. Back to Our Professional Roots

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

As a profession, we take pride in our work and believe that it is both essential to our democratic system and personally rewarding. Unfortunately, the vision of the lawyer and the judge—and the court—in mainstream America has changed. It is clear there has been a turn for the worse in the perception of our judges and our attorneys. At the same time, 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. Courts feel these same pressures, particularly given tight budgets.

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. Lawyers do not get the same opportunities to meet each other in person and work across the aisle. It is clear the nature of our practice has changed, and there is no way to put the genie back in the bottle. 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.

2. Guided by Justice

The focus should be on justice, not on winning at all costs.

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 to find the truth, seek justice, and achieve fair and efficient outcomes for our clients. Focusing on achieving justice, rather than “winning” at all costs, can shift the representation and the goals to a positive effort that is more professional, more objective, and more consistent with our overarching goals of a fair and just system. Achieving

¹ See generally, Thomas Church, Jr., Alan Carlson, Jo-Lynne Lee, and Teresa Tann, “Executive Summary,” *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (Williamsburg, VA: National Center for State Courts, 1978), p. 15.

² See Edgar H. Schein, *Organizational Culture and Leadership*, 4th ed. (San Francisco: Jossey-Bass, 2010), p.14.

³ Church et al., *Justice Delayed*, p. 192 (concluding that “the most important, and the most difficult, change a court should make is in the long-term expectations and practices of civil attorneys practicing in the court”).

procedural fairness is an essential component of this shift. We need to recognize the importance of procedural fairness for litigants and make it a guiding star throughout the process.

3. Dig Deeper, Earlier

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

To achieve this 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. With the continued growth and complexity 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. As a result, it is often the norm that lawyers are unprepared at the initial stages of a case. While there may be legitimate reasons that lawyers put off this preparation, lawyers also need to recognize that to best serve their clients, they need to stop and think about the issues in the case and the needs of the client. When they do not, the result is cost and delay for their clients and the entire system. The more our system—through the rules, the judges, and reminders from the court—encourages attorneys to efficiently think about their case at an early point, the better.

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. Technology has contributed to this expansion. We need to change this “discovery until the ends of the earth” mentality. 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.⁴ 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 a way that is best designed to discover the facts and prepare the case for trial—or settlement on the merits.

5. Engaged Judges

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

Judges play a critical role in achieving these changes, 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. Some judges have resisted these changes on the grounds

⁴ See Institute for the Advancement of the American Legal System, “Creating Momentum for Change: IAALS’ Final Evaluation of Colorado Court Rule Changes,” press release, October 2, 2014, available at <http://iaals.du.edu/blog/creating-momentum-change-iaals-final-evaluation-colorado-court-rule-changes> (quoting Skip Netzorg).

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.

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 inefficiencies and efficiencies 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 them. 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.

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. We also need to rethink how we utilize the entire court infrastructure. 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. 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 nonlawyers.

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. 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.

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. 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.

And while funding is critical, the issue is deeper than adequacy of funding. It goes to the extent that we value our court system. We need to recognize the important role that courts, judges, and juries play in our society and value them accordingly. 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.

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 this 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. We need to recognize that current economic incentives do not always line up with the goals of the system, and that current economic incentives tend to work against, rather than for, many

of the changes above. To effect real, long-lasting change, we need to strive to align the incentives at the individual case level with the overarching goals of the system. We need to consider the actual incentives that motivate people to comply with change when changes are being adopted. This is an important takeaway from past research on local legal cultures, and it must be a central consideration in future reform efforts.⁵

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.

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.

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⁵ Joel B. Grossman, Herbert M. Kritzer, Kirstin Bumiller, and Stephen Dougal, "Measuring the Pace of Civil Litigation in Federal and State Trial Courts," *Judicature* 65 (1981): 86, 93 ("successful reform efforts must be based, in substantial part, on creating different kinds of incentives for the main actors in the system").

⁶ David R. Sherwood and Mark A. Clarke, "Toward an Understanding of 'Local Legal Culture,'" *Justice System Journal* 6 (1981): 200, 213-14 (emphasis added).