

AVOIDING THE BLACK

The Case for Alternative Dispute Resolution in Place of Civil Litigation

By Andrew L. Braunfeld

I plead guilty to having been captivated by a recent barrage of American Express television commercials extolling the virtues of a customer/company dispute resolution program. Perhaps it was the sheer idiocy of John McEnroe being charged for thousands of dollars worth of tennis lessons or Tina Fey having to deal with “the other kind of German shepherds,” but the concept did cause me to think about a practice specialty to which I have been devoting more and more effort as time goes on.

The term “alternative dispute resolution” (ADR) is interesting. I do not look at that term in the same context as I did 20 years ago. Then, outside of the labor field and perhaps government, neither mediation nor arbitration was a particularly desirable choice to resolve personal and business disputes, especially among lawyers and even more especially among litigation lawyers. Truthfully, at that point in time, I was one of those very active trial lawyers whose motto was, “Give me the 12 jurors every time.”

At various times during the 15 years of my fellowship in the American College of Trial Lawyers, I have read with great interest articles, essays and commentary from other fellows lamenting the vanishing jury trial within American jurisprudence. As my own practice began to drift further and further into the world of ADR proceedings, I began to question whether or not I was indulging a process that was seriously undermining the portion of the legal profession where I had spent much of my almost 40 years of practice.



HOLE

be on the term “alternative.” An alternative, by definition, is an option among others. The traditional context for this discussion would be that arbitration, mediation or kidnapping the opponent’s first-born child are alternatives to the “black hole” that our civil litigation system now provides. My suggestion is that, at this point in time, almost any dispute resolution approach will serve the parties to a dispute as a better alternative to a civil jury trial and that perhaps trials themselves will be the means of alternative dispute resolution in the future.

I hope it will not seem overly cynical of me to point out three of the more cogent reasons for the current state of our civil justice system. While there is plenty of responsibility to go around, I will limit the instant analysis to the interlocking chains of procedural rules, the legal profession and the current state of the civil judiciary.

The Role of Rules of Civil Procedure

Beginning shortly before my entry into legal practice in 1969, the federal courts and most state courts began to liberalize severely the approach to pretrial discovery. In addition to expanding the scope of permissible discovery, rules were designed to make the practice of law more uniform and less dependent upon arcane practices of particular courts or particular localities. Despite the nobility of intent, however, many courts have seen fit to employ their own sets of local rules that apply to discovery and other practices, and even within those courts judges have been known to require adherence to their own edicts and practices, all of which are different from judge to judge. In Pennsylvania, for example, and despite recent efforts of the Pennsylvania Supreme Court, there is virtually no limit to the variation in practice from county to county, especially with regard to discovery and motion practice. This is a process that I have heard referred to as “Balkanizing” the system.

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The other reasoning behind the increasingly liberalized approach to pretrial discovery is that there should no longer be trial by ambush. The theory is that if a lawyer takes advantage of all the discovery tools available under the rules, that lawyer will have available everything that his opponent has in his or her briefcase and that the exchange of all knowledge, extraneous or otherwise, will reduce the number of cases tried and increase the number of cases that resolve.

The truth is that the sheer volume of material in the discovery process and the cost of producing that volume is more than any but the wealthiest clients can absorb and should be more than the wealthiest clients should be willing to absorb.

I sit every several weeks as a volunteer discovery master for the Court of Common Pleas of Montgomery County. Before embarking upon this service, I began to wonder why the court would require an intermediary within the process and questioned whether it was merely because judges don’t like dealing with discovery motions. Spending a few years dealing with boxes of baseless motions and a seeming refusal of lawyers to deal with each other in any fashion other than motion practice has convinced me of two things. There should be more of a price to pay than now exists for improper discovery practice and the judges themselves need to be more involved, rather than less, so that they

Before branding myself a turncoat, I began to analyze whether the issue of the vanishing jury trial was real or illusory and, if real, what factors were responsible for its demise. Inherent in that discussion is the question of the role of the ADR intrusion into a legal system that is in obvious need of repair at many levels.

Initially, the resolution of disputes is what (trial) lawyers are all about. Surely everybody knows that! The focus of this analysis, therefore, must



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can keep a better handle on their cases in order to curb abuse.

Lawyers

Clearly, the most notable trend within the legal profession in recent years has been the proliferation of the mega-firm. Mergers and consolidations within the profession and the beginnings of multidisciplinary corporations suggest that this trend will continue. As costlier competition for top associates increases, salaries in big cities for first-year law graduates approximate \$150,000 per year. While philosophically I have no aversion to legal fees or to lawyers earning money for that matter, the obvious caveat here is that somebody needs to pay the law firm for the work that inexperienced and often un-mentored rookies produce.

In terms of the civil litigation system, we seem to be training specialists in case work-up where teams of lawyers and paralegals are being paid to obtain, sift through, organize and reorganize boxcars full of documents and other information, following which depositions are taken, motions are filed and delays are incurred over the fights. These case work-up specialists need to justify the huge salaries they are being paid and, more importantly, need to impress their senior associates or firm partners with their skill and toughness. This produces fights over just about everything and an attitude of professionalism be damned.

Also at the heart of this issue is the normal fee structure for client payment for legal services — the billable hour. Most younger lawyers, and many more senior ones as well, seem not to recognize the inherent conflict of interest between the law firm and client with regard to by-the-hour fees. Taking the personal injury or property damage contingent fee out of the equation for a minute, we persist in charging our clients an hourly rate because we have always done it that way. While it is not the purview of this analysis to discuss more creative ways of billing for services, including a reward

for bottom-line benefit to the client and a penalty for the inability to achieve that bottom-line benefit, lawyers need to realize that the law of diminishing returns applies to their own work as well as to everything else. In my experience, the best example of law firms putting their own interests ahead of the client's is with respect to unnecessary discovery and ill-conceived and even silly motion practice.

Courts

Irrespective of the manner in which judges obtain their positions on the bench, as each year passes we see more and more judges on the civil side of the system with no background of civil trial experience. Even the brightest and more talented judges need the benefit of that type of experience, and the lack of it manifests itself not only within the courtroom during the trial but in all aspects of the manner in which the court relates to attorneys and in turn the way attorneys relate to each other. We are living in an era when the court's role in civil litigation is more focused on case management than the eventual trial or other result, and a case-management-first mentality serves neither litigants nor lawyers properly. It should be more important that the lawyers and the courts get it right than that they get it done. The modern case-management order often requires things to be done that are unnecessary and costly and is put in place long before the court and/or the lawyers have any way to know that. For example, time restraints placed upon counsel can often force depositions to be taken before anybody has a chance to determine whether the witness will have anything to add or whether strategically it is a good idea at all to bother with the deposition. Motions for summary judgment are often required to be filed by a certain date but many times are not resolved until just before trial, when the full gamut of preparation has gone forward and been expended.

It does not seem untenable to suggest that newer judges who come from a

background of courtroom trial work can better appreciate the roles of litigants and their counsel and realize that case management should be afforded on an individualized basis because not every case has the same problems or requires the same approach. On the other hand, if the civil jury trial is actually vanishing, then it is *ipso facto* more likely that newer judges will not have this needed experience of courtroom work because lawyers themselves are not trying cases.

The System

Given that at this point in my career I am considered to be a veteran (i.e., old) trial lawyer, I often admonish my younger colleagues as follows: "Ask yourself whether, if you got into legal trouble, you could afford yourself."

It is no wonder we have civil courts staffed by judges without trial experience, and one need go little farther than to many law firms whose "litigators" have no or little civil jury trial experience, despite having been in practice for 10 or 15 years. We have clients with no idea of why their legal services budget has soared out of sight. The problem is not so much the evolution of the law as it is the system we have created in which to play with the law. So the question we must now ask is whether or not we can *at the same time* preserve both the civil jury trial and the legal system. Until that question is answered, all of us are assuming that there has to be a better way. But what is it? It is reasonable to conclude that right now we should be looking at the civil trial as the alternative dispute resolution tool.

Mediation

While not every case can be better mediated than litigated, many can be. I am often surprised to note the timing when litigation cases are referred to me for mediation. While the avoidance of trial and the desire to settle are the reasons behind the referral, I find myself asking why the case could not have been identified as appropriate for mediation long before I saw it. Not every case gets

better with discovery or age and often lawyers know how strong or weak their cases are almost from the time the client walks through the door. It is a mistake to believe that engaging in all of the pretrial work will always benefit the bottom-line result to the client. This, of course, goes to the client/fee conflict noted above.

Given the success rate that good mediators are achieving in the resolution of litigation cases, one would have to assume that a much higher percentage of cases within the system could be successfully mediated. Trial lawyers, clients and judges need to become more familiar with the various forms of mediation so that more cases, rather than fewer, can be funneled into mediation mode. The participation of the client in this process, as opposed to litigation, where the client is largely excluded from the proceedings, is a key ingredient to this success. A party to litigation, when given some control of his or her own destiny, will be much more willing to compromise than one who is feeding on the hormone levels of his or her hired gun.

On the other hand, I do not advocate the compulsory mediation imposed by some courts. If a court wants to hold a settlement conference, so be it. Mediation is not just another settlement conference but requires participation with clients, insurers and lawyers, and the idea is to get the parties to want to settle the dispute between and among themselves. This is not a process that fares well when some or all of the parties have no interest in the proceeding.

In short, we have developed a system that cannot help overburdening itself and one that is collapsing under its own weight. At the forefront of the attitude problem is the feeling that if a party is willing to fight, he or she will get more, and the prospect of getting more fuels the fight. Mediation as a process tends to temper greed and deflect emotion, where litigation in an adversary system seems to fuel those factors.

Whether It's Traditional Litigation or Other Forms of Conflict Resolution, PBI Has You Covered

Resolving legal disputes today includes a multitude of options in addition to the traditional jury trial. To be effective, today's litigators — now sometimes referred to as conflict resolution attorneys — have to master new approaches, learn to apply trial and negotiation skills in new ways and adapt to the changing demands of their clients while providing innovative solutions to legal matters.

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- "Discovery: Where Most Cases are Won or Lost," in October and November;
- "TRIALS! Tips, Tactics and Practical Tales," in December; and
- the popular "ADR Institute," in March 2010.

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Again, at the risk of being called a cynic, I guess if the clients want to spur disagreement and eschew resolution, they probably deserve what the legal system, in its current state, and their lawyers will do to them.

The next obvious question, I suppose, is how do you get the clients to agree to mediation? The client must want the dispute to be over in some reasonable way, and the lawyer must do what is best for the client, not what is best for the lawyer. Success in this field feeds on itself. The more favorable result the lawyer has with a successful mediation, the easier it will be for him or her to suggest mediation in the next case. On the other hand, settlement conferences scheduled by a court or court-ordered mediation sessions are free and the client does not have to pay a separate bill for them. It is not hard to recognize that you get what you pay for in that regard. Then, too, not all mediators are equally talented and/or successful. Do not discount that the buy-in investment by the client makes the mediation service more credible and effective.

Arbitration

Arbitration can be expensive, and that expense might be one of the factors that dissuades parties from selecting

arbitration as a dispute resolution tool. In cases of a panel of arbitrators, litigants often are required to pay the expense for their own arbitrator and a portion of the neutral arbitrator's fee. We seem to be in an era where party-appointed arbitrators see their roles more as advocates than triers of fact, and I have come to the conclusion that much of the time single arbitrators are more efficient, more cost effective and basically more likely to get a just result than arbitration panels. Sometimes surprisingly, however, the expense of arbitration in the end will still likely be much less than that of a jury trial of the same dispute.

Many types of expert testimony can be admitted by report and, if the arbitrator can be counted on to do the work, hearing time and witness time can be kept to a minimum. I do not take the position that trained arbitrators in certain fields are more likely to get a just result than a jury; I am a firm believer in the jury system as the ultimate in fairness, albeit not under today's constraints. On the other hand, an arbitrator trained in the subject matter of the dispute can certainly more expeditiously get the case tried and disposed of. Additionally, in most instances, arbitrations are not appealable and are final upon entry of award. That in itself is a valuable goal, oftentimes even to the loser.

Conclusion

This topic brings to mind a classic episode of the television series "M*A*S*H" in which Radar was arrested and faced court martial for stealing someone's camera. Without a JAG officer available, the court appointed the pretentious Maj. Winchester as defense counsel, ostensibly because someone in his family in Boston was a lawyer. Despite the poor defense tendered in the case, Winchester argued to the presiding judge that he simply could not convict Cpl. O'Reilly. When asked why not, Winchester replied,

"Because no Winchester has ever lost a case."

I am sure that all trial lawyers have wondered at some time whether or not they go to battle for the client or for their own ego. I personally have rationalized that conflict by realizing that if I were in that courtroom for myself, then the client would be getting the very best I had to offer anyway, so what difference did it make philosophically?

Everyone wants to win. We seem, however, to have lost sight in many cases of what a win actually is. ☼



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