Ways of Handling Conflict: What We Have Learned, What Problems Remain

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This article canvasses the principal achievements of the past twenty-five years in alternative dispute resolution and addresses some of the current challenges and how they might be addressed.

Key words: ADR, dispute resolution, mediation.

Introduction

Who would have thought in 1984 when the first issue of *Negotiation Journal* went to press that twenty-five years hence we would see such a vibrant range of dispute resolution processes — from such basic processes as negotiation to more specialized ones like mini-trials — employed in such a vast variety of contexts, from the environment to families and public disputes? In the first section of this article, I provide a brief overview of some of these developments, focusing specifically on the courts. Next, I turn to some problem areas that have emerged. Finally, I take a look forward in order to identify some of the challenges that alternative dispute resolution (ADR) faces today, which are opportunities for its continued development in the future.

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10.1111/j.1571-9979.2009.00243.x

ADR and Its Accomplishments over the Past Twenty-Five Years

In an earlier article (Sander 2000), I identified three periods of ADR development since the seminal 1976 Pound Conference in St. Paul, Minnesota, in which two hundred lawyers, judges, and others addressed the topic of popular dissatisfaction with the administration of justice. The first period was one of wide-ranging experimentation ("Let a Thousand Flowers Bloom"). Even before Pound, efforts had been undertaken to find substitutes for the adversarial tenor of divorce trials through the use of mediation. Mediation was also a strong theme in the development of community mediation programs designed to deal more effectively with disputes between neighbors and other parties involved in long-term relationships. Indeed, use of the process of mediation was a recurring theme in a number of diverse settings, such as schools, the environment, consumer problems, and health care.

But in the legal community, there was also a push to develop new processes such as the mini-trial, an imprecise label for a telescoped process consisting of a blend of a summary presentation of the essence of the dispute by each side to a panel consisting of high-settlement officials for each side joined by a neutral presider. After that presentation, interspersed by questions from the panel, there typically follows an interest-based negotiation between the settlement officials representing the two sides. If that does not bring about a resolution, the neutral presider provides a rights-based prediction of the likely court outcome in the hope that that step will bring about a resolution. In the first mini-trial in 1976, the process only had to go to the first stage; it took the two settlement officials a short time to work out a mutually satisfactory solution.

Following this exploratory period involving new applications of familiar processes as well as the invention of new processes, there came a second period characterized by cautions and criticisms. Perhaps the best known of these was Professor Owen Fiss's "Against Settlement," which, interestingly, was published in the same year this journal made its first appearance (Fiss 1984).

We are now in the third period whose theme is institutionalization: making those innovations that turned out to be viable a regular part of the dispute resolution machinery in businesses, law firms, and the courts. Some examples of this effort have been:

- the creation of the International Institute of Conflict Prevention and Resolution, a major player on the ADR scene involving some Fortune 500 companies and leading law firms devoted to the task of exploring methods of dispute settlement other than litigation;

- extensive state and federal legislation mandating, or at least encouraging, the use of various nonbinding court-annexed dispute processes (such as arbitration and mediation) as a preliminary to litigation;
- creation of the Dispute Resolution Section of the American Bar Association, which now comprises more than 17,000 members and sponsors a well-attended conference each spring that brings together ADR practitioners from various sectors, and publishes a leading quarterly, *Dispute Resolution Magazine*; and
- extensive developments in the academic realm, evidenced by one or more ADR courses at most law and many other professional schools, as well as the emergence of a vast literature on all aspects of dispute resolution. (See Goldberg and Green 2006 for a detailed description of the development of the first ADR textbook for law school courses, and Rogers 2006 for a discussion of the development of ADR courses in law schools.)

One major development, spurred by the publication of *Getting Disputes Resolved* (Ury, Brett, and Goldberg 1988), was the new field of dispute system design. The focus here is on dispute process planning: given a system in which many disputes are expected to surface (e.g., an insurance company, a hospital, a school, or a new governmental compensation program such as the compensation scheme for the families of those killed or injured in the terrorist attacks of September 11, 2001), how to set up a process that deals efficiently with the multiple disputes that can be expected (Symposium on Dispute System Design Forthcoming).

Problems and Prospects

One major anomaly of the institutionalization phase in which we presently find ourselves is the geographic unevenness of the process. Why do some jurisdictions such as Florida and Ohio have extensive ADR activities while others have barely scratched the surface? There appears to be no simple answer to this question. Indeed, we presently lack a suitable metric for measuring a jurisdiction's facilities for, and use of, mediation (Sander 2007), so it is difficult to compare two or more jurisdictions in this respect. Hence, it may be desirable to develop such a metric by looking at such tangible factors as the number of public and private mediators, as well as the extent of mediation legislation. Also relevant could be such intangibles as the presence of one or more prominent public figures that are devoted to the advancement of mediation in their jurisdiction (e.g., Chief Justice Tom Moyer of Ohio).

Another similar anomaly is the disparity between the number of available trained mediators and the demand for their services. Here, too, there is no easy explanation. Surely, the reason is not the absence of ample disputes

that need resolving. In part, the disparity between demand and supply is because of the public's unfamiliarity with mediation as a powerful and helpful process, as well as the unavailability of low-cost or freely provided mediation at a public facility analogous to the availability of adjudication in court or at a multifaceted facility, such as the "multidoor courthouse" (see Gray 2006).

The absence of reliable data presents another impediment to the greater use of ADR. At a time of fiscal constraints, legislatures that are asked to expand the public provision and financing of mediation often ask for persuasive cost–benefit data. But such data are difficult to come by. Suppose, for example, that appropriations are sought for dealing with a new mediation program for landlord–tenant disputes. Persistent questions will undoubtedly be raised by the funders about how much money will be saved by the "more effective and efficient" mediation program.

To begin with, the initial expense is usually incremental because, normally, no judges or other court officials will be laid off as part of the new program to offset the cost of hiring new personnel as mediators. Beyond that, how can we measure the precise benefits of the new mediation program? Generally, they are largely intangible, in terms of a less adversary form of dispute resolution than court, as well as having a hoped-for longer-lasting effect.

Another major challenge to increasing institutionalization is the push toward greater quality control. To date, no state has established general licensing requirements for mediators; the closest we have come to such requirements is court-approved conditions (e.g., a minimum amount of training) for listing on a court panel or voluntarily meeting the requirements for listing by private professional groups. Given the substantial disagreement that still prevails about what constitutes competent mediation, as well as over the utility of the recently revised Model Standards for Mediators, it is probably wise to avoid further steps toward a mandatory scheme at this time (Moffitt 2009; Sander 2009).[1] (For a discussion of issues surrounding the development of codes of ethics for mediators, see Honoroff and Opotow 2007.)

Quite aside from these difficulties just alluded to, there is also the oft-voiced feelings of some of the founders that additional formalization and legalization threatens to rob mediation of its vaunted flexibility and creativity.

Opportunities

The twenty-fifth anniversary of *Negotiation Journal* comes at a critical time. The recent financial crisis left us with a large number of pressing disputes — over housing foreclosures, employment and securities controversies, as well as Ponzi schemes. This will require a careful search for responsive and effective solutions, using all that we have learned about

ADR, and then some. In addition, there are incipient public policy disputes that call for more creative and innovative approaches (see Susskind 2009 in this issue). From the ADR perspective, this may be a powerful teaching moment.

Happily, President Barack Obama has heralded and demonstrated a problem-solving approach to many of the controversial issues he has faced. We should do likewise.

NOTE

1. There are now a multitude of mediation styles (evaluative, facilitative, transformative, narrative, understanding based), some of whose practitioners feel confident that their approach is the only "true" mediation. In light of that, how could one find evaluators who would fairly judge new candidates who apply to be credentialed (Jarrett 2009)?

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