The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice

Edward F. Sherman*

The distinctiveness of the American "common law" trial process in civil cases from that of European continental "civil law" countries is a generally accepted, but too infrequently questioned, truism. Americans, as we know, have jury trials; continental trials do not.[1] The American trial process is "adversary," while the continental is "inquisitorial." This is supposed to mean that American judges act primarily as umpires with the primary responsibility on counsel to develop and present the case,[2] while continental judges take the lead

* Dean and Professor of Law, Tulane University School of Law. A.B., Georgetown University, 1959; J.D., Harvard Law School, 1962; M.A., University of Texas, 1962, 1967; S.J.D., Harvard Law School, 1981.

1. Sweden tries certain criminal cases with a jury made up of a judge "chairman" and lay members who are instructed by him. 9 THE PENAL CODE OF SWEDEN ch. 21 (Thorsten Sellin trans., 1972).

2. *See* Marvin Frankel, *The Search for Truth: An Umpireal View*, l23 U. PA. L. REV. l03l, l042 (l975) ("The judge views the case from a peak of Olympian ignorance. . . . The ignorance and unpreparedness of the judge are intended axioms of the system. The 'facts' are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial."). This traditional view of the passive judge has been considerably altered in recent years in the United States as federal judges in particular have been given extensive "managerial" and "settlement" responsibilities. *See generally* Abram Chayes, *The Role of the Judge in Public*

role in investigating the case and directing the order of presentation and questioning witnesses.[3] Whereas an American trial is a continuous, single "snapshot in time" event, continental proceedings may be composed of a number of hearings held over an extended period of time. At these hearings, evidence is taken by the judge, and when the dossier is complete, ruled on by one or multiple judges. Americans have extensive pretrial discovery, while continentals have very little.[4] Witnesses in American trials are subjected to searching cross-examination by opposing counsel, made more intense by the fact that they have generally been subjected to lengthy depositions in advance. In contrast, evidence in continental hearings may often be admitted in affidavit or summary statement form, and, even when live testimony is presented, cross-examination is limited. Finally, verbatim transcripts are made of all testimony in American trials, while testimony in continental trials is generally recorded in only summarized form by a judge or magistrate.

These are the paradigmatic models for the American "adversary" and continental "inquisitorial" systems, but today there are significant trends that defy those paradigms. Both American judges and continental attorneys have become more activist in the trial process, with the stark differences between "adversary" and "inquisitorial" approaches becoming less pronounced in both systems. American trials, particularly in complex cases, can be extended into a number of hearings, while in some continental countries, trials are increasingly becoming continuous single events. There is, in fact, no one continental model, and the trial process these days differs much more

---

Law Litigation, 89 HARV. L. REV. l28l (l976); PETER SHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (l986).

3. "One striking difference between Anglo-American and European conduct of civil litigation is the difference in the role of the judge on the one hand, and the lawyers on the other. In the American, and perhaps even more in the English model, the judge is a kind of umpire, with no responsibility to find out for himself what went on between the parties, no expectation that he will question the witnesses or seek out evidence that may help to illuminate the controversy. In the European model, in contrast, the judge (or one of a panel of three judges) is in charge of preparing the dossier and gathering the evidence, and he or she usually takes the lead in questioning the witnesses." Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT'L LEGAL STUD. 163, 166 (1985).

4. "[T]he idea of a hearing itself in an international arbitration is largely drawn from the common law model, though it is understood that the sessions may be separated by weeks or months—partly to accommodate the schedules of the participants who come from distant lands, partly because the hearing is not so firmly entrenched as the climax of the proceeding as it is in a common law trial." *Id.* at l74; *see also* W. Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTL. L.J. 390, 394-97 (l98l).

from country to country than ever before.[5] Even the much maligned American practice of pretrial discovery is finding its way across the Atlantic to continental courts.[6]

This Article will consider the on-going evolution of the American trial process towards greater congruence with continental practice. This has partly been in response to greater public awareness of the shortcomings of American trials. In the last two decades, American trials have increasingly come under attack for being too costly and time-consuming, and for permitting obfuscation, rather than elucidation, of the facts. Procedures for pre-trial investigation have been criticized as permitting unnecessary and expensive discovery of information, overpreparation and wasteful rehearsal of testimony, and unduly prolonged pre-trial maneuvering. Trial procedures have been challenged as permitting overly long examination and cross-examination of witnesses, excessive introduction of evidence, and tactics better suited to proving the skill of the lawyer than to getting at the truth. In this atmosphere exists an increasing tendency to experiment with procedures that will reduce the cumbersomeness and length of the American trial, in short, to replicate some of the efficiency features of the continental process.

I. AMERICAN SINGLE-EVENT TRIALS VERSUS THE CONTINENTAL DOSSIER-SYSTEM

The American jury trial is a single-event in which witnesses and evidence are presented seriatim in a continuous proceeding. It is based on the notion that the truth will best be discovered if live witnesses give spontaneous testimony in a posture of answers to questions posed by the attorneys. Trial testimony, however, is rarely entirely spontaneous because discovery devices like depositions permit parties to question opposing witnesses thoroughly before trial. Thus the testimony of most witnesses at American trials has been rehearsed at least once, and sometimes many times, before in a

5. For example, the "proof taking" process of the traditional German model has been altered in recent years to more closely approximate a continuous event trial. *See* Peter Gottwald, *Simplified Civil Procedure in West Germany*, AM. J. COMP. L. 687, 692-93, 697-701 (1983) (discussing the recent "Simplification Amendment" to the German Code of Civil Procedure that adopted the "Stuttgart Model" of rejecting a succession of formal in favor on one oral main hearing). Compare The American Law Institute (ALI), Transnational Rules of Civil Procedure, Discussion Draft (Apr. 1, 1999) at 31-33 ("Receipt of evidence shall be concentrated in a single hearing, or hearings on consecutive judicial days, except when the court orders otherwise for the convenience of the parties or persons giving evidence or the administration of justice.").

6. *See* ALI, *supra* note 5, at 72-83 (sections on "Disclosure and Discovery" and "Deposition and Testimony by Affidavit").

deposition. In fact, by putting off definitive testimony until a trial, rather than taking it earlier when memories are not clouded by the passage of time, the American "snapshot in time" trial leaves room for witnesses (often under the tutelage of attorneys) to modify their stories to keep up with other testimonial developments before trial. A deposition should tie testimony down, but it sometimes becomes a source for nit-picking and quibbling by the time the definitive testimony is finally given at trial. The fact that American trials will often take place years after the events to which the witnesses testify increases the likelihood of faulty memory and dissembling changes of testimony.

In contrast, the traditional continental trial system, rather than trying to capture testimony from all witnesses at a single, spontaneous trial, relies on the collection of evidence over a period of time beginning shortly after suit is filed. In the traditional German model, witnesses are called before a magistrate at different times for "proof taking," and their testimony is written down in a summarized form for inclusion in a dossier.[7] When all the evidence is gathered, the dossier will be reviewed by the judge (or, in some countries, presented to a panel of three judges) for decision.

One explanation for the difference between American and continental trials is that there is a right to a jury trial in the United States that would seem to mandate a single-event trial. However, the use of pre-packaged final trial segments is not necessarily inconsistent with the American jury trial. A witness deposition testimony may, under certain circumstances, be introduced substantively in the trial by reading from it or summarizing its content.[8] Similarly, a deposition may be taken on video-tape, and the video-tape shown to the jury at trial. This is done increasingly with expert witnesses such as doctors because it is hard to accommodate their schedule to the uncertainties of trial proceedings, and calling a live expert witness is very expensive.

One feature of American procedure that works against utilizing pre-packaged final segments of deposition testimony is the federal rule that a deponent must be shown to be unavailable in order for his

---

7. *See* John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 828 (1985); W. Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTL. L.J. 390, 395 (1981).

8. *See* FED. R. CIV. P. 32(a)(1) (permitting a deposition to be used to impeach the deponent); (2) (permitting use of a deposition of a party for any purpose); and (3) (permitting use of a deposition if the court finds the witness is dead, more than 100 miles from the place of trial or out of the United States, is unable to attend because of age, illness, infirmity, or imprisonment, or attendance could not be obtained by subpoena).

deposition to be admissible.[9] This reflects the American preference for live testimony. However, this rule predates video-tape technology that permits a jury to both see and hear a deponent, and some local federal court rules now approve the routine admission of experts' depositions.[10] In such jurisdictions, expert testimony is routinely presented through video-taped depositions.

The testimony of ordinary witnesses, as opposed to experts, is arguably less suitable for pre-packaged final deposition testimony. Live testimony in the court room is touted as promoting candor in witnesses, and the opportunity to hear and observe witnesses live is seen as necessary for a jury to judge a witness' credibility. On the other hand, experts may be viewed as an exception because the scope of their testimony is often circumscribed and live testimony may not be as critical for a jury's assessment of their testimony. But in reality, we have come to accept video deposition testimony of experts in the interests of convenience, and it is hard to distinguish their case from that of ordinary witnesses. Clearly a stronger case exists for encouraging live testimony of the parties themselves and of key witnesses as to whom credibility may be important. However, a more relaxed practice as to admitting deposition testimony of other witnesses seems consistent with the trend begun with video depositions of expert testimony. This would permit a larger part of American trials to be pre-packaged and used at trials, providing more certainty in advance of trial as to what the testimony will reveal, thereby encouraging settlement.

New developments in trial technology have also moved American trials closer to the continental pre-packaged evidence model. For example, pre-packaged evidence was central in the trial of the antitrust suit by the United States against Microsoft in the fall of 1998. On the opening day of testimony, the lead lawyer for the Justice Department played a portion of Bill Gates' deposition in which "gazing directly at his questioner, brow furrowed, head tilted slightly to the left," he denied that he was involved in discussions of meetings to seek an arrangement with the rival Netscape.[11] The lawyer then presented, on a ten-foot video screen, enlargements of a number of documents and emails in which he claimed Gates seemed to direct Microsoft's strategy with Netscape. Testimony from depositions of a

---

9. FED. R. CIV. P. 32(a)(3) (and many state rules based on it) allows the introduction of a deposition only if the witness is unavailable to testify in person.

10. *See, e.g.*, Rule 300-9, U.S. Dist. Ct., W.D. Tex.

11. *As Microsoft Trial Gets Started, Gates's Credibility Is Questioned*, N.Y. TIMES, Oct. 20, 1998, at Al.

large number of witnesses was central throughout the trial. In commercial litigation, evidence more often than not is in pre-packaged form rather than by live testimony.

A developing practice in complex cases in federal courts combines the use of summarized deposition testimony with portions of video-taped testimony. Judge Robert Parker, who used a number of streamlined techniques in a complex federal court antitrust case, describes the practice:

> [Counsel] reduce the summaries to writing and exchange them with opposing counsel in advance to accommodate objections and to facilitate counter-summary designations. While summaries offer the benefit of great savings of time, they still lack the real impact of testimony, However, there is no question that jurors retain a much greater amount from deposition summaries than from the laborious reading of a deposition by question and answer.
>
> An improvement on the use of summaries is to combine a video presentation with summary techniques. This may be done in several ways. The simplest way is for the jury to see a portion of the video deposition of a witness and then for counsel to summarize the remainder. This combination method of presentation permits the jury to actually see and hear the witness and develop a better feel for the witness' qualifications and credibility. . . . [C]ounsel may wish to interrupt a summary to permit the jury to see and hear part of the witness' actual testimony. This technique may be presented to the jury entirely by a video made in advance, with the attorney also appearing on screen when the summary portions are being presented and with the witness appearing on screen for those portions for which counsel feels the jury should have the visual and audio impact of the actual testimony of the witness.[12]

Having a piece of testimony "in the can" and ready to be played at trial would bring the American trial closer to the continental dossier system. A great deal more certainty is achieved by the knowledge on both sides that particular pieces of testimony will be admitted, thus aiding settlement and alternative dispute resolution proceedings that depend on presentation of summarized evidence. This development pushes back to the deposition stage the place for attorney objections and cross examination, with each side later specifying the portions of the deposition they plan to use and the judge ruling on any objections prior to trial. Most significantly this process makes the trial essentially a presentation of prior approved evidence with minimal objections and opportunity for attorney maneuvering.

---

12. Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 551 (1991).

II. AMERICAN DEPOSITION PRACTICE MILITATING AGAINST USE OF DEPOSITIONS AS PRE-PACKAGED SEGMENTS

Despite the trend in complex cases towards using pre-packaged trial segments, the prevalent deposition practice of American lawyers can often prevent a deposition from serving as definitive evidence. The usual attorney practice is to take depositions of opposing witnesses, but not of one's own witnesses, and so depositions are usually taken only in response to a request from the other side. The theory is that the attorneys already know what their witnesses will say and have no reason to tie them down to specific testimony in a deposition. Attorneys also generally withhold damaging cross-examination of opposing witnesses, as well as impeaching evidence at the deposition in order to enhance their surprise value at trial. Likewise, attorneys tend not to depose their own witnesses nor to fully rehabilitate them after they are deposed by the opponent. The philosophy of playing one's cards close to the chest and withholding ammunition for surprise at trial governs this strategy. As a result, deposition testimony is often not an adequate substitute for trial testimony in an American trial because the lawyers, for strategic reasons, have no incentive to make it a definitive and final piece of testimony.

There may be a growing recognition among American trial lawyers that there are advantages in having a deposition be a full and relatively final exploration of what the witness knows and is prepared to testify. This reassessment has been particularly influenced by the realization that, in an era of heavy emphasis on settlement, depositions are more likely to be used in settlement proceedings than in a trial. Professor James McElhaney argues in a recent article in the ABA Journal that "hiding the flag" by not asking questions on deposition that will give away the case's strong points, or by encouraging one's own witness to give as little information as possible, often makes no sense. McElhaney's Socrates-like questions to an attorney with the "hide the flag" mentality makes the point:

> You said you would just as soon settle. . . . So what's going to make the plaintiff respect your case more – an impressive expert who will do a beautiful job of explaining your position to the judge and jury, or an annoying verbal jouster who looks like she's got something to hide?. . . . [T]here are a lot of times when you don't want to keep your talent hidden until trial, because nine times out of 10 the case settles and the depositions

> are the only trial you are going to get. They are the hearings that shape both sides' evaluations of the case.[13]

Even if American attorneys begin to see the deposition as a chance for full testimony, there is a further problem with deposition practice that militates against a deposition providing definitive and final testimony. Attorneys often choose not to make evidentiary objections at a deposition. A "usual stipulation" made at the beginning of a deposition states that all objections, except those relating to form, are waived until trial. This stipulation negates the provisions of Federal Rule of Civil Procedure 32(d) (and similar provisions in most state rules) that provide that objections as to form, as well as to "the competency of a witness or to the competency, relevance, or materiality of testimony" which could be "obviated" if made at the deposition, are waived.[14] The purpose of this rule is to prevent attorneys from "lying behind the log" and raising objections as to both form and substance for the first time at trial when it may be impossible to obviate or correct them (for example, failing to object to a deposition answer as hearsay when the witness, who turns out to be unavailable at trial, could have been asked a further question that would have established the existence of a hearsay exception). The obviability rule is directed at allowing parties to rely on deposition testimony as reflective of what can or will be introduced at trial, and thus to encourage settlement based on a reliable discovery record.

If a deposition were normally expected to provide definitive testimony that would be used at trial (or in settlement or alternative dispute resolution proceedings), attorneys would have to reassess the practice of waiving all substantive objections at a deposition. They would then have an incentive to raise evidentiary objections at the deposition so that they might be obviated at that time. This has the disadvantage of lengthening depositions with objections, but rulings on objections could be made by a judge only on those portions of the deposition that the attorneys intend to use at trial, and the final version could be edited to take out the objections and lawyer comments, saving time and confusion in the trial itself. The virtue of establishing what is on the video-tape as the final and definitive testimony is that the parties and attorneys can rely on what the exact testimony will be in their settlement negotiations and in planning for trial.

---

13. James W. McElhaney, *Should You Hide the Flag? It Can Pay to Reveal Case Strengths During Depositions*, 84 A.B.A. J. 74, 74 (1998).

14. FED. R. CIV. P. 32(d).

American deposition practice results in an incomplete rehearsal of evidence that limits the utility of the deposition as a pre-packaged trial segment. There are undoubtedly situations in which only a discovery deposition should be taken, as when complex information needs to be obtained and immediate cross-examination cannot reasonably be expected without further preparation. But many situations arise in which a deposition could serve as a final proof-taking that will, in the absence of a showing of special circumstances, be presented to the jury and not merely serve as a rehearsal. A local rule that encourages counsel to have informal interviews with witnesses before taking depositions would enhance the role of the deposition as providing definitive evidence rather than mere discovery.[15]

III. ADMISSION OF EVIDENCE IN WRITTEN FORM

Under continental practice, witnesses often present testimony in the form of written summary statements. Because there is no preference for oral testimony, and because it is generally accepted that a summary statement can accurately condense the testimony, there is considerably less quibbling about exact language in a continental trial. Traditional American practice favors live testimony, and evidentiary rules and practice often only permit summaries if the witness is unavailable.

American courts, particularly federal courts in complex cases, are gradually coming to allow summaries in place of live testimony. Some courts actually require direct testimony of expert witnesses to be presented in the form of "written narrative statements."[16] Although criticized as "trial by affidavit," the practice has been upheld on appeal.[17] Submission of witnesses' testimony in writing in administrative agency hearings has been justified as a more efficient way to present technical evidence.[18] As described earlier by Judge Parker,[19] many local federal court rules require counsel to reduce expert testimony to writing, give it in advance of trial to the other

15. *See* THAD M. GUYER, SURVEY OF LOCAL CIVIL DISCOVERY PROCEDURES 20 (Fed. Judicial Center 1977).

16. *See* Judge Gus J. Solomon, *Techniques for Shortening Trials*, 65 F.R.D. 485, 489-90 (1974).

17. *See id.*; *see also* Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193, 197-98 (9th Cir. 1980).

18. *See* MICHAEL S. HORNE, *Presenting Direct Testimony in Writing*, 3 No. 2 LITIG. 30 (1977).

19. *See supra* note 12 and accompanying text.

side, and have it read to the jury as evidence rather than eliciting it from the witness by questions.

A federal rule of evidence specifically provides for introducing summaries. Rule 1006 provides that the contents of "voluminous writings, recordings, or photographs which cannot conveniently be examined in court be presented in the form of a chart, summary, or calculation."[20] The underlying evidence that is summarized need not be introduced into evidence if it is made available to the opponent.[21] Expanding Rule 1006 beyond "voluminous writings" would further the introduction of summaries of a witness' testimony.

The objection often raised to admitting evidence in summary statement form is the unavailability of cross examination. However, American courts that require testimony of experts to be submitted in a summary statement also permit cross examination of the witness. Of course, if the summary statement is based on the witness' deposition, cross examination would also have been available and the pre-packaged segment could be final. Some American courts have also imposed limitations on cross examination in the interests of economy, such as strict time limits on the amount of cross-examination[22] and allowing or requiring testimony, particularly of experts, to be presented in affidavit form with cross-examination limited to the assertions in the affidavit.[23]

IV. VERBATIM TRANSCRIPTS VERSUS SUMMARY STATEMENTS OF EVIDENCE BY JUDGE

A significant difference in American and continental (as well as British) trial procedure is that in most American trials there is a verbatim transcript, while in other countries the judge will stop the testimony at various points and make a summary statement of it. The

---

20. FED. R. EVID. 1006.

21. *See id.*; William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 589 (1991).

22. Federal judges sometimes allocate a set time period for cross-examination or allocate a total number of hours of trial to each side to use as it wishes for direct and cross-examination, thus effectively preventing an unlimited cross-examination. *See* MANUAL FOR COMPLEX LITIGATION (3d ed. 1995), Tentative Draft #2, § 21.643, at 98-99 (time limits may be imposed in the aggregate or "on the length of examination and cross-examination of particular witnesses").

23. Local federal court rules, contain such provisions as requiring direct examination of experts to be submitted and exchanged in narrative form before the pretrial conference (N.D. Cal.) and requiring expert testimony to be submitted in writing in bench trials with cross-examination only done before the fact finder (E.D.N.Y.). *See* SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 20 (l992); *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 22.331, at 110 ("If the contents of a deposition is a necessary element of a party's proof, the preferred mode of presentation should be a succinct stipulated statement or summary of the material facts that can be read to the jury.").

summaries are submitted to the witnesses for their approval, and constitute the official version of their testimony for the record. This serves not only to reconcile inconsistencies but also to weaken the effect of any cross examination, as described by Professor Andreas Lowenfeld in reference to a similar practice in international arbitrations:

> [W]hereas the witnesses had stammered or mumbled, occasionally contradicted and then corrected themselves, omitted relevant factors and then come back to them under prodding from counsel or questioning from the panel, the arbitrator produced a neat, logical, perfectly grammatical, and even elegant statement of the position of each witness or party.[24]

Nothing in American trial practice approximates the function of the judge's summary as a definitive condensation of testimony. American lawyers are used to having the freedom throughout a trial to go back to a verbatim transcript to point out inconsistencies in and impeachment of testimony through cross-examination. The judge's condensed summary constitutes a contemporaneous judgment that inconsistencies or impeachment notwithstanding, this is the essence of the witness' story. The summary thus provides a higher degree of certainty and common understanding concerning testimony as it is received, consistent with the continental dossier trial tradition by which the proof is built piece-by-piece.[25] American attorneys, who are used to having the import of evidence up for grabs until the case is finally submitted to the decision maker (whether jury or judge), are likely to chafe over the degree of finality imposed by this process. On the other hand, this process is not so different from that followed in American administrative law practice and bench trials, particularly in complex cases, where on-going provisional condensing and evaluation of evidence are more common.[26]

---

24. Lowenfeld, *supra* note 3, at 169.

25. *See* Kaplan, *supra* note 5, at l225.

26. *See* WILLIAM W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES (1982); MANUAL FOR COMPLEX LITIGATION (3d ed. 1995), Tentative Draft #2, § 22.51, at 129 ("Where credibility or recollection is not at issue, and particularly when the evidence is complicated or technical, the court may order that the direct testimony of witnesses under the parties' control be presented in substantial part through written statements prepared and submitted in advance of trial. At trial, the witness is sworn, adopts the statement, may supplement the written statement orally, and is then cross-examined and perhaps questioned by the judge.").

V. USE OF MOTION IN LIMINE PRACTICE IN FOSTERING PRE-PACKAGED TRIALS

Expanded use of pre-packaged deposition testimony in American trials would depend in part on the ability and willingness of judges to make rulings prior to trial on admissibility and evidentiary objections. For attorneys to be able to rely on deposition testimony as definitive and final, doubts as to admissibility must be put to rest. This requires judges to be willing to rule on the admissibility of portions of depositions that counsel propose to use at trial. Some states have a well-developed motion-in-limine practice used by judges to issue pretrial rulings on evidentiary questions,[27] but many states do not. Courts in those jurisdictions are understandably chary of making evidentiary pretrial rulings without knowing the context in which the evidence will be offered at trial. However, many matters can be disposed of without the need for specific context. Courts anxious to encourage greater certainty as to pre-packaged evidence should be willing to consider making earlier evidentiary rulings. If a case turns on whether a particular piece of evidence will be admitted, or if that piece of evidence is so crucial that a verdict could be very different depending on the evidentiary ruling, effective use of pre-packaged evidence would lead to enhanced pretrial rulings.

VI. ROLE OF PRE-PACKAGED EVIDENCE IN SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS

Promotion of settlement and resort to alternative dispute resolution (ADR)[28] is a typically American legal development of the last several decades. Settlement conferences and ADR have emerged as an integral part of the American litigation process as courts

---

27. *See* Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963) ("the purpose of a motion in limine is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury"); J. Patrick Hazell, *The Motion in Limine: A Texas Proposal*, 21 HOUS. L. REV. 919, 919-20 (1984) (noting that, while not mentioned in any state or federal statutes, the motion in limine has a rich history in Texas courts, with the present use exceeding its common law purpose); *see also* Charles W. Gamble, *The Motion in Limine: A Pretrial Procedure That has Come of Age*, 33 ALA. L. REV. 1 (1981) (asserting that Rule 16 and its Alabama Counterpart, as well as inherent judicial power, grant the trial court the power to determine the admissibility of evidence); *cf.* Koller By and Through Koller v. Richardson-Merrell, Inc., 737 F.2d 1038, 1067 (D.C. Cir. 1984) (noting that judges should use pretrial motions and motions in limine to "resolve in advance" problems that may be reasonably anticipated to arise at trial); MANUAL FOR COMPLEX LITIGATION, *supra* note 22, § 21.6 (suggesting that motions in limine be decided well in advance of the final pretrial conference).

28. The term "ADR" is used to refer to all nonbinding alternative dispute resolution processes that use third-party neutrals to encourage settlement. *See ABC's of ADR: A Dispute Resolution Glossary*, *in* 10 ALTERNATIVES TO THE HIGH COST OF LITIG. 115-18 (1992).

increasingly require that those procedures be utilized before a lawsuit is allowed to proceed to trial.[29] Distinctively American though settlement promotion and ADR are, they are not well served by the American practice of eschewing development of definitive pre-packaged evidence prior to trial.

Settlement is enhanced if the parties have confidence that the basic facts are known so they can make a reasoned estimate of what would result if the case went to trial. ADR procedures similarly involve evaluation and reality testing with the parties as to the strength of their cases based on adequate knowledge of the facts. Mediations can sometimes be successful early in a litigation before discovery is done, but more often the parties want some assurance as to the facts and as what the evidence will be at trial. Other ADR procedures that are evaluative in nature, such as early neutral evaluation, contemplate discussion of the issues of fact and law so that a reasoned evaluation of strengths and weaknesses can be made. Finally, formal "trial run" processes, such as court annexed arbitration, summary jury trial, and mini-trial, involve a presentation of each side's case to third parties so they can render a nonbinding decision. To provide a reasonably accurate picture of how the case might play out if it went to trial, it is necessary for each side to summarize its evidence and arguments.

Depositions provide a primary source for the factual information normally needed for settlement and ADR proceedings. But if the usual American deposition practice has been followed, with attorneys not divulging their strengths and weaknesses and not developing a full account of what the witness knows, depositions are an inadequate source. As ADR becomes integral to most litigation, attorneys need to reassess that practice. In a summary jury trial, for example, attorneys' summarization of the facts must have factual support in discovery, affidavits, or other information. Failure to bring out the best points in one's own witness' deposition, or to rehabilitate him after harmful questions by opposing counsel, would leave counsel with an incomplete deposition that may be difficult to contradict. A complete and accurate deposition may also be important if there is a motion for summary judgment since incomplete depositions may be difficult to rebut if relied on by the other side.[30] Again a distinctive American procedure (summary judgment) would seem to require greater

29. *See* Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 168 F.R.D. 75, 76 (1996); 15 REV. LITIG. 503, 504 (1996).

30. *See* Sherman, *supra* note 29, at 81.

congruence with continental practices as to pre-packaged evidence and use of summarization techniques.

VII. CONCLUSION

The continental dossier system of trial has certain attractions for American trial practice. The fact that a jury will ultimately have to decide the case in American trial practice does not pose insurmountable barriers to greater use of pre-packaged deposition testimony. Evolving American practice utilizing multiple hearings in trials over extended periods of time, video-tape technology, submission of evidence in written form, and techniques for summarization of evidence reflect movement towards the continental practice. However, a number of rules and practices concerning the taking and use of depositions are stumbling blocks and need to be reconsidered. A greater receptivity to accepting pre-packaged evidence offers such benefits as greater certainty in advance of trial, trial efficiency, promotion of settlement, and enhancement of reality testing in ADR processes.