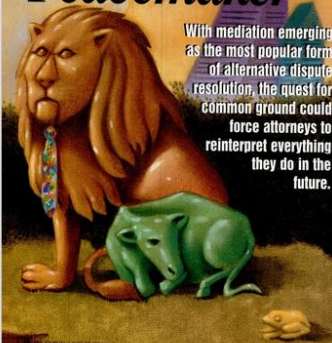


The Lawyer Turns Peacemaker

With mediation emerging as the most popular form of alternative dispute resolution, the quest for common ground could force attorneys to reinterpret everything they do in the future.



The self-spoken scholar stood before the brightest lights of the nation's legal community 20 years ago, offering a radically different vision of the American justice system.

"One might envision by the year 2000 not simply a courthouse but a dispute resolution center, where the grievant would first be channeled through a screening clerk who would then direct him to the process, or sequence of processes, most appropriate to his type of case," Professor Frank E.A. Sander of Harvard Law School told the Pound Conference, which was called to address public dissatisfaction with the justice system and chaired by Chief Justice Warren Burger.

Twenty years later, Sander's vision for a multidoor courthouse, for the most part, remains unrealized. But the modern alternative dispute resolution, or ADR, movement, as it has come to be known, is well under way, shaping the contours of justice in the 21st century.

No doubt millions of people and businesses have benefited from simpler, less stressful modes of dispute resolution. Moreover, ADR is primed for much greater growth, as witnessed by the breathtaking expansion of court-related programs, the rush of lawyers and nonlawyers alike to mediation training seminars, and the pledge of thousands of businesses and large law firms to consider ADR options.

But the child born of necessity is still, at best, teetering between adolescence and adulthood. For all of its potential to reshape the ways problems are solved, it still shows a dark side—overzeal, conflicts, competency issues and commercialism—that leaves even many supporters privately concerned about the future course it will take.

Such questions have led critics to condemn ADR as just another assault on juries and the civil justice system. They charge that its secret, kangaroo courts deliver a skewed brand of justice that fails to provide adequate remedies for weaker parties such as women and minorities, and that it favors parties who generate repeat business and gives the powerful a way around the law.

The legal profession has long

had a strained relationship with ADR, and a new ABA Journal poll confirms a continuing uneasiness with ADR amid broad support for such efforts. The poll, a random sampling of ABA members, shows an almost even split on the desirability of mandatory ADR programs, the need for additional procedural safeguards, and the ability of lawyers to manipulate the ADR system.

But it also confirms a preference for mediation over litigation and arbitration as the dispute resolution method of choice, which is consistent with other signs mediation is gaining ground. Still, only half of those polled prefer mediation to litigation. Remarkably, more than half of all respondents say they have not even been involved in any ADR hearing during the past five years.

"I'm not surprised," says Marc Galanter, a law professor at the University of Wisconsin Law School and an authority on the court system, noting that the reality of ADR has never matched the hopes of its boosters. Nor has any other independent study been able to verify the claims of those advocates that it is usually faster, cheaper and more satisfying for the parties than traditional litigation, or that ADR has materially shrunk state or federal court dockets.

"It certainly is proving no panacea for problems with the justice system," Galanter adds. "I would say its efforts have been marginal, compared to good court management." ADR's real impact, Gal-

anter continues, has been to expand perceptions of options available for dispute resolution—a phenomenon he calls "process pluralism"—and to bring resolution techniques to disputes much earlier in the process, before conflict escalates into legal warfare.

For lawyers, though, the growth of process plural-

ism figures to change the nature of their role and possibly even the importance of it, in the event that dispute resolution develops as an adjunct to the legal system rather than an integral part.

Arrival of Mediation

A fundamental difference between mediation and binding methods of dispute resolution is that in mediation, the parties decide themselves how to resolve their dispute by talking out their differences, with the mediator helping them get past their "positions" so that their real interests can be addressed. Legal rules are relevant but not dispositive—just one of many factors to consider along with feelings and the importance of a continuing relationship between the parties.

Where there is little room for a simple, sincere apology in litigation—other than as an admission to be used to tactical advantage—such empathy can be the turning point of a mediation. In this way, the promise of mediation is to transform conflict into resolution at its very core, rather than merely providing an answer to the superficial dispute.

"Mediation is the sleeping giant of ADR because it is a totally different process than trial and arbitration adjudication," notes Harvard's Sander.

For example, when Harvard Law School's External Professor Kingfield presciently the terror of legal education, one of the nation's leading mediation training meets



Frank Sander: Mediation is a 'sleeping giant.'

Richard C. Reuben, a lawyer, is a reporter with *The ABA Journal*.

ABA Journal Poll

Long after the first talk of ADR, lawyers are still wary about the process. A scientific sample of ABA members involved in ADR hearings the past five years shows:

51% favor mediation over litigation for resolving disputes, while 31% prefer litigation. When the choice is litigation or arbitration, 43% prefer litigation and 31% choose arbitration.

39% say clients find mediation more satisfying than litigation (40% equal or less) and 25% say clients find arbitration more satisfying than litigation (52% equal or less).

at a Zen Buddhist monastery in Northern California, where participants on a diet of beans, breads and nuts are encouraged to rise early and meditate with the monks before their training.

Yet despite its novelty, the ABA Journal poll found a preference among ABA members for mediation over arbitration or traditional litigation, with law firms expanding their mediation practices more than arbitration.

Another marker of the mediation preference is that the federal courts have not adopted a single arbitration program since 1991, while mediation programs continue to expand, in a pattern also seen in the state courts. Even in the securities industry, dominated by mandatory and binding arbitration in recent years, a blue ribbon task force of the National Association of Securities Dealers recently recommended that mediation options be significantly expanded.

Judith Fines, a senior lawyer with National Institute for Dispute Resolution—which funded many of the programs implemented in the 1980s, and is now directing much of its energies into teaching youth how to resolve conflicts peacefully—says mediation's attraction stems from the public's "phenomenal dissatisfaction" with the court system, regularly reinforced by such debates

as the trials of the Menendez brothers and O.J. Simpson.

"The feeling is that there is no justice in the courts and that people can solve their problems better themselves," Fines says. "They are

Negotiation, the Harvard Negotiation Project, and others in the years since the Pound Conference continue to confirm that these concerns really do affect clients and their decisions. The more sophisticated me-

The State of ADR



looking for something different, and mediation provides that."

Still, it is a lot for a time-honored, rule-based profession like law to take, historically preferring to leave the "fuzzy-fuzzy stuff" to the social workers and therapists.

But research by the Stanford (University)-Center on Conflict and

dispute techniques become, and the more attorneys and their clients learn about mediation, the more that people with problems are being drawn to mediation and its transformative power.

Nancy Rogers, a mediation scholar at the Ohio State University College of Law in Columbus,

A quick course in mediation advocacy

BY EDWARD L. RIZON

So the judge handling your breach-of-contract action has ordered it into mediation. And now you wish you had attended that CLE program on alternative dispute resolution. Don't panic. You'll do just fine if you pay attention to these pointers:

• **Know your mediator.** Mediation is usually defined as a process in which an impartial third party helps parties resolve a dispute

or plan a transaction by assisting their negotiations. Approaches, however, can vary considerably.

Most mediators facilitate, but others evaluate by making assessments or predictions or by pushing parties to accept a particular solution. Similarly, some mediators tend to define the scope of the mediation narrowly, focusing only on the facts and issues that would be important in litigation.

Others give the parties the opportunity to define the

scope of the mediation more broadly, to include the parties' underlying interests (what they really need) along with their positions (what they say they want).

Many mediators tend to use the same approach regardless of the situations of the parties, but others are flexible and do whatever will work. Each approach has potential advantages and disadvantages; keep this in mind if you have the opportunity to choose a

mediator. If you do not, you may be able to negotiate with the assigned mediator about the nature of the process.

• **Match your strategies to the mediator's approach.** For example, if the mediator prefers to help the parties define the problem broadly—to include, say, the parties' relationship—you may need to encourage your client to reveal his or her real wishes.

But if your mediator imposes a narrow focus and tries to predict how a court would decide your case, your job is to persuade the media-

Perceptions of client satisfaction with mediation split on gender lines: 53% of women say clients prefer it to litigation while 37% of men say clients prefer it.

77% say clients willingly use mediation and 64% say clients willingly use arbitration.

But despite a willingness to use ADR procedures, 33% of defense lawyers and 22% of plaintiff's lawyers say clients have felt coerced into arbitration.

51% say mandatory ADR programs should be encouraged, while 18% say they should be discouraged and 28% take no position.

credits the mandatory mediation programs in many courts for getting the ball rolling. "The strongest indicator of whether lawyers are likely to recommend mediation for a client seems to be whether they have had a case involving a mediation before," Rogers says, citing a recent study of Ohio lawyers. "If they had been involved in a mediation, they were much more willing to recommend its use again."

Mediation, though, raises questions not found in law. Does "the law" even have a place in a mediation, or will it just co-opt the mediation process? How should an attorney advise a client in mediation? Does mediation constitute the practice of law for purposes of malpractice and other professional standards?

"Experienced lawyers trying their hand at mediation often find the difference in orientation awkward and frustrating," says Gary Friedman, a mediator and trainer in Mill Valley, Calif. "Attorneys accustomed to seizing power in law practice must learn to give it away to the parties in a mediation," he says. "That's counterintuitive for lots of lawyers whose habits are such that they feel the essence of being a good lawyer is controlling their client."

Despite these concerns, the leading commercial providers of

ADR services, which just five years ago were touting the virtues of arbitration, see the handwriting on the wall and are gearing their services primarily toward mediation for now.

Even American Arbitration Association President William K. Slate finds himself insisting, "Triple A's emphasis is not on arbitration but on providing whatever kind of dispute resolution services the customer wants." It may be telling that his organization has even considered changing its name.

Waning of Arbitration

The very reasons for mediation's rise also shed some light on why arbitration—so faddish a decade ago—has lost its sizzle, and, apart from the securities and employment contracts, may well be contracting. It's a lot like litigation.

In arbitration, the parties present their cases to a neutral of their choosing. For larger cases, it is

common to have a panel of three arbitrators. The hearings are informal and are not governed by traditional rules of evidence or civil procedure; arbitrators do not even



Arbitration is most common in employment-labor disputes.

have to consider the law when making their decisions. Court-related programs tend not to be binding because of the state and federal

tor of the merits of your case.

- **The mediator is a resource.** Look at the mediator in two ways. First, as a wise friend who is trying to help both sides discover or develop an agreement that both would find preferable to their alternatives. Second, as an instrument through which you can affect the other side's expectations. Strike a balance, and don't let overly adversarial attitudes torpedo the process.

goals and underlying interests, not just the legal claims. Also develop options that might satisfy these interests as well as the interests of the other side. Be certain your client understands the costs, risks and benefits of the alternatives to settling in the mediation.

Make sure your client understands what to expect and how to participate. Usually client participation will speed up the process and enhance satisfaction. Prepare your

side. You need to develop a deal that they like. Listen to them, if you want them to listen to you. Learn about how they see their case and their interests.

Feel and express empathy for their situation. Don't threaten or humiliate or try to belittle them; treat them as partners in problem-solving (remember, however, that at some point the two sides' interests may diverge).

- **Use advocacy aids.**

know how effective you would be at trial.

- **Keep your chin up.** Keep working as long as the mediator sees hope.

- **Take another look at your calendar.** Find time to learn more about mediation.

Leonard L. Bittler is C.A. Leahy Professor and director of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law. For more guidance, see his article

70% are at least somewhat concerned about personal biases or qualifications of arbitrators or mediators.

Lawyers under age 50 tend to worry more than older lawyers about biases and qualifications, while those in mid-career are the most concerned about conflicts of interest.

73% of defense lawyers and 70% of plaintiff's lawyers worry about biases or qualifications of arbitrators, mediators or other neutrals.

Defense lawyers worry more than plaintiff's lawyers about neutrals' conflicts of interest: 37% v. 20% have concerns.

constitutional rights to a jury trial. But contractual arbitration generally does not allow for appeals, apart from arbitrator bias or misconduct.

"Arbitration tends to be the same as litigation, only less," says James J. Alfin, dean of the Northern Illinois University College of Law in DeKalb. It is most appropriate, he adds, when the parties need particular expertise in deciding a dispute, when time or confidentiality is of the essence, or when the dispute is so small that a trial just doesn't make economic sense.

James F. Henry, president of the New York-based Center for Public Resources' Institute for Dispute Resolution, an ADR think tank for corporate lawyers, large law firms and academics, agrees. He says many companies that adopted arbitration policies for a broad range of issues in the past decade are backing away from them one way or another.

"If you were to ask our membership what they thought of arbitration, perhaps more than 50 percent would want nothing to do with it because they perceive it—rightfully or wrongfully—as too expen-

sive, slow and having a lot of the shortcomings and baggage of litigation without the benefit of appeal," Henry says.

One problem is that there is a



One computer industry case was in arbitration for 7 years.

lot of statutory and common law on arbitration. That gives lawyers room to manipulate the system, and courts have upheld the use of such old litigation favorites as discovery, motions in limine and summary judgment in arbitration.

As a result, whether arbitration is faster and cheaper than litiga-

tion really hinges on the parties and their interests in being in arbitration—and hard-nosed lawyering can escalate arbitration costs and length to rival those of litigation.

Just ask Tom Dunlap, vice president and general counsel of the California-based Intel Corp., a manufacturer of computer chips. His company had a dispute with Advanced Micro Devices Inc. over microprocessor technology surrounding the 386 computer chip that a predispute arbitration clause routed into arbitration. The proceeding lasted seven years, cost about \$100 million, and included several rounds of collateral litigation—for what Dunlap describes as a basic contract dispute. *Advanced Micro Devices Inc. v. Intel Corp.*, 9 Cal.4th 362 (1994).

A lot of the time and expense came about because prehearing discovery is generally not available in arbitration, Dunlap says. That led to a lengthy and expensive examination of witnesses. "Much of the arbitration ended up being discovery by teams of lawyers in front of an arbitrator we were paying for," he notes.

As can often be the case, the scope of the arbitrator's power was another issue, Dunlap says. While

Mandatory arbitration clauses under fire

Within the field of employment law, the question of voluntariness and the propriety of predispute ADR clauses has led to a virtual holy war between management and plaintiff's lawyers.

Employment law has been one of the most significant sectors of ADR growth, as management

on statutory grounds—with plaintiff's lawyers crying foul.

"Most employment statutes involve matters of public policy—decisions by elected representatives in the legislature to eliminate discrimination," says Cliff Palefsky, a plaintiff's employment lawyer with McGuire, Hillman & Palefsky in San Francisco, and

"When employers are permitted to compel these claims to be heard in secret tribunals, with no record of the proceeding and no opportunity for the public or the media to see that the statute is being enforced correctly, every purpose behind those statutes is being effectively voided."

believed the legality of mandatory employment arbitration, as long as the rights and remedies available to the parties are the same as those available in public courts.

Still, those rulings have prompted representatives of a number of organizations—including the National Academy of Arbitrators, the ACLU, NELA and the AAA Labor and Employment Law Section—to agree on certain

53% think that ADR procedures are immune from manipulation that could make them as time-consuming and expensive as litigation.

37% say, however, the possibility for manipulation is available, and 10% say they do not know if it is.

While the loss of income is often cited as a reason for resistance to ADR, defense, plaintiff's and transactional lawyers all say it is not a concern.

85% say they simply do not worry that less-expensive ADR procedures will reduce their practices' revenues.

he says the arbitration clause conferred limited authority to decide the dispute, the arbitrator construed his powers under the clause to the broadest extent, even going so far as to award benefits to Advanced Micro Devices that Dunlap contends could not have been awarded under the contract. The California Supreme Court said the scope of the arbitrator's power was up to the arbitrator, and, deferring to that, upheld the arbitration award.

That ruling led the parties—in an ironic twist—to settle in 1994, in a mediation.

Today Dunlap says the arbitration was "a very slow, expensive and unsatisfying process," and says Intel is one of those companies that no longer use predispute arbitration clauses, preferring informal negotiation and mediation instead.

The Intel case is hardly an isolated example of how lawyers' tactics and other dimensions can distort the arbitration process—a concern acknowledged by more than a third of the ABA *Journal*

poll respondents. The California Supreme Court is considering allegations that a health maintenance organization dragged out the arbi-

tration from complaint to award, as compared to 15-19 months in the relevant trial court.

Mediation's Inward Gaze

The controversies surrounding mediation tend to be more subtle than those in arbitration because it is a less formal process. For instance, the purpose of arbitration is clear but less so than that of mediation.

Some experts believe mediation should facilitate the parties' own resolution of the problem by digging deep into the interests and feelings underlying the surface dispute. Mediators who take this more therapeutic approach would in a divorce mediation, for example, try to work through the parties' feelings of anger or resentment or rejection that led to the breakdown of the marriage. Then they can let that cleansing process pave the way for mutually acceptable terms of property settlement and child custody—and maybe even reconciliation.

Other mediators, however, say this approach is best left to therapists. They say the proper purpose of mediation is just to bring the parties into an amicable accord—much like the settlement conferences that continue to shape lawyers' and judges' understanding of mediation. Still others contend that mediators should provide subject



Kimberlee Kowich: "Mediation by definition is facilitative."

matter selection process in a medical malpractice case until the complainant died. *Egolf v. The Permanente Medical Group*, 80-4882. A study of arbitrations involving the Kaiser Permanente Health Care Program introduced into evidence in that case found that they typically take nearly 29 months,

and JAMS. Either those brokerages stop handling cases arising from mandatory and binding predispute resolution clauses, or NEJA's lawyers would boycott those companies' arbitrators whenever possible.

JAMS responded by announcing several "principles of fairness" that clarified its existing policies in employment arbitration cases. The organization generally endorses the protocols, discourages mandatory arbitration, and states that JAMS will refuse to accept mandatory cases if the

arbitration agreements don't allow for full remedies—including punitive damages, reasonable discovery, the right to counsel and other safeguards.

"We think it's a matter of fairness, and while this doesn't represent a change in our policy, we want to make sure people know what our policy is," says its president, Jack Urtse.

Triple A's response has been more limited. In June it adopted rules for arbitrations generally endorsing the protocols and providing that their standards of fairness will

trump one-sided mandatory arbitration clauses (which assumes courts will permit AAA standards to preempt the plain language of contracted arbitration clauses).

But the association will not reject mandatory cases outright, taking the position that its new approach makes the issue moot, and that such clauses are legal until the courts or legislatures declare them illegal.

"We hope the courts will give us much more guidance than we now have," says AAA President William K. Slate.

Challenges to Previsions

The courts may soon provide guidance, as more attorneys are bringing claims challenging the validity of mandatory arbitration provisions.

Fairfax has filed a major lawsuit in U.S. District Court at San Francisco challenging the constitutionality of mandatory employment arbitration in the securities industry on grounds of the process, equal protection and right-to-jury trial. *Dugfield v. Liberman Stephens & Co.*, C-95-100-137.

To date, most challenges

53% think their training and experience as lawyers have prepared them for arbitration and 47% say the same of their preparation for mediation.

But some doubt their skills: 24% say they were not prepared for arbitration and 20% not for mediation.

38% of lawyers in the survey practice in defense firms, 27% in plaintiff's firms, 17% in transactional firms, and 7% are in-house counsel.

The telephone survey of 402 ABA members was conducted April 8 to 17 by Research USA, and has a margin of error of a 5%.

matter expertise, acting essentially as sounding boards to help the parties evaluate the merits of the dispute or the proposed settlement.

"There is a lot of diversity of approach in the field, and one of the things we're beginning to see is that there is not a single model that works in all situations," says James Boskey, law professor at Seton Hall School of Law in New Jersey.

"What works in a divorce mediation may not work in a community or a business mediation."

The diversity of mediators' backgrounds makes even self-regulation extremely difficult, and some say impossible, even though such efforts are often critical to the institutionalization of any profession.

The ABA's Section on Dispute Resolution, the Society of Professionals in Dispute Resolution, and the AAA ran into this problem last year in the most significant attempt to date at ethical standards of conduct for mediators.

In a bold, though controversial, move, the drafters concluded that

mediators should only try to facilitate the parties' own resolution, and went so far as to admonish professionals who serve as mediators—including lawyers—to "refrain from providing professional advice."

"Mediation by definition is facilitative, and while there may be other approaches that bring about

the Dispute Resolution Section.

Qualifications and regulatory oversight present similar problems. What kind of training should good mediators have, and how should they be regulated, if at all?

Keeping Out a Strangler

In most states, there are stiffer requirements to become a heir stylist than there are to become a mediator. Only a small handful—Florida, New Jersey and Hawaii—have adopted qualifications requirements. Many merely require completion of 40 hours of training, while in others, a law license is enough. Florida is the only state to go the further step of implementing a disciplinary process for mediators.

While many mediators contend that standards and regulation are inappropriate, many other experienced mediators say they already are a element of backsliding. They also warn that bad training can lead to poor results for clients and a black eye for the nascent profession.

"There are people out there trying to make money any way possible, taking the training and hanging out their shingle as mediators without having a clue of what they are doing," laments Marvin E. Johnson, an attorney mediator in Silver Spring, Md. For example, experts agree that domestic cases involving



In cases involving the police, mediators need experience.

dispute resolution, they aren't mediators," says Kimberlee K. Kovach, formerly a professor at the South Texas College of Law and a reporter for the effort who is chair-choof of

have been rejected, deepening the gulf between the bench and bar on mandatory arbitration. For example, an aggressive 7th U.S. Circuit Court of Appeals at Chicago recently held that an important U.S. Supreme Court decision, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), upholding vital rights in certain discrimination claims in union cases, is no longer good law. That case is likely to be appealed to the Supreme Court. *Austin v. Ocean Driveway Glass Container Inc.*, 78 F.3d 875 (1996).

But the prohibition may

be starting to swing the other way. The 9th Circuit at San Francisco, for example, has refused to enforce a securities industry arbitration clause in a sexual harassment case, holding that the agreement to arbitrate was not "knowing," in a decision left intact by the U.S. Supreme Court. *Prudential v. Lat.*, 42 F.3d 1299 (1994).

State courts are also beginning to take such challenges more seriously. The Michigan Supreme Court announced this spring it would review a lower court decision upholding the

binding nature of a mandatory arbitration clause in an employment contract. *Haworth v. Balfour Beatty Computer*, 102015.

The California Supreme Court, too, is considering allegations that a health maintenance organization dragged out the arbitration selection process in a medical malpractice case until the complainant died. *Expedit v. The Anatomical Medical Group*, 90489.

Moreover, the U.S. Equal Employment Opportunity Commission and the National Labor Relations

Board have taken positions challenging the validity of mandatory and binding pre-dispute arbitration clauses.

The EEOC, successfully argued one such clause as interfering with its statutory obligations, in a highly publicized case from Texas. *EEOC v. River Oaks Shopping and Shopping*, 91-95-715.

Similarly, the NLRB authorized awards on two others in Florida on unfair labor practices. One of those cases settled after the NLRB stepped in, while the other is still pending.

—Richard C. Brubaker