

2000

## Some Reflections on ADR

James F. Henry

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

James F. Henry, *Some Reflections on ADR*, 2000 J. Disp. Resol. (2000)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2000/iss1/8>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Some Reflections on ADR

*James F. Henry\**

It may be time for practitioners and theorists who have contributed quality and innovation to the ADR movement to declare victory. It also may be time to “cut and run,” because ADR must address some difficult issues if it is to realize its full potential.

So far, we have assembled an excellent state-of-the-art in a relatively short period, but we have paid relatively little attention to the ADR infrastructure required to fulfill the quality and promises of ADR. It is that delivery system of ADR which will determine the degree of economy, accessibility, expedience, innovation and party control that are the goals of ADR. Most fundamentally, it will assure, or fail to assure, equity and justice.

## I. HOW FAR HAVE WE COME

Twenty years ago, the ADR movement was overwhelmingly focused on developing alternatives to the costs of litigation. Since then, we have discovered that reducing litigation cost and delay are only some of the benefits of ADR. Today, we possess a knowledge that contributes to the broadest range of conflict resolution. We have discovered the relevance of ADR tools to conflicts that are not on a litigation track--policy disputes for instance. Without neglecting ADR's importance in litigated matters, “alternatives to litigation” no longer describes the subject; “appropriate dispute resolution” probably does. In this article, “ADR” will henceforth mean “appropriate dispute resolution.”

In the early eighties, Harvard Professor Frank E.A. Sander suggested that the CPR Institute for Dispute Resolution initiate an awards program for outstanding ADR scholarship. I harbored some concern then about whether the subject would generate new learning on an annual basis. I long ago abandoned those worries. The subject, both in theory and in practice, has proven rich and possesses the promise of continued dynamic growth.

Twenty years ago the mediation giant was asleep. Today, it is awake, with real prospects for broad, accelerated use by the private sector, courts and government. With the limitations of arbitration better understood, mediation is increasingly the preferred method for resolving both public and private conflict.

With a glance back, we should recognize the shift in the nature of the mediation being delivered and demanded. We have evolved from early rather rigid views that

---

\* James F. Henry, a graduate of Williams College and the Georgetown Law Center, is the founder and president of the CPR Institute for Dispute Resolution (CPR), a non-profit organization dedicated to the development of alternatives to the high costs of litigation. CPR is now widely recognized as one of the country's foremost authorities on alternative dispute resolution (ADR). In addition to his work with CPR, Mr. Henry has published several books on ADR and is the recipient of the Whitney North Seymour, Sr. Award for his contributions in furthering the use of ADR.

mediators should only facilitate negotiations to more pluralistic approaches which offer parties options in a spectrum ranging from facilitation to evaluative mediation. Experts also differ about whether the goal of mediation should be to solve problems, transform relationships, or both, or neither. In practice, and particularly in court-annexed programs, this leaves us with serious questions as to which neutrals are best qualified to engage in evaluative mediation or problem solving efforts.

While ADR's early years emphasized its potential to reduce litigation costs, more recently mediators and parties have recognized the importance, even the predominance, of other benefits. They include, among others:

- control;
- a high level of success;
- retained and even reconstructed relations between the parties;
- expedience in a fast-moving market economy; and
- accessibility for high-volume conflicts.

ADR started with a quaint, perhaps insecure, preoccupation with two-party conflicts and has evolved to being applied, largely in the form of mediation, in a broad range of multi-party, multi-sector disputes. It has led to innovation involving the facilitation of plaintiffs, defendants and insurers in toxic mega-disputes and mass disasters; the creation of large mediation claims facilities; and consensus building in major public policy conflicts and environmental disputes involving diverse interests.

In addition to developing the process tools of ADR, the movement appears to have brought to the forefront a subject of enormous importance to appropriate dispute resolution: that subject is negotiation, most significantly, interest-based negotiation. Leading academics have made an enormous contribution to the utility of negotiation, without more, as a powerful tool in appropriate conflict resolution. Parties who are genuinely or contractually committed to negotiation can resolve their dispute without additional assistance in most instances. Negotiation is becoming the first step provided in dispute resolution clauses or ADR programs, and with good reason. In this author's judgment, the potential of party negotiation, exclusive of third-party assistance, does not get the attention that is warranted by the ADR movement, perhaps because there is neither a role nor economic gain for neutrals or providers. Negotiation should remain a subject of great importance to the law school and the practitioner.

ADR has generated another subject of growing sophistication, particularly among major companies: the management of conflict. Companies are managing, rather than reacting to, their litigation portfolio. For instance, they are employing screens to assess settlement and ADR potential, reviewing classes of litigation for prevention strategies and entering into intra-industry ADR commitments to avoid conflict among competitors. This is a major development resulting directly from the ADR dialogue.

In these two decades, we have nurtured and grown a robust, dynamic subject relevant to a fast-moving business economy with global dimensions, as well as to our own democratic system of competing pluralistic interests. At the same time, the ADR movement has made impressive inroads into the teaching and use of improved methods for resolving interpersonal, community, school and other conflicts arising from the disputes of an increasingly complex society. The importance of this quiet revolution seems to be woefully understated. This author often wonders if the ADR

movement realizes the importance of its contribution and its potential to affect more significant change in our economic and social systems. The following are observations about the future of the delivery system and its actors: the neutral resources, the provider organizations, the law practice, the government, the courts, the global prospects and some missing players.

## II. THE LAW PRACTICE AND THE DELIVERY OF ADR

The prospect of ADR entering the mainstream of conflict resolution is overwhelmingly related to the extent to which ADR becomes an integral part of the practice and culture of the legal profession. As that happens, the practice will contribute more of its formidable abilities to advance the momentum of ADR. As this happens, ADR curriculum and scholarship will grow in response to prospective employers. In step with this change, the nation's culture of conflict resolution can change from the adversarial to a more problem solving civil mode; but not before.

The legal practice is the predominant decision maker, the gatekeeper of how conflicts will be resolved. Achieving their full commitment to ADR in the face of strong disincentives is a huge task. The hurdles include time charges, legal training, inertia, the enormous profitability of litigation, and America's fascination with litigation. But there is good news here and there.

In the early 1980's, the CPR Institute for Dispute Resolution stated a goal on behalf of its membership of 500 leading general counsel and major law firms. The goal, which seemed a bit ambitious at the time, was to change the culture of the law practice to problem solving, as opposed to being perceived as part of the problem. With the developments we see today in mediation and negotiation, it seems that the profession may well be headed in the direction of problem solving.

Circumstances support this trend. Surveys establish that lawyers are dissatisfied with their role and image, and that they want to be viewed as problem solvers rather than gladiators.

Problem solving is on the agenda of legal leaders. In early 1999, Attorney General Janet Reno addressed the American Association of Law Schools, encouraging them to teach future lawyers to be problem solvers. In a recent speech to family court judges, New York Chief Judge Judith S. Kaye proposed a "problem-solving model of judging." At the request of the Soros Foundation, the CPR Institute and a distinguished group of legal academics have undertaken a project to promote a problem-solving orientation in law school curricula, and to build scholarship that will train lawyers as problem solvers.

The most compelling evidence of a problem-solving orientation is the growing demand of general counsel for legal services that solve problems, add value and are cost-effective. This requires law firms to possess sophisticated alternative dispute resolution as well as litigation skills. These requirements are becoming criteria in the retention of outside counsel, and are fueling the emerging corporate practice of RFPs, or requests for proposals. This corporate interest conveys an important message to the practice.

Many major firms are innovators in problem solving who have used a number of sophisticated methods. Some have assisted major corporations to re-think their

entire conflict resolution policy, commencing with the corporate mission and resulting in partnering approaches to business relationships. They have designed mediation programs to deal with conflicts endemic to a given company. Other CPR member firms have coalesced the leaders of a given industry to commit to ADR in disputes such as intellectual property conflicts that arise among them. Firms have created the role of the settlement counsel, often acting in tandem with the litigation team. Transactional lawyers are crafting dispute resolution clauses that replace the traditional arbitration clause with sophisticated step provisions employing negotiation and mediation. Leading firms are more aggressively counseling on preventive practices in areas such as employment, consumer strategic alliances and joint ventures and relationships with the clients' supply chain.

The corporate counsel is increasingly going to seek the same competence in ADR and problem-solving capabilities that the law firm possesses in litigation skills. It is increasingly in the law firm's interest to position itself as effective in both litigation and problem solving, which requires sophisticated ADR knowledge.

### III. ETHICAL ISSUES WILL IMPORTANTLY DETERMINE WHO DELIVERS ADR

The mediation movement has made progress in identifying the critical ethical issues surrounding ADR as they relate to the advocate, the neutral, the provider, and the courts. Issues of conflict of interest and what constitutes law practice in ADR will importantly determine who delivers ADR and how it is to be regulated. These issues also will help determine the extent to which lawyers and firms are actively engaged in playing neutral roles.

For example, some propose that a partner and his or her firm are conflicted out of representing in the future any party to a conflict where the partner serves as mediator. If this position prevails, firms of all sizes would strongly discourage partners from serving as mediators privately or in court programs. This view should not prevail. If it does, the ADR field would be deprived of a large segment of leading lawyers. The public interest would not be served.

The bar is undecided about when, if at all, mediation constitutes the practice of law. Some say it never is, or never should be, in spite of the fact that mediators in business disputes are overwhelmingly retained by parties because they are lawyers or retired judges. The parties expect that their legal experience will enable them to understand and contribute to the negotiations, ask the right questions, and perhaps engage in framing options or problem solving. They may even be expected to assess positions and opine on outcomes. In a vast number of conflicts, it is difficult to assume that a non-lawyer is equally equipped to perform competently, or that a lawyer retained because he or she is a lawyer is not responsible for performing as a lawyer. Most court programs allow only lawyers to serve as mediators. Is it not implicit that they are acting as lawyers? If mediation cannot be brought within the discipline of the profession because it is not the practice of law, who or what body will preside over performance of neutrals?

Will the emerging ancillary business concepts prevail to hold lawyers accountable? Or, will ancillary business concepts offer a solution to the conflict

issues by enabling firms to organize separate mediation vehicles? These are difficult issues that require sound policy vision on the part of the organized bar. Without such vision and policy, and at a time of growing competition from accounting firms and others, the bar could forfeit a major part of the important conflict resolution mandate it has possessed for centuries.

#### IV. QUALITY IN ADR DELIVERY

The impressive growth of court, government and private mediation programs have demonstrated enormous prospects for new applications, as well as the ability to resolve whole classes of conflicts that would choke the courts. At the same time, large programs which address specified classes of disputes--such as in the health care industry--may pose the greatest danger to the success of mediation.

ADR systems that deal with volumes of disputes risk becoming so poor in quality of management, process, and neutrals as to inhibit or prohibit equity and justice consistent with our sense of fair play and our expectations of ADR. Avoiding such flawed court, government, and private programs may be our biggest ADR challenge.

Regardless of the sector in which the program is conducted, tools that measure ADR effectiveness need to be in place. Installing a mediation program without monitoring its effectiveness and encouraging its improvement, promises poor performance. Legislated or private programs may follow all of the accepted ethics rules, but still be so poorly delivered and monitored that they deny justice.

#### V. THE NEUTRAL RESOURCE

With mediation's emergence, one seemed only to require a calling card and stationery to get into the game. At the same time, there seemed to be a presumption that neutrals would be retained predominantly through both non-profit and for-profit provider organizations. But a different picture seems to be evolving, and the question of who is going to supply mediation services lingers. We have reached a point where a growing body of trained mediators is increasingly well known locally, nationally, and/or within specific industries. The mediators are practicing individually, in boutique ADR firms, and in law firms, as well as in non-profit and for-profit providers. It is reasonable to assume that this pluralistic approach will continue.

The future, and the role, of major ADR providers is very much in flux. A factor that has to be relevant in determining the role of the provider industry is the fact that parties are showing a clear preference for mediation over arbitration. Unless the number of arbitrations can be maintained, the higher revenue that is realized from administering arbitration will be lost in favor of much lower fees for administering mediation.

Furthermore, the provider industry has not been overly successful. Several for-profit providers have come and gone. The published investment data indicates that their investors have not been rewarded. While one must always assume that provider

organizations are necessary to administer or manage volume programs, one has to wonder what the future of the provider industry will be in a mediation world.

## VI. BUILDING QUALITY AND PROFESSIONALISM IN NEUTRALS

We aspire for our judiciary to possess outstanding personal qualities and experience, but almost anyone can offer their services as a neutral. Some liken the neutral community to the Wild West. Court-annexed programs vary, but some require no more than five years legal experience. Of necessity, these court programs have to insist on facilitated mediation from their mediators, yet court ADR administrators testify that evaluative mediation is common. A great deal of effort is needed to build a professional cadre of neutrals.

While we have soundly established the need for mediation training, we have not thoughtfully defined what adequate training should consist of in terms of time, curriculum or the credentials of trainers. Also largely ignored is an effort to establish what is needed in terms of personal qualifications, ADR and career experience, and credentials required for a given dispute. We think we know that a very smart person is helpful and sometimes essential to understand the facts surrounding a given dispute. We know that ADR experience in multi-party actions is extremely important in mediating other multi-party actions. We also know that a career working with large corporations and insurers is important to understanding how major decisions get made in institutions such as these. We know that the leadership or judicial credentials of a mediator can be very helpful in persuading negotiating parties to get together, or in helping them to convey a settlement to a senior management or board. Diversity and other developments have also brought about a need for specialists within the neutral community. Yet little attempt has been made to organize this understanding and these differences for application to mediator selection. Many still view the mediator, mediator training, and discussion of certification as if mediation was a generic term where one size fits all.

## VII. THE GLOBAL PROSPECT FOR ADR

ADR has shown considerable promise around the world. In Europe, mediation centers are forming rapidly. An important question remains as to whether and when the traditional reliance on arbitration for international disputes will yield to the more problem-solving, less costly and time-consuming use of mediation. The nature of today's global economy may well accelerate mediation use abroad. Faster product development in a service and technology economy means that product lives are often measured in months, while litigation or arbitration is measured in years and even decades.

The CPR Institute continually receives requests for assistance from public and private ADR entities in the developing world. Both the World Bank and the Inter-American Bank have focused on civil justice as a crucial element in building economies, and, in that context, have encouraged ADR use. With CPR's assistance, the International Development Law Institute in Rome has taught ADR to developing

country lawyers for the past ten years. A huge opportunity exists in developing economies to bypass malfunctioning court systems and avoid extravagant arbitration procedures. An important question is whether and how ADR can grow effectively in diverse developing cultures, both to resolve commercial and other disputes within those countries and also to resolve international disputes.

Another subject of international importance is whether ADR, as developed by legal academics and lawyers for legal disputes, has a contribution to make in intra-country and international strife. At last count, forty-four different countries were suffering intra-national conflict. As we have addressed the Somalias of the world, the diplomatic community has relied on skills developed from the schools of international affairs and the diplomatic profession. There is real need for cross-fertilization between the legal community and the diplomatic community to ascertain what can be borrowed from the other.

### VIII. THE COURTS

The courts have become extremely important factors in the ADR movement. In the U.S., for example, the state courts have made important changes in ADR practice and increased the use of mediation by the state's citizens and business community. But court programs have also raised issues in terms of quality, adequate resources and management.

### IX. GOVERNMENT DEPARTMENTS AND AGENCIES

The role of federal and state government may be as important as the courts, given the governments' enormous caseload. Government departments and agencies potentially can be an enormous ADR laboratory and resource. Still, government has unique budgetary and other inhibitions to ADR use. Among them, constraints on confidentiality and arbitration are problems to work through. There is also the concern that legislated ADR programs, particularly at the state level, may impose the worst of bureaucracy and offer little that is useful.

### X. SOME MISSING PLAYERS

We also are missing some actors in ADR. The public interest bar should be more of an ADR user since they are often engaged in problems that should be solved rather than subjected to win-lose decisions. The same is true of legal services lawyers, who often deal with social problems requiring a solution or reform.

The ADR movement has only begun to understand and use the knowledge of relevant disciplines beyond law. We know that behavioral scientists and organizational theorists, among others, have a great deal to contribute. Some legal academics are building these bridges, but the potential is still in front of us.

These questions about the future suggest, among other things, that the quality of ADR players and ADR infrastructure will be critical to determining whether



**ADR really becomes the mainstay of our legal culture or remains an ancillary, indeed a flawed adjunct in conflict resolution.**