Some Concluding Thoughts

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When Professor Stulberg first invited me to this symposium, he suggested that I need not prepare any remarks. "Just offer a few wise comments on what was said by the various speakers," he suggested. After partaking of this rich smorgasbord of stimulating ideas, I have concluded that would be unwise, if not foolish. Instead I want to say a few words on three topics that particularly interest me at this time.

I. HOW TO ACHIEVE BASIC CHANGE IN THE DISPUTE RESOLUTION SYSTEM

We have accomplished many impressive things in the twenty-five years since Pound.[1] But many of these changes are isolated and episodic. The challenge now is to weave these disparate strands into a coherent fabric so that the normal disputing route leads first to an exploration of appropriate ADR options, with litigation used only as a last resort. The Multidoor Courthouse is one mechanism that seeks to achieve that objective.

There have been a number of promising developments along these lines: 1) imposing on lawyers an ethical duty to canvass ADR options with their clients;[2] 2) following this up with a judicial conference under Federal Rule 16 or its state counterparts at which lawyers are obligated to discuss ADR options that they have considered in the case at hand. We must also continue to find and enlist influential movers and shakers like Chief Justice Thomas Moyer.

The challenge is not only to produce change in the ADR climate, but to do so without damage to the fundamental values that ADR serves. It is a sad fact that quantitative enhancement often brings with it qualitative deterioration.[3] As ADR expands and grows we must be especially alert to

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[1] For a partial list, see Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 3–4.

[2] *See, e.g.*, Marshall J. Breger, *Should an Attorney Be Required To Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 439–42 (2000).

[3] *See generally* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (discussing the risk that the aggressive pursuit of ADR can lead to coercion).

this concern. The current shortage of public funds makes it more difficult to do so.

Of course, such change is not limited to the court system. However, courts are important symbols in our society, and if they encourage greater diversity in the forms of dispute settlement used, their example is likely to have wide-ranging ramifications.

In the long run, fundamental change comes about through education. So we must do more to expose children early on in schools, and the public at large through the media,[4] to the benefits of ADR and problem-solving approaches.

II. NEED FOR MORE BASIC RESEARCH

Despite all the encouraging developments that have occurred, it is remarkable how little we know about many issues that are basic to ADR. Let me just list a few:

A. *Cost Effectiveness of Mediation*

We boast liberally about the time- and money-saving advantages of mediation, but there is little in the way of rigorous research to back up this claim. Nor is this merely a question of academic interest. In times of tight budgets, legislatures are prone to ask for proof that adoption of mediation programs will save money. So far as I know, except in very isolated specialized settings, there is no such research. Yet the legislative yearning for such data seems entirely reasonable. Or maybe we need to take a different tack and stress the qualitative improvements brought about by mediated agreements.

To be sure, such research would be incredibly difficult to do, considering all the tricky issues of cost accounting. A further complexity would arise if one sought to take account of the claimed superiority of mediation over time in reducing future disputes, thus requiring a longitudinal study. One would also need to distinguish between cost savings to clients (caused in part by lower attorney fees) and cost savings to the court system.

B. *What Are the Deeper Implications of Mediation Satisfaction?*

If there is any consistent finding in mediation research, it is that the participants like the process and tend to view it as fair, regardless of whether

[4] Perhaps we should have a TV program called "Perry Mediator."

a settlement was reached. Why is this so? And what are the larger implications of this finding? Is the feeling of satisfaction the result of a momentary pleasure, or does it carry over into the participants' lives? For example, if an employee participates in mediation with her employer, is she likely to carry this experience into relations with her family or her community?

C. *Training as Cost Effective*

As mediation and other ADR procedures are spreading, there is an increasing trend towards quality assurance and certification. Typically those steps include required training for a certain number of hours. Yet the question remains: do we know that there is any correlation between training and quality performance? The answer is no, in part because training is not always combined with individual evaluation of the candidate's ability to perform the process in which she was trained. Thus, exposing a person to even outstanding training provides no assurance of high-quality performance by the trainee. Indeed, the only relevant research suggests that the most promising basis for predicting success as a mediator is prior mediation experience.[5]

More broadly, we still know preciously little about what makes an effective mediator, in part because there is still such a lack of clarity about what are the essential qualities for success in mediation.[6]

D. *The Value of Co-Mediation*

In some sectors, particularly family dispute resolution, co-mediation is a common practice. Unless the service is provided by volunteers or students, the use of co-mediation increases the cost.[7] Is this increased cost worth it? Proponents might suggest that two heads are always better than one, particularly if they belong to different genders and disciplines. But again, there is a lack of hard data to compare co-mediation with solo mediation on relevant criteria.[8]

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[5] *See* ROSELLE L. WISSLER, SUPREME COURT OF OHIO COMM'N ON DISPUTE RESOLUTION, EVALUATION OF SETTLEMENT WEEK MEDIATION, at ii (1997).

[6] A related issue is the paucity of hard data concerning the impact on parties and disputes of different styles of mediation (*e.g.*, "evaluative" v. "facilitative," "problem solving" v. "transformative") that have led to such profuse discussions in the literature.

[7] Occasionally, the two co-mediators split the fee for one mediator.

[8] An exception is the 1994 evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program by Professor Craig McEwen of Bowdoin College. CRAIG A. MCEWEN, CTR. FOR DISPUTE SETTLEMENT, AN EVALUATION OF THE

E. *Mandatory Mediation*

A step that has been advocated by many scholars, including this writer, is limited use of mandatory mediation as a temporary first step to encourage greater use of mediation. Limited available data suggest, somewhat counter-intuitively, that the results in terms of settlements are more or less the same regardless of whether the parties opted for mediation or were ordered into it.[9] This might be due to the power of the process dominating the method by which the case got into mediation. In any event, because this is such an important policy question, more precise research—looking to such issues as the perception of fairness by the parties, not just the settlements reached, and the qualitative aspects of the mediations in the two instances—is very much in order.[10]

F. *The Importance of Mediation Confidentiality*

Perhaps the most sacred canon in mediation is the importance of mediation confidentiality. Indeed, that is the underlying premise of the recently promulgated Uniform Mediation Act. There have been spirited scholarly debates about the importance *vel non* of confidentiality to the process,[11] but little by way of basic data. Moreover, one needs to distinguish between the two kinds of confidentiality (as between the two caucuses and vis à vis the external world), as well as between articulations of confidentiality by the mediator and confidentiality's legal enforceability.

Again, this may be a question very difficult to explore. But, so far as I know, we have not even begun to do so. While real-life experiments might be difficult to achieve, perhaps we could learn something from laboratory experiments.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S PILOT MEDIATION PROGRAM (1994). He found no significant difference in settlement rates or party perception of fairness of process or satisfaction with outcome between solo and co-mediation. *Id.* at 70.

[9] *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 393 (3d ed. 1999).

[10] A point needing clarification is exactly what do we mean by mandatory mediation: Clearly not required settlement, but rather, required attempts at settlement. Suppose one party requests a mediation session, but the other refuses and is then ordered into mediation by a judge or magistrate. Does this also constitute mandatory mediation?

[11] *See, e.g., Symposium on the Uniform Mediation Act*, 85 MARQ. L. REV. 1 (2001); *Symposium on Critical Issues in Mediation Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

III. COLLATERAL BENEFITS

Much ADR training and experience has focused on developing a cadre of negotiators, mediators, and arbitrators who can more skillfully handle their assigned roles. This is an important goal. But there has been a splendid fallout of other ADR-like practices that hold great promise. Let me just list a number of the developments of note:

- The focus on interest-based negotiation and mediation has led to more searching lawyer-client interviews as well as negotiations across the table that focus on creating value and reaching Pareto-optimal solutions. Thus, just as a skillful mediator in a continuing relationship case seeks to teach the parties how to handle future disputes more effectively by themselves, there is hope that better training for negotiators will make mediation less and less necessary.
- The increasing interest in collaborative lawyering[12] (a form of lawyering that precludes use of litigation) holds promise of downplaying litigation except as a last resort.
- Increasing use of settlement counsel (negotiation experts who focus exclusively on ways of settling the case while other lawyers are handling the litigation aspects of the case).[13]
- Increased emphasis on problem solving as a skill for lawyers.[14]
- More focus on the constructive role that apology can play in dispute resolution.[15]
- Development of the field of Dispute Systems Design, encouraging the exploration of systematic dispute processing *ex ante*.

IV. CONCLUSION

Twenty-five years after Pound, we seem to have reached a new fork in the road. Instead of simply continuing the kind of experimentation we have been usefully undertaking, we have an opportunity to dig deeper and begin to address more fundamental questions. This path may be more strewn with thorns, but it holds immense promise because of its destination—

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[12] *See* GOLDBERG ET AL., *supra* note 9, at 571.

[13] *See* William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 367 (1999).

[14] *See, e.g.*, Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 97 (2001).

[15] *See, e.g.*, Jonathan R. Cohen, *Advising Clients To Apologize*, 72 S. CAL. L. REV. 1009 (1999).

achievement of a more effective, responsive, and accessible dispute resolution system.