

Welcome – It’s good to see you, and thank you for your interest in case management and civil justice reform.

As the chief said, it was in 1992, 25 years ago – that Arizona adopted the Zlaket rules. Those rules were intended to change the culture of the practice of civil litigation. And the culture did change. To the extent the intent of the rules was to curtail the “Rambo” litigator, we can argue about how effective they were. But in changing a culture of trying to find a way to keep from producing information, to a culture of disclosure, I think they’ve been quite successful. Arizona lawyers today don’t question disclosure rules. And a couple of surveys reflect that two to one, Arizona lawyers prefer to litigate in state court, with those rules, rather than in federal court, without. The U.S. District Court has started pilot projects here in Arizona and in Illinois – Arizona lawyers are unconcerned and the lawyers in Illinois are horrified that they will be required to give up their finely crafted responses to discovery requests, allowing them to hide the ball unless the other side asks just the right question.

So why civil justice reform? What is the problem? “Uncertainty, delay and expense, and above all the injustice of deciding cases upon

points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.” Roscoe Pound, 1906, ABA presentation. Or, as the Chief Justice of the United States said “Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.” Chief Justice Burger, 1984 report to the ABA on the state of justice.

We - that is, judges - have been engaged in the reform of the judicial branch since the turn of the last century. Historically, I think that’s because we recognize as a core value that judges must be independent. But I’d ask you to think for a moment about what we mean by the term judicial independence. We insist on judicial independence – that judges decide cases without outside interference from anyone - decisional independence. But to have decisional independence, we must have institutional independence. The judicial branch, and hence judges, can’t be independent if they can’t efficiently manage the judicial branch of government, and be perceived as competent and independent by the other

two branches of government. The fundamental idea underlying court reform for the last hundred years, as we've gone from judges running their own courtroom as an individual fiefdom, to a judicial branch with a management structure, is that judges must be able to effectively and efficiently manage the business of the courts if they want to be independent to make their decisions.

In the 1980's as Justice Burger suggested, the proposed remedy was arbitration and mediation.

But more than 30 years after Justice Burger's speech, our civil justice system is still generally perceived as too slow, too expensive, and too inefficient. The large firm civil lawyers I have spoken to say that they advise clients that unless one million dollars or more is at stake, that it doesn't make economic sense to take a case to trial. That is not a system that will serve to resolve the average citizen's disputes.

As a result, there has been a nationwide call for reform of our civil justice system. The Institute for the Advancement of the American Legal System/American College of Trial Lawyers Task Force on Discovery and Civil Justice Report in 2015 suggests 24 principles for civil justice reform,

including adoption of mandatory disclosure rules like Arizona's. Likewise, the Conference of Chief Justices' Civil Justice Improvements Committee 2016 Report resulted in a resolution by the Conference of Chief Justices and the Conference of State Court Administrators calling for each state to develop and implement a civil justice improvement plan.

Why does it matter? We are in the business of dispute resolution. Courts exist for people to bring us their disputes. Taxpayers fund us to provide that service. But they use us less and less, and choose alternatives whenever they can. And for the last 35 years, since I've been a practicing lawyer, we have been driving that business away. As Justice Burger suggested, we consciously have built a system that actively pushes cases to other methods of dispute resolution as a means of managing our caseloads. And we've succeeded. If we were running a for-profit business that depended on new customers for its income, we'd be headed for bankruptcy.

In Arizona, of the cases resolved in 2016, .44% were tried to a jury, and .45% were tried to a judge. That is, less than 1% of cases were resolved by a trial. 2014 and 2015 were no different. And if lawyers are not trying

cases, where will we find judges who can try jury cases? It is not unusual to recommend names to the Governor for appointment as superior court judges, who have never tried a jury trial. One of our Arizona law schools debated whether to hire a new trial practice professor or instead to hire someone to teach arbitration and mediation practice.

I think jury trials are important, not just to the parties but to our nation as a democracy. John Adams said that “Representative government and trial by jury are the heart and lungs of liberty.” For most people, voting and service on a jury are the only two opportunities they have to participate in their government. As Professor Andrew Ferguson put it in his book “Why Jury Duty Matters,” jury service “may be the closest a citizen ever comes to the Constitution – participating in a process through which constitutional rights and values come alive in practice.”

The diminishing number of trials also has an impact on the development of our law. Fewer trials means fewer cases coming up on appeal. The common law develops through appellate opinions.

For me, the work of the Civil Justice Reform Committee is a step to returning to a system where trials are as efficient a means of resolving disputes as arbitration or mediation.

I would argue, however, that the real work required is not in changing the culture of the bar like the Zlaket rules, rather it is in changing the culture of the bench.

I think it starts with a philosophical question which has been debated since at least the 1950's. Who is responsible for moving cases through our system - the parties or the court? Our civil justice system has historically expected litigants to drive the pace of civil litigation by moving for court involvement as issues arise. Frequently though, at least one party benefits from delay and from driving up expense.

For our system to work efficiently, once a case is filed in court, it must become the court's responsibility to manage the case toward a just and timely resolution. If we are to have an independent judiciary, relevant as a means of civil dispute resolution, judges have to take control of their caseloads, and of their individual cases. The court has to drive the pace of litigation. If we want to be in the business of trying civil cases, we must

develop a reputation as an efficient, cost-effective means of resolving civil cases.

The civil justice reform committee, ably led by Don Bivins, was charged by the Chief Justice with “developing recommendations to reduce the cost and time required to resolve civil cases in Arizona’s superior courts.” Don led a broad-based committee, with extensive experience representing all aspects of civil practice, including a number well-respected trial judges.

I think our Court has adopted a set of rules which give judges the tools needed to actively manage their cases. They give new judges a place to start and experienced judges the freedom to innovate. We now need to convince judges to use them.

So I thank you for being here to start the hard work of changing our culture.