

# Foreword

Paulette Brown

The practice of law is rapidly changing in many ways. Along with the innovations in technology, regulation, marketing, billing, ethics, and client expectations, lawyers have recently confronted another tectonic shift: What Marc Galanter calls the “Vanishing Trial.”<sup>1</sup>

The world we lived in as children treated trials as the pinnacle of legal practice: Atticus Finch in *To Kill a Mockingbird*, spontaneous confessions of guilt in *Perry Mason*, searing cross-examinations in *Law & Order*. Yet, in my own state of New Jersey, fully 99% of civil cases filed are disposed of by means other than verdict at trial.<sup>2</sup> Some are withdrawn; some are dismissed through dispositive motion; many are settled. But, few are tried.

This trend is only the tip of the iceberg, when one considers all of the civil disputes that were not filed in the first instance. Consider all of the commercial disagreements, the neighbor-to-neighbor conflicts, the insurance claims, the online consumer orders, the employment conflicts, that were adjusted or negotiated or resolved before any court was called in to adjudicate. And there are, in addition, all the securities disputes, the reinsurance battles, the labor disputes, and others that were sent to arbitration rather than to court.

If yesterday’s lawyer gave impassioned closing arguments to a rapt jury, today’s lawyer better assists her client by intentionally avoiding lengthy, costly, and uncertain processes like trial, and spends time fixing the problem. The old model was lawyer as vindicator. The new model is the lawyer as problem-solver.

It is all the more appropriate, therefore, that the American Bar Association Business Law Section offer this volume. Covering several

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1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD., 459 (2004).

2. See New Jersey Judiciary Civil Statistics June 2015 (<http://www.judiciary.state.nj.us/quant/gray1506.pdf>), at 89.

fields of business law, the essays in this book guide practitioners in how Alternative Dispute Resolution (ADR) is currently used to realign parties' commercial interests and manage disputes in a way that is commercially rational, and of benefit to the clients we serve. I particularly encourage readers to take seriously the guides for transactional drafting, for embedding dispute systems into the commercial enterprise, and for looking ahead to forms of mediation and arbitration that return us to the essential, direct, and straightforward way of helping clients do business efficiently. The glossary offered in Chapter 4 is a particularly useful tool for all practitioners, ensuring that we converse with each other accurately and with a minimum of misunderstanding.

As lawyers, whether as transactional or litigating counsel, we negotiate and cut deals on behalf of our clients. In light of the Vanishing Trial, perhaps it is time to take the word "Alternative" out of ADR. This is now a mainstream practice area, and competence in these skills will soon be a core client expectation. I welcome the publication of this volume and look forward to its future enhancement and enlargement to even more fields of practice.