SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

*UC Irvine School of Law Legal Studies Research
Paper Series No. 2009-6*

Maintaining ADR Integrity

Carrie Menkel-Meadow

cmeadow@law.uci.edu

Georgetown University Law Center; University of California, Irvine ~ School of Law

The paper can be downloaded free of charge from SSRN at:

Alternatives

CPR

International Institute for
Conflict Prevention & Resolution

TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 27 NO. 1 JANUARY 2009

CPR
International Institute for
Conflict Prevention & Resolution
Alternatives
TO THE HIGH COST OF LITIGATION

Publishers:
Kathleen A. Bryan
International Institute for
Conflict Prevention and Resolution

Susan E. Lewis
John Wiley & Sons, Inc.

Editor:
Russ Bleemer
Jossey-Bass Editor:
David Famiano
Production Editor:
Ross Horowitz

JOSSEY-BASS[®]
An Imprint of
WILEY

Alternatives to the High Cost of Litigation (Print ISSN 1549-4373, Online ISSN 1549-4381) is a newsletter published 11 times a year by the International Institute for Conflict Prevention & Resolution and Wiley Periodicals, Inc., a Wiley Company, at Jossey-Bass. Jossey-Bass is a registered trademark of John Wiley & Sons, Inc.

Editorial correspondence should be addressed to *Alternatives*, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; E-mail: alternatives@cpradr.org.

Copyright © 2009 International Institute for Conflict Prevention & Resolution. All rights reserved. Reproduction or translation of any part of this work beyond that permitted by Sections 7 or 8 of the 1976 United States Copyright Act without permission of the copyright owner is unlawful. Request for permission or further information should be addressed to the Permissions Department, c/o John Wiley & Sons, Inc., 111 River Street, Hoboken, NJ 07030-5774; tel: 201.748.6011, fax: 201.748.6008; or visit www.wiley.com/go/permissions.

For reprint inquiries or to order reprints please call 201.748.8789 or E-mail reprints@wiley.com.

The annual subscription price is \$190.00 for individuals and \$275.00 for institutions. International Institute for Conflict Prevention & Resolution members receive *Alternatives to the High Cost of Litigation* as a benefit of membership. Members' changes in address should be sent to Membership and Administration, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022. Tel: 212.949.6490, fax: 212.949.8859; e-mail: info@cpradr.org. To order, please contact Customer Service at the address below, tel: 888.378.2537, or fax: 888.481.2665; E-mail: jbsubs@josseybass.com. POSTMASTER: Send address changes to *Alternatives to the High Cost of Litigation*, Jossey-Bass, 989 Market Street, 5th Floor, San Francisco, CA 94103-1741.

Visit the Jossey-Bass Web site at www.josseybass.com. Visit the International Institute for Conflict Prevention & Resolution Web site at www.cpradr.org.

Alternatives

TO THE HIGH COST OF LITIGATION

SPECIAL ISSUE

This month, *Alternatives'* publisher, CPR: International Institute for Conflict Prevention and Resolution, will mark its 30th anniversary at its Annual Meeting in New York.

To mark the occasion, *Alternatives* asked ADR legends to look ahead. The four articles at right reflect on the anniversary—but just a little. Mostly, they tell *Alternatives* readers—the practitioners, academics, regulators, consumers, and even CPR members and staff—how to address second- and third-generation conflict resolution growth issues in ways that will ensure continued effective use.

ADR maturity, these articles tell us, has brought great results, but has exposed some areas to continuing growing pains. The results that ADR users have demonstrated assure us that more innovation—and more such problems—are on the way.

These articles provide a good roadmap to what needs to be addressed in the short term in order to secure long-term viability, utility, and success in deploying the wide variety of assessment, prevention, and resolution techniques developed since CPR's 1979 founding.

- CPR Institute founder **James F. Henry**, of Waccabuc, N.Y., discusses how the changes ADR has produced in legal practice indicate that more are on the way, probably in the justice system itself.
- CPR Board Chairman **Charles B. Renfrew**, of San Francisco, writes that the focus will now be on tailoring processes, and preventing disputes.
- Georgetown Law Center Prof. **Carrie Menkel-Meadow** discusses participants' responsibility to the process—a necessity to maintain effectiveness.
- Harvard Law School Prof. **Frank E. A. Sander** provides keys to growing the profession, also necessary to keep ADR useful and effective.

At press time, the Jan. 15-16 Annual Meeting was nearing capacity. To check on last-minute availability, please visit <http://meetings.cpradr.org>, or call +1.212.949.6490.

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 27 NO. 1 JANUARY 2009

On CPR's 30th: Looking to the Future

More Changes Coming

BY JAMES F. HENRY

In opening an early CPR Institute meeting, I stated that the goal was to assist in changing the legal culture by developing alternatives to the high cost of litigation.

At the time, the assertion seemed a bit bold. But 30 years later we are well on our way into that cultural change. Given the strong current desire for change in our governing institutions and restoring our competitive economy, reforming civil conflict resolution is a good focus point,

(continued on page 3)

The author, of Waccabuc, N.Y., retired in 2000 as president and chief executive officer of the CPR Institute. He founded the CPR Institute with a group of corporate general counsel in 1979, and began publishing *Alternatives* in 1983.

Maintaining ADR Integrity

BY CARRIE MENKEL-MEADOW

Alternative dispute resolution and the CPR Institute were developed 30 years ago in reaction to abuses or problems with conventional forms of dispute resolution, especially costly and inefficient litigation.

(continued on page 7)

The author is A.B. Chettle Jr. Professor of Law, Dispute Resolution and Civil Procedure at Georgetown University Law Center in Washington, D.C. She is a member of *Alternatives'* editorial board, and serves on the Executive Committee of CPR-International Institute for Conflict Prevention and Resolution. She served as Chair of the Georgetown-CPR Commission on Ethics and Standards in ADR, which drafted the Model Rule for Lawyers as Third Party Neutrals, and Provider Principles, discussed in this article.

Design and Prevention

BY CHARLES B. RENFREW

This is the 30th Anniversary of CPR.

We are celebrating more than an institution. We are celebrating alternative dispute resolution, which has been one of the most significant movements in the U.S. legal system in the past 50 years. Its phenomenal growth has had a major impact on the practice of law.

Lawyers now view and analyze their clients' disputes in a different light because of the availability of many more resolution alternatives. ADR also had an impact in

(continued on page 5)

The author is an arbitrator and mediator in San Francisco. A former federal judge, he has been chairman of the CPR Institute's board of directors for more than two decades.

Keep Building ADR

BY FRANK E.A. SANDER

The alternative dispute resolution field has gone through roughly three stages since its modern-day revival at the Pound Conference.

(continued on page 9)

The author is Professor of Law Emeritus at Harvard Law School in Cambridge, Mass. He has been an *Alternatives'* editorial board member since the newsletter's inaugural issue in January 1983, and is chairman of the editorial board of the American Bar Association Section of Dispute Resolution's *Dispute Resolution Magazine*. This article is based on remarks he made last July upon receiving a lifetime achievement award at the annual meeting of the American College of Civil Trial Mediators, a nonprofit professional group, at Samoset Resort in Rockland, Maine.

Menkel-Meadow: Integrity

(continued from page 1)

From the beginning, founders of the field or “movement” that ADR has become, and its institutionalization and growth through those founders’ efforts, have sought to provide *quality* dispute resolution.

KEEPING QUALITY IN CONFLICT RESOLUTION

Quality dispute resolution has always referred to a few key concepts and concerns. First, in its earliest forms, there was always a notion of *voluntariness*—that is, choice in dispute resolution processes. Parties would ask other parties to join them in post-dispute mediation (the facilitation of a jointly negotiated solution), or pre- or post-dispute arbitration (the willing submission to a “neutral” third party for binding or nonbinding decisions). Or the parties would enter into the more modern hybrids of private minitrials, and slightly more public, in-court summary jury trials.

The processes all use a combination of negotiation, evidence presentation, non-binding advisory opinions, as well as case management and mediation. This principle has morphed in more recent times to such oxymorons as “mandatory mediation”—requiring parties to attend, but not to agree to particular outcomes—and court-annexed arbitration, with automatic assignment for cases below a certain value. These recent processes require parties to participate in court-ordered forms of ADR that are no longer so voluntary. We have succeeded in persuading the official institutions of dispute resolution that in many dimensions ADR is better, faster, cheaper and more tailored to the parties’ needs and interests.

Second, mediators, arbitrators, early neutral evaluators, retired judges, and other ADR professionals, regardless of their membership on CPR’s Panels of Distinguished Neutrals, were to behave with the highest standards of professional performance and character. This includes disclosure of conflicts of interests, transparency of decision methods and processes, fair compensation (and generally no contingent fees), “neutrality” (or non-bias, impartiality, or, preferably, “fairness” and no prejudgment for the parties) and *adhered-*

to promises of confidentiality, advice-giving or other contractually agreed to terms.

Third, *process pluralism* is a good idea: different kinds of parties and particular kinds of disputes might best be handled in different ways. In other words, “one size will not fit all.” ADR has always been about “*tailoring*”—both tailoring the process to fit the dispute (or as the late Columbia University School of Law professor and judicial reform advocate Maurice Rosenberg said so wisely, “fit the forum to the fuss”), and tailoring the particular outcomes and solutions to the parties’ particular needs and interests, and not the requirements of legal precedents.

Fourth, ADR, in all its forms, was intended to improve dispute resolution and make the parties better off, not worse off, for having used it—a sort of Pareto optimality of dispute resolution. Or, as doctors would say, “do no harm.”

Finally, for many of us in the founding generation, quality dispute resolution included two other important qualities, integrity and flexibility. Our own reputations, and the reputation of the field itself, mattered enormously to those who began mediating, arbitrating, designing dispute systems, and looking for “out-of-the-box” solutions to problems.

WISE AND GOOD

We wanted to design and preside over dispute processes that were efficient, fair, wise, and good solutions for the parties. We also recognized that ADR itself meant not assuming the rigidity and formality of structure provided by the formal litigation system, at least in cases where it was appropriately used.

To that end, a very prescient Jim Henry asked this author, more than a decade ago, to chair the CPR-Georgetown Commission on Ethics and Standards in ADR. An extremely able, distinguished, and diverse commission of judges, lawyers, CEOs, general counsels, academics, and public members, including both consumer advocates and corporate ADR users, worked hard over a seven-year period to codify some of the notions of what “good,” “worst,” and “best practices” might be.

Our work products were

- The CPR-Georgetown Commission on Ethics and Standards Model Rule

for the Lawyer as Third-Party Neutral (available at www.cpradr.org/Portals/0/CPRGeorge-ModelRule.pdf), which was submitted, with testimony, to the American Bar Association when the legal profession’s ethics codes were revised in 2000. The effort led to a less ambitious revision of a few model ethics rule provisions, but it acknowledged this new role for lawyers, and

- The CPR-Georgetown Commission on Ethics and Standards Principles for ADR Provider Organizations, a set of best practices for providers to use when administering, recommending, or supplying any form of ADR services. Available at www.cpradr.org/Portals/0/finalProvider.pdf.

The provider principles have been used for program design, training, and even a few groups’ local adoption, but in general, regulation of provider organizations is non-existent. They are governed either by voluntary acceptance of organizational ethics and standards codes—as JAMS, the CPR Institute and the American Arbitration Association have undertaken, but the International Chamber of Commerce arbitration program and the LCIA, the London Court of International Arbitration, for example, have not—or rare court decisions that treat issues of organizational or referral liability for the unethical activity of individuals.

WHAT HAVE WE DONE?

As ADR has gained acceptance and grown exponentially, so much so that scholars and judges protest the “vanishing trial”—see the articles in the Vol. 1, Issue 3 *Journal of Empirical Legal Studies* ((November 2004)(available at www.WileyInterscience.com)—it is a good time to step back and ask what we have wrought.

For at least 15 years, a battle has raged between consumer and employment lawyers on the one hand, and corporate counsel on the other, on the use of “mandatory”—or in their words, “cram-down”—arbitration, placed in form contracts, franchise agreements, personnel manuals, and securities and brokerage documents, both in the employment and purchase arenas, as well as court rules for cases below a certain value. These provisions remove the voluntariness

(continued on next page)

Menkel-Meadow: Integrity

(continued from page 7)

that is so much a part of our founding efforts.

Less controversial has been the mandatory referral to some form of court "alternative" process, like early neutral evaluation, settlement conferences, and court-supported mediation, where agreement to a negotiated solution is suggested but not required. At least in some courts there are clear procedural and even ethical rules about the court-supported ADR programs. See, e.g., California's northern federal district (rules available at www.cand.uscourts.gov).

Legal challenges to various ADR uses have increased and include complaints about coerced mediation agreements; conflicts of interest in arbitration and mediation; breaches of confidentiality; unconscionability, and even unconstitutionality in the use of mandatory pre-dispute arbitration clauses in a variety of settings. (The caselaw is usefully collected each year by Profs. James Coben and Peter N. Thompson at Hamline University School of Law in St. Paul, Minn. at <http://law.hamline.edu/adr/mediation-case-law-project.html>.)

The courts have been supportive of ADR and generally reluctant to strike down mandatory arbitration clauses and, only in rare cases, to revoke mediation agreements. The enforcement rate of arbitration awards is well over 95%, both domestically and internationally.

MANIPULATE THE MEDIATION

Nevertheless, for us, the founding generation, there is some unease as we contemplate some recent abusive uses of our well-intentioned ideas for multiple processes and party determination. Increasingly, there is fear that clever lawyers and manipulative and profit-hungry (and cost-minimizing) business owners and legal clients have learned to misuse some forms of ADR for less-than-honest purposes. In my own practice, I have seen lawyers manipulate the mediation and arbitration process to force out information from the other side, later to be used adversarially, rather than collaboratively, in subsequent processes—after refusing to agree to a solution outside of litigation.

Lawyers and clients have misrepre-

sented the law, the facts, and their own opinions of what a case is worth, not to mention, change, exaggerate, or misrepresent their own goals (much of which need not be disclosed honestly in legal negotiations, see Model Rule of Professional Conduct 4.1, Truthfulness in Statements to Others) in order to gain information from the other side.

Sadly, I also have witnessed parties who "willingly" sign agreements in mediation, and then refuse to abide by them, knowing they have shifted an expensive and perhaps impossible enforcement process onto their "opponent."

Most serious are the class-action settlements in the past decade that have "settled" complex suits involving thousands of claimants by putting closed and individualized mediation and arbitration proceedings—with harsh proof requirements, no public or court review, and virtually no appeal rights—in the place of more public and aggregate legal rights and processes.

These include some of the employment discrimination cases in investment brokerages and class action settlements of some mass torts—not to mention the recent flap over a "faked" arbitration proceeding in a sexual harassment claim against American Apparel owner Dov Charney, which was terminated when the arbitrator and plaintiff's representatives refused to participate in the sham proceeding. See *Nelson v. American Apparel*, (Cal App. LA County, No. BC333028 (remanding for arbitration on some issues, but not to be published in official reports, as per California's unique "de-publication" procedure) (available in full text at www.onpointnews.com/docs/charney2.pdf). See also "Settlement Shock: Parties Had Agreed to a Pre-scripted, Staged Arbitration," 26 *Alternatives* 209 (December 2008).

RESPONSIBILITY FOR THE PROCESS

What should be done about abusive uses of ADR? As I have long argued, both as an ADR theorist and practitioner, and as a legal ethicist, ADR was created to respond to a set of concerns about the efficacy of some forms of legal process—"waste" in time and money, and inappropriate and rigid or "limited" remedies. It was not created to inflict more unfairness or inefficacy than already exists in any unequal dispute resolution process.

I have suggested on these pages, and in many other venues, that as a matter of ethical, moral, and legal practice, lawyers—and to a lesser extent, parties—who design, participate in, and use ADR processes, have a responsibility for their use in an ethical and "fair" manner—in short, to have some integrity about the process and for what purposes it should be used.

Using ADR—whether it is mediation, arbitration, class-action settlement processes and results, minitrials, neutral evaluation or other hybrids—to take unfair advantage of the other side or to prevent the development or revelation of important evidence about a party's guilt or wrongdoing, should be (1) an ethical violation of some sort, and (2) a ground for revoking or failing to enforce an inappropriate agreement.

Since the ADR movement's beginning, there has been much discussion about whether ADR should be self- or market-regulated, or subjected to other forms of professional, official, or governmental discipline. The CPR Institute, as a leader in good thinking about ADR, tried to take an early leadership role in proposing ethical standards and good practices for both individuals and organizations involved in providing mediation and arbitration processes, and also for the lawyers who appear as representatives in these settings.

Many other (mostly private professional) organizations have now followed suit, including the International Bar Association. Many of the leading ADR provider organizations have produced "codes," often for internal use only. And now the International Institute for Mediation, an international group based in the Hague, is seeking to provide such leadership in international mediation settings, including certification programs for mediator competency. See imimediation.org.

As our field has grown and has now developed its own sub-fields and spin-offs—most recently, dispute system design (see Menkel-Meadow, "Are There Systemic Ethics Issues in Dispute System Design? and What We Should (Not) Do About It: Lessons from Domestic and International Fronts," *Harv. Neg. L. Rev.* (2009))—it is important to revisit these questions about ethics, integrity and quality control.

Whether regulation is best done at the individual—that is, the mediator, arbitrator, lawyer, or party—or group or organizational level, including provider or

ganizations and professional associations, and whether our private “market” has now failed us enough that we need to turn to more governmental oversight or formal professional discipline, are questions that we must take seriously on the occasion of CPR’s 30th anniversary.

ADR was conceived with integrity, concern for fairness, quality, efficiency and efficacy. If the processes can be used to create abuses worse than the “illness” we were supposed to “cure,” then it is time to consider our obligations, as individuals and as members of organizations and professions, to ensure our processes are used for good, not ill, within our dispute resolution system.

After all, since doctors are told to “heal thyself,” we should not be creating more “jurigenic” problems by creating processes that are worse than those we hoped to improve on. Each of us has a responsibility to use our “alternative” processes “appropriately.”

DOI 10.1002/alt.20257

(For bulk reprints of this article, please call (201) 748-8789.)

Sander: Keep Building

(continued from page 9)

That three-day April 1976 gathering in St. Paul, Minn., formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, brought together about 200 judges, legal scholars, and bar leaders to examine the efficiency and fairness of court systems and administration.

The conference sparked the initial block of wide-ranging ADR experimentation, the period I call “Let a 1,000 Flowers Bloom.”

Then, around the mid-1980s, there began to appear some trenchant—and some not-so-trenchant—ADR criticisms. Perhaps Owen Fiss’s “Against Settlement” (93 *Yale Law Journal* 1073-1090 (May 1984)) (available at www.law.yale.edu/documents/pdf/againstsettlement.pdf) was the leading critical piece.

This was “Separating the Wheat From the Chaff.”

Now, we are in the third period—an attempt to institutionalize ADR on the dispute resolution landscape, so that the burden is not on the person who seeks to use it, but with the relevant mechanisms so embedded in the landscape that the burden shifts to the disputant who opposes its use.

Put another way, we are in the process of building a profession. It’s a complex and difficult task. Much has been studied and written. See, e.g., ABA Section of Dispute Resolution Task Force on Improving Mediation Quality (2008) (available at www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf); Eliot Freidson, “Professionalism Reborn: Theory, Prophecy and Policy” (University of Chicago Press 1994).

There are at least four salient aspects of the larger task.

• DEVELOP RULES OF GOOD PRACTICE

This sounds easy, but isn’t. There is no clear agreement on what constitutes good mediation.

Indeed, it is remarkable that there is so much robust disagreement—and sometimes un-mediation-like characterization of the “other” approaches. See, e.g., Kimberlee K. Kovach and Lela P. Love, “Evaluative Mediation is an Oxymoron,” 14 *Alternatives* 31 (March 1996). There also has been a serious debate about whether a compilation of vague generalities serves a useful purpose. See Michael L. Moffitt, “The Wrong Model, Again: Why the Devil Is Not in the Details of the New Model Standards of Conduct for Mediators,” Vol. 12, No. 3 *Dispute Resolution Magazine* 31 (Spring 2006), and Joseph B. Stulberg, “The Model Standards of Conduct: A Reply to Professor Moffitt,” Vol. 12, No. 3 *Dispute Resolution Magazine* 34 (Spring 2006).

Finally, some questions have been raised about whether the effort to define good practice will stultify the innovation and experimentation that characterized the beginnings of this field.

Even if there was provisional agreement on what constitutes good practice, it is very difficult to describe the conclusions persuasively and lucidly on paper. See, e.g., the controversies surrounding the 2005 revisions of the Model Standards of Conduct for Mediators. See both of the *Dispute Resolution Magazine* articles cited above; a comparison chart of the original standards and the revisions is available here: www.acrnet.org/pdfs/Comparison_Document_1994_v_August_2005.pdf. It also is remarkable that there have been almost no malpractice cases that would at least define what is not good practice.

• ASSURANCE OF MINIMUM COMPETENCE

If it is so difficult to define good practice, can we at least establish agreed-upon minimum competencies as we have done for barbers and plumbers? This is another can of worms, for even if we could agree on basic skills, there are some major impediments to putting them into practice. See, e.g., Tony Willis, “Mediator Accreditation: Is It a Risk? Or Quality Enhancement?” 26 *Alternatives* 165 (October 2008).

(A) *How to test for competency.* Years ago, a group in which I participated, headed by Christopher Honeyman, who heads Convenor, a Madison, Wis., conflict resolution consulting firm, tried to design a competency test. But the task proved to be overwhelmingly difficult. First, one must identify the needed skills—not an easy task because of the disputes within the ADR field as to what constitutes “true” mediation. Then one must validate the connection of the key skills to mediation success, a complex and expensive undertaking.

(B) *Training requirement.* Most, if not all, mediator accreditation programs require a modest number of approved training hours, usually 30 or 40. But such a requirement rests on shaky legs, because there is no evidence that someone who participated in the training has acquired the skills. That gets us back to (A), how to test for competence of the skills in question.

Moreover, it is interesting to note that there is no empirical evidence that participation in specified training results in higher quality performance.

(C) *Putting a regulatory scheme into effect.* Although there have been numerous efforts to regulate mediation performance, most of these have been voluntary certification programs by private organizations, or requirements for being listed on a court referral panel. See, supra, Willis.

(continued on next page)