

3-15-2003

The Administrative Law Judge as a Bridge between Law and Culture

Phyllis E. Bernard

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Phyllis E. Bernard, *The Administrative Law Judge as a Bridge between Law and Culture*, 23 J. Nat'l Ass'n Admin. L. Judges. (2003)
available at <https://digitalcommons.pepperdine.edu/naalj/vol23/iss1/1>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The Administrative Law Judge as a Bridge between Law and Culture

By Prof. Phyllis E. Bernard*

INTRODUCTION

The agency adjudicator plays a special yet largely unrecognized role in effective communication between the American people and their government. More than policy-makers or policy enforcers, the administrative law judge is expected to create a bridge between the standards of legal conduct and the norms of cultural behavior for the public. From the founding of the nation, America has been comprised of diverse ethnic, social and religious groups. Yet, until the closing of the American frontier in the early 20th century, and the rise of the urban industrial complex, Americans could circumvent the harshest realities of this heterogeneity.

The American frontier supplied the oft-referenced “safety valve” which allowed large segments of the population to migrate westward and establish self-sufficient agrarian settlements with more or less shared values.¹ The customs and expectations of one particular

* Phyllis E. Bernard, M.A., J.D., Robert S. Kerr, Jr. Distinguished Professor of Law and Director, Center on Alternative Dispute Resolution, Oklahoma City University School of Law, Oklahoma City, OK, Director, Early Settlement Central Mediation Program, Council Member, American Bar Association Section on Administrative Law & Regulatory Practice, 1998-2001, Council Member, ABA Section on Dispute Resolution, 1999-2002, Long Range Planning Officer, ABA Dispute Resolution Section 2002-2003, Former Member, Provider Reimbursement Review Board, U.S. Department of Health & Human Services, Former Commissioner, Oklahoma Merit Protection Commission. A.B. cum laude, Bryn Mawr College, 1976; M.A., Columbia University Graduate School of Arts and Sciences, 1978; J.D. University of Pennsylvania Law School, 1981.

1. A recent article offers a deft iteration of the noted historian Frederick Jackson Turner's thesis in action:

As industry grew and the importance of agriculture declined, the new urban workers were drawn from the farms as well as from the nine million immigrants the nation absorbed between 1880 and 1900....The free land to the west had given the discontented both an outlet and an opportunity. In

locality or specific trade or category of workers did not have to be the same. Microcosms of the old world could exist, even thrive, within the new world, allowing assimilation to proceed at a slower yet steady pace. That was so until the last quarter of the 19th century, the dawning of the modern age.²

As the nation's economy grew more complex, relying upon industry and mass transportation at an ever-increasing scope, government regulation also grew. The increasing centralization of control at the state, then federal, levels finally compelled the creation of a single standard for conduct whereas before several may have been commonplace.³ The task of mediating between the diverse

addition, it would also draw many of the millions of European immigrants. The individualism and optimism provided by the West kept alive that part of the national mindset which had long vanished everywhere else. By the end of the 1890s, the frontier had virtually ceased to exist, and as Frederick Turner pointed out, the nation faced a situation entirely different from any it had ever known. [cite omitted] As free land diminished in supply, workers had less opportunity to escape the growing, intolerable conditions of the factory; the developing class consciousness among labor and bitterness over economic competition became more prevalent.

P. Blake Keating, *Historical Origin of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 KAN. J.L. & PUB. POL'Y 279, 290 (Winter, 2001).

2. The reader interested in a more detailed historical analysis of this transition and its implications for American culture is referred to JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860 - 1925* 41-42 (Atheneum 1975). Consider, for example, his discussion of the economic crisis of the 1880s and its impact on perceptions of immigrants:

Opponents of land monopoly were quick to sense a relation between contracting horizons in the West and unchecked immigration... Protests arose hand in hand with a new consciousness that the supply of good vacant land was dwindling, that it might soon give out. Once gone, where would the United States find room for its immigrant-inflated population? Henry George, the greatest of all the land reformers and one of the first Americans to rage at the country's reversion toward European conditions, connected the closing of the safety valve of western land with the danger of immigration, as early as 1883: "What," he queried, "in a few years more, are we to do for a dumping-ground? Will it make our difficulty the less that our human garbage can vote?"

Id.

3. Historian Eric Foner describes the dynamics of the Progressive Era as follows:

Most of the era's reform legislation, including changes in voting requirements, regulation of corporations, and the overseeing of safety and

expectations of persons from diverse backgrounds has fallen primarily to the administrative law judge (ALJ).⁴

This paper will examine the ALJ's evolving cultural role in this context. We shall explore an emerging innovation which is developing in the Niger Delta to embrace multiple legal cultures in conflict. We shall close with preliminary suggestions on how the Niger Delta cross-cultural model could enhance the bridge function of agency adjudication.

Part I of this paper covers what could be characterized as the first generation of modern administrative judging. Initially, the ALJ has been expected to fuse the corporate, industrial and regulatory cultures that come into conflict. The Federal Administrative Procedure Act⁵ erected a foundation for flexible hearings to attain this objective.

health conditions in factories, was enacted at the municipal and state levels. But the most striking development of the early twentieth century was the rise of the nation-state, complete with administrative agencies, independent commissions, and laws establishing the parameters for labor relations, business behavior, and financial policy, and acting as a broker among the disputatious groups whose conflicts threatened to destroy social harmony. These were the years when the Federal Reserve Board, the Federal Trade Commission, and other agencies came into existence, and when the federal government, through measures like the Pure Food and Drug Act (1906), sought to set basic rules for market behavior and protect citizens from market abuses.

Eric Foner, *THE STORY OF AMERICAN FREEDOM* 152 (W.W. Norton & Co., Inc. 1998).

4. The reader interested in a wider vision of the social dimensions of this emerging regulatory structure could hardly do better than LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed., Simon and Schuster 1985), including the following insights about how increased market size, advances in scientific knowledge and the attenuation of communal ties combined to create a demand for health regulation and government oversight:

Times ... had changed. The progress of science made a growing circle of people aware that danger lurked in food and water. The discovery of germs, invisible, insidious, hidden in every spot of filth, had a profound effect on the legal system. To a much greater extent than before, goods – including food – were packaged and sent long distances, to be marketed impersonally, in bulk, rather than to be felt, handled, and squeezed at the point of purchase. This meant that a person was dependent on others, on strangers, on far-off corporations, for necessities of life; society was more than ever a complex cellular organism; these strangers, these distant others, had the capacity to inflict catastrophic, irreparable harm.

Id. at 458. Thus arose, the call for government agencies to protect the public against such harms.

5. 5 U.S.C. § 551 *et seq.* (2003).

However, over time, the process became increasingly formalized, complex and legalistic, losing the flexibility and innovations originally envisioned.

To regain some of the user-friendly nature which had initially distinguished the adjudicatory process from the civil trial, agencies began to turn to mediation and arbitration as a supplement to the formal adjudicatory proceeding. Part II reviews the growth of this trend; focusing attention on the ways alternative dispute resolution (“ADR”) can facilitate an informal understanding of norms and expectations.

Part III discusses a model of peacemaking the author has developed with the International Federation of Women Lawyers (“FIDA”) in Rivers State and Bayelsa State in southern Nigeria. This mediation model consciously takes into account social and cultural variations extending beyond the corporate culture of industry or agency. Rather, it reaches out to integrate and incorporate traditional ethnic, tribal, religious and other social norms.

Part IV closes with suggestions how the principles of FIDA peacemaking could be adapted for use in the United States. Despite the great geographical distance that separates America from Nigeria, several aspects of the two countries overlap in philosophically productive ways. Namely, both countries bring together many different ethnic groups within limited geographic boundaries while attempting to forge a unified nation. Ultimate prosperity – indeed, even survival – for both countries may depend upon their ability to honor diversity while applying more or less consistent standards of justice. Ethnicity, gender, age, social and economic class create an often volatile mixture for both nations’ legal systems. The proposals presented here seek to recognize and include in problem-solving some traditional values and community structures which may facilitate successful, long-term resolution of conflicts.

I. THE FIRST GENERATION OF MODERN ADMINISTRATIVE JUDGING

A. *Flexible Hearing Structure*

The philosophy and practice of administrative adjudication under the federal Administrative Procedure Act allows flexibility in circumstances where a rigid, rote application of the procedural or

evidentiary rules would not be fair; or, might not readily be perceived by a lay party as fair. Thus, the APA structures a role for the adjudicator which is already more flexible, less formalistic than in general civil litigation.

1. Relaxed Rules of Procedure and Evidence

a) Hearing Process Keyed to Lay Participation

The Administrative Procedure Act (hereinafter “APA”) attempts to be “user-friendly.” Indeed, Section 555(b) clearly contemplates that parties may appear before the agency without legal counsel being present, or represented by a non-attorney.⁶ This practice is not without its critics. Nevertheless, the Conference on the Delivery of Legal Services to Low-Income Persons recommended that non-lawyer practice be supported and encouraged. Why?

The whole notion of an administrative agency proceeding is that it should be less formal than a judicial proceeding, in part because agency proceedings are rarely traditionally adversarial. With this non-adversarial informality in mind, no per se prohibition on nonlawyer [sic] representation before an administrative agency makes sense.⁷

Since parties or their representatives might be unsophisticated about the law, the APA pares down formal adjudication, reducing

6. 5 U.S.C. § 555 (b) (2003):

A person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding . . . This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

7. *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1764 (April 1999). See also, Gregory T. Stevens, Note, *The Proper Scope of Non-lawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245 (January 1990).

those processes which the public often views as so-called “mere legal technicalities.” Courts, too, have acknowledged that the individual confronting an administrative agency generally will benefit from relaxed evidentiary rules.⁸

b) Due Process without Undue Procedure

This does not mean that agencies operate without procedural rules. Rather, the APA creates a floor to which agencies add such pretrial and evidentiary provisions as suit their particular needs. Nevertheless, the overwhelming majority of agencies have opted to maintain the APA’s minimalist approach.⁹ Thus, under Section 556(c)(4), the APA empowers the adjudicator to “regulate the course of the hearing,” but does not require a panoply of formal motions akin to the court room’s cross-complaint, motion to show cause, etc.¹⁰

Streamlining the adjudicatory process is, indeed, a most admirable goal. Notwithstanding, one ought to proceed with caution. In the effort to eliminate non-essential elements, it is all too easy to inadvertently to remove procedures vital to assure claimants have received a constitutionally adequate hearing.¹¹

8. Consider the description offered by Judge Posner for the Seventh Circuit regarding a deportation proceeding before an Immigration and Naturalization Service ALJ: “[T]he alien is free to try to rebut the [State] Department’s advice [that religious refugee status is no longer valid due to changes in the alien’s home country], and since the rules of evidence are not applied in proceedings before the INS, he need not, in casting his net for helpful evidence, feel cabined by those rules.” *Gramatikov v. INS*, 128 F.3d 619, 619-20 (7th Cir. 1997).

9. In the mid-1980s a study reviewed the 280 regulations governing evidentiary decisionmaking by federal agencies. It found that 243 out of the 280 did not refer to the Federal Rules of Evidence and “appear not to impose constraints on the discretion of ALJs to admit evidence. Often these provisions either parrot the APA or paraphrase it.” Richard J. Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 5-6 (1987).

10. 5 U.S.C. § 556 (c)(4).

11. What this means has evolved and continues to evolve. The anticipated meaning of *Goldberg v. Kelly*, 397 U.S. 254 (1970), has probably been captured best by Hon. Henry J. Friendly in his now-classic *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267 (1975). An intriguing 20-year retrospective was presented in the Brooklyn Law Review Symposium issue “The Legacy of *Goldberg v. Kelly*: A Twenty Year Perspective.” Especially relevant articles include Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 BROOKLYN L. REV. 831 (Summer 1990) and the remarks of Hon. Cesar A. Perales,

c) Evidentiary Principles without Complex Evidence Rules

Perhaps the most arcane area of judicial functioning is the treatment of evidence, such as: burdens and presumptions, offers of proof, the laying of a foundation, hearsay and hearsay exceptions. The APA at Section 556(c)(3) invests the adjudicator with broad authority to rule on “offers of proof” and to “receive relevant evidence.”¹² The following subsection (d) elaborates. The field of admissible evidence is wide. The adjudicator in her discretion may receive “any oral or documentary evidence.”¹³ Thus, even hearsay testimony can be permitted. The only valid objections to admissibility are that the proffered evidence would be “irrelevant, immaterial or unduly repetitious.”¹⁴

Most agencies have elected to follow the general principles of the evidence rules as guidance in close cases. The National Labor Relations Board stands nearly alone in its decision substantially to incorporate the Federal Rules of Evidence in its hearings. However, the reader should note that the NLRB pre-dates the APA.¹⁵

This statutory structure rests upon two foundational premises which do not go uncontested. Ostensibly, the complex array of hearsay rules had developed to protect lay juries from entertaining evidence likely to sway inappropriately an untrained trier of fact. Administrative agency determinations, however, are not rendered through a jury system. Thus, this rationale for the rules does not apply.

This links to the second premise: the ALJ has been selected for this decision-making role specifically due to expertise both in the facts and law relevant to the particular subject matter. Therefore, the

The Fair Hearings Process: Guardian of the Social Service System, 56 BROOKLYN L. REV. 889 (Summer 1990).

12. 5 U.S.C. § 556(c)(3) (2003).

13. 5 U.S.C. § 556(d) (2003).

14. *Id.*

15. For a thorough overview of evidentiary rules in administrative adjudications see Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1 (1971) and Richard Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987).

ALJ's "subject matter sophistication"¹⁶ places her in a uniquely qualified position to assess credibility, without need for technical constraints such as the hearsay rule and its exceptions.

Are these mere technicalities, or do they create objective standards by which to measure justice? As one thoughtful critic has pointed out, the Federal Rules of Evidence "were designed to limit judicial power over the admission evidence without resort to whether or not the fact finder was a jury or judge."¹⁷ Indeed, it could be argued that the rules of evidence are needed even more urgently in administrative adjudications because the ALJ's decisions typically are reviewed by lay commissioners.¹⁸ The situation lends itself to a paradoxical result: in settings where there are law-trained decision-makers skilled at compartmentalizing, weighing or ignoring problematic evidence, such as hearsay, there are fewer safeguards than in court where a law-trained neutral decides whether evidence is heard and how it is to be weighed.

d) Transparency in Decision-making

Finally, the APA leaves no doubt that the adjudicator's decision must rest upon facts and evidence in the record. Section 557(c)(A) requires that the decision be written and include a statement of "findings and conclusions, and the reasons or basis therefor, and all the material issues of fact, law, or discretion presented on the record."¹⁹ The Act contemplates that there may be occasions when the decision may be based in part upon the adjudicator's familiarity with agency practices or institutional knowledge; this resource might not have been cited in the record. Section 556(e) describes this commonly occurring situation as a decision which "rests on official notice of a material fact not appearing in the evidence in the record."²⁰ Under these circumstances, a party must be permitted an

16. Prof. Glicksman has used this apt term in his challenging analysis of the hearsay rule. Elliot B. Glicksman, *The Modern Hearsay Rule Should Find Administrative Law Application*, 78 NEB. L. REV. 135 (1999).

17. *Id.* at 138.

18. *Id.* at 139.

19. 5 U.S.C. § 557(c)(A).

20. 5 U.S.C. § 556(e) (2003).

opportunity to present a challenge to this unidentified evidence. From the perspective of the lay party, this evidentiary requirement assures that all the agency's "cards" will be "on the table;" the adjudicator's reasons should be transparent.

2. An Active Role for the ALJ

a) The ALJ as a Bridge for Lay Understanding of the Process

Often one hears mediators describe themselves as advocates not for any one party, but for the process of conflict resolution itself. Similarly, one could frame the role of the ALJ in non-adversarial proceedings as an advocate for neither the government nor the public, but for the adjudicatory process. While not all administrative hearings could be viewed as non-adversarial, this self-characterization deserves a closer look, particularly since it applies to the largest single body of hearings in government – Social Security.

If the application of a person applying for benefits under the Social Security Disability Program has been denied, and the reconsideration of their claims has not changed the outcome, the claimant has a right to a *de novo* hearing before a federal ALJ. The adjudicator in this setting takes on a different role than in the typical trial. Instead of refereeing a combat between the prosecution and defense, the ALJ represents the interests of the government yet simultaneously is designated as the "neutral arbiter of the disability claim."²¹ Instead of relying primarily upon information gleaned from the questions posed by attorneys as they examine and cross-examine witnesses, the ALJ interrogates the witnesses directly.

Although a claimant is not required to appear in person, it usually helps his or her case to do so. The ALJ reviews the written record of medical exams and vocational evaluations. However, paper rarely conveys the subtle verbal and non-verbal messages of credibility on which the case hinges. A study by the Social Security

21. Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575, 579 (June 1983). The infamous grid sought to standardize disability determinations by creating a table displaying assessment of physical or mental ability/disability combined with suitable employment in the national economy. Ostensibly, this array assured more consistent decision-making by removing much of the ALJs' discretion.

Administration which laid the groundwork for the Bellmon Amendments—the “grid”—noted a major difference in outcomes, depending upon whether information provided was from the claimant’s in-person appearance.²² Approximately 60% of claimants on average were awarded benefits. When in-person information was removed from their case file, benefits were awarded in only 46% of cases.²³

Why was the communication between an ALJ and the claimant so determinative? A controversial denial of eligibility more likely than not required an assessment of the claimant’s credibility: did they in fact experience pain of such magnitude and consistency that they could not engage in gainful employment? Few issues in litigation are more inherently controversial than witness credibility, both as presented in oral testimony and in written reports.

How should the adjudicator weigh the credentials, pecuniary interest, and thoroughness of the reports prepared by physicians on contract with the Social Security Administration? Should the ALJ doubt the reliability of reports written by the contract physicians as compared to reports prepared by the claimant’s regular physician or another specialist not allied with the government?

How should the adjudicator understand the claimant’s verbal and non-verbal responses to the questions presented? Some persons will carry themselves with stoic dignity in a hearing while others will tremble and weep; yet, both may have experienced the same trauma. Some persons will speak in a well-educated, business-like cadence that makes the ALJ feel comfortable. Others will grope for words or remain silent. Is lack of eye contact a sign that the ALJ should not trust the witness? Or, was the witness’ lowered gaze a sign of respect for the adjudicator’s status?²⁴ These are uncomfortable probes into

22. *Id.* (citing The Bellmon Report, Soc. Security Bull., May, 1982, at 3).

23. *Id.*

24. Judge Duniway’s concurrence and dissent in *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 104 (9th Cir. 1977) eloquently describes the ambiguity of demeanor and its susceptibility to misinterpretation. Judge Duniway dubs the belief that the trier of fact can detect lies based on demeanor as “myth or folklore.” He contrasts the outwardly forthright and sincere “openness” of the “consummate liar” against the hesitation and nervousness of the “perfectly honest but unsophisticated or timid” witness. An expert liar could handle themselves far more adroitly than an “average” and “non-public sort of person” facing a hostile adjudication.

the mind of any decision-maker. Nevertheless they cannot be ignored, or else the very process for which the ALJ advocates fails.

In 1983, the Social Security Administration used the grid system to remove the wide variability in ALJ decision-making. Discretion was significantly limited to regularize the factors ALJs could consider in rendering their determinations. While undoubtedly the prime objective was to reduce the amount of money paid out under the disability program, the methodology sought to achieve that objective by imposing a rigid structure—a grid—to control the ineffable quality of witness credibility. It did not work. The grid did not manage to eliminate human subjectivity—for better or for worse.

In 1991, the General Accounting Office issued a controversial report on racial differences in the approval rates of applications for benefits under the Social Security Disability Program. It found that at the appeals level, where ALJs preside over in-person hearings as described above, the rates of approval differed significantly. “Overall, ALJs allowed benefits to 55% of appealing black claimants under the DI program, while allowing benefits to 66% of white appellants.”²⁵ These differences could not be explained away by factors such as education, attorney representation, age, gender, nor geography.

The findings of the GAO and of the Ninth Circuit Gender Bias Task Force reveal troubling deficits in the way some ALJs have perceived their role. These reports reflect a concern that some ALJs—a distinct minority—have attempted to preside over non-adversarial adjudications as if they were standard court room litigation where the neutral could stand passively on the sidelines and still justice would be done. Some courts have been quite articulate in affirming that the ALJ has a heightened duty to help the claimant understand what is required in order to prove their case, particularly when a claimant appears unrepresented by counsel. When the claimant faces a cultural or linguistic barrier that renders this proof

25. Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1547 (1995). I do not necessarily present these reports as demonstrations of proof on their face. My key interest is in the public perceptions they articulate.

even more difficult, the burden falls upon the ALJ to make extra efforts to bridge the gap.²⁶

b) The ALJ as a Bridge to Understand the Industry Culture

Conventional wisdom tells us that administrative agencies exist in order to bridge the gap between Congress's broad, abstract, statutory standards and the real world. Agencies refine legislative norms through rulemaking, and further fine tune through adjudication. Hence, ALJs are selected for the expertise they bring to the exercise of discretion in decision-making.²⁷ Their specialized knowledge results in informed discretion to which the courts give deference.²⁸

26. *Id.* at 1547 n.124 (discussing *Echevarria v. Sec'y of Health & Human Servs.*, 685 F.2d 751, 755 (2d Cir. 1982) and *Cruz v. Sullivan*, 912 F.2d 8, 11 (2d Cir. 1990)). *See also id.* at 1549 n.126 (discussing Magistrate's Report for *Pedroza v. Bowen*, cited in *Kendrick v. Sullivan*, 784 F. Supp. 94, 103 (S.D.N.Y. 1992), and *Lora v. Bowen*, No. 85 CIV. 7063, 1987 WL 16151, at *6 (S.D.N.Y. Aug. 14, 1987), in which the "ALJ's failure to probe . . . the claims of an individual who cannot speak English leads this Court to direct . . . the case on remand to another ALJ." *Id.*).

27. One case that unequivocally expresses the standard reading of such agency expertise is *NLRB v. Mar Salle, Inc.*, 425 F.2d 566 (D.C. Cir. 1970), in which the NLRB was required to determine the appropriate composition of a bargaining unit to represent workers in a nursing home. Here, the Board had thoroughly familiarized itself with "the respondent's business, employees and method of operation" and then "made a unit determination consistent with established precedent in the nursing home industry." *Id.* at 569. The D.C. Circuit quoted the Supreme Court in the early case of *Packard Motor Car Co. v. NLRB*, 330 U.S., 485, 491-92 (1947) concerning the need for flexibility: The bargaining unit determination "is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." *Id.*

28. The National Labor Relations Board provides a coherent body of cases illustrating this principle in action. Showcased is the decades-long, case-by-case struggle to rationalize the occupational, educational, class, economic, and often racial dynamics that characterize the work force for health care institutions. *International Brotherhood of Electrical Workers Local Union 474 v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987) sets forth a history of the "dance" between the NLRB, Congress, and the courts in this area of large discretion. *See id.* at 700-04.

As referred to in the immediately preceding note, the NLRB has long been tasked with determining what constitutes an appropriate bargaining unit with which an employer must negotiate. The test had been whether among a particular set of employees their functions and skills were sufficiently similar as to create a community of interests. If so, then they deserved separate union representation. This can require crossing a cultural divide: Are janitors and cafeteria staff in the same group as orderlies? Are orderlies in the same group as nurse assistants? Are

This has been the generally accepted, albeit not unquestioned,²⁹ perception of ALJs as expert interpreters of industry culture. Despite intermittent expressions of caution—even of doubt and denial—we still turn to ALJs to identify and articulate the nuances of agency policy. For example, as an increasing number of disabled children and adults are mainstreamed into society, how do evolving work structures fit within the federal labor laws? When the NLRB and two

licensed practical nurses in the same group as registered nurses? Are lab technicians in a class of their own? And where, if anywhere, does medical staff—attending physicians, interns and residents—fit in? Key factors of determination were written and unwritten traditions within the profession or trade and within the hospital. Congress had required that the NLRB avoid certifying a proliferation of bargaining units, due to the disruption that could result if the hospital employer were required to negotiate with each and every small unit which demanded recognition; and due to the threat to the public's health and welfare when health care workers strike.

Mary Thompson Hospital, Inc. v. NLRB, 621 F.2d 858 (7th Cir. 1980) offers a window into the not always benign tension between Congress's statutory delegation and instructions to the NLRB on implementation and the NLRB's preferences. It also provides a window into the internal tensions among members of the NLRB itself, correlating with differences in the labor-management composition of the Board. The following cases highlight other factors in dispute, which NLRB adjudicators were considered uniquely qualified to meld into workable decisions: *NLRB v. W. Suburban Hosp.*, 570 F.2d 213 (7th Cir. 1978) (determining issues regarding common work stations and work interrelationships, time spent in the same work area of the hospital (maintenance), and whether 50% or more of their work time involved contact with maintenance employees); *S.W. Cmty Health Servs. v. NLRB*, 726 F.2d 611, 613 (10th Cir. 1984) (deciding how much of the purpose and function of the ambulance service directly related to traditional hospital services and functions, given that ambulance employees work away from the hospital and may transport patients to medical centers other than the plaintiff hospital); *St. Anthony Hosp. Sys., Inc. v. NLRB*, 884 F.2d 518, 522 (10th Cir. 1989) (deciding whether "salad makers and laundry workers" have interests sufficiently "different enough from EKG technicians and surgical technicians to justify placing them in different bargaining units" based on "wages, education and training, degree of interchange and commonality of supervision").

29. Judge Weis in his concurrence and dissent in *Electrical Products Division of Midland-Ross Corp. v. NLRB*, 617 F.2d 977 (3rd Cir. 1980), refutes the ritual invocation of adjudicatory expertise in determining bargaining units. *Id.* He would find that acceptance "of Board 'expertise' to support conclusory 'boilerplate' without a reasoned analysis, does not comport with proper judicial review. *Id.* Studies have cast doubts on the existence of such expertise. See Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972); Samoff, *N.L.R.B. Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228 (1968). Moreover, the subject matter is not so complex nor ethereal that it cannot be understood by members of the third branch." *Electrical Products Division of Midland-Ross Corp.*, 617 F.2d at 991.

U.S. Circuit Courts of Appeal considered this question, the fundamental legal issue presented was jurisdictional. For, if the activity were not employment within the definition of the labor laws, the NLRB did not have jurisdiction to determine whether the disabled workers could be organized into a union with federal protection.

Sheltered workshops have attempted to provide the handicapped with opportunities for vocational rehabilitation and occupational therapy. At the same time, these workers produce commercial products that are sold to the general public. A non-profit, therapeutic or rehabilitative institution is not subject to the labor laws covering for-profit manufacturers of the same products. Thus, in *Cincinnati Ass'n for the Blind v. NLRB*³⁰ and *Arkansas Lighthouse for the Blind v. NLRB*,³¹ disabled workers produced light bulbs under conditions that severely undercut the production costs of for-profit competitors.

Ironically, the "sheltered" workers enjoyed little or no protection from the non-profit institution. The work environments had been so thoroughly adjusted to be in line with "traditional, for-profit business enterprises"³² that they were largely indistinguishable. The shelter employer "encourage[d] its employees to increase production and transfer[red] employees to other departments if their production [was] insufficient."³³ The Board had also noted that employees "work[ed] a full workweek, punch[ed] a time clock, and receive[d] overtime compensation, health and life insurance, unemployment benefits, workers' compensation, nine paid holidays, and paid vacation time."³⁴

Further, socially unacceptable behavior—which presumably ought to be expected as an inherent challenge for the handicapped—was punished not treated. An employee who broke work rules, even if due to emotional distress, could be removed from his job just as any other worker would have been.³⁵ Finally, at least in *Arkansas Lighthouse*, no social or counseling services were provided for employees nor for the general community of blind persons in the

30. *Cincinnati Ass'n for the Blind v. NLRB*, 672 F.2d 567 (6th Cir. 1982).

31. *Arkansas Lighthouse for the Blind v. NLRB*, 851 F.2d 180 (8th Cir. 1988).

32. *Cincinnati Ass'n for the Blind*, 672 F.2d at 572.

33. *Arkansas Lighthouse for the Blind*, 851 F.2d at 182.

34. *Id.*

35. *Id.*

area.³⁶ The Board held that the described work culture was materially indistinguishable from for-profit sector. The evolving phenomenon of sheltered workshops, therefore, was subject to federal labor laws.

The “special understanding” the agency adjudicators bring to “the actualities of industrial relations”³⁷ remains a vital resource that keeps administrative law in sync with an ever-changing society. Our nation will call upon this resource repeatedly as new technologies replace or reorganize traditional job duties. Such changes have often threatened an entire way of life;³⁸ and have been particularly difficult for workers with few transferable skills.

In fields where industry custom has typically filled in undefined terms and conditions of employment, those customs may be in flux. Regardless, whether they have changed or not, the custom and traditions of an industry, trade, profession or business characteristically are not written and therefore cannot be researched as precedent. Instead, they are organic things which must be familiar to and communicated through the adjudicator on a case-by-case basis.³⁹

36. *Id.*

37. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (*quoting NLRB v. United Steelworkers of America*, 357 U.S. 357, 362-363 (1958)).

38. *See Int’l Ass’n of Machinists & Aerospace Workers Local 1484 v. Int’l Longshoremen’s & Warehousemen’s Union*, 781 F.2d 685 (9th Cir. 1986):

Historically, longshoremen . . . performed the loading and unloading of ships, using equipment such as wire slings, rope nets, barrels, and pallet boards; which equipment they also repaired and maintained. Machinists . . . were responsible for the repair and maintenance of mechanical cargo handling equipment such as trucks, tractors, lift trucks and mobile cranes The arrival of the “container” on the longshores of the United States around 1960 revolutionized the shipping industry, and with it the traditional work assignments of many longshoremen and machinists From the standpoint of dock-side labor, the most significant change created by the containerization of the industry was the drastic reduction in the amount of on-pier work involving cargo handling. The new technology largely eliminated the traditional piece-by-piece loading and unloading of cargo. In its place emerged a new need for handling, maintaining and repairing the containers and their related equipment.

Id. at 686.

39. *See Kingsport Publ’g. Corp. v. NLRB*, 399 F.2d 660, 661 (6th Cir. 1968) (holding that “[a]n expired contract in the Labor-Management field must be viewed

c) The ALJ as a Bridge for Understanding the Agency Culture

Perhaps the most controversial bridge function for an adjudicator is his interaction with others inside the agency itself. How could this engender controversy? The adjudicator must understand the culture of the agency, including its enforcement philosophy and practice. Notwithstanding, the adjudicator faces a simultaneous need to preserve both actual and apparent freedom from the undue influence of agency politics. Indeed, the very knowledge necessary to have expertise deserving of deference may be founded upon understanding how the agency interacts within and between its own units. Whether overtly or not, the ALJ serves as a bridge between the various needs, agendas, and expectations of the agency, particularly in terms of how those needs, agendas, and expectations impact the public.

Congress in the APA has commanded ALJ independence.⁴⁰ As a general principle, prosecutorial or investigatory and judicial-type powers must not vest in the same persons. However, agency members, the very people most likely to have such contacts, are

in light of its effect upon the past operation of the plant and the entire industrial pattern which has been established, in part, by it, together with the customs, practices, and traditions of the industry and the Company.”); *See also* Paterson Parchment Paper Co. v. Int’l Brotherhood of Paper Makers, 83 F. Supp. 928 (E.D. Pa. 1949).

The wisdom of applying strict notions of contract law to the sphere of labor management relations is debatable It may well be that the usage of the parties or a custom in the industry will determine the issue here. Certainly usage may be important in interpreting the requirement of ‘written notice’ in a formal contract Its significance must at least be as great where the contract is as living and changing a thing as a collective bargaining agreement.

Id. at 929-30.

40. 5 U.S.C. § 554(d) (2003).

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

Id. However, this prohibition does not apply “to the agency or a member or members of the body comprising the agency.” 5 U.S.C. § 554(d)(C) (2003).

exempt from this bar.⁴¹ The degree and quality of interaction between agency staff and ALJs remains problematic; between administrative judges and staff, even more so.

The nature of these unsettling concerns can evade ready description using any objective measurements. The dynamics of perceived bias or prejudgment are subjective and subtle. One scholar put it well: "Ideological closed-mindedness may originate with an individual decision maker, or it may be produced by the deciding institution's successful socialization of the individual into its culture, mission, and ways of thinking."⁴² Thus, the ALJ seeking to understand agency culture is also at risk of being "captured" by the agency itself.

Worse yet, the ALJ may have wholly adopted the agency's world view without realizing it has happened. The process of inculcation may occur primarily through the informal daily interactions whereby the ALJ hears mostly one side of a controversy: namely, the agency's. Such ex-parte contacts within an agency can result in a difficult to measure but nonetheless real reduction in the openness of an adjudicator's mind.⁴³ "[P]olicies or laws are frequently subject to many possible interpretations, and the existence of one-sided, off-the-record communications about policy or law is likely to leave the decider without a sufficiently panoramic view of the possibilities."⁴⁴

Congress devised one of its more dramatic prophylactic remedies by dividing the responsibilities for implementing the Occupational

41. Thus, by analogy, it was permissible for members of the state medical board to be responsible for and knowledgeable about both investigation and adjudication of professional misconduct charges, absent evidence that the investigation had tainted the adjudicatory result. See *Withrow v. Larkin*, 421 U.S. 35 (1975).

42. John R. Allison, *Combination of Decision-making Functions, Ex Parte Communication, and Related Biasing Influences: A Process Value Analysis*, UTAH L. REV. 1135, 1201 (1993).

43. One case illustrates the public apprehension about cultural capture, where plaintiff publishing companies moved to have a specific ALJ recused from all adjudications before the agency due to his prior tenure as attorney-advisor to the Commission—irrespective of whether he had had any involvement in the particular case before him. The court refused, requiring a fact-specific inquiry on a case-by-case basis. *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980).

44. Allison, *supra* Note 35 at 1201.

Safety and Health Act.⁴⁵ Rulemaking powers reside in the Secretary of Labor, while the Occupational Safety and Health Commission (OSHRC) adjudicates. This split enforcement model has solved the problem of ALJ capture within agency culture. Unfortunately, this approach has gone to the other extreme: OSHRC has been so out of sync with agency policymakers that their conflicting positions have regularly formed the basis of litigation.⁴⁶

B. The User-Friendly Process Bridging Objective and Subjective Needs

The agency adjudication was intended to provide the public with a user-friendly process that bridged, or mediated the objective and subjective needs of all participants. The first generation of adjudicators attempted to bridge the objective formalities of a civil trial structure with the lay public's subjective, intuitive sense of fairness. ALJs aspired to offer the lay public their last, best hope that justice will be done. Laypersons could walk away from the agency with a sense that neither tricks nor technicalities stood between themselves and a fair hearing. Whether or not the ultimate outcome was what the party desired, they, nevertheless, had the opportunity "to look their government in the eye" and say what needed to be said, and what they had to say would be heard.

Over time, these aspirations became increasingly more difficult to achieve as the volume and complexity of agency adjudications grew. In many agencies today, administrative litigation is virtually indistinguishable from civil litigation, including the concomitant

45. 29 U.S.C. § 651 *et. seq.* (1991).

46. See dictum in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 152 (1991).

This is not the first time we have been called upon to resolve an OSH Act 'jurisdictional' dispute between the Secretary and the Commission. [cites omitted] . . . We noted that 'enforcement of the Act is the sole responsibility of the Secretary' The Commission's role as 'neutral arbiter,' we explained 'plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.'" With regard to the particular matter at issue, the Court held that the Secretary "is in a better position than is the Commission to reconstruct the purpose of the regulations in question;" hence the Secretary's interpretation is authoritative. *Id.*

costs. This phenomenon does not limit itself to administrative law. The courts have also experienced an increase in demands for services that far outstrip the judicial resources available. Both factors together have combined to promote searches for creative solutions to high costs and limited resources. The evolving answer has been alternative dispute resolution, especially mediation.

II. ALTERNATIVE DISPUTE RESOLUTION AS AN ADJUNCT TO AGENCY ADJUDICATION

During the 1990s ADR started to evolve into the type of bridge between the lay public and the agency which the ALJ has traditionally been. The need to “translate” the agency’s needs and the public’s expectations into language they could both understand needed a simpler forum than the formal adjudication had become. Major legislative initiatives paved the way for rapid change. Just as importantly, the executive branch put substantial energies and resources into developing ADR as a viable option for adjudication in all federal agencies.

This section describes the broad contours of this development, as a framework for later comparison with ADR in the Niger Delta. In Part IV we shall conclude with suggestions about how the federal ADR activities described herein could be modified, using some of the insights gained from the FIDA peacemaking process.

A. *ADR for Adjudications under the APA*

Both formal and informal adjudications under the APA can be facilitated by the use of alternative dispute resolution for all or part of the issues under review. The Administrative Dispute Resolution Act of 1990 (“ADRA” or “the Act”)⁴⁷ required each agency subject to the APA to establish a policy supporting the appropriate use of negotiation, mediation, arbitration or med-arb in adjudications. ADRA did not stop merely with enunciating a supportive policy.

47. Administrative Dispute Resolution Act, Pub. L. No. 101-552 (1990), 5 U.S.C. §§ 571-583, Historical and Statutory Notes (West 1996).

The Act required agencies to develop and implement methods for incorporating ADR into the agencies' adjudicatory processes.

Clearly, ADRA did not mark the federal government's first use of ADR in adjudications. Labor-management issues have long been resolved through arbitration with the Federal Mediation and Conciliation Service, created by the Labor Management Relations Act (Taft-Hartley Act) in 1947. The FMCS maintains a roster of trained neutrals ready to resolve labor disputes in virtually any sector of the economy.⁴⁸

For three decades the Community Relations Service ("CRS"), an agency mandated by the Civil Rights Act of 1964,⁴⁹ has provided non-coercive third party intervention assisting "communities and persons therein in resolving disputes, disagreements or difficulties relating to discriminatory practices based on race, color, or national origin." CRS has provided conciliators and mediators nationwide to resolve disputes involving Native American communities and other governmental or private entities; prescriptives for avoiding racial conflict in municipalities; addressing community racial tensions due to police use of force.⁵⁰

However, ADRA was the first legislation to create a comprehensive foundation for these conflict resolution mechanisms to be used in all agencies subject to the APA. Thus, ADRA offered the promise of a certain modicum of consistency throughout the federal adjudicatory structure.

1. Flexible definitions to encourage creative applications

The Administrative Dispute Resolution Act (hereinafter ADRA) seeks flexibility in ADR processes by presenting a non-exclusive list which encourages creativity in matching the dispute to the appropriate forum for resolution. ADRA of 1996 generally retained the language of the 1990 Act, defining "alternative means of dispute

48. 29 U.S.C. §§ 171- 173 (1998).

49. 42 U.S.C.A. § 2000(g) (1994)..

50. See Community Relations Service, U.S. Department of Justice, *Conflict Resolution in Indian Country, Avoiding Racial Conflict, and Police Use of Force: Addressing Community Racial Tensions*, all available at <http://www.usdoj.gov/crs/publist.html>.

resolution” to mean “any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration and use of ombuds, or any combination thereof.”⁵¹

ADRA covers a broad range of “issues in controversy,” meaning an issue which “is material to a decision concerning an administrative program of an agency, and with which there is disagreement.”⁵² This elastic coverage has enabled agencies to develop models of government intervention that lead to the “creative, efficient and sensible outcomes” Congress envisioned.⁵³

Section 556 of the APA was amended in 1990 to empower agencies to add flexibility to hearing procedures. Under subsection (c)(6) employees presiding at hearings can use ADR procedures adopted under ADRA to settle or simplify issues by consent of the parties. Further, Section 556 empowered agency hearing officers not only to inform parties about the existence of ADR, but also to encourage its use.⁵⁴

Nevertheless, ADRA of 1996 does not assume that litigation is always inappropriate, nor that it should always be the last resort. The Act lists a number of contra-indicators, mandating that an agency consider not using alternative means of dispute resolution if:

- (1) a definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding would not result in an authoritative precedent;
- (2) the matter involves significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency;

51. 5 U.S.C. § 571(3) (2003).

52. 5 U.S.C. § 571(8) (2003).

53. *See id.* at n.4.

54. 5 U.S.C. § 556(c)(6) (1990).

- (3) maintaining established policies is of special importance, and an ADR proceeding would not likely reach consistent results among individual decisions;
- (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
- (5) a full public record of the proceeding is important, and an ADR proceeding cannot provide such a record; and
- (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter if circumstances change, and an ADR proceeding would interfere with such agency control.⁵⁵

These factors play a critical role in the initial determination of whether ADR is appropriate. They may also serve an important function in determining whether confidentiality protections are available, and if so, under what circumstances.

2. Balancing the need for open public processes and private-sector conventions of confidentiality

The ADRA's of 1990 and 1996 attempted to strike a balance between private sector's evolving expectations of confidentiality in ADR disclosures, against the need for open government operations concerning public policy and the public fisc. The compromise was: communications made to a neutral in an ADR proceeding are generally confidential, with some important exceptions. The neutral can disclose such communications if the confidentiality protections

55. 5 U.S.C. § 572(b) (1996).

have been waived by all parties to the proceeding – in writing; and the neutral agrees, also.⁵⁶

The magnitude of this exception depends upon the circumstances. Particularly in matters involving the federal government, there is every possibility that information communicated in a dispute resolution proceeding (statements, data, financial documentation, reports, etc.) has “already been made public.” This information may already be contained in some public record, such as Congressional hearings, agency reviews, or the general news media. These already public communications are not shielded.⁵⁷

ADRA also recognized that administrative dispute resolution takes place in a sometimes complex interplay of substantive and procedural law. The APA is not the only controlling statute. It is possible that a particular dispute resolution communication “is required by statute to be made public.” If so, then the neutral is duty bound to make the disclosure. However, ADRA strongly qualifies this duty: the neutral must ascertain that “no other person [including entity or agency] is reasonably available to disclose the communication.” Disclosure from the federal neutral should be the last resort.⁵⁸

3. Complementary legislative and major executive agency actions also promoted the development of administrative dispute resolution.

Other legislation and executive orders ensued in the early to mid-1990s that were separate from, but highly supportive of, ADRA 1990. ADRA sought to make litigation a last, not first and only, resort for resolving disputes with federal agencies. To that end, ADRA promoted educating agency staff in methods of alternative dispute resolution. Still, many cases that might have benefited from ADR were taken to federal court. The Judicial Improvement Act of

56. 5 U.S.C. § 574(a)(1) (1996).

57. 5 U.S.C.A. § 574(a)(2) (2003).

58. 5 U.S.C.A. § 574(a)(3) (2003).

1990⁵⁹ significantly reduced the availability of this “by-pass”: if an administrative agency case was referred to a federal judge who believed that ADR would be helpful, the judge was empowered to refer the case to ADR. Federal court-annexed ADR grew, strengthened by the dictates of the Judicial Improvement Act.

The Department of Justice (“DOJ” or “the Department”) recognized that ADR could save time and money, and could increase public acceptance of agency decisions. Yet, these improved outcomes would only occur if government attorneys learned the different sets of skills necessary to be an effective representative in these more flexible, non-trial type forum. In Spring 1995, the Department issued OBD 1160.1 to coordinate ADR among all components of the Department and all its attorneys. All ADR activities for the Department were to be coordinated through the newly created position of Senior Counsel for ADR.⁶⁰ This comprehensive order required each component in the Department to establish a formal ADR policy that clarified: ADR should be used as widely as possible for civil matters.⁶¹ All attorneys in the Department were to receive training in negotiation, mediation and arbitration.⁶²

On February 5, 1996 President William J. Clinton effectively enlarged the policy and direction articulated in OBD 1160.1 to include all federal agencies in the executive branch. Executive Order 12,988 on “Civil Justice Reform” required all litigation counsel in non-criminal matters make reasonable efforts to resolve disputes before trial. Litigation should be the last, not the first resort, of federal agencies. To further this goal, Executive Order 12,988 ordered all agency litigation counsel to receive training in ADR.⁶³

Two years later President Clinton directed the heads of executive departments and agencies to create an Interagency Alternative Dispute Resolution Working Group (IADRWG) to “promote greater use of mediation, arbitration, early neutral evaluation, agency

59. Judicial Improvement Act, Pub. L. No. 101-650 (1990).

60. U.S. Department of Justice Order OBD 1160.1 (Spring 1995).

61. *Id.* at 2.

62. *Id.* at 7.

63. Executive Order No. 12,998, § 1(c)(3), *Civil Justice Reform* published at 61 Federal Register 4,729 (1996).

ombuds, and other alternative dispute resolution techniques.”⁶⁴ This committee, now better known as the Federal ADR Council, assists agencies in: developing ADR programs; training agency personnel in ADR usage; developing procedures to assure neutrals can be obtained on an expedited basis; and record-keeping to monitor the benefits of administrative dispute resolution.⁶⁵

This was an important step in institutionalizing administrative dispute resolution. The 1990 Act had relied upon the Administrative Conference of the United States (ACUS) to provide on-going consultation and training in ADR activities, and to coordinate the growth of ADR in federal agencies. Upon the demise of ACUS, the 1996 Act required the President either to designate an agency to do the work envisioned for ACUS, or to create an inter-agency committee.

B. ADR Under Other Federal Statutes Governing Agency Adjudications

1. Labor-Management Relations

A number of federal activities operate under ADR programs apart from the APA. Most prominent among them is the area of labor-management relations. When a dispute arises under the National Labor Relations Act,⁶⁶ notice must be given to the Federal Mediation and Conciliation Service (FMCS). The FMCS will meet promptly with the parties and “use its best efforts by mediation and conciliation to bring them to an agreement.” The statute imposes upon the parties an obligation to bargain in good faith, to participate “fully and promptly” in such meetings. For prevention of unfair labor practices, the NLRA provides even broader power for

64. Memorandum from William J. Clinton, President of the United States, *Designation of Interagency Committee to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking* (May 1, 1998), IADRWG homepage at <http://govinfo.library.unt.edu/npr/library/direct/memos/disputre.html>.

65. *Id.*

66. 29 U.S.C. § 158 (d)(C) (2003).

alternative dispute resolution. Under 29 U.S.C. § 160(k) if the parties have agreed to use “methods for the voluntary adjustment of the dispute,” then the NLRB itself will not hear and decide the dispute, taking the resolution out of the hands of the agency.

Similarly, ADR has long been used to resolve labor-management issues involving employees of the federal government. The Federal Labor Relations Act (FLRA) at 5 U.S.C. § 7121 (a) and (b) mandates a negotiated grievance procedure that must be fair, simple, and expeditious. The FLRA also requires binding arbitration to resolve disputes that cannot be handled through negotiation.⁶⁷ The U.S. Postal Service has institutionalized a major mediation program to resolve employee-management disputes in their early stages.⁶⁸

2. Discrimination

A handful of federal agencies have more recently developed ADR processes to encourage consensual resolution of disputes. Conflicts arising in the workplace, schools, or service agencies involving a continuing relationship between the parties seem especially suitable for mediation or negotiation, rather than adjudication. Thus, the Under Secretary of Labor is statutorily required to use ADR mechanisms “to the maximum extent possible” to resolve disputes about access to services for individuals seeking vocational rehabilitation services.⁶⁹ Again, the authorizing statute provides a fairly broad definition of ADR, encouraging a combination of procedures, not merely negotiation or mediation.

Parties may choose to bypass formal adjudication to resolve disputes concerning public services accommodations under the Americans with Disabilities Act.⁷⁰ In particular, the use of mediation for such cases allows for expression of personal perspectives, and encourages a degree of disability education. Traditionally, formal

67. *See also* 5 U.S.C. §§ 7117, 7119 (2003).

68. 39 U.S.C. § 1207(2003).

69. 29 U.S.C. § 732 (a), (g) (2003).

70. 2 U.S.C. § 1331(d)(2-3) (2003).

adjudication does not have room for such a broad agenda. By taking a broad approach, mediation can achieve consensual resolutions.⁷¹

Congress, in Title I of Pub. L. 102-166, section 118, encouraged the use of settlement negotiations, conciliation, fact-finding, mediation and arbitration to resolve employment discrimination claims under 42 U.S.C. § 2000(e).⁷² The Equal Employment Opportunity Commission has begun to refer to mediation discrimination claims that seem to turn more on interpersonal dynamics than upon readily provable facts and law.

When a child with disabilities has been “mainstreamed” into public schools, and conflicts arise concerning the appropriate handling of the child’s curriculum and other needs, the Individuals with Disabilities in Education Act,⁷³ requires mediation. This process offers a forum to explore the deep emotional issues triggered by: the concern of multiple persons about the best interests of the affected child, the role of the child’s family, and the impact of decisions upon others in the classroom.

3. Consumer Complaints

In contrast to the continuing working relationships typified in the cases referred to ADR above, several agencies have developed ADR programs to negotiate a settlement to complaints by consumers about a particular incident involving a regulated entity. These processes attempt to make the adjudicatory process more “user-friendly” through efficiency, simplicity and flexibility. In so doing, the agencies significantly improve their responsiveness to the needs of taxpayers.

The Securities Exchange Commission has a well-established arbitration program to handle disputes arising in connection with

71. *See also* 42 U.S.C. § 12188 (2003) (providing alternative means of dispute resolution where private entities provide public accommodations); 42 U.S.C. § 12212 (2003) (providing negotiation, conciliation or mediation to assure equal opportunity for individuals with disabilities).

72. 42 U.S.C. § 2000(e) (2003).

73. 20 U.S.C. § 1415(e) (2003).

prospectuses and communications,⁷⁴ and other claims involving the registration and sale of securities.⁷⁵ The Department of Agriculture has a parallel program to handle complaints against persons registered as commodities dealers.⁷⁶ 15 U.S.C. § 2310 provides for ADR as a remedy in consumer product warranty complaints.⁷⁷

4. Taxation/Financial Matters

Negotiation, conciliation, mediation or arbitration can offer the most effective way to resolve a highly technical, complex dispute. The more relaxed procedures of informal settlement facilitate more efficient disposition of matters than formal adjudication. Thus, disputes over employer withdrawals under the Employee Retirement Income Security Program (ERISA),⁷⁸ can be resolved through ADR methods. In the past few years, the Internal Revenue Services has inaugurated a system of appeals dispute resolution that offers mediation to disgruntled taxpayers.⁷⁹

Powerfully emotional conflicts between disgruntled farmers (debtors) and local bankers (lenders) during the late 1980s led to the creation of a mediation process to resolve foreclosures under the Farm Service Administration, Department of Agriculture. This process has permitted a blend of complex financial problem-solving and personal reconciliation, critical to the stability of rural communities.⁸⁰

5. Flexibility in Enforcement of Bureaucratic Standards

The Department of Agriculture (USDA) has a fairly extensive statutory framework for control of environmental pesticides. Title 7 U.S.C. sections 136 *et seq.* cover registration of pesticides; registration of establishments; recordkeeping; sale, use, and removal

74. 15 U.S.C. § 77 l (2003).

75. 15 U.S.C. §§ 77 -78 t (2003).

76. 7 U.S.C. § 18 (2003).

77. 15 U.S.C. § 2310 (2003).

78. 29 U.S.C. § 1401(2003).

79. 26 U.S.C. § 7123 (2003).

80. 7 U.S.C. § 5103 (2000).

of pesticides.⁸¹ This complex of standards is flexibly enforced by using alternative methods of dispute resolution rather than formal adjudication. The USDA has also used statutory authority to create a system to arbitrate and mediate disputes concerning the sale of milk and milk products.⁸²

The management of government purchasing arrangements has long required mechanisms for negotiation of disputes. Speedy resolution of discrepancies, protests, and appeals has required something other than formal adjudication. The negotiation, mediation and arbitration provisions established for public contracts have installed procedures that business people can recognize from the private commercial sector.⁸³

6. Tribal Sensitivity in Federal Programs

Negotiation and mediation have come only recently to many federal agency programs. However, these processes have been an indigenous part of conflict resolution among Native American nations for millennia. In recognition of the central role that face-to-face discussion plays in Native cultures, the administrative process for overseeing contracts or grants under the self-determination programs includes ADR.⁸⁴

C. ADR through Procedural Rules

In addition to the many statutes that explicitly authorize particular ADR processes for adjudicatory matters, a great number of agencies have implemented ADR through procedural rules.

Some ADR regulations elaborate greatly upon the statutory framework.⁸⁵ The Department of Justice adopted regulations implementing ADR processes to handle claims of discrimination due

81. 7 U.S.C. §§ 136 *et. seq.* (2000).

82. 7 U.S.C. § 671 (2000).

83. *See* 40 U.S.C. §§ 1301 – 1303 (2003); 41 U.S.C. §§ 605 – 607 (2003).

84. 25 U.S.C. §§ 450 j, 450 l (2003).

85. *See, e.g.*, 17 C.F.R. §§ 31.29, 170.8, 180.1 - 180.5 (2003).

to disability in state and local government services, and discrimination on the basis of disability in public accommodations.⁸⁶

Among other agencies, however, ADR procedures appear to be a whole new body of regulation, which is implied, rather than expressed. For example, the Department of Transportation's Federal Aviation Administration uses ADR as a central method for resolving complaints and contract disputes.⁸⁷ The same applies to arbitration and negotiation of disputes under the statutory jurisdiction of the Surface Transportation Board.⁸⁸ In both of these agencies, arbitration exists as an implied principle in their enabling acts, but not as an express program mandate. Similarly, the Appeals Board for the Department of Health and Human Services has used implied authority to develop a successful and respected comprehensive program of mediation to resolve disputes concerning grants and contracts.⁸⁹ The Provider Reimbursement Review Board has implemented a successful mediation program for Medicare Part A disputes.⁹⁰ Arbitration of disputes concerning rights of way, tram roads and logging roads has been read into the statutory authority for the Bureau of Land Management.⁹¹ The Federal Communications Commission has turned to ADR when reviewing the compliance of emerging technologies with evolving industry standards.⁹² Finally, the Department of Housing and Urban Development used implied authority under the Fair Housing Act to develop procedural rules on conciliation.⁹³

86. 28 C.F.R. §§ 35.176 and 35.506 (2003).

87. 14 C.F.R. §§ 16.21, 17.9, 17.27, 17.33 (2003).

88. 49 C.F.R. §§ 1108.1 - 1108.12, 1109.1, 1144.2 (2003).

89. 45 C.F.R. § 16.18 (2003).

90. 43 C.F.R. § 2812.4-1, 2812.4-3, 2812.4-4 (2003).

91. *Id.*

92. *See* 47 C.F.R. § 64.1703 (2003); 47 C.F.R. § 76.1003(m)(2) (2003) (parties have the option to resolve a complaint concerning multi channel video program access by ADR instead of a formal hearing); and 47 C.F.R. § 76.1513 (2003) (dispute resolution processes for open video systems).

93. 24 C.F.R. § 103.300, 103.335 (2003).

D. Does Rapid Growth + Rapid Institutionalization = Rapid Loss of Innovation?

Administrative dispute resolution has developed successfully through a combination of amendments to the APA, agency innovation, and inter-agency coordination. ADRA has benefited from the intense and wide-based attention it has received. For now, there seems to be a good, if not always easy, balance between the need to assure flexibility for innovation, and some modicum of form and consistency from agency to agency. The issue of confidentiality will need to be monitored carefully over the next couple of years as agencies, the public and the courts work through the pragmatic details of applying the guidelines proposed by the Federal ADR Council.

One must question, however, whether ADR in administrative adjudications risks becoming more than consistent. ADR may risk becoming ossified into a set pattern that fails to reach beyond standard civil/commercial evaluative mediation. ADR risks becoming simply one more formalistic hurdle that litigants pass over, replete with motions practice and appeals. ADR may soon become no true alternative to the courtroom unless we can look beyond our American models to see what features from other countries and cultures could enliven our work.

III. BRIDGING LAW AND CULTURE IN THE NIGER DELTA

In Parts I and II we explored the concept of administrative adjudication itself as forming a bridge between law which is (1) general, non-specific, and broad, and (2) its application to the narrowly focused, pragmatic problems of individuals. The American system of administrative justice relies primarily upon the ALJ to justicially close this gap justicially at both objective and subjective levels. Yet, as the complexities of administrative adjudications have increased, a parallel concern has grown. ADR may be needed to assure that adjudicative function remains flexible and genuinely responsive to a lay public.

The renewed vigor with which the federal government has pursued ADR can be viewed as one element in the global trend

towards harmonization of laws. This is a significant step in the realization of truly interdependent international trade. Thus, it is not surprising to find that Nigeria has also turned its attention towards the development of ADR as an adjunct to its civil and administrative processes.

In Part III we return to the foundational quaere: How can one build an ADR system that is user-friendly but not user-biased? In the Niger Delta this inquiry carries a hefty weight not yet characteristic of the U.S.A. For, when the adjudicator seeks to mediate within the context of Nigeria's "culture wars" s/he wrestles not with a glib metaphor, but with a viable threat of bloody, violent clashes over culture.⁹⁴ Hence, the bridge function takes on an added potency and immediacy which American ALJs and mediators have not regularly encountered to date. America's diverse population continues to grow

94. The reader should be reminded that the region of Nigeria under discussion was once part of the short-lived Republic of Biafra in the 1960s. Minority tribes of the recently-designated South-South chafed under the domination of the majority Igbo tribe; split away and led the blockade of the Niger River. The infamous Biafra Blockade resulted in a famine that killed more than a million Igbos and ended the civil war. The imprint of this holocaust remains strong. As one researcher concluded in 1988 "Most adult Nigerians have directly and poignantly experienced protests, riots, even massacres, civil war and coercive military rule." WILLIAM D. GRAF, *THE NIGERIAN STATE: POLITICAL ECONOMY, STATE CLASS AND POLITICAL SYSTEM IN THE POST-COLONIAL ERA* 13 (1988), quoted in Philip C. Aka, *Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in the New Century*, 14 *TEMPLE INT'L & COMP. L. J.* 327, 333 (Fall 2000). Prof. Aka offers an excellent background on the "Nature of Ethnicity and Ethnic Politics in Nigeria" in Part III of his article. *Id.* at 330-37. Regarding contemporary ethnic politics in the Niger Delta and pervasive violence Prof. Aka notes:

Briefly, three categories of conflicts, all of which have generated violence resulting in many deaths and large-scale destruction of properties, have characterized this brief period [of civilian rule]. The first consists of old conflicts from the historical past exacerbated by military rule and which continue to fester even with the installation of democratic politics. The trouble in the Niger Delta involving oil-producing minorities [e.g., the Ijo/Ijaw, Ikwerre, Ogoni, Ibibio] falls into this category. [cite omitted] The second category consists of formerly suppressed conflicts that are now coming to the fore, aided and abetted by the climate of freedom and reduced repressiveness democratic politics affords. [cite omitted] The numerous inter- and intra-ethnic disputes in parts of the country, especially over communal lands, belong in this second category. The third and final category ... are religion-based, sharia-related, conflicts, which negate the country's political stability, challenge its secular status, and question its continued integrity as one country. [cite omitted]

Id. at 334.

rapidly without the benefit of its traditional frontier “safety valve.” Depending upon economic and social factors, the U.S.A. may confront similar cultural strains in the 21st century.

A. The FIDA Village Peacemaker Model

The solution crafted by the International Federation of Women Lawyers (FIDA) in Rivers and Bayelsa States seeks not merely to harmonize laws. Rather, FIDA seeks to harmonize systems and cultures of dispute resolution. Their solution strikes a subtle and non-static balance between the distinctive elements that lead persons to pursue formal litigation in a civil or customary court,⁹⁵ or informal mediation and conciliation.

When a dispute has arisen in Rivers or Bayelsa States, two FIDA-trained and supervised village peacemakers meet jointly with the disputants early in the developing conflict. The peacemakers use facilitative techniques of restating and reframing to understand each disputants’ perspective. The peacemakers consult with their assigned group of ten other village peacemakers in the area to determine the most suitable type of intervention under the circumstances. Intervention could be via indigenous methods, the local Customary Court, or usage of the civil or criminal courts.

95. Customary Courts were originally created by the British as a primary mechanism of indirect rule. They represent the external authority discussed in section A.3. of this paper, in contrast to the power embodied in the indigenous system of conflict resolution through traditional social groups. F.U. OKAFOR, IGBO PHILOSOPHY OF LAW 93-94 (Fourth Dimension Publishing Co., 1992). In 1900, the British colonial government established Native Courts by proclamation. The Native Courts were intended to be a principal mechanism for controlling the indigenous population. In many ways one could describe the early Native Courts as an attempt to circumvent the traditional or so-called “natural rulers” who exercise power through the indigenous institutions. By 1930 the colonial administration was forced to adapt the Native Courts to align more closely with traditional practices. Instead of authority resting in warrant chiefs selected by the British and backed by the military and administrative power of the colonial regime, Native Court judges were selected by the villages themselves. Usually, the person elected was the traditional village chief or king. In 1956 the name “Native Court” was replaced by “Customary Court.” *Id.* In the estimate of some scholars of these legal systems, “[n]either the ‘Native Court’ as amended nor the ‘Customary Court’ could replace effectively the traditional legal system” Customary court remains as an option, but one rarely used. *Id.*

If the disputants desire, the FIDA peacemakers then return to the disputants and to the relevant traditional leaders to prepare all for participation in crafting a resolution process. At that point the FIDA peacemakers step out of the picture. The FIDA peacemakers are described as “mid-wives of change;” not the change itself. The FIDA peacemaking process itself, then, becomes the bridge between law and culture.

B. Harmonizing Distinctive Elements

Successful venues and methods of dispute resolution must speak to the objective and subjective needs of the disputants. For some matters, such as those requiring interpretation of a constitutional or statutory provision, no genuine option exists outside of the civil courts. For other matters, however, persons could achieve their underlying interests more fully by pursuing one or more alternative methods. The FIDA model does not attempt to supplant the Anglo-Nigerian system of civil and administrative litigation. Instead, it seeks to supplement those processes by encouraging informed, voluntary participation in carefully selected traditional institutions respected by the disputants.

What distinctive elements must be addressed? We shall examine them below, as they manifest in the contemporary Niger Delta.

1. Formalism versus Flexibility

Justice, fairness, a re-balancing of power, transparency and accountability are typically seen as the best products of a formal adjudicatory process. Litigation achieves these results through the competitive clash of attorneys, relegating parties to the side-lines of the action. Formalism might impede the expression of individual creativity and feelings, yet it protects individual rights. This paradigm of justice is enshrined in the Anglo-American common law systems, which also frames the Nigerian civil and administrative court structure.⁹⁶

96. I have elected not to analyze the Customary Courts for this paper. Although federally sanctioned, formal Customary Courts exist in the Niger Delta typically do not play as prominent a role as the informal indigenous methods this

Under the Anglo-Nigerian model of justice, fairness is synonymous with formalism. This being so, suggestions to reduce formality through the use of ADR can encounter deeply embedded skepticism, even hostility. Resistance can run deep, despite supportive pronouncements emanating from the bench and bar. Formality and ritual define the very look of justice in Nigeria, in ways unfamiliar to Americans. White wigs and black robes are mandatory garb in Nigerian civil courts. Forms of address in everyday life include honorifics such as "Your Excellency," and are routine in the civil and administrative courts. Finally, the system is intended to move slowly, inexorably.

Although the British did not invent bureaucracy, one could fairly say that the British colonials perfected stifling bureaucratic inefficiency. They invented the now-infamous red tape, which bound innumerable government files; a phrase describing the frustrating process of working one's way through repeated administrative roadblocks.

At a more profound level, Nigerian independence from colonial rule and the end of the Biafra War/Nigerian Civil War gave rise to a federal concept of justice seeking to transcend differences in ethnic and religious traditions. Nigeria's federal law offers a standard for resolving disputes that is not captive to any one particular demographic group. Despite the demerits of its imperialist origins,

paper discusses. Additionally, this paper focuses on potential parallels to American social structures that could be adapted to serve similar roles. Except for the tribal courts in sovereign Native American nations, the Anglo-American system has no parallel to the Customary Courts. The reader interested in a fuller description of how Customary Courts typically operate in contemporary Nigeria should refer to ONEYBUCHI T. UWAKAH, *DUE PROCESS IN NIGERIA'S ADMINISTRATIVE LAW SYSTEM: HISTORY, CURRENT STATUS, AND FUTURE* 31-60 (University Press of America, 1997) (see Chapter 2, "Nigeria's Native Law, Customs and Administration.") Especially helpful may be the description of a prototypical land dispute, which begins with private settlement attempts, but moves quickly to a Customary Court summons and hearing with "as many responsible relatives" attending as each party can achieve. The arbitrators will hear the case. If it is "purely a matter of moral (or social) obligation" the parties will be asked "to go back and have it settled 'at home' (that is, privately)" since it is not a case "for legal proceedings." If, on the other hand, the case does have legal foundation, then a formal hearing commences, with testimony by witnesses, evidence, comments on the merits and demerits of each side's case. The decision is reached in a private, secret session. Appeal is available to another arbitral court. *Id.* at 37-38.

Nigerian federalism has been remade to find common ground on which the most populous nation of Africa could potentially unify.⁹⁷

But for now, all of this has been undermined by lack of trust. Those vested with the duty to protect the system's integrity have stumbled badly. The judiciary has come under suspicion for widespread corruption, graft, and bribery.⁹⁸

In a system where the arbiters of justice themselves are sometimes perceived as unjust, one would expect a call for increases

97. I recognize that to date Nigeria's sometimes tentative unity could be labeled "false" as was well explained by Prof. Pade Badru in his book *IMPERIALISM AND ETHNIC POLITICS IN NIGERIA*, 1960-96 136-139 (Africa World Press, 1998). I further acknowledge that good reasons may exist to question whether unity is an ideal to seek, given that "Nigeria" is an artificial construct, created by Britain to facilitate their control of the area's natural resources easier. Britain's objective was to prevent subject peoples from transcending ethnic differences, so they could not form sustained opposition to colonial exploitation. Some legal scholars have begun to suggest that respect for the right of self-determination will require a redrawing of boundary lines in order to preserve "social equilibrium" and to promote "the rule of law." Okechukwu Oko, *Partition or Perish: Restoring Social Equilibrium in Nigeria through Reconfiguration*, 8 IND. INT'L & COMP. L. REV. 317, 324 (1998). And, taking a more global perspective, Michael J. Kelly, *Political Downsizing: The Re-emergence of Self-Determination, and the Movement toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209 (1999).

98. For a couple of years, Nigerian newspapers have been replete with reports on investigations by the Independent Corrupt Practices and Other Related Offences Commission (ICPC). As of December 2002, forty-seven judges had been indicted, including two Chief Judges and four High Court judges. Some judges in the Niger Delta states of Abia, Cross River, Delta, Imo and Rivers have also come under fire. *See Indicted 47 Judges have Persistent Reputation for Corruption*, Says Esho, VANGUARD, reprinted in AFRICA NEWS, December 21, 2002 available at NEXIS: Library: NEWS; File: AFRNWS; *Eso Report: NJC [National Judicial Council] Suspends Indicted Judges*, THIS DAY reprinted in AFRICA NEWS, October 13, 2002.; *Delta Sacks Two Corrupt Judges*, VANGUARD, reprinted in AFRICA NEWS, October 31, 2002; *Justice Kalu O. Amah*, THIS DAY, reprinted in AFRICA NEWS, August 28, 2002. (*See also Abia Judge Dragged to Anti-Graft Panel, Id.*) (reporting that the Abia state branch of the Nigerian Bar Association had declared a boycott of the courts to protest the continued stay in office of the Chief Judge of Abia State.); *Imo Government Warns Corrupt Judicial Officers*, VANGUARD, reprinted in AFRICA NEWS, August 13, 2002. Many of the allegations of judicial corruption represent the difficulties of transitioning from a military rule, where "the judiciary was not independent of the military regime," as described by the VANGUARD newspaper in *Law & Human Rights: Time for a Judges' Revolt?* November 29, 2002 reprinted in Africa News. *Id.* This article details a pattern throughout Nigeria of judicial salaries being delayed for months or effectively denied by the state governments; court staffs on strike; and perennial shortages of "necessary working facilities such as courtrooms, books, typewriters, stationery, and files." Under such difficult working conditions, particularly when judges cannot meet the costs of supporting their families, judges become susceptible to corruption.

in procedural and administrative protections. And, indeed, some of that is afoot.⁹⁹ Notwithstanding, parties and attorneys are more than willing to pursue a resolution method that will take less time and offer more legitimate control over the outcome.¹⁰⁰ Ironically, it may be that parties are more likely to find the qualities of transparency, accountability and re-balancing of power through ADR than through litigation.

99. DAILY TRUST, Jan. 30, 2002 (remarks of Chief Justice of the Federal Court Mohammed L. Uwais, urging for a total separation of judicial power, including appointment and salary, to undergird an improvement in case processing); *See also National Centre for State Courts Holds Workshop on Rule of Law*, THIS DAY, Dec. 17, 2002 (repeating that the U.S. State Department has committed substantial technical assistance to improve functioning of the Nigerian judiciary through the Rule of Law pilot projects in Lagos, Abuja and Kaduna); *See National Centre for State Courts Holds Workshop on Rule of Law*, THIS DAY, reprinted in AFRICA NEWS, December 17, 2002 (reporting that the World Bank/International Monetary Fund (IMF) have also taken an interest in a broad-based reform of the Nigerian Justice Sector Community, as described in *Justice Sector Reform: Where are the Road Maps?*, THIS DAY, reprinted in AFRICA NEWS (January 14, 2003).

100. *Ige Pledges Support for NCMG*, THIS DAY, reprinted in AFRICA NEWS, October 29, 2000. The Negotiation and Conflict Management Group (NCMG) was established in Lagos to promote ADR in both private and public sectors. The statement of the Attorney-General and Minister of Justice, Chief Bola Ige made at a seminar by the NCMG is noteworthy. As reported: He "called on the Federal Government to emulate the United States of America which has adopted the ADR as alternative in resolving civil cases. [sic] Ige said that Nigeria, at this stage of its development 'definitely cannot afford to be left behind in this wind of legal reform and change.' He said that conflict resolution is *sin qua none* [sic] to Nigeria, more so with her 'nascent democracy and dire need for foreign investments.'" *Id.* *See also: Dispute Resolution as Panacea to Court Congestion*, THIS DAY, reprinted in AFRICA NEWS, November 7, 2000; *Nigeria: A Way Forward*, THIS DAY, reprinted in AFRICA NEWS, January 23, 2001 (promoting American-style ADR as presented in the recently published book by ROBERT MNOOKIN, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2001)). In 2001, the U.S. State Department committed major funds to establish in Lagos state judiciary ADR reforms based on the American Bar Association model of the multi-door court house and a companion Judges Mediation Programme, as reported in THIS DAY, reprinted in AFRICA NEWS, December 10, 2001. Lagos State Justice Ministry established a free citizen's mediation center to resolve "minor and major disputes" such as "rents, landlord/tenant debts, employer/employee, and family disagreements." VANGUARD, reprinted in AFRICA NEWS, April 10, 2001. These are important advances and deserve support. They do not, however, actively seek to incorporate the traditional, indigenous dispute resolution processes that are central to the FIDA peacemaking model.

2. Public Policy Versus Private Justice

Thoughtful observers of ADR in the United States have asked the continuing question: When does the private ordering of ADR begin to compromise the development of the common law?¹⁰¹ This underlying concern rises to a higher level when we consider the appropriate and inappropriate use of ADR in regard to public policy, public monies, and public resources. Again, American politicians do not have a monopoly on graft. Nigeria has suffered under the debatable characterization as one of the most corrupt countries in the world.¹⁰²

Be that as it may, we need not concern ourselves with the truthfulness or untruthfulness of such pronouncements. The key issue is the public perception it bespeaks, the pervasive sense that adjudications are highly subject to bias or conflicts of interest, based on financial or political interests. To cure bias and conflicts, decision-making must be in the open. Confidentiality and accountability are not compatible. Mediations occurring behind closed doors bear uncomfortably close resemblance to shadowy deal-making between political operators.

The peacemaking model developed through the International Federation of Women Lawyers (FIDA) in the Niger Delta has struck a balance in the dynamic dance between public and private interests. A first step in the dance is understanding that what is considered “public” and “private” in the Niger Delta may differ from the usage of those terms in America. In the Niger Delta, unincorporated, fraternal and family groupings of individuals whom Americans would characterize as wholly private, typically undertake duties that Americans would expect to be public works, for example, the

101. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

102. *Legitimization of Corruption*, THIS DAY, reprinted in AFRICA NEWS, October 13, 2002. One source for this oft-repeated assessment is the report of the NGO Transparency International ranking Nigeria as the “second most corrupt country in the world,” as referenced above. *Id.* The World Bank/IMF has recently shifted its policy on corruption. Rather than treating it as a political problem “outside their purview,” they are now moving this issue “to the top” of their “agenda,” treating corruption, bribery and graft as an unacceptable drain on money for development assistance. *Fighting Corruption — Myth or Reality?*, VANGUARD, reprinted in AFRICA NEWS, February 21, 2003.

building of schools and the repair of community centers.¹⁰³ On the other hand, a private matter in the Niger Delta is rarely one occurring between two individuals alone. Such cases would likely refer to a family rather than an individual. This would not necessarily be the nuclear family of close consanguinity; rather, what most Americans

103. As described among the Ijo/Ijaw, older women (the *okusi ere*) and older men (the *okosi-otu palemo*) are “responsible for the planning and organization of community projects and for the town’s welfare.” The women’s association includes “a spokeswoman, a treasurer, a secretary and a town crier for the whole town and one for each quarter. These women are responsible for ... settling disputes, and for discussing women’s aspects of community development with the men.” MARIDA HOLLOS AND PHILIP E. LEIS, *BECOMING NIGERIAN IN IJO SOCIETY* 76 (Rutgers Univ. Press 1989).

Throughout this section, references will be made to scholarly works the reader can seek on their own. Many of these sources will discuss the traditional ways of the Igbo, because more has been published concerning this regional tribe that can be readily obtained in the West. Anthropologists and most political scientists would categorize many of the tribes in the South-South Niger Delta region as related to the Igbo, or at a minimum, still highly influenced by Igbo culture. I greatly appreciate the insights provided by the following persons who participated in a series of workshops I facilitated under the auspices of a U.S. State Department grant “Nigerian Mediation Exchange,” sponsored by the American Bar Association Africa Law Initiative and the ABA Dispute Resolution Section, held in Oklahoma City, Oklahoma and Port Harcourt, Rivers State, Nigeria during June and July of 2002: Barrister Mrs. Elsie Nwanwuri Thompson, Deputy Country Vice President-FIDA Nigeria; Barrister Mrs. Didi Walson-Jack, Director of Legal Services, Bayelsa State House of Assembly, later appointed Attorney General and Minister of Justice for Bayelsa State; The Hon. Vivien Ere Imananagha, Deputy Chief Whip and Chairperson of the Committee on Health and Women’s Affairs and Social Development, Bayelsa State House of Assembly; Her Excellency Mrs. Owanari Bobmanuel-Duke, partner in the law firm of Duke and Bobmanuel, Lagos and First Lady of Cross River State; The Hon. Barrister (Chief) Nixon Bright Erewari, Chairman, House Committee on Justice, Judiciary and Related Matters, Bayelsa State House of Assembly; The Hon. Barrister Bassey Eko Ewa, Majority Leader Cross River State House of Assembly and Chairman of the Committee on Judiciary and Public Service Matters; and Chris W. Ogbondah, Ph.D., Professor of Journalism, University of Northern Iowa. Their guidance assured that the training in advanced forms of the FIDA peacemaking model discussed within this paper would ring true to the cultural traditions and practices of the region.

It is very possible, however, that in my own attempts to restate these insights for purposes of scholarly analysis, some detail of processes and terminology have been edited out. My apologies. I also feel it necessary – since the observer never stands wholly apart from the observed – to acknowledge for the reader that I am West Indian-American, with strong tribal affiliations to the Igbos of South-South and Southeastern Nigeria. I hope this has not unduly colored my understanding of the processes described here; but I will leave it to the reader to make his/her own assessment of my neutrality and objectivity.

would call the extended family of aunts, uncles, cousins, and even family friends.¹⁰⁴

The genius of the FIDA model is that it embraces this expanded notion of the individual within a community context. Instead of looking solely to a narrow definition of legal rights and duties, FIDA peacemaking asks attorneys, government ministers, and judges to consider non-litigious ways that an entire dispute, or aspects of a dispute, could be resolved with the involvement of the largest number of relevant persons, not the smallest. Why? Because almost any ostensibly legal conflict may be less about the law than about the people involved, and people in the Niger Delta do not live without a social context. If the parties are truly to understand each other, reach a workable agreement between each other, and hold to that agreement, they must be able to see each other through the lens of their social context, agree within the parameters of their social context, and be supported by others who comprise that social context.

For example, in the Niger Delta, a land dispute filed in civil court as a property matter between two men is much more complex than it may appear. The land in dispute may involve immediate family living together in the same house. Three to four houses of several other family members may be located together in one family compound, with each of these families carrying a concern in the land dispute. Family compounds are part of a larger community with several other such compounds. A grouping of such communities represents an entire clan in the region. This is known as the "House System"¹⁰⁵ of the Niger Delta, wherein at each step along the way – house, compound, community, and clan – there is a king or chief to whom persons traditionally turn for guidance in resolving a dispute.¹⁰⁶

We shall return shortly to dispute resolution within the House System, and its adjuncts. For now, our focus rests on the ever-expanding role of others in what Americans might style as a two-

104. See HOLLOS & LEIS, *supra* note 104, at 35-63 (giving a detailed and illuminating discussion of the methodological difficulties in attempting to impose a Western template of family definitions on the family structure of the Niger Delta peoples).

105. This is the term preferred by the Nigerian delegation. (See *infra*, note 109.)

106. *Id.*

party case. These other persons do not have de jure named party status in litigation. Nevertheless, they have de facto status in the world to which the parties will return after leaving the hearing room. It is highly unlikely that they would all be able to participate directly or indirectly if the matter were litigated. However, their input, and even, perhaps, their physical presence, would be respected in the House System.

This leads to the paradoxical result that if public disputes are resolved through private ordering of this sort, there would be no such thing as a shadowy, back-room deal. With the eyes of virtually the entire compound, community or clan observing the conduct of the discussions, there is no place to hide. Transparency is assured to a degree unimagined in litigation.¹⁰⁷

3. Authority Versus Power

Litigation looks to the courts and administrative agencies to mandate certain behavior through varying degrees of compulsion. Compliance is compelled through force of law. The long-term success of mediated agreements, on the other hand, characteristically rests upon parties' voluntary compliance because they have contributed to fashioning the terms. Willing buy-in equals a willing implementation, with less disruption to relationships.

This widely accepted construction of the benefits of ADR operates from a premise that usually goes unexamined: namely, the difference between resolutions resulting from an exercise of authority and resolutions emanating from an invocation of power. "Authority" as used here refers to sovereignty, dominance, or command; control given externally through outside, governmental structures. "Power,"

107. VICTOR C. UCHENDU, *THE IGBO OF SOUTHEAST NIGERIA* 17 (Holt, Rhinehart & Winston, 1965) (discussing that the concept of transparency had currency among the tribes of this region long before the term came in Western vogue. In the Niger Delta, people are expected to live "transparent lives"; leaders are expected to emphasize "transparent orientation." At least among the Igbo, "secretive processes are held in contempt as not being properly socialized." This also means that since the "concept of the good life" is "so built on the transparency theme ... the individual dreads any form of loss of face. The major deterrent to crime is not guilt-feeling but shame-feeling").

by contrast, refers to willing compliance given by the people. It is the use of influence which derives from internal social and religious structures.¹⁰⁸ Persons and institutions holding such power do so by dint of the respect they have earned in the conduct of their lives or by mastering various levels of traditional wisdom.

Thus, the Anglo-Nigerian system of administrative and civil justice relies upon lawyers to manipulate the authority of the justice of the peace, the civil courts, and the administrative courts. These entities enforce their authority through the issuance of orders, decrees, injunctions, summonses, writs, liens, levies and garnishments.

The House System of the Niger Delta relies upon the king/chief of the family, compound, or community and the tribal council. But their power is circumscribed. The people of the Niger Delta traditionally handle their affairs in a manner reminiscent of the Greek City-State democracies.¹⁰⁹ Hence, resolutions reached through the House System are reached not by fiat but through consultation. Compliance is obtained through respect for the traditional ways. Non-compliance is punished by shunning, ostracization, and loss of face.¹¹⁰

108. I thank Sue Darst Tate, Director of the Alternative Dispute Resolution System, Administrative Office of the Courts, Oklahoma Supreme Court for this insight. It proved an extremely helpful construct in the Nigerian Mediation Exchange workshop of June 2002.

109. This apt analogy was repeated in Michael S. O. Olisa, *Political Culture and Political Stability in Traditional Igbo Society*, 3 THE CONCH 16 (September 1971):

The mechanism of the political system of the Igbo is based on ideas reminiscent of the great statement of Edward III of Britain in summoning the First Parliament, namely that "What touches all must be approved by all." Traditional Igbo, on account of this, is thus spoken of as practicing primary democracy similar to that of the classical Greek states. At all levels of society every adult male is entitled to direct participation in the task of political decision making.

Id. at 25.

110. *Id.* at 27. ("Because it touches the very roots of communal life without which the individual or the group finds no meaning in life, ostracism is ... reserved as a weapon of last resort in the process of group coercion." *Id.*). The most famous illustrations of these processes in action can be found in the classic novel by CHINUA ACHEBE, *THINGS FALL APART* (Anchor Books 1994) (1959), which depicts several historically accurate scenes of indigenous justice at work: (1) the resolution of a family dispute involving spousal abuse and a request for return of the bride-

The fully developed mechanisms of social control reach still farther and prove vital to the establishment and maintenance of a lasting resolution. Families and communities organize themselves around additional circles of influence. These groupings might include: (1) titled elders; (2) lineage groups which could be small, at the sub-village level, or include the village group as a whole; (3) kindred meetings; (4) family meetings; or (5) adult women of the kindred known as the Umuada or Umuokpu.¹¹¹

Additional “pressure points” can also stimulate resolution through consultation with the disputants, as age grades might become involved. These are gender-segregated groupings of persons dedicated to provide mutual support and guidance throughout the various passages of maturity.¹¹² Traditional religion continues to play a meaningful, albeit less publicly acknowledged, role. Thus, the priesthood and medicine men may need to be consulted, if only to allay potential rivalries between the religious and social institutions. Women’s societies, fraternities, and secret societies can guide the conduct of their members through direct and indirect means, by

price; wherein the *egwugwu* (mystical council of elders) arbitrate between two families, determining “It is not bravery when a man fights with a woman” and directs reconciliation. *Id.* at 87-94; and (2) when the protagonist Okonkwo inadvertently kills a boy in a funeral dance, and has thereby committed his third abomination against the sacred harmony of the village, he is exiled to his mother’s village. *Id.* at 120-125. The reader interested in a fuller historical and social analysis of this landmark work should consider KALU OGBAA, UNDERSTANDING THINGS FALL APART: A STUDENT CASEBOOK TO ISSUES, SOURCES AND HISTORICAL DOCUMENTS (Greenwood Press 1999).

111. See OLISA *supra* note 110 at 23-25. (These descriptions are summarized from various sources, written and unwritten).

112. One picture of age-grades among men suggests a glimpse into these often secret societies. Names are chosen that carry the tone of their self-image; e.g., *Egbara*, “the name of a prickly seed” – suggesting that “if any one interferes with the members of the grade he will get scratched.” A female age-grade might be named, for example, “The Basins” which translates as “The discreet ones.” C.K. MEEK, LAW AND AUTHORITY IN A NIGERIAN TRIBE: A STUDY IN INDIRECT RULE 197 (Oxford Univ. Press, 1937). The age-grades serve the important function of “guarding public morality,” beginning with its own members. “It took common action against any of its members who committed an offence or behaved in an unseemly manner. Thus, if any one had committed a theft, he would be called upon by his grade to restore the stolen property and pay to the grade a fine of one goat.” *Id.* at 198.

serving as arbiter to a dispute or downgrading the status of members within the association.

Among all these circles of influence, Umuada or Umuokpu are probably the most powerful. They hold the ultimate social sanction against one who fails to conform to the community's sense of what is ethically appropriate conduct in resolving a dispute. The profoundly critical duty of burying family members rests with the women of the kindred. Thus, if a person has failed to live up to the conduct expected by the Umuada or Umuokpu, the women may refuse burial rites. The transgressor would be compelled to handle all matters directly themselves, without assistance from anyone in the village to wash the body, obtain a coffin, prepare a burial ground, carry the coffin, and provide an appropriate series of memorials (replete with food for dozens, or even hundreds of people).¹¹³

Since there is no funeral industry in rural Nigeria – and very little in the urban areas – this sanction cannot be avoided by merely paying for the services to be provided commercially. The power of the Umuada/Umuokpu is thereby rendered inescapable. This leads to another paradox: that in a clearly patriarchal system, the women sometimes hold ultimate power, enabling them to resolve disputes the men have found intractable.¹¹⁴

B. The FIDA Peacemaking Model

The FIDA peacemaking model takes a salient step beyond most ADR programs. Instead of focusing solely on litigants, lawyers and judges, FIDA has broken through class lines to incorporate village women as the centerpiece of their mediation efforts. Some 600 village peacemakers have been trained since 2000 in a style of mediation adapted from the Oklahoma Supreme Court's facilitative model known as Early Settlement. The "standard" ADR trainees have not been neglected. Approximately 70 lawyers, administrators,

113. See, OLISA, *supra* note 110, at 24. Again, I must express my profound gratitude to our Nigerian delegation for unpacking the full meaning of a refusal of burial rites. In so many written sources it is described as a withholding of "mourners," which for most Westerners does not carry the weight that this more detailed description conveys.

114. *Id.* at 25.

government ministers and jurists have also taken part in FIDA peacemaking workshops.

At the request of FIDA Rivers State, the author consulted with FIDA pro bono to identify appropriate applications of this facilitative approach for the Niger Delta, using the FIDA vision of bridging civil and traditional venues. The author had already modified the Oklahoma Supreme Court's standard model to be more culturally responsive to the preferences and communication styles of traditionally-oriented Native Americans. Because Oklahoma's large Native population is highly dispersed, urban, and usually inter-married, the Oklahoma tribal peacemaking model is not tied to the traditions of any specific Native American nation. Instead, it emphasizes the principles of communal harmony and quality of life shared by all, irrespective of tribe.

Similarly, the FIDA peacemaking model was tailored around the core values shared by virtually all persons in the Niger Delta, without reference to any single ethnic group or community. Maintaining this common ground was central to its success, for in the Delta, tribal issues lie at the base of most conflicts, no matter how these conflicts might appear on the surface. FIDA considered it crucial to have a model that could speak in a unifying voice to all participants. They did not want the mediation model itself to become an unnecessary source of further struggle over whose values or style should be employed.

The generic Early Settlement model was crafted and has been uniformly used throughout Oklahoma for implementation of the Court's ethics rules for mediators, embodied in the Code of Professional Conduct. The Court places protection of party self-determination at the heart of the mediation process. Affirmative steps are required to assure mediators are in fact, and give every appearance of being neutral and unbiased.¹¹⁵ Typically, the Early Settlement mediator is a stranger to the parties and to the conflict.¹¹⁶

115. ADRS BASIC TRAINING MANUAL 9-47; 9-48 (February, 1994) (displaying the forms used to assess mediator performance. One category is empathy, defined as "conspicuous awareness and consideration of the needs of others." At the high end, evaluating a mediator-candidate as performing very well, the mediator "avoided appearance of bias or favoritism for or against either party." At the low end, evaluating a mediator-candidate as performing poorly, the mediator

While FIDA village peacemakers will likely know many of the disputants in advance, they are not to be direct stakeholders. Indeed, the village peacemaker system was designed to ensure that other trained FIDA peacemakers would be at hand to assist, to guide, even to assume responsibility for interventions where any one person might appear to have a conflict of interest. Another aspect of FIDA peacemaking contributes to its reputation for integrity: the village peacemakers serve without remuneration.

FIDA peacemakers have earned a growing reputation not only for personal integrity, but also for unwavering respect of others. FIDA peacemaking highlights the dignity of every person, regardless of social status. This feature of the Oklahoma Court model proved a valuable adaptation. Further, the Oklahoma model operates in a manner compatible with the decorum expected in the Niger Delta. Whether standard Early Settlement mediation or tribal peacemaking, the process is less than formal, yet never casual. The stylized communication allows the mediator to restate and reframe statements in ways that allow the speaker to save face, while still acknowledging emotion and the vulnerability such revelations can entail.

would have: asked misleading, loaded or unfair questions exhibiting bias, engaged in oppressive questioning to the disadvantage of one of the parties, threatened more than persuaded, came into the discussion abruptly to challenge others [or] disregarded others' warnings. *Id.*).

116. CODE OF PROF'L CONDUCT FOR MEDIATORS (2001).

B.2. The responsibility of the mediator to the mediation process. . . . b. When it is improper to be a mediator . . . (3) The mediator who has biases or prejudices either for or against one of the parties or the issues in dispute shall not accept the role of mediator. c. Mediator's impartiality. (1) The mediator shall maintain impartiality at all times. (2) The mediator does not represent a party of mediation in court concerning the issues which were the subject of mediation. ... (4) The responsibility of the mediator to the sponsoring agency and to the profession. a. Mediator's role during mediation. ... (3) The mediator shall work within the policy of the sponsoring agency, and shall avoid the appearance of impropriety. (4) The mediator shall not use the third-party role for personal gain or advantage. ... (6) The mediator shall not voluntarily incur obligations or perform professional services that might interfere with the ability to act as an impartial mediator.

12 O.S. § 1801 *et seq.* Appendix A.

C. Informal + Flexible + Transparent = Lasting, Public Resolution

The FIDA peacemaking model brings to the resolution of public disputes an enlarged vision. Rather than rely on the rigid, rote systems of formal adjudication – be it civil or administrative court – narrowing the parties to the least number possible, the FIDA approach reaches out to include as many persons as feasible in the resolution of problems that “touch all.” The FIDA model recognizes the severe limitations of governmental, external authority to oversee a lasting, voluntary settlement of a community dispute. Understanding these limitations, FIDA looks to the strengths of viable, traditional social groupings to gain their active participation in crafting the resolution.

IV. THE NEXT GENERATION OF ADMINISTRATIVE ADR: BRIDGING
CULTURES WITHIN AMERICA

This paper has worked from the premise that “culture” in America connotes more than ethnicity alone. Rather, culture embraces the world view of an industry, of an agency and of lay members of the public themselves. Amongst these disparate and disputing cultures, the ALJ seeks to bring common understanding; not necessarily agreement, but at least a clearly enunciated result that makes sense. The task becomes more challenging each year as the cases and gaps in understanding become more intricate, both substantively and procedurally.

As cautioned in Part II of this paper, the institutions of administrative ADR may be replicating themselves rapidly; perhaps too much so. One must question whether this growth has relied upon repeating more or less the same template in agency after agency. While this may be an excellent way to introduce the basic concept of ADR – typically, mediation – it may not be the best way to assure continued innovation. The creativity which Congress had sought under ADRA, with the purposefully flexible definitions of ADR and statutory protections for adjudicators to experiment, may soon

become if not dead letter, then at best, forgotten letter. One expanded hypothetical has been selected to synthesize the lessons identified.

A. A First-Generation Agency ADR Proceeding - Ignoring the Community

1. Resolutions Achieved Through the Use of Authority

Let us revisit the purpose of ADR. According to ADRA at Section 556(c), an agency should not employ ADR when an “authoritative proceeding” is required, or when there must be “authoritative precedent.” Note ADRA’s use of the term “authority.” Through the lens of the Niger Delta experience, this looks different than before. We see in a fresh light that ADR does not truly suit matters which require external, government-given controls if the resolution is to work. Instead, we can now invert the analysis and see the promise that ADR could hold. Namely, ADR could be ideal in situations where persons or groups of persons with genuine power in a community can participate in and support the implementation of a resolution. More clearly, this refers to internal, people-given power similar to that which has been recognized in the indigenous social structures of the Niger Delta.

How could this apply in America? We might revisit any one of the list of administrative agencies performing ADR currently, as summarized in Part II. Let us choose, though, the U.S. Department of Agriculture and its farmer-lender mediations. Although these mediations typically do not entail the ethnic, tribal or racial delineations typical of the Niger Delta, they do arise within communities that are sufficiently small, cohesive and interdependent that they could provide a meaningful parallel.

Let us elaborate upon an example shared by the director of the USDA’s Agricultural Mediation Program:

A farmer took out a series of mortgage loans from the USDA. At the time the loans were extended, the farmer’s assets provided sufficient collateral. After three years of drought, the value of his crops and his land plummeted. He has defaulted on his loans. The farmer requested a mediation with the Farm Service Agency (FSA)

under the USDA Certified State Agricultural Mediation Program.¹¹⁷ The farmer provided a substantial amount of financial information to the financial analyst at the mediation program, on the understanding that all mediation documents were not to be used for any other legal action.¹¹⁸ The farmer provided detailed information with the assurance from the mediator that his statements and documentation would be kept confidential.¹¹⁹ Some time after the mediation has been completed, the USDA Office of the Inspector General (OIG) requested copies of certain documents provided by the farmer in the mediation, as part of the loan work-out. The OIG suspected the loan work-out may have involved some element of fraud involving the mortgage loan repayment, funded through the USDA.

This scenario describes cases that resulted in major litigation, yet still have not resulted in definitive answers. As a matter of law, the question is: Can the OIG obtain these documents? The answers differ. In *Breakey v. United States Dept. of Agriculture*, the answer was “no.”¹²⁰ Mere “official curiosity” does not provide sufficient grounds for the agency to obtain access to protected documents.¹²¹ In *re Grand Jury Proceedings*¹²² reached the opposite result.¹²³

2. The Hypothetical Aftermath

Needless to say, the results of the mediation and its aftermath have been unfavorable for all involved. We shall extrapolate beyond the case as presented, beyond the time period of the appellate briefs,

117. 7 U.S.C. § 5101(1)(A) (2000).

118. *Id.*

119. 7 U.S.C. § 5101(3)(D) (2000).

120. *Breakey v. United States Dept. of Agriculture*, 836 F. Supp. 422 (E.D. Mich. 1993).

121. *Id.*

122. *In re Grand Jury Proceedings*, 148 F.3d 487 (5th Cir. 1998).

123. This scenario and summary were adapted from “United States Department of Agriculture Farm Service Agency Agricultural Mediation Program” by Chester A. Bailey, USDA Agricultural Mediation Program, and “No Fear? Confidentiality Day-to-Day in Federal Dispute Resolution” by Charles Pou, Jr., former director of the dispute resolution program of the Administrative Conference of the United States and co-author of the Administrative Dispute Resolution Act, both in the ABA Federal ADR Desk Book (2002).

to see a network of people in disarray. The farmer eventually lost his farm. The lender, who used to be a family friend, and the farmer no longer speak. Because of the tension between them, their families no longer attend the same church. Their breach has begun to unravel the small congregation.

The children of the farmer and lender, who attend the same school, are no longer friends; and their rift has filtered through their classmates just as surely as it has in the church. Various members of the small town perceive the lender as a “cold-hearted, money-grubber;” others perceive the farmer as a “dead beat.” Grumblings begin to echo that for each man these character flaws were generational; “after all, his daddy was like that, too.”

Unfortunately, one can extrapolate even farther and use a story right from the American Midwest in the 1980s as farm land prices collapsed. The psychological and emotional strain on farmers and lenders alike became unbearable in many rural communities. Domestic violence escalated. All too frequently, the strain literally exploded as farmers resolved their dilemma in a most desperate fashion: by shooting the lender, their family and themselves.

It was in recognition of this dire human toll that the USDA had originally begun the farmer-lender mediation program. Yet, it seems that over time it, like so many other ADR innovations, risks losing its expansive vision. Its mediations risk becoming routine, rigid, with few signs of its origins in concern for the family and community life of rural America.

Indeed, the hypothetical aftermath described here illustrates circles of expanding relationships that have been disrupted by the poor outcome of the farmer-lender mediation. How much more preferable it would have been to foresee these circles of social relationships and work with them in a positive way.

B. A Next Generation Agency ADR Proceeding - Honoring the Community

How could that expanded vision of the early USDA mediation program be restored? Let us re-do the farmer-lender mediation along the lines of a FIDA peacemaking, adapted to American circumstances. Return to the legal issue which gave rise to the request for the ostensibly confidential documents to be provided to

OIG: Had fraud been committed? From one perspective: Did the farmer fully disclose all assets that he was required to? From another perspective: Had the lender somehow betrayed the farmer by indicating to the USDA that there had been less than full disclosure of assets?

Once more we are compelled to deal with the bedrock issue of trust, and the path for achieving it: transparency. The more open and accessible the process is, the more readily participants will trust each other and the outcome. How could the mediation have been made more user-friendly in the ways that ultimately matter most?

1. First contact with the administrative process

In FIDA peacemaking, the first contact a disputant has with the administrative process may be the village peacemaker, not a government official or employee. Moreover, the village peacemakers are women known to the people involved, although the peacemakers are not stakeholders. They come with innate credibility because of their typically long-standing relationship with the disputants. They have earned respect by dint of their character.

The USDA has done an excellent job at attempting to put in place financial planners/ counselors who assist farmers in preparing an appropriate response to the foreclosure action. However well-meaning these counselors may be, they typically are not persons with whom the farmer has a prior, personal relationship. The counselors are paid by the government and the wary farmer perceives them as representing the government's interests, not his own.

Consider the difference in having the first contact be not a financial planner or counselor but a member of a local social organization with which the farmer has an already established relationship. The choices could range from the Farm Bureau to members of Kiwanis, to parents of the local FFA chapter. These trained volunteers would not replace the USDA technical support staff rendering financial planning and counseling services. They would, however, be an initial contact that could more effectively, sensitively bridge the gap between lay person and government agency, so the farmer has a clearer understanding of the overall process, options and realistic expectations.

As much as anything else, the role of such trained volunteers would be to listen fully to the fears and frustrations of the farmer, using active listening techniques of restating, reflecting and reframing. For this intervention authority is not necessary; only the power of informal social support networks.

In addition to helping the farmer allay some of the initial apprehension that derives solely from being presented with a strange and formidable undertaking, the peacemaker-style intervention can help parties think beyond their stated positions to know their underlying interests. In this expanded, non-directive exploration of their situation, the farmer can re-evaluate the strengths and weaknesses of his situation; consider new options; and prepare to entertain novel suggestions from the lender.

Finally, the peacemaker-style intervener can help all participants think about the networks of social support within their community that could facilitate and support the crafting of a workable resolution.

2. Circles of Influence

When the ill-feelings between the farmer and lender began to spill over into the church and school, all could see the circles of influence within which they operated. The fabric of the town began to unravel because for so many persons, the matter of whether the farmer kept his farm, and how he was treated in the foreclosure process touched them. Perhaps they saw it as a projection of where they, themselves, might be in only a few more months. Perhaps they saw it as a reflection of where they had been a few years ago. Perhaps it represents for them the loss of a way of life for their family, and especially for their adult children. "What touches all must be approved by all" – if not directly, then at least indirectly.

Consider what persons or associations were touched by, and could potentially have influenced, the farmer's and the lender's crisis. Within their church, the Churchmen's Association might have played a conciliatory role. Might we even go so far as to suggest that if there were concerns about the degree of disclosure of assets, perhaps a respected member of their men's group could have been invited to observe the discussions? Or, even to participate?

This suggestion calls for a level of openness and literal transparency that shocks the American conscience. At any rate, it

runs counter to the contemporary, urban mind-set which privileges privacy, isolation and autonomy above community. However, these may not be the shared values of many rural towns in America. If we are to keep ADR flexible and adaptable to meet changing circumstances wherever where it is applied, we also need to permit waiver of procedural protections that would bar such innovations.

3. Supportive Implementation, Not Compulsory Enforcement

Finally, we turn to the families, especially the children of the farmer and lender. Again, the original vision of the USDA agricultural mediation program was to provide a mechanism for foreclosure that would be less onerous than litigation. The mediation program could permit a dignified end to a farmer's dream. The reduction in shame and rage should, ideally, reduce or even eliminate the fracturing of friendships within small farming communities.

One can readily imagine the taunting between children when one family has slid into bankruptcy and another family appears to have pushed them under. Granted, this is not necessarily the reality. But it may well be the perception as held by young people, overhearing the conversations of their elders. How might this budding rift be addressed?

Whereas in most urban areas one might readily suggest counseling or therapy, those services typically are not available in rural areas. Or, if present, such services may be shunned, being seen as embarrassing admissions of weakness. Where could the family members, especially the children, find circles of support? How might those circles indirectly raise the level of trust between the farmer and lender?

This may be an area where the Parent Teachers Association at school, the Order of the Eastern Star, or the Churchwomen's Association could have played a role. Children are unlikely to act out their hostilities against each other in the presence of their parents. But, they might engage in negative behavior within earshot of other adults.

Consider the impact of having engaged such a group in consultations about how these matters should be handled in front of

the children: What are appropriate, acceptable words to describe the situation? What values does the community want to convey?

In many farming towns, one still finds a traditional sense of community-wide responsibility for the behavior of children; unlike in urban areas where people remain strangers to each other. Thus, the women could be charged with watchful, compassionate intervention if and when they observe strains between the children concerning the foreclosure.

C. Further Applications

This expanded concept of ADR need not be limited solely to small communities in rural areas. Even in larger, urban settings one readily finds communities of coherent interests and values. There may be, nevertheless, an ever-present gap in communication between the culture of those communities and any given administrative agency.

The classic situations involve claims of discrimination in employment or in contracting. In closing, let us consider another application of the FIDA model, as described below:

In a dispute with the General Services Administration, might we include a minority business trade association to assist in articulating the standards of expected conduct for government suppliers? Would a minority supplier be more ready to hear under these circumstances than if it came from the government side alone – since the ALJ or mediator would likely be perceived as representatives of the government? The trade association could continue to consult with the supplier to ensure efficient, ethical compliance with standards.

In a Merit Protection Commission dispute concerning appropriate work place conduct when a Native American employee is ill, might we include a respected member from one of the complainant's own tribal dance (religious) groups to discuss with all parties differences in cultural values and etiquette concerning illness? By involving an additional community resource in the problem-solving process the resolution may offer improved assurances of compliance.

CONCLUSION

The administrative judge has led the way in integrating the sometimes conflicting cultural expectations which collide in agency adjudications. We have learned much in America about how to make the formal adjudicatory process accessible to most lay persons. Regrettably, adjudications are quickly becoming nearly as complex and cumbersome as the civil court litigations they were designed to replace. We have turned enthusiastically to ADR as a solution, a way to return the informal adjudicatory process to something flexible and human. Yet, soon, ADR may also become ossified, with increasingly routinized and rigid concepts of mediation.

This paper has presented a look at mediation from another cultural perspective, as developed in the Niger Delta. While it would be impossible and inadvisable to attempt to transplant the FIDA peacemaking model intact, many valuable principles can, nevertheless, refresh the practice of ADR in our administrative system.

