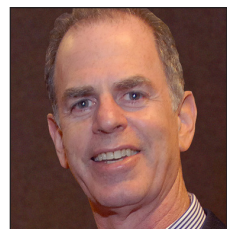


Bringing ADR Home

by Joan D. Hogarth, ADR Section chair, with contributions by Simeon H. Baum



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Welcome to the first and what we anticipate will be a regular Alternative Dispute Resolution (ADR) column of *The Federal Lawyer (TFL)*. Twenty years ago, the Federal Bar Association (FBA) formed the ADR Section, or, as our California colleagues refer to it, the “appropriate dispute resolution” section.

We familiarize counsel and corporate clients with the words of Abraham Lincoln: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, and expenses, and waste of time,”¹ and with the observations of Chief Justice Warren E. Burger, who made us acutely aware that to rely principally on litigation to “resolve conflicting claims would be a mistake.”² These words force us to give equal consideration to the processes on the continuum of dispute resolution techniques—from negotiation and mediation, to more evaluative processes such as neutral evaluation, arbitration and, of course, litigation. Today, members of the FBA and their clients have grown into sophisticated users of the available dispute resolution processes.

It has been over 155 years since Lincoln first said the above quoted words. Yet they are as apt today as ever.

In the upcoming monthly columns, we invite you to share your favorite quotes, and explore the world of ADR with the *TFL* community. In this column, the current section chair, Joan D. Hogarth, provides perspective on the history of ADR and on negotiation and arbitration, while former chair, Simeon H. Baum, offers mediation practice tips drawing on the ancient wisdom of the *Tao Te Ching*.

How ADR Became an Integral Part of the Legal Landscape

ADR has its history in commercial activities where arbitration was used to harmoniously resolve disputes among businessmen and where business and unions used mediation to address the contentious labor workplace disputes. These agreements to use ADR to resolve disputes privately were intentional and known between the parties.

Court-annexed ADR began in the 1970s when the federal courts experimented with various forms of ADR procedures, primarily mediation. The courts

were motivated by the desire to improve costs and time associated with resolving judicial disputes.³

The 1980s and 1990s saw a surge of ADR activities where court-mandated ADR now supplemented voluntary ADR, including passage of the Civil Justice Reform Act of 1990, which was motivated by the need for the courts to develop cost and delay reduction plans in their case management⁴; the Judicial Improvements and Access to Justice Act of 1993, which enabled district courts to submit cases to arbitration; and the Alternative Dispute Resolution Act of 1998, which required district courts to offer litigants the option of using ADR in the resolution of civil cases.⁵

The enabling legislation—along with a compendium of district court ADR rules, programs, and successes—are readily accessible from the a number of sources, including the district courts and the Department of Justice's Office of Legal Policy under Alternative Dispute Resolution.⁶

2016: An Effortful Year for Arbitration

The steady growth of ADR has not been without its controversies, however. While court-annexed programs are gaining a foothold even among the most recalcitrant of parties, state courts are challenging the holdings of the Supreme Court. Regulatory agencies are creating rules that will force some users of ADR to deeply reconsider what is most important in having an ADR process. Time and cost savings along with harmonious outcomes have been at the core of ADR benefits. Now they are being disturbed by ongoing litigation about the use of ADR.

Several developments made 2016 a challenging year for arbitration. Two major regulatory agencies issued rules that could limit the use of arbitration in consumer agreements. The Consumer Financial Protection Bureau issued proposed rules that will deny the use of mandatory arbitration clauses that waive class action lawsuits by consumers of financial services (e.g., credit cards and bank accounts).⁷ The Centers for Medicare & Medicaid Services issued rules that prohibit the use of pre-dispute arbitration clauses in nursing home admissions agreements.⁸ In the judiciary, some state courts continue to creatively interpret the governing arbitration law—Federal Arbitration

Act (FAA)—to test the Supreme Court’s interpretation and to stymie the use of arbitration in consumer cases. The Supreme Court has consistently held that the FAA trumps state arbitration laws and that arbitration is a matter of contract that is revocable and held invalid under general contract laws and not those that specifically carve out arbitration. Nevertheless, Kentucky held that where a power of attorney does not specifically state that it grants the agent the authority to waive the constitutional rights of the principal to a jury trial, there can be no arbitration. In October 2016, the Supreme Court granted certiorari and the case was heard in February 2017 and remains under consideration.⁹ These rules further compound the sentiment expressed in a series of scathing articles on arbitration published by the *New York Times*,¹⁰ a publication with about 130 million readers. The articles address the use of private adjudication to resolve consumer disputes and characterized them as unfair. This should be a teachable moment for ADR experts and consumers alike, in that the experts should use the very ADR techniques they promote to resolve the disputes surrounding the debate on the utility of ADR.

The Power of Non-Doing—A Mediator’s Point of View

By Simeon H. Baum

As legend has it, 2,500 years ago, at a mountain pass in China, an old sage wrote down the secret of mediation. Non-doing. This message permeates the Chinese Taoist classic attributed to Lao Tzu, the *Tao Te Ching*, which might arguably serve as the mediator’s bible. Non-doing, or *wu wei*, is a subtle idea, yet we can see it operating in mediation training and theory emphasizing facilitation and party empowerment over excessively directive efforts by the mediator. We see it operating, as well, in the ways we mediators handle the mediation process. We let it happen; we do not stand in the way.

Mediation is an art of transformation. It reminds us of the psychoanalytic version of the old lightbulb joke. How many analysts does it take to change a lightbulb? Answer: None; the lightbulb must want to change itself. Unlike judges or jurors, mediators are powerless. We are not the decision-makers. Neither are we litigators, arguing parties into changing their minds or ways. Non-doing is a holistic way to foster the change that leads to dispute resolution. It draws not on one person, but on all people involved in the negotiation—lawyers, clients, and those who influence them. It draws on not one part (e.g., case analysis), but on all parts of each person—emotions, principles, interests, their business context, corporate hierarchies, values, visions, economic pressures, even time itself. All of the levers that impinge on negotiators are recognized in the discussion that enables parties to gain clarity that helps them grow flexible and make a deal.

Being together in the mediation process, rather than any specific activity, is the heart of what enables change to happen. We see non-doing when we refrain from case evaluation and the negotiation morphs into a corporate reorganization that resolves the matter. We see it again, when we refrain from pushing the parties to generate an offer before they have engaged in storytelling or case analysis. Or when we refrain from putting in our opinion and the parties themselves propose terms that produce a deal. It is there when we hold back disagreement, or even outrage, at party or counsel assertions or behaviors, and the matter continues on its march toward resolution. Non-doing is tact. It is found in silence, waiting, patience, deep listening. It is found when we let counsel work out an issue without the mediator. Or when we let parties work out a deal alone, of course with approval of counsel. Hundreds of times, this mediator has ob-

served that restraint and supportive waiting are the bricks on which the path to a deal is paved.

This non-doing is much more than a path of bricks, much more than one or more series of acts of omission. It is a deep listening in harmony with all of the players in the mediation drama and with their context itself. It is a non-doing that intuitively, and makes way for, that which embraces us and tends toward peace.

With this in mind, here is a passage from the *Tao Te Ching*¹¹:

The best (rulers) are those whose existence is (merely) known by the people.

The next best are those who are loved and praised.

The next are those who are feared.

And the next are those who are despised.

It is only when one does not have enough faith in others that others will have no faith in him.

(The great rulers) value their words highly. They accomplish their task; they complete their work. Nevertheless their people say that they simply follow nature.

Reflections on Non-Doing in Negotiations

What makes a crisis negotiator so skilled that he would have the confidence to transform the toxic, anxiety-ridden, and hostile environment of a hostage-taking or a jumper threat into one of voluntary compliance? Who would have imagined that the skills utilized by this hostage negotiator would be similar to those used by the non-doing mediator who uses the Taoism philosophical tradition? Hostage negotiation is the ultimate dispute resolution at work. Here the outcome is not about saving dollars or business relationships but about saving lives. “Getting to Yes” is highly intensified here. It is not done in the comfort of a conference room but on a ledge or a bridge span on a windy and cold day. There are five sets of skills that Jeff Thompson, a New York Police Department crisis communications and conflict specialist, uses to shift the unstable, emotionally charged captor to voluntary compliance.¹²

- 1. Active listening.** The hostage negotiator uses this skill to do nothing. In other words, he listens to become engaged with the captor’s stories and balancing that with a sense of detachment that allows him to have an impact on the storyteller. He begins to understand why this person is in crisis. Not surprisingly, he learns the interests behind the positions. He uses this engagement to reduce the negative emotions that may have caused the crisis in the first place.
- 2. Slowing down the process.** The crisis situation is hyped by the adrenalin of both the person in crisis and the negotiators. Slow it down. Listen actively. Engage. It should come as no surprise, then, that negotiations of this type are never hurried. They take hours.
- 3. Rapport that is marked by empathy.** At this point of the negotiation, rapport has been built. The negotiator takes the extra step to place himself in the shoes of the person in crisis. This is akin to the method actor living the life of the character he will be portraying. Only then will rapport be developed.

Only then will the method actor be at his best.

4. Influence will be a natural byproduct of using all the other skills in the negotiation. The active listening, de-escalation of the situation, and empathy leads to a point of influence. The captor or jumper is trusting and, invariably, will comply voluntarily.

5. Voluntary compliance is the objective of the hostage negotiator and is achieved by use of all the skills noted above and, most importantly, by giving back some of the control the captor or jumper may have lost on the way to the crisis. The captor now finds himself with options that he may not have had originally. A decision is partly made by the captor for a positive outcome.

Conclusion

With the available options for resolving disputes, we know that ADR, despite the challenges, remains a strong option and one that is beyond “alternative.” We know for sure that it will continue to be an integral part of the court system because of its contribution to the cost-efficient and effective way of resolving claim disputes. Take references made in the 2016 Year-End Report on the Federal Judiciary. Chief Justice John Roberts, even as he praised the work of the district court judges, acknowledged the benefits of ADR when he cited those core reasons for using it. “Litigation,” he writes, “is costly, and everyone benefits if disputes can be resolved efficiently with minimal expense and delay.”¹³ We hope you assimilate these words and decide to supplement your dispute resolution options by joining the FBA’s ADR Section. ☺

Beyond Alternative is a column of the ADR Section, for the promotion of ADR as an integral and necessary part of dispute resolution. It includes practice tips, issues, case discussions, commentaries, and answers to questions for all things ADR. Send your pieces, points of view, and comments to fedbaradr@gmail.com.

Endnotes

¹Note (July 1, 1850), in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* (1953).

²Dorothy W. Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 PEPP. L. REV. 4 (1987), citing Address by former U.S. Supreme Court Chief Justice Warren Burger, American Bar Association mid-winter meeting (1984).

³Donna Stienstra, *ADR in the Federal District Courts: An Initial*

Report, FED. JUD. CTR. (Nov. 16, 2011), available at [www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf) (last visited Jan. 27, 2017).

⁴28 U.S.C. § 651 (1998) (“Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under § 2071(a), to encourage and promote the use of alternative dispute resolution in its district.”).

⁵See, Stienstra, *supra* note 3.

⁶See, Alternative Dispute Resolution, U.S. DEP’T OF JUST., available at www.justice.gov/olp/alternative-dispute-resolution (last visited Jan. 27, 2017); see also, INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP, available at www.adr.gov (last visited Jan. 27, 2017).

⁷CFPB proposed rules, available at files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf (last visited Jan. 27, 2017).

⁸Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 42 C.F.R. § 483.70.

⁹See, *Kindred Nursing Centers Limited Partnerships et al. v. Clark et al.*, 478 S.W.3d 306 (Ky. 2015), cert. granted, 2016 WL 3617216 (Oct. 28, 2016).

¹⁰Jessica Sliver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), available at www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (last visited Jan. 27, 2017); Jessica Sliver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES (Nov. 1, 2015), available at www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html (last visited Jan. 27, 2017); Michael Corkery & Jessica Sliver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), available at www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html (last visited Jan. 27, 2017); Jessica Sliver-Greenberg & Michael Corkery, *U.S. Just Made It a Lot Less Difficult to Sue Nursing Homes*, N.Y. TIMES (Sept. 28, 2016), available at www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html (last visited Jan. 27, 2017).

¹¹TAO TE CHING (Wing-Tsit Chan trans., 1963).

¹²Jeff Thompson, Presentation at the New York State Bar Association, Dispute Resolution Section Fall Meeting (Oct. 28, 2016).

¹³2016 Year-End Report on the Federal Judiciary, U.S. SUPREME CT. (Dec. 31, 2016), available at www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf (last visited Jan. 27, 2017).