Court-Referred ADR and the Lawyer-Mediator: In Service of Whom

Louis J. Weber Jr.

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WHEN the Alternative Dispute Resolution (ADR) idea began in early 1977, it was a very noble and selfless undertaking. Without exception in the last 36 years, the only lasting, positive impacts the legal profession has had on the public have been those projects that benefit the public as opposed to benefitting lawyers. Some of these projects are law related education in our public schools; expanded legal services to the poor on a pro bono basis through interest on lawyers' trust accounts; institutionalized lawyer referral services; the cooperation between the bar and realtors which resulted in simplified, pro-consumer real estate forms; and public involvement in our professional activities. ADR had at least as much potential and appeal as did law related education because of its aim to resolve community and individual disputes before they blossomed into lawsuits. In other words, disputes would be *resolved* with the aid of third party neutrals and by the disputants themselves instead of the disputes being *settled* by courts after entering the court system. This is a fine distinction perhaps, but a significant one. Additional incentives include cost savings to the parties, cost savings to the state, time saved both by the parties and the system, reduction of the burden on the courts, and the empowerment of the parties to resolve their own differences instead of having them settled by a judge, jury or even by their own lawyers.[1]

This notion of helping the public without involving lawyers, lawsuits and the courts had a slow beginning. While the concept was endorsed by the State Bar of Texas in 1977, it was not until the fall of 1980 that Houston and

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1. *See generally* JOHN SANDS, ALTERNATIVE DISPUTE RESOLUTION (ADR) AND RISK MANAGEMENT: CONTROLLING CONFLICT AND ITS COST (1987).

later Dallas were able to raise adequate funds to begin dispute resolution centers. Other cities followed, but dollars were hard to find. Public interest was difficult to generate as well. Lawyers had a tendency to resent the idea, probably because it suggested a drastic change from the usual way of doing things and perhaps because their fees would be affected. Judges were also slow to embrace the idea. Even when legislative changes allowed a portion of filing fees to be set aside to fund dispute resolution alternatives, the response of lawyers, judges, and the public was lukewarm. However, the legislation provided considerable relief for financially-strapped mediation centers. Interestingly, public volunteers willing to aid disputants in settling their differences have been in abundance since the beginning of the ADR movement. It is equally interesting that significant lawyer interest in this endeavor in Texas did not begin until after passage of the 1987 ADR Act[2] which, among other things, tied ADR into the court system. The Act also provided that court-appointed or third-party neutrals be compensated by the litigants or through court costs.[3]

At the same time, Texas was entering into a recession and a general economic downturn. This resulted in a very significant change in the legal profession which still continues to some degree. From the late '70s through the mid-'80s, law firms rapidly increased their capacities to perform legal services. Fee income increased and times were very good for lawyers as well as for their varied clients; however, when the economy soured, so did lawyer income. The result was the reality of law firms terminating large numbers of staff personnel, associates and partners. Even some of the best law school graduates could not find employment in law firms at a time when more and more graduates were being produced by our law schools.

Strangely, and perhaps predictably, ADR "suddenly"—after ten years of marginal interest—began to be popular, not only with some courts, but also with some lawyers. Despite strong efforts by those who had labored in the ADR vineyard for years, the public remained generally unaware of this alternative to lawsuits and lawyers. This is still the case even though the ADR movement is fueled now by increased court referrals to third-party neutrals on a fee basis after the dispute has become a lawsuit.

The result of this court-referred ADR, as opposed to the attempted resolution of disputes by mediators before the parties enter the court system, should perhaps be described as an "additional" dispute resolution mechanism instead of an "alternative" method of resolving disputes. This is because the mechanism begins after suit is filed and usually after most of the trial preparation is completed. At this point, the clients are ordered by the court to enter into an ADR procedure and to pay additional fees to participate in the ADR process. While in many cases this may still save dollars for the clients and time for the courts, certainly in some cases it will not: most of the trial preparation has usually been completed, the court has handled the usual pre-trial matters and all that remains is the trial itself. In addition,

2. TEX. CIV. PRAC. & REM. CODE ANN. § 152.001 (Vernon 1988 & Supp. 1993).
3. *Id.* § 152.004.

most trial lawyers and judges say that over ninety percent of law suits filed settle without trial or ADR intervention.

This manner and practice of ADR may not be an alternative to the courts at all; as it is being predicated on a civil filing, it should properly be considered an administrative aid, disguised as an "alternative" in order to make it more palatable to the public. For instance, with the natural push towards settlement throughout our systems of justice, both state and federal,[4] are we not actually shifting more cost to the parties themselves? This attorney-mediator dominated process is not an alternative method of dispute resolution when it occurs only within the litigation framework. More properly, it is an "add-on" procedure. It may also be a more costly form of settlement than most of the ninety percent of civil cases that eventually settle without the benefit of ADR.

In Dallas County, a vast majority of court-referred mediations are made to attorneys who are on lists kept by individual courts or by a county ADR coordinator. Inclusion on these lists is aggressively pursued by almost all lawyers interested in receiving court appointments. Various attorney-mediator owned training programs aid lawyers in being included on these lists after completion of their courses, as such training is mandatory for most court appointments. This desire for court appointments in fee-generating cases is evidenced by the plethora of attorney-mediators advertising their "success rates" and their ADR "institutes."

For centuries, lawyers have enjoyed a monopoly in the practice of law. The rationale for this monopoly has always been that it was for "the good of the public." While the rationale is noble, the profession has been stung by great criticism of this monopoly in recent years. It now appears, at least in Dallas County, that attorney-mediators are attempting to extend this monopoly to the mediation arena, except for cases that will not generate mediation fees. Non-revenue cases will continue to be referred to Family Services, the Juvenile Department, or Dispute Mediation Service.

The evidence for a growing monopoly of court-referred mediation is manifold, including training programs, evolving standards of practice, and mandatory qualifications that are being devised by lawyers, skewed to legal practitioners, in service of lawyers. One has only to observe the abundant lawyer-mediator marketing as evidence of the strong revenue interest court-referred ADR has to lawyers competing in a slumping or declining lawyer economy. Look also to the advertised "success ratio" or "settlement ratio" printed by some lawyer mediators. Does this come at the expense of being neutral? If a person is trying to have a high "success ratio," does it perhaps cause a possible conflict of interest? If a person is attempting to enhance "success" or "settlement," is it natural and human to pressure the weakest party to make the critical accommodations? Is this not a short term, mechanical *settlement* instead of a long term, comprehensive *resolution* of

4. Civil Justice Reform Act of 1990, 28 U.S.C. § 477 (Supp. II 1990); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, APRIL 15, 1992.

the differences between the parties? Does this lawyer-mediator phenomenon in Dallas, and perhaps other cities in Texas, represent a crisis in the court system? Are the dockets really so staggering? If so, are there other ways to manage the dockets? If the court referrals to lawyer-mediators are to ease court dockets, are we to assume that there will no longer be a need to expand the number of courts?

Does the lawyer-mediator phenomenon reflect the economic crisis in the legal marketplace? In the Southern and Eastern Federal Districts of New York, volunteers, lawyer and non-lawyer, perform the court referred mediations. If this were the case in Texas or if the process were removed from the litigation framework, would our lawyers be as enthusiastic about mediating cases?

Does the lawyer-mediator phenomenon represent a crisis in the profession? If the settlement process, in the main, has been commercialized, then many wonder if we have not lost sight of the original, service-oriented goal of ADR which arose over a decade ago. Perhaps the development of the lawyer-mediator phenomenon has taken place without regard to our Texas community mediation experience. This considerable ADR experience has been dominated by volunteer commitment and responsiveness to the needs of the public and the court system. Some have suggested that our more recent Texas lawyer-mediation phenomenon is predicated on enhancing both the revenue prospects of lawyers and the monopoly to practice law. This is perhaps so, although many attorney-mediators support a requirement that they conduct two pro bono cases annually in order to be eligible to receive court referrals. Volunteer service is now the "price" for being on the court referral lists, which has little to do with the commitment and responsibility for public service by the profession.

We as lawyers have a unique opportunity to provide service to the public as well as leadership to the profession through the ADR movement. As mediators, we can become true peacemakers without being considered greedy. We can use our legal training and interpersonal skills to actually help resolve differences rather than just win cases. We are at a critical point in the profession as we see ADR becoming more and more popular; we have an obligation to avoid the temptation to merely make money on a hot commodity. We have the potential to affect significantly the attitudes of disputing parties from the "win at all cost" mindset to the "win-win solution" by which disputes are diffused. Our community, our state, and our country are all experiencing problems emanating from disputes—between individuals, corporations, and institutions. Even our young people are exhibiting aggressive behavior through gangs who settle their disputes in inappropriate ways. We as lawyers and leaders have to start somewhere to provide a means by which disputes are resolved that does not merely line our pockets. If we truly serve the public, we will find that service is rewarded by the confidence of our clients, whether in the traditional mode of providing legal services or in this emerging alternative for dispute resolution.