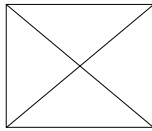


MSBA ADR SECTION

Annual Meeting, May 12, 2009



ADR AND THE COURTS



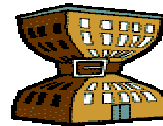
Have we gone too far?

WHAT BROUGHT COURTS AND ADR TOGETHER?

- 1925 Federal Arbitration Act
- 1960's Neighborhood Justice Centers
- 1970's ADR Movement
- 1990 Civil Justice Reform Act
- 1998 Alternative Dispute Resolution Act

TOO MANY CASES, TOO LITTLE TIME, NOT ENOUGH MONEY

Get these cases out of here!



ARBITRATION



HOSTILITY, ACCEPTANCE AND BACK AGAIN

“[arbitration] agreements in advance to oust the courts of the jurisdiction conferred by law are **illegal and void**.”

Ins.Co. v. Morse, 87 U.S. 445, 452 (1874)

...TO THIS....

We have a “**national policy favoring [arbitration]** and plac[ing] arbitration agreements on equal footing with all other contracts.”

Buckeye Check Cashing, Inc. v. Cardegna, 546 U. S. 440, 443 (2006).



...TO THIS...

That is why in the typical arbitration... the issue for the court is not whether the **contract interpretation is incorrect or even wacky** but whether the arbitrators had failed to interpret the contract at all...

Wise v. Wachovia, 450 F. 3d 265, (7th Cir.) 2006

EVEN THIS!

"Just ask Jamie Leigh Jones what she thinks of binding arbitration clauses.

Jamie was raped, drugged, beaten, and then confined to a shipping container by KBR/Halliburton employees while working in Iraq. Because of a clause placed in her employment contract, KBR is trying to force Jamie to submit to a binding, secret, non-appealable arbitration. These are the types of corporations the U.S. Chambers of Commerce are trying to protect."

American Association for Justice, April 2008

NOW?

BAN
MANDATORY
ARBITRATION??

MEDIATION

MEDIATION HAS HAD A SIMILAR JOURNEY

- Local judges report using ADR in 76-100% of their cases
- Mediation the primary tool
- Started as “consensual” and “voluntary”
- ADR relieves dockets, provides access

Bobbi McAdoo, *The Judicial Perspective on Rule 114 in Minnesota*, 2004

Mediation: Jack of All Trades

- Facilitative
- Transformative
- Directive
- Narrative
- Understanding
- Coercive
- Talk therapy

WONDERFUL!

- More congenial
- Less Costly
- Much Faster
- Self-determined
- “Voluntary”
- Confidential
- No pesky jury
- Informal
- Transformative



TOO WELCOME?

I believe that mediation (in its many varied forms) is valuable and vital.

[But I remain troubled and challenged by the critique that] mediation "permits private actors with powerful economic interests to pursue self-interest free of community norms." (McThernia & Shaffer, *For Reconciliation*, 94 *Yale L.J.* 1660, 1665 n. 33 (1985)). . . . How can "self-determination" be a guiding principle for justice in a society plagued with all sorts of inequalities?

Regardless of what neutrals say they do, I have often felt that mediation is a forum ripe with manipulation and deception conducted by the mediators themselves (often unintended, but sometimes overtly intentional and defended simply because the conduct facilitates settlement).

Quoted from: James Coben, *Syllabus, Summer 2008 Dispute Resolution Institute*

PANACEA?

ADR has become the perceived panacea for much that ails federal courts. It is unfortunate that . . . Congress has swallowed so completely the myth of ADR . . . The time has long since come, not for expanded use of ADR as a court management tool, but to question more seriously the premises underlying the ADR movement.

Dayton, *The Myth of ADR in the Federal Courts*, 76 *Iowa Law Rev.* 889 (1990-91)

HAS ADR DELEGITIMIZED THE COURTS?

- Has it undermined the rule of law?
- Does it diminish the development of legal rights for the disadvantaged?
- Does it privatize the judiciary, create an unequal two-tiered system?
- Has it reduced the role of community norms in the resolution of disputes?

HAS ADR DELEGITIMIZED THE COURTS....

- What happens to the unfolding of the common law?
- Has it turned judges into managers not adjudicators?
- Does it coerce? Manipulate? Deceive?
- Does it block effective judicial reform?

Ward, *Ettie, Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?* <http://ssrn.com/abstract=993220>

CORE QUESTION

What are the goals and ends of a government-supported judicial system?



THE PANEL DEBATES

YOU

DECIDE!

HAS ADR DELEGITIMIZED THE COURTS?

- Has it undermined the **rule of law**?
- Does it **diminish the development of legal rights for the disadvantaged**?
- Has it **reduced the role of community norms** in the resolution of disputes?
- Has it **impeded the unfolding of the common law**?
- Has it made **judges managers not adjudicators**?
- Does it **coerce? Manipulate? Deceive?**
- Does it block effective **judicial reform**?

Ward, Ellie. *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Pandemic or Pandemic?* 81 *St. John's Law Rev.* (2007). <http://ssrn.com/abstract=993220>

PRESS RELEASE

ADR SECTION ANNOUNCES:

It has collectively and conclusively solved
ALL questions related to the judiciary and
ADR!!