LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

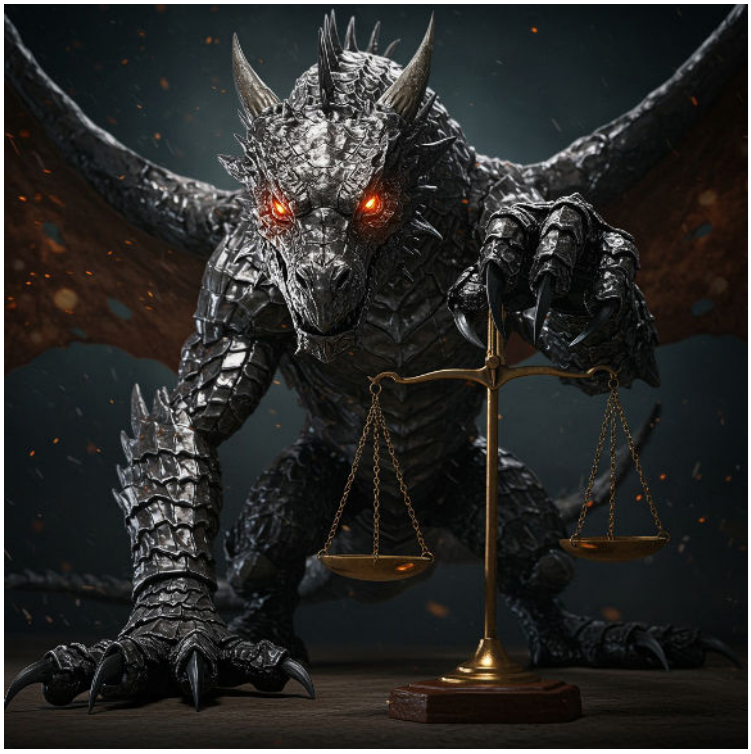
TUESDAY, MAY 20, 2025

REIMAGINING ALTERNATIVE DISPUTE RESOLUTION: PART I

Mediation reigns, but the litigation beast lives on

Fifty years after Harvard Law Professor Frank Sander's multi-door vision, meaningful early dispute resolution still faces cultural and institutional resistance.

By Greg Derin



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Ten years ago, I published an article about the full panoply of ADR processes, noting how the litigation landscape had changed in the 40 years since visionary Harvard Law Professor Frank Sander delivered his ground-breaking speech, *Varieties of Dispute Processes*, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly known as the Pound Revisited Conference. Sander conceived of a "multi-door courthouse" in which disputes would be screened by a clerk and directed to the process(es) most appropriate for their disposition (e.g., mediation, trial, arbitration, mini-trial, early neutral evaluation).

Few jurisdictions have adopted true multi-door courthouses. The use of arbitration has grown, but when I suggest that parties consider early neutral evaluation I am met with bewilderment. Through the leadership of Sander and others, mediation has become the default mechanism by which litigated disputes are eventually resolved. The ranks of mediators have grown to accommodate this demand. However, the notion that mediation, arbitration and other "alternative" processes would avoid expensive pre-trial and trial costs remains illusory. Establishing true "alternatives" to traditional expensive forms of dispute resolution continues to confront barriers.

Albert Einstein said that "[t]he significant problems we face cannot be solved by the same level of thinking that created them." Certain disputes will always require adjudicatory determinations. These tend to be matters demanding the establishment of precedent or public policy conflicts. In the early years after Sanders proposed his paradigm, some counsel and parties persisted in the belief that what they perceived as 'bet the company' matters could only be resolved by traditional adjudication. With experience and more mature reflection, those objections have yielded to the wisdom of parties determining their own fate by negotiation, often 'expanding the pie' to achieve win-win solutions not attainable in a courtroom.

We sit 50 years after the Pound Revisited Conference with one primary change - a proliferation in the number of mediators. The volume of litigation continues to grow, with the concentration ebbing and flowing in different specialties and jurisdictions. Judicial resources remain scarce and are unable to manage demand. In my home jurisdiction of Los Angeles, it can take months to schedule preliminary, process and discovery motion hearings. When I began practicing law it took almost five years to bring a case to trial. That period dropped closer to one year, only to surge back near the record statutory high again. The painful irony remains that 98% of civil cases resolve by settlement or motion before trial. Without institutional pressure, however, most cases still languish in the system consuming costs, fees and judicial resources until trial approaches and resolution becomes urgent.

While California permits recovery of prejudgment interest at the rate of 10% per annum, far exceeding what most can achieve by reasonable and prudent investment, this is rarely actualized in settlements. It is difficult to expect the culture to force a change without a radical reimagining of how disputes are directed to litigation institutions, rewards and disincentives are created to encourage the use of early dispute resolution processes, and improvements are made in such processes.

With deep wisdom and insight, Sander and his colleagues successfully moved the profession toward a default reliance on mediation, but could not dislodge the use of litigation costs and structures to pressure opponents or serve other unproductive purposes. Artificial intelligence promises (or threatens) further disruption of the litigation landscape, but without clear guardrails for its use. This series of three articles is a rumination, borne of 23 years of

experience as a mediator, on how the landscape might be changed to facilitate early, effective use of ADR to make it a true alternative to costly and destructive litigation.

In Part I, attention will be given to the use of ADR processes to avoid litigation from commencing. Part II will focus on institutional changes that might reshape the litigation landscape. The changes proposed in this next installment would require a major refocus and commitment leading to legislative and regulatory innovations. Finally, Part III is dedicated to how parties and counsel can alter their mediation behavior to make the process more outcome-determinative - a more tactical than strategic approach focused on the true goal of ADR, efficiently meeting the interests of the parties through negotiation or cost-effective adjudication.

Transactional mediation.
In previous articles, I have written about utilizing mediation in transactional contexts. Mediation is merely a facilitated negotiation. When parties are reluctant to reveal business plans or closely held interests, utilizing an impartial third party to explore potential deal structures can insulate the parties from apprehensions that might otherwise deprive them of the opportunity to achieve favorable outcomes. Anticipating the need for assistance with internal change, inter-company dynamics or government intervention, mediation offers enormous benefits.

These benefits are not limited to contexts in which actual conflicts have arisen or disputes have ripened into litigation. Seeking the assistance of a trained third party to facilitate a negotiation, or as an ombudsperson for intracompany conflicts, can avoid costly disruptions, anticipate problems, structure solutions and enhance personal and corporate reputations. Transactional mediation is used frequently in labor negotiations and within certain industries. More extensive use in traditional bargaining contexts (e.g., commercial, real estate, intellectual property) can help move the culture toward early use of mediation to resolve disputes, which can otherwise become the subject of costly adjudication.

Mandatory early mediation.
Members of the International Institute for Conflict Prevention & Resolution (CPR) (which includes some of the largest corporations in the country) subscribe to a Dispute Resolution Pledge for Business Relationships, which encourages the use of dispute resolution mechanisms within and between organizations. Creating a similarly broad pathway for the dissemination of information regarding businesses that participate in first-step dispute resolution processes would provide the dual benefit of discouraging precipitous litigation and enhancing the reputation of participating businesses as cooperative partners.

Increasingly, commercial contracts provide multi-step processes before one may initiate litigation. Making the already inevitable mediation a required early step can be effective if the parties make allowances for potential early barriers to settlement of certain cases and institutional impediments.

Not all litigation arises from disputes with precedent contracts. Implementing mandatory mediation before litigation may be filed requires statutory initiatives. For example, initiation of formal documented mediation processes tolling or meeting statutes of limitation, enhancing and strengthening confidentiality protections nationwide, providing mechanisms for distributing or allocating the costs of mediation, widespread funding of court-mediation programs, and formalization of the process itself. Accommodation would be required for mediation readiness and to control the motivations of counsel and parties that divert stakeholders from legitimate interests involving resolution of disputes. Models already exist for all of these conditions.

Early mediation has enormous benefits in maintaining party relationships, controlling adverse publicity and business consequences, and avoiding sunk litigation costs that later become impediments to resolution. Although the unavailability of sufficient information to make reasonable decisions can be an obstacle to early resolution, most experienced counsel acknowledge that exhaustive discovery is not cost-effective in the majority of disputes, and verifiable representations and warranties in settlement agreements often satisfy apprehensions arising from early information voids.

Requiring reasonable pre-mediation information exchanges establishes credibility, reveals further required material, and helps prepare for productive dialog. If the extreme costs of litigation can be deferred by commencement of mediation, the path to resolution may surface, avoiding the more damaging consequences of litigation.

In the next installment in this series, more dramatic incentives to mediate and disincentives to rush into litigation will be explored.

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