Remarks to the Court Symposium

ABA Dispute Resolution Section Spring Meeting

Rethinking the Delivery of Justice in a Self-Service Society

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Good morning and thank you for the invitation to be with you. I want to particularly thank Cathy Geyer. Cathy and I worked together as colleagues. I was the Administrative Director of the Ohio Supreme Court. She headed our dispute resolution programs. For those of you who know her, you will know Cathy as an exceptionally competent and steady person, unflappable even when dealing with a sometimes very flappable administrative director. So, thank you Cathy.

I would also like to thank the ABA, particularly the section on dispute resolution, and all of you in attendance at this Court Symposium. Notice I did not use, for reasons that I hope will become obvious, the term "alternative" dispute resolution. If you were to look-up the term "alternative" in the Merriam-Webster dictionary you would find definitions such as "different from the usual or conventional" or "existing or functioning outside the established cultural, social, or economic system." Alternative suggests something other than; perhaps a lesser thing;

perhaps even that thing you do because you cannot do the ideal. It can easily be cast in a pejorative tone. The term is binary in tone just as it is binary in effect.

What I suggest this morning is that we need to transition our language, our programs, and our systems away from notions of "alternative" dispute resolution and towards a more encompassing and holistic notion of dispute resolution services offered by the courts. A menu of options, if you will, not defined in terms of alternatives but defined by litigant needs.

I.

Why is this important? If you read once again the Preamble to the United States Constitution, you might notice that "We the people in order to" is followed by three important objectives: "form a more perfect Union, establish Justice, insure domestic Tranquility." Establish justice. These objectives come before addressing the common defense and providing for the general welfare. And, of these three pressing objectives, I would argue, as did James Madison, that establishing justice is the lynchpin, the foundation, the bedrock, for every other objective of government and civil society. Madison knew this when he wrote in *Federalist 51*:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.

To state the obvious, lawyers and judges and courts get a bad rap at times. Some of it is deserved. Some of it is not. But if we could step back and gage our actions against Madison's wise words, well there is no more noble pursuit and needed cause in this world today. This is why I think we need to have a discussion on what it means to deliver justice today in a world of

growing virtual relationships defined by boundlessness, not boundaries. How are we in the courts going to achieve the goals of establishing justice, protecting core values, and remaining relevant in this increasingly physically-disconnected but virtually-interconnected world? How will we help people navigate the complexities of human dispute at a time when many people see physicality and institutionalism as calcified and constraining concepts. The virtual world, even with all its faults, is creating new expectations, launching new ways of relating, and opening new opportunities for services. Where are we?

The title of my remarks this morning is "Rethinking the Delivery of Justice in a Self-Service Society." There are several themes in this title. There is the theme of "delivery of justice." We might call this the "what," the ultimate objective. There is the theme of "self-service." We might call this the "how," the means. There is the theme of "society." We might call this the "who," the context. But these themes are qualified by the theme of "rethinking." In other words, the exercise of suspending our deeply held assumptions and beliefs about a topic to test their continued validity and relevancy in light of new information or emerging trends.

I hope to do a few things this morning. First, I would like to outline what I see as some of the challenges facing those of us who work in the courts, what we might call the established public justice system. I make a distinction between the public justice system and emerging private justice systems. I believe we are in an increasingly competitive industry – the industry of dispute resolution – and, to be candid, I do not think we compete all that well at times, in no small measure because of our beliefs and assumptions and thinking.

Second, I would like to provide a framework for thinking about these challenges. As I will explain, the difficulty in rethinking highly complex and sophisticated systems is that those of us in the system easily can be captives of the system. I think we need to ask this singularly

important question: Do we have a public dispute resolution system designed for the needs and expectations of the 21st century? I think the answer to that is generally no, but that the solutions to the question may lie in the past as well as in the present.

Third, I would like to ask some questions and offer some thoughts on moving forward. Of course, any remarks that I make in this regard are admittedly cursory, at best. These are large complicated systems that can neither be explored or re-engineered in 30 minutes. What I hope, however, is that I can provide some encouragement to rethink and redesign some of the core services, structures, and procedures that we rely upon – perhaps too much because they are known, convenient, and routine. What I will offer isn't groundbreaking. We've talked about it for years. But we have, in my estimation, made little progress towards change because we have been unwilling or unable to make the intellectual, financial, and institutional investment necessary. We have generally played at the edges. We have not looked too deeply into the core and its assumptions.

Lastly, I would like for us to have some time to talk with one another. In other words, I do not plan on spending my time just talking at you. I am very interested in your thoughts.

To help set the stage, I'm going to ask for robust audience participation in a little exercise. I'm going to call it "15 questions with multiple subparts." Kind of like a law school exam.

1. How many of you have worked for or with a court for longer than 12 years? Less than 12 years? Any idea why I picked 12 years? The iPhone was introduced in 2007.
2. How many of you have a cell phone with you today? How many of you can recall when a landline was the only electronic connectivity you had to others?

3. How many of you own an iPhone 6 or higher? Does anyone know theoretically how many Apollo spacecrafts your iPhone could guide to the moon simultaneously? By some estimates, the iPhone 6's clock is over 32,000 times faster than the best Apollo era computers and can perform instructions 120,000,000 times faster. Think about that.
4. How many of you right now are connected to the internet using your phone?
5. How many of you are more interested in browsing the internet than listening to me?
6. How many of you think that at some point in the next 30 or 40 minutes you will tune-me-out and tune the internet in?
7. How many of you will admit that you CANNOT look at your phone for the next 30 minutes without feeling a twinge of anxiety?
8. How many of you engage in any of the following during the day using your cell phone?
    a. Social media?
    b. Banking?
    c. Booking travel?
    d. Navigating?
    e. Watching videos?
    f. Shopping?
    g. E-mailing?
    h. Ask your phone a question?
    i. Interacting with a government agency?
    j. Interacting with a court or a dispute resolution system as a participant?

9. How many of you would rank a platform or app on your phone as being one of the top three ways you interact with family, friends, and others? If you lost your phone today and could never get it back what would that mean for you?
10. How many of you know that systems such as IBM Watson are helping doctors and judges make decisions?
11. What is the average monthly number of Amazon inquiries using a mobile app? Approximately 160 million according to one estimate. How many robots does Amazon use at its fulfillment centers? Estimated 54,000. How many of you talk to Alexa?
12. Anyone know what the anticipated percentage increase in AI spending by industry will be from 2018-2022? One thinktank opines that spending on cognitive and AI systems will increase 37% compounded annually and the use of "digital assistance" between customers and services will increase 45%. What does that mean for a workforce?
13. A bit of a shift in questioning. What percentage of the companies listed on the S&P 500 in 1955 were still listed on the S&P 500 in 2015? Only 61 companies, or just 12% of the companies still existed in 2015. Stated differently, 88% of the 500 largest companies around in 1955 no longer exist.
14. Now here's a tricky question. In 1993, to what did the term Amazon refer? One of my favorite recent observations is from a Canadian trade official who noted that in 1994 when NAFTA was signed Amazon referred to a river in South America. Amazon, the company, was founded in 1994.
15. Last question. According to *Forbes* magazine, what were the top five most valuable companies in the world in 2018?
    a. Apple (1976)

b. Amazon (1994)

c. Alphabet/Google (1998)

d. Microsoft (1975)

e. Facebook (2012)

What do these five companies have in common? They are highly innovative. They are disruptors and game-changers. They are relatively recent ventures.

What does any of this have to do with this morning's theme? If these questions got you thinking about anything, I hope what you thought about were four things: (1) how fast times are changing; (2) how much "self-service" you engage in everyday; (3) how innovation is constantly reshaping our world; and (4) nothing is inevitable; institutions either adapt or they fail themselves out of existence.

Before I go further, I think it is fair to disclose to you that I suffer from some strong opinions. My views have been shaped by working in various state courts and with the courts of other countries for some 30 years. But many of my current opinions were shaped by the three years I spent in Kosovo and my work with other judicial systems struggling to establish justice. Three are most important for this morning.

First, and most importantly, I learned from my experiences that the breakdown of the social order, political stability, and economic well-being of a community is vastly accelerated by a breakdown in the public's confidence in the fairness and capabilities of a justice system. This is why I believe in strong, effective courts that are focused on public service, helping people resolve their differences peacefully, protecting the rule of law, and rendering justice fairly and objectively. This is why I believe we must build capacity and expertise in the courts and innovate as society's needs change. And this is why I think it is our responsibility to

periodically suspend our confidence in the perceived perfection of our system of justice and ask penetrating questions of it.

When people perceive the justice system is tilted, unfair, unresponsive, more concerned with mechanics than substance, outputs more than outcomes, its own survival rather than its relevance, communities are lessened not strengthened. The descent of Kosovo into civil war in the 1990s was, in my opinion, ultimately a reflection of the collapse of the public's confidence in the justice system. This then accelerated the collapse of other government systems and then society generally.

The need for public confidence in the justice system is particularly acute in a democracy like ours because compliance with norms and rules is largely voluntary. We generally expect people to comply not simply because there are consequences for non-compliance, but also because people believe those consequences are fairly and competently administered. Courts are important institutions in this exercise not simply because they are places to resolve disputes peacefully, but also because they are important symbols of stability, service, objectivity, factual judgment, expertise, fairness. They are anchors for a healthy, peaceful, and vibrant society that can resolve its differences without resort to warfare or violence. Therefore, no matter what role we play in these institutions, there is always a wider dimension to our actions. We either contribute to or detract from the public's faith in the system. And each little contribution or detraction either builds or erodes confidence in all systems of government.

Second, I learned that law and courts and notions of legality and systems of dispute resolution are reflective of certain cultural understandings, customs, and social thinking. These then drive institutional design and institutional processes. The decisions we make or assumptions we rely upon to form norms, procedures, processes, and institutions are more a

reflection of culture than a universal understanding of what the optimal system of justice should be, what it should look like. Not every culture, for example, prefers a complex adversarial system of justice with intense procedures overseen by detached and neutral magistrates as its initial approach to resolving differences. That approach to dispute resolution is culturally driven; it is not ordained from on high.

To be clear, there may be good reasons for a system generally designed around an adversarial model. Such a system may, in many circumstances, be more capable of protecting some core principles that we know are important in building a more justice society. Principles such as separation of powers, due process, equal protection, the independence of judgment. But ultimately how these principles are actualized and protected can be highly variable – driven by history, experience, and culture.

And this leads me to my third opinion, which is this: People who live and work and are comfortable in highly complex and sophisticated systems can become prisoners of those systems. We assume that there is no need to revisit fundamental questions of design because things seem to be working so well – for us. We engage in the defense, not the questioning, of architype or prototype thinking. Martin Shapiro, the author of the book "Courts: A Comparative and Political Analysis," observed that most people believe that the prototype court reflects the following elements: (1) an independent judge; (2) applying pre-existing legal norms; (3) after adversarial proceedings to; (4) achieve a purely dichotomous decision in which one party is assigned right and the other assigned wrong. Yet he also noted that such a protype does not really exist in any pure form. It probably cannot exist in a pure form if justice is to be obtained. Human disputes are not prototypical.

Nevertheless, our thinking tends to gravitate to prototypes and their procedures as standard measures for success. As systems of justice become more sophisticated, more prototypical, we develop more and more rules and procedures as indicators of success, efficiency, objectivity. We see things in highly procedural terms, procedures that were initially designed to protect certain values but have become, in some circumstances, self-reinforced thinking. There is little regard for the question: Do we really need to do it this way and is there a better way to do it? We become captives in the pursuit of outputs that are easily measured, not the sustainability of outcomes, which is a far more difficult and elusive measure of success. And we convert facilitators and decisionmakers into umpires, analogizing our actions and our systems to sporting events and games.

The problem with these assumptions, with this prototypical thinking regarding a purely adversarial approach to dispute resolution, was perhaps best summed-up by Roscoe Pound over 100 years ago. You have probably heard this before. You may even roll your eyes at the constancy of its repetition in speech after speech. But it bears repeating nevertheless.

> [I]n America we take it as a matter of course that a judge should be a mere umpire. . . and that the parties should fight out their own game in their own way without interference[.] The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he [or she] is merely to decide the contest . . . according to the rules of the game, not to search . . . for truth and justice[.] The inquiry is not, "What do substantive law and justice require?" Instead, the inquiry is: "Have the rules of the game been carried out strictly?"

In a society that has increasing expectations for self-service, for simplicity in their interaction with systems large and small, this focus on procedural formality, on the rules of the game at the expense of other more substantive objectives, becomes a real stumbling block and point of frustration for many.

If we are honest, if we suspend our beliefs, we probably would admit that not much has really changed since Pound's 1906 speech. This notion of courts serving merely as forums for a game overseen by umpires continues to have an unfortunate hold on the institution of the courts, on our own thinking, and the politics of our age. It is as if the more detached and procedurally intense we can become, the better we will be at judging others or solving their problems. But as you well know working in the trenches, this is not a game where you have warm-ups and foul-outs that really do not matter in the grand scheme of life. Helping people resolve their disputes is not a sport with easily applicable rules. A missed called does not mean losing a trip to the super bowl but whether someone will ever see their kids again, or will lose their homes, their freedom, or everything. There is always a wider dimension to what we do.

If I summed-up the core message that I hope you take away this morning it is this: There is a difference between our legal legitimacy and our public relevancy, and we in the courts are not spending enough time deeply worrying about the latter in the face of change around us. When I made a similar comment to a group of judges a while ago, one judge retorted that he wasn't worried about innovation or relevance because the constitution made the courts relevant by establishing them. I'm not so sure about that. His comment demonstrates my underlying concern. We are now participants in a competitive industry. If we are not careful – if we are unwilling to rethink our business model, the services we offer, our modes of delivery – if we cannot adjust to changing public expectations – the public justice system will see declining

relevance as more attractive competitors become available. The fact that constitutions establish courts does not mean that they guarantee our relevance. Relevance is earned. It is not gratuitously given.

So why is rethinking systems so difficult? I recommend for your reading a 1999 article in the *Harvard Business Review* entitled "Why Good Companies Go Bad." When considering why good companies ultimately failed, Dr. Donald Sull found four common themes that collectively he called "active inertia." They were:

- First, assumptions framed by past success blinded leaders to identifying innovations and making the hard decisions needed to meet evolving needs and future challenges.
- Second, processes and procedures became routines, so much so that maintaining the status quo was simply easier than dislodging it to adapt.
- Third, existing relationships and ways of relating shackled the ability of leaders to think about new forms of relationships and new ways of relating.
- And fourth, values became unyielding dogmas. I would argue that many of the values of justice have now become ensconced as procedural dogmas.

Perhaps the most consequential finding of Dr. Sull for all leaders is relatively simple to understand but hard to counter. He found that leaders of good companies became trapped by long-engrained institutional thinking. It wasn't that they ignored the signs of the times or misunderstood the changing environment. Firestone Tire, for example, was well-aware that this small French company called Michelin had developed this tire called the "radial." But still the leaders of Firestone failed to adjust. Their thinking about relationships and practices and values was so anchored in certain assumptions and beliefs that they could only make changes at the

fringes when, in fact, the threats drove to the very core of their business. They were convinced that in making small changes they were doing something radically different. They were engaged in active inertia.

Given the enormous challenges we face, I suggest to you that it is time for us to engage in a systemic exercise in "zero-based" management. We should ask ourselves this "zero-based" question: Knowing what we know today would we design the justice system that we have? Stated differently, are the delivery mechanisms, institutions, processes and procedures that have been developed and served us for the last 200 years up to the demands of a highly connected, self-service oriented society that is the 21st century? If the answer is "no" or even "probably not," then it is time to rethink the system and focus on changes that will promote greater access and result in more meaningful and sustainable outcomes to disputes while also protecting core values.

II.

Having outlined what, I think, are some challenges we face, the most pressing of which are the limitations we impose on our own thinking, let me offer three ideas for you to consider as springboards for actually "rethinking" the delivery of justice services in an increasingly self-service society.

First, should we fundamentally redesign the way people access and interact with the justice system, and particularly the civil justice system? Consider the very unscientific survey we did earlier. What, if anything, did it tell you about your own behaviors and expectations when interacting with systems? For good or ill, people expect to be able to interact at their convenience and through means that are often disconnected from the principle of physicality. I am not suggesting this is always good, only that it is the increasing reality in which we operate in

our personal lives. Yet we in the courts tend to be somewhat traditional in our thinking, willing to make changes on the fringes but not all that willing to ask questions at the core.

Just consider, for a moment, the notions of venue and jurisdiction that form the heart of our system and many of its rules. These concepts, or aspects of them, were generally defined in an era where horses, buggies, and model-T's defined boundaries and distance. In many states, particularly in the east and Midwest, the courthouses were located within a day's horseback ride. Venue became a question of physical location and geography and frankly imaginary lines on a map. In tacit recognition of this reality and the need for change, we haltingly institute new electronic systems, we write rules for electronic filing, and we give the public online access to dockets, and think we have achieved something revolutionary. We haven't. The system remains very much grounded in past business practices and notions of geography and physicality all the while most of us are increasingly living our lives in a virtual world unconstrained by such considerations.

This world of virtual relationships is hugely reshaping how we interact with systems. But it is also reshaping how we expect to interact with systems in the future. Why should I go to court in a physical sense when I can conduct almost every other aspect of my life in a virtual sense? I cannot remember the last time I walked into a bank. I can now consult a physician on-line and receive a prescription for most common illnesses without ever leaving my home. Should we not consider that going to court in the future is no longer about place, but about opportunities for a variety of dispute resolution services offered in a variety of ways?

Even our more recent effort, ODR, is defined as an "alternative" to going to court in the physical sense. One article I read suggested that ODR is nothing more than another attempt at promoting "alternative" dispute resolution by placing it on the internet. It was not described as an

opportunity for courts to offer a broader array of services or a new way of engaging the public and resolving disputes. For many types of cases, ODR could become the preferred access to the system, not its alternative. I am not suggesting that going to court should be like shopping on Amazon. The issues are not that simple, not that prototypical. But what I am suggesting is that we need to address public expectations in a way that builds trust and confidence and secures the vitality of the public justice system in our communities. We cannot remain bunkered down in physical locations expecting "them to come to us" because the "them" have increasing opportunities to go elsewhere without ever leaving their homes or interrupting their jobs.

Second, should we consider whether the complexity of our system – its intense procedural rules and complex institutional designs – is meeting the needs of our citizens? Behind my desk when I was in Ohio were four volumes of court rules. These four volumes sitting side-to-side were almost a foot wide. I do not dispute the need for rules. What I question is whether all these rules actually serve the purpose of establishing justice; whether they have become ends in and of themselves. In all my years, I cannot remember a time when a commission on rules of practice and procedure actually recommended reducing the number of rules. The rules have been designed for lawyers not the public, and that is a problem in an era when people expect to do some of the work themselves. The question is not whether we need procedural rules to protect the integrity of processes, but whether we should develop rules that achieve that end by better balancing integrity with new demands for access. Rules should be flexible and more targeted in their design. And depending on the case type, they should be simple enough for the public to understand and use.

Finally, and perhaps most importantly, should we reconsider what it means to go to court in the future? As many of you know, the late Professor Frank Sander proposed years ago the

idea of the "comprehensive justice center" or what came to be known as the "multi-door" courthouse designed to offer a variety of dispute resolution services. Rather than the judiciary performing the role of umpiring a competitive game, he envisioned a public center where people had access to diversified services based on needs and *not* uniformity of process. He called upon us to de-routinize the system; to rethink ways of relating; to replace unyielding procedures with more nimble approaches designed to meet particularized objectives; to rethink what the courthouse means with all the historical narrative, connotation, and belief that we attach to that term.

Yet some 40 years, on instituting this concept has been a hit and miss adventure at best. Some of the miss is our own culturally constrained thinking that still sees the courtroom battle as the idyllic forum, the prototype for resolving disputes. As a result, adversarial litigation still forms much of our collective belief in how the dispute resolution system should operate. The changes we have made, while not to be glibly diminished, have been more at the edges and too often cast as alternatives to that other more superior process. All the while, the public continues to express concern about the long-term damaging effects of this focus on adversarial first and alternatives second. No one ever casts adversarial litigation as the alternative to other forms of dispute resolution.

If we are going to truly focus on public service and not institutional preservation, we need to invest in differentiated systems of access to justice and differentiated systems of dispute resolution – not simply differentiated systems of case management. Through the principle of immediate triage at intake, people in an emergency room are directed to those services most likely to be most helpful. Similarly, we should implement deep systemic changes designed to identify key contested issues early, leading to a targeted approach for resolving those issues

using a variety of techniques along the continuum of dispute resolution tools including, at times, the alternative for full adversarial litigation. Not everyone who walks into a hospital is presumed to need a neurosurgeon or a cardiac surgeon, and hospital procedures are not designed to direct that result. The same principle should apply to our dispute resolution systems.

III.

The theme this morning is rethinking the delivery of justice in a self-service society. I am under no illusion that transforming our thinking on this topic is easy. Courts are tradition bound institutions, and there is goodness that comes with that fact so long as the traditions are in pursuit of a larger objective – establishing justice. But traditions and traditional thinking can also be dangerous. We miss cues, dismiss contrary information, ignore the effects of external forces on internal dynamics. We can, if we are not careful, tradition ourselves into irrelevancy, constitutional words notwithstanding.

Knowing what we know today, would we design the system of justice that we have? That is the central question facing us. I suspect for many of us the answer is "probably not" given what is happening around us and our own admitted expectations for how we interact with systems and the services they provide. I suspect many in the public would answer "no." That is not a bad thing because it gives us a starting point, an opportunity to ask more penetrating questions about how we protect our core values while innovating to ease access into the system and the diversity of services that it can offer. It gives us the opportunity to design a system of justice for the 21st century where virtual ways of relating are balanced against the real challenges and complexities of human disputes. But if we do not do this, if we do not ask penetrating questions, we may all celebrate our legitimacy while losing our relevancy.

Thank you for your time. Thank you for your attention. Thank you for your contributions in the past and hopefully your innovative contributions in the future that combined can ensure that the American justice system retains its status as the envy of the world.