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A POST-CONFERENCE REFLECTION ON SEPARATE ETHICAL ASPIRATIONS FOR ADR'S NOT-SO-SEPARATE PRACTITIONERS

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I. INTRODUCTION.....	705
II. ADR'S SEPARATENESS.....	707
III. ADR'S LACK OF SEPARATE PLAYERS	709
IV. ADR WITHOUT SEPARATE ETHICS RULES	710

I. INTRODUCTION

I arrived at this conference¹ with a background in professional responsibility, but I was a relative newcomer to the practice and ethical issues of alternative—or “appropriate”—dispute resolution. As a law student in the 1980's, I recognized the term “ADR” only as an acronym used in legal periodicals and conversations. It was, I knew, the general idea of a book (which was commercially very successful and, therefore, caused jealousy among faculty members) that I had never read.² Although ADR was “taught” in a course or two (which I never took), it was, for me and most of my classmates, simply not a big part of the legal landscape that we were being trained to enter.

My experiences in law practice also did not expose me to anything I perceived as ADR. As a law clerk, I worked for a federal judge who dealt with cases in litigation, not the alternatives to that adversarial process.³ As a government lawyer working on investiga-

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1. “The Lawyer's Duties and Responsibilities in Dispute Resolution” Symposium at South Texas College of Law (Oct. 25, 1996).

2. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN* (1981) (discussing a strategy for successful negotiations).

3. I observed as a law clerk what I have come to think of as a form of ADR at least once. I watched an oral argument on appeal from a federal judge's order dismissing a civil case that was factually compelling and seemed, at least on the pleadings, to be a meritorious claim. The trial judge had dismissed the case in a fit of anger that was out of both

tions and criminal prosecutions, I continued to focus on more adversarial processes (although we did, of course, plea bargain).

My lack of exposure to, and inexperience with, ADR is, I think, still typical of the experiences of most law students, practicing lawyers, and even law professors. ADR is still, within law school curricula and in legal practice settings, a separate thing that is dwarfed by more litigation-based (or litigation-anticipating) adversarial forms of dispute resolution.

Most lawyers would not identify themselves as ADR practitioners. ADR's thinkers, however, exemplified by the authors of these symposium papers, recognize—indeed, they often embrace—the separateness of their teaching, and of their scholarly identities and approaches, from those that are more traditionally legal.

At this conference, a central topic of discussion was ADR's ethical separateness. There was a shared sense that ADR providers and practitioners confront a range of ethical issues that differ from those

human and legal proportion, due to a supposed infraction by plaintiff's counsel. As a result, going into the oral argument, the appellate judges and we law clerks seemed to have mentally marked the case as a "slam dunk" reversal. That expectation was strengthened when appellee's counsel—the winner of the erroneous dismissal in the trial court—failed to arrive at court by the scheduled argument time, apparently due to traffic problems on that snowy morning. (Although each judge probably entertained a thought of summarily reversing at that moment, they instead merely stalled by moving the case down on their argument list.) The missing lawyer arrived eventually and the court later called the case (again) for oral argument. Appellant's counsel explained, with great force and ample legal authority, the trial court's error. Appellee's counsel then began his argument. He got half way through his apology for being late when the judges began to pepper him with impossible questions about the trial court's indefensible decision.

And then the ADR began. The presiding judge rolled his chair back and his colleagues leaned their heads in toward his. They had an extended, whispered conference. The lawyer, who was in the middle of his oral argument as this occurred, simply stopped talking. After five or so minutes of silence, the presiding judge rolled his chair back up to his microphone and said, "Would counsel please approach the bench?" Although the attorneys were a bit stunned at this odd development, they both came forward. This required stepping over a red velvet rope that was strung about three feet off the ground. (Appellee's counsel, who already was having a bad day, tripped a bit as he tried to hurdle this rope.) The judges then told them, in essence, that the court would be sending the case back to the district court for a trial on the merits unless the parties could work something out immediately. About thirty minutes later, after various huddled talks that occurred in the back of the courtroom while the panel was hearing arguments in other cases, and some trips to the pay telephones outside the courtroom, the lawyers returned together to the podium. They informed the court that the appeal was being withdrawn because the case had been settled.

I happened to walk past the plaintiff and his family as they waited for an elevator afterwards. They had waited all day for the oral argument to occur, witnessed the odd turn of events during the argument, and then accepted a settlement offer from defendant's counsel. I did not need to hear their conversation to know that they felt they had received a very stunning and tangible, if somewhat unorthodox, form of justice.

that confront non-ADR lawyers. On this view, because our rules of professional responsibility are geared toward more adversarial forms of legal practice, they at best provide no answers and may provide wrong answers to ethical questions that arise in ADR. One solution would be to create new, separate, "role-specific" ethics rules for ADR practitioners.⁴

This essay reflects some skepticism about the achievability and desirability of ADR separatism.⁵ Although ADR practices are conceptually distinguishable from more traditional forms of lawyering, ADR's legal practitioners are, and will remain, professionally indistinguishable from their supposed counterparts. Indeed, they are largely one and the same people. The proliferation of ADR forms throughout legal practice has created lawyers who sometimes play ADR roles and other times, often in the same practice settings, play more traditional lawyer roles. This inseparability of ADR lawyers from non-ADR lawyers generally means that, for as long as lawyers remain free to move into and out of traditional and ADR practice forms, creating separate ethical regulatory schemes for ADR practitioners will be extremely problematic.

II. ADR'S SEPARATENESS

Is ADR a separate thing? I certainly see its distinct reality, to a point. Separateness from the traditional, adversarial, litigious approaches to pursuing disputes is, after all, the meaning of the "A" in alternative dispute resolution. To summarize grossly, ADR offers processes that can be uniquely inquisitorial, participatory, consensual, and empowering.

I also see the desirability of dispute resolution approaches that differ from the tradition of one disputant taking the other to court. The growth of ADR forms and their continuing promise demonstrate not only that the alternatives are real in the eyes of disputants and

4. See generally Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997) (discussing the need for ethics, standards of practice, and rules in ADR). As Richard Abel once wrote, albeit in a different context, the issue of "whether the obligations of lawyers should be role specific [is] a central (perhaps the central) question in legal ethics." Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 645 n.44 (1981) (emphasis in original).

5. Although I am referring to ADR as if it is a unitary thing, the acronym of course embraces a spectrum of practices that probably defy cataloging. So too do litigation, adversarial lawyering, and other traditional practices that I am placing in juxtaposition to ADR. In addition, that very juxtaposition—ADR v. traditional dispute resolution—is, well, ironically adversarial in nature.

their representatives, but that these alternatives are relatively attractive and, thus, that they can succeed when they compete with more adversarial forms in the market of dispute resolution services. ADR also seems to make many of its practitioners—both the parties' representatives and the so-called "neutrals" and others who play mediating roles—feel good about what they are doing with their talents. Among the actual ADR practitioners with whom I spoke at this conference, a predominant attitude (and not an undeserved one) was that they often accomplish actual good for actual people. The practitioners believe that doing good for disputants distinguishes them from many of their peers and from their own experiences in the traditional world of litigation and adversarial legal practice.

Not surprisingly, the understanding that ADR processes are separate from and more elevated than traditional forms of lawyering has produced a specific focus on ADR ethics. The general concept, which Professor Menkel-Meadow has set forth brilliantly, is that ADR's separate forms, objectives, and methodologies generate ethical questions that are unique to ADR roles.⁶ These questions include: (1) whether third-party neutrals may properly use or reveal any of the confidential information that they receive from parties during arbitration, mediation, or some hybrid ADR proceeding; (2) which conflicts of interest should be imputed from non-ADR lawyers to their colleagues, thus disqualifying them from participating in an ADR proceeding; and (3) what type of past participation in ADR should disqualify a lawyer and/or her colleagues in a law firm from future employment opportunities. These are core "appearance of impropriety" issues. If the threshold definition of an ethics problem generally is lower in ADR contexts than it is in traditional lawyering, it would seem that separate ethics rules should be enacted to make that threshold enforceable.

In the past decade, of course, ADR adherents have already made some progress by enunciating separate standards—if not enforceable rules—of professional ethics in ADR contexts.⁷ I admire this process, which I call ethical separatism, for its sustained and careful thinking about issues that go to the heart of ADR's integrity. The practical reality that this process needs to face more directly, however, is not the ethical implications of certain behaviors in ADR. It is, instead,

6. See generally, Menkel-Meadow, *supra* note 4.

7. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994); ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (Society of Professionals in Dispute Resolution (SPIDR) 1986); ABA STANDARDS OF PRACTICE FOR LAWYER-MEDIATORS IN FAMILY DISPUTES (1984), reprinted in NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY & PRACTICE* app. D at 8, 22 (2d. ed. 1989).

the intertwined identities of the ADR actors who this process is evaluating and potentially regulating. First, we need to acknowledge that we are talking about lawyers. Then we must recognize how that reality limits anyone's ability to regulate ADR ethics separately.

III. ADR'S LACK OF SEPARATE PLAYERS

When an academic conference attracts a sizable crowd, it is reasonable to wonder why. When an academic conference includes breaks, receptions, and meals featuring good food and wine in a comfortable setting, it is reasonable to mingle. The South Texas College of Law offered all of the above, and so I asked people at the conference why they were in attendance. The people I met—perhaps a majority of the conference attendees—explained their presence simply by identifying themselves as practicing lawyers. Their practice settings varied. Some were sole practitioners or provided legal consulting services in a non-law firm setting. Many practiced in large, private law firms. Not one attendee identified himself or herself as exclusively an ADR provider or participant. Instead, in varying ways, these lawyers said that they “do some” ADR; that judges increasingly are directing them to do more ADR in conjunction with litigation (so called “court-annexed ADR”); and that they and their firms regard ADR as a lucrative growth area in private legal practice.

Within this “lawyers” category, the conference attendees included a professional subset that is also representative of ADR practitioners generally—former judges.⁸ In every jurisdiction, it is now common to find experienced, senior lawyers who have returned to private practice after years of judicial service. Among other professional pursuits in private practice, many of these ex-judges provide private judging- or mediating-type services to disputants. Although ADR in theory offers alternatives to the methods and processes of adversarial litigation, the reality of former judges presiding over a significant portion of ADR activity contributes to my skepticism about its ability to be something separate and distinct.⁹

8. See Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 95–98 (restating the introductory remarks of Edward Sherman); *Id.* at 104–05 (restating comment made by Robert Moberly).

9. I of course mean no disrespect to, and I am not criticizing, any of the former judges who now performs an ADR role. I also must note that, among the conference participants, former Judges Frank G. Evans and Ruby Kless Sondock made it quite clear in their remarks that they understand their current roles to differ quite significantly from their former roles as sitting judges. I am suggesting that, to public observers of ADR processes, this “meet the new boss, same as the old boss” reality reduces ADR's ability to be understood generally as something distinct from in-court judging. See *THE WHO, Won't*

The project of enacting separate ethics rules for ADR practitioners strikes me as generally futile because—as the title of this symposium expresses, perhaps unintentionally—there are and will be “lawyers . . . in dispute resolution.” Put another way, ADR cannot define its ethics to the exclusion of ethics for traditional lawyers because ADR and its practitioners are rooted in the traditional legal profession.¹⁰ More specifically, the reality of repeat players with multiple professional identities—lawyers moving into and out of ADR and non-ADR roles—suggests that it will be practically impossible to craft attorney disciplinary rules that can give effect to the differing, higher purposes of ADR, while maintaining the behavioral boundaries for lawyers performing traditional non-ADR work.¹¹

IV. ADR WITHOUT SEPARATE ETHICS RULES

If a separate ethical code for ADR lawyers is not to be, is that regrettable? I think not. One of the last things any lawyer or the legal profession needs to digest is a new, complicated scheme of disciplinary rules. (We already have so many that it is a major problem simply to restate them.¹²) We particularly do not need new codes that will de-

Get Fooled Again, on WHO'S NEXT (MCA Records 1971). I also suspect that at least some former judges would quite effectively oppose any efforts to enact new ADR ethics rules that restrict (more stringently than existing conflict-of-interest-rules) ADR practitioners' abilities to engage, concurrently or subsequently, in non-ADR practice forms.

10. I would claim, in other words, that Walter O'Malley never moved the *Brooklyn Dodgers*. (I don't expect Houston sports fans to find this persuasive if and when the Astros and/or Oilers begin to play their home games in some other city.) And, to push the analogy further, ADR in the legal profession is like today's Dodgers in Los Angeles—not going anywhere. Cf. John H. Wilkinson, *Preface* to DONOVAN, LEISURE, NEWTON & IRVINE ADR PRACTICE BOOK viii (1990) (“[A] number of firms have made a substantial commitment to ADR and encourage their clients to use it whenever it might be of benefit. Concomitantly, corporate use of ADR is growing by leaps and bounds.”).

11. See Michael Moffitt, *Loyalty, Confidentiality and Attorney-Mediators: Professional Responsibility in Cross-Profession Practice*, 1 HARV. NEGOTIATION L. REV. 203, 211 (1996) (discussing the ambiguity in the professional guidelines that govern an attorney's services as a mediator).

12. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 1, 1996); Jacob A. Stein, *An Embarrassment of Ethics*, 10 WASH. LAW. 68 (1996).

Ethics, legal ethics in particular, has taken its own place within the complexity industry and it too has passed into the custody and control of experts. To keep abreast of the subject, one must have the ABA/BNA *Lawyers Manual on Professional Conduct*, the Model Code, and the Rules. In addition, keep at hand *The Law of Lawyering*, two volumes, Hazard and Hodus [sic]. Then there are the opinions of one's own local ethics rules committee and one's local bar counsel.

There are legal ethics experts getting fees in the \$300- to \$500-an-hour range for sage comments on the complexities of legal ethics. When they condescend to explain how the Disciplinary Rule became a Model Rule as modified by the local

fine duties and responsibilities for lawyers performing ADR roles that will, as bases for lawyer discipline, define duties and responsibilities that differ from those that the same lawyers will be measured against when they perform traditional, non-ADR roles.

A less onerous alternative, of course, would be to craft and enact new ethical guidelines for ADR practitioners. I am confident that such recommendations, like the Ethical Considerations and Comments that already exist in respective state's rules governing lawyers, would give pause to lawyers whose own ethical compasses already point true but would mean almost nothing to the lawyers who most need the guidance. We also do not need to create formalities that may chill the development of creative new ADR approaches or drive practitioners who are interested in those approaches out of the legal profession.

Instead, recognizing that we lawyers are (or at least might be at various times throughout our professional lives) both traditional and alternative in our approaches to disputes, we should embrace the project, both in terms of confronting ethics issues and generally defining the behaviors and approaches that are appropriate to varying roles within our one professional identity. In short, the project should involve more discussion and education¹³ than regulation. That project will mean convincing practicing lawyers—particularly those who already do some ADR but would not attend this conference or read this symposium at their own initiative—of the value of an ethics focus in their ADR activities.¹⁴ In addition it should include, in law school classrooms and clinical settings, more concerted efforts to address ADR ethical issues.

rules, they do so in a tone that forgives the ignorance of those who have no time for the daily study of the scrolls.

Id. at 68.

13. An excellent step will be the collection and publication of ethical "best practices" in ADR. See Menkel-Meadow, *supra* note 4, at 415, n.32.

14. Mandatory continuing legal education requirements, particularly if they included ethics credit requirements, would certainly help to get these messages out.

