

[Vol. XI: 169, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

American Justice at a Crossroads: Remarks of Thomas J. Stipanowich

Thomas J. Stipanowich*

It is a tremendous honor for Pepperdine and The Straus Institute for Dispute Resolution to be co-sponsoring this important Symposium with our valued colleagues at The International Institute for Conflict Prevention and Resolution, the New York-based global organization better known as “CPR.” While there has been considerable discussion about the recent evolution of public and private justice in the United States, *American Justice at the Crossroads* is unique in its breadth. This Symposium was prompted by a whole range of current initiatives and developments that reflect common concerns and offer thoughtful suggestions about the present and future of American conflict resolution.

We are now witnessing a major resurgence—a wave of reform, if you will—that has motivated actors in every realm of legal practice. There is widespread and growing recognition of the need to take stock of the real costs and limitations of the prevailing approaches to justice in the public civil system as well as “private justice” through contract-based procedures, notably binding arbitration. In both arenas, many have come to the conclusion that when it comes to “justice,” one size does not fit all, and that the burdens of full-blown, full-discovery American litigation may far outweigh its benefits in most cases. Justice delayed is often, truly, justice denied; more procedure may mean, for many, less justice.

You have in front of you a short article, entitled “Lincoln’s Lessons for Lawyers,”¹ that describes one great American’s approach to problem solving in law practice. Lincoln wrote:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

* Thomas J. Stipanowich is the William H. Webster Chair in Dispute Resolution, Professor of Law as well as the Academic Director of the Straus Institute for Dispute Resolution at Pepperdine University School of Law.

1. Thomas J. Stipanowich, *Lincoln’s Lessons for Lawyers*, DISP. RES. MAG., Winter 2010, at 18.

Remember that Abraham Lincoln was a work-a-day lawyer. He was one of the busiest lawyers in the state of Illinois, with an extensive trial and appellate practice. He probably wrote this late one afternoon in the middle of filing motions, and counseling clients, and frankly, thinking about his next political speech. He was a pragmatist, and he recognized that he was dealing with real people with real problems. He recognized that clients were rarely best-served by prosecuting a case to the full extent of legal procedure, and that lawyers needed to craft approaches that met the particular needs of clients.

Many of you are familiar with the debate and discussion about what some have called “the vanishing trial.” If you look at the civil trial statistics in federal and state courts, you know that there has been a significant contraction in the incidence of trial among filed cases.² It is rare in any federal or state court for more than one in fifty filed civil cases to actually see the inside of a courtroom for a trial on the merits. What are the reasons for this? Costs, length of cycle time, time to resolution, risks and uncertainties, and impact on relationships.

Today you will hear about the Final Report recently issued by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System.³ The Report states, among other things, that “[b]ecause of expense and delay, both civil bench trials and civil jury trials are disappearing.” Our discovery system is broken. Document discovery alone, we know, accounts for fifty percent of litigation costs in the average case, says one study, ninety percent in active discovery cases. The Report also takes note of the real elephant in the room—electronic discovery. In both public and private adjudication, e-discovery is the driver of conflict in many cases because the case becomes centered on the vast mass of electronic documentation and attendant costs—not the actual merits of a dispute or underlying interests. Electronic discovery is a nightmare and a morass. As with other forms of discovery, of course, the percentage of all of this material that is actually, directly relevant is miniscule.

Robert Greenleaf trained many people in management skills at AT&T. He always told business managers that they could and should not depend on acquiring perfect information with respect to pending problems because if they did the attendant cost would be so great, and the length of time taken would be so long, that the problem would have changed; the

2. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

3. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2009).

[Vol. XI: 169, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

drive for perfect information would actually undermine their ability to accomplish their business goals. His message was: “Don’t seek perfect information; you need to decide what is enough and move forward.” Contrast that with our approach to discovery and litigation, where we have become fixated on leaving no stone unturned. All too often, as a result, costs mount and things don’t get better—they get worse. Unresolved conflict has consequences; this is something that psychologists tell us all of the time, and we study, talk about, and teach it at the Straus Institute. As conflict progresses and spirals, positions—and people—become more hardened, raising higher and higher obstacles to effective resolution.

During one of my recent trips to China I ran across an article that offers a humorous metaphor for the present state of American civil justice. The article, published in the *China Daily*, had the headline *Woman Deafened By Passionate Kiss*.⁴ It seems that the couple was engaged in a very serious bout of romancing and the male puckered up rather vigorously on his mate’s ear; the resulting vacuum actually punctured her eardrum. After explaining the mechanics of the situation, the article concluded, “Doctors warn couples, ‘Proceed with caution!’” I think there is a lesson in this, for all of us, and for lawyers: We really have gone too far with a good thing.

The Final Report by the American College of Trial Lawyers calls upon lawyers to move beyond the “one size fits all” system of current federal and state court rules. In short, the legal profession must take the lead in finding ways out of the box we have created for ourselves. As someone who spends a lot of time focused on alternatives to litigation, I wonder: “Isn’t developing adjudicative processes that ‘fit the forum to the fuss’ the whole point of contract-based binding arbitration processes?” Getting out of the metaphorical box is, in short, the prime attraction of arbitration as an alternative to court adjudication. Having spent plenty of time in litigation and in arbitration, I’ve tended to prefer arbitration for construction and commercial cases because of the ability to have expert decision makers, including multi-disciplinary panels, to offer a tailored procedure and a true forum for choice. Arbitration may offer anything from a rapid-response, short-and-sweet decision to a private surrogate of federal court litigation with all the usual bells and whistles—and important differences. It all depends on user choice. Choice is theoretically at the heart of arbitration, and making and sticking with good choices is the key to successful use of

4. *Woman Deafened by Passionate Kiss*, CHINA DAILY, December 8, 2008, available at http://www.chinadaily.com.cn/china/2008-12/08/content_7280037.htm.

the process. Why? Because business needs and interests vary. If you're focused on businesses, arbitration provides flexibility and allows tailoring to specific needs and goals.

When I was in Kathy Bryan's current position as President and CEO of the CPR Institute early in the last decade, I regularly heard expressions of concern about arbitration from corporate general counsel, the heads of litigation, and outside counsel. FMC Technologies General Counsel Jeffrey Carr, who will be honored this year by CPR, concluded, "As inside counsel, we have turned over the keys to outside counsel, they run it just like a trial, and that's a problem. But it's our fault." Jim Bender, General Counsel at the Williams Companies, said, "If you use standard arbitration rules, you will end up with a system of discovery like you have in trial. It is not sufficient to simply choose the 'one size fits all' rules." Mike McIlwrath and Roland Schroeder of GE, who are focused not only domestically but internationally in arbitration, say, "There are always goals of speed and economy in arbitration." But they observe that too often the practice focuses on concepts of due process to the exclusion of, or the undermining of, efficiency, resolution, and certainty. They also point out that, again, justice delayed is justice denied for many business parties. Speaking of commercial arbitration, a participant in our program recently stated, "I'm here to tell you that our current experience is that we're getting quicker and more cost-effective results in U.S. courts."

My own revelation regarding these issues evolved from my background as a lawyer and neutral in construction and engineering disputes. Back in 1997, I made note of the fact in an article I wrote that suddenly, the primary standardized construction documents in use in the United States, the American Institute of Architects contracts, were amended to include provisions for mediation prior to binding arbitration. At the time, my response was: "Great. It will be interesting to see how this impacts the management of conflict. Perhaps it will reduce the need for arbitration." What I didn't anticipate was that ten years later the American Institute of Architects would say, "We're taking the default arbitration clause completely out of the document because if you have a mediation step, then the leftover cases can simply go to litigation. You'll need to take affirmative steps to elect binding arbitration." While no one would suggest that arbitration is always superior to litigation as a means of adjudicating construction disputes, the fact remains that a sine qua non of construction contract documents—the commitment to use arbitration for adjudication (something that had been a feature for many decades, and for many good reasons)—all of the sudden has disappeared. The new ConsensusDocs, another new set of contract documents which were published by the Association of General Contractors and a number of other groups, also left

[Vol. XI: 169, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

out arbitration—making it an elective but not a default provision. These and other developments have served as a kind of wake-up call for those who believe arbitration can provide an effective alternative if employed appropriately. They prompted a recent initiative by the College of Commercial Arbitrators, CPR, AAA, JAMS, the ABA Section of Dispute Resolution, the Chartered Institutions of Arbitrators (which is a global organization), and our Straus Institute. They convened a national summit in Washington in the fall and out of that came the new Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators, and Arbitration Provider Institutions.⁵

I hope that today's Symposium will serve as a landmark, the turning of the corner, for all of those concerned about or engaged in addressing the challenge of developing more effective and appropriate approaches to resolving conflict. Going forward it will be critical, through programs of this kind, to promote more pragmatic, creative ways of resolving legal disputes, and to spotlight successful use of options to "fit the forum to the fuss." I hope Mr. Lincoln would approve!

5. THE COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS ON EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS, AND ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich, et al, eds.).