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1998

# Civil Justice Reform Symposium: Introduction

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## Publication Information

24 William Mitchell Law Review 287 (1998)

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## Repository Citation

Hogg, James F., "Civil Justice Reform Symposium: Introduction" (1998). *Faculty Scholarship*. Paper 57.  
<http://open.mitchellhamline.edu/facsch/57>

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# Civil Justice Reform Symposium: Introduction

## **Abstract**

Many people in the United States are not happy about the way in which litigation proceeds. In a country sometimes thought to be overpopulated with lawyers, either one party or both parties in a significant percentage of civil cases apparently cannot afford, or decline to retain, legal counsel. Financing for legal aid seems to be less than adequate, pro bono services are helping to some extent, but the administration of civil justice is in danger of sinking in the swamp of pro se ("do-it-yourself") litigation. The articles in this symposium discuss ideas for reform, such as introductory resources directed at pro se litigants, arbitration, mediation, and other specialized courts or processes.

## **Keywords**

civil justice reform, pro se litigants, conciliation court, mediation, arbitration, discovery

## **Disciplines**

Civil Law | Courts | Dispute Resolution and Arbitration | Law and Society

## CIVIL JUSTICE REFORM SYMPOSIUM: INTRODUCTION

James F. Hogg<sup>†</sup>

The rest of the world thinks that the United States is litigation happy. Many people in the United States are not happy about the way in which litigation proceeds. In a country sometimes thought to be overpopulated with lawyers, either one party or both parties in a significant percentage of civil cases apparently cannot afford, or decline to retain, legal counsel. Financing for legal aid seems to be less than adequate, pro bono services are helping to some extent, but the administration of civil justice is in danger of sinking in the swamp of pro se (“do-it-yourself”) litigation.

Judge Stanoch, in his article in this symposium, describes the rise of concern in Minnesota about the growing “pro se” litigation problem and the creation, in 1994, of the Committee on the Treatment of Litigants and Pro Se Litigation by the Minnesota Conference of Chief Judges. He describes the work of that Committee, the further creation in 1996 of a Pro Se Implementation Committee, and the various creative outcomes, including some experimentation, resulting from these initiatives. As he says, “[t]he Minnesota state court system has demonstrated a strong commitment to addressing pro se issues and implementing programs to assist pro se litigants.”<sup>1</sup>

Our system, derived from the English model, relies on three players - separate counsel for each side of the dispute, to identify, present, raise and argue the facts and legal issues for the purpose of arming the third player, the judge, with everything needed to

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1. See John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 296, 311 (1998).

decide and dispose of the case. When the legal counsel are missing, the work of the judge is increased exponentially - placing virtually the whole burden on his or her shoulders to seek out fact, law and argument. In the Twin Cities' conciliation courts (courts with jurisdiction over claims up to \$7,500 which handle perhaps two thirds of all civil claims filed) this process leaves little opportunity for judicial pondering about individual cases. I sat through a one day conciliation court session a while ago. Ninety cases were docketed for hearing that day. Despite a significant number of defaults, five to ten minutes a case seemed close to the standard, with no indication from the bench of intended ruling. The outcome was communicated, apparently, through the mail in about a week. Much is made of the fact that either side may appeal a conciliation court decision, as of right, into district court. The statistics indicate, however, that in a high percentage of cases, the initial decision is not appealed and becomes final. A complaint heard is that the parties in conciliation court often fail to understand why they won or lost or what they might have done differently to improve their chances of success. In one case a plaintiff had sued to recover damages based on installation of defective vinyl flooring in a kitchen. An architect had said, in writing, that the vinyl was defective. The plaintiff introduced the letter in conciliation court, together with pictures, but failed to bring the architect. She lost, never knowing that basic rules of evidence and proof apply in conciliation court. The system is a bit less than user friendly to those who fail to understand the fundamental rules of evidence and burden of proof.

Conciliation court is the court of first and last resort for the civil disputes of most of our Minnesota citizens. It behooves us to look with the closest attention at how these courts are working, with a view to trying to make them more user friendly. Judge Stanoch has been a leader in experimental efforts designed to that end. One such improvement, tried and evaluated in Hennepin County, which he describes in his article, involves the introduction of mediation as a first step prior to formal hearing. The argument against such a required first round of mediation is that it may require the parties to be present in court on two days rather than one — and time is usually precious to the parties. Judge Stanoch describes the creative way in which a two day exercise has been avoided or minimized. The result of first round mediation has been the resolution of many disputes at that stage rather than

through formal hearing. As he explains, this has led to better feelings by the parties about the system and a better understanding of the reasons why one party wins and the other loses. Another advantageous byproduct of this approach is the provision of more hearing time for those cases that merit it. The mediation step can also serve to acquaint each side with the kind of proof that will be required if the case fails to settle in mediation and goes through to formal hearing.

Maricopa County, Arizona, has made some courageous efforts to assist pro se parties in low-end litigation. One approach, involving the use of interactive computer technology, is to collect information from each litigant and then prepare any required pleadings, ready for filing, based on the information so collected. The creation of the necessary software has proven, apparently, to be a formidable and very expensive task. Another approach involves the furnishing of written advisory materials to those contemplating pro se litigation. These written aids are extensive, within the particular subject matter covered, and indicate other important inputs such as counseling, where appropriate. Yet another feature of Maricopa invention is a complex phone system, said to contain up to six hours of branched responses to a variety of common questions from would-be litigants. The system is said to be capable of receiving up to one hundred inbound calls at a time. I was told some two years ago that this system was then logging up to three thousand calls a week. Someone interested in asserting or defending a civil claim can call into the system and, through a detailed series of branching switches, receive beginning help. But perhaps the most important feedback from the phone system is the list of the various locations to which a proposed litigant can go to look through and find written materials containing more detailed information about what may be required and how it will have to be presented.

I am told that many people, proposing to use the conciliation court process in Minnesota, go to the clerk of court's office expecting to receive help and advice. The staff want very much to be helpful but are uniformly constrained by an instruction not to cross the line into providing legal advice. If only we could devise a system where a would-be litigant in conciliation court could get some preliminary advice and evaluation of the merits of the claim. Judge Stanoch reviews a number of creative steps undertaken in Minnesota since 1994 to provide help and advice to pro se litigants, but

clearly, there are further opportunities to be explored. Perhaps a thoughtfully prepared workbook for the litigant to use might be a helpful addition for a number of stock issues. Perhaps a carefully designed interactive technology driven process could also help in some types of cases.

At the other end of the litigation process in Minnesota state courts, the realm of "high-ticket" litigation, there is once again some substantial user dissatisfaction with the way the process is working. Corporate managers are fond of describing their latest encounter with our civil justice system and their concern that the process is both amazingly slow and unbelievably expensive, both in dollars spent on legal fees and management time consumed in discovery.

Two years ago, a small but representative group was convened to discuss the process of high-end litigation in the Minnesota district courts. When I called one member of the group for an appointment that day he said, "Jim — I'd like to meet with you today but I just can't — I am preparing answers to the ninth set of interrogatories in a case!" A number of members of this group commented that closer management of the discovery phase of litigation was required. In the opinion of the group, the rules provided judges with appropriate powers to control discovery, but exercise of those powers was often less than perfect.

A number of different factors were apparently contributing to this result. The first was judicial exhaustion — the available judge power being ever more challenged by the steadily increasing volume of criminal cases, family law cases, and juvenile cases. The time needed for complex civil matters was increasingly stressed by the needs to provide resources for those other areas. Secondly, complex corporate practice formed no part of the experiential background of many members of the district court bench. The special problems of complex corporate practice are thus not familiar to many members of the bench. Thirdly, I am told, motion practice takes place typically, one day a week. Judges are rotated through assignment to motion hearings. Thus a lawyer handling a complex civil suit with a number of motions to be made and heard along the way, may encounter a different judge on each motion. The rules make provisions for special judicial assignments on complex cases, and a number of such assignments are made, but I am told that many cases run their course without the benefit of such special assignment.

The group spoke somewhat enviously of the discovery control provided in our federal courts and the advantages of having a discovery master for a case in the form of a federal magistrate — one, moreover, applying the Minnesota district rule calling for an early conference to develop a specific discovery plan for the case. Would it be possible, asked some members of the group, to assign perhaps two members of the Hennepin County bench with appropriate prior experience in complex civil litigation, to serve as masters of discovery in all such complex cases in the district?

All of which leads to the topic covered by Senator Ember Reichgott Junge — the potential for creating a special court in Minnesota with jurisdiction over such complex commercial cases. Senator Reichgott Junge describes the various arguments, pro and con, made with respect to the desirability of such a specialized court, as well as the history of such efforts in a few other states. Corporate lawyers often speak favorably of the Delaware Chancery Court, a court of just such special jurisdiction. But Delaware just happens to be the state of incorporation of a majority of the Fortune 500 corporations, and quite possibly of the next thousand as well. This nexus underlies the flow of many complex corporate suits to the jurisdiction of the Delaware Chancery Court. But absent such a comparable nexus in Minnesota might a specialized court, nevertheless, be justified here?

Opinions within the bench and bar on this issue differ markedly. On two occasions within the past ten years, interest in this topic has picked up within the membership of the Executive Council of the Business Law Section of the Minnesota State Bar Association. Senator Reichgott Junge describes a bill which she introduced designed to afford an opportunity for preliminary consideration of such a concept for Minnesota. As Senator Reichgott Junge says, somewhat cryptically, of the proposal to create a business court in Minnesota, “but it won’t be in the 1998 legislative session. Let the debate continue.”<sup>2</sup> She is to be congratulated for encouraging a healthy discussion of the pros and cons of this idea. Rumor has it that an overwhelming majority of the Hennepin County bench are opposed to the creation of any such specialized court for complex commercial litigation. The reasons for such opposition are a touch less clear.

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2. See Sen. Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 313, 319 (1998).

Happily, no such problem of the potential of less than fully controlled discovery is suggested in the context of practice before the federal courts in this district. Professor Oliphant, in his article,<sup>3</sup> describes one of the significant changes made in the federal rules in 1993 respecting discovery, the changes in Rule 26(a) requiring early discovery. These changes, requiring, with some exceptions, voluntary exchange of certain information at the outset of litigation, were made, however, subject to local option. A majority of federal districts elected to opt out of these changes. Minnesota elected not to opt out and the changed rules have been in effect in this district for some four years now. Professor Oliphant describes these changes to Rule 26, considers the arguments pro and con for the changes, and analyzes the results of an attorney survey conducted by the Civil Justice Reform Act Advisory Group for the District of Minnesota in 1996 and a further survey which he conducted in November-December, 1997, of the federal judges and judicial magistrates in this District. As his article indicates, opinion in the bar survey was split between those who favored the new rules and those who opposed them.

Significantly, some 75 percent of those attorneys most heavily involved in litigation in federal district court were opposed to opting out of this rule change; 48 percent of those with five years or less of experience opposed opting out with another 15 percent being neutral. Thus, those more recently admitted together with those most frequently using the system, favor retention of the rule changes. Of special significance, however, is the strong endorsement of the changes given by the federal district judges and magistrates in their responses to Professor Oliphant's survey. They have the advantage of independence of viewpoint (including freedom from concerns about whether voluntary production may or may not be harmful to the client's best interest and inconsistent with the essential advocacy role of counsel), hands-on knowledge and experience with practice under the new rule, and freedom from bias based on years of practice under the old regime and the relative likelihood of built-in resistance to change. This article is a welcome addition to the literature which tends, for the most part, to reflect argumentation from those in other districts where the courts opted out of the new changes. There is growing reason to

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3. See Robert E. Oliphant, *Four Years of Experience with Rule 26(A)(1): The Rule is Alive and Well*, 24 WM. MITCHELL L. REV. 320 (1998).



believe that one purpose, intended to be served by the new rules — that of encouraging earlier settlement of cases — is having such an effect. The concept is that by giving both parties an early and more comprehensive understanding of the strengths and weaknesses of both sides, settlement opportunities will be promoted. This concept contrasts with the traditional belief that settlement discussions are premature until full discovery has been completed.

The fourth article in this symposium, by Professor Michael A. Landrum and Mr. Dean A. Trongard, addresses yet another facet of the struggle about the process of litigation — the story of the continuing evolution of the concept of arbitration. Given the vagaries of court-centered litigation, including the scope, breadth and cost of discovery in that process, many corporations have accelerated the specification of arbitration as the medium of choice for resolving disputes — disputes that run the gamut from commercial issues to those involving employee relations. Arbitration is now required in a number of customer disputes with sellers, customer disputes with stock brokers, and even customer disputes with bankers, insurers and health care providers. Among the touted advantages of arbitration over litigation are: savings in cost, faster resolution, relative confidentiality, ability of the parties to choose as arbitrator a person with background skills and experience matching the particular problem, and avoidance or minimization of the risk of parochial local decision (particularly important in international dispute resolution).

The authors of this article review carefully the history and evolution of arbitration, its strong history in the world of labor, and the multiplicity of contexts that have evolved over the last several decades. They emphasize the fact that arbitrations are not monolithic — that a number of factors can and should differentiate various types of arbitration, types that can and should affect the extent to which courts express a willingness to review the results of any particular arbitration.

Consider, for instance, the employer who contemplates inserting an arbitration provision in every employee's employment contract, requiring all disputes arising out of that employment, including all work-place conditions such as alleged harassment, to be arbitrated and not litigated. The advantages to the employer seem clear — relative confidentiality, avoidance or reduction of costly discovery, possible ability to limit forms of available relief, and avoidance of jury risk of punitive damages. The correlative disad-

vantages to the employee may be equally clear, but a relative imbalance of bargaining power may affect the outcome in the employment contract. To what extent can and should an employee's statutory rights be required to be solved in the context of arbitration rather than litigation including jury trial? The authors review these concerns in detail, noting the somewhat hodge-podge work of the courts in this area.

But if a primary cause of the cost of litigation, the delays and wear and tear, is found in the discovery process, how about discovery in arbitration? Can arbitrators cut to the chase without the now traditional court discovery process? Where arbitration occurs between bargaining equals who enter into an agreement to arbitrate after the dispute arises, they have the flexibility to make any reasonable provision for discovery which will then be enforced by the arbitrator. Discovery problems are more likely to be at the forefront of the minds of the negotiators in such a situation. Such problems may be further in the background where an arbitration clause of general application is inserted in a commercial agreement at the outset and before any dispute has arisen. And where the obligation to arbitrate occurs in a contract of adhesion situation, the gates are very likely to be set in favor of the institution dictating the form of agreement. The relative scope of discovery provided may be one of the factors courts consider when they decide, as described in this article, whether a required arbitration constitutes a satisfactory remedy for statutory rights.

The authors describe the wanderings, or meanderings, of the courts in attempting to define the boundaries of license to require arbitration of disputes and judicial review of arbitral decisions. They describe the different and varying histories of commercial arbitration, labor arbitration, and now the evolving issues of "statutory rights" arbitration, including employment disputes arbitration. They review the precedents with respect to whether arbitrators should be required to adhere to the "law" in making their decisions, and the "fair hearing" test. They document the "futility of the search for a judicially created 'Grand Unified Theory of Arbitration Law.'"<sup>4</sup> They point to the current work of the National Conference of the Commissioners on Uniform State Laws ("NCCUSL") now reviewing the earlier Uniform Arbitration Act

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4. See Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL L. REV. 342, 392 (1998).

and suggest organizing a new “Uniform Arbitration Code” around what they term “transaction dynamics.”

The four articles in this symposium provide much food for thought.

