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“ADR” Comes of Age: What Can We Expect in the Future?*

Richard Chernick**

Important developments in dispute resolution are reported in the legal and popular press every day. We have recently seen, for example, major developments in arbitration ethics, mediator confidentiality, standards for mandatory consumer predispute processes and expansion of court-annexed ADR programs.

This is an opportune time to think about the future of ADR, because dispute resolution has survived its infancy and its sometimes awkward adolescence without any obvious body piercings, tattoos or felony convictions and is now thriving, energetic and poised for its most productive period.

It has been more than 25 years since Frank Sander announced the modern era of dispute resolution with his introduction of the multi-door courthouse at the ABA-sponsored “Pound Revisited” Conference in St. Paul, Minnesota.¹

The ABA conference intended to create an opportunity to rethink our justice system; the conference title refers to a pioneering speech on “The Popular Dissatisfaction with the Administration of Justice,” delivered by Roscoe Pound (then the dean of the Harvard Law School) to the ABA House of Delegates in 1908.

Sander’s concept of the multi-door courthouse led directly to our first three neighborhood justice centers. They were funded by Justice Department grants in locations selected by Griffin Bell, Jimmie Carter’s Attorney General.

One of those three original neighborhood justice centers was located in Venice, California. It grew to become the Dispute Resolution Services of the Los Angeles County Bar Association, one of the most successful bar-based dispute resolution programs in the nation.

ADR was truly launched in the late 1970s by Professor Sanders’ concept. The image of a multi-door courthouse is not only a perfect metaphor for Sanders’s creative vision but also for the way dispute resolution has infiltrated our

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1. Sander’s *Multi Door Courthouse* initiative can be found at 70 F.R.D. 111 (1976).

justice system in the past 25 years. Some of the more important results of this ADR revolution include the following:

- Creation of neighborhood justice centers for the mediation of community disputes
- Court-annexed mediation of small civil disputes and later expansion into judicial arbitration and early neutral evaluation programs in many state and federal courts.
- Numerous statutes and executive orders on the federal level mandating ADR in the courts and federal agencies.²
- Peer mediation programs in our schools .
- Statutes requiring the resolution of professional disputes through dispute resolution (*e.g.*, Bus. & Prof. Code § 6200, attorney-client fee disputes).
- Routine use of mediation and arbitration in the settlement of class actions and in the distribution of settlement funds for mass tort claims. Wendy Trachte-Huber's Dow Corning settlement facility is an example of this.

There have been parallel developments in the teaching of ADR. Naturally, Professor Sander and Harvard Law School were early leaders, but many law schools have by now established dispute resolution teaching and research programs, and negotiation, mediation and arbitration have made their way to the core curriculum in most leading law schools.³

The most important contribution of these academic programs is to raise the awareness of law students who, over time, will become the bar of the future. But academic programs also contribute essential research and scholarship, program design and evaluation and training to the profession.

It is not surprising that community and court based programs primarily designed for small disputes have been expanded to handle larger and more complex matters. Many lawyers have been exposed to mediation and arbitration for the first time in these programs; some of us took our first trainings there to qualify to serve as volunteer mediators.

Many judges have become familiar with dispute resolution in the same way. Their first hand observation of the successes of these court-annexed programs

2. Just a sampling of Federal court ADR mandates: 1991 Civil Justice Reform Act, 28 USC 471, et seq.; 1996 ADR Act (amending the Administrative Procedures Act); ADR Act of 1998, 28 USC 671 et seq. (every trial court, every litigant, opportunity to use mediation); President Clinton also issued an Executive Order requiring all government agencies to consider use of ADR.

3. M. Breger, *Should an Attorney be Required to Advise a Client of ADR Options*, 13 GEO. J. LEGAL ETHICS 427 (2000).

have aided them in developing skills in sending cases to the right process at the right time and encouraged them to send larger and more complex cases to appropriate neutrals — sometimes within existing court-based programs, sometimes to neutrals in the private market.

This in turn has helped to create a viable and vibrant *private* market for mediation. There is now a growing expectation that large commercial disputes will be mediated at some point in their life-span. If the parties do not initiate it on their own, their lawyers will suggest and recommend it. They do so either because they believe in the process or because they know the court will require or at least encourage it.⁴

Because it started from next to zero, the most dramatic developments in dispute resolution since Professor Sander heralded the age of ADR have occurred in mediation.

On the other hand, arbitration has been present in our justice system since the early 20th century so it has appeared to change very little. Nothing could be further from the truth.

Although arbitration has been around in some form for centuries, it was not until the adoption of the United States Arbitration Act in 1925 (and the formation of the American Arbitration Association at about the same time) that it became a permissible alternate to the courts. And it was not until the 1990s that it really came into its own.

This growth is principally attributable to the Supreme Court's broad embrace of the commercial arbitration process and its rejection of legal doctrines that try to limit the scope and relative importance of arbitration.

Arbitration was transformed in the 1980s and 1990s by a series of United States Supreme Court decisions⁵ which have made it more accessible and its

4. ADR growth has also been nurtured by voluntary regional bar associations and groups like SCMA, state-wide organizations like CDRC and CDRI and national organizations like ACR and the ABA Section of Dispute Resolution. Neutrals and other supporters of ADR seem to have an inexhaustible enthusiasm for programmatic development of the field and networking opportunities. This Masters Forum itself is evidence of the importance of ADR in the current legal landscape. Many neutrals got their initial training from these organizations and most of us rely on them to keep our skills sharp and to learn what is happening on the outer edges of our disciplines.

5. Chernick, *Law Attempts to Put Arbitration Agreements on Equal Footing*, *Los Angeles Daily Journal* (April 9, 2003). See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Wilco v. Swan*, 346 U.S. 427 (1953); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) *Rodriguez de Quias v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Allied Bruce-Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); see also *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1

enforcement more predictable. This in turn has encouraged businesses to consider arbitration for its disputes and has encouraged individual neutrals and providers to promote arbitration.

I cannot overemphasize the importance of the courts in creating a hospitable environment for the growth of arbitration. The key doctrines of the U.S. Supreme Court cases are (1) that arbitration is a preferred dispute resolution choice and that courts must therefore err on the side of enforcing rather than limiting agreements to arbitrate; and (2) that arbitration, being a contractual process, encourages parties to create their own unique processes which courts will respect and enforce.

In this context, parties and counsel have come to appreciate the value of fashioning their own process to suit the individual case and expect that a court will enforce those process choices (or, more usually, defer to the arbitrator and the parties in determining what the parties' agreement was and how it should be effectuated). The benefits to the parties are obvious, and the value in high-dollar cases where much is at stake and where the issues are complex is inestimable in the hands of skillful lawyers and neutrals.

Counsel and clients who have figured this out now clearly prefer private to public resolution, including at least one effort at mediation prior to arbitration. This is especially so in cases of importance to the parties.

The skilled neutral is an essential element of this scheme. It does not work if there are not mediators and arbitrators up to the task of managing the most complex and difficult disputes. Parties know this and regard their opportunity to choose the neutral in each case as the most important of their rights. They know what they want and they usually know who can provide it for them.

There is not a law firm of any size that does not have sophisticated (albeit sometimes *ad hoc*) procedures for vetting proposed and possible neutrals. Lawyers' organizations also keep records on their members' experiences with particular neutrals, share that information regularly, and occasionally meet together for the sole purpose of comparing notes and experiences about particular mediators or arbitrators.

Nowhere is the private market for dispute resolution as vibrant as in California. This is where private judging began. The stars were perfectly aligned over California for private judging to flourish as it has, since 1980. We had an existing statutory framework for temporary judge and reference cases; we had calendar congestion which motivated parties to look for quicker resolution options; and we had a number of respected retired judges who were ready and able

(1992); *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362 (1994); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951 (1997); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

to provide what the parties were looking for. Our justice system (public and private) has been the great beneficiary of these conditions.

It must also be said that the public court system has not earned the confidence of many litigators. Judges' busy calendars, aggressive calendar management and budget constraints have combined to make the trial of even the largest civil cases prohibitively expensive and usually unpleasant. A prominent Federal Circuit Judge recently wrote a lead article in the ABA Journal bemoaning the "disappearing civil trial." He noted that less than one percent of civil filings in the federal court result in a verdict after trial. He cited the confluence of available private options and the restraints on the courts to deal effectively with civil matters as prime reasons for this unfortunate development.

In California there are several hundred full-time private neutrals and scores of part-time arbitrators and mediators. Virtually every case is mediated, and it is likely that more commercial disputes are resolved by award than by court judgment. This trend will likely continue, because parties appear to be satisfied with private dispute resolution.

It is a "canon" of Mediation that a settlement fashioned in a facilitated mediation process will be more satisfying to the parties than one imposed on them by a third party. The skilled mediators who practice employment and commercial mediation have high success rates and surely create high levels of satisfaction in their clientele — parties and counsel.

Some arbitrators mistakenly believe that every arbitration produces one temporary friend and one permanent enemy. Satisfaction surveys conducted by JAMS of its clientele suggest that parties who go through arbitrations generally rate the process and their satisfaction as high as or higher than our mediation clients.

What does all of this signify for the future? I would like to venture six observations:

1. **The private dispute resolution market will continue to grow robustly.** It will grow locally and regionally and it will particularly develop nationally. Many larger and even mid-size cases now involve a national search for the best mediator and/or arbitrator because counsel have learned that the cost of the neutral is a relatively insignificant portion of the total cost of the process and the benefits to be gained by having the right person at the table far outweigh any additional cost. A corollary of this proposition is that the fees neutrals charge are not, in such cases, a very important selection criterion.

This will create career opportunities for neutrals, who increasingly will be full-time rather than continuing their law practice or other professional activity. In part this trend to full-time practice is controlled by the preferences of the

parties; in part it is necessitated by other forces which I will address in a moment.

2. The expectations of professionalism and skill levels for neutrals will continue to heighten. It goes without saying that in a sophisticated market of high-value and high-profile cases, expectations about performance levels are enhanced and the participants' observations about the skills of the neutral will drive that neutral's reputation and acceptability for future assignments.

Informal credentials for neutrals will also be important. Membership in organizations such as the College of Commercial Arbitrators, the National Academy of Arbitrators, the International Academy of Mediators and the Chartered Institute of Arbitrators, is relevant to users of neutral services and provide a referral network among members of those organizations.⁶

3. Pressure from courts and legislatures to regulate the profession will increase. It is inevitable that this significant market segment will attract the attention of courts and legislatures, which must respond to constituencies who object to or have concern about the wide availability of such services.

Ethics rules such as those adopted by the Judicial Council for court-annexed mediations and the disclosure rules adopted to regulate the activities of providers and neutral arbitrators in contractual arbitrations are only the beginning. The profession needs to be vigilant that such regulations are warranted and, at least, will not undermine the intrinsic value of the process.

It is also likely that legislatures will seek mandatory certification of mediators, arbitrators and providers as an additional means of controlling or regulating the practice. Those regulatory standards are not likely to be compatible with the needs of the private marketplace and may create artificial barriers to entry (of neutrals and providers) which will not be helpful.

We can also expect to see adoption of more national and international standards of conduct, such as the Uniform Mediation Act and the Revised Code of Ethics for Arbitrators of Commercial Disputes.⁷ Those efforts are more likely to be designed to shape the best practices of the profession, not disguised efforts to prevent the growth and efficacy of arbitration and mediation.⁸

4. It will be increasingly difficult for part time neutrals to thrive in this market. Conflict issues with law practice clients and prospective clients will make both the neutral practice and the law practice more difficult for arbitrator hyphenates and mediator hyphenates. Codes of legal ethics have been slow to

6. See J. Lehrman and R. Chernick, *Credentialing Mediators – The Lay of the Land*, Experience (The Magazine of the Senior Lawyer Section of the ABA) (2003).

7. See *Principles for Provider Organizations*, CPR Georgetown Commission on Ethics and Standards in ADR (2002).

8. See the NASD and NYSE objections to the arbitrator disclosure rules and the holding in *Mayo v. Dean Witter Reynolds*, 258 F. Supp. 2d 1097 (N.D. Cal. 2003), that the Standards are preempted both by the FAA and the regulation of the securities industry. See also *Jeyne v. Oxford Holdings, Inc.* 113 Cal. App. 4th 486 (2003) (accord).

recognize the unique needs of lawyer-arbitrators and lawyer-mediators. The ABA's most recent revision of its Model Rules of Professional Conduct did not effectively deal with these issues.⁹

Another law practice issue is multi-jurisdictional practice limitations on arbitrators and mediators who try to develop a national practice.

5. **There will be increasing efforts to make claims against neutrals, particularly arbitrators, in high stakes cases.** For example, disclosure rules and the possible consequences of non-disclosure resulting in a vacated award is an obvious target for frustrated litigants who have the resources to discover mistakes and omissions in disclosure statements. Arbitral immunity may not protect this aspect of arbitrator performance.¹⁰

6. **Finally, the more success the private dispute resolution market experiences, the more aggressively opponents will push the underlying policy issues.**

Since the early days of private judging in California, concerns have been expressed that an extensive private dispute resolution system takes away from the public system in several distinct ways.

First, it is argued that a viable private system undermines support for the public system somewhat in the way that private schools undermine support for public schools. And like private schools, people with means can choose to exit the system and thereby create a two-tiered justice system, one for the rich and one for the poor.

Second, critics assert that a robust private system also is likely to tempt the best judges to retire early — the so-called “brain drain.”

Lastly, a related effect of the private system is said to be to move “interesting” cases to private resolution where they are not part of the development of the common law and the development of legal doctrine. This is said to be the reason for the “vanishing civil trial.”

Much of this debate is fueled by opposition to one controversial form of dispute resolution — imposed arbitration of employment, health care and consumer disputes. But the policy at issue there is the voluntariness of predispute arbitration agreements, not the use of private resolution. The issue of voluntariness ought to be addressed by the courts and the legislatures, and can be severed from this discussion.

9. See *Model Rules for the Lawyer as Third-Party Neutral*, CPR Georgetown Commission on Ethics and Standards in ADR (Nov. 2002); Cf. *Furia v. Helm*, 111 Cal. App. 4th 945 (2003).

10. Cf. *Baar v. Tigerman*, 140 Cal. App. 3d 979 (1983)

That leaves the principal issue of the appropriateness of the resolution of disputes on a private basis which could be brought in a court but are not. To oppose voluntary resolution at any level, one must deal with the vast majority of “disputes” which never progress beyond two disputants who successfully work out their issues on their own, or perhaps with the aid of a third party. None of these disputes ever sees a court or even a lawyer, and no one suggests that the courts ought to be involved at all.

There is little difference from this and a private resolution market in which parties, independent of the courts, choose to use mediation or arbitration services. That some of the participants are former public judges is of minimal relevance to the propriety of parties choosing to solve their problems privately rather than in the court system.

Finally, the issue of the vanishing civil trial is more an issue for the courts to address, and to look at their own operations and processes to assess why that is happening.

Business trial lawyers are privileged to be entrusted with the resolution of some of the more challenging issues facing civil litigants; together with neutrals who serve that market, they have a responsibility to improve and maintain the entire system of dispute resolution. The growth and development of private dispute resolution as a complement to the civil justice system is an important responsibility for all of us, and its future seems bright.