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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The Center of the Center for Alternative Dispute Resolution

Magistrate Judge Wayne D. Brazil*

Hawaii was one of the first states to establish within its judiciary a Center for Alternative Dispute Resolution.[1] The Center's mission is: to mediate major public policy disputes and to facilitate policy formulation dialogues, to design and help implement mediation and other ADR programs for state and local governmental agencies, to provide education about and training in mediation for the public and for employees of state and local government, and to oversee the extensive network of community mediation centers that provide grass-roots mediation services throughout the Islands.

In November of 2005 the Center celebrated its 20th anniversary by sponsoring various activities and events. These included a series of seminars on the Uniform Mediation Act, a program on negotiating with the assistance of a judge, a "peace poster" contest for school children, and a colorful and spirited ceremony in the historic courtroom of the Hawaii Supreme Court. I was asked to be one of the speakers at that ceremony.[2] I had two goals: (1) to help a wider audience understand why the courts in Hawaii have been so committed to providing ADR services, and (2) to try to capture the essence of the spirit that animates the Center's wonderful work. In pursuit of the first of these two ends, I contrasted the history and purposes

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1. The Center was founded in 1985 with support from the National Institute for Dispute Resolution (operating then out of Washington, D.C.). It became a permanent office within the state judiciary in 1989 with the passage of Act 346, Chapter 613, of the statutes of Hawaii.

2. A heart-felt "mahalo" is in order to all the people who made it possible for me and my family to share in the celebration of the Center's milestone anniversary: former Chief Justice Herman Lum, under whose leadership Hawaii was the first state whose judiciary created a comprehensive ADR program, Chief Justice Ronald T. Y. Moon and his colleagues in the judiciary of the state of Hawaii who understand so well the spirit of ADR and who offer such important support for its growth, Thomas R. Keller and his colleagues in the Office of the Administrative Director of the Courts, and Charles Crumpton and his colleagues in the Alternative Dispute Resolution Section of the Hawaii State Bar Association. It is important to add a separate and special recognition of Elizabeth Kent, whose beautiful spirit and boundless energy inform and enrich the remarkable work of the Center for Alternative Dispute Resolution, the Center she has so ably served as Director for so many years.

of ADR programs in institutionally selfish courts with the history and purposes of court-sponsorship of ADR in Hawaii. The second goal was more elusive – but I hope I located, in my account of the special kind of "listening" the Center teaches, something close to the Center's spiritual center. What follows, in essay format, are my remarks.

We gather here to celebrate so much. The 20th anniversary of the Center for Alternative Dispute Resolution, the commitment by the judiciary of Hawaii to serving – in a broad spectrum of ways – the problem-solving needs of all the people of this lovely state. That same commitment by many agencies in the executive branch of government at the state and local levels here, the thousands of people in this state who have been moved by the spirit of ADR to seek training in its methods and then to help others try to "work it out"[3] by serving as neutrals in ADR processes. The trainers, teachers and students who have brought the constructive power of mediation into the schools and neighborhoods of Hawaii. Finally and most importantly, the many hundreds of thousands of people in this state who have been open enough to give ADR a chance — to use an ADR process to try to work through a difficult situation or to address a serious problem.

So this is a celebration of people and of process. It is a celebration of the power that can be generated when the good in people and the good in process come together. It also is a celebration of the good that can be found in people and in institutions even during those times they are forced to deal with the bad – the bad in their circumstances, the bad in the events and developments that affect them, even the bad in themselves.

At the center of all this we celebrate the spirit of trying – of trying to make things better, trying to reduce pain and rectify harm, trying to listen, trying to learn, trying to find ways to move forward, trying to solve and resolve, and finally, trying to "work it out."

I would like to illustrate this "spirit of trying" by speaking briefly about ADR and the judicial system – about the role ADR can play in the evolution of the Third Branch of government and in its relationship with the people. I will focus on the judiciary because that is the branch of government I know best, but many of the same themes could be developed for the other branches.

The story of ADR and the judiciary can be divided into two parallel historical columns. The first of these historical columns features the courts whose attraction to ADR began with, and has never really moved beyond, one primary motive: reducing docket pressures. The history of ADR in

3. The theme for ADR Week in Hawaii in 2005 was "We can work it out."

these courts tends to be narrow and not completely happy. It is a history marked by what some people might perceive as institutional selfishness.

While one goal of the courts in this group might be to reduce the volume of cases so that judges and administrative staff can deliver higher quality service to the cases that remain, there is considerable risk that the people will not perceive or understand that purpose. In fact, there is considerable risk that the people will infer that the judges in these courts have certain favored classes of cases or litigants for whom they are trying to reserve their time, and that the primary purpose of ADR in these courts is to get rid of all the other kinds of cases. Stated baldly, ADR programs whose purpose is to reduce docket pressures risk sending the following message from the court: "Litigants and lawyers, you are bothering us, taking up our time and depleting our resources. We have more important things to do, so please leave. Go somewhere else to solve your problem." Public institutions should think twice before sending this kind of message to their constituents.

It also is important to emphasize that an ADR program in a court that is pre-occupied with reducing docket pressures has little chance of affecting the character of the judicial institution, encouraging the court to re-examine how it defines itself, or broadening its sense of mission. This stands in sharp contrast to courts that are not preoccupied with reducing docket pressures, for in those courts ADR programs can significantly affect how the judges and administrators view the role and character of their institution.

There is another significant negative that accompanies a preoccupation with reducing docket congestion: it can impose pressures on neutrals and on program administrators that can threaten the quality and integrity of ADR processes. A court that measures the value of its ADR program by how many cases the program diverts out of the judicial system puts pressure on its neutrals to settle cases. Pressure to get settlements can distort the way neutrals act. It can lead them to cut process corners, to cut ethical corners, and to put pressure on litigants to accept terms the litigants really don't think are fair. Moreover, a neutral who feels that her value to the court is measured by whether the ADR sessions she hosts produce settlements is likely to think, in each case, that it is *her* responsibility to get a settlement. She is likely to think that when a case settles, *she* has settled it, and when it does not settle, *she* has failed. A neutral that slips into this kind of thinking has turned mediation on its head – has forsaken mediation's central tenet, which is party self-determination. All of this is bad for ADR.

It also is bad for the courts that sponsor docket-driven ADR programs because such programs invite the parties to think that the court's primary goal is to get rid of them.

When the people believe that an institution's goal is to get rid of them they are likely to resent that institution, not respect it. Thus, docket-driven ADR programs can make the people feel alienated from their public institutions and from the democracy those institutions run.

A very different picture emerges when we shift our focus to the second of the two columns in which we can recount the history of court sponsored ADR. This historical column features programs that were founded for very different reasons and that had a very different orientation. Instead of looking primarily inward, toward themselves, courts in this tradition look primarily outward, toward the people. The preoccupation in these courts is not with institutional self-protection but with serving the people. The court-sponsored ADR programs in Hawaii and in the Northern District of California fall in this column. Because I know the details of its history better, I will use the ADR program in the Northern District to flesh out this story.[4]

The ADR programs that are sponsored by courts in this historical column are rooted in a crucial set of fundamental principles: (1) that it is essential to the survival of our democracy that our public institutions be healthy, (2) that public institutions cannot be healthy unless they deliver real and valued service to the people, (3) that the "people" who are served by public institutions must not be limited to the wealthy, the well-connected, and the powerful, but must include everyone, and (4) that public institutions cannot be healthy, regardless of what they think they are trying to do, unless the people believe that their institutions understand that their overriding purpose is to serve.

It is with these fundamental principles firmly in mind that courts in the second historical column assess the implications of the following kinds of facts – facts that challenge most major court systems in the United States today. In federal courts (and, it appears, in state courts in urban areas), less than 2% of civil cases that are filed go to trial.[5] Between 5% and 15% of

4. *See* Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, The University of Chicago Legal Forum 303 (1990) (detailing the early history of what has become the Multi-Option ADR program in the Northern District of California.).

5. *See, e.g.*, LEONIDAS RALPH MECHAM, 2004 JUDICIAL BUSINESS OF THE UNITED STATES COURTS (Annual Report of the Director of the Administrative Office of the United States Courts), Table C-4, at 156 (reporting that of all the civil cases that were terminated in federal district courts during the 12-month period ending September 30, 2004, only 1.6% reached trial).

civil cases are resolved by a court ruling on a contested motion.[6] Thus, it appears that most civil cases leave the judicial system before receiving any service of real value from the court. In real-world effect, what the judiciary gives to the majority of civil litigants who turn to the traditional adjudicatory process for help is nothing.

Why don't the parties remain in the court system? While many factors play some role in this matter, the two most significant appear to be cost and delay. Of these two, cost is the primary culprit. More precisely, the primary culprit seems to be the growing disproportion between case value and the transaction costs of litigation. This disproportion has many sources, but two are particularly notable. First, attorney's fees have risen at about twice the rate of inflation (even more at the higher ends of the market) over the past three decades.[7] Second, pretrial processes have become more complicated – creating more occasions for costs and fees to mount. The scope and intensity of discovery have grown, lawmakers have created more incentives for parties to file pretrial motions, and judges have been encouraged to involve themselves much more assertively and earlier in case management and case development planning.

The upshot of all this is that if the real value of a case today is less than six digits, parties will feel considerable economic pressure not to file in the first place, or, if a complaint has been filed, to get out of the court system as quickly as possible. In other words, the effect of these facts of current civil litigation life is to close the courthouse doors to a very significant percentage of the population – to convert the court system, for many of our people, into a cruel mirage.

When the judges of the federal trial court in the Northern District of California first began confronting these emerging realities in the late 1970s

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6. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. OF EMPIRICAL LEGAL STUD. 591 (Nov. 2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlement, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. OF EMPIRICAL LEGAL STUD. 705 (Nov. 2004); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1307-08 (2005); *see also* John Barkai, Elizabeth Kent, and Pamela Martin, *Settling Civil Lawsuits in the Hawaii Circuit Courts*, HAW. B.J., forthcoming (analyzing data from the mid-1990s that disclose very low trial rates in tort and contract cases filed in these state courts of general jurisdiction – and an alarmingly high percentage of terminations by default judgment, especially in contract cases).

7. For example, compensation for first year associates at large firms in San Francisco increased from $16,500 per year in 1975 to some $125,000 in 2002. If the rate of increase for these salaries had tracked the rate of inflation, the figure in 2002 would have been about $60,000.

they were primarily concerned about the fate of tort and contract cases of modest economic value. Recognizing that parties to these kinds of cases simply could not afford to proceed through the traditional judicial system, the court established a non-binding arbitration program to serve them.[8] The purpose of the program was to provide litigants with something akin to a day in court – a proceeding (hosted by a neutral figure) in which they could participate directly, tell their stories, and hear, first hand, the other party's side of the matter – but much earlier and at much less cost than the traditional adjudicatory system could deliver.[9]

The non-binding arbitration program was successful. Even though cases were assigned to it automatically (so the parties' participation was 'involuntary'), the program was endorsed by 80% or more of the litigants and lawyers who were exposed to it.[10] Inspired in part by that success, the Chief Judge of the Northern District at the time, the late Robert F. Peckham, wanted the court to develop a supplemental process opportunity not just for the modest-sized tort and contract cases, but for virtually every class of case on the court's civil docket.

To work toward this end, Chief Judge Peckham appointed a Task Force with representation from a wide range of civil practices. That Task Force invented and implemented Early Neutral Evaluation (ENE) in the early and mid 1980s.[11]

Initially, the primary purpose of ENE was to give parties an opportunity to cut costs and delay – to improve the efficiency of the process leading to disposition.[12] But the court soon came to understand that parties also could use ENE to enhance the quality of justice they received – the fairness of the outcome of their cases – by expanding the information base on which they made decisions, by refining and making more reliable their legal analyses, and by making sure that there was real joinder of issues in the parts of the case that mattered most.[13]

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8. *See* E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983).

9. *See id.*

10. *See* Barbara Meierhoefer and Carroll Seron, *Court-Annexed Arbitration in the Northern District of California* (Federal Judicial Center 1988) (unpublished document) (on file with Federal Judicial Center); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (Federal Judicial Center 1990).

11. *See* Brazil, *supra* note 4, at 306; Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman & Judith Z. Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 279-80 (Feb.- Mar. 1986).

12. *See* Brazil, *supra* note 4, at 279-80, 283.

13. *See* Brazil, *supra* note 4, at 356-57. For an ambitious empirical assessment of ENE as the program was operated in the early 1990s in the Northern District of California, see Joshua D.

In the early 1990s, with resources provided through the Civil Justice Reform Act,[14] the court formally added mediation as a featured process alternative in its ADR program. Simultaneously, the court replaced what had been a mandatory assignment system with a multi-option approach under which the parties could select the ADR method that seemed to hold the most promise in their particular circumstances.[15]

The addition of mediation to the court's offerings was especially significant. Mediation teaches that it is the parties, not the lawyers or the court, who should remain at the center of the process. Even more significant, mediation teaches that the parties should be empowered to choose the values that are most important to them, and then should be permitted to shape their dispute resolution process to pursue those values.

Mediation taught our court that the values that dominate the traditional litigation system are not always the values that are most important to the parties. The value-drivers in litigation are rationality and efficiency. To some litigants in some settings, however, feelings are at least as important as facts, process is at least as important as product, and relationships are at least as important as abstract legal entitlements.

By adding mediation as a featured alternative process, and by moving to a system that invites litigants to choose the ADR method that best fits their circumstances, the federal court in the Northern District of California has ended up doing three very important things through its expanded ADR program. First, it has provided parties with an opportunity to prioritize their values for themselves and to pursue the values that they consider most important – and to do so through services provided by a public institution. Second, the court has acknowledged, more clearly than ever before, that the formal adjudicatory process that defined the court for so long suffers from significant limitations and is not well-suited to promote some values that are just as 'legitimate' as those served by the traditional system and that can be even more important to some litigants. Third, the court has reached out to the people in a concrete way that demonstrates that the court understands that its core mission is to serve. That 'reaching out' has taken the form of

Rosenburg and H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (July 1994).

14. Requirement for a district court civil justice expense and delay reduction plan. 28 U.S.C. § 471 (1991) Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

15. For current information about the multi-option program in the Northern District of California, see the District Court's Local Rules for Alternative Dispute Resolution, especially ADR L.R. 3 (as amended in January of 2005), *available at* http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/156691e4d829edc3882564e900738ec7/$FILE/Adr300.pdf (last visited Jan. 2006).

visibly committing significant court resources to the task of creating a much wider range of processes that parties can use – on the same economic terms they could use the procedures of traditional litigation – to address their problems.

So, instead of using ADR to show litigants and lawyers the door, courts in this second historical tradition have used ADR to open their doors wider and to encourage more people to come in for service.

Moreover, by admitting their limitations, and by demonstrating that they are self-aware and honest, these courts have made themselves more respect-worthy in the eyes of the people. And by reaching out to try to meet the people's needs as the people define those needs, these courts have earned the people's gratitude. With that gratitude comes respect and connection.

These are matters of considerable importance to the long-term health of our democracy that have been well understood by the leaders of the judiciary in Hawaii for many years. That is why judicial leaders here have made it one of the primary missions of the Center for Alternative Dispute Resolution to help agencies in all branches and at all levels of government in this state to develop programs that inspire these kinds of feelings in the people. What could be more important than that? Maybe one thing. That one thing is inspiring people to have these kinds of feelings not only for their public institutions, but for one another. When we recognize this as a possible goal we are positioned to address our ultimate question: what is the real center of the Center for Alternative Dispute Resolution? What is it that the Center teaches in all of its work, in every process it sponsors, in every training it undertakes, in every mediation it encourages or hosts? It teaches the beauty and creative, connecting power of one of the most elemental yet most difficult human acts . . . listening.

Of course, there is listening, and there is listening. What kind of listening does the Center teach? It is a listening that moves in a great arc – taking the shape and richness of a Hawaiian rainbow. That arc begins and ends with the ear turned inward. But the real locus of its vibrancy is in the main body of the arc, where the ear is turned in full to the messages coming from without.

The listening that the Center teaches begins with the listener trying to tune more clearly into herself and her situation – trying to recognize that problems have complicated roots and many dynamically related sources, some of which may be in her own conduct or ideas or feelings. It is the beginning of this recognition that enables us to open the door, at first maybe just a crack, in the protective wall that we build around our hearts and minds.

What are we to do when we put our ear to this crack? The Center teaches us to shift into a state of suspension – a state in which we suspend prejudgment, judgment, and self-protection. It is a state in which we assume, for the sake of seeing what can come of it, that there really might be something to hear, that what we hear might be of moment, and that what we are hearing is coming from a fellow human being, an "us" rather than an "other."

Entering this state of suspension to try to really hear another person may be the single most important act in the human drama, the most essential predicate to and component of growth, repair, and connection. As the Center teaches it, this is listening without agenda, without trying to detect vulnerabilities or develop counters. It is listening for only one purpose: to hear. Not to hear ourselves, our reactions, our parries, our comparisons – but to hear the human being who is speaking.

The Center teaches that listening to hear is the first necessary step toward learning, toward growth, toward connection. It is when we listen to hear that we are most likely to begin to understand not only the words of the speaker, but also something of the spirit and the circumstances that inform those words. And it is that kind of understanding that is most likely to help us discover the best route forward.

Very significantly, the Center also teaches that this kind of listening communicates respect for the human being who is speaking. As the person who is speaking begins to feel that respect coming from us, he can begin to feel more centered, more self-confident and self-aware. In these ways, the respect we communicate by listening to hear can help the person who is speaking begin the process of self-repair. Our respect begets his trust – slowly at first. But as he opens to us without suffering harm, he begins to mistrust his mistrust. As his mistrust slips away, he can open more. As he opens, he shares. And as he shares, our connection grows. That, in itself, is a huge reward. But there is more.

Opening and sharing leads to learning – learning not only about the person who is speaking, but also about ourselves and about the events that led us to where we are. And the more we learn about how our circumstance arose, the better we are able to understand what needs to be done. But that prospect – the prospect of discovering the best route to resolution – is not the primary reason for listening in the way the Center teaches. Finding that route is a benefit, but, in the end, it is not really why we listen. Rather, the Center teaches that we listen because listening is the ultimate act of humanism.

We listen as an end in itself. We listen because in listening we are affirming and connecting – we are centering ourselves with our others in our rightful place in the universe. We are gathered here today because centering us in this understanding is such a matchless and precious gift from the Center for Alternative Dispute Resolution – a gift worthy of the greatest celebration.