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The Ethical Compass

Should There Be a Rule Compelling ADR? Follow the Road Where a Thousand Flowers May Grow

By Elayne E. Greenberg

"One day Alice came to a fork in the road and saw a Cheshire cat in a tree.' Which road do I take? 'she asked. 'Where do you want to go?' 'I don't know,' Alice answered. 'Then,' said the cat,' it doesn't matter.'"[1] So too, in 1994 NYS reached the proverbial fork in road as our state continued its foray into dispute resolution.[2] Which road should New York State proceed down to promote the development of ADR in our state? Should New York State adopt a mandatory rule compelling ADR or should New York State embrace a more voluntary approach to ADR use? Expectedly, an individual reader's initial preference for one approach or the other may be based on whether she is an ADR enthusiast or naysayer. Yet, New York State's decision to support a voluntary approach rather than a mandatory approach to ADR is actually a nuanced one that respects New York's court culture and adheres to conflict resolution system design principles.[3] First, I explore the rationale for, and gains made under, New York's chosen path, an evolutionary approach to ADR development. Then, I contemplate the lost opportunities on the road not taken, mandatory ADR. Finally, at our current fork in the road, I invite you to consider which path we should take as we continue to advance the responsible development of ADR use in New York State.

In 1996, New York's beloved former Chief Judge Judith Kaye decided that New York State should proceed down a voluntary, experimental ADR course. This decision was informed by the recommendations of Chief Judge Kaye's New York State Alternative Dispute Resolution Project Task Force that the Chief Judge had formed in 1994. This Task Force was aptly lead by co-chairs Fern Schair and Margaret Shaw who guided the Task Force through two rounds of statewide public hearings, a survey of existing New York ADR programs, an analysis of other States' incorporation of ADR, an Interim Report, a Proposed Final Report, all culminating in the Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project.[4] In relevant part, the Final Report advised that New York should first embark on an experimental phase of ADR in which judicial districts throughout New York State would try out different forms of ADR for different types of cases. [5]

New York State's decision to proceed with a voluntary instead of mandatory approach was a well-reasoned determination. It recognized that the New York court culture is conservative, and that court reform proceeds at glacial speed. It respected that any discussion about ADR evoked a vibrancy of opinions and provoked the strength of personalities that make New Yorkers New Yorkers. And, it was consistent with the ADR's core values of voluntariness and self-determination.[6]

Our then Chief Administrative Judge Jonathan Lippman aptly characterized this evolutionary approach as one in which the New York State Office of Court Administration "let(s) a thousand flowers bloom."[7] Evidence abounds that this policy of encouragement, rather than coercion, has, in fact, led to the proliferation of successful ADR advancements, excited an increasing groundswell of ADR supporters, and shifted our legal culture from a litigation-centric to a settlement-focused culture. The New York Office of ADR, stewarded by the ever-positive Dan Weitz, serves as a stimulus and invaluable resource for ADR innovation and development in court-connected and community dispute resolution ADR programs and standards. During this time, some of our courts have shifted from tentative experimentation to a meaningful integration of ADR in their case management.[8] For example, our New York State Supreme Court Commercial Division has a mediation program.[9] In another noteworthy example, our New York State problem–solving courts have designed dispute resolution systems to address such challenging issues as mental health, domestic violence, and child permanency planning.[10] And, the "let a thousand flowers bloom" approach has encouraged mediation programs to selectively choose from a range of mediation ideologies including transformative, understanding-based, facilitative and evaluative, recognizing that each ideology has its own value and contribution.

Continuing, lawyer-initiated ADR activism plays a significant role in contributing to NYS ADR advancements. How different the legal community's reaction to ADR is today from fifteen years ago, when many New York lawyers were debating whether ADR was actually the death knell or the elixir to the practice of law. In 2010, increasing numbers of lawyers are seeking training in ADR, clamoring to get on ADR rosters, and more regularly using ADR in their case management. In another example, lawyers are actively experimenting with new

types of ADR lawyering such as collaborative law and encouraging other colleagues to jump on the bandwagon. One further illustration, the formation of our Dispute Resolution Section and the increasing numbers of New York State Bar Association Substantive Sections that also have ADR subcommittees, evidence the growing interest in ADR in New York.

Yet, many ADR enthusiasts still favor a mandatory approach. Some have remained hopeful that the Office of Court Administration would enact a mandatory ADR rule once courts and consumers of ADR realized its benefits. Hope springs eternal. Courts and consumers are increasingly realizing the benefits of ADR. However, there is still no mandatory rule. Supporters of a mandatory ADR rule point to states such as Florida, Texas and California who have mandatory ADR rules[11] and question if New York should follow suit. Yes, New York judges have discretion to order parties to mediation,[12] but discretion is not enough to sustain consistent use of ADR. Proponents of mandatory ADR point to the inconsistency and underutilization of ADR services in New York State that they believe would be remedied by a rule mandating ADR. A mandatory rule would serve as a proclamation that dispute resolution is how we resolve cases, rather than merely a good idea that might be considered at the discretion of the judges and lawyers.

And, dear reader, we have arrived at another crossroad in our travels. Looking back, we can be proud how far we've come and applaud the ADR evolution that many of you are a part of. Going forward, we need to decide whether New York should continue down its road where we "let a thousand flowers bloom," or take a different road and adopt a mandatory ADR Rule. As the Cheshire cat advised, "It depends where you want to go."

Where does New York want to go? For some, the answer is based on whether we value encouragement or compulsion, mandates or choices. Still others question whether a mandatory rule might stifle the richness of the New York ADR culture and encourage compliance at the expense of meaningful participation. For others, an alternative query to consider is whether New York has evolved into such an ADR receptive culture that a mandatory ADR rule would just be reinforcing what is already good practice. Ours answers will determine the road we should take. Any road, without making an informed determination, won't do. New York, unlike Alice in Wonderland, needs to be clear about where we want to go with the continued development of ADR in New York because ADR in New York State matters.

Endnotes

1. Lewis Carroll, Alice's Adventures in Wonderland (MacMillan and Co. 1865).
2. Kathryn C. Sammon, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 St. John's J. Legal Comment. 923 (Fall 2008). Chief Judge Judith Kaye appointed a task force, co-chaired by Margaret Shaw and Fern Schair, to review the state of ADR in NYS and the country and make recommendations about how to proceed. *See* Ctr. for Ct. Innovation, *A Decade of Change: The First 10 Years of the Center for Court Innovation* (2006), *available at* http://www.courtinnovation.org/_uploads/documents/10th_Anniversary1.pdf.
3. Amy J. Cohen, *Dispute System Design, Neoliberalism, and the Problem of Scale*, 14 Harv. Negot. L. Rev. 51 (2009).
4. Schair, Fern and Shaw, Margaret, "*Court–Referred ADR in New York State: Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project*," (May, 1996).
5. *Id.* at 8.
6. Chief Administrative Judge Jonathan Lippman, *Remarks from the Inaugural Fordham Dispute Resolution Symposium, "ADR As A Tool for Achieving Social Justice": Achieving Better Outcomes of Litigants in New York State Courts*, 34 Fordham Urb. L. J. 813 (2007) [hereinafter Judge Lippman Lecture].
7. *Id.* This is a frequently heard response by Chief Judge Lippman when asked if ADR would be mandatory, including at the NYSBA Committee on ADR Annual Meeting, "Shall We Dance," on January 29, 2004. This is a common paraphrasing from Chairman Mao Zedong's quote, "Letting a hundred flowers bloom and a hundred schools of thought contend is the policy for promoting progress in the arts and the sciences and a flourishing socialist culture in our land."
8. *See* New York State Unified Court System, Alternative Dispute Resolution *available at* http://www.nycourts.gov/ip/adr/ (last visited Feb. 10, 2010).
9. *See* New York State Unified Court System, Commercial Division *available at* http://www.nycourts.gov/courts/comdiv/ (last visited Feb. 10, 2010) [hereinafter Commercial Division].
10. *See* Judge Lippman Lecture, *supra* note 6.
11. *See* Craig A. McEwen, Nancy H. Rogers & Richard Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 9 Minn. L. Rev. 1317 (1995); *see also* Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 7 U.S.F. L. Rev. 1031 (2003).
12. *See* Commercial Division, *supra* note 9.

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