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ADR in a Civil Action

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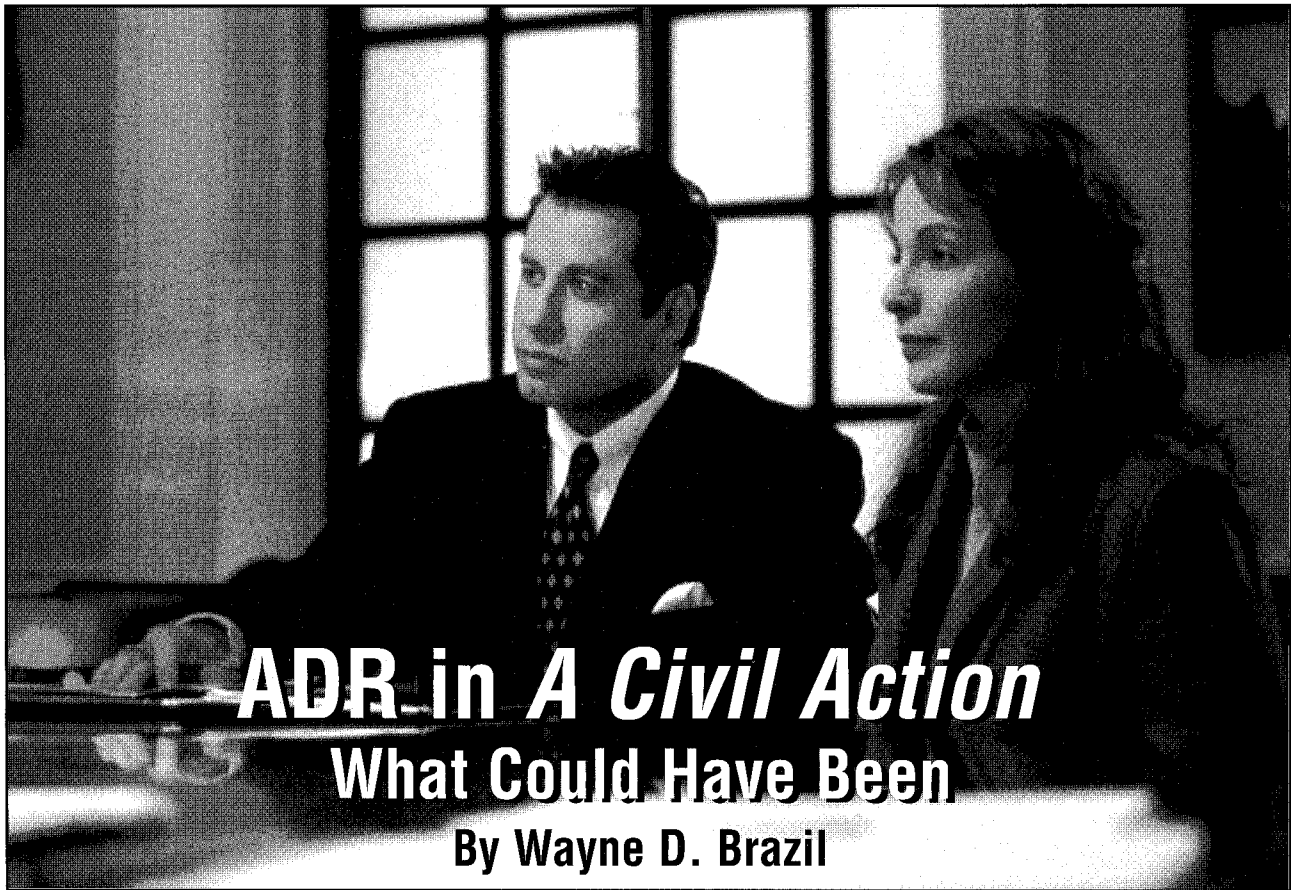


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CIVIL ACTION, John Travolta, Kathleen Quinlan, 1998
Photo provided by The Everett Collection

ADR in *A Civil Action* What Could Have Been By Wayne D. Brazil

While there may be a dearth of ADR portrayed in recent fiction and nonfiction, it is not hard to imagine scenarios in which ADR could have drastically altered the stories we read. Jonathan Harr's book *A Civil Action* is just one example where wise counsel grounded in problem-solving approaches may have made for a happier ending for everyone involved.

Harr's book and the movie it inspired made *Anderson v. W.R. Grace Co. and Beatrice Foods, Inc.* one of the most visible civil cases of the past several decades. The litigation pitted 33 individual plaintiffs against large corporations. The plaintiffs alleged that by contaminating the local public water supply the defendants were responsible for the deaths of five children and for serious injuries and illnesses suffered by many other people.

After following a notoriously tortured course that included enormously expensive discovery and motion work, and a fractured, frustrating, highly publicized trial that was followed by visits to the court of appeals, the matter slid over a period of years toward a settlement that satisfied no one and did no real good.

Even though most of the action in *A Civil Action* took place in the early- and mid-1980s, before the explosion of litigant interest in ADR that we have seen over the past 15 years, the lead plaintiff's lawyer, Jan Schlichtmann, had learned something about minitrials and was interested in pursuing settlement. His famously clumsy effort at ADR backfired. Neither he nor his opponents thought to involve a mediator or any kind of neutral facilitator. He did not work with opposing counsel in advance of the session to jointly determine how the proceedings might be structured most constructively. Nor did he prepare the other lawyers to

anticipate what he intended to do. Instead, he spent a lot of money renting a fancy venue and preparing what he foresaw as a dramatic pitch based on the harms his clients had suffered and the scientific opinions of his experts. Then he opened the "negotiations" by making an accusatory speech and an extravagant demand that drove the defendants out of the room before any exchanges occurred.

The way plaintiffs' counsel mishandled this event substantially reinforced his opponents' inclination to view him as both naive and greedy—and dealt a death knell to any prospects for settlement at a juncture when it would have made transaction-costs sense.

Though none of the lawyers or parties appreciated it at the time, the circumstances were rich with mediation potential. On all sides, the stakes were very high. The uncertainties were legion. The science on the causation issues was a muddle. The transaction costs were predictably huge. The range of the possible judgment-value of the case was enormous. There was a real prospect that it would be many years before litigation closure would be reached—a period that could have been extended by the filing of additional actions arising out of the same underlying situation. The case had attracted, and promised to continue to attract, considerable publicity—most of it unfavorable to defendants. Insurance in substantial amounts was arguably



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in play. Three separate agencies of the federal government had launched aggressive investigations that could lead not only to huge civil fines but also to criminal indictments. In some significant ways, the defendants were not similarly situated. And there were substantial differences in circumstances among the plaintiffs.

There was, in sum, a lot for a good mediator to work with. There were compelling long-range interests that no one could be confident would be adequately addressed through adjudication. There was a lot to organize and to coordinate. There were barriers to communication—across party lines, between opposing counsel, and between counsel and their own clients—that threatened to rob the case development process of any coherence and to prevent sensible or creative exploration of possible terms of settlement.

A skilled mediator could have worked with the parties well in advance of any joint meeting to promote behaviors that would invite dialogue and encourage interest, to devise a process that everyone would understand before it began and that would minimize the sizeable risk that negotiations would be compromised by ill-considered words, off-putting moves, or frictions rooted in personalities or egos. A good mediator could have taken some of the shrill out of the air and could have cabined the considerable potential for destabilization that was created by the vast differences between the backgrounds, values, and personal styles of the principal players. He or she also could have made sure that the principal messages and proposals made their way, without editorial distortion, through the lawyers to the parties themselves.

While there are innumerable ways a mediator could have made the playing out of this drama much happier, I would like to focus on the character of the opportunity that a neutral mind, blessed with some breadth of vision, could have helped the group of defendants see. This is an opportunity that narrowness of focus, or an excessively bunkered mindset, prevented defense counsel and defendants in *Anderson* from seeing. But that should not have been the case. A good lawyer, pursuing his client's most consequential long-range interests, should have seen this opportunity without outside assistance. For this reason, I will describe the opportunity that these tragic circumstances presented as it should have been envisioned by a truly wise counselor to the defendants. My goal is to demonstrate, through this famous case, how essential a problem-solving spirit is to lawyering that pursues a client's best interests.

Many of the plaintiffs in *A Civil Action* had suffered in the most severe of ways, physically and emotionally. They felt both afraid and angry. They wanted answers. They

wanted help dealing with the consequences of their tragedies. They wanted restoration of their community.

Lawyers with insufficient vision would have said that the plaintiffs were naive to think that they could achieve these kinds of ends through the legal system. Certainly the system as it was used in this litigation delivered precious little toward these goals. The transaction costs, not counting a dime of the settlement money that eventually was paid, appear to have been well above \$15 million. But that huge investment of money and the eight years of the parties' time that the case consumed yielded a judgment and a settlement that brought no answers to the biggest questions, no emotional healing, no restoration of community, and no repair of severely damaged goodwill.

Instead of compounding the real-world tragedy with a litigation tragedy, a truly wise counselor would have helped the defendants understand, shortly after the severity of the harms

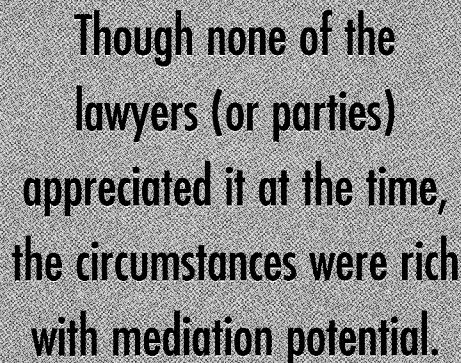
became clear, that the circumstances presented an opportunity to build—to use ADR to create new, long-range value of great significance. Even if the only value that really mattered to defendants was profit, a good lawyer would have advised them to move in a very different direction, and to use ADR to do so. What could such a lawyer have helped his clients see?

Defendants knew that the Environmental Protection Agency had designated the area as a Superfund site and had been investigating the extent and sources of the obvi-

ous contamination for some time before the lawsuit was filed. Defendants knew that they were required by law to cooperate fully with the EPA investigation. Defendants knew that there was a substantial possibility that the EPA would order them to contribute toward the cost of clean up. Defendants knew that the U.S. Geological Survey also was studying contamination in the area. And defendants knew that if they were not truthful with federal authorities, the Department of Justice might well intervene. In fact, the justice department ultimately indicted one of the corporate defendants for just such untruthfulness, and that defendant ultimately pleaded guilty.

Defendants also could foresee that a case like this would generate a great deal of press coverage and that defendants would not be favored in the sympathy slant; 77 percent of people polled in surveys taken as the trial date approached believed that the corporate defendants were responsible for the deaths of the children. Moreover, two of the three companies that ended up being pulled into the case knew they would remain in the community, employing local workers, working with local politicians, and needing local services.

Given these circumstances, a good lawyer would have counseled his client to use an ADR process early in the pretri-



Though none of the lawyers (or parties) appreciated it at the time, the circumstances were rich with mediation potential.

al period, well before most of the litigation transaction costs were incurred and before the litigation process further alienated the plaintiffs and rigidified their positions. The goal would be to use ADR to explore what was most important to the plaintiffs themselves, as opposed to their lawyers, to demonize the defendants, and to reach out to the plaintiffs in a constructive and civic spirit that might make it possible to work out a settlement that would save the defendants some money and yield potentially huge public relations benefits.

A good lawyer would have urged each corporate defendant to send its chairman or its CEO as its principal representative to the ADR session to demonstrate graphically that the company understood the gravity of the losses that plaintiffs had suffered. Direct participation by the highest level corporate officers was fully justified by financial considerations alone and could have considerably improved the odds that the companies' proposals would elicit favorable responses from the plaintiffs.

Good lawyers would have advised their companies' representatives to listen actively to the plaintiffs before making any statements of their own. After listening, each CEO or chairman would seek an opportunity to speak directly to the plaintiffs in the presence of their lawyers and the neutral. He or she would communicate, with compassion and concern, the following messages and proposals.

The company's representative would begin by telling the plaintiffs how sorry he or she and the company were about what had happened to them. The representative would acknowledge, directly and without qualification, that the plaintiffs had suffered severe losses, and that he or she was not about to claim that he or she could fully understand the pain they had experienced. Then, the speaker would say that he or she also doesn't understand what the causes were of these tragedies, but he or she really wants to. The representative would explain that the scientists who advise him or her do not think that chemicals associated with the company's operations reached the wells or caused the illnesses, and he or she would emphasize that the company never would have permitted the operations to proceed if they had known that such tragic consequences would ensue. But he or she would concede that no one knows enough about the sources of these kinds of illnesses to be completely sure, so one of the representative's goals will be to support the effort to learn from these tragedies.

The representative would propose doing that in two ways. First, by cooperating fully with the EPA and all other governmental agencies that are investigating these matters. He or she would promise that the company would open its records and provide the authorities promptly with all the information and other forms of assistance they might seek. The second way the company, along with the other defendants), would support the search for answers would be to contribute several million dollars directly to support independent research into the possibility that there are environmental causes of leukemia.

In making these proposals, the spokesman for the company would emphasize that many of his or her valued and long-time employees live here, so it is partly on their behalf that she wants

to help find out why this happened. But the representative also would emphasize that the company wants to be a responsible and valued member of this community and thus wants to identify with certainty any aspects of its operations that might cause harm to any other members of the community.

Next, the CEO or chairman would commit the company to contribute its full fair share to the cost of cleaning up the contaminated area. He or she would say that even though it is not clear that the contamination that has been found caused the cancer, it is clear that the contamination is a legitimate source of concern and must be removed. So the company, he or she would say, stands ready to pay toward the cost of the clean-up whatever share the government scientists conclude is appropriate. The representative also would say that the company would do everything it can to speed up the process of making that determination and to press for completion of the cleanup work on as fast a timetable as possible.

To evidence his or her good faith, the representative of the company then would say that none of the commitments he or she has just described are contingent on the case settling. The company intends to go forward with them, including the commitment to support the cancer research, even if the parties cannot reach an agreement that would end the litigation.

Finally, on behalf of all defendants, the representative would offer money to help the plaintiffs meet the needs that the situation has created. He or she would start by acknowledging that no amount of money could adequately compensate for the personal losses that have been suffered. But he or she also would emphasize that the tragedies have had real and damaging consequences that require resources. The defendants collectively would like to provide some of those resources, and toward that end they would like to offer the plaintiffs, as a group, \$10 million.

Making a package of proposals like this early in the pre-trial period would have encouraged a perception that defendants were sincerely sorry about the plaintiffs' losses and wanted to act as responsible and engaged members of a shared community. The likelihood that plaintiffs would not have responded positively to such an offer is small.

With acceptance of this offer, defendants would have saved considerable money. They also would have generated considerable positive press and good will and avoided the years of bad press, to say nothing of the criminal indictment, that accompanied the protracted litigation. Moreover, they would have distinguished themselves from their competitors, encouraging investors to perceive them as possessing especially acute business judgment and thus being worthy of investment confidence.

There is a real chance that a scenario like the one just described could have occurred. That real possibility demonstrates that breadth of "solution-vision" can be an essential tool even in pursuing client interests that are limited to money. A lawyer who cannot help her client explore problem-solving solutions simply cannot be considered a wise counselor. ♦♦