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### **Profile -- David A. Hoffman**

“The truth shall make ye free,” they say, “but first it shall make ye miserable.” The truth was that in the late 1980’s, after devoting my full attention to becoming a trial lawyer, civil litigation had lost much of its luster for me. There may be some lawyers, I concluded, who thrive on a steady diet of litigation, but I was not one of them. I had just returned to my law practice at Hill & Barlow, after a year as staff attorney at the ACLU of Massachusetts, and I found myself agreeing (for once) with Chief Justice Warren Burger, who described our litigation system as “too costly, too painful, too destructive, too inefficient for a truly civilized people.” Although a trial might be what is needed in some cases, I wanted to use my knowledge of the law to help clients avoid litigation.

#### Getting Started

I called Prof. Frank Sander, my former law school advisor, for advice about converting my litigation practice into an ADR practice. I did not realize at the time how many calls of this kind Frank was receiving each year from disgruntled litigators and burned-out corporate attorneys. With enormous patience, however, Frank outlined some useful steps for developing an ADR group at Hill & Barlow and getting the training I needed to begin mediating and arbitrating. (One of Hill & Barlow’s claims to fame is that Frank was an associate with the firm before he moved on to bigger and better things at Harvard Law School.) Much to my surprise, I encountered no resistance at Hill & Barlow. In fact, unbeknownst to me, a small committee of very senior partners in the firm had begun meeting to discuss setting up an ADR practice of some kind, because they wanted to hire a very prominent Massachusetts judge who was about to retire. One of the firm’s senior partners, Carl Sapers (a long-time member of the AAA National Board) and I decided to co-chair Hill & Barlow’s fledgling ADR Practice Group. Carl’s experience as an arbitrator in high-stakes construction cases for many years gave us instant credibility, while I went about getting training and looking for the unfortunate souls who would be my first ADR clients.

My strategy for developing an ADR practice was to knock, rather indiscriminately, on the door of every organization that might have cases to refer. My first stop, after taking training programs in mediation and arbitration, was a community program, the Cambridge Dispute Settlement Center, which provides mediation services for low- and moderate-income individuals in a working-class section of Cambridge. CDSC maintains a roster of approximately 40 volunteer mediators handling landlord-tenant, divorce, small claims, employment and neighborhood disputes. I thought that, with my law background and the experience of working in a 100-lawyer downtown firm

where I had handled all of those kinds of cases and more, I would be welcomed with open arms. I discovered, to my surprise, that even after submitting a detailed application and being interviewed, I was put on a waiting list along with a number of highly qualified people. Welcome to the crowded ADR marketplace where, in Boston (as in some other cities), there are more would-be mediators than cases!

Although I was one of many seeking to enter the profession, I found that the experienced mediators and arbitrators who ran the programs welcomed newcomers. I think they cast a somewhat skeptical eye in the direction of recovering litigators like me, waiting to see whether we had truly changed our ways. I guess I passed muster in that regard, because after continued and persistent door knocking, I eventually found myself on the panels of a number of organizations -- the AAA, the Middlesex Multi-Door Courthouse, the Massachusetts Office of Dispute Resolution, The Center for Public Resources, The Private Adjudication Center, The Mediation Group, JAMS/Endispute, among others -- and I started getting cases.

### Good Fortune

Much as I would like to attribute the development of my ADR practice -- which now occupies approximately two-thirds of my time -- to persistence, hard work, avid reading in the field, and attending many workshops and conferences, candor compels me to include good luck as one of the major ingredients. One such piece of luck was to be in the right place at the right time when the Private Adjudication Center in North Carolina was selecting arbitrators for the Dalkon Shield cases administered by PAC. I found out about it because one of my partners, Nonnie Burnes, got a mailing about the selection process and, since it sounded like ADR, she sent me a copy. Conducting nearly 200 arbitrations of Dalkon Shield cases gave me a sudden immersion in the work of running a hearing, deciding procedural matters and evidentiary issues, and figuring out how to conduct a hearing which was not only fair but also felt fair to all participants. Along the way, I also learned more about women's reproductive health issues, epidemiology, and statistics than I ever thought I would come to know.

Additional good fortune came simply from working in Boston -- a city that is rich with ADR pioneers and mentors, all of whom were extremely generous with their time. In addition to Frank Sander, I learned from David Matz (the director of the graduate program in dispute resolution at U. Mass/Boston), Albie Davis (a leader in the community mediation field), Gail Packer (program director at CDSC), Eric Green (co-founder of Endispute), Marjorie Aaron (former director of the Harvard Program on Negotiation), Rick Reilly (Vice President at AAA), and many others.

### Good Work

Some mediators and arbitrators specialize. Not me. I was omnivorous. I tried my hand at virtually every case in which the parties would have me as their neutral. I found that I had some insight about construction and business cases, because of my pre-law

school career as an entrepreneur in a modest-sized woodworking business. I was drawn to family law cases because the psychological dimension was fascinating (and I had some personal background from my own divorce many years ago). I enjoyed the scientific and medical issues in personal injury and product liability cases. I even enjoyed the number crunching involved in complex finance and insurance cases.

One of my earliest cases involved a town-house condominium in which 35 unit owners and the condo association were suing a developer. The plaintiffs were furious, and their list of construction defects was huge. The developer was outraged by their demands, which he considered baseless. We used Hill & Barlow's largest conference room and a large break-out room for the mediation. Over the course of twelve sessions, technical issues concerning paving, siding, weather-tightness, and other construction details were reviewed. We considered the opinions of the parties' experts. Ideas for testing, remediation and cost-sharing emerged. The lawyers for the parties treated each other with great respect, which made my job easier; their clients, however, were still seething, which made my job harder. In the end, the parties were \$2,000 apart, having closed a gulf involving six-figure claims. Their stubbornness seemed inexplicable given the progress we had made. I tried every impasse-breaking technique I could think of, but each side was adamant. They said it was a matter of principle, but I believe each was reluctant to lay down the cudgel in a battle that I think they enjoyed in some perverse way. Finally, I said to the lawyers that, if it weren't for the fact that I was handling the case at the court-assigned rate (a substantial discount from my ordinary hourly rate), I would contribute the difference to close the gap. My shameless ploy worked. Each of them agreed to kick in \$1,000 from their fees in the case, and we were done.

The condominium case, like the series of Dalkon Shield cases, was a trial by fire. But these cases and others taught me one of the central truths of dispute resolution work: virtually every dispute, from the bitterest divorce to the driest banking and securities case, has a vital personal dimension. For me, this remains the most enduring fascination of ADR work – exploring the intersection of fact and emotion.

I also enjoy the variety of cases. In my law practice, I may have 30 or 40 active cases at a time; some of them last for years. But in my work as a mediator and arbitrator, I have a turnover of nearly a hundred cases per year – some of them lasting no more than three hours and others going into multiple sessions. I find the variety fascinating: the legal issues – many involving unfamiliar areas of law -- are intriguing, and the personal issues even more so. During a recent month I handled cases involving the appraisal and marketing of a Renaissance painting, an HMO's dispute with an indignant physician accused of providing sub-standard care, a child custody dispute involving a lesbian couple and the child's father, an auto fatality resulting from a high-speed race by two teenagers who had been served liquor at a private club, and the break-up of a family manufacturing business in which warring clans could not agree on the interpretation of a murky buy-out agreement.

## Why Practice Law?

Some of my colleagues in the dispute resolution community have asked me why I do not abandon the practice of law altogether, and I have come to the following conclusion: as fascinating as the practice of dispute resolution is, I also enjoy the relationship I have with my clients in a law practice. Each type of work has different rewards -- and costs.

When I represent clients, I am sometimes uncomfortable with the harshness of the positions they wish me to take, the one-sidedness of their view of the case, and the difficulty they have in seeing and understanding the other party's point of view. On the other hand, I value the close relationships I have with my clients, the ability to stand entirely by their side, to be their friend, their ally, their confidante. In arbitration work I must, of course, stand completely apart from the parties, my communications with them structured by the formalities of adjudication (no *ex parte* communications, little if any expression of my own point of view until the end of the case, etc.). However, even in my work as a mediator, in which I can meet in confidential, private sessions with each side, there are limits to everyone's candor. For example, the parties seldom share with me the true bottom line they bring to the negotiation (although, to be sure, sometimes they do not know it themselves), and I must keep a certain distance emotionally in order to maintain both the appearance and reality of impartiality.

The reward of working as a mediator or arbitrator is to stand for fairness – in mediation, fairness of process, and in arbitration, fairness of both process and outcome. Mediation work is particularly gratifying when, in addition to helping the parties reach a settlement in a process that both sides feel is fair, they come to a greater understanding of each other and themselves – i.e., they are truly able to put the anger and grief of their dispute behind them and move on with their lives. These moments come all too rarely but when they do, I am reminded of how fortunate I am to be doing such work – and getting paid for it to boot.

## ADR in the Law Firm Setting

My colleagues at Hill & Barlow sometimes ask me why I continue to do this work in the high-overhead setting of a downtown law firm. They point out – correctly, as far as I can tell – that my costs would be lower and I would probably make more money in an office of my own where I could get by with a half-time secretary and a few pieces of office equipment. I would also be able to serve in cases from which I am currently precluded by conflicts created by my colleagues, both past and present. In a law firm which has been in existence for over 100 years and has 100+ lawyers, the list of individuals and companies that have been clients or adverse parties is formidable.

I respond to these inquiries as follows.

Conflicts. The conflicts are not an enormous problem. The Hill & Barlow computer prints out a list of the cases in which one or more of the parties has dealt with

the firm. After making appropriate disclosures to the parties in the mediation or arbitration and telling them that I believe I can be impartial, they almost invariably tell me that they have no objection.

Administrative burdens. Although the costs of a solo-practice might be lower, I would have to devote time and attention to managing the financial and administrative aspects of my practice. There was a time in my life (my seven years as a woodworker, before going to law school) when I found those aspects of entrepreneurship appealing. I am now quite grateful for the staff at Hill & Barlow that handles billing, insurance, bookkeeping, taxes, employee benefits (including my own), facilities management, relations with vendors, mailing and copying, and -- perhaps most importantly in this day and age -- maintaining and improving my computer equipment. I have very little interest in handling these items, or even supervising someone else who handles them (since I could not effectively supervise those decisions without spending the time to inform myself about the matters being decided).

A vantage point on the legal world. Working in a law firm gives me an inside view of the world of legal disputes. I have access to information about the practice of law -- from internal memos and attending in-house workshops and meetings -- that would be otherwise unobtainable. For example, Price Waterhouse gathers confidential financial and practice-related information from a group of participating law firms and then provides compilations of that data, with appropriate redaction, to those firms. As a member of a participating firm, I have access to that data. In my day-to-day contact with lawyers from various departments, and at meetings with lawyers in the firm, I have had the privilege of learning about the practice of law from some of the most capable attorneys in this part of the country. Thus, when I mediate, I bring to the table first-hand experience of the legal, financial, and practical constraints under which the lawyers in the case operate.

Information resources. Most of my ADR cases reach me in the form of legal disputes, and law is, at least in part, a knowledge industry. The firm is a rich environment in that regard. Hill & Barlow's library circulates to me and the other lawyers daily and weekly advance sheets with information about developments in the areas of law in which we practice. I follow developments in ADR, family law, employment, construction, product liability, professional liability, personal injury and a few other fields. To duplicate these subscriptions on my own would cost a fortune. Could I practice as a mediator or arbitrator without such information? Absolutely. Is there a benefit from keeping abreast of changes in the law? I think so.

Physical and technological resources. Any mediator or arbitrator needs offices, conference rooms, and reception areas in which to practice. These are easily obtainable in any city, but the firm provides me with the ability to use several conference rooms at once, in a highly complicated multi-party case, or a single compact room, depending on my needs. There are technological tools -- ranging from a sophisticated phone system

with conferencing capabilities to computer projection equipment that enables me to craft settlement agreements in real time and project them on a screen while the parties and I edit them -- that I would find difficult or expensive to duplicate. Hill & Barlow's technology staff keeps these services functioning in a way that minimizes my headaches and maximizes my efficiency.

Human resources. The firm has supported my work as a teacher and writer -- activities that give me the opportunity to reflect on, and learn from, my ADR and law practice. For the past four years I have taught law school courses on negotiation, ADR, mediation, and family law practice. I have co-authored a book on ADR and written several articles. Could I have done these things without logistical support from paralegals, secretaries, and computer wiz's of various kinds? Probably, but with much more hair-pulling and teeth-gnashing on my part. Practicing law and ADR, while teaching and writing, requires expert juggling skills or a wonderfully supportive staff. Because I lack the former, I count my blessings that I work in a setting that provides the latter.

Referrals. One of the benefits of law firm life is the referral network -- one of the principal reasons for organizing a professional services firm. Naturally I cannot provide mediation or arbitration services in a current case for a current client. But if one of my colleagues at Hill & Barlow is asked if they know of a good mediator or arbitrator, there is a good chance that my colleague will mention my name or the name of some other member of our ADR Practice Group.

Visibility and credibility. Perhaps most importantly, practicing in a well-respected law firm has provided me with visibility and credibility which, as a relatively junior member of the bar (law school class of 1984), ordinarily take much longer to acquire. My ADR clients make certain assumptions about me, my integrity, and my ability -- whether deserved or undeserved -- based solely on the fact that a reputable law firm has kept me on board for thirteen years and even promoted me to membership in the firm. What are those assumptions? I can think of a few: (a) that I know how to maintain confidences and adhere to ethical standards; (b) that I am comfortable handling cases in which the stakes are high and the legal issues complex; and (c) that I have a strong work ethic. In the crowded ADR marketplace of today, even such assumptions are not enough to attract business, but they might be helpful in a close contest between or among other providers.

#### Advantages for the Firm

The advantages of ADR practice in a law firm setting are not a one-way street. I would like to think -- and I have often been told -- that my ADR work brings with it a number of benefits for the firm. First, I know a lot of mediators and arbitrators. I attend professional meetings with them. I hear them lecture and lead seminars about their approaches to dispute resolution. Getting to know them personally is one of the great pleasures of the work I do, because, for the most part, the people engaged in this work are

among the most decent, fair-minded, and down-to-earth people I know. That kind of personal knowledge of the people in the field makes me a useful resource for the lawyers at Hill & Barlow who are trying to evaluate a list of potential ADR providers in a particular case. I receive such inquiries from lawyers in the firm on a more or less weekly basis. Second, when my colleagues at Hill & Barlow are drafting agreements, there is usually some type of dispute resolution mechanism built into the agreement, and I am frequently called upon for advice about such clauses. Finally, our clients occasionally wish to implement a far-reaching dispute resolution system of some kind, and I am the lawyer who is usually called upon for advice.

### Challenges for Law Firm Providers of ADR Services

While the advantages of ADR practice in a large firm have -- for me, at least -- outweigh the disadvantages, some challenges lie ahead. Law firms are under continuing economic pressure. Costs continue to rise, with continuing increases in the price of office space, high-tech phones, faxes and computers, and higher staff costs. Billing rates for lawyers in large firms have increased to the point where a significant gap exists between very able ADR providers working inside such firms and those practicing on their own. I have to keep my own hourly rate, which is set by the firm, in a reasonable relationship to the market set by other providers.

In addition, court-based ADR programs have generally set up fee structures which cap the hourly rate that a mediator or arbitrator can charge. Unless they are modified, such structures will force many experienced providers to drop out of court-connected programs or leave their firms. At present, these programs provide the majority of referrals in some cities, and probably will continue to do so for the foreseeable future. Because many of my cases come from such programs, this is an issue I am currently discussing with program administrators.

Finally, even in those cases where I am billing at my full hourly rate, my value to the firm depends in part on my ability to generate business (i.e., rainmaking) and supervise the work of associates and paralegals, thus creating profitable leverage for this firm. An ADR provider who does nothing more than fill his or her plate with work is a less profitable member than one who generates work for him/herself and others. Thus the challenge for those of us who practice ADR inside a firm is either to generate work for others (and it is not an easy task to generate ADR referrals for others, because the parties are usually looking for a specific individual, not a firm) or to persuade firm management that we provide a valuable service to the firm and its clients wholly apart from any rain we may make for our colleagues.

### Bottom Line

There is no longer any doubt about the importance of ADR in our legal system. Among the issues that remain to be worked out, however, is whether law firms will be one of the places in which mediators and arbitrators will practice. Attorneys have served

as arbitrators for many years, but they did so, for the most part, as a minor adjunct to their law practice. It is only in recent years that the growth of mediation in the legal system has led to the development of small cadres of lawyer-mediators and lawyer-arbitrators who devote most or all of their time to the practice, and a larger number who are cultivating it as a substantial part of their professional practice.

I have found my law firm to be a congenial and supportive environment for my practice. This is probably not the right setting for every lawyer who practices ADR. The stereotypes promulgated about law firms in our popular culture -- from John Grisham's books, "L.A. Law," and The Verdict -- are not entirely false. But I find it both stimulating and rewarding to work in a firm where the lawyers are bright, the standards are high, and the staff is very capable and motivated. There is also something to be said for loyalty and a feeling of connection to the lawyers at Hill & Barlow who taught me the ropes. Some of those lawyers are now my fellow mediators and arbitrators, and we are learning together how to integrate these two aspects of our work.

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