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Assessment, An

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The first national conference on court ADR was convened last year to address several related questions: Have we found a better way? Has court ADR kept its promise? What are the perils on the road ahead?

I suggest that the first question contravenes the spirit that should animate court-sponsored ADR programs. We must make clear, especially to those who believe ADR subtracts from the Seventh Amendment, that ADR is not about being "better than" or subtracting from traditional litigation; it is about adding a complement to it.

Has court ADR kept its promise?

ADR is built on many different kinds of promises — promises that should evolve over time as parties determine which interests are most important to them. As a matter of public policy, however, two promises are most significant: opportunity and process integrity.

The opportunity promise is captured in the central message conveyed to parties by every good court ADR program: “We acknowledge you and your entitlement to define your own priorities, and we acknowledge that traditional litigation sometimes serves poorly values that are important to you. We cannot guarantee that ADR will save you time or money, or that you will be successful, by whatever criteria you define success. We promise only the opportunity to see if a high-quality ADR process might better serve your values.”

For reasons I will describe, the integrity promise is more difficult to keep. That difficulty produces some of the most significant perils that court ADR programs face. But the public’s trust in the courts’ most precious asset, and court ADR programs must enhance, not diminish, that trust.

What has been gained?

Before identifying ADR’s future perils, we should ask whether ADR has improved the administration of justice. But how should we define improvement? Should we focus only on efficiency interests, such as reducing cost and delay? Or should we also look to a broader range of values, including: (1) the quality of justice, (2) party and lawyer feelings about the fairness and utility of court services, (3) party participation, (4) the clarity of the parties’ understanding of their situation and options, and (5) the parties’ feelings about our justice system’s values and who that system is designed to serve.

Generating reliable objective measurements of court ADR’s effect on cost and delay has proven very difficult. We must further study this important arena — while remaining acutely aware of the dangers of generalizing among hugely diverse court programs.

Fortunately, subjective views of court ADR programs have been more suc-
cessfully assessed. Studies consistently show, often dramatically, that parties and lawyers feel that court ADR is both fair and beneficial. They emerge with a deeper understanding of the case and others’ views — and with higher respect and gratitude for the whole package of case-management and litigation services the court provides.

We opened pathways parties could use, if they chose, to travel outside the traditional litigation mold. Parties could focus primarily on the future, rather than the past, and emphasize and reward different values and kinds of behavior. In these new processes, feelings could be as important as facts, and judgments about events and people could be actively acknowledged what has not been gained.

In some quarters, there has been a tone of “movement” about ADR, accompanied by a perceived radicalism in spirit and ambition in claims that inspires skepticism and disrespect among heavily rationalistic and sometimes cynical players in the established system.

Enriching, democratizing courts

In the late 1970s, when my court first entered the ADR arena, we did not expect these programs to enrich the court’s sense of mission. In the early years, our primary goal was improved efficiency (for the parties) through early neutral evaluation (ENE), nonbinding arbitration and settlement conferences. Gradually, we came to realize that parties could use these same tools to promote rationality, fairness and direct party involvement. But we still viewed ADR as a means to improve traditional litigation and to advance its values.

Our vision began to broaden after we added a range of mediation processes. At first, we considered mediation as simply another process tool parties could use to pursue the efficiency, rationality and party-empowerment values that our other ADR processes served. But over time, we began to absorb the broader, richer spirit that has informed much of the mediation movement.

We began to see that parties could use mediation to pursue a much wider range of values. We began to appreciate that mediation was a far superior tool for certain kinds of communication across party lines, for giving greater play to emotion, for repairing a person’s sense of self, for preserving old relationships or forging new ones, and for encouraging parties to accept more responsibility for their present circumstances and for improving them.

As important, we came to understand that mediation might democratize our institution in potentially profound ways. By sponsoring mediation, the court was acknowledging that values other than efficiency and rationality sometimes could be more important to the parties — and that those “alternative” values could be legitimately pursued in the public system of justice.

Discouraged — allowing participants to pursue more effectively the larger goals of repair of persons and relationships.

Thus, our court has evolved into an institution that offers three kinds of processes: traditional litigation and two different kinds of ADR processes. One kind (arbitration, ENE, and some versions of evaluative mediation) works within the traditional litigation context to address its limitations. A second kind (facilitative mediation) enables parties to pursue quite different goals and behaviors.

An important by-product of all this has been to deepen and broaden our court’s understanding of itself as, fundamentally, a service institution.

Finally, as we have expanded our ADR program, we have made a moving discovery about the depth of the reservoir of pro bono resources in the legal community. The vast majority of the more than 400 neutrals in our ambitious program are lawyers who serve without compensation — and we have many more applicants than we can accommodate. This public-service outpouring beggars common cynical notions about the profession, and may be one of the most significant but overlooked positives to accompany the court ADR movement.

What has not been gained?

To balance our assessment, we must — even pro se litigants — must pay full market rates for a private neutral, triggering difficult policy questions about why litigation services are free but ADR services are available only at a substantial price.

ADR offerings are distressingly uneven among different jurisdictions. For example, litigants whose cases are venued in one federal court in California have ready access to a range of free ADR options, while litigants in the other three confront a spare ADR landscape. Moreover, the federal courts of appeals receive funds to hire full-time staff neutrals, while the district courts receive essentially no funding for that purpose.

Quality control also is quite uneven. Neutrals sometimes deviate substantially from process protocols, compromising the parties’ ability to prepare appropriately and risking feelings of unfairness that compromise public confidence in judicial institutions.

Thus, as a whole, our judicial system falls far short of providing equal access to ADR services.

Sources of future peril

What are the underlying forces that restrain the development of court ADR?

In some quarters, there has been a tone of “movement” about ADR, accompanied by a perceived radicalism in spirit and
ambition in claims that inspires skepticism and disrespect among heavily rationalistic and sometimes cynical players in the established system. Such skepticism has been reinforced by the failure of empirical research to prove that ADR delivers many of the efficiency benefits its proponents have promised.

To discuss other perils, it is useful to focus on some of our primary constituencies. While acknowledging that the constituency about whom we care the most is comprised of the people who need the public system of justice to address their problems, it will be instructive to examine our relationships with five other constituencies: legislatures, judges, litigators, neutrals and ADR supporters.

Legislatures
Legislatures could be the source of two particularly dangerous perils. First, legislatures may confuse court ADR with the push by some private corporations to use compulsory and binding ADR processes to block citizens' access to the courts and to shrivel the significance of jury trials. Especially in courts that lack stringent conflict-of-interest and quality-control mechanisms or that outsource some or all ADR services to the private sector, perceived private-sector abuses may contaminate public perception of court ADR.

Second, lawmakers may be inclined to assess court ADR's value using only efficiency criteria. Fixation on efficiency could result in legislators imposing pressures (indirectly) on court neutrals to cut ethical corners and to pressure parties to settle. Such a fixation also increases the risk that only the most assertively evaluative forms of ADR would be valued — a development that would both compromise the courts' ability to service the full range of party interests and threaten public confidence in the moral integrity of court programs. The public might infer that the courts' only real interest in ADR is selfish — trying to push parties out of the trial queue as quickly and often as possible.

Judges
Some judges (and some high-level court administrators) fear that ADR threatens the frequency, visibility and accessibility of the jury trial -- one of the most powerful deterrents to misbehavior in our society -- and allows litigants to shield their misconduct from public view. These judges may attribute the gradual decline in trial rates over the past few decades to ADR, despite the lack of empirical evidence for this link. In response, we must reassure our critics that the core value animating court ADR is party self-determination -- including a party's decision to take its case to trial.

Some judges also worry that ADR funding subtracts from a fixed public budget for spending on the judiciary, thereby compromising courts' ability to perform their core functions. These worries are real, especially in courts heavily affected by criminal filings. We must acknowledge resource constraints squarely and work to increase overall court funding, lower ADR administrative costs, and research ways that ADR programs can conserve court resources.

Some judges fear that court ADR programs threaten to change the role of the judge and to erode her importance in a system in which she has flourished.

by reducing inter-party frictions, case-management interventions and judicially hosted conferences or hearings.

Another source of concern among some judges is fear that ADR processes are analytically sloppy, inviting parties to make important decisions without adequate information. Some judges also worry that litigants are pressured to accept the mediator's value system, which may favor ending disputes over protecting individual rights. Hopefully, these kinds of fears are at least exaggerated, if not entirely misplaced. In addressing them, however, we should emphasize our considerable efforts to monitor and train our neutrals to really honor party self-determination.

Other judges may fear that ADR will be used to push unpopular cases or politically vulnerable litigants out of the courts and into a second-class system of justice. In response, we must refuse to permit any political agenda to drive court ADR programs and we must emphasize that ADR processes do not constitute a separate "system" — but offer parties an additional opportunity, an additional and nonbinding tool within the established system for the administration of justice.

A more conventional judicial concern is that ADR threatens to delay or disrupt traditional litigation. While poorly designed ADR systems or undisciplined referrals can have such effects, we must assure judges that high-quality studies have shown that well-run programs can reduce aggregate time to disposition and improve litigant perceptions of the value of the courts' overall approach to case management.

We need to be sensitive to one additional set of feelings about court ADR among some judges. The gist of these feelings is that court ADR programs threaten both to change the role of the judge and to erode her importance in a system whose values she reveres and in which she has flourished.

We should respond to such apprehensions by emphasizing that we have no intention of trying to change the kind of work most judges spend most of their time doing. We completely agree that preserving and strengthening the civil adjudicatory system is essential to our society's long-range health. Our goal, we must teach, is not to displace or to reduce the role of that system, but simply to supplement the core services courts must continue to provide.

Lawyers
Many court ADR programs exist today only because of lawyers' initiatives and hard work. There remain a considerable number of lawyers, however, who neither understand nor accept ADR. Such lawyers can threaten our programs by discouraging their clients from using
ADR, by failing to explain ADR’s potential, or by participating in ADR only in the most guarded and perfunctory ways.

Good court ADR programs attack these perils by (1) showing lawyers that ADR is in their clients’ best interest, (2) incorporating incentives and directives for lawyers and litigants to seriously consider using ADR, and (3) establishing and publicizing tight ADR-quality-control mechanisms.

Neutrals

Over the past 15 years, ADR neutrals, whom I call the “fourth estate,” have organized themselves into a significant political force, with a demonstrated ability to affect how the legislative branch resolves significant ADR issues (e.g., confidentiality and conflicts of interest).

While courts and the fourth estate have a great deal in common and have worked synergistically to do much good, occasionally there are tensions. For many mediators, the paramount concern is preserving the integrity and viability of mediation. For judges and court administrators, the paramount concern is performing the courts’ critical constitutional role and preserving public trust.

When mediators who seek to protect process confidentiality are pitted against courts that seek to protect individual rights, this tension is particularly visible, as in Rinaker v. Superior Court, 62 Cal.App.4th 155 (1998). Confidentiality protections can also conflict with a court’s concern (1) not to use the state’s power to impose an unfair outcome on a vulnerable litigant, and (2) not to damage public confidence in the integrity of the judicial institution, as in Olam v. Congress Mortgage, 68 F. Supp.2d 1110 (N.D. Cal. 1999).

To preserve the health of ADR, we must acknowledge these differences, then engage in mutually respectful dialogue—bearing in mind how often our purposes and philosophies are in sync.

We must be vigilant not to use myopic self-congratulation or ideological filters when we assess our programs.

ADR supporters

Among the perils posed by some ADR supporters is the temptation to impose a generalized duty to participate in ADR in “good faith.” Formally imposing such a duty could do considerable damage without yielding anything approaching offsetting benefits.

It is not clear that there is much “bad faith” participation in ADR — so it is not clear that there is a real need for a formal “good faith” requirement. On the other hand, imposing such a requirement could breed fear of an elastic and unpredictable standard, rigidify party participation and spawn counterproductive motions for sanctions. It also could force the neutral into a judgmental role, impairing her ability to develop a constructive relationship with the parties.

Another peril lurks in the trend to devolve court-sponsored ADR into one hybrid but largely evaluative process. This fusion would compromise our ability to serve the full range of litigant needs and values, risk corrupting both “evaluation” and “mediation,” threaten quality control and impair the parties’ ability to predict and prepare for ADR processes. These developments, in turn, would imperil the productivity of ADR processes and undermine public confidence in their integrity.

We also must avoid rigid institutionalization of our programs in ways that encourage party passivity about ADR and settlement and that discourage case-specific dialogue with a judge or a staff professional to determine whether ADR would be productive.

Finally, we must be vigilant not to use myopic self-congratulation or ideological filters when we assess our programs. In post-ADR surveys, neutrals consistently report greater accomplishments than parties or their lawyers. Whether this pattern is the product of self-delusion, failure to teach parties to appreciate their accomplishments, or both, important work remains to be done. In launching that work, we must take care to understand accurately not only what our programs accomplish but also what their limitations are.

Ironically, however, the greatest peril among court ADR supporters may not be the temptation to over-promise what our programs can deliver, but the tendency to underestimate their importance -- and then to lose the will to continue and to improve our work.

While we must recognize, squarely, that ADR programs have limitations and that we and our neutrals will make mistakes, and while we must understand that there are lawyers and litigants who do not share our values and whose conduct will not change regardless of the process setting, we also must never lose sight of the fact that there are many more people who will appreciate the spirit that drives our service and who will find real value in what we do.

Endnotes

This article has been condensed from Wayne D. Brazil, Court ADR 25 Years After Pound: Have We Found A Better Way? 18 Ohio St. J. on Disp. Resol. 93 (2002). The article and essay are based on the keynote address delivered at the National Conference On Court-Connected ADR, held in conjunction with the ABA Section of Dispute Resolution 2002 Annual Meeting in Seattle.