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What is (A)DR About?

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Does ADR include trials? I know, I know. This sounds like another one of my dumb questions.

Although I have a pretty broad conception of DR, my initial reaction was that trial is one of the few procedures I would exclude from DR. As described below, on reflection, I probably would include trials. More importantly, I would reframe the question.

Two things prompted my question. First, the Institute for the Advancement of the American Legal System recently wrote a blog post about "short, summary, and expedited trial programs." Are these DR processes?

Second, a colleague in my DR Center noted that he teaches trial practice and he asked if this is DR.

Trying to answer these questions led me to write this post, which is longer than usual and hopefully worth your time.

Why Bother With Definitions?

In some situations, it is important to have authoritative definitions with clear lines distinguishing what's in or out. For example, in many sports, it makes a big difference whether a player is in or out of bounds. Officials can spend what seems like hours reviewing video replays and applying legalistic decision rules to make the right rulings, which can affect which teams win or lose a game.

In most areas of legal doctrine, it is important to have relatively clear standards because there can be major consequences depending on which side of the line a case falls. For example, when criminal defendants claim self-defense, their freedom may depend on whether the courts decide that the facts fit within that defense or not.

In sports and courts, there is general agreement about the lines, even though different umpires and judges may differ somewhat in their views about things like the proper size of the strike zone or their calls in particular instances.

For many things in the DR field, there aren't clear lines with significant consequences and there is no authority like a court or sports umpire to "call balls and strikes." For an exception that illustrates my general point, consider a question someone recently asked me about whether parties in "deal mediations" qualify for confidentiality protection. The answer may depend on whether courts decide that the process really is "mediation" and this could affect whether critical evidence is admissible at trial.

For most issues related to DR processes based on agreement, such as negotiation and mediation, I think that definitions have much less significance. Consider statements that some "mediation" processes are really just "settlement conferences." Although some people think that there are clear distinctions between the two, in practice there's a lot of overlap.

Of course, there is no DR referee to "call it" one way or the other. And there isn't the same kind of stark consequence based on which category it falls into. (Some people are concerned that unclear DR definitions lead to confusion of parties. This assumes that such parties have a clear understanding of the processes to begin with, and there probably aren't a lot of such situations where people are confused by the DR labels.)

And, as a wise person once said, "[DR] labels suck."

What Makes Something DR?

Although DR labels are problematic, they can help identify who we are and distinguish what we do from other activities.

Here's a list of possible distinguishing factors – and why they don't work.

Neutral third parties. Many people in our field identify it primarily with third-party processes such as mediation and arbitration. Of course, unassisted negotiation, i.e., without a third party, is widely recognized as part of our field. In the legal context, probably many more cases are resolved through negotiation than mediation and arbitration combined.

Focus on parties' interests. The landmark book, *Getting to Yes*, and many other publications highlight the importance of focusing on interests rather than positions. But arbitration doesn't focus on parties' interests and probably most negotiations and mediations in legal cases these days don't either.

Party self-determination. Many people think of DR primarily in terms of settlement processes in which the parties decide whether to settle and what the terms should be. Of course, this excludes arbitration. Parties may not even have the choice of whether to participate in a DR process, such as in court-ordered mediation and adhesion contract arbitration. And they may not even get to speak very much, such as when their lawyers tell them to shut up in mediation.

Good processes. Many of us don't like dirty tricks in negotiation, coercive tactics by mediators, or adversarial maneuvers in arbitration. We may criticize them as bad DR processes but they still are considered as DR. Professionals in our field aspire to provide high-quality processes. So do many lawyers and judges.

Private processes. Some people focus on the concept of "private ordering" but much DR takes place in public settings and is conducted by public employees. For example, some mediators are employed by courts and conduct mediations in courthouses.

Innovation. Historically, ADR has been about improving DR processes. But courts often try to improve their processes. And some DR professionals resist changes to their preferred procedures.

In her article, "The Trouble with Categories," Linda Edwards describes the "classical" approach in which membership in a category is based on the presence of certain characteristics deemed to be essential. An alternative approach is based on degree of similarity (or "family resemblance") to certain prototypes. Unfortunately, this alternative approach doesn't solve our problem because trials resemble arbitration more than arbitration resembles mediation.

Another conception of ADR is a system of providing alternatives for parties to choose from and especially helping them choose appropriate DR processes in particular cases. Under these conceptions, trials would be part of ADR. Trials are appropriate DR processes in some cases and they add to the range of alternatives that parties may choose.

Courts as Tools of Cooperation

Part of the reason that it just doesn't feel right to consider trials as part of (A)DR is the assumption that the courts are necessarily adversarial, producing only on win-lose solutions rather than solving problems. This assumption isn't necessarily accurate however.

My views are colored by my study of cooperative practice, where lawyers and parties start by trying to negotiate but may go to court if needed. Unlike collaborative Practice, the lawyers

in a cooperative case may appear in court, though they try to avoid or minimize court processes.

One cooperative lawyer described her perspective as using courts as “tools of cooperation” when necessary. Although this goes against widespread perceptions of courts as nasty snakepits, courts actually do foster cooperation in many ways.

A cooperative lawyer said that courts sometimes provide helpful “reality therapy” for parties with unrealistic expectations in divorce cases. Some parties may need a court hearing to decide temporary arrangements while their case is pending and this “dose of reality” may motivate them to resolve the ultimate issues themselves.

Another lawyer described a case in which both parties had unreasonable expectations about child custody. Their lawyers were very frustrated with them and jointly asked the judge to give the parties a “scared straight” lecture in chambers, which had salutary effects.

In some cases when cooperative lawyers end up trying their case, they cooperatively plan the trial. This may involve agreeing to focus solely on the merits of the issues and avoid tactics that would unnecessarily aggravate the conflict. Although this may sound naive and certainly lawyers don’t do this in some trials, this approach actually reflects the underlying values of our rules of legal ethics.

Numerous court rules are designed to encourage cooperation before and during trial. Judges often promote cooperation by directing lawyers to resolve discovery disputes or even “go out in the hall” to settle their cases. And, of course, judges regularly conduct settlement conferences, which probably far outnumber the number of mediations.

I suspect that most trials involve appropriate professional lawyering without the histrionics or dirty tricks that people often associate with trials. Most people probably have unrealistic perceptions of trials based on distorted and/or atypical portrayals.

Much of the public image of trials comes from sensationalized news coverage of unusual cases, as news executives figure (probably correctly) that people will be bored by stories about routine trials. The other major image of trials comes from TV shows and movies, which seem written to satisfy seeming insatiable consumer appetites for melodramatic morality plays relying on a few hackneyed plot devices.

Professionals working in the courts may also focus on the extreme cases of bad adversarial behavior because these stories are more salient and interesting than the routine cases in which no one acts outrageously. It’s like the fact that people generally don’t focus on all the

planes that land safely but pay a lot of attention to planes that disappear (especially if they watch CNN).

I have documented what I call ordinary legal negotiation (OLN), which I suspect is quite common but "flies under the radar" of most DR scholars and practitioners. In OLN, lawyers undramatically try to settle cases based on shared understandings of applicable legal or other norms.

I suggest that lawyers are more likely to use an OLN approach to resolve the ultimate issues in a case when (1) the lawyers know each other, (2) they believe that their counterparts are experienced and competent, (3) they want to maintain reputations for reasonableness, (4) there is a relatively clear body of applicable legal or other norms, (5) the facts of a case can be readily likened to arguably comparable cases, (6) there is not enough at stake to justify an all-out adversarial battle, and (7) using an OLN process is considered a legitimate negotiation method in the particular legal culture. Of course, not all of these conditions would be necessary for lawyers to use an OLN approach.

I suspect that, analogous to OLN, there are what might be called "ordinary trials." Lawyers may put on ordinary trials when they trust their counterpart lawyers, believe that flamboyant behavior is counterproductive, and/or want to maintain a reputation for reasonableness, especially when there is not enough at stake to "pull out all the stops."

What is (A)DR About?

Part of the definitional problem is that we usually focus on small slices of a case, typically at the end, rather than looking at cases holistically. But that's not how parties and lawyers typically experience them. Lawyers live with cases from their first contact with their clients about the problems. Parties start to deal with their conflicts even earlier than that.

As I noted in an earlier post, pretrial litigation often includes a long string of negotiations along with other processes such as discovery procedures, consultations with experts, judicial status conferences, and court hearings, among others. A single case could involve several processes for resolving the ultimate issues including negotiation, mediation, arbitration, and trial.

Focusing only on the final process of dispute resolution is like identifying an elephant solely by examining its tail and ignoring the rest of its body. Although it is important for some experts (like ear, trunk, and tusk specialists) to focus on specific parts of the anatomy, it is also important to recognize that these organs work only if they are integrally connected with the entire beast.

This analysis suggests that trials should be part of our world of DR even though it feels odd because it is inconsistent with our traditional notions of "ADR" as "alternatives" to trial. It may be helpful to consider that professional identities and boundaries regularly shift, as described in Andrew Abbott's excellent book, The System of Professions.

Although I think that definitions in our field generally aren't that important, as described above, I think it's helpful to have a sense of who "we" are and what we do.

One could think of DR as processes of planning, managing, and/or resolving disputes or something like this. This would include pretrial litigation and trial because DR isn't limited to processes that are private or involve party self-determination as noted above.

This definition isn't completely satisfactory because it would include people in our community (such as most lawyers and judges) who don't identify themselves as part of our community and aren't recognized as such by established members of our community.

On the other hand, categorically omitting them and their work also doesn't feel satisfactory.

As a practical matter, should we consider that expedited or summary trials are DR? If so, what about "normal" trials?

Should our colleagues who teach pretrial and trial practice be considered as part of our community?

By what analysis would you answer these questions?

Reflecting on these questions may help us figure out who "we" are and what we are about these days.

ARBITRATION DISPUTE RESOLUTION FIELD DISPUTE SYSTEM DESIGN EMPIRICAL RESEARCH
FOR TEACHERS AND STUDENTS LITIGATION MEDIATION NEGOTIATION

ONE THOUGHT ON "WHAT IS (A)DR ABOUT?"

Jerry Wyrosdick
JANUARY 14, 2015 AT 9:07 AM

Rightly said John! You have done brilliant comparison with sports. Really some times we all feel the need to have a DR umpire of sorts to tell us which situation is ideally a DR one and which falls outside of it? Though a clear answer is yet to emerge but you have given a brilliant analysis of facts and various situations.