

# Civil Procedure and Alternative Dispute Resolution

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The eclecticism of the alternative dispute resolution movement is wonderful, uniting as it does the professional aspirations of both marriage counselors and rented judges, and the economic hopes of both consumer advocates and corporate cost control officers. Its breadth is reflected in the evanescent quality of its name: alternatives it seeks, but to what? It is not explicit what the dissatisfaction might be.

At least three different aversions unite under this banner of alternative seeking. Sometimes the champions of alternative dispute resolution seem to be seeking an alternative to law itself; sometimes they seek an alternative to contemporary professionalism in law; and at other times they chiefly desire alternatives to the judicial procedures which are familiar to us. Of course these three aversions are not mutually exclusive: one may simultaneously favor delegalization of social norms, deprofessionalization of the law, and informalization of legal processes. There may be other threads in the pattern of the movement for alternative dispute resolution, but these three are easily identifiable and pose very different issues for contemporary teaching of Civil Procedure.

## I

First, consider the effort to displace law as a basis for dispute resolution. This strand of the alternative dispute resolution movement grows from roots in American communitarianism and ethnic pluralism. It may also draw strength from the Oriental wisdom that counsels forbearance as a general approach to social life. That wisdom, despite all we have heard to the contrary in recent years, is still the choice of many Americans who resolve their individual disputes by "lumping it." Or, if they do not lump it, they limit their responses to grievances to an audience of neighbors, family, or church elders, who may resolve their disputes without resort to legal rules.

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We are told by some on the left that this aspect of alternative dispute resolution is illiberal; in this view, forbearance and law avoidance is, like religion, an opiate to people who ought to be asserting rights to social change. This debate presents a centrally important question, one to be addressed by anyone thinking about law or a professional career in the law. It is, indeed, an issue ubiquitously arising through much of the curriculum of professional education in law. Whether legal control is benign or malign is a question close to the heart of such diverse courses of instruction as Family Law, Corporations, Criminal Law, and Land Use Planning.

Even teachers of Civil Procedure may find opportunities to ask students how far and how aggressively the law should extend its reach into personal affairs. Thus, in considering the qualifications of judges, one may invite students to consider the autonomous power of disputants to arrange their affairs outside the reach of law by conferring dispute resolution power on a nonjudge. The law of arbitrability offers outstanding examples of the law's paternalism.<sup>1</sup> And, in considering the standard of appellate review applied to the decisions of official legal decision-makers, it is useful to compare the variant standard applied when the decision being challenged was made by a private arbitrator selected by consent of the parties: to what extent is arbitration bound by law (pp. 380-86)? In a quite different vein, students considering the problem of identifying a proper plaintiff in public interest litigation may usefully study the right of public interest lawyers to solicit the representation of appropriate plaintiffs (pp. 1132-1136). Each of these homely issues turns in the end on some aspect of our determination, or lack of determination, to thrust the rule of law into circumstances where it may, but may not, be welcome.

In candor, it is unlikely that teachers of Civil Procedure can add greatly to their students' receptivity to the issue of the role of law in the social order. The issue is a lofty one for mere technicians, involving as it does considerations that can be aptly labeled political, social, economic, anthropological, psychological, philosophical, and perhaps even biological. Moreover, we suffer from the disability of special interest, like auto dealers or mechanics trying to appraise the social and economic costs of excessive public dependence on automobiles. Nevertheless, it is valuable for students of Civil Procedure to perceive these relationships between their subject and the central phenomenon addressed by alternative dispute resolution, in this most basic of its manifestations.

## II

Civil Procedure can likewise make a modest contribution to understanding the second aspect of the alternative dispute resolution movement—its impulse to deprofessionalize the law. This strand of the alternative dispute

1. Paul D. Carrington & Barbara Babcock, *Civil Procedure: Cases and Comments on the Process of Adjudication* 215-21, 3d ed. (1983). All following citations, included in parentheses in the text, are to the same book; the limited purpose of these citations is to demonstrate the link between the text and an existing course book; editors of other books are implored to forgive this parochialism; doubtless similar citations could be made to other Civil Procedure casebooks.

resolution movement hums a long familiar refrain. It has deep roots in American frontier populism, and can flourish even in such places as annual reports of Harvard presidents.

Who would say that people are altogether wrong to mistrust lawyers? Our trained psychic aggression is a trait that often causes the matasestization of lesions that would otherwise heal. And professional services are costly, perhaps often costly beyond their intrinsic worth.

Legal education has limited capacity to support, mollify, or resist deprofessionalization of the law. The cost of legal services is affected by the length and cost of training; perhaps services would be significantly reduced in cost to those who have the greatest trouble paying for them, if the training were less time consuming or less expensive. Moreover, law schools could offer training to allied professions, those that might be said to engage in the unauthorized practice of law, and this, too, might affect cost. These are, however, major institutional responses. For reasons of politics, both internal and external, it is not likely that any existing institution will be able to consider them seriously. The cost of training seems to be driven upward by inexorable force; only a stiff competitive market is likely to have corrective effect, if anything can.

There is a bit more promise, perhaps, in our efforts to respond to the deprofessionalizing impulse by modifying the traits of lawyers to make them less hateful, even if they are not less expensive. Many teachers of negotiation and mediation, for example, are engaged in an effort to condition law students away from destructive hostility.

It would not be inappropriate to include a component of instruction on creative negotiation within a course in Civil Procedure. Procedural rights are most frequently used as counters in private bargaining carried on in the shadow of the law; a student could therefore learn some procedure by engaging in moot bargaining in which procedural rights, or the want of them, have significant influence on the bargaining strengths of the parties. Whether such training would really have a benign effect on the traits of students and thus of lawyers remains an open question. Given the present state of the arts, it seems unlikely that the early returns would be large. On the other hand, there are two plausible reasons for undertaking such training in the context of a course having substantial legal content. One is that it may bring the law of procedure more fully to life. The other is that the isolation of skills training in special courses which separates skill from legal content, may risk the unintended consequence of reinforcing the tendency of some students and lawyers to think cynically of their craft, to regard it as a mastery of the arts of interpersonal manipulations. To the extent that this is a consequence, contemporary humanistic skills training may be at risk of backfiring, and contributing to the very self-aggrandizing tendencies of lawyers which give rise to the desire to deprofessionalize.

A possible corrective for the tendency of lawyers to overlitigate may be familiarity with the tiresome intricacies of formal procedure. One who is fully aware of intricacy and its causes may be more inclined to guide clients into alternatives that are less costly in time, treasure, and heartache. At least this is true for lawyers who are loyal to the interests of clients over self-

interest. The conclusion of any perceptive student of Civil Procedure should be that litigation is an experience to be dreaded by litigants.

In an important sense, Civil Procedure is an accumulation of experience with the management of strife. Easy as it is to be critical of the costs of formality, one can say that formality is an improvement over the head-breaking that can result in the absence of such last-resort dispute resolution machinery. Traditional formality is a measured response to the mendacity so often manifested by people who have given themselves over to dispute. Formality assumes, because it must, that there is no trust between disputants; all must be everlastingly constrained and protected even as they are pitted against one another. A lawyer fully cognizant of the costs that result to clients when trust erodes, if he is both rational and loyal to his client's interests, will strive to shelter any remaining elements of trust because it will serve the client's interest in avoiding where possible the calamity of formal litigation.

Whether or not Civil Procedure teaching may condition lawyers to a wiser role in dispute resolution, there seem to be at least two substantial contributions to be made by Civil Procedure to student understanding of the deprofessionalization initiative. We have accumulated much experience with lay dispute resolution. Anyone striving to think seriously about this aspect of alternative dispute resolution should give close attention to the institution of the civil jury. The existence and scope of the right to jury trial in civil cases reflects the populist tradition in which the present movement can find antecedents (pp. 168-214). The operation and the costs and benefits of the civil jury system provide norms for the evaluation of other alternative dispute resolution mechanisms. Moreover, our emphasis on lay participation as a matter of constitutional right can itself be an obstacle to the creation of alternative dispute resolution mechanisms that impede the exercise of that constitutional right (pp. 222-28).

Secondly, the impulse to deprofessionalize the law may be further illuminated by consideration of issues regarding the availability of counsel. Specific issues deserving of study in Civil Procedure include the right to counsel in civil cases (pp. 855-65), the shifting of fees in matters both private (pp. 786-90), and public (pp. 1150-1158, 1200-1221), and the compensation of class attorneys by nonparties (pp. 1079-1085). Each of the matters calls for appraisal of the need for lawyers in the resolution of disputes appropriately controlled by law.

### III

The third, and I believe the most important, of the three strands of the alternative dispute resolution movement is its ambition to informalize legal institutions. The hope of alternative dispute resolution advocates pursuing this objective is to make the law more effective by increasing the efficiency of the mechanisms by which legal disputes are resolved. In this manifestation, the alternative dispute resolution movement is simply a new initiative in the everlasting struggle for judicial law reform. Seen in this light, the intellectual stuff of the movement is almost coterminous with the subject of Civil Procedure. The objective of the movement is also the aim of most legal

scholarship in the area of Civil Procedure, which strives to illuminate and improve the mechanisms of the law to produce legal decisions more efficiently. Civil Procedure teachers and scholars were concerned with those issues long before there was such a movement, and continue now to examine those issues with their students, save only that sometimes they omit the rhetoric or jargon of the alternative dispute resolution movement.

Anyone commencing the study of alternative dispute resolution mechanisms should be helped by historical perspective. Thus, he might usefully note that the Justices in Eyre who pioneered the establishment of the common law courts in the time of Henry I were on the errand of establishing an alternative dispute resolution mechanism for the local institutions manned by Saxon peasants (p. 7). So likewise, the fifteenth century chancellors who eased into the work of adjudicating disputes otherwise headed to the far end of Westminster Hall did so because they perceived a current need for an alternative dispute resolution mechanism (p. 9). How desperately that kingdom needed an alternative dispute resolution mechanism in the late eighteenth and early nineteenth centuries (pp. 629-33)! Is it not an important educational purpose to reckon the kinship of the present movement with the spirits of Jeremy Bentham and Henry Brougham? And was David Dudley Field not the architect of the best alternative dispute resolution mechanism of the nineteenth century (pp. 633-36)? Somewhat more recently, in the early years of this century, Roscoe Pound was one of the leaders of the movement to unify and to simplify court structures, hoping thus to improve their efficiency and effectiveness by eliminating or reducing jurisdictional bickering. Was Pound not advocating an alternative dispute resolution mechanism for his time? And, above all perhaps, were the Federal Rules of Civil Procedure anything other than an effort to informalize procedure, to promote disputes prior to formal trial by providing adversaries with every known inducement and opportunity to settle their differences short of full combat?

A student studying alternative dispute resolution should begin with the lessons to be learned from these previous reforms, each viewed in its time as a great advance, and each in turn becoming the very problem calling for reform. There is some cause to fear that the judicial law reform aspect of the alternative dispute resolution movement may reinvent the wheel, so little interest does it manifest in procedural history. Illustratively, much talk and effort is invested in designing varied procedures for different classes of disputes. Perhaps this is a sound approach to contemporary problems, but should not the advocates of such reforms at least confront the fact that it was the complexity borne of just such differentiation which was the ultimate downfall of common law procedure? And the fact that it was a similar kind of differentiation which the unification movement led by Pound sought to correct. Shall we reestablish the forms of action in ignorance that we are doing so?

The formalities which alternative dispute resolution advocates are prone to dismiss are the product of a millennium of evolution. They reflect a great deal of practical wisdom intertwined with cultural values deeply rooted in the social and political traditions of which they are a part. Our chances of

designing superior mechanisms without knowledge of the ones in place are little better, say, than our chances of developing a superior algebra without knowledge of Pythagoras or his intellectual descendents.

Having sensitized students of alternative dispute resolution to some historical realities, the teacher of alternative dispute resolution might next proceed to examine *seriatim* the various forms of Civil Procedure which are candidates for reduction or elimination. In what particular respects can it be said that contemporary Civil Procedure is too formal and inflicts unnecessary, dispensable steps or stages on reluctant litigants? Alternatively, the alternative dispute resolution teacher might examine some of the basic functions which a procedural system must perform in order to see wherein the standard court procedure is defective. What are those essential functions, and can they be performed with less process? I suggest the following categories of issue which ought to be examined as one considers designing or evaluating an alternative dispute resolution mechanism; my list is the table of contents to my procedure course.

(1) What qualifications are expected of an alternative dispute resolver (pp. 141-68)? Is he to be a neutral participant? If so, how selected? How removed? Can he delegate his authority? If he is professional, is there also to be lay participation for balance (pp. 168-214). What size should the group be? To what extent should the parties be free to decide these questions by contract (pp. 214-21)?

(2) If different neutrals are to be used in different kinds of disputes, how are disputes to be channelled to the right dispute resolver (pp. 229-350)? Does an alternative dispute resolution mechanism in the United States have to be concerned with territorial boundaries? With subject matter limitations? With differing relations among diverse authorities or sovereignties?

(3) If the alternative dispute resolution mechanism is intended to achieve decisions that conform to controlling law, how are dispute resolvers to be made accountable for their fidelity to that law? Is there, in other words, an appellate function to be performed (pp. 351-56)? Must the alternative dispute resolution mechanism produce some findings and conclusions, or an award that is made not in manifest disregard of the law (pp. 356-86)? And if there is lay participation, is the professional dispute resolver to control or guide the deliberations and decisions to prevent lawlessness (pp. 386-441)? To which law does an alternative dispute resolution mechanism adhere, state or federal (pp. 441-81)? And how can it authoritatively ascertain what that law is (pp. 481-90)?

(4) Is the alternative dispute resolution mechanism expected to adhere to any particular procedural norms? Does it, in other words, have a procedure? If so, is the dispute resolver also accountable for procedural error? If so, then effective restraint may require appraisal of the constraints on the timing of appellate review (pp. 491-586). Perhaps the designer of the alternative dispute resolution mechanism might think to informalize by restoring strictness to the rule against appeals from decisions that are not final, but those so tempted should reckon the cost in diminishing the effectiveness with which procedural rules may be enforced.

(5) One wishing to consider the utility of a proposed alternative dispute

resolution mechanism might inquire on what information its decisions might be based. Are potential adversaries required only to make informal statements of their information (pp. 587-97, 639-66)? Or does the alternative dispute resolution mechanism propose to extract information of all kinds from disputants, whether or not disclosure is in their particular interest (pp. 669-732)? Most difficult of contemporary issues, how does the alternative dispute resolution mechanism manage to get available information at a reasonable cost? Any alternative dispute resolution mechanism which finds a fully satisfactory answer to that question will not long be an alternative dispute resolution mechanism, but will soon become *the* alternative dispute resolution mechanism.

(6) One appraising the prospects for an alternative dispute resolution mechanism might wisely consider the need to deter or control misuse of process. How is the new procedure to be protected from the assertion of hopeless claims or dilatory defenses? Perhaps such a student might be usefully informed about demurrers and summary judgments (pp. 733-63). Or perhaps the alternative dispute resolution mechanism seeks a design which will provide incentives to disputants to forbear or settle. Are we to consider criminal liability for perjury in the making of verified statements to the alternative dispute resolution mechanism (pp. 763-67)? Or tort liability for abuse of process (pp. 767-71)? Or professional discipline for irresponsible lawyers (pp. 771-75)? Or the shifting of costs and fees to make losers sorry that they forced issues to final resolution (pp. 776-95)? Or interest charges to deter delay (pp. 796-99)? Perhaps, additionally, the alternative dispute resolution mechanism might hope at least to discourage the use of tactics of obstruction and delay. If so, are compensatory remedies appropriate to correct such tactics (pp. 808-11)? Or limited cost shifts (pp. 811-13)? Or perhaps the dispute resolver should coerce or punish disputants who use deplorable tactics (pp. 813-20). Or would we consider deciding disputes (pp. 820-31), or at least constricting procedural rights (pp. 831-40), on the basis of inferences drawn from the use of inappropriate tactics? Each of the foregoing questions has at least a partial answer to be found somewhere in the Federal Rules of Civil Procedure or the Judicial Code of the United States.

(7) The alternative dispute resolution student may consider the prospects for dealing fairly with impecunious disputants. Does the alternative dispute resolution mechanism charge for its services (pp. 847-55)? Is there to be a right to counsel (pp. 855-65)? To an interpreter (pp. 865-69)? To a transcript (p. 869)? To scientific evidence provided at public cost (pp. 869-872)? The alternative dispute resolution student might profitably examine the law governing the operation of small claims courts and our experience with such institutions (pp. 873-79). Or also the law governing contingent fee arrangements for lawyers and witnesses (pp. 880-90). Or for the third party payment of legal expenses (pp. 890-96).

(8) The alternative dispute resolution student might appraise a particular alternative dispute resolution mechanism by reference to its ability to terminate disputes. Does an alternative dispute resolution mechanism contemplate relief from decisions that are mistaken or fraudulent or contrary

to law (pp. 897-932)? What effect does the alternative dispute resolution mechanism give to its own former decisions or those of other forums on related claims and issues (pp. 932-69)? How does an alternative dispute resolution mechanism take account of the interests of nonparties (pp. 969-93)? Of stakeholders (pp. 993-98)? Of indemnitees (pp. 998-1003)? If we are to design and develop alternative dispute resolution mechanisms that are effective at the resolution of disputes, do we not require answers to such questions?

(9) The student of alternative dispute resolution might wish to consider at least some of the problems of remediation. Does the alternative dispute resolution mechanism have the power to compel obedience to its dictates? If it is limited to monetary remedies, in what ways can its awards be enforced? Are there steps to be taken at the outset of disputes to assure that the alternative dispute resolution mechanism will be able to enforce its decisions when rendered (pp. 62-83)? To what extent can such matters be controlled by contract?

This laundry list easily could be extended. But even as stated, it forms a very substantial agenda for study, study that is an almost essential predicate to serious conversation about judicial law reform leading to the use of alternative dispute resolution mechanisms. A student striving to appraise alternative mechanisms for dispute resolution who has not examined most of these functions of formal rules can have at best only a limited understanding of his task.

Finally, yet another approach to the study of alternative dispute resolution mechanisms is an examination of the law which governs the use of such informalities as settlement. There is a substantial body of such law that is properly embraced within the field of Civil Procedure. As previously noted, such procedural devices as summary judgment, pretrial (pp. 775-76), and discovery, all had originating impulse in the policy of promoting settlement. Other principles, not always included in the Federal Rules of Civil Procedure, pursue the same policy; illustrative are the principles governing the insurer's liability for refusal to settle within policy limits (pp. 799-802), and the nondisclosure of partial settlements to triers of fact (pp. 803-06).

Perhaps even more informative for the student of alternative dispute resolution are the procedural rules requiring the participation of the judge in the settlement of certain kinds of disputes. The class action, itself an alternative dispute resolution mechanism devised as recently as 1966, reveals its softer parts to the student of the settlement process as controlled by the trial judge (pp. 1060-1079). Equally informative is the law governing the formulation and force of consent decrees used to resolve "public interest" disputes (pp. 1167-1180).

In all these respects, Civil Procedure provides appropriate and even essential insights into the movement to informalize legal processes.

### Conclusion

So viewed, Civil Procedure is the basic course in dispute resolution. In the tradition of university service as a repository for received traditions, values, and experiences, Civil Procedure informs all our efforts to resolve disputes. It



is, of course, also an obligation of university teaching to critically evaluate those traditions, values, and experience; our subject is not merely what the present forms of legal procedure are, but what they ought to be. Hence the alternative dispute resolution movement is a welcome rekindling of our elderly lamp. Let us make the most of this contemporary increase in the illumination.