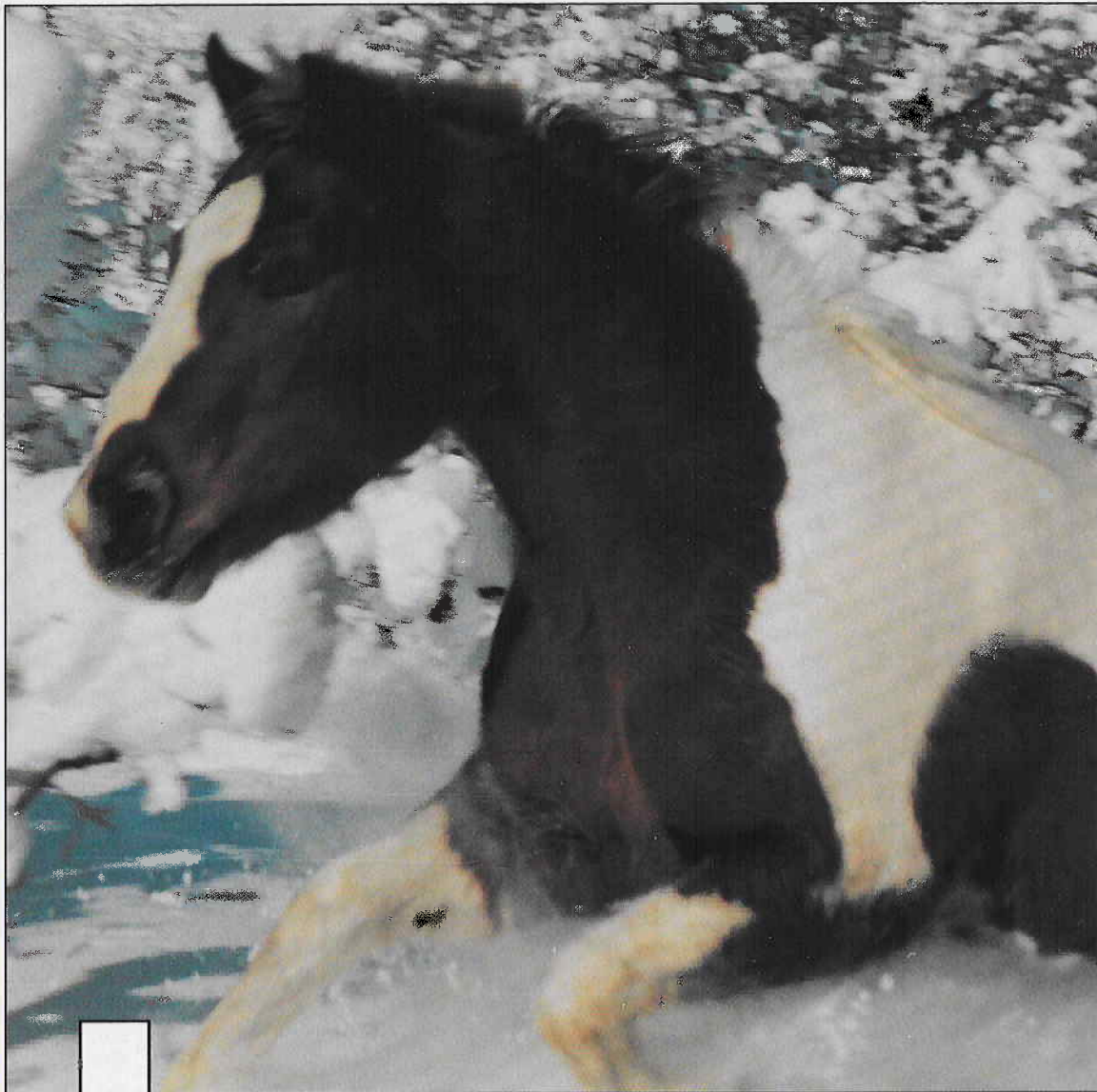


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COVER: Horse in Winter Setting, Alpine, Utah, by A. Dennis Norton, Shareholder
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What is ADR

By James Z. Davis

Unless you have been attempting to reduce stress by seeking your inner self at the top of a peak in Nepal, you are probably aware that the letters ADR stand for Alternative Dispute Resolution.

Unfortunately, the word "alternative" in Alternative Dispute Resolution has come to mean an alternative to the resolution of disputes by the civil justice system administered by local, state and federal courts in one permutation or another since the advent of common law as we know it.

In the fall 1991 edition of the *Utah Trial Journal* published by the Utah Trial Lawyers Association, substantial portions of Judge Bruce S. Jenkins' September 26, 1991 address at the Aldon J. Anderson American Inn of Court were printed.

According to Judge Jenkins, our civil justice system, aided by the significant efforts of the majority of lawyers who practice preventative law, is alternative dispute resolution.

"The alternative provided by the courts is an alternative to bloodshed. Court resolution has had a novel, successful and largely untold history, and even now it has not just a promising but also an essential future. Imagine this country without easily accessible courts, and self help becomes a horrible and horrifying alternative."

Judge Jenkins also observed that in the District of Utah only 3 percent or 4 percent of civil cases actually go to trial and that the entire cost of the federal court system is less than one tenth of 1 percent of the federal budget.

Over the past several years, however, it has been a generally accepted premise that the civil justice system is not doing its job, and other methods of dispute resolution such as mediation, conciliation, and arbitration are necessary, more cost effective and less time consuming than utilization of the courts. Indeed, the growth of "non-judicial" ADR and the desire to provide ADR service and facilities were major objectives in obtaining funding for and construction of the Law and Justice Center; and the Utah State Bar has not waived in its commitment to the notion that all of our citizens should have access to a methodology of effective dispute resolution. Every year, more and more contracts provide for arbitration of disputes thereunder and limit access to the courts for that purpose. In 1985, Utah adopted the "Utah Arbitration Act" (78-31a-1 *et seq.* Utah Code Ann.); and in 1991, Utah adopted an act entitled "Alternative Dispute Resolution" (78-31b-1 *et seq.*, Utah Code Ann.) giving the courts power to refer a pending dispute for resolution by an ADR provider and granting immunity to the provider. I understand 78-31b-1 *et seq.*

has not been utilized as of this writing, but it nonetheless serves as an indication of the legislature's attitude toward ADR. Of course, while the civil justice system is funded primarily by tax dollars, other methods of dispute resolution are funded by the parties to the dispute.

Notwithstanding the foregoing, in that same edition of the *Utah Trial Journal*, the editors asked the following people whether the right to a trial by jury was "as important today as it was in 1791 when the Bill of Rights was finally ratified by the state of Virginia? Or have times so changed that the right to a trial by jury should be abolished and a more efficient form of dispute resolution mandated in its place?" The respondents were Gordon R. Hall, Dennis L. Draney, Monroe G. McKay, Norman Bangerter, Don V. Tibbs, Dee Benson, James Z. Davis, David K. Winder, Eleanor VanSciver, Scott Daniels, Wayne McCormick, Michael L. Hutchings, Boyd Bunnell, H. Reese Hansen, J. Thomas Greene, Michael D. Zimmerman, Cullin Y. Christensen, David Sam and Richard C. Howe. With the exception of Judge Bunnell and Dean Hansen, all of the respondents favor the right to a trial by jury. Since submission of a dispute to arbitration outside the civil justice system constitutes a *de facto* waiver of the right to a jury trial, it appears to me that we are, perhaps, some-

what schizophrenic about our views of these issues.

A survey conducted by a subcommittee of the Civil Justice Reform Act Advisory Committee of the United States District Court for the District of Utah reveals some interesting information, however. Although far from "scientific," the survey attempted to determine the general satisfaction levels of lawyers and litigants using the United States District Court for the District of Utah. The results of the survey suggested that pre-trial discovery had little impact on the cost of litigation, and in many cases was barely utilized. The survey also revealed that, by and large, both the litigants and their attorneys were satisfied with the "services" provided by the District Court. As one might imagine, the major cost of litigation was attorney's fees—presumably a factor in other types of dispute resolution where representation by counsel is desired.

Many of you are aware that the Bar has a very active ADR committee ably chaired by Hardin A. Whitney Jr. That committee is charged with the responsibility of coordinating the involvement of lawyers in alternative forms of dispute resolution and making recommendations to

the bar relative to the appropriate involvement of its members. Wisely, Din Whitney has appointed a subcommittee chaired by Marcella Keck to survey the availability of ADR services in the state of Utah, identify providers, identify users, determine costs and identify funding sources. As of this writing, it is anticipated that the subcommittee will complete its work by January 31, 1992. In the meantime, I

... it has been a generally accepted premise that the civil justice system is not doing its job ...

would urge all lawyers who have an interest in or information about ADR to communicate directly with Din Whitney or Marcie Keck.

Hopefully, through the efforts of Din's committee together with those of other groups, organizations and bar members, we will be able to develop a better grasp of "What is ADR?" For example:

1. Should ADR, by definition, mean an alternate to the civil justice system?
2. Should the definition of ADR be expanded to include the civil justice sys-

tem as one of the alternatives?

3. Should the civil justice courts have the authority to send pending matters to another forum?

4. Do litigants who utilize the services of counsel in dispute resolution proceedings outside the civil justice system save time or money?

5. To what extent is free access to the civil justice system the "right" of a citizen?

6. What level of resources are being expended on dispute resolution outside the civil justice system?

7. Do alternatives to the civil justice system provide the same level of fundamental due process as does the civil justice system?

8. Who are the primary beneficiaries of dispute resolution outside the civil justice system?

9. Are those who agree to submit disputes to resolution outside the civil justice system aware that they are thereby waiving their right to a jury?

10. Will the Third Branch of Government eventually lose its effectiveness as a stabilizing and moderating influence on executive and legislative power if its role in dispute resolution is diminished?

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