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Future of ADR - The Earl F. Nelson Memorial Lecture, The

Frank E. A. Sander

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The Future of ADR

THE EARL F. NELSON MEMORIAL LECTURE*

*Frank E.A. Sander***

Because I've been fortunate to observe the ADR scene for much of its recent development, I'm often asked my views of where we stand now. My somewhat flip answer is, "On Monday, Wednesday and Friday, I think we've made amazing progress. On Tuesday, Thursday and Saturday, ADR seems more like a grain of sand on the adversary system beach." So I think we have a way to go. Let me try to elaborate a little on those thoughts.

What are some of the signs that the glass is half full? What are the things that give me optimism on Monday, Wednesday and Friday? First, in 1998, the Congress of the United States enacted the Dispute Resolution Act which directs each federal district court to establish an ADR program by local rule. There is also comparable state legislation in a large number of states, sometimes mandating referral of specific cases to ADR or authorizing judges to do so in their discretion.

Second, dispute resolution clauses, sometimes quite sophisticated, are increasingly being used in contracts of all kinds.

Third, some businesses and law firms systematically canvass cases for ADR potential; relatedly some law firms have set up ADR practice groups, where people who specialize in ADR come together. These lawyers also help to raise the ADR awareness of their colleagues.

Fourth, the CPR Institute for Dispute Resolution, an impressive New York organization of representatives from 800 leading businesses and law firms, is dedicated to the goal of educating its members and others concerning better ways of resolving disputes. Its CPR pledge commits signers to explore ADR before resorting to court. So if somebody has a lawsuit with one of the CPR pledge signatories, that person may say, "Well, you've committed yourself to try ADR first. We expect you to live up to it."

* The Earl F. Nelson Memorial Lecture "The Future of ADR" was delivered by Professor Frank E.A. Sander at the University of Missouri-Columbia School of Law on April 16, 1999.

** Bussey Professor, Associate Dean, and Director of the Program on Dispute Resolution, Harvard Law School.

Fifth, a number of states now require that lawyers discuss ADR options with clients or to certify on the pleadings that they have done so. This is a particularly important step about which I'll say something more later.

Sixth, for disputes in the public sector, the Administrative Dispute Resolution Act of 1996 requires federal agencies to consider the use of ADR and to appoint an ADR specialist. And there have been some Executive Orders issued by the President to stimulate similar action in the U.S. Department of Justice.

Seventh, about half the states now have state offices of dispute resolution that seek to facilitate the resolution of public disputes by providing technical assistance or recommending competent dispute resolvers.

Eighth, virtually every law school as well as many schools of business and planning now offer one or more ADR courses. It seems appropriate to note that the University of Missouri Law School is at the forefront of this movement.

Finally, and this list could go on and on, about 20,000 persons, mostly volunteers, now mediate in 550 community mediation centers all over the country.

So those are a few of the positive indicators. What are the downsides and remaining challenges?

Let me first pause briefly for a little historic summary. I think there have been three periods in the approximately twenty-five years of the modern ADR development. Obviously, we didn't invent mediation, we didn't invent arbitration. But, by common agreement, it was in about 1975 that the current interest in ADR began. The first period, I think, was about 1975 to 1982. I call it, "Let a thousand flowers bloom." There were many experiments, some not well thought out, some not adequately funded, often involving a failure to articulate goals clearly. As you know, there are many possible goals for ADR--reduce the time and cost of litigation, enhance access, reduce court congestion, provide more responsive and effective dispute resolution. Oftentimes these goals conflict. There is a particular tension between quality and quantity. Obviously, if you're focusing on reducing court congestion, you may have some techniques that suffer in quality. If you're focusing on quality, you shouldn't expect a huge quantitative impact. Thus a critical step is the clear initial articulation of goals.

The second period, about 1982 to 1990--and these dates are pretty impressionistic on my part--I call "Cautions and caveats:" Concerns about where we're heading, attempts to sort out the wheat from the chaff. Perhaps the most famous piece in that period was Professor Owen Fiss's article in the *Yale Law Journal* called *Against Settlement*,¹ where he made a very eloquent, but I think misguided, attack on settlement and mediation. He said in that stimulating piece that settlement comes at the expense of justice, that it amounts to trading justice for peace. His primary focus was large-scale public litigation, like *Brown vs. Board of Education*,² the desegregation case. So from his perspective as a proceduralist focusing on complex cases of institutional litigation, it's not surprising that he's concerned about the courts focusing too much on settlement, and not enough on the articulation of public values.

1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

2. 347 U.S. 483 (1954).

But complex litigation isn't all that courts do. In fact, about ninety-five percent of the cases that get into court aren't disposed of by court decision. They are disposed of by settlement and negotiation, sometimes aided by court decisions on motions. So it doesn't take much to figure out that if those ninety-five percent of the cases were all adjudicated rather than settled, we would be in far worse shape in the courts than we are. Quite aside from that fact, you usually can't prevent parties from settling cases, so often the inevitable alternative to court adjudication is negotiation. And I'm not aware of any law (barring some special regulatory situations) that prevents litigants from settling their dispute.

So I think it's important to separate the two roles of courts: articulation of public values and interpretation of statutes and the Constitution (which Professor Fiss is addressing), and dispute settlement. What Professor Fiss should have said is that the premier task of courts is the articulation of public values and the interpretation of statutes and the Constitution. It is important to recognize that the ADR movement is not an anti-court movement, as is often asserted. It is an effort to have the courts more effectively doing those things that they are peculiarly fit to do, and have other institutions like arbitration and mediation dispose of those cases that don't require the specialized expertise of courts. That is the idea behind the multi-door courthouse--a comprehensive justice center where cases are screened and analyzed so that they can be referred to that process or sequence of processes that's best suited to provide an effective and responsive resolution. So, for example, if we have a dispute between two neighbors who continually fight over a joint driveway, what we need is not so much to determine their legal rights as to help them understand better their conflicting concerns and teach them how those can be accommodated more effectively in the future.

The third period, starting about 1990, is what I call "Institutionalization." The question there is: How do we weave ADR into the dispute resolution fabric so that ADR options are systematically considered at various points along the life of a dispute rather than putting the onus on the party who wants to use ADR, which will often be construed as a sign of weakness? That's the task we are currently engaged in and that will be our principal challenge in the future.

What are the present obstacles and impediments to institutionalization, and what are some of the hopeful signs? When you look at the situation from the disputant's perspective there is often a lack of knowledge of ADR. They assume that court is the place to resolve disputes. Why do they assume that? Maybe if we had a TV program called, "Perry Mediator," there would be better public awareness of what mediation can offer. Clearly the media give the impression that if you have a dispute, you should go to court. I don't know whether you have had the same experience I've had when people from other countries visit here. They're always amazed at the kinds of problems we take to court, problems that in their country would be dealt with by negotiation or by administrative disposition or just by talking it out. So the prevailing assumption that court is *the* place to resolve disputes is a major part of the problem.

Second, there is the lack of readily available public dispute resolution options--the absence of a public facility like a comprehensive justice center where someone can go to have access to mediation or arbitration--a place where the sign over the door says, "This is where disputes get handled. The experts here will help you

decide which is the best process for your case.” We don’t have anything like that, and I think that’s unfortunate.

What if we look at the situation from the perspective of lawyers? What are the impediments there? Unfortunately, because not all law schools are like the University of Missouri, many lawyers are still very unfamiliar with ADR. There is some interesting recent research, which showed that what was most influential in lawyers using ADR was not CLE, not going to educational programs, but having had prior experience with ADR, having gone through ADR procedures. That has obvious implications for public policy. For example, it suggests, as I will indicate a little bit later, that a strong case can be made for mandatory mediation on just that ground.

What are some other impediments to lawyers using more ADR? The fact is that in ADR they lose control, particularly in flexible procedures like mediation. Mediation is not like court where lawyers are in total control and the clients just observe (or sometimes don’t even do that). In mediation, lawyers are not the directors of the proceeding as they are in court, and that’s a threatening and scary thing. So lawyers are sometimes reluctant to get involved with an unfamiliar, threatening procedure.

There are also economic incentives for lawyers to stay with litigation. Law firms have built up huge litigation departments over the last fifteen or twenty years. And if there is the promise of solving a case by mediation or rapid arbitration, obviously that has economic implications for lawyers and law firms. In the long run, the most experienced lawyers say, “Being able to settle client problems effectively is really a boon to business.” But in the short run lawyers don’t always see it that way and worry whether a more efficient process will mean reduced fees.

There are also other perverse incentives. For example, in some companies a settlement is charged to the budget of that division, but litigation costs are not charged to a department. So in that company there’s an incentive to litigate rather than settle a case. Attorney compensation also sometimes takes account of successful wins but not of money-saving settlements.

Finally, there is a public policy impediment, and that is the lack of adequate cost-benefit studies. I’m currently serving as Vice Chair of the Standing Committee on Dispute Resolution appointed by the Supreme Judicial Court of Massachusetts. The Massachusetts legislature recently said to us, “We want you to submit a study showing the cost savings from appropriating money for ADR.” That’s not an easy task. Initially, there is always the incremental cost of adding an ADR program, since we don’t say, “I’m going to add this ADR program and these three judges will be furloughed or retired.” It’s usually something that comes on top. More significantly, it’s very difficult to document the specific money savings of pursuing a case through mediation rather than court adjudication. We have some anecdotal data, but when you think about it, that kind of research is incredibly difficult to do. For example, one claim for mediation is that in cases of continuing relationships, it’s often a more lasting solution. That is, it prevents future disputes because you get at the underlying concerns and it teaches the parties how to resolve disputes more effectively by themselves in the future. That means you have to have a longitudinal study, spanning over many years in order to document that kind of thing, quite aside from the difficult questions of how you measure the peace of mind that comes from

an absence of future lawsuits. So we haven't had any sophisticated studies of that kind of fundamental question. And that's a clear problem when it comes to obtaining proper public funding of ADR.

Let me now turn to some promising future directions. But before I do, let me note briefly a couple of current developments that really concern me. I'm concerned about the internal struggles that are developing within the mediation community about what mediation is and what it is not. For example, there is the debate about evaluative versus facilitative mediation, evaluative being where the mediator expresses his or her own opinion at some point in the case while the facilitative mediator just tries to act as a go-between, a questioner, a question-raiser. Len Riskin has written the definitive piece on this subject.

Another similar debate is going on between problem-solving mediation (which is supposed to be bad) and transformative mediation (which is what we should all strive for).

Perhaps an outsider watching these debates might say that they evidence healthy professional growth. But to me it seems contrary to the very spirit of mediation for some of the leading people to say in effect, "What *you're* doing is not mediation; only what *I'm* doing is true mediation." A similar troubling development is the turf battles between lawyers and other disciplines about who should do mediation. All these battles are retarding forces that are unfortunate for the future development of the field. We need to be more open and eclectic and recognize that there are many different kinds of mediation that are appropriate in different settings.

Let me end up with some promising future directions for overcoming these impediments and advancing the cause of institutionalization. In the short run, we need to strengthen some of the institutionalization devices such as those I've mentioned earlier, like the duty of a lawyer to apprise a client about ADR options as part of professional consultation, coupled with early court consideration of ADR possibilities, and judicial power to refer cases to appropriate ADR processes. All those institutionalization devices have an important indirect effect. They not only teach clients about these possibilities, but they also get lawyers up to par.

Some years ago, I was asked to give a short course on ADR at a leading Washington law firm. In the course of one of the breaks, I asked one of the lawyers, "How come you decided to have this course?" He said, "Well, a couple weeks ago, one of our lawyers was in federal court and the judge said, 'I think this case might be suitable for a mini-trial.'" The lawyer rushed back to the firm and asked his colleagues, "What is a mini-trial?" They didn't know what a mini-trial was. They promptly decided they ought to know something about it. So, requiring a lawyer to explain ADR to clients or authorizing courts to ask lawyers to use some of these processes is one of the best ways of getting lawyers who haven't gone to the University of Missouri Law School up to level. Of course, the problem is much greater with people who are now in practice than people who are now in law school because people now in law school are beginning to get this kind of education.

These institutionalization devices have indirect leverage power in the way that I've described. The same can be said about the CPR pledge. That is also why I favor mandatory mediation at the present time. There are some hot arguments in the literature with some people saying, "Mediation means voluntarily agreeing to a result. How can you force somebody to voluntarily agree to a result?" I think that

confuses coercion *into* mediation with coercion *in* mediation. If you have coercion *in* mediation, it is not mediation. But to say "You have to try this process because in our judgment"--the legislature's or judge's judgment--"this may be a good case for attempted settlement," that seems to me all right. We have evidence that many people who resisted settlement and then went into mediation did settle the case or, even if they didn't, found the process to be productive for simplifying the trial later. So we have evidence that the process is very powerful, that it works for people who use it, but for some of the reasons I mentioned earlier, people don't seem to be using the process sufficiently voluntarily. So my view about mandatory mediation is about the same as for affirmative action--that is, it's not the right permanent answer, but it is a useful temporary expedient to make up for inadequate past practices.

My basic view is that it is for the court, not the parties, to allocate the precious public resource that is the court. The courts and the legislature should decide how much use you should make of courts and in what kinds of cases, not the parties or their lawyers. Those are unpopular words in some quarters, and some lawyers who compare our system favorably with that in the civil law system where the lawyers have much less control and the judges have much more control, are concerned about this, but it seems to me a pretty basic proposition that you shouldn't leave it to the litigants or their lawyers to determine how to allocate the courts' resources.

In the long run, we need more education of lawyers and clients. Lawyers particularly are the key because they're often the dispute resolution gatekeepers. But we have to recognize that lawyers need to learn more about ADR procedures, tell clients about them, and to begin to make more use of the procedures.

Second, I am concerned about the long-term professional issues that are raised by ADR. At the moment we have a lot of people who have been trained in ADR, but there is insufficient paying work for them. So in a sense one might say, "Well, all we need is more ADR work." But it isn't quite as simple as that. There are many places where ADR is done by volunteers, and that's a good thing. Volunteers can make important contributions for the community as well as the court. But I get concerned about developing career paths by which talented graduates of this and other law schools can become self-purporting ADR professionals. At the moment we have to say to many students, "If you want to do ADR work, find a good paying job during the day and work at night or on weekends as an ADR volunteer." Maybe there is an important role here for an enterprising foundation to provide tideover financial help to talented students who wish to develop ADR careers, and to help them facilitate mentorships with established professionals. Increasingly over this period of twenty-five years, more and more people have made careers out of ADR, but it's still extremely difficult and there's no simple way to do it. When people call me up and ask "How do I get into this field?" I say, "Well, do some volunteer work. Take some courses. Go to meetings of professional organizations, and maybe things will work out. But don't quit your day job." That's not a good way of developing a new profession.

Of course, increasingly individuals are being paid directly by the parties for ADR services. I have mixed feelings about this development. First, I believe the public dispute resolution system should provide mediation and arbitration on the same basis as it provides court adjudication, *i.e.*, free. Otherwise there is a perverse incentive to use the free process even though another process might be more

effective for a particular case. So long as there is an adequately funded and staffed comprehensive public justice system, private dispute resolution provides a useful supplement, rather like the relation of Federal Express to the U.S. mail service. But suppose we only had Federal Express?

Finally, above all, we need to change the public attitude towards more constructive ways of resolving disputes. Again, Len Riskin led the way in this domain with a famous piece almost twenty years ago, where he talked about the standard philosophical map of focusing on the adversary system, and how we might change that.

There have also been two promising recent developments that encourage me. One is the work of my colleague, Professor Robert Mnookin, and two young students of his who are currently working on a book whose title is descriptive. It's called *BEYOND WINNING: HOW LAWYERS CAN CREATE VALUE FOR CLIENTS THROUGH NEGOTIATION*.³ As practitioners, we've all seen situations where if it weren't for one or both of the lawyers, the clients could undoubtedly settle the case. But there are also many reverse situations where the clients are stuck in adversary ruts and it is up to the lawyers to get them out. Professor Mnookin, in this book, emphasizes that lawyers are peculiarly situated for that challenging role.

First, they are repeat players whose reputations are important, and hence, if they can develop a reputation for effective negotiation, they'll be used a lot. Second, they can be trained in value creation, *i.e.*, ways of enlarging the pie. Third, lawyers can thus help warring parties to bring about imaginative and integrative solutions that avoid polarizing or even destroying valuable business and other relationships.

Another auspicious development is a recent movement called, "collaborative lawyering." This has been developed by a group of lawyers, some in California and some in Ohio. What these lawyers have said to clients is, "We won't represent you if you want to litigate. We will only represent you if you want to negotiate or mediate." The focus of these efforts is clearly on interest-based consensual win-win resolutions rather than on imposed win-lose decisions. And they are trying to promote this kind of practice. The obvious question to ask is, "What happens if you can't resolve it? And what if the other side doesn't have a collaborative lawyer? Aren't they going to take the client who has a collaborative lawyer to the cleaners?" Those are all valid questions. The collaborative lawyers say to the client, "If we can't resolve it, then you'll have to hire another regular lawyer to litigate." My view of this development is that I like its animating spirit. But there are some details that need to be worked out. Ideally, we should all be collaborative lawyers, with the emphasis on collaborative problem solving, and that's what Professor Mnookin is trying to develop. But unless both sides commit to this new form of practice, it won't work for the collaborative lawyer in effect to tie one hand behind his back and say, "We won't go to court if that's necessary." So collaborative lawyering may be a useful step in the right direction, but there are some kinks that need to be worked out.

It would be interesting to speculate what things will be like twenty or twenty-five years from now. Maybe Missouri can have its Nelson Lecture twenty-five years

3. ROBERT H. MNOOKIN, *BEYOND WINNING: HOW LAWYERS CAN CREATE VALUE FOR CLIENTS THROUGH NEGOTIATION* (forthcoming, to be published by Harvard University Press).

from now on this same topic. I wish I could be there. At least on Monday, Wednesday, and Friday, I feel quite confident that we're making gradual progress in creating a more diverse and responsive dispute resolution system. You're fortunate that you have effective training here, and hence, can play an important role in bringing about those changes. I hope you will do so.