For the past century, the interests of the bench and bar in delivering justice to civil litigants were closely aligned. As civil litigants' needs change, courts recognize they must lead the way on civil justice reforms both for their own sake and to encourage productive change in civil legal practice.

Changing Times, Changing Relationships for the Bench and Civil Bar

Paula Hannaford-Agor, Principal Court Research Consultant,
National Center for State Courts

In July 2016, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) adopted resolutions endorsing the report and recommendations of the CCJ Civil Justice Improvements Committee (CJI Committee). The report and recommendations resulted from a three-year, painstaking effort to identify and develop rules and best practices for courts to manage civil cases. The explicit objective of the CJI Committee was to reduce delay and expense in civil litigation and to ensure access to justice for civil litigants.[1] CCJ and COSCA encouraged courts to implement the recommendations in their respective jurisdictions. However, many judicial policymakers encountered only a lukewarm reception by state and local civil bar organizations. Several responded only with a polite "thank you, but we're not really interested in pursuing those recommendations at this time."

This response was surprising given ongoing demands from the organized civil bar for civil justice reforms. For years the civil bar has clamored for additional resources such as:

- business and complex litigation courts;
- judicial education on e-discovery and other knotty problems in contemporary litigation; and
- more consistent and effective judicial involvement in case management.

In many respects, the bar's indifference to the CJI Committee recommendations is less indicative of their merits and more a symptom of the widening gulf between the bench and civil bar over their institutional obligations to civil litigants. The conflict stems from growing recognition that lawyer and client interests do not always closely align. In fact, courts have contended with a growing number of lawyers who exploit the litigation process to support their own business model through excessive gamesmanship that drives up litigation costs and, more recently, through ethically dubious practices in cases with self-represented litigants (SRLs).

Courts now recognize that a major shift in approach is needed to address the current needs of civil litigants, and the CCJ recommendations provide the framework for that change. The civil bar cannot be permitted to veto civil justice reform by insisting on maintaining the status quo.

Mutually Compatible Interests?

To better understand how the bench and bar arrived at this point in their relationship, it is useful to examine the factors that made the relationship mutually satisfying for so long. Traditionally, courts viewed their role as providing an impartial forum in which civil litigants could resolve their disputes. Their primary obligation was to provide the forum, the ground rules, and the procedural decision-making criteria that both sides—plaintiff and defendant—agree are fair. By doing so, courts could enjoy broad public respect and support. Key to maintaining public perceptions of fairness, however, was the caveat that trial courts respect the traditional adversarial system. That system assumes that lawyers will contest illegitimate claims and raise appropriate defenses on behalf of their clients, so that the outcome of the case is substantively fair given the applicable law (substantive justice). Judges are responsible for ensuring procedural due process (procedural justice) for both sides, but should not rule on the legitimacy of claims or defenses unless specifically requested to do so by the lawyers. Judges who inserted themselves into disputes over substantive justice were viewed as unfairly favoring one side of the litigation over the other.

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From the bar's perspective, the interests of lawyers and their clients were synonymous. The lawyers' role was to navigate the procedural framework provided by the courts, assert legitimate claims and defenses on their clients' behalf, and thereby obtain the best possible outcome for their clients given the applicable substantive law. Lawyers who routinely accomplished this goal could make a very decent living from attorneys' fees. By bringing civil cases to court for resolution, lawyers provided continued justification for the existence of courts, but also provided a buffer between the bench and the litigants that protected trial courts from being drawn directly into disputes about substantive justice. Greater procedural flexibility benefited both the lawyers and the bench. As civil procedure grew more complex, lawyers who successfully navigated that complexity could command higher fees from clients. At the same time, greater procedural flexibility for lawyers created a more effective buffer to maintain the impartiality of the bench.

This arrangement worked fairly well for much of the 20th century, but occasionally problems would arise, especially when the interests of the lawyers and their clients did not align perfectly. Courts have always been sensitive to complaints that civil litigation takes too long and costs too much, especially when those complaints were directed to state and local legislatures, which controlled funding for the courts. Periodically, it became imperative for courts to respond by enacting procedural reforms, including alternative forums and procedures, such as small-claims courts; ADR programs; and, more recently, business and commercial courts. Such reforms generally included features to make them palatable to the organized bar, such as:

- greater procedural flexibility;
- greater access to judges;
- more experienced judges; or
- more resources allocated for civil caseloads.

By cooperating for a time, both sides could plausibly claim to be improving the delivery of justice to civil litigants. However, most of these reform efforts only marginally improved the problems of cost and delay. A significant obstacle to meaningful change was the difficulty in getting reforms to take root and become firmly entrenched in court operations. Some judges introduced reforms, but after those judges left the bench, reforms often withered on the vine. Institutional

fragmentation, in which judges operate more or less autonomously, also made it difficult to spread reforms across the entire trial bench.

Another factor was the inability to enforce reforms. Absent an objection from one of the parties, most courts lack an effective mechanism to identify cases that fail to comply with rules or to address noncompliance in a timely manner. Even in jurisdictions that have such tools, many judges are unwilling to employ them rigorously or consistently. Some judges believe that unless the parties specifically seek judicial enforcement, preemptive enforcement interferes with lawyers' prerogatives to manage civil cases as they see fit. Other judges, especially those who were elected to the bench, believe that unsolicited enforcement risks alienating lawyers on whom their continued status as judges relies.

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Further complicating the ability to conduct effective case management is the development of case law in many jurisdictions that favors unrestricted and unlimited examination of claims and defenses over the prompt resolution of litigants' cases. It should not be surprising that civil cases will languish or unnecessarily drive up costs when "due process" requires judges to permit litigants to repeatedly amend pleadings, expand discovery, or continue a case over and over again. There are few incentives for trial judges to enforce existing court rules when decisions concerning case management are likely to be overturned on appeal.

Courts Disrupted: Self-Represented Litigants, ADR, and Technology

Societal changes have also disrupted the civil justice system, introducing an additional wedge between the bench and civil bar. One of the most noticeable changes is the increase in self-representation in civil cases. A 2015 study of civil litigation in state courts found that both sides were represented by lawyers in less than one-quarter of civil cases (Hannaford-Agor, Graves, and Miller, 2015). The driving factor for the increase in self-represented litigants (SRLs) is that many litigants do not believe that lawyers can solve their legal problems in a timely and cost-effective manner. (Sandefur, 2010-11). In many instances, the estimated legal fees greatly exceed the monetary value of the case, so lawyers providing services on a contingency-fee basis cannot afford to accept otherwise meritorious cases, and plaintiffs cannot pay for legal services upfront, even if those fees would be wholly or partially reimbursed by a damage award. Similarly, defendants do not hire lawyers because the costs of doing so often exceed the likely damages, especially in contract cases in which the damages are more easily known.

For decades, both the bench and bar tried to stem the tide of SRLs by pushing for expansion of programs that provide free or low-cost legal services for people who could not afford lawyers. But as litigation costs continued to rise, those efforts fell far short of the demand (Cummings and Sandefur, 2013; Legal Services Corporation, 2017). Until very recently, the civil bar strongly resisted proposals to change how lawyers provide legal services to clients (e.g., unbundled legal services) or to allow specially trained nonlawyers to provide simple legal services and advice.

> *"The influx of large numbers of self-represented litigants greatly undermines the argument that the interests of the civil bar and civil litigants are synonymous."*

The influx of large numbers of SRLs greatly undermines the argument that the interests of the civil bar and civil litigants are synonymous. Courts today must accommodate the needs of SRLs, who, by definition, are independent of the organized bar. Independence does not necessarily imply opposition; SRLs, like the civil bar, have a legitimate interest in courts providing a neutral, accessible forum to resolve disputes. There is strong disagreement, however, that maintaining a highly complex procedural framework provides an optimal forum to deliver justice. Particularly given the customer-friendly, streamlined experience that users have come to expect from other public and private institutions, many SRLs find court processes to be frustrating, time-consuming, expensive, and unnecessarily byzantine. Courts' insistence on maintaining these procedures in the interest of "procedural due process" is unpersuasive, at best, and sometimes viewed as a deliberate effort to favor represented litigants.

SRLs are similarly impatient with courts' reluctance to be held accountable for the substantive fairness of case outcomes. In contrast to lawyers' preferences for the traditional adversarial system, SRLs are considerably more comfortable with an inquisitorial system that delivers substantive justice, rather than just a neutral forum in which advocates resolve civil disputes on behalf of their clients. SRLs assume that judges know the substantive law and expect that judges will proactively apply the law without waiting for litigants to explicitly request relief in formal pleadings, motions, or in-court hearings. This is a tough proposition when both sides are self-represented, but it is even tougher in cases with asymmetrical representation. Courts across the country have reported widespread instances of sharp practices in which represented plaintiffs seek judgments in consumer debt collection, landlord/tenant, mortgage foreclosure, and other high-volume dockets in which legitimate counterclaims or defenses would likely be successful, if only the defendants had sufficient legal expertise to raise them. Judges face the untenable position of watching injustices occur in their courtrooms, but often feel ethically constrained from intervening.

Another major disruption to the bench/bar relationship is the growing availability of alternatives to traditional adjudication that has diverted civil cases away from both courts and lawyers. Alternative dispute resolution (ADR) programs have proliferated over the past several decades. Many of these programs offer litigants a more streamlined and procedurally flexible process of resolving disputes at less cost and greater privacy than traditional litigation. Increasingly, standardized contracts include binding-arbitration provisions that prohibit employees and consumers from filing cases in court. Because these programs have largely developed outside the formal justice system, few states have developed a robust regulatory system setting procedural standards or qualifications for who may serve as a mediator or arbitrator. More recently, states are experimenting with permitting nonlawyers to provide certain types of legal services to litigants. For example, limited legal license technicians (LLLTs) in Washington State and family law facilitators in New York State (Clarke and Sandefur, 2017) are authorized to undertake specifically enumerated legal matters for clients without supervision by a lawyer and without violating state unauthorized-practice-of-law (UPL) statutes.

Finally, technology platforms are disrupting the bench and bar by offering both legal services and dispute resolution solutions online (JTC Resource Bulletin, 2017). For example, LegalZoom, Avvo, and Rocket Lawyer provide legal services, including standard legal documents customized for each state for common issues such as residential and commercial leases; common business documents; guardianship petitions, wills, and trusts; and divorce petitions, including child-support and custody petitions. These companies have survived a number of UPL enforcement actions, and most states have moved from blocking to regulating their participation in the legal-services marketplace (Rhode

and Ricca, 2014). Online dispute resolution (ODR) originated as embedded tools within online commercial platforms, such as eBay, PayPal, and Amazon, to provide a technologically supported, and largely automated, means for buyers and sellers to resolve disputes about commercial transactions without resorting to traditional courts. Most courts have been skeptical that ODR algorithms can replace judicial oversight in adjudication,

but recently a handful of courts have begun to explore this option for small-claims, consumer-debt-collection, landlord/tenant, and domestic-relations cases.

Conclusion

Continued solidarity by the bench and the bar will not be sufficient to overcome the challenges that they both face. The solutions that they have traditionally employed to address complaints about cost and delay have not solved those problems, and the unrelenting external forces continue to marginalize the relevance of both institutions. Although a bare majority of civil cases still have a lawyer representing at least one party, the continued presence of large numbers of SRLs in civil caseloads demands that courts acknowledge and accommodate these stakeholders on an equal basis with lawyers. Civil litigants are already speaking with their feet, leaving courts for more responsive forums such as ODR and private ADR programs. They are also increasingly speaking with their mouths—to legislators and executive-branch officers—about the wisdom of supporting a civil justice system with declining caseloads and widespread litigant (public) dissatisfaction. No rapprochement with the bar will change this dynamic for the bench. Pretending otherwise also causes the bar to put off hard decisions it needs to make about its own future in the legal-services marketplace.

The CCJ civil justice recommendations set the parameters of what a new relationship might look like. In that framework, courts are responsible for their own procedures and set the pace of litigation with the explicit objective of reducing expense and delay and ensuring access to justice for all litigants. Courts employ a robust administrative infrastructure to monitor case progress and to enforce rules and case management orders. Courts take responsibility for ensuring procedural due process, especially for cases involving SRLs. Courts provide SRLs with effective tools and streamlined procedures, including greater use of common communication technologies that offer a more even playing field with represented litigants.

> *"…allowing courts to implement civil justice reforms that address contemporary challenges will also free the bar to leverage technologies and make long overdue changes…"*

The organized bar should still have input about civil justice reforms, especially in the narrow range of cases in which lawyer representation on both sides is still the predominant practice. The civil bar could be enormously helpful in identifying and highlighting

areas in which procedural or administrative changes might unfairly benefit one side or the other. But it is critical that the bar no longer be able to exercise a veto over court reform efforts. In the broader context, allowing courts to implement civil justice reforms that address contemporary challenges will also free the bar to leverage technologies and make long overdue changes in legal practice that will ultimately help keep the legal professional relevant into the future.

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[1] The resulting recommendations incorporate principles of proportionality and evidence-based case management practices. They also bring renewed focus on high-volume calendars that comprise the vast majority of contemporary civil caseloads, especially improved access for self-represented litigants, greater attention to uncontested cases, and greater scrutiny of claims to ensure procedural fairness for litigants.