

Avoiding and Resolving Conflict: Unfinished Business for Corporate Counsel?

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The Association of General Counsel

Spring Meeting

May 5, 2006

The only constant is change...

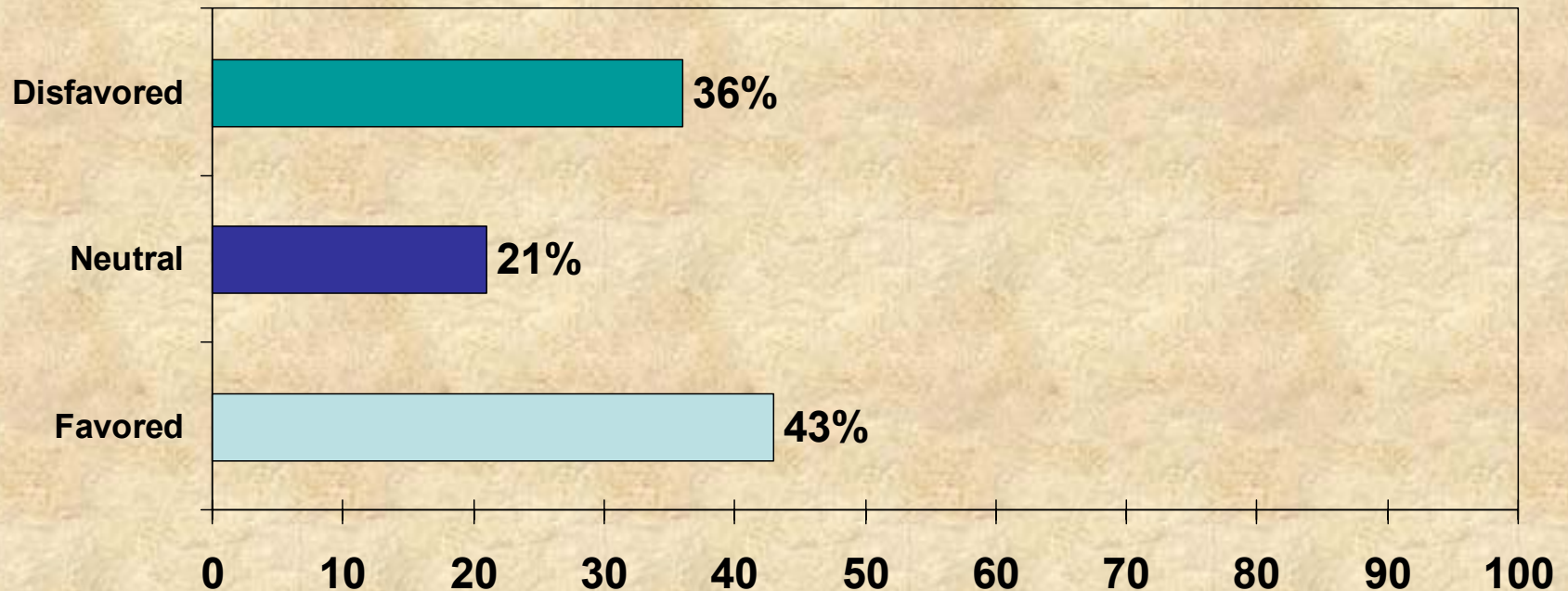


Applications of arbitration . . .

- Commercial disputes—domestic and international
- Investor/broker disputes
- Lawyer fee disputes
- Domestic relations disputes; disputes over property
- Lemon law disputes
- Advertising controversies
- Tort and other claims through court-annexed arbitration programs

2004 Fulbright & Jaworski Survey of 300 Corporate Counsel

General Attitudes Regarding Domestic Arbitration



The Challenges of Binding Arbitration

Why do many companies continue to choose arbitration as a method for resolving business-related disputes?

- Expectations of potential economy, time saving
- More satisfactory process than litigation
- Limited discovery [and motion practice]
- Neutral expertise
- Privacy
- Perceived limitations on liability

The Challenges of Binding Arbitration

What concerns act as barriers to the use of arbitration, and prevent some companies from employing the process?

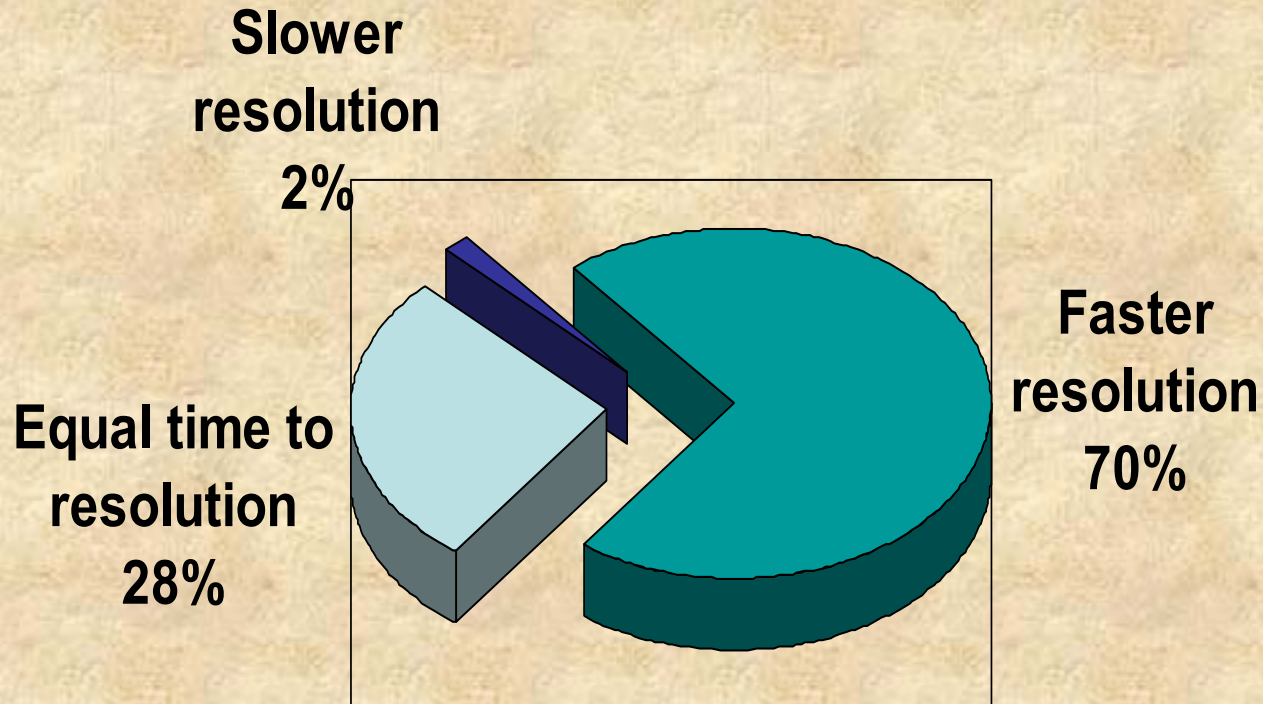
- Limited appeal
- Compromise outcomes
- Lack of confidence in arbitrators
- Lack of qualified arbitrators, uneven administration
- Cost

2002 Survey of Experienced Arbitrators

In 2002 survey of 83 experienced arbitrators in U.S., 31 of 42 responding believed that...

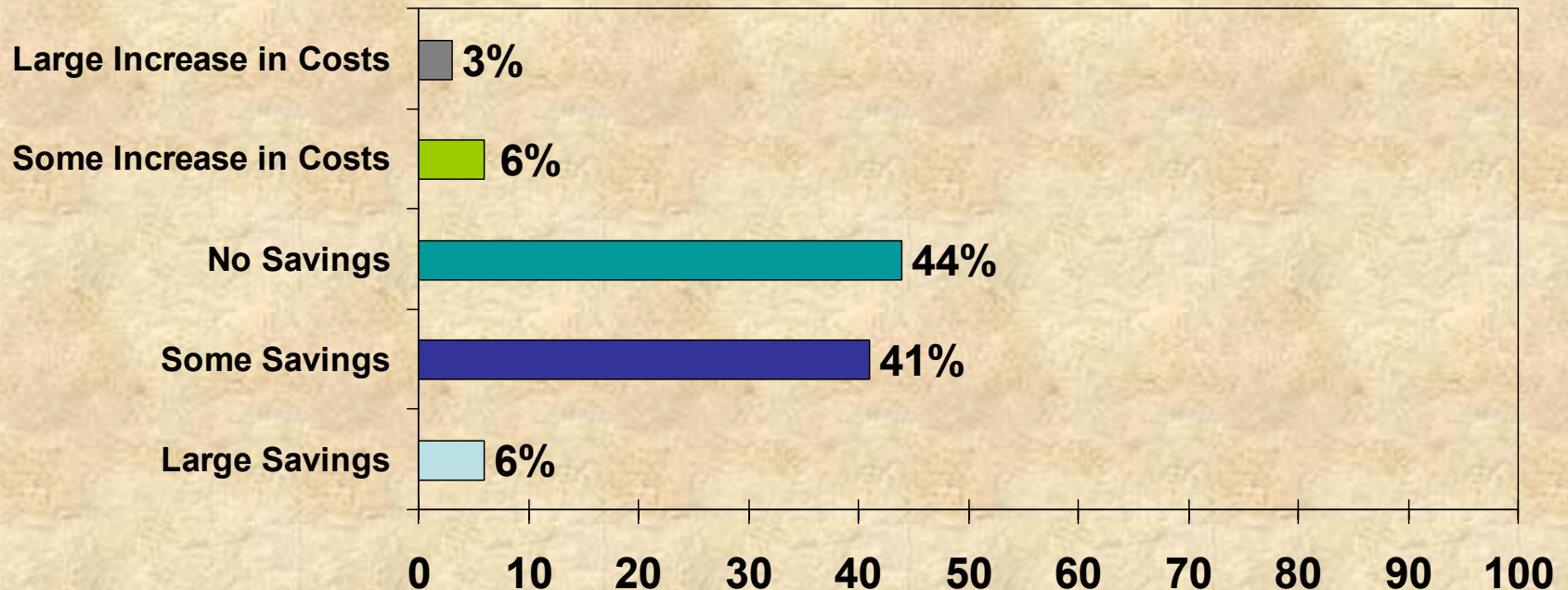
“arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and efficient means of resolving commercial disputes...”

Speed of Arbitration vs. Litigation (Corp. Legal Times 2004)



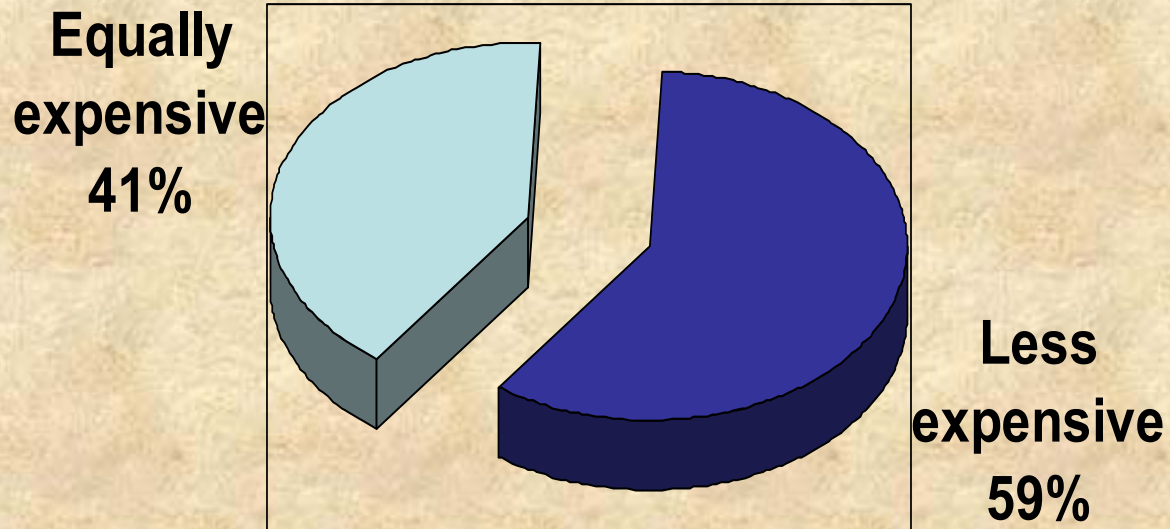
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Domestic Arbitration Results: Savings vs. Costs



Cost of Arbitration vs. Litigation:

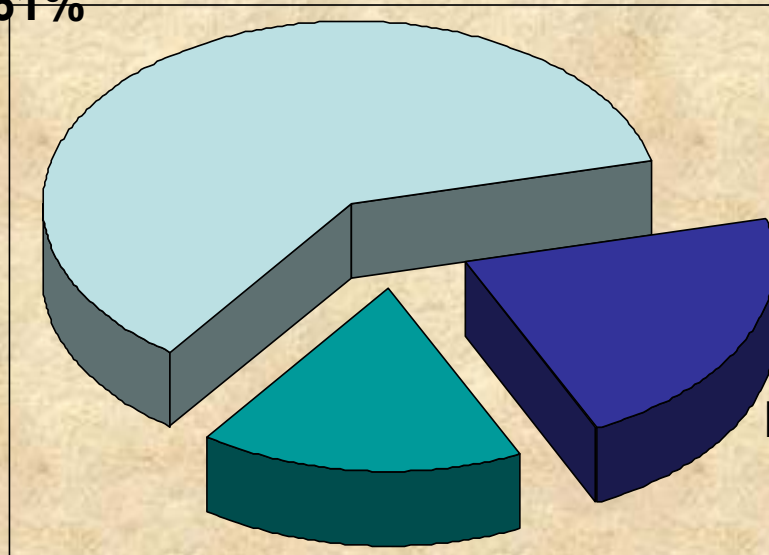
Corp. Legal Times Survey (2004)



Fairness of Arbitration vs. Litigation (Corp. Legal Times 2004)

Equally fair

61%

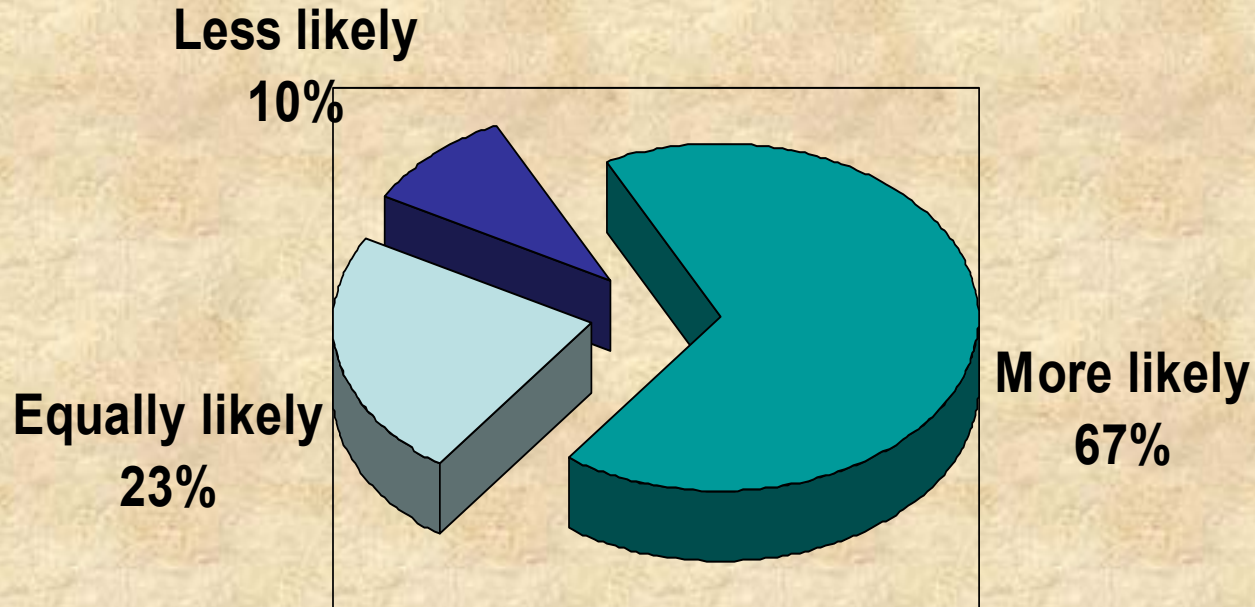


More fair
22%

Less fair
17%

“Likelihood of Splitting the Baby”: Arbitration vs. Litigation

(Corp. Legal Times 2004)



Is Arbitration More Like Litigation?

Of course, for a number of reasons...

Fifty Years Ago . . .

- The “Commercial Moot” model predominated
- Closed trade or industry systems backed by group coercion
- Issues involved quality, facts
- Often without lawyers

Fifty Years Ago . . .

- Volunteer arbitrators – The Cincinnatus Model – predominated
- Procedures tended to be simple
- Little if any pre-hearing procedure; hearing closely followed on demand

Fifty Years Ago . . .

- Arbitration was a “Black Box”
- Finality was important – the simplest award is best
- Courts and arbitrators followed the “Don’t Ask, Don’t Tell” Principle

Today, Arbitration Tends to Be Much More Like Litigation...

- Arbitration has ceded much of the ground traditionally covered by civil litigation
- Under broad-form clauses, courts liberally direct contract, tort, statutory claims to arbitration
- Lawyers have assumed a dominant role

Today, Arbitration Tends to Be Much More Like Litigation...

- More concerns about “docketing” problems (private dockets instead of public ones)
- Arbitration procedures have become more detailed, lengthy
- “Trial” is more likely to be preceded by motion practice, discovery
- Concerns about excessive damages or irrational results in high stakes cases
- Punitive damages, class actions

And Many Question its Relative Value...

“[W]e found arbitration generally is as expensive [as litigation] . . . less predictable, and not appealable.

Arbitration is often unsatisfactory because litigators have been given the keys to run the litigation and they run it exactly like a piece of litigation. It's the corporate counsel's fault by simply turning over the keys to a matter.”



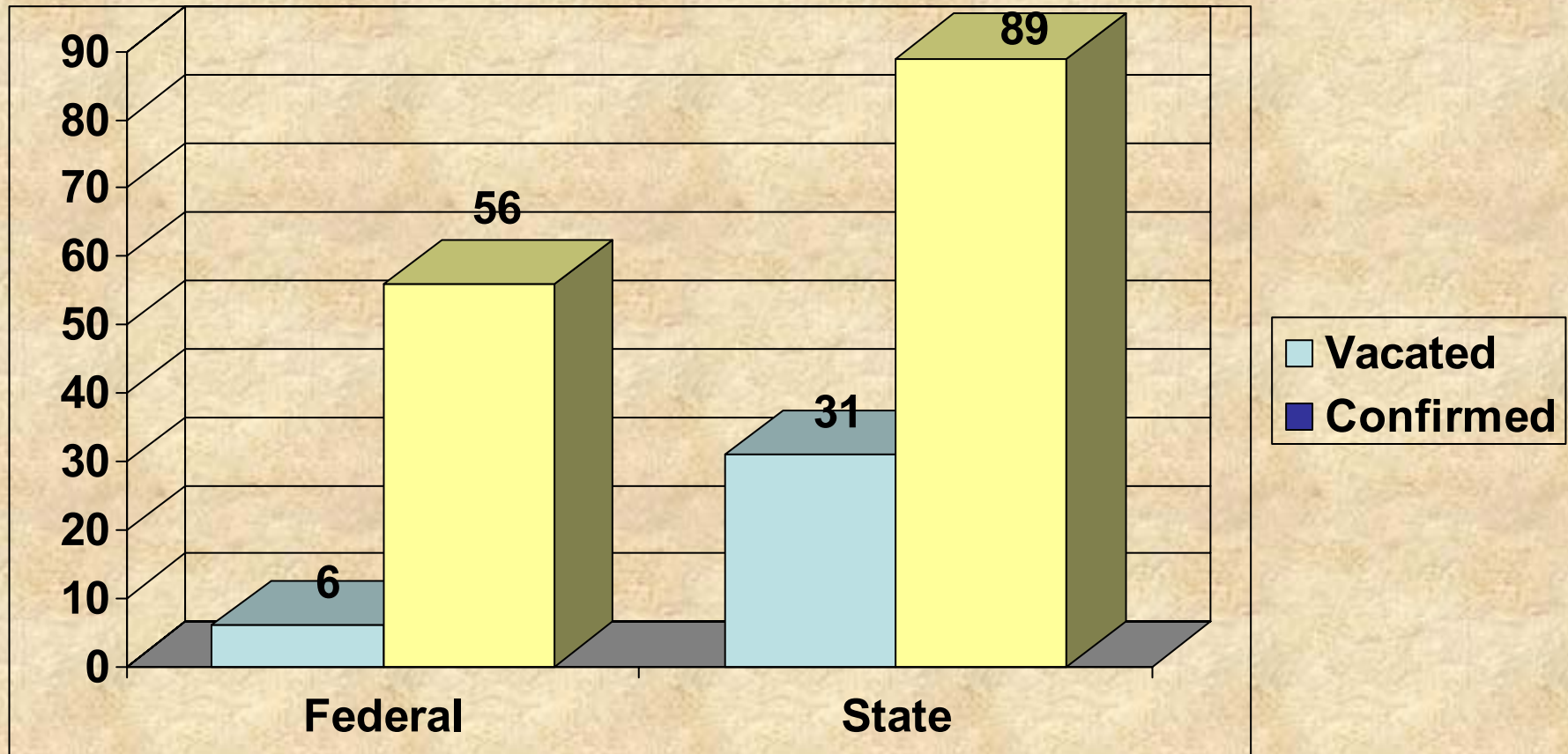
**Jeffrey W. Carr
Vice President and General Counsel
FMC Technologies, Inc.**

“Choice is the Key Benefit of Arbitration”

- Business needs and goals in dispute management vary
- Arbitration affords parties flexibility and autonomy in making process choices
- Arbitration should be tailored to specific needs and goals

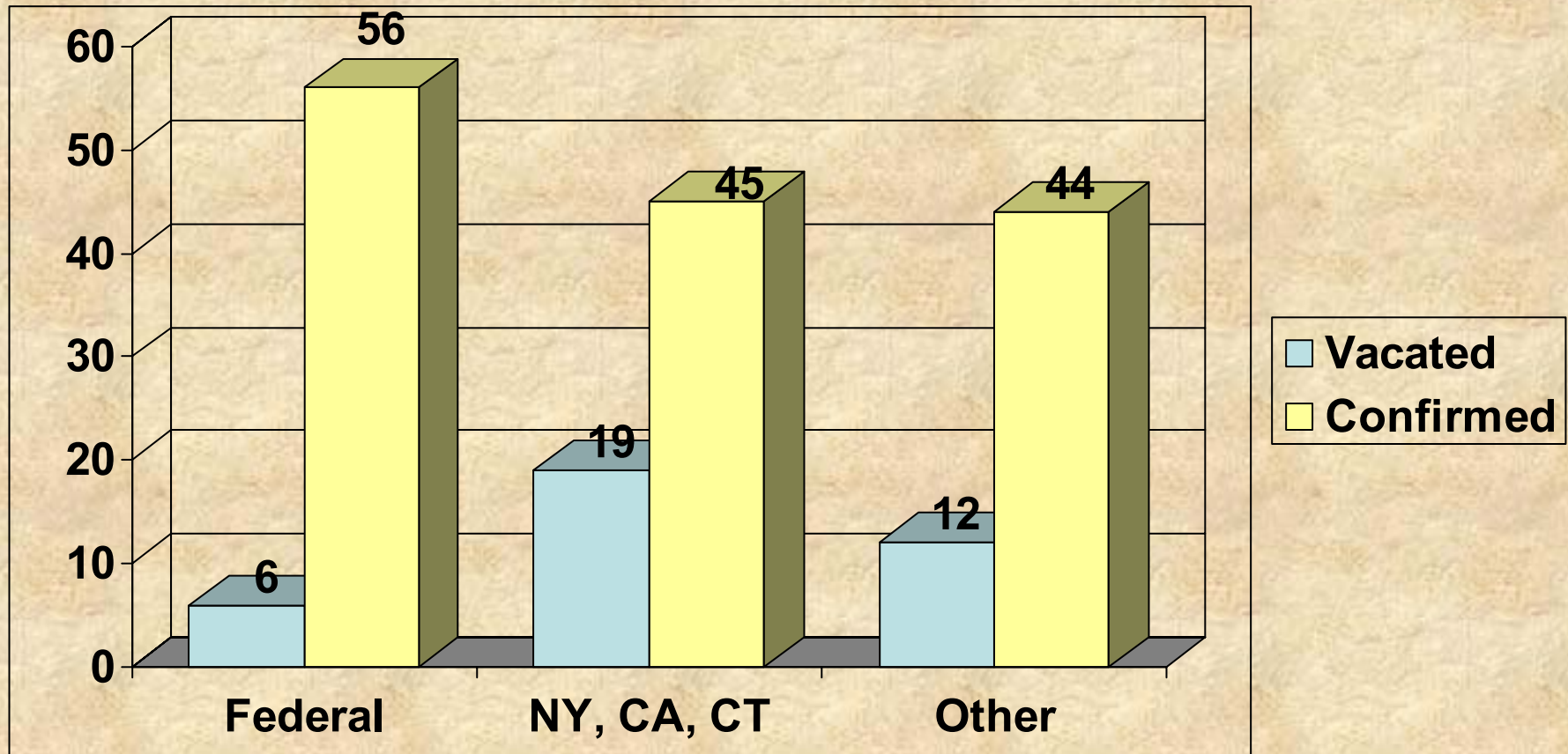
Challenges to Arbitration Awards (Jan.1 '04 – Oct.31 '04)

Vacating Arbitration Awards, *Disp. Res. Mag.* 23 (Summer 2005)



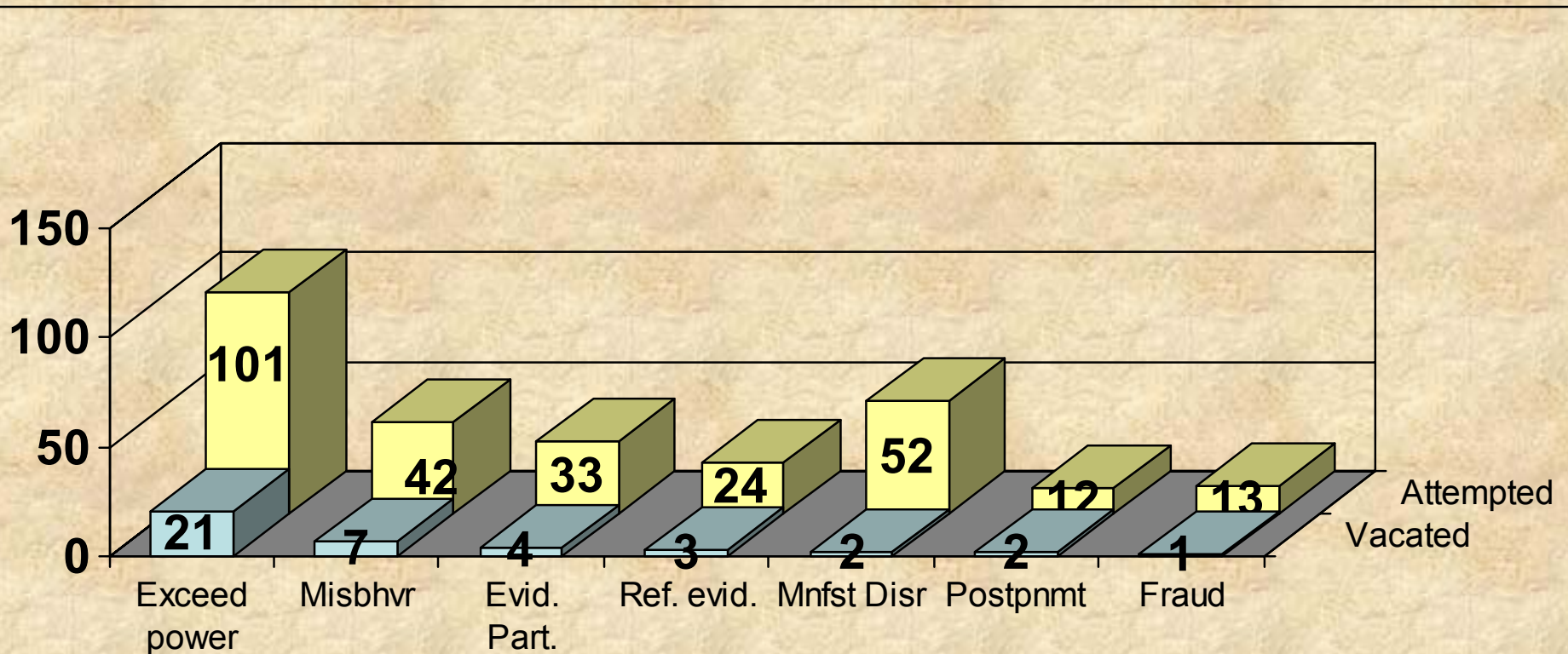
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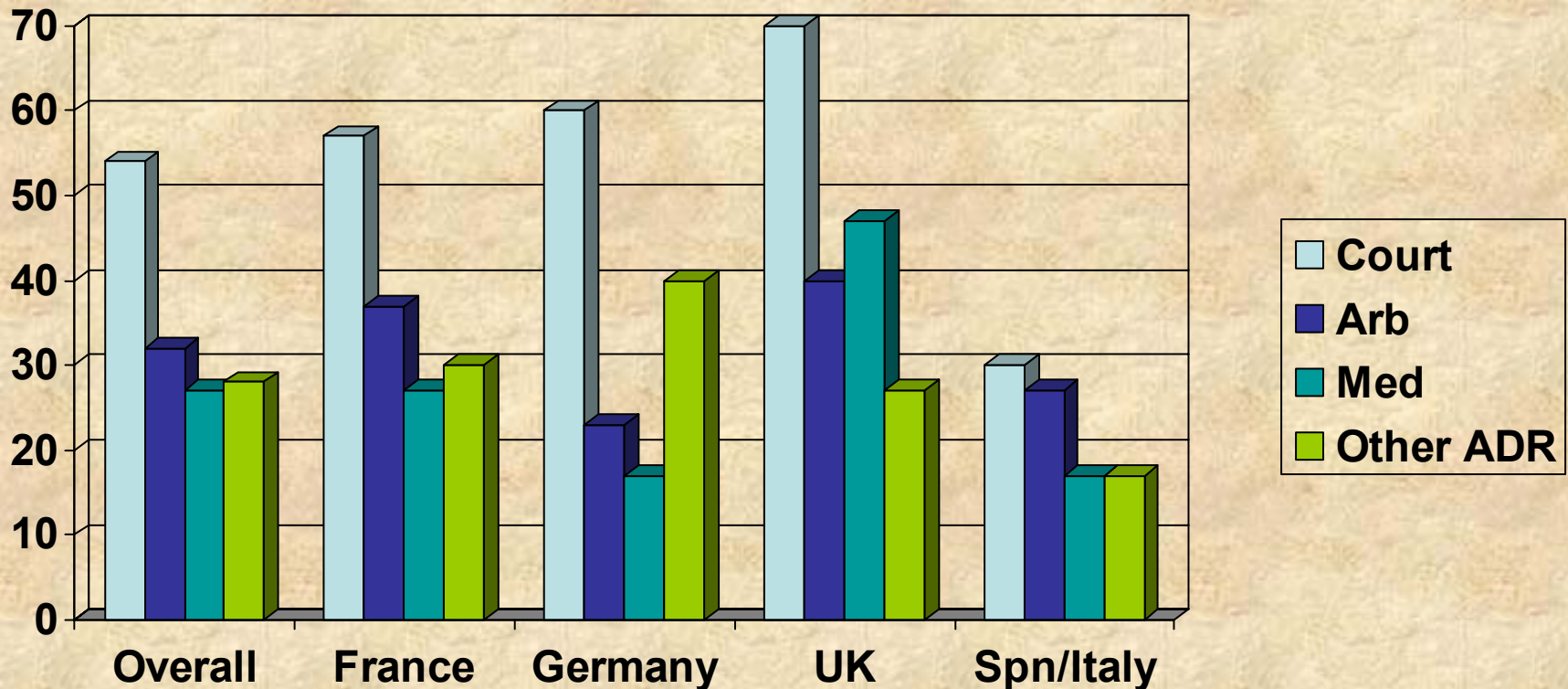
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Usage of international dispute resolution methods (last 2 years):

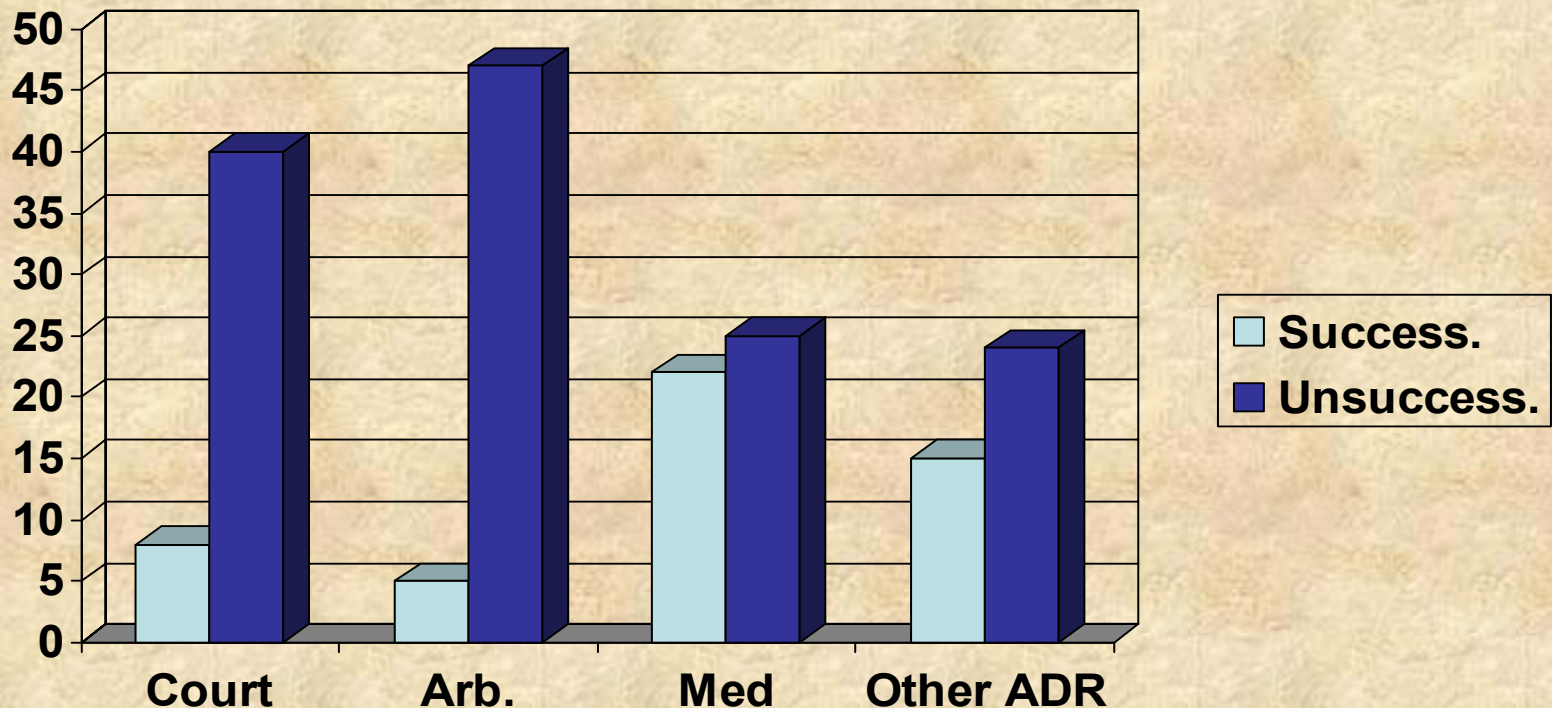
DLA Piper Rudnick Survey of 120 Corporate Counsel



General Success of Methods in Last 2 Years

-- Five EU Countries

DLA Piper Rudnick Survey of 120 Corporate Counsel



DLA Piper Rudnick Survey Observations

- Most respondents think the use of litigation as a means of dispute resolution will increase or remain constant.
- *“In relation to ADR, the interest is growing and is likely to increase further but, for the time being, the idea that ADR provides a ‘second class justice’ is still widespread.”*—Quote from Italian respondent

Cornell/PERC Survey of Fortunate 1,000 Companies (1997; 2002)

- More than 600 companies surveyed
- The great majority had experiences with mediation, arbitration
- Mediation was the most widely used ADR approach (87%)
- About 1 in 10 have policies favoring ADR use; a small percentage have pro-litigation stance; great majority take ad hoc approach

Potential Benefits of Mediation

- 1. Continuing control by the parties over dispute resolution process and product, as contrasted with the risks and uncertainties of litigation or arbitration
- 2. Customisation of the process for managing and resolving the dispute
- 3. Confidentiality
- 4. Communications enhanced
- 5. Cultural, cross-border bridge
- 6. Commercial realities considered
- 7. Cost savings, cycle time reduction
- 8. Creative, durable solutions
- 9. Continuing relationships maintained or enhanced
- 10. Cost and risk low as compared to potential benefits

CPR Survey: Results; Satisfaction with Results

- Most respondents report settlement rates for mediation in 80-90% range
- Most responding companies are highly satisfied with mediation under private auspices
- Nearly all at least moderately satisfied with court-annexed mediation
- Companies rarely report more than moderate satisfaction with arbitration or litigation

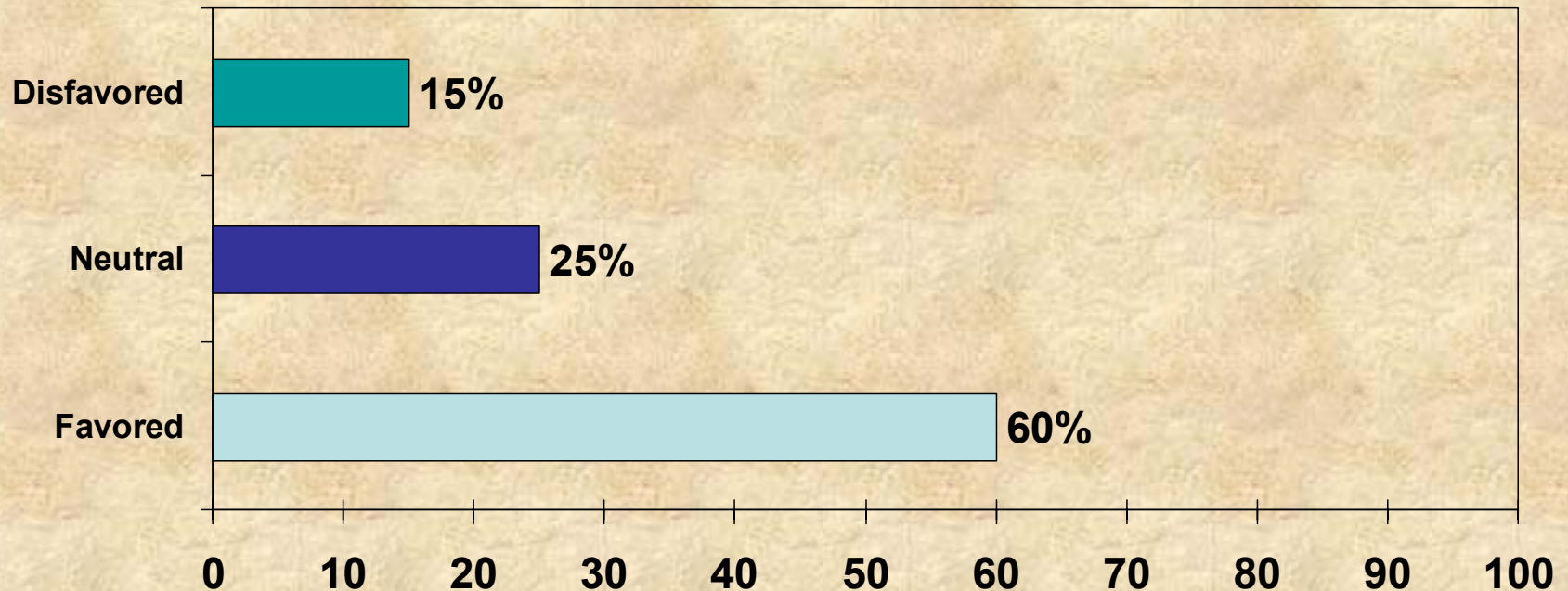
CPR Survey: Estimated Savings

[in contrast to likely litigation costs if ADR were not used
("Litigation costs" include attorney*s fees, filing, discovery,
motion, expert witness & appeal costs)]

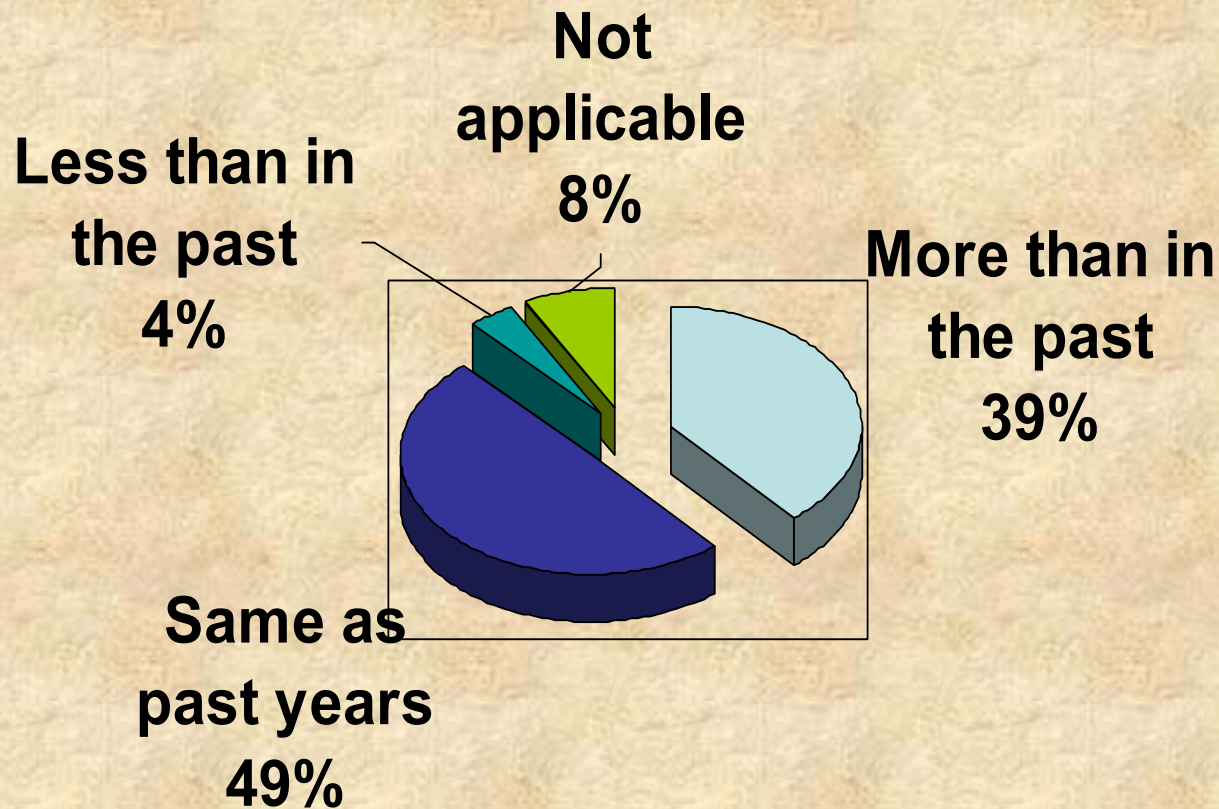
- Most responding companies reported cost savings with mediation (Usually \$500,000 or more)
- Cost savings resulting from the use of arbitration were hardly ever reported

2004 Fulbright & Jaworski Survey - 300 Corporate Counsel

Attitudes Regarding Mediation



Extent of Mediation Last 12 Mo.: Corp. Legal Times Survey (2004)



Costs of Litigating Patent Cases

- The cost of preparing a matter through the end of discovery with a medium amount at risk was over \$1 million in 2003. AIPLA Report of Economic Survey 2003.
- The average cost of patent litigation from filing through trial can range from \$1.5 million to \$3 million. And in some pharmaceutical cases, reaching into the \$4 million to \$10 million range.
Matthew W. Siegal, "Selecting the Right Forum For a Patent Dispute," National Law Journal (May 7, 2004).

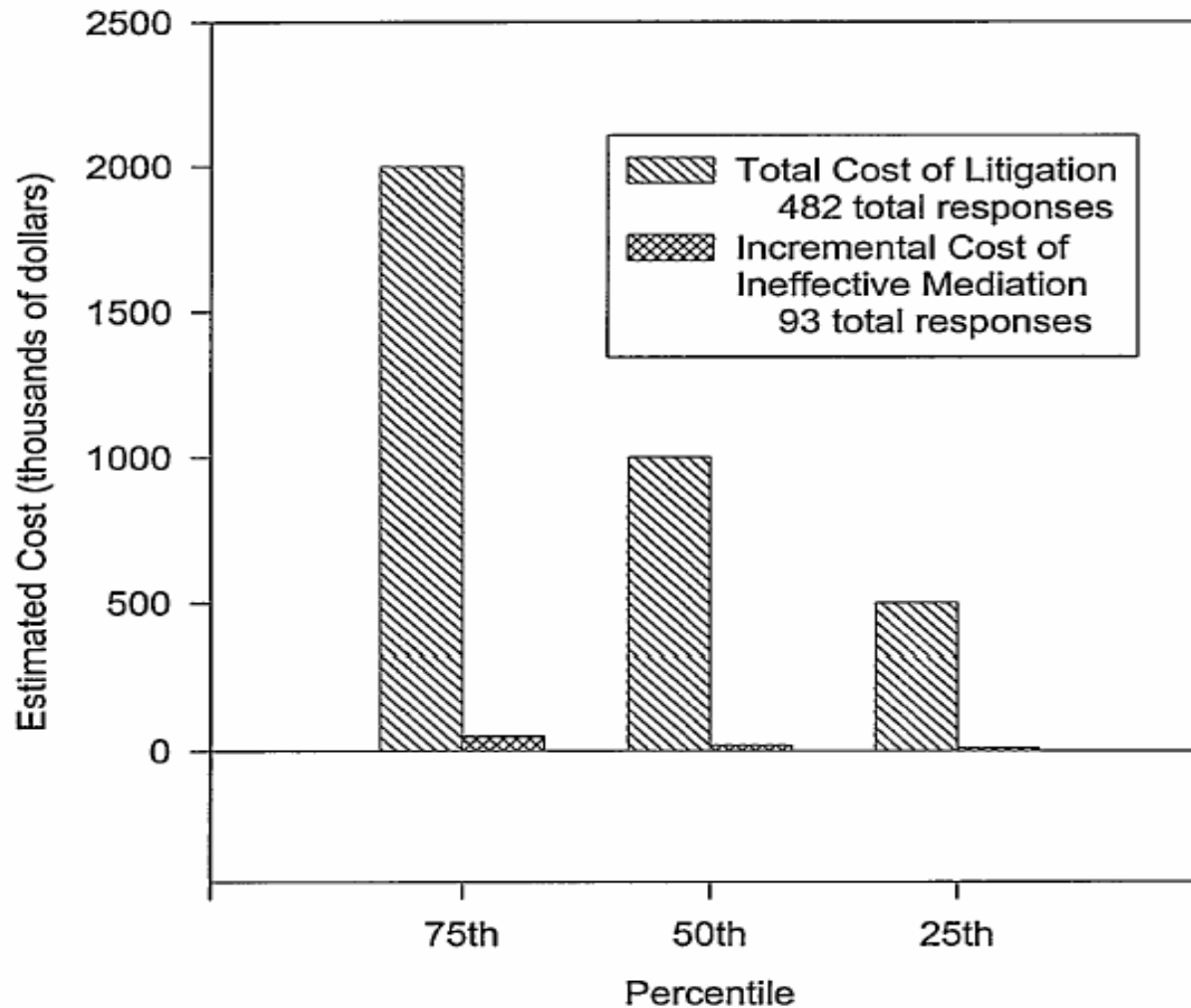
Settlement of patent cases

- **Over 95% of patent cases settle before trial.**
Merriann M. Panarella, “Stemming the Patent Litigation Tide” 2004
- **Settlement rates in patent infringement cases are roughly 80%.** Zisk, supra, quoting Elizabeth Plapinger and Donna Stienstra, “Federal Court ADR: A Practitioner’s Update,” 14 Alternatives to High Cost Litig. 7, 7 (1996).

Benefits of mediation in patent disputes

Mediation is increasingly used in the patent arena because...

- It permits party control of process and outcome
- It is well suited to expert handling of complex technical matters
- It may bring about prompt resolution of time-sensitive issues
- It permits flexible, tailored business responses to problems
- It can avoid significant direct and indirect costs, risks
- It maximizes privacy, confidentiality



Source: Matthew B. Zisk, "Mediation and Settlement of Patent Disputes in the Shadow of the Public Interest," 14 Ohio St. J. on Disp. Resol. 481 (1998-1999).

Success of patent mediation

Statistics from the U.S. District Ct. for the District of Delaware reveal the success of mediation in patent disputes...

- U.S. Dist. Ct. for Delaware has the 4th highest number of patent cases in the US (behind C.D. Cal., N.D. Cal. and N.D. Ill.)
- As of Jan. 16, 2003, Magistrate Judge Thyng had mediated 203 patent cases, of which about 67% settled through mediation. (Another 23 cases settled prior to mediation.)
- Between Jan. 2002 and Jan 2003, 58 cases were mediated, of which 20 were patent cases. Of the latter, about **87.5%** settled. The court reports growing “comfort level” with mediation.



Hon. Mary Pat Thyng
United States District Court,
District of Delaware

Metrics and ADR Employment

- Median Fees and Costs - \$50,000
- Median Cycle Time – 12 months
- Manager's Time – 50 hours/year
- Affect on Business Relationships – None externally but affected in business productivity internally

Metrics and ADR Personal Injury

- Median Fees and Costs - \$80,000
- Median Cycle Time – 14 months
- Manager's Time – 34 hours/year
- Affect on Business Relationship – affected relationships with contractors

Metrics and ADR

Commercial

- Median Fees and Costs - \$100,000
- Median Cycle Time – 18 months
- Manager's Time – 70 hours/year
- Affect on Business Relationship- very high

Metrics and ADR Products Liability

- Median Fees and Costs - \$30,000
- Median Cycle Time – 12 months
- Manager's Time – 15 hours/year
- Affect on Business Relationship - moderate

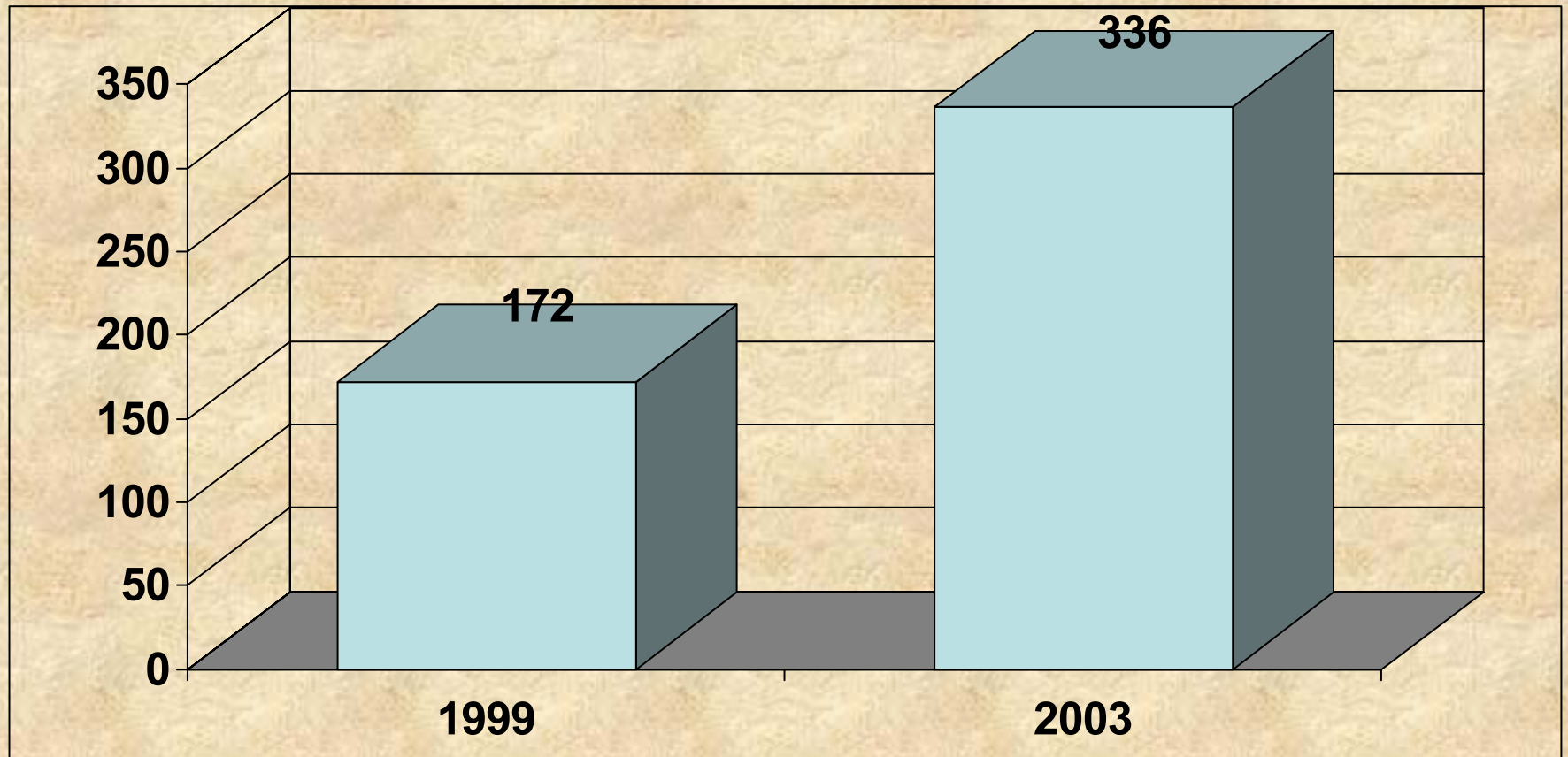
Metrics and ADR

The Results

- Reduced median fees and costs by 25 percent
- Reduced cycle time for personal injury and employment cases to 6 months
- Minimized manager's time spent on cases and
- Revised contract language to help business relationships

Court Decisions about Mediation

Coben & Thompson, *Disputing Irony...*, *Harv. Neg. L. Rev.* (Spring 2006)



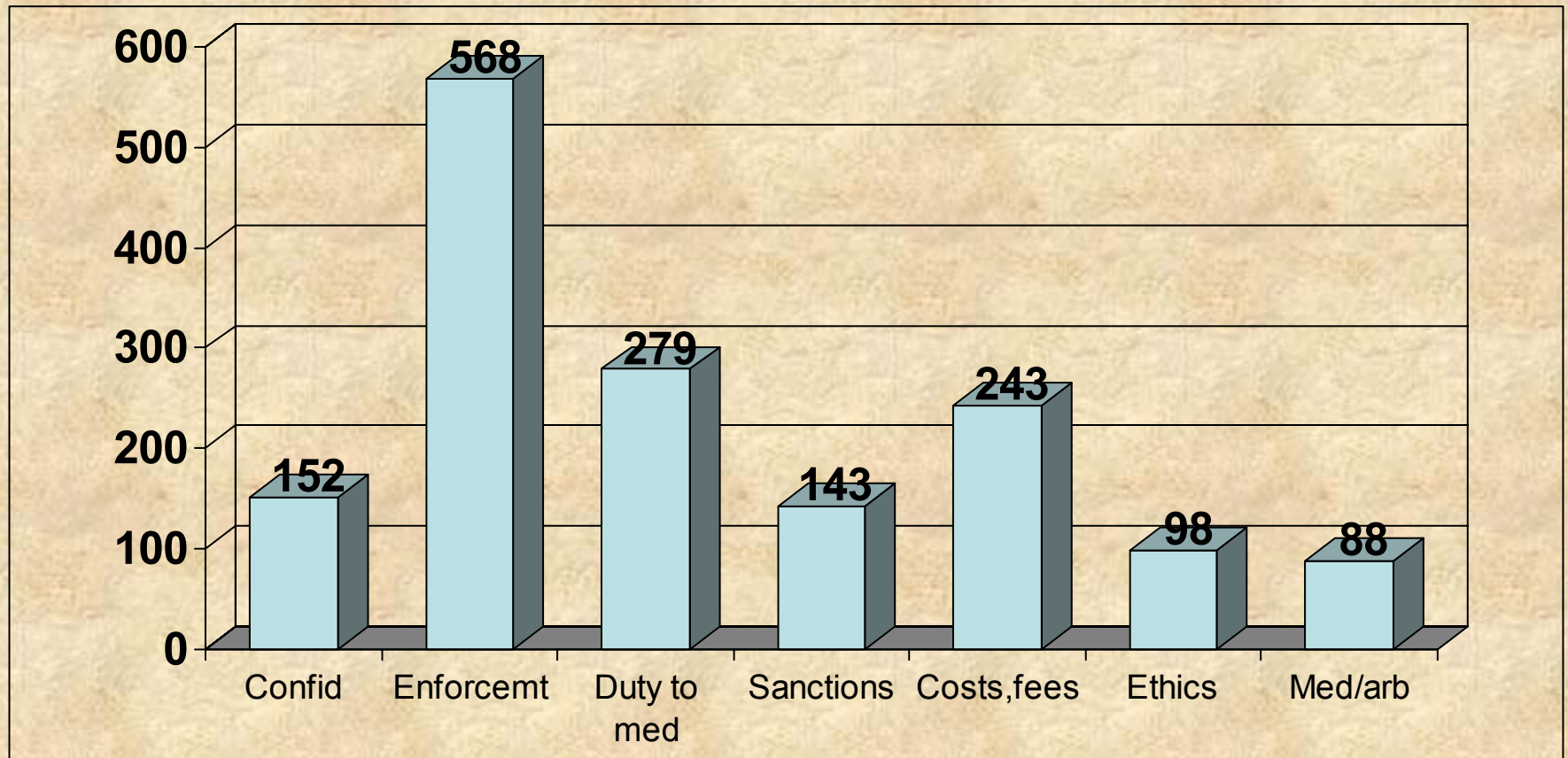
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- **1,223** Total decisions, 1999-2002
- **300** Decisions in which courts considered mediation evidence
- **67** Instances in which mediators offered testimony (objections raised only **22** times, testimony precluded only **9** times)

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