The Lawyer Turns Peacemaker

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The Lawyer Turns Peacemaker

With mediation emerging as the most popular form of alternative dispute resolution, the quest for common ground could force attorneys to reinterpret everything they do in the future.
The soft-spoken scholar stood before the brightest lights of the nation's legal community 20 years ago, offering a radically different vision of the American justice system.

"One might envision by the year 2000 not simply a courthouse but a dispute resolution center, where the grievant would first be channeled through a screening clerk who would then direct him to the process, or sequence of processes, most appropriate to his type of case," Professor Frank E.A. Sander of Harvard Law School told the Pound Conference, which was called to address public dissatisfaction with the justice system and chaired by Chief Justice Warren Burger.

Twenty years later, Sander's vision for a multidoor courthouse, for the most part, remains unrealized. But the modern alternative dispute resolution, or ADR, movement, as it has come to be known, is well under way, shaping the contours of justice in the 21st century.

No doubt millions of people and businesses have benefited from simpler, less stressful modes of dispute resolution. Moreover, ADR is primed for much greater growth, as witnessed by the breathtaking expansion of court-related programs, the rush of lawyers and nonlawyers alike to mediation training seminars, and the pledge of thousands of businesses and large law firms to consider ADR options.

But the child born of necessity is still, at best, teetering between adolescence and adulthood. For all of its potential to reshape the ways parties resolve their disputes, it still faces a dark side—coercion, conflicts, competency issues and commercialism—that leaves even many supporters privately concerned about the future course it will take.

Such questions have led critics to condemn ADR as just another assault on justice and the civil justice system. They charge that its secret, kangaroo courts deliver a skewed brand of justice that fails to provide adequate remedies for weaker parties such as women and minorities, and that it favors parties who generate repeat business and gives the powerful a way around the law.

The legal profession has long had a strained relationship with ADR, and a new ABA Journal poll confirms a continuing unease with ADR amid broad support for such efforts. The poll, a random sampling of ABA members, shows an almost even split on the desirability of mandatory ADR programs, the need for additional procedural safeguards, and the ability of lawyers to manipulate the ADR system.

But it also confirms a preference for mediation over litigation and arbitration as the dispute resolution method of choice, which is consistent with other signs mediation is gaining ground. Still, only half of those polled prefer mediation to litigation. Remarkably, more than half of all respondents say they have not even been involved in any ADR hearing during the past five years.

"I'm not surprised," says Marc Galanter, a law professor at the University of Wisconsin Law School and an authority on the court system, noting that the reality of ADR has never matched the hopes of its boosters. "Nor has any other independent study been able to verify the claims of those advocates that it is usually faster, cheaper and more satisfying for the parties than traditional litigation, or that ADR has materially shrunk state or federal court dockets."

"It certainly is proving no panacea for problems with the justice system," Galanter adds. "I would say its effects have been marginal, compared to good court management." ADR's real impact, Galanter continues, has been to expand perceptions of options available for dispute resolution—a phenomenon he calls "process pluralism"—and to bring resolution techniques to disputes much earlier in the process, before conflict escalates into legal warfare.

For lawyers, though, the growth of process pluralism figures to change the nature of their role and possibly even the importance of it, in the event that dispute resolution develops as an adjunct to the legal system rather than an integral part.

**Arrival of Mediation**

A fundamental difference between mediation and binding methods of dispute resolution is that in mediation, the parties decide themselves how to resolve their dispute by talking out their differences, with the mediator helping them get past their "positions" so that their real interests can be addressed. Legal rules are relevant but not dispositive—just one of many factors to consider along with feelings and the importance of a continuing relationship between the parties.

Where there is little room for a simple, sincere apology in litigation—other than as an admission to be used to tactical advantage—such empathy can be the turning point of a mediation. In this way, the promise of mediation is to transform conflict into resolution at its very core, rather than merely providing an answer to the superficial dispute.

"Mediation is the sleeping giant of ADR because it is a totally different process than trial and arbitration adjudication," notes Harvard's Sander.

For example, where Harvard Law School's fictional Professor Kingfield personified the terror of legal education, one of the nation's leading mediation trainings meets...
at a Zen Buddhist monastery in Northern California, where participants on a diet of beans, breads and nuts are encouraged to rise early and meditate with the monks before their training.

Yet despite its novelty, the ABA Journal poll found a preference among ABA members for mediation over arbitration or traditional litigation, with law firms expanding their mediation practices more than arbitration.

Another marker of the mediation preference is that the federal courts have not adopted a single arbitration program since 1991, while mediation programs continue to expand, in a pattern also seen in the state courts. Even in the securities industry, dominated by mandatory and binding arbitration in recent years, a blue ribbon task force of the National Association of Securities Dealers recently recommended that mediation options be significantly expanded.

Judith Filner, a senior lawyer with National Institute for Dispute Resolution—which funded many of the programs implemented in the 1980s, and is now directing much of its energies into teaching youth how to resolve conflicts peacefully—says mediation's attraction stems from the public's "phenomenal dissatisfaction" with the court system, regularly reinforced by such debacles as the trials of the Menendez brothers and O.J. Simpson.

"The feeling is that there is no justice in the courts and that people can solve their problems better themselves," Filner says. "They are looking for something different, and mediation provides that."

Still, it is a lot for a time-honored, rule-bound profession like law to take, historically preferring to leave the "touchy-feely stuff" to the social workers and therapists.

But research by the Stanford (University) Center on Conflict and Negotiation, the Harvard Negotiation Project, and others in the years since the Pound Conference continues to confirm that these concerns really do affect clients and their decisions. The more sophisticated mediation techniques become, and the more attorneys and their clients learn about mediation, the more that people with problems are being drawn to mediation and its transformative power.

Nancy Rogers, a mediation scholar at the Ohio State University College of Law in Columbus,

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A quick course in mediation advocacy

BY LEONARD L. RISKIN

So the judge handling your breach-of-contract action has ordered it into mediation. And now you wish you had attended that CLE program on alternative dispute resolution. Don't panic. You'll do just fine if you pay attention to these pointers:

• **Know your mediator.** Mediation is usually defined as a process in which an impartial third party helps parties resolve a dispute or plan a transaction by assisting their negotiations. Approaches, however, can vary considerably.

  Most mediators facilitate, but others evaluate by making assessments or predictions or by pushing parties to accept a particular solution. Similarly, some mediators tend to define the scope of the mediation narrowly, focusing only on the facts and issues that would be important in litigation.

  Others give the parties the opportunity to define the scope of the mediation more broadly, to include the parties' underlying interests (what they really need) along with their positions (what they say they want).

  Many mediators tend to use the same approach regardless of the situations of the parties. But others are flexible and do whatever will work. Each approach has potential advantages and disadvantages; keep this in mind if you have the opportunity to choose a mediator. If you do not, you may be able to negotiate with the assigned mediator about the nature of the process.

• **Match your strategies to the mediator's approach.** For example, if the mediator prefers to help the parties define the problem broadly—to include, say, the parties' relationship—you may need to encourage your client to reveal his or her real wishes.

  But if your mediator imposes a narrow focus and tries to predict how a court would decide your case, your job is to persuade the media-
credits the mandatory mediation programs in many courts for getting the ball rolling. "The strongest indicator of whether lawyers are likely to recommend mediation for their clients is whether they have had a case involving a mediation," Rogers says, citing a recent study of Ohio lawyers. "If they had been involved in a mediation, they were much more willing to recommend its use again."

Mediation, though, raises questions not found in law. Does "the law" even have a place in a mediation, or will it just co-opt the mediation process? How should an attorney advise a client in mediation? Does mediation constitute the practice of law for purposes of malpractice and other professional standards?

"Experienced lawyers trying their hand at mediation often find the difference in orientation awkward and frustrating," says Gary Friedman, a mediator and trainer in Mill Valley, Calif. "Attorneys accustomed to seizing power in law practice must learn to give it away to the parties in a mediation," he says. "That's counterintuitive for lots of lawyers whose habits are such that they feel the essence of being a good lawyer is controlling their client."

Despite these concerns, the leading commercial providers of ADR services, which just five years ago were touting the virtue of arbitration, see the handwriting on the wall and are gearing their services primarily toward mediation for now.

Even American Arbitration Association President William K. Slate finds himself insisting, "Triple A's emphasis is not on arbitration but on providing whatever kind of dispute resolution service the customer wants." It may be telling that his organization has even considered changing its name.

**Waning of Arbitration**

The very reasons for mediation's rise also shed some light on why arbitration—so faddish a decade ago—has lost its sizzle, and, apart from employment contexts, may well be contracting: It's a lot like litigation.

In arbitration, the parties present their cases to a neutral of their choosing. For larger cases, it is common to have a panel of three arbitrators. The hearings are informal and are not governed by traditional rules of evidence or civil procedure; arbitrators do not even
Mandatory arbitration clauses under fire

Within the field of employment law, the question of voluntariness and the propriety of predispute ADR clauses has led to a virtual holy war between management and plaintiff's lawyers. Employment law has been one of the most significant sectors of ADR growth, as management lawyers have seized upon several Supreme Court decisions upholding mandatory arbitration clauses on statutory grounds—with plaintiff's lawyers crying foul. "Most employment statutes involve matters of public policy—decisions by elected representatives in the legislature to eliminate discrimination," says Cliff Palefsky, a plaintiff's employment lawyer with McGuinn, Hillsman & Palefsky in San Francisco, and chair of the National Employment Lawyers Association's mandatory arbitration committee.

"When employers are permitted to compel these claims to be heard in secret tribunals, with no record of the proceeding and no opportunity for the public or the media to see that the statute is being enforced correctly, every purpose behind those statutes is being effectively voided."

Due Process Protocols
Several U.S. Supreme Court decisions in the 1980s and '90s, however, have bolstered the legality of mandatory employment arbitration, as long as the rights and remedies available to the parties are the same as those available in public courts.

Still, those rulings have permitted representatives of a number of organizations—including the National Academy of Arbitrators, the ACLU, NELA and the ABA Labor and Employment Law Section—to agree on certain "due process protocols" in employment cases. But they largely languished until NELA issued an ultimatum to AAA.
he says the arbitration clause conferred limited authority to decide the dispute, the arbitrator construed his powers under the clause to the broadest extent, even going so far as to award benefits to Advanced Micro Devices that Dunlap contends could not have been awarded under the contract. The California Supreme Court said the scope of the arbitrator’s power was up to the arbitrator, and, deferring to that, upheld the arbitration award.

That ruling led the parties—in an ironic twist—to settle in 1994, in a mediation. Today Dunlap says the arbitration was “a very slow, expensive and unsatisfying process,” and says Intel is one of those companies that no longer use predispute arbitration clauses, preferring informal negotiation and mediation instead.

The Intel case is hardly an isolated example of how lawyers’ tactics and other dimensions can distort the arbitration process—a concern acknowledged by more than a third of the ABA Journal poll respondents. The California Supreme Court is considering allegations that a health maintenance organization dragged out the arbitrator selection process in a medical malpractice case until the complainant died. Engalla v. The Permanente Medical Group, SO4881. A study of arbitrations involving the Kaiser Permanente Health Care Program introduced into evidence that case found that they typically take nearly 28 months, from complaint to award, as compared to 15-19 months in the relevant trial court.

Mediation’s Awkward Age

The controversies surrounding mediation tend to be more subtle than those in arbitration because it is a less formal process. For instance, the purpose of arbitration is clear but less so than that of mediation.

Some experts believe mediation should facilitate the parties’ own resolution of the problem by digging deep into the interests and feelings underlying the surface dispute. Mediators who take this more therapeutic approach would in a divorce mediation, for example, try to work through the parties’ feelings of anger or resentment or rejection that led to the breakdown of the marriage. Then they can let that cleansing process pave the way for mutually acceptable terms of property settlement and child custody—and maybe even reconciliation.

Other mediators, however, say this approach is best left to therapists. They say the proper purpose of mediation is just to bring the parties into an amicable accord— much like the settlement conferences that continue to shape lawyers’ and judges’ understanding of mediation. Still others contend that mediators should provide subject
53% think their training and experience as lawyers have prepared them for arbitration and 47% say the same of their preparation for mediation. But some doubt their skills; 24% say they were not prepared for arbitration and 29% not for mediation. 38% of lawyers in the survey practice in defense firms, 27% in plaintiff’s firms, 17% in transactional firms, and 7% are in-house counsel.

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There is a lot of diversity of approach in the field, and one of the things we’re beginning to see is that there is not a single model that works in all situations,” says James Boskey, law professor at Seton Hall School of Law in New Jersey.

“What works in a divorce mediation may not work in a community or a business mediation.”

The diversity of mediators’ backgrounds makes even self-regulation enormously difficult, and some say impossible, even though such efforts are often critical to the institutionalization of any profession.

The ABA’s Section on Dispute Resolution, the Society of Professionals in Dispute Resolution, and the AAA ran into this problem last year in the most significant attempt to date at ethical standards of conduct for mediators.

In a bold, though controversial, move, the drafters concluded that mediators should only try to facilitate the parties’ own resolution, and went so far as to admonish professionals who serve as mediators—including lawyers—to “refrain from providing professional advice.”

“Mediation by definition is facilitative, and while there may be other approaches that bring about the Dispute Resolution Section.

Qualifications and regulatory oversight present similar problems. What kind of training should good mediators have, and how should they be regulated, if at all?

Hanging Out a Shingle

In most states, there are stiffer requirements to become a hair stylist than there are to become a mediator. Only a small handful—Florida, New Jersey and Hawaii—have adopted qualifications requirements. Many merely require completion of 40 hours of training, while in others, a law license is enough. Florida is the only state to go the further step of implementing a disciplinary process for mediators.

While many mediators contend that standards and regulation are inappropriate, many other experienced mediators say they already see an element of hucksterism. They also warn that bad training can lead to poor results for clients and a black eye for the nascent profession.

“People are out there trying to make money any way possible, taking the training and hanging out their shingle as mediators without having a clue of what they are doing,” laments Marvin E. Johnson, an attorney-mediator in Silver Spring, Md. For example, experts agree that domestic cases involving have been rejected, deepening the gulf between the bench and bar on mandatory arbitration. For example, an aggressive 7th U.S. Circuit Court of Appeals at Chicago recently held that an important U.S. Supreme Court decision, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), upholding trial rights in certain discrimination claims in union cases, is no longer good law. That case is likely to be appealed to the Supreme Court. Austin v. Owens-Brockway Glass Container Inc., 78 F.3d 875 (1996).

But the pendulum may be starting to swing the other way. The 9th Circuit at San Francisco, for example, has refused to enforce a securities-industry arbitration clause in a sexual harassment case, holding that the agreement to arbitrate was not “knowing,” in a decision left intact by the U.S. Supreme Court. Prudential v. Lai, 42 F.3d 1299 (1994).

State courts are also beginning to take such challenges more seriously. The Michigan Supreme Court announced this spring it would review a lower court decision upholding the binding nature of a mandatory arbitration clause in an employment manual. Heartise v. Reliable Business Computers, 102019.

The California Supreme Court, too, is considering allegations that a health maintenance organization dragged out the arbitration selection process in a medical malpractice case until the complainant died. Engalla v. The Permanente Medical Group, S04881.

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Moreover, the U.S. Equal Employment Opportunity Commission and the National Labor Relations Board have taken positions challenging the validity of mandatory and binding predispute arbitration clauses. The EEOC successfully enjoined one such clause as interfering with its statutory obligations, in a highly publicized case from Texas, EEOC v. River Oaks Imaging and Diagnostics, H-95-755.

Similarly, the NLRB authorized assaults on two others in Florida as unfair labor practices. One of those cases settled after the NLRB stepped in, while the other is still pending.

—Richard C. Reuben

The telephone survey of 402 ABA members was conducted April 6 to 17 by Research USA, and has a margin of error of ±5%.

In cases involving the police, mediators need experience.
a history of violence require special attention because of the possibility of physical reprisals, and yet this dynamic is often left out of trainings.

State legislatures need to bite the bullet and establish qualification, licensing and disciplinary standards for mediators just as they do for other professions, Johnson adds. But that may be easier said than done, says Mary Kay LeFevour, executive director of the Society of Professionals in Dispute Resolution, which has produced two studies in recent years analyzing ADR standards. "There are many paths to competence, such as life skills and on-the-job experience, as well as professional training." But, she stresses, "Just because [people have] a professional degree doesn't mean that they're going to be good mediators."

It remains to be seen, however, whether the services of lawyers will be necessary at all, particularly in areas of mediation that require a specialized background.

"We don't know now whether, and to what extent, the legal profession will be the predominant vehicle for ADR services," notes the CPR's Henry. He says that role could be assumed by leading commercial providers of ADR like Judicial Arbitration and Mediation Service/Endispute (JAMS) and Triple A, as well as nonlawyers not bound by legal professional ethics or standards.

"It's a competitive market, and while we're getting a lot of inquiries from lawyers, we're also getting a lot from psychologists, social workers, human resource personnel and other professionals," says LeFevour.

Jack Unroe, president of JAMS, compares the situation to the recent history of the medical profession. "There was a day when physicians controlled the whole formula for how health care was provided, but they failed to respond to a changing environment and let it get away from them," Unroe says. "Big law firms have the same risk with ADR."

Many firms already are taking steps in that direction, not only by considering ADR options but by establishing ADR divisions within their firms. Some are also beginning to offer their services as arbitrators and mediators.

Still, the integration of ADR and the law promises to be difficult. As the Journal poll shows, the bar continues to be uneasy about ADR. It would be easy to shrug off such ambivalence, and occasional hostility, as mere protectionism for attorney fees—an argument overwhelmingly rejected in the poll. However, lawyers know that legal rules also balance the playing field between parties and provide for an ordered process; arbitration and mediation do neither.

Drumming Up Business

A related complaint is that the arbitrator's unbridled discretion is affected by many hidden experiences and predispositions, such as cultural and professional biases. For example, 89 percent of all arbitrators who hear securities-related complaints—ranging from fraud allegations to sexual harassment—"stems from an imbalance of information in selecting the arbitrator." Repeat players have the resources and incentive to track the predispositions of arbitrators on certain types of facts, which can prove invaluable when selecting a neutral.

Nonrepeat players without such information and resources, typically blue- and pink-collar workers, "have no facts on which to veto an arbitrator, even a well-respected one," she adds.

The only way to get around such problems is to increase upfront disclosure, she maintains, because the hearings are private and arbitration awards are not published.

Looking Past 2000

While some growth of ADR seems assured, the acceptance that is the key to its expansion is less so.

Arbitration, mediation and settlement enhancement techniques are frequently forced upon litigators and their clients by courts and legislatures. This has the positive
effect of introducing ADR on a broader scale but can also breed resentment and other unintended consequences.

"Five years ago, you could just call up the other lawyer and talk things out," complains Kirk Watson, a personal injury lawyer with Whitehurst, Harkness, Watson, London, Ozmun & Galow in Austin, Texas. "Now, you generally have to go to mediation for at least a day," he says, adding it is often unfair to his clients because insurers won't negotiate before a mediation, and then often come to the mediation unfamiliar with the case.

Moreover, coercive mediation programs also thrust parties into the same kinds of commercial pressures that create repeat-player problems in arbitration. Less scrupulous mediators who are paid by the hour have an economic incentive to keep the parties in the room longer, and to use whatever tactics it takes to get the parties to settle so that they can continue to advertise high settlement rates.

One answer to the economic incentive problem—at least for court-related programs—is for ADR services to be provided free to the parties, paid for by the government as part of the bill for public justice.

"Mediation ought to be on par with adjudication," says Harvard's Sander. "There is no reason why someone should be able to get a judge for free, but have to pay for a mediator, arbitrator or other ADR service when they are compelled to go into ADR."

Many court-related ADR programs use volunteer arbitrators or mediators. But Michael Broderick, director of Hawaii's extensive and innovative ADR program, stresses, "You can only go to the pro bono well so many times."

As these debates show, the very systems devised to solve disputes more efficiently have bred disputes of their own. Such are the challenges for ADR, and public justice itself, at the onset of the next millennium.

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Plethora of ABA resources for ADR

Lawyers who want to explore the use of alternative dispute resolution techniques in their practices can look just about anywhere in the Association for what they need.

One of the large sections—the Section on Dispute Resolution—focuses on ADR, and numerous others have ADR committees.

The Dispute Resolution Section has worked on a variety of fronts, with the most notable perhaps being the formation of the American Arbitration Association and the American Bar Association's Dispute Resolution Section, which advocate uniform standards for mediators.

It completed that effort last year, and has moved to such areas as a program for adapting law practices to ADR.

"There is a tremendous interest in this on the part of our section members, and other members of the ABA," says Jack Hanna, section staff director. This effort will not only address how to integrate dispute resolution into litigations but also focus on how to use it as an alternative to litigation, and other ADR procedures.

Attorneys in the Labor and Employment Law Section have also been working on a variety of projects. The section has been working on a variety of projects. Representatives of the ADR committees of that section worked with several other organizations to establish the due-process protocol for mediation and arbitration of statutory disputes.