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A Primer on Resolving Disputes: Lessons From Alternative Dispute Resolution

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Attorneys resolved disputes before the emergence of alternative dispute resolution (ADR).[1] Attorneys will continue to resolve disputes when alternatives to ADR are someday developed. What is new in the field of alternative dispute resolution is that we now know much more about traditional dispute resolution methods and we now know many more ways to resolve disputes.

In this paper, I will first examine alternative methods for resolving disputes and then present a strategy for selecting the best method for resolving a client's dispute.

I. Two Dispute Resolution Approaches: Negotiation and Adjudication

The alternative dispute resolution movement claims as its subject matter a large number of traditional and new dispute resolution methods such as negotiation, arbitration, minitrials, summary jury trials, private judging and more. A close examination of the list reveals a surprising and comforting insight: the list can be grouped into two very familiar methods for resolving disputes:[2] negotiation and adjudication.

A. Negotiation

Two important changes in the field of negotiation have taken place since the emergence of ADR. First, we have become much more knowledgeable about how to negotiate effectively. Second, we have learned more about how third parties can help break impasses and promote negotiated settlements.

1. Direct Negotiations

Much has been written about how to negotiate. These writings are not merely how-to books based on the personal experiences of a single practitioner. They are robust and practical approaches to negotiation.[3]

In an important book, *Getting to Yes*, Roger Fisher and William Ury present a powerful method called "principled negotiation" or "negotiation on the merits." They contrast it with an approach practiced by many— "positional negotiation" where each party takes extreme and specific positions and then makes concessions until the parties reach a compromise.[4]

"Principled negotiation" consists of four basic elements: (1) Negotiation should focus on the broader INTERESTS of the parties, not their narrower positions; (2) Parties should SEPARATE THE PEOPLE PROBLEM from the substantive problem; (3) Parties should generate a variety of OPTIONS before they decide which is the best option; and (4) Parties should base the resolution on OBJECTIVE CRITERIA which are independent of each party's control.

Fisher and Ury even gave bargaining power a new name— BATNA (Best Alternative to a Negotiated Agreement), a label that reminds a party to leave the bargaining table when the alternative to a negotiated agreement is more attractive. A party's BATNA provides a standard against which a party can determine whether to accept or reject a proposal.[5] This short practical book integrates the concept of BATNA and these four elements into an effective and practical approach to negotiation. The book should be read by all attorneys.

2. Third Party Methods for Breaking Impasses and Promoting Settlement

These methods have in common one theme: each method is designed to create new information that the parties can factor into the negotiations and use to break an impasse and reach a resolution. These methods, each of which involve bringing in a third party, include mediation, minitrials, summary jury trials, early neutral evaluation, and the use of neutral expert advisors.

Mediation

Mediation can be helpful when parties are having difficulty negotiating among themselves. Mediating a dispute simply means negotiating with the assistance of a third party called a mediator. A

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[1] A separate field of alternative dispute resolution began to be recognized in the nineteen eighties based on new and expanded methods of dispute resolution which began to be used in the late sixties and seventies.

[2] There are other ways this list of methods can be usefully grouped: (a) whether third party involved or not, (b) whether public or private process, (c) whether court annexed or not, (d) whether voluntary or compulsory process, (e) whether advisory or binding result.

[3] See, *e.g.*, G. Williams, Legal Negotiation and Settlement (1983); H. Raiffa, The Art and Science of Negotiation (1982); R. Fisher & W. Ury, Getting to Yes (1981); G. Nierenberg, The Art of Negotiating (1981); H. Cohen, You Can Negotiate Anything (1980); H. Edwards & J. White, The Lawyer As A Negotiator (1977); T. Schelling, The Strategy of Conflict (1960).

[4] The selling of residential property usually presents a classic example of positional negotiation in that a seller sets an offering price (a position), the buyer makes a counteroffer (a position) and the parties continue this cycle until a compromise price is reached or one party decides to drop out. See, R. Fisher & W. Ury, Getting to Yes, 3-8 (1981).

[5] R. Fisher & W. Ury, Getting to Yes, ch. 6 (1981).

mediator is an expert in helping people negotiate. A mediator should be impartial, neutral, and acceptable to the parties and should have no decisionmaking power.

Mediation is a surprisingly common form of dispute resolution. Many people find themselves unwittingly mediating disputes. It comes naturally. My five-year-old daughter, Elizabeth, mediates in nursery school when she interrupts an argument between two of her classmates who insist on playing with the same toy and suggests to them that they take turns. My nine-year-old son, Todd, shows a little more skill when he suggests as an objective criterion the flipping of a coin to determine which child should play first with the toy.

Professional mediators are of course much more sophisticated; they have received extensive training in how to intervene in disputes. A professional mediator approaches a dispute with a formal strategy consisting of a method of analysis, an opening statement, recognized stages of mediation and an array of tools for breaking impasses and facilitating a resolution.[6]

In New York State, there are a growing number of institutions and private professionals that provide mediation services. Mediators are available who specialize in labor disputes, family disputes, environmental disputes, business disputes and so on. They can be found listed in the telephone book under mediation or the directory published by the American Bar Association.[7] Mediators are not licensed; their credentials and references should be investigated.

New York State has promoted the use of mediation to resolve minor disputes by providing funds for community dispute resolution centers in almost every county.[8] The Rochester civil courts recently conducted a program to train attorneys to mediate settlements as part of a successful pilot "settlement week." The attorney-mediators resolved 38.1 percent of the cases including 46.4 percent of the matrimonial cases.[9]

Minitrials

A minitrial can be an effective way for large institutions to resolve disputes. A minitrial's main advantage is that it forces senior officials in institutions to focus on a dispute and settle it early, thus saving the parties a significant amount of money.

In a minitrial,[10] each attorney engages in a truncated discovery process and then presents a summary case to a specially constituted panel. The panel consists of a neutral advisor and a senior official from each party's organization who has not been involved in the underlying dispute and who has the authority to settle the dispute.

After hearing both sides of the case, the senior officials try to negotiate a settlement. If they reach an impasse, the neutral advisor may try to mediate a resolution. If unsuccessful, the advisor might advise the parties of the likely outcome if the case were to go to court. With this additional information, the senior officials would continue to negotiate. If they again reach an impasse, the parties may suspend any litigation for an additional cooling-off period and if no settlement is reached, turn back to the courts for resolution. But, the parties are now much further along in preparing for trial.

This relatively new dispute resolution method has been used primarily by large businesses in New York State, although it can be adapted to the needs of smaller organizations.[11] Anyone interested in using a minitrial should contact the American Arbitration Association or the Center for Public Resources in New York City for assistance.

Summary Jury Trials

Summary jury trials[12] can be effective in cases in which parties differ substantially in how they think juries will react. Like minitrials, summary jury trials consist of

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[6] A mediator uses a technique of analysis consisting of identifying parties' interests, developing objective standards and alternative solutions, and examining the parties' BATNAs. A mediator also brings to the dispute the knowledge of when and how to use such tools as private caucusing, brainstorming, neutral experts, and one-text procedure. For more information on mediation, see N. Rogers & C. McEwen, Mediation— Law, Policy, Practice (1989); C. Moore, The Mediation Process (1986); J. Folberg & A. Taylor, Mediation (1984); and R. Fisher & W. Ury, Getting to Yes, 118-122 (1981).

[7] Dispute Resolution Program Directory (Standing Committee on Dispute Resolution, ABA 1990).

[8] NY Judiciary Law Art. 21-A (McKinney Supp. 1990).

[9] "New York's First Settlement Week Is Held in Rochester, Wins Praise," 4 ADR Report 268 (BNA, August 16, 1990) and "Rochester Courts Close for a Week of Mediation," Syracuse Post Standard, April 22, 1990, at A1, col. 1.

"Settlement weeks" have been successful in other states in significantly reducing judicial backlogs. H. Paddock, Settlement Week: A Practical Manual for Resolving Civil Cases Through Mediation (BNA 1990).

[10] See, Wilkinson, "A Primer on Minitrials" in ADR Practice Book 172 (J. Wilkinson ed. 1990).

[11] For example, in a dispute between a one-person marketing company and a small mining company, the panel consisted of three respected business executives from the community named by the marketer and three outside directors of the mining company's board. None of them was given the power to settle and no neutral was appointed. The minitrial resulted in a settlement of the dispute. See, "Mini-Trial in Mining Dispute Preserved Good Business Relations, Says N.Y. Lawyer" in Alternatives to the High Cost of Litigation 3 (Center for Public Resources, August 1986).

[12] See, Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States, Committee on the Operation of the Jury System, 103 F.R.D. 461 (1984) and Lambros, "A Summary Jury Trial Primer" in ADR Practice Book 373 (J. Wilkinson ed. 1990).

A federal district court recently held that a court has no authority to summon persons to serve as summary jurors because the summary jury was developed for settlement purposes and not for issuing binding verdicts. *Hume v. M&C Management* (DC N Ohio, No. C87-3104, February 15, 1990).

Whether summary jury trials can or should be mandatory has been the subject of debate. See Houck, "The Judicial Power to Compel A Summary Jury Trial," in ADR Practice Book 385 (J. Wilkinson ed. 1990), Webber, "Mandatory Summary Jury Trial: Playing by the Rules?", 56 U. Chi. L. Rev. 1495 (1989), and Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," 53 U. Chi. L. Rev. 366 (1986).

abbreviated discovery and summary presentations of cases. However, the cases are heard by real juries in real courtrooms under the supervision of real judges. The jury even renders a verdict though a nonbinding one.

Like minitrials, summary jury procedures also force parties to focus on cases and settle them early, saving the parties considerable money. This occurs because new information and insights are generated early which the parties can factor into ongoing negotiations. The information and insights are generated when the parties are preparing their summary presentations, observing the reactions of the jury and evaluating the jury's nonbinding verdict.

The procedures for a summary jury trial were developed by Judge Thomas Lambros of the Northern District of Ohio in 1980[13] and have since been used in several states including Ohio, Michigan, Massachusetts and Florida. To the best of my knowledge, they have not yet been used in New York State.

Early Neutral Evaluation

Like minitrials and summary jury trials, early neutral evaluation[13] is designed to force parties and their attorneys to focus on their cases early in the lawsuit. Instead of presenting a summary of each side to senior officials from each party's organization or to a jury, the summary is presented to a court-appointed, highly respected attorney who will evaluate the case. The summaries are presented by the clients in the presence of their attorneys.

The evaluator helps the parties identify areas of agreement and central issues in dispute. If no settlement occurs, the evaluator evaluates the case and predicts the likelihood of liability and amount of damages, if any. If settlement still does not occur, the evaluator helps the parties devise a discovery or motion plan that will generate essential information for additional settlement discussions and a possible follow-up session with the evaluator.

Early neutral evaluation was first introduced in the District Court for the Northern District of California in 1984. Since then, it has been adopted by the U.S. District Court for the District of Columbia and Congress in the new Civil Justice Expense and Delay Reduction Act (28 U.S.C.A. § 471-482 (1991)) as one of the options for implementation by federal courts.

Neutral Expert Advisors

Neutral expert advisors may be used to help resolve a dispute involving technical facts. During the course of a negotiation, such facts may need to be resolved in order to reach an agreement. Rather than relying on hard bargaining or a trial, the parties may stipulate to hire a mutually agreed upon expert to examine the technical facts in dispute and to recommend what facts the parties should assume when negotiating.

For instance, when negotiating over the purchase of real estate, the parties might jointly hire an appraiser to prepare a market analysis of the value of the property. If both parties are satisfied with the quality of the analysis, the parties could rely on the expert's advice and resolve the factual dispute over the property value.

B. Adjudication

Since the emergence of ADR, we also have become much more creative about ways to adjudicate disputes. It is important to recall a central feature of adjudication: a third party imposes a binding solution on the disputing parties. When we rely on adjudication, we lose control over the resolution of a dispute; we are no longer trying to design a tailor made solution. Instead, we are asking someone else to dictate a solution.

Adjudicative solutions are appropriate when efforts to negotiate have failed or the nature of the dispute makes negotiation inappropriate. For example, a third party may be needed to impose a solution when the parties can no longer communicate with each other, when the parties have unequal bargaining power, or when each party has substantially different views of his or her rights. This is not to say that negotiation will never work in these situations, only that these situations might call for an adjudicative solution.

Of course, the best known method of adjudication is through the courts with all of its costs, delays, precedent creating capability, and procedural protections. However, courts provide only one form of adjudication. Other forms include arbitration, private judging, binding neutral experts, administrative agencies, legislatures, and small claims court.

Arbitration

Arbitration is not new. Many attorneys use arbitration. Its features are commonly known: a private decisionmaker with substantive expertise, informal procedures, quicker and cheaper than courts (usually) and limited judicial review. What is new is that arbitration is growing in use; it is being used to resolve disputes involving medical malpractice, insurance claims, automobile sales, environmental problems and even garden variety money claims. Arbitration can be divided into two types: mandatory arbitration with nonbinding decisions and voluntary arbitration with binding decisions.

In New York State, many counties have a mandatory arbitration program for money actions of $6,000 or less or $10,000 or less, although parties can stipulate to increase these amounts. The arbitrators are drawn

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[13] See, Peckham, Brazil, Kahn, Newman, and Gold, "Early Neutral Evaluation: An Experiment to Expedite Dispute Resolution," in ADR and the Courts— a Manual for Judges and Lawyers 165 (CPR Legal Program, 1987), and "Lawyers Get Tips on Using Early Neutral Evaluation From ENE Originator and Experienced Trial Lawyer," 4 ADR Report 124 (BNA, April 12, 1990).

randomly from a list of practicing attorneys. After an award is issued, a party has a right to a jury trial de novo in the court where the action was commenced.[14] New York State also has established voluntary arbitration programs such as one for automobile buyers involved in new car warranty disputes.[15]

Of course, parties can always agree to submit a dispute to arbitration and turn to the American Arbitration Association or other private dispute resolution organizations for assistance in setting up and administering an arbitration.

Private Judging

Private judging in New York State entails "renting" a judge to hear a case. As with voluntary arbitration, this is done by consent of the parties and any decision is binding on the parties.[16] The parties also are given enormous freedom to select a private judge.[17] Unlike voluntary arbitration, however, private judges are given virtually all the powers of a court, including the power to issue a decision that will stand as the decision of a court and be appealable on the same basis to the Appellate Division.[18]

The California version of private judging has received considerable publicity and analysis and is popularly known as "rent-a-judge."[19] New York State's less visible and less used option is known as "trial by referee."[20] New Jersey recently adopted an important variation called the "New Jersey Alternative Procedure for Dispute Resolution Act."[21]

Binding Neutral Experts

Rather than using neutral experts for only their advice— as described in the section on negotiation, parties can stipulate to be bound by the conclusions of a mutually agreed upon expert. By doing this, the parties agree to adjudicate a portion of a dispute. They then can factor that decision back into the on-going negotiations.

Administration Agencies

Administrative agencies[22] resolve disputes. They were developed out of a need for an alternative to the courts for adjudicating disputes thus making administrative agencies an early form of ADR. Administrative agencies must try to resolve a dispute before courts will intervene as set forth in the judicially established doctrines of primary jurisdiction,[23] exhaustion of administrative remedies,[24] and ripeness.[25] When courts do intervene, they have only limited authority to review an agency decision.[26]

Legislatures

Legislative bodies resolve disputes by enacting laws which create new rights or obligations or clarify existing ones. They present an alternative to going to court.

The legislative process is of course different from the judicial process. In order to try to influence a legislative decision, interested parties

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[14] See, N.Y. CPLR 3405 (McKinney 1990) and 22 NYCRR 28.1 *et seq.* (In chapter 30 of the 1990 Laws of New York, CPLR 3405 was amended to authorize the New York City Civil Court to increase the jurisdictional amount to $10,000.) See also, Rosenblatt, "Alternative Dispute Resolution: A New York Primer," NYS Bar Journal 10 (February, 1989) and Cooke, "Court Annexed Arbitration: Well Founded," NYS Bar Journal 10 (December, 1988).

[15] N.Y. General Business Law 198-a(k) (McKinney 1988).

[16] N.Y. CPLR 4301, 4319 (McKinney 1963 & Supp. 1990).

[17] Parties have two choices for selecting a referee: They can select a judicial hearing officer, a former judge, who conducts a trial in a courtroom and is compensated by the State of New York. Alternatively, they can select a private attorney who conducts a trial in a private law office and is compensated by the parties to the lawsuit. However, in matrimonial actions, a party cannot nominate a referee. N.Y. CPLR 4312, 4317 (McKinney 1963 & Supp. 1990). See also, Shapiro, "Private Judging in the State of New York: A Critical Introduction," 23 Colum. J. L. & Soc. Probs. 275, 290-291 (1990).

[18] N.Y. CPLR 4301, 4319 (McKinney 1963 & Supp. 1990).

[19] The program has been controversial because it presents important legal issues (*i.e.*, whether it violates due process, equal protection, or first amendment) and policy issues (*i.e.*, whether it removes pressure for court reform, induces experienced judges to retire prematurely, hides decisions of public interest, or creates a dual system of justice— one for the poor and one for the rich). See, Chernick, "California Attorney Considers Arguments For and Against Private Judging Process," 3 ADRR 397 (BNA, Nov. 9, 1989); Note, "Private Judging: An Effective and Efficient Alternative to the Traditional Court System, 21 Val. U. L. Rev. 681 (1987); Green, "Avoiding the Legal Logjam— Private Justice, California Style," 1982 Corporate Dispute Management 65 (1982); Note, "The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts", 94 Harv. L. Rev. 1592 (1981).

[20] For an overview, see NY CPLR 4301-4321 and Shapiro, "Private Judging in the State of New York: A Critical Introduction," 23 Colum. J. L. & Soc. Probs. 275 (1990).

[21] N.J. Stat. Ann. 2A:23A-1 to 23A-30 (West 1990).

[22] Administrative agencies are themselves beginning to use ADR methods as part of their decisionmaking processes. For example, many federal agencies and some state agencies are beginning to use a process of negotiated rulemaking for issuing administrative regulations. See, Negotiated Rulemaking Sourcebook (Administrative Conference of the United States, 1990). Some agencies also are beginning to use ADR to resolve government contract disputes and for settling administrative cases. See, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution (Administrative Conference of the United States, 1987) and "Agency Use of Settlement Judges," 1 C.F.R. 305.88-5 (Recommendation of Administrative Conference of the United States).

[23] "The primary jurisdiction doctrine means that once an agency is set up and jurisdiction over cases conferred upon it, the agency is automatically vested with exclusive original jurisdiction over those cases. The courts are divested of whatever original jurisdiction they would otherwise possess; their function in the cases concerned is limited to judicial review." B. Schwartz, Administrative Law 488 (2nd ed. 1984).

[24] "Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process." *Id.* at 502.

[25] The ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

[26] Judicial review of federal agency decisions is limited by Section 706 of the Federal Administrative Procedure Act and judicial review of state agency decisions is limited by Article 78 of the New York Civil Practice Law and Rules.

lobby elected officials and their staff at each step in the legislative process, draft proposed bills and memoranda, and testify in legislative hearings at which there is no opportunity to cross-examine adverse witnesses. At each step of the process, interested parties must wait for a decision from a third party (*i.e.*, committee vote, vote by each house, joint committee vote, and chief executive vote). None of these decisions must be based on a record or made by an unbiased decision maker.

Small Claims Court

For claims up to $2000 by nonbusinesses, small claims court provides informal and simplified procedures for adjudicating cases in court without the need for legal representation.[27] For claims of up to $1500 by corporations, partnerships, or associations, commercial small claims parts were recently authorized.[28]

Courts

Courts have performed and will always perform an important role in resolving disputes. ADR is not anti-courts but instead recognizes litigation as one of a large number of options for resolving disputes.

We need courts to establish precedent, to clarify legal rights and obligations, to help equalize bargaining power,[29] to ensure full discovery, to enforce our laws, and to promote settlement of disputes.[30] Courts perform an essential societal function for which there is no substitute.

C. Conclusion: Part I

This list of negotiation and adjudication options for resolving disputes is incomplete. It is only a starting point from which more options can be added by modifying some of these options, combining some of them,[31] and creating new ones. The possibilities for designing dispute resolution methods are unlimited and that is one of the most important lessons from ADR.

II. Strategy for Selecting Methods for Resolving Disputes

This list of dispute resolution options needs to be incorporated into a strategy for resolving disputes. The strategy described here has two stages. First, the dispute needs to be evaluated and a plan developed. Second, the plan needs to be implemented skillfully. There is nothing new about this overall strategy; many people approach disputes instinctively in these two stages. What is new is that we now know much more about how to accomplish these two stages of dispute resolution.

A simple hypothetical should help show how the strategy works. Let us assume that we are representing the seller of a home who is negotiating with a friend. The seller has set a selling price and has no other bidders for the house. The seller and buyer plan to continue to live in the same town. In fact, the seller has already signed a purchase contract for a new home. The buyer is renting his home on a month-to-month lease and has not been actively looking to buy a home. The buyer has rejected the selling price.

A. Stage One: Conflict Assessment— Three Building Blocks

FIRST, the issues, parties, and interests need to be identified.

Each issue to be resolved needs to be separately framed. The need to frame each issue is obvious and is a prerequisite to proceeding with the conflict assessment. Many disputes involve more than one issue and different issues might call for different strategies.

Each interested party needs to be identified. Interested parties include persons who might not be directly involved in the dispute such as principals (*i.e.*, bosses) and constituencies (*i.e.*, peers or members of an organization).

The interests of each of the parties need to be understood. The different interests may not be obvious because parties tend to talk more about their positions than their interests. Behind each position is an interest and understanding a party's real interests provides an avenue for developing creative solutions. This is because there is usually more than one position that can satisfy an interest.[32]

In our hypothetical, the ISSUE is whether to sell the property to this buyer. The PARTIES include the seller and buyer. The INTEREST of the seller is not necessarily obtaining the asking price; that may be the POSITION taken by the seller to satisfy her INTEREST. The INTEREST of the seller may be to sell the property for the highest price possible as soon as possible so that she can move into her new home. There may be more than one POSITION that would satisfy that INTEREST such as a reduced price coupled with a quicker sale or an increased price with a purchase-money mortgage.

SECOND, distinguishing characteristics of the dispute need to be identified. There are two types of distinguishing characteristics- neutral and conflict-causing. They

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[27] NY NYC Civil Court Act, Uniform District Court Act, and Uniform City Court Act, Art. 18 (McKinney 1989).

[28] NY NYC Civil Court Act, Uniform District Court Act, and Uniform City Court Act, Art. 18-A (McKinney 1989).

[29] Professor Galanter has suggested that courts may not always equalize bargaining power because "repeat players" in the courts can afford to select cases to secure favorable legal rules in order to perpetuate unequal bargaining power in the more numerous negotiations. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 Law & Socy. Rev. 95, 97-114 (1974).

[30] Professor Galanter has suggested that courts resolve disputes other than through final adjudication by fostering "litigotiation" which involves "the strategic pursuit of settlement through mobilizing the court process." Galanter, "Worlds of Deals: Using Negotiation to Teach About Legal Process," 34 J. of Legal Educ. 268 (1984).

[31] For instance, mediation and arbitration have been combined into med-arb where parties agree to have a dispute mediated and if the mediation fails, to have the dispute arbitrated.

[32] R. Fisher & W. Ury, Getting to Yes, 41-57 (1981).

both influence the selection of the dispute resolution method and how the method is implemented.

Neutral characteristics do not yet contribute to the conflict. For example, if the parties want to preserve their on-going relationship, that characteristic becomes one factor in favor of selecting a method more likely to preserve the relationship such as mediation rather than a method that is likely to strain the relationship such as court adjudication.

In contrast, conflict-causing characteristics focus our attention on why a dispute still persists. These characteristics contribute to the conflict. Understanding what is causing the conflict helps us identify a method for resolving the conflict. For example, if the parties have reached an impasse because of different assumptions regarding a critical piece of technical information such as the projected rate of inflation, then a method should be selected that addresses that conflict-causing factor. One method would be to hire a mutually agreed upon economist.

The two categories of characteristics are not airtight. The same characteristic can be neutral at one point in the dispute and become conflict-causing at another point.

For instance, the fact that the parties want to preserve their relationship or the dispute involves a technical factual issue does not in itself cause a conflict although at some point in the dispute one of these facts might contribute to the conflict. One party might begin to exploit the common interest in a continuing relationship which the other party might resent. At that point, a mediator might be brought in to focus the discussion on how the relationship is being strained by the negotiation and ways to preserve the on-going relationship. Or, the parties may have such strong and different views of how a factual issue should be resolved that the negotiation reaches an impasse. The parties then may want to bring in a third party expert to recommend a resolution.

Each dispute must be carefully studied in order to identify its most significant characteristics and how the characteristics impact on the resolution of the dispute. The number of possible distinguishing characteristics are unlimited and the ones that are important can vary from dispute to dispute.[33]

Three key characteristics[34] are:

- what is the bargaining power of each party?
- whether the parties face a deadline or not and the timing of the deadline?
- whether the dispute is distributive (zero-sum-game) or integrative (win-win)?[35]

In our hypothetical, there are several critical characteristics. A neutral characteristic is that the parties have an on-going relationship and presumably would like to preserve that relationship. There also are several conflict-causing characteristics: (1) A critical fact is in dispute and may have caused the impasse— the disputed value of the property. (2) The buyer and seller are each operating under different deadlines. The seller needs to sell her house quickly because she has already purchased another house. The buyer does not appear to be under any pressure to buy at this time. (3) The BATNA of each party appears unequal. The seller's BATNA is weak; she has no alternatives to this sale. The buyer's BATNA is strong because he has a very attractive alternative— to simply not buy. These last two conflict-causing characteristics highlight the buyer's considerable bargaining power.

THIRD and the most critical step: Dispute resolution options need to be evaluated and a dispute resolution plan needs to be developed, in view of the issues, parties, interests, and distinguishing characteristics identified in the first two steps.

Developing a plan involves matching a dispute resolution method or methods with one or more issues. To do this, the strengths and weaknesses of each option must be considered in-depth. The first part of this paper provided only an

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[33] More empirical research is needed on the characteristics of disputes, although important progress has been made. One experienced mediator groups conflict-causing characteristics of a dispute into five categories: data conflicts, interest conflicts, structural conflicts, value conflicts, and relationship conflicts. As to each category, he suggests several possible causes of the conflict and several possible interventions to break the impasse. For example, if a data conflict exists because the parties lack important information, then an intervention should be designed to collect the missing information. See, C. Moore, The Mediation Process, 26-29 (1986).

The authors of a leading textbook in the field group all characteristics into four categories: barriers to negotiation (or the reasons a case has not settled), general case characteristics, nature of the parties, and situational factors. The four categories include over forty possible characteristics. See, S. Goldberg, E. Green, & F. Sander, Dispute Resolution, 545-548 (1985).

[34] Other common characteristics are:

- whether all interested parties are participating;
- number of interested parties involved in the dispute;
- whether there are multiple issues;
- whether the parties have an on-going relationship;
- whether or not the parties want the dispute to be resolved privately;
- whether the dispute is new or mature;
- whether the dispute involves complex factual issues;
- whether the parties have a good or bad relationship;
- whether fundamental values are involved (*i.e.*, a party is opposed to abortion in negotiation about abortion rights);
- whether a party needs to establish a judicial precedent;
- whether issues are purely legal, purely factual, or mixed.

[35] A distributive dispute is when one issue is at stake such as money so that as one party gains in the bargaining, the other party losses. For example, when selling a house, each dollar increase in the price means transferring one dollar from the buyer's pocket to the seller's pocket.

An integrative dispute is when two or more issues are at stake so that if the parties cooperate, they both can achieve benefits. For example, a seller of a house may value selling a house immediately more than maximizing the proceeds from the sale. The buyer may value paying the least amount of money more than determining the date of the sale. These different priorities permit the seller to trade a lower price for a quicker sale so that both parties come out ahead.

Most disputes are integrative; but, many parties negotiate as if their disputes are distributive.

introduction.[36] This task does not simply involve picking a method from a fixed menu of dispute resolution options. The list is only the beginning point. The methods need to be shaped and tailored to best fit the issue or issues to be resolved. The plan also may include a sequencing of methods (*i.e.*, mediation to be followed by arbitration).[37] This third step is the most complicated part of conflict assessment and requires making some difficult judgments.

In our hypothetical, the parties may prefer a dispute resolution method that would preserve the ongoing relationship which would otherwise be strained by the several conflict-causing characteristics (disputed property value, different deadlines, and unequal bargaining power). Furthermore, the parties may prefer a method that deters parties from engaging in hard, positional bargaining based on a contest of will and which might end with an unimaginative splitting of the difference.[38]

One way to resolve this dispute is for the seller and buyer to agree to have the most divisive issue, the price, settled by adjudication instead of negotiation. Assuming the buyer is not committed to exploiting his superior bargaining power due to his interest in preserving the friendship,[39] the parties could agree to base the price on the value established by an agreed upon appraiser.

B. Stage Two: Implement Skillfully

The dispute resolution plan needs to be implemented. This means the parties or their representatives need to know how to effectively participate in the various dispute resolution methods (*e.g.*, minitrial, arbitration and so forth). It is not enough to know how to do the analysis and write a memorandum. The participants must be skilled dispute resolvers.

C. Conclusion: Part II

The reality of dispute resolution is not as neat as the two stages of dispute resolution presented in this paper. Dispute resolution is a dynamic process with the variables constantly changing. Deadlines change, facts change, BATNAs change, and even issues change. Therefore, the dispute resolution plan must change. The plan must be constantly updated as the parties shift back and forth between the two stages of conflict assessment and implementation.

The lessons from ADR are many and more will be forthcoming. In this paper, a number of the lessons were incorporated into this systematic approach to resolving disputes on behalf of clients.

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[36] For a fuller discussion, see S. Goldberg, E. Green, & F. Sander, Dispute Resolution (1985) and ADR Practice Book (J. Wilkinson ed. 1990).

[37] See, *e.g.*, W. Ury, J. Brett, & S. Goldberg, Getting Disputes Resolved, 62-64 (1988). (In this book on how to design an effective dispute resolution system, the authors suggest sequencing of procedures based on a low-to-high-cost sequence.)

[38] This is likely to occur due to the distributional character of the dispute. See, R. Fisher & W. Ury, Getting to Yes, 3-10 (1981).

[39] The buyer has another reason to not exploit his bargaining power. A power advantage can be fleeting. If he tries to exploit it, the seller might become motivated to improve her bargaining power by finding other prospective buyers.

The Conduct and Misconduct of the Deposition

Continued from page 23

Responsibility specifically admonishes attorneys against such behavior. EC 7-37 provides:

> In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

The failure to comply with this rule does indeed cause damage. It undermines the common code of civility of the profession. It brings the profession into disrepute and confirms in the public mind the stereotype of attorneys as a collection of unscrupulous sharks. Even if insults do not harm the moving party, they do harm the good name of the profession and the standing of the profession cannot afford to suffer any further erosion. Therefore, the attorney who has no manners may well deserve a sanction for such misbehavior even if all depositions are completed.

Conclusion

We do not offer this analysis as a diatribe against lawyers or lawyering in the 90's, but rather as an effort to outline some of the pitfalls to be avoided in the conduct of depositions. As indicated above, we are aware that litigation in general and unsupervised EBTs in particular have all the ingredients to bring lawyers to the end of their tether. Nonetheless, lawyers have a duty and an obligation to act in furtherance of the letter and the spirit of the law. We are concerned that the evidence of misconduct appears to be on the increase, more so perhaps among younger lawyers. This may simply be the result of immaturity or, perhaps more worrisome, ignorance. With respect to the former, we suggest as remedies moderation, lawyer-like behavior and time for experience; we hope our text will do something about the latter. We will be satisfied if this discussion helps in some measure to advance the cause of swift, efficient, inexpensive discovery of relevant facts in litigation. We hope too that these guidelines and thoughts will contribute to making the deposition at least a civil exchange among persons with respect for each other. The sporting theory of justice, along with trial by ambush, is dead and its vestiges—in the form of obstructive and abusive conduct at depositions—deserve to be buried once and for all.