ADR — Past, Present and Future
by Hon. Lawrence H. Fleischman, Pima County Superior Court

So, you say you want a revolution? Well, it's arrived. Sure, lawyers, judges and juries still try cases; that is more or less as it should be. Of course depositions still get taken, motions still get filed, and the courtroom looks pretty much the way it has for generations.

But, the last decade in Arizona has altered, in some cases dramatically, the manner and approach for the resolution of disputes in this state. Lawyers and judges have taken a long, hard look at the way we do business and have not been particularly enamored at what they've seen. A growing number of us believe there is a newer and better way.

In so doing, we have returned to the roots of our profession. The irony of the alternative dispute resolution movement is that it pushed aside the litigation model of the last 50 years and has resurrected the noble concept of the lawyer as a resolver of disputes. When Abraham Lincoln urged lawyers to discourage litigation, he spoke across the ages to judges such as Dan Nastro and Barry Schneider, and lawyers like Bruce Meyerson and Michelle Lopez— people who view our profession as the glue that binds society together.

Without an effective dispute resolution system, society simply cannot function. Politicians who try to make hay out of the recognized problems with the justice system are simply silenced when confronted with the ADR methods currently in use in Arizona. They are hard-pressed to complain about an approach to dispute resolution that annually saves millions of dollars for litigants and taxpayers, years of precious court time, and delivers a process that is immensely satisfying to the parties involved.

Indeed, when we began, this last legislative term, to press for the fee-for-service statute now embodied in ARS § 12-134, I was amazed at the ease with which the proposal went through the process. Even in an atmosphere that could only charitably be called anti-court, there was an instinctive recognition by all concerned that ADR was a system worth supporting.

This is not to say, however, that ADR is not without its critics. Indeed, there are many highly responsible people who may support the concept, but are alarmed at what they believe could be an erosion of the most basic right to trial by jury. Moreover, ADR has raised a host of new and complex ethical dilemmas for judges and lawyers alike. Issues such as how hard a judge can push for settlement, whether the court can become involved in fee disputes, and the ability of a settlement judge to seek lienholder compromises are just a few of the new problems we must confront and resolve.

Perhaps some of the answers to these and other problems can be put into perspective by a brief review of how we got to where we now are and where we may be heading. Judges and lawyers have settled cases for years, but it was only about 10 years ago that an institutionalized process, and the development of a new beast known as a "settlement judge," began.

Things got started with the Commission on the Courts. The mission of this group of lawyers, judges and non-lawyers was to identify what was wrong with the justice system and to seek solutions to these problems. The Commission studied the issues at length and issued a number of recommendations. Many of these ideas had at their heart the exploration of so-called "alternative" methods of resolving disputes.

About the same time, the Arizona Judges Association and the Arizona Supreme Court sponsored the first presentation of what is now a fairly regular seminar that trains judges in mediation and settlement conference techniques. Our guru from the time of the first conference was the Hon. Richard Bilby of the United State District Court. Judge Bilby infused us all with his enthusiasm for ADR and sought to redirect our attention as judges to our role in a system of dispute resolution. Back then, the idea that a judge could sit in a room and conduct *ex parte* negotiations with one side, and then the other, would probably have gotten you run out of town on a rail. However, largely through the efforts of Judge Bilby and the Commission, the development of our current settlement conference process began.

It was made into law through Rule 16(c), which is at the heart of judicial management of the civil caseload. As noted in the comment to Rule 16(c)(11), the rule is intended to be "a strong suggestion that the court explore the possibility of alternative dispute resolution including binding and non-binding arbitration, mediation and summary jury trials." By providing a sanction procedure for parties who act in bad faith under Rule 16(f), the ADR process for probably the first time had real teeth.

Thus, ADR as we now know it got its start from a committee consisting, not only of lawyers and judges, but also actual consumers of the justice system. Today, of course, ADR is a dominant force in dispute resolution in Arizona, and increasingly is being used in a growing variety of cases. For example, since 1992 the Arizona Supreme Court has sponsored the Public Funds Risk Management ADR Project. The first such

organized system in the country, the Project identifies cases involving taxpayer-supported entities (i.e., counties, the state, municipalities, school districts, etc.), stays the litigation in those cases, and then assigns the case to a settlement judge for hopeful resolution.

The first 100 cases were recently completed. The Project costs no extra money for the taxpayers, other than the normal salaries of the judges and staff involved, and has saved in excess of $6 million. Settlement judges around Arizona settled, either at the conference or shortly thereafter, 62 of the 88 cases that actually went to a settlement conference, and 53 responding attorneys estimated they avoided spending more than 23,000 hours preparing for trial. At least $500,000 in direct costs for trials were avoided, and the Project, which has now been permanently implemented by the Court, settled cases from almost every county in Arizona.

I venture to suggest that there are few, if any, governmental programs that can boast of such taxpayer and litigant savings, and cost nothing for the taxpayers to sponsor. This is just one example of the bang for the buck that ADR delivers.

The challenge now lay in what we want for the dispute resolution process in the future, and how it will fit into our traditional system of justice. ARS §12-134 now permits the presiding judge of each county, in conjunction with the county board of supervisors, to set fees for ADR services by court-connected providers. If a judge conducts the settlement conference, there will be no fee, but the demand for settlement conferences has become so overwhelming that a fee-for-service system was necessary to meet it.

For me, nirvana will be the day in when lawyers and their clients don't even come to court, but rather rely on private dispute resolution providers to resolve their cases. The court system will still be involved in credentialing private providers and in handling cases that don't settle and/or require traditional litigation methods. A glimpse of this future can be found in Maricopa County Superior Court's self-service center. There, would-be litigants can, through the computer, obtain the name of a mediator from the computer, resolve the matter with the mediator, and appear in court only to process the paperwork.

It is certainly a brave new world, and a scary one at that. No responsible person could advocate wholesale abandonment of the jury system, but the fact is that even today the vast majority of cases are resolved short of jury trial. The idea should be to make ADR the best system we can for our clients, taxpayers and ourselves. Judges should be able to handle cases that either can't, won't or shouldn't settle, free from the burden of cases that could be resolved by an effective ADR process.

Let me end this article with the same theme with which it began. We have truly witnessed a revolution, and, even though it had been a relatively quiet one, as with all major change there are a number of people who are alarmed. Those of us who pushed for change make a major mistake if we do not heed responsible criticism, for the fact is that we, too, can be wrong.

I don't consider ADR a panacea for all our ills. But the undeniable fact is this—when one utilizes one's talents to convince people to put down the weapon of modern warfare—litigation—and resolve their differences in a way that often results in both winning, one is truly doing work that brings great personal reward. Whether it is a case of neighbors fighting over a barking dog, parents grieving over their dead child, or the restructuring of the delivery of medical services to a large metropolitan area, dispute resolution is essential to the preservation of civilized society. It is work that separates us from the beast.