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American Justice at a Crossroads: Remarks of Kathleen Bryan

Kathleen Bryan*

I thank you so much, Dean Starr, on behalf of the International Institute for Conflict Prevention and Resolution, and it has been known for a long, long time as the CPR Institute. I have had the honor and the privilege of running the organization for the past three years, having followed Tom Stipanowich and Jim Henry as President. I want to start by asking, just for a moment, who here doesn't know what CPR—other than cardio pulmonary resuscitation—is? A show of hands? Well, just a few. So I'll make my remarks very brief. Thirty years ago, a group of general counsel, headed by Jim Henry, got together and said—as Dean Starr said, it was a watershed moment—the litigation system is broken. We want to get together and figure out how to do it better. We can do it not just through the justice system, but we can do it ourselves. We have power. We have authority. We can solve problems. We can do it.

In those days, in 1979—just to reflect for a moment on mediation—mediation wasn't really on the radar screen. The new, new thing then was early neutral evaluation. People thought that the savior for our litigation system was early neutral evaluation and mini-trial. I don't know how many of you have done a mini-trial. I have, and after one experience I said, "Never again." It wasn't mini, and it wasn't a trial. But what that represented in my mind was a willingness to try new things, and say, "Well, we've got an idea. Let's see if that works. Try it. If it works and has legs, great. If it doesn't, move on to the next thing." And that's what CPR has been all about for the last thirty years. You might associate this organization, fifteen people in New York, with a great worldwide presence as demonstrated by the honor to be able to co-sponsor this with an institution as prestigious as Straus. We are very, very honored to be able to do that, but we are a small organization with a big reach because it's all about four hundred organizational members who get together and share best practices. Just like this session today, it's all about what you think, what your ideas are, and how you can make a difference.

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I want to talk just for a minute about my own personal journey in private dispute resolution and what I think we can get out of our lessons and our sharing today. My background is that I was in private practice as a litigator. I often say I am a reformed litigator because of the dissatisfaction I had with litigation. I'm going back now a number of years, but in those days, let me tell you, we did a lot of wasteful things. I confess I was a part of it. It was very frustrating to have a big bill at the end of a case, have absolutely fabulous work—there is no question about that—but a lot of work that wasn't really necessary.

One of the things that I remember so vividly was, you'd start out at the beginning of a case and you'd find facts, you'd get all these depositions, you'd gather documents—and this is before electronic documents—so you'd get a hot document book. I remember within the first thirty days I had a hot document book in every case I ever worked on. And at the end of five years, that hot document book didn't change all that much. Our understanding of the case didn't change all that much. And in between, we spent a lot of money, and a lot of our clients' money.

So I went in-house, and I headed up litigation at Motorola for many years. In that situation, I was trying a case, dealing with a case, and then trying the next case, and dealing with that case, and trying the next case, and dealing with that case. When I was a young lawyer in that situation, I worked up a case with a good analysis, and I went in to see a business manager (this is a semi-conductor business, and he ran the entire semi-conductor business for Motorola) and said, "Okay, let me tell you about this litigation." I go through my speech, and at the end I told him the price tag for what it was going to cost for legal fees—this wasn't for settling the case; this is just for legal fees—and his jaw dropped. I didn't think it was that big, frankly, but his jaw dropped, and he said, "Do you know how many semi-conductors it took me to pay for that? Do you know how many people have to work how many hours, the margin? Because your work comes out of my margin. You're not building widgets for me. You are taking profit."

"Oh," I said. "Well, let's look at some other solutions then. Let's see what we can do." I got very interested in how to move that problem solving earlier, and earlier, and earlier into the process. That led me to my role at CPR and why I think that what we are doing today and organizations like Straus and CPR are so important. It is not about changing the legal system for us. It is not about changing everything about what we do. It is changing little tweaks. It's finding solutions. It's problem solving and doing it in a different way.

Some of the things, for example, you're going to hear about today are what's wrong with arbitration. I travel a lot and talk to users. Most of our constituents are the advocates in litigation—some arbitrators and mediators,

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true, but also the advocates, the general counsel, and the people who are hiring the arbitrators and mediators—and they say as far as arbitration is concerned, particularly in the United States, they don't want to use it. Don't want to use it. It's just as expensive as litigation, you don't have the advantages of appeal, and the court system here is good, so what's the benefit of arbitration? Well, I say, and I think you are going to hear this today, there are a lot of advantages of arbitration, both in the U.S. and internationally. Clearly it's an easier sell internationally, but there are a lot of reasons to use it, and it has to do with party autonomy. It comes back to self-determination—you can fix the problem.

Now, let's reflect on mediation for a moment. The journey to where we are today with mediation hasn't been a smooth road. Back in 2001 or 2002, I was asked to give a speech about the myths associated with mediation. I had ten myths because I was frankly getting kind of tired about talking to counsel and saying, "Well, why don't we mediate this case?" They would say things like, "we don't have enough information yet, we've got to do discovery," and "mediation is good but it's a sign of weakness." Or, how about this one? "Well, the best time to mediate is actually when you have some leverage. And the way to get the leverage is, first you get the information, then you file the motions, then you win the motions, and after you win the motions, then you can mediate." Eighty percent of the transactional costs are already incurred at that point. What's wrong with that picture?

But that was not very long ago, and now I think we have a lot of people who are saying mediation is a good thing, although you might be shocked to know it was only a year ago at a conference in Chicago I was talking to a very prominent trial lawyer, who shall remain nameless, and he said, "I don't believe in meditation." After I picked myself up off the floor I said, "What do you mean you don't believe in meditation? What's to believe? It works! It can work. Yes, it doesn't work all the time, but it certainly can work." And he said, "No, no. No, I mediate all the time, and it doesn't work. It's a waste of time. It's a waste of my client's time. I recommend against it." So there are opinions all over the board.

We're exploring mediation and arbitration, but let me throw a few more out to you. Collaborative law. That is actually my favorite because it has not made its way to civil business practice yet. When I joined CPR, I looked around to see who was doing something different. The wildfire with which collaborative law has taken over in family law is amazing. When parties get together with their counsel with the only goal to solve the problem something incredibly powerful happens. Why aren't we using it like we use

mediation? I'm sure we can come up with a thousand different reasons why it wouldn't work, but what I urge you to do is think about, instead of the thousand reasons things don't work, the thousand reasons why they could.

I guess since I have the podium I get to show off my reading list. I'm reading a wonderful book called *Switch*, and it's about how to change things when change is hard. His thesis is that it is very difficult to change big problems. This is our assumption. And the best way to change big problems is with big solutions. That is the thesis that he starts with, and he says that is all wrong. All wrong. The best way to change the biggest problems is to pick and shine a very bright light on something that's working well. You solve a big problem, not with a big solution (although we're here to talk about big solutions in our justice system, and I hope we do, and I hope we can fix it) but with each and every one of you affecting what you do every single day. You can change it, and little by little the system will change. If you shine that bright light on the things that work, and you share those things that work with others, just like this symposium, then we can evolve into a much more improved system than we have today.

Let me ask you to think about a few things as you go through today. First of all, why are we doing this? Why do we do what we do? We have a legal system that the rest of the world looks at and says, "You guys are nuts!" Our system is not efficient, from the point of view of arbitrators outside the United States. They don't even want to arbitrate here because they are concerned about it. Is our system working? Well, I'd say it can be improved. I don't want to say it is entirely broken because I think the rule of law is strong, and that is the fundamental and most important thing—and we have some of those fundamentals right. But we don't have all of them right, and it can be improved.

So ask as we go through this, "Why are we doing this?" Don't accept the status quo. Think about why? Can we do it differently? Then think about, "What can I do to change it?" Each and every one of you can do something to change it. And you are going to be hearing about the economical litigation agreements. I'll point to Dan Winslow. We're going to be talking about that this afternoon on a panel. It's an idea one person had after being a trial judge. You can judge for yourself (I won't foreshadow anymore of that) but one person can change and come up with good ideas.

And then I ask you to ask, "How can I lead that change?" Because it isn't institutions that lead change, although that's great when they do; I think it's individuals that lead change, and everybody in this room can have a role in that. I'll leave you with two other ideas. These are just my ideas. By the way, CPR is pretty much just business-to-business focus, commercial matters, so that's what I'm going to reflect on here for my two ideas that I want to throw out.

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One is, think about when you ask people, how long does it take to prepare a case and actually solve a case? When you ask corporate counsel, they'll tell you one thing; when you ask outside counsel, frankly you hear much longer periods of time, and that's understandable, and the truth is probably somewhere in between. But what I suggest is, what about if we had a series of ideas? Sixty-day solutions? Maybe cases can be resolved in sixty days; why not? I'm used to "Corporate America" saying, "Give me a metric, and then I'll respond to that metric." What if we said sixty-day solutions? Is this a case that could be resolved in sixty days? Will it fit under a sixty-day solution? Why not? Most of the costs occur in that discovery period, so if you reduce the amount of time to sixty days—I know it just churns to hear that—but there may be cases that would be appropriate for sixty days.

And then I'd say, "What about a six-month solution?" If it's not sixty days, maybe it's six months. If we took eighty percent of the cases that we currently have, and we resolve them—fix the problem somewhere between sixty days and six months—I guarantee it would be a significantly different legal system that we have. Now I'm not saying that's possible. I just throw that out, as we could think broadly about solutions. Enjoy the day, and I look forward to getting to know you.

Thank you very much. Let me introduce Tom Stipanowich.

