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## Reflections on the ADR Movement

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REFLECTIONS ON THE ADR MOVEMENT

ROBBEN W. FLEMING\*

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**A**DR, the acronym that identifies the alternative dispute resolution movement, derives its current popularity from widespread dissatisfaction with the present system of justice. Thus, ADR both proposes and promotes “alternative” ways of dealing with disputes which would otherwise be the subject of litigation.

In truth, there is nothing very new about the criticism directed at the legal profession, the courts, and the adjudicatory systems in general. In his very interesting book entitled *Justice Without Law*,<sup>1</sup> Jerold Auerbach traced some of the current “alternatives” back at least as far as Biblical times. Literature is filled with lawyers who more nearly fit the image of a sly character out of Dickens than the dignified eminence of a Charles Evans Hughes. Furthermore, the alternatives which have been suggested over the years are very similar. All of the alternatives lie along an axis which starts with efforts to bring about voluntary agreement by the parties and ends, where agreement is unobtainable, with some form of adjudication. This suggests a sobering thought: Perhaps all systems of resolving disputes inevitably grow unpopular over time either because the parties find ways to manipulate the system to their advantage or because for every decision there is likely to be a somewhat disgruntled participant.

In any event, my intention in these remarks is to address four questions: (1) Why is our present system of justice unpopular?; (2) What alternatives are there which seem to hold promise?; (3) What are we to conclude about the respective merits of the court system versus alterna-

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<sup>1</sup> J. AUERBACH, *JUSTICE WITHOUT LAW* (1983).

tive methods of dispute resolution?; and (4) What should law schools be doing about all of this?

### I. WHY IS OUR PRESENT SYSTEM OF CIVIL JUSTICE UNPOPULAR?

In brief, the criticisms of our present civil justice system are that it is too slow, too costly, too inaccessible, too manipulative, too adversarial, too legalistic, too overpopulated by lawyers who are alleged to stimulate frivolous claims, and "too" any a number of lesser things.

There are, as one would expect, scholarly refutations of most or all of these charges. Two studies done at The University of Wisconsin describe the landscape of disputes and what is known about the costs of ordinary litigation.<sup>2</sup> They demonstrate fairly conclusively that many of the criticisms of the judicial system are exaggerated. That this is so is undoubtedly attributable in part to the propensity of the press and the broadcasting media to focus on the sensational. Thus, society sees a stream of "horror" stories about litigation.

Putting aside the distortions, it remains true that there are real problems with the court system. There are many jurisdictions, particularly in urban areas, where it takes years to hear and resolve a case. When big, affluent companies start turning to organizations such as the *Center for Public Resources*<sup>3</sup> in New York to help them find alternative ways of settling intercompany disputes in order to save both time and money, they are acting out of experience, not rumor. When judges begin to insist that lawyers bring their clients before them and disclose the costs of an extensive discovery proceeding before the judge grants the request, it suggests that the discovery process can be exploited in terms of both time and cost. Because an adversarial divorce proceeding or a discrimination charge in educational institutions pits the married parties or colleagues against each other to the frequent psychological destruction of those involved, one cannot help but conclude that there must be some better way to solve society's problems. Finally, the fact that judges themselves are among the most active participants in seeking out and employing new and different means of disposing of cases before them without a trial indicates the increasing reliance being placed upon alternative dispute resolution techniques.

As to the charge that there are too many lawyers in the United States, it is true that this country has the highest population of lawyers per

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<sup>2</sup> Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Trubek, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

<sup>3</sup> Henry, *Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s*, 1 OHIO ST. J. ON DISPUTE RESOLUTION 113 (1985).

capita in the world.<sup>4</sup> Japan, on the other hand, limits the number of lawyers and judges in order to discourage formal litigation. The United States has never been willing to “manage” its system in that fashion, and there is no reason to suppose that this attitude will change in the foreseeable future. Meanwhile, the impact of the great number of attorneys in this country is somewhat mitigated by the fact that large numbers of people trained in the law never practice. They prefer other callings, such as the business world, and simply regard their law training as preparation for other activities.

Quite apart from the deficiencies in the system which have already been stated, it is said that the United States is an unusually “litigious society.” Marc Galanter’s studies at the University of Wisconsin cast genuine doubts on the validity of this claim,<sup>5</sup> but if it is in some measure correct, it is of no surprise. One need only reflect on the enormous range of issues which are referred to the courts to sense the magnitude of the task. While the doctrine of *caveat emptor* once advised that the buyer beware, courts now require a producer to stand behind the quality and safety of his products. Society insists that there be no discrimination on the basis of age, sex, race, color, ethnic origin, and sometimes sexual preference, and provides legal redress where violations are found. The courts face some of society’s most delicate personal problems, such as the right to live and the right to die. Because this country’s land, water, and air are polluted as the result of uncontrolled activities in the past, society now monitors the environment and provides for legal intrusion into areas once thought to be private. Entitlement programs, such as social security, medical aid and assistance, and veterans’ rights inevitably involve disputes over coverage and benefits which lead to thousands of claims. Changes in the structure of the family, the high divorce rate, the single-parent family, the division of property rights, and the custody of children all lead to new rules with respect to family law. The impact of new technology on the work place, along with the increasing pace of business mergers, displace not only workers, but large numbers of white collar personnel. As a result, the courts are being asked to redefine the rights of employees with respect to employment.

In short, society is very different than it once was. If its increasing complexity requires more and more rules, it should not surprise anyone to find that disputes proliferate. The result of all this can be to aggravate the feeling of irritation which so many people feel about the law and the way it is administered. If one needs actual proof of this, there is no better example at the moment than the excitement over liability insurance with

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<sup>4</sup> J. MARKS, E. JOHNSON, JR. & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION* (1984)(available from the National Institute for Dispute Resolution).

<sup>5</sup> Galanter, *supra* note 2.

respect to both cost and availability. Health care personnel in some places find themselves unable to get insurance at all or, if it is available, only at a much higher price. Once modest insurance charges for protecting members of boards of directors of non-profit organizations are escalating rapidly. Owners and operators of amusement parks are pondering how to cover their risks. The clamor for both state and federal laws to limit liability and provide protection in other ways is also increasing. Is there a better way to deal with these claims than to channel them through the courts?

To summarize, some of the criticisms of the system of civil justice are doubtless exaggerated, but they are nonetheless real. It may be that such changes as present society is able to effectuate will, in turn, run through their own cycle of acceptance. In that case, the most important lesson to learn from the present exercise is that dispute resolution, whether through the court system or any of a series of alternatives, is a dynamic field in which people must periodically adapt to a new environment.

## II. WHAT ALTERNATIVES ARE THERE WHICH SEEM TO HOLD PROMISE?

While the focus of these remarks is on the substantive merit of the various alternatives to court litigation being proposed, it should be recognized in passing that there are at least two other serious problems which must be faced in devising and applying alternatives to ADR. One problem is the question of how any such system will be financed and administered. The other problem is whether such proposals can be made compatible with the right to a jury trial, the requirements of due process, and the requirement of equal treatment under the law.

As has already been stated, all the alternatives to litigation lie somewhere along an axis of negotiation through adjudication. The form which the procedure may take is limited only by the imagination of the people involved. Neighborhood justice centers, for instance, emphasize conciliation, rely upon participation by community members who it is believed will share common values, and deal heavily with family disputes, landlord-tenant disputes, and minor criminal charges. How well such centers work is a matter of opinion and depends, at least in part, on whether one believes that it is important to empower the local community.<sup>6</sup>

Other types of disputes involving sensitive human relations problems, such as divorce proceedings or child custody cases, are increasingly subject to mediation proceedings as a prerequisite to court approval of the ultimate settlement.

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<sup>6</sup> S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 347-49 (1985)[hereinafter GOLDBERG].

Environmental disputes are complex because they can involve not only the immediate adversaries but also public interest and citizen groups. Any meaningful settlement requires tacit acceptance on the part of many parties in interest who may themselves see the problem quite differently. An adjudication of the dispute may not eliminate the problem: Therefore, many environmental disputes are settled privately or under the auspices of a court through mediation.

Consumer disputes, like those found in the auto industry concerning warranties which the companies place on their products, have likewise reached new forums. Under an arrangement with the Better Business Bureau, such disputes are submitted to a form of "arbitration" which is binding only on the companies, but which nevertheless resolves a high percentage of the cases.<sup>7</sup>

At a more sophisticated level, business disputes between companies can be very costly, slow-moving, and exasperating to their owners. The *Center for Public Resources* has carved out a special niche in this area by working with companies to find different, less costly, and more efficient ways of settling disputes of that kind.<sup>8</sup> The corporate mini-trial, for instance, is a non-binding procedure in which the lawyers for each side make abbreviated presentations to a group of executives from both companies. Sometimes a neutral advisor also listens to the presentations, presides at the proceeding, and may offer suggestions or opinions. When the presentations are finished, the executives retire and negotiate among themselves, often reaching an agreement.

Because an examination of the dispute spectrum suggests that the availability of different types of procedures best serve the cause of justice, Professor Frank Sanders, of the Harvard Law School, originated the idea of a "Multi-Door Courthouse."<sup>9</sup> Thus, the standard courthouse would offer its clientele quite different ways of resolving their differences. One "door" might lead to mediation, another to arbitration, another to an ombudsman, another to litigation, and so forth. The success of the idea depends heavily on the skill of the court official who screens and helps allocate the cases as they come in the door.

One other variation on the theme of dispute settlement which is worth mentioning is the "reg-neg" (regulation-negotiation) idea. Legislatures have long faced the difficult problem of passing legislation which cannot possibly include all the detailed regulations which are needed to implement the law. Typically, the development of such regulations is left to the administering agency. How well the law works is then heavily dependent upon the rules which are propounded. The legislation is often unclear,

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<sup>7</sup> *Id.* at 389-91.

<sup>8</sup> Henry, *supra* note 3.

<sup>9</sup> Ray, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. ON DISPUTE RESOLUTION 9 (1985).

either because the legislature did not anticipate the problem, or because the language was deliberately left vague as the result of a political compromise. If the meaning of the legislation and its accompanying rules have to be litigated, a number of years will elapse before essential decisions are forthcoming, and the law will not be fully effective during this period.

In such a situation, many of the arguments might be avoided if the regulatory agency sat down with the interested parties before the rules were passed and attempted to resolve foreseeable disputes in advance. This is now being done in a number of cases with encouraging results.<sup>10</sup> "Reg-neg" thus becomes a means for the avoidance of disputes and thereby contributes to the diminution of litigation.

There are, of course, a wide variety of other experiments taking place in the field of alternative dispute resolution. The ones mentioned above are simply illustrative. A more comprehensive list can be found in the Goldberg, Green, and Sander book entitled *Dispute Resolution*.<sup>11</sup>

### III. WHAT ARE WE TO CONCLUDE ABOUT THE RESPECTIVE MERITS OF COURT LITIGATION VERSUS ADR METHODS?

When discussing the merits of resolving disputes through litigation versus utilizing various alternative methods, it is important to understand two things at the outset. Virtually no one suggests abandoning courts as a means of resolving disputes. The personal rights which they protect, the valuable precedents which they establish, and the powers of procedure and enforcement which lie in their hands are of great value to society. At the other extreme, virtually no one argues that any given alternative method would be universally applicable to all cases. If there is value in the ADR movement, as this author and a great many others feel that there is, it is because it often provides flexibility and a greater sense of satisfaction to the parties involved in the dispute.

An initial problem for the ADR movement is the question of how alternative methods of resolution are to be provided and financed. In certain areas, like grievance arbitration under union-management contracts, the answer is simple. Only two parties are involved—the union and the management. They simply agree upon an arbitrator, and the cost of the proceeding will then be split between them. If they need help in identifying an arbitrator, they can solicit the services of the Federal Mediation and Conciliation Service, counterpart agencies in many of the states, or the privately run American Arbitration Association. The same system can, of course, be used in other situations in which the parties to the proceeding provide the funds. If there is any hesitancy in abiding by

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<sup>10</sup> Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

<sup>11</sup> GOLDBERG, *supra* note 6.

the award, an arbitration award is normally enforceable in the courts in a relatively simple proceeding.

Suppose it is desirable to undertake the resolution of an environmental dispute through some form of conciliation, mediation, or arbitration. The dispute could involve industrial pollution, Indian fishing rights, the disposal of hazardous waste or any number of other concerns. The parties in interest will include not only the immediate principals but public interest groups which actively participate in environmental cases. If a professional mediator, arbitrator or other independent participant is brought in, who will pay the bill? Some of the eligible participants in the proceeding may have only very limited funds.

One solution to the funding problem is to provide such services within the court system. Thus the judge might appoint a Special Master, a Referee or some other intervenor. Changes in the rules of court now make that possible, and innovative steps are being taken.<sup>12</sup> This means that the proceeding becomes an adjunct to the court. However, some advocates of ADR methods find this objectionable because they see it as perpetuating features of the present system which they dislike.<sup>13</sup>

Another solution would be to establish a pool of money under independent auspices from which costs could be paid. The National Institute for Dispute Resolution is currently experimenting with this possibility.<sup>14</sup>

Aside from problems of cost and administration, ADR methods face some legal obstacles. The constitutional guarantee of the right to a trial by jury, due process requirements, and the concept of equal protection under the law may be offended if some ADR procedures are made mandatory. This can mean that a procedure which appeals to the parties because of its simplicity may nevertheless not be binding upon them.

In addition, critics of ADR see in the emphasis upon settlement of disputes a danger that the economic inequality of the parties or the differential in power between them will place the weaker of the two parties at a clear disadvantage. Thus, when courts adopt ADR procedures, judicial pressure or incentives on the parties to engage in alternative methods of settlement once a case has been filed with the court are sometimes viewed as improper or unwise.<sup>15</sup>

In the last analysis, it may be that poking around the courts and ADR proposals for a comparison of their respective merits overemphasizes potential impingement upon great and enduring jurisprudential principles. In the totality of cases, only a relatively small number involve

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<sup>12</sup> *Id.* at 187, 305, 493, 544.

<sup>13</sup> Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3 (1984).

<sup>14</sup> NATIONAL INST. FOR DISPUTE RESOLUTION, ANNUAL REPORT (1984) [hereinafter ANNUAL REPORT].

<sup>15</sup> FISS, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

constitutional questions or matters of fundamental principle. Furthermore, most disputes which are brought before courts are settled in one way or another and never go to trial.<sup>16</sup> If the focus of concern is with what disputants prefer by way of settling their differences, one concludes from this that they would rather make their own judgments about a proper decision than subject the problem to a judicial mandate. Since the ADR movement places very heavy emphasis upon techniques which assist the parties in arriving at a conclusion which is acceptable to the disputants, it is hard to see why these methods are either incompatible with the court system, or why they are not additional tools in our dispute resolution arsenal.

#### IV. WHAT THE LAW SCHOOLS SHOULD DO ABOUT ADR

The popular image of the lawyer has always been that of the great courtroom performer. Television has done nothing to diminish that image. The truth is that the average lawyer spends very little of his or her time in the courtroom. On the contrary, far more of a lawyer's time is spent in counseling clients and in negotiating on their behalf. Meanwhile, law schools have, for the most part, assumed that the market place would eventually sort out those lawyers who were particularly effective in court and that, as to the balance of a lawyer's duties, every graduate could negotiate effectively.

It is doubtless true that the superstars of the negotiating world would be high achievers at the art whether or not any effort was ever made to train them in the skills of negotiation. It is not true, however, that nothing can be done to teach people to improve their skills in an area so vital to their success. There is by now a great deal of significant research in the field,<sup>17</sup> and training sessions are widely available from reputable sources; law schools are themselves awakening to the opportunities.

Law schools can and should offer courses and/or seminars in negotiation. The fact that such courses will be very popular with students should not be a reason for declining to offer them! The best of such courses will be interdisciplinary in nature and will reach out beyond law schools for both teaching talent and course content. The creation of interdisciplinary Dispute Resolution Centers at a number of universities is proof that there is widespread academic interest in the field. Political scientists, psychologists, environmentalists, evolutionary biologists, sociologists, anthropologists and others are probing various aspects of problem solving in widely different societies. There is presently a golden opportunity for law schools to enhance the abilities of their graduating students in an aspect of their practice which is vital to success.

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<sup>16</sup> Galanter, *supra* note 2, at 18-26.

<sup>17</sup> GOLDBERG, *supra* note 6.

Separate and apart from attention to the art of negotiating is a focus on other possibilities inherent in the ADR movement. Current interest in the subject, plus some innovative combinations of old ideas, have spawned a new literature which provides the material for classes and seminars. Given an already crowded law school curriculum, it may be that the basic information on alternative dispute resolution will find its way into Civil Procedure, Contracts, and Tort books. Indeed, the National Institute for Dispute Resolution has encouraged that kind of approach through research support to authors who wish to add such materials to their textbooks. It has also given grants for the preparation of case materials and provided an outlet for distribution of such materials through the University of Wisconsin Law School.<sup>18</sup> At the same time, the American Arbitration Association has worked with law schools to encourage the adoption of course work in the field and to provide an opportunity for faculty members from various schools to get together to exchange information.

That there is real interest in law schools in the alternative dispute resolution field is demonstrated by the fact that in 1983 it was thought that there were only about twenty-five ADR courses offered in law schools, whereas in 1986 it is estimated that there are 115 such courses.<sup>19</sup> There may be an element of faddishness about this, but that seems unlikely when viewed in the context of the growing ADR movement.

Finally, there is another possibility which long ago proved both its vitality and its viability. Its greatest exponent was Professor John R. Commons who served at the University of Wisconsin from 1904 until the early 1930's. He was more than an economist who came to Wisconsin to write a history of labor; he was an institutional economist, as much interested in people and their institutions as in economic theory. He involved both himself and his students in the enactment of the social legislation which made Wisconsin a leader and forerunner for the nation in enacting much of the "progressive" legislation of the day. It was the time of the elder LaFollette, and the climate was right for change. Professor Commons used his classes and his seminars to develop legislation to deal with such problems as job-related injuries, unemployment compensation and other pieces of legislation. Understanding, as he did, the necessity for gaining legislative approval of the measures on which he had his classes work, he involved legislators, businessmen, and those involved in labor unions in the cadre of advisers and cohorts who joined together in bringing about the legislation.<sup>20</sup>

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<sup>18</sup> ANNUAL REPORT, *supra* note 14.

<sup>19</sup> Information obtained from American Bar Association, based upon surveys of law schools (available from American Bar Association).

<sup>20</sup> COMMONS, MYSELF, THE AUTOBIOGRAPHY OF JOHN R. COMMONS (1963).

From the Commons' classroom came generations of students who later staffed key positions all over the United States in government, industry, and labor. He nurtured in them an excitement, a sensitive social conscience, and an understanding that law is but an instrument to accomplish the goals of a society.

There is a need for a new generation of Commons clones in the ADR field today. To take but one example, the nation is wrestling with the problem of liability insurance for manufacturers, health care personnel, taverns, municipal recreation facilities, ski resorts, nonprofit boards of directors, and many others. There must be a better answer to these problems than negligence suits based on tort theory. The opportunity is there for a law professor to involve his/her students in an exploration of that problem, or others like it, which would foster excitement, a greatly broadened perspective beyond that found in textbooks, and the fulfillment of a desperately needed public objective.

#### V. CONCLUSION

The ADR movement has taken on new life and vitality because of a confluence of events. Today's ever more complex society has asked the courts to decide some of its most sensitive questions, thereby exposing the courts to more criticism. In at least the highly urbanized area, crowded dockets, high costs and long delays have led to dissatisfaction with the present court system. The Chief Justice of the United States has been a very visible advocate of reform. Bar associations have formed hard-working committees that are stimulating new and experimental approaches to the resolution of problems. Foundations have committed significant resources to new organizations designed to promote and strengthen the ADR movement. Scholars from many different disciplines are writing on the subject, and law and business schools are particularly active in teaching ADR methods. Interdisciplinary dispute resolution centers, spurred on by the enormous interest in the peaceful solution of international problems, are being established across the country. Movement is therefore evident on many different fronts.

Will the ADR movement endure? It will clearly have had an impact, even if the present degree of enthusiasm diminishes. A critical factor in the long run may be whether people recognize what ADR is and what it is not.

ADR is *not* a substitute for the courts, nor should it be. ADR is *not* even a single idea applicable to all kinds of situations. At its best, it is a congeries of ideas for encouraging disputants to play a greater role in settling their own differences, for providing greater flexibility in processing their own claims, and for doing so in a less complex, less costly, and less time-consuming manner.

A final word of caution is in order. Dispute settlement is a dynamic process. The parties who participate in it will make adjustments designed

to improve their respective positions. When they do, the “new” may become the “old,” and a new life cycle, demanding change, will begin. For that reason, the success of ADR will depend heavily on its ability to continually evaluate its own work, and to change its outlook in order to adapt to new conditions.

