

4-15-1997

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L. Randolph Lowry

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Recommended Citation

L. Randolph Lowry *Alternative Dispute Resolution*, 24 Pepp. L. Rev. 3 (1997)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol24/iss3/7>

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But I was close to another case involving a client that I was not representing in that case but I had previously represented, just to give you an example, I think, of the impact of *BMW*. There was a case that went to trial in the Western District of Oklahoma on purely economic grounds. It had to do with tortious interference with contract. It was between some oil and gas operators and really had to do with access to a gathering system in western Oklahoma. There were antitrust violations that were alleged against my clients as well as the state courts. It went to trial in federal district court in Oklahoma City. The jury entered a compensatory damage award of \$235,000 and then a punitive award of \$30 million. This was two times bigger than any punitive damage award ever granted or ever to go before the Tenth Circuit Court of Appeals. It was by several times the largest punitive damages award ever to come out of the state of Oklahoma either in federal or state court. *Haslip* was first argued on appeal before the Tenth Circuit. The Tenth Circuit affirmed, and you can see the ratio: \$235,000 compensatories and \$30 million punitives. There was a petition for cert. that was taken by the Court at the same time *BMW* was taken. On the last day of the term, that case was taken, and therefore it was there when *BMW* was decided. It was one of about six cases that was remanded by the Supreme Court to the circuits in light of *BMW*.

What happened in that case is that the Tenth Circuit then heard this evidence again in light of *BMW* and granted a remittitur of \$30 million down to \$6 million.

I don't know whether that helps you or not, but that's what they did in that one day.

PART FOUR

Alternative Dispute Resolution

PROFESSOR L. RANDOLPH LOWRY

L. Randolph Lowry is founder and director of the Straus Institute for Dispute Resolution and an associate professor of law at Pepperdine University School of Law. Professor Lowry teaches mediation, negotiation, and dispute resolution courses and has published books titled Collaborative Negotiation and Conflict Management and Counseling.

Professor Lowry: Good afternoon to you all. I have a unique position in this day-long program on civil litigation reform. I am the last speaker

and so I have had the opportunity, while hearing other presentations, to continually rewrite what I might say.

I appreciate all of you who serve on the *Law Review* and who are responsible for this conference happening. You are to be congratulated. And I want you to recognize that while there is an excellent audience here today, your work is going to have a much, much broader impact. As you capture this particular moment, and as you publish, your work will touch many more in the legal profession. I want you to be proud of that and I commend you for it.

As we think about dispute resolution, the civil justice system, and the reality of bringing these two together, I would like to begin by having you think with me about the perspective of a client.

Often we think about judges and their role in managing the system. We think about lawyers and their role as advocates in the system. But I believe we need to remind ourselves of the role of clients in the system, how they might be looking at what we do professionally in the system that we have created and needs that they have that sometimes we respond to with great enthusiasm and expertise, and at other times respond to with less appreciation.

A number of years ago I received a call from the president of a California real estate company. He said, "I want you to come to my office, and I want to see if I can share with you what's going on and if you can help us in some way."

And so I drove to Century City and walked into his executive office and sat there at his conference table, and he began to describe to me his circumstance. He said, "I'm one of the largest real estate companies in the country. Each month we sell about \$500 million worth of real estate." He said, "Business is doing just fine. The economy is perking along. I can manage all of that." But then he said, "Here's the circumstance for which I need your help." He said, "I've looked at my litigation bill, and in the last four years it has gone from about \$600,000 a year to about \$6 million a year." He said, "I now recognize that there are one hundred lawsuits pending against me, most of which have very little merit, most of which we will resolve for very, very few dollars, but the cost of getting resolution is putting my business at risk. In fact, it's not the 1200 salespeople I have to keep focused. It's not the economy around us. And it's not the real estate sales management that I'm concerned about. The future of my business rests upon the resolution of my legal disputes!"

He then went on to share with me a little information about that circumstance: "The average lawsuit costs me \$140,000 in legal fees and the

average settlement is less than \$25,000. I'm in a terrible bind here, because I have to put five times as much into the case to get to the moment of settlement, knowing full well that most of the cases will go away for a relatively small amount of money. Yet, on the other hand, if I just stop paying the lawyers who defend me and I start paying people \$25,000 or \$30,000 every time they make a claim, I'll go bankrupt. What can you do to help me? What can you do to help me save my business?"

That is a valid perspective. The challenges that he faced were real. If he were here today he, as a client, would have some things to tell us. He would have some requests to make, and he would have some admonitions for those of us who conduct, control, and manage that system.

In response to that client's needs let me make just five observations—five observations that might take some of the more specific conversations we have had today and put them into a broader dialogue for this symposium.

Let me first suggest that *we need a vital and accessible litigation system*. You might ask, "Why is the Director of the Straus Institute for Dispute Resolution, why is someone who has focused his future and his career on the "alternative," suggesting that what we need is a vital and acceptable litigation system?" I believe we do. I think we need that litigation system for a variety of reasons, and frankly, the dispute resolution field in which I work depends upon that litigation system being in place.

In the fall I was in Montgomery, Alabama, as the keynote speaker at the first Alabama Conference on Dispute Resolution. It was an amazing moment as I sat in the auditorium and looked out on four hundred people who had gathered—lawyers and judges, legislators, and the Attorney General. The Governor was sitting next to me. Here was this moment when dispute resolution was about to take off in the state of Alabama, and here I thought back to a moment in time forty years before. I thought about Rosa Parks in Montgomery, Alabama, as she got on that bus on that particular day and decided she was not going to go to the back. Her making that particular decision, that particular day, made me think about how ironic it was that we in Alabama were talking about mediation because as a process it would not have helped her. Hers was a dispute that needed our litigation system. Hers was a conflict that some would contend set up the entire civil rights movement. She needed someone to say, "Here is a court, and we can argue this out, and when that judge makes a decision, it's going to change our society." We need the litigation system for such moments.

We also need the litigation system to define the law before we can apply it. A few months ago, I was in Idaho working on a wrongful termination case. It was very difficult to mediate the case because at that point in time the Idaho Supreme Court had not yet defined wrongful termination in the state. No one knew what the Supreme Court's attitude

might be about the particular issues. So, it was very hard to bring people together in the shadow of the law and resolve that particular dispute through a consensual process like mediation.

If we look at the court system, it is really the only system that provides injunctive relief. You can never get that kind of relief in my mediation process. For example, a contractor plows a field, ready to build houses, and uncovers an Indian graveyard, there is no room for mediation at that moment. There is no middle ground. You cannot say, "Well, we'll destroy half the cemetery but leave the other half intact." There is no place where we can find an acceptable compromise, and so we go to court and say, "Judge, help us immediately resolve this dispute."

In addition, there are times when people just are not ready for what we in dispute resolution offer. A number of months ago, I was called to a city with a rather large problem. They had a harbor, and the harbor was loaded with mud and debris so the boats could not sail. The parties to that case began to share with me that twenty or thirty years ago, when they built hundreds of homes on this harbor, the city had said it was not going to take responsibility for the dredging of the harbor knowing full well that the flood plain emptied into it. And yet now, a generation or two later, people look out their backyards, their sailboats are tipped on their sides, they cannot get them out to sea, and all of a sudden we have a problem. A \$100 million problem. I am there as a mediator, and I notice that people are getting along extremely well. I notice that people are very polite to each other. I notice that people are happy to participate in this process. The only problem is the people are \$100 million apart, and nobody is ready to give very much.

And so I did what mediators do not like to do—I suggested they sue each other. I said, "Let me leave you my card and you'll call me back in a few years. But I think right now what you ought to do is sue each other. You ought to go through some discovery and spend three or four million dollars on each side because this case isn't ripe to settle yet. It needs the litigation system and some of the reality that the litigation system brings to conflict."

We need a vital and accessible justice system. We need the litigation alternative, we need its shadow over all dispute resolution. And, even as one who is focused on the "alternative," I want to support what has society perceives as the norm.

But thinking about that, my second observation is this: *Really, litigation is the alternative.* During the day we have listened to fine lawyers as they have described, the management of their cases. As they talked,

they discussed those cases that went all the way to a jury, that had that jury decision, and that made law. They described *tremendous* results. But they did not tell you about most of their cases. Most of their cases never went that far. Somewhere along the line, most of their cases, even those of the best trial lawyers, get settled.

And so step back just a moment with me, and look not just at the justice system, but at our society for a moment. We could legitimately conclude that settlement is the norm, and that the alternative, the alternative form of dispute resolution, is the court system. All the studies done would suggest that when someone has a dispute, some legal right that might have been violated, most of the time they never pursue a resolution. And when they do pursue a remedy, most of the time they craft it as a "claim" and it is resolved. Only a small percentage of the time do disputes ever involve members of our profession. And only a small percentage of the time do we ever use the court system. And only a very, very small percentage of the time is a case finally resolved in that system.

So, that reporter who looked at this field and labeled it "alternative dispute resolution" did us a tremendous disservice. It is not the alternative. What we teach at the Straus Institute in the terms of negotiation and settlement is the norm. It is the norm as far as most of your practices. It is the norm as far as the numbers of claims, the numbers of disputes, in our society. What we really want to do is have a justice system that is healthy, that is well-funded, and that is capable of resolving conflicts in that forum. But we as a society have to recognize that this question about how to deal with our differences is really much, much larger.

I walk down the halls of the faculty offices every once in a while and I like to smile when I see a trial practice professor and ask that person how ADR is coming. And of course, my colleague looks back at me and tells me, "That's what you teach." And I say, "No, that's what *you* teach. I teach what people *usually* do to settle their cases!" You get the point. At least arguably settlement is the norm and litigation is the alternative.

The third observation I would make is that *the challenges facing our litigation system are very, very real*. The client who I talked about a few moments ago recognizes this. He sees the delay in Los Angeles courts. He recognizes the cost of processing the case. He realizes the limits on his remedies. And so he would be here saying, "Do all you can at the level of education, at the level of practice, at the level of the legislature. Do all you can to make this system work, because there are cases where I need to use it, and right now it's hard to even get to it."

Not very long ago a lawyer in Torrance, California, walked up to me after a speech at the local bar association. He said, "You want to know how I practice law in Los Angeles? I get a good case, and I start calling courthouses to see which one will take it. I call Long Beach, and if they

won't take it, they don't have enough time, I call Compton. If it doesn't work there, I call Van Nuys, and then downtown, and then to Pomona. As a civil litigator in Los Angeles, with the three strikes law and all the stuff that's going on in the criminal world, I have to search for a courtroom to hear my client's case."

The *Wall Street Journal* not long ago had an article about our dispute resolution system in its broadest sense. There was a quote from a car dealer in Atlanta, Georgia. Apparently he had sold a Corvette to someone, the buyer had brought the Corvette back, and now they had a legal dispute. After the dealer's years of processing that dispute, here was what the paper quoted him saying: "Lawyers want too much justice. I just want it over."

Those who know the system can empathize with that remark. The system sometimes brings about *too much* justice and a client says, "I just want it over."

There is an often-quoted statement by the chairman of IBM about the expense of the legal services he buys: "Every year I give my lawyers an unlimited budget and every year they exceed it." You get a sense of his frustration as well.

How about this case: There is a woman schoolteacher who is about sixty years old, who lives about one hundred miles from here. One day, as she is leaving her classroom and walking toward the cafeteria, she pauses to get a drink at a drinking fountain. All of a sudden, she slips on the concrete. As she slips, her face hits the drinking fountain—one of those round metal ones sticking out. She is moved to the hospital. The emergency room physicians handle this case as best they can and send her home, and she thinks she has been taken care of, until two or three weeks later there is a constant tingling in her face, like your foot or your hand when it goes to sleep. She notices on some days it is worse, and some days it is better.

She goes back to the same emergency room and says, "I'm not sure what's wrong, but I don't think it has been correctly treated." And so the physician reread the x-rays, looked at the charts once again, and then informed her of his new diagnosis. Apparently, she had broken a number of bones right under her eye and they "just missed it" the first time around.

They gave her a choice. "You can live with it the way it is for the rest of your life, or we can go in and try to fix those nerves and rebreak that bone and reset your face. We believe you might lose one eye in doing it."

So she looked for her options in this world of dispute resolution. She contacted someone who said, "The reality of today's world is you must sue them. You cannot get their attention unless you do that." Such a strategy was completely foreign to her. She could not imagine dealing with lawyers or litigation, but it was the only option based on the lack of any response from the medical center.

So she sued the hospital. Almost five years later, on the eve of that arbitration, after being involved in our litigation system for all of that five years, her case was settled and the check sent to her.

She called me up. She said, "Tell me, what do I do with the check?" And I said, "Well, Mom, do anything you want. Take a trip around the world." I said, "Mom, this is your lottery. As a schoolteacher, you never expected a check that big. Have a good time with it."

And she said, "It's not what I wanted."

I said, "What do you mean?"

She said, "Well, the money is fine, and they're trying to take care of this. But more than the money I wanted two other things and nobody ever paid attention to them."

She continued, "One, I wanted the assurance my doctor would continue to treat me, because I really do think the world of him. Of course, I haven't been able to speak to him for five years. And two, I wanted the assurance that this wouldn't happen to someone else."

That was what she wanted. So here is a system that takes a long time—five years—here is a system that takes tremendous cost, and here is a system that in spite of all the merits, is limited in the remedies it can provide. All it really can provide is a check. Sometimes that is sufficient. Sometimes it is not.

And so we come to dispute resolution. The simplest way to look at dispute resolution, I believe, is that ADR is really about choices. I do not understand why some members of my profession have been so reluctant to embrace it. All we are really doing in dispute resolution is saying there might be some more choices, those choices might help you in practicing law, and those choices might help your clients in getting disputes resolved. That is what the movement is about. Yet, we have been so threatened by it.

A key figure in a trial lawyers association summoned me to his office a few months ago. I walked into his office and he was absolutely furious. He said, "I've been to mediation twice. I hate this process. I'm going to tell my association to pass a motion against it."

I asked him why, and he said, "Well, I've been to mediation twice and neither time has the other side paid what I demanded."

I thought that was an interesting view of the process: go make a demand, and if the opposing side of the controversy pays it, the process is

acceptable. If the opposing side does not pay it, it must be bad." So I asked, "Why don't you just use another process?"

What we are really saying in this movement is that there are choices. And we are into the third generation of those choices now.

In colonial America, we really did not have a litigation system, but a mediation system. That lasted until the colonies started trading with each other. The litigation system then came into play, and for more than two hundred years it really has served us relatively well. But along about 1970 or so, we began to say, "You know, this system really only has two components. We either settle the case or we litigate the case. Maybe we could put some other things in between." And so, we began to think about this movement.

We looked to the labor field, and found the process of arbitration that worked there and we brought it into our civil justice system. It seemed to work pretty well in the context of small cases that could be resolved efficiently through a more informal form of adjudication. And we looked at the family law area and took the early success mediating family law issues through mediation and brought that process into the civil justice system. It seemed to work well. Particularly because it was responsive to the reality of ongoing relationships and allowed for more creativity than litigation.

We went through about ten years trying those processes generally and we began to say even those processes are not creative enough. So lawyers brought their creativity to the table and began to modify the processes a bit so they're particularly appropriate to particular disputes. Now we do not have just arbitration. We have nonbinding arbitration and binding arbitration. We have high-low arbitration and baseball arbitration. We have night baseball arbitration. In the mediation area there is no single mediation form but many. We have med-arb. We have "binding mediation." We have judicial settlement conferences. And the list goes on and on and on.

What we have really done in this third generation is to say that the creativity of lawyers, when focused on the *process*, can bring to us creativity that will enhance resolution. That is really what this movement is about.

So it seems to me that as lawyers we ought to say, "If we can expand the menu of opportunities doesn't that help in my practice, and doesn't that help my client? And, won't that have some impact on some of these difficulties with the civil justice system?" In the cases that other speakers discussed this morning, some of those cases need the courtroom. Some

of these we have talked about in the last few minutes need the courtroom. Yet, they cannot get there because we have hundreds, thousands, hundreds of thousands, or millions of other cases in the courtrooms that in fact could be resolved some other way. And so, we now think about choices, and the menu that is available. We think about what those choices might mean to a client.

Let me just illustrate with one telephone call we received at the Institute a number of months ago from the general counsel of a large aerospace company. He said, "Could you come down to the office? We have a case that we think needs some kind of help. We're not sure exactly what."

So I went down to his offices in Century City and we looked at the case. He said, "Here's the problem. The case that must be resolved comes from a federal statute that involves whistle-blowers—those who report to the federal government problems in the administration of federal contracts. It has to do with a defense contractor that manufactures some very, very technical equipment.

He indicated that the way the statute is written, even though the case had been in litigation for seven years, as the trial is approached, one of two things would happen: Either the company would win the case and pay absolutely nothing, or the company would lose the case and pay \$36 million. There was no possibility of anything in between.

He described his circumstance this way. "We feel strongly about our case. We believe in our side. But some of my corporate officers don't want to risk a \$36-million roll of the dice. What am I going to do?"

So we sat around his office that afternoon, and we worked with some lawyers on the other side and began to craft a process that was uniquely connected to the case. We wondered if we did not have any rules, and if we did not have any preconceived notions, whether we could just sit back and say, "Let's take this piece of legislation and let's craft the process that will be most effective in getting it resolved."

So, in throwing away those constraints, we begin to talk. We began to combine a number of things. We began to ask some questions. "Why does it have to be a ten-week trial, in federal court, that the jury will not understand anyway?" The only person that really understands this case is the federal judge. This led to, "What if the federal judge took off the robe and for this case was an arbitrator? What if instead of ten weeks of presentation—we realize this judge has been listening to this for seven years—why don't we just collapse that down into a couple of days?" Of course, in order to do that, we would have to diminish the use of the Federal Rules of Civil Procedure and the evidence code. We would have to throw out those things because we could not possibly present the case in two days with all of those constraints. "Why don't we see if we can just give each side four hours to present its case and that side could

present whoever it wants as witnesses during that four hours?" We could give each side a couple of hours of rebuttal and we'll just be done.

And they did. They presented thirteen witnesses in four hours. And the judge listened to the case. Ten days later, the decision was in and the case was over.

As you are in practice now, or as you are going to practice, your clients will look to you and appreciate that kind of creativity. Not with the substance of the case, not giving up an ounce of your advocacy, but saying maybe we could be more creative with the process. That will serve our system and the people who use it as well.

The last observation I would make is this: *The future will, and I believe should, emphasize the more collaborative dimension of dispute resolution.* We have on the adjudicatory side the litigation system, with the trial courts and the appellate courts. And we have over there, the sense that we present a case as advocates and somebody is going to decide it. And as far as I know, someone always does. Except in Japan. A Japanese lawyer said to me not long ago, "In Japan, there are a couple of cases in the Japanese Supreme Court that will never be decided because they can't figure out how to decide them and save face for everyone." Isn't that a unique moment to think about?

But in *our* system, we always get a decision. That is one of the certainties of the adjudicatory process. The future, however, is on the other side of the dispute resolution continuum. The future is where people will say, "We will take responsibility for the private ordering of our conflict, and we will appreciate your helping us do that with both your skills and your talents. We will appreciate the system, but we will try to do this privately and collaboratively and creatively ourselves."

Look at U.S. history. If you had a conflict in colonial America, at least one of the solutions was simply to move further west. If you read the history book, you get a sense of that—you became angry at your neighbor during those times, you would move to Pennsylvania and start your own town. And, after that, you would move farther west because the conflicts kept coming.

We have a unique vantage point here in Malibu, because we look down on a pier that extends out into the Pacific Ocean. The reality is we cannot move any farther west! So we have this tremendous experiment going on in Los Angeles where, all of a sudden, we must turn and try to figure out how to get along in a very multi-cultural, multi-ethnic society.

I do not believe the litigation system will be our answer to the challenge of getting along. It will be helpful. It will be there for the right

kinds of cases, but it will not be the answer for a society that needs to find a way to resolve its disputes. As an alternative we embrace the mediation process that says we do not have to be restricted to the issues presented. We can look at the total conflict that is at the origin of this dispute. We look at the mediation process and see a great efficiency. We look at the mediation process and see the fact that it is even possible for people to leave the process with a better relationship at the end than they had at the beginning. That does not happen in the court system. While we do not want to impose that process on every single dispute, I think we see potential there that can have a tremendous impact.

Yesterday, I was with Judge Barry Russell of the United States Bankruptcy Court here in Los Angeles. We helped the court put together a bankruptcy mediation program about a year ago. It has now sent 700 cases to that program. Mediation has resolved over 400 of them, and most of them in not more than a day. Do you think that federal judge is happy with this process?

I was talking with the vice president of claims for Farmers Insurance. We have done a project that resolved over 1800 cases. He said, "When we litigate these cases, it's five to six thousand dollars and six to nine months before we get them resolved." He went on to tell me that when they mediate the very same kind and size of cases, they save millions of dollars—not in what is paid to claimants but in what the process costs. Typically, he said, "It costs only \$385 and an hour and forty-two minutes before we get a resolution both parties agree with and walk away." As a business person, he recognizes a difference between adjudication and collaboration.

Well, what does all this mean? Let me in closing, suggest three things it might mean and have you think about these as you consider not only this academic moment where we consider the justice system, but as you think about your careers and your role in reforming and retooling the system for the next century.

First, the reform of our civil justice system cannot rest just on efforts to limit various aspects of it. It must rest to some degree on the creation of new opportunities. We are not going to reform the system by just limiting punitive damages. We are not going to reform the system enough by just limiting the fees lawyers charge. We are not going to reform the system by just trying to put rules into it. If we are going to reform it, we are going to have to look outside of it and be creative as well. Let's not just say, "Here are the limitations." Let's say, "Here are the creative opportunities, some of which may work, and some of which may not work as we experiment, but many of which will have a tremendous impact."

Second, reform of the civil justice system cannot solely focus on tinkering with or modifying the existing system or structure. It is not just

a matter of looking at how the courts work. It is a matter of looking at many other things: how lawyers are trained, how clients are educated, and how we can prevent or resolve, very early, claims that otherwise would become complex litigation. It really says we have to broadly define our work to reform it if we are going to do it well.

Third, and finally, the reform of the civil justice system cannot just come from political efforts. It cannot be the result of legislators who find that they have a bill and it has great popular support, so all of a sudden they pass it, doing this to the courts or this to the litigants, or this to the legal profession. Reform must come from experience. It must come from those moments when we try something and it in fact does work, and we determine it is viable.

In closing, let me go back to the real estate company I talked about at the very beginning. There was the president of the company, the company with a hundred pending lawsuits, a legal bill that had gone from \$600,000 to \$6 million a year. There was someone frustrated with the legal system who saw the future of his business at stake. We went to work. We saw it as a challenge, and we began to think about all the things that might be done.

Within two weeks, we had one of the most fascinating moments in my life. I called all six of his outside law firms together and said, "Instead of running away from you, I want to run to you. This is not just your client's problem. It's your problem because if your client isn't here, none of you will be able to represent it. How would you help solve your client's problem?" And they came up with a number of wonderful ideas, ideas they could have come up with a year or two before. But ideas that were generated to save their client and to save his company. Within six months we were able to help resolve half of the pending litigation.

Well, we reduced the legal bill by \$500,000 per quarter within the first year. We installed within that company a full-time mediator. His job continues to be to identify those cases that are really just disputes between people at first, to get to them very, very early. I received the annual report from the internal mediator last week and he reported that there were seventy-eight claims that he worked on during the year, and statistically most of them would have become litigated matters. Because of the mediation process, the early intervention, and what was done with clients, only eleven of those ever even involved a lawyer. The claims were for millions of dollars, yet, the total amount the company paid out on those files was less than \$32,000.

It seems to me that such results are responsive to the needs of that client. It seems to me that is the kind of reform in an institution that makes sense. It seems to me like that is an area of service you can extend to clients in the future.

Let me close with the statement we close with as we end almost every Straus Institute program anywhere in the country or anywhere in the world. I think it is a statement that really sets out a broader perspective of the entire conversation today.

Peace is not the absence of conflict; rather, peace is that state when we can deal with conflict effectively, efficiently, and respectfully.

We are not going to eliminate conflict—and thank goodness. Our careers depend on it! This is a growth industry, and that is okay for us. After all, we are lawyers! But the reality is we will ultimately be judged by how we resolve the conflicts of our clients. Will we do it efficiently? Will we do it effectively? And will we do it respectfully?