THE ADR MYTH and other fictions By Prof. Donald B. Cripe

The myth of ADR is that the very term is deceiving: ***Alternative*** Dispute Resolution.

"I'm a Trial Lawyer, and I don't settle cases!" ranted one young attorney who opposed me in one of my last litigation cases. It appears that, until fairly recently[1] law students were taught that the way to Valhalla was trying cases and certainly the way to get one's stripes in a law firm was to try cases. From the highest levels of our judicial system, rings the tone of reason when Chief Just Burger said, "The entire legal profession--lawyers, judges, law professors--has become so mesmerized with the stimulation of the courtroom that we tend to forget that we ought to be healers of conflicts. For many claims, trials by adversarial contests must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, and too inefficient for a truly civilized people."[2] Coincidentally, I suppose, is a quote in the March 2011 *California Lawyer* magazine from the movie, *A Civil Action*, in which John Travolta's character says, "The odds of a plaintiff's lawyer winning in civil court are two to one against. Think about that for a second. Your odds of surviving a game of Russian roulette are better than winning a case at trial. Twelve times better. So why does anyone do it? They don't. They settle."

These principles do not apply only to civil litigation. Having mediated a significant number of family law cases (some parties represented, some not), I have found that the parties are remarkably pleased that they were able to resolve their cases quickly and even were able to compromise on what seemed to be "sticky" issues.[3] Studies have shown that most of what family law litigants need can't be handled in a typical "divorce" situation or by the Court.[4] If family law attorneys really want to deliver for their clients, they should seriously consider ADR, including judicial arbitration pursuant to *California Family Code* §2554, for the overall benefit of their clients.

After spending some time on the internet searching for trial statistics, I stumbled across national statistics on cases that were actually tried in the United States through the year 2005. I was surprised to discover that nationwide only about 3.6 of civil cases filed across the country actually

[1] ADR was not even mentioned in any of my law school courses and no course on ADR was offered.
[2] Chief Justice Warren E. Burger, 1984 State of the Judiciary Address.
[3] Just as with civil cases, some family law cases are not right for mediation, particularly those involving pervasive domestic violence.
[4] Pauline Tesler, Tesler Sandmann & Fishman

made it to trial. I am informed that the figure for California is not much different[5] and in some states, such as Oregon, in one county less than ½ of one percent were tried in a particular year. That begs the question, then, "What happens to all of those filed cases?"

Of course, many are filed just to protect a statute of limitation or pending some discovery and are dismissed, but the lion's share of all civil cases are settled before trial. I am also informed that the settlement rate has been climbing steadily over the past 20 years. I suspect that is the result of a number of factors. The cost of litigation has become absolutely outrageous. Burgeoning case inventories in the courts not only adds to the cost of the cases, but creates incredible frustration for the parties. I recently mediated a fairly complex case to settlement in which, after the plaintiff and counsel calculated the numbers, if the plaintiff had been successful at trial and a verdict had been returned in the amount the plaintiff believed he could recover-- under the specific circumstances of that case-- it would have cost more to try and win than he would have recovered.[6] For most parties, financing a case through trial on the hope of recovering costs and expenses can be financially ruinous.[7]

So, if the vast majority of civil cases settle and a great proportion of them resolve as a result of some "ADR" process, why is it referred to as "alternative?" It seems that trying the case is the alternative while settlement is the norm. Given that reality, the next question is why does trial seem to be the golden chalice? Why are so many litigating attorneys so resistant to ADR, particularly mediation?

I recently attended a Symposium on ADR[8] at which nationally known experts in the field presented various aspects of the system. During the presentation, one of the participants rose and made a statement that attorneys and judges should be required to explain to the litigants the ADR opportunities. Good point. Obviously, judges have enormous case loads and struggle to make it through daily calendars. Many judges still take the time to mention ADR/Mediation from the bench. Also, *CRC* 3.221 requires all California Superior Courts to provide an ADR package with every case filing that, per the *CRC* must be served upon the defense at the time of service. Later, before the Case Management Statement is filed, the Courts want to know if counsel have informed the parties about ADR possibilities (Form CM-110, p. 2). Then at the time of the CMC, the court is required to discuss whether the case should be submitted to ADR (*CRC* 3.728(1)). At this stage, the responsibility is pretty clear.

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[5] Estimates have ranged to as high as about 6%.
[6] Of course this is an unusual situation, but I am finding it to be closer to fact with each case I see.
[7] Not all firms can afford to finance cases and many will not sign on to help unless the case is virtually risk-free.
[8] Presented by the University of La Verne College of Law.

Attorneys, on the other hand, have a greater responsibility to discuss ADR with their clients. The practice of law is, of course, a business. I had a lawyer friend once say to me that practicing law is almost the only profession in which if we do our jobs right and efficiently, our income stops (at least for that case). I disagree, generally. I submit that if attorneys do their jobs correctly, i.e., extricating clients from litigation as quickly, economically and successfully as possible (the maximum result for the least risk and expense), the word will get around to potential clients and certainly to colleagues. Further, the Treatises are pretty clear on our obligation. At numerous places in the ***Rutter Group: Civil Procedure Before Trial***, statements such as found at 1:25, "The client should be given an estimate of the cost, time and effort likely to be incurred in litigation. The possibility of early negotiations toward settlement and other alternative dispute resolution ("ADR") procedures should be explored. *Seeking settlement should not be viewed as a sign of weakness, but rather as an intelligent evaluation of the risks vs. benefits of litigation.*" (emphasis mine) ***Rutter*** continues at 1:31 to state, "The client should be made aware of alternative forms of dispute resolution (ADR) that might be utilized to reach the legal objective sought: e.g., mediation, arbitration, neutral fact-finding, etc. If such procedures would be appropriate to the case, they should be explained to the client and evaluated as viable alternatives to a lawsuit." It continues, " An attorney should advise a client of ADR 'at the outset of the relationship" and, when appropriate, during the course of litigation.' [State Bar California Attorney Guidelines of Civility and Professionalism § 13]")

In the ***Rutter Group: Alternative Dispute Resolution***, the commentators write, "[1:18] Competent Representation: An attorney's duty to provide "competent" representation (see *CRPC* 3–110(A)) requires application of "the learning and skill ... reasonably necessary" for the case. [*CRPC* 3–110(B)] *Comment*: Arguably, the "learning and skill" reasonably necessary to represent a client in litigation includes the duty to (1) develop a settlement plan and (2) explore ADR possibilities with opposing counsel. Then at [1:18.1] Communications to Client: Under the ABA Model Rules of Professional Responsibility, a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." [ABA Model Rule 1.4(b)] *Comment*: Arguably, "explaining" the means by which a matter is to be pursued requires the lawyer to explain available ADR processes. In this vein, Professor John Lande, Director of the University of Missouri ADR LLM Program, has created (in his recent book) the concept Planned Early Negotiation to be utilized in coming to a "Dispute System Decision," i.e., how are the attorney and client best going to resolve the conflict in which they find themselves?

Many of the California Superior Courts (local rules) require counsel to discuss ADR with their clients. It also seems clear from the "penumbra" of the various statutes, rules and advisories, that failing to do so may be a serious error.

It is hard to imagine any litigant, particularly a business person, to whom the economic advantages of ADR have been explained, would refuse. Certainly, engaging the services of an experienced, well trained mediator or arbitrator can be expensive,[9] but there is little debate that if a case can be resolved through ADR, it is much less expensive than carrying the case through trial. The cost of resolving a litigated case through private ADR at or about the time of the typical CMC is typically 10 – 25% the cost of taking a case through trial.[10] Added to the benefit of reduced costs is the control the parties have over the outcome thus reducing the risk and eliminating the gamble.

It should also be explained to the litigants that unlike a trial or even most arbitrations, mediation is a "dynamic" process. A process in which, if all parties are participating with an eye toward resolution, the settlement options are far more numerous than a judge or jury can craft under the law. Moving freely within the confidential confines of the mediation process allows the parties to create their own solutions. Moreover, unlike getting a judgment; suffering the post-trial proceedings and the potential of the difficulties with collection and actually enforcing a judgment,[11] settling parties can include payment or satisfaction terms in their agreement so they will walk away with a sense of finality. In these days of fragile credit, a settlement that is honored by the parties will keep the process confidential and, unless a judgment becomes necessary, should have no adverse effect on credit. On top of being a dynamic, flexible and confidential process through which faster recovery is possible, a properly drafted settlement agreement will provide the parties with a summary proceeding in the event that a judgment becomes necessary.

Attorneys and the Courts have an obligation to reveal ADR opportunities to litigants. ADR proceedings are, for the most part, far more efficient (faster and less expensive) than taking a case to trial. The parties maintain control of their cases and the outcome. Attorneys can boast of their settlement rates and satisfied clients and, finally, the burden on the courts will be greatly reduced so the small percentage of cases that need to be tried can be tried more quickly and inexpensively for the parties.

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[9] Frequently the cost of mediation is also a subject for mediation.
[10] Source: Pepperdine University, Strauss Institute.
[11] It is often said that getting a judgment is the easy part.

Beginning on January 1, 2012, the Family Law Courts in California will be in greater disarray. A program referred to as "Elkins" will be initiated. Though the goal of the program is to ensure due process to all, family law practitioners universally see the "new" system as creating greater obstacles to family law litigants getting to resolution. Many believe that this is the opportunity family law mediators have been looking for to bring family law litigants to negotiation and settlement. That said, there will always be a certain percentage of family law litigants who insist upon having a judge make their decisions for them; and there will always be family law attorneys who will encourage litigation because that is where the money is for them. Nevertheless, mediators and those on the periphery of the family law justice system who want to provide a *service* to ordinary people in need at a reasonable cost, will find opportunities.

Though ADR is not a "myth" as the title suggests, the term misstates the practical fact that ADR is the norm and NOT the alternative. I suggest that all the system needs is civil ***and*** family law attorneys who will accept that fact and participate with their clients. I sincerely hope that active litigators (and judges) will keep in mind this quote from antiquity: "The litigious spirit is more often found with ignorance than with knowledge of law." –Cicero

We live in a time of transition in our system of civil justice. The cadre' of ADR professionals is growing and though it is still a bit "wild and wooly,"[12] careful investigation and selection will allow one to find a well-qualified ADR professional for almost any case.

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Biographical note: Prof. Donald B. Cripe is a retired litigator who is currently an active ADR Professional. Prof. Cripe teaches Mediation at the University Of La Verne College Of Law and is a principal in C.A.M.S.: California Arbitration & Mediation Services, Inc

[12] There is currently no government "certification" or licensing requirement. Sort of like the early days of lawyering when there were no means of monitoring performance.