

Viewpoint

Justice should emphasize people, not paper
*More face-to-face contact among clients, lawyers and judges
will improve satisfaction with the court system.*

by Morton Denlow

One of the major problems today with federal civil litigation is that we place too much emphasis on drafting papers and not enough on listening to people. If you walk through federal courthouses you will see few motions being argued or civil trials in progress. But if you walk back into chambers you will find mountains of civil motions and briefs and extensive legal research and writing underway. If you walk a law firm's corridors, you will find few conferences with clients or opposing counsel; however, you will find lawyers busily typing on their computers. More paper and less human interaction has become the trend. It is time to question whether this trend should continue.

Over the past twenty-five years, federal civil litigation has placed a much greater emphasis on the written word than on the personal side of the practice of law. Criminal cases have pushed civil cases to the back burner. Courts have responded by relying on written motions to decide contested civil cases. The result is a legal system that has become professionally unsatisfying for lawyers, isolating for judges, and prohibitively expensive and frustrating for clients. We should be striving for the polar opposite: lawyers who value their important role in the system and in society, judges who interact with litigants and lawyers, and a justice system that clients can afford. To achieve that end, our legal system should

place a greater emphasis on face-to-face interaction, whether it be in lawyer conferences, court run settlement negotiations, oral arguments of motions, or trials.

The problem with paper

Our legal system provides the basic framework within which individuals and businesses resolve their disputes. The litigation process should operate to facilitate this dispute resolution function. Unfortunately, the legal system, with its emphasis on paper justice, has not met the public's needs in resolving disputes because it is often too slow or too expensive.

Clients bring a variety of problems to their lawyers for resolution. These are generally personal or business issues involving economic and social concerns. For example, clients can be accident victims seeking compensation for their injuries. They can be involved in contract disputes with economic consequences or can believe they have been victims of discrimination in the workplace and seek monetary relief and reinstatement. Citizens bring an endless variety of problems through their lawyers' doors.

Clients are more interested in finding solutions to these problems than in the legal process or substantive legal principles. They are indifferent as to whether their attorney writes a letter, makes a phone call, holds a meeting, or files a lawsuit to accomplish the desired goal. As a result, they become frustrated when they encounter a legal system that

emphasizes process and substantive legal principles rather than problem-solving when addressing their economic and social concerns.

Furthermore, clients prefer to have their problems solved quickly and affordably. In many jurisdictions, the wheels of justice grind slowly and at great expense. It is not uncommon for a case to take years to be resolved and for the legal costs to the litigants to exceed the amount recovered by the plaintiff. It is therefore not surprising that alternatives to the legal system have arisen and found acceptance by lawyers and clients. The alternative dispute resolution movement has grown in response to the inadequacies of our legal system. It is time to acknowledge the causes of the problem.

Why is our legal system so slow and expensive? The answer lies in its emphasis on paper as the mechanism to achieve justice. The federal practice places a great emphasis on written motions to decide cases, a predilection illustrated by the litany of motions contained in the Federal Rules of Civil Procedure. Lawyers devote a significant portion of their time to drafting these motions and supporting briefs. In a typical federal civil case making its way to trial, the parties will prepare a complaint, a motion to dismiss with supporting briefs, an answer, scheduling orders, interrogatories, document requests, a motion for summary judgment with supporting briefs, and a final pretrial order. In the federal courts, parties frequently view the motion to dismiss and motion for summary judgment as a necessary step before considering settlement. The clients' dispute is transformed into a paper war between competing computers. As a result, meaningful settlement conferences are frequently delayed

as expensive and time-consuming motions are briefed and decided. The emphasis on motion practice delays the ultimate resolution of disputes and involves great expense.

In addition to delay and expense, paper justice is unsatisfying to clients because written opinions are not readily understandable to laypeople. Many clients find a system in which their case is decided on the papers to be distressing because it denies them the opportunity to personally interact with the decision maker. It deprives them of the chance to see the attorney ply her trade. And it frustrated them to receive the bill without ever having seen a judge or jury.

Paper justice can frequently be unsatisfying to attorneys as well. In some federal courts, lawyers are not permitted oral argument on their motions. Normally, lawyers prefer to address the decision maker and to see why and how the decisions that impact them are being made. Lawyers prefer an opportunity to engage the court in argument. Issuing written decisions on motions without hearing oral arguments is an unsatisfying way to dispense justice, because lawyers are uncertain whether the judge truly understood the points being made.

As a result, litigation practice has lost much human and personal contact between lawyers. The use of fax machines, e-mail, voice-mail and other technological advances has expedited the communication process, but has not necessarily improved it. What has been lost is the establishment of personal working relationships and the trust and ability to facilitate resolution or clarification of issues. The practice of law has become dehumanized

as the attorney rolls swell and the number of court appearances, phone conferences, and face-to-face meetings diminish. This depersonalization has resulted in increased acrimony between lawyers, and the common practice of putting everything in writing and bringing each dispute to court for resolution. This trend should be halted and improvements found. The answer lies in placing the emphasis on people, not paper.

Suggested solutions

From the standpoint of clients, lawyers, and the court, a more personalized form of justice is preferable. Promoting settlement, lawyer conferences, oral argument, and trial will improve the quality of justice and the personal and professional satisfaction of clients, lawyers, and judges.

Promote early settlement. Settlement conferences enhance the role of our judicial system as a method by which citizens can peacefully resolve their disputes. Settlement conferences conducted in a mediation format with the active participation of counsel, clients, and the court are the best method of achieving prompt and fair case resolution. This is true for three reasons. First, a settlement conference can focus on the economic and psychological issues that gave rise to the dispute and is not limited to the legal issues framed by the pleadings. Second, client participation in this process permits them to control their own destinies and reach their own decisions. Third, when all parties are involved in coming to a settlement, that outcome is more likely to be voluntarily enforced than a judgment rendered on the papers.

Procedural rules should promote and expedite fair settlements by encouraging early client participation. Emphasizing the participation of clients in the settlement process offers advantages to our legal system. It permits citizens to view the court at work as an instrument of justice. Much of a judge's work is done in chambers out of public view. Bringing lawyers and clients before judges to settle cases enables parties to express their grievances to a knowledgeable neutral and to observe the judge work to achieve a just resolution. Settlement conferences give the public a better understanding of the judge's role as an active participant in resolving disputes.

Client participation also enhances respect for lawyers as clients observe them utilizing their skills to achieve the client's objectives. Clients seldom see their lawyers in action in the office or in court. In settlement conferences, though, clients can observe their lawyers acting as counselor, problem-solver, and advocate for their interests. This is a unique opportunity for lawyers to demonstrate their skills to their clients.

And the courts benefit as well. Early settlements assist the court in managing its caseload. Deciding cases on the basis of motions may lead to appeals or further judicial involvement. A settlement brings the case to a conclusion and permits the court to focus on other cases. Given the caseloads faced by most judges, encouraging settlement is a necessary tool for managing one's docket.

Even when cases do not settle, the process helps clients better understand that the additional costs to be incurred and steps taken are the result of the parties not being able to

reach agreement. The decision by a client not to settle determines that the additional work and expense are necessary to resolve the dispute and do not constitute an effort by lawyers to create expensive work.

Finally, a settlement atmosphere is a more comfortable setting in which to discuss and resolve differences. Neither depositions nor trial present clients with as good an opportunity to tell their stories and to resolve their grievances. At a deposition, a client is generally instructed by his or her lawyer to answer the question and say nothing more. At trial, the rules of evidence govern what a client may discuss from the witness stand. This does not lend itself to a relaxed give and take discussion. Clients long for the opportunity to tell their story and genuinely appreciate the time a judge spends with them in a settlement conference.

To determine whether settlement appears feasible, we should require parties to itemize their damages and exchange settlement demands and offers as early as possible. The issue of damages should reasonably govern the amount of time and effort that goes into a case. It makes little sense to spend \$75,000 on a \$50,000 case, though such circumstances are not unusual. Much of the expense is the result of active motion practice, which is avoidable. Courts should discourage motions while the parties first explore the dual questions of how much is at stake and whether there is an interest in settlement.

Our legal system should strive to bring opposing parties together as early as possible to explore settlement. As currently structured, a settlement conference is often the last step

in the process before trial, rather than one of the first. Our system exists to serve the public. We should emphasize public involvement and place the interests of the clients first.

Bring lawyers together. Lawyers should be encouraged to meet and discuss issues before bringing them to court. Requiring counsel to meet in person or talk by phone before running to court can help to create trust and confidence between opposing counsel. A 15-minute meeting can oftentimes avoid thousand of dollars of expense in briefing a motion. Clients and the court are entitled to such a good faith effort.

Many courts require personal conferences before a discovery motion can be brought. Similar requirements should be considered in connection with the typical motion to dismiss or summary judgment motion. A plaintiff facing a Rule 12(b)(6) motion should be required to choose between filing an amended complaint or standing on the complaint before briefing begins. There is little utility in briefing and granting a motion to dismiss when an amended complaint can correct the defects set forth in the motion. A meeting between counsel can avoid the delay and expense involved in such a motion.

Encouraging counsel to meet to discuss a possible summary judgment motion is also useful. Lawyers can clarify issues, avoid futile motions, or discuss settlement. Summary judgment motions should focus on legal issues. To expedite the process and reduce costs, lawyers should be required to meet and discuss these issues before briefing complex motions. Unfortunately, lawyers rarely meet to discuss motions unless required to do so by the court.

Such meetings can assist the parties and the court, and can lead to a more professional and civil relationships between lawyers.

Judges bear a major responsibility for the current emphasis on summary judgment, often viewing it as a tool to reduce caseloads rather than reserving it for those cases that turn on legal issues. Judges should actively discourage summary judgment motions by encouraging counsel to meet and weigh the relative advantages of settlement or trial before proceeding with summary judgment.

Promote oral argument. Once a motion is filed, courts should utilize oral argument in resolving the motion. There has been a great tendency in the federal courts to set briefing schedules and issue rulings by mail without oral argument. Placing an emphasis on oral argument has a number of benefits. Oral argument enables the court to better understand the issues and competing arguments. In most discovery disputes, relying on oral argument without briefing is generally sufficient to enable the judge to render a proper decision. Attorneys appreciate the opportunity to argue their motions and explain their position. This gives the parties a better understanding of the judge and allows them to be more effective in future appearances.

Oral argument provides lawyers with an opportunity to practice and improve upon their craft. This is particularly true for young lawyers. If the judicial system expects competent advocacy, our courts must provide a forum where advocacy skills can be developed. The emphasis on deciding motions on the papers, without an opportunity for oral

argument, negatively impacts the quality of decision making and lawyer development.

Make trials affordable. In the absence of settlement, courts should encourage trial over resolution by paper. A trial provides an opportunity for the client to come face to face with the decision maker, be it judge or a jury, to witness the facts being developed, and to hear the arguments presented. A client should feel that his or her case is taken seriously and is given full consideration by the decision maker. This is best done at trial.

Although trials are expensive, litigating on the papers is no bargain. Motion practice has grown into the favored practice by “litigators” who rarely appear in court. But it is time consuming and less satisfying for most clients and lawyers. Clients pay great sums of money for motions that they do not fully understand and that delays the ultimate outcome of the case.

Legal principles are better developed in the context of a trial. The presentation of issues on paper is not as compelling as in person and may lead to a skewed development of the law. For example, why must a court in the context of summary judgment accept a statement in an affidavit as true, when neither a judge nor jury need accept that statement as true if uttered from the witness stand at trial?

The emphasis on paper justice has placed an equal emphasis on technically proficient paper pushers. Justice dispensed on this basis leaves much to be desired when it results in a decision based on a procedural defect rather than on the merits of the dispute. It also leaves clients alienated from the process when they see that the merits have not been reached. A party whose case is decided at trial has a greater regard for our system of justice than a party

who receives a summary judgment ruling through the mail. Seeing is believing. A losing party is better able to accept his or her fate after a trial than after summary judgment.

The challenge for our system is to make trial an affordable and accessible alternative. One of the major criticisms of trial is the expense involved. We must work to simplify the process by creating simple forms of final pretrial orders, emphasizing cooperation between counsel, standardizing jury instructions, and setting firm and realistic trial dates so that those who want their day in court can afford it.

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Our legal system would benefit by placing a primary emphasis on bringing clients and lawyers together either in their office or in our courthouses, while reducing the volume of paper filed. A legal system structured to emphasize early settlement of disputes, with direct client involvement, or an early and affordable trial will result in better justice and more satisfied public and profession. Our rules and procedures should be modified to place the emphasis on personal interaction to secure justice.