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The Impact of Alternative Dispute Resolution (ADR) in Employment Law

Douglas Ashman
dashman@purdue.edu

PURDUE UNIVERSITY

Purdue West Lafavette. Indiana

COLLEGE OF TECHNOLOGY

The Impact of Alternative Dispute Resolution (ADR) in Employment Law

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By

Douglas Edward Ashman

Committee Member	**Approval Signature**	**Date**
<Name>, Chair		
<Name>		
<Name>		
<Name>		

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A growing group of distinguished legal observers see cause for concern as ADR methods become more institutionalized and the basic theories and practices of Civil procedure are mediated and justice becomes an exercise in compromise. It is perceived by some observers that the justice system is becoming privatized and ADR is undermining the basic tenants of the American justice system and is a growing replacement for the checks and balances of a once enviable and unique civil justice system.

This study examines the role of ADR in settling employment disputes and grievances and offers recommendations to either combat erroneously perceived ideas about the effects of ADR or suggestions to preserve the foundations of judicial review and civil procedure that protect fairness and justice in our society.

SECTION 1. INTRODUCTION

Introduction

As the volume and complexity of employment law related disputes has grown, employers and employees have struggled with ways to manage these disputes while avoiding the overwhelming expenses and perceived negative elements of formal adjudication in the courts. A wide range of options, collectively referred to as alternative dispute resolution (ADR) methods has developed over the course of the last 25 years. These methods have not only found acceptance within the courts that formerly were charged with resolving these disputes, but ADR methods have become institutionalized within the context of the judicial system in America and, some would argue, have functionally replaced the judicial system in addressing and resolving some employment law related disputes as employment contracts more frequently require ADR methods for addressing and resolving disputes.

A growing group of distinguished legal observers see cause for concern as ADR methods become more institutionalized and the basic theories and practices of Civil procedure are mediated and justice becomes an exercise in compromise. It is perceived by some observers that the justice system is becoming privatized and ADR is undermining the basic tenants of the American justice system and is a growing

replacement for the checks and balances of a once enviable and unique civil justice system.

This study examines the role of ADR in settling employment disputes and grievances and offers recommendations to either combat erroneously perceived ideas about the effects of ADR or suggestions to preserve the foundations of judicial review and civil procedure that protect fairness and justice in our society.

Statement of the Problem

The incidents of employment law related litigation in business and industry is growing at an alarming rate (EEOC). In an effort to stem the wave of employment law related litigation on an overburdened court system, many methods of alternative dispute resolution have been developed that avoid traditional court systems and "save" litigants the expense and inconvenience of a protracted legal battles to resolve complaints.

As alternative dispute resolution systems have become institutionalized in our judicial procedures, concerns have developed over time that question the affects that these systems have had on the basic tenants of our civil procedures and our basic rights to access to the court system to resolve conflicts. Some observers have indicated that these "alternative" methods of resolving disputes have had negative effects and hindered the ability for the modern judicial system to adequately represent public policy and the

development of future laws, rules and regulations that protect the foundations of modern civil procedure.

Where did ADR come from?

The ideology behind the development of many of the Alternative Dispute Resolution systems centered on the growing dissatisfaction with the adversarial nature of traditional litigation methods and outcomes of the day. Litigation produces only winners and losers and often at very high costs financially and emotionally.

"Relationships are irrevocably damaged. People are emotionally and financially destroyed. And the reputation of lawyers and the civil justice system continues to decline." (Marshall, 1998, pg.795) These issues were the primary motivators to find an "alternative" method of addressing and resolving conflicts and disputes. ADR with its "win-win" persona appeared to fulfill the hopes of the people that wanted to find a less confrontational and more conciliatory solutions to conflicts.

In 1998, Pam Marshall wrote a paper that identified what she felt were inaccurate ideas about ADR and its potential. First, that it was developed in response to inaccurate notions about the failures of the adversary system; second, that it is particularly problematic as a mandated process in certain cases; and third, that the ADR system is at risk of being taken over by the people that created the problems with the adversary system in the first place, namely "lawyers".

Marshall notes that the real catalyst for the development of ADR originated at the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, held in 1976. This conference is generally referred to as the Pound conference, named after Roscoe Pound, an early advocate for the study of the growing dissatisfaction with the judicial system.

The conference was the result of the public debate that began in the 1960's that voiced dissatisfaction with the state of the legal system. Alternative processes were portrayed as "…agencies of settlement or reconciliation, peace rather than war." (R.E. Miller & A. Sarat, 1980, pg. 527). "The years following the Pound Conference saw the public immersed in ADR rhetoric that established many principles and practices of alternative dispute resolution systems that are institutionalized in the modern judicial system." (Nader, 1993, pg.6)

These ADR systems promised an informal, fast, and private adjudicative process to reach an outcome that is final and subject to very limited appeal (Dictionary of Conflict Resolution). With the passage of time and experience, however, it has become debatable as to whether these qualities adequately protect plaintiffs and defendants in cases of public policy and if ADR has substantially undermined the judicial system altogether.

Statement of the Purpose

The purpose of this study is to examine the role of ADR in employment disputes and the impact they are having the grievance process. This research defines and identifies key components of alternative dispute resolution systems (ADR) and the judicial system that employers and employees rely upon to address and resolve conflicts related to employment law issues in America. Preliminary research in current case law and academic legal journals have identified emerging issues of concern as to how modern alternative dispute resolution systems have negatively affected the body of employment law related judicial processes.

Research and findings provide insights into the development of ADR and civil procedures and how they have ultimately affected each other. Findings identify the positive and negative perceived affects and consequences of ADR and recommendations are made to interpret and address these perceived contradictions.

Significance of the Problem

Resolving conflicts in employment relationships has become a very expensive problem in recent years. A recent publication of Jury Award Trends and Statistics indicates that the median award for all types of employment claims rose 60% in the last year. From $204,000 to $326,000. Discrimination verdicts alone rose 16%, from $208,000 to $241,119. (Jury Verdict Research, 2009). These statistics indicate that

employment related claims and litigation represent a very large expense and are a problem of considerable significance to business and industry.

While sex discrimination cases were the most common claims (35%), Age discrimination claims generated the biggest verdicts. The publication also indicated that employers are better off in Federal court, where they won 43% of the cases, versus only 37% in state court. Out of court settlements that were the result of alternative dispute resolution systems and are often court mandated were the highest in the past decade at $90,000, a 20% jump over the previous year (Jury Verdict Research, 2009). These statistics indicate that employment law related issues are finding themselves in state and federal courts. This is reflective of the various statutes that are enforced at state and federal levels. Some issues, such as discrimination, are strictly regarded as Federal court issues and efforts by employers to mandate that they be resolved within the context of contractual arbitration agreements have met with very limited success. As a matter of public policy, many observers feel that these issues should not be addressed within the limited context of ADR of any kind. They are not addressed or resolved in a sufficiently public forum considering the national public interest in these kinds of issues and cases.

These statistics reflect instances where conflict ran through the entire court system, a difficult goal to accomplish. Almost all court jurisdictions have some kind of mandatory intermediate steps collectively referred to as Alternative Dispute Resolution systems (ADR) that attempt to resolve conflicts and disputes without taking up the courts

time and attention. Evidence suggests that ADR methods resolve conflicts more quickly, less expensively and protect potential litigants privacy in resolving disputes.

Arbitration is but one possible alternative to address disputes. Some contracted and union employers have arbitration clauses in their contracts that prohibit or strictly limit the extent to which a complainant can submit their complaints to the courts for review. To that end, many companies strive to make their arbitration proceedings binding so that issues can never be submitted to the courts in a public forum. This brings to question many issues of due process and the methods that need to be in place to protect employee rights so that these arbitration methods do not run afoul of established employment law or due process statutes.

Arbitration is not necessarily a weaker version of adjudication, though the differences are cause for concern. Arbitration proceedings routinely exercise their perceived procedural rights to award corrective monetary penalties in their judgments. According to a recent study, Employers typically win 52.1% of the arbitration awards, with the Employees receiving only 38.3% and the remaining 9.6% of awards resulting in a split award of some kind between the litigants. The study goes on to refine the data in that the Employer wins a median award of $34,000 and the Employee in arbitration cases takes away a median award of $250,000. Over seven times the award amount received by employers. (Leroy & Feuille, 1998). This should indicate to employers that they have strong monetary motives to understand these processes and recognize the most frequent

issues that are finding their way to alternative dispute resolution systems and, when necessary, to the courts.

The most common types of disputes that end in arbitration proceedings are Breach of Contract, Title VII Discrimination and Unjust Dismissal. Indiana, specifically, has long adhered to the employment-at-will doctrine and they have remained reluctant to recognize exceptions to the practice for fear of undermining it. Generally, employment-at-will stipulates that either party to an employment relationship, absent a binding agreement providing otherwise, may terminate the relationship at any time for any reason. (Tony v. Elkhart County, 851 N.E.2d 1032, 1035 (Ind. Ct. App. 2006). More generally, this practice is interpreted as a policy whereby an employer can terminate the employment relationship at any time, for a good reason, a bad reason, or no reason at all.

The growing trend of employment law related litigation and the increasing number of cases being won in the courts, with significant punitive damages awards being given would indicate that the employment-at-will doctrine has come under considerable scrutiny in recent legal history.

The Americans with Disabilities Act (ADA) and *Title VII* of the Civil Rights Act of 1964 represent a challenge to the ideas that employees can be terminated for any reason or no reason at all. Incidences of Title VII litigation handled by the Equal Employment Opportunity Commission have almost doubled in the last ten years (EEOC).

More recently, the Americans with Disabilities Act (ADA) which was enacted in 1990, was amended with the Americans with Disabilities Act Amendments Act (ADAAA) effective January 1, 2009. This legislation broadened many important definitions with the intent that "The definition of disability shall be construed in favor of broad coverage…" These definitions also broaden the employers' obligations to reasonably accommodate employee disabilities and the numbers of qualifying disabilities that are protected from discrimination in the workplace.

The Age Discrimination in Employment Act (ADEA) further defines employees that enjoy some kind of protected status in their employment relationships. The Indiana Civil Rights Law (ICRL), codified in Indiana Code sections 22-9-1-1 through 22-9-1-18, "prohibits discrimination in employment on the basis of race, religion, color, sex, disability, national origin or ancestry" (Montgomery v. Bd. Of Trs. Of Purdue Univ.., 849 N.E.2d 1120, 1130 (Ind. 2006) (citing Ind. Code 22-9-1-2, -1-3 (2004)). Some municipalities have enacted their own regulations that prevent employers from discriminating against employees for other characteristics that are not protected by Federal law. Like sexual orientation and gender identity.

Add to these exceptions the issues of lawsuits that center on retaliation practices in the workplace by employers and disparate treatment claims and many employers find themselves severely limited in the decisions they can make regarding the status of their employees.

In many cases these civil suits develop after the employee has exhausted "in-house" conflict management systems or submitted their complaints to a long list of alternative dispute resolution systems (ADR) that may even be required steps by the courts before formal adjudication of the issues can begin.

For purposes of this study, in-house grievance systems are being characterized as an ADR system in that its primary design and function is to avoid the perceived expense and inefficiency of traditional judicial systems. Unlike in-house grievance systems, however, ADR has become an institutionalized component of the judicial system in America as can be evidenced by the codification of ADR methods and rules in state and Federal statutes and rules of procedure across the country. These "front line" conflict management systems represent the best opportunity that employers have to resolve conflicts and complaints and prevent them from escalating into formalized litigation.

If the trend in litigation is any indication, then these in-house systems are either fundamentally flawed in their capacity to address and resolve conflicts, or the employees utilizing them do not perceive that the systems are fair, legitimate processes to have their concerns resolved adequately. Consequently, they resort to more expensive, time consuming, and potentially damaging methods that exist within formal judicial processes.

While the State statutes tend to promote the idea that employment-at-will is an ideal that is alive and well, it is increasingly coming under the scrutiny of the law in the

light of the federal regulations that have developed to specifically protect workers that are traditionally discriminated against.

With the combination of federal regulations and state and community regulations, many employers are practically unable to dismiss poorly performing workers. Most American workers fall into at least one, and sometimes several, protected categories.

Survey responses from several firms indicate that approximately one-third of those who did not file grievances chose not to do so because they either feared reprisals or believed that there was little chance their appeal would be successful. It appears that grievants in these non-union firms exercised their rights to use these procedures at considerable risk. If this pattern is at all representative of experiences in other firms, it supports some arguments that conflict management systems in general are lacking in legitimacy and/or effectiveness. (Lewin and Peterson, 1998).

Much academic research has concentrated on the tasks of defining conflict for the purposes of analyzing work environments and perceived fairness of in-house conflict management systems (Donais, 2006). Little emphasis has been placed on the analysis and application of what the courts have stated in their judicial proceedings that establish binding precedence on future cases.

This information is of critical importance and should be applied to the fundamental design of in-house conflict management and ADR systems that would give them powerful, preclusive and defensible effect. It would appear by some observers that

the intent of modern ADR is to circumvent the judicial processes and establish a secondary, but no less powerful, body of law that makes important decisions on public policy and statutory interpretation. These methods and systems have very limited judicial review and often operate outside the limitations and context of formal adjudication and public oversight. This secondary level of law should be recognized as a problem of considerable significance to employers and employees everywhere.

Research Questions

Three research questions guide this legal analysis.

1. What role does ADR play in employment disputes and specifically, the grievance process?

2. What are the positive, negative and unintended consequences of relying upon ADR to settle employment disputes?

3. What recommendations can be made to improve the resolution of employment-related disputes?

Definitions

ADR: Alternative Dispute Resolution. A group of alternative methods for resolving disputes outside the context of a courtroom. Potential litigants can choose to participate in ADR voluntarily, though many courts require some for of ADR as a prerequisite to a jury trial or formal litigation.

Affirmed Decision: A decision by a court or administrative body that has been formally appealed and found to be valid and defensible.

Arbitration: A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is usually binding.

De novo review A courts review of an administrative decision, usually through a review of the administrative record plus any additional evidence the parties present. (Blacks Law Dictionary) Without lawyers or litigants present.

Due Process: The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.

EEOC: The Equal Employment Opportunity Commission. An independent federal commission that investigates claims of employment discrimination based on race, color, religion, sex, national origin, or age and enforces antidiscrimination statutes through lawsuits.

Judicial Review: A courts review of a lower court or administrative body's factual or legal findings. (Blacks Law Dictionary)

Precedent: The making of law by a court in recognizing and applying new rules while administering justice. A decided case that furnishes a basis for determining later cases involving similar facts or issues.

Persuasive Effect: A non binding decision by a court that may influence how a court makes a decision on a similar issue or circumstance.

Preclusive Effect: A decision or judgment that is so similar to the circumstances of a subsequent case that the decision made in the prior case must be followed and applied to the subsequent case to insure consistency in judicial decisions.

Peer Review Immunity: see case citation file March 15, 2010, Indiana Peer Review Statute (IN. C 34-30-15-1)

Public Policy: Principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.(Blacks Law Dictionary)

Remanded: When a case that has already been decided is reviewed by a higher court and the issue is sent back to the original court for reevaluation because the higher court felt that key points of law were overlooked.

Reversed Decision: When a case that has already been decided is completely changed to favor the individual appealing the case.

Restatements: In American jurisprudence, the ***Restatements of the Law*** are a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law. There have been three series of Restatements to date, all published by the American Law Institute, an organization of legal academics and practitioners founded in 1923.

Individual Restatement volumes are essentially codifications of case law, which are common law judge-made doctrines that develop gradually over time because of the principle of **stare decisis**. Although Restatements of the Law are not **binding authority** in and of themselves, they are highly **persuasive** because they are formulated over several years with extensive input from law professors,

practicing attorneys, and judges. They are meant to reflect the consensus of the American legal community as to what the law is (and in some cases, what it should become). (Blacks Law Dictionary)

stare decisis: "it is decided", The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. (Blacks Law Dictionary)

Substantive Law: The part of the law that creates, defines, and regulates the rights, duties, and powers of parties. Procedural Law. (Blacks Law Dictionary)

Summary Judgment: "….materials show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." (Blacks Law Dictionary)

Vacatur: (ve-kay-ter) "it is vacated". The act of annulling or setting aside. A rule or order by which a proceeding is vacated. It is a method used to prevent judicial decisions from becoming a matter of public record. Mediated and arbitrated settlements often provide additional monetary incentives to the winner to agree to have a motion for Vacatur so the decision is not published. (Blacks Law Dictionary)

Assumptions, Delimitations and Limitations

This study was a document review which focused on employment law and related journal articles, reviews of precedent case law developed through state appellate and Supreme Court decisions, and analysis of federal legislative and federal commission publications related to employment law issues and information collected from employment law seminars and conferences. This information has been used to establish a qualitative summary of opinion of alternative dispute resolution systems and their cumulative effect on the judicial system in America. As an analytical study, it is not generalizable.

SECTION 2. REVIEW OF THE LITERATURE

Introduction

It may seem unlikely that a modern analysis of the effects of alternative dispute resolution systems would start with a Journal article that appeared in the Harvard Law Review in 1986. 25 years ago, the author, Harry T. Edwards, a circuit Judge in the United States Court of Appeals for the District of Columbia, had grave concerns about the potential effect of alternative dispute resolution systems on our court system.

The Alternative Dispute Resolution (ADR) "concept" was a relatively new one and he was writing from the perspective of summarizing a decade's worth of experience with this fledgling system. He had noticed that as ADR became more prevalent that it was "attracting a bandwagon following of adherents." He was cautious in his observations, however, that "…the bandwagon may be on a runaway course." (Edwards, 1986, p. 668)

He specifically cautioned: "In our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished or to destroy this important function of formal adjudication" (Edwards, 1986, p. 676)

While he was not willing to dismiss the basic benefits of negotiated decisions in the context of mediation, he is reluctant to advocate ADR as a solution for all conflicts in our society. He referenced an environmental dispute that had been in various stages of litigation for seventeen years. In that case, the litigants bypassed federal and state agencies, reached their own agreement and presented the settlement to government regulators. He conceded that the agreement may have been laudable in bringing an end

to protracted litigation. But the resolution of the dispute should not be construed that the public interest had been served.

Many ADR systems find advocates and representatives that operate within the theory of ADR and its promise of efficient and affordable conflict resolution. The overwhelming concern is that substantive standards (procedures) of law could be replaced by negotiated and mutually agreed settlements that neither protect rights nor conform to the body of developed law that is intended to address such issues. Solutions are being found outside the context of the law for the sake of convenience and that is not good public policy. As District Judge Sarah S. Vance of the Eastern District of Louisiana noted, ADR "doesn't produce any publicly made law. There is no verdict, no appeal, no precedent" (Samborn, 2002, p. 26)

With the benefit of an additional 25 years' worth of institutionalizing ADR systems and methodologies in our courts and conflict management systems, it would appear that Hon. Judge Edwards observations may have been more prophetic than he realized.

As ADR has become more prevalent and more widely used it has become a more integral part of our judicial system. That may, at first glance, appear to be a commendable accomplishment, but there is a growing sense that there is a blurring of the lines between adjudication of a complex public policy issue in the public legal arena and a system of ADR that has, in many cases, replaced and concealed the legal system. There is growing concern that public laws are no longer a matter for the public to be involved in or to benefit from.

If there is any doubt that ADR systems have become institutionalized as a component of our judicial system rather than a supplement, one would only have to examine the current Indiana Rules of Court that specify the rules for Alternative Dispute Resolution.

The Indiana Rules of Court have dedicated 15 pages of rules that relate to the application of ADR to conflicts in the courts in Indiana. These rules address the major ADR methods as they are recognized and used by the courts. They include; mediation, arbitration, mini-trials, summary jury trials and private judges. Rule 1.10, entitled "Other Methods of Dispute Resolution", acknowledges the ongoing development of these systems by stating that, "These rules shall not preclude a court from ordering any other reasonable method or technique to resolve disputes" (Indiana Rules of Court, 20011, p. 3).

This is a foreboding statement as it demonstrates the inherent move away from formal litigation in our judicial system. The question that should be considered is what is being lost when the courts mandate themselves the authority to require ADR in place of established judicial processes.

Where are we Now?

In 2007, Ettie Ward, published a paper that carefully analyzed the work of Harry Edwards and the concerns that he had about the future of ADR that he published in 1986. She readily acknowledged that he identified a number of crucial questions and concerns about the goals, promises, and dangers of the institutionalization of ADR and its impact on courts, law, and litigants. Her research was aimed at determining how the state of

modern ADR systems compared to the issues that Harry Edwards identified some 25 years earlier.

She notes that it is almost impossible to measure whether ADR has improved the quality of mediated or arbitrated results. Parties are not required and generally do not publicly disclose settlements, so we cannot survey the results (Ward 2007). This becomes an issue of greater concern as we investigate the impact of non-published decisions on the development of subsequent statutory and judge made case law in the judicial system.

Of particular note was the codification of The Alternative Dispute Resolution Act of 1998 that mandated that every district court establish an ADR program that provides litigants with at least one ADR process. The Act empowers the federal courts to compel participation in mediation or early neutral evaluation. Litigants will be required to consider using ADR at an appropriate stage in the case.

This is particularly of concern because ADR processes that result in settlements provide no opportunity for review and most programs do no more than perfunctorily attempt to assess mediators' skills (Landsman 2005).

A strict civil procedure assessment of a case, as opposed to an agreement reached in an ADR procedure, provides a written assessment of the procedures as this documentation is required to become a matter of public record. The documentation is available for review in the event of an appeal or in the effort of a subsequent judge or court to review the proceedings and the results achieved in the prior case. Ideally, judges review similar court cases to reach decisions when there are similar legal questions and issues to be resolved. They do this to provide consistency in the decisions that are being

made about similar issues and they do this to insure that their decisions are defendable if their decisions are ever appealed to a higher court.

An attorney representing a case on appeal will vigorously search for prior cases that are relevant and similar in their effort to persuade the higher court to overturn the prior decision because they feel it was a decision that was inconsistent with prior cases of similar issue and circumstance. The entire ADR system does not operate with this "prior decision" precedent and their decisions can be entirely arbitrary and inconsistent with previously established legal precedent. The ADR systems are not required to consider previous case law or even statutory law at all. This is a major failing of ADR.

The Role of Common Law

As ADR methods were initially promoted and developed, many of the more cautious observers and eventual critics were recognizing how the elements of ADR were somehow contrary to the fundamental design of the American judicial system as they had studied them in Law schools around the country.

Hidden amidst the warm friendly terminology that appealed to the senses of the general public of minimizing costs, improving efficiency, clearing up the backlog of court cases, reducing stress and the psychological trauma associated with trial courts and the virtue of greater satisfaction expressed by litigants, were the legal scholars that recognized that many of these perceived benefits were circumventing the more complex, but fundamental structures of the modern judicial system.

The average American, and for that matter, the average litigant, does not have a solid understanding of the concepts of the development of case law, *stare decisis*,

precedence, preclusive effect, binding authority, public policy or of the very constitutional core of the judicial system: the right to trial by jury (Samborn 2002). As many scholars have noted, ADR is a method that, for the sake of efficiency, seeks to circumvent and undermine most of these basic judicial concepts.

Though most first year Law textbook sources can define these fundamental elements of our modern judicial system, it is necessary to define some of these terms in detail as they form the basis for some of the more frequent and compelling arguments later in this project as other authors contribute their observations and concerns.

Common Law is the body of law that develops as laws are enforced and interpreted by the courts. A statute can be open to considerable interpretation despite the very best efforts of the legislators that enacted it. As the courts interpret the law and apply it to real world situations and circumstances, the law becomes refined and more useful as a tool for enforcement. As more cases are documented and resolved using the laws that are written, a body of cases is developed that provide context and clarity for how the law is to be used and how it is not.

When someone attempts to appeal a decision that a judge has made, they will have to demonstrate that there are significant prior decisions that contradict the decision made by the judge. The higher courts extensively research prior case decisions in their effort to make decisions that are consistent and reflect the needs and expectations of society. These needs and expectations are constantly changing and adapting to the shifting values of society. Prior case law decisions become a critical component of measuring the attitude and desires of society. Prior case law decisions are the mechanisms that influence how public policy is perceived and enforced.

This process is more than just academic practice. Trial attorneys learn that judges, at least the good ones, do examine precedent, and that the modification and development of precedent depends upon a change in holdings of individual courts about specific disputes (Cardozo 1921).

Why care about Precedent Relative to ADR?

Different theories explain why the courts are concerned about the concept of precedent and how they use it. One concept is that prior judicial decisions serve as the "public record of the unwritten law, customs and traditions, acquiring both their meaning and authority from recognition as part of the collective wisdom or reason" (Hinderks & Leben 1992, p. 155). This theory helps establish a "smooth transition between the accumulated experience of the past, evidenced by judicial decisions, and the present, to which the reasoning of the prior decision is applied, unless the present court determines that the prior court's reasoning was in error." (Hinderks & Leben 1992, p. 170).

Precedent serves the vital function to ensure that the decisions that are being made in the judiciary are consistent across the country. When courts appear to make decisions that are inconsistent with prevailing public opinion or prior decisions that courts have made that are similar in situation and circumstance, the only opportunity for correction of those errors lies in the careful examination of former court cases that have established binding precedent. An appellate court will only allow a decision made by a lower court to be reexamined or overturned when there is ample prior case law available that is related to the issue that demonstrates a contradictory position to a lower court decision. These are critical checks and balances that protect the consistency and integrity

of the judicial system to make decisions that are representative of the best interests of public policy and society.

What does this have to do with ADR?

ADR operates in our society as an alternative to formalized adjudication in the courts. This provides many perceived advantages in various areas of law. Research focused on employment law, so there are perceived advantages for both the employee complainant and the employer defendant. When a decision is made by an arbitration board or an arbitration judge, the decision can be final and binding. The presumption is that an arbitration proceeding is an appropriate substitute for a judicial one and that the rights of the litigants are protected by policy and procedure and standards of due process. It is important to emphasize that these qualities of arbitration are largely assumed.

There is much debate as to whether ADR, and specifically arbitration, is an appropriate arena for addressing and resolving all kinds of disputes. Employment law is an area under much scrutiny and debate as this area of law represents an area where many federally mandated rules and public policy regulations converge with lesser personal policy grievance issues. Generally, the courts want to advocate and support ADR and in-house grievance systems in their effort to resolve employment disputes. When an issue involves an employee complaining about a company policy or practice it may appear reasonable to resolve that issue in the limited context of the work environment and prevailing industrial practices and standards.

This issue becomes more difficult to answer when a company “policy” may run afoul of federal statutes that are designed to address Civil Rights violations and

discriminatory practices that are administered on a national level by the federal government. Arbitration clauses in employment contracts seek to have the right to resolve these questions exclusive of the judiciary and to have the arbitration clause strictly enforced to prevent judicial review of an arbitrated decision that an employee may find unfavorable. Employers want the contract "agreement" to force these issues to be resolved in the limited context of an arbitration proceeding.

In the case of Alexander V. Gardner-Denver Co., the court held that an employee's right to trial before a federal court under the Equal Employment provisions of the Civil Rights Act (Title VII) was not prevented by submitting a claim to arbitration. More specifically, in Alexander v. Gardner, an individual's right to equal employment opportunities cannot be abrogated by a collective-bargaining agreement (Alexander V. Gardner-Denver Co., 415 U.S. 36, 1974).

There are many reasons for not allowing arbitration proceedings to render judgments of Title VII issues. These reasons collectively expose the weaknesses and inherent dangers in allowing arbitration proceedings to represent laws and render legally binding decisions.

Federal Rules of Civil Procedure allow civil litigants a wide range of pre-trial discovery that is not generally available in arbitration cases. Usually, discrimination is subtle, occurring in the form of glass ceilings, promotional and hiring practices, and attitudes of bigotry throughout the company. Broad discovery is necessary for an employee to meet the burden of proof necessary to achieve a fair and just resolution (Tyre 2001)

Federal judges are more qualified than industry insiders to adjudicate federal statutory questions. Arbiters do not have the authority to develop law. They are hired to resolve a single dispute and are not required to consider public policy. (Moohr 1999)

Federal courts have a wide range of remedies against discrimination unavailable to arbiters. A federal court may enjoin a discriminatory practice of the employer, but an arbiter may only determine the outcome of the dispute at hand and they are not involved in enforcing the judgments (Tyre 2001).

Contracts to require arbitration between employers and employees are not made with the same amount of bargaining power, a most fundamental requirement of any enforceable contract. The potential employee signs the contract to get the job to provide their most basic needs in society and may unknowingly sign away critical rights of protection.

If a complainant is not satisfied with the arbitration decision then they may elect to pursue a formal claim in the judicial court system. The courts have generally been advocates of ADR and affording ADR proceedings the same power to make binding decisions when standards of due process are met. "Where a collective bargaining agreement provides for a method by which disputes are to be resolved, there is strong policy in favor of deference to that method of resolution" (Hines v Anchor Motor Freight, 1976).

The courts explicitly wish to grant in house grievance systems the same authority and deference to make their own decisions when conflicts arise. The United States Supreme Court has held that decisions of joint management-labor grievance committees

are entitled to the same deference as the decisions of independent arbitrators. (General Drivers, Warehousemen & Helpers, Local Union No 89 v Riss & Co., Inc., 1963).

The courts have struggled to maintain a policy whereby arbitrated or grievance procedure decisions are only allowed to be appealed to the courts where fundamental due process standards are compromised. In Renny V. Port Huron Hospital (1987), the courts have established terminology that is frequently referenced by many subsequent employment law related cases and appeals because of its clear standing on due process issues.

Furthermore, a private employer cannot insulate itself from judicial review of an employee's discharge by unilaterally establishing a method of dispute resolution to which the employee must submit.

However, where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless the court finds as a matter of law that the procedures used did not comport with elementary fairness. The merits of the case may be submitted to the jury to determine if, in fact, the employee was fired for just cause.

This case has established generally accepted policy across much of the country with its ruling. In this case, the plaintiff (Renny) dutifully contested her termination to a grievance board designed by her employer that supported the termination. Renny then filed a suit with the courts asking to be reinstated, alleging, among other things, that the grievance procedure did not allow for fundamental fairness in its procedures and as a result she was unfairly deprived of her rights to due process. Her employer argued,

however, that by submitting her complaint to the in-house grievance procedure she forfeited her rights to further judicial review because the decision of the company was final and binding. The courts disagreed that her rights were forfeited because the grievance procedures so completely lacked elements of due process.

As a reflection of the status of ADR methods in the country, this issue becomes a point of concern as recent research would indicate that there is a growing trend where courts have agreed to review arbitration awards more frequently than ever before.

From 1970-1979, the Federal District Court reviewed 0.7% of employment arbitration awards. For the period of 2000-2006, the same court reviewed 62.5% of all employment arbitration awards. The same trend appears to be true for the State Appeals courts who reviewed 2.4% of arbitration awards in the 1970-1979 period and 47% in the 2000-2006 period (Leroy & Feuille, 2008).

Arbitration has come under serious scrutiny as a means of resolving conflicts and has lost some of its luster as a peaceable method of resolving issues outside the context of traditional courtroom proceedings. Current research is indicating that the disputes are just taking a long circuitous route to reach the courts, making a momentary pause at the ADR station along the way. As long as it is ending up in the courts and is certainly functioning under the heavy shadow of the courts, it should have some compelling obligation to contribute the value of its findings to the improvement of the body of existing case law and the development of public policy and precedent.

SECTION 3. PROCEDURES

This research was for all intents and purposes, an analytical paper, or some might say, a legal analysis of an important aspect of Employment Law. It was conducted by referencing Journal articles related to employment law and other academic legal journals and reviews. Precedent case law, state and federal statutes and various governmental agency publications were reviewed to develop a consensus of opinion on the issues of alternative dispute resolution systems and their affects in the judicial system in America.

This is a qualitative study relying solely on document review for data collection. Data and information were gathered from legal articles and treatises, scholarly articles and research studies, case law and legal analyses. Common themes were identified and evaluated relative to the topic. Articles were found with specific internet searches, online library searches and document and journal entry searches.

As publications referenced specific case law citations specialized computerized database case law citation software was used such as WestLaw and LexisNexis to review specific details of case development and adjudication status as well as references to cases of similar focus and circumstance. As such, it examines an issue in Employment Law that is of growing concern when it comes to employee rights.

SECTION 4. FINDINGS

Following an exhaustive review of more than a hundred journal articles and legal publications, 42 were selected and studied in depth and retained for this study. Almost a thousand pages of various journal articles were reviewed for relevance and perspective to the issues identified. Dozens of specific state, federal and Supreme Court cases were reviewed and the most relevant ones were cited specifically in this study if they were deemed "on point" or historically relevant.

Research findings reveal that the issues associated with ADR, and specifically institutionalizing ADR within the context of formalized litigation, are very complex, diverse and far reaching. Several authors predicted some of the outcomes of ADR use with uncanny accuracy (Edwards 1986). Some affects of ADR have only been identified as a verifiable data history and experience has developed over time.

What is clear is that the perception of litigation and trials has changed significantly in light of the growing influence of ADR. Judge Patrick E. Higgenbotham of the 5th U.S. Circuit court laments, "We are creating a whole new culture where a trial is perceived as a failure of the system" (Samborn 2002, p. 25). ADR advocates would interpret this statement as a successful attainment of the goals defined in the ADR movement from the very beginning.

Some of the affects may seem innocuous and little more than interesting side notes, but to others those same side notes represent a serious deconstruction of a judicial

process that has potential to affect every one of us in the future. Attorneys are assuming greater roles in selecting mediators, shaping the mediation sessions, and negotiating for the parties (Ward 2007). Robert A. Clifford, of Chicago's Clifford Law Firm says lawyers are becoming more involved in settlement negotiations as a part of case management rather than case preparation. To some this might be perceived as a conflict of interest when a client hires an attorney to vigorously represent an issue or a cause only to discover he has retained a mediator for hire. To a large extent, some of this negotiation process is mandated by federal laws and civil procedure rules.

Mr. Clifford states, "I don't think it is bad to have fewer trials" (Samborn 2002 p. 27). ADR is clearly achieving this goal. However, he is also quick to observe that fewer young lawyers are trying cases. The opportunity to try cases and develop trial lawyer skills is simply not as available as it once was. This paradox is fairly representative of all of the authors' observations that have contributed to this study. ADR has very clear, seemingly publicly demanded goals and ideals motivating it and these goals are universal and noble in intent. The ADR process may have also eroded critical elements of the judicial system that may have far reaching consequences if lawyers are no longer able to develop and refine advocacy skills in the court room. If the courts are becoming obsolete, it would appear that the lawyers role may also be being compromised in the process.

Some believe that ADR has grown to represent a bureaucratic barrier to having their grievances and complaints heard in a court of law and that the well being of society and the development of public policy is threatened by this development. If the lawyers themselves are losing the opportunity to develop advocacy skills in the courtroom, and, in

fact, are strongly encouraged to utilize ADR resources to achieve a mediated compromise and settlement, then who will advocate for public policy issues when they develop? It may seem ridiculous, but how would issues like women's voting rights or slavery have ended up if the judicial system only sought avenues of vigorous compromise. Some issues have no room for compromise in the minds of the public and society in general.

The courts have addressed this improbable chain of events in their own way by limiting the power of arbitration agreements to address some issues in a way that precludes the courts from reviewing the decision. Of particular attention have been the Title VII issues of the Civil Rights Act and issues arising from interpretation of the Age Discrimination in Employment Act (ADEA). These are the most common sources of conflict in the employment law arena that the courts have determined generally fall under Federal jurisdiction and are not for arbitration agreements to address. There are many reasons for this distinction.

The judicial system in America was designed to recognize that there are certain issues that can be considered "state" issues and some that cannot. It did not take long to recognize the inherent dangers of allowing the states to make any and all decisions about issues that they decided to exercise statutory control over. Without digressing into a prolonged discussion on the socio-economic merits of the Southern states and the Northern states in the 1800's in America that led to civil war, it is notable that the Federal government felt that the states were not capable of looking past their own self-interests to make appropriate public policy decisions with regard to the issue of human freedom. To a great extent, these same thoughts and concerns were responsible for the issues of Civil Rights discrimination acts (Title VII) and equality being issues addressed by the federal

government rather than for the states to remedy amongst themselves in inconsistent fashion. The Federal courts do not trust the state courts to remain impartial to administer these issues of public policy.

This same analogy provides compelling insights as to why many feel that arbitrators should not be permitted to address Federal and statutory issues in the limited context of an arbitration proceeding. Arbiters are not familiar with the statutes in question or the complex judicial decisions that developed over time to become law. Arbiters may be swayed by local discriminations and do not have the job security that is provided for federal judges (Tyre 2001) to protect them from making popular decisions rather than conscionable ones. Arbiters lack legal training and "are usually industry insiders who normally decide disputes over prices and contracts instead of individual rights" within Title VII legislation (Moohr 1999, pg.435). Federal courts should hear these discrimination claims because broad industry discrimination can be eliminated by court oversight (Tyre 2001).

"The limited available remedies of arbitration prevent it from being an effective forum for Title VII claims (Gilmer v. Interstate / Johnson Lane Corporation, 500 U.S. at 28). Without remedies such as injunctions, court oversight, and class-wide compensation, employers may continue to discriminate. Since arbitrated decisions are kept confidential and out of the public forum, the prospect of bad publicity is avoided and so is a big motivator not to violate discrimination laws in the first place. "Since arbiters remedies do not include punitive damages or wide-range/broad-sweeping ability to require change in policy, the deterrent effect of Title VII is weakened (Gilmer v. Interstate / Johnson Lane Corporation, 500 U.S. at 41-42)

New Perceptions: Is arbitration lawless

Some learned observers are not subtle about their sentiments of ADR and its negative consequences, as discussed in the following section. In an article written by Christopher Drahozal in 2007, he titles his paper and asks the fundamental question, "*Is Arbitration Lawless?*" He has examined a wide range of authors in his paper that provide damning testimony of sorts as to the fundamental error of Arbitration. Drahozal shares a predecessors thoughts, "no theory in support of organized arbitration can conceal the essential lawlessness of this form of private government" (Kronstein 1944, p. 66) He explains this position, "Arbitration is power, and courts are forbidden to look behind it. The protection of awards against judicial interference, and, under that umbrella, of the development of organized arbitration as a rule maker, has established "judicial powers" other than those provided by federal and state constitutions" (Kronstein, 1963, p. 699-700). To Kronstein, the idea of arbitration was not much short of an act of revolution or at least civil disobedience.

As mentioned earlier, much has been accomplished to define what circumstances are necessary to "overturn" an arbitrated decision and what issues are more and less appropriate to be handled within the context of an arbitration proceeding and what issues should be reserved for comment strictly by the courts. Many of these developments were not available when Kronstein (1944) made his observations.

It has also been noted that "arbitration involves a form of contractual 'lawlessness' that is especially undesirable in claims that involve new legal issues. This lawlessness not only adversely affects the parties to each dispute, but the legal system as

a whole" (Abraham & Montgomery 2003, p. 4) As the Table 4.1 indicates, 52% of arbitration awards go to the employer while 38% go to employees.

Table 4.1 EEOCC Arbitration Statistics for 2010

Table 1
Dispute Characteristics in Employment Arbitration

Who Wins the Arbitration Award?		***Type of Employment?***	
Employer	125/240 (52.1%)	Securities Industry	91/240 (38.1%)
Employee	92/240 (38.3%)	Other Employment	148/240 (61.7%)
Split Award	23/240 (9.6%)		

Amount of Arbitration Award?	
Employer Wins (N=37)	$34,000 (Median) / $2,450 – $11,245,668 (Range)
Employee Wins (N=87)	$250,000 (Median) / $2,677 – $38,233,079 (Range)

What Employment Actions Are Arbitrated?	
Discharge/Termination	91/240 (37.9%)
Resignation	22/240 (9.2%)
Post-Employment Pay	37/240 (15.4%)
Current Employment Pay	19/240 (7.9%)
Post-Employment Restriction	16/240 (6.7%)
Worker Injury/Diesease	13/240 (5.4%)

What Legal Issues Are Arbitrated?	
Breach of Contract	94/240 (39.2%)
Title VII Discrimination	41/240 (17.1%)
Unjust Dismissal	33/240 (13.8%)
State Discrimination	25/240 (10.4%)
ADEA Discrimination	14/240 (5.8%)
Emotional Distress	12/240 (5.0%)
Negligence/Miscellaneous Torts	12/240 (5.0%)
Defamation	11/240 (4.6%)
ADA Discrimination	10/240 (4.2%)
Tortious Interference	10/240 (4.2%)

How Often Do Courts Review Employment Arbitration Awards?				
	1970-1979	*1980-1989*	*1990-1999*	*2000-2006*
Federal District Court	1/144 (0.7%)	6/144 (4.2%)	47/144 (32.6%)	90/144 (62.5%)
Federal Appeals Court	1/84 (1.2%)	4/84 (4.7%)	30/84 (35.7%)	49/84 (58.3%)
State First Court	3/90 (3.3%)	8/90 (8.9%)	44/90 (48.8%)	35/90 (38.9%)
State Appeals Court	2/85 (2.4%)	8/85 (9.4%)	35/85 (41.1%)	40/85 (47.0%)

Source: http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

In his article, *Taking Contract Private: The Quiet Revolution in Contract Law*, Charles Knapp points out an interesting correlation between contract law and what is more generally considered public law. Arbitration may be more frequently wandering over into the realm of employment law and even attempts at Title VII arbitration in the context of employment law relationships. In the realm of contract law, however, arbitration has held a powerful and traditional position. There seem to be few opponents to the idea that arbitration is well suited for negotiating compromise in the area of contract law. These are disputes between consenting parties of presumably equal power so it is generally considered a "private law" issue. This is where the issue of "private law" is first introduced in the American judicial landscape. These contract issues have little public policy effect and society is scarcely harmed when two parties consent to terms and conditions of their mutually beneficial contracts. The public does not care that these issues are private or that they remain private when disputes arise. So why does it matter?

Charles Knapp warns, "It matters because the pressure for mandatory arbitration represents another step, and a giant one, in the privatization of American contract law" (Knapp 2002, p. 765). Court citations that review arbitration proceedings and judgments routinely affirm that arbitrators are not required to follow the law and that arbitration represents a best effort toward consensual reconciliation and a product of negotiation on terms best defined by the individuals involved in the conflict. The notion that arbitration is an enforcement of legal rights is misguided and inaccurate.

Charles Knapp argues that there is no such thing as "private law" and that a disservice is done to society when these private adjudications presume legally binding powers but remain deliberated and adjudicated outside of public scrutiny in a public arena like the courts that require documentation and reasoning…the process by which contract disputes are resolved is indeed a "public" process, and in the course of that process, "public" values are brought to bear. The "rule of law" of which the American legal community is justly proud involves not only the application of "rules" of law, but also the workings of a legal "process," in a public forum, as part of a public discourse." (Knapp 2002, p. 765) The fact that these public forum "workings" have been invoked to resolve a private dispute incurs a duty in the opinion of many to share details of the dispute that may establish precedent and affect future decisions and the development of public policy. Precedent is not a by-product of lawsuits, rather, precedent is the entire point of adjudication (Purcell 1997). It is the necessary component that protects the idea of consistency of the application of law across the nation. Arbitration, with it's private deliberations eliminates this relationship.

Because of some of these perceived shortcomings of arbitration that have only become apparent over time and experience, some believe that arbitration is falling out of favor and people are avoiding it as a means of having their disputes resolved in contractual situations. Reports of dissatisfaction with arbitration – not only by consumers and employees, but also by businesses and their attorneys – appear with increasing frequency. Some attorneys complain that its costs and complexity have been rising, while losing parties are dissatisfied at the difficulty of appealing in court when they believe the verdicts are unfair (Drahozal & Whittrock 2008).

Avoiding Public Policy Requirements

It would seem increasingly evident that ADR has resulted in unintentional negative consequences to the judicial system over the course of the last 25 years of development, advocacy and institutionalized use. Not every person had the requisite expertise to recognize the potential for the systematic deconstruction of the judicial processes that were designed to protect and serve the public policy needs of society.

The effect on the more obscure but critical concepts of precedent, *stare decisis* and the development of public policy issues were largely overlooked by all but the most astute legal scholars of the time when ADR was being embraced by the general public as the solution to the stranglehold that the professional litigators had over our collective judicial system.

However, research into these issues has revealed that there are other processes and methods that are perhaps more obscure in our judiciary that circumvent the judicial standards of our society as efficiently as ADR methods but with much more clear and obvious intent to do so. These methods serve to further privatize the judicial system and further damage the basic premise that the judicial system in our country is to serve the needs of society and public policy in general.

Litigants can make full use of the judicial processes that are available to the public to address and resolve conflicts and disputes of all kinds. A judgment can be made by the court that may establish legal precedent, legal rights and duties. If the losing litigant wants to minimize the publicity resulting from the judgment against them, they can offer to pay the opposing party a sum in exchange for cooperation in a motion for *vacatur* of the trial court judgment (Purcell 1997). "If the court grants vacatur, the judgment ceases to have legal effect in the parties or, in most cases, as precedent. Even

though the judgment was in no way defective, it is essentially erased" (Purcell, 2009, p.868)

As they have been blocked from having precedent value, these decisions do not contribute to the body of case law that ultimately develops precedent holdings and helps keep public policy representative of verifiable opinion and judicial process. This is the most blatant form of privatization of our judicial processes that occurs.

Vacatur is a tool that is used almost exclusively by wealthy, repeat litigants who have the greatest incentive to suppress unfavorable judgments. It deprives poorer litigants of the basic litigation tool of precedent, a corrective tool or reference in subsequent but similar decisions. "A vacatur-friendly regime inevitably produces, on aggregate, a body of law skewed toward the interests of the wealthy" (Purcell, 2009, p. 869)

This amounts to damage control and an effort to suppress and clean up potentially negative publicly available information regarding the case. It eliminates the opportunity to use prior judgments as a frame of reference when deciding future similar issues because these cases never become a matter of public record. A legally binding decision has been rendered in a public arena forum like the courts, yet the courts willfully allow these proceedings to be suppressed from public appraisal.

In Neary v. Regents of the University of California, Justice Joyce Kennard of the California Supreme Court wrote in her dissent that: "Public respect for the courts is eroded when this court decides a party who has litigated and lost in the trial court can, by paying a sum of money sufficient to secure settlement conditioned on reversal, purchase the nullification of the adverse judgment" (Neary v. Regents of University of California,

834 P.2d 119, 127 (Cal. 1992) at 10). Honorable Justice Kennard cited the Integrity of the Judicial Process in her effort to refuse the granting of a vacatur judgment in this case as it held public policy value and reflected negatively on the judicial process to have its decisions hidden from public view without just-cause.

Some would argue that there are important distinctions between public and private disputes and their belief that the "public" law can apply the same principles to a "private" dispute without ever having the requirement to be tried in the public arena (court) or made a matter of "public" record. "But even the most private of suits – suits involving no constitutional issue at all…may have some valuable public effect" (Purcell, 2009, p. 902).

For example, judge Learned Hand developed an algebraic formula for establishing negligent behavior that is still widely used in business and the courts today. "If the probability be called P; the injury L; and the burden of taking adequate precautions to prevent the injury B; liability depends upon whether B is less than L multiplied by P. Whether L = (B *less than* PL)" (United States v. Carroll Towing Co. 1947, at 173). If injury did occur and the business was sued, it could argue the Carroll Towing formula to the court. If it could establish that the costs of taking the precautions were disproportionately high, it might avoid liability (Purcell, 2009). This is an example of how a seemingly private dispute being handled in the context of the public court system had valuable and precedent affect on many subsequent cases and public policies. Were the powers of vacatur invoked by the litigants in this case, such useful precedent and litigation tools would not have been made available to the public.

Daniel Purcell writes that disputes between private litigants have public significance for another reason: they are adjudicated in a public courtroom. The courtroom is staffed by judges, clerks, and bailiffs whose salaries are paid by the government. The costs of providing public services invoke a responsive duty by the litigants to share information about the logic and precedent that develops within the case. "A public final judgment, bought with public funds and supported by the system of precedent, should not simply be set aside. To do so ignores the public nature of the courts" (Purcell, 2009, p.905)

Vanishing Trials?

Several authors have seized on the recurring theme of the "Vanishing Trials" phenomenon in our judicial system. As Patricia Refo noted in her paper, "The Vanishing Trial", those examining litigation statistics cannot help but notice the large number of court filings at one end and the very small number of trials at the other end. (Refo, 2004)

This is not merely a measure of the number of trials occurring or not occurring that should be the primary cause of concern, but the estimation of the sheer volume of case law, precedent and relevant information that is never disseminated to the public, through a public mechanism of justice, that could be shaping a multitude of public policy issues that never does.

There are many reasons for this "interception" of justice and information. It has little to do with the proliferation of ADR systems and methods, but is rather an indication

of lesser known elements of the law that prevent the judicial system from operating in the way in which it was intended, to the greater public good.

One mechanism that has admittedly had an impact on the number of cases reaching a formal trial is the practice of summary judgment. A series of cases that were before the Supreme Court increased the procedures availability (1986) and more aggressively enforced the procedure as a limit on the availability of trials.

Summary judgment is a motion that is made to the court prior to trial asking the judge to make a judgment in favor of one of the litigants without having a trial. This can only occur when there is no material fact in dispute that would otherwise require a trial to resolve. That the evidence is so overwhelming or that one of the parties has admitted to the truth of the events or circumstances that are being litigated. Parties are trying to avoid the time and expense of a trial when the outcome is obvious. A motion for summary judgment can address the entire issue before the court or only specific elements of the case that will reduce the number of issues cumulatively submitted to the court.

According to Federal Judicial Center research, 17% of the U.S. Court's civil cases had at least one motion for summary judgment filed. Since almost two-thirds of the U.S. Court's civil cases are dismissed or settled, over half of the cases that reach the final judgment stage were disposed based on a motion for summary judgment. 71% of the summary judgment motions were filed by defendants, 26% by plaintiffs. Out of these, 36% of the motions were denied, and 64% were granted in whole or in part. Martin Redish sees this trend as a positive statement on the effort to control the number of disputes that are actually going to trial, but cautions it may have some negative public policy affects (Redish, 2005)

The practice of summary judgment has clear benefits if the goal is streamlining the litigation process by pre-testing the dispute and resolving as many of the issues before a trial so that time is only spent addressing issues that are unresolved or are not obvious.

Few people realize that most of the cases that go to trial are never published in any volume of accessible form. It would be a difficult, if not impossible task. Published cases are generally limited to cases that have been formally appealed and established a record for detailed extensive review for legal validity. In this way a reader of the published opinion can follow the court's reasoning and cite the logic as reference for future similar decisions if necessary. Unpublished cases cannot be citied for purposes of appeal as a matter of civil procedure.

When a court decides to selectively publish certain decisions, they are suppressing information either arbitrarily or intentionally and this practice has resulted in significant loss of available cases reference materials (Carr & Jenks, 2000). Knowing that a case will not be published may encourage a judge to be less diligent in their inquiry.

A review of ADR case law indicates that disproportionate emphasis has been placed on the perceived negative consequences that ADR represents on the workings of the judicial system in America. This lopsided representation may leave the impression that there are no staunch advocates or defenders of the virtues of ADR and that all the authors of the various journal articles and citation referenced thus far had nothing positive to say about ADR.

Justice Harry T. Edwards asserted that ADR elements have always been an integral part of the formalized judicial system before it was fashionable to label it as such. The fact that the majority of all court cases are settled well before trial rather than fully

adjudicated indicates that ADR has the potential to reduce caseloads by enhancing the effectiveness of settlement (Edwards, 1986).

The authors of the journal articles read, and much of the precedent case law studied for this project readily acknowledged the intended benefits of ADR in the text of their writings as well as acknowledging the necessity for developing cheaper and more efficient methods of addressing and resolving conflicts. As the volume of opinions were analyzed about the motivating factors and development of ADR in its early years, virtually every author emphasized the positive qualities of ADR in exactly the same way, before considering any possible negative consequences that have developed over time and experience.

The "virtues" of ADR are simple and readily understandable and quickly embraced and advocated by the public who were outspoken about their unhappiness of the limitations of the judicial system of the day that represented their only other option to have their issues addressed. Anything that promised greater efficiency and a substantial reduction of costs and a peaceable resolution of conflict shepherded by the advocates of mutual compromise at every level of society was seen as the antidote for what the ailing justice system needed. As one observer noted, "we have trained judges to clear their caseload quickly with as few trials as possible" (Stephan Landsman of DePaul University College of Law in Chicago as cited in The Vanishing Trial, 2009, p. 26). This has resulted in more secrecy in the process, a reduction in developing case law and the elimination of public scrutiny. ADR appears to have had a chilling effect upon the litigation process.

SECTION 5. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

One question guided this analysis of ADR in employment law:

1. What are the positive, negative and unintended consequences of relying upon ADR to settle employment disputes?

Over the course of the last 25 years ADR systems have achieved the goal for which they were originally designed. That goal was to come up with an alternative method for addressing and resolving conflicts that avoids the perceived overwhelming expense and perceived inefficiency of the court system that was the only method available at the time.

Early advocates of alternative dispute resolution methods could not have imagined that ADR would have been so fully incorporated and institutionalized into the very fabric of the judicial system in America. Its success at achieving that goal has been nothing short of remarkable. It has gone from advocating alternative methods to requiring them as a step on the quest for judgment and justice when conflict arises.

Herein lies the problem.

The judicial system of resolving conflict was a very carefully orchestrated and designed system. It remains completely unique in its national and international capacity to be a system designed to remain perpetually amendable to reflect the opinions and judgments of the future. It is a system designed to adapt to the need of a consistent public policy for society across a nation. With its system of precedent and stare decisis, it

is designed to control inconsistent rogue judgments based on emotion or self-interests of individual judges or communities. Simultaneously it protects from decisions that are made from the bench that are disinterested and indifferent to the issues at hand and the values and needs of society as a whole for protection and advocacy. As Table 5.1 illustrates, the number of civil rights cases today being addressed via ADR has continued to grow over the past 20 years.

Table 5.1. Civil Rights Cases Concluded in U.S. District Courts, 1990-2006

Table 4. Civil rights cases concluded in U.S. district courts, by disposition, 1990-2006

		Percent of cases disposed								
		Dismissed						Judgment		
Year	Number of complaints disposed[a]	Total	Settled	Voluntary	Lack of jurisdiction	Want of prosecution	Other	Total	Trial[b]	Other[c]
1990	17,985	66.2%	30.7%	8.1%	8.3%	5.0%	14.1%	33.8%	7.6%	26.2%
1995	30,175	69.4	33.4	11.8	2.0	4.1	18.1	30.6	6.0	24.6
2000	39,941	72.3	37.6	11.9	1.7	4.1	17.0	27.7	4.1	23.6
2001	38,612	73.9	38.9	12.2	1.8	4.0	17.0	26.1	3.8	22.3
2002	38,551	74.2	37.8	12.7	1.8	4.0	17.8	25.8	3.6	22.3
2003	37,624	74.7	38.5	12.8	1.9	4.0	17.5	25.3	3.4	22.0
2004	37,407	73.8	37.6	12.0	1.8	4.0	18.5	26.2	2.9	23.3
2005	36,929	73.6	38.1	11.8	1.7	4.1	17.9	26.4	3.0	23.5
2006	33,108	72.0	37.0	11.4	1.7	4.4	17.6	28.0	3.0	25.0

Note: Does not include prisoner petitions. Percentages may not sum to total due to rounding.

[a]Excludes transfers, remands, and statistical closures.

[b]Trial includes cases disposed of by jury trial, bench trial, and directed verdict. In some cases, the parties may have settled before the completion of the trial.

[c]Includes judgments by default, consent, a motion before trial, judgment of arbitrator or by some other final judgment method.

Source: Administrative Office of the U.S. Courts, Civil Master File.

Source: U.S. Department of Justice (http://bjs.ojp.usdoj.gov/content/pub/pdf/crcusdc06.pdf)

ADR and its methods that preempt judicial decision making processes that keep decisions consistent and based on legitimate interpretation of statutory law and precedent are eliminating the foundations of civil procedures and policies in our modern judicial system. These effects may not have been intentional or by design or even foreseeable, but as research has indicated there are other civil procedure methods that are explicitly

designed to conceal information that is of critical value to developing precedent and public policy issues that should remain in the public domain.

Recommendations

There are a number of policy changes that are worth considering to address the perceived negative effects that ADR has on the judicial system and the development of public policy standards and practices. Many authors of the articles and journal publications researched in this study make a wide array of recommendations to address these issues. They range from adding additional staff to courtrooms and improving attorney training and education to completely redesigning common law practices and procedures to protect public access to and control over information and precedent that develops in the course of addressing and resolving conflicts in our American judicial system. To many observers, there should be no option to suppress any information that comes out of a public policy institution like our justice system. To do anything other would be to betray the most fundamental goals of the justice system as it was designed.

1. Restrict the practice of vacatur when there is not judicial error that warrants vacating the earlier judgment. This practice is discriminatory and arbitrary in it benefit to a select group of predominantly wealthy litigants. Vacatur should be limited to defective judgments; litigants should not be given control over the system of precedent (Purcell, 1997, ref.026, p. 867).

Any judgment that results from a mediation or court ordered ADR has invoked and utilized a public policy process and owes the public a decision of fact and a logic

based assessment of the merits of the decision made in the dispute. There should not be an option to "negotiate" away issues of liability or responsibility at these stages. Agreements between the litigants to deny "liability and responsibility" in exchange for favorable settlements or extra monetary award should be disallowed by the courts. This practice circumvents the "product" of the judicial process that the litigants have already invoked when the motion of complaint was initially filed.

A duty is owed to the public benefit when that motion is made requesting intervention of the judicial system to resolve the dispute. This does not prevent parties from seeking a mediated or arbitrated solution of their own motivation. The fact that court ordered mediation or other ADR was necessary to provoke settlement discussions demonstrates the insincerity of the motives of the litigants to come to reasonable settlement of their own free will. The motion and complaint carries with it the threat of formal litigation somewhere down the road and litigants should not be perceived as "negotiating" a solution without consequence.

2. ADR should be limited to non federal public policy issues.

Federal statute issues should not be examined by anyone other than the judiciary and ADR is not an appropriate substitute for those strict processes that protect the public. ADR advocates should not be trying to look for or negotiate compromise on issues where the federal judiciary has stipulated clear distinctions between right and wrong. There can be no public policy benefit to that practice. If public policy requires that there be protections to prevent sexual harassment or racial discrimination in the workplace and

those protections are codified in state and federal statutes then ADR has no place trying to initiate a plan of mutual compromise between litigants on those issues.

3. A policy of consensual binding arbitration should have strict record keeping and precedent reporting responsibilities. All "binding" arbitration decisions should have recourse built into their contract language that allows for the enforcement of procedural fairness and due process.

The policy of binding arbitration should be eliminated where it seeks to address statutory claims. This becomes problematic as Edwards notes in his article in 1986 that, "hidden in many seemingly private disputes are often difficult issues of public law." (Edwards 2006, p.671).

4. Unpublished opinions should be allowable for reference and citation to decide future cases and precedential authority should be given to all opinions, whether published or unpublished. If a court has devised an opinion based on logic it should be able to be referred to in any subsequent decisions in the future. This is a fundamental way of guaranteeing consistency in decisions and should not be avoidable. Knowing an opinion may be referenced in the settlement of a future decision will motivate diligence and accountability within the judiciary.

REFERENCES

Abraham, Kenneth & Montgomery, J.W. III. (2003). The Lawlessness of arbitration, 9 *Connecticut Insurance Law Journal*, 355, 357.

Alderman, Richard, (2002). Consumer Arbitration: The Destruction of the common law, *Journal of American Arbitration*, Vol. 2, No. 1.

Blacks Law Dictionary. (1996). 3rd edition, West Publishing Company.

Cardozo, Benjamin N. (1947). *The Nature of the judicial process,* (1921), reprinted in *Selected writings of Benjamin Nathan Cardozo,* at 112.

Dictionary of Conflict Resolution. (1999). Douglas H. Yarn ed., 28, 33.

Donais, Blaine. (2006). *A Guide to conflict management in union and non-union work environments*. The Cartwright Group Ltd.

Drahozal, Christopher. (2007). Is Arbitration lawless? *Loyola of Los Angeles Law Review*, 40, 187.

Drahozal & Whittrock. (2008). Is There a flight from arbitration? *Hofstra Law Review*. 37, 71.

Employment Practice Liability. (2009). *Jury award trends and statistics*. Jury Verdict Research.

Edwards, Harry. (1986). Alternative dispute resolution: Panacea or anathema? *Harvard Law Review*, 99, 3. 1.

Hinderks, Mark D. & Leben, Steve A. (1992). Restoring the common in the law: A Proposal for the elimination of rules prohibiting the citation of unpublished decisions in Kansas and the Tenth Circuit, *Washburn Law Journal*, 31, 155, 170.

Knapp, Charles. (2002). Taking contract private: The Quiet revolution in contract law, *Fordham Law Review, 71*, 761.

Kronstein, Heinreich, (1944). Business arbitration – Instrument of private government, *Yale Law Journal*, 54, 36, 66.

Kronstein, Heinreich. (1963). Arbitration is power, *New York University Law Review*, 38. 661, 669-700.

Landsman, Stephan. (2005). ADR and the cost of compulsion, *Stanford Law Review*, 57, 1593, 1619.

Lewin, David and Peterson, Richard. (1998). *The Modern grievance procedure in the American economy*, New York Quorum Books.

Leroy & Feuille. (2008). Happily never after: When final and binding arbitration has no fairy tale ending, *Harvard Negotiation Law Review*, 13, 167.

Marshall, Pam. (1998). Would ADR have saved Romeo and Juliet? O*sgoode Hall Law Journal*, 36, 4.

Moohr, Geraldine. (1999). Arbitration and the Ggoals of employment discrimination law, *Washington and Lee Law Review*, 56, 395, 435 (1999)

Nader, Laura. (1993). Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology. *Ohio State Journal on Dispute Resolution*, 9, 29.

Redish, Martin, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, Stanford Law Review Symposium, (2005)

Refo, Patricia Lee. (2004). The Vanishing trial, *Journal of Empirical Legal Study*, 1, 1.

Samborn, Hope Viner. (2002). The Vanishing trial, *American Bar Association Journal*, 9, 1.

Tyre, Mary Rebecca. (2001). Arbitration: An Employers right to steal Title VII claims, *Alabama Law Review*, 52, 4, 1359.

Ward, Ettie. (2007). Mandatory court-annexed alternative dispute resolution in the United States federal courts: Panacea or pandemic? *St. Johns Law Review*, 81, 77.

Cases Cited:

Alexander V. Gardner-Denver Co., 415 U.S. 36 (1974).

General Drivers, Warehousemen & Helpers, Local Union No 89 v Riss & Co., Inc. 372 U.S. 517; 83S Ct 789; 9 L Ed 2d 918 (1963).

Gilmer v. Interstate / Johnson Lane Corporation, 500 U.S. 20 (1991).

Hines v Anchor Motor Freight, Inc., 424 U.S. 554; 96 S Ct 1048; 47 L Ed 2d 231 (1976).

Montgomery v. Board of Trustees of Purdue University, 849 N.E.2d 1120, 1130 (Ind. 2006, citing Ind. Code 22-9-1-2, -1-3 (2004).

Neary v. Regents of University of California, 834 P.2d 119, 127 (Cal. 1992).

Renny V. Port Huron Hospital (427 Mich. 415, 398 N.W.2d 327, 105 (1987).

Tony v. Elkhart County, 851 N.E.2d 1032, 1035, Ind. Ct. App. 2006.

United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

VITA

Douglas E. Ashman
2704 Soldiers Home Road
West Lafayette, IN
deashman@hotmail.com

Academic Credentials

M.S.	Technology (Employment Law and Labor Relations)	Dec. 2011
A.S.	Ivy Tech (Legal Studies)	Dec. 2011
B.S.	Organizational Leadership and Supervision	Dec. 2002
A.S.	Technology	Aug.1997

Teaching/Academic Experience

2006 Primary Instructor – School of Technology – Applied Leadership
2005 Primary Instructor – School of Technology – Human Behavior in Organizations
2005 Graduate Student Teacher Certification from Center for Instructional Excellence, Purdue University
2004 Teaching assistant – School of Technology – Training Methods

Professional/Industry Experience

Production Supervisor
Gannett Inc. (Journal and Courier) August 2007 – June 2011

- Managed all aspects of newly constructed high tech print production facility.
- Prioritized and managed multi-state wide print production schedule.
- Trained and supervised staff to meet and exceed production goals.
- Promoted and monitored measurable quality control processes to meet precise corporate standards.

Production Director
Journal Review February 2006 – August 2007

- Managed all facets of the production area of The Journal Review Newspaper.
- Interviewed, hired, establish performance goals and trained production personnel.
- Coordinated pre-press and production areas to meet strict production deadlines.
- Established measurable quality, productivity and waste reduction standards.
- Continually assessed production methods and implemented improvements in total quality, productivity and safety.
- Researched and made recommendations to management to bring production facility into compliance with OSHA and state regulations.

Pressroom Operator
Purdue University Exponent: August 2001 – February 2006

- Trained and supervised part time student employees in operation of machinery and presses in the newspaper production facility.

- Formalized training procedures to assess effectiveness.
- Operated production machinery to meet daily production and quality goals.
- Installed and upgraded industrial printing presses to improve production capacity and quality.

Professional Development

2011 Seminar on Labor-Management Relations,
Indiana University School of Law,
Indianapolis, Indiana

2011 Indiana Labor and Employment Law Update Conference,
Indianapolis, Indiana

2010 Indiana Labor and Employment Law Developments Conference,
Indianapolis, Indiana

2009 New FMLA Regulations and ADA Amendments Act Seminar,
Hall, Render & Killian,
Indianapolis, Indiana

2009 Litigation Damages: Current Trends and Strategies Conference
National Business Institute,
Indianapolis, Indiana

2009 Litigation Tactics and Strategies Seminar
National Business Institute
Indianapolis, Indiana

2005 Graduate Student Teacher Certification from Center for Instructional Excellence, Purdue University