Beyond Settlement: Reconceptualizing ADR as "Process Strategy"

Theory-of-Change Symposium

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Deborah Thompson Eisenberg argues that it is time to retire the confusing, incomplete, and myopic acronym of "ADR." She recommends that we reframe ADR under the more inclusive and flexible concept of "process strategy," a field that studies and teaches "the process strategies that lawyers and others use to help individuals, communities, organizations, and nations accomplish change or address conflicts." She is professor of law and faculty director of the Center for Dispute Resolution at the University of Maryland Francis King Carey School of Law.

The dispute resolution field is in a time of transition. Many professors and practitioners who blazed trails for us have moved on or will retire in the foreseeable future. While we celebrate the tremendous growth of ADR over the past few decades, some are concerned, if not downright panicked, that the future of ADR in the legal academy and in the courts looks bleak.

Consistent with our field's mantra of turning crisis into opportunity, let us welcome this challenge with the same courage, candid self-reflection, and open-minded creativity that we ask of mediation participants.

I believe that it is time to retire the term "ADR." Reframed to be forward-looking, this time of transition (or crisis, if you prefer) presents an opportunity for us to reconceptualize our field to encompass the broad scope of our collective work.

Confusion About the Nature of Our Field

As I write this piece for the "Theory-of-Change" symposium, I confess that I am struggling a bit: what is the "theory" that we are changing? As a field, we lack a unified theoretical underpinning. The ADR field grew rapidly, grounded in a binary dichotomy of "litigation" versus "settlement" or "justice" vs. "peace." The value of ADR as presently conceptualized depends, in part, upon dissatisfaction with litigation and the desire for less adversarial and more efficient "alternatives" that value self-determination and neutrality. We study and teach processes that will achieve procedural justice and positive outcomes for the participants and efficiency and other benefits for the judiciary. Yet, we tend to be a *how*-focused field – *how* the trifecta of negotiation, mediation and arbitration processes should be conducted, *how* these processes impact the parties and other stakeholders, and *how* these processes compare to litigation. This is important and necessary work, but it is not sufficient.

Many people outside of our field view ADR as one "black box," lumping all processes together without appreciating the differences between them. (How many of us have had to explain to colleagues that ADR is not simply arbitration? Or mediation?)

Worse, some perceive us as Pollyannaish proselytizers who advocate ADR processes that will magically produce peace and harmony in the world. Of course, this is not true. We do not hold hands and sing kumbaya at our conferences (although some of us have been known to belt out some karaoke). Many ADR scholars have examined process options from a critical lens, and we should continue to do so. Our field recognizes the need for transparent data and rigorous research about the use and impact of a variety of processes, and much exciting scholarship in this regard is emerging.

But the perpetuation of *specific* processes should not be our goal. Consider mediation, for example. Even if the use of court-based mediation declines, ADR is still relevant to society and important for law schools or lawyers. Our field is much larger than any one process.

In a time of extreme polarization in our society, when democratic civil discourse and the rule of law seem to be threatened, our field is more important and relevant than ever. *We teach and write about this stuff* – dialogue across divides; communication and persuasion; the sources, cycle, and psychology of conflict; strategies to prevent, manage, and resolve conflicts; strategies to accomplish systemic change; the impact of lawyering process and negotiation strategy on outcomes. We need a new moniker and theoretical framing to capture what our field means and why it matters to lawyers, courts, and society more generally.

Problems with the ADR Moniker

First, we need updated branding that is more precise and less limiting than ADR. All three terms that label our field – Alternative, Dispute, and Resolution – are incomplete, myopic, and confusing to outsiders.

"Alternative" taints the field as being either subversive (which I personally like) or second best to litigation. Many of us either change the term to "appropriate" or drop it altogether because we incorporate litigation into our teaching and scholarship.

"Dispute" (and its cousin "conflict") sounds reactive in nature, focused on matters that have already devolved into litigation or some other oppositional posture. "Dispute" also trivializes the subject matter addressed by the field, sounding too much like small claims bickering between neighbors. That excludes the segments of our field that focus on proactive processes to make change or structure relationships.

Finally, "resolution" keeps us mired in the false "settlement" versus "justice" dichotomy that early critics of the field established. "Resolution" perpetuates the stereotype that a matter needs to "settle" for a process to be successful. Indeed, sometimes the desired goal requires a competitive approach such as protest or impact litigation. "Resolution"

also fails to recognize the range of our field's work in areas such as public policy conflict resolution, conflict de-escalation and prevention, restorative and transitional justice, and dispute system design.

We need a descriptor that is more inclusive and comprehensive. At various times, the field has experimented with terms such as problem solving and lawyering, but they likewise fail to capture the full scope of our field (and "problem solving" has some of the same issues as "settlement" or "resolution").

Our Field is About Process Strategy

The business world uses the concept of "process strategy" to describe the processes that businesses use to achieve their competitive priorities or provide something of value.

I propose that the legal world likewise use something akin to "process strategy" as a broader framing of our field: ***We study and teach the process strategies that lawyers and others use to help individuals, communities, organizations, and nations accomplish change or address conflicts.***

Framing our field in terms of legal process strategy would accomplish several goals. First, it describes what we hope law students learn as they transition into their work as lawyers, judges, and leaders. The process strategies they use to accomplish client goals or positive change are at least as important tools as the governing substantive law. In this regard, our field undergirds nearly every subject taught in law school, especially civil procedure, international law, business transactions, public law, public interest lawyering, as well as leadership and professionalism. The future is interdisciplinary. Many of us already teach across the curriculum, and more of us should do so.

Second, the process strategy lens emphasizes that the field has advanced far beyond the traditional trifecta of negotiation, mediation and arbitration. It frees us to be nimble, adapting to changing needs and technologies. Rather than asking, "How can we increase the use of mediation?" or some other specific process, we should, like a mediator, ask an open-ended question: "What are the desired interests and goals [of the client, community, court, or organization] and which process strategies can best be applied to accomplish them?" This framing frees us to explore not only *reactive* processes that respond to conflicts but also *proactive and preventive* legal process strategies (such as transactional deals, law or policy reform, consensus-building, and organizational change).

Third, a broader framing allows the field to study the application of process strategies to accomplish social justice, such as restorative justice and public policy conflict resolution. I see this as an area of tremendous growth potential. At last year's clinical law conference, those of us who teach at the intersection of clinical law and ADR noticed many panels related to the use of innovative process strategies to accomplish systemic social change. Law school ADR programs are exploring the application of process

strategies to stem the school-to-prison pipeline, prevent sexual assault, increase access to justice, decrease evictions, address divided communities, and accomplish other systemic social reform goals. Without labeling their work as ADR, clinical law professors likewise are activating dispute resolution methodologies to tackle a range of issues, such as environmental protection, criminal justice reform, and community development. Our field should collaborate with our clinical colleagues, who are eager to integrate our strategic process knowledge and skills into their courses and client representation.

As we stand on this precipice of a changing ADR landscape, let us stop staring down towards certain doom.

As the sage advice goes: “Look where you want to go.” Let’s take a step back from the ledge and consider the horizon of unexplored opportunities for our teaching, scholarship, and applied work the field of process strategy.