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ESSAY: ADR AS AN ALTERNATIVE TO OUR CULTURE OF CONFRONTATION

THE HONORABLE THOMAS J. MOYER¹

I. OUR CULTURE OF CONFRONTATION

We are living in a contentious society today; our culture is becoming a culture of confrontation. Cynicism in our country today is clouding our public discourse and future direction. Pick up the newspaper, turn on the television or radio, and unless it is *Mr. Rogers' Neighborhood*, chances are you will see and hear people threatening or demanding. It seems at times that we no longer have discussions or reasoned debates; it is all confrontation.

Imagine what the Lincoln-Douglas debates would be like if they were held today. Daydream about history and you could end up with a nightmare. First, it would be an event moderated by a television personality, such as Geraldo Rivera or Phil Donahue. The two simple podiums would be replaced with cameras, lights and media hype.

As for the actual debate, reasoned points of view forged and honed by years of study and deeply held beliefs would be scrapped. Instead, we would witness charges of racism and countercharges of being against progress.

The concept of public debate and reasoned discussion is vanishing in our country. In today's discourse, words, phrases and points of view are the swords used to draw lines in the dirt rather than tools to change reasonable minds. Social commentator Deborah Tannen notes that debates have given way to fights, with winners and losers.²

In this culture of confrontation, truth is a sure victim. To score a point, to win the fight, anything goes. If history or facts do not support your view, bend them to make them fit or ignore them altogether. We saw this portrayed in Oliver Stone's movie, *"JFK"*. Mr. Stone was intent to make *his* point that President Kennedy's assassination was nothing short of a coup carried out by the generals, the Mafia and Cuban exiles. Mr. Stone responded to his critics that *his* film was not literally true, but that, instead, "it spoke an inner truth."³

An inner truth? This sounds like a theological point until you consider what St. Augustine said about truth: "When regard for truth has been broken down or even slightly weakened, all things will remain doubtful."⁴

¹Chief Justice, Supreme Court of Ohio.

²DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN & MEN IN CONVERSATION* (1990).

³John Leo, *Oliver Stone's Paranoid Propoganda*, U.S. NEWS & WORLD REP., Jan. 13, 1992, at 18.

⁴CYNTHIA CROSSEN, *TAINTED TRUTH: MANIPULATION OF FACT IN AMERICA* 239 (1994).

Oliver Stone, of course, is not an isolated example. In our culture of confrontation many others--artists, attorneys, news reporters and public officials--too often are willing to shade or completely ignore facts and history because all that counts is winning the fight.

For all of its wonders and benefits, technology is also contributing to the decline in our public discussion. As more and more information becomes easier to obtain, knowledge is becoming more specialized. On many subjects, people offer uninformed opinions or rely on others to shape reality for them. An example of this is recent reports of skinheads using the Internet to disseminate their hate messages in hopes of recruiting new members. The technology creates a paradox. We are awash with information and statistics, but this data loses its power and meaning as it becomes easier to twist and manipulate.

We cannot afford to accept or abide by this culture of confrontation. Our democracy depends on people's ability to make choices based on a free flow of information. When information is blocked or twisted, we are not free. Fortunately, there are alternatives to the culture of confrontation.

II. ALTERNATIVE DISPUTE RESOLUTION AS AN ALTERNATIVE

One very important alternative is alternative dispute resolution [hereinafter ADR]. ADR is steadily working its way through our system, becoming part of our public and private lives. The impact can be seen in our courtrooms, boardrooms, schoolrooms, and even our living rooms.

At the heart of ADR lies a simple concept now in short supply, and that is this: accepting responsibility and listening. Listening to options, listening to ideas, listening to fair and workable solutions.

ADR works because it requires all parties involved to clearly state positions listen—to all sides and consider reasonable solutions. Dispute resolution works because this process of discussion, listening, considering options and agreeing on a solution, requires the parties to assume their share of responsibility for the dispute and actively participate in resolving it.

In my experience of working with the various forms of ADR, I have yet to come across a negotiated agreement that did not call for the active involvement of all the participants at the table. Taking part in developing a solution gives all parties a stake in the outcome. When all parties take an active role, they are more likely to follow the terms of the settlement.

ADR is a relatively new activity in our legal culture. But whether it is the nation, the state, or local government, the response has been all positive. The accounting firm Deloitte & Touche conducted a national survey of 246 corporate counsels.⁵ It showed that 72 percent had at least some experience with mediation, arbitration or other alternatives to expensive litigation.⁶ About

⁵*Lack of Control Over Judicial Process Drives ADR*, CORPORATE LEGAL TIMES, Sept. 1993, at 14-15.

⁶*Id.*

10 percent of those responding said they rely on ADR extensively, using it twenty or more times over the three-year period.⁷

Arbitration and mediation are the most popular ADR methods. They accounted for more than 90 percent of the 3,248 cases studied over the three-year period.⁸ These figures show that neutral evaluations, summary jury trials and private judging are not used as much.⁹

It is also encouraging that provisions for using ADR increasingly are being written into contracts with franchisees, suppliers, contractors, customers and labor unions.¹⁰ This is a positive sign because it shows that ADR is becoming engrained in the way we do business.

In Ohio, dispute resolution programs are flourishing. The success reflects the support of the courts, the legislature and the executive branch. Programs exist across the state. They are successful because, like ADR itself, they are grounded in civility and common sense.

The Ohio Commission of Dispute Resolution was established in 1989 through a joint effort of the Governor, the Chief Justice and the General Assembly. It was the first in the country. Its mandate is to promote dispute resolution in government, schools and communities.

Time and again, the Commission has proven that mediation and arbitration work in different types of disputes at all levels. It is worth noting that the Commission is not an overgrown bureaucracy. In fact, its budget for this year totals \$392,000.

Disputes between government agencies can be nasty, time consuming and wasteful. The Government Assistance Program helps elected officials work out their own disputes. We have seen significant success in resolving heated budget disputes between a court or government agency and its funding authority. In one case involving county commissioners and the domestic relations court, more than \$25,000 was saved before the matter went to trial.

Perhaps the greatest sign of progress is what is happening in our schools. We now have ongoing dispute resolution (peer mediation) programs in 600 Ohio schools. And 150 of those are in the Greater Cleveland area. One of the true pleasures of my job is the opportunity to visit a number of these programs. Many of the stories one hears are heartening. During a visit to a high school, one of the student mediators told me how she used her mediation skills at home. She said that she had to settle arguments between her mother and father. When I asked her how her parents responded, she said, "It's keeping the peace."

It is good that our young people are learning these valuable lessons and using them. But it does cause one to pause and wonder what it says about our world when children are taking on the responsibility to mediate problems at

⁷*Id.*

⁸*Id.*

⁹*See id.*

¹⁰*Lack of Control Over Judicial Process Drives ADR, supra note 5, at 14-15.*

home. Maybe there is truth in the Crosby, Stills and Nash song, "Teach Your Parents Well."

A recent survey of children between the ages of 10-16 reported in the *Los Angeles Times* revealed that one-third of the children "often" want to try what they see other people doing on television, while two-thirds said their peers are influenced by what they see on TV.¹¹ Sixty-six percent said programs such as *The Simpsons* and *Married with Children* encourage children to disrespect their parents.¹² Eighty-two percent said TV shows should teach children right from wrong.¹³ We should not wonder why the most dramatic increase in filings in all of our courts is in juvenile court with survey results like this.

One of the reasons conflict resolution works well in schools is that it calls on students to take an active part in the process. It requires them to assume responsibility for the dispute. They see that it works because they are part of the process of resolving the dispute.

The Youth Services' Mobile Mediation Project is a three-year-old project supported by the Gund Foundation. Director Cheri Jacobs uses a van to immediately respond to after-school conflicts that have the potential to boil over into violence. One of her first incidents involved two female gangs at a Cleveland high school. Hostilities reached the point where the high school principal feared someone would be seriously hurt. Ms. Jacobs responded first by getting as many of the gang members together as possible. Thirty-six angry young women were there. She had them form a circle and then had each one tell their story without interruption. Over the course of several days and many discussions, she was able to sort out the tangled web of grievances. Apparently two boys and many rumors were at the heart of the conflict. By forming smaller groups with members from both gangs, Ms. Jacobs was able to get the members to identify three problems and three solutions. She knew the tensions had eased when one of the gang members told her, "We don't need you anymore."

This is one story about one program. There are other projects, like the Youth Forum on Violence next month that is sponsored by the Task Force on Violent Crime, radio station WVIZ and *The Plain Dealer*. My hope is that all these programs will give young people the skills to peacefully settle disputes throughout their lives. Such training should have long-term remedial implications for the culture of violence so loudly espoused in our popular media and played out in too many homes.

Ohio courts, like many courts throughout the country, actively support ADR. One of the key elements to success in these cases is maintaining confidentiality about the parties and settlements.

Yet, I can tell you about one significant case. It stands as the largest personal injury case in one of our major urban counties and ultimately was settled

¹¹Claudia Puig, *Youths in Poll Say TV Is Harmful Influence*, L.A. TIMES, Feb. 27, 1995, at 1.

¹²*Id.*

¹³*Id.*

through mediation. It involved a customer at a retail outlet who was tackled by a security guard who thought the man had stolen a pack of batteries. The customer was left completely paralyzed. The jury awarded \$12.9 million, \$850,000 in punitive damages, plus attorney fees. Both an appeal and cross-appeal were filed. Two mediators entered the discussions and after intense negotiations over a period of days, the case was successfully negotiated. It is estimated the settlement saved at least two years in additional appeals and more than half a million dollars in legal fees.

On a smaller, but no less significant level we have seen mediation and arbitration applied in countless other instances, and with great success.

During the past four years, the Supreme Court has developed mediation programs in 18 municipal courts where 80 percent of all cases are filed. The Small Claims Court in Cleveland refers about 500 cases a year to mediation and 80 percent of them are settled. Similar programs are getting underway in Rocky River and South Euclid.

By using trained, volunteer mediators, we have found that in 85 percent of the cases both parties have lived up to the terms of the negotiated agreement. The high success rate is actually no mystery. Parties are willing to meet their obligations because they have assumed the responsibility to help shape the agreement. As one volunteer mediator said to me, "People just want someone to listen to them."

There is another important ingredient in Ohio's success with ADR. Regardless of the forum or the case, we are offering it as an option. We do not mandate or regulate it to the point that it would become unmanageable or overbearing.

Every step of the way we have worked closely with the bar, judges and other legal groups to ensure that everyone understands where we are and where we would like to go. Mandates and uncertainty are not part of the program. Of course, ADR is not the answer to all of our legal dilemmas. There are instances when arbitration or mediation are not appropriate. For example, ADR may be inappropriate in cases that involve a novel legal issue that can be decided only through litigation. And then there are the personal grudge cases. Often, the key issue is not money, but ego. And, no matter how skilled the mediator, the issue will be resolved only through a trial.

Alternative dispute resolution has value beyond our courtrooms and boardrooms, despite its limitations. Quite simply, it helps reintroduce our society to the concept of civility. By its very nature of relying on people to take responsibility for the dispute, to talk and listen to one another, and then resolving their differences in a civilized manner, it is evidence that we do not have to resort to confrontation. ADR is a hope for civility, reason and respect—respect for the law and respect for one another as individuals.

