

THE MYTH OF LITIGATION: BUILDING A SYSTEM OF DISPUTE RESOLUTION . . . And Doing What Makes Sense

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ADR as a System

In many circles, ADR still means *alternative dispute resolution*. Many of us in the business of conflict resolution have been working for years to redefine the familiar ADR acronym to represent *appropriate* dispute resolution. This definitional shift has slowly begun to occur; for it to really mean something will require us to re-examine the conceptual nature of dispute resolution, as a whole, and the systems that are driven by disputes and their resolution (e.g. our court system, the practice of law, mediation, arbitration).

Presently litigation, arbitration and other more adversarial oriented processes are seen as the primary courses of action to pursue when disputes arise. Regardless of how committed we are to changing the acronym's meaning, the majority of dispute resolution users still perceive other dispute resolution processes to be alternatives to the more traditional win-lose institutions. Mediation and other forms of facilitated conflict/dispute resolution and other forms of *alternative* dispute resolution processes are, for the most part, seen as separate and distinct from the adversarial stream, as well as from one another. Changing *alternative* to *appropriate* is a step in the right direction; we need to follow through by working to create a dispute resolution (DR) *system* that encompasses all DR mechanisms and even creates new ones as the need arises. This systemic approach would provide organizations, as well as the public at large, with more responsive, efficient and timely processes. With the creation of this more organic and "holistic" approach, those parties involved in disputes, as well as their advocates and representatives, would be able to choose the *appropriate* process, or combination of processes, from the selections offered on the "menu". The choice would depend upon the nature of the dispute and what would prove most beneficial and cost-effective at the point in time in the dispute. Professionals in DR would become process designers as well as service providers.

In the past those professionals (judges, lawyers, mediators, arbitrators, negotiators, consultant/experts) involved in dispute resolution have pursued DR processes from an "either/or" perspective. By engaging in this "systems" approach to the resolution of disputes, DR practitioners can provide, the clients and the communities they serve, a more comprehensive and responsive range of services which can be implemented anywhere along the progression of the dispute. ADR (appropriate dispute resolution) would be viewed as a continuum where one could move from one process to another until the matter is efficiently and effectively resolved.

Substantive issues, which are negotiable, can be negotiated. Issues that are seen as negotiable, with the assistance of an objective third party, can be mediated. Issues that could benefit most from an arbitrated decision can be resolved by an arbitrator or by mini-trial. Any issues that require the procedures, protections, and other elements that the court system provides can be litigated. Other aspects of disputes could also be dealt with more creatively as parties begin to look at dispute resolution as a system of strategic interventions.

Rather than argue each and every procedural conflict that may occur throughout the course of a conflict, parties could take advantage of the same systems approach as opposed to pursuing the most costly, time consuming route each time. This integrated strategy would also serve as a foundation for creating more collaboration among those involved in the DR professions. Dispute resolution professionals would likely form strategic partnerships, short or long term, that would serve clients most effectively.

A few years ago mediators, working in areas other than labour-management, found that one of the biggest challenges was finding ways to inform the public that there were alternatives to going "full steam ahead" into litigation. It made sense at the time to distinguish among the various processes that one could choose in order to inform the public as well as promote the advantages of one over the other.

The Changing Role of Lawyers and Judges

The public is now becoming better informed. Litigants and their lawyers who, in the past, would inevitably wind up in litigation, are now more actively involved in seeking more effective, efficient ways of reaching resolution. Parties in dispute are asking lawyers questions about more efficient approaches to legal disputes and, in some cases, are making decisions about representation based on whether or not a lawyer pursues a wider range of DR processes. Lawyers are beginning to re-assess the practice of law as clients become less inclined to follow the route to the courthouse steps. As it becomes more evident that other approaches to resolving disputes are proving successful and cost effective, partners and associates are faced with some difficult questions.

When litigation was assumed to be the first course of action to be taken, there was little or no question with respect to whether it was appropriate or not. Now lawyers are struggling with the knowledge that there are other processes that could serve their clients more effectively that, in turn, will result in reduced litigation time and reduced litigation fees.

In principle most would say that this should not be a problem, much less an ethical conundrum. Lawyers are retained to provide the best overall legal services for their clients. Most would also agree that those services would include exploring the most effective options for reaching fair and reasonable settlements. The process or processes chosen would seek to minimize litigation costs and, in some cases, preserve and even enhance valuable business relationships. In reality the concern expressed behind some closed law office doors is "How will this effect revenue?" This is a practical consideration for most businesses. It presents a particularly difficult situation for the business of practicing law. Faced with more increasingly viable settlement processes, lawyers are beginning to ask themselves (privately and increasingly publicly) if their own financial interests might be in direct conflict with the interests of their clients.

This potentially explosive question of ethics will be significantly defused if lawyers and judges began to look at extending and expanding the dispute resolution system to encompass all of the ADR processes that could be implemented. While judges are pursuing the integration of more settlement oriented procedures into the court system, lawyers can follow suit by engaging more proactively in the development of a more creative multi-option approach to the resolution of disputes. This multi-faceted model will serve as the foundation for law firms becoming more full service dispute resolution organizations. These lawyers will be providing a wider range of services to clients, who are

seeking more creative and efficient ways to resolve disputes. This kind of service defines the term "value added".

Many law firms throughout North America are successfully moving in this direction. They are de-emphasizing litigation and marketing themselves as problem-solvers. The more lawyers approach the practice of law from a problem-solving perspective and participate in the building of the most effective systems of dispute resolution for their clients, the more marketable their services become. All successful business, including the practice of law, needs to respond to changing markets with changing needs.

More recently, our legal systems have come under harsh scrutiny and have been found wanting in the court of public opinion. Many sociologists and legal academicians are convinced that public confidence in the legal system (along with lots of other "systems") is progressively eroding. At the same time, there are objectively diminishing resources to support the accelerating rate of justice-related needs. Lawyers, and often judges, are seen as more a part of the problem than as part of the solution. It is time for all of us engaged in the business of Dispute Resolution to step back and assess the "big picture" and find new and dynamic ways to work together as partners. It is incumbent upon us to provide better service to those who are seeking our assistance, often at some of the most difficult times in their lives. It is time to shift from distinguishing and separating the various methods for resolution to an integration of the resources into a synergistic alliance of *appropriate dispute resolution* processes and professionals. This would be the beginning of transforming the system to a System of Settlement.

The myth of litigation

In the last few years, arising out of the principle of *appropriate dispute resolution*, I have discovered a concept that seems to resonate for a number of lawyers, judges and mediators. I refer to this as the "myth of litigation".

The fact is that 98% of all civil lawsuits in North America are resolved, one way or another, prior to trial. That leaves approximately 2 per cent that are actually tried. Many litigants simply "give up" due to the costs associated with continuing. Most are eventually settled, *later than sooner*. Yet we continue to create settlement processes that are alternatives to litigation. This is the "myth of litigation". It's as if we are all in some kind of societal trance in which we continue to agree that we are involved a System of Litigation. The objective reality is that we are engaged in a settlement system in which settlement occurs too late and, more often than not, ineffectually and inefficiently. Historically ADR was defined as Alternative Dispute Resolution – meaning alternative to litigation. The truth is litigation is the alternative to settlement, and we continue to engage in the world "as if" it is the opposite. How much sense does that make?

This "myth" mentality has led me on a mission, and I'm usually very wary of missions. I am challenging all of us in the business of conflict and dispute management and resolution (mediators, judges, arbitrators, lawyers, court administrators, and others) to step back and look at the bigger picture – the system in which we are all operating. We continue to evolve and develop processes (including mediation in all of its forms) that get tacked onto the system as it presently exists rather than looking at transforming this System of Justice. This system, made up of the sub-systems of the law firm and the courthouse, continues to operate on the principle that a lawsuit filed is a lawsuit tried. This System has not changed (much) to reflect the "two per cent" reality.

Law offices have software that give each file a “life of its own” with brief detours from the litigation path for brief settlement discussions (sometimes) and various litigation events that cause the file to pop up on the lawyer’s radar screen (discovery, motions, etc.). The only other occasions that bring the file to the forefront are various “aggravating events” such as Notices to Mediate (B.C), mandatory settlement conferences, mediation or some other process intended to promote settlement. At present, these events are merely minor exits off of the main litigation highway and are rarely given much attention or real preparation. In fact, they are considered by some to be little more than additional “hoops” through which to jump.

There is no blame to place in this situation. We all find ourselves doing business in various ways; for the most part, we all conduct ourselves in the most efficient, productive and successful ways that we can. I believe that judges, lawyers and others associated with our justice system are doing the best they can within a structure that has deep and strong roots. It is certainly not the time to be pointing fingers at any one segment of this System in which we all have contributed and continue to contribute and participate. As we persist in adjusting and “tacking on” and “fiddling” with our system of justice, we all know deep down that that is how systems stay intact. Systems seem to sustain themselves through their capacity to consume and digest the various add-ons that we feed them.

In closing I offer the following “food for thought and consideration”:

- that judges and lawyers consider settlement the main highway and litigation as an exit;
- that litigation be treated as the alternative to settlement thereby reflecting the reality;
- that, instead of case management, the courts consider instituting settlement management wherein litigation remains only a possibility. Let’s build a system of justice that reflects the reality that litigation is really the alternative to settlement;
- that lawyers create parallel streams within their practices, a litigation stream and a settlement stream. Neither will interfere with the other and will, in fact, complement and support the other. Litigation and settlement do not have to be *either/or* propositions or processes.
- that we re-consider the premise that ardent, passionate advocacy means engaging in an adversarial process. Productive and effective settlement requires first-rate advocacy.

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