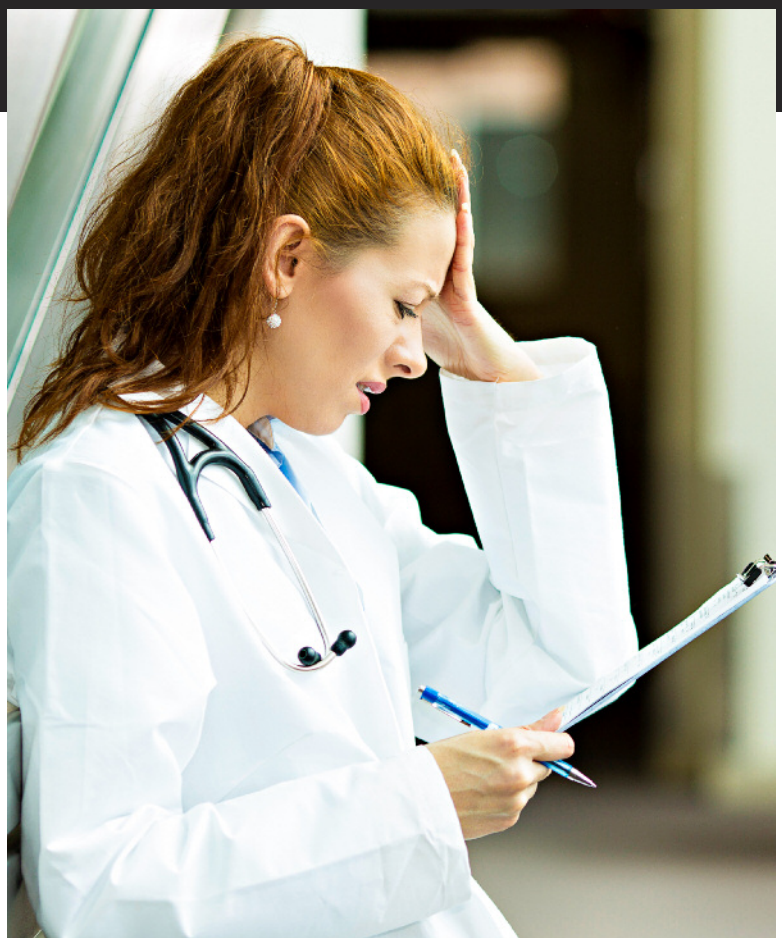
Expanding Dispute Resolution:

Design & Use of Anticipatory and Preventative Processes



by Kimberlee Kovach

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by

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Kim was instrumental in the development of court-annexed mediation and dispute resolution programs, working with courts throughout Texas. She also served as a consultant to courts in several other jurisdictions nationwide. Kim was an early pioneer in the creation of community dispute resolution centers, and trained several hundred initial volunteer mediators in Texas.

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For many, it appears that dispute resolution methods, particularly mediation and arbitration, have greatly increased in use. However, others have questioned whether mediation is under-used—or in other words, is sleeping.[2] A reflection on dispute resolution development and evolution in Texas, based upon the last 35 years,[3] provides some perspective of where we have been, currently are, and the potential of future possibilities. This chapter provides a brief look at the early use of mediation that may be helpful in visualizing the future.

During the time of mediation's development and evolution in Texas, as well as throughout the world, the mediation process has gone through some changes and modifications. The processes I anticipate will be used in the context of early intervention or anticipatory processes may look dissimilar to what many consider to be mediation in the "settlement of lawsuits" context. At this time, mediation process features that allow parties to be empowered in making their own solutions need emphasizing. Thus, I challenge non-adjudicatory neutrals to reconsider the possibilities of mediation, so that its potential to provide the "value added" to dispute settlement or prevention.

That way, parties, whether individuals, business corporations, institutions, or other organizations will be provided the possibility to prevent, manage, and resolve conflict in constructive ways. Such approaches will also assist the mission of mediation, by retaining process aspects that provide opportunities for finding creative, productive, and collaborative resolutions to disputes. In other words, the increased use of mediation early on in disputes will decrease potential conflict, and can avoid disputes in general, allowing the empowering foundation of the process to emerge and assist parties in collaborative and effective ways.

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[2] *See* Giuseppe De Palo, *A False 'Prince Charming' Keeps 'Sleeping Beauty' in a Coma: On Voluntary Mediation Being the True Oxymoron of Dispute Resolution Policy*, Mediate.com (Mar. 2014), http://www.mediate.com/articles/PaloResponse.cfm (discussing primarily the paradox of mediation use in the European Union); *see also* Giuseppe De Palo & Romina Cannessa, *Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 Cardozo J. Conflict Resol. 713 (2015).

[3] I began this journey in September 1980, with the initial 40-hour mediation training for volunteer mediators at the first Texas Dispute Resolution Center, then known as the Houston Neighborhood Justice Center, and I continue to train, teach, and practice.

The History of Mediation Hints at a Possible Future

Some of the early work in mediation within the United States was preventative[4] or anticipatory in nature. For example, work in the labor context, as well as the creation of the Department of Justice Community Relations Service (CRS) in response to desegregation, are two instances where mediation was used to prevent or lessen anticipated conflict. Although inevitable conflict and disputes occurred, they were kept to a minimum with the use of mediation.

The creation of the Federal Mediation and Conciliation Service and the National Mediation Board[5] was instrumental in the government's mission to maintain peace and stability in the workplace. Further, several federal statutes were enacted by Congress to aid in these efforts. These federal statutes provided methods to prevent, avert, or decrease strikes within the labor force.[6]

Realizing that conflicts and disputes typically arose between individuals, management, and labor sectors, mediators were able to minimize disruptions to industry and commerce. In addition, when disputes and controversies did arise, dispute resolution methods often were included in the collective bargaining process to minimize the likelihood of strikes. Through the use of dispute resolution methods, particularly mediation and arbitration, companies and employees were provided expedient methods of dispute resolution.

The establishment of the CRS within the U.S. Department of Justice focused on the community arena.[7] Realizing that there was a real potential for conflict after Congress passed the Desegregation Act, the Justice Department created the CRS as part of the Civil Rights Act. The CRS acts as a national peacemaker for community tension and conflict by working with state and local communities to explore methods to address and prevent potential conflicts.

As predicted, when desegregation disputes erupted; the CRS worked to reduce and prevent conflicts within communities. Recently, with the enactment of the Hate Crimes Prevention Act, the work of the CRS has expanded to assist in the resolution of violence associated with hate crimes.[8]

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[4] While it has become common to interchange the words preventive and preventative, in investigating the issue, I found that the more recent preference is for preventative, which I will use throughout the remainder of this chapter.

[5] *See* The National Mediation Board, http://www.nmb.gov/.

[6] The Railway Labor Act creation the National Mediation Board, while the Taft-Hartley Act in 1947 established the Federal Mediation and Conciliation Service. *See* Federal Mediation & Conciliation Service, http://www.fmcs.gov/internet/index.asp.

[7] *See Community Relations Service*, The United Stated Department of Justice, http://www.justice.gov/crs.

[8] *See CRS History*, The United Stated Department of Justice, http://www.justice.gov/crs/about-crs/crs-history.

The Pound Conference is the singular event most often associated with the beginning of the modern mediation movement.[9] Although a few community mediation programs were already in existence,[10] it was the focused effort that resulted from the Pound Conference that ignited the development of many additional programs. During the Pound conference, a call for separate community mediation centers, then called neighborhood justice centers, was made.[11]

One result of the early work in these centers was to focus on using preventative mediation. Volunteer mediators at early community centers not only assisted parties in resolving particular disputes, but were also focused on objectives such as party empowerment, along with education and use collaborative methods of dispute resolution. One main goal of mediators at early community centers was for parties take back to their respective neighborhoods the ability to engage in cooperative dialogue.

During the Pound Conference, discussions also occurred about the use of ADR in court cases. The initial discussions focused on resolving matters before they were filed in a court, quite analogous to a preventative dispute resolution approach. As these early talks took place, it was often with anticipation that mediation or other dispute resolution methods would be used as the first step in a dispute resolution scheme. Professor Sander, in his highly regarded paper and talk at the Pound Conference, suggested a multi-door center where individuals would go prior to the courthouse.[12] Mediation was viewed as a first step, along with other dispute resolution options.[13] Before long, the vision was re-named the multi-door courthouse.

A U.S. Supreme Court Justice also promoted the view that mediation should be the first step, and courts the last.[14] Specifically, then-Justice Sandra Day O'Connor stated: "The courts of this country

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[9] *See* Leo Levin & Russell R. Wheeler, Epilogue to The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 289, 291 (A. Leo Levin & Russell R. Wheeler eds., 1979); *see also* Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. Tex. L. Rev. 1003 (2007) (critiquing process developments).

[10] Early work was through the United States Department of Justice's Community Relations Service, established in 1964, which helped to prevent violence and facilitated open discussions during the implementation of the Civil Rights Act. Soon thereafter, in the early 1970s, a few community programs were established, often with financial assistance from the United States Department of Justice Law Enforcement Assistance Administration (LEAA). These included the Philadelphia Municipal Court Arbitration Tribunal and the Columbus Ohio Night Prosecutor's Program (NPP). In addition, early work in mediation began at the Rochester Community Dispute Service Project, sponsored by the American Arbitration Association.

[11] Levin & Wheeler, *supra* note 8 at 289, 291.

[12] Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. Tex. L. Rev. 1003 (2007).

[13] Levin & Wheeler, *supra* note 8, at 291.

[14] Justice Sandra Day O'Connor, Address at the Consumer Dispute Resolution Conference: Exploring the Alternatives (Jan. 21, 1983).

should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."[15]

At the time Sandra Day O'Connor said this, many early mediators had visions that mediation would become the primary dispute resolution process. The use of mediation as a first step to resolve a dispute or disagreement, before it became a lawsuit, could certainly be considered preventative in nature. As noted before, while the dispute itself is not prevented, early use of mediation can decrease the time and cost associated with protracted resolution methods.[16] Moreover, potential escalation of emotions and hardening of positions associated with the dispute or conflict may be avoided as well.

[15] *Id.*

[16] Hanson Lawson, Preventive Use of ADR, in Handbook of Alternative Dispute Resolution (State Bar of Texas, 3d. ed. 2003).

Litigation-Centered Mediation in Texas

When assessing the current state of private mediation use within Texas, we can see that most of the use lies within the context of litigation. And with that use, the resulting process has changed.[17] Mediation within the context of the court and the community are often dissimilar. Mediators have taken different approaches to the mediation process, which has resulted in the development of modified versions of mediation.[18] When framing the dispute or conflict in legal terms, the real promise of mediation—the value that it brings to people—can be lost.[19]

In Texas, courts given the authority to order cases to mediation did so, but of course could only compel the parties to mediation after a lawsuit was filed. Mandatory mediation did increase process awareness among judges and lawyers, but in some instances the process lost a great deal in terms of its problem-solving potential.[20]

Rather than lament the demise of the attributes that mediation promised,[21] it is now time to examine what possibilities in mediation continue to be viable but underutilized. Can ADR processes, particularly mediation and collaborative negotiation, begin to be used more expansively prior to the existence of a formal dispute? I look first at some of the current work that may be considered preventative, and follow that discussion with some thoughts on additional potential use.

Current Opportunities

When considering the use of preventative mediation, a few existing approaches come to mind. These examples provide the opportunity for discussions and problem solving prior to resorting to an adversarial approach. Acting before a dispute becomes adversarial affords more opportunity for the early resolution of matters.

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[17] *See* Giuseppe De Palo & Romina Canness, *supra* note 1.

[18] Likely one of the most common and most frequently cited issues is what has become commonly known as the "evaluative-facilitative debate". *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 25 –31 (1996); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 Harv. Negot. L. Rev. 71, 92 –93 (1998).

[19] *See* Robert Baruch Bush & Joseph Folger, *Promise of Mediation: The Transformative Approach to Conflict* (Rev. ed. 2005); *see also* Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 Fla. St. U. L. Rev. 903 (1997); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 Nev. L. J. 399 (2005).

[20] Robert A. Baruch Bush, *What do We Need a Mediator For?: Mediation's Value-Added for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1 (1996); Leonard L Riskin & Nancy A. Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 Geo. Mason L. Rev. 863 (2008).

[21] *See* Giuseppe De Palo & Romina Canness, *supra* note 1.

First, planning for disputes includes adding dispute resolution clauses in contracts and other documents that establish legal relationships. For example, many business contracts contain dispute resolution clauses that call for the use of stair-stepped procedures. In contracts where arbitration clauses are commonplace, such as in the construction industry, the arbitration clause can be preceded by a condition precedent of mediation, or be replaced altogether by the mediation clause.

In other instances, companies have dispute resolution clauses which are policy, rather than a firm contract. Internal dispute resolution programs allow or require employees to access dispute resolution procedures before taking formal legal action. Some companies have included numerous steps in the process, while others just one or two. The method generally involves an initial process, usually a meeting or direct negotiation, before moving to mediation and then more formal arbitration. Such approaches are often considered preventative in nature since protracted legal action is avoided; if the matter reaches the arbitration level it will proceed in a more adversarial posture. While arbitration is often considered more adversarial than mediation, time and cost savings do occur with its use.

In anticipating disputes, another approach is the inclusion of ADR clauses in employment manuals and other written material, such as corporate policy statements.[22] These provisions often obligate the parties to use ADR to resolve matters early, although in most instances these promises are not enforceable.

[22] For example, some corporations have signed a pledge committing to use ADR in disputes. One example is the CPR Pledge, originally the Center for Public Resources, now known as the International Institute for Conflict Prevention and Resolution. Yet despite the large number of signatories, it is difficult to determine if actual early ADR use takes place, as companies appear to first access the litigation system. Likely since the pledge itself includes the term "when appropriate" to allow great discretion by the lawyers.

As a consequence of the unenforceability of these promises, they are often not followed. A first step of mediation can be included in any existing dispute resolution procedure conceptually, even in the criminal arena.[23]

The real difficulty is ensuring the presence and participation in mediation (or other process) by all parties. In the case of a signed contractual agreement to mediate, there is at least the legal obligation, as well as the psychological element, that the individual has committed in writing to first attempt resolution through mediation. As a result, it is generally more likely that those who have signed a written contract agreeing to mediate will follow through than those who have only made a promise to participate.

Pre-Suit Mediation

Another early effort to introduce mediation early on in a disputed matter was the "Pre-Suit" mediation program. Several insurance companies agreed that at least before the initiation of a lawsuit, they would participate in mediation with the goal of resolving the matter expeditiously. The International Association of Defense Counsel sponsored the first national program in 1992.[24] While the comprehensive nationwide effort was not as successful as anticipated, many mediators still offer and market for pre-suit cases, which are not limited to insurance claims. In addition, some class action claims can be considered pre-suit, such as the Storm Sandy mediation programs.[25] Early mediation is also used with complaints filed before the EEOC. Through the mediation process, many cases are resolved early before litigation is formally commenced.

[23] Some of the first work in mediation in several jurisdictions including Ohio and Texas used mediation as a first step in small misdemeanor criminal cases where the parties were familiar with one another such as neighborhood and small business matters.

[24] Edward J. Rice, *Presuit Mediation: A Win-Win Situation for Everyone*, 63 Def. Couns. J. 1 (1996).

[25] Storm Sandy Insurance Mediation Program, State of New Jersey Department of Banking & Insurance, http://www.state.nj.us/dobi/division_consumers/insurance/sandymediation.html.

Collaborative Law

Collaborative law is another instance where a new approach to dispute resolution provides the parties in a divorce[26] the opportunity for agreed, mutually acceptable resolution. Collaborative law provides a mechanism for legal representation focused solely and exclusively on negotiating a client-centered resolution in divorce proceedings.[27]

Collaborative lawyers represent clients, but can do so only in the context of settlement negotiations. In essence, early proponents of collaborative law viewed their role as one where the attorney representatives would be settlement only specialists.[28] Both spouses and their lawyers sign a contract agreeing to participate in a good faith negotiation of all the facets of the divorce case. "Collaborative practice" is the label used when the practice includes professionals in addition to lawyers, such as therapists and financial planners.[29]

If the parties and their lawyers are unable to reach a final resolution through the negotiation process, then the collaborative law process terminates, and both attorneys are disqualified from any further involvement in the case. In other words, should litigation be necessary, the parties will be required to hire new lawyers.

Some opponents have criticized collaborative law as limited representation and a violation of ethical rules.[30] However, if settlement-only representation is limited, then the lawyers who fail to inform clients about availability of ADR processes and settlement opportunities are also engaging in limited representation as "litigation only" lawyers.[31]

Collaborative professionals note that it is very important that lawyers and parties are singularly focused on the negotiated resolution, rather than consideration of other options as in court. Despite those concerns, primarily about the mandatory disqualification of the lawyer, collaborative law continues to be used in many jurisdictions. The practice has support, including the enactment of the Uniform Collaborative Law Act (UCLA) in several states.[32]

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[26] Collaborative law had its origin family law and divorce cases. Although some urge expanded use such as in employment and business cases, its primary use remains in family and divorce cases.

[27] Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 Wm. Mitchell L. Rev. 971 (2007).

[28] *Id.* at 974.

[29] William H Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 Pepp. Disp. Reosl. L. J. 351 (2004).

[30] John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 Ohio St. J. on Disp. Resol. 619 (2007).

[31] Kimberlee K. Kovach, *The Duty to Disclose Litigation Risks and Opportunities for Settlement: The Essence of Informed Decision-Making*, 33 LaVerne L. Rev. 71 (2011).

[32] Collaborative Law Act Summary, Uniform Law Commission, http://uniformlaws.org/ActSummary.aspx?title=Collaborative%20Law%20Act.

Planned Early Negotiation

Planned Early Negotiation (PEN) is another approach that places the responsibility for early dispute resolution work on the lawyers. In this approach, Professor John Lande calls for lawyers to consult with clients when assuming representation, and engage in a process of detailed and structured negotiation early in the representation.[33] In PEN, parties have legal representation but have not usually accessed the court system yet. In a number of cases[34] If early negotiation does not result in settlement and litigation becomes necessary, there is no reason why the negotiations cannot continue once the lawsuit is filed. We know, though, that once the adversarial process begins, many parties are less willing to work collaboratively. Thus, early intervention is also beneficial because resolutions are reached before the lawyers and the case become inflexible and uncompromising.[35]

The PEN process, while similar to the collaborative law practice, can be distinguished. First, the lawyer is not bound to withdraw from representation if an agreement is not reached. Even in those instances where suit is filed, settlement efforts may continue through direct negotiation or mediation. Moreover, the PEN rules about how the negotiations will occur are not as rigorous as the collaborative law rules and guidelines.[36] Acknowledging that lawyers in many instances have actively resisted the use of ADR, thinking that such early and constructive resolution would lessen fees and outcomes, Professor Lande also explains how ADR methods can be used effectively and profitably.[37]

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[33] *See* John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (American Bar Association, Section of Dispute Resolution, 2011).

[34] Certainly if the early negotiation does not result in settlement, a lawsuit is filed.

[35] *Id.*

[36] *Id.*

[37] *Id.*

Intersection with Preventive Law

The Preventive Law approach to law practice, initially urged by Louis Brown in 1952,[38] examines the ways that lawyers can be proactive in assisting clients to anticipate potential legal problems and plan for them in advance.[39] In fact, at its very essence, the focus of preventive law is on finding ways to prevent the occurrence of a problem or dispute. Of course, that may not always be successful, and certainly advanced planning for ways to resolve disputes can be an important part of the process as well. Thus in the consideration and planning of legal issues or matters expected or projected, the clients with their lawyers can anticipate and include the use of more collaborative dispute resolution processes.

Victim-Offender Mediation

Another type of mediation use that can be considered preventative in nature is victim-offender mediation (VOM), sometimes referred to as victim-offender restitution, or in some cases victim-offender reconciliation projects (VORP).[40] When a crime has occurred, the initial goal of the process is generally to determine appropriate or agreed-upon restitution for the harm caused. Other objectives can also be met through the process, though.

Victim-offender mediation is viewed as part of the movement toward restorative justice, where the focus is placed on repairing the harm, rather than doling out

[38] *See* Louis M. Brown, *PREVENTIVE LAW* (1952).

[39] Thomas D. Barton, *Preventive Law and Problem Solving: Lawyering for the Future* (2009). *See also* https://www.cwsl.edu/clinics-and-programs/national-center-for-preventive-law ; and http://www.preventivelawyer.org/main/default.asp

[40] There are several references to programs and projects that utilize mediation between the victim of a crime and the offender. In most instances, the primary focus is on determining restitution, although many other objectives are attained such as closure for the victim. *See* Mark S. Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice* (2002).

retributive consequences.[41] For example, the goal of the first victim-offender mediation in Elkhart, IN was to reduce the recidivism in juvenile cases, as well as give voice to the victim.[42] Studies have demonstrated that victim–offender mediation is effective in:

- resolving matters,
- improving compliance with the agreed-upon restitution, and
- decreasing recidivism in offenders.[43]

By preventing additional criminal or harmful acts, the process of participation in victim–offender mediation is clearly preventative. Additionally, many times mediation use in neighborhood disputes can resolve matters before they escalate to criminal matters.

Regulatory Negotiation

Regulatory negotiation, also known as "reg-neg", can be used at the local, state, and federal levels. It is another example of how dispute resolution processes can be used to avoid disputes, if it is actually implemented properly. In the reg-neg process, facilitated dialogue and negotiation are used while drafting regulations.[44] This process is a preventative approach, because no defined dispute or conflict exists.

When planning to draft a rule or other type of regulation, an agency can call and identify the potential stakeholders, and assure that they are engaged throughout the rulemaking process. So rather than waiting until the rule is drafted to receive comments, the review of the proposed regulation is ongoing throughout the drafting process. The primary objective is to ensure stakeholder participation in the process, thereby achieving buy-in, acceptance, and often active support of the actual regulation. Most, if not all, potential disagreements and disputes are avoided.

Finally, some work in the community engagement arena provides even more opportunities for the use of mediation and facilitation as preventative undertakings. Community engagement can be effective where the possibility, or probability, of disagreements or differences of opinions arise in communities.

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[41] *Id.*

[42] William Bradshaw, David Roseborough & Mark S. Umbreit, *The Effect of Victim-Offender Mediation on Juvenile Offender Recidivism: A Meta-Analysis*, 24:1 Conf. Resolution Q. 87, 87 –89 (2006).

[43] *See* discussion of mediation use in criminal matters infra ch. on criminal law and ADR in this handbook.

[44] In Texas, the legislature encourages agencies to use such an approach. Tex. Gov't Code, CH. 2008.

Through the process, input is encouraged at a variety of levels to obtain the participation and involvement from citizens, primarily those impacted by the proposed action. For example, a city government could engage a neutral facilitator to conduct town hall meetings. Such facilitated dialogue can be used with a number of different factions of the general public, as well as specific citizen groups. The public policy arena is one where opportunities exist for a large increase in the use of conflict resolution processes early on. Results can differ; in some cases the goal may be to actually reach a consensus that will then dictate the proposed action. In other cases, however, the engagement and dialogue process may be used primarily as a vehicle to exchange information and ideally reach a better understanding of each of the differing perspectives.

While the community engagement process is generally thought of as being conducted in a public meeting, it is also possible to engage a neutral who could conduct private, confidential meetings with the relevant stakeholders. By gathering information and ascertaining the concerns and interests of all involved, the neutral may be in a better position to forge an agreement or resolution that all factions will be willing to live with, thereby preventing or avoiding protracted controversy, tensions, and disagreements. Because the private meetings would be held with public officials individually, Sunshine laws would not be implicated.

Deliberative democracy is another dispute resolution process that is closely related to community-engagement. Unlike majority rule, which can be viewed as commanding,[45] deliberative democracy affords citizens the opportunity to participate in a meaningful manner, rather than simply cast a vote. Deliberative democracy solicits citizen input, through open communications and dialogue, as well as by structuring conversations in a deliberate decision-making process. Where the majority rule approach can leave many displeased and resentful individuals, a deliberative process gives the chance to decrease the negative outcomes, and give participants some satisfaction with the process, even if not with the result.

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[45] Lawrence Susskind, *Deliberative Democracy and Dispute Resolution*, 24 Ohio St. J. on Disp. Resol. 1 (2009).

Expanding the Possibilities

Is conflict inevitable? There's plenty of room for debate. Could it be possible that with sufficient anticipatory processes in place, a truly peaceful society can exist? I will leave that more philosophical discussion for another time and place. Regardless, I believe that it is possible to expand the use of mediation, facilitated dialogue, and related processes. Such expansion could include use of facilitative and collaborative processes to decrease conflict. Increasing awareness and educating all people impacted by conflict, not just those in legal or quasi-legal disputes, can make mediation what many saw early on: the first step in a dispute resolution continuum.

This could occur on at least two levels. One is the anticipatory use of mediation and similar processes to reduce some inevitable conflict. Similar to planned early negotiation, parties may use dispute resolution clauses or other methods that call for mediation or negotiation shortly after a dispute arises.

It is also possible to implement policies and procedures that, like the early use of mediation, can actually prevent disputes and conflicts. We may not be able to prevent conflict from occurring—although I remain convinced that is possible—but we should also strategize for additional, early intervention approaches.

To increase the use of early intervention processes, the most critical matter is the need to expand early process use. If mediation or a facilitated dialogue is implemented earlier, cost savings are greater; and quite likely, conflict escalation will be prevented. Similarly, where it is possible to anticipate potential litigation before a lawsuit is filed, parties are able to reach a more creative and constructive resolution.

By thinking in advance, dispute resolvers could design a system which not only resolves disputes when they arise, but also can allow the parties to begin thinking about engagement before matters

arise. I view this as a hybrid of preventive law and collaborative planned negotiation. While the pre-suit approach has not been often used, it's certainly possible to resurrect efforts to use mediation and resolve matters before the dispute becomes a legal matter. While not totally preventative, this approach can result in greater satisfaction to the parties, as well as result in costs savings. Perhaps it's similar to when individuals met informally with one another in an attempt to engage in a conversation and solve a problem without the need to hire advocates or engage in a win–lose, right–wrong view of the matter. Moreover, with the focus on the parties' real interests, rather than the legal issues, it is more likely that the parties will find solutions that meet their interests and concerns.

Another important feature, when using anticipatory practice, is the intentional use by the parties of dispute resolutions processes at the beginning of their relationship. Though infrequently used, it is quite possible to insert dispute-resolution processes into deal negotiations. And just as in the labor arena, where mediation procedures become part of the collective-bargaining agreement, specific clauses could be included in resulting contracts, leases, business or partnership agreements, or even pre-nuptial agreements. Requiring the use of mediation and facilitation in transactional matters will provide additional opportunities not only for early dispute resolution, but also for beneficial by-products, such as team-building efforts. In these ways, parties, lawyers, or other representatives are able to anticipate and lessen potential conflict, prevent escalation, and maintain the business and relational interactions of the parties.

At the very first indication of conflict, an organization can have in place procedures which would address the disagreement or conflict, just as mediation was used in labor to prevent strikes. Through mediation, participants can actually work to prevent the development and evolution of conflict itself. By acknowledging that disagreements are possible and anticipating them, the parties involved can agree in advance to work with a neutral who can facilitate greater understanding of differences. For example, using a facilitator in an important meeting can lessen the likelihood of disagreements. With increased education and focus on the real potential of mediation outside of litigation matters, a great number of additional options may arise.

Great potential also exists for public decision-making. Many factors account for disagreement, most based upon different perceptions. Using facilitation or mediation to gain with an understanding of all of the positions, the stakeholders and government can move through the issues with less discord. While education of government officials is helpful in increasing the awareness of those involved in public disputes, other options may be better. For example, legislatures could incorporate mandates for consensus processes in statutes and regulations. Or, a city could mandate the use of a facilitative process before matters, such as zoning disputes, can reach the city council.

One example that could impact the larger community is the development of a model like the CRS. Communities through state and local government agencies would have the ability to work with citizens to engage in dialogue and to increase understanding, thus preventing conflicts. For example, instead of expanding police protection, additional money and effort could be spent on the prevention of community conflict.

Planning for Inevitable Disputes

Yet, in all of these situations the real difficulty is getting the parties, individuals, businesses, or government, to the table at the outset. After nearly 40 years of mediation use in Texas, the majority of mediated cases are those required to be mediated, either by contract or court order. In the end, we must do much, much more in terms of education and awareness of the general public.

We could plan for inevitable disputes. By using collaborative and problem-solving processes early on, might it be possible to reduce the time, energy, and money spent on a more formal dispute resolution system? In doing so, the education gained through participation by those involved could result in additional implementation of processes early, and gradually reach a time where parties who participate in facilitative processes are taught better conflict management skills, and can actually prevent further disputes.

More recently, there has been an increase in focus on Elder Care law, as well as mediation use in such matters. By its very nature, elder law can generally be considered as preventative in nature, as the focus of most of the consultation, advice, and legal work is on looking to the future, and anticipating the issues and concerns that arise as individuals age. These issues include matters such as estate planning, living wills, probate, adult guardianship, trusts disability planning and long term care planning, as well as end-of-life matters.

Much of this legal practice is focused on the planning and preparation for anticipating issues for aging individuals and their families. Mediation has been used with some frequency in probate matters, that is, generally after a dispute occurs. There are, however, a number of additional opportunities for mediation use in a preventative manners, especially since many of the issues involve family-related matters.

In terms of the preventative aspect, a number of opportunities exist for the use of mediation in an anticipatory manner. For example, in estate planning work, often estate distribution to family members can result in a variety of disputes—after the fact—such as will contests and estate disputes. Of course the inclusion of mediation clauses within a will is one way this can be handled, where the obligation to mediate is a condition precedent to bringing an action before a probate court.

Another way to approach these types of issues, however, is to have an actual mediation during the estate planning and will-drafting processes. The mediator can work with the testators, as well as the entire family and other beneficiaries. There actually have been instances where a mediator facilitates the process to determine the distribution under a will or other estate planning document.

Another example of early mediation use can be in the instance of pre-guardianship determinations. For instance, once an initial determination is made that a guardianship is needed, the parties can utilize a mediation or facilitated process to work through the issues in a collaborative fashion.

Moreover, advance directives can also be facilitated before the individual is at a terminal stage in terms of health. Once end-of-life determinations need to be made, often the matters are accompanied by family disagreements. Using mediation in advance with the family members and care givers can assist in preventing the later disputes. It would seem as these issues continue to increase with our aging population, the potential for mediation increases as well.