SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas Wesleyan Law Review

Volume 11 | Issue 1 Article 3

10-1-2004

Introduction: Problem Solving Processes: Peacemakers and the Law

Hon. Frank G. Evans

Follow this and additional works at: https://scholarship.law.tamu.edu/txwes-lr

Recommended Citation

Hon. Frank G. Evans, *Introduction: Problem Solving Processes: Peacemakers and the Law*, 11 Tex. Wesleyan L. Rev. 1 (2004).
Available at: https://doi.org/10.37419/TWLR.V11.I1.1

This Symposium is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas Wesleyan Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

DOI: https://doi.org/10.37419/TWLR.V11.I1.1

INTRODUCTION

PROBLEM SOLVING PROCESSES: PEACEMAKERS AND THE LAW

Hon. Frank G. Evans†

Thank you for inviting me to your conference, which in this day of global unrest is so appropriately titled *Problem Solving Processes: Peacemakers and the Law*. I am honored to be in such fine company. Professors Kay and Frank Elliott have really been on the cutting edge of the Alternative Dispute Resolution (ADR) educational effort and have been continuously engaged in work to create new and innovative ADR processes. I am truly grateful for their leadership and inspiration over the years.

Today, we will be treated to presentations covering a wide range of creative ideas and you will hear from some of the most knowledgeable people in the ADR field. This morning, I hope to set the tone for their presentations by briefly recalling some of the events occurring in the ADR field over the past two decades.

For those of you who have taken an active part in the Texas ADR movement, I think you might agree that we have come a long way over the past 20 years. Back in the early 1970s, most of us had no inkling of the importance of ADR or how its use might transform the paradigm of our civil justice system. But following the so-called "Pound Conference" in 1976,[1] some judges, lawyers, and law professors started to discuss this new thing called "mediation." Pretty soon, word of it was spreading across the nation. In 1978, then Chief Justice of the Texas Supreme Court, Joe Greenhill, happened to be in Houston attending a local bar association meeting. He suggested to Bob Dunn, then the local bar president, that the Houston Bar ought to look into mediation as a way of alleviating its crowded court dockets. I happened to be standing on the periphery of that conversation when Bob looked over at me and told Judge Greenhill, "I'll appoint a committee to look into this if Frank here will chair it." Upon that seemingly innocent comment, the bench and bar of Texas became

† Hon. Frank G. Evans (Ret.), a Senior Appellate Judge, was formerly Chief Justice of the First Court of Appeals in Houston. Evans was the Founding Chair of the State Bar of Texas ADR Committee, and sometimes has been referred to as the "Father of ADR in Texas." Currently, he serves as a mediator, arbitrator, and neutral evaluator, and he is the Founding Director of the Frank Evans Center for Conflict Resolution at South Texas College of Law.

1. The official title of the conference was the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. *See, e.g.*, 70 F.R.D. 79, 79–246 (1976).

committed to the endless task of integrating ADR concepts and techniques into the traditional justice system.

With a modicum of financial support from the Texas Supreme Court, the energetic, young lawyers on this newly formed bar committee were able to travel to existing dispute resolution centers across the nation to develop an ADR plan appropriate for Houston. Based on the committee's report and recommendations, the Houston Bar voted to implement an experimental ADR forum in Houston, named the Houston Neighborhood Justice Center, after those centers established by the United States Attorney General in Atlanta, Los Angeles, and Kansas City.

Because the new Houston center had no financial backing, the committee's first task was to raise about $150,000 needed to meet the estimated 18-month pilot project budget. Serendipitously, a young journalist/law student, named Lynne Liberato,[2] was going to law school and working part-time in the public relations department of Shell Oil Company. Hearing of our need, Lynne's boss loaned her to us for the purpose of developing a fund-raising slide presentation for a luncheon meeting with Houston's business leaders. Armed with only her camera and a keen instinct for good copy, Lynne created a "bang-up" presentation that inspired donations meeting most of our budgetary needs.

So, with that money in the bank, we returned to Kansas City and Atlanta and hired some of their staff to train our first volunteer mediators and to become our initial staff directors. One of those people was none other than Kimberlee Kovach,[3] now one of our premier mediator-author-trainers. We had only a vague notion of how to operate a dispute resolution center. Our first mediations were conducted in a deserted portion of the county's mosquito control center, so people with disputes had to walk by a line of mosquito-infested water tanks. In those early days, our primary concern was whether we would be able to recruit enough volunteer mediators and get enough referrals from the district attorney's civil complaint desk to make the center's operation worthwhile. If we put out the word, would anyone come to us?

Come they did, and the Houston center has never run dry, either for disputes or for volunteers to mediate those disputes. From that point on, I imagine our experience in Houston has been pretty much like the rest of the state. As we learned of new needs for mediation, we added new components, following the theme of Professor Frank

2. Lynne Liberato later became a partner in Haynes and Boone in Houston and served as President of the State Bar of Texas.

3. Among her other positions, Kimberlee Kovach teaches at the University of Texas School of Law and is a past Chair of the ABA Section of Dispute Resolution and the State Bar of Texas Section of Dispute Resolution.

https://scholarship.law.tamu.edu/txwes-lr/vol11/iss1/3
DOI: 10.37419/TWLR.V11.I1.1

Sander's multi-door courthouse,[4] so that today there is some type of ADR program in practically every court in the county, from municipal courts to the appellate courts. In 1983, several years after the center opened, we were able to obtain a new statewide statute that authorized counties to establish and fund local ADR systems.[5] As a result of that legislation, we now have some 18 dispute resolution centers across the state.

In those early days of Texas ADR, relatively few lawyers and judges were familiar with the ADR process, and most mediators were volunteers providing pro bono services to people of limited means. By experimentation, we started to find that ADR was an effective means to resolve all kinds of disputes, not just the so-called small disputes, such as those involving a neighbor's fence encroachment or barking dogs. Thus, we embarked upon the mission of finding new ways to help courts settle their civil litigation cases. We also began to see that ADR worked well in resolving business disputes and tort actions, and even that it was effective in bankruptcy and trust actions.

In 1987, the Texas ADR Act[6] established a state policy encouraging peaceable settlement of civil disputes and mandating all courts, both trial and appellate, to refer appropriate lawsuits to ADR. After the enactment of this legislation, nothing spectacular happened for several years. In the early 1990s, the Texas ADR field began to change. Some mediators, particularly those with a separate source of income, found they could survive by doing mediation for compensation. As more and more mediators entered this new profession, debates soon arose about which mediation practices were ethical and which practices were not. This and other concerns about the integrity of the process inspired the bench and the bar to examine the need for rules and regulations governing the practice of mediation. After a decade of continuing meetings and spirited debate, much of the dust now seems to have settled on this activity. All sides to the debate now seem to have a more tolerant view of the other sides' positions, and to the credit of Suzanne Duvall and others, a voluntary credentialing system with an ethics code has become a practical reality.[7]

So, with that backward look, where are we going today and tomorrow? I hope I am not being naïve in predicting the beginning of a more collaborative approach among the leadership of the legal and ADR communities. While there are still strongly held differences of opinion about the merits of various mediation styles, such as whether

4. *See* Frank E. A. Sander, Varieties of Dispute Processing (Addresses Delivered at the National Conference on the causes of Popular Dissatisfaction with the Administration of Justice (The Pound Conference), Apr. 7–9, 1976), *in* 70 F.R.D. 79, 111–34 (1976).

5. Tex. Civ. Prac. & Rem. Code §§ 152.002, 152.004 (Vernon 1997).

6. Tex. Civ. Prac. & Rem. Code § 154.002 (Vernon 1997).

7. *See* Texas Mediator Credentialing Association, *available at* http://www.txmca.org (last visited Oct. 5, 2004) (on file with the Texas Wesleyan Law Review).

"facilitative" as opposed to "evaluative" practices are good or bad, I think I see the beginning of a "coming together" of the leadership in our legal and ADR communities. I also believe that we have made good progress in enhancing the public's understanding of ADR as an alternative to courtroom litigation. Most business leaders now have some practical awareness that ADR can save their companies substantial sums in litigation transaction costs. But even with this general awareness, there is much work yet to be done to educate lawyers, judges, and business leaders about the development of procedural systems that incorporate new and innovative ADR processes.

Accordingly, I see a lack of public awareness as the greatest challenge we face in our efforts to advance the cause of ADR in Texas. Most of us in the legal and ADR fields have only a smattering of knowledge about the newly developing notion of Collaborative Lawyering. We do not know whether it will work in small towns, such as Bastrop, where I have my home, or whether it will be practical only in the cities and in larger cases. So, we will need to have a continuum of CLE programs, such as this, to educate the bench, the bar, and the public around the state about which cases are appropriate for collaborative law, and which cases are not.

There is also a need, I think, to develop a wider understanding about how the dynamics of a conflict can be transformed through the use of new dispute resolution mechanisms, such as Transformational Mediation and some of the hybrid ADR processes. While such processes have been the subject of various CLE seminars over past years, I do not believe the legal profession has had much of an opportunity to obtain practical skills training in these innovative conflict resolution methods. Moreover, the trend of traditional law school curriculum has been to treat ADR as a second-tier elective, with the result that many graduating law students are not being fully prepared to represent clients in a mediation, arbitration, or hybrid ADR process.[8]

So, where do we go from here? Let's see if we can make some educated guesses about what may be in store for the future. First, I think American law schools will begin to recognize that, like any other business, they must effect major changes in the way they market their products if they expect to survive. In the automotive business, for example, the major companies have continuously issued public reports on their ongoing efforts to develop electric, gas-electric, and fuel cell powered vehicles. Of the major companies, only Honda and Toyota have made any substantial investment in these new concepts. Honda and some of the other major companies have tried to continue their

8. Fortunately, this trend seems to be changing. Texas Wesleyan University School of Law, for example, has from its beginning stressed the importance of ADR, and South Texas College of Law has created a new center directed to the study of conflict resolution methods and processes.

"business as usual" agendas by retrofitting existing vehicles, but Toyota developed an entirely new technology specifically designed for its new power systems, and has positioned itself some three to four years ahead of its nearest competitor.

My point, obviously, is that we in the legal community, like our friends in the automotive field, must be prepared to refine and adjust our focus to meet new challenges. To do this, we will have to use our collaborative efforts to develop new and innovative conflict resolution methods and to build more efficient, effective, and affordable dispute resolution systems. We will need to carefully monitor these systems to be sure they are consistent with our traditional notions of equity and fairness.[9] For example, while it is good to see the business community expanding its use of ADR processes, it is somewhat alarming to note the proliferation of one-sided arbitration clauses in consumer and employment contracts. So, even while we are looking at new horizons in ADR, we must take care not to undo the accomplishments that have been made in the justice system over the years.

I think some of our best progress has been in developing mediation programs in the middle and elementary schools. Our challenge is to make these programs more efficient and effective so that they can readily be replicated without extensive public expenditures. I think that challenge is being met by new program concepts such as the Volunteer Mentor-Mediator Program and the Online Parent Coaching Program, which enable volunteer law students and other professionals to provide online guidance, free of charge, to at-risk youth and their families.

Looking further into the future, I see an increasing use of collaborative law concepts and responsible dispute resolution protocols not just in family law, but extending into probate, estate, and commercial disputes, and then into personal injury, medical malpractice, and insurance. I think we are beginning to see some important changes in the way lawyers view their professional responsibilities, and I believe more lawyers now realize that winning a lawsuit is not everything. A legal victory is not always the best thing for the client.

I find it interesting, if somewhat demeaning, to look back at my own worldly views when I first started to practice law more than 50 years ago. At that time, I had just completed two tours of military service in the Marine infantry, the first in World War II and the second in the Korean War, with a stint at law school in the middle.

Today, I must admit somewhat reluctantly, that at that point in my mental development I strongly believed the only way to achieve lasting peace in the world was to do what we did in Japan and in Korea and firebomb the "bad guys" into submission.

9. *See, e.g.*, Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?* 79 WASH. U. L.Q. 787, 858–61 (2001).

Texas Wesleyan Law Review, Vol. 11 [2022], Iss. 1, Art. 3

I am pleased to be able to report that my views on the subject have undergone substantial change, and I am no longer convinced that violent action is the best and only solution, at home or abroad. Today, I am optimistic that a great many people; lawyers, and business people included, are coming to the same conclusion; collaborative problem solving is the best way and the most productive way, to resolve both domestic and international conflicts.

I am persuaded that more and more people across the world are now beginning to realize that we all must think outside the proverbial box and look to options other than violence if we want to survive as a civilized people. Just as we need to find new ways to power our vehicles, homes, and boats and reduce pollution and preserve our nonrenewable resources, so must we continue our search for new and innovative conflict resolution systems.

We are beginning to see a shift in our general legal culture as our bench and bar gains increasing awareness of the value of responsible dispute resolution strategies, which embody traditional ethical principles such as civility and respect. I am also persuaded that ADR concepts such as mediation, collaborative Lawyering, and Transformative Mediation will work well in other countries, especially in cultures such as Mexico and certain other Latin American nations, where people have traditionally recognized collaborative problem solving as the preferable way to resolve disputes. With this in mind, we should expand our efforts to develop cost-effective collaborative resolution plans for businesses wishing to engage in international business transactions.

In conclusion, I want to express my sincere appreciation for your attention this morning and for your efforts in expanding the problem solving concept. It will require the unified effort of ADR professionals who are courageous, dedicated, and willing to move into the frontlines of public service. I am convinced that your efforts will inspire others to participate in a global collaborative movement for the non-violent and peaceable resolution of conflicts.

https://scholarship.law.tamu.edu/txwes-lr/vol11/iss1/3
DOI: 10.37419/TWLR.V11.I1.1