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Lawyers' Agenda for Understanding Alternative Dispute Resolution

EDWIN H. GREENEBAUM*

Alternative dispute resolution (ADR) has been an increasingly prominent feature in the legal profession's consciousness. The motivations for the increasing attention to ADR are to provide cost-effective ways to respond to society's (supposedly) increased litigiousness and to improve the quality of dispute resolution services that the profession provides. While these concerns with quantity and quality produce tensions within the ADR movement, they have combined to generate extensive ADR activity in court studies, legislation and court rules, in organizations and specialized journals, in continuing legal education, and in an extensive and extending literature.

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1. The reality of court congestion is very controversial. Hardly a day goes by that we do not hear or read of the dramatic increase in the number of lawsuits filed, of the latest multimillion verdict, or of another small business, child care center, or municipal corporation that has had its insurance canceled out from under it . . . . [Why?] Because, quite simply, everyone is suing everyone, and most are getting big money . . . . [Americans have developed a] mad romance . . . . with the civil litigation process.

132 CONG. REC. S948-49 (daily ed. Feb. 4, 1986) (statement of Sen. Mitch McConnell) (introducing S. 2038, 99th Cong., 2d Sess. (1986), the Alternative Dispute Resolution Promotion Act), quoted in Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?, 140 U. Pa. L. Rev. 1147, 1157 (1992). But cf. Saks, supra, at 1149 (“Much of what we think we know about the behavior of the tort litigation system is untrue, unknown, or unknowable.”); see also Lauren K. Robel, Private Justice and the Federal Bench, 68 IND. L.J. 881 (discussing how the debate over the caseload crisis has usually focused on the increases in areas such as civil rights litigation since the business-oriented legal profession tends to overlook increases in cases brought by its usual clients); Lauren K. Robel, The Politics of Crisis in the Federal Court, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991); Marc Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3 (1986).


6. See, for example, Missouri Journal of Dispute Resolution, Ohio State Journal on Dispute Resolution, The Arbitration Journal, and BNA Alternative Dispute Resolution Report. In addition to academic journals and reporting services, several of the organizations established to support ADR publish newsletters, such as the A.B.A. Dispute Resolution Alternatives by the Standing Committee on Dispute Resolution.


8. See GOLDBERG ET AL., supra note 2, at 489-97 (containing a compilation of sources in its bibliography); Franklin A. Weston, Alternative Dispute Resolution: A Bibliography, 3 J. CONTEMP. LEGAL ISSUES 183 (1989).
Arbitration and mediation have been a part of specialized legal practices for a very long time, and anthropologists have studied, and told us about, the variety of ways in which human societies have approached "dispute resolution" since the founding of that discipline. Nevertheless, "most" lawyers' study and practice of dispute resolution methods have included only litigation and unassisted negotiation between parties' lawyers. The ambition of this Essay is to articulate a framework through which those of us needing remedial education can develop an understanding of ADR.

After discussing "problem solving" as a general matter, I will delineate conceptions of disputes, examine what constitutes the resolution of disputes, and survey major categories of dispute resolution methods. I will then differentiate the characteristics of dispute resolution methods and examine criteria by which dispute resolution methods should be chosen. Finally, I will comment on lawyers' agenda for understanding alternative dispute resolution.

I. PROBLEM SOLVING

We usually think of disputes as problems in need of solutions. Since our need to move from ignorance to learning about ADR is also a problem to be solved, thinking about problem solving is a good place to begin. As a general matter, we may solve problems by routine, by problem-solving disciplines, and by art.

A. Routine Problem Solving

Problem solving is frequently routinized so that recurring problems can be resolved "by the book," that is, by rules. One may adopt routines to be efficient, to allow delegation of authority to agents whose judgment one might


11. I know of no systematic research that establishes the degree to which this, or the cognate assertion that lawyers resist ADR, is true, but there are extensive anecdotal assertions. For a cultural/psychological explanation of lawyers' resistance to more cooperative modes of dispute resolution, see John Dieffenbach, Psychology, Society and the Development of the Adversarial Posture, 7 OHIO ST. J. DISP. RESOL. 261 (1992).

12. As I am currently teaching a course in Alternative Dispute Resolution for the first time, I include myself. I am grateful to the students in the class who are working through these materials with me, and especially to Benjamin Lo and Michael Turner who are providing research assistance.
otherwise be unwilling to trust, and to assure the implementation of authoritative policies and nondiscriminatory problem solving. These motivations for routinization have justifications. Approaching every problem as a novelty is expensive. Among the expenses of nonroutine approaches is investing in problem solvers whose training and experience would allow us to trust their discretion. Because perceptions differ and values are implicated, equal treatment and policy implementation are real problems.

But these benefits of routine are accompanied by costs. The inappropriate application of routine may make the problem more serious and expensive to resolve. Whether a problem is suitable for routine treatment is itself a problem to be solved, and if one does not trust the judgment of one's problem solvers, then rules must be written for screening. While many bureaucracies have such rules, there is no routine for designing routines.

Routines may be written or unwritten; they may be adopted formally or be the product of culture. When one is confronted with an unfamiliar problem, one is likely to look for processes to imitate, and routinized models may make problem solving feel safer.

B. Disciplined Problem Solving

Where novelty in problems is recognized, problem solving will involve creativity/imagination, intuition, experimentation, and aesthetics. While problem solving may be more art than science, the art has foundations in discipline. We will first articulate the discipline and then witness the art. The elements of problem-solving discipline are definition, searching, evaluation, and choice. This may sound like a progression through steps, but the path does not follow a straight line.13

1. Defining the Problem

When I ask a group of students to specify the process of problem solving, "defining the problem" is the aspect likely to be mentioned first. One cannot solve a problem without understanding its nature. Because problematic situations frequently are incoherent and have multiple aspects, "defining the problem" is often itself a difficult problem (to be solved by routine, art, or

discipline, with greater or lesser resources, patience, and creativity). Not only do problematic situations come without labels (or with unreliable labels), but more fundamentally, even a simple problematic situation can be conceived in diverse ways. The process of definition is likely to be circular.

Take the problem of “urban decay.” The matter is certainly multifaceted, multicentered, and confusing. There are problems of education, housing, law, transportation, and urban management, among others. Our tendency is to try to break large, complex problems into more manageable subproblems, but adopting such a strategy becomes part of the problem definition. Our goals and values, and our priorities among them, are also likely to influence our problem definition. Urban decay is multifaceted and confusing, but if a riot is in progress, our minds are focused wonderfully, at least for the time being.

Definitions are important thinking tools, but they are confining. Initial definitions should be provisional.

2. Generating Possible Solutions

Disciplined problem solving involves considering the greatest available number and diversity of possible solutions, and separating, at least initially, the process of searching for possibilities from that of evaluating them. This separation functions to avoid judgmental frames of mind that inhibit the generation of ideas and to avoid making premature judgments. Premature judgment comes when we are captured by a “good idea.” Too often the idea seems good because it conforms to our biases and stereotypes. And, in any case, better ideas may yet be discovered. One can generate possibilities through research, brainstorming, and play. The most productive searches are likely to include all three.

Lawyers are most likely to rely on research, looking for prior solutions to the same or similar problems (precedents). We are too likely to rely on precedents, both for the definition of the problem and its solution, and to settle for the first plausible precedents that come to our attention.

Brainstorming is the uninhibited generation of ideas through free association, through following trains of thought wherever they may lead, and through exploring the most tangential analogies. One lets bad ideas come with good ones, not only to avoid turning off the flow, but also because early in the process we may not be good judges of quality and because the best solution may turn out to be constructed from pieces of bad ones. One can productively

14. This is an aspect of teaching law students “to think like lawyers” in which legal education is not very successful. See Edwin H. Greenebaum, How Professionals (Including Legal Educators) “Treat” Their Clients, 37 J. LEGAL EDUC. 554, 563-66 (1987).
brainstorm both in private reverie and in bouncing ideas off others in groups. The process may continue unconsciously when one takes a break or turns conscious attention to other matters.

Adults, as well as children, can learn from play. One of the reasons “role playing” is a useful pedagogical device is that participants discover aspects of the simulated situation through experiencing its drama. Adults’ creativity is too often constricted by an “unwillingness” to indulge in play as a part of work, making work both less fun and less productive.

Research, brainstorming, and play support each other. Brainstorming and play are, indeed, hard to separate. And ideas generated in brainstorming and play may lead to productive research, just as material found in research may be the starting point for brainstorming and play.

3. Evaluating Possible Solutions

One commences evaluating possible solutions when the sources for additional possibilities seem exhausted, when time and other resource constraints require moving on, or when one judges that the marginal utility of new ideas does not justify investment in further searching (violating the principle of separating generation from evaluation). Moving on does not leave possibility generation behind; new ideas will emerge in the process of evaluation. When to commence evaluation is a matter of judgment. The inexperienced and impatient frequently begin evaluation too soon. The very experienced may be more flexible, relying more on reiteration. In any case, at some point the time for evaluation arrives.

Making choices involves applying values to perceptions of facts, including our understanding of history, of present circumstances, and of the social and natural systems upon which our predictions depend. To judge the benefits and costs of possible solutions, then, one must identify and assess factual uncertainties and clarify one’s conflicting values (including tolerance of risks) as one is confronted by the problem and its possible solutions. Where the choice of a solution must be made or accepted by a client or a group, assessing factual uncertainties and clarifying values are more than an individual matter. The degree to which uncertainty should be eliminated and clarification achieved as predicates for making a choice is yet another problem.

15. See infra note 19 and accompanying text.
The tools of evaluation are research and experimentation. Research may get us data that will reduce factual uncertainty, in some cases to practical certainty (the kinds of facts of which courts take judicial notice). And the accounts of others who have confronted relevant value issues may assist us in clarifying our own. Or we may find that there have been authoritative determinations that constrain the choices available to us.

Much of our experimentation is done through models. We frequently do this mentally, running possibilities through the models of social, economic, and natural systems we carry in our minds. One can experiment in some situations with game-playing simulations. Sometimes, computerized models may be used. And one can sometimes experiment by trial runs of a solution in the actual situation. Whatever methods of evaluation we use, our problem solving is an intervention in the situation and is, to some degree, changing the problem as we seek to solve it.

The diverse cognitive styles of different problem solvers will each have advantages and disadvantages for generating possibilities and for evaluating them. The logical analysis of linear thinkers will leave no stone unturned following a path of inquiry. Associational/gestalt thinkers will see possibilities and implications not available to the more focused among us. Problem-solving teams of individuals with complementary aptitudes may be better able to create or find the best solutions, but professions and firms of problem solvers may tend to attract, and value, "like-minded" groups.

4. Branching and Reiteration

Each possible definition of the problem will lead to multiple possible solutions, each of which will need to be evaluated through research and experimentation by assessing various understandings of the facts, as judged according to various weightings of our conflicting values, before the best definition of the problem may be selected with confidence. Not only will this branching lead in many directions, but at each stage we may encounter ideas or data that may prompt us to loop back to an earlier stage and follow yet more new paths. Our exploration of definitions, goals, strategies, solutions, and evaluations will interact in our minds, if we let them. To say the least, disciplined problem solving is not straightforward. Resource constraints will truncate problem solving in all but the simplest situations, requiring good judgment in problem-solving "triage."

5. Making Choices/Commitments

The time comes to make a choice and act on it. This may occur when a convincingly good solution is found or when time and other resources run out. In any case, whether a choice is a commitment or merely an experiment is a matter of degree. The law's ambivalent precedents on reopening judgments for newly discovered evidence and modifying decrees for changed circumstances are a formal instance of the general issue. Developing judgment regarding making commitments is a significant aspect of maturity. It is a comfort that many decisions made under constraints may be revisited. Understanding where one stands, and what to do about it, is always a problem needing a solution.

C. Problem Solving as an Art

Artistic mastery is acquired with discipline, and artists never leave their disciplines fully behind. Experienced practitioners of problem-solving arts reflect on their work in progress, allowing the work to speak back to them. The inexperienced learn problem-solving arts in part by acquiring information and rules (learning the discipline), but in larger measure by witnessing models of and receiving guidance from experienced practitioners. These processes are exemplified by the architect whose work and teaching are described by Donald Schon in *The Reflective Practitioner*:

In the medium of sketch and spatial-action language, [Quist, the architect/teacher,] represents buildings on the site through moves which are also experiments. Each move has consequences described and evaluated in terms drawn from one or more design domains. And each creates new problems to be described and solved. Quist designs by spinning out a web of moves, consequences, implications, appreciations, and further moves. . . .

Each move is a local experiment which contributes to the global experiment of reframing the problem. Some moves are resisted (the shapes cannot be made to fit the contours), while others generate new phenomena. As Quist reflects on the unexpected consequences and implications of his moves, he listens to the situation's back talk, forming new appreciations which guide his further moves. . . . Out of his reframing of [the student's] problem, Quist derives a problem he can solve and a coherent organization of materials from which he can make something that he likes. . . .

. . . In [Quist's] unfailing virtuosity, he gives no hint of detecting and correcting errors in his own performance. He zeroes in immediately on fundamental schemes and decisions which quickly acquire the status of commitments. He compresses and perhaps masks the process by which designers learn from iterations of moves which lead them to reappreciate, reinvent, and redraw. But this may be because he has developed a very good understanding of and feeling for what he calls "the problem of this problem." . . . But Quist reflects very little on his own reflection-in-action,
and it would be easy for a student or observer to miss the fundamental structure of inquiry which underlies his virtuoso performance.¹⁹

Lawyers acquire problem-solving habits, good and bad, in their developing years, and then learn problem solving as it applies to "legal" matters in practice. The models and instructors they encounter in practice will themselves have developed varying degrees of virtuosity. We are too likely to believe we can move from our life-long habits to becoming artists without attention to discipline. Problem-solving skills are important for most aspects of legal work. They are critical to effective dispute resolution.

II. RESOLVING DISPUTES

A. What Is a Dispute?

The question, "what is a dispute?", should be understood as, "what are the various phenomena that can be thought of as a dispute?" Because the idea of dispute implies something in contention, "dispute" and "problem" are not synonymous. This section will articulate some conceptions of "dispute." They are not mutually exclusive, and any contentious situation is likely to be a dispute in multiple senses. Answers to the questions, "when is a dispute resolved?" and "what constitutes the resolution of a dispute?", will be a function of the prevailing conception of dispute.

1. Conflicting Assertions/Claims of Legal Rights. We lawyers are so familiar with these (and their range of possibilities), that this idea of dispute tends to dominate our "analysis" when we are "thinking like lawyers." (We should distinguish conflicting claims of legal rights from disagreements regarding "what is the law" in some matter, which falls in my third conception below.)

2. Conflicts of Wills (Desires, Intentions). Consider two children quarreling over a toy. Depending on their development, they may rationalize their positions by claims of right, but the underlying matter is a conflict of "wants." Conflicts of wills are resolved when disputants' wills are modified or when circumstances effect a disengagement (for example, the children are sent to their rooms). A definitive resolution of a question of legal rights may not resolve parties' conflict of wills.

3. Argument/Disagreement. For example, "when does life begin?," or "what is ‘the right to bear arms’?" It is this sense of dispute that dominates dictionary definitions. 20

4. Unsettled Relationships. Marital and labor management disputes are, only most obviously, likely to be this kind of dispute in some of their aspects.

5. Conflicting Views/Intentions Regarding Future Relations. In this conception, a version of unsettled relations, the dispute may be formal (for example, in contract negotiation) or informal (for example, a dating couple breaking up because only one of them wants to continue).

6. Opportunities for Growth and Increased Understanding. Disputes (and problems generally) may create opportunities for those immediately involved and for their communities (large and small). Development of the law (through precedent and legislative response) is the opportunity side of litigation. The opportunity for community development is one of the principal tenets of the community dispute resolution component of the ADR movement. 21

7. Parties to the Dispute, Including Determining the Groups Involved. The disputing parties may frequently be conceived in multiple ways in a contentious situation. 22

One may well be considering at this point what aspects of disputes are of concern to lawyers, an issue we can only touch upon in this Essay. We may note, however, that one source of dissatisfaction with our profession’s dispute resolution services is that we may focus too much on one dispute aspect of contentious situations, leaving other aspects of disputes unresolved or, worse, aggravated.

B. Generating Dispute Resolution Possibilities

Our search for dispute resolution possibilities should branch to consider the various ideas of disputes, but space limitations prevent following all the paths. Identifying or defining dispute resolution devices is not the same as structuring possible dispute resolution strategies, in which one may consider

20. E.g., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 655 (1986) (defining “dispute” as “verbal controversy; strife . . . ”).


22. Cf. HAZARD, supra note 17 (describing circumstances where attorneys have difficulty discerning to whom they owe a professional duty and in what situations).
questions of sequence and timing, manner of communication, and the use of multiple devices.

Argument/disagreement may be resolved by learning processes through which one party persuades the other or in which the disputants achieve a shared understanding that differs from the initial position of either. Educational methods range from coercive (brainwashing) to voluntary, collaborative possibilities. Sometimes disputants may accept an authoritative resolution (for example, relying on a dictionary or almanac, or on the professor teaching the course). Sometimes authority will be accepted if the parties have had an opportunity to present arguments. And sometimes they will accept a resolution for limited purposes. (For purposes of the examination, the professor declares the truth.)

For interpersonal/relational conflict, there are many schools of counseling/therapy through which the parties may relearn or adjust their roles and relationships to ones that are mutually satisfying, or at least acceptable. Or alternatively the solution may be disengagement or separation.

Viewing dispute resolution as the settling of legal status, several methods of dispute resolution are available. I will address this area more fully, sorting dispute resolution possibilities by major categories.

1. Negotiation/Contract. Parties may resolve "legal" disputes by negotiating settlement contracts, assuming they are competent in law to enter the contract.

Devices in which neutral, disinterested third parties facilitate settlement are known, generally, as mediation. Other devices that have been created to facilitate settlement are fact finding, mini-trial, summary jury trial, and ombudsmen.

23. See Greenebaum, supra note 14, at 573-75.

24. Disputed claims of right can also be lost through waiver, which strictly understood is a voluntary change of position without consideration. Waiver, thus, is an exception to the requirement of consideration in contracts. RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1981).

25. In addition to general issues of competence, such as minority and mental incapacity, there are issues of specific competence regarding whether an individual may enter specific contracts that affect settlements. For example, contracts between fiduciaries and their beneficiaries and clients are reviewable for fairness. See RESTATEMENT (SECOND) OF CONTRACTS § 173(a) (1981) (discussing when contract voidable for abuse of fiduciary relationship).

26. In a "mini-trial," a neutral presides over counsel who present abbreviated versions of their cases to the senior management representatives of both parties who will negotiate a settlement. In a "summary jury trial," counsel present summary versions of their cases to a jury which gives an advisory decision which counsel can then consider in settlement negotiation. "Ombudsmen" act as fact finders and promote settlement through counseling and mediation. JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 171, 191-92, 204 (1992); cf. Ind. R. Alternative Disp. Resol. 1.3.
2. Adjudication. In adjudication, the parties present evidence and argument to a neutral third party who is authorized to make a decision that is binding on the parties. The process is initiated by the parties and the adjudicator responds. Litigation resulting in a judgment by a court is the dominant example in our legal system. Arbitration is usually thought of as a private variation on this theme, but parties are bound to arbitral judgments because they have so agreed, and arbitration has its roots in, and its scope is measured by, contract.

3. Legislation. Disputants may persuade lawmakers to enact rules that will resolve matters for the future.

4. Executive Action. When children quarrel over their toys, parents may dispose of the matter by decree. Parents may listen to argument, but they are not bound to do so. There are circumstances in which police, employers, teachers, and other authorities have similar powers, sometimes because disputants have so authorized them.

Governmental adjudicative, legislative, and executive actions, of course, occur in administrative agencies as well as in the three constitutional branches.

5. Fault and Default. When parties delay too long in pressing their claims, their legal rights may be settled by statutes of limitation or by laches. If they have created appearances having legal implications on which others have relied, their legal claim may be foreclosed by estoppel. If they fail to litigate according to the rules, courts' judgments may be based on default rather than adjudication.

6. Chance/Contest. Two friends each claim to be the first to have seen a dollar bill abandoned on the street. They could agree to resolve the matter by each getting fifty cents, but they might resort to a device of chance. Recently, Southwest Airlines and Stevens Aviation each were using the phrase "Plane Smart" in their advertising. The CEOs of the two airline companies gained

27. That is, usually binding. While courts do not render advisory judgments, nonbinding "arbitration" is possible.

28. See generally Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) (discussing social and structural constraints on the process of adjudication).

29. A substantial portion of the world's legal systems follow "civil law" traditions which have an "inquisitorial" variation on the adjudication theme familiar to us. See Mary Ann Glendon et al., Comparative Legal Traditions 167-74, 180-81 (1985); Mary Ann Glendon et al., Comparative Legal Traditions in a Nutshell 91-96 (1982).

30. Another innovation in adjudication is the "private judge," which occurs within the framework of litigation when the parties hire and compensate a qualified private judge to expedite the processing of their case. See e.g., Ind. R. Alternative Disp. Resol. 1.3(E), 6.1-6.5.
notoriety by agreeing to resolve their conflicting claims to the slogan by arm wrestling for it.\(^{31}\)

7. Self-help. In some instances, the law sanctions self-help, for example, in the reclamation of property.\(^{32}\) Sometimes activity that is lawful for one purpose may have collateral self-help effects, for example, exercising free speech in circumstances that have coercive effect. Sometimes self-help activity is illegal, but politics, economics, or other practicalities constrain law enforcement.

C. Characteristics of Dispute Resolution Methods

The many possible variations on the major themes articulated in the previous section cannot be appreciated without surveying the characteristics of dispute resolution methods. Take a deep breath:

1. Scope of Dispute to be Resolved

What aspects of a contentious situation does the dispute resolution device focus on or give priority to?

2. Timing

When is the dispute resolution device chosen? Dispute resolution devices may be selected before disputes arise as part of contracts governing continuing relations (constitutions, articles, bylaws, leases, and so forth) or as part of a contract governing a single transaction, or the device may be selected after a dispute has arisen. Sometimes the device is prescribed by statute, court rule, or by other rules outside the parties' control.

3. Financing the Dispute Resolution Process

Are the resources for dispute resolution furnished by the parties, subsidized by the public or a charity, or funded by insurance? Do those paying the piper have a role in composing the tune?

\(^{31}\) Entertaining accounts of the denouement are contained in Real Men Don't Litigate, INC., May 1992, at 13; Bill Freeman, Kelleher KO'd: 'Malice in Dallas' Match Leaves Lawyers in the Lurch, 29 AIR TRANSPORT WORLD, May 1992, at 112; Southwest Airlines, 54 WKLY. BUS. AVIATION, March 23, 1992, at 126.

\(^{32}\) E.g., U.C.C. § 9-503 (1978).
4. Parties, Representatives, and Neutrals: Their Roles and How They Are Chosen

Do the disputants have the assistance of a third-party neutral to resolve their dispute? If so, is the neutral a professional of some kind, one with knowledge of the subject matter, an acquaintance or a stranger, one with authority from a significant group to which the disputants belong, a single individual or a group? Are neutrals chosen by the parties or in accordance with a procedure agreed to by the parties, provided or designated by a public or private institution, or chosen in accordance with an institution's or government's rules? Neutrals' roles are a matter of contract between the disputants and the neutral, if not determined by law or other controlling institution, and will be a function of the chosen dispute processing method.

Do the disputants act on their own or with assistance? Is the one providing assistance a professional (a lawyer or other) for whom the disputant is a client, a friend, or someone provided by a group of which the disputant is a member? Is the assistance chosen or hired by the disputant or provided or assigned by an institution? If the disputants have assistance, do they speak for themselves, with advice and support, or through representatives? If through representatives, are the disputants present or absent?

5. Coercion

Is participation coerced or voluntary? In coercive dispute resolution, participation is involuntary with a binding result. Beyond what the law permits by way of self-help and executive action, coercive dispute resolution is limited by constitutional requirements of due process and separation of powers to litigation and administrative processes with judicial review. Coercive dispute resolution is also limited in form to settling legal claims. Parties may be required to participate in ADR procedures, but they may not then be required to accept the results.33

33. This general principle is a function of the separation of powers, the requirements of due process, and the right to jury trial. Nevertheless, there is some evidence that court rules may place sanctions, such as costs or attorneys' fees, on parties who do not obtain better results from litigation than those they have been offered in court-annexed ADR. Dayton, supra note 4, at 900-01, 952-56; cf. Fed. R. Civ. P. 68 (detailing "offer of judgment" provisions that require a party who has declined a settlement offer to pay costs incurred after the rejection of such offer if the judgment ultimately rendered is not more favorable to the rejecting party than the earlier offer it declined).
6. Dispute Processing Method

Where the process is negotiation or mediation, do the parties bargain in adversarial/positional or in collaborative/interests-oriented modes? Does a mediator operate as a communications facilitator (go-between, clarifier), a counselor (helping the parties to see reality and to change their positions), or an advisor (recommending outcomes)?

Whether the process is negotiation/mediation or adjudication: Is the procedure formal, rule-governed, and elaborate, or is it informal, ad hoc, and simple? Is it chosen by the parties or prescribed by a public or private institution? Is the result to be governed by "law," by rules or customs of a private community, by the terms of the parties' contract or principles inferred from the content of their relationship, or by what the neutral thinks best for the parties and/or the community?

What is the product of the dispute resolution process? Does it declare rights, provide compensation, or order specific behavior for the future? Is the result binding or only advisory?

Are the process and the results public or private?

Arbitration and mediation are two steps along a continuum from litigation to unassisted negotiation between the parties. Moving from litigation to arbitration maintains the feature of a binding result determined by a third party, but nevertheless moves from public to private dispute resolution. Litigation is public in every sense: the institutions, the procedures, the substantive criteria governing the outcome, the decision maker, and the finances are supplied by the public. The process occurs in public view, and the results are public record. Arbitration need not be public in any of these respects. Even the criteria governing decision may be provided by the parties' contract or be those of a private community that the parties have chosen to govern their relationship. Arbitration results are limited only by the same criteria of legality that would limit their choices in unassisted settlement negotiation. Mediation removes the feature of a neutral determining the result in favor of party determination, but retains third-party facilitation (and that facilitation may still carry influence).

ADR is contract-based, "design-your-own" dispute resolution, limited only by what contracts the law may determine to be illegal, or unenforceable by

particular remedies. The choices are not limited to "pure" mediation or arbitration. Rather, the defining characteristics identified above yield innumerable permutations of dispute resolution possibilities. Further, the content of ADR agreements, like other contracts, may be determined by the parties' course of conduct pursuant to the agreement, giving meaning to, supplementing, or modifying their explicit contract. Understanding dispute resolution devices as they actually operate, therefore, requires close examination of behavior rather than just the surface forms to which parties apparently agree, or, indeed, what the law apparently sanctions.

D. By What Criteria Should Dispute Resolution Methods Be Chosen?

1. Constraints

While the permutations of variable characteristics surveyed above give rise to thousands of possible ADR combinations, the available possibilities will be substantially constrained.

First, there are legal constraints. Some choices may be positively prohibited or legally difficult to negotiate, and courts sometimes meet others with inhospitable attitudes, which makes their use hazardous and unpredictable. Just as one needs to study civil procedure to understand the legal dimensions of litigation, one must study Alternative Dispute Resolution to understand legal constraints on alternative methods of settlement.

Resource constraints are more limiting, however, than legal ones. For particular parties and circumstances, a particular dispute resolution method may be too costly in time, delay, or finance. The services required for a particular method may not be available.

Less obvious are resource constraints in negotiating dispute resolution agreements. Choosing among standard dispute resolution packages will have advantages over starting from scratch, especially where the methods under consideration involve neutrals, making it a three-party negotiation. The advantages of choosing a dispute resolution method available from an established dispute-resolution provider include: a set of rules, precedents amplifying the rules' meanings, an institution providing administrative services, readily available who are neutrals competent to perform the role

35. Thus, "alternative dispute resolution" should, strictly speaking, be understood as "alternative methods of settlement."

36. One cannot know, for example, what goes on in pre-trial conferences just by studying the governing rule, FED. R. CIV. P. 16.
required for the particular method, and, to varying degrees, a tested legal status. The courts provide this for litigation, as does the American Arbitration Association (and some other organizations) for arbitration and a greater variety of institutions for mediation and related methods.

In addition to the obvious negotiation efficiencies of taking a dispute resolution package off the shelf, consider that, without these packages, parties who are already in dispute, and who may not trust each other, will have to reach agreement on a great many details, the choice of which may give advantage to one or the other, increasing the hazard of further damaging their relationship. Established packages invite parties' trust in methods with the legitimacy and apparent reliability that comes with a track record. Finally, where the method chosen involves a neutral, individuals competent and willing to work as neutrals in idiosyncratic ways without the support of established rules and institutions may be difficult to find. Working with neutrals in conventional methods provides greater assurance of competency and of understood ethical constraints. Otherwise, negotiations with neutrals may be expensive.

Resourceful professionals, however, should test the reality of perceived constraints. Dispute resolution providers may be willing to play variations on familiar themes; some may welcome the opportunity. Lawyers advising their clients regarding dispute resolution methods will feel constrained by their knowledge and competency, but these may be expanded through research and development, viewed as an investment in know-how rather than as a cost that must be charged to an immediate client. In some instances, the potential advantages of creating a dispute resolution device tailored to the needs of a dispute may outweigh the risks of innovation. And greater experience will increase competence in judging and minimizing risks.

2. Parties' Interests

Lawyers' traditional viewpoint is that the choice of a dispute resolution method is to be made in the client's best interest, but there is some confusion regarding who is to do the choosing. The choice of a dispute resolution method is a prime example of the entanglement of means and objectives. Identifying objectives and ranking their priority determines the means, and one cannot do the best possible job of identification and ranking without exploring the implications of the available means. At the same time, the principle of client autonomy will be in tension with lawyers' concerns that

their clients understand the implications of the choices they are making, that is, that they are acting competently. 38

Each of the defining characteristics of dispute resolution methods identified in the previous section will have implications for clients’ interests. Whoever does the choosing, identifying the aspects of a dispute on which to focus will be important. In particular contentious situations, some aspects of a dispute may be more resolvable than others, and this may affect priorities for investing in dispute resolution resources. Clients’ interests will turn on matters such as: expedition and costs, the relative importance of gaining advantage and fostering relationships, the costs and benefits of maintaining privacy or going public, which decision maker will inspire trust and seem legitimate, what competencies are desirable in the decision maker, what process will provide the best psychological payoff, and what will work.

3. Professionals’ Interests

Lawyers have legitimate professional interests implicated in dispute resolution choices. They have interests in being honest and moral persons who do not cause unnecessary harm, either to clients or others. They have craft interests in their competent and artful practices and in their reputations. They have interests in providing services at costs clients can afford while earning a reasonable profit. Conflicts of interests between lawyers and clients in such matters are inevitable. While the interests of lawyers and clients in choosing dispute resolution methods will coincide in many respects, clients will be well-advised to take an active interest themselves in considering dispute resolution approaches.

4. Public Interests

Public policy in dispute resolution is expressed through limitations on which dispute resolution contracts are legal and enforceable and on how they may be entered. 39 However, such limitations only control “easy” cases, and some commentators criticize ADR methods as too likely to sacrifice public

38. See id. at 10 (defining “consult” as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter”); id. Rule 1.14.

interests\textsuperscript{40} or to sanction coercion or manipulation of individuals to “voluntarily” give up rights and protection to which the law entitles them.\textsuperscript{41} Only recently have the ADR roles and responsibilities of neutrals, professionals representing clients, and the courts received sustained attention.\textsuperscript{42} While ADR has yet to create an ideal dispute resolution world, the traditional approaches to dispute resolution are subject to the same criticism because they do not always prevent overreaching and the sacrifice of public interests.

III. LAWYERS’ AGENDA FOR UNDERSTANDING ADR

To the extent that lawyers’ duties to provide competent representation\textsuperscript{43} have come to include knowledge and skills regarding ADR, the job description of “lawyer” has acquired new dimensions.

First, lawyers need to acquire the same kind of knowledge of arbitration, mediation, and other ADR methods that their study of civil and criminal procedure has provided them for litigation. That is, lawyers should acquaint themselves with ADR methods and acquire knowledge of the legal frameworks in which they operate.

Second, lawyers should be able to counsel clients in the design and choice of dispute resolution methods. Legal education has given too little attention to development of the problem-solving competencies touched on in this Essay, either in law school or in continuing education. To the extent problem solving is viewed as something lawyers and clients should do collaboratively, this aspect of ADR work will prompt reexamination of lawyer-client relations. Further, lawyers may become more aware of how disputed legal claims relate to other aspects of clients’ problems and become more responsible for the consequences their representation has for aspects of contentious situations beyond the narrowly legal. As a by-product, lawyers may be better able to

\textsuperscript{40} See, e.g., Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984).

\textsuperscript{41} See, e.g., Penelope E. Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441 (1992); Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 HARV. WOMEN’S L.J. 57 (1984). The concern with coercion may be greatest in institutional arrangements, such as in court-annexed ADR, where mediators may feel a need to maintain an adequate settlement rate to secure their employment.


\textsuperscript{43} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).
solve the problem of being lawyers and good people, in the view of others (clients and the public) and themselves.

Third, ADR confronts lawyers with an expanded developmental agenda in representational skills. In every negotiation, there is a negotiation over the process as well as the (usually) more obvious one over substance. Lawyers, however, are not as aware and considerate as they should be regarding the choices available in negotiating the process of negotiation. Some commentators observe that lawyers too infrequently negotiate productive problem-solving processes with "opposing" parties. Fortunately, this is an aspect of the ADR agenda that is receiving pedagogical attention in both law schools and continuing education. By the same token, ignorance in this regard is becoming less excusable. Much more difficult is finding opportunities to learn representational skills in ADR methods beyond bipolar negotiation. There is little "clinical" training in these aspects of mediation and arbitration, and because these methods have been confined largely to specialty practices, few senior lawyers are available as models. Ironically, it is probably easier to find training as a neutral in mediation and arbitration than it is to be trained as a representative in those processes.

This agenda is challenging, but pursuing it will be rewarding. Since clients, our professional institutions, and professional competition will soon demand ADR competencies, neglect of these matters is not something we can afford.

44. See supra note 34 and accompanying text.