

THE DISPUTE RESOLUTION PROFESSION SHOULD NOT CELEBRATE THE VANISHING TRIAL

*By Bruce E. Meyerson*¹

Many mediators and arbitrators are celebrating the vanishing trial and the increasing use ADR, viewing this as a vindication of ADR over litigation.² I suggest that those of us of who make a living as neutrals should not take out the champagne; but rather, we should help improve the quality of our litigation system. Why?

The transactional costs and delays associated with litigating cases in court are significant reasons for the growth of mediation and arbitration. I submit, however, that for ADR to be appreciated, it should be valued on its own merits and not as a fallback to a failed system of litigation. In addition, as American citizens we have an interest in reforming our litigation system to ensure meaningful access to our courts.

The primary reasons lawyers and their clients give for using mediation and arbitration is that they save time and money. Various studies support this proposition. In a 2004 survey of corporate counsel done on behalf of the law firm, Fulbright & Jaworski, almost fifty percent of respondents stated that they believed that arbitration resulted in cost savings,³ and about seventy percent responded that mediation resulted in cost savings.⁴ In 1998, Cornell University surveyed the chief counsel or senior litigator of Fortune 1000 companies. Time and cost savings were the top two reasons for choosing mediation and arbitration given by over 600 attorneys who responded.⁵ The study concluded that “[m]ost of

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² It is estimated that in the federal courts, alone, during the past five years, 20,000 to 25,000 cases have been referred to mediation. See Donna Steinstra, Address at Cardozo Law School, Vanishing Trial Symposium (Dec. 3, 2004). In 2003, the Los Angeles courts alone referred over 28,000 cases to mediation. See DAILY JOURNAL, Dec. 6, 2004. A survey of 200 attorneys in 1200 of the nation's largest law firms showed that ninety-three percent of attorneys responding would recommend ADR to a client as an alternative to litigation. See Fulbright & Jaworski LLP, 2004 *U.S. Corporate Counsel Litigation Trends Survey Findings* [hereinafter *Survey*] at 10.

³ *Survey*, *supra* note 2, at 10.

⁴ *Id.* at 11.

⁵ CORNELL/PERC INSTITUTE ON CONFLICT RESOLUTION, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17 (1998).

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the participants . . . believe that there are economic reasons to use ADR processes . . . compared with conventional dispute resolution processes.”⁶ American Arbitration Association telephone interviews with 254 corporate general counsel or other senior officials in corporate legal departments reflected the same results.⁷

Indeed, by managing the arbitrations and mediations over which we preside in an efficient and engaged manner, we can significantly reduce legal costs in ways not possible in litigation. For example, many arbitrators encourage counsel to call them to resolve discovery disputes, rather than filing motions. Some arbitrators have adopted innovative ways of presenting evidence as another means of keeping costs down. The extensive use of telephonic conferences in place of motion practice, reduced discovery, and streamlined rules of evidence are just some of the aspects of arbitration that help reduce costs. Unquestionably, it is hard for a busy trial judge to devote the personal attention to cases in ways possible in mediation and arbitration.

Of course, there are other positive reasons to choose mediation and arbitration. Mediation provides great party satisfaction and permits the utilization of creative solutions to problems in ways that litigation cannot. In addition, parties are more likely to implement mediated solutions than those imposed by litigation. Mediation and arbitration also allow parties to choose knowledgeable neutrals who bring specialized expertise to the process. Mediation, in particular, offers a uniquely flexible process not possible in litigation or arbitration. Thus, even though research shows that time and cost savings are the primary reasons for choosing ADR, there are many other sound and positive reasons why parties should choose to mediate and arbitrate.

But despite these advantages, I think it is clear that the growth of ADR is largely due to the deficiencies in our legal system. Arbitration is ordinarily required by the parties' contract. Mediation, however, is normally chosen voluntarily by parties, or directed by a court, as a requirement before a case can go to trial. When cases settle through mediation, I am concerned that the settlement reached may not always promote confidence in the legal system. If a party settles a dispute without regard to the merits of a claim, on a basis perceived as lacking principle, and solely out of the necessity to avoid the cost of litigation, that party will believe that the

⁶ *Id.* at 19.

⁷ AMERICAN ARBITRATION ASSOCIATION, *DISPUTE-WISE MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS* 19 (2003).

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settlement was, in effect, “coerced” by the failings of the justice system. That perception does not build respect for our courts and the legal system.

As ADR professionals, we need to join with our litigation and judicial colleagues to improve our justice system. For ADR to continue to complement our legal system, it must not be perceived as a profession that only profits from the failings of a broken system of litigation, but as a profession that recognizes the important and essential role that our courts play in society. Society will only suffer if there is a cynical attitude regarding the lack of efficacy in our justice system.

So, although the vanishing trial has caused a boom in the practice of mediation and arbitration, it is a trend not without potential negative consequences for our justice system. Some of these include the following:

LOSS OF PRECEDENT AND PUBLIC STANDARDS OF CONDUCT

Although no one is predicting a world without case law and a complete absence of legal precedent, the growth of mandatory arbitration and mediation has taken many cases out of court. It can be argued, of course, that we already have too many laws and that fewer court rulings would actually be a good thing. There is value, however, in societal institutions which operate under clear guidelines that regulate conduct. No one is suggesting that we are about to suffer from a dearth of judicial decisions; nevertheless, the growth of ADR should at least prompt us to begin thinking about such issues.

LOSS OF ACCOUNTABILITY OF PUBLIC AND PRIVATE INSTITUTIONS

The use of ADR to resolve a dispute in a confidential setting is seen as a significant advantage over litigation. In the Fulbright & Jaworski survey, one general counsel was quoted as saying that the “biggest benefit of arbitration is that it is non-public.”⁸ But the non-public aspects of ADR have prompted questions. Professor Owen Fiss expressed concerns about ADR twenty years ago when

⁸ *Survey*, *supra* note 2, at 11.

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he argued that the “dispute-resolution story trivializes the remedial dimensions of lawsuits.”⁹ “[W]hen the parties settle, society gets less than what appears, and for a price it does not know it is paying.”¹⁰ As a significant number of disputes involving the public interest are currently resolved in private, confidential settings, it is appropriate to ask whether business and government will remain truly accountable when significant questions about their conduct are resolved out of the watchful eyes of the public and press.

Of course, settlement, even in the absence of mediation or arbitration, occurs by private agreement, and, most certainly, the negotiated resolution of disputes has many obvious advantages to the parties. But, because of the important public interest in certain cases, some have questioned whether the privately negotiated resolution of these disputes — those affecting the public interest — should be made public. Moreover, it is one thing for parties to freely negotiate a resolution of their dispute, it is quite another thing to require the nonpublic resolution of disputes through mandatory judicial policies such as court-ordered mediation.

LOSS OF PERCEIVED OPPORTUNITY FOR ONE’S DAY IN COURT
AND DIMINISHED PUBLIC PERCEPTION
OF THE JUSTICE SYSTEM

Television shows such as *The People’s Court* and *Court TV* overly glamorize the ideal that every citizen should have access to the court system. We take pride, however, in the notion that everyone “can have their day in court.” Although this expectation usually remains unfulfilled, checks and balances among the three branches of government is a fundamental value in our democracy. A cardinal principle of our constitutional system is judicial review of legislative and executive action. The perception that our courts are there to protect the rights and interests of ordinary people gives our citizens comfort and confidence that their voices will be heard. The vanishing trial, however, suggests that this ideal is diminishing.

So what are we to do as ADR professionals? I submit that we have much to offer judges, litigators, and others concerned with improving the trial process. As mediators and arbitrators, we em-

⁹ Owen Fiss, *Against Settlement*, 93 *YALE L. J.* 1073, 1082 (1964).

¹⁰ *Id.* at 1085.

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phasize the principles of problem-solving, efficiency, and creativity in the management of the disputes before us.

Specifically, we should share ideas on how litigation can be improved by drawing upon the innovation that has occurred in the world of ADR. For example, limited discovery appears to work in arbitration. In addition, some of the problem-solving techniques used by mediators (e.g., active listening, reframing) may be applicable in court if judges were able to take on a greater case management role.¹¹ There are undoubtedly many more examples of ideas from the world of ADR that may benefit the litigation system.

ADR, and particularly mediation, should be seen as complements to, as opposed to substitutes for, our court system. When judges and mediators work together to offer parties procedures most suited to their needs, the public's satisfaction with the court system increases. As ADR professionals, we must work alongside our judicial and litigation colleagues to make our justice system the best that it can be. In so doing, we will strengthen the public's faith in our democracy and give further legitimacy to our world of mediation and arbitration.

In summary, the concerns about the vanishing trial should be taken seriously. As neutrals, we need to carefully consider the reasons behind the vanishing trial and support those who want to change this trend. While we may be impacted as mediators and arbitrators if litigation is reformed, our society will be strengthened and our legal profession enriched as a result.

¹¹ Other ideas include improving the efficacy of juries. The American Bar Association Jury Project is examining how the role of the jury can be strengthened.

