Success and Failure in ADR

A Dialogue between Partners

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Abstract

Love and Stulberg critically discuss policy, scholarly, and practice developments in four areas of program development in the area historically referenced as alternative dispute resolution (ADR): the range of process options; the impact of court procedures on ADR program development and practice; the nature of ADR scholarship and training; and the general public's receptiveness to or rejection of the normative principles that structure ADR collaborative processes. Their concluding remarks suggest that the promise of ADR, particularly of the mediation process, remains inspiring to many, even if its effective implementation remains uneven.

Keywords: collaborative, adjudicatory, pedagogy, interdisciplinary, diversity.

Professor Frank Sander,[1] when asked of his view of the success and failure of ADR, famously observed: "On Mondays, Wednesdays and Fridays, I think we've made amazing progress; on Tuesday, Thursday and Saturday, ADR seems more like a grain of sand on the adversary system beach" (Sander, 2000, p. 3). We are humbled to join the spirit of that inquiry.

We have been professional partners in the ADR arena for more than 25 years, teaching together and collaborating on many projects. We share fundamental values and aspirations for the field. But we start from differing experiences and sometimes assess ADR developments differently. In a dialogue format, we explore what we see as successes and failures in five areas.

1. Process Range

Josh: When I started full-time work in this field in 1973, ADR referenced multiple non-trial procedures: mediation, fact-finding, arbitration and democratic elec-

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1 The Hon. Wayne Brazil, himself a distinguished jurist and leader of court-annexed ADR initiatives in the United States, referred to Professor Sander as the Dean of ADR (at least with respect to developments in the United States), observing that Professor Sander is: "[...] the leader with the deepest experience, the broadest vision, the richest knowledge, and the most balanced counsel" among those active in the field since the 1970s (Brazil, 2000).

tions. Excitement and energy focused on all these processes. For many today, ADR means only consensual processes, which represents a dramatic diminishment of the rich array.

Certainly, the increased use of mediation in many settings is inspiring and clearly constitutes a success. The highly visible use of mediation to help resolve international disputes like the impasse in Northern Ireland or the development of the Truth and Reconciliation process in South Africa are two-well publicized situations. In the United States, mediation's use has become pervasive, including its use to resolve the complex claims in the City of Detroit's bankruptcy case; the economic challenges arising from home foreclosure or natural disaster situations; the emotional and practical dynamics in family or marital controversies; and, at the more publicized level, such civil rights controversies that erupted from the shooting of Treyvon Martin in Sanford, Florida. For me, this broad-based presence is a testament to the vitality and importance of citizens assuming responsibility for working hard with one another to resolve their differences in a non-violent, effective manner. But all of this may have come at a significant cost.

I think most practitioners today, and certainly newer scholars, equate ADR only with mediation or other consensual processes. Consensual processes are privileged over adjudicatory processes for most disputes. I think that is a failure of vision and flexibility.

Lela: Failure, Josh, is way too strong. I'm with you that adjudicatory processes are important and should not be neglected. I agree about developing a vibrant process array. However, let's acknowledge that some of mediation's successes are in terms of building consensual processes into traditional systems that already feature adjudication. I celebrate, for example, that in some European documents, ADR means 'Amicable Dispute Resolution', a development that parallels the International Chamber of Commerce (ICC) in Paris adding a mediation (ADR) arm to its more traditional arbitration dispute-resolution services. Bringing mediation into courts and arbitral institutions – bastions of the adversarial process – is a tribute to self-determination, freedom, creativity, human connection and peace. Human beings have been schooled for so long in the arts of confrontation and argument. We are all too prone to be overconfident and biased with respect to our positions and perspectives. So, mediation is a welcome addition, but arbitration and litigation remain the backstop processes.

I find it inspiring to attend the ICC Mediation Competition or the American Bar Association (ABA) Representation in Mediation Competition and see law students from schools around the world vying to demonstrate skills in listening, problem solving and collaboration. That's a success. That success has not diminished the importance of international and national arbitral and litigation moots.

In 2014, I count it a success that judges (as a matter of public policy), institutions (in their dispute system designs) and individuals (in their contracts) require people to meet with a mediator to explore resolving a dispute before resorting to adjudication. The point is that we're not supplanting adversarial processes, we are augmenting them.

Josh: Well, we agree that the values of party autonomy, participation and consent are wonderful. I love what mediation stands for, and I love to mediate. We

both do. But I don't think it is desirable to view arbitration or litigation as the 'backstop', as you put it. I think that each dispute-resolution process, including mediation, should stand on its own. For instance, I believe that in some settings – *e.g.* mortgage foreclosure claims by banks – it might be desirable for a state to assert that, as a matter of public policy, bank claims for delinquent payments must be mediated. That would require lenders and debtors to meet and talk – and work it out. And, if they did not meet or work it out, then the banks would have to use some other mechanism, not the court system, to obtain relief. I use such an example because it is obviously controversial; but the point I want to stress is that I am comfortable adopting the posture that in some important settings the only available dispute-resolution process should be mediation. But that also means that I believe that there might be a broad range of disputes – *e.g.* some commercial activities conducted entirely by persons across borders via Internet communications – in which an adjudicatory process such as arbitration would be the exclusive dispute-resolution procedure. And having adjudicatory processes, private or public, is not simply to promote efficiency. I think that sometimes the only way to promote a fair dialogue, advance basic respect and pierce power disparities that are strengthened by bigotry and hatred – that is, the only way to cement justice – is to require disputing parties to vindicate their claims through an adjudicatory process.

Lela: Josh, I agree that we need a more concerted focus on arbitration and private adjudication – but I think we must do so cognizant of what I see as two notable failures of private adjudication.

First, the failure in arbitration that I most regret is that it has come to embody so many of the shortcomings of litigation that spurred on the ADR movement in the first place. It is not the envisioned fair, efficient and user-friendly process that characterized its historical format. It has developed into being a litigation look alike with similar costs and delays. We should stop this gradual devolution towards litigation, address the flaws in arbitration and build fair, efficient initiatives, such as online dispute-resolution (ODR) alternatives, to serve parties.

Second, I believe that the process array that you and I endorse has, to some extent, been compromised – or collapsed – into being called 'mediation'. In New Hampshire, for example, where I am a member of the Bar, parties to litigated cases must try one of three ADR options (neutral evaluation, non-binding arbitration or mediation) before their case can be assigned to the court's trial docket. Everyone chooses mediation. The other options have disappeared. Or have they? In reality, some mediators' primary function is to give evaluations (neutral evaluation), others are conducting adversarial hearings in which they render a decisive opinion (non-binding arbitration) and some are conducting what I would call mediations. I feel it is a failure not to understand and label processes according to their distinctive features and contributions to disputing parties.

Josh: Important insight, Lela, with which I'm sympathetic. Since you mention the New Hampshire program, let's turn to the courts.

2. Different Doors in the Courts

Josh: In many courts throughout the United States, mediation and litigation are offered side by side. Court personnel, judges and court rules encourage parties to use mediation first; if that does not succeed, parties can present their case to a judge or jury. While I do believe, as mentioned previously, that one can make a compelling argument for having only one type of process option available (consensual or adjudicatory) for a certain range of cases, I think that this development over the past thirty years at the state and federal court levels of offering several processes, constitutes progress. And the sequencing of processes – consensual and adjudicative – does effectively address two pervasive practical matters: first, it prompts and supports lawyers picking up a telephone and talking with their counterpart about the case and its possible resolution; second, it removes the alleged stigma of 'weakness' for a party to participate in settlement discussions – stated affirmatively. And to your earlier point about wanting to encourage public attitudes other than confrontation and argument, it sends a clear signal to fellow citizens that a central part of our public justice process involves disputants taking responsibility for investigating settlement possibilities themselves.

Lela: Yes, but temper your enthusiasm, for there are some serious failures connected with the success you mention. Two jump out. First, courts do often refer cases to mediation – I'm thinking of family cases, now, as well as small claims and civil court matters – with an imposed time limit on mediation activities. Some judges impose a thirty- to forty-minute limit on mediating civil court matters or matters involving property and parenting arrangements in the context of a divorce proceeding. That time constraint distorts mediation practice in two ways: first, it undermines the capacity of parties to improve their understanding of the situation. Talking and understanding requires time, and this artificial constraint cramps that dimension. Second, given a mediator's desire to help parties settle, the time constraint encourages the mediator to adopt an evaluative, 'quick-fix' orientation. That approach undermines the parties' capacity and responsibility to shape more creative outcomes that reflect their distinctive priorities. In short, the time constraint, in the name of judicial efficiency, imposes cookie-cutter outcomes on the parties. The result is to present to the parties – and the public – a vision and experience of the mediation process as a coercive, non-public interaction. That is dangerous and represents a failure. While we have succeeded in introducing mediation, we have failed to introduce a model – at least in many court-connected contexts – that can achieve mediation's important goals.

Josh: Certainly not desirable for the public's perception – and experience – of mediation. My hope and belief is that individuals who design and implement mediation programs in other institutional settings – *e.g.,* in businesses, universities, community dispute-resolution centres, or peer-mediation programs – do not impose such time constraints on mediation participants.

Lela: Let's move on to examine the track record in scholarship and teaching.

3. ADR Scholarship and Training

Lela: The range and breadth of dispute-resolution scholarship has grown exponentially in the past forty years. Comparing university curricula alone, the primary home of conflict-resolution studies – historically – has been in schools of diplomacy or, domestically, industrial relations. Today, scholars in business, law, natural resources, psychology, economics, education, city planning, medicine and engineering, among others, are contributing to the literature and leading classes for students at varying levels. There are multiple specialty journals focusing on dispute-resolution studies. And this development is not simply a U.S. phenomenon – it is being replicated in university and professional programs internationally. This undoubtedly constitutes a success.

Josh: I strongly agree that dispute-resolution studies are more expansive across disciplines and quantitatively more robust. It's exciting. And, to me, there are two features of this development that are particularly valuable. First, much of this scholarship sustains an important historical tradition: namely, ADR scholarship links theory to practice.[2] The most popular example, of course, is *Getting to Yes,* but one can readily cite a range of other literature contributions that reflect this point. I think this occurs because many authors also participate in some form of ADR at a practice level, so their conceptual insights are informed by practice and vice versa. That approach sustains the tradition distinctive in the industrial relations context: in the United States during the 1945-1980 period, scholars and practitioners spoke to and learned from one another.

There is a second feature, though, that is strikingly distinctive of ADR activities since the 1960s, and that is its pedagogical form. Remember the dawn of the contemporary ADR movement in the United States: race riots erupted in cities; students closed universities with demonstrations against military recruiting on campus or demands for diversity in the curriculum; hostage confrontations occurred in prisons; and demonstrators protesting environmental practices, such as nuclear plant development, chained themselves to gates. Add to that the development of court-annexed mediation programs that targeted disputes among neighbours and the explosive growth of using mediation and arbitration in public sector labour relations and the result was a strong need to train interveners to assist on-the-ground – immediately, not just in theory – to help disputing parties reach a peaceful accord. The training was 'practical'; students – be they agency staff persons, community volunteers, or law enforcement officers – needed to sharpen their communication and problem-solving skills in order to serve active cases. So the training program resembled a piano teacher giving a lesson to a student much more than a professor exploring the theory of musical composition. But what was, and remains, crucial about these programs is that their content that focuses on sharpening performance skill development is systematically and rigorously connected to theoretical analysis.

That pedagogical form has penetrated the teaching of all ADR courses in U.S. law schools today – and, in so doing, has contributed to transforming law school

2 Andrea Kupfer Schneider (2013) describes this approach as 'pracademics,' at p. 188.

teaching from its signature pedagogy of the 'Socratic', professor-centred focus to a collaborative inquiry By blending the study of theoretical materials with performance skills, it is a pedagogy that is also distinctive from the traditional clinical teaching model that links performance skills primarily to reflections regarding challenges of professional responsibility. And, in its most important dimension, the approach to teaching ADR has supported a form of democratic learning styles that challenges existing pedagogical approaches used by scholars and professors steeped in the European university tradition. This is a success.

Lela: You are right. It has been energizing and fun to be a part of, and help shape, this emerging tradition.

I think, too, that the field has stimulated scholars in many different disciplines, such as communication, psychology and medicine, to examine human conduct from the lens of conflicts – and that has importantly enriched our understanding of the human experience. Just think of the work of people in the field of medical ethics, for instance, and the dispute-resolution challenges that doctors, health care providers and family members confront when trying to develop – under severe time constraints – mutually acceptable action plans for treating loved ones with end-of-life medical issues. It is humbling to reflect on, and learn from, these practitioners and the challenges they face.

And, before we move on, one other important element to note: the development of professional associations of conflict-resolution practitioners that sponsor conferences, symposia and international exchanges to promote the study and practice of justice-making processes. The American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution are just two examples of significant organizational initiatives that have triggered dialogue and learning among writers, practitioners and policy makers, both within the United States as well as internationally. That development is a clear success.

Josh: Good. But do you think that the combination of increased use of processes in courts and other settings, together with these multiple educational initiatives, has contributed to increased public consciousness of non-litigation options?

4. Public Consciousness of Non-Litigation Options

Lela: Only modestly. People who scan the sports pages read, here and there, about a dispute involving an athlete – professional or Olympian – being resolved by arbitration. They may hear about disputes in bankruptcy or divorces being sent to a mediator. There has been a launch of a television series about a mediator, *Fairly Legal* (which is only fairly accurate about mediation). And we hear about international mediators addressing hot issues.

But these are modest recognitions and not nearly as publicized as fights and wars. Society, at least for citizens in the United States, is still remarkably litigious. Even the stunningly large financial settlements of litigated cases – *e.g.*, recent settlements involving the SEC and investment banks relating to mortgage liabilities – are seen not as negotiated settlements to be celebrated as part of a creative

problem-solving ADR process, but as private talks conducted under the umbrella of a civil or criminal investigation leading to mutually accepted outcomes to close down the potential war of litigation.

The fact that mediation is not regularly sought by disputing parties in public or legalized disputes strikes me as a failure. Our instinct as individuals in such cases – our default posture – is to embrace a right/wrong framework in which one ascribes blame and seeks vindication, rather than to have our default posture be a problem-solving, consensus-building approach. I find it ironic, actually, because I believe what most of us do – instinctively and in many aspects of our daily lives – when confronting a challenging situation is not to worry about who caused what, but to instantly engage in efforts to solve the problem and move on. I'm waiting for the day when our concepts in public disputing processes match our everyday conduct!

Josh: I share your thinking on this. The only additional success I would reference is that I believe that the idea of resolving conflicts promptly and effectively has gained significant attention and use in the business world. I might not like all of the practices because their design, to my mind, is often not balanced in a way that reflects valuable justice considerations. But I love the fact that there is a growing discussion of, and consciousness about, how to deal with differences. My own sense and hope is that this increased awareness and discussion about dispute-resolution processes drives a growing interest in and acceptance of resolving conflicts on the basis of people providing reasons to each other, rather than one person systematically exerting power over another.

5. Final Comments: What Disturbs You the Most about Current Practice? What Inspires You the Most about the Future?

Lela: First, I will say what disturbs me the most – what I see as a failure: even where the use of mediation in the United States appears to be thriving, mediation practice by talented individuals falls distinctively short of advancing the values and goals that inspire the process. Mediator practitioners, whom I admire, claim that market-place realities – what the client wants – compel a mediator: to engage in such practices as dispensing with joint sessions with parties and their counsel and conducting the entire conference via caucuses; to be dominantly evaluative; to treat the lawyer representative, not her client, as the mediator's client; to target issues as narrowly as possible, usually meaning that the dispute is framed by the causes of action in the lawsuit; and to divide cases, and shape mediator practice, according to whether a case is a 'money-only' case or something else. What is a 'money-only' case? Aren't people involved? To me, all of these practices – regrettably characteristic of law-trained mediators – convert what I believe to be a dispute-resolution process that fundamentally promotes human dignity through valued dialogue into an economically framed exercise in distributive, zero-sum bargaining. What is lost is a sense – and an experience – of justice, all in the name of getting the money and getting out of the dispute.

By contrast, what inspires me is how the idea of consensus-building appears to be permeating the globe at a very practical level: the EU Directive; the growth of dispute-resolution studies in universities throughout much of the world; the professional exchange programs occurring among scholars and practitioners; and, most significantly, the many important, quiet efforts of people of goodwill trying to create bridges in conflict arenas among disputants that will transform historical tragedies, bloodshed and antagonism into relationships of respect and reconciliation. It's exciting. Mandela's ability to let go of personal wrongs he suffered and embrace forgiveness and *ubuntu* – a universal human bond – is an important roadmap. And, in the words of Bob Dylan: "you don't need a weatherman to know which way the wind blows." The wind that will take us in the most positive direction is the wind of human understanding and collaboration. At least on Mondays, Wednesdays and Fridays, I feel there are winds that are blowing strong in that direction.

Josh: Wonderfully stated, Lela.

To me, the most disturbing development in our field – a clear failure – without doubt is the abysmal record of racial diversity among practitioners and teachers. For some of us, this field is importantly linked to serving in conflicts – school integration, prison riots, land-claim disputes – systematically laced by feelings of racial or ethnic prejudice. There was a commitment – that was honoured – to have interveners and supportive organizations reflect the racial and ethnic diversity of the communities being served. Samuel Jackson and Willoughby Abner, both African American males, led the National Center for Dispute Settlement of the American Arbitration Association; the racially mixed team of George Nicolau and Jeff Jefferson spearheaded the development of Theodore Kheel's Institute for Mediation and Conflict Resolution. Linda Singer and Michael Lewis led the Center for Community Justice. Mediator interventions and training programs consisted of professional teams, not solo practitioners, and those teams reflected diversity.

From my perspective, today that commitment has evaporated.

One need only look at the websites of the faculty at those law schools with nationally recognized dispute-resolution programs; the staff composition of most state and federal court ADR program administrators; the profiles of the country's most active advocates in arbitration or mediation who attend various annual conferences sponsored by such organizations as the International Center for Conflict Prevention and Resolution (CPR); or the profile of the arguably most successful third-party interveners who comprise the membership of such professional organizations as the International Academy of Mediators or the National Academy of Arbitrators to know that the reality of the initial commitment has disappeared. The picture is somewhat more favourable for Caucasian females, particularly in the professoriate.

Perhaps one must always be prepared to make the case for the value of diversity: the central reasons, of course, include enhanced understanding of differing human experiences; a capacity to develop pedagogical materials that teach and resonate broadly with citizens; and a collegial value that may result in enhanced honesty so that criticisms, as well as compliments, can be shared among peers in an atmosphere of trust and respect. These values become diminished in a world

of homogeneity. And with it, our empathy for – and relevance to – our fellow citizens.

What inspires – my concluding success? I love to get up in the morning because the ideas at the heart of ADR work – freedom, responsibility, justice, respect – are, and always have been, inspiring and demanding. Further, the field attracts remarkably talented people who not only are passionate about wanting to do something constructive for their fellow citizens but also are generous in sharing their expertise and resources with everyone in the field, newcomers and veterans alike. And, finally, the work will always be present, whether it is a man-made trauma of a housing foreclosure crisis or a natural disaster that destroys homes and food sources. All of us regularly find ourselves in conflict situations whose resolution can benefit from the strong, steady contribution of a constructive third-party intervener. The opportunity to do this work – to help fellow citizens address and resolve their differences with dignity and respect – is extraordinary. It means that each of us, every day, can make a contribution. What a gift.

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