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“Wait a Minute. This Is Where I Came In.” A Trial Lawyer’s Search for Alternative Dispute Resolution

*Steven H. Goldberg**

The first question about alternative dispute resolution (ADR) is: “Alternative to what?”

As a latecomer to the ADR dialogue, I first heard this question at the initial session of the Hewlett Socio-Legal Institute on Dispute Resolution, in the Spring of 1993. Twenty-five of us—social psychologists, judges, social workers, business administrators, labor mediators, practicing lawyers, communications teachers, law teachers, social scientists, graduate students, dispute resolution professionals, and myself, an about-to-be-ex-law dean—were spending our first of thirty days together in an Ohio State University Law School classroom. We were there to discuss ADR with Deborah Hensler, Carol King, Craig McEwen, Nancy Rogers, the late Maurice Rosenberg, Frank Sander, and Gerald Williams, among others. Most of the Institute attendees knew our leaders were among the giants in the field. One of us had no clue he was about to view the landscape of the ADR movement with some of the very best.

One of these giants, I do not remember who, began the opening session with “the first question about ADR,” no doubt as a teaching device more than an inquiry for which the answer was truly in doubt. I was the only person in the room who knew almost nothing about ADR, but even I knew the answer. So did everyone else. Of course, all of our answers were somewhat different, reflecting our different experiences, professional backgrounds, socio-political philosophies, and aspirations. Except for me, the Institute participants had one important thing in common, each considered herself or himself a card-carrying member of the ADR movement.¹

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1. The author has spent about equal time—a decade—as a trial lawyer, a dean, and a full-time law teacher. Though occasionally active as an arbitrator and intensely interested in making litigation less painful for clients and lawyers, the author cannot

Four years after that June morning in Columbus, following some ADR practice and reading,² I, too, teach an ADR course and I, too, use "the first question about ADR" as the pathway into the subject. But after four years of searching, I have a different answer to that first question than the answer I knew, when I knew nothing about the subject.

My original answer to the question "Alternative to what?" was "the adversary system." ADR held out the promise of a better way than the adversary system for handling at least some of the inevitable friction in society. I could not define "better" precisely, but it contained notions of faster, cheaper, less contentious, less aggravating, or more likely to leave the parties talking to each other when the process was over.

My current answer to the question "Alternative to what?" is that ADR is not an alternative. Alternative Dispute Resolution courses have become Dispute Resolution. In this society, dispute resolution is the adversary system. My unhappiness with the current answer is the reason for this essay and for its suggestion that the ADR movement, and particularly the law teachers within it, think again about the direction it should take.

In the classic sense of the outsider looking in, the ADR movement has made it to "in" status. During this decade, its various forms have become commonplace in many American courthouses. The movement is snowballing, as the number of forms and the number of courthouses grows every year. A decade ago, only a few law schools offered a course in ADR. Today, dispute resolution has become a staple elective in most schools (just

claim to be part of the ADR movement. The search for ADR reported here, with its unfortunate conclusion, is the search of a trial lawyer.

2. There is much to read for one who jumps into the subject of ADR without previous background. I have listed the material that I found most helpful and most thought provoking in a bibliography at the end of the essay. Many of the ideas in this essay come from these readings or from conversations with the authors.

I dislike having my reading interrupted by a footnote, only to find that the reference is to an idea not important enough for the text, but too dear to the author to exclude. At other times, I break the train of thought, only to be told in the footnote that five other people have at one time or another said the same thing that the author has said in text, as if the earlier observations made it true when the author's assertion would not. Except for the first two footnotes, this essay contains no textual footnotes and no attribution citations for propositions that have been previously stated by others. Names of authors and articles that are worth mentioning are mentioned in text. Footnotes appear solely to provide a citation for the reader who wishes to locate the original document or attributed idea referred to in the text.

as tax, corporations, and other popular electives). Course books expand as the courts develop more of what Professor Carrie Menkel-Meadow has called "The Law of ADR."³ Can a Restatement of the Law of ADR be far behind?

I liked it better when ADR was not fast becoming part and parcel of society's main dispute resolution apparatus. The most important word in "ADR movement" was "alternative." It was the soul of the idea, its substance. Today, the form is succeeding, but the substance is dying. More precisely, the substance is dying because the form is succeeding. The alternative in ADR has become a victim of its own success.

Of course, many in the ADR movement will disagree. They will contend that Professor Frank Sander's innovative vision of a multi-door courthouse,⁴ has become reality, in one form or another, and that ADR is having a profound influence on dispute resolution in America. As in all things, where one stands depends largely upon where one sits.

For a decade at the end of the 1960s and through most of the 1970s, I sat at counsel tables in courtrooms, trying everything from antitrust to zoning, with the most common stops at contracts, criminal, estates, family, and tort. The legal community was relatively small in our county seat in Minnesota and the number of trial lawyers was even smaller. We had a civil pretrial system that was more disclosure than discovery, and a criminal trial system that was a mixture of "ambush trial" and wrangling over the new "rights" the Warren Court had discovered, while turning over the rocks in the garden of the Bill of Rights. Civil disputes were settled without much faldral when they could be, and tried quickly when they could not. Clients were as satisfied as possible, given a system in which one side loses. Members of the community at large gave little thought to their justice system, when not personally involved, and maintained a grudging respect for lawyers. Lawyer jokes were outnumbered by Polish

3. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

4. For a description of how the "multi-door courthouse" might work see *infra* pp. 13-14. See generally Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). Although Sander does not use the term "multi-door courthouse" this is a term used by others to describe his ideas. See, e.g., Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-door Courthouse*, 37 CATH. U. L. REV. 577 (1988); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 324 (1996).

jokes, in our largely Polish community. Trying cases was fun and most of the trial lawyers were friends, there being no one else willing to listen to trial stories for more than a drink or two. The last thing any lawyer in our community was searching for was an alternative to the relatively efficient, relatively just, relatively enjoyable, and relatively profitable dispute resolution system that we served and, paradoxically, over which we were the masters.

Toward the end of the 1970s, I found myself more often sitting in a chair in the conference room of a large Minneapolis law firm, or in court chambers, wrangling about what was and what was not discoverable in a civil action. Trials were rarer. Depositions, motions, and fighting over procedures were more common. Early settlements were harder to come by. Cases took longer to come to trial. Lawyers were less pleasant. Clients were less satisfied. And Chief Justice Warren Burger, a one-time lawyer from across the river in St. Paul, was complaining about the diminution of the quality of lawyering in America and the litigation mess in the justice system.⁵

The Chief Justice was probably more concerned about criminal defense lawyers bombarding the federal courts (his, in particular) with rights claims for criminal defendants and prisoners than he was for the quality of the examination and argument skills in state trial courts. And he may have cared more about the "unimportant" personal injury diversity suits taking federal court time away from "important" corporate litigation than he did about reforming the process of dispute resolution. His pronouncements on both lawyering and law reform, nevertheless, carried the weight of his office and the breadth of its influence. The 1976 Pound Conference in St. Paul, Minnesota⁶ is often cited as a watershed in the legal history of the twentieth century, the time when the legal establishment embraced ADR and, in particular, Professor Sander's multi-door courthouse.⁷

There is a difference between marking a date and identifying causes of change. It is the embrace of ADR with which I am here

5. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973).

6. Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. (A.L. Levin & R.R. Wheeler, eds., 1979).

7. See, e.g., Stempel, *supra* note 4.

concerned. The Pound Conference may have had a coincident existence with the growth of the ADR movement, but other forces were changing the legal landscape.

By the early 1980s, I was sitting in the ivory tower of academia watching the justice system on its way to free-fall. The legal profession's ability to acculturate and finish the training of law school graduates through guided experience had been completely swamped by the rapidly multiplying number of graduates. The exponential increase in unmonitored pretrial activity in civil cases and the accompanying shenanigans (an urban practice phenomenon—mostly in New York—for more than a decade earlier) were spreading across the breadth of the legal profession from North Dakota to Mississippi. In addition, the huge increase in the number of lawyers, the insurance industry's insistence that there was a litigation explosion, and television's often critical spotlight on the real and fiction of law practice were providing fuel for the smoldering coals of public disdain for lawyers.

I sat where most lawyers sat. The "impending crisis" in the justice system was the grist for classes in professional responsibility and bar association conferences, for occasional hand wringing, and for suggestions to make litigation more efficient and lawyers more civil. Although Professor Laura Nader, a one-time supporter and insightful anthropological observer of the ADR movement, claims that lawyers fueled the ADR explosion in the years following the Pound Conference,⁸ ADR was not part of the "impending crisis" dialogue for most of the nation's practicing lawyers. There were, to be sure, a few pioneers and innovators in academia, and even fewer in practice, who saw alternative methods of dispute resolution as an important answer to the growing discontent about lawyers and justice. But those innovators were a tiny minority among lawyers. In the late 1970s and the early 1980s, most lawyers were not searching for ADR.

The social phenomenon known as "the ADR movement" started mostly outside of the law. The lawyers thinking about ADR were an even more insignificant minority in the ADR movement than in the legal profession. The modern ADR movement started in the late 1960s and 1970s, with neighborhood centers, marriage counselors, conflict resolution types (social scientists,

8. See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3, 6-7 (1993).

for want of a better term), and a host of other nonlawyers and nonlawyer groups actively seeking kinder processes, empowerment of disputants, and better, longer-lasting relationships between disputants. A pervasive system of mediation and arbitration for resolving labor disputes and the American Arbitration Association (both with heavy involvement from lawyers) were well established by the 1960s, but they were not part of what Professor Nader identifies as the modern ADR movement's "harmony ideology."⁹

The ADR movement—at least the part that was concerned with making fundamental changes in the way society resolved disputes—enjoyed modest success in the late 1970s and early 1980s as various groups and communities increasingly tried mediation as a way for solving problems—mostly small problems. But the ADR movement made little progress in changing the dispute resolution culture of the country. There were, to be sure, ADR systems in a number of commercial communities (like the diamond industry), but most of these were historical and unrelated to any push from the modern ADR movement. A significant exception was the Center for Public Resources, an organization to support ADR, founded by major corporate counsel seeking a way to reduce the cost of resolving major business disputes.

As Professor Nader suggests, the ADR movement did not begin to have any widespread influence in society until many of the movers and shakers in the legal community began to see ADR as a solution to the "crisis" in the justice system.¹⁰

That is the time where I came in—along with a lot of other lawyers. Toward the end of the 1980s the "impending crisis" in the justice system had matured into a "full-blown crisis." From my seat in the law school teaching trial advocacy, and from an occasional perch in the world of practice, I joined the growing group of academics and practitioners who were asking aloud whether the current operation of the adversary system of justice was sufficient for society's needs. Litigation appeared so costly, so interminable, so freighted with procedural wrangling, coreugly, and inaccessible for most of the disagreements that most of society wanted to resolve, that it seemed beyond salvage. Tinkering with the system might not make enough difference to be worth the effort. More law schools were developing courses in

9. *See id.*

10. *See id.*

ADR. Private dispute resolution enterprises were beginning to spring up in areas of heavy population. Judges were beginning to wonder whether some of these "other" dispute resolution ideas might be saviors for their dockets, rather than threats to their dispute resolution monopoly.

By the time of the 1993 Hewlett Institute, I had become a full-fledged skeptic about the usefulness of the adversary system—at least for most civil disputes. It may have been due to the four years spent as Dean of the Pace University Law School, away from the day-to-day teaching and practice of law. It may have been moving to New York, where everything that had seemed troublesome in Minnesota's version of urban America seemed disastrous in New York's seemingly rotten apple. The more removed I had become from participation in the system, the clearer it had become that the encrustations that pretrial wrangling had placed on trial decision making were killing it—at least killing the adversary system that had seemed so useful in my trial practice of the 1970s. In any event, I could not resist the allure of ADR and the chance to teach and write about something that might be useful to a society increasingly estranged from an overly complex dispute resolution system.

I flew to Columbus with the same anticipation that most judges and some lawyers had as they flew ADR in hopes of salvation. Somewhere in the wisdom of the ADR movement I would find the key to making litigation less costly, aggravating, and time-consuming, and more accessible, streamlined, and responsive to the needs of most citizens who had disagreements to be resolved. And if it cleaned up the congestion in the courts at the same time, that would be okay, too.

I entered the classroom that first day having served as an arbitrator in a number of matters, knowing something about (though never having participated in) mediation, and having heard something about minitrials, but knowing nothing beyond the name. I was ready to be taught by the law professors, lawyers, and judges who had thought about how ADR could help fix the adversary system.

The first shock was the class. I expected to find a room full of practicing lawyers and law professors who were experienced in ADR and meeting to share their experiences, wisdom, and ideas for the future. There were a couple of practicing lawyers and law professors in the room but they were badly outnumbered by the social scientists and others of various nonlaw descriptions. What

was someone from interpersonal communications going to offer about streamlining the expensive and interminable wrestling before trial? Was a psychologist really going to know anything important about deciding cases—or finding some way other than trial to make law?

The second shock was finding that I was not starting from zero; I was somewhere in the hole. I not only knew very little about ADR, the little I knew about arbitration was the least important part of ADR with which the Institute would be concerned.

The third shock was finding that most of the participants and teachers in the Institute thought that the common-law trial (the only part of the system that I thought was still working) was the dispute resolution mechanism for which an alternative was most needed.

Over the month of the Institute, I learned that different individuals had varying reasons for preferring ADR to the common-law trial. Although it was not then apparent, my colleagues' reasons for preferring alternatives to trials were subject to categorizations that reveal much about the ADR movement. As I look back on it now, the participants and teachers in the Hewlett Institute were fairly representative of the entire ADR movement. Their reactions and comments, though not a perfect reflection of the entire ADR movement, are close enough so that the Institute serves as a pretty good surrogate.

At the risk of oversimplification, the Institute participants fell into two groups: those who sought an alternative to common-law trials because trials were too inefficient, and those who sought an alternative because common-law trials were too hard on disputants, lawyers, and society in general. The groups were neither self-conscious nor self-identifying. The articulation of positions on various ADR issues was never aimed at demonstrating the dichotomy, even though some of the readings invited the discussion. At the time of the Institute, I had neither the experience with nor the knowledge of ADR to notice what is now apparent to me. But the two groups are identifiable and important for the observations and suggestions that follow in the second and third parts of this essay.

It is tempting to suggest that the two parts of the ADR movement represent the ideological split Professor Robert Baruch Bush claims is central to the adjudication/mediation controversy: the "liberal/individualist" vision of society versus the "communi-

tarian/relationist" vision.¹¹ While there is certainly an element of that division separating the two groups, there is both more and less to it than that.

The liberal/individualist was not represented in full flower at the Institute. There were no outright opponents of ADR in attendance, though Professor Fiss's important critique of ADR, *Against Settlement*,¹² was one of the first readings. There were some rights-based advocates, but as to the adjudication system, they were of the no-reason-to-do-away-with-it-completely kind, rather than the it's-the-natural-order-of-things-and-should-be-left-untouched variety. Moreover, the topics of the Institute, save for the introduction, did not lend themselves to debating the efficacy of ADR. The Institute mainly attracted people who were already part of the ADR choir. The communitarian/relationist, therefore, was more in evidence, though one had to listen between the lines and understand the history and makeup of the ADR movement to hear the importance of the ideology to some of the positions taken. Being the only one in the room who was neither a member of the choir nor knowledgeable about ADR, I was hard of hearing. I make the observations in this essay mostly from the echo.

Law training was an important, though not universal, difference between the two groups in the Institute. Including the author, there were two ex-trial lawyers, one judge, and no practicing trial lawyers in the group. Those with law training were mostly law teachers or lawyers "practicing" ADR.

"Trial" was almost the universal answer to the "Alternative to what?" question, but the meaning of "trial" and the rationale for finding an alternative were different between the two groups. Most of the nonlawyers in the group disliked the trial for its method. Most of the lawyers claimed to be at least neutral about trials, but were concerned about their cost in time, money, and court resources. Those nonlawyers who thought trials ought to be replaced by better methods also made the antitrial arguments of the lawyers about cost to clients, time for resolution, and wasted societal resources. Those lawyers who thought that trials were too expensive, time-consuming, and wasteful of the government's resources also made the antitrial arguments of the

11. See Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 15 (1989).

12. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

nonlawyers about finding methods for resolving disputes that were kinder and gentler on all involved in the process.

It is now clear that when the nonlawyers said "trial," they used it as shorthand for adversarial dispute resolution. When the lawyers said "trial," they meant trial. These different perspectives on the same answer to the "Alternative to what?" question reflect an important division in the ADR movement, one with its roots in the movement's diverse origins. There are those in the ADR movement who think the adversary system of dispute resolution is little more than a pagan right that ought to be excised root and branch. There are those who think that engrafting the ADR forms and some of the underlying philosophy onto the adversary system will fix it. The excisers (mostly nonlawyers) would replace all adjudication with mediation, if they could. The engrafters (mostly lawyers) would put negotiation, early neutral evaluation, mediation, minitrial, summary trial, and arbitration into every courthouse. While I do not mean to suggest that the excisers/engrafters division defines actively opposing groups in the ADR movement, I do suggest that the ADR movement combines two groups that arrive at the movement with different approaches and training. Recognizing that difference is helpful in gaining an understanding of the current and future states of ADR, much in the same way that Professor Baruch Bush's liberal/individualists versus communitarian/relationists dichotomy is useful in understanding the heat in the mediation versus adjudication debate.

The Hewlett Institute consideration of ADR forms began with negotiation. The discussion leader suggested that if one was looking for an alternative to the pervasive method of dispute resolution in society, it was negotiation, not trial, that was to be replaced because negotiation, not trial, resolves most disputes. As a trial lawyer, I had always thought of negotiation as part of the trial process. The distinction between negotiation and trial was therefore lost on me—until I heard the nonlawyers begin to discuss negotiation.

The nonlawyers did not share my view that negotiation was part of the trial process—a reality that Professor Marc Galanter has identified and labeled "litigotiation."¹³ They discussed negoti-

13. See Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 n.14 (1994) (citing and explaining Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal*

ation as if it were a process that could be divorced entirely from the adversary system and, more importantly, from adversarialism. For them, negotiation was the basic process that could convert the primary flaw of adjudication—the inevitability of zero-sum resolutions (someone wins, someone loses), into the panacea of problem solving—the potential for win-win resolutions (everyone smiles). The lawyers in the group, particularly the negotiation teachers, shared the same ideas about effective negotiation technique and used the same language to explain negotiation styles as the nonlawyers, but their discussion of the subject did not carry the same overtone of panacea.

Professor Gerald Williams' path-breaking study on lawyer/negotiator types¹⁴ and his class material, with its echoes of Jungian psychology,¹⁵ set the tone for our consideration of negotiation. The nonlawyers heard it as an affirmation of their view that negotiation could be a problem-solving alternative to trial resolutions, if only lawyers would learn to negotiate in the proper spirit. The lawyers heard it as a description of different techniques that might work well to provide an advantage in negotiation (an adversarial process by nature) even if the negotiation was in pursuit of a commercial transaction having nothing to do with a trial.

Had I the background to listen properly, I would have been able to infer, from the nonlawyers' view of negotiation, that when they spoke of trial as the process for which an alternative was important, they really meant the adversary system. I would have understood that the gulf between the nonlawyers and the lawyers in the ADR movement had great potential for growth.

Our mediation discussion provided a simple example. The lawyers saw mediation as a tool for prodding a stalled negotiation into a settlement that would avoid trial. Anything the neutral mediator could do to achieve a settlement (short of deciding for the parties—and maybe even that) was appropriate, because achieving settlement was the standard for success. To borrow two-thirds of Professor James Alfini's elegant trilogy,¹⁶ the heavy-handed "trashing" of the disputants' legal positions or the

Process, 34 J. LEGAL EDUC. 268 (1984)).

14. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 15-46 (1983).

15. For a full exposition of Professor Williams' approach, see Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1.

16. See James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991).

“bashing” of their dollar positions, until they met in the middle was fine, so long as it worked.

The nonlawyers saw mediation as the paradigmatic alternative to the trial. “Hashing” (Alfini’s third mediator style) in a consensual mediation, so that the mediator’s orchestration would facilitate empowerment and create the transformative process, was the only acceptable method of mediation for the nonlawyers. Without consent, empowerment, and transformation, there was little value in a mediated settlement.

The significance of the difference in approach between the nonlawyers and lawyers was not as apparent to me as it should have been, because the lawyer/mediator debate raged at the same time. The suggestion that only lawyers should be allowed to mediate was the first issue in the Institute to divide explicitly along lawyer/nonlawyer lines. The idea that only lawyers could be effective mediators drove the nonlawyers apoplectic. I heard their outrage as a turf issue and missed the real message. The nonlawyers not only rejected the notion that mediators should be required to be lawyers, they thought lawyers should not mediate. It had nothing (at least not much) to do with non lawyers wanting the work. They believed that most lawyers were incapable of shedding their adversary system indoctrination and perspective. Ergo, lawyers would make poor mediators.

The last item on the Institute agenda—court-annexed ADR—should have made the division I have suggested between excisers and engrafters obvious even to one as unsophisticated about ADR as I was. If the nonlawyers were really, but unknowingly, looking for an alternative to the adversary system, not just trials, what better subject than court annexed ADR to bring that to their consciousness and into the discussion? It did not happen and there is an important lesson for the ADR movement in that failure.

Everyone wants ADR to “succeed,” even if for different reasons. Professor Frank Sander, the architect of the multi-door courthouse, led the Institute discussion of court-annexed ADR. Some cautions were expressed about infringing on the right to jury trial, forcing litigants to an extra procedural stop before trial, and the theoretical inconsistency of mandating a process based on consensual participation. Despite the cautions, each of the Institute participants (including the leaders) seemed to think annexation of ADR by the courts was a most important step in achieving the goals of the ADR movement. The lawyers saw

court annexation of ADR as a way to relieve the pressure on the justice system, so it could operate better for all concerned. The nonlawyers saw court annexation of ADR as a foot in the door, a way to begin converting an inferior adversary system to a superior problem-solving method of resolving disputes.

Court annexation of ADR was the only subject during the Institute about which I had a firm opinion. I was persuaded that court annexation was a bad idea, but I was unable to persuasively articulate a reason to myself, let alone to anyone else.

I now know why court annexation of ADR is bad for the ADR movement. If our litigation system becomes the sponsor, supporter, and "success" of ADR, ADR will lose its unique character, and with it, its value to a society already too adversarial for its own good. It is that idea and its consequences that take up the remainder of this essay.

"WE HAVE MET THE ENEMY AND THEY ARE US!"¹⁷

ADR IN THE LAND (THE MULTI-DOOR COURTHOUSE) OF LAWYERS

Those who believe that trial is the evil for which an alternative is needed should be exuberant. Legislators have discovered ADR. They think it will save taxes. At the federal level, the Civil Justice Reform Act of 1990¹⁸ and the Administrative Dispute Resolution Act of 1990¹⁹ are but two examples. Courts have discovered ADR. They think it will clear dockets. State courts, as well as federal, are jumping on the bandwagon. The growing number of states with multi-door courthouses makes Professor Jeffrey Stempel's observation that "the practicalities of court pressure, public preference, and political power ensure that ADR in some form will be part of the judicial system for at least the foreseeable future"²⁰ appears unassailable.

An alternative to "trial," unfortunately, was the last thing for which this trial lawyer was searching. My experiences with trials were positive. Even in complex cases with large amounts at stake, trials were relatively quick, painless, and produced results that seemed as right as one might expect from any after-the-fact exploration of "what happened."

17. Pogo, great swap philosopher and one-time staple of the comic pages of most of America's newspapers.

18. 28 U.S.C. §§ 471-82

19. 5 U.S.C. § 574

20. Stempel, *supra* note 4, at 301.

The further I became removed in time, geography, and population size from that satisfying experience as a trial lawyer, the clearer it became that the road to those quick and painless trials was increasingly long and torturous. Trial lawyers were all but extinct by the late 1980s, except for those trying criminal cases and a few personal injury lawyers. They had been replaced by a group of people calling themselves litigators.

The civil pretrial swamp in which litigators work and through which they drag their clients might have been the Hell of Dante's *Divine Comedy*, had he known about it. There are scholarly apologia for the civil litigation system as the best dispute resolution system ever devised,²¹ but if you asked clients you would find a different attitude. Most clients (and any litigator whom you could persuade to speak honestly about it) would tell you that the pretrial process is so full of delays, battles over secondary matters, and adversary attempts to avoid disclosing information that it is hardly worth the candle.

I had become interested in ADR as an alternative to that system of civil dispute resolution that encouraged the parties or their lawyers to engage in an unmonitored war of hide-and-seek or harass-and-delay. Learning that the justice system had discovered the "wisdom" of ADR and was annexing it to the already overloaded and dysfunctional litigation system was not what I wanted to hear. ADR adherents who are cheering court-annexed ADR—because they believe it will improve the justice system by making it more like ADR—should take a lesson from the discovery "revolution" of the late 1930s and 1940s.

The proponents of the Federal Rules of Civil Procedure (the current model for most pretrial schemes in the United States) thought they were going to make the justice system better, faster, and fairer.²² In a sense, they were the first ADR proponents. They wanted to put an end to "trial by ambush." They envisioned a future in which parties would become fully aware of the facts through a kind of nonadversarial exchange of information before trial. They wanted resolutions based on all of the relevant evidence. They believed full disclosure would lead to more settlements of an amicable and informed nature and fewer trials of an adversarial and uninformed nature. And should trial

21. See, e.g., Stempel, *supra* note 4.

22. For a balanced overview of the "intent" of the drafters, see Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

be inevitable, they did not want the result to be wrong because one party could not produce evidence in the exclusive possession of the other. They wanted a system that did not so heavily favor the information holder, often the malefactor. They believed that settlements, as well as trial results, would better mirror what really happened than the results achieved by a system with almost no discovery. Although the drafters knew they were adding rules of discovery to an adversary system, they thought the rules were designed to facilitate a kind of "simple and efficacious"²³ system of disclosure that would result in quicker settlements and better trial results.

It did not work out that way. The shorter "ambush trial" has been replaced by the longer pretrial war of attrition. The adversary system did more to change the nonadversarial disclosure notion of the Rules of Civil Procedure than the Rules did to change the adversary nature of the justice system. It is undoubtedly true that some parties have gathered facts about their claim or defense under the discovery system that they might not have learned in the prediscovery days. It is not so clear that the results of today's trials following discovery provide a better mirror of the events in question than those ambush trials of prediscovery days. The rectitude of trial results is one of those things beyond either empirical or anecdotal proof. Whatever the added benefit from discovery to individual parties or to adversary justice in general, it has come at significant costs of time, money, and aggravation not imagined by those who invented the system. This is due, in large part, to a failure to understand that lawyers would not treat pretrial activity as a time for open and honest disclosure.

Litigators have treated pretrial as a time for adversary activity aimed at gaining an information advantage, developing impeachment ammunition, limiting the opponent's trial options, and harassing the opponent into a less-than-fair settlement. It is common understanding (whether or not actually true) that lawyer pretrial behavior in the past quarter century has become much more aggressive (often outrageous) than anything any trial lawyer ever did in a courtroom—where the fact finder sees what the lawyers are doing and judges the client's case in part on the credibility and the conduct of the lawyer.

23. See Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 224 (1942).

When the litigation culture of using discovery to gain every competitive advantage was developing in lawyers' conference rooms, there were no practical checks on what lawyers could do. It was laissez-faire adversary discovery without enforceable rules. Outrageous conduct—everything from purposeful delay and destruction of evidence to unbelievable harassment of witnesses and lawyers—became so common that the stories ceased to be surprising. The amendments to the Federal Rules of Civil Procedure of the 1980s and 1990s were aimed at encouraging sanctions. Trial “referees” evolved, in Professor Judith Resnik’s apt description, into “managerial judges.”²⁴ The amendments to the Rules of Civil Procedure had limited success in reigning in lawyer conduct. Some of them, most spectacularly Rule 11, have succeeded only in spawning new places for new kinds of pretrial wrangling. Professor Stephen Yeazell offers a most picturesque description of the effect of the Rules in changing and the ineffectiveness of the “managerial judges” in controlling lawyer behavior: “control of litigation has moved further down the legal food chain—from appellate to trial courts, and from trial courts to lawyers.”²⁵ The clients who suffer in the system, no doubt, see the sharks pooling.

The Federal Rules of Civil Procedure effectively moved the determinative part of the adversary contest from the light of the courtroom to the dark of the lawyers' conference rooms, with the unintended effect of making the adversariness of the system longer, stronger, and more expensive, to boot. ADR will suffer the same fate. The disclosure rules did not make the justice system more fair and less adversarial. The justice system became less fair and more adversarial. ADR will not make the justice system more like ADR. The justice system will make ADR more like litigation. The changes are already apparent.

There are many forms of ADR (negotiation, early neutral evaluation, arbitration, minitrials, and summary trials), but mediation is the paradigm. Supporters of mediation have argued that any settlement achieved in a consensual process is likely to be “better” than one imposed by adjudication—better in fairness, acceptance by the parties, and the civility of the process. Mediation promises the possibility of less formality, less concern for

24. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

25. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 647.

legal rights and process, and more attention to individual concerns and solutions—more attention to problem solving. It can be done without lawyers. It can be done without publicity. It can be done without weighing down the result with concern for how subsequent disputes might be resolved.

Now the justice system has hold of ADR.

Consent, so central to the notion that the parties and society will profit from solutions by agreement, has been replaced by mandatory participation. Even in those court-annexed programs where mediation is not mandatory, it has been my observation that many judges trying to clear dockets coerce parties into mediation. Many ADR proponents, paradoxically, support the effort. Some believe that mediation is so superior to adjudication that it will take over the courthouse. Others believe it is so important to society—and so unlikely to be used without coercion—that consent should be ignored in order to save mediation as a viable dispute resolution alternative. Professors McEwen & Milburn, for example, offer the paradox that people “forced” to participate in the consent-driven process of mediation, nevertheless, are often pleased with and profit from the process.²⁶

The notion that nonlawyers with different skills, perspectives, and substantive knowledge will bring a refreshing difference to mediation has been replaced by the notion that only lawyers can mediate. The concept of the mediator as facilitator, someone who would empower the parties and pave the way for an agreement that would prosper because of the parties' stake in it has been replaced by the mediator as pseudo-decision maker. The idea that something other than rights and legal process might inform agreements has been replaced by the idea that mediators will trash the parties legal positions or bash their demands until the parties, exhausted, meet in the middle.

Putting mediation into the courthouse has made both mediation and the court processes more, not less, cumbersome. Even parties with cases that ought to be adjudicated are forced into the time, expense, and seeming irrelevancy of mediation.

Professor Stempel's suggestions for updating Professor Sander's multi-door courthouse are exemplary of what happens when you give lawyers control of a dispute resolution mecha-

26. See Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23 (1993).

nism. When you put ADR into the courthouse, it begins to look like litigation:

- Sander's screening clerk, who would pick the right "door" for the dispute would be "upgraded to a judicial officer of substantial training and discretion."²⁷
- The clerks who work for the new "upgraded judicial officer" should be "lawyers with training and background substantially similar to that of United States Magistrates."²⁸
- After the "Intake Magistrate" requires the parties to participate in a process for deciding which door should be used, and after the magistrate decides which door is available, the parties have a "limited right of appeal to a judge assigned to preside over this aspect of the court's caseload."²⁹
- If one ADR procedure does not work, the parties might be required to participate in further ADR procedures before being admitted to the sanctity of a trial.³⁰
- The no-discovery culture of traditional ADR would be replaced by early discovery, not only to aid in the ADR resolution, but also to determine which ADR method should be used in the first instance.³¹
- Instead of using volunteers to do the ADR work, the mediators, arbitrators, etc. should "receive sufficient compensation and benefits so as to attract society's most able lawyers."³²
- The entire ADR process should be subject to appellate review.³³
- A party should not be involved in ADR without legal representation.³⁴

27. Stempel, *supra* note 4, at 370.

28. *Id.*

29. *Id.* at 371-72.

30. *See id.* at 372.

31. *See id.*

32. *Id.* at 373.

33. *See id.* at 374-75.

34. *See id.* at 382.

- Mediators should be able to actively intervene and to force parties into a different method of ADR or to trial.³⁵
- The compelled ADR results would be admissible if the matter eventually came to trial.³⁶

Some or all of the above might be fine for an adversary system trying to change the way it handles cases, but none of it is good for developing alternatives to the litigation system. None of it is good for ADR—a cheaper, fairer, less contentious, and simpler way to resolve some disputes.

The problem is lawyers. I do not mean to suggest that some lawyers are not fine ADR practitioners, both representing people and facilitating ADR procedures, but that does not mean one should choose lawyers as the group to define ADR. And when ADR goes into the judicial system, it will be defined by lawyers—more specifically, by the concerns that lawyers are trained to protect. The law and lawyers are concerned with who is right, which procedures constitute due process, creating precedents that define normative behavior, and creating results that are acceptable enough to society so that it will not opt for some less acceptable method of resolving disputes, such as reliance on might. Moreover, in our society, “justice” depends upon the assumption that “truth” will be most readily discovered by an intellectual war between trained gladiators representing competing ideas.

The discovery revolution again provides a useful warning for ADR proponents who believe they will advance ADR and improve the justice system by putting the two together. It is impossible to prove that lawyers caused the trial system to deteriorate into the litigation system, but it is clear they were around when it was happening.

The more cynical view might suggest that the litigation change in lawyers and lawyering was coincident with the explosion in the number of lawyers, the exponential increase in large law firms, and the religion of lawyers—charging for work by the hour rather than the task. Conscious or not, the legal services

35. See *id.* at 379, 383.

36. See *id.* at 376.

industry had a stake in litigation that took longer, required more people, and involved more intricacy—even if the intricacy had nothing to do with the merits of the dispute, but centered instead on how the game was being played. The more charitable explanation is that lawyers are acculturated to believe that the adversary common-law process is the best way to order society and are trained in techniques to perpetuate and effectuate that system.

In either event, when asked to mold something foreign into an effective adjunct to their adversary system of justice, lawyers will, invariably, mold it into a shape with which they are familiar. Professor Stempel's view provides an exquisite example:

Although the debate will undoubtedly rage about whether this constitutes "real mediation" or justifies mandatory programs, it seems inevitable that mediation officers must be willing to depart from passive neutrality when warranted (*just as a judge does*), and that mediation, like any form of disputing, probably works better when lawyers (*the world's leading dispute resolution specialists*) are part of the process.³⁷

It is not that lawyers are bad people. It is that we cannot help it. Part of the reason that adjudication works so well—if we finally get around to it—is that lawyers are well trained to look at and describe the world in a particular way.

ADR proponents are not the only ones who ought to be wary of court-annexed ADR. Lawyers ought to be equally leery of putting ADR methods into the justice system. It is a shame that in pursuit of our goal of adjudicating truth, we lawyers have so cluttered the system that it does not work as well as it might. We will not gain much ground, however, by constructing still more courthouse hurdles in front of the courtroom door. Our unique system of truth through intellectual battle suffers from too much process, not too little. If its supporters want to preserve a system that provides societal norms through judicial precedents, they ought to worry less about incorporating ADR and worry more about stripping the system of the pretrial adversarial clutter that bludgeons parties into settlements instead of decisions. It is trial, not settlement, which validates the system. If the system does not vindicate rights, assign fault, and create societal norms through trial results, it is not worth the

37. *Id.* at 383 (emphasis added) (footnotes omitted).

time and money society pours into it. That is not to say that all cases ought to be tried. It is to say that the value of the system is in the trial results, not the settlement results. Settlements may be valuable, but not for establishing rights, fault, and societal norms. Moreover, settlements are more easily achieved in other settings.

ALTERNATIVE: A ONE-DOOR COURTHOUSE IN A POSTMODERN,
MULTI-DOOR WORLD

A judicial system dominated by the lawyer's perspective is certain to care more for rights and process than is necessary to resolve every societal disagreement.

Where should we deal with those disagreements that do not need all the rights and process due in the justice system, with those disagreements that might profit by other considerations? An effective trial system for assigning fault, blame, or liability might not reach the "proper" resolution for all disagreements. Trial might not be worth the trouble for all disagreements, even if it reaches the "proper" result. Individuals may not be as well served by the "right" result as they would be by the "right" process. Trial might be a more expensive, lengthy, and public process than some might wish or prudence might dictate for the resolution of their problems. The culture promoted by constant resort to fault and rights determinations for all of society's differences might not be as useful as a culture promoted by communitarian values.

This is not to say that the adversary system is not an important tool for resolving disputes. Not even the postmodernists—the most recent school of scholarly attack on the adversary system—want to abandon it entirely. Professor Carrie Menkel-Meadow, in her devastating critique of the adversary system, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, for example, allows that the adversary system "has its value."³⁸

A decision about fault and liability is often critical to future community peace, psychologically important to individuals, therapeutic for society at large, and a useful way to establish societal norms. Many disputes cry out for adjudication and ought to be

38. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 40 (1996).

subject to effective resolution in court. The problem is that there are very few disputes that can be effectively adjudicated in our society. There are too few trials to provide either vindication or precedent. We have a brutal "on the way to trial" system that results in settlement by accident, judicial coercion, surrender, or exhaustion. We, lawyers of the 1980s and 1990s, have proven beyond disagreement that we are incapable of maintaining an adjudication system in a manner worth the effort.

If we are to find a better way to resolve disputes in our society, the first thing we must do is fix the one door that every courthouse must have—the door to the courtroom—rather than to spend our time worrying over the design for a multi-door courthouse. Nothing else will matter if we cannot fix the trial door. The individual equality provided by our justice system's trials is deep in our cultural psyche and central to our understanding of society. At one level, Professor Fiss is right, we cannot tolerate a world in which all disputes are resolved by settlement, a system of adversary justice.³⁹ The more we settle, the less we try. The more our justice system develops a settlement mentality, the less vigor it will have for trying those cases that ought to be tried. Putting ADR doors on the courthouse only further increases the likelihood of settlement by exhaustion, while it reduces the number of disputes passing through the trial door.

This essay is not primarily concerned with all the details of how to repair—maybe open is a better term—that trial door, but it is clear that more trials will occur only if there is less wrangling and decision making before trial and greater expedition and acceptability during trial. Professor Yeazell's telling observation that the percentage of federally filed civil cases resulting in trials dropped by almost 80% in the half century since the advent of the Rules of Civil Procedure⁴⁰ cannot be attributed to coincidence.

Replacing discovery with disclosure would be a first step to fixing the trial door. Without elaborating an entire statutory scheme, one can imagine that a rule of full disclosure with criminal penalties of the kind we now assess for testimonial perjury might be at least as effective for information exchange as the current system of adversary discovery. Changing the rules of

39. See *supra* text accompanying note 9.

40. See Yeazell, *supra* note 25, at 633.

evidence to conform more with the way we process information for making other important decisions might both speed up and tune up the trial process. Trying cases only before juries comprised of the first twelve people randomly selected from the community—no judges—might provide a system of decision making that truly reflects the composite values of the society.

The above suggestions will draw howls of protest—detailing the ripple effect of the unintended consequences of such nonsense—from those currently toiling in the adversary system. These suggestions are not offered, however, as something to be done in isolation tomorrow. They are offered to make the point that there are many possibilities for reform of the trial system, if one is first clear about what the trial system is designed to accomplish.

If an absolutely accurate reproduction of past events is the object of trial, then there may be something to the howls. Adversary searching may turn up some information that disclosure under the penalty of prison might not. The perjury laws do not stop all witnesses from lying. The current rules of evidence might keep out some unreliable information that a more permissive scheme might allow. Trained judges might be marginally better at finding facts than twelve randomly selected citizens. (The author does not happen to believe this, but has observed that a majority of federal judges and many commentators do).

If, on the other hand, one appreciates the trial system as principally a vehicle for establishing societal norms, an instrument for resolving disputes that will discourage brawling on the street corner, and a participatory mechanism for imposing community values on dispute resolution, one might have a different view of what changes in the trial system might be reasonable.

Fixing the trial door is important to the vindication of many core societal values, but that does not mean that every dispute should be handled in a trial system or that those core values must be vindicated for every dispute of a particular kind or for every particular kind of dispute. But try to persuade the public of that. Despite the mess we have made of the judicial system and the pain it inflicts on those clients with the temerity to try it, "I'll take it to court" remains the almost universal response to disagreements in our society. It matters not how trivial the dispute or how unhelpful a trial resolution might be to the individual or to society at large.

The school did not choose your overweight daughter to be a cheerleader. "Take it to court."

Your neighbor's apple tree sheds its apples into your yard. "Take it to court."

Your car was part of one of this year's tens of thousands of road accidents. "Take it to court."

You don't like the boss's jokes. "Take it to court."

You don't want your former wife to raise your son. "Take it to court."

You don't want your neighbor to park his RV next to his garage. "Take it to court."

You don't want a halfway house in your neighborhood. "Take it to court."

You don't want an X-rated theater in your neighborhood. "Take it to court."

You don't like the condition of something you purchased. "Take it to court."

You did not receive all you hoped for from a product. "Take it to court."

Something thought to be safe three decades ago turns out not to be. "Take it to court."

Legislatures, religions, minor scuffles, community pressures, consensus, respected elders, and the force of cultural tradition have all been diminished as means for solving some societal problems by: "I'm right. I'm going to court."

Rejecting the multi-door courthouse as the forum for handling those disagreements that ought not to be in a trial system does not mean rejecting the ADR movement and leaving everything to trial. Quite the contrary, rejecting the multi-door courthouse means giving life to the notion of alternative, to escape from the adversary system of justice. The ADR movement had a chance to help us change our obsession with the law, until it joined the law and lost its character—or its soul, if you are so inclined. The multi-door courthouse does not provide alternative dispute resolution; it provides substitute dispute resolution. ADR in the courthouse is just another way to finish the journey through the swamp we call litigation.

We need alternative places and alternative methods for solving some of society's problems. We need to have something more than a substitute forum in a litigation system to show for the innovation and the effort that went into the modern ADR movement. We need to find, again, that passion for alternative.

It is unsettling for this trial apologist to find himself—at the end of the search for ADR—agreeing with the original goal of the nonlawyer (anti-lawyer?) group in the ADR movement: establishment of some dispute resolution institutions outside of the adversary system. It is frustrating to realize that there is no alternative to litigation, because ADR has become a success by becoming part of the litigation system. It is downright perplexing to find that the only people seriously pursuing dispute resolution alternatives outside of the litigation system are the postmodernists—people who have little regard for the adversary trial.

The postmodern critique of adversary justice is unlike postmodern critiques in architecture and literature, where the label was first used. The seemingly nonsensical name (What is newer than new?) usually identifies those who react against modernism by self-conscious use of earlier styles or conventions. Legal postmodernists have no particular interest in a dispute resolution style or convention of the past—certainly not the pre-Rules trial. Their focus of deconstruction is an “adversary system [that] is inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system.”⁴¹

It is jarring to a trial lawyer who thinks that adversary system jury trials are crucial to the fabric of our society, to discover more shared goals with the postmodernists than with other trial lawyers, ADR advocates, or dispute-resolution commentators.

Postmodernists reject the notion of adversary justice for many reasons that are beyond the explicit purpose of this essay, but they center their critique on the system's inability to find the truth. For example, Professor Menkel-Meadow's critique of the adversary system focuses on two propositions about truth: 1) “[b]inary, oppositional presentations of facts in dispute are not the best way for us to learn the truth;” and 2) “polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.”⁴²

I am prepared to concede that trials are not perfect (maybe not even very good) truth-finding devices, but so what? Truth finding is not the primary purpose of the common-law trial. The primary purpose is to resolve society's disputes through a process in which the disputants may be heard and through which

41. Menkel-Meadow, *supra* note 3, at 6.

42. *Id.* (footnotes omitted).

community values may be brought to bear on the decision. We indulge the myth that the adversary trial reaches the real truth (as did the proponents of the joust and every other adversary system) because it is required; it is part of our aspiration to immortality. But it remains a system for ordering the behavior of less-than-perfect people, by resolving their differences through the "informed" judgment of other less-than-perfect people, about a less-than-perfect representation of less-than-perfect perspectives on past events. Its imperfections, in a sense, are its strength. So long as truth is its aspiration, the imperfection of the disputants, the participants, and the fact finders are no reason to discard it. The poet teaches, "Ah, but a man's reach should exceed his grasp, / Or what's a heaven for?"⁴³

My insistence on the value of the social utility of the adversary trial, irrespective of its inability to guarantee the "truth," aligns me, paradoxically, with the postmodernists who also find important values other than truth that ought to be served by the dispute resolution system. Professor Menkel-Meadow asks: "I wonder what would result if we redefined our legal system to seek 'problem-solving' as one of its goals rather than 'truth-finding.'"⁴⁴

What, indeed? I take her reference to "legal system" to mean the full panoply of a society's dispute resolution system. And while I would leave "truth-finding" to a trial-centered justice system (imperfect as trial results might be), it is time that we reduce the size and the importance of that justice system, so that different ways to avoid or handle disagreements might develop. It is one thing to hold rights in high regard and to attach importance to blameworthiness; it is something else to be obsessed with it, as we seem to be.

There are some changes in law and procedure that we could make to reduce the influence of the litigation system in our society, but we are speaking, ultimately, about a change in culture. A change in culture will come mostly from outside the justice system and the people who operate it, not from within. Because that is where I come out, it is discomfoting to find ADR inside the justice system. That is where I came in.

Deciding which disputes ought to be resolved outside of the courts and deciding how to persuade those with the disagree-

43. ROBERT BROWNING, ANDREA DEL SARTO.

44. Menkel-Meadow, *supra* note 3, at 30.

ments to go elsewhere are difficult—some would argue impossible—issues. While I have no more to offer than others about how to solve those difficult problems, it is clear that no progress can be made while those interested in alternatives focus on incremental changes in an adversarial litigation system.

Are there other doors available?

We do not often think of legislation as a dispute resolver, but it can do in batch what the common-law does one dispute at a time. If we had more systems like no-fault automobile insurance, would we have a less just society? Does the case-by-case assessment of negligence really influence how others drive? Does it redistribute wealth in a way that is more just than other, less costly methods? Private arbitration has been successful, both in homogenous communities, such as the diamond industry, and in the broader context of the commercial world at large. There is no reason to believe that private mediation would not become successful if the only mediation available existed outside of the court system. For people with problems that are larger in personality than they are in dollars, mediation offers a more satisfying result. For companies that develop large monetary disputes, but must deal with each other over time, mediation offers a response for both the money and the future. Other societies, and ours in an earlier time, have left some problems to the exclusive province of religion. A council of wise, usually, men, has been used by other societies to regulate important societal behavior. (The Senecas, a matrilineal society, used wise women as well, and by all accounts, with equal success.⁴⁵) Some societies—again, ours, in its earlier days—have preferred a five-minute fistfight to a year-long, hundred-thousand-dollar lawsuit that consumes the time and attention of the disputants, friends, families, employees, and, oh yes, their lawyers. (How much better would all have been served if the CEOs of IBM and Fujitsu—or pick your own decade-long corporate dust up—had been locked in a closet with boxing gloves, rather than spending tens of millions of dollars and years of attention on a dispute that ended up in a draw of sorts—a result equally likely to occur in a fistfight between two out-of-shape CEOs with pillows on their hands?)

While I do not mean to advocate a punch in the nose as a dispute-resolution method of choice for a peaceful society, it

45. See ANTHONY F. C. WALLACE, *THE DEATH AND REBIRTH OF THE SENECA* 28-29 (1970).

must be clear that many societies have prospered without taking every disagreement to a lawyer and then to the litigation machine. To be sure, this society grew and matured more rapidly during a time when the days-of-litigation-per-person in the country were substantially fewer than they are today. In order to reduce our reliance on litigation as the method for handling society's problems, we must create a world in which people recognize, at the outset, that there are doors other than the door to the courthouse. Once the person with the problem starts into the litigation system, the litigation ethic envelopes the problem, the litigation practitioners work on the problem, and values other than "rights" and "fault" have no chance.

People outside the justice system, such as those nonlawyers attracted to ADR in the late 1960s and early 1970s, are critical to the establishment of the multi-door world. It will not happen without their innovation and their advocacy. We, lawyers who share their interest in resolving some of society's disagreements through problem solving, must recognize the importance of helping them to establish institutions that will compete with the justice system, rather than bringing them into our intractable world of advocacy.

The current pervasiveness of the legal solution in our society makes it imperative that we work on lawyers as well. Like it or not, lawyers will be the gatekeepers to dispute resolution in this society for the foreseeable future. Although they should not be expected to lead the way to resolving disputes outside of the justice system, they may be educated to understand that a more diverse dispute-resolution world will better serve their clients. It is the welfare of the client, after all, by which we justify our existence.

ASPIRATION

This trial lawyer's search for ADR, which led back to the courthouse from which he started, was fruitful despite finding no there, there. As with most searches, it is the searching, not the finding, that is of the most value.

We, lawyers who are privileged to teach and to shape tomorrow's lawyers, owe that search to our students. We need to reorient our approach. We should return to consideration of the lawyer's role as steward for society's dispute-resolution mechanisms and as problem-solving counselor for clients. Many early ADR

courses were more about the personal development of the dispute resolution professional and the nonlegal options for the client than they were about the law, or even the technique, of ADR. The texts, the teaching, and the perspectives are shifting. Court annexation has made ADR a law-firm profit center and a law school "skills" subject. We teach negotiation and mediation the way we teach Trial Advocacy. We focus on the "skills" that a lawyer must learn in order to "win" a negotiation or mediation. Even as we offer the win-win approach to negotiation, best captured in Fisher & Ury's standard, *Getting to Yes*,⁴⁶ we sell it to our ADR students as a technique for maximizing results for their clients, rather than as a different perspective on the solution of problems. We even send our students to negotiation competitions. Can mediation competitions be far behind?

We owe it to our students to push their horizons beyond the craft of lawyering. The ADR course ought to be a convenient window to inquiry how we serve the society as stewards and our clients as counselors. ADR is where we ought to examine the limits to the usefulness of the adversary system, where we should consider the consequences to our society of an overly legal dispute-resolution culture. It is in ADR where our students ought to ask whether rights and fault ought to be the cornerstones for handling all of society's problems, or whether lawyers ought to have a broader perspective.

Jurisprudence and legal philosophy are virtually dead in legal education—if student interest and course enrollments are any measure. It is not pedagogically cool to deal in the abstract when there is lawyering to be learned. ADR offers the opportunity to stretch our students' perspectives and inquiries beyond the craft they will practice a year or two after sitting in our classrooms. We can use this simulation course—the sure road to student engagement and interest—to slip in, while no one is looking, some concern for the lawyer's role in society. If we can expand our students' horizons to understand the value to their clients and to society of a world that can resolve some of its problems outside of an adversary model, we might help to develop a world in which our students will continue to be considered useful.

46. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 2d ed. 1991).

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