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MICHAEL BUENGER'S GREAT KEYNOTE ADDRESS AT THE ABA COURT ADR CONFERENCE

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MICHAEL BUENGER'S GREAT KEYNOTE ADDRESS AT THE ABA COURT ADR CONFERENCE

APRIL 21, 2019 | JOHN LANDE | 1 COMMENT

I liked virtually all of the sessions I attended at this year's ABA conference and I especially appreciated the Court ADR Conference keynote address, delivered by Michael Buenger, the executive vice-president and chief operating officer of the National Center for State Courts.

He kindly agreed to let me post his provocative, wide-ranging talk, which I think is worth reading. This post highlights some of his points and applies them to the DR field.

His talk, [Rethinking the Delivery of Justice in a Self-Service Society](#), focuses on the changes needed to deal with social and technological changes in how we live today and are likely to live in the future.

For decades, there has been a symbiotic relationship between the courts and the DR field. Many court leaders value mediation as a mechanism to help manage the courts' workload by directing some cases to mediation that would be better handled without trial.

Mike offered a broader vision, reflecting the reality that the courts and "alternative" dispute resolution are becoming increasingly integrated and arguing that we need to plan better so that this combined system can better serve the public.

He cited a Harvard Business Review article, *Why Good Companies Go Bad*. The article identified four common themes contributing to business failures, collectively called "active inertia." Mike summarized this dynamic as follows:

- First, assumptions framed by past success blinded leaders to identifying innovations and making the hard decisions needed to meet evolving needs and future challenges.
- Second, processes and procedures became routines, so much so that maintaining the status quo was simply easier than dislodging it to adapt.
- Third, existing relationships and ways of relating shackled the ability of leaders to think about new forms of relationships and new ways of relating.

- Fourth, values became unyielding dogmas. I would argue that many of the values of justice have now become ensconced as procedural dogmas.

Mike elaborated this critique and urged a fundamental rethinking of the way that the justice system enables people to use it, writing:

[O]ur thinking tends to gravitate to prototypes and their procedures as standard measures for success. As systems of justice become more sophisticated, more prototypical, we develop more and more rules and procedures as indicators of success, efficiency, objectivity. We see things in highly procedural terms, procedures that were initially designed to protect certain values but have become, in some circumstances, self-reinforced thinking. ... If we are not careful – if we are unwilling to rethink our business model, the services we offer, our modes of delivery – if we cannot adjust to changing public expectations – the public justice system will see declining relevance as more attractive competitors become available.

Just as some businesses and courts stay stuck in traditional thinking about their procedures, so does our field in some ways.

I was struck by the reference to procedural dogmas, which I think is an apt description of some aspects of our DR thinking. For example, almost 40 years after publication of *Getting to Yes* and 25 years after publication of the *Riskin Grid*, some of us still have intense dogmatic beliefs about the merits and effects of particular procedures based on simplistic assumptions. I realize that this paragraph will disturb some readers – perhaps including you – which I think illustrates my point.

The justice system is (or should be) changing, and so is negotiation and DR generally, as [Noam Ebner points out](#).

Considering these changes, we need to develop good understandings of what is happening in practice and how it has been changing. This was the original inspiration of the [Stone Soup Project](#) – to encourage empirical research providing accurate portrayals of real-world practice, not just reflections of our procedural assumptions. Although the Project has focused on encouraging qualitative methods to improve educational experiences, academics and practitioners can use these methods to conduct empirical scholarship about legal and other DR practice.

One of the ABA conference sessions was entitled *ODR in the Courts: The Future is Now*. The future of the DR system – online and otherwise – is coming at us at increasing speed. We need to keep up (and hopefully help lead) or we will be left behind.

◀ CIVIL JUSTICE ◀ COURT ADR ◀ DISPUTE SYSTEM DESIGN ◀ ONLINE DISPUTE RESOLUTION

ONE THOUGHT ON “MICHAEL BUENGER’S GREAT KEYNOTE ADDRESS AT THE ABA COURT ADR CONFERENCE”

Jen Reynolds

APRIL 22, 2019 AT 2:57 PM

I love the article [Why Good Companies Go Bad!](#) I wrote a [piece](#) using Professor Sull’s “active inertia” idea to analyze how commitments become interests (and sometimes become competing commitments) in future negotiations. I’m happy to see there are other Sull fans in the DR community.

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