1987

The Teaching of Alternative Dispute Resolution

Lisa G. Lerman
The Catholic University of America, Columbus School of Law

The Teaching of Alternative Dispute Resolution

Lisa G. Lerman

The field of dispute resolution appears to have quite different meanings and functions inside and outside law schools. Outside law schools, a great deal of the activity that falls under the rubric of ADR is mediation, often conducted in programs attached to small claims or family courts.[1] These programs are designed to reduce overwhelming caseloads by offering expedient and informal resolution of minor disputes. While some ADR programs perform intake and screening functions and make referrals to both traditional and nontraditional forums, their primary function is to deliver alternative services, such as mediation, which are otherwise unavailable.[2] The resolution offered by an ADR program may provide an alternative to substantive law in that the dispute may be discussed without reference to law. It may offer an alternative to judicial procedure in that the resolution may be in lieu of any court proceeding. It may offer an alternative to dealing with lawyers in that the mediators are often not lawyers and often discourage the parties from using lawyers.[3]

Perhaps it is from the context of practice that the field of Alternative Dispute Resolution gets its name: it provides the alternatives listed above; the subject matter deemed appropriate for disposition includes "disputes"—a common characterization of problems deemed too trivial to be worthy of a judge's attention;[4] and mediation programs are oriented toward simple and rapid "resolutions."[5]

Lisa G. Lerman is an attorney at Lobel, Novins, Lamont and Flug in Washington, D.C. She was a Visiting Assistant Professor of Law at West Virginia University in 1984–85, and was a clinical fellow at Georgetown University Law Center from 1982 to 1984.

1. See, e.g., ABA, Alternatives to Family Dispute Resolution (1982) (conference proceedings titled ADR but including primarily discussion of mediation programs and the questions raised by the use of mediation in domestic relations problems).
2. See e.g., United States Dept. of Justice, Neighborhood Justice Centers Field Test: Evaluation Report (1980).
3. These alternatives are described in Paul D. Carrington, Civil Procedure and Alternative Dispute Resolution, 34 J. Legal Educ. 284 (1984).
4. Battering cases, for example—referred to as "domestic disputes" or "family disputes" by police, prosecutors, judges and mediators—have long been treated as inappropriate for formal adjudication. See Raymond Parnas, 1967 Wis. L. Rev. 914. E.g., Presentation of Morton Bard, The Police and Family Violence: Practice and Policy, in United States Commission on Civil Rights, Battered Women: Issues of Public Policy 49 (1978).
5. At the Citizen's Complaint Center in Washington, D.C., for example, cases are typically resolved in one mediation session. Charles Bethel & Linda Singer, Mediation: A New Remedy for Cases of Domestic Violence, 7 Vt. L. Rev. 15, 26 (1982).

 Cite as 37 J. Legal Educ. 37 (1987).

In law schools Alternative Dispute Resolution appears to be defined differently and to be used to promote goals different from those espoused by programs that provide ADR services. ADR courses tend to examine a spectrum of options—including negotiation[6] and other informal procedures—which are or might be available to deal with problems presented by clients.[7] While the array of options is generally presented as including every conceivable possibility, those who have written textbooks and developed teaching materials in this field tend to focus primary attention *not* on mediation, but on negotiation and arbitration—practices that are almost exclusively the province of lawyers.[8] Teaching materials on ADR display one further common characteristic: nearly all of those identified by the Dispute Resolution Clearinghouse at the University of Wisconsin include some participatory or simulation exercises that bring clinical teaching methodology into the law school classroom.[9] ADR in law schools may be being used primarily to teach some traditional aspects of lawyering that have not received adequate attention elsewhere in the curriculum.

What is the significance of this divergence between ADR in legal education and ADR in practice? One might simply note that the resurgence of interest[10] in ADR is relatively recent, and conclude, as Frank Sander does, that "dispute resolution has not yet achieved the status of an established law school discipline."[11] Or one might note—again as Sander does—that ADR is a "growth industry"[12], and that research money is available for work that arguably falls within the ambit of "ADR," and conclude that the field is defined differently by people whose uses for ADR differ.

Although it is not unusual for a subject to be presented in a law school course in a manner that does not fully or accurately reflect that field as it exists in practice, this particular divergence raises some concerns about what may be omitted from the ADR syllabus. If ADR is being used as a vehicle to teach lawyering skills and process, then some of the serious political and policy issues raised by the wholesale exclusion of certain categories of cases from the court system might not be addressed. Martha Minow suggests that it

6. Over half the materials listed in the bibliography of ADR teaching materials produced by the Wisconsin clearinghouse include substantial exercises designed to teach about negotiation. Annotated List of Teaching Materials Available from the Dispute Resolution Clearinghouse, University of WisconsinMadison (1986).

7. See e.g., Leo Kanowitz, Cases and Materials on Alternative Dispute Resolution (1985); Stephen B. Goldberg, Eric D. Green & Frank E.A. Sander, Dispute Resolution (1985).

8. *Id.*

9. *Id.*

10. Carrington points out that in fact most law reform movements have included an examination of new alternatives to the then existing system of adjudication. Carrington, *supra* note 3, at 303.

11. Frank E. A. Sander, Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles, 34 J. Legal Educ. 229, 235 (1984).

12. *Id.*

is important to examine "the attitude adopted in the course about the relationship between alternatives to court and civil litigation."[13]

A course that set out to examine critically the alternative forms of dispute resolution might consider, for example, whether the informal models have the effect of divesting the less powerful parties to disputes of the opportunity to invoke the power of the law on their own behalf,[14] and whether the removal of cases from the courtroom to other settings has a similarly adverse impact on tenants in conflict with landlords, consumers in conflict with merchants, and women in conflict with their husbands. Such a course might consider the political and economic priorities of the courts as reflected in choices made about which cases are susceptible of informal resolution, and whether those priorities reflect race, sex, or class bias.

If ADR is taught without attention to questions of whether alternatives are appropriate for the cases for which they are proposed, then the students may leave school with a value-neutral image of the rainbow array of options available to disputants. If ADR is to be taught, then it is of paramount importance that the classes focus on the development of a critical attitude toward any choice of forum, particularly if the choices involve divesting the parties of counsel, legal advice, a public hearing, and an enforceable remedy. Since the ADR movement appears to be blossoming as rapidly as court dockets overflow, its development is an appropriate subject for study.

On the other hand, the material on negotiation and other lawyering processes which is covered in many ADR courses may be a more important component of the law school curriculum than is an examination of the activities of the mediation movement. ADR courses that teach the informal aspects of the adversary process may provide an invaluable introduction to the practice of law. If the vast majority of all civil cases are the subject of negotiated settlements, then negotiation should be the subject of intensive study during law school. Some portion of this instruction might occur in ADR courses, but perhaps the course should be renamed, to avoid the confusion that may result if the most mainstream of lawyering activity is denominated as an alternative to the norm.

The other significant innovation in the ADR courses is the use of experiential exercises. This is evident in Professor Spiegelman's materials, in the other teaching materials available from Wisconsin (mentioned above), and was the subject of much discussion at the ADR workshop at the 1986 AALS meeting. The hallmark of traditional law school education is substance over process. Areas of law that become separate courses in law schools tend to be subjects that have elicited a sufficient number of appellate decisions to fill respectable casebooks. Especially in the first-year curriculum, legal doctrine so dominates the syllabus that many students (some of whom have found

13. Martha Minow, Some Thoughts on Dispute Resolution and Civil Procedure, 34 J. Legal Educ. 284 (1984).

14. See Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 Harv. Women's L.J. 57 (1984).

their way into my clinical offerings) finish their civil procedure courses with only the most theoretical idea of how a case progresses and what work is involved in each stage of a case.[15]

The best reason to follow Spiegelman's suggestion and include some curricular material that is referred to as "ADR"[16] in civil procedure courses is to give the students some activity to which they may apply the doctrine that they are learning. The use of participatory simulation changes not only the students' perspective on the material they are studying but their perception of themselves as prospective lawyers.

From the tangle of pedagogical options presented as ADR, two quite different priorities emerge. The first is the critical examination of alternative forms of dispute resolution to explore both the gains and the losses that may result from a movement away from traditional litigation. The second is the use of simulation to teach negotiation and other aspects of the lawyering process in ADR courses. This kind of teaching is a priority because it calls upon other skills than those of doctrinal analysis and brings the students closer to the experience of practicing law.

There is certainly time to address both these priorities in a semester-long course. Whether each can be given its due in a three-class unit of civil procedure, I do not know. Given the amorphous boundaries of this newly developing field, the setting of specific pedagogical goals is essential to coherent instruction.

15. One consequence of this abstraction has been that in the clinic many students undertake to represent their first clients by going to the library and learning everything available about the general area of law that governs their clients' cases. Many students are oblivious to the importance of fact investigation and procedural strategy. This approach to preparing cases indicates that the students have absorbed and internalized the priorities in legal work as presented to them in the first year of law school.

16. It might eliminate some confusion and allow the use of more diverse material in class if these courses were renamed "Dispute Resolution." It is noteworthy that Stephen B. Goldberg, Eric Green & Frank E.A. Sander have titled their recent textbook simply *Dispute Resolution.*