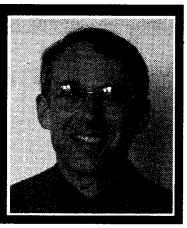
FROM THE CHAIR

BY DAVID A. HOFFMAN



Courts and ADR: A Symbiotic Relationship

I HAVE A CONFESSION: DESPITE MY DEEP COMMITMENT to dispute resolution, one of the most satisfying moments in my career was serving as lead counsel in a ten-day jury trial.

This memory has a special place in my heart, in part, because we won. But even if I had lost the case, the experience would have left an indelible impression. The case involved a sales manager who had been fired because of flagging sales and who sued my client for wrongful termination. The jury not only rejected his claim, but came within inches of awarding the company damages because of lies the employee told to get the job.

Having represented both employees and employers, I was impressed not only by what I perceived as fair treatment by the jurors, most of whom were employees and not employers, but also by their willingness to endure—more or less cheerfully—ten days of service in a case which, frankly, could have been settled in a day if both sides were motivated to do it.

My client, however, was not interested in settlement. I knew from talking with opposing counsel that the case could have been settled for $100,000. By the time we had completed two years of discovery and motion practice, nine days of trial and another day of nail-biting while the jury deliberated, the costs to my client were far more than that. For my client, however, this was a matter of principle.

When the jurors returned to the courtroom, we all stood, just as we did each time they entered or left. This was the tangible sign of our respect for them, their sacrifice of time, and the venerable institution of trial by jury–one of the cornerstones of our democracy.

ABA President Robert Grey has made the protection and enhancement of jury trials one of his priorities. I share Bob's view about the importance of jury trials in our society, and I believe that, as dispute resolvers, we need to be particularly respectful of the right to be heard in a court of law.

When Harvard Law Professor Frank Sander articulated the concept of a multi-door courthouse, with portals leading to mediation, arbitration and other ADR processes, one of those doors led to a courtroom. Although most cases settle before trial, our negotiations are more likely to succeed if we can look to jury verdict research and a body of decisional law to inform the parties' interpretation of statutes, constitutional provisions and common law principles.

As dispute resolvers, we have a symbiotic relationship with the courts. Our help is needed to manage their docket congestion and to give people who wish to settle an opportunity to be heard. Yet we also need judges and juries to help us, and the parties we work with, understand the law. We bargain, to use Bob Mnookin and Lewis Kornhauser's famous phrase, "in the shadow of the law."

During the last few years, some lawyers and judges have expressed concern about the "vanishing trial." Statistics show, however, that while the percentage of cases going to trial has dropped, the number of trials has declined only slightly. Our courts remain quite busy with trials and other dispositions. Although more cases are going to mediation and arbitration than previously, this is not the cause of declining trial rates—it is one of the effects of soaring trial and discovery costs and more pro-active case management by judges.

It concerns me that mediation and arbitration are being unfairly blamed in some quarters for causing the demise of an important institution in our society, when in fact they are providing vitally needed alternatives.

I worry too about whether, in our work as dispute resolvers, we may be unintentionally eroding the public's confidence in our courts. It is all too easy for us to castigate the courts and litigation generally, and to cite the costs, delays and uncertainties associated with trials, especially jury trials, as the reason people should settle. By doing so, are we contributing to a dangerous tendency that undermines not only confidence in important institutions but also faith in the rule of law itself?

I encourage all of us—including those recovering litigators, such as myself, who point to our battle scars as one of the major reasons for our commitment to peacemaking—to keep the larger picture in view. We will be better able to help people achieve principled and cost-effective solutions if our courts have the resources and the respect that they need to do their important work. Like other institutions of our government, our courts are imperfect, and they need our support and informed oversight. Let us remember, however, as we talk with people about their options, that we are blessed to live in a society in which citizens and not despots are entrusted to decide cases involving intractable conflicts and matters of principle.

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