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Inside the Litigation Settlement Machine

When you take a close look at how disputes are resolved, it's not a pretty picture.

Stuart Gasner

We trial lawyers and our clients are trapped in a litigation settlement machine. The machine is made of various parts that are each added one at a time—some of them well-intentioned, others not—but each added without regard to the operation of the whole. What we have ended up with is an overdesigned and unduly expensive system in which settlement is forced upon lawyers and clients who would really prefer to have their dispute decided, not settled.

It is beyond dispute that our system of justice depends utterly on settlement. Practically all civil and criminal cases end that way. But everyone acts as though that is a good thing. Judges love settlements as relief from their caseloads. Everyone is supposed to love mediation and other forms of alternative dispute resolution (ADR) designed to promote settlement. Many, if not most, lawyers view settlement as the goal and celebrate good ones as victories.

I am starting to wonder, though, whether settlements are really a good thing. Mediators like to say that in a good settlement, everyone goes away unhappy. And they often do. But is participant unhappiness really a sign of a system that is working well? Is this a worthy goal of a system of justice? Or is our mania for settlement a sign that the system is broken and needs drastic overhaul?

If you take a hard look at how most settlements happen, it's not a pretty picture. Plaintiffs often overstate their case; prosecutors often overcharge. The parties then wear themselves out in discovery and motions practice, with trial a distant prospect. The courts steer the exhausted players to a mediator (in civil cases) or allow the in terrorem effect of a harsh sentencing regime to force the defendant into plea bargaining.

The system encourages this unhappy state of affairs. The Federal Rules of Civil Procedure allow notice pleading, virtually unlimited discovery, and a set of pretrial motions designed to be effective only in rare situations, e.g., where (despite notice pleading and a presumption of truthfulness) the plaintiff has failed to state a claim, or (despite whatever state of affairs has brought the parties to court) there really is no genuine issue of material fact. This setup guarantees that the parties will spend a lot of money getting nowhere. This may make settlement look attractive, but only in comparison to a system spinning its wheels at huge expense.

It's even worse in the criminal arena. There, ironically, the law provides for practically no discovery and a speedy trial—even though the stakes are much higher—so that the defendant has little chance to show the weaknesses in the government's overcharged case. Motions are even further from the merits than in a civil case, and must typically involve egregious violations of the Constitution to have any chance of success. The result is that the defendant hurtles toward trial with little chance to challenge the government's case, and with harsh sentencing (under the U.S. Sentencing Guidelines or otherwise) the consequence of rolling the dice at trial.

Even more troubling are programs such as the U.S. Department of Justice's approach to cartel cases, in which the settlement machine has been fine-tuned into an actual government program in which the first to confess to price-fixing gets a pass, and other would-be defendants get increasingly harsh treatment the longer it takes them to settle.

Of course, we lawyers are a big part of the problem, too. Our rates have gotten to the point where it's pretty much impossible to try a commercial case for less than $1 million, depending on the amount of e-discovery involved.

There are exceptions, of course. Some clients have the nerve and/or resources to take cases to trial. But those cases are few and far between, and tend to be big money cases where seven- or eight-figure attorney fees are justified by the amounts at stake. They're paid for by wealthy individuals facing life-changing problems, or by insurance companies. Or they're pro bono cases where the lawyers are free. Everyone else gets tossed into the settlement machine.

So, what to do about it?

First, let's recognize that doing more to encourage settlement is not the answer to a broken litigation system. This is a bigger challenge than it seems. We have gotten so used to the machine that we have come to equate "dispute resolution" with "settlement." I think that what most clients truly want is someone to decide who's right, and to resolve the dispute by deciding it, not by forcing a compromise.

No wonder Judge Judy is so popular; likewise television shows in which disputes go from initial consultation to trial in under 60 minutes. But real trial judges living under the rules and scrutiny of the appellate courts cannot act like their TV brethren. Nor can they realistically try very many cases within the current rules and budget constraints. Accordingly, the judges have been forced to promote voluntary ADR as the only way to relieve their clogged and underfunded dockets. Let's try to improve the system, and stop acting as though bypassing it is a good thing.

Second, let's stop acting as though the disputes in our society are made up. Businesses have disagreements over what contracts mean, especially when circumstances change. The boundaries of patents and other forms of intellectual property are inherently difficult to define. Not everyone accused by the prosecution is guilty. Perhaps other countries have developed cultures in which consensus and conflict avoidance are prized, but face it, that's not 21st-century America.

There may be a "litigation crisis" in this country, but (except in a small percentage of cases) it isn't caused by lawyers generating conflicts that don't exist, as some self-styled reformers would claim. Let's acknowledge that people and businesses have legitimate disputes and that we need to figure out how to decide them in a cost-effective way.

Third, let's fix the rules and the court system so that they can do the job. That means a drastic rewrite of the rules to favor deciding cases in a reasonable amount of time at reasonable expense, and somehow taming the ediscovery beast. It will also mean funding the courts adequately, which is assuredly not the case in California and many other places. I'll bet, however, that legislatures would come around if the public perceived the system as more efficient at actually deciding disputes rather than dragging them out and encouraging settlement. The Court of Chancery in Delaware, for example, has developed that reputation and is a source of pride to the citizens there.

Fourth, while we wait for the court system to be reformed, let's find creative ways to decide disputes other than sending them to mediators who, ironically, leverage the impossibility of the current system into settlements that oftentimes neither side likes. In the current regime, this means voluntary arbitration, so lawyers and their clients will have to agree (if the transactional lawyers did not agree for them in advance by having an arbitration clause).

Once these reasonable lawyers and clients agree to arbitrate, they should be willing to limit discovery and somehow cut to the chase. I've always wanted to try "baseball arbitration," in which the two sides present proposed outcomes and the arbitrator hears evidence to decide which is better. I've never convinced anyone to do it, but hope springs eternal. My fantasy rules of civil procedure would include it.

I love trying cases. I'm tired of discovery, motions practice and settlement. Aren't we all? How about shaking up the system to focus on shutting down the settlement machine and starting up a system capable of actually deciding disputes?

Stuart Gasner is a partner at Keker & Van Nest in San Francisco, where he centers his practice in the areas of white-collar criminal and securities defense, intellectual property litigation and complex corporate disputes.