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PERSPECTIVE

Should we 'flip the system' from litigation to mediation first?

By Lonny Zilberman

Full disclosure: I've learned and practiced in the litigation and trial system for over 25 years. Yet, it appears more and more that traditional dispute resolution — litigation through jury or court trials — is failing to meet today's needs. One of the little secrets that the COVID-19 pandemic has exposed is the fact that jury trials — often touted as the purest form of obtaining justice — are, at best, not the answer to the ever-skyrocketing lawsuits, most recently heavily focused on employment and business relationships, gone awry. Litigation is slow, expensive and often disappointing (even the perceived "winner"). Over more than a year now, the COVID pandemic has pierced our illusion of certainty and control in the justice system.

Admittedly, our current dispute resolution system has been in place for a long time. A system where most law schools continue to train young people how to obtain "justice." And how is justice defined? Often, it is represented by exacting punishment or righting a wrong. It is by its nature adversarial. Metaphorically, a war or battle, where one side tries to "crush" the other. However, the reality is that half of those who step into the ring of battle lose. Like tossing a coin, statistically there is one loser and one winner — every time. Winner takes all.

We are, and anecdotal evidence suggests, more polarized, angrier and more dispute-oriented, than ever before. We see it in the news, our elected representatives, on social media, and we see it in our own homes and families. That is not a subjective judgment. According to the California Judicial Council, statewide filings in the California superior courts have topped 10 million, resulting in an increase of 20% over the past decade. It is no surprise that once the COVID pandemic hit and tens of thousands of cases were frozen, and not going to be tried, there was a bottleneck of galactic proportions (akin to that containership that got stuck in the Suez Canal). What now?

What are all the extremely gifted, clever, and exceptional "Trial Lawyer of the Year" types to do? The great big irony is that while everyone acknowledges that close to 96% of all litigated cases are settled short of trial, it appears that mediation and negotiation are always referred to as "alternative" dispute resolution methods. Like the fairy tale character Cinderella, "ADR" is the discriminated stepchild. Although, we all know how that story turned out. What if those were reversed? What if the focus and emphasis was on practicing mediation first? In other words, what if the legal profession incorporated mediation as a first resort at resolving a dispute, and then used litigation only as an alternative means, if negotiation failed? That way, mediation and negotiated resolutions are not the "fringe" alternative process, but the first step. Wouldn't that make sense?

One point of common agreement is that the current adversarial litigation system is painful, it is destructive, expensive, and it is inefficient. There are a myriad of deleterious quotes about the process, all culminating in the refrain that in the end, the only winners are the lawyers. One could argue that it is almost designed that way, with a loser — every time. In law school, I did not learn that the definition of "justice" is getting outcomes performed in the longest possible time, for the most amount of money and stress, without any guarantees of the result. That cannot be the ideal. Wouldn't it make more sense to have acceptable results, which the parties can control and accomplish the result in a much shorter amount of time, without all the stress and without having to undergo the ordeal where most people don't really feel satisfied, even after they "win" the case? Mediation offers satisfactions that the adversarial system cannot. It offers speed (usually a mediation is done in a single day), it offers a "choice" of the mediator, which is agreed by the parties and it offers flexibility, where there are mutually acceptable results and in effect a controlled outcome. Any trial lawyer will tell you that one hundred times as many legal disputes are settled through creative dispute resolution rather than by trial — that's also fact, not fiction. For years, those who deal with conflict have questioned the efficiency of our adversarial system. Lawsuits involve an attempt to always reconstruct the past, through evidence. When people fight about the past, they open old wounds and psychologically, the legal system can never fully compensate them for their perceived pain and suffering, no matter if it is a business transaction, an employment dispute or a traumatic personal injury. If we can accept that mindset, and the incredible uncertainty that comes with litigating past wrongs in front of 12 random people, is that really the most desirable way to figure out "who gets what?"

Most folks I know, plaintiff or defendant, don't want to drag out litigation and spend hundreds of thousands if not millions of dollars, without any guarantees. Most disputants want conflicts resolved quickly and fairly. Another secret most trial lawyers don't like to admit is that trials only happen at the end of a very long and expensive road. So, someone spends a heck of a lot of money, time and resources, with nothing to show for it. Kind of like that line that Jeff Probst always utters at the end of a Survivor challenge, to the losing team, "I have nothing for you."

I realize that some people have a hard time letting go of conflict. And, there are those things that some people are willing to die for. But, it seems that something is always better than nothing. Half a loaf, better than no bread at all. The reason that mediation works so well is because all litigation is ultimately about risk assessment. Although accurate risk assessment is hard to achieve, it is always attempted. Maybe a better way would be to impose a "mandatory" mediation system, where all who are aggrieved attempt to resolve their conflicts before proceeding down the long and expensive path of lawsuits. In a way, the litigation option is much easier than mediation.

In litigation, both parties have "lawyered-up" and they are wedded to their respective position. In a trial, one party does not have to ever engage in any meaningful communication with the other side, or even think about the other side's perspective or position. Mediation is harder because the parties must necessarily engage in communication with each other and do have to — via the mediator — put themselves in the other side's shoes. Ultimately, posturing leads to negotiation and negotiation leads to a possible zone of resolution; the sweet spot where both sides see value in a negotiated settlement.

Civil War Gen. William Tecumseh Sherman, coined the phrase, "War is hell." If litigation is like a war, and war is hell, why not try a less diabolical option first? ■

Leonid "Lonny" Zilberman *is a partner at Wilson Turner Kosmo in San Diego and practices employment law as well as a mediator and alternative dispute resolution.*