
Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience

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Introduction

An uneasy traveler, entering into an unfamiliar land, happens upon a guide station. As she enters, an eager guide quickly approaches her. "Choose me," he beseeches, "I've been around a long time now and I can guide you to your destination." The woman hires the guide with the expectation that he will be able to help her effectively navigate through this land.

Several miles beyond the guide station the pair reach a fork in the rocky road. The guide tells her that both roads will eventually lead to her desired destination. "Well, which road is best for me?" asks

the woman. "Ah, 'tis your choice, but I strongly advise taking the left road," replies the guide. "Why is the left road better for me?" inquires the woman. To this the guide sheepishly admits, "'Tis the only one I know."

The days of the trial lawyer are essentially gone. Even the term "trial lawyer" has fallen out of favor over the past four decades as a majority of "trial lawyers" now describe themselves as litigators.¹ Trials themselves are essentially gone as well.² Since the 1960s, there has been a steep decline in the actual number of civil jury trials and the number of civil jury trials as a percentage of the cases filed in both state and federal court. While there is no single reason for this decline, the ever-increasing costs of trials, the increased availability of alternative dispute resolution (ADR) methods, and clients' loss of faith in the jury system have all been contributing factors. Clients have more dispute resolution options available to them and do not have to rely on juries to resolve their disputes. So where does this changing landscape leave attorneys? An increasing number of litigators lack jury trial experience and, instead, are becoming increasingly experienced in ADR methods. Some may view this trend of moving from "antiquated" jury trial skills to "modern" ADR skills as a natural and beneficial evolution.

It certainly appears to be the model of most large civil law firms.

Between the increase in the size of the civil litigation bar and the decrease in the number of cases going to trial, there is an entire generation of litigators for whom trial is merely a theoretical concept. This article examines why a litigator's lack of jury trial experience matters regardless of the likelihood of the case actually going to trial — and posits that this deficiency should be disclosed to prospective clients prior to the formation of the attorney/client relationship. Originally, this need for disclosure was an assumption. In order to empirically test our assumption, we conducted a series of surveys to explore client expectations, litigator disclosures, and whether a litigator's lack of jury trial experience is manifested in mediation.³

Part I: The Implications of Litigators' Lack of Trial Experience

Section I: Litigators in Name Only?

A. Litigator versus Trial Lawyer

As the term “trial lawyer” has fallen out of favor over the past few decades most “trial lawyers” now describe themselves as litigators. But what does it mean to be a “litigator” today? As Professor Kimberlee Kovach⁴ notes, the term “litigator” conjures up images of an attorney who tries case in court.⁵ However, as empirical studies have shown, going to court to try a case is actually a very atypical activity for the modern litigator.⁶

Our survey data indicates that responding litigators have had substantially more experience in resolving disputes through mediation and negotiations than by trying them to a jury. Of responding litigators with five years of litigation experience, only 30% had tried even one case to a jury and only 8% had tried two or more jury trials. However, 93% of

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these litigators had settled at least one case through mediation or negotiation and 38% had settled 10 or more cases in this manner in their first five years of practice. Within the group of responding litigators with 10 years of experience, 30% had still never tried a case to a jury and only 36% had tried two or more, but all of them had settled a case through mediation or negotiations, with 70% having done so 10 or more times. A majority of responding litigators had not tried a single case to a jury until they had practiced for approximately seven years. Approximately 30% of all litigators responding to the Litigation Survey had never tried a single case to a jury.

In practice, the “traditional role” of a litigator has become outdated. Current legal norms have de facto replaced the trial lawyer with the modern definition of the litigator. Kovach redefines the job description of a litigator as “one who uses the litigation or court system as the primary tool to resolve the client's problem.” This definition assumes, however, a litigator who both consciously chooses the court system over ADR and who can effectively use either. The problem seems to be that modern “litigators” are making no such choice at all. Thus, it may

be more apt to re-define a litigator in the 21st century as “one who uses the court system only as a last resort if a dispute cannot be resolved outside its bounds.”

B. Building on, Rather than Rejecting, the Skills of the Displaced Trial Lawyer

If litigators want to distinguish themselves as something more modern than trial lawyers, their tool belt should contain newer ADR skills in addition to, and not in lieu of, trial skills. In order to advise a client appropriately regarding the most advantageous resolution method for the client's dispute, a litigator needs an in-depth knowledge of the available choices. Ideally, the choice of resolution methods should be based on empirical data, as well as actual experience. Rather than parroting anecdotal adages about the advantages of arbitration over trial, the modern litigator should have the ability to advise objectively the client on his or her options so that the client can make an informed decision. A litigator lacking jury trial experience lacks the ability to assess accurately this choice if various options are being over or under-valued. Unfortunately, the client is rarely in a position to know that the balanced, objective assessment they have paid for may not be provided. Therefore, when the client bases his or her decision regarding the method of dispute resolution on the litigator's advice,⁷ the client is making this decision without the benefit of being fully informed. When a lawyer only knows one road, it can hardly be said that the client had a choice in traveling it—particularly if the client is unaware that the litigator has never traveled the other roads.

Section II: Lack of Experience and the Potential Harm to Clients

Regardless of the forum in which a matter is ultimately resolved, a litigator's lack of jury trial experience can have a

significant, negative impact on his or her ability to act effectively in the client's best interest. When lawyers cease to view trial as a viable alternative, settlement becomes the most likely option. Whose job is it to protect the client whose case is resolved for less-favorable terms than a judge or jury would have awarded? Or the defendant who is hounded into settling for nuisance value, but could have won the trial outright? Are defense costs saved the same as dollars paid to a plaintiff in settlement? What about the precedential value of a zero liability verdict?

The client is not only harmed if he or she has to hire new, experienced counsel when the matter is set for trial, nor is the client only harmed if the case is actually tried to the jury by the inexperienced litigator. Rather, this lack of experience has the potential to impact nearly every decision made by the litigator. As a responding partner with over 20 years of litigation at a California law firm opined, "In my view, trial experience informs decision-making in all other aspects of a suit."

A. Sticking With the Devil You Know: The Bias Against Jury Trials

One of the reasons for the decline in civil jury trials is the formation of a bias against juries. One oft-cited reason for this tendency or inclination against pursuing jury trials is the popular belief held by many litigators and clients about the inequity of juries.⁸ Especially frightening to defense attorneys and their clients are the anecdotal and media reports about "runaway juries" which have become the "poster children" for tort reform.

Fear can be a powerful motivating source for lawyers who already possess well-developed powers of rationalization. A jury trial can be a scary place for litigators. Few circumstances expose a litigator to the exercise

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of professional judgment, the occurrence of mistakes, and the resulting accountability as trying a case to a jury. Jury trials, at least those that reach a verdict, result in actual winners and losers. In large civil disputes, this means that one set of high-powered, high-priced litigators will find themselves with a loss and a client demanding to know why. Additionally, with a loss comes the potential for malpractice claims. Thus, trying a case to a jury means that a litigator stakes his or her reputation, and that of the firm (*i.e.* future ability to attract new high-dollar clients), on a skill set that the litigator may not have used since trial advocacy class—assuming that he or she even took such a course—in law school.

With such economic, social, and possible legal pressures, it makes sense that lawyers will cling to any lifeline thrown their way, and the prevailing zeitgeist, erroneously informed as it may be, happily obliges. Both the legal community and the public seem securely ignorant that the "problem of runaway juries" may be a great boogiemanager, as empirical evidence suggests that there is rarely a scary monster in the courtroom just waiting to strong-arm your client.⁹

Another reason given for this bias against jury trials is the perceived inadequacy of juries. As Deans Larry Lyons¹⁰ and Bradley Toben¹¹ and Professors James Underwood¹² and James Wren¹³ note, this perception of the juror's inadequacy is often intertwined with the perception of juror inequity:

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Rather than wagering the future on an undeveloped — or under-developed — trial skill set, a litigator may be more likely to take the "known road" and advise the client to pursue resolution outside the traditional court setting.¹⁵ This phenomenon is discussed by Professor Kevin McMunigal in his article entitled "The Impact of Scarcity of Adjudication on Litigating Lawyers."¹⁶

Unfortunately, once developed, a bias against jury trials is likely to reinforce itself in a positive-feedback-system manner. Litigators will not risk a jury trial because they lack previous jury trial experience. Without trying jury trials, litigators never gain jury trial experience. Lack of experience influences future decisions not to pursue jury trial.

And round and round the system churns, reinforcing the bias as it goes. It is highly likely that a bias formed early in one's legal career will increase over time if the litigator is unable to gain jury trial experience. As the monetary and reputational stakes increase, the stronger the bias will likely be against risking it all in an unfamiliar forum.

For a modern litigator who participates in numerous

mediations, arbitrations, and out-of-court settlements, but never in actual trials, a mindset can develop that it cannot be below the standard of care to do what everyone else is doing; therefore, it must be right (i.e., resolution without trials must be the best course for clients). Herd mentality prevails and is self-reinforcing.

B. The Effect of Lack of Jury Trial Experience on the Discovery Process

The discovery process has become the backbone of civil trials. Whether gearing up for trial or working to settle the case in another forum, discovery is a necessary part of litigation. It is also an area where a litigator's lack of trial experience can have significant indirect consequences.

For civil matters, the goal of discovery is to "present both sides with a clearer view of the merits of the case." This enables the parties to fulfill the two principal purposes of discovery: (1) To evaluate the strengths and weaknesses of your client's position to negotiate an effective settlement; and/or (2) To gather ammunition to be victorious in a trial between adversaries. These purposes are often intertwined because the discovery process is frequently used as a method of evaluating whether to settle or proceed to trial. Therefore, discovery is often conducted as if the matter were going to trial and, certainly in theory, that is the ultimate destination.

Herein lies the problem: In a world without trials, discovery can easily lose its moorings. If a litigator lacks jury trial experience, how does that litigator know what discovery to conduct in order to prepare to try a case to a jury? Along with the problem of not knowing what to discover are the problems of not knowing how much discovery to conduct or the best manner in which to conduct discovery. Without a clear understanding of

the evidence necessary for trial, the litigator is more likely to engage in "extensive, expensive and unfocused discovery." There are also potential strategic costs which may not be apparent to litigators who lack jury trial experience.

When lawyers have no concept of what happens to a deposition after it is taken, or the reams of paper or the electronic files produced, it becomes impossible for a client to know what is essential and what is the "norm." How is a client to know that a lack of trial experience exists or the effect it could be having on his or her case? Without disclosure by lawyers and true informed consent on behalf of clients, how is a client to know whether 15 depositions are really necessary in a case or whether five depositions would have been sufficient?

Where does our current practice leave clients? Right now, we do not require lawyers to disclose their lack of trial experience, and there is no legal ramification for the failure to do so. Our data shows that lawyers are not voluntarily disclosing this information either. Most cases are being resolved outside of litigation. Perhaps we assume that clients ask directly; however, based on the results of client assumptions about trial, this seems unlikely. How would a client exercising due diligence ever discover that the last motion to compel or the 30th request for production was unnecessary? At what point is overbilling for unnecessary legal work by \$1,000 or \$50,000 harmless? At what point is learned inefficiency punishable? Who would even be able to evaluate the client's claim? If the case settles, the charges and behaviors become "whitewashed" in the settlement process. The client never knows, the inefficiency becomes justified, and our economic model of doing business remains intact. Without mandatory disclosure, the client is left in the dark, and it is a rare occurrence if this conduct is exposed to the light of day.

Lawyers are a largely self-

regulating body with respect to ethical considerations; however, we are also fiduciaries to our client. As such, we do not have the luxury of setting the bar low enough to accommodate our present economic model of legal practice because our business model is familiar, easier, more risk averse, and more lucrative. We are required to self-examine and correct our own inadequacies as individual lawyers and as a learned profession.

C. The Effect of Lack of Jury Trial Experience on the Ability to Settle

With many clients expressing a desire to settle cases from the outset, it is easy to overlook the value of a litigator's jury trial experience. In fact, when surveyed about whether a litigator's jury trial experience would be important in a hiring decision, a number of attorneys responded with comments such as that of this DC firm partner stating "[w]hether jury trial experience is important depends on whether one is hiring an attorney to do a jury trial." Other respondents also indicated that jury trial experience would only become important later if it appeared that the matter would go to trial. Yet, even in situations where the client wants to settle, being represented by a litigator without jury trial experience can negatively affect the litigator's ability to reach the best possible settlement for the client. As a responding litigator from Texas noted, "[w]ithout the knowledge and experience of what happens next (pre-trial, post-trial, appeal), how does one intelligently judge the (negotiation to a) BATNA (best alternative to a negotiated settlement)?"

In particular, there are at least three important ways that a litigator lacking jury trial experience is at a disadvantage in the settlement arena: (1) making accurate jury-value predictions; (2) objectively assessing a settlement offer; and (3) bargaining for a better settlement.

(1) Inaccurate “Jury-Value” Predictions

Settling a case requires a litigator to evaluate and make predictions regarding a jury’s likely reaction to a particular witness, evidence, or argument — we will call this “jury-value.” Jury-value is not just the damage award that a jury would likely give to a particular case, but rather the assignment of value—*i.e.*, weight—that a jury would likely give to facts and testimony, if presented at trial. The ability to predict jury-value—as it relates to evidence and the claims as a whole—is important. This predictive ability is often one of the driving forces behind the decision of whether to settle or proceed to trial. As respondents to the Litigation Survey noted, along with the discussion of the associated economic costs of various forms of dispute resolution, liability and damage predictions are the most frequently discussed issues between the litigator and client when discussing whether to pursue a jury trial or an alternative means to resolution.

Because of the trend towards privatizing the justice system, making accurate jury-value predictions can prove to be a very daunting task, regardless of whether the litigator has jury trial experience. As Professor Stephan Landsman¹⁷ notes, “[w]ithout trial judgments to serve as guideposts, what remains is subjective groping unlikely to yield reliable or consistent results.”¹⁸ Without jury verdicts, the public ceases to have a function in determining issues like reasonableness, causation and damages. Questions of evidence are never presented. Jury-value ceases to be known in most categories of claims. Settlements are then controlled by the corporate repeat players in the system on one side and individual participants on the other.¹⁹ The individual participants are not only disconnected from the external reality of what a jury has done in similar circumstances, but are equally disconnected from

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any external reality against which to measure their recommendations regarding settlement values in ADR because they lack the internal databases of the repeat players. This is a self-reinforcing behavior since if the only known guide is the attorney’s past ADR settlement experience, then that attorney has no choice but to value every similar case, in his or her narrow experience, similarly—regardless of what a jury might do and regardless of what the many unknown players in the ADR system are doing in their confidential settlements.

(2) The Inability To Assess a Settlement Offer Objectively

Even if a litigator accurately predicts jury-value, the ability to assess objectively an opposing settlement offer may still be negatively affected by a litigator’s lack of jury trial experience. As McMunigal explains, a litigator without jury trial experience will likely evaluate a particular settlement offer by inflating both the advantages of settlement and the risks of trial.²⁰ This non-objective view of the settlement offer is attributable to two things: *1*) the litigator consciously concludes that his or her lack of trial

experience decreases the chance for success at trial; and/or *2*) the litigator subconsciously magnifies the risk and uncertainties of trial because of a fear of the unknown. Regardless of the reason, McMunigal argues that “the lawyer’s lack of trial competence introduces an additional element of risk unrelated to the merits and decreases the settlement value of the case.” Thus, the litigator’s interest in reputation preservation may cause the litigator to lose his or her independent judgment when advising a client in settlement negotiations.²¹ McMunigal concludes that:

[A] lawyer’s self-interest in avoiding the risk of trial because of embarrassment and exposure of lack of trial skills may conflict with the client’s interest. It also threatens the lawyer’s independent judgment in assessing the desirability of settlement. The easiest way for the lawyer to resolve such a dilemma is to avoid the risk of trial and settle the case. The resulting settlement distortions are particularly insidious because many clients have at best a limited ability to assess a lawyer’s settlement advice and the basis for it, particularly given the lawyer’s apparent expertise.²²

Fiduciaries cannot take advantage of their principal’s trust and cannot benefit themselves without full knowledge and consent of the principal. This is a fundamental aspect of agency law. Lawyers are agents of their clients; agents are fiduciaries for their principals. By definition, once the independent judgment of counsel is compromised by their own self-interest on a material issue, a breach of fiduciary duty has occurred if this compromise is not fully disclosed and consented to by the client. This assumes that consent is possible, which is not always the case under conflicts of interest rules. If a lawyer lacks the skills necessary to evaluate

the settlement value of the case, the client deserves to know. We can hardly claim that settlements or demands for arbitration are in fact voluntary when the client lacks essential information for consent. Like any other conflict of interest under the rules of professional responsibility, the client must be fully informed before the conflict can be waived²³—if waiver is even permitted.²⁴ Here, our client is never even alerted to the existence of the conflict, and yet we pretend that the consent to ADR is both voluntary and informed while we extol the virtues of client self-determination and empowerment.

(3) Weakened Bargaining Position at the Settlement Table

McMunigal argues that the strength of a litigator's bargaining position is at least partially a function of his or her willingness to try the case if settlement negotiations break down. If settlement negotiations do break down, or the opposing party provides an inadequate offer, it is certainly a valuable bargaining chip if the litigator can at least legitimately threaten to go to trial. As a responding litigator at a large New York firm explained, "Very few cases actually go to trial, it's true. But to hire someone without any experience is to leave yourself forced to settle, with no backup plan if the other side does not make a good enough offer." Thus, a litigator without jury trial experience may be more likely to advise a client to accept the opposing party's inadequate settlement offer. Indeed, it may be the best the client can expect if his or her litigator is in this weakened negotiation position.

Section III: Lack of Jury Trial Experience and the Effect on Mediation

Whatever justice many clients

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are receiving is occurring over conference room tables without judicial scrutiny. While this may be hypothetically fine with some clients, it is important to examine whether the reason that clients believe that this is fine is influenced by their lawyer's assurance that the absence of judicial scrutiny is to be avoided because it involves a trial.

Determining whether clients need the protection of disclosure depends in part on what protections, if any, are being provided in the mediation process and the assumptions being made about the actual consent of clients to the process. In order to probe these assumptions, we surveyed mediators. Not surprisingly, most mediators do not believe they have responsibility for exploring issues like the jury trial experience of counsel, exposing the malfeasance of counsel or the verification of legal authorities.

Our data further suggests that while there is not a consensus on the issue, mediators generally consider a litigator's jury trial experience to be important to the mediation process.

Perhaps not surprisingly, an inability to make accurate jury-value predictions was one of the

most oft-noted problems associated with a litigator's lack of jury trial experience. As a Texas mediator and former litigator explained, ". . . the client seldom knows how little [jury trial] experience their attorney has. Such attorneys give advice based on anecdotes from others rather than experience. That tends to make [the client] more secure than they are, and therefore less realistic."²⁵

While jury-value predictions—particularly the ultimate jury-value prediction, the verdict—are certainly not the only factors that induce settlements in mediation, as a Texas mediator and former litigator pointed out, "even though attorneys only discuss likely verdicts a small portion of the allotted time [in mediation], [these predictions are] the silent motivating presence 100% of the time." The ABA Final Report of the Task Force on Improving Mediation Quality confirms this connection between trial experience and mediation. For example, the report notes that 95% of their survey participants thought it would be helpful if the mediator would "give analysis of the case, including strengths and weaknesses," and 60% would like a "prediction about likely court results."²⁶ In the report's section defining "analytical inputs or techniques," it included mediator reality testing questions such as, "how do you think a jury will evaluate your testimony.....will the court permit any testimony about the oral agreement?" Or mediator "opinions" such as, "who knows what a jury might do with this case, but based on what I have learned...." If settlements in mediation are based in large part on jury-value predictions, then the accuracy of these predictions is critical to the client's ability to make an informed decision to settle.

Why does any of this matter? While we do not know precisely how many cases are being resolved through mediation, we suspect it is

significant. With courts ordering cases to mediation, mediation becomes a de facto judicial surrogate for many clients. It would be convenient to assume that someone confirms that clients are participating voluntarily and are fully informed, that someone monitors the explicit and implicit representations of counsel, and that settlements reached are based solely on objective case value information, accurately assessed and free from whitewashed inflation. Unfortunately, true consent has already been compromised with lawyers and judges pushing clients into mediation and other forms of ADR.²⁷

This is not to glorify trials or to ignore the real risks associated with a system of winners and losers; nor are the shortcomings of litigators and the justice system to be laid at the feet of mediators and the ADR process. To be clear: the purpose of this article is not to do away with mediators or ADR. But, the pendulum has swung so far in the direction of ADR and away from trials that we should not assume without question that ADR is better. If a settlement achieved at mediation is “good,” by what standard do we measure that success if not in comparison with the alternatives, including trial? Is it an adequate answer simply to conclude that a settlement at mediation was good because it was arrived at in a collaborative rather than adversary process? This ignores the fact that collaboration is a process; but, the true test of any process is the fairness of the result achieved. Processes can be collaborative and still produce unfair results.

We are not mounting a full-bore assault on ADR. We recognize its value—in context. The problem is that the context has been steadily eroded as the alternative, jury trials, has declined. To be effective alternatives to each other, there has to be some balance between ADR and trials. That balance has become

so tilted toward ADR that lawyers collectively know very little about the alternative, actual trials, and, consequently, their clients know even less. An ADR advocate might claim that this is a result of the “market” having spoken against trials and in favor of ADR. But “markets” function best with

transparency and objective data about alternatives. We detect that neither is present with the current unbalanced system.

Part II of this article will appear in the Summer 2011 issue of VOIR DIRE.

¹ John H. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 *LITIG.* 5, 6 (1978) (noting that by 1970, lawyers described themselves as “litigators” in contradiction to trial lawyer).

² Marc Galanter, *The Vanishing Jury Trial: An Examination of Trial and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUDIES* 459, 459–61 (2004).

³ Five nation-wide surveys were conducted. Our primary surveys were the *Litigation Survey*, which generated 1,358 responses from litigators in 45 states and the District of Columbia, and our *Mediation Survey*, which generated 488 responses from mediators in 42 states and the District of Columbia. In addition, we also conducted three surveys of different types of potential clients—individual lay clients, institutional clients, and other attorneys as clients. Respondents to our survey were promised anonymity besides basic demographic information. Some comments have been very lightly edited to correct spelling or grammar mistakes. Any added language beyond these minor corrections is bracketed.

⁴ Professor of Alternative Dispute Resolution and Negotiations, South Texas College of Law.

⁵ Kimberlee Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 *CLINICAL L. REV.* 359, 361–362 (1998).

⁶ See Galanter, *The Vanishing Jury Trial*, *supra* note __, at 461, 466.

⁷ 87% of the respondents in the *Litigation Survey* indicated that their clients follow their advice regarding the appropriate dispute resolution method for the client’s matter at least ¾ of the time.

⁸ See, e.g., Theodore Eisenberg, et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration in Consumer and Nonconsumer Contracts*, 41 *U. MICH. J.L. REFORM* 871, 879–80 (2008) (noting that “some tort reform proponents regard jury trials as a distinct source of problems with the U.S. legal system,” that arbitration clauses “constitute a way of effectively avoiding jury trials,” and that “[b]y agreeing ex ante to avoiding jury trials, business can avoid the perceived risk of a runaway jury”).

⁹ See e.g., Thomas A. Easton, *Of Frivolous Litigation and Runaway Juries: A View from the Bench*, 41 *G.A. L. REV.* 431, 447 (2008) (empirical data indicates that “it is clear that Georgia trial judges observe few signs of runaway juries”); Larry Lyon, et al., *Straight from the Horse’s Mouth*, *supra* note __ at 428–29 (noting that more than 83% of Texas district court judge had not observed a single instance of a runaway jury verdict during the 48 months preceding their survey); John T. Nockleby, *How to Manufacture a Crisis: Evaluating*

Empirical Claims Behind “Tort Reform”, 86 *OR. L. REV.* 533, 552–58 (2007) (debunking the popular misconceptions regarding “runaway juries”).

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¹⁴ Larry Lyon, et. al., *Straight from the Horse’s Mouth*, *supra* note __ at 422.

¹⁵ See McMunigal, *The Cost of Settlement*, *supra* note __, at 856–61.

¹⁶ 37 *UCLA L. REV.* 833 (1990).

¹⁷ Robert A. Clifford Chair in Tort Law and Social Policy; DePaul College of Law.

¹⁸ Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 *J. EMPIRICAL LEGAL STUDIES* 973, 978 (2004).

¹⁹ See McCormack, *Privatizing the Justice System*, *supra* note __, at 741–42 (discussing the “repeat player affect”).

²⁰ McMunigal, *The Cost of Settlement*, *supra* note __, at 859.

²¹ *Id.*

²² *Id.* at 860.

²³ See Model Rule of Professional Conduct 1.7(b) (4).

²⁴ Not all conflicts of interest can be waived under many professional responsibility codes. A typical test is whether a disinterested lawyer would conclude that a waiver of a conflict is in the client’s best interest. The best interest of the lawyer seeking the waiver is irrelevant. Retaining a particular lawyer may appear to be an advantage, but that advantage, if true, does not necessarily justify a conflicts waiver in itself and may easily be outweighed by a single disadvantage.

²⁵ Responses to the *Mediation Survey*.

²⁶ ABA Section of Dispute Resolution, Task Force on Improving Mediation Quality, *Final Report* 14 (Apr. 2006–Feb. 2008).

²⁷ Jacqueline Nolan-Haley, *Consent in Mediation*, *DISPUTE RES. MAG.* Vol 14 # 2 (Winter 2008).