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Institutionalizing Mediation: The Role of Lawyers and Bar Associations[1]

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In discussions about mediation, I find that the usual focus is upon on the process-related issues, such as those relating to power imbalances, confidentiality, and, of course, the on-going debate over "real" mediation – usually couched as the "facilitative v. evaluative" styles. As important as these issues are, I find myself coming back to a more basic question: How do we get parties to the table? While pondering that most basic of questions, I'm also fascinated and challenged in visioning the comfortable fit between mediation and one the most basic institution of our society, our government.

For all the talk about the user-friendliness of the process and the unquestioned rise in popularity of mediation, I believe that those of us who would like to see mediation used more widely need to think locally and concretely if our dreams are to become reality. Experience has taught us, I believe, that the availability of well-trained proficient mediators does not necessarily lead to user acceptance. There are, no doubt, a litany of factors that lead to the conclusion that "If you build it, they will not necessarily come." Let me give one example:

Robert Benjamin, in a recent article in MEDIATION QUARTERLY,[2] suggests that "there is a deeply ingrained cultural resistance to negotiation and mediation." He theorizes that the sources of this resistance "can be traced to our moral and religious teachings and to the theological practices that underlie our culture." As fascinated as I am by this thesis and as drawn as I am to a discussion about cultural and religious norms, I will resist this temptation and proceed to discuss the practical and mundane. Assuming that we all share some interest in promoting the use of mediation, how might that be accomplished?

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1. [Editor's note: the following speech was presented before the Joint Program of Sections on Alternative Dispute Resolution and Donative Transfers, Fiduciaries and Estate Planning in Washington, D.C., on January 7, 2000. The theme of the panel discussion: "Using Mediation to Resolve Probate Disputes."]

2. See *generally*, Robert D. Benjamin, *Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts, Mediation Q., Spring 1998.*

As I begin, I have some phrases that suggest the kinds of topics I'm interested in talking about today: creating a structure for mediation [otherwise put, "building a house" for mediation]; providing incentives and opportunities within existing structures for mediation [otherwise put, "creating a pipeline"]; and assuring accessability to mediation [otherwise put, "how is mediation made available to all segments of society"].

In offering some thoughts on these topics, I draw upon my own experiences as a law professor who has taught both mediation and trusts and estates, but more importantly, my experiences as a volunteer within the community and as an active member of the Nebraska State Bar Association.

If there is one role that law professors are supremely qualified to perform it is that of being the educator. When the ADR movement was in its infancy, there was rampant ignorance and widespread confusion whenever the term "mediation" was mentioned. My experience is that one should never assume, in conversing with lawyers and judges, that the process of mediation is well understood. There are all kinds of opportunities that a law professor has, in working with and through the bar association, to educate the legal community. When the Nebraska State Bar Association held its first bench/bar conference over ten years ago, my mentor and friend Kathleen Severens and I were part of the proceedings. Our role, as we see saw it, was to engage the litigators in a discussion as to how the mediation process might assist the parties. We wanted the bar leaders to know that we respected the role of judges, the litigation bar, and the adjudicative process. But we also wanted them to know that the "one size fits all" approach of litigation had, as Len Riskin so elegantly put it, "a power all out of proportion to its utility." While making our points we tried to use a mediation technique: we tried to acknowledge their feelings of fear and insecurity and attempted to explore WHY our audience might be feeling threatened by mediation. In any dialogue with lawyers and judges you have that opportunity to do what you do best: teach.

In many bar associations there are official committees that are devoted to the topic of Alternative Dispute Resolution. If you believe, as do I, that the bar association can and should play a significant role in the institutionalization of mediation, then the ADR committee of the bar is the logical place to begin. It is probable that the members of that committee are least sympathetic to, if not wholly supportive of, efforts to increase the use of mediation. You need to have a nucleus of persons within the bar to effect change and if those persons' talents and energies are focused at the level of an official committee, the chances of success are enhanced..

In Nebraska, the ADR committee of the Nebraska State Bar Association provided the opportunity for a group of energetic and creative thinkers to plan a strategy for involving the state government in the promotion of mediation.

Under the leadership of Kathleen Severens, the ADR Committee wrote proposed legislation that would create an Office of Dispute Resolution within the court system. This Office would encourage the creation of community-based dispute resolution centers by making grants to those non-profit entities that would agree to basic structural and performance standards. The community dispute resolution centers would be free-standing entities that would provide mediation services to the public utilizing trained volunteers. The establishment of this office was a landmark step; it was a comfortable blend of state standards and local control. In order for this legislation to pass unanimously (which it did), extensive networking and grass roots lobbying was employed. Law professors are excellent resources for doing this type of activity: our schedules are generally more flexible than most professionals and we are viewed with credibility by the public by virtue of our status.

The approach of Nebraska, as well as that of some of the other states, has been to enact comprehensive statutes that have the effect, in varying degrees, of "regulating" or "encouraging" mediation. In some states there are statutes that are subject specific, such as the so-called "farm mediation" statutes. From state to state the interest group that has been active in the promotion of such legislation is usually clearly identifiable. It is usually not difficult to associate oneself with the interest group in question and become a part of group that is institutionalizing mediation by way of legislation.

Earlier today, the AALS Section on Alternative Dispute Resolution sponsored a program on "court-sponsored" ADR programs. Many of you are probably aware that the "institutionalization" of mediation in many jurisdictions has come about by court rule. In some states, the supreme court has taken the initiative by establishing supreme court committees on alternative dispute resolution. Once again law professors are uniquely situated to provide expertise and, perhaps, practical experience.

If you have any interest at all in becoming a community or bar leader in promoting mediation, I would strongly urge you to take a training course in mediation. It may be that your training experience leaves you with the firmly held conclusion that you do not have the skills to be an effective mediator. Conversely, you may find that you are one of those naturally gifted, facilitative persons for whom the process is virtually second nature. If you're like me and like a lot of others I have met, you probably fit somewhere in the middle: You have the desire and skills and all you need is practice, practice, practice. Learning new practical skills can be tremendously insightful and self-satisfying, especially when you realize that the skills you are learning are

LIFE skills, not just lawyering skills. If you go down the road of being a trained mediator, you can participate in other educational activities within the burgeoning world of mediation training. Within my own state, I have been privileged to volunteer my time as a coach in numerous mediation trainings. I have also volunteered as a mediator in small claims court. In addition, I have taken every advanced level mediation training to enhance my knowledge and skills. I've had the opportunity to co-mediate three cases referred by the federal district court.

It is enormously beneficial for those who are encouraging the use of mediation to be able to speak from first hand knowledge. If you have had experience as a mediator and have had the thrill of seeing the mediation process work well, you enhance your credibility as a leader in the field. In this field, like others, experience is the best teacher.

I have spoken of the law professor's role in "institutionalizing" mediation and how law professors can participate in the process of building design systems that create an "infrastructure" for mediation. As one who has participated in the process of building an infrastructure, working arm and arm with lawyers and non-lawyers, I can assure you that the experience can be rewarding and self-satisfying. In this day and age when publications tend to be the sole measure of a law professor's contribution to the legal system, the contributions a law professor makes in law reform activities tend to be undervalued. The down-to-earth activities I have described are not usually highlighted in what a colleague of mine has described as "brag pieces" mailed out by law schools. But as one who has been privileged to work in building an infrastructure for mediation and has had the experience of being a mediator, I received intangible rewards and a satisfaction that law review authors rarely, if ever, experience: I made a positive, tangible contribution to making our society more peaceful. When we build that infrastructure and make mediation more readily available and work to improve the quality of mediation, we may never realize how great our impact has been and how many people we have helped. Working within a system as entrenched as the legal system is, it may require a lengthy and substantial commitment before efforts to change that system are realized. But if you believe as strongly as I do in mediation, you will commit yourself to do whatever it takes to make mediation more widely accepted and a comfortable fit with our adversarial legal culture. In thirty years of law teaching, I am proud of many of my professional activities, but volunteering my time to promote the utilization of mediation probably ranks first on my list of accomplishments.

The world of trusts and estates is changing before our eyes – the "multidiscipline practice" trend may radically change the traditional practice of the probate bar. There is one constant, however, besides change and that is con-

flict. That conflict is oftentimes lurking beneath the surface when a lawyer becomes involved in the estate planning process. All of the technical knowledge you may possess about the legal system and its rules is valuable and necessary. But, the estate planning lawyer is preeminently a counselor at law. In the strongest possible way I urge students to become aware of conflict management skills and I specifically recommend that they take advantage of learning more about what mediation has to offer. My message is the same to all of you, but I offer an additional challenge to all of you: Get involved in your state or local bar association and determine how you might build that house and how you might make sure that all have access to that house. The field of mediation is still very wide open and much still needs to be done at the structural level. You may find, as I did, that this activity is both meaningful and self-satisfying. Your participation and hard work CAN make a difference.