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A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse

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TRANSCRIPT

A DIALOGUE BETWEEN PROFESSORS FRANK SANDER AND MARIANA HERNANDEZ CRESPO: EXPLORING THE EVOLUTION OF THE MULTI-DOOR COURTHOUSE

I. INTRODUCTION

The following is a segment of a video-taped conversation between Professors Sander and Hernandez Crespo that occurred in March of 2008 at Harvard Law School. The remaining segment of the dialogue explores further the evolution of the multi-door courthouse. The dialogue will be available in its entirety on the UST International ADR Research Network's homepage and through the Program on Negotiation at Harvard Law School at a later date. The conversation has been lightly edited for purposes of this publication.

NARRATOR: Today we are pleased to be at Harvard Law School for a conversation between the creator of the multi-door courthouse, Harvard Law Professor Frank E.A. Sander, and the executive director and founder of the University of St. Thomas (UST) International ADR [Alternative Dispute Resolution] Research Network, Professor Mariana Hernandez Crespo. This recording is a collaboration between the UST School of Law and the Program on Negotiation at Harvard Law School.

The UST International ADR Research Network is a research program designed to create inclusive problem-solving models that utilize social capital[1] and consensus-building techniques (i.e., dispute-resolution processes

1. The concept of social capital was first used by L. J. Hanifan, who was in 1916 the state supervisor of rural schools in West Virginia. Hanifan invoked the idea of social capital as an argument for the community to become more involved with the school system:

> [T]hose tangible substances [that] count for most in the daily lives of people: namely good will, fellowship, sympathy, and social intercourse among the individuals and families who make up a social unit. . . . The individual is helpless socially, if left to himself. . . . If he comes into contact with his neighbors, and they with other neighbors, there will be an accumulation of social capital, which may immediately satisfy his social needs and which may bear a social potentiality sufficient to the substantial improvement of living conditions in the whole community. The community as a whole will benefit by the cooperation of all its parts, while the individual will find in his associations the advantages of the help, the sympathy, and the fellowship of his neighbors.

that include the voices of all stakeholders, especially the disenfranchised members of a community). In a pilot project in Brazil,[2] participants examined the different options available to maximize the dispute-resolution process, including the multi-door courthouse conceived by Frank Sander. The multi-door courthouse is an innovative institution that routes incoming court cases to the most appropriate methods of dispute resolution, saving time and money for both the courts and the participants or litigants.[3] In our Brazilian pilot project, participants met in a virtual forum following the consensus-building methodology designed by Professor Lawrence Susskind of MIT and Harvard Law School. The project was implemented under the direction of Professor Hernandez Crespo, together with a team of Brazilians, global experts and collaborators.[4]

Let us meet our guests.

Professor Frank Sander

Frank Sander is Professor Emeritus at Harvard Law School, where he has taught for more than forty-five years and served as associate dean from 1987 through 2000. Born in Germany, Professor Sander came to the United States at age thirteen. He graduated in 1949 from Harvard College, with a degree in mathematics, and from Harvard Law School in 1952, where he was treasurer of the *Harvard Law Review*. Following clerkships with Chief Judge Calvert Magruder of the First Circuit and Justice Felix Frankfurter of the United States Supreme Court, he served as an appellate advocate in the

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ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000) (alteration in original) (quoting Lyda J. Hanifan, *The Rural School Community Center*, 67 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 130 (1916)).

2. The pilot project in Brazil was conducted through the UST International ADR Research Network, of which Professor Hernandez Crespo is founder and executive director. Professor Hernandez Crespo designed the project, and, together with a team of Brazilian mediators, implemented a consensus building process regarding the multi-door courthouse as part of the broader national policy on conflict resolution. Representatives of the various sectors of Brazilian society took part in the consensus building project, from judges, lawyers, law students, law professors, low-income community leaders, NGOs, and businesses.

3. These methods include mediation, arbitration, early neutral evaluations, and mini-trials.

4. Participants had the opportunity to learn from and discuss with experts in the MDC and dispute systems design: Jeannie Adams, from the Multi-door Courthouse in Washington, D.C.; Kenny Aina, Director of the Lagos, Nigeria Multi-door Courthouse; Stephen Chiang, Case Administrator for the Singapore Multi-door Courthouse; Alejandro Lareo, from the Argentina Multi-door Courthouse; Joyce Low, Deputy Director of the Primary Dispute Resolution Center at the Singapore Multi-door Courthouse; James McCormack, from the Boston Multi-door Courthouse; Timothy Germany, Commissioner of Mediation with the Federal Mediation and Conciliation Service; Carole Houk, J.D., LL.M., CEO of Carole Houk International, LLC (CHI), which designs, implements, and evaluates integrated conflict management systems for organizations; Deborah Katz, JD, Model Workplace Program Executive at the U.S. Transportation Security Administration (TSA), with primary responsibility for development and implementation of TSA's Integrated Conflict Management System; and Dr. Mallary Tytel, president and founder, Healthy Workplaces. Dr. Tytel has advised senior-level civilian and military personnel within the U.S. Department of Defense; and has given oversight for three congressionally-mandated pilot programs for high risk populations in 16 communities across the country.

tax division of the United States Department of Justice and then joined the firm of Hill & Barlow in Boston.

Since he joined the Harvard Law School faculty in 1959, Professor Sander has taught many subjects, including Taxation, Family Law, Welfare Law, Professional Responsibility, Alternative Dispute Resolution, Mediation, and Negotiation. In the late 1970s, he began focusing on the field of ADR. In 1976, he delivered a seminal paper, "Varieties of Dispute Processing," at the Pound Conference. In it, Professor Sander put forth the notion of the multi-door courthouse—a multifaceted dispute-resolution model currently used in several settings in the United States and abroad. Together with Professors Stephen Goldberg and Eric Green, he wrote the first ADR casebook, *Dispute Resolution: Negotiation, Mediation, and Other Processes* (1985), which won the International Institute for Conflict Prevention and Resolution award for the best ADR book published in that year. He also has written numerous articles about ADR and has served as an arbitrator or mediator in several hundred cases. For many years, Professor Sander served on the American Bar Association Standing Committee on Dispute Resolution, which was instrumental in helping to institutionalize ADR in U.S. venues. Twice a year, Professor Sander also teaches a weeklong mediation workshop at Harvard Law School's Program on Negotiation; he also has taught this workshop in Canada, Australia, New Zealand and Norway. In addition, Professor Sander served on the drafting committee of the Uniform Mediation Act and during the past decade he has been an ADR consultant to many foreign countries, including Israel and Singapore, lecturing on the topic across the globe.

Professor Mariana Hernandez Crespo

Professor Mariana Hernandez Crespo is the executive director and founder of the UST International ADR Research Network and assistant professor at the University of St. Thomas School of Law, where she teaches in the field of alternative dispute resolution. Professor Hernandez Crespo holds J.D. and LL.M. degrees from Harvard Law School, where she was co-president of the Latin American Law Society. She has taught at the Universidad Metropolitana in Venezuela on public leadership, civic engagement, and multiparty negotiation, and she also has taught ADR at the Law School of University Alfonso X El Sabio in Madrid. Her first law degree is from Universidad Católica Andrés Bello in Caracas, Venezuela, where she received the University Prize for authoring a preeminent legal paper. There she also taught criminal law and founded and led an advocacy program for children under state custody. While in Caracas, she practiced law and clerked at the Venezuelan Supreme Court. Her education and experience in Latin America and the United States has equipped her with a thorough understanding of key assumptions of both the civil and common law systems. Her scholarship and teaching, together with her experience, have been ori-

ented toward helping legal professionals create value[5] in the ADR field, both in the local and international arena. She interacts with the legal system and its actors to explore alternative ways of thinking and acting that could improve their political and legal systems.

II. BACKGROUND

MARIANA HERNANDEZ CRESPO: I am delighted to be here today talking with you. We have had so many enriching conversations, and I am especially pleased that today we have an opportunity to share some insights from our discussions over the years. I remember in 1998 when I was a student in your ADR class—at the end of your course, you asked us to write down an idea or insight that we wanted to take with us into our careers. I wrote down the multi-door courthouse, and here we are, ten years later, still working on it. I was especially interested in this institution because I saw then that ADR methods, particularly the multi-door courthouse, could help bring the disenfranchised majority into the ball game on a level playing field, so to speak. I recognized that it could be refined as a process to give a voice to the disenfranchised people in Latin America and indeed, across the globe. Coming from Latin America (from Venezuela) I have seen that getting into the participatory circle is on many people's minds . . . the poor and disenfranchised there make up the majority and have little say in how things are run. I saw that the way in which people interact [inside and outside of the courthouse] was causing a lot of conflict and exclusion. When I started looking at ADR's potential, I saw how it provided parties with an experience in which they could move from conflict into resolution; in other words, I saw that it would help move them from a room full of noise to one full of music! By learning different ways to approach conflict, mediators could start broadening the discussion table to include all members involved in a conflict by promoting inclusion.

To challenge a paradigm,[6] I believe it is important for stakeholders to actually experience something different. I saw that the multi-door courthouse could promote this opportunity for citizens to experience participation . . . by selecting the conflict-resolution process, by experiencing a different form of dispute resolution, and by having more options—not just the courtroom and the court's coercion as the main mechanisms for dispute resolution.

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5. By definition, "value creation" occurs when two parties in negotiation reach an agreement in which both parties are no worse off, and perhaps are better off than they were before. To take this further, according to Robert H. Mnookin, creating value means "reaching a deal that, when compared to other possible *negotiated* outcomes, either makes both parties better off or makes one party better off without making the other party worse off." ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 12 (2000).

6. The paradigm challenged is the adversarial approach to solving conflicts with litigation as the sole means. Here, we move from a binary mindset where one person wins and the other loses to a win-win mindset, where the interests of both parties are addressed.

III. The Origins and Development of the Multi-Door Courthouse

We have talked over the years about the current use and potential of the multi-door courthouse institution. I think it is especially important to explore some of your insights, given the fact that you developed this concept and that it has taken off and been shaped by others and is now being used in different countries. It would be very interesting for judges, mediators, and ADR specialists who are considering options to learn about the origins of the multi-door courthouse and its various aspects.

Frank Sander: Well, I will try to answer your question. First, I want to say that this is an exciting opportunity for me because being part of a live project and building institutions is different from writing out something on paper. I came to this multi-door courthouse idea almost accidentally. I was on sabbatical with my family in Sweden in 1975, and I was studying some aspects of family law, which is what I taught then, along with taxation and some other non-dispute resolution courses. I was studying the legal issues and rights of unmarried couples living together, something that has become a very hot topic. At that time, we wanted to see what lessons Sweden, which had a lot of experience with unmarried couples' legal rights, had learned. Well, I found out it had not learned very much. So, I began rationalizing the lifework I had done, as people tend to do when they get away from their home base and are on sabbatical. I had done some labor arbitration on the side and had some experience with family disputes in the courts, and I was struck by how unsatisfactory the courts were for resolving family law disputes and how promising arbitration was for resolving labor disputes. So, I jotted down a number of thoughts and sent them back to some of my colleagues at Harvard Law School for comment. Unknown to me, one of them sent the memo on to a professor at Pennsylvania Law School, who was working with U.S. Chief Justice Warren Burger on the upcoming Pound Conference in St. Paul, Minnesota. At the time, the American Bar Association, the Judicial Conference of the United States, and the Conference of State Chief Justices were planning a conference in 1976 in St. Paul, Minnesota. [They intended] to make up for a talk that Roscoe Pound, Dean of Harvard Law School, had given in 1906 on the popular dissatisfaction with the administration of justice in the United States, where I think he was not very well treated and received. They had felt bad about it since then and wanted to have a broad conference dealing with various issues of dissatisfaction with the legal system, one of which was dispute resolution, but also many others—criminal cases, civil cases, and so on. So, when I got back to the United States, I was surprised to get a telegram from Chief Justice Warren Burger, asking me whether I would come down to Washington to talk with him about giving a paper on dispute resolution at the 1976 Pound Conference. At first, I thought that was ridiculous, because I did not have a

lot of experience and did not regard myself as an expert in the field. But I guess he persuaded me to do this, and although I generally feel people should not give talks when they are *invited* to do so, but should give talks when they are *ready* to do so, here I thought, "Well, I'd better do this." I had a hurry-up education for three months and [then] gave this talk in St. Paul called "Varieties of Dispute Processing."[7] I think that was a typical example of being at the right place at the right time because things started to take off from there.

MARIANA HERNANDEZ CRESPO: In previous conversations that we have had, you explained how the multi-door courthouse was not the original name. Could you elaborate a little bit more?

FRANK SANDER: Yes. . . . After this Pound talk in the summer of 1976, one of the ABA [American Bar Association] publications had an article about this talk. On the cover, they had a whole bunch of doors, and they called it the multi-door courthouse. I had given it a much more academic name, the "comprehensive justice center," but so often the label you give an idea depends a lot on the dissemination and the popularity of the idea. So, I am indebted to the ABA for having this catchy name—multi-door courthouse.

Now, I should explain a little bit about the idea, whatever you want to call it. The idea is to look at different forms of dispute resolution—mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some kind of taxonomy of which disputes ought to go where, and which doors are appropriate for which disputes. That is something I have been working on since 1976 because the thing about the multi-door courthouse is that it is a simple idea, but not simple to execute because to decide which cases ought to go to what door is not a simple task. That is something we have been working on.

MARIANA HERNANDEZ CRESPO: You have written a couple of articles . . . .

FRANK SANDER: Yes. I wrote one piece with Stephen Goldberg[8] at Northwestern University called "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure," and then I wrote a more recent piece with Lukasz Rozdeiczer[9] that goes into more detail . . . this research is still ongoing.

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7. Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65 (A. Leo Levin & Russell R. Wheeler eds., 1979).

8. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

9. Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006).

MARIANA HERNANDEZ CRESPO: Could you elaborate more for our audience about the relationship or connection between ADR and the court system?

FRANK SANDER: Well, there is no inherent relationship. I think, on the other hand, it is a pretty natural relationship because courts are our main, perhaps our most important, dispute-resolution place. So, one can make a strong argument that the multi-door courthouse ought to be connected with the courts, but technically the comprehensive justice center [or multi-door courthouse] that I mentioned could be quite separate from the courts. It is a little bit like the story about Willie Sutton, the bank robber, who, when asked why he robbed banks, said, "That's where the money is." The court is where the cases are, so it is natural to have the court as one door of the multi-door courthouse—that is the idea. But, it could be that the court could be over here and the other processes [arbitration, mediation, etc.] could be over there; there is nothing inherent [in the scheme] that prevents this.

MARIANA HERNANDEZ CRESPO: Yes, but the main point is that citizens need to know where to go when they have conflicts.

FRANK SANDER: Right.

MARIANA HERNANDEZ CRESPO: This is all about the idea of the multi-door courthouse being an alternative for litigation in the courts. However, libraries are full of books with great ideas, as we have discussed in the past. As we know, many books full of great ideas never take off. So, what factors enabled this idea to take off after the 1976 Pound Conference?

FRANK SANDER: This is a complicated question, and, you know, an interesting question that political scientists and philosophers worry about—what ideas get embraced, and what ideas do not. Sometimes it is a variety of causes. Sometimes, to borrow from a title of a recent book by Malcolm Gladwell,[10] you reach a "tipping point" when things in favor of a movement fall into place.

MARIANA HERNANDEZ CRESPO: There are social actors . . . .

FRANK SANDER: Well, I think one specific thing that happened is that in the fall of 1976, Jimmy Carter was elected U.S. president. He appointed Griffin Bell as Attorney General of the United States. [Bell] had commented on my paper at the [1976] Pound Conference, and he was very intrigued by what he learned there. So, he set up a special division in the Department of Justice called the Office for Improvements in the Administration of Justice. Then, the Pound Conference leaders created a follow-up taskforce to look at what ideas were thrown out there [at the conference] and how they could be advanced and implemented, and Griffin Bell was the head of that. But, there were many other influences. The American Bar Association embraced this idea and set up a special committee initially

10. MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).

called the Special Committee on the Resolution of Minor Disputes, which was an odd name, but it gradually became the Committee on Dispute Resolution. Then, in 1993, it became the ABA's Section of Dispute Resolution, which now has 17,000 members. So, the ABA has embraced this [concept]. They give a national conference every spring that is very popular in the field. They have put out a journal called *Dispute Resolution Magazine*, so there have been many things that have happened.

There also has been state and federal legislation on the subject. One interesting law that exists in a number of states is that lawyers have an ethical duty to apprise clients of different forms of dispute resolution for their cases. So when you come to a lawyer in those states—like Massachusetts, Colorado and New Jersey, and a number of other states—you have to canvass different options with a client, just the way a doctor ought to do if you come in with some ailment. You say, "My stomach hurts," and the doctor does not say, "Well, let me get out my scalpel and operate." [Doctors] must tell you your options: "You can take drugs, you can do nothing about it, [or] you can have an operation." So, lawyers ought to be doing the same thing with disputes, and that naturally leads to greater exploration of dispute options.

And of course, then the lawyers have to be educated. That is one consequence of that kind of [legal] obligation. I remember once I was asked to give a short course on ADR at a major Washington, D.C. law firm, and I asked them, "Why did you ask me to do this?" They said, "Well, some of our lawyers have gone into court, and the judge has said, 'You ought to consider a mini-trial,'" which was one form of the dispute process for this case. The lawyer went back, embarrassed, to the firm and asked, "What's a mini-trial?" So, there is some education that has to take place, and that is a good thing.

MARIANA HERNANDEZ CRESPO: So, let me ask, what happened in academia? How did it all start? Lawyers have to be trained, so at some point ADR and mediation had to become part of the curriculum.

FRANK SANDER: Yes. I think what happened is that starting soon after 1976, [following] these developments in the government and in the ABA and other areas in the [legal] literature, the academy came aboard this train through pressure. In 1976, few law schools had courses in negotiation. I doubt whether any had a course in mediation—maybe arbitration, yes. But, now every law school has at least one course in ADR; many have three, four or five. There are many research centers like the one we have at Harvard—the Program on Negotiation—and many other schools have similar centers.

MARIANA HERNANDEZ CRESPO: Even before we get to this point where American law schools embraced ADR and started to disseminate it, what influenced the courts to adopt ADR? I remember several years ago, in 2002, when I gave a talk for the Inter-American Bar Association for the section of

justices and judges across Latin America. They all really liked the idea of the multi-door courthouse, but despite this interest, the multi-door courthouse still has not taken root in Latin America. Then, when I came back and spoke to you, I learned that there were pilot projects here in the United States.

FRANK SANDER: You are right to mention that. One of the many things the ABA did is when its Dispute Resolution Committee got some money, it set up a pilot project with multi-door courthouses in three places: Tulsa, Oklahoma; Houston, Texas; and Washington, D.C. And while not all of them have survived, the Washington, D.C. multi-door courthouse [the D.C. Superior Court's Multi-Door Dispute Resolution Division] is now a very active and impressive one. So, this was a useful experiment that showed what to do and what not to do, absolutely.

MARIANA HERNANDEZ CRESPO: We have had conversations with the different directors of multi-door courthouses because we need to learn from experience. We need to see what has worked, even though not all will be transferable because each place has its own context [e.g., style, needs, political and social dynamics] that we need to take into account.

FRANK SANDER: Yes, that is an important thing. We have had to learn both in spreading the idea nationally and particularly in spreading it internationally. This is an idea that is pretty flexible, but you cannot just pick it up and transplant it somewhere else because the climate and context may be quite different. So, you have to adapt the idea to the place.

MARIANA HERNANDEZ CRESPO: For that reason, we want to involve the actors—the stakeholders—so they can gain the knowledge from the other people who have experimented with this, and they can make informed decisions that actually respond to their own reality.

This will take us to the internationalization of this idea, which I think is very important. As you know, many of your international students—LL.M.s, including myself and other foreign-trained lawyers—have been key in spreading ADR around the world. Tell us a little bit about your experience with them.

FRANK SANDER: Well, I do not know a great deal about the internationalization of this idea. I occasionally get e-mails from Nigeria, where there is a multi-door courthouse that I have never visited, and I am sure it is not the same as the one in Washington, D.C. just based on what I know about Nigeria generally. We have had a Swiss student who wrote a book in part about the multi-door courthouse and the possibility of bringing it to Switzerland. Lots of my graduate students are in Germany, and I do not know that they have looked into the multi-door, but the whole ADR [field] has captured a lot of interest there.

MARIANA HERNANDEZ CRESPO: And like you said, Nigerians actually came here and explored the idea. Now through our International ADR Re-

search Network, we were able to watch some of the meetings with the directors.

FRANK SANDER: Yes, I think you have done what has been missing so far—to link some of these operations and learn from the past to build the future.