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# The Future of ADR Practice: Three Hopes, Three Fears, and Three Predictions

*David A. Hoffman*

## **Envisioning ADR's Future**

Unlike Professor Frank E.A. Sander, who offered the insights in his famous 1976 Pound Conference lecture from the vantage point of a national law school, my vantage point on the future of ADR practice is situated in a small Boston law and dispute resolution firm where I serve as a workaday mediator, arbitrator, and collaborative law attorney. Nevertheless, inspired by the example of his efforts to envision the future of ADR, I will summarize my views on the subject by describing three hopes, three fears, and three predictions.

## **Three Hopes**

### ***Diversity***

Several years ago I was mediating an employment termination case in which the plaintiff — a brilliant, young, African-American professional — sought redress for what he believed was race discrimination in connection with his firing. After the mediation was underway, the plaintiff suggested that, in addition to me, we should have Harvard Law School professor Charles Ogletree serve as comediator, and Charles agreed. That case settled, in part, because Charles, as an African American, enabled that plaintiff to feel heard in a way that I — despite my good intentions, active listening, and my efforts to be a skillful mediator — could not.

I am not suggesting that cases involving one type of person can be mediated only by that same type of person. What I am suggesting, however, is that a diverse society needs diverse dispute resolvers. When I attend conferences of mediators and arbitrators, I am struck by what a well-dressed, well-educated, and largely white movement we are. To be

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sure, the leadership ranks are sometimes diverse but, at the level of the rank and file, we are more homogenous than we would like to be.

I use the word “movement” advisedly because we are as much a social change movement as an incipient profession. The people who are drawn to ADR practice are an idealistic bunch, trying to make the world a better place. And yet in the small corner of that world that we are cultivating, the world of ADR practice, we have only begun to “walk the talk.”

I believe ADR practice in the U.S. and throughout the world will not achieve its full potential until we find the will and the resources to share these vital tools with the broadest spectrum of people in our society. My hope is that ADR practitioners will a) support initiatives such as Access ADR (Access ADR 2006), which provides mentoring and enhanced market visibility for experienced minority mediators, and b) find the funding to situate and support community mediation programs in minority communities where the next generation of ADR practitioners can be recruited, trained, and given opportunities to learn this trade. If we do so, the ADR conferences of the future will look more like a full cross-section of our society than they do now (see Hoffman 2004).

### ***Renaissance of Idealism***

Last year, mediator and trainer Kenneth Cloke (2005) wrote an article entitled “Mediators without Borders: A Proposal to Resolve Political Conflict.” In his article, Cloke acknowledges that it may be unrealistic to send mediators parachuting into war zones, but he argues persuasively that the skills we have developed as ADR practitioners are transferable and can be adapted to the cultures and circumstances of conflict overseas.

What would we need to launch such a project? First, we would need a different mindset for mediators: instead of passively waiting to be invited to the party, we would have to take some initiative. This is the type of proactive engagement that Bernie Mayer (2004) describes in his recent book, *Beyond Neutrality*. Second, we need volunteers, financial resources, and, just as importantly, the intellectual resources to understand the complexities of the conflicts we will be encountering. (The work done by Harvard Law School professor Robert Mnookin and University of Massachusetts professor David Matz in the Middle East certainly attests to those complexities.) To marshal these resources, the world of ADR practice must foster a renaissance of idealism — of the kind that the current American Bar Association president, Michael S. Greco, is urging for the legal profession. I hope to see such a renaissance, which would take us back to our roots in the movement for social justice, within my lifetime.

### ***Universal Training***

Much has been written about the institutionalization of ADR in our courts, in large corporations, and in our schools. And it is true that, in certain pockets of our society, ADR is well known. If one is negotiating a labor

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contract, getting a divorce, resolving a construction dispute, or preparing for trial in a civil matter, one will probably hear about arbitration, mediation, or some other variety of ADR.

But we have only begun to scratch the surface. What does the average person in the street know about these tools and methods? Precious little. My hope is that thirty years from now, in every corner of our society, from elementary schools to universities, from the world of commerce to the world of religion, from the rural town hall to the halls of Congress, training in negotiation and dispute resolution will be universal and the tools used by ADR practitioners will be found in many hands. (For an example of such universal training, see Mediation Works, Inc. (2005), which describes the conflict management and mediation training given to 20,000 Coca-Cola employees at all levels of the company.)

### **Three Fears**

#### ***Mandatory Arbitration***

It is becoming harder every day in the U.S. to open a bank account, open a software program, or get a job in a big company without agreeing to binding arbitration of any dispute you may have with the bank, the manufacturer, or the employer. Before criticizing such contracts of adhesion, I should make a confession. In addition to my ADR practice, I also represent clients, primarily in collaborative law cases, and if you come to my office and ask my colleagues or me to represent you, we will ask you to sign an engagement letter that calls for arbitration by the Massachusetts Bar Association Fee Arbitration Board.<sup>1</sup>

One important difference, of course, between the Bank of America or Microsoft and me, besides the obvious ones, is that I am willing to negotiate the terms of the engagement letter, and I am occasionally asked to do so. Fortunately, I have never had to go to arbitration with a client. But my point is that we, as a society, are moving toward a world in which our right to present certain kinds of disputes — consumer complaints, employment disputes, and other kinds of disputes — in a court of law *could* vanish. Even worse, the system of arbitration to which these disputes are referred is largely unregulated. Arbitration might be the best forum for these kinds of disputes, but unless the choice to go there is truly voluntary or the forums are regulated in such a way as to protect the fairness of the process, I fear that important rights will be lost and the public's confidence in ADR will be diminished. (For a critique of mandatory arbitration, see Sternlight 2005.)

#### ***Pernicious Regulation***

For more than twenty years, the ADR movement has been debating the question of whether we need certification of mediators. The short answer, in my opinion, is that we do, but the devil is in the details. Moreover, with the extraordinary breadth of services offered by ADR

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practitioners, the many styles of practice, and the lack of consensus in the ADR field on such basic questions as “What *is* mediation?”, there are a lot of unresolved details.

My fear is that the sheer complexity of the task will deter us from doing it and then others will do it for us. Here is an example: Several years ago, Frank 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 qualifications for mediators and other ADR practitioners. Our committee studied and debated the issue for several years, and then, unbeknownst to us, the Massachusetts legislature passed a bill — literally, in the middle of the night — providing that mediators shall be deemed certified and qualified to mediate if they have been doing it for five years. No training needed; proven skill or knowledge, not needed. When the ADR community learned what had happened, we all mobilized and persuaded the governor to veto the legislation.

The longer we go without a consensus about legally enforceable standards of practice and eligibility to serve as a mediator or arbitrator, however, the more vulnerable we are to regulation that is uninformed, mischievous, or worse. I do not underestimate the difficulty of doing this right. I fear, however, that we could be headed for greater difficulty if we do not do it at all.

### ***Lack of Funding***

In the early years of ADR, critics of the movement expressed concern about whether the privatization of dispute resolution through ADR would create a two-tier system of justice in which only large corporations and wealthy individuals would be able to get speedy resolution of their conflicts.

Sadly, that prediction has come true to a substantial degree. For people without money, the available alternatives to court can be found primarily in community mediation centers. There are hundreds of these throughout the U.S., almost all of them relying on donations, *pro bono* services by the mediators, and very modest user fees. These centers — like the one here in Cambridge where I first trained as a mediator — rely heavily on fund raising and are sometimes just one foundation grant or two bake sales away from folding. My fear is that, unless we make public funding of community mediation and other ADR services a priority throughout the U.S. and elsewhere, the poor in our society will have the same level of ADR services as they have legal services — which is to say woefully inadequate.<sup>2</sup>

## **Three Predictions**

### ***Technology***

One of the hallmarks of the dispute resolution movement has been face-to-face contact, but today, e-mail, voice mail, conference calls, web boards,

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and videoconferencing are becoming familiar tools in the mediator's toolbox. In the current issue of the Association for Conflict Resolution's *Conflict Resolution Quarterly*, there is an article about online dispute resolution entitled "Mediating in Your Pajamas" (Raines 2006).

It will probably be many years before mediation without face-to-face contact becomes common. I have tried mediating by phone, and it is very difficult. There are probably some disputes — divorce, parent-child, business-partner breakups — that will continue to be resolved with the kind of in-person techniques that humankind has been using for millennia. But in thirty years, technology will probably change what we mean by personal contact, and the dispute resolvers of that era will be using tools that we can barely dream of today. (See Lenski 2006; Melamed 2006; Weiss 2006.)

### ***Multi-Disciplinary Practice (MDP)***

In his 1976 Pound Conference lecture, Frank Sander said "We must continue to forge links with those from other disciplines who share our concerns. Their differing orientation and background often give them a novel perspective on the legal system" (Sander 1976). One of the best examples of interdisciplinary work can be found at the Program on Negotiation (PON) at Harvard Law School.

In my own practice, I have seen the value of Frank's advice. I work in a firm with a psychologist, a financial planner and certified public accountant, a workplace consultant, and several other lawyers and mediators. We share perspectives, learn from each other, and try to provide a more holistic form of client service. One of the most satisfying professional experiences of my career involved a case in which our psychologist, our financial planner, and I comediated, my first and only case to date in which all three of us mediated together. The case involved the breakup of a family trust, dating back to the nineteenth century, which owned an island as well as many stocks and bonds. Two branches of the family wanted to sell the island, but the other three branches wanted to keep it. With complex tax, interpersonal, and legal issues woven into the fabric of the dispute, all three of us mediators were working hard to keep up with the twenty family members who gathered in our office for two days. I believe that the mix of the mediators' backgrounds was essential to the success of the process and contributed to a result in which estranged family members hugged for the first time in years.

So, do I believe in MDP? Well, Frank tells the wonderful story of the Maine farmer who was asked whether he believed in infant baptism. "Believe in it?" said the farmer. "Hell, I've seen it done." MDP is quite powerful — and I have seen it done. I predict that we will see a great deal more of it in the years ahead. (For a discussion of MDP, see Hoffman and Wolman 2004.)

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### ***Identity, Meaning, and Spirituality***

Until recently, the questions that ADR practitioners wrestled with were, for the most part, nuts-and-bolts issues. Should we use shuttle diplomacy or keep the parties in the same room? Is evaluative mediation good, bad, or an oxymoron?

With the creation of the path-breaking Harvard Negotiation Insight Initiative led by Erica Ariel Fox at PON, a new door has opened for dispute resolvers into a realm of intuition, emotion, identity, meaning, spirit, and (on our good days) wisdom. Drawing on such diverse sources as *Difficult Conversations* by Doug Stone, et al. (2000); Viktor Frankl's (1992) *Man's Search for Meaning*; and a book of essays entitled *Bringing Peace into the Room* (Bowling and Hoffman 2003), mediators are opening the way for an exchange with the parties about interests and needs that goes deeper than their material interests. This realm lies in a space bounded by the paths of law, psychology, and the various wisdom traditions.

I agree with the mediator I heard recently describing this space. "I love mediation," she said, "because it has the analytic qualities of law but without the viciousness, and the empathic qualities of psychotherapy but without the aimlessness." And I would say that mediation has (on our best days) some of the transcendence of religious experience but without having to go to services. This is mostly uncharted territory for ADR practitioners today, but I predict that in thirty years, it will no longer be considered strange to think of mediators as serving some of the needs that village elders served in days long ago.<sup>3</sup>

In conclusion, I have one more thought — a bonus prediction. Thirty years from now, and beyond, we will still be thanking Frank Sander for his insights, his good advice, and his inspired leadership in the field of dispute resolution.

### **NOTES**

1. Collaborative law is a process in which the lawyers and the parties sign an agreement limiting the lawyers' involvement in the case to negotiation; if there is an impasse in negotiations and litigation is needed, new counsel must be hired. For a fuller description, see Tesler (2001).

2. The leading advocacy organization for funding community mediation is the National Association for Community Mediation. Information is available from <http://www.nafcm.org>.

3. During 2004, the American Bar Association Section of Dispute Resolution devoted a special issue to the subject of what they called "The Spiritual Side of ADR." See *ABA Dispute Resolution Magazine* 2004.

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