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Dispute Resolution In The Northwest

BRYAN M. JOHNSTON*

With an apology to television weather forecasters, it is often said that they make their predictions because they're paid to, not because they know what's coming. The business of predicting becomes easier when a party has some control over the possible outcomes. A prediction agreed upon by enough people with the power to influence the outcome could well become reality.

The alternative dispute resolution movement does not have a commonly shared prediction of where it is going. Its constituency, both individuals and institutions, begins at so many different places that it is difficult to find agreement on where it is going. The individuals involved range from community workers interested in empowering communities to better deal with conflict, to the professional labor arbitrator/grievance mediator interested in further studying his field in order to improve his abilities. Institutional motivation for participation in methods of alternative dispute resolution is generally based on the economic benefits associated with more party control over settlements; the speed, finality, and measure of damages; and the resultant docket clearing. Between these groups lie the lawyers, judges,

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Mr. Johnston holds a law degree from Loyola University of Chicago Law School, and an undergraduate degree from Northern Illinois University in De Kalb, Illinois. Prior to joining the Center's staff, Mr. Johnston was in private law practice in Salem for five years. He is originally from Chicago, Illinois, where he worked both as a public defender and as a VISTA (Volunteer In Service to America) attorney with the Legal Services Corporation. In 1983, Mr. Johnston was appointed a circuit court judge pro-tem by the Oregon Supreme Court.

Mr. Johnston also serves as an Associate Professor of Law at Willamette University College of Law. He currently teaches a new mandatory course for first year students entitled Introduction to Dispute Resolution. In years past, he has taught Evidence, Trial Practice, Criminal Law, and Advanced Criminal Procedure. He is involved in teaching, training, arbitrating, mediating, and other dispute resolution activities in the Northwest.

politicians, academicians, and disputants intent on creating converts to a "better way."

In an attempt to contribute to this discussion of the destination of alternative dispute resolution methods, this article offers several predictions. By offering a view of what the dispute resolution landscape might look like in 1997, how that configuration would affect the way lawyers practice law, what motivated its development, and what occurred to make it come about, I hope to offer a possible destination for the alternative dispute resolution movement. Having a clear picture of where one is going helps one select the easiest route.

Initially, I would like to point out that a destination attractive to one part of our country might seem like a step backward in another. This projection covers the northwestern states of Idaho, Washington, and Oregon, but even within those jurisdictions there would be differences in application in the year 1997 and, where appropriate, those are pointed out.

The year 1997 finds the courts more involved with alternative dispute resolution than ever before. The current office of the court administrator has grown to assume responsibility for administering all of the dispute resolution services in the jurisdiction. The same staff and resources that provided the forum for litigation now provide it for arbitration and negotiation as well. The office supplies the logistical support which allows for the voluntary resolution of disputes by negotiation, or involuntary resolution by arbitration or litigation. Parties still choose whether to invoke the system's involvement; but, once invoked, the courts can exercise their coercive power to ensure participation by all parties.

Support offered for negotiation takes several forms. One form is the maintenance of a panel of mediators. The administrator arranges the training of volunteers to serve as mediators for voluntarily submitted cases, and those civil and criminal cases referred by the administrator's office. These volunteers are generally closely associated with the community where the dispute arose. Likewise, paid mediators are also on the panel, to be dispatched at the direction of the administrator or by party request.

Another form of support given to negotiation is the active compiling of information important to local negotiations. Jury verdicts and awards, as well as sentencing decisions by the court, are readily available for use as measures in the marketplace. This data compilation service is designed to assist the parties by providing a backdrop of relevant, if not controlling, information.

The program also provides information on how other dispute resolution experts or factfinders view the specific facts of a case. The program organizes panel evaluations wherein a judge, a plaintiff's at-

torney, and a defense attorney may express their opinion on a case after listening to abbreviated presentations of it. Likewise, an advisory jury opinion can be obtained by submitting an abbreviated case to an actual jury drawn for this input purpose. In both procedures, the parties appear to offer their presentations and receive the results.

The negotiation process is further supported by the willingness and power of the court to compel participation. The rules of civil procedure in force in 1987 held that a party who obtained a smaller award at trial than was formally offered pre-trial suffered a penalty for taking the case to trial. That concept has been expanded by 1997 to require that, prior to going to trial, final resolution offers from all sides be made a part of the record. Some jurisdictions go so far as to additionally penalize a party who makes a pre-trial offer some measured distance from the award actually given. Most have limited themselves to the compelling of participation in such settlement efforts.

The final area of support for negotiations is the power of the court administrator to decide which process will be employed. Although always honoring requests joined in by all parties, the administrator has the authority to unilaterally order a dispute to mediation or any of the other processes. This power is not unchecked. In most jurisdictions, the parties are free to object to the process selected, or to the amount of time it takes, by bringing a motion before the presiding judge of that jurisdiction. The philosophy is uniform throughout the Northwest, and absent some special reason for dispensation, all parties must first proceed through resolution techniques deemed appropriate by the office of the court administrator.

Court-annexed arbitration is the second major change in the dispute resolution landscape of 1997. The program covers all three states. Although the court administrator has discretion to order any case through arbitration, legislatively established dollar limits more frequently determine which cases go to arbitration. Arbitration is mandatory in cases where the damage prayer is under \$125,000.00. Court review of the arbitration award is possible in each jurisdiction, but disincentives to that review vary between states. To avoid an economic penalty, the appealing party must better his position upon trial *de novo*.

Disputants may choose an arbitrator, or a panel of arbitrators, from a list maintained by the administrator's office. The list is broad, and includes nonlawyers as well as lawyers. Every arbitrator on the list has been certified by the state as having received training in the skills necessary to conduct dispute resolution, in addition to skills re-

lating to the arbitrator's individual field of expertise. Architects, physicians, and merchants, among others, supplement lawyers in providing these services.

An oft-repeated fear of the anti-alternative dispute resolution forces has been disproved by the past ten years: the accusation that the rise of these alternatives would substantially curtail the average lawyer's practice has proved inaccurate. The gate keeper function of the attorney is as significant as ever. There has been an increase in the number of cases filed, and the pro se segment has tended to confine itself to low dollar amount cases and misdemeanors in the criminal field.

Attorneys find themselves called upon to play more roles in the dispute resolution field. In addition to the traditional representative role, their role as advisor has expanded. Attorneys now participate in the alternative dispute resolution process by advising clients on what process to select and how to prepare for that process. They are expected to be able to craft resolution methods for those clients willing to be creative in their resolution efforts. While they are working to put a deal together for clients, they are expected to plan the best way to resolve disputes arising under the agreement.

The communication and strategic expertise necessary in these fields have created a keener awareness of practical skills in the minds of most attorneys. Legal reasoning, and research and writing skills are as avidly sought as ever, but equally in demand are those elusive personal skills that assist one in being successful at negotiation.

Finally, an important perceptual change has also occurred. It is no longer considered a sign of weakness if one side offers to "submit" to the negotiation process. It is now acknowledged that even the side that maintains it will not settle can gain through one of these alternative processes. The goals of protecting the client and advocating his interest are found to be well served in pursuing these alternative processes.

Three forces combined in the past decade to bring alternative dispute resolution to this point of general use and acceptance. Judicial reformers became advocates of alternative dispute resolution when it became clear that the docket impact was direct and significant. Second, a wide variety of successful programs and special events created a desire in the general public for the availability of alternative dispute resolution services. Finally, some portion of the change is the result of the efforts of individuals and organizations to proselytize.

Court-annexed arbitration led to court reformer acceptance of alternative dispute resolution. By 1987, a number of counties in both Washington and Oregon were already fully engaged in an arbitration

program. The spread of court-annexed arbitration took a similar pattern in each state. Initially, the jurisdictional amounts for mandatory arbitration were low. Slowly the process has spread to cover the entirety of each state and to increase the arbitration limits to \$125,000.00. The resultant impact has been to free the courts of eighty percent of the current civil docket.

The ongoing successful programs and occasional news coverage of special events have created significant public awareness of alternative dispute resolution methods. The community dispute resolution programs initially developed in cities throughout the Northwest under volunteer efforts. Victim-offender reconciliation programs were pioneers in this development. These church-related programs joined their community-based volunteer colleagues and came to the attention of legislators. Each court took a different approach with their implementation. For example, the City of Boise began its implementation by showing a film on domestic relations mediation to all parties who, after discovery, answered ready.

News coverage of unusual events also caught the public's attention. Robert Redford's Institute for Resource Management's successful mediation of a dispute between environmentalists, oil concerns, and state regulators over oil drilling off the Alaskan coast gained much publicity. Likewise, an accord in Washington between Indian tribes, environmentalists, lumber groups and state regulators, was heralded by the newspapers as a first in the history of dispute resolution in that State.

Efforts of the committed to bring the processes to the public's attention were successful. All three bar associations had dispute resolution committees up and running in their jurisdictions. Multnomah County in Oregon created a judicial department of dispute resolution, the federal courts in Washington and Oregon were first to initiate a mediation program, several law schools opened centers for dispute resolution, and Willamette gave awards to those who made significant contributions to the field. Together, these developments created significant public awareness.

Finally, and most important to the public's adoption of alternative dispute resolution processes, was the conclusion reached by a majority of disputants who had participated in one of the processes; namely, that alternative dispute resolution forums tend to yield better solutions. "Better" is of course a subjective determinant that may be the result of a variety of considerations—speed, cost, ongoing relationship, or how many times the parties later return to court—but

for whatever reason, more people single out the processes as resulting in "better solutions." The awarding of that label creates in others the willingness to attempt the process.

This prediction of court support for alternative dispute resolution in 1997 has been easy to make. The seeds for the future growth outlined above are already planted; and some, like arbitration, are already growing rapidly and performing well. Most importantly, the publicity given these forums, the support offered by court and legislative officials, and the number of lawyers being trained in these processes combine to give considerable momentum to the movement. It is possible 1997 could be here by 1992.