Speculation on the Future of ADR 11-26-14

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By Jerry Barrett

The basis for my speculation is my 51 years of ADR experience, described briefly below:

I began mediating in 1963 as an Assistant Labor Conciliator for the State of Minnesota, and in 1964, I became a FMCS mediator. That work gave me an opportunity to not only do labor-management mediation work, but also to follow the growth of ADR practice into other sectors of society by reading, researching, writing, associating with organizations beyond labor-management, and earning an EdD. What follows are my reflections on developments that encouraged and promoted the spread of ADR, although, that title was not used until much later.

During the latter half of the 1960s, while mediating in Milwaukee, I witnessed Milwaukee being shut down twice by race riots. That motivated me to write two published articles suggesting that the civil rights movement should use the collective bargaining model of dispute resolution, which frequently relies on mediation assistance. Professor Nate Feinsinger, University of Wisconsin Law School and founder in 1967 of the Center for teaching and research in dispute settlement, asked me several times to lecture his law students on mediation and to demonstrate mediation. Feinseinger was a pioneer in exposing law school students to mediation and arbitration. Other law schools had not yet shown an interest in teaching what would become ADR, but they would by the 1980s.

During that period, the 1964 Civil Rights Act created the Community Relations Service (CRS) to mediate civil rights disputes. A few years later, when I moved to the FMCS office in Washington, I became involved in providing technical assistance and training for the CRS staff.

Following the 1968 Kerner Report for the National Advisory Commission on Civil Disorder, which outlined ways the private sector could play a role, foundations began making grants to address the problems. The Ford and Rockefeller foundations granted funds to create the National Center for Dispute Settlement. I took leave from FMCS for two years to become Assistant Director of NCDS in 1969, and I moved to Washington D.C. With two other mediators, we sought to demonstrate and persuade racial disputants to use mediation and other nonviolent processes in place of violence. As a black and white mediation team, we mediated on campuses and met with angry civil rights groups to discuss peaceful conflict resolution. During that time, I met with the staff of Arlan Specter, Philadelipha District Attorney, to create what we called a court diversion program to mediate civil cases. To get the program started, I selected, trained and mentored volunteer mediators. In 1976, Harvard Law Professor E.A. Sanders greatly expanded and promoted a similar program nation-wide under the name the Multi-Door Court House.

By the early 70s, it was becoming obvious that the civil rights movement and the expanding drive to unionize state and local public employees had great commonality. In the late 60s, Martin Luther King was killed in Memphis while supporting a predominately black worker strike. A White House concern about public employee strikes resulted in the Department of Labor creating a new division to address the problem. I left NCDS to head that new function, Public Employee Labor Relations, where I hired staff that could research and write publications on how some states had developed laws and practices to deal effectively and fairly with labor-management relations. Other staff was hired to conduct training and conferences for public managers and representatives of public employee unions on the best practice for dealing with labor-management relations.

A series of labor-management neutrals meeting in late 1971 and early 72 resulted in a Chicago meeting in September 1972, where I joined 33 others to sign the charter forming an organization for neutral dispute resolvers called the Society of Professional in Dispute Resolution (SPIDR). While all 34 of us were experienced labor-management neutrals, a few, including me at NCDS, had already begun working in what we referred to as “new areas of dispute” or “nontraditional disputes.” Those labels were based on the idea that

traditional disputes were labor disputes. A primary purpose for creating SPIDR was to share labor-management neutral experience with those working or interested in working in these new areas. SPIDR'S first annual membership meeting was held a year later with over 200 members participating, only a small percentage were from outside of labor-management. That would change rapidly, and within 15 years, labor-management neutrals were a minority of SPIDR's membership.

Chief Justice Warren Burger (1969-1984) spent much of his tenure pushing court reform. He believed trials were too costly and inefficient. In 1976, he convened a conference of lawyers, judges and legal scholars to discuss alternatives. In his opening remarks, he encouraged increased exploration and use of informal dispute resolution. This seminal conference provided a great leap forward for ADR use in the justice system and elsewhere. For Judge Burger's role as convener, as well as his other efforts, he has been viewed as a founder of ADR.

After two years with Department of Labor in 1973, I was asked to return to FMCS to head a newly created office called the Office of Technical Services. With a staff of ten, we selected new mediators, trained them, updated experienced mediators, conducted collective bargaining research and managed preventive mediation. We were also able to do work in what we call non traditional mediation on an experimental basis. For example, we helped a home builders association develop a mediation system, helped develop State highway engineers' capacity to negotiate with land owners, sent staff to train mediators working in other countries, assisted the implement of a conflict resolution process in Health care, mediated racial staff disputes for several local government in VA, MD and DC, supported work by a former FMCS Director mediating a hundred year old land dispute between the Hopi and the Navaho Nations in Arizona.

In 1981, President Reagan fired striking Air Traffic Controllers and appointed a very pro-business NLRB, that gave management license to reduce wages and benefits in the non union sector, and to bargain with unions in a high handed way insisting on wage and benefit reductions by threating to become union free, move south or over

seas. It was an effective strategy for reducing union membership, union strength and the influence of collective bargaining.

The resulting decline in union membership, collective bargaining agreements and the need for mediation began and continues to this day. Today, the size of the mediation staff is half what it was at the start of the 1980s. Only by expanding its work beyond its traditional L-M, has FMCS been able to avoid shrinking even more.

Reagan budget cuts eliminated my position in 1982, so I joined the faculty of Northern Kentucky University for two years, and then returned to DOL's Bureau of L-M Cooperation, where I developed an interest-based bargaining (IBB) model and training program. I tested my program on FMCS dispute cases and introduced FMCS mediators to IBB, which they continue to use today.

Following my retirement from DOL in 1989, I have spent time arbitrating, mediating, consulting, training, researching, writing and maintaining my Friends of FMCS History archive. I also continued to observe the remarkable and continuing growth of ADR. Below is a sketch of these ADR developments:

- Numerous college and university degree and certificate programs, both undergraduate and graduate, in conflict resolution, offered in a variety of academic departments: law, business, communication, education, government, and international relations.
- Increasing cost of litigation causing disputants to seek ADR options to litigation.
- Ever expanded research and writing on ADR by both practitioners and scholars, producing books, papers, articles, reports, webinars, conferences, mentoring and training.
- Many law firms added an ADR section to their office.
- Growth of organizations, institutes, centers, firms and individuals offering ADR services.
- Many K -12 school systems offer peace making and conflict resolutions courses and workshop for students, and student mediators to deal with peer conflicts on play grounds.

- Governments offering ADR processes to handle internal and external disputes. Two ADR laws in the early 1990s. Administrative Dispute Resolution Act authorizing and encouraging federal agencies to use ADR to resolve administrative disputes. The Negotiated Rulemaking Act authorized agencies to use ADR to establish rules to enforce laws. Many state governments followed a similar practice.
- Court systems at all levels offer and encourage ADR options to avoid using court trials. The 1990 Civil Justice Reform Act required Federal District Court to develop plans to expand the use of ADR. The Uniform Mediation Act in 2002 attempted to standardize the way mediation is practiced in all 50 states.
- To the short list of old ADR processes (negotiation, mediation, and arbitration) a growing list of new ADR processes continues to grow (med-arb, nonbinding arbitration, mini trial, ombudsman, regneg, mock hearing/trial, early neutral evaluation, facilitation, neutral expert factfinding, multi-site on line processes,
- Websites, webinars and the numerous on line ways of connecting individuals and organizations has expanded knowledge of and use of ADR.

What does this past suggest about the future of ADR?

I view this uninterrupted growth and expansion of ADR during my ADR career as proof that ADR is an idea whose time has come, and therefore, ADR will continue to grow and succeed.

As Victor Hugo wrote over 150 years ago: “An invasion of armies can be resisted, but not an idea whose time has come.”

Given the creativity of ADR practitioners and scholars, the best of ADR will continue to grow and expand to new areas of practice, and unheard of new ADR practice will emerge.

See the final section in the last chapter of my book A History of Alternative Dispute Resolution. That section is titled: “How ADR Can Prosper.”