

# REDUCING THE COST AND INCREASING THE EFFICIENCY OF RESOLVING COMMERCIAL DISPUTES

*John S. Kiernan*<sup>†</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	188
I. CURRENT MAJOR IMPEDIMENTS TO ACHIEVING GREATER EFFICIENCY IN RESOLVING DISPUTES.....	192
A. <i>Defining Efficiency and Waste</i> .....	192
B. <i>Major Sources of Inefficiency and Waste in Obtaining Decisions</i> .....	194
1. Fealty to Discovery, and the Unaffordability of Obtaining Decisions on the Merits .....	194
2. The Difficulty of Obtaining Early Resolutions .....	196
3. Impediments to Clients' Focus on Efficiency .....	198
4. Impediments to Advocates' Focus on Efficiency .....	200
5. Consequences of Impediments to Focus on Efficiency .....	203
II. REDUCING COSTS AND IMPROVING EFFICIENCY .....	204
A. <i>Roles for Parties and Their Counsel in Reducing Costs and Delays</i> .....	204
1. Voluntary Bilateral Agreements to Reduce Inefficiency .....	204
a. Pre-Dispute Agreements .....	205

---

<sup>†</sup> Partner, Debevoise & Plimpton LLP, New York City; President, New York City Bar Association, 2016–18; Chair, New York State Chief Judge's Advisory Committee on ADR. This Essay has benefitted from a broad range of thoughtful contributions by members of the New York City Bar Association's President's Committee for the Efficient Resolution of Disputes (Daniel F. Kolb and Erin Gleason Alvarez, co-chairs); members of other City Bar Association committees who have engaged on the subject of reducing the cost and increasing the efficiency of dispute resolution, and numerous judges, court administrators, clients, advocates, neutrals, and other interested observers who have generously committed time and energy to interviews, meetings, convenings, and generation of written reports. The City Bar's efforts have resulted in a Report dated June 2018 that includes a statement of Best Practices for the Efficient and Cost-Effective Resolution of Civil Litigation in New York (City Bar Statement) that advances concepts highly consistent with this essay. *See generally* N.Y.C. BAR ASS'N, REPORT AND RECOMMENDATIONS BY THE PRESIDENT'S COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES (June 2018), [http://s3.amazonaws.com/documents.nycbar.org/files/PresCom\\_Efficient\\_Dispute\\_Resolution\\_6.27.18.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/PresCom_Efficient_Dispute_Resolution_6.27.18.pdf) [<https://perma.cc/6CVH-2PLB>]. This Essay has also benefitted from longtime involvement with the very thoughtful and forward-looking work of the International Institute for Conflict Prevention and Resolution (CPR), including as a board member and as Board Chair. The views expressed in this Essay, though, are solely the author's.

b. The Negotiation/Mediation Component of Pre-Dispute Efforts .....	206
2. Agreements for Arbitration or ADR Mechanisms .....	209
a. ADR in the Absence of Pre-Dispute Agreements.....	212
3. Increasing Focus on the Management of Economic Risk.....	213
B. <i>Courts' Role in Reducing Costs and Delays</i> .....	216
1. Court-Sponsored Mediation, Settlement Negotiations, and Other ADR Options .....	216
a. Current Court-Sponsored Programs .....	217
b. Thinking About Further Court-Sponsored Programs ....	219
2. Courts' Role in Advancing More Efficient Litigation to Decisions.....	222
3. Case Management and Proportionality.....	223
a. Efficiency Goals and Access to Justice Principles in Case Management .....	223
b. An Expansive View of the Pursuit of Proportionality.....	225
C. <i>Making Litigation More Efficient by Making Decisions Earlier</i> .....	227
CONCLUSION.....	231

## INTRODUCTION

Among the central participants in commercial disputes—individuals or enterprises that become litigants, advocates, judges, court administrators, and the neutrals who are sometimes called in to help the parties negotiate resolutions—a near-consensus exists that resolving disputes generally costs too much and takes too long.<sup>1</sup>

This is not a new notion—Roscoe Pound decried the excessive costs and delays of litigation as central problems in 1906.<sup>2</sup> And, without some calibrating mechanism, the mere observation that it would be better to resolve disputes less expensively and more quickly carries no greater insight than the observation that it would be better if lines at airports or theatres were shorter. But the most thoughtful current critics of the process are not merely communicating irritation from unavoidable processing costs associated with resolution of complicated disputes. Instead, they are raising important issues of access to justice and fair service to the people and entities engaged in disputes.

---

<sup>1</sup> This Essay focuses primarily on commercial disputes, as a significant subset of civil disputes, recognizing that some other categories of civil disputes are litigated in New York courts so overburdened by the sheer number of matters that they present different, important volume-management issues beyond this Essay's scope. But many of the issues and suggestions presented here are intended to have application in those other contexts too.

<sup>2</sup> See generally Roscoe Pound, *Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906) (cited by Michael L. Buenger, *Do We Have 18th Century Courts for the 21st Century?*, 100 KY. L.J. 833, 843 n.59 (2011)).

Those issues arise primarily because, apart from the outlier realms of small claims court (where the processes of dispute resolution are usually calibrated to take account of the limited amount in controversy) and disputes involving enormous sums or defining principles (where parties would often love to see faster and less expensive resolutions, but the time and cost of litigation are ultimately of secondary importance given the scale of what is at stake), the vast majority of disputes exist in a range of controversy that makes litigating to a decision unaffordable as a practical matter (unless a party can persuade the judge to grant a motion seeking early summary disposition of the dispute). When even parties plainly entitled to prevail are unable to obtain victories without spending such a large portion of the disputed amount over such a long period that the pursuit becomes unaffordable, the settlements that follow tend to be governed too much by cost and differentials in ability to tolerate further litigation and not enough by the relative merits of the parties' positions. This reality impedes the quality of justice.

Similarly, when habits or cultures regarding approaches to dispute resolution prevent parties from engaging in the possibility of a negotiated or mediated resolution early in disputes, so that settlements get negotiated only after expenditures of substantial litigation costs that could otherwise have been spent to bridge the gaps between the parties and create a surplus for both, that reality also implicates concerns about effectiveness in dispute resolution.

This Essay—drawing on inputs from sophisticated and experienced clients, judges, court administrators, advocates, and neutrals, from observations by Judge Victor Marrero in his important 2016 Article on this subject in this journal,<sup>3</sup> and from comments made in panel discussions at a related Symposium sponsored by Cardozo Law School on April 3, 2017<sup>4</sup>—tries to consider how serious the problem of processes that cost too much and take too long appears to be, and to identify reasons why resolution of commercial disputes continues to cost too much and take too long even when participants in the process assertedly recognize the value of, and consistently say they would prefer, less expensive and faster resolutions. It also tries to identify and critique cross-currents in rules, practices, and personal culture of the relevant players and institutions that may muddy efforts to resolve disputes less expensively and more quickly. It further suggests that while participants in litigation have increased their focus over the years on improving the efficiency of dispute resolution with identifiable examples of significant improvement, accelerated evolution of rules, best practices, and cultures could and should improve much further both the process of achieving

---

<sup>3</sup> Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599 (2016) [hereinafter Marrero].

<sup>4</sup> See Symposium, *Panel Transcript: Controlling the High Cost of Justice: Perspectives from the Federal Judiciary*, 40 CARDOZO L. REV. 271 (2018) [hereinafter Symposium].

decisions and the process of advancing disputes to negotiated resolutions in ways that reduce waste and improve the administration of justice.

The primary answer to the challenge of how to achieve decisions or settlements in disputes at lower cost and more quickly is that those goals can be achieved if participants in the process truly embrace reduced cost and greater speed of resolution as a value that is important to fair administration of justice and effective service of disputing parties' interests.

For advocates and clients, that means:

- (1) rigorously engaging, early in disputes, in objectively evaluating the strengths and weaknesses of each party's position, the probabilities of different ultimate outcomes, the expected courses and costs of litigation, and the possibility and potential range of early-negotiated or -mediated resolution;
- (2) considering, from the outset, how to pursue a faster and less expensive decision, including by calibrating the scope of work needed before seeking a court decision with the aim of making pursuit of the decision affordable given the scale of what is at stake, and by engaging both internally and with adversaries to seek creative ways to resolve portions of the dispute quickly and efficiently and to streamline discovery and other litigation processes;
- (3) aggressively seeking to overcome barriers rooted in conventional litigation practices to streamline litigation processes and pursue settlements at earlier stages, resisting the instinct to reflexively oppose any adversary's proposal of an approach to achieving greater efficiency, avoiding performance of unneeded work and imposition of unneeded work on adversaries, and energetically enlisting courts in preventing conduct by opposing counsel that will impose undue burden or delay; and
- (4) pursuing effective mechanisms to get cases settled efficiently and, when possible, earlier.

For courts, this may mean different courses of action based on the degree to which the court is swamped with too many matters (or individual judges are already employing multiple streamlining methods, as the judges who participated in the Symposium are well known for doing), but could include:

- (1) pressing the parties to streamline processes (including, but extending beyond, the powerful but blunt mechanism of setting short deadlines and early trial dates) and not limiting streamlining efforts to whatever both parties can agree on;
- (2) enforcing concepts of proportionality for the entire dispute, not just discovery, and thereby managing adaptation of the scale of permitted processes before a decision to the dispute's scale;

- (3) reaching out to decide central conceptual issues as early and broadly as possible (even if pleading or factual issues prevent complete resolution of the dispute) and internalizing more intensely the costs of delaying decisions for the purpose of letting the dispute ripen further (particularly when a trial that will resolve all factual disputes seems unlikely, so that a delayed decision means the party entitled to prevail will settle without the benefit of any judicial input into the merits);
- (4) pursuing creative approaches to more efficient resolution of identified pivotal factual issues without the comprehensive discovery and trials that the parties usually cannot afford; and
- (5) effectively employing the power to urge or compel parties to mediate or negotiate at the earliest times when settlement seems like a potentially promising route.

The notion of taking disciplined steps to pursue these outcomes should not be controversial. Most clients, both plaintiffs and defendants, want their disputes resolved—whether through decisions or through settlements—less expensively and more quickly. Courts uniformly aspire to operate under the principles set forth in Rule 1 of the Federal Rules of Civil Procedure and New York C.P.L.R. § 104, which use the identical three adjectives in providing the essential tone-setting message that all procedural rules are to be “construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive* determination of every action and proceeding.”<sup>5</sup> Advocates should be driven by the goal of achieving cost-effective results for their clients, and should recognize that doing so will provide substantial professional return.

But achievement of reduction in the cost and duration of litigation will require continued evolution in thinking on multiple fronts. It will require all participants to deplore the consequences of delaying performance of their roles. And to believe that any access to some justice issues, presented by significantly simplifying the process before reaching a decision or engaging in efforts to settle much earlier, can only be evaluated fairly by counterbalancing them against the access to other justice issues, presented by letting achievement of a decision remain unaffordable or by wasting potential settlement dollars on unneeded litigation costs.

---

<sup>5</sup> FED. R. CIV. P. 1 (emphases added); *see also* N.Y. C.P.L.R. 104 (McKinney 2018).

I. CURRENT MAJOR IMPEDIMENTS TO ACHIEVING GREATER  
EFFICIENCY IN RESOLVING DISPUTES

A. *Defining Efficiency and Waste*

Analysis of how to achieve greater efficiency in dispute resolution should start with a candid recognition that different participants in the process operate under different definitions of efficiency, which may cause them to view different courses of action as most efficient. Participants all agree that efficiency necessarily implicates the achievement of fair resolutions at the lowest practicable cost and on the fastest achievable timetable, but incentives for pursuing that form of efficiency are often not fully aligned for all participants.

Courts, for example, operate under a wide range of caseload burdens but almost uniformly share the appropriate institutional understanding that extra allocations of time and energy to any individual dispute have implications for their ability to manage their overall dockets as effectively as possible. The responsibility to attend to the docket in its totality necessarily directs the judicial definition of efficiency to focus on ways the court can manage the largest number of matters to resolution per unit of judicial time expended, without excessive delay that amounts by itself to a denial of justice. No matter how much judges are inclined toward taking the time needed to decide individual disputes, they often recognize that effective administration of their dockets requires that the majority of disputes before them be resolved through mediated or negotiated settlement.

Under a categorical definition of judicial efficiency, a court's handling of a dispute by denying all dispositive motions without opinion, setting and enforcing short discovery deadlines, pressing the parties to resolve their discovery and case management disputes without involving the court, setting the case for early trial, and ultimately dismissing the case following a settlement is arguably the model of judicial efficiency. It permits the parties to learn what they need to learn about each other's conduct through discovery, and from there to make informed assessments of their positions' risk-discounted value and to choose between negotiating to close valuation gaps or pursuing a trial, all without consuming limited judicial time and resources.

While this common, general process of case management promotes judicial efficiency, it can also impede the fair administration of justice. As U.S. District Judge Richard M. Berman recognized in the Symposium's discussion of efficiency, a judge's first orientation should be, and generally is, to decide disputes.<sup>6</sup> That is the essence of providing

---

<sup>6</sup> Symposium, *supra* note 4, at 282 ("Most often, it is my opinion that the person will get the best shake—a fair shake in the courts and this also has the added advantage of being

justice. Achievement of a fairly-reached favorable decision on the merits also is often the first goal of at least one party to the dispute, and sometimes both.

Case management processes, in which judges supervise the process but postpone or decline to make decisions on the merits, are rarely the fastest and least costly mechanism for achieving a final judgment from the parties' perspectives. Judges carry the burden of needing to reconcile the efficiency goals of optimal docket management with the sometimes competing efficiency goals of helping individual parties get to a decision more quickly and at less cost by devoting early extra energies to deciding the dispute.

Plaintiffs and defendants, by contrast, seem more likely to define efficiency by reference to achieving the best possible resolutions—whether by court decision or by mediated or negotiated settlement—through the least expensive and fastest process possible. But parties are often governed by institutional or personal concerns that can obscure their focus on achieving optimal efficiency in individual disputes. They also can have understandable difficulty measuring the trade-offs between particular expenditures of litigation costs and the expected effects of those incremental expenditures on the ultimate result.

Parties often resolve doubts in these circumstances in favor of pursuing more rather than less litigation. The same is true for the advocates they hire. Observers of advocates often worry that advocates allow the particular economic incentives associated with their modes of compensation to interfere with single-minded focus on achievement of their clients' definitions of the most-efficient, achievable result. Or that they may litigate more than necessary based on training that has instilled in them a reflexive belief that extra work is a central ingredient for achieving better outcomes for their clients.<sup>7</sup>

Even with all these difficulties in identifying what constitutes sought-for efficiency for general purposes, it seems indisputable that the dispute resolution process should be managed to the extent possible to avoid needless waste in either the pursuit of decisions on the merits or the pursuit of negotiated outcomes. One form of waste that implicates both efficiency and access to justice occurs whenever a dispute that is fairly susceptible to a streamlined decision on the merits is litigated or managed so that the decision is achievable only after far more extensive litigation than necessary. The consequence of this form of waste tends to be that the party entitled to win either has to pay too much to achieve that win or, far more often, is unable to afford the cost of litigating to a win and settles on terms significantly affected by the cost of litigation rather than based on the claim's merits. As a general proposition,

---

everybody's constitutional right.”).

<sup>7</sup> See, e.g., Marrero, *supra* note 3, at 1671–73.

settlements affected more by differing levels of ability to tolerate the cost of litigation to a decision than by the relative merits of the parties' positions present access to justice issues worth examining.

Similarly, in the context of a negotiated resolution rather than a decision on the merits, waste self-evidently has occurred if the parties reach a settlement only after expending such extensive litigation costs that the net cost of the settlement, including litigation costs, is higher than it would have been if the parties had disciplined themselves to settle earlier. Even if the net cost for one party ends up lower as a result of delaying settlement, a higher aggregate net cost to the parties usually means they could more efficiently have settled earlier with a different allocation of the resulting surplus associated with avoided tangible and intangible litigation costs.

B. *Major Sources of Inefficiency and Waste in Obtaining Decisions*

1. Fealty to Discovery, and the Unaffordability of Obtaining Decisions on the Merits

Since at least the 1930s, the American justice system has primarily looked to discovery as the pivotal mechanism for largely self-executing resolution of litigation disputes, often without the need for judges to engage on the merits. Rights of access to discovery have been defined and applied broadly, in the apparent belief that discovery provides an optimal route to the truth, with doubts about proper scope of discovery often reflexively resolved by determinations that a party ordinarily would not take the trouble to seek particular information without some cognizable reasons for wanting it. State and federal procedural rules governing early dispositive motions have generally been applied strictly to make early resolution of disputes difficult to achieve, in the belief that parties should have full opportunities to develop their claims and defenses.

In a dispute-resolution process structured in this way, settlement is—or should be—the naturally expected outcome. Once the parties have had full opportunity to develop and learn each other's positions, a good faith effort by each side to identify the objective risk-discounted value of the case should narrow the gap between the parties sufficiently to permit effective settlement negotiations. That assessment gap tends naturally to be susceptible to closure because of most parties' desire to avoid the costs of trial, distaste for the litigation process and its protracted adversarial demands on personal and institutional resources, mistrust of juries, and aversion to the risk of complete defeat.<sup>8</sup>

---

<sup>8</sup> See generally Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation*

A system like this also tends to consign trials to exceptionality. Trials impose an expensive demand on both private and public resources. If the process of developing the case functions as designed, trials seem fated to take place almost exclusively on rare occasions such as when a party feels essentially certain that only its position has any prospect of success and it can afford to test that conviction by paying the substantial costs of pursuing the dispute to a final judgment. Or when the best achievable settlement would be so utterly contrary to a party's doctrinal convictions or an institution's politics that only a final judgment can provide the needed resolution. Thus, in our current civil justice system, trials take place in only a miniscule percentage of cases.<sup>9</sup>

Judges operating under these realities often recognize that their role will be (1) to address whether the dispute can be resolved by a decision accepting or rejecting the parties' legal theories of liability or non-liability on a motion to dismiss, for judgment on the pleadings, or for summary judgment; and, if the answer is no, (2) to manage the required dance of discovery and contention before a trial can be scheduled and settlement talks motivated by the upcoming trial date can proceed. Judges presented with an early dispositive motion often see that generating a definitive ruling on the motion will require them to allocate substantial quantities of limited judicial resources to working through often unwieldy submissions, constrained by rules prohibiting early resolution of disputed facts, and to suppress the natural instinct to want to know the fullest possible version of the story before announcing an important decision subject to appeal.

While all these dynamics reflect understandable and well-intentioned approaches to the resolution of disputes, they have generally resulted in an institutional outcome that nobody can rightly consider satisfactory: the vast majority of disputes take place in a context where the parties simply cannot afford to litigate to an actual decision declaring which party is entitled to prevail.

For these disputes, both parties know (or should know), from early on, that litigating the dispute to final judgment will probably involve spending way too large a fraction of the amount in controversy to be workable economically. Unless one of the parties can persuade a judge to dispose of the case summarily, or unless the judge provides substantive inputs on the merits in rejecting a dispositive motion in ways that help the parties negotiate a resolution, parties will usually end up resolving their disputes privately after spending substantial legal

---

*Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 111–18 (1994).

<sup>9</sup> See, e.g., Hon. Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. BOOKS (Nov. 24, 2016), <https://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court> [<https://perma.cc/P78L-TVN5>] (reporting that “whereas in 1938 about 19 percent of all federal civil cases went to trial, by 1962 that rate had declined to 11.5 percent and by 2015 it had declined to an abysmal 1.1 percent”).

costs but not receiving any consequential judicial insight into the merits.

In this extremely common context, the dispute's regular course involves an exchange of accusations and denials, one or more rejected (or never decided) dispositive motions, at least the commencement of a period of expensive discovery, the setting of a trial date, and ultimately a settlement rather than a judgment. While the merits of the claims and discovery revelations play a role in refining the boundaries of settlement discussions, settlement terms will often be affected at least as strongly by the cost of litigating to an actual substantive decision and the parties' different levels of tolerance for the unaffordability of that cost as by the fair merits of the parties' positions.

The importance of providing a route for parties to obtain decisions affordably, even when their disputes do not involve enormous sums or life-defining principles, warrants more thinking about how to streamline dispute resolution.

## 2. The Difficulty of Obtaining Early Resolutions

Statistics regarding early resolutions of disputes tend to confirm the difficulty of obtaining an early case-ending decision from the court in most civil cases. As Judge Marrero observed, parties present dispositive motions in the overwhelming majority of cases, but a staggering 45% of all motions to dismiss and 30% of motions for summary judgment filed in federal courts are never acted upon by the court—sometimes because the judge simply chooses not to decide them, and sometimes because the parties settle before the motions are decided.<sup>10</sup> Of those for which a decision is announced, movants obtain complete relief in only about 25–35% of federal court motions to dismiss and 30–35% of summary judgment motions.<sup>11</sup> After that, the statistics confirm, the parties ultimately settle in all but an insubstantial percentage of cases, leaving only an occasional civil matter for trial. While Judge Marrero has suggested that the relatively low success rate of dispositive motions confirms a wasteful practice (said to reflect counsels' economic motivation to increase legal fees) of parties' filing motions that have no prospects of success,<sup>12</sup> an alternative explanation apart from assuming negligent wastefulness by greedy attorneys who are over-litigating or padding their workloads may account for at least part of the phenomenon.

As a practical matter, advocates often bring dispositive motions (on behalf of both plaintiffs and defendants) because they believe such motions represent their only genuine prospect for eliciting a judge's

---

<sup>10</sup> Marrero, *supra* note 3, at 1641.

<sup>11</sup> *Id.* at 1653 & n.110, 1665 & n.129, 1667 & n.131.

<sup>12</sup> *Id.* at 1636–37, 1669–70.

engagement in support of their clients' position in the dispute. They proceed with such motions, while recognizing the challenging procedural hurdles to winning, because a win seems sufficiently valuable to be worth pursuing if there is any reasonable prospect of prevailing, and because even if they do not win—for example, because the opposing party identifies factual issues requiring trial—the judge may provide observations about the claims' legal merits that support their clients' positions and thereby enhance their settlement prospects. Because the combination of legal costs and risk aversion will probably make trial unavailable as a mechanism for establishing the correctness of their clients' position—as the extremely low trial statistics indicate is overwhelmingly the case—those lawyers are often correct that dispositive motions represent their only genuine prospect for obtaining any kind of judicial weigh-in on the merits of the dispute.

That weigh-in can be highly imperfect, of course, given the court's obligations regarding assumptions about disputed facts. But, as the percentages identified by Judge Marrero tend to confirm, sometimes these motions win cases (or help define the merits in ways that alter settlement discussions in directions favorable to the fair administration of justice). While lawyers motivated by hope for a summary victory often end up filing unsustainable motions that can be a significant impediment to cost-effective and rapid resolution, some percentage of these motions, substantially larger than the percentage that prevail, probably constitute reasonable strategic efforts. Early motions represent the best hope for avoiding the undesirable alternative of litigating without court guidance until some combination of the maturation of the dispute, battle fatigue, and the imminence of a trial drives the parties to a settlement.

Even judges who have strong instincts about whether essentially undisputed conduct constitutes a legally cognizable wrong often persuade themselves that the case should ripen before they express firm views on the central legal or conceptual issues being presented. Judges also openly worry, often with good reason, that exercising even strong instincts through an early decision is an invitation to an appellate reversal that could be embarrassing, cost the parties substantial legal fees, and hugely delay the dispute's ultimate resolution. That sensibility, combined with recognition that writing a decision disposing of a case takes substantial time otherwise usable to process multiple other disputes, often leads to postponement of a decision until a later date.

But such postponements usually are not truly postponements. As the statistics confirm, nearly all such postponements of decisions do not lead to a better-informed later decision, but instead to a settlement uninfluenced by any judicial input into the dispute's conceptual merits, reflecting a significantly less favorable outcome for the party in whose favor the judge would have ruled if required to rule on the merits.

Sometimes a court will reach out to address a dispute's central legal or conceptual questions even if it cannot resolve the entire case in light of disputes over potentially pivotal facts. These partial decisions can readily increase the degree to which settlement terms are affected by the merits of the parties' positions—and can significantly neutralize the impact on settlement terms of factors unrelated to the merits, such as the parties' different levels of capacity to afford litigating to a final resolution. Some courts even supplement decisions addressing the governing legal concepts and principles by proposing streamlined procedures to resolve, on an accelerated basis, any fact questions that seem to impede a complete resolution. When courts take these steps, the result is improved administration of justice.<sup>13</sup>

### 3. Impediments to Clients' Focus on Efficiency

Wholly apart from the challenges presented by court rules and accepted litigation procedures, disputes often activate crosscurrents of institutional or cultural sensibilities for clients that can prevent them from focusing effectively on achieving resolution at the minimal achievable cost and delay. These dynamics often begin with the filing of a complaint without substantial prior discussions between the parties about the nature and merits of the claims and defenses or about whether the dispute can be resolved without litigation. In such circumstances, litigation before a court often looks like the only readily available means for resolving the dispute.

Parties' initial approach to a dispute often features anger rather than dispassionate commercial analysis. Plaintiffs' conviction that they have been wronged, and defendants' unhappiness at being sued and instincts to protect individuals whose actions and judgments the plaintiff has attacked, can affect initial strategies, including the dynamics of the decision to hire litigation counsel. Advocates trying to get retained regularly perceive that prospective clients will be significantly influenced in hiring decisions by impressions about which competing lawyer seems to offer the most aggressive strategic roadmap for winning the dispute and claims the best prospects for success. Although retention practices have become much more sophisticated in recent years, it is still remarkably common for clients to be influenced by heady

---

<sup>13</sup> An interesting and potentially significant development along these lines is the very recent promulgation of a new Rule 9(a) to the New York Commercial Division Rules, Section 202.70(g) of the Uniform Rules for the Supreme Court and County Court, effective October 1, 2018, explicitly encouraging parties to demonstrate to the Court that a pre-trial evidentiary hearing or mini-trial (with or without targeted expedited discovery) "may be particularly useful in disposition of a material part of a case." Administrative Order of the Chief Administrative Judge of the Courts, AO/243/18 (July 25, 2018), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-08/AO-243-18-ImmediateTrial.pdf> [<https://perma.cc/Y9M6-9FN5>].

predictions of victory and not to ask litigators for an early, objective, dispassionate, and well-informed analysis of the claims' strengths and weaknesses, the prospects for the different possible paths of the dispute, probabilities for ultimate success, and the viability of seeking an early settlement, mediation, or other alternative dispute resolution (ADR) procedure. Often, the avoidance of that initial analysis is purposeful because the client wants to focus single-mindedly on pursuing victory or defending conduct under attack rather than considering a negotiated resolution that feels like a partial capitulation or admission of wrongdoing. Advocates also often do not volunteer such analyses, sensing (sometimes correctly) a strong initial need to demonstrate aggressiveness and categorical support for the client's position to get themselves hired or to earn the client's trust.

These institutional and personal dynamics can interfere with treating clients' first priority as achieving the lowest cost and fastest resolution of a dispute. Time sometimes needs to pass before clients seem ready to absorb and act on, and advocates feel ready to provide, dispassionate cost-benefit analysis of the claims and the most efficient strategies for pursuing or resolving them.

Clients' early assessments about whether and how to pursue negotiated resolution of disputes are also frequently affected by one or more of four commonly held views about the litigation process generally: (1) litigation is war as to which the principal goal is to win, and any possible compromise should be considered only after exhausting efforts to win; (2) infliction of some of the pain, cost, and unpleasantness of litigation on the adversary (and, sometimes, experiencing some of that pain and expense as a party) is an essential cathartic precursor to achieving acceptable settlement terms; (3) the client needs to convey through its litigation style a message to others in a generally attentive marketplace that litigation against this client will be particularly costly and unpleasant; and (4) the first party to suggest streamlining of dispute resolution processes or discussion of settlement signals weakness that may stimulate the adversary to redouble the imposition of burdens, and that will likely carry a material cost to its ultimate outcome in any negotiated resolution. These views are sufficiently robust as impediments to early settlement to warrant considering with greater rigor whether the benefits of being guided by them outweigh the costs.

Some clients also admit that their own institutions and executives need time to absorb the experience of a litigation before becoming able to think about compromising to resolve it. Even if provided opportunities for accelerated and comparatively inexpensive ADR processes to reach a quick definitive result, or options to negotiate an early settlement, they sometimes balk. Many decision-makers, with full business agendas and schedules, also have a natural inclination not to

prioritize the kind of intense and often unpleasant concentration of effort that can be necessary to achieve a fast adjudication or settlement. This reaction is understandable, and sometimes unavoidable, but almost never efficient.

#### 4. Impediments to Advocates' Focus on Efficiency

Many advocates begin considering the possibility of settling commercial disputes long before their first discussions of the subject with their clients, even while focusing primary energies on learning their cases, gaining the client's trust, and developing strategies for achieving outright wins. Litigators' experience with seeing settlements of even the most adversarial disputes, and detachment from some of the personal reasons why compromise feels intolerable to their clients, sometimes means they need to travel a shorter psychic distance than their clients to contemplate the possibility of an outcome other than final victory after a trial.

Most litigators also believe that they can sufficiently manage their emotions to be able to proceed simultaneously as effective, zealous advocates for their clients' position and effective, objective, and balanced analysts of their positions' strengths and weaknesses. Clients do not always share this belief about their litigators' capabilities.

While many counsel (particularly but not exclusively plaintiffs' counsel) express the view that they cannot responsibly settle a dispute until they have learned or confirmed certain pivotal facts in discovery, experienced counsel for both plaintiffs and defendants often say after extensive discovery and litigation that their initial assessments of the client's prospects remain essentially unchanged. Discovery (and particularly extensive discovery) is not always necessary to ready a case for effective settlement discussions. Clients with extensive litigation experience often say, by contrast, that their litigators too often express much more confidence in their prospects for success early in a dispute, and less confidence as trial approaches. Some suggest that this deterioration in assessment of probabilities is sufficiently predictable that canny clients build assumptions about it into their internal evaluations.

Even advocates who consider themselves more open to early consideration of settlement than their clients nevertheless often operate under, and need to overcome, their own collection of impediments to focusing on the most efficient possible resolution of their clients' disputes. These include: (1) the desire to display their aggressiveness and relentlessness to their clients and adversaries; (2) the tendency to become caught up in the fight and embrace the adversarial process; (3) the urge to develop advantages in the litigation by knowing the case

better than the adversary; (4) the ambition to reach and prevail at a trial; (5) the susceptibility to develop excessive affection for their client's position and excessive disrespect for the adversary's position; (6) the strategic embrace of the prejudices against initiating suggestions of early settlement identified above; and sometimes (depending on the compensation arrangement) (7) the intentional or unintentional propensity to be influenced in making litigation decisions by personal economic considerations.

Strategic and personal economic considerations can push counsel in a wide range of directions. In the context of a plaintiff represented by a contingency fee lawyer and suing a deeper-pocketed defendant, for example, the plaintiff and counsel will have an aligned interest in avoiding wasteful steps, but their economic definitions of efficiency will not be the same. As a strictly economic matter, putting aside all the broader interests in professionalism and personal character that govern most good lawyers' conduct, a contingency lawyer's definition of efficiency will focus on return per hour of work by the lawyer. For example, the purely economic analysis of whether to settle a dispute or expend much more effort to try it for a somewhat higher risk-discounted prospect of success can be extremely different for a contingency fee lawyer (who will have to shoulder not only the risk but also the enormous costs of trial) and the client (who does not need to pay any trial costs).

Seasoned plaintiff's counsel may also adapt sensibilities about efficiency to the recognized rhythms of advancing a plaintiff's claim (and particularly, the effort to weather dispositive defense motions and establish that defendants cannot prevail without litigating through discovery and winning at trial). Even though—and in some respects because—defendants often believe the plaintiff is less well-resourced for a long and demanding litigation than the defendant, plaintiffs' advocates frequently try to avoid any appearance of efforts at streamlining, pursue particularly broad discovery (which may increase burdens on the defendant), and make a strong showing of willingness to press the claim through trial. Interests in efficiency often yield to these perceived strategic and posturing imperatives.

Defense lawyers can also be affected by strategic and personal economic priorities that interfere with focus on efficiency. Many participants in disputes believe, for example, that billing by the hour systematically incentivizes lawyers (and especially defense lawyers) to spend more time than is needed to ripen their cases for decision or settlement. The consensus that this phenomenon exists is strong and seems consistent with the consensus that litigation generally costs too much and takes too long.<sup>14</sup>

---

<sup>14</sup> Judge Marrero and other judges at the Symposium have similarly suggested that a

Before categorical acceptance of the view that padding of work by hourly billers is a central contributor to excessive cost and time, though, it seems worth identifying some of the counterevidence, even beyond the general observation that most lawyers are ethical people and that tailoring the work performed in a representation to generate larger bills than single-minded focus on the client's interests would yield is obviously and egregiously unethical. Many, if not most, hourly billers, like contingency fee lawyers, believe that their goal in handling any individual dispute is not to maximize their income from that representation but to help guide the client to the best possible result for the least practicable cost. From this perspective, many advocates view each representation as substantially an audition for the next retention and believe their integrity and reputation (which includes their reputation for pursuing favorable results at the lowest achievable expense for their clients) are far more important than the profitability or outcome of any single litigation. As commercial litigation clients have become increasingly sophisticated about overseeing their litigators, decisions about the needed scale of efforts also no longer rest exclusively (or even mostly) with outside litigators, and this oversight (sometimes combined with flat fee arrangements that incentivize efficiency) has become an increasingly important vehicle for enhancing focus on efficiency.

Clients and advocates often have strikingly different perspectives about which of them is more to blame for delays in addressing the settlement option. Many advocates will say that they invariably consider and often propose serious consideration of settlement long before their clients are ready to pursue that course, while many clients attribute the delays to their advocates' early expressions of bullishness on the merits and urging that no settlement be pursued until after a period of effort to win outright.

Sorting out the motivations behind litigation inefficiencies can also

---

primary cause of excessive cost of litigation is the enormously high fees lawyers charge—which is linked to, but different from, over-lawyering by performing too many tasks. Symposium, *supra* note 4, at 273–74, 277–80, 289–92. The role of high hourly rates in increasing the cost of litigation seems inescapably significant as a matter of arithmetic—since litigation would obviously cost less if lawyers charged less or clients hired less expensive lawyers—but difficult to alter systematically. Judges can reject fees they consider excessive in fee-shifting cases or other disputes in which the judge must approve the fee—a substantial component of the federal docket; *id.* at 277–78, but a negligibly small component of the state docket. Otherwise, though, the pricing of legal services is generally governed by the marketplace. Judge Rakoff's suggestion that greater openness to forms of advocacy practice by non-lawyers or lowering of bar standards to admit many more people into the profession would help reduce costs and address the radical underrepresentation of clients who need inexpensive representation in small cases presents important access to justice issues, but will not be a part of this Essay. *Id.* at 290–91. The marketplace changes that would be necessary to transform the cost structure of commercial litigation in ways that make hiring advocates for such litigation significantly more affordable would have to be substantial, likely be very difficult to achieve, and present their own policy issues warranting separate thoughtful discussion.

be confounded by the strong conviction of many litigators, often developed from senior mentors, that they serve their clients best by doing the extra work necessary to understand the dispute and internalize the facts better than their adversaries, and that the extra effort differential is an important component of quality. That sensibility can similarly lead to what looks like over-litigation, but may reflect much more principled (and therefore sometimes harder to modify) purposes.

Discerning counsels' economic motivations from their conduct can further be complicated by a swirl of contradictory-seeming defensive tactics that include efforts to pursue acceleration (dispositive motions) and corner-cutting (by narrowing discovery) in search of a quick and inexpensive victory, coupled with slow movement, delay, and over-expansion of the litigation for the purpose of resisting discovery, capitalizing on the defendant's greater resources and informational advantages, and exhausting the plaintiff.

#### 5. Consequences of Impediments to Focus on Efficiency

The upshot of these sometimes competing impulses is often that, even though all parties usually have an interest in achieving resolution of their disputes at less cost and more quickly, these interests can readily become subject to tactical detours and to the elevation of posturing conduct, viewed as important to settlement dynamics, satisfaction of internal constituents, and institutional reputation, over avoidance of wasteful cost. Except where parties have voluntarily committed to some process for accelerating and streamlining the litigation process before their disputes begin, the consistent experience of many litigators is that one party's expression of interest in short-cutting the process predictably spurs the other party to disfavor any such acceleration. The instinct that an adversary's expression of desire to proceed more efficiently may indicate battle fatigue or limited resources for the fight can readily cause opposing counsel to dismiss the notion that streamlining could be beneficial for both parties. It is regrettable but no surprise, for example, that after New York State's Commercial Division Rules were amended in 2014 to permit parties to agree to a significantly foreshortened discovery and pretrial preparation timetable and process, leading to a greatly accelerated trial and decision, there have been almost no instances of agreement to proceed under this provision.<sup>15</sup>

The wide variety of nuanced reasons why parties, advocates, and courts pursue actions that run counter to the goal of lower cost and faster resolution of disputes does not undermine the value of efforts to

---

<sup>15</sup> See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(g) (2018) (listing rules of practice for the Commercial Division, including Rule 9).

promote these results that can be pivotal components of access to justice. Many steps already taken and experiments performed in a broad range of disputes confirm that waste can be reduced and greater efficiencies can be achieved in the interests of justice and client service. Many of the current impediments to greater efficiency spring from beliefs, practices, and rules that can readily be changed if the marketplace simply decides to change them.

## II. REDUCING COSTS AND IMPROVING EFFICIENCY

Each of the categories of participants in the litigation process has an important role in pursuing greater efficiency in dispute resolution. For clients and advocates, this role primarily involves substantial continuation of an evolution in culture and best practices that has been taking place in varying contexts for many years, featuring increased focus on reducing avoidable expense and pushing aside unproductive impediments to efficiency, and, in some contexts, involving perspectives on dispute resolution that seem like a 2.0 version of the approaches that have been steadily evolving in the marketplace. For courts, the next wave of contribution may involve further refinement in views about the court's role in managing disputes to streamline processes, avoid waste, and achieve decisions at costs bearing an appropriate relationship to the scale of the controversy, and changes in rules (or in interpretation and application of existing rules) to foster faster decisions and earlier resort to mediation or negotiation for cases headed to settlement. For all, it may involve greater engagement specifically on how to make litigation to a decision more affordable and how to achieve settlement based primarily on the strength of the parties' positions before too many party resources better spent on achieving negotiated resolutions have been expended on litigation costs.

### A. *Roles for Parties and Their Counsel in Reducing Costs and Delays*

#### 1. Voluntary Bilateral Agreements to Reduce Inefficiency

Much of the continuing evolution in thinking about dispute resolution lies in the hands of the private actors—the parties and their counsel—who usually play a defining role in determining the nature of the adversarial relationship and the strategy and timing that will dictate whether the dispute resolution process is efficient and cost-effective. Individual clients and their counsel have experimented with a wide variety of mechanisms for resolving disputes less expensively and more

quickly. These experiments—some trickling down from initiatives originated in large commercial enterprises, and others percolating up from entrepreneurs or young disputants impatient with the delays of litigation and determined to get their disputes resolved with less distraction and process—suggest that in the next generation of dispute resolution, as sensibilities about effective approaches continue to evolve, parties in disputes and their counsel will increasingly come to view disputes less like wars to be fought and won and more like injections of economic risk to be analyzed, priced, managed, and solved.

In this context, some forms of posturing and approaches to litigation dynamics, currently viewed as necessary, may come increasingly to be viewed as superfluous because all parties will understand that everyone fully appreciates the dispute's underlying dynamics. Plaintiffs with limited resources will not spend funds they can't afford to create impressions about the limitless nature of their resolve. Defendants will not pretend to be determined to litigate their positions through trials they are unlikely to be willing to tolerate. Parties will understand that some information exchange may be necessary to achieve a resolution and will figure out ways to exchange that information without enormous cost, adversariality, or fanfare. Parties and advocates will more openly consider mutual agreements to forego litigation steps calculated more to impose burden on each other than to facilitate the resolution of the dispute, and parties will more often agree that they share an interest in advancing the dispute efficiently to an accelerated decision or a negotiated resolution.

Parties will not change in these ways out of altruism, but out of enlightened self-interest—and, possibly, because courts will not let them continue to impose waste or unnecessary burdens on each other. The sense that approaches to dispute resolution probably will evolve in this way stems at least in part from the striking evolution that has already been discernible in recent years and decades. Parties today are increasingly acknowledging their role in contributing to the excessive cost and inefficiency of dispute resolution, and sophisticated litigants have devoted and will continue to devote significant imaginative energy to reconsidering accepted models of litigation to a decision or a settlement. Parties are also increasingly recognizing that one party's discernment of advantage in streamlining the dispute resolution process should not necessarily prompt the other party to resist any such course.

#### a. Pre-Dispute Agreements

The simplest mechanism for achieving more efficiency in dispute resolution is a voluntary bilateral agreement to act efficiently if a dispute arises, made part of a contract's dispute resolution provisions drafted

when parties are first defining their legal relationship.<sup>16</sup>

The history of dispute resolution clauses is an indicator of how thinking about interest in greater efficiency in dispute resolution has evolved. For many years, dispute resolution provisions were written by corporate lawyers and reviewed by business-people and corporate counsel with limited, if any, consultation with actual litigators. They often identified the governing law and an agreed-upon jurisdiction for resolving disputes, and occasionally provided for a mutual waiver of jury trials, but rarely did more. As contracts became more often multinational, involved longstanding relationships carrying the possibility of multiple disputes that would need to be resolved without poisoning the business relationship, or came to be reviewed by people with experience in contractual disputes, they became much more sophisticated.

Today, the evolution of dispute resolution clauses has reached the point where many, if not most, sophisticated business contracts—and a substantial percentage of not particularly sophisticated ones—contain two-part provisions regarding procedures for dispute resolution. First, they provide for a period of negotiation or mediation, often including high-level executives, before any lawsuit is brought. These provisions parallel a requirement of the English court system that solicitors for opposing parties discuss an intended claim with each other—often leading to negotiated resolutions—before anyone is permitted to file a complaint. Second, they often provide mechanisms for litigating disputes in efficient ways if the parties are unable to negotiate a resolution—sometimes with constrained court procedures (colloquially known as “litigation pre-nups”), sometimes with arbitrations under a set of established institutional rules or the parties’ own customized rules, or sometimes with even simpler forms of decision-making. All of these mechanisms share the important common feature of reflecting parties’ recognition, outside the context of an identified dispute, of the value of agreeing on alternatives to conventional litigation for addressing any disputes that may arise between them.

#### b. The Negotiation/Mediation Component of Pre-Dispute Efforts

Probably the most notable advance in dispute resolution processes

---

<sup>16</sup> These comments about dispute resolution provisions are directed to agreements between parties having sufficiently similar bargaining power to have clearly agreed voluntarily to contractual dispute resolution provisions. Separate issues attach to what Judge Berman referred to during the Symposium as “exclusive mandatory” arbitration agreements involving consumers or other commercial counterparties who did not “bargain” for or agree to them in any true volitional sense, which may or may not have been carefully designed to be fair to both parties, and which present their own different policy questions. Symposium, *supra* note 4, at 278–80, 284–85.

over the past few decades has been the degree to which parties to business-to-business disputes have built an effort to resolve the dispute before starting litigation into their standard course of contractual dealings. In 1979, a collection of major corporations sponsored the inception of the International Institute for Conflict Prevention and Resolution (CPR), the first think tank devoted exclusively to ADR in commercial disputes.<sup>17</sup> CPR shortly thereafter established the CPR Pledge, in which signatory large corporations committed not to commence litigations against other signatories (apart from exceptional circumstances) without talking with them first.<sup>18</sup> Business entities' practice of committing to talk with other business entities before litigation has now become commonplace far more broadly than the signatories to the CPR Pledge. There is every reason to expect that the distinctive marketplace movement in the direction of pre-litigation efforts at dispute resolution will—as it should—continue to expand in upcoming years.

An important parallel development, not limited to pre-complaint processes or to contractual commitments before any dispute, has been the emergence of mediation—resort to a skilled neutral focused on helping the parties to find common ground—to enhance the efficient narrowing or resolution of disputes. A quarter century ago, the culture of the litigation process included broadly held views that mediators generally presented more of a distraction than a powerful vehicle for resolution of disputes between tough-minded adversaries, and that mediators offered little prospect for achieving settlements differently from what seasoned advocates or their clients could accomplish through direct bilateral negotiations. Mediation took place only rarely and was generally reserved for disputes involving multiple parties and recurring fact patterns where the challenge of achieving a collection of deals among several different groups made a bilaterally-negotiated agreement seem particularly difficult to accomplish.

Mediation of less complex bilateral disputes first began to emerge more prominently in California in the mid-1980s, where the combination of a court system paralyzed by excess and virtually incapable of resolving disputes, tech entrepreneurs' impatience with

---

<sup>17</sup> See, e.g., PETER R. SILVERMAN, SHUMAKER, LOOP & KENDRICK, LLP, EARLY DISPUTE RESOLUTION: RESOLVING DISPUTES WITHIN 30 DAYS OF INCEPTION 4 (Mar. 13, 2018), [https://www.slk-law.com/site/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRVPMQiLsSwCJcN0ZC/document.name=/SLK\\_TOL-#2890966-v1-EDR\\_-\\_Resolve\\_disputes\\_in\\_30\\_days.pdf](https://www.slk-law.com/site/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRVPMQiLsSwCJcN0ZC/document.name=/SLK_TOL-#2890966-v1-EDR_-_Resolve_disputes_in_30_days.pdf) [<https://perma.cc/9FGQ-SYG9>] (citing F. Peter Phillips, *Introduction*, in *MANAGING FRANCHISE RELATIONSHIPS THROUGH MEDIATION* (2008)).

<sup>18</sup> The current version of the CPR Pledge, which was refreshed in 2012, can be found at [www.cpradr.org](http://www.cpradr.org) under “21st Century Pledge” in the list of ADR Pledges in the website’s “Resource Center.” *21st Century Pledge*, CPR: INT’L INST. FOR CONFLICT PREVENTION & RESOL. (2012), [https://www.cpradr.org/resource-center/adr-pledges/21st-century-pledge/index/\\_res/id=Attachments/index=0/21st%20Century%20Pledge%202017.pdf](https://www.cpradr.org/resource-center/adr-pledges/21st-century-pledge/index/_res/id=Attachments/index=0/21st%20Century%20Pledge%202017.pdf) [<https://perma.cc/C787-LTNS>].

delays in getting their disputes resolved, and parties' positive experiences with "Rent-a-Judge" experiments led to a surge of appreciation for ADR's capacity to help parties achieve resolutions. The pattern of growth in mediation's effectiveness has continued in a similar vein ever since: parties who have experienced mediations resulting in resolutions that had seemed unachievable have recognized the value mediation can have. Advocates sometimes find that clients have limited experience participating in mediations and seeing how they can succeed, are not accustomed to or naturally disposed toward involving a third party in negotiating resolutions, and therefore need to be persuaded to try mediating their disputes. But mediation's value is steadily becoming more widely recognized, and mediation processes have increasingly been included in commercial contracts' dispute resolution provisions.

Mediation obviously will not yield a settlement when one or more of the parties feels unwilling or unready to compromise a dispute. But even then, early mediation still often helps to accomplish faster and less expensive negotiated resolutions when all parties become ready later on.

Mediation provides a structure for approaching and resolving the dispute as a business problem. In the heat of litigation, counsel and clients can readily slip into viewing consideration of settlement as a distraction from their fully absorbing efforts to win. Client decision-makers often find that other work demands prevent them from attaching priority to focusing sustained energies on the sometimes unpleasant-feeling task of taking ownership of and working to achieve a potential compromise. Inertia and adversarial momentum can readily lead to postponements of engagement on settlement, and both internal conversations about the possibility of settlement and negotiation overtures from one party to the other can consequently end up shorter, more temporally spaced apart, and more discontinuous than is optimal for the rigorous process of reaching a deal.

The mere process of mediation, regardless of the eventual outcome, can prompt the parties and their counsel to engage in a more focused, continuous, and sustained way on the challenges of negotiating a resolution. It can create an occasion that stimulates the parties to greater discipline in weighing the probability of different outcomes and the costs of litigating until the next settlement opportunity. When mediation is required by contract, it can free the parties from the burden of not wanting to be the first to suggest an effort to settle. It can also liberate key decision-makers from distractions that impair the capacity to reach a deal, by creating procedures that require them to sit in a room for extended periods, sometimes alone with their counsel, concentrating in undistracted ways on the difficult concept of compromise and on how to get the dispute acceptably resolved.

The most highly skilled mediators not only can help accomplish many of these process goals, which do not necessarily require special

ability, but also can do much more. They can help to (1) close communications gaps between the parties; (2) defuse personal tensions that interfere with effective exchanges; (3) nudge parties who are instinctively protective about discovery to hand over targeted pieces of information that the other side says it needs to make real progress with case valuation or negotiations; (4) assess when particular components of potential settlement consideration are more important to one party than the other; (5) identify forms of consideration with intangible or hard-to-measure economic cost or value that can materially advance the settlement dynamic (sometimes including, for example, a simple apology or other statement of goodwill); (6) help to arrange for future dealings that may make resolving the current dispute feel more palatable; (7) suggest possible terms for an acceptable agreement when the parties seem unable to close the gap between them; and (8) help to negotiate collections of deals when a settlement requires more than an accommodation between a single plaintiff and a single defendant.

Mediation has the greatest promise of achieving a resolution when the parties have external reasons for valuing a negotiated resolution over a categorical win for one side and loss for the other, when the economics of the dispute argue for settlement, when the parties' analysis or the course of the litigation has made clear that the question of which side is correct is close and a categorical win for either side would feel like a particularly harsh defeat for the loser, and when the parties know they should settle but particular adversarial dynamics warrant using a detached and independent interlocutor to broker discussions, soften tone, calm passions, and prevent the urge to advocate from interfering with negotiation progress.

Mediation tends, particularly, to be a feature of contractual dispute resolution provisions when parties recognize that they may want to continue doing business with each other even if they have disputes. In those cases, the ability to detach the dispute in part from the ongoing relationship may depend on each party's success in treating the dispute as reflective of a good faith difference of views carrying no implications of negative judgments about the personal character of the individuals involved in challenged actions. Some of the most successful mediations occur in disputes having these characteristics, in which no complaint is ever filed. But an expectation of continued dealings is not in any sense a requirement for a successful mediation.

## 2. Agreements for Arbitration or ADR Mechanisms

Contractual dispute resolution provisions may not lead to negotiated pre-complaint resolutions because one or both parties perceive a need for a decision resolving their dispute (or defining ways

they must deal with each other going forward). The desire to pursue processes other than conventional litigation in that circumstance has led to a broad array of ADR provisions in business contracts. Parties will sometimes agree in advance, for example, on a mutually trusted arbitrator or dispute resolution institution, or on mechanisms for choosing arbitrators calculated to ensure that any decision-makers will be highly regarded by all parties as able to reach a credible and well-informed judgment with sensitivity to the parties' desires to avoid the full burdens of conventional litigation. Parties' resulting prospects for obtaining both a mutually trusted decision-maker and a level of detailed attention on their preferred schedule differentiate arbitrators from the judges who would be assigned to the parties' court disputes at random, and even from some high-quality judges in a normal court system (who often manage huge dockets and lack both the arbitrator's freedom to choose which and how many disputes to take on and obligation to adapt to the parties' procedural desires). This ability to select the decision-maker also significantly reduces the perceived risk of an anomalous decision that commercial litigators generally attach to juries (probably explaining in part why arbitrated disputes go to final judgments after evidentiary hearings so much more often than litigated disputes go to jury verdicts).

Parties can further agree on rules that strictly constrain or eliminate expensive discovery, that substitute depositions with parties' advance presentation of their witnesses' direct testimony by written affidavit (thereby giving opposing counsel ample notice of subjects for cross-examination), and that set strict timetables for written submissions and hearings (and sometimes even for decisions). The terms of the resulting ADR provisions can invoke recognized sets of rules, from organizations like the American Arbitration Association, the International Chamber of Commerce, or CPR, or can be as customized and idiosyncratic as the parties' imaginations and preferences may dictate.<sup>19</sup>

---

<sup>19</sup> The author has participated, for example, in disputes governed by arbitration provisions that called for (1) any dispute to be addressed by each party's contemporaneous submission to a previously agreed-upon, trusted arbitrator of written presentations of no more than five pages, with the arbitrator charged with holding short hearings within days, using whatever procedures the arbitrator considered most practical, and pursuing best efforts to decide the dispute without exercising the backstop residual authority to direct further processes; (2) all disputes (including a contract dispute involving \$1 billion) to go to a hearing within forty-five days of the filing of a notice of arbitration, with the arbitrator working with the parties to craft highly constrained discovery and pre-hearing processes consistent with this timetable, and a decision by the arbitrator no more than ten days after the hearing ended; (3) hearings before a "system arbitrator" no more than five days after the failure of required mediation efforts; and (4) discovery governed by the confines of the IBA Rules, or no discovery, or discovery only to the extent permitted by an arbitrator charged with keeping discovery limited to essential information. In each of these instances, the parties ultimately believed, notwithstanding the constraints under which they had agreed to proceed, that they had a full and fair opportunity to present their positions.

The effectiveness of these dispute resolution provisions, and parties' tendency to continue using them, tends to support the notion that parties unburdened by need to posture or other efficiency-undermining dynamics of a particular dispute will recognize that it is usually in their interest to achieve decisions more quickly and less expensively than would occur through a conventional litigation.<sup>20</sup> While some commercial clients and advocates express categorical opposition to arbitrations, their reasons appear to stem more from individual negative experiences—possibly mismanaged—than from rigorous evaluation of comparative advantages and disadvantages of arbitrations versus trials. Criticism that an arbitrator or a panel unduly prolonged the process, imposed or permitted excessive and inefficient procedures, “split the baby” or otherwise failed to act decisively, or delayed too long in issuing a decision most often reflects either a remarkably mis-drafted arbitration provision or a remarkably poor choice of arbitrator. Criticism that discovery in an arbitration was as extensive and expensive as in conventional litigation similarly suggests both failure of the parties to use the arbitration process effectively and failure of the arbitrator to press the parties for greater efficiency.

It is not difficult for experienced advocates who are proceeding carefully to identify and select only arbitrators with proven records for not mismanaging in these ways. While the criticism of arbitrations for inefficiently not providing for dispositive motions has some force, arbitration proceedings are increasingly developing procedures to eliminate this difference, and dispositive motions may be less needed as a cost-cutting measure when the arbitral hearings come quickly.<sup>21</sup> While arbitration rules also often do not permit appeal from the arbitral award, this limitation can also be a positive source of earlier finality, and if a right to appeal seems important enough (even though appeals only rarely make a difference in commercial disputes), known mechanisms exist for permitting various forms of appeal from arbitral awards.<sup>22</sup>

---

<sup>20</sup> Several studies have compared the cost and duration of arbitration to litigation. While the comparisons can be difficult—including because litigation are more often resolved by dispositive motion or by settlement while arbitrations more often yield post-hearing decisions—the data appear to suggest strongly that arbitrations are consistently faster and less expensive than litigation. See, e.g., Roy Weinstein, Cullen Edes, Joe Hale & Nels Pearsall, *Efficiency and Economic Benefits of Dispute Resolution Through Arbitration Compared with U.S. District Court Proceedings*, MICRONOMICS (Mar. 2017), [www.micronomics.com/articles/Efficiency\\_Economic\\_Benefits\\_Dispute\\_Resolution\\_through\\_Arbitration\\_Compared\\_with\\_US\\_District\\_Court\\_Proceedings.pdf](http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf) [<https://perma.cc/NWH5-X4LW>]; *Measuring the Costs of Delays in Dispute Resolution*, AM. ARB. ASS'N, <http://go.adr.org/impactsofdelay.html> [<https://perma.cc/BR8F-DBQY>] (last visited Aug. 16, 2018).

<sup>21</sup> Development of a body of case law confirming that a summary disposition in arbitration does not implicate the Federal Arbitration Act's provisions permitting judicial setting aside of an arbitral award based on a failure to consider evidence, 9 U.S.C. § 10(a)—a legal principle that seems correct—might bolster arbitrators' willingness to provide this relief. See 9 U.S.C. § 10(a) (2012).

<sup>22</sup> In one general comparison between arbitration and litigation before a court, Emperor

a. ADR in the Absence of Pre-Dispute Agreements

When so many sophisticated commercial entities agree to dispute resolution provisions calling for pre-litigation negotiations or mediations and streamlined mechanisms for obtaining decisions in contracts entered before any dispute has arisen, it seems reasonable to ask whether the same considerations should incline parties without a pre-dispute agreement to pursue similar arrangements when disputes arise. Streamlining should carry the same advantages; the only major difference is that the existence of a dispute might make it more emotionally difficult for the adversaries to talk constructively about how best to manage that dispute. The relative rarity of process-simplifying agreements between parties who did not enter a pre-dispute agreement may reflect a combination of advocates' reluctance to engage on these subjects at the outset of a dispute, shortcomings in imagination and initiative by lawyers and their clients, the stubborn power of the instinct to oppose any adversary's proposal to proceed in unusually efficient ways, the fear of failure (and the desire to avoid responsibility for losing) after supporting an unconventional approach, and longstanding notions regarding the importance for settlement dynamics of displaying the will to litigate expensively over a long period. But the logic behind pursuing more efficient approaches remains the same.

As thinking about efficient approaches to dispute resolution advances, over time clients and advocates should come to understand that urging a rapid decision-making process can as readily communicate a party's confidence in its position as suggest desperate impecuniousness, transparent desire to prevent discovery of damaging facts, or fear of conventional litigation. Parties who have experienced highly accelerated arbitration or litigation in "rocket docket" federal courts—both plaintiffs who have brought cases there and defendants who have been pulled into those courts—often extol the increased efficiency and lower cost these courts offer, particularly when the judicial acceleration does not just feature a collection of summary denials of dispositive motions and burdensome foreshortened deadlines, but also includes attentive management and tightening of processes to

---

Kang-hsi suggested the preferability of arbitration in the early 18th century by stating:

I desire [ ] that those who have recourse to the courts should be treated without any pity and in such a manner that they shall be disgusted with the law and tremble to appear before a magistrate. In this manner . . . good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commun[ity]. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts.

See WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 525–26 (2d ed. 2012).

prevent over-litigation and waste.

Mutual constructive conversations between adversaries about how to streamline resolution of disputes, particularly in the early phases of the dispute, do not need to remain rare. When parties and counsel talk effectively among themselves and with each other, they can often organize the process of resolving issues in ways that serve the interests of all, and can sometimes escalate attention to central issues worthy of separate discovery and mini-trial or other ADR procedures that, once resolved, establish the predicates for a legal decision or negotiated resolution.<sup>23</sup> Even when one party is significantly better-resourced than another, that difficult-to-conceal difference can be priced into the analysis without halting constructive discussion about how to resolve the dispute more efficiently.

Although advocates often reflexively want to prevent discovery for as long as possible, an early exchange of basic plainly discoverable information often can inexpensively advance the process, too. Anecdotes abound of openminded advocates and clients who have crafted resourceful approaches to positioning their disputes for an accelerated decision that leaves nobody less satisfied for avoiding a normal unconstrained litigation. Parties and their counsel talk far more among themselves and with their adversaries about these options today than they did a few decades ago, but ample room exists for further conversations that many clients and advocates continue incorrectly to treat as antithetical to the adversarial process. Experience with agreed-upon or externally-imposed efficiency devices in dispute resolution should help parties become more willing, over time, to explore agreements for streamlining of litigation through ADR regardless of whether any prior contractual provision exists.

### 3. Increasing Focus on the Management of Economic Risk

In many commercial contexts, a thoughtful enterprise's first reaction to the identification of a new economic risk will be to try to understand the nature and scope of the risk, to evaluate it objectively, and to identify the best proposed course of action for managing it. That is often not the approach parties follow in litigation. Special characteristics of litigation, including the presence of an asserted wrongdoer and an asserted victim, and the dynamics of adversarial presentations of claims and defenses—and habits or assumed principles of engagement born of long-standing practice—frequently prevent parties from addressing litigation disputes the way they address other newly introduced risks.

---

<sup>23</sup> Judge Koeltl pointed out the value of more communication about processes between adversaries during the Symposium. Symposium, *supra* note 4, at 286–87.

Greater efficiency will almost always emerge if clients systematically begin their relationships with their retained advocates by asking the advocate to develop and present, quickly and relatively inexpensively, (1) a reasonably well-informed analysis of the proposed or actual claims' strengths and weaknesses; (2) the prospects for ultimate success or defeat; (3) the likely course (or the most likely alternative courses) of the litigation; (4) the areas of apparent greatest uncertainty in predictions about what will happen; and (5) possible approaches to resolving the dispute through mechanisms other than conventional litigation to final judgment (including ADR mechanisms for reaching decisions, mediation, and direct settlement negotiations). Such an analysis, performed as early as practicable, should be a threshold component of virtually every representation involving a dispute, with the scale of the upfront effort appropriately tailored to the scale of the dispute. It almost always improves the quality of communication between client and advocate, and frequently improves the ultimate outcome. Omission or postponement of this analysis may be the largest source of communication failure between clients and their lawyers and of inefficiency and waste in litigation.

Courts regularly complain that parties appear for conferences before them with virtually no idea what their dispute is truly about. While court appearances constrained by this lack of knowledge can still yield a schedule for the litigation, they often represent a missed opportunity to engage with the adversary and the court on how best to choreograph the processes for resolving the dispute.

Early rigorous analysis of the merits, likely processes, and potential outcome also often helps to stimulate early thinking about potential negotiated resolution. Fixing a likely cost to the various stages of a litigation and performing even a preliminary risk-discounted valuation of the parties' claims tends to reduce the exclusivity of focus on winning, and helps to place the dispute into a context of management of economic risks that can often feel more familiar to decision-makers. Sincere and balanced efforts to predict the future can also minimize destabilizing surprises from later developments. Sometimes these analyses lead to upfront discussions among principals that advance or accomplish an early resolution of the dispute, saving significant tangible and intangible litigation costs. Even when the thinking leads to a conclusion that the litigation should proceed until some future inflection point, early consideration and internal or bilateral discussion of settlement concepts and parameters often helps when the parties later become ready for hard negotiation.

Experienced advocates have markedly differing views about the importance of inflicting litigation pain and sending messages to the marketplace about the particular unpleasantness and expensiveness of litigation against the lawyer and client before engaging in settlement

discussions. Experienced advocates also differ over the importance of not being the first to raise the subject of settlement. Those considerations can be important but, in most instances, can be factored into the analysis of potential settlement forces without allowing the artificial delay they cause to achieve ascendancy over the goal of efficient resolution. Overall, postponements based on these considerations may carry more cost to all parties than benefit to party in ultimate settlement terms.

Effectiveness in settlement negotiations is most readily discerned by reference to the final result, not the way the negotiations started. Success as an advocate is best demonstrated by winning cases that can be won and making full and effective use of both the merits and available sources of external leverage in negotiating settlements without unneeded expenditures in litigation costs. Delaying engagement in settlement discussions for the purpose of increasing the adversary's sense of urgency can be effective, but only if the resulting effects on the settlement amount turn out to exceed the tangible and intangible costs of continuing the litigation until the later time when a settlement is reached. Particularly in contexts where the parties believe they fundamentally understand each other's substantive positions (which does not necessarily require extensive discovery), as well as each other's expected strategic courses and degree of probable willingness and capacity to save or spend litigation costs, effective negotiators can take all these considerations into account in trying to price the resolution of the dispute (and to allocate between the parties any economic "surplus" resulting from achieving a resolution).

Pursuing greater efficiency in dispute resolution may grate with lawyers who believe a strategy of delay, maximizing demands on the adversary, and unrelenting adversariality will take advantage of clients' different levels of resources to continue the fight and desire to settle without incurring excessive cost. While a strategy of delay and maximization of burden can sometimes be effective, experience suggests that in many instances the strategy causes more cost to both parties than benefit to either. It is also unethical; Rule 3.2 of the New York Rules of Professional Conduct, entitled "Delay of Litigation," categorically states that "a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense," and the Comments on this Rule make clear that "[i]t is not a justification that such tactics are often tolerated by the bench and bar," and that "[s]eeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."<sup>24</sup> While adversaries should generally cooperate in seeking greater efficiency in dispute resolution, counsel should not hesitate to raise

---

<sup>24</sup> N.Y. RULES OF PROF'L CONDUCT r. 3.2 & cmt. 1.

concerns about opposing counsel's apparent strategies of delay and burden with courts, and courts should be highly alert to prohibiting these kinds of efforts to interfere with parties' access to justice.

To the extent a case presents genuine imperatives for one party or the other to obtain a favorable decision, many reasons can exist for litigating the dispute until that opportunity is achieved or frustrated. But the continued evolution of sensibilities regarding dispute resolution should, over time, support more rigorous and earlier evaluation of whether the dispute is headed toward a decision or a settlement, and more forceful decluttering of current institutional, cultural, and personal impediments to earlier resolution of disputes that seem foreordained to be settled or resolved on dispositive motions.

### B. *Courts' Role in Reducing Costs and Delays*

Once a complaint is filed, all party activity directed to fostering efficiency in the process of achieving a negotiated resolution or a decision, or directed to impeding any such efficiency, is subject to the oversight of the court. Judges carry the responsibility for supervision of case management in the broader context of management of their entire dockets. Their approaches to pursuing faster and less expensive negotiated resolutions or decisions, as opposed to leaving case management exclusively to the parties, can have pivotal effects on the timeliness of resolution of all the cases before them, and on parties' ability to obtain genuine access to justice. Any effort to reduce the cost and increase the speed of resolutions must therefore invariably contemplate an important role for judges—both in advancing negotiated resolution and in streamlining the processes for obtaining affordable decisions.

#### 1. Court-Sponsored Mediation, Settlement Negotiations, and Other ADR Options

Many judges have expressed views over the years that their role is to decide cases, and that the decision of whether and how to pursue the alternative of a negotiated or mediated settlement should be left to the parties. Under the most categorical versions of this approach, the only judicial role in the settlement process is to set schedules for the litigation, decide motions when they are filed, and otherwise march forward toward a resolution with enough clarity on timing and interim views about the case to enhance the parties' ability to make informed decisions.

That sensibility has evolved over the years (although some judges always thought they should foster settlement, and some still do not

think they should), with courts increasingly concluding that their responsibility for managing their dockets and ensuring access to judicial resources supports active thinking about how to help parties resolve their disputes through mechanisms other than judicial decisions, and that they can play important roles in breaking cultural or posturing logjams that are impeding negotiated resolutions. These sensibilities have led to creation of a broad array of court-sponsored programs designed to establish vehicles for earlier and less expensive resolution of disputes without any final decision by the court.

a. Current Court-Sponsored Programs

Some of these court-sponsored programs have achieved distinctive success in New York and elsewhere. New York's federal courts for the Western and Northern Districts have operated mandatory mediation programs for almost all civil cases, and the Eastern District combines a non-mandatory mediation program with highly successful mandatory, non-binding arbitration for all disputes, with damage claims under \$150,000 (as to which the most recent report indicates a remarkable 65% of referred cases settle before or in the arbitration).<sup>25</sup> Although a program for mediation of cases on appeal might not intuitively be expected to have a high success rate—because one party already has a favorable decision in hand—both the New York Appellate Division Mediation Program and the Second Circuit Court of Appeals mediation program, called the Civil Appeals Management Plan (CAMP), have achieved positive results.<sup>26</sup> New York court administrators also report extremely positive preliminary results from an experimental program inaugurated in 2017 requiring mediation of contract disputes in supreme courts involving amounts below the New York County

---

<sup>25</sup> See Gary Shaffer, *Automatic Court Annexed Mediation in New York's Federal District Courts: Sometimes Numbers Don't Lie 1–6* (2018) (unpublished manuscript) (on file with author); ALTERNATIVE DISPUTE RESOLUTION PLAN, U.S. DISTRICT CT.: W.D.N.Y. (May 11, 2018), [www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf](http://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf) [<https://perma.cc/T5VD-YEA4>]; ALTERNATIVE DISPUTE RESOLUTION REPORT, JULY 1, 2015–JUNE 30, 2016, U.S. DISTRICT CT.: E.D.N.Y., [https://img.nyed.uscourts.gov/files/local\\_rules/2015-2016mediationreport.pdf](https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf) [<https://perma.cc/N9Q3-7M7H>]; DISPUTE RESOLUTION PROCEDURES, U.S. DISTRICT CT.: E.D.N.Y., <https://img.nyed.uscourts.gov/files/forms/DisputeResolutionProcedures.pdf> [<https://perma.cc/QJ7X-5AJW>] (last visited Sept. 8, 2018); *Mandatory Mediation Program Statistics*, U.S. DISTRICT CT.: N.D.N.Y., [www.nynd.uscourts.gov/mandatory-mediation-program-statistics](http://www.nynd.uscourts.gov/mandatory-mediation-program-statistics) [<https://perma.cc/384C-6267>] (last visited Sept. 8, 2018); see also Hon. Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 JUST. SYS. J. 343 (2005) (“[R]eporting that of cases sent to non-binding arbitration in 2004, 74% settled before arbitration hearings and almost exactly half of the remainder that were arbitrated were resolved without the need for further court proceedings.”).

<sup>26</sup> See, e.g., Gilbert J. Ginsburg, *The Case for a Mediation Program in the Federal Circuit*, 50 AM. U. L. REV. 1379, 1383 (2001) (as of 2001, the Senior Staff Counsel for the Second Circuit estimated that 45–50% of the cases referred to the Second Circuit's CAMP mediation program—the first of its kind among federal courts of appeal—settled each year).

Commercial Division's \$500,000 jurisdictional limit.<sup>27</sup>

Experiments with different types of disputes have helped to define particularly good candidates for mediation. In the Southern District of New York, for example, in recent years all employment, civil rights, and Fair Labor Standards Act claims have been automatically and mandatorily referred to mediation at the outset of the dispute, using either a member of a high-quality panel of volunteer mediators or a mediator of the parties' mutual choice.<sup>28</sup> Sets of omnibus court rules relating to these mediation programs require, among other obligations calculated to enhance prospects for success, parties' upfront production to each other of specified basic factual and documentary information that costs very little to produce but adversaries often strive energetically to delay or avoid providing.

The results of this mandatory mediation program have been remarkable, with settlement rates ranging from 35% for Section 1983 cases to over 40% for all employment cases and 65% for FLSA cases—generally before either side had expended substantial resources on litigation costs.<sup>29</sup>

These three categories of disputes automatically referred to upfront mediation share the common features that (1) the plaintiffs tend to be significantly less well-resourced than the defendants and unlikely to be able to afford to litigate through trial, (2) they involve statutes with fee shifting provisions for defendants' payment of prevailing plaintiffs' attorney's fees, (3) the plaintiffs are particularly likely to be significantly animated by sincere belief that they have been personally wronged, and (4) defendants are likely to view the cost of litigating to a final judgment as nearly as high as or possibly even more than the cost of settlement (so that the parties essentially face a standoff bluff on the unaffordability of litigating to a resolution).

Recent reports from the Southern District of New York also show that the highest success rates of all categories of referrals to mediation occur in cases that judges refer based on individualized determinations that those cases seem like good candidates for mediation, without regard to the dispute's particular legal rules—tending to confirm, unsurprisingly, that judges generally understand the characteristics of disputes that make them good candidates.<sup>30</sup>

---

<sup>27</sup> *Commercial Division: NY Supreme Court: New York County: ADR Overview*, N.Y. STATE UNIFIED CT. SYS., [www.nycourts.gov/courts/ComDiv/NY/ADR\\_overview.shtml](http://www.nycourts.gov/courts/ComDiv/NY/ADR_overview.shtml) [https://perma.cc/MK2D-6HJ5] (last visited Aug. 15, 2018) [hereinafter *ADR Overview*].

<sup>28</sup> *See* Bd. of Judges of the E.D.N.Y. & the S.D.N.Y., LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK 75–77 (2018), <http://www.nysd.uscourts.gov/rules/rules.pdf> [https://perma.cc/3X7R-2WBM] (Rule 83.9).

<sup>29</sup> REBECCA PRICE, U.S. DISTRICT CT.: S.D.N.Y., MEDIATION PROGRAM ANNUAL REPORT, JANUARY 1, 2016 – DECEMBER 31, 2016 6–7, 9 (Dec. 5, 2017), [http://nysd.uscourts.gov/docs/mediation/Annual\\_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf](http://nysd.uscourts.gov/docs/mediation/Annual_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf) [https://perma.cc/24KV-578U].

<sup>30</sup> *Id.*

One pilot mediation program widely viewed as not successful was a July 2014–February 2016 experiment in New York County’s Commercial Division courts in which every fifth case filed over a test period was randomly and mandatorily referred to a mediator.<sup>31</sup> The default mediators for these referrals (who could be replaced by a privately chosen mediator if all parties so elected) were assigned from a panel designated by the court, and had agreed not to charge for the first four hours of mediation and to be compensated for any further efforts as agreed with the parties. The marked difference in success rates between this program and the nearby federal court mediation programs was probably not attributable to characteristics of the mediators, since the two programs’ panels of approved mediators featured substantial overlap. Rather, it more likely reflected the absence of screening to identify types of disputes that made individual matters particularly good or poor candidates for mediation—the Commercial Division’s assignment of cases to mediation was purposefully random—possibly coupled with adverse dynamics from the artificial construct that the mediators would require payments of costs after four hours.

b. Thinking About Further Court-Sponsored Programs

It seems clearly inappropriate, though, to conclude from the outcome of this experiment that Commercial Division disputes—state court business cases involving a minimum amount in controversy that varies by county and ranges from \$50,000 (Albany) to \$500,000 (New York County)—are generally poor candidates for mediation (court-mandated or otherwise). The evolution of court-annexed mediation should feature systematic and broad experimentation as court administrators and parties test the nature and limits of cost-effective mediation as a faster and less expensive alternative to conventional litigation, and as a means for decluttering court dockets. For example, the recent “Non-Division Pilot Project” described above—in which the New York County Supreme Court automatically refers to mediation, upon filing of a request for judicial intervention for any reason other than a motion to dismiss, all breach of contract cases with amounts in controversy below the New York County Commercial Division’s \$500,000 limit—is achieving marked success.<sup>32</sup> Experimentation with mediation programs in New York’s matrimonial, family, and surrogate’s courts has similarly shown enormous promise, and such mediation programs are currently being expanded to additional courts. The dramatic success of some of these experiments provides ample basis for assuming that individual instances of failure may be more attributable

---

<sup>31</sup> See *ADR Overview*, *supra* note 27.

<sup>32</sup> *Id.*

to shortcomings in the pilot project than to shortcomings of the concept.

The most successful mediation programs in New York offer parties the option of either using high-quality approved panel mediators at no or significantly reduced charge or selecting (and paying) their own mediators. A dramatic expansion of these court-imposed mediations could place pressure on the available pool of skilled mediators willing to work for free—most of whom appear to do so for reasons combining public service generosity and desire to accumulate credentialed experience as neutrals and credibility with the courts.

Some New York federal and state judges have hesitated to compel mediations before private neutrals charging fees, concerned that courts should not impose external costs on parties as a prerequisite for adjudicating their disputes.<sup>33</sup> New York courts have appointed special masters or referees to be compensated by the parties, though (but generally only in cases where the amounts in controversy were substantial enough that the costs would not likely be material to the dispute), and courts in other states have issued decisions or promulgated rules expressly permitting mandatory referrals to private mediation and authorizing the imposition of the resulting costs on the parties.<sup>34</sup> Even where local rules and state codes may not expressly authorize courts to order mandatory referrals to mediators compensated by the parties, practitioners will often find that courts have become comfortable with directing the parties to mediate with the expectation that this directive would be followed.

Managed correctly, court-supported or court-ordered mediation enhances rather than impedes the fair, inexpensive, and speedy resolution of disputes. A brief pause in litigation processes to determine whether the dispute can be resolved without the need for a judicial decision, which may be very expensive and take a long time to obtain, makes sense. As a matter of simple arithmetic, an early mediated or negotiated resolution usually will result in lower total tangible and

---

<sup>33</sup> See generally Frank E. A. Sander, *Paying for ADR: To Make It Work, We Have to Provide Funds for It*, 78 A.B.A. J. 105 (1992) (identifying this concern).

<sup>34</sup> The leading court decision, *In re Atlantic Pipe Corp.*, 304 F.3d 135, 143, 147 (1st Cir. 2002), found that district judges have inherent authority to order mediation and the implied authority to order the parties to share the mediator's costs. See also *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 381 (S.D.N.Y. 2011) (recognizing bankruptcy court's power to order private mediation). For court rules or statutes permitting such practices, see, e.g., MINN. GEN. R. PRAC. 114.11(b) (2018) (providing that "[t]he parties shall pay for the neutral"); N.M. STAT. ANN. § 40-12-5(C) (2018) (requiring parties to pay the costs of mediation on "a sliding fee scale" based on ability to pay); OHIO REV. CODE ANN. § 3105.091(A) (West 2018) (authorizing courts to "order the parties to undergo conciliation . . . [and to] direct and order the manner in which the costs of any conciliation procedures . . . are to be paid"); FLA. R. CIV. P. 1.700 (2018) (same). *But see* *Ventrice v. Ventrice*, 26 N.E.3d 1128, 1130, 1132–33 (Mass. App. Ct. 2015) (provision in divorce decree requiring the parties to "engage in and pay for court-directed mediation before either may file any subsequent action" violated Declaration of Rights (Article 11) of Massachusetts Constitution). See generally Shaffer, *supra* note 25.

intangible expense to the parties than a later resolution, leaving the parties with an economic surplus to distribute between themselves. And even when mediations do not lead to immediate settlement, they often promote efficient exchanges of information, help the parties focus on the heart of their dispute, and set the stage for later successful settlement discussions.

In the next generation, many of the current posturing and other interferences with the effectiveness of mediation will likely continue to erode. Parties will consistently appreciate, as many do now, that the economic advantages held by one side or the other, the prospect of success in an early or late dispositive motion, the risks before a jury, and the various costs, delays, and burdens of a long litigation can be incorporated into the parties' analysis even in an early mediation. Devices like refusing to bridge gaps in an effort to increase the adversary's desire to settle and thereby obtain a better price will be increasingly seen as not accomplishing sufficient changes in recoveries to be worth the costs they create. Parties will be nimble at shifting from adversarial to mediation roles (or will split those roles between different lawyers) and will be more willing to exchange voluntarily information they believe may enhance the parties' sense of readiness to reach a deal.<sup>35</sup>

Court rules or practices regularizing the process of considering mediation and other forms of ADR can by themselves play important roles in advancing negotiated resolution. In New York State's Commercial Division, recent changes to Rules 10 and 11 require counsel to submit a written statement, at each case's preliminary conference and each subsequent compliance or status conference, certifying that they have discussed the availability of ADR with their client.<sup>36</sup> In other courts, judges have said that their merely asking the parties whether they have discussed a negotiated resolution to their disputes sometimes triggers serious settlement discussions or the retention of a mediator. New York State Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks have recently announced the formation of a new Advisory Committee on ADR to consider ways of expanding alternative mechanisms for helping parties to resolve their disputes less expensively and more quickly, and that Committee seems likely to propose further

---

<sup>35</sup> The entire emerging discipline of collaborative law, as an alternative to adversarial law, illustrates this provocative sensibility. See, e.g., UNIF. COLLABORATIVE LAW RULES & UNIF. COLLABORATIVE LAW ACT prefatory note 4–9 (2010), [http://www.uniformlaws.org/shared/docs/collaborative\\_law/uclranducla\\_finalact\\_jul10.pdf](http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf) [https://perma.cc/B7G2-ZSVT]; Lawrence R. Maxwell, Jr., *The Development of Collaborative Law*, ALTERNATIVE RESOLS., Summer/Fall 2007, at 22. Versions of this law have been adopted in fifteen states; see SILVERMAN, *supra* note 17, at 5, 7–10.

<sup>36</sup> See Christopher Harris, Jonathan Lippman, Gregory Mortenson & Nicole Valco, *Commercial Division Rules Poised for Additional Business-Oriented Changes*, N.Y.L.J. (Dec. 19, 2017, 2:35 PM), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/19/commercial-division-rules-poised-for-additional-business-oriented-changes>.

experimentation and substantial expansion of pilot experiments that appear to be succeeding, in the interest of fostering access to justice, efficiency in resolving disputes, and greater effectiveness in judicial administration.<sup>37</sup> Actions directed to focusing the parties' attention on achieving a resolution generally serve the interest in accelerating resolutions of even intractable-seeming disputes.

## 2. Courts' Role in Advancing More Efficient Litigation to Decisions

Courts' role in thinking about how to improve access to justice through attention to reducing the cost and duration of disputes should not be limited to settlement processes. Judges' core roles as decision-makers point toward also substantially focusing on the process of achieving decisions. For cases that are to be resolved by decisions, courts' consideration of how to reduce costs and increase efficiency tends necessarily to be influenced by sensibilities about the imperatives of docket management. The simple step of hiring more judges, law clerks, and law secretaries to help them could yield decisions more quickly and at less cost to the parties. But, apart from waiting for these perennially underfunded expenditures, it appears worth asking what judges can do to resolve disputes less expensively and more quickly using approximately the same resources the courts now use.

The most obvious potential mechanisms for accelerating decisions and reducing the cost of disputes are far easier to identify than to implement consistently with current burdens on judges: (1) issue early and firm orders circumscribing the scale, cost, and duration of the dispute, based on the predicates that the court, rather than the parties, should have the ultimate word about these issues, and that faster and less expensive is presumptively better; (2) expand and embrace the concept of proportionality, not limited to the discovery context (where it has been built into the Federal Rules and Commercial Division Rules but applied fairly sparingly), but instead with reference to the entire dispute; and (3) shift judicial practices and priorities away from postponing decision-making and toward making the most comprehensive decisions possible more quickly and earlier in the dispute.

---

<sup>37</sup> See Andrew Denney, *Court System Officials Want to See More ADR in New York*, N.Y.L.J., Apr. 30, 2018, at 1; Press Release, Hon. Lawrence K. Marks, New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice (Apr. 20, 2018), [http://www.nycourts.gov/PRESS/PDFs/PR18\\_10.pdf](http://www.nycourts.gov/PRESS/PDFs/PR18_10.pdf) [<https://perma.cc/Z93L-49T4>].

### 3. Case Management and Proportionality

#### a. Efficiency Goals and Access to Justice Principles in Case Management

Every case should presumptively be managed based on the concept of capacity to yield a decision accepting or rejecting the plaintiff's claims.

That simple-sounding principle can readily present issues relating to the fair administration of justice. Taken to its logical extension, it suggests that, even when only a small amount is in dispute, parties should be able to achieve justice with an expenditure of legal fees no more substantial than the parties can rationally afford to spend in litigating a dispute of that scale. If the total cost of litigating a dispute amounts to more than, say, one-third of the amount in controversy (one-sixth for each side), as it often would if disputes were regularly litigated to judgment, that cost will usually overwhelm the will or practical ability of the party entitled to win the dispute to continue to judgment, forcing a settlement that provides less justice to the meritorious side than a decision would have provided.

The notion that the scale of process in a dispute should be calibrated to the scale of the controversy receives regular support in small claims court, but far less support elsewhere. Plaintiffs in New York's small claims court (which resolves disputes involving \$5,000 or less) waive rights to a jury trial by proceeding in that court,<sup>38</sup> and defendants rarely seek to impede the contemplated quick dispute resolution process by exercising their right to demand a jury trial (six jurors). At the first hearing in a small claims dispute, the judge typically asks the parties to choose between referral to an available mediator for an attempt at immediate negotiated resolution, referral to an available arbitrator who will try to issue a binding decision in that same session, or retention of the dispute by the judge for resolution at a future hearing date (or possibly two). Parties most often choose the immediately available alternatives. All three alternative categories of mediator or decision-maker are intensely focused on rapid (and ideally immediate) resolution of the dispute, with decision-makers typically hearing both sides' positions, asking any needed questions, and then announcing a resolution. While limited discovery is technically available, needed information is more often elicited by jawboning from the judge, and is limited to what the parties and the judge need to know to get the dispute

---

<sup>38</sup> N.Y. CITY CIV. CT. ACT § 1806 ("A person commencing an action upon a small claim under this article shall be deemed to have waived a trial by jury, but if said action shall be removed to a regular part of the court, the plaintiff shall have the same right to demand a trial by jury as if such action had originally been begun in such part.")

resolved. Lawyers are rarely present. The speed of the resolution reflects sensitivity to the amount in controversy, but also thoughtful and earnest judicial attention to doing justice.<sup>39</sup>

Once cases outgrow small claims court and lawyers become involved, the concept that the procedures leading to a decision should be calibrated based on the court's understanding of the controversy's scale gets applied with far less rigor. Even in the low-dollar realm of New York City Civil Court (jurisdictional limit of \$25,000<sup>40</sup>), for example, parties rarely take advantage of available streamlining procedures, and defense lawyers frequently stymie plaintiffs' efforts to proceed quickly by demanding jury trials that do not get scheduled for long periods and rarely take place. While a number of courts in New York and elsewhere provide rules for accomplishing highly accelerated adjudication of disputes with consent of both parties,<sup>41</sup> those options regrettably almost never command consent from both sides.

Courts and parties should not fix the scale and duration of processes for reaching a decision in litigation based reflexively on the positions of the party that wants the longest process and the greatest expense. That party's desires may stem from a strategic purpose, an instinct to litigate so comprehensively that the cost will be disproportionate to what is at stake, or simply a determination to impose burdens on the adversary. Instead, scale and duration should be fixed based on hard-headed assessments of what is needed to permit a fair decision determined with reference to what is at stake.

Courts today tend not to engage intensively with the parties over the specific litigation steps they propose to employ, or even over generally contemplated processes and scale. The courts' most commonly employed weapon to reduce cost and shorten time is the deadline—especially the discovery cutoff and the trial date. This weapon has the advantages of powerfully affecting how the parties manage their litigation (and how they think about timing of settlement discussions) and of enabling the court to press the parties to find ways of

---

<sup>39</sup> See, e.g., J. Peder Zane, *Tell it to the Judge . . . but Only if You Feel You Really Must*, N.Y. TIMES (July 16, 1995), <http://www.nytimes.com/1995/07/16/business/tell-it-to-the-judge-but-only-if-you-feel-you-really-must.html>.

<sup>40</sup> *New York City Civil Court*, N.Y. STATE UNIFIED CT. SYS., <https://www.nycourts.gov/COURTS/nyc/civil/general.shtml> [<https://perma.cc/N9QK-Z855>] (last visited Sept. 15, 2018).

<sup>41</sup> See N.Y. COMP. CODES R. & REGS., tit. 22, § 202.70(g) (2018) (Commercial Division's accelerated adjudication provision included at Rule 9). Outside of New York, for example, the Minnesota Supreme Court has established a pilot program called "The Expedited Litigation Track" (ELT) pilot project that aims—through mandatory referral of all actions within certain categories of disputes—to "improve the way our trial courts process civil cases in order to secure the just, speedy, and inexpensive determination of every civil action." See Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice, ADM10-8051 (Minn. May 8, 2013), [http://www.mncourts.gov/Documents/0/Public/News/Public\\_Notices/Administrative\\_-\\_Order\\_-\\_Rules.pdf](http://www.mncourts.gov/Documents/0/Public/News/Public_Notices/Administrative_-_Order_-_Rules.pdf) [<https://perma.cc/69EC-STVN>].

streamlining without need for the court to devote substantial energy to unsatisfying specific mechanics of case management. Deadlines really do work. Parties and advocates usually do less when they have less time (although sometimes particularly rigorous deadlines necessitate inefficient and expensive expansion of litigation teams). The disadvantages of managing litigation by deadline are that deadlines can be somewhat of a blunt instrument if employed without listening to counsel, and sometimes direct focus toward accelerated settlements more than to less expensive and faster decisions on the merits.

b. An Expansive View of the Pursuit of Proportionality

The Federal Rules of Civil Procedure and the New York CPLR have long identified “inexpensive” as one of the three specified central goals in application of procedural rules, but it appeared to be a significant development when the Federal Rules were amended (effective December 1, 2015) to incorporate an explicit concept of “proportionality” to Rule 26(b)(1), governing the scope of discovery,<sup>42</sup> and the New York Commercial Division Rules were amended to embrace this concept in 2015.<sup>43</sup> This change plainly reflected a purposeful recognition of the access to justice implications of imposing excessive burdens on parties by not calibrating the scope of tolerable litigation costs with reference to the scale of the dispute. While some decisions have provided color on application of the proportionality concept in practice,<sup>44</sup> the general impression of most observers has been that it is too early to assess the real effect of this revision of the rules.<sup>45</sup>

---

<sup>42</sup> The rule provides that discovery is to be “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” FED. R. CIV. P. 26(b)(1).

<sup>43</sup> See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(g), *as amended by* Amendment of Preamble to the Rules of the Commercial Division (adopted Oct. 5, 2015; effective Dec. 1, 2015) (Preamble relating to proportionality in discovery).

<sup>44</sup> See, e.g., *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 258–59 (3d Cir. 2016) (where plaintiffs made bare fraud allegations and sought extensive False Claims Act discovery, the court, counsel, and parties would need to develop a limited discovery plan consistent with Rule 26 “to limit the expense and burden of discovery while still providing enough information to allow [the plaintiff] to test its claims on the merits”), *cert. denied sub nom. Victaulic Co. v. United States ex rel. Customs Fraud Investigations, LLC*, 138 S. Ct. 107 (2017); *Armstrong Pump, Inc. v. Hartman*, No. 10-CV-446S, 2016 WL 7208753, at \*3 (W.D.N.Y. Dec. 13, 2016) (considering that, after six years of voluminous discovery, discovery had reached the point of diminishing returns and would provide only marginal utility and, guided by Rule 26’s proportionality principle, allowing further discovery only of a narrow class of technical documents).

<sup>45</sup> See, e.g., Steven Baicker-McKee, *Mountain or Molehill?*, 55 DUQ. L. REV. 307, 313–14 (2017) (noting an increase in the use of proportionality analysis by courts after the amendment but that “it is difficult to determine whether the courts are reaching a different *result* because of the increased application of proportionality, or whether they are reaching the same result for a

Over time, parties and courts can and should attach much more weight to this important concept.<sup>46</sup>

As Judge Preska suggested during the Symposium, the interests of access to justice support not limiting the concept of proportionality to discovery, but instead applying it to the cost of the entire dispute.<sup>47</sup> That way, proportionality considerations can play their proper role of enhancing parties' ability to achieve decisions without knowing from the outset that they must ultimately settle because they cannot afford to litigate to a decision.

Lawyers who insist that they need more process to represent their clients adequately can readily adapt the scale of their efforts in accordance with court directives when necessary. For example, senior litigators all remember when taking or defending multiday depositions was commonplace, but litigators have adapted so completely to court rules presumptively limiting depositions to seven hours that today lawyers rarely seek, and courts rarely grant, exceptions to that presumptive limit.<sup>48</sup> The same has been true for litigators' adaptation to court rules severely limiting interrogatories, requests to admit, and numbers of depositions as imposing too much cost and burden on responding parties for the limited benefits they provide. Advocates regularly adapt and truncate the scale of their litigation efforts to comply with arbitration rules, litigate preliminary injunction motions or other emergency requests, meet short deadlines, or satisfy client budgets. Judicial consideration of such truncations, because the scale of the dispute warrants them, can and should be a component of proportionality review.

To those who worry that curtailing procedures for proportionality-based reasons presents significant access to justice concerns, the answer should be that proportionality and inexpensiveness are elements of a mandate regarding fair decision-making. And that any access to justice issues presented by curtailing processes that cost too much, should be evaluated in comparison to the access to justice issues posed by allowing the process of seeking a decision to become so unaffordable that the parties entitled to win disputes are unable to achieve that result.

---

different reason"); *Tracking the 2015 Discovery Amendments*, 32 FED. LITIGATOR 8 (Apr. 2017) (observing that end-of-2016 metrics showed courts "narrowing or restricting discovery more than four times as often after the amendments as they did before," but cautioning that courts could have been reaching similar decisions under the pre-amendment rules without application of the word "proportionality").

<sup>46</sup> As Judge Koeltl remarked at the Symposium, one judicial sensibility is that practitioners tend to be slow in adapting to changes in the rules when these rule changes relate to matters of long-standing practice. Symposium, *supra* note 4, at 285–86.

<sup>47</sup> Symposium, *supra* note 4, at 286–87, 291.

<sup>48</sup> See FED. R. CIV. P. 30(d)(1).

C. *Making Litigation More Efficient by Making Decisions Earlier*

The simplest way to accelerate achievement of decisions in civil disputes, thereby resolving litigation more quickly, is for courts to decide dispositive motions more quickly, more categorically, and more comprehensively. This change, if supported by appellate courts, could significantly advance efficiency in litigation.

Courts that deny motions to dismiss, for judgment on the pleadings, or for summary judgment, rarely treat their decisions as their last opportunity to pass on the merits of the claims because the full course of the litigation can present multiple opportunities for a decision based on a fuller record and more fully ripened thinking about important claims and defenses. As an empirical matter, though, those choices to postpone a decision usually are not merely postponements but effectively determinations not to identify who is entitled to prevail before the parties settle their dispute. A settlement reached without judicial input will never be as favorable or fair to the party entitled to win as the result following a decision declaring as much as the court is able to determine in a dispositive motion. In this important respect, a change in judicial orientation in the direction of earlier and more categorical decisions would advance rather than impede the fair administration of justice.

Courts have treated an increase in openness to dispositive resolutions as within their policy reach in the past, particularly in the federal system. In 1986, the U.S. Supreme Court expressly eased the route to summary judgment in the so-called “*Celotex* trilogy” of decisions, which collectively required parties opposing summary judgment to present evidentiary facts sufficient to support a jury verdict on any matter for which they had the burden of proof (or to defeat a jury verdict on any matter for which the moving party had the burden of proof).<sup>49</sup> Over the years preceding passage of the Private Securities Litigation Reform Act of 1995,<sup>50</sup> a succession of appellate decisions also progressively reconsidered how much rigor to apply in evaluating the sufficiency of securities fraud claims against the obligation in Federal Rule 9(b) to plead all circumstances constituting fraud with “particularity.”<sup>51</sup> And, in 2007 and 2009, the Supreme Court

---

<sup>49</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See generally Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 82–83 (2006) (noting that “[c]ollectively, the trilogy is viewed as a ‘celebration of summary judgment’ and a mandate for federal courts to embrace the use of summary judgment to dispose of cases before trial”).

<sup>50</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

<sup>51</sup> See generally Sharon Nelles & Hilary Huber, *Pleading Securities Fraud Claims: The Good, the Bad, and the Ugly*, 45 LOY. U. CHI. L.J. 653 (2014).

significantly modified and modernized its longstanding standard for evaluating motions to dismiss complaints, set forth in *Conley v. Gibson*,<sup>52</sup> which required courts to sustain complaints unless, taking all inferences in the plaintiff's favor, the court determined there was "no set of facts" plaintiff could present that would entitle it to relief. The Court's decisions in *Ashcroft v. Iqbal*<sup>53</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>54</sup> confirmed courts' power to exercise their own rationality more confidently in evaluating complaints' sustainability by injecting the concept of "plausibility" as a new component of courts' permitted testing of factual allegations.

These express appellate court invitations to lower courts to open themselves more aggressively to dispositive motions have had far less empirical effect on courts' openness than their language and subtexts might have led observers to predict. Thirty-two years after the *Celotex* trilogy was decided, the academic consensus appears to be strong that those decisions had no significant effect on the percentage of cases in which courts granted summary judgment or in general judicial attitudes about summary judgment, even in a time when percentages of disputes resolved through trials continued to fall.<sup>55</sup> Similarly, a 2016 survey of decisions on motions to dismiss since the Supreme Court's seminal 2007 and 2009 decisions found that "[r]ates of dismissal with prejudice have held steady, motions to dismiss remain uncommon, and settlement and filing patterns have not changed appreciably in the wake of *Twombly* and *Iqbal*."<sup>56</sup>

The proposed greater degree of outreach to make decisions need not and should not be limited to decisions in favor of defendants seeking dismissals. It can and should equally be employed to make early dispositive findings without the need for trial when a plaintiff has fully presented a basis for relief and the defendant has not presented legal

---

<sup>52</sup> 355 U.S. 41 (1957).

<sup>53</sup> 556 U.S. 662 (2009).

<sup>54</sup> 550 U.S. 544 (2007).

<sup>55</sup> See Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 561 & n.2 (2012) ("[T]he summary judgment trilogy has had scant impact on judicial reception to enhanced utilization of summary judgment as a means to streamline litigation.") (citing JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 1-2 (2008), and multiple other empirical analyses by those same authors).

<sup>56</sup> William H.J. Hubbard, *The Empirical Effects of Twombly and Iqbal* (Univ. of Chi. Pub. Law & Legal Theory Paper Series, Working Paper No. 591, 2016). A different analysis has found an increase in numbers of motions filed and complaints dismissed in the particular areas of housing and employment discrimination since *Iqbal*, but no more general trend to that effect has been observed.

See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2012) (concluding that "the number of dismissals on the grounds that the pleadings were not sufficiently specific has risen dramatically after [*Iqbal*]").

grounds for rejecting the plaintiff's claim or sufficient evidence to overcome plaintiff's factual showing. It can and should also be employed in decisions denying motions by either party through court efforts to present the most comprehensive decisions they can, consistently with procedural rules, regarding the central legal issues and what showings regarding disputed factual issues will establish entitlement to relief or to dismissal.

The Supreme Court of Canada took a firm step in the direction of intensively encouraging greater use of summary judgment in a purposefully seminal 2014 decision expressly animated by concerns about the effects of cost and delay in decision-making on affordable access to justice.<sup>57</sup> As the Court explained, in endorsing a broad expansion of trial courts' use of summary judgment powers and affirming a grant of summary judgment to a plaintiff:

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle . . . can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.<sup>58</sup>

While Canadian judicial approaches to summary judgment do not face the constraint of a constitutional right to jury trial on disputed issues of material fact that applies to most U.S. commercial disputes, there is little doubt that a similar U.S. Supreme Court or New York Court of Appeals decision urging courts to pursue a "shift in culture" in the direction of trying more affirmatively to resolve cases on dispositive motions whenever possible, could affect the cost and timing of dispute resolutions—especially if trial courts accepted the invitation. Any such shift readily could, and should, be accompanied by the procedures Judge Marrero's article properly extols as mechanisms for making the filing of dispositive motions less burdensome on courts: an opportunity for plaintiffs to amend their complaints before defendants move against them; requirements of consultation between counsel before such

---

<sup>57</sup> *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (Can.).

<sup>58</sup> *Id.*

motions are filed; disfavoring of both complaints that add unsustainable peripheral counts to the core claim of wrongdoing and motions to dismiss only those peripheral counts that consume substantial court time but have no material effect on the dispute; pre-motion letters to the court that enable the judge to assess whether full briefing is needed (a somewhat more complicated procedure in state court, because a denial of any such motion is immediately appealable to the Appellate Division); and preliminary guidance from the court in a pre-motion conference (if it feels able to provide such guidance) about the apparent merits of the proposed motion.<sup>59</sup>

A purposeful judicial shift in priorities to make dispositive decisions earlier, and to say as much as can be said when denying such motions, would undoubtedly impose burdens on courts. Writing decisions on the merits takes more time than rejecting motions without opinion or postponing decisions as premature. The readier availability of a final disposition might also increase the number of such motions (particularly on the plaintiff side), although, as Judge Marrero has pointed out, the hope for a quick win has already led to filings of such motions in almost every case where they seem even arguably cognizable.<sup>60</sup> But many judges would likely relish a sense of greater latitude to decide disputes at earlier stages with less concern about reversal. As Judge Berman intimated in the Symposium, judges generally believe they are performing the function for which they become judges when they make decisions, far more than when they merely oversee the progress of litigations to settlement.<sup>61</sup> And earlier resolutions would make a substantial difference in addressing the current unaffordability of achieving a court decision for most disputes.

Even when the court remains unable to decide a dispositive motion, a commitment to decide as much as can be decided can fundamentally alter the process for resolving the dispute, in ways that serve the interests of justice. As the Supreme Court of Canada noted in *Hryniak*, even the undesirable delays and costs associated with a failed motion

can be attenuated by a judge who makes use of . . . trial management powers [that] . . . allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion.<sup>62</sup>

---

<sup>59</sup> Marrero, *supra* note 3, at 1677–78.

<sup>60</sup> *Id.* at 1633, 1653 & n.110.

<sup>61</sup> Symposium, *supra* note 4, at 282–83.

<sup>62</sup> *Hryniak*, [2014] 1 S.C.R. 87, 90.

## CONCLUSION

Some disputes will continue to need to be litigated much as they have been litigated for decades. But the history of dispute resolution over the last few decades shows a steady evolution of thinking and action directed to making dispute resolution more affordable and reducing unnecessary strategic, procedural, and emotional posturing and intellectual clutter. The explosion of potential cost associated with electronic discovery has only increased the need to think in more disciplined and proportionate ways about how to position disputes for a negotiated resolution or a decision without avoidable waste.

The dynamics of the adversary process do not demand that opposing parties take opposing positions on pursuit of a faster and less expensive resolution, or that courts defer to the procedural desires of whichever party is seeking most energetically to draw out the dispute. Saving time and cost creates economic surpluses that can be shared by all. Reducing the cost and delay of resolving disputes is sufficiently pivotal to the fair and orderly administration of justice that it deserves institutional attention alongside the central goal of generating the correct result.