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CIVIL JUSTICE REFORM: A MOVEMENT

HON. REBECCA LOVE KOURLIS

Civil justice reform is FINALLY a hot topic. In fact, we can now say that it is a movement.

Dictionary.com defines a movement as: “a group of diffusely organized people or organizations striving toward a common goal relating to human society or social change, or the organized activities of such a group[.]”¹

Civil justice reform is, indeed, now a common goal related to social change, and shared by a diffuse group. Hence, we are a movement.

Why? How has this happened and what does it mean?

Let’s begin by talking about the importance of a robust civil justice system. We are a nation in unrest, and part of what we long for is an assurance of fairness, predictability—justice.

The West's greatest thinkers . . . have insisted again and again on the centrality of justice. "Justice is the end of government," James Madison wrote in Federalist No. 51. "It is the end of civil society." Madison was echoing Aristotle, who argued that justice is the purpose of political community. Though today we often think of justice only in reference to crime and punishment, Aristotle understood that there is far more to justice than that: He contended that justice means arranging society in the right way, in accord with how humans are made and meant to live. The just society is one that permits its citizens to exercise their noblest gifts, to reach their highest potentials, to flourish. Thus while all partnerships aim at some good, Aristotle taught, the political partnership "aims at the most authoritative good of all," at justice.²

In Federalist 17, Hamilton wrote: “There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light,—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.”³

Justice is not just the even handed prosecution and conviction of criminal wrong-doers; it is also the enforcement of individual rights and contracts, the redress of wrongs, and the ultimate belief that if an individual or company conducts affairs in accordance with the law, the civil justice system will offer protection and support.

1. *Social Movement*, DICTIONARY.COM, <http://dictionary.reference.com/browse/social-movement> (last visited Feb. 18, 2016).

2. Joshua D. Hawley, *Rediscovering Justice*, NATIONAL AFFAIRS, Issue No. 10–Winter 2012 121, at 121–22 (2012).

3. THE FEDERALIST NO. 17 (Alexander Hamilton).

The World Justice Project Rule of Law Index includes a category that is called “Civil Justice.”⁴ It

[M]easures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system. The delivery of effective civil justice requires that the system be accessible and affordable (7.1), free of discrimination (7.2), free of corruption (7.3), and without improper influence by public officials (7.4). The delivery of effective civil justice also necessitates that court proceedings are conducted in a timely manner and not subject to unreasonable delays (7.5)[, and that orders are enforced (7.6).] Finally, recognizing the value of Alternative Dispute Resolution mechanisms (ADRs), this factor also measures the accessibility, impartiality, and efficiency of mediation and arbitration systems that enable parties to resolve civil disputes (7.7).⁵

The report notes:

“Where the rule of law is weak, medicines fail to reach health facilities, criminal violence goes unchecked, laws are applied unequally across societies, and foreign investments are held back. Effective rule of law helps reduce corruption, improve public health, enhance education, alleviate poverty, and protect people from injustices and dangers large and small.”⁶

The United States does not rise to the top of the heap in the Rule of Law Index – either broadly or more specifically with respect to civil justice. We are 14 out of 24 regionally; 21 out of 31 in income-comparative countries; and 21 out of 102 countries world-wide.⁷

Some data that is perhaps a bit closer to home:⁸

- When surveyed, attorneys and judges around the country resoundingly report that the system is too expensive and takes too long.⁹
- The amount that needs to be in controversy for an attorney to be able to take a case is somewhere around \$100K.¹⁰

4. *Civil Justice*, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/factors/effective-civil-justice> (last visited February 16, 2016).

5. *Id.*

6. *The WJP Rule of Law Index 2014*, WORLD JUSTICE PROJECT 1 (2014), http://worldjusticeproject.org/sites/default/files/files/introduction_key_findings.pdf.

7. *The WJP Rule of Law Index 2015–United States*, WORLD JUSTICE PROJECT (2015), <http://data.worldjusticeproject.org/#/groups/USA>.

8. See generally Paula Hannaford-Agor et al., *The Landscape of Civil Litigation in State Courts*, NAT’L CTR. FOR STATE CTS. 35-38 (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

9. Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2011), http://iaals.du.edu/sites/default/files/documents/publications/excess_access2011-2.pdf.

- The clients report even greater dissatisfaction with the system than do the attorneys and judges.¹¹
- Sometimes in roomfuls of attorneys I ask whether attorneys could afford to hire themselves if they were sued – and the answer is often no.
- Newer attorneys are having trouble finding jobs.¹²
- People across the country have burgeoning unmet legal needs.¹³
- Civil case loads around the country are dropping at a rate of somewhere between 2 and 6% a year – with the corresponding drop in civil appellate cases (hence, no development of the common law).¹⁴ Here in Idaho, the civil case load is down 13.4% since 2005.¹⁵ People are voting with their feet and going outside the system for dispute resolution or in many instances, they are not achieving resolution at all. In an October 2015 national survey undertaken by the National Center for State Courts, respondents preferred alternative dispute resolution over the court system by margin of more than 2 to 1 (64 to 30 percent).¹⁶ Their preference was predicated on persistent concerns about customer service, inefficient and bias.¹⁷
- Civil jury trials occur in something less than 1% of all civil cases.... A loss in terms of resolution of cases by our peers,

10. See ABA SECTION OF LITIGATION, ABA, *ABA Section of Litigation Member Survey on Civil Practice: Full Report* 172-73 (2009), https://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report_authcheckdam.pdf; Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members*, NAT'L EMP'T LAWYERS ASS'N FALL 2009 45 (2010), (considering only those who work in a private law firm environment); Kirsten Barrett et al., *Mathematica Policy Research, ACTL CIVIL LITIGATION SURVEY: FINAL REPORT* 83 (2008).

11. Corina D. Gerety, Institute for the Advancement of the American Legal System, *Civil Litigation Survey of Chief Legal Officers and General Counsel belonging to the Association of Corporate Counsel* 1 (2010), http://iaals.du.edu/sites/default/files/documents/publications/civil_litigation_survey2010.pdf.

12. Adam Cohen, *Just How Bad Off Are Law School Graduates?*, TIME (March 11, 2013), <http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/>.

13. See Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (2009), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGapInAmerica2009.authcheckdam.pdf>.

14. R. LaFountain, et al., *Examining the Work of State Courts: An Overview of 2013 State Court Caseloads*, NATIONAL CENTER FOR STATE COURTS 2-3, 10 (2015), http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC_CSP_2015.ashx.

15. *FY2014 Annual Report of the Idaho Judiciary*, STATE OF IDAHO JUDICIAL BRANCH (2014), http://www.isc.idaho.gov/annuals/2014/FY2014_ISC_Annual_Report-Final.pdf

16. National Center for State Courts, *The State of State Courts: A 2015 NCSC Public Opinion Survey: Analysis of National Survey of Registered Voters* 3 (2015), available at http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx.

17. *Id.* at 2.

civic engagement and education of the public and transparency.... As well as developing standards by which future behavior can be gauged.¹⁸

- Court budgets were severely impacted by the recent economic downturn.¹⁹
- And public trust and confidence - which is the stock in trade of the courts - is at risk.

So, yes, indeed, a movement to rebuild the civil justice system is much-needed; what is at risk is nothing less than a foundational element of our way of life, and the foundation is cracking.

And, the movement has begun. It has both heart and legs.

There are three interrelated components that shape the movement:

- Rules changes - at the state and federal level
- Case and court management changes
- And culture changes - in the bench and the bar

Rules - they are a-changing. New Federal Rules Amendments went into effect on December 1 of 2015.²⁰ The Chief Justice highlighted the new federal rules amendments in his state of the judiciary report on December 31 of 2015, expressing the hope that the changes would herald a sea-change in the way litigation is conducted.²¹

The changes are intended to streamline the process so as to control costs and delay and so as to assure that the issues are targeted at an early point in time.²² Specifically, the changes focus on encouraging cooperation among counsel; focusing discovery at an early point in the process on the real issues in the case; keeping discovery proportional to the issues in the case; requiring early and consistent judicial attention; and prescribing the consequences for loss of electronic data.²³

The Federal Judicial Center has a robust judicial education program in place, which will touch all federal district court judges over the course of 2016 - the purpose of which is to discuss implementation of

18. ABA, *Opening Statement The Vanishing Trial*, 30 LITIGATION ONLINE No. 2 (Winter 2004), http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf.

19. Micahel Cooper, *Courts Upend Budgets as States Look for Savings*, THE NEW YORK TIMES (June 6, 2011), <http://www.nytimes.com/2011/06/07/us/07budgets.html>.

20. *2015-2016 Federal Rules of Civil Procedure Amendments Released*, THE NAT'L COURT RULES COMM. (May 13, 2015), <https://www.federalrulesofcivilprocedure.org/2015-2016-federal-rules-of-civil-procedure-amendments-released/>.

21. *Chief Justice Roberts Issues 2015 Year-End Report*, U.S. COURTS (December 31, 2015), <http://www.uscourts.gov/news/2015/12/31/chief-justice-roberts-issues-2015-year-end-report>

22. Brittany K.T. Kauffman, *Long Awaited Amendments to the Federal Rules of Civil Procedure Go Into Effect*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Dec. 1, 2015), <http://iaals.du.edu/blog/long-awaited-amendments-federal-rules-civil-procedure-go-effect>.

23. *Id.*

the changes in a way that is best designed to achieve the objectives of a just, speedy and inexpensive resolution of every dispute.²⁴ This is the case management component of change – what do judges need to be doing differently to assure that the new rules – and indeed the system – works.

The American Bar Association has a ‘Roadshow’ which is travelling across the country, teaching lawyers about the changes and about the implications for their practice.²⁵ This is culture change – what does co-operation mean; what is proportional discovery; what do lawyers need to do differently.

The state courts are also in the thick of the change as well.

And, I am here to tell you that Arizona – like Idaho – has a pretty visionary system already, but they too recognize the need to make future changes.²⁶

The Conference of Chief Justices created a Civil Justice Improvements Committee in 2013 that was directed to study pilot projects, innovations, tap into experience of stakeholders from a variety of perspectives and develop recommendations for change to the state court civil justice processes across the nation.²⁷

The broad and diverse committee met over the course of two years – four in person plenary sessions, and monthly lengthy calls for two sub-committees. The group also reached out to other contributors for input. The Committee recommendations are on the verge of being finalized. They were presented to the Chief Justices in January of this year; we will take their feedback, make some changes, and then present the final version for action at the mid-summer Conference of the Chief Justices.

I will give you a sneak peak at those recommendations: triage of cases at filing in order to try to match court resources and process with the needs of the case; three pathways with varying degrees of judicial involvement, but a constant factor of court involvement and court management of the case; enhanced use of technology; and a pervasive customer focus.

Some courts, like Idaho, Utah, Colorado, Texas, New Hampshire and Minnesota have put permanent rules changes in place over the last three to five years; some, like Arizona or Iowa, have committees that are

24. FED. JUDICIAL CTR., <http://www.fjc.gov> (last visited March 30, 2016).

25. ABA, *Hello “Proportionality,” Goodbye “Reasonably Calculated”: Reinventing Case Management and Discovery Under the 2015 Civil Rules Amendments*, <http://www.frcpamendments2015.org> (last visited March 30, 2016).

26. Brittany K.T. Kauffman, *Arizona Establishes Committee on Civil Justice Reform*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (March 29, 2016), <http://iaals.du.edu/blog/arizona-establishes-committee-civil-justice-reform>.

27. *Conference of Chief Justices Civil Justice Improvements Committee*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/creating-just-speedy-and-inexpensive-courts-tomorrow/conference-chief-justices> (last visited March 30, 2016).

directed to craft and implement future solutions.²⁸ For example, in December, Chief Justice Scott Bales adopted a resolution directing the court system in Arizona to study the recommendations of the Committee on Civil Justice Reform and implement those that would benefit Arizona litigants.²⁹

Thus, stay tuned for profound changes in the way state courts do their business. Stay tuned for an effort on both the federal and state fronts to win back the business (away from Alternative Dispute Resolution) and to win back the trust and confidence of the American public.

For just a moment, I want to back up and outline the role that IAALS has played in this movement.³⁰ In doing so, I understand the risk of overstating. You have all heard the Aesop quote about the fly on the chariot wheel who looks back and says “my what a dust do I raise.”³¹ I fear that I may be subject to the same myopia, but here I go...

The movement, insofar as IAALS is concerned, started in 2006, when IAALS was created.³² The foundational reason for creating IAALS was to reform the civil justice system such that it would be accessible, trustworthy and cost-effective.³³

We created the *Rule One Initiative* which is dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system.³⁴ 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.³⁵

Over the years, *Rule One* has worked to understand the various issues that plague our system and make an impact in resolving them.³⁶ Our work has centered on a number of areas, including:

- Federal and State Rules Changes³⁷

28. *Action on the Ground*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/recommendations-reform/action-ground> (last visited March 30, 2016).

29. *Committee on Civil Justice Reform*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/cscommittees/Committee-on-Civil-Justice-Reform> (last visited March 31, 2016).

30. *See* Univ. of Denver, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu> (last visited March 31, 2016).

31. Francis Bacon, *Of Vain-glory*, AUTHORAMA.COM, <http://www.authorama.com/essays-of-francis-bacon-54.html> (last visited May 26, 2016).

32. *About*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/about> (last visited May 26, 2016).

33. *Id.*

34. *Rule One*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one> (last visited May 26, 2016).

35. *Id.*

36. *Id.*

37. *From Recommendations to Reform*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/recommendations-reform> (last visited March 31, 2016); *Creating the Just, Speedy, and Inexpensive Courts of Tomorrow*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/creating-just-speedy-and-inexpensive-courts-tomorrow> (last visited March 31, 2016).

- Judicial Caseflow Management³⁸
- Discovery, including E-Discovery³⁹
- Simplified Court Procedures⁴⁰

Our process from the beginning has been that we identify problems, undertake and compile empirical research, bring together stakeholders, develop solutions and then put those solutions to work in a context in which they can be tested.⁴¹ As part of that process over the last ten years, we have undertaken 8 nationwide surveys.⁴² We have done six intensive docket studies – federal and state courts.⁴³ We have worked closely with the American College of Trial Lawyers, the American Board of Trial Advocates, the American Bar Association, the National Center for State Courts, the Federal Judicial Center, the Conference of Chief Justices, the National Judicial College, and various federal and state courts.⁴⁴ We have published 16 reports, clarifying, identifying and recommending solutions to the problems at hand.⁴⁵

We understand the need for all three pieces – Rules, Case Flow Management Changes and Culture Change to come together.⁴⁶ In fact, one of our most recent publications concerns just that.⁴⁷ We interviewed over thirty people around the country, in the state and federal systems – the bench and the bar – to ask them what would have to change for the system to truly become more just, speedy and inexpensive.⁴⁸

Here are their answers:

1. Back to our Professional Roots
2. Guided by Justice
3. Dig Deep, Earlier
4. A New Approach to Discovery
5. Engaged Judges
6. Courts Taking Ownership

38. *Case Management*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/case-management> (last visited March 31, 2016).

39. *E-Discovery*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/e-discovery> (last visited March 31, 2016).

40. *Achieving Access: Short, Summary, and Expedited Trial Programs*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/rule-one/projects/achieving-access-short-summary-and-expedited-trial-programs> (last visited March 31, 2016).

41. *From Recommendations to Reform*, *supra* note 37.

42. *Library*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/library> (last visited May 26, 2016).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Projects, Rule One Initiative*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. <http://iaals.du.edu/rule-one/projects> (last visited May 26, 2016).

47. Brittany Kauffman, *Change the Culture, Change the System: Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (October 27, 2015), <http://iaals.du.edu/rule-one/publications/change-culture-change-system>.

48. *Id.*

7. Efficiency up the Court Ladder
8. Smart Use of Technology
9. Valuing Our System
10. Realign Incentives⁴⁹

The intersection of these pieces of the puzzle is critical to lasting improvement in our system and the way the puzzle pieces fit together is different in every jurisdiction. For example, in Arizona, there is a culture of initial disclosures – real disclosures of documents.⁵⁰ Colorado is moving in that direction too.⁵¹ Other jurisdictions have no disclosure culture.⁵² Or, in some federal courts, motions languish for months and months – and in others, they are ruled on expeditiously.⁵³ What are the culture changes that need to happen in your jurisdiction to achieve a functioning, just, speedy and inexpensive system? How can you make that happen?

What we know about change is that it requires that change proponents:

- 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

49. *Id.*

50. Corina D. Gerety & Brittany K.T. Kauffman, *Summary of Empirical Research on the Civil Justice Process: 2008–2013*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 9 (May 2014), http://iaals.du.edu/sites/default/files/documents/publications/summary_of_empirical_research_on_the_civil_justice_process_2008-2013.pdf.

51. See Corina D. Gerety & Logan Cornett, *Momentum for Change: The Impact of the Colorado Civil Access Pilot Project*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (October 2014).

52. See Rebecca Love Kourlis & Jordan M. Singer, *Managing Toward the Goals of Rule 1*, 2009 THE FED. CTS. L. REV. 1 (2009).

53. *Id.*

- Consolidate Gains to Produce Additional Change
- Anchor New Approaches in the Culture

Change needs to sink in overtime to become “the way we do things around here”⁵⁴

Here is our goal –

In five years, we would like to see:

- Litigation that is cost effective
- Courts that are accessible and affordable
- Technology that serves litigants
- Judges who are engaged and attentive
- Lawyers who are cooperative and innovative⁵⁵

The civil justice reform movement is gathering momentum. We cannot afford to fail to realign our civil justice system with the needs of the users, and to partner with other branches of government in getting there. We risk losing a fundamental cornerstone of our way of life.

54. See generally JOHN. P. KOTTER, *LEADING CHANGE* (1st ed. 1996).

55. *2015 Annual Report*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., at 11-12 (2016), http://iaals.du.edu/sites/default/files/documents/annual-reports/iaals_2015_annual_report.pdf.