The Future of ADR: Professionalization, Spirituality, and the Internet

By David A. Hoffman

When I was in law school, I had the good fortune to have Prof. Frank E.A. Sander, who chairs the editorial board of this magazine, assigned as my faculty advisor. It was good fortune, but I did not realize it or take advantage of it. I hardly ever went to see him. Only years later did I begin to realize the opportunity I had missed, as I got more involved in the ADR field. And today Frank is one of my heroes – a leader whose contributions to the field are enormous and whose shoulders we stand on every time we mediate or arbitrate a case or teach students about ADR. And so, in my continuing effort to make up for my shortsightedness as a law student, I find that whenever Frank asks me to write an article, I immediately say yes, even when I haven't a clue as to what I am going to say.

In this instance, I had to wonder what I could say about the future of ADR practice that has not already been said – in abundance. As a field, we are inclined to self-examination and constantly in search of self-improvement. Much has already been written about such important topics as the need for greater diversity in the field, the risk that private ADR forums will create a dual system of justice for the rich and poor, and the problems inherent in mandatory arbitration of consumer and employment claims.[1] But I thought that I could contribute – as a thank you to Frank on this 15th anniversary of the Section of Dispute Resolution that he was instrumental in founding – some observations on three developments that present significant challenges for our field and may change dramatically the way we do our work in the years ahead:

(1)   *The Internet* – how will we adapt dispute resolution methods to an electronic future in which human relationships unfold and flourish in a virtual space that our current generation can barely imagine?

(2)   *Spirituality* – how will we manage the emerging tension between those who seek to explore spiritual dimensions of dispute resolution work and those who see little, if any, place for spirituality in their ADR work?

(3)   *Professionalization* – how will we respond to the growing risk that if the ADR field does not develop its own methods of quality assurance, outsiders will do it for us?

I have described these themes as problems, but we mediators know that reframing problems as opportunities is one of the most well-worn tools in our toolbox. Some of us cite that marvelous saying of Henry Kaiser: "problems are just opportunities in work clothes."[2] And so the primary focus of this essay will be on the resolution of these problems rather than exploring at length the dangers that they pose.

1.   *The Internet*

In my second year of law school, I was introduced to the world of computer-assisted legal research. I remember the frightening moment in the library when I faced the large,

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[1] *See, e.g.,* David Hoffman, *The Future of ADR Practice, Three Hopes, Three Fears, and Three Predictions,* 22 NEGOT. J. 467 (October 2006).

[2] Or, to the same effect, the comment that Pres. John F. Kennedy made in several of his speeches: "When written in Chinese, the word 'crisis' is composed of two characters. One represents danger and the other represents opportunity." More recently, some linguists have called into question the accuracy of Kennedy's statement, but it has endured as a useful metaphor of a truth that dispute resolvers see in the crises that the parties bring to us for resolution. *See Chinese translation of crisis*, http://en.wikipedia.org/wiki/Chinese_translation_of_crisis.

humming box with blinking red lights and first touched my fingers to the computer's keyboard. The whole concept of operating a computer was intimidating. That was 26 years ago. Today, my tiny laptop computer is my nearly constant companion. It connects me, more or less effortlessly, with my clients, my colleagues, my relatives, my friends, and numerous direct marketers that cleverly evade my SPAM filters. My firm, like most firms, has a web site, but if you had asked me five years ago how much of our business would come to us *solely* because of Internet exploration by prospective clients, I would never have guessed that the answer would one day be one-third, as it is today. And that figure is growing.

Of course, we of the baby-boom generation are mere novices when it comes to technology. Our children and grandchildren are steeped in electronic media. How many of us have had to turn to a 10-year-old to help us solve some arcane computer-related problem? For them, communicating electronically – including with people that they have never met face-to-face – is entirely normal. Author Douglas Adams once described the all-too-human tendency to think "that anything that was in the world when you were born is normal and natural. Anything invented between when you were 15 and 35 is new and revolutionary and exciting, and you'll probably get a career in it. Anything invented after you're 35 is against the natural order of things."[3]

For the generation that is currently in college, or in grade school, there is nothing unnatural about sharing intimate information with total strangers in Internet chat rooms and, indeed, posting such information in publicly available electronic forums. Relationships are born, develop, and die in cyberspace, without any in-person meeting. Some relationships are played out through the intermediaries known as avatars in "virtual" (i.e., fictional) communities or cities. In a recent paper, Ken Heare, Dana Kaplan, Nan Starr, and Wendy Vonhof note that the "Facebook Generation" is "so comfortable being online it is inevitable that they will expect to resolve many of their conflicts online as well."[4] We do not have to wait until the next decade or even the next year to see this phenomenon at work. According to Colin Rule, who serves as counsel at eBay and PayPal, those two companies handle "many millions of disputes" online each *year*. And that is just two companies.

One of the problems for the ADR field is the generation gap. We dispute resolvers – even those of us who are wedded to our laptops – are technologically challenged in comparison to a younger generation to whom we are offering our services. At the Pew Internet and American Life Project, Director Lee Rainie describes this younger generation as "Millennials" who are "digital natives in a land of digital immigrants."[5] We of the older generation, who are struggling, as immigrants do, to learn the customs, language, and culture of the natives, will probably never go completely native in this new electronic environment. It appears that the pace of technological change in the realm of electronic communications will continue to accelerate, and therefore this structural gap may widen over time, even if we try to stay abreast of these developments.

Technology itself will probably help us bridge some of this gap. The computer industry continues to develop ever newer, user-friendly, plug-and-play interfaces that enable even the

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[3] Brendan Buhler, "Interview: Doug Adams," University of California, Santa Clara, *Daily Nexus*, Vol. 81, Issue 99 (April 5, 2001) (available at http://www.dailynexus.com/article.php?a=678).

[4] Ken Heare, Dana Kaplan, Nan Starr, and Wendy Vonhof, "Communicating Online: How the Facebook Generation is Shaping the Future of Online Dispute Resolution," unpublished manuscript (January 20, 2008) (on file with author).

[5] *See* David Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 U. TOLEDO L. REV. 213, 218 (2006).

technologically challenged to participate in Internet communications, which now include audio and video as well as text. In addition, newer technologies will make our interactions on-line feel far more like in-person communications. In one such technology – tele-immersion – expanded bandwidth enables technologists to create three-dimensional images akin to those that science fiction brought us in the form of the holodeck on the spaceship Enterprise in *Star Trek*. The significance of such technology for the dispute resolution field, with its reliance on face-to-face communications, is apparent. To give but one example, arbitrators often rely on credibility judgments about witnesses based on the subtle cues that can be detected more effectively in person than via current audio or video technologies. It may be many years before technology can transmit all of the subtle cues that we pick up from other people when we meet face-to-face, but most assuredly that is the direction in which we are headed.

There is enormous opportunity here for expanding the reach of dispute resolution services around the globe. Like the telemedicine techniques that enable surgeons in Boston to guide, and even conduct, a procedure in a rural corner of Zimbabwe, mediators and arbitrators specializing in, say, patent cases will be able to "sit with" the parties in virtually any locale.

In the meantime, harnessing our digital technologies requires specialized training for dispute resolvers. One aspect of such training is learning how to communicate collaboratively in what will soon be seen as a rather primitive medium – namely, email.[6] There are nuances of emotion – often misinterpreted – that can be communicated by even the simplest and most perfunctory messaging, and, as we know, nuances count. How many of us have stubbed our toes on some Internet communication glitch like this one: a man trying to express sympathy over the death of a colleague's relative signed his email message "LOL," which he thought meant "lots of love"; the colleague interpreted that to mean "laughing out loud." Needless to say, feelings were hurt. More frequently, however, the glitches are subtle but can damage relationships just the same. In a recent workshop, I asked dispute resolvers what percentage of their communications with the parties took the form of email and the middle of the range was 30 to 40 percent, with one mediator reporting that 80 percent of her communications were via email. To manage this much e-communication effectively, dispute resolvers in the years ahead will need to learn about not only computer software and hardware but also the new social software and social codes of the digital age.

2.   *Spirituality*

The burgeoning interest in what has come to be known as the spiritual aspects of dispute resolution work can be seen in nearly every corner of the dispute resolution field. This magazine recently added as a regular feature a column entitled "Deeper Dimensions." The Association for Conflict Resolution has a Spirituality Section. For several years the Program of Negotiation at Harvard Law School has had a project, led by Erica Fox, called the Harvard Negotiation Insight Initiative, which has now become the independent Global Negotiation Insight Initiative, offering workshops and courses on the lessons that dispute resolvers can learn from the various wisdom traditions and contemplative practices. Workshops and symposia on the subject of meditation (note the extra "t" there) and mindfulness, including one such symposium sponsored by Harvard Negotiation Law Review, have opened the door to wider acceptance of

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[6] *See* David Hoffman, *Communicating Collaboratively in Cyberspace: What Couples Counselors Can Teach Us about Email,* COLLABORATIVE L. J. (Fall 2007) (available at http://www.bostonlawcollaborative.com/documents/CommunicatingCollaborativelyinCyberspace.pdf).

the idea that spiritual practice can play an important and useful role in dispute resolution work. Numerous books and articles on this subject are also beginning to appear.[7]

The problem for the field of dispute resolution in this development is that many practitioners view spirituality as alien to their worldview and irrelevant to their practice. A recent article on the subject captured the point nicely in its title: "What the Bleep Does Spirituality Have to Do with Conflict Resolution?"[8] One mediator, Diane Levin, wrote recently in a blog commentary that "As an atheist, I personally have little use for or interest in getting in touch with the so-called spiritual aspect of conflict . . . There's plenty in the earthly toolbox that mediators like me can utilize."[9] There is also a risk that those outside the ADR field – for example, potential clients – will be alienated by this perspective.[10] As mediator Colin Rule noted in a recent blog posting, in which he discusses the value of game theory as a powerful tool for understanding negotiating behavior, "There are legions of practitioners who will talk about the spiritual side of peacemaking . . . but I think they alienate more people than they attract to the field."[11]

Recent developments in the field of neuroscience may provide a bridge across this divide. Research employing MRI imaging of the brain has shown the positive effects that result from even short periods of meditation.[12] In an MRI study of experienced Zen Buddhist meditators, conducted at Massachusetts General Hospital, increased activity in the subjects' frontal lobes suggested the presence of "enhanced insights and attentiveness, . . sharper mental focusing, and deeper emotional resonances."[13] According to UCLA brain researcher Daniel Siegel, "anecdotal reports suggest that mindfulness meditation enhances the capacity for individuals to detect the meaning of facial expressions without verbal clues."[14] The discovery of mirror neurons in the late 1990s may explain in part the sensitivity of a well-attuned mind to the

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[7] *E.g.,* BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (eds. Daniel Bowling and David Hoffman, 2003), which includes essays on "Mindfulness Meditation and Mediation: Where the Transcendent Meets the Familiar," "Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice," and "Mediation and the Culture of Healing."

[8] Eileen Barker, *What the Bleep Does Spirituality Have to Do with Conflict Resolution?,* ACRESOLUTION (Fall 2005). In her article, Barker makes the case that spiritual perspectives can play a valuable role even in commercial cases.

[9] *See* http://mediatorblahblah.blogspot.com/2007/09/spirituality-in-mediation.html)

[10] In my own practice, considerable discussion preceded the decision to list "spiritual and moral integrity" as one of the core values of the firm in which I practice, Boston Law Collaborative, LLC, but the decision to make that statement on our web site has had no discernible negative impact on our practice and has been mentioned positively by several clients. *See* http://www.bostonlawcollaborative.com/firm-overview/mission-and-values.html. Of course, it is unlikely that our firm would have heard from those who decided not to retain us because they were alienated by this message.

[11] *See* http://cyberlaw.stanford.edu/node/5489)

[12] *See* Cary Barbor, *The Science of Meditation,* PSYCH. TODAY, May/June 2001.

[13] *See* Rients Ritskes et al., *MRI Scanning During Zen Meditation: The Picture of Enlightenment,* 8 CONSTRUCTIVISM IN HUMAN SCIENCES 85-89 (2003) (available at http://zenmanagement.eu/hersenscan.pdf).

[14] *See* DANIEL SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING 200 (2007).

mental states of others.[15] And in a recent peer-reviewed study of experienced Buddhist meditators at the University of Wisconsin, researchers showed that "cultivating compassion and kindness through meditation affects brain regions that can make a person more empathetic to other peoples' mental states" and that this effect could be seen to some degree even in subjects who had been meditating for only two weeks.[16] While no one has demonstrated scientifically that a sustained practice of meditation enhances the ability of mediators to resolve conflicts, the studies done to date suggest that such practices as meditation and yoga enhance precisely those qualities that help mediators suspend judgment and attune themselves to the emotions of those with whom they are working.

These findings may provide common ground for those who, on the one hand, believe that pursuing the deeper dimensions of spiritual awareness adds value for mediators, and those who, on the other hand, are irreligious, agnostic, or atheists. The mental training associated with meditation does not require religious belief of any kind. Although meditation practice is associated most strongly with Buddhism, it is used by people of all religious backgrounds and by many who practice no religion. As Steven Pinker points out, common structures of the human brain and the specialized functioning of those structures "underlie superficial variations across cultures."[17]

Neuroscience is also providing those of us in the dispute resolution field with some tantalizing possibilities for future research. For example, scientists are just beginning to understand the role of neurotransmitters – chemicals found in the brain, such as serotonin and oxytocin – in regulating human emotion. One set of studies suggests that increasing the production of oxytocin increases an individual's feelings of trust. The implications of these findings for dispute resolution practice are obvious. The research also suggests specific activities that might increase oxytocin production, such as physical touching (hence the importance of handshaking or similar trust-enhancing activities in many cultures?) and eating or working together.[18]

I don't want to ignore the profound differences that remain between those in the dispute resolution field who find value in a spiritual orientation and those who don't – notwithstanding the research that suggests down-to-earth, provable, scientific explanations for the efficacy of contemplative practices. After all, calming the minds and opening the hearts of the people involved in a dispute resolution process may be only half the battle, so to speak, for a mediator. Those who advocate for greater understanding of game theory and other cognitive approaches to mediation practice may find these new findings in neuroscience to be of only marginal interest. However, at a minimum, these findings may provide us with a set of common terms that we can use without stigma or embarrassment to describe mental and emotional states –

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[15] *See* Mbemba Jabbi et al., *Empathy for Positive and Negative Emotions in the Gustatory Reflex*, 34 NEUROIMAGE 1744 (February 15, 2007).

[16] *See Compassion Meditation Changes the Brain*, MEDICAL NEWS TODAY, March 27, 2008, http://www.medicalnewstoday.com/articles/101812.php (citing Antoine Lutz et al., *Regulation of the Neural Circuitry of Emotion by Compassion Meditation: Effects of Meditative Expertise*, PUBLIC LIBRARY OF SCIENCE ONE, March 27, 2008, http://www.plosone.org/article/fetchArticle.action?articleURI=info:doi/10.1371/journal.pone.0001897

[17] Douglas Noll, *The Neuropsychology of Peace and Conflict* (available at www.lawyertopeacemaker.com/neurospych.html) (citing STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2003)).

[18] *Id.* While research has shown that sex, breast feeding, and even just hugging stimulate oxytocin production, I am not aware of experiments proving that behaviors such as working together or eating together will produce similar effects.

regardless of whether we call them "spiritual" or not – that will aid us in the work that we do. Mediator Doug Noll notes that, given the recent research in neuroscience, it appears that spiritual teachers who advocated various forms of contemplative practice as the path to peacemaking were prescient. But perhaps they were simply well-attuned scientists detecting patterns of human behavior before we had MRI's to confirm those observations. There is an opportunity here for those of us who find meaning and value in spiritual approaches to dispute resolution to reframe those techniques as simply sound practices validated by science.[19]

3.   *Professionalization*

Several years ago, Prof. Sander and I served on the Massachusetts Supreme Judicial Court Standing Committee on Dispute Resolution, where we and our colleagues wrestled with the question of qualification standards for mediators, arbitrators, and other dispute resolvers. This aspect of the committee's work took several years, but one thing that was clear was that we would be recommending training requirements for all dispute resolvers. While our deliberations continued, the state Legislature passed a bill, unbeknownst to us and literally in the middle of the night, that would have made any mediator "certified and qualified" if s/he had been providing mediation services for the courts for five years or more -- no training required. The bill had been submitted to the Legislature by a lobbyist representing a group of retired judges who were unhappy about our proposed training requirements, which they considered unnecessary. A concerted effort by the dispute resolution community persuaded then-Governor William Weld to veto the bill, which would have eradicated several years worth of work by our committee. Although this bill was killed, ADR practitioners may see more efforts of this kind in the years ahead.

The challenge for dispute resolvers is nothing less than defining the nature and scope of our field. While we engage in a robust debate over whether professionalization of our field will be helpful or harmful, we get closer every year to becoming a profession. The fundamental characteristics of a profession include a recognized body of knowledge, an agreed-upon set of skills, and a mechanism (such as a certification board) for defining who is in and who is out.

It seems astonishing to think that we are nearly a profession while there is still a lack of consensus over such basic questions as the meaning of the term "mediation," much less agreement on the essential skills and knowledge.

To illustrate the reasons for this difficulty, permit me to tell a brief story. For two years during the 1990s, I had a memorable (and very enjoyable) experience working with colleagues from several different ADR organizations – SPIDR (Society of Professionals in Dispute Resolution), AFM (Academy of Family Mediators), NAFCM (National Association for Community Mediation), and others – on the AFM's Voluntary Mediator Certification Project. One of the goals of the project was to develop a written test for mediators. We spent several months getting trained by Ph.D's at the University of Georgia who specialize in developing certification exams for police departments and a variety of other occupations. With their guidance, we analyzed actual mediations – looking for the specific knowledge and specific skills used by workaday mediators. We developed batteries of questions designed to sort out the trained from the untrained. All of the questions needed to be multiple-choice so as to weed out subjectivity on the part of the examiners. I then gave a short battery of questions to my 10-year-old daughter, Lily, who scored 80 out of 100 on the test. Now, I will admit that Lily is good at taking

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[19] There are, of course, certain cases – and I have had a few – where the parties affirmatively welcome a spiritual approach. I recall a mediation between two priests, another mediation between two rabbis, and a third mediation involving a spiritually oriented non-profit organization – in each of those cases, the mediation began with meditation or prayer at the request of the parties.

tests. But I found it dauntingly hard to create questions that would be understandable by someone with a basic education but not easily solvable by someone without mediation training.

Why should that be? I think I can answer that question with another story. A Boston mediator, Jim Barron, was hired in the mid-1980's, right out of law school, by the Superior Court to help the court clear its backlog of 24,000 cases. Unschooled in mediation — indeed, he had never heard of it — Jim was asked to review the pleadings and meet with the parties and/or their lawyers. He found that he was able to facilitate a settlement in a large percentage of the cases. A few years later, he began to learn about mediation, and he discovered — much to his surprise — that the techniques offered in mediation training were exactly those that he had developed by himself through trial and error. In short, mediation is a natural, normal process that can be done successfully by people with very little training so long as they have good communication skills, good relationship skills, and a modicum of emotional intelligence.

Why then should we consider this a profession? In my opinion the answer is that higher levels of skill are needed as we move from the simplest cases to those in which the stakes are high, emotions run deep, and there are multiple issues and/or multiple parties. To protect the public, our field probably needs training requirements (shouldn't we make it more than 40 hours?), a period of mentorship, and a very basic entry level exam – even if it is easy enough for a smart 10-year-old to pass.

But we also need more than that. The problem here is that if we do not develop sophisticated mechanisms for credentialing in our field, clumsy legislative or regulatory attempts will be made by those outside the field or those seeking to enter it. The opportunity that invites us – and has been inviting us for some time – is to strike the right balance between rigorous standards on the one hand and openness to innovation on the other.

The best analogy, in my view, is the field of psychotherapy, in which there are multiple forms of practice and multiple forms of professional training. A basic level of knowledge and a command of ethical principles is required for licensure as a psychiatrist, psychologist, clinical social worker, or licensed mental health counselor. And then one can specialize further in cognitive-behavioral therapy, psychoanalytic techniques, or a variety of other forms of psychotherapy. In each of these combinations of basic professional training and later specialization, we see forms of practice that differ widely, depending in part on the skills and experience of the practitioner, but also depending on the type of client. A form of therapy suitable for an adult might be entirely unsuitable for an adolescent.

My wife is a psychotherapist, and she has specialized training in EMDR (Eye Movement Desensitization and Reprocessing) techniques and Internal Family Systems. Certification in each of these disciplines requires many hours of training, supervised role play, and case supervision over the course of a year or more. Likewise in mediation, we are beginning to see specialized certification of mediators in unique subsets of the field. For example, mediators with a commitment to the practice of transformative mediation can apply for certification by the Institute for the Study of Conflict Transformation, Inc., which requires training, performance-based assessment using a videotaped mediation session, written self-assessment by the applicant, and a dialog with a seasoned practitioner to assess the applicant's skill and understanding of the transformative model. In Massachusetts, certification is offered by the Massachusetts Council on Family Mediation for its members, who must meet more rigorous training requirements and submit five mediated agreements for review.

If the ADR field widely embraces these models of specialized credentialing, we will be better able, with time, to assess (a) what common elements could be used as a baseline level of competence, and (b) the best techniques for measuring such competence. Paradoxically, we may need to start with the most specialized and demanding standards in order to help us figure

out the more basic ones. At the same time, while these more specialized forms of credentialing develop, a coalition of ADR organizations could begin accrediting basic ADR training programs. Doing so would likely improve the quality of training and would also help the field assess whether there is an emerging consensus on core skills that should be taught for mediation, arbitration, and other ADR practices. With experience from these two efforts – accrediting basic training programs and certifying advanced level practitioners – the ADR field might then be ready for the challenging task of setting baseline entry-level requirements that will protect the public while at the same time holding the door open for people of all backgrounds. If we seize this opportunity to define our own field, and go about the task remembering that we have more in common than what separates us, I believe we will succeed in staving off the occasional attempt of people outside the field to tell us how to do our work.

Conclusion

The challenges – both the problems and the opportunities – that lie ahead are formidable and exhilarating. Are these challenges related? I think they are. The computer operating systems that have become a dominant feature of our lives and an increasingly important component of our work are dramatically expanding the horizons of our outreach to others, and will enable dispute resolvers to work on a global scale. Meanwhile, advances in neuroscience are deepening our understanding of the finest calibrations of our internal operating systems, and will enhance our ability to connect with the parties that we work with. The accelerating pace of change – both outward directed and inner directed -- could make it that much harder, but all the more necessary, to develop, from pockets of increasingly specialized ADR expertise, a methodology for identifying best practices and creating a true profession.

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