FOREWORD: PRETRIAL LITIGATION, 
DISPUTE RESOLUTION, AND THE 
RARITY OF TRIAL

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In modern American civil law practice, the very term “pretrial litigation” seems almost incongruous. The truth of the matter is, as reflected in the recently popular label “the vanishing trial,”1 very little litigation actually involves a trial at all. In federal courts, less than two percent of civil lawsuits result in a trial.2 There is substantial evidence that the trend of dramatic declines in relative numbers of trials has been mirrored in state courts as well.3 In the very unscientific sample of my own fifteen years as a litigator in a variety of state and federal courts, I can safely say that more than ninety-nine percent of my litigation time was spent in “pretrial” work and less than one percent in trial. For good or for ill, and opinions among practicing lawyers and the legal academy vary on that judgment, “litigation” should no more be thought of as “pretrial” than medicine should be considered “pre-surgery” or defense, “prewar.”

It is important to be clear: the actual rate of litigation, as measured by the relative numbers of lawsuits being filed, has not declined in recent years.4 The implication of this, in light of the decrease in trials, is that the basket of processes and tactics known as pretrial litigation is now of utmost importance. It is, for most lawyers who deal with lawsuits, and for most judges in civil matters, where the action is. As one trial lawyer turned professor has noted, “Trial lawyers were all but extinct by the late 1980s. . . . They had been replaced by a group of people calling themselves litigators.”5

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4. Id.
5. Steven H. Goldberg, “Wait a Minute. This is Where I Came In.” A Trial Lawyer’s Search for Alternative Dispute Resolution, 1997 BYU L. Rev. 653, 666 (1997).
Pretrial litigation involves such varied objectives and procedures as discovery to gather information, dispositive motions practice to weed out baseless claims, and pretrial conferences to schedule and plan the course of litigation. Increasingly, therefore, the work of judges in our civil system involves the bureaucratic role of “case management.” This has been accompanied by an enormous growth in the size of the judiciary over the second half of the twentieth century that continues to this day, along with rapidly increasing budgets for courts and supporting administrative services.\(^6\) Not coincidentally, the number of lawyers—“officers of the court”—has increased at a rate which far exceeds population growth: in 2003, we passed the one million lawyer mark in the United States, and that number continues to rise.

Much of the trend away from trials might be viewed as a reaction to the excesses of the adversarial component of the trial process. On the wall in my office hangs a framed lithograph that I received as an award, but that I display not so much out of pride as for the content:

> The entire legal profession: lawyers, judges, and law professors, has become so mesmerized with the stimulation of the courtroom contest, that we tend to forget that we ought to be healers of conflict. . . . For many claims, trial by adversarial contest must in time go the way of the ancient trial by battle and blood. . . . Our system has become too costly, too painful, too destructive, too inefficient for a truly civilized people.\(^7\)

The quotation is from the late Chief Justice Warren Burger and sums up what for many is the central criticism of our civil trial system. But those who practice “pretrial litigation,” if being completely candid, might tell you that the so-called “pretrial” process is, if anything, more costly, painful, destructive, and inefficient than the trial itself. “[T]he pretrial process is so full of delays, battles over secondary matters, and adversary attempts to avoid disclosing information that it is hardly worth the candle.”\(^8\)

Increasingly, many inside and outside of the legal profession have embraced ADR (Alternative Dispute Resolution) as the antidote to the problems of litigation. Indeed, over the past three decades there has been an astonishing growth in the field of ADR, recognized here at Creighton through the recent establishment of the Werner Institute for Negotiation and Dispute Resolution. While much of the phenomenon has been embodied in efforts by community and business groups,

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practitioner associations, and interdisciplinary organizations to promote such approaches as negotiation, mediation, and arbitration, there has been considerable and growing interest by the government—including the judiciary—in promoting ADR. The enactment of the Civil Justice Reform Act of 1990 and the Alternative Dispute Resolution Act of 1998 authorized federal courts to create and offer ADR programs. More and more state courts and administrative bodies refer large numbers of cases to ADR processes, and we are at the point that participation in ADR is a prerequisite to trial in many cases in most states. At the same time, states and local governments are funding more of their own ADR programs to support these efforts.

The result is that, while it may have first been conceived as an antidote to litigation, ADR has become very much “an integral part of the litigation process.” Increasingly, there is a “blending” of ADR and litigation approaches to the degree that “whether one practices in federal court, state court, or before administrative agencies, ‘litigators’ are now ADR practitioners.” Indeed, the vanishing trial phenomenon has often been attributed, at least in part, to the growth in ADR. “[I]t is striking how many more disputes filed in court are now resolved through ADR rather than trial.” It has been argued that ADR has become “just another form of pretrial litigation” and might just as well be known as “litigation lite.”

Many in the field of ADR view such trends with trepidation. By making ADR a routine part of the bureaucratic pretrial litigation process, it is feared, the flexibility, creativity, and responsiveness to parties’ needs and desires that formed much of the original promise of ADR will be lost.

12. See Lande, 5 HARV. NEGOT. L. REV. at 145; Sherman, 15 REV. LITIG. at 504; Rogers & McEwen, supra note 11, §§6:04, 7:01-02.
13. Sherman, 15 REV. LITIG. at 504.
15. Id. at 691.
The discovery process, long a cornerstone of pretrial litigation, presents a cautionary tale. "Discovery" in civil courts was originally conceived as a kind of alternative dispute resolution, though it was not known by that name. The idea was that if the parties could only be required to exchange information early and intensively in a case, the matter could be easily settled.\footnote{Goldberg, 1997 BYU L. Rev. at 666.} In fact, discovery has in large measure become the tail that wags the dog of civil justice. A high percentage of the time and money invested in litigation focuses on the discovery process, which has become a cumbersome kind of game that many view as virtually out of control. It is not inconceivable that ADR could follow the same trajectory.

There is, however, another side in the potential of ADR with implications for the broader realm of pretrial litigation. While much of ADR has been subsumed in the litigation process, a great deal of the action takes place completely outside of bureaucratic court procedures, and more can be done. It is widely recognized that "courts . . . may not be the best institutional settings for resolving some of the disputes we put before them."\footnote{Carrie Menkel-Meadow, The Trouble With the Adversary System in a Postmodern, Multicultural World, 38 WM. & MARY L. Rev. 5, 7 (1996).} A renewed emphasis on creative, privately developed approaches where people take ownership for resolving disputes may provide courts more time and resources to focus on those matters that genuinely require public trial.\footnote{Pearlstein, 22 OHIO ST. J. ON Disp. Resol. at 740.}

The articles in this volume reflect the array of complex issues facing lawyers, litigants, and judges in the realm of pretrial litigation. As the legal profession and particularly the legal academy come to terms with the reality that "pretrial" misleadingly implies a likelihood of trial, perhaps litigation itself will more often become a process of private ordering, embodying the efforts of people to reclaim responsibility for running their own affairs in a manner that is less costly, less painful, and more efficient.

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