Finding common ground: As alternative dispute resolutions become more common, questions of transparency linger

By Tatiana Walk-Morris
Chicago Lawyer correspondent

Through the windows of his office, Marc Becker, founder and president of ADR Systems, can see the tall, black Everett M. Dirksen Federal Courthouse. In ADR Systems’ offices at 20 N. Clark St., the company oversees a variety of alternative dispute resolution procedures, ranging from mediation and arbitration to appellate review and case review, though the firm mostly handled binding arbitration cases in its early days. The firm, which was founded in 1994, turns 25 this year.

Reflecting on when he started working in the alternative dispute resolution field 2½ decades ago, Becker recalled the practice being taught in a few law schools, but today more law schools are teaching students about mediation and arbitration. In the beginning, he also had a hard time selling his services, because people weren’t interested, he said.

“I can’t tell you how many times I got hung up on in the beginning — countless, countless times by people didn’t understand what service I was selling,” Becker recalled.

Today, the trend of alternative dispute resolution has caught on here and beyond Chicago. Across the country, jury trials appear to be on the decline. Jury trials in U.S. District Courts in both civil and criminal cases have declined to 3,647 in 2016 from 6,893 in 2000, according to the Winter 2017 Judicature issue from Duke University. In U.S. District Courts, the number of juries selected has decreased from 10,388 in 1996 to 3,887 in 2016, Duke University’s report also found.

Over the past few years, the Illinois circuit courts have seen a decline in their caseloads. Litigants filed 3,174,144 cases in 2013 compared 2,528,512 in 2017, according to the 2017 Annual Report of the Illinois Courts.

Whether the use of alternative dispute resolution is beneficial for society, plaintiffs and defendants depends on both the case itself and the area of law, sources said. Alternative dispute resolution offers plaintiffs and defendants a chance to settle cases without the glaring spotlight of public accountability and can save the trial courts’ resources for cases that have no other path to a conclusion.

However, sources said the trial court system must maintain its teeth in order to uphold the rule of law and others question whether alternative dispute resolution is a pathway for powerful entities to create their own secretive pseudo-justice system.

The national decline in trials comes as the U.S. Supreme Court has weighed in on binding arbitration. In a 5-4 ruling in 2018, the Supreme Court ruled in Epic Systems v. Lewis that workers could not collectively challenge federal labor law violations.

The costs of going to trial

For both plaintiffs and defendants, going to trial cost time and money. Becker said his firm has been experiencing a growth in commercial arbitration, which could stem from parties wanting to settle in a timely fashion as well as contractual clauses mandating arbitration for dispute resolution.

In his experience, companies like to resolve disputes by mediation or arbitration so that they can have greater control and flexibility over the process.
Parties can resolve the dispute with a mediator who understands the kind of case the plaintiff is bringing forth, Becker said, adding there’s no guarantee in court that the judge will understand your case. Plaintiffs and defendants also have greater control over their timeline, contrasted to a court setting in which both parties are given deadlines for depositions, expert reports and the like, he said.

From the fees for filing paperwork and hiring court reporters to compensating experts and assembling evidence or simulations, cost is a major factor driving cases into alternative dispute resolution, Antonio Romanucci, founding partner of Romanucci & Blandin and president of the Illinois Trial Lawyers Association.

If a case has a significant risk of a large verdict or no verdict, the case could be better suited for alternative dispute resolution rather than a trial, Romanucci said.

Years ago, attorneys were resistant to requiring mediation before trial for cases, but alternative dispute resolution has also grown over time in part because attorneys have discovered that effectively settling disputes would draw business from insurance adjusters looking to quickly close cases, Faustin Pipal Jr. of Resolute Systems said.

“The attorneys who — back in those days — who would hold on for dear life to cases and maybe resist the mediation process because once the case was over they couldn’t bill anymore, those attorneys learned pretty quickly that wasn’t a successful business strategy,” Pipal said.

Plaintiffs coming in for medical-malpractice cases, for example, might be able to get closure quicker, and thus receive compensation faster, than if they had gone to trial, Becker said. But during a trial, which could be lengthier than expected, the loved ones of the injured plaintiff will need to support them during the trial, Becker pointed out.

In any case, going to trial presents a risk for both parties, because it is unclear how a jury will decide a case and how much the plaintiff could receive — or conversely how much a defendant will have to pay — in an award, Becker added.

In some disputes, there is an incentive for both parties to keep the mediation or arbitration proceedings private, sources say. A mediation or arbitration procedure provides a way to settle a dispute without airing a company’s “dirty laundry,” Becker said.

“You have vendor supplier relationships that may have been going on for 20 years and all of a sudden, there’s one bad situation. Well, do you want to throw this relationship away or do you want to work through it so that you can continue your business relationship?” Becker said.

Taking a large, complex dispute to federal court might drag out the process for four to five years, but resolving it in mediation or arbitration can quickly settle — usually within a year — while preserving what’s left of the business relationship, said Andrew Merrick, partner at Jenner & Block.

In more sensitive situations, such as childhood sexual abuse cases, there’s also an incentive for both parties to settle the case out of court. Victims may not want their names out there for the public to see, Pipal said. Though Cook County allows parties to sue under a pseudonym, mediation allows them to keep the settlement proceeding entirely private, he said.

“On the abuse side of the equation, I’ve seen a lot of progress and light being shined on these behaviors … That’s something that society benefits from,” Pipal said. “But I think sometimes the victims don’t want a light shined. And I think that should still be their right to bring their claim and not have to disclose.”

**The value of the court**

Is it ethical for companies or institutions to conceal their wrongdoing through the alternative dispute resolution process? The answer to that depends on who you ask.

Of course, a plaintiff’s ability to conceal their identity through mediation or arbitration can prevent future harm, especially given that people can access court documents online, said Linda Friedman, founding and managing partner of Stowell & Friedman.

Friedman, who has litigated multiple high-profile discrimination cases, noted that one significant downside to filing a discrimination lawsuit against a former employer is the ability of future employers to find out about that lawsuit when conducting a background check.

“In terms of prospective future employment, there are very few things that dampen your application with greater force than having filed a lawsuit against your last employer for racial discrimination,” Friedman said.
Friedman said she prefers mediation before filing a claim in court, because it enables both parties to share information and resolve the situation in a manner that satisfies both sides.

**Arbitration?**

Well, Friedman said she has spent her “entire adult life fighting arbitration,” because it’s not the best method for resolving discrimination cases.

Civil rights claims, such as employment discrimination, were meant to be tried in public in federal court, a venue where the public shaming of such behavior would ideally disincentivize corporations and institutions from engaging such behavior as well as remove bias from the judicial process, Friedman said.

She is not against arbitration if both sides agree to the terms of arbitration, because at least then, they’re both on equal footing.

“When the employer mandates it, the employer selects the forum, the employer pays the bill … it’s like they’ve created their own private judicial system to judge whether they engaged in bad conduct and they don’t have any incentive anymore to change,” Friedman said.

While some of the sources say arbitration can cut down the time that would otherwise be spent litigating a case in court, Friedman said sometimes the arbitration process can still be inefficient, because arbitrators don’t have the same resources and procedures as a traditional court.

In arbitration, the arbitrator, for example, may not have access to law books or other legal research or transcripts, Friedman said. She also recalled instances in which an arbitrator fell asleep during testimony, another who disclosed that he was legally blind and hard of hearing but did not make preparations for those conditions prior to the hearing and another arbitrator told her to stop referring to case law altogether.

“If you want to have a chance that you could get a favorable verdict, you don’t say to the person, ‘Hey, you can’t fall asleep during my arbitration,’” Friedman said.

Regardless of whether counsel for both parties like the judge, there is a sense in a traditional courtroom that the judge is a public servant who seeks to administer justice, Friedman said. Federal judges are lifetime appointees and thus not beholden to corporations or anyone else, she added.

On the other hand, Friedman also said she has witnessed an uncomfortable friendliness between the arbitration firm and the defendant. In a courtroom, however, there is a more formal relationship between both parties counsel and the judge, she said.

Ultimately, the courts are the place where attorneys will practice litigation. Without them, attorneys can’t sharpen their litigation skills and thus will not be able to become skilled trial attorneys, Romanucci said. Given that the U.S. is one of the few countries that has jury trials for both civil and criminal courts, it’s critically important to uphold one’s right to a jury trial, he said.

Reflecting on when he began his career as a trial lawyer in the Cook County Public Defender’s Office after law school, Romanucci recalled swearing to honor and obey the Constitution.

“One of the amendments to our Constitution is the Seventh Amendment, which is the right to civil jury trial, and that’s been very near and dear to me my entire professional career,” Romanucci said. “I feel very strongly to honor that duty to honor the Seventh Amendment and preserve that right to a civil jury trial. And that’s why to this day, I continue to try cases.”

**Opaque resolutions**

With many practice areas, particularly commercial litigation cases, there is no settlement trail in the public courts, because the cases are settlement figures and terms of the agreements are kept confidential, Merrick said.

For other practice areas, the jury verdicts can provide some insight into how similar cases may be decided, however, commercial litigation that Merrick typically sees are so fact-specific that comparing one case’s facts to other cases might not yield much “actionable intelligence,” he said.

“I do a lot of pro bono work and have a lot of 1983 [civil rights] cases, excessive force, [and] medical indifference cases. And in those
cases, I think there is value in assessing both for the benefit of your client and your adversary what the potential outcomes might look like if you were to actually go to court,” Merrick said.

Of course, attorneys have found ways to work around that opacity. Even in confidential settlements, lawyers may ask around the settlement figure, but the parties’ names are redacted or check the legal press for settlement information, Merrick said. When cases settle, both parties’ attorneys also often disclose some settlement details to the Jury Verdict Reporter, he added.

And during a typical mediation, both parties will submit documentation supporting the conclusion they wish to reach, ranging from relevant cases to medical records, which gives the mediator a sense of where the middle ground between both parties might be, Pipal said.

Beyond being a venue for impartial justice and for attorneys to practice litigation, trials provide a venue for educating the public about what’s happening in society, Romanucci said.

“There’s no question that when cases are not brought to trial, the one thing that is lost is the truth,” Romanucci said. “We have a responsibility to our society to bring forth facts that educate our entire community so those defendants can be held accountable.”

TATIANAWM@LIVE.COM

© 2019 Law Bulletin Media

Unless you receive express permission from Law Bulletin Media, you may not copy, reproduce, distribute, publish, enter into a database, display, perform, modify, create derivative works, or in any way exploit the content of Law Bulletin Media’s websites, except that you may download one copy of material or print one copy of material for personal interest only. You may not distribute any part of Law Bulletin Media’s content over any network nor offer it for sale, nor use it for any other commercial purpose.