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# ADR and Civil Procedure: A Chapter or an Organizing Theme?

Bryant G. Garth

The two obvious questions about Alternative Dispute Resolution and civil procedure are: What might the study of Alternative Dispute Resolution add to a first-year course in civil procedure? And, given limitations of time and requirements for coverage, how might ADR best be integrated into the course? I believe that the casebook approach of “adding a unit” is useful but insufficient, not because ADR is such an attractive legal reform movement that we must promote it more, but because the best way to establish the connection between ADR and civil procedure is to bring a new perspective to civil procedure generally. This new perspective, which has aspects in common with the ideas developed in Paul Spiegelman’s article, does not in my opinion require that we go as far as he proposes toward making civil procedure into a “lawyering process” course.

The need for ADR in the first-year procedure course has been asserted somewhat simplistically in most discussions. One hears, for example, that, to better serve their clients, lawyers should be familiar with the whole range of dispute-processing institutions. Another strongly asserted justification is that lawyers are too inclined to litigate—too adversarial. Both observations may be true, but we have little information to support either. Clients retain lawyers because of their expertise in the world of law and legal procedures, not because they know best how to “resolve disputes” or “solve problems.” And the need to curb the litigiousness of lawyers is not clear; indeed, lawyers who have been educated in the traditional adversary process have managed to learn to negotiate settlements in the vast majority of civil cases.

A better justification for studying ADR in a civil procedure course is that lawyers can learn at the outset the limitations of the adversary system. A unit on alternatives to courts and the adversary system can expand the lawyer’s perspective. We must understand, however, that there is an ideology for alternatives as well as for litigation. Fitting a dispute to the “appropriate” forum, one of the goals of the ADR movement, depends on agreement about just what in fact is appropriate. We must recognize in addition that critical features of the adversary system evolved not just to find an efficient means of resolve disputes but also as part of the development of individual rights in state-supported dispute resolution. The ideology of the adversary system—

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formal due process—cannot easily be separated from the ideology of individual rights. Alternative approaches are not just cheaper and faster; they may reflect a different approach to the individual rights promoted by the traditional model.

The only way to develop the interplay between litigation and its practical and ideological alternatives is to go well beyond a chapter in a casebook. We should focus on what might be termed “formal due process and its alternatives.” Civil procedure evolved in the 19th century around the idea of party control of litigation and judicial passivity. Private parties were thought to own their lawsuits as individuals with private law claims and defenses. This image represented a rather expensive but in many ways appealing description of a court. Civil procedure in that image could concentrate on the abstract arguments made by the parties, since what mattered was only the cultivation of the image. The image is still important as a legal ideal, but the model must be examined and questioned and above all situated in a context that includes other methods of processing disputes.

The inquiry can be explained simply in reference to cases in a typical casebook. Usually they are cut and edited to distill a legal issue that can then be considered in the abstract. But every case has a history and involves parties with particular problems and goals, bargaining power that shifts in the course of any process, lawyers with their own interests, and a variety of potential “alternative” paths that could have been taken. This context should be included by good professors in any course, but it is especially important in civil procedure. The question for teachers of civil procedure therefore is not really that of finding what to cut out of the traditional course, but rather how to orient what remains there.

Cases such as *Sniadech* and *Fuentes*, for example, raise the following concerns: (1) What did the litigants really want, and was litigation worth the expense? (2) Was the real problem poverty, not lack of procedures, and how do formal hearings help the poor? (3) What was the role of the legal aid lawyers, and was it appropriate? (4) Why didn't these very small claims settle out of court? (5) What are the costs of a formal model of due process, and should the formal model be modified to cut those costs? (6) If due process is our model to protect individuals with property, why is it triggered only when we find state action triggered by some kind of official involvement? Most teachers probably raise many of these issues. My point is that this perspective relates directly to ADR and pushes much beyond the abstract law of prejudgment remedies.

Discovery should be addressed in terms of how it affects the relative power of judges and litigants, settlement negotiations, and, obviously, costs. Appealability of discovery decisions, for example, has a crucial impact on settlements. We must also explore how efforts to control costs and delay through “case management” affect the parties' ability to frame their own cases and decide what resource commitment to make to the litigation. Many casebooks neglect the extremely important problem of how, through discovery, private litigants can use the resources of the government—grand juries, general investigations, and the like—to build their positions in nego-

tiation and litigation.

Class actions of course raise many questions, some of the more notable including the role of certification decisions in promoting settlements, the contours of notice and opt out as they affect our visions of due process and the practicalities of settlement, and the various “alternatives” that must be used to distribute damages, including negotiation, minimal screening of claims, arbitration, and distributions to groups or particular funds.

Similar kinds of concerns can be raised with respect to summary judgment, *res judicata*, right of trial by jury, and a number of other components of a typical first-year course. The perspective I am suggesting here draws on important recent legal scholarship, including that concerned with lawyer-client conflicts, the economics of dispute processing and litigation, the processes of dispute transformation, and the role of legal ideology. The ideas that can come from a chapter of ADR should be developed, but they should provide a theme throughout the course.

It may be that my suggestions will require that some part of the traditional course receive less attention in a civil procedure class. Those who are worried about that prospect should ask themselves why, for example, they are concerned with studying so many cases on personal jurisdiction and the *Erie* problem. One reason, I would guess, is that those areas are among the few in a traditional civil procedure course which provide a real line of cases and a certain intellectual stimulation. That is not reason enough. The course can be made both more interesting and more insightful by pushing beyond the development of legal doctrine to a frank questioning of the basics of civil procedure and ADR.