December 06, 2004

IN DISPUTE
Attorneys like Julia A. Molander worry that the rise of mediation spells trouble for the future of the justice system. But veteran neutrals say alternative methods of resolution are doing what they were created to dotake pressure off courts EXTRA Feature

By Eron Ben-Yehuda

Dan Stormer has tried dozens of cases in his 30-year legal career."I would probably qualify as a trial dog," Stormer of Pasadena's Hadsell & Stormer says. "What I do best is try cases. When I'm in trial, I'm a happy guy." He recently represented a gardener in a workplace-discrimination suit. The case seemed destined to go to trial, set for Jan. 24. "We took a hard line that we weren't backing off," he says. So did the defense, he says. But a mediation last Monday settled the case for confidential terms. "My client is satisfied," he says. "I believe in the mediation process."

With "trial dogs" on board, it's no wonder mediation has taken off.
Mediators "are sitting on a cash cow right now," according to San Francisco attorney Julia A. Molander. "The mediation world is strong and going to get stronger," Molander of Sedgwick, Detert, Moran & Arnold says. "It was unheard of 20 and 25 years ago. It is now very common." While mediators may be cheering, Molander, past president of the Association of Defense Counsel of Northern California, is alarmed. "From society's standpoint and from the rule of law and the development of the legal system, I think it's a tragedy," she recently told a group at the Southern California Mediation Association conference held at Pepperdine University School of Law.
But Molander's fears don't ruffle the feathers of mediators and arbitrators. "I'm not going to stay up nights worrying about that," says Richard W. Page, a San Diego mediator, arbitrator and former business litigator. "My impression is that the trend is, on the whole, positive."

The state court system is grateful. "It definitely helps alleviate the pressure [of caseloads]," says Lynn Holton, spokeswoman for the Administrative Office of the Courts.

Berkeley neutral Ron Kelly has spent years advising the state Legislature on regulations for the alternative dispute resolution industry. Kelly considers the downward trend in trials an affirmation of his work. "That's what we were trying to do," Kelly says. "We were trying to make mediation a more-attractive alternative."
Pasadena mediator Lynne S. Bassis says litigators are applying less-combative conversational skills that they've picked up in mediations they've attended.
"They're slow to learn," Bassis says. "But some are learning."
A 2003 study by University of Wisconsin Law School professor Marc Galanter titled "The Vanishing Trial An Examination of Trials and Related Matters in Federal and State Courts" sparked widespread debate. Galanter based many of his conclusions on data from federal courts across the country, although he also analyzed statistics from state courts in 22 states, including California. He found that the trends in both the state and federal court systems bear an "unmistakable resemblance." Nationwide from 1992 to 2002, federal civil trials dropped from 8,029 to 4,569 while civil filings increased, according to the study. During that same time, the state courts studied saw trials decline from 712,676 to 487,200, Galanter wrote. He did not provide data on state-court civil filings.

At the Pepperdine conference in November, one of the panelists, Los Angeles Superior Court Judge William F. Highberger, presented data specific to California state courts. Between 1993 and 2003, trials dropped by more than half, 141,603 to 66,943, according to the Administrative Office of the Courts. The number of trials compared to filings dropped by nearly half, as well, the data indicates. "It's definitely declined," Highberger says. "It hasn't disappeared. If these trends continue, though, in another 15 or 20 years, .. we could be at a place where there are no trials."

Fellow panelist U.S. District Judge George H. King of Los Angeles didn't see the future so starkly. "I don't buy into the notion that it's vanishing," King says. "It is declining, no doubt about it. It may be bottoming out, I don't know."

Many explanations are offered for the decline in trialsis more complex and xpensive; juries presume the worst about the behavior of corporations, so companies locked in litigation with an employee, for example, tend to settle; conducting mock trials, with focus groups and jury consultants, is a growing industry that gives parties a better notion of a how a case will turn out in court; and judges increasingly are disposing of suits through summary judgment. But of all the reasons, the proliferation of mediation and arbitration are among the most-often-cited, according to Galanter and others.

"Mediation has been a major factor in that," Jeffrey F. Ryan of San Jose's Olimpia Whelan Lively & Ryan says. Mandatory arbitration clauses in contracts is "the greatest factor" in the reduction in trials, Antony Stuart, president of the Consumer Attorneys Association of Los Angeles, says. Molander, a veteran trial lawyer, sees serious drawbacks in a world with fewer and fewer trials. Among her concerns is access to justice for those of modest means. "If we increasingly rely on settlement," Molander says, "in particular private mediation services, to resolve the issues that come before our courts, using courts only as a funneling system or as a first call, a first step that you have to take in order to get conflict resolution, then what you have is a disparate system of justice. "You have a system of justice where people who have problems [and can afford ADR], fine and dandy, they can go and use [the] private mediation system. "But the poor, the people of middle-class means, don't always have that available to them. The smaller businesses don't always have that available. "So I worry about the disparate impact of the justice system overall in terms of that."

Sharing her concerns is Dan Grunfeld, president of Public Counsel, based in Los Angeles, although he considers the disparity part of a larger societal problem.
"Poor people have less access to mediation, just like they have generally less access to any judicial resolution process," Grunfeld says.

Some ADR providers such as JAMS offer their neutrals on a pro bono basis, he says.
"That's obviously very welcome and very much-needed, but it doesn't come close to meeting the demand," Grunfeld says.

Julie L. Bronson, ADR administrator for the Los Angeles Superior Court, doesn't think the less wealthy are getting the short end of the stick. "I think that the opportunity is there, through means other than the private providers," Bronson says. Last year, Los Angeles courts referred attorneys in 28,400 cases to mediators on the court referral panel. That doesn't include cases for which attorneys choose their own mediators without the court's assistance.

The court offers pro bono neutrals who volunteer the first three hours of hearing time, after which the parties can continue at whatever fee they agree on with the mediator. In the fiscal year that ended in July, the court program served 5,256 people with reported income levels of less than $50,000, Bronson says. However, 19,945 people served by the program declined to state their income, she says.

Hernan Vera, directing attorney of Public Counsel's Consumer Law Project, says that the few hours of pro bono mediation offered per case by Los Angeles Superior Court go only so far. "In some cases, that's good, and it's enough," Vera says.
But often, complicated cases require additional time, and that's one way the disparity in access to justice shows through, he says.

Statewide, 72 programs offer poor people free or low-cost alternative dispute resolution, according to Los Angeles County's Community and Senior Services Department. The programs are located in counties from San Diego to Yolo.

One such program is Mediation Resolution Services in Castro Valley. Executive Director Brenda Gaspar says poor people do have adequate access to mediation, if only more knew about it. "I hope that people will become more knowledgeable about this alternative," Gaspar says.

Community mediation agencies handle everything from guardianship and visitation issues in family law cases to disputes among neighbors over parking, blaring music or barking dogs. "These are the kind of issues that drive people nuts," Gaspar says.
One of the reasons the public isn't more aware of the services that agencies like hers provide is the litigious nature of America, she says. "There's Judge Judy," she says. "There's no mediation Nancy."

How many cases are disposed of through arbitration and mediation each year is difficult to assess. The Administrative Office of the Courts doesn't have those statistics. Many courts do not report that kind of information, although a few are starting to, according to the administrative office. Whatever statistics eventually are collected will not provide a true overall picture because commercial contracts often have clauses that divert any potential court dispute to private ADR providers such as the American Arbitration Association and JAMS.

"We know that a significant number of claims are kept out of the courts by such [mandatory arbitration] clauses, but we don't know how many," Galanter says.
The American Arbitration Association handled 175,000 cases last year. JAMS general counsel John Welsh estimates that his organization resolved 10,000-to-12,000 cases annually over the past few years.

Mediation and arbitration offer vastly different approaches to resolving disputes. Mediators facilitate communication among the disputants in order to reach a settlement that all sides are comfortable signing off on. Arbitrators, on the other hand, impose their rulings on the parties.

And while mediation is thriving, arbitration is losing its luster, according to Molander.
It used to be considered "the next big thing," a way to resolve most commercial disputes and many cases brought by individuals, she says. "I think the train is going the other way," Molander says.

Advocates touted arbitration as faster and cheaper than court litigation. But that hasn't panned out, she says. "It is by no means faster," Molander says. "[And] arbitrators tend to charge a huge amount per hour on their time." What's especially disconcerting to Molander is that arbitration decisions are "nearly impossible" to appeal. "Very unfair decisions come down in the arbitration process," she says.

In 1997, National Basketball Association Commissioner David Stern suspended player Latrell Sprewell for a year after he choked Golden State Warriors coach P.J. Carlisimo during practice. But an arbitrator cut the suspension to 68 games. At the time, Stern reportedly said, "You cannot choke your boss and keep your job unless you are an NBA player. But this is arbitration." King agrees with Molander that some of the shine has worn off arbitration, but for a different reason. "I kind of get the feeling that there was a love affair with arbitration by a lot of businesses because they thought they were going to have an advantage there, not because it was going to be fair," King says. "Nobody in this business ... wants fairness. They want to win."
The American Arbitration Association saw an increase in cases from 1993 through 2002, when filings peaked at 225,000.

Last year, though,the filings dropped by 50,000. Spokeswoman Kersten Norlin says the decline is largely related to no-fault insurance cases, not arbitration provisions in commercial contracts. The company recently lost a contract with the state of New Jersey to oversee statutorily mandated arbitrations on automobile insurance claims under $50,000. Overall, Norlin says, the company's major caseloads in the Areas of commercial, employment and construction disputes have either grown or remained constant over the past five years.

Molander says she's seeing more and more businesses shy away from arbitration because of wrong-headed results. "I know the insurance industry, which is one area of business I'm most familiar with, is backing away lock, stock and barrel from arbitration because of that situation," she says.

Sam Sorich, president of the Association of California Insurance Companies, concedes that some members have been disappointed with arbitration results. The Sacramento-based organization represents 300 property/casualty insurance companies doing business in the state. But Sorich wouldn't go as far as Molander.
"I don't think that there has been a wholesale movement away from arbitration," he says. "Our member companies still view arbitration as a hopeful avenue for resolving disputes."

Renowned arbitrator Richard Chernick of JAMS, who charges $6,000 a day and specializes in complex commercial litigation, says he hasn't noticed a dip in caseload.
"It's just the opposite," Chernick says. "We are busier and busier with bigger and bigger cases.

In February, as an arbitrator on a three-member panel, Chernick was the lone dissenter in a ruling against a breach-of-fiduciary-duty claim brought by one side of a joint venture between two energy companies seeking $120 million in damages.
Arbitration takes longer and is more expensive "only if it's managed by someone who is inept," says Chernick, a former partner at Gibson, Dunn & Crutcher. Litigation delays add enormously to the cost of taking a case to trial, he says, while arbitrators are better at sticking to hearing dates. Also, Chernick says that arbitrations don't have to deal with "baloney" discovery and pleading motions that he considers unnecessary. "You get occasional bizarre results when you have amateur, ill-prepared and ill-trained arbitrators," he says. Those at the "top end" of the arbitration bar will do a good job, Chernick adds. "They are going to spend the time," he says. "They have experience. They have skill." Chernick says there's a certain truth in what King says about businesses perhaps feeling frustRate d about their inability to dominate arbitration, especially in the area of employment law.
Employees have done fairly well in their cases, and employers pick up the cost for the procedure, he says.

Bosses may see an advantage to taking cases to court, where they are better able to "bludgeon" workers into submission with discovery and motions, he says. "I just don't see that," says Greta W. Schnetzler, who specializes in employment defense at San Francisco's Gordon & Rees. Schnetzler says the plaintiffs' bar litigates just as aggressively, if not more so. Mandatory arbitration clauses in employment contracts may be waning, but not for the reasons Chernick cites, she says.

Employees sometimes have taken minor grievances through the costly arbitration process, so employers have moved toward cheaper dispute resolution alternatives such as mediation, Schnetzler says. The uncertainty over the validity of some aspects of mandatory arbitration is another reason employers have backed off, she says. "The law continues to go back and forth," Schnetzler says.

Although arbitration may no longer be a hot commodity, Molander sees a bullish market for mediation. "I do think that mediation will continue to be a most-favored dispute resolution," she says.

The popularity of mediation is evident in King's courtroom. "Quite frequently, lawyers will come in and voluntarily tell me that they would like to comply with our local rule for a settlement conference by going to private mediation," he says. "And that happens more and more."

Statistics on the growth in the number of mediators in the state over the past few years are hard to come by, according to Robert Barrett, director of the California Dispute Resolution Institute at the University of San Francisco. "This is an area in need of much more empirical research and data gathering," Barrett says. He estimates that, over the past decade, the number of mediators has grown by no more than 5 percent annually. Barrett figures that the state has 8,000 mediators, with 5,000 paid

for their work and 3,000 volunteers.

Molander says that fewer cases going to trial also harms the development of the law by limiting precedent-setting judicial decisions. In the field of insurance law, appellate opinions that tackle the "big issues" are declining because they are settled out of court, often through mediation, she says. "I have seen fewer decisions that I would say really advance the rule of law," Molander says. "The courts are not deciding issues involving construction coverage because those cases are mediated without opportunity to litigate the insurance issues," she says. "This leaves gaping holes in the interpretation of a number of policy provisions critical to construction matters."

San Francisco business litigator Philip Borowsky agrees. "The business judgment rule," a legal principle meant to offer business executives some protection from liability because of decisions they make that affect their companies "is very murky because very few trials have developed the issue," Borowsky of Borowsky & Hayes says.

In that regard, alternative dispute resolution is "certainly an obstacle," he says.
Mediators concede the point. Kelly says cases with a "large societal value," like the nationwide sex-discrimination class action against Wal-Mart, belong in court.
"If it's a case that you want to make a precedent, I agree with that," he adds.
Page of the Page Law Firm says that even individuals involved in "landmark" cases are better off avoiding trials. "It's outweighed by the positive of settling cases earlier for the litigant," he says.

Kelly points to the 1996 sexual-harassment class action filed by the Equal Employment Opportunity Commission against Mitsubishi Motor Manufacturing of America as an example of the benefits of trials and alternative dispute resolution.
In January 1998, the commission scored a major legal victory when a Chicago judge ruled that the agency could pursue allegations of a "pattern or practice" rather than being required to offer evidence that each of the 300 plaintiffs suffered discrimination. Five months later, the two sides announced a $34 million settlement that included the company's agreeing to revise as necessary its sexual-harassment policy and complaint procedure. Mitsubishi wouldn't have agreed to that settlement without the threat of a trial, Kelly says. At the same time, "Mitsubishi could have won that trial by some sort of skillful [legal maneuver]," he says.

Bassis is ambivalent about the benefits of trials. Through the passage of time, trial preparation and advocacy by attorneys, conversations and events that led to the lawsuit become "manipulated" and "skewed," sometimes delibeRate ly, she says.
"What happens is the best show wins," Bassis says. Veteran plaintiffs' trial lawyer Wylie A. Aitken says that's an insult to jurors, whom he considers intelligent and unbiased. Aitken says the trial system is precious to freedom because a jury of one's peers can make independent decisions that can change society. "It's the only single place left in our society where democracy truly works," Aitken of Santa Ana's Aitken, Aitken & Cohn says.

According to Molander, mediation also suffers from less-civil trials. The process requires "as a fundamental" that the mediator have a sense of the case's value, which is based on jury- and bench-trial verdicts, she says. "If those values are no longer available, then how are you going to tell someone that that case has a value of $700,000 and, therefore, you should be looking at that as you settle the case," Molander says.She says mediators end up "shooting in the dark." "That's spoken like a trial attorney," Kelly says. "It's looking at a case as a commodity, as a monetary value." That does apply to some cases, he says. "[But] I think that's a really narrow slice of the field," Kelly says.

Many mediations are about healing relationships that have soured, whether between business partners or a boss and an employee, he says. Justice is served by having a litigant sitting in a room with an adversary and talking about the perceived wrongs inflicted without worrying about what the rules of

evidence determine is irrelevant, Bassis says. Even with money at stake, the calculations by attorneys aren't always scientific. "I don't think I've ever had anybody pull out a jury verdict and say, 'Here's why,'" Bassis, a mediator for 14 years, says. "It seems to be more of a visceral valuation."

Page points out that the Daily Journal offers subscribers access to a database of case summaries voluntarily submitted by lawyers. The database includes results from mediations and arbitrations. "You've still got a pretty good base of information," he says. Neutrals say that the vast majority of cases ended in settlement even before the rise in popularity of alternative dispute resolution.

In 1982, for example, federal courts disposed of 184,835 civil cases, but only 11,280 concluded by trial, according to Galanter. Thousands of cases continue to end up at trial every year, anyway. "I'm not worried about it at all," Kelly says. "There are plenty of fights out there."

Name Jeffrey Krivis
Affiliation First Mediation Corp., Judicate West, American Arbitration Association
Rate $3,000 per half day, $6,000 per full day
Location Los Angeles
Areas Mediation of insurance, employment, catastrophic injury, entertainment and professional liability disputes
Cases In November, Krivis mediated a $3.5 million settlement in a case brought by a construction worker left brain damaged after he fell through a skylight of a residence under construction against the contractors and building owner. In June, he mediated a seven-figure settlement between a production company and a celebrity who claimed a wrongful termination of professional services. In February, he settled for $2.8 million a case brought by a truck driver who, because of the negligence of a crane operator loading two-ton rails onto a truck, had his right leg crushed as he stood on the truck's trailer.
Background Litigator, Krivis & Passovoy
Quote "He's very persistent but not in a kind of obnoxious or pushy way ... . He's sort of a calming influence in the passions that rage in these things." Thomas P. Laffey; Folger, Levin & Kahn.