

MIS(UNDERSTANDING)JUDGING

The Honorable Philip M. Pro*

In his article, *Misjudging*,¹ Professor Guthrie argues that because judges possess “blindness” that make adjudication on the merits difficult, alternative dispute resolution processes may better serve the interests of potential litigants.² Acknowledging that serving over a quarter century on the federal bench undoubtedly influences my views on the subject, I offer my response with the hope that readers will not dismiss them as a predictable or “blind” defense of judges and the process of adjudication in our courts. Perhaps it is really just a matter of perspective.

That one’s perspective can enhance or obscure understanding is illustrated by a story I heard many years ago about Abraham Lincoln’s representation of railroad interests in Illinois in the 1850s.³ Although it may be apocryphal, the story relates to Lincoln’s defense of the Illinois Central Railroad in a case brought by a plaintiff for damages to goods allegedly suffered during shipment by Lincoln’s client. Lincoln barely examined a witness and made no objections throughout the trial. Following plaintiff’s exhaustive summation, Lincoln stood before the jury and stated, “Gentlemen, you have heard the evidence. Plaintiff’s counsel has stated the facts exactly right, but his conclusions are all wrong.” After a brief summation by Lincoln, the jury returned a verdict in favor of the railroad. Plaintiff’s counsel was flabbergasted and asked Lincoln, “Abe, how on earth did you pull that one off?” Lincoln provided the following possible explanation:

Well, counsel, today at lunch I walked over to the tavern near the courthouse where I happened to see the members of the jury also taking their lunch. Mindful of my ethical obligation to avoid inappropriate communications with members of the jury, I decided to eat my lunch standing at the bar. During lunch, in a voice perhaps loud enough for some of the jurors to hear, I told the bartender a story I heard recently about a farmer near Springfield who was plowing his field when his five-year-old son came running up to him yelling, “Pa, Pa, come quick! Big sister is up in the hayloft with the hired hand. And Pa, big sister has her dress pulled up over her shoulders

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¹ Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007).

² *Id.* at 263.

³ I relate the story as I heard it. For a similar recitation of the story, see Ray Allen Billington, *Foreword* to PAUL M. ZALL, ABE LINCOLN LAUGHING ix - xii (Univ. Cal. Press 1982), which suggests the story, though associated with Lincoln, cannot be authenticated as having been told by Lincoln. For his assistance in locating this source, I thank Dr. Edward Steers, Jr., a recognized Lincoln authority, whose most recent book, BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN (2001) was selected by the Lincoln Group of New York as the best Lincoln book for 2001.

and the hired hand has his overalls dropped down around his ankles. Pa, I think they are going to pee on the hay!" As the farmer unstrapped the plow, picked up his nearby shotgun, and headed for the barn, he turned to his boy and said, "Son, you've got your facts exactly right, but your conclusions are all wrong."

I offer this story not because I think Professor Guthrie has his facts "exactly right" or his conclusions "all wrong," or because my response is unassailable. I suggest, however, there is considerable room for disagreement with Professor Guthrie's apparent perspective on judges and the adjudication of cases in our courts.

Resolving disputes is often difficult, whatever the forum, and the results are frequently imperfect. Our state and federal courts traditionally have provided the predominant forum for dispute resolution. Indeed, they still do. Nevertheless, I concur with Professor Guthrie that disputants and lawyers should not assume the courthouse is the best place to resolve their disputes in every case. The proliferation of alternative dispute resolution ("ADR") processes in recent years has offered a variety of useful options that parties to a dispute can and should consider in selecting the optimum forum in which to seek resolution. They should do so, however, with a clear understanding of the strengths and weaknesses of the alternatives they are considering.

Naturally, judges, like anyone else, may be limited when making decisions by the informational, cognitive, and attitudinal "blinders" described by Professor Guthrie. So, too, are the mediators, arbitrators, neutrals, and others involved in various ADR processes, including the parties to the dispute and their counsel. Potential litigants surely should consider this human element that affects everyone involved in the resolution of any dispute. They also should consider the structure and rules of the various dispute resolution mechanisms in assessing which process will work best for resolving their particular dispute.

Judges are not characteristically hostile to ADR. In my experience, most embrace ADR as a valuable tool to help resolve matters quickly and inexpensively, leaving room on the court docket for cases that may not lend themselves to an ADR option. Moreover, although I have not researched the panoply of court-annexed ADR programs available throughout state and local court systems, ADR is clearly a viable component of our nation's federal courts.

For example, the Alternative Dispute Resolution Act of 1998 requires United States District Courts to provide ADR services to civil litigants.⁴ A wide variety of ADR programs have developed within the ninety-four United States District Courts including settlement conferences, arbitration, mediation programs, early neutral evaluations, and summary jury trials, among others. A preliminary study of forty-nine United States District Courts conducted in 2005 by the Federal Judicial Center found that out of a total 24,835 cases that went through court-annexed ADR programs, 15,555 of those cases were referred to some form of mediation.⁵ In May 2006, the Ninth Circuit Court of Appeals ADR Committee, under the auspices of the Western Justice Center Foundation,

⁴ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (Oct. 30, 1998).

⁵ *In Resolving Disputes, Mediation Most Favored Option in District Courts*, 38 THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), July 2006, available at <http://www.uscourts.gov/ttb/07-06/mediation/index.html>.

published *Education Programs on Court-Sponsored ADR: Model Programs and Guide to Resources*, which offers guidance to federal courts and members of the bar on how to implement court-annexed ADR programs.⁶

Hence, any potential litigants and their counsel should recognize that in selecting a court as a forum to commence resolution of their dispute, they are, in the federal courts as well as in most state courts, entering a process that itself provides effective ADR options. I do not suggest for a moment that potential litigants should limit themselves to the courts. Like most busy judges, I would encourage all potential litigants to consider resolution of their disputes prior to initiating lawsuits. I also would encourage them, however, to keep matters in perspective when making a forum selection.

In choosing a forum, disputants and their counsel should consider that unlike most ADR options, the process of judicial decision-making in our state and federal courts involves elements that more fully account for and safeguard against the types of inimical blinding influences cited by Professor Guthrie. Ultimately, Professor Guthrie acknowledges that the same blinders afflicting judges potentially afflict everyone involved in a dispute, including those performing in the ADR context. But his analysis does not fully consider whether the procedural and other safeguards that operate throughout the court process are similarly in play in the context of ADR, and the impact of those safeguards on forum selection.

For example, Professor Guthrie warns of people's tendency "to overestimate the predictability of past events due to 'hindsight bias' . . ." ⁷ Professor Guthrie asserts that "hindsight bias can influence determinations of legal liability, where judges or juries are called upon to assess the reasonableness of some conduct after the event has occurred." ⁸ How could it be otherwise? The very function of a fact-finder is to reach the appropriate resolution of a dispute based upon evidence of past events. The potential for hindsight bias is inherent in dispute resolution through any process. A judge, jury, mediator, neutral, or arbitrator is faced with a similar dilemma in attempting to facilitate reasonable resolution, assign fault, or judge liability, whether guiding the parties to settlement or imposing judgment.

Where they have a choice, parties and their counsel understandably will be guided by their subjective assessment of which forum best serves their perceived interests. In doing so, it is important that they consider the self-awareness and training of judges regarding the "blinders" that otherwise may interfere with the accurate application of governing law to the facts of the case. More importantly, they should consider the structural and procedural safeguards within the court process that are designed to attenuate the danger of "misjudging."

Beyond the reasonable assumption that nearly all judges conscientiously want to avoid misjudging, there are other factors to consider. Among those factors are the bifurcation of law and fact-finding allocated to the judge and

⁶ DANA L. CURTIS, THE NINTH CIRCUIT ADR COMM., EDUCATION PROGRAMS ON COURT-SPONSORED ADR: MODEL PROGRAMS AND GUIDE TO RESOURCES (2006), available at http://www2.ce9.uscourts.gov/committees/adr/program_guide.html.

⁷ Guthrie, *supra* note 1, at 434.

⁸ *Id.*

jury, various rules of civil procedure and evidence, the Canons of Judicial Conduct and financial disclosure requirements applicable to judges, the public nature of court proceedings and transparency of judicial decision-making, the availability of appellate review, and the fundamental elements of the adversarial process itself, which all work to reduce the danger of misjudging.

A judge's self awareness of the dynamics of decision-making should not be underestimated. Most judges I have encountered over many years appreciate that the decisions they make are only as sound as the information upon which those decisions are based. Of course, this is true of anyone, including a juror, an arbitrator, a mediator, a neutral evaluator, a party to a dispute, or legal counsel. Issues human, economic, and constitutional surge up against the walls of our courtrooms every day, and one has only to engage in the humbling challenge of judicial decision-making to appreciate how fallible we all can be. Inevitably, the experience of judging builds insight in each judge regarding the importance and challenge of accurately applying the governing law to the facts of the case, as well as the consequences of failing to do so. It is the very need for complete and accurate information to resolve disputes fairly that drives the pleading and discovery process and the entire adversarial system that plays out in our courts every day.

Moreover, the importance of correctly determining the governing law of the case and the danger of allowing inadmissible evidence or inappropriate influences to creep into the process are precisely why the functions of the judge, as the arbiter of the law of the case, and the jury as the finder of fact and credibility, generally are divided. The failure to account fully for this bifurcated process, which dominates our federal and state court systems, undermines Professor Guthrie's conclusions about the potential impact of "misjudging" based on the experiments conducted with various cadres of judges regarding subsequent remedial measures, attorney-client privilege, and the impact of prior criminal convictions.⁹

For example, the experiment regarding subsequent remedial measures at the 1992 Ohio Judicial Conference described by Professor Guthrie ignores an important judicial reality. While a judge surely will be cognizant of the evidence that judge has ruled inadmissible, the jury as finder of fact is not, and thus should not be influenced inappropriately. Similarly, the Wistrich, Guthrie and Rachlinski study¹⁰ fails to account for another separation of functions within the judicial system that generally operates to militate against attitudinal blinders. As the study suggests, a judge's assessment of an appropriate damages award indeed may be influenced, or anchored, by knowledge of a demand made at a pre-trial hearing or settlement conference. However, in practice, the judge who conducts a settlement conference rarely is the same judge who conducts the trial, at least where the trial is going to proceed before the court sitting without a jury. Another study¹¹ Professor Guthrie cites to illustrate the impact of anchoring on judges is framed as a personal injury lawsuit in federal court based on diversity jurisdiction. The study rests on the unlikely assumption that

⁹ *Id.* at 422-23.

¹⁰ *Id.* at 432 n.60.

¹¹ *Id.* at 432 n.66.

both parties to a personal injury case would waive a jury, which in my experience is about as common as big sister and the hired hand peeing on the hay.

The impact of procedural and evidentiary rules is particularly important in understanding how litigation progresses and judicial decisions are made. In making case-dispositive or other decisions regarding claims, defenses, or the admissibility of evidence, judges are bound by well-recognized legal standards. The relevant jurisdiction's Rules of Evidence guide the admissibility of evidence, including evidence that otherwise would unfairly prejudice a litigant before the fact-finder. The procedural safeguards applicable under the Federal Rules of Civil Procedure are fairly typical of those in most state courts as well. These rules are extremely important to the adjudication process in our courts and have a real "anti-blinding" impact.

For example, in ruling on a motion to dismiss, a federal district court may consider only "all well-pleaded allegations of material fact" and must construe those allegations "in a light most favorable to the non-moving party."¹² A court may not grant a motion to dismiss for failure to state a claim unless it appears, on the face of the complaint, that the plaintiff could prove no set of facts that would support his or her claim.¹³ Moreover, a district court must treat a motion to dismiss "as a motion for summary judgment under Federal Rule of Civil Procedure 56 if either party to the motion to dismiss submits materials outside the pleadings in support or opposition to the motion, and if the district court relies on those materials."¹⁴

Similarly, a district court may grant a summary judgment motion only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" demonstrate "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."¹⁵ The court must view all justifiable inferences in the light most favorable to the non-moving party.¹⁶ Furthermore, "[a] trial court can only consider admissible evidence in ruling on a motion for summary judgment."¹⁷

These rules and countless others serve to bring coherence and consistency to the resolution of disputes in our courts. While some might argue that parties give up control of their dispute by subjecting themselves to the court process and its rules, I suggest an equally valid perspective is that the rules enable the parties, their counsel, and the court to control the resolution of the dispute in a fair manner.

Another fundamentally important force counteracting the impact of "blinders" on judicial decision-making that Professor Guthrie fails to address is the public nature of the court process. With certain exceptions,¹⁸ all state and

¹² *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).

¹³ *See, e.g.*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

¹⁴ *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

¹⁵ FED. R. CIV. P. 56(c).

¹⁶ *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

¹⁷ *Ort v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (citing FED. R. CIV. P. 56(e)); *see also* *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

¹⁸ *See, e.g.*, FED. R. CRIM. P. 6(e) (grand jury proceedings); *Matter of Sealed Affidavit(s) to Search Warrants Executed on February 14, 1979*, 600 F.2d 1256, 1257-58 (9th Cir. 1979)

federal court filings, hearings, and judicial decisions are open to public scrutiny. So, too, are jury verdicts and the entire appeals process. Moreover, the advent of electronic filing and case management systems ("CM/ECF")¹⁹ and public access through systems such as Public Access to Court Electronic Records ("PACER")²⁰ that are prevalent in the United States courts, makes it possible for those wishing to study judicial decision-making to do so comprehensively rather than to rely on the small percentage of judicial opinions published in the Federal Supplement, or similar services. Thus, virtually all decisions in every federal case are now available to any researcher who wishes to plow that field.

I am aware of no similar means of examining what actually occurs in most ADR settings. I am not suggesting that the circumstances should be otherwise, but the difference makes comparisons of the competing processes more difficult and conclusions about their comparative value necessarily subjective.

The goals of parties opting for some form of ADR as compared to traditional court litigation are often quite different. Most forms of ADR understandably are designed to facilitate the resolution of disputes in a more informal, flexible, less costly, often non-binding, and confidential forum in which a mediator, neutral, or arbitrator can help bring parties to an acceptable resolution.

By comparison, court proceedings and judges' decisions should, with rare exception, be public and those involved in the process should be accountable. Indeed, the decisional independence so important to the rule of law in this country and public confidence in our justice system require such transparency. Additionally, the Codes of Judicial Conduct that apply to most judges, the various public financial disclosures judges must file, and the very active and public appeals process also help to ward off the "blinding" impact of inappropriate influences.

The transparency of court proceedings perhaps makes the courts the most suitable forum for what Professor Guthrie characterizes without definition as "politically salient" issues.²¹ Venturing a contextual guess as to what Professor Guthrie means by "politically salient," it is undeniable that many cases are litigated in our state and federal courts that involve constitutional, economic, and social issues of local, state, national, or even international importance. Clearly the resolution of such issues may have a profound and precedential impact beyond the individual interests of the disputants before the court. In a political and economic sense, such cases may affect the allocation of values or goods and services as well as the relationships between public and private rights and interests now and in the future. However, even if one accepts Pro-

(holding courts have inherent power to control papers filed with the court, including sealing documents, within constitutional and other limitations); NEV. CONST. art. 6, § 21(5)(d) (directing the legislature to make rules for the confidentiality of judicial disciplinary proceedings); NEV. REV. STAT. ANN. § 62H.100-.170 (West 2006) (providing for sealing juvenile justice records).

¹⁹ See Admin. Office of the U.S. Courts, CM/ECF Frequently Asked Questions (2006), <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html#GE1>.

²⁰ See Admin. Office of the U.S. Courts, Public Access to Court Electronic Records Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Feb. 13, 2007).

²¹ Guthrie, *supra* note 1, at 446.

fessor Guthrie's extensive discussion of politically-grounded attitudinal blinders,²² he fails to explain why disputants to politically salient issues may find the ADR process more suitable than the transparent and more fully accountable process available through our courts.²³ It may be a matter of perspective, but in my view, with rare exception, the private resolution of politically salient issues through ADR processes, when and if that is possible, may diminish the public debate and deprive political decision-makers, such as voters or legislators, of information they need to evaluate and resolve the issues on a larger scale.

Do the structural safeguards and procedures discussed in this response guarantee that what Professor Guthrie characterizes as "misjudging" will never occur? Of course not. Are some disputes more amenable to resolution in a forum other than the adversarial one provided by the trial courts? Of course they are. While I agree with Professor Guthrie's analysis of the benefits of various forms of ADR, I suggest he has not fully considered some of the principal safeguards that serve to attenuate the danger of misjudging in the court process. The presence of those safeguards, and perhaps the absence of similar ameliorating factors in the ADR context, should be carefully balanced by those selecting a dispute resolution forum. In the end, forum selection will remain a subjective decision by the parties to a dispute – a matter of perspective.

²² *Id.* at 440-46.

²³ It is difficult to conceive how cases such as *Bush v. Gore*, 531 U.S. 98 (2000), would be better suited to mediation or arbitration. I seriously doubt the parties to such politically salient cases as *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006) (holding that an employer may be liable for retaliatory discrimination under Title VII of the Civil Rights Act of 1964 for materially adverse actions that would discourage a reasonable employee from making a discrimination claim); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (holding that a university forfeits all federal funding where it denies military recruiters the same access to students it provides to other employers); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (striking down New Hampshire's law regulating abortions for minors); or *Gonzales v. Oregon*, 546 U.S. 243 (2006) (removing a bar under the Controlled Substances Act prohibiting doctors from prescribing certain drugs for physician-assisted suicide under Oregon law), would be better suited to ADR than the court process.