THE MCCAW LEWIS CHAPMAN ADVOCACY COMPETITION

ADR: APPROPRIATE DISPUTE RESOLUTION?

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"The primary human reality is persons in conversation."[1]

"ADR" is commonly used to refer to alternative dispute resolution. In this paper I argue, from both ideological and practical perspectives, that ADR is also appropriate dispute resolution. I firstly show by use of example how ADR, as opposed to the adversarial system, is a highly appropriate form of dispute resolution. Secondly, I discuss the special case of domestic violence, where ADR may not in fact be appropriate. Finally, the paper concludes that, despite this exception, ADR should also stand for appropriate dispute resolution.

I. THE APPROPRIATENESS OF ADR

Take a specific scenario.[2] Imagine two men quarrelling in a library. One wants the window open and the other wants it closed. They argue about how much to leave it open: a fraction, halfway, three-quarters of the way. No solution satisfies them both. Enter the librarian. She asks one why he wants the window open: "To get some fresh air." She asks the other why he wants it closed: "To avoid the draft." After thinking a minute, she opens wide a window in the next room, bringing in fresh air without a draft.

The successful outcome of this scenario underlines the importance of one of the fundamental advantages of ADR over the adversarial system: the focus on the underlying interests of the parties as opposed to their increasingly polarized positions. It is obvious that the positional approach was getting nowhere.

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1 Harre (1983) cited in Shotter, J *Conversational Realities: Constructing Life Through Language* (1993) 1.

2 Adapted slightly from Fisher, R & Ury, W *Getting to Yes* (2ed, 1991) 41.

The scenario also illustrates the second fundamental aspect of ADR: a chance to say what you want, how you want. We may usefully analyze this in a comparison with the adversarial system. In a courtroom setting where the effects of the adversarial system are most prominent, participants cannot say "what they want, how they want." For example, the recurring phrase "Just answer the question, Mr Brown" is very familiar to those who have observed courtroom actions. Here, counsel are clearly preventing the witness from saying what he or she wants to, how he or she wants. Likewise, the hearsay rule prevents a whole story being told.

In contrast, an ADR system empowers participants by enabling them to say what they want, how they want. As part of my research for the course Dispute Resolution in 1995, I observed mediations in Hamilton.[3] One of the participants said that he had chosen mediation over a more adversarial setting in the first instance as "it was not so scary" and so that he could have the chance to say what he wanted.

It is significant that ADR participants can use language as they want, and not how a courtroom setting prescribes. This is especially the case in narrative mediations, where it is fundamental that people be able to tell their own stories. Further, a mediator may be able to assist participants by summarising and reflecting what has been said, so as to ensure that a full understanding has been gained. In contrast, in a courtroom setting, a witness may be declared unfavourable if he or she does not answer questions directly, hesitates, or generally conducts him or herself in a way which is inconsistent with courtroom rules.

Another significant aspect of communication which can be recognised in ADR, as opposed to the adversarial system, is that of non-verbal communication.

> Students of communication estimate that in a face to face encounter, as much as 60% to 80% of the communication occurs non-verbally. Relevant factors include voice tone, facial expression, relative placement (eg sitting or standing), distance and "body language."[4]

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3 For reasons of confidentiality and an agreement regarding disclosure, I am unable to specify more.

4 Bell, D "Negotiation in the Workplace: The View from a Political Linguist", in Firth, A (ed) *The Discourse of Negotiation* (1985) 46.

Mary Parker Follett's observation in the 1920s that effective communication requires "keen perception"[5] is again far more apt to an ADR setting than to a courtroom setting, where counsel are perceptive primarily by being aware of mistakes and weaknesses in the "other side's" presentation, so as to undermine its argument. A perceptive mediator or negotiator, however, who is aware of non-verbal communication, including silences,[6] can ensure that the process is carried out to the maximum benefit of participants.

ADR is therefore highly appropriate as it allows people to be able to say what they want and how they want without strict courtroom rules. It has the added advantage of being able to accommodate various forms of communication, rather than just the spoken word, as in courtroom settings. It therefore offers greater flexibility, and allows the conversations to emerge from the narrative dialogue, thus being driven by the parties themselves rather than by others speaking for them.[7]

A third fundamental aspect of ADR is its ability to allow either party, the mediator or negotiator, and any other invited participant to generate any number of creative options. The ADR system therefore permits originality and flexibility. Legal training in moots where one "side" takes one stance and the other "side" takes the other is highly indicative of the polarisation of two positions, allowing little if not no room for creativity. The doctrine of precedent (*stare decisis*) further shows how constrained and bound the adversarial system may be, as opposed to the originality, creativity and flexibility of results offered by an ADR system.

II. Where ADR may be Inappropriate

I turn to a situation where ADR is generally thought to be inappropriate. Mayer has warned against using mediation if mediation will increase the power differential.[8] It is widely acknowledged that domestic violence

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5 Davis, A "In Theory: Interview With Mary Parker Follett" (1992) 3:1 Australian Dispute Resolution Journal 7, 10 (with specific reference to the integrative approach to conflict resolution).

6 Hoffman, L "A Reflexive Stance for Family Therapy" in McNamee, S & Gergen, K *Therapy as Social Construction* (1992) 7, 18 (with specific reference to the interviewing techniques of the Norwegian postmodern therapists Anderson, Flam and Hald).

7 Firth, supra note 4 at 26 (with specific reference to the manner in which negotiation activity emerges in the work context through the 'talk' itself).

8 Described in Astor, M & Chinkin, C *Dispute Resolution in Australia* (1992) 109.

occurs in relationships where the male attempts by power and control to dominate the woman.[9] The bringing together of such couples for mediation would serve to further perpetuate the power imbalance which exists in the relationship, rather than to redress it.[10] In Australia, the Chief Justice of the Family Court has stated that mediation will normally be regarded as inappropriate in cases of domestic violence.[11]

There have, however, been recent developments in ADR research in the area of Victim Offender Mediation. In Adelaide, at the Dulwich Centre, White conducts a course of narrative therapy sessions for men who have been violent in relationships.[12] At the end of that course, it *may* then be considered appropriate, if consent of the woman is gained, for mediation to take place. One must stress that this is an area where extreme caution is advised. However, mediation may be appropriate after a successful preparatory course has been completed and strict guidelines are followed.

III. Conclusion

I have shown that, apart from situations involving domestic violence, an ADR system is appropriate in terms of discovering the parties' true interests, allowing them to say what they want to say in their own way, and its inherent ability to generate positive options. Further, ADR is a growing form of dispute resolution. The Privacy Act 1993 incorporates mediation into its scheme. Increasingly law firms advertise alternative dispute resolution services. Waikato University has established a compulsory course in the discipline. These are all indications that ADR is certainly and increasingly appropriate.

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9 Busch, R & Robertson, N "What's Love Got to Do With It? An Analysis of an Intervention Approach to Domestic Violence" (1993) 1 Waikato Law Review 109, 116.

10 Gagnon, A "Ending Mandatory Divorce Mediation For Battered Women" (1992) 15 Harvard Women's Law Journal 272, 273.

11 Nicholson, A "Introduction to the Family Violence Administrative Direction of the Family Court of Australia (1994) 2 Australian Feminist Law Journal 197, 199.

12 McLean, C "A Conversation About Accountability with Michael White" (1994) Issue 2 & 3 Dulwich Centre Newsletter 68. Two key features of White's course are the focus on accountability and the dynamics of power and control.