

Tulsa Law Review

Volume 36

Number 4 *Symposium: Alternative Dispute
Resolution in the Twenty-First Century*

Volume 36 | Number 4

Summer 2001

Across the Ripple of Time: The Future of Alternative (Or, Is It Appropriate)Dispute Resolution

Jeffrey Scott Wolfe

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey S. Wolfe, *Across the Ripple of Time: The Future of Alternative (Or, Is It Appropriate)Dispute Resolution*, 36 Tulsa L. J. 785 (2001).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol36/iss4/3>

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

ACROSS THE RIPPLE OF TIME: THE FUTURE OF ALTERNATIVE (OR, IS IT “APPROPRIATE?”) DISPUTE RESOLUTION

Jeffrey Scott Wolfe*

Where are the sky-cars, the soaring walkways spanning gleaming, pristine skyscrapers, the roar of rockets and people flying through the air? I thought this was the future.

I. INTRODUCTION

The future is upon us. We stand upon the brink of societal evolution, engulfed in the transforming essence of the information age. A new wave approaches the essential role of law in sustaining civilization. Are we facing a fundamental conversion of the long-accepted paradigm of Anglo-American dispute resolution? Are we the progenitors of this new era? Or, do we run the risk of becoming officious intermeddlers, participants in the erosion of the firm foundation upon which society is built? Some say, “I have seen the enemy and he is us.” Others decry a proliferation of rules and resultant chilling of creativity and initiative.¹

Many doors open upon the course to be charted.

Many paths beckon.

Famous televangelist Oral Roberts spoke of believing, “*in the now.*” By this he seemed to mean that belief could be actualized, or realized in tangible form, in the present—that faith was a reality for those who so accepted. It was a question of perception. One’s ability to transcend his or her circumstances then becomes a question of individual perception of faith.

Similar comments may be made generally about law and the operation of legal systems and processes in society. It is said that a legal system is only as effective as it is perceived to be. Our system works because we believe it works. Absent faith in

* Jeffrey S. Wolfe received his Juris Doctor (J.D.) from California Western School of Law (1976), and a Master of Laws (LL.M.) with *Concentration in Litigation and Trial Process* from the University of San Diego, School of Law (1990). He serves as United States Administrative Law Judge with the Office of Hearings and Appeals, Social Security Administration. He formerly served as United States Magistrate Judge, U.S. District Court, Northern District of Oklahoma (1987-1995); and currently teaches *Arbitration* as a member of the adjunct faculty of the University of Tulsa, College of Law where he has taught various subjects since 1980. He has also taught at Texas Wesleyan University School of Law (1995) and California Western School of Law (1984-1985), and published on a variety of topics.

1. See PHILIP HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1996).

the efficacy of legal process, societal norms falter, shift, and evolve. Such is the stuff of present days. One solution: *alternative dispute resolution* (ADR).²

Addressing the question of the future of *alternative dispute resolution* conjures an immediate image of faith.³ Why then, do *alternative* means seem to work, in some cases, 'better' than so-called 'traditional' or 'formal' means of dispute resolution? Is the reason substantive, or is it more a question of hyperbole—of form over substance – or is it a simple question of belief? More importantly, from where we stand "*in the now*," on the crest of the wave of a new Millennium, what future beckons for ADR? Will it be tied to a question of faith in a new, as opposed to an 'old' process? Have people stopped "believing in" litigation as a viable mechanism of dispute resolution? As with all things human, the answer is neither simple nor straightforward.

II. THE HUMAN FACTOR

Fundamental to any exposition of dispute resolution is the so-called 'human factor.' The sheer humanity of the undertaking must initially be the basis for any discussion. Nowhere is this more apparent than in the resolution of conflict. Martin Shapiro expressed it best, stating:

The root concept employed here is a simple one of conflict structured in triads. Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution.⁴

Essential to resolution of human conflict is the intervention, in some form or another, of a disinterested third person. Over time, this process evolved to become what is known today as the highly structured 'court' system. When two persons forsake the intervention of a third, and cannot otherwise resolve their own differences, their choices are limited to the following:

- Accept the status quo ante and leave the dispute unresolved (i.e., walk away or pay the demand);⁵

2. See Christian Duve, *Dispute Resolution In Globalization Context*, 221 N.Y.L.J. 9 (1999), stating:

... [A]ll means of alternative dispute resolution consist of alternatives to a formal decision-making process. Accordingly, the acronym "ADR" encompasses any method of resolving any dispute that does not require the ultimate decision to be made formally by a judge, a jury or any other decision-maker that has been designed as the competent forum of dispute resolution by the respective state authorities.

Id.

3. See, e.g., John Lande, *Getting The Faith: Why Business Lawyers And Executives Believe In Mediation*, 5 HARV. NEGOT. L. REV. 137, 138-9 (Spring 2000), expounding:

Do you believe in mediation? That may seem like an odd question. Normally one thinks of "believing in" (or, having faith in) things like magic, God, or the market. These are typically things that are beyond verifiable human knowledge (such as magic and God) . . . I suspect that for most people, belief in mediation refers to the value of mediation as a dispute resolution technique (particularly in comparison with the value of litigation).

Id. at 138-9.

4. MARTIN SHAPIRO, *COURTS, A COMPARATIVE AND POLITICAL ANALYSIS*, 1 (1981).

5. See, e.g., Drew Peterson, *Getting Together: The Continuum of Dispute Resolution*, 23 AK Bar Rag 10 (1999), observing:

Imagine if you will a continuum of the ways people resolve disputes. On one extreme are

- Attempt unilateral action within the context of the dispute, (e.g., self-help) which, in all likelihood, will exacerbate the dispute;
- Attempt unilateral action beyond the context of the dispute, (e.g., retaliation or the exercise of force) which, in all likelihood, will similarly exacerbate the dispute.

A favored law professor and law librarian, the late John Lindsey, once commented in teaching International Law, that the “only law among nations was that of force.”⁶ By this he meant, the processes by which claims were resolved among sovereigns were only as efficacious as the two disputing nations deemed them to be. Few nations will accede to a loss and willingly submit to court-like processes when they could just as easily withdraw. Once removed from the veil of lawful process, the only remaining recourse is the use of force. Even today, these simple truths color the face of international relations.⁷

The behavior of nations in dispute mirrors elementary human nature. At bottom, people want what they want and, unless persuaded to take a different course people will act to achieve their desired end. Thus, for Shapiro, the necessity of a third-party intervener is universal:

So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.⁸

The humanity of the conflict resolution process is captured in our own unique cultural view of ‘traditional’ dispute resolution. Integral to Anglo-American judicial process is the concept of fundamental fairness. This is embraced in yet another Anglo-American concept of a broader scope, namely ‘justice.’ Indeed, many an American super-hero has been heralded as striving for ‘truth, justice and the American way.’ The concept is cultural. For Americans, truth and justice are cornerstones upon which ‘fairness’ is built. Dispute resolution must be ‘fair’ and ‘just’ to be accepted by Americans. These motivational ideas spur emotional reactions.

What exactly does this mean? The answer lies in further exploration of the third-party intervener. Shapiro describes the third-party intervener as an individual whose role differs depending upon the type of process in which he or she is engaged. Interestingly, Shapiro places interveners of various types along a spectrum, noting

the simplest methods of dispute resolution, like simple avoidance of the issue, or immediate capitulation . . . To the other end of the continuum are the most destructive methods of resolving disputes, such as war, terrorism, mayhem and murder.

Id.

6. John Lindsey, Prof. of Law and Law Librarian, Teaching International Law at California Western School of Law, 1975-1976.

7. Witness, for example, the conduct of President Saddam Hussein of Iraq, who, despite United Nations Resolutions to the contrary, had to be forcibly removed from Kuwait; and even today, stands in defiant opposition to continuing United Nations sanctions.

8. SHAPIRO, *supra* note 4, at 1.

“that the judge of European or Anglo-American courts, determining that the legal right lies with one and against the other of the parties, is not an appropriate central type against which deviance can be conveniently measured.”⁹ “Instead,” says Shapiro, “he lies at one end of a continuum.”¹⁰

The continuum runs: go-between, mediator, arbitrator, judge.¹¹ Of the “go-between” Shapiro says:

The go-between is encountered in many forms. In tribal or village societies he may be any person, fortuitously present and not connected with either of the households, villages or clans in a dispute, who shuttles back and forth between them as a vehicle of negotiation. He provides communication without dangerous physical contact between the disputants that would otherwise be required.¹²

In describing the “go-between” as a “Kissinger-esque” character—shuttling back and forth between the disputants—Shapiro points to a critical element of human conflict, namely emotion. This element is central to human behavior and, in particular, the initiation and resolution of conflict. It is virtually a given that for two persons embroiled in a dispute that any “dangerous physical contact”¹³ means confrontation, depending upon the nature of the dispute. For most of humankind confrontation has been the essence of conflict. The American Heritage Dictionary defines confrontation as: “Discord or a clash of opinions and ideas.”¹⁴ A more cogent definition is found “on-line” at WordNet: “A bold challenge; a hostile disagreement face-to-face; the act of opposing groups confronting each other.”¹⁵

It is the resolution of conflict—of confrontation—that presents the most significant challenge to structured ADR. In essence, the resolution of conflict whether it be face-to-face confrontation or remote interaction requires resolution of fundamental emotional states, which are an integral part of the underlying need for resolution. The “go-between” achieves this through the exercise of the process itself:

[T]he go-between is not a mindless communicator. He exerts influence by “rephrasing” the messages he delivers. He may manage to slip in a fair number of proposals of his own. And by his characterization of the flexibility or inflexibility of each side to the other, he may strengthen or weaken the bargaining position of one or the other.¹⁶

Along the spectrum, Shapiro describes the mediator as “somewhat more open in his participation in the triad. He can operate only with the consent of both parties. He may not impose solutions. *But he is employed both as a buffer between the parties and as an inventor of mediate solutions.*”¹⁷

9. *Id.* at 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. See SHAPIRO, *supra* note 4, at 3.

14. *The American Heritage Dictionary of the English Language*, Third Edition, Houghton Mifflin Company (1996).

15. WordNet 1.6, Princeton University (1997), available at <http://www.cogsci.princeton.edu/~wn/online/>

16. SHAPIRO, *supra* note 4, at 3.

17. *Id.* (emphasis added).

Mediation, unlike resolution through a “go-between,” places the disputants in physical proximity to one another. Thus, a description of the mediator as a buffer recognizes the critical role emotion plays in the beginning, continuance, and especially in the resolution of conflict. The mediator acts as a buffer through his or her physical presence, and by reason of his or her participation in a process of “proposal and counterproposal . . . actively and openly assist[ing] in constructing a solution meeting the interests of both parties.”¹⁸

Next along Shapiro’s continuum is the arbitrator. Unlike the “go-between” or the mediator, the arbitrator “is expected to fashion his own resolution to the conflict rather than simply assisting the parties in shaping one of their own.”¹⁹ In a dramatic shift, the parties remove themselves from the realm of self-determination to that of a third-party directed-determination. This evolution is significant. No longer does emotion play a direct role in the outcome of the dispute. In a mediation, or process involving a “go between,” the parties’ emotions, whether they be positive or negative, play a direct role in the outcome because the result is fashioned by the parties themselves. Conversely, in an arbitration, as in litigation, the parties defer resolution to a disinterested third party. This effectively nullifies the immediacy of any emotional response affecting the outcome. In short, none of the parties’ “emotional reaction,” “feelings,” or other limbic responses directly affect the decision of a third party. The simple reason is that such emotions, feelings, and limbic responses are not those of the decisionmaker.

Emotional interplay is not the only difference between a party-directed and third-party directed resolution. The difference between a solution engineered by a mediator or go-between is axiomatically distinctive from that of an arbitrator. The transition from a party-directed solution to one imposed from without works a fundamental shift in the basis upon which the resolution rests; raising, in turn, new issues of confidence and perception.

[A]rbitrators, unlike mediators and go-betweens, usually work with a relatively fixed set of legal norms, analogous to that of the early Roman judge. The parties have consented to, or themselves constructed in advance, the norms to which they will now be subject. If in a given dispute one party has violated these norms more than the other, *it is not expected that the arbitrator arrive at a compromise solution purely on the basis of the interests of the parties* and quite apart from their obedience to the preexisting norms *The arbitrator has the legal authority to impose his solution on both parties even if one or both do not voluntarily consent to the solution.*²⁰

Therefore, the arbitrator does not necessarily seek to accommodate the interests of the parties as would a mediator or go-between. Instead, the inquiry is one of decision as measured against an agreed-upon norm or legal standard. The issue becomes one of confidence and perception. Given that the parties agreed in advance to an arbitrator, how is the outcome perceived? Do the parties have confidence in the system sufficient to equate a result with one of their own choosing

18. *Id.*

19. *Id.* at 4.

20. *Id.* at 4 (emphasis added).

had they pursued mediation or resolution through the offices of a “go-between?”

The answer necessarily returns the discussion to fundamental issues of ‘fair play’ and ‘justice.’ A process perceived to be unfair would engender lack of confidence. On the other hand, one that is perceived to be fair will be accepted regardless of whether it is actually fair or just. Such is the power of human emotion.

Thibaut and Walker, exploring the role of “control” over process and decisions between disputants and the decision-maker, concluded that disputants with greater power over the presentation of their cases, as in adversary court proceedings, were more likely to perceive that the process was fair. However, Shepard found that permitting disputants an opportunity to present their positions and appeal an unfair decision dramatically improved the perceived fairness of an inquisitorial [as opposed to ‘adversarial’] type of process.²¹

Clearly, perception of fairness is as important as fairness itself.

When discussing the future of ADR, the temptation is to focus on more complex applications of technology. Yet, in the end, the ‘human factor’ cannot be disregarded. Ultimate boundaries are thereby reached. The efficacy of any dispute resolution system, no matter how sophisticated in terms of technology or procedure, depends upon its acceptance. Acceptance is a matter of acculturation—both within and without the legal profession. A system perceived as “unfair” or “unjust” will ultimately fail, notwithstanding its objective merits. Thus, the question of the future of ADR is not so much a question of innovative uses of technology as it is a question of societal evolution and acculturation. Better said, the question is not one of *alternative* dispute resolution; but simply of dispute resolution by a number of means, only one of which is now considered the ‘gold standard,’ that is, litigation.

Thus, the future of ADR is one of transition, where traditional methodologies and dispute resolution paradigms are integrated into a larger whole. Such that, in the universe of dispute resolution alternatives, litigation achieves equal footing with other and different dispute resolution processes.

III. FROM LITIGATION TO TRANSITION

One writer comments about the transition overtaking the legal profession as a result of emergent technology:

In recent years, technology has changed both the study and practice of law. The law has its own culture, comprising a shared language, common ethical norms, models of reasoning, and tools of trade. As with any culture, changes in the tools used in legal practice inevitably influence the profession’s development, creativity, and responsiveness. Although technology enhances the study and practice of law, its use also subtly changes the way lawyers reason and think.²²

“[T]echnology has broadened our information base to seemingly limitless proportions. Word processing and communication technologies have expanded our

21. Eleanor D. Kinney, *Tapping and Resolving Consumer Concerns About Health Care*, 26 AM. J. L. & MED. 335, 390-91 (2000).

22. Molly Warner Lien, *Technocentrism And The Soul Of The Common Lawyer*, 48 AM. U. L. REV. 85, 85 (1998).

work potential and accelerated the exchange of ideas across both the classroom and the globe.”²³ The power of technology to change lives cannot be denied. Neither can the power of technology within the legal profession be denied.

Notable is “improved communication within the profession, both inside the law office as well as with co-counsel, opposing counsel and clients.”²⁴ The question for the legal profession is how this transition to the ‘information age’ affects, or may be led to affect dispute resolution systems? Does it have significance for the efficacy of adversarial dispute resolution as we now know it?

The reality of heightened information technology is that it is fast becoming omni-present in all facets of modern American life. As Americans integrate these machines, methodologies, and ultimately, technology-based behavior patterns, the pressure upon the legal profession to change in a like manner is significant. For example, how many people used to ‘make sure to check their email’ even five years ago? With improved (and improving) technology arises a continued expectation for rapid results. This same expectation is creeping into the legal profession. “The judiciary is pressured by numerous external and internal factors to keep pace with technology. Both litigants and the public have frequently criticized the judiciary’s inability to administer justice quickly.”²⁵

Beyond the pressure to adopt information technology (IT), courts face fundamental evolutionary challenges, similar in some respects to other challenges in the past. For example, the adoption of the Federal Rules of Civil Procedure and, notably, the adoption of an “open discovery environment” worked an essential change in the litigation process. This required lawyers to view litigation differently than they had before. No longer was “trial by ambush” the sanctioned methodology for the conduct of adversarial dispute resolution. Faced with open discovery procedures, lawyers re-oriented litigation planning from tactics of surprise to those of substance, addressing the *factum* of extant evidence. Mandatory discovery continued, if not completed, this evolutionary cycle. It too, brought forth a hue and cry from the established bar, but is now the established norm.

The adoption of the Federal Rules of Civil Procedure and later the Civil Justice Reform Act of 1990 (CJRA) and still later the Alternative Dispute Resolution Act of 1998,²⁶ heralded new challenges. Not so much because of their requirements, but because of what these enactments signify to an evolutionary view of the institution we call “the legal system.” Some observe that the tempo of societal change quickened with the advance of technology. “Color television took years to predominate over black and white, and fax machines took a decade to completely populate lawyers’ office, but the Internet has become pervasive in five years.”²⁷ As David Nuffer aptly observes: “More fundamental are increased mobility and

23. *Id.* at 87.

24. *Id.* at 102.

25. James Crowell, *The Electronic Courtroom*, 4 B.U. J. SCI. & TECH. L. 10 (1997).

26. 28 U.S.C. § 652 (2000).

27. David Nuffer, *The Future of Legal Systems, the Legal Profession and the Rule of Law: A Paradigm for a Season of Change*, 13 UTAH BAR J. 9, 12 (2000).

worldwide sense of community, and changes in family structure. Literally, people now live in a much different world than just a few years ago.”²⁸ Another writer captures the essence of this transfiguration: “[T]hose of us on the front line of dispute resolution can almost feel the velocity of the change.”²⁹

When examined at the root, the adoption of the Federal Rules of Civil Procedure, the Civil Justice Reform Act and the Alternative Dispute Resolution Act of 1998 reflects a continuum of change in the evolution of dispute resolution. Because society is increasing its tempo of change, so too, must (and are) the courts. The change, however, has been subtle; though in the future it may not be so.

[S]ome say, in spite of societal changes and the acceleration of change, law and legal structures have not changed much over the past 100 years. New legislation and procedures regularly appear, but there is an absence of marked change. We have seen no transition as dramatic as that from railroad to air; newspaper to radio and TV; horse to automobile; bleeding by barbers to medical assistance by trained doctors. This lack of change in the legal profession and structures is regarded by some as validating the legal institutions and procedures. *However, the multiple changes listed above may indicate that the strain is increasing, just as the absence of a large earthquake indicates pressure along fault lines is growing dangerously great.*³⁰

These sentiments are echoed by others who view societal evolution as accelerating away from common bonds of community toward an increasing demand for “rights.”

Litigation has only been recently seen as a method of resolution for all human problems. Proliferation of laws and rights, and a national sentiment toward litigation has created unprecedented pressures on courts. A more mobile society, less dependent on neighborhood relations and community trust, in which even familial relations are transitory, resorts much more to the impersonal legal system for resolution. The contentious nature of society has increased. Lawyers taught to wield the litigation hammer see every problem as a nail. Courts have never been so numerous, and never so crowded.³¹

In this evolving era of rights versus relationships, the emergence of “alternative” methodologies seems to signal an awareness of a problem beyond those articulated as the basis for “civil justice reform,” namely, cost and delay.

Increasingly, we tend to refer to people’s problems as “cases” — just one of a myriad of clients, files, and court appearances. Time is money, and it takes too long to establish

28. *Id.*

29. Bennet G. Picker, *ADR: New Challenges— New Rewards*, THE METRO. CORP. COUNS. New York, August 1999.

30. *See* Nuffer, *supra* note 26, at 12 (emphasis added).

31. *Id.* at 12. Nuffer further comments:

Lawyers may indeed face the same fate as railroads. Lawyers may continue to be what they have always been, but serving an ever-shrinking percentage of the market, sufficient in the knowledge that they have upheld traditions and heritage even though most of society thinks them irrelevant. Lawyer may continue to move freight and a few passengers, but *we cannot tell everyone else they cannot travel.*

(Emphasis added). *Id.* at 13.

bedside manner. The less a client knows, the less he or she will question what you're doing. Ignorance is bliss.³²

The problem, of course, is that people are not "cases," "files," or ambulatory legal problems. The increasing demand for vindication of rights, having as its corollary the de-humanization of one's fellows, such that society becomes increasingly desensitized to the preservation of relationships (and all which that entails), bodes ill for the legal profession.

What's wrong is that we are becoming out of touch with the very people we are supposed to help. We don't realize that the problem they came to see us for is the most important thing in their life right now. So when we fail to return phone calls, it hurts. It makes our clients feel like we don't care about them.³³

ADR may be seen as an alternative not simply to "cost" and "delay" but to the very premises which underlie the present, dominant form of dispute resolution. Confrontational dispute resolution, a vindication of one's right over another, taken to its outer reaches, is fundamentally anathema to forces of cohesion which constructively mold civilization. Strident demands for "rights," which, *because of cost* and delay, are ultimately destructive, are *contra* constructive concepts of dispute resolution. The current processes of heightened adversarial interaction create greater division.

The *process* of adversarial dispute resolution as manifested in our current system of thought is itself contrary to fundamental notions of "dispute resolution," where "resolution" means "solution," not simply "decision." Equating "decision" with "solution" runs the risk, now evident in a heightened climate of litigiousness, of creating greater enmity and interpersonal friction, more so, in fact, than the original dispute. Is it any wonder then, that:

Alternative dispute resolution services, particularly mediation and arbitration, have become the rage in recent years. Many prominent judges are leaving the bench for ADR. Many civil cases . . . are being handled with little or no involvement of the courts. . . . high stakes cases are often litigated outside the court system.³⁴

In Drew Peterson's words:

The only thing new and different about ADR is its approach. The predominant formal dispute resolution method in the United States has been rights-based, namely through the courts. ADR tries to focus the dispute resolution method more on the collaborative side of the continuum.³⁵

However, while an alternative system may be lauded, it is a double-edged sword. "If enough members of the public start opting out of a government system, it will soon be in trouble. The first to leave are always those who can afford to opt out; this means that the affluent and powerful go first."³⁶ The writer further explains:

32. Coralie Chun Matayoshi, *Perspectives: Reinventing Our Profession—Attorneys as Caring Problem Solvers*, 2 HAWAII B.J. 4 (May, 1998).

33. *Id.*

34. Rex S. Heinke, *The Dangers of Monopolistic Thinking*, 4 LOS ANGELES LAWYER 10, 11 (2001).

35. Peterson, *supra* note 5.

36. Heinke, *supra* note 34, at 11.

This has a disproportionate effect on the system that is far greater than the actual numbers involved, because those left behind reflect a change in the makeup of the public system's users. If the number opting out becomes too large, public support for the government system seriously erodes. *Not enough people—especially those with money and the ear of the government—care any longer about the public system because they have stopped using it.* This makes it very difficult to organize the constituency and secure the funding that is needed to fix the public system. We must not let that happen to our courts.³⁷

The implications are significant, as witnessed by the efforts in recent years to bring former Communist nations into a world-economic community:

[In] setting up “market systems” in former Communist lands, one thing should be kept in mind: It cannot be done without first creating a legal system that protects the right of all individuals to hold, buy or sell property and without corresponding legal protections for the contracts through which those transactions are conducted . . . Entrepreneurship . . . has increased the importance of law. . . .³⁸

Importantly, there can be no “alternative” system absent a primary, rights-based dispute resolution system. Eliminating the primary system, so that the only mechanism left is a collaborative “alternate,” runs significant risk of undermining the efficacy of the remaining system, even though it is an “alternative.” In short, an adversarial system, grounded upon a rights-based paradigm, in turn founded upon “the rule of law,” must remain in place, at least in some form, as a viable dispute resolution mechanism.

Why?

The answer is straightforward. Ultimately, the collaborative paradigm falters if not grounded upon an absolute. Absent the rule of law, dispute resolution devolves into anarchistic manipulations of situational morality – “whatever works” – and can be agreed upon, notwithstanding extant legal principles.³⁹ Such thinking, left unchecked, erodes essential societal and economic stability upon which American culture is grounded.

There is no question that “technology brings into play a wide variety of legal topics in unique and innovative settings,”⁴⁰ but it cannot fuel the flame of

37. *Id.* at 12 (emphasis added).

38. George J. Siedel, *Six Forces and The Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L. J. 717, 735 (2000) (quoting George Melloan, *Coase was Clear: Laws can Cure or Kill*, WALL ST. J., Oct. 27, 1991, at A2 1).

39. See John J. McCauley, *Overcoming Common Barriers to Settling Cases*, 42 ORANGE COUNTY LAWYER 21 (2000), who observes of our present system:

People need protection from the wrongs of others. What provides that protection is an institutional commitment to the “Rule of law, not of men” as the standard by which major disputes get resolved. This is a deep and ancient value, whose roots precede Plato, whose existence is a hallmark of civilization and whose implementation is a prerequisite to liberty. Its protectors are judges who are charged and under oath to impose not their will, but public and predictable rules of social conduct, and who are themselves held accountable to a higher power, a court of appeal, whose only mission in life is to correct errors of law as a failsafe on human corruption or fallibility.

Id.

40. Seidel, *supra* note 37, at 737.

abandonment of the old. Instead, the emergence of alternate methodologies stimulates innovation, in part through the application of technology. The goal is to achieve a reasoned balance between the old and new systems with neither replacing the other; and each complimentary. This is the transitional process we now witness.

IV. THE FUTURE

Predicting the future is a lost cause from the outset. Thus, the challenge is not to predict the future, but to reflect upon the nature of the present, knowing that actions taken today can and will affect the result tomorrow. In striking the balance between an established “rights-based” system of law and a collaborative system of alternatives seemingly more responsive to the advent of new technology, the challenge is to maintain the balance.⁴¹

Thus, the question for the evolving future is not so much an issue of “alternatives” as it is the selection of an “appropriate” dispute resolution mechanism. Given the increasing presence of differing methodologies, some mandated and others voluntary, the future embraces a balance between traditional and “alternative” methodologies, so that selection of either becomes “appropriate,” dependent upon the case, the parties, and the desired outcome.

The most significant change now emerging from the melting pot of various ADR methodologies is not a particular program, method or approach. Rather, an essential paradigm shift from the acceptance of adversarial litigation as the dominant form of dispute resolution to acceptance of dispute resolution driven by what is appropriate to the given scenario has emerged, grounded upon a rights-based system of law.

In such a setting, lawyers will, in the words of Justice Berger, truly become “healers,”⁴² able to assist clients in selection and pursuit of methodologies tailored to the issues and problems presented. One size no longer fits all. Indeed, the passage of the Civil Justice Reform Act of 1990 and later the Alternative Dispute Resolution

41. See P. Jean Baker, *Competent Use of Alternative Dispute Resolution*, 39 ORANGE COUNTY LAWYER 16 (1997), who writes:

Typically, civil legal disputes have proceedings in a pattern of attempts at negotiating settlement, including or closely followed by the initiation of discovery and litigation. Now, however, a proliferation of contract clauses, state or federal statutes and court programs providing alternatives to litigation has become standard. The sheer variety of ADR options, including either voluntary or mandatory use of mediation, binding contractual arbitration, nonbinding judicial arbitration, general and special references, temporary judges, and special masters, has created landmines for practitioners.

Id.

42. See Warren Burger, *American Law Institute Study on Paths to a “Better Way:” Litigation, Alternatives, and Accommodation: Foreword*, 1989 DUKE L.J. 808 (1989), wherein he stated:

The machinery of justice is in the hands of the profession; lawyers and judges have a duty to make the system work better and the public has a right to look to use for some answers.

....

Some lawyers were disturbed when I wrote that lawyers should be “healers not gunslingers” but I have not hesitated to restate it. It is our responsibility to find a “better way. . .”

Id. at 809.

Act of 1998, signal an "official" shift to this very path. Provision of dispute resolution methodologies and mechanisms through governmental structure provides access to such systems to all, regardless of financial resources, much (at least in theory) as the court system today.

So saying, it is apparent that the paradigm shift has already begun. The passage of the Civil Justice Reform Act of 1990 spurred innovation in the federal courts, and resulted in studies by the Federal Judicial Center (FJC) and the RAND Corporation. "The RAND study carefully selected six districts, evaluating 12,000 cases, with 3,000 judges and 5,000 lawyers."⁴³ The RAND study concluded "that ADR had little or no impact on time to disposition and the cost of litigation," but did acknowledge that "*lawyers and litigants viewed the programs as worthwhile in general as well as valuable to their individual cases. . .*"⁴⁴ Why, despite the conclusion that cost and delay were *not* affected, did lawyers and litigants view the programs worthwhile? The answer can only be that the methods and processes, collaborative in nature, were more appropriate to resolution of the dispute than traditional rights-based litigation.

In January 1997, the FJC issued a similar report, finding different results in terms of cost and delay, but arriving at the same fundamental conclusion as the RAND study. The FJC concluded that:

ADR programs had a favorable impact on time to disposition, costs *and lawyer and litigation satisfaction. . .* In addition, a sizable majority of lawyers in each of the three demonstration districts reported that, in their opinion, participating in ADR had lowered the cost of their cases by the median average of \$10,000, \$15,000 and \$25,000 respectively. *Moreover, lawyers and litigants in all three districts overwhelmingly supported the ADR programs in their districts.*⁴⁵

In an analogous study of the use of ADR within the corporate arena, Cornell University, in conjunction with Price-Waterhouse-Coopers and the Foundation for the Prevention and Early Resolution of Conflict (PERC), surveyed "1000 of the largest U.S. corporations on the use of ADR."⁴⁶ The study found that "88 percent of the respondents to the survey had used mediation and 79 percent had used arbitration in the three years preceding the study," and that "84 percent were likely to use mediation in the future, while 69 percent were likely to use arbitration."⁴⁷ The Cornell study also noted that use of mediation in corporate dispute resolution "*affords greater control of the process, more satisfaction with the process, more satisfaction with the outcome, the preservation of relationships and efficiency both in time and cost.*"⁴⁸

43. John S. Murray, *Congress Directs Courts to Devise Dispute Resolution Programs*, 14 LEGAL BACKGROUND (1999).

44. *Id.* (emphasis added).

45. *Id.* (emphasis added).

46. William J. Snyder, *Institutionalizing ADR: Changing the Corporate Culture*, THE METRO. CORP. COUNS., New York, May 1999, at 69.

47. *Id.*

48. Donna J. Tuttle and Jennifer E. Hutchinson, *ADR Perspectives: Law Firms: The Secret of a Successful ADR Program*, THE METRO. CORP. COUNS., August, 1999, at 56 (quoting John G. Bickerman of Bickerman Dispute Resolution Group) (emphasis added).

Acculturation, however, takes time. Commenting upon the Cornell study, John Bickerman, founder of Bickerman Dispute Resolution Group in Washington, D.C., cautioned that while a vast number of companies have experience with alternative dispute resolution, “it is taking time for some to become frequent and habitual users of ADR.”⁴⁹ Nevertheless, the message is spreading throughout the corporate world. The New York-based CPR Institute for Dispute Resolution (CPR), a non-profit coalition of 500 companies and law firms, was founded in 1979 to commit themselves to “seriously consider ADR before litigating.”⁵⁰ In Great Britain, “the Centre for Dispute Resolution (CEDR) has emerged as one of the leading international bodies in the field of ADR . . . [committing] . . . more than 4,000 companies . . . [and] . . . 1,500 law firms” to a policy statement that they will also “seriously consider ADR before litigating.”⁵¹

The Civil Justice Reform Act of 1990 “required extensive studies into the effects of new case management and ADR initiatives on the problems of cost and delay in federal litigation.”⁵² The CJRA effectively became a catalyst for accelerated national experimentation by the federal courts in alternative dispute resolution.⁵³ In its wake, the Alternative Dispute Resolution Act of 1998 provides, in-part that:

litigants in all civil cases consider the use of an ADR process at an appropriate stage in the litigation. Each district court shall provide litigants in civil cases with at least one ADR process, including but not limited to mediation, early neutral evaluation, minitrial, and arbitration authorized in sections 654 through 658.⁵⁴

Notably, the presence of alternative mechanisms is directly tied to litigation. The question becomes: Will the courts at some point become the “point of first contact” between those seeking dispute resolution and any one of a different number of alternatives, *without need of meeting the threshold requirement of filing a complaint and beginning formal (adversarial) litigation?* At this stage in societal evolution, we are committed by the force of the institutions now in place, to a system of adversarial dispute resolution pursued through the mechanism of the “courts.” As we attain greater understanding of both the *destructive* nature of litigation *per se* (when pursued at “heightened” levels), and the potential *constructive* nature of “alternative” methodologies, will the courts become a forum for “appropriate dispute resolution” and not simply “litigation?” Annexation by the courts of alternative methodologies seem to herald such a result.

Indeed, why should it not be so? Why must the threat of litigation be the triggering mechanism spurring one to ADR? The ‘old’ paradigm reveals

49. *Id.* (quoting John G. Bickerman of Bickerman Dispute Resolution Group).

50. Duve, *supra* note 2, at 9.

51. *Id.*

52. Murray, *supra* note 42.

53. See Donna Stienstra, *ADR in the Federal Trial Courts*, 7 FJC DIRECTIONS 4, 5 (1994), who comments:

Even without enactment of the 1990 Civil Justice Reform Act, it is likely that ADR would have continued to develop in the federal courts, as it has in the state courts and private sector, but the Act’s passage almost certainly quickened the pace of ADR adoption in the federal courts.

54. 28 U.S.C. § 652 (2000).

“alternative” methodologies as favored because they *avoid* the cost, delay, and oftentimes rigid results occasioned by litigation. Will there be a point in time when the motivation for pursuing a collaborative remedy is *not* the ever-present Sword-of-Damocles which litigation has become? “Litigation” is to alternative methods as is the spur to the horse. Run fast to avoid the pain. Will it always be so?

“In its broadest sense, ADR suggests a culture that takes a proactive approach to avoiding disputes and one that embraces full range of options for resolving them.”⁵⁵ The crest of the wave is rising. Even a quick glance at Martindale-Hubbe’s ADR service section reveals more than 60,000 listings of lawyers and law firms holding themselves out as active within the ADR arena.⁵⁶ As one writer notes, “there is a need to change our basic attitudes. We need to redefine the very meaning of what it is to win.”⁵⁷

The change has begun. ADR is among us. It has already begun to work a change in our perspectives, redefining our understanding of service and taking the legal profession to new heights in understanding how to best meet the client’s interests. In short, the paradigm shift is now. As “Doc” Emmett Brown exclaimed, with a gleam in his eye, at the conclusion of the film *Back to the Future*: “Roads? Where we’re going we don’t need roads!” And the cold-fusion-powered DeLorean leapt into the air, its wheels tucking neatly into its undercarriage, streaking in a flash of white brilliance into the future.

Some might say, it is our destiny as well.

V. HEY! WHAT ABOUT THE SKYCARS AND JET-PACKS?!

Could the future hold promise for a “courthouse” whose function is “dispute resolution” and not litigation? Will it be possible for a dispute to be formally stated without need to resort first to adversarial litigation—to threaten an adverse decision beyond the defendant’s control? In IT terms, will the courthouse be capable of functional multi-tasking instead of being a dedicated-use facility?

In a word—yes.

Given a paradigm shift, it is not only possible but likely that the “rule of law” will bear fruit in an evolutionary process or “maturation,” allowing non-adversarial (*e.g., collaborative*) mechanisms to take their place alongside litigation as co-equal means of dispute resolution, without need of the potential threat of litigation as the bottom-line motivator. Even now, the call is being made to remember the late Chief Justice’s words that “lawyers should be healers, not gunslingers.”⁵⁸

Good lawyers must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders. They must know of pain, and how to help heal it. Lawyers can be healers. Like physicians, ministers, and other healers, lawyers are persons to whom people open up their innermost secrets when they have suffered or are threatened with serious injury.

55. Picker, *supra* note 29.

56. Tuttle & Hutchinson, *supra* note 48.

57. See Picker, *supra* notes 29, 55.

58. Burger, *supra* note 42, at 808-09.

People go to them to be healed, to be made whole and to regain control over their lives.⁵⁹

There are, however, powerful forces working to the contrary, and before a discussion of future methodologies can begin, there must be understanding of these countervailing forces. Just as we see an evolutionary change raising the status of “alternatives” to that of “co-equal” dispute resolution mechanisms, so too do many see an evolutionary change in the professional role of lawyers, from caring professionals to hard-bitten, bottom-line business people:

A long time ago when the world was “kinder and gentler,” and perhaps so was I, there were only “lawyers.” They were people who cared about people and their problems, cared about their profession, and owed a greater allegiance to the legal profession than to money, success, or even their clients. They were counselors, confidants, and often friends who enjoyed their work and were proud of what they accomplished.

Where in the name of change and progress has this concept of a “lawyer” gone? What has happened to that beloved, honest, bifocaled counselor whose eloquence and commitment was epitomized in movie classics such as *To Kill a Mockingbird* or *Inherit the Wind*. Are the “lawyers and principals” of yesteryear going to be replaced with the image of the “Fortune Cookie Litigator?”⁶⁰

In light of such comment, one might be tempted to abhor “progress in the legal profession” and rebuke technology as more likely than not being co-opted to the “dark side.” “No longer is there a desire for simplicity and an expeditious result. No longer does fundamental fairness mean admitting to the judge when your client’s position is not well-founded. The adversarial process is defined solely in terms of winning; seldom do the methods, means, or expenses involved matter.”⁶¹

Indeed, technology has often been decried as contributing to this process, enabling ‘paper wars’ to proceed at a frenzied pace, motions, objections and discovery rolling out of computers and printers in vast numbers of pages at the simple touch of a keyboard. “[T]oo often, the modern day litigator believes that zeal and disruption are positive attributes of advocacy which can produce favorable results.”⁶²

Notwithstanding the foregoing, the pendulum is swinging back—not to earlier times, but toward opportunities to multi-task; bringing practicing lawyers to a point at which dispute resolution is no longer synonymous with litigation. Enactment of legislation specifically embracing “alternatives” foreshadows the rising evolution. Over time, as lawyers function in “alternative” settings, attitudes will change. Change begets change. The Heisenberg Uncertainty Principle, prominent in the study of the behavior of sub-atomic particles, applies equally well to human interactions: *The very act of observing, changes that which is being observed.*

As lawyers participate in growing numbers of alternative methodologies the efficacy of those methods will become self-evident. “Alternative” methods will

59. Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, n. 106 (1996) (citing James D. Gordon, III, *Law Review and the Modern Mind*, 33 ARIZ. L. REV. 265, 271 (1991)).

60. Leonard Pertnoy, *Order in the Court*, 43 SYRACUSE L. REV. 1159 (1992).

61. *Id.* at 1160.

62. *Id.* at 1162.

emerge as "appropriate" methods, and thinking will change as form follows function.⁶³

What about jet-packs, skycars and rockets?

Through the course of dispute resolution, experimentation with and adoption of alternate methods necessarily stimulates experimentation and adoption of alternate and/or advanced technologies. Technology and law have been and are, natural companions. The law's swift embrace of newly available technology is understandable.

A brief overview of the technological innovations of the last twenty years suggest that many have conferred substantial benefits on the profession. In particular, information technology, which is the most familiar technological development gives lawyers access to amounts of legal information previously undreamed of . . .⁶⁴

The most significant technological change in the past five years has been the proliferation of the *Internet*. It alone, beyond all other technologies, has captured the imagination of ADR proponents, stimulating experimentation and encouraging continued use of alternate methodologies. Five critical elements seem to propel heightened use of Internet technology:

1. Information access;
2. Information sharing;
3. Ease of communication;
4. Negation of distance; and
5. Ease of access.

Information access refers to the user's ability to *obtain* information via on-line data bases, or from others. *Information sharing* addresses the user's ability to *provide* information; while *ease of communication* describes the synergy of *access and sharing*. *Negation of distance* recognizes the capability of *communication* across vast physical distance, at seeming minimal cost; while *ease of access* refers to capability for Internet communication via a variety of differing devices, including palmtops, laptops, desktops, or even cellular telephones, regardless of location.

The application of the Internet becomes more complex, however, in the context of alternative dispute resolution, particularly in light of the traditional ADR roles of "go-between," "mediator," and "arbitrator." By definition, the Internet is self-limiting. Interpersonal contact is absent, and interaction is restricted to a two-dimensional framework. "No problem," some might say, convinced that dispute

63. See Kenneth L. Jacobs, *Alternative Dispute Resolution: How to Implement an "Appropriate Dispute Resolution" Program in Your Litigation Department*, 76 MI BAR. JNL. 156 (February 1997), noting that:

Although the ADR movement originated in an effort to promote "alternatives" to court-based dispute resolution, more recently ADR practitioners have emphasized that the process really is about tailoring an "appropriate" means of resolution for a particular case. Hence, court litigation is appropriate dispute resolution for a constitutional question. Mediation is appropriate dispute resolution for many commercial contract conflicts. Arbitration is appropriate dispute resolution for many labor disputes.

Id.

64. Lien, *supra* note 22, at 93.

resolution may be effectively achieved through the dispassionate mechanism of remote communication offered by the Internet. Others, disagree.⁶⁵

People are not computers. While a difference in factual perception may form the basis for a dispute, that difference, and its ultimate resolution, are often tinged with intangibles, not readily quantifiable. Many argue that communication alone—especially in the written form prevalent in today's technology—cannot be the singular mechanism of dispute resolution. To be efficacious, communication must be believed. Perceptions of credibility, sincerity and trustworthiness are critical intangible factors, significant to collaborative dispute resolution.

Although persuasive communication in an adversarial setting requires destruction of an opponent's credibility, precisely the opposite must occur in the ADR venue. Instead of destroying an opponent's credibility, each disputant must be convinced that the other party is sincere and is seeking a peaceful or nonadversarial resolution. . . . That communication can be persuasive in its effect is well understood. Not so clear are the means by which communication is persuasive. Understanding the mechanisms of persuasion is particularly cogent in the settlement venue, in which processes and undertakings are far less structured than that of trial.⁶⁶

Persuasive communication is necessarily influenced by a variety of factors, not the least of which are nonverbal. Nonverbal communication embraces a spectrum of behaviors, including facial expressions, physical gestures, kinesics, proxemics, touch, smell and paralanguage. Kinesics describes body movement; proxemics refers to spatial relationships, together with orientation in space; while paralanguage describes vocal variations in pitch, speech rate and loudness.⁶⁷

Yet, none of these "intangibles" are present in cyberspace.

The claims about the benefits of electronic distance amount to blatant double-talk. Like litigation, where the parties send briefs to each other without the benefit of face-to-face interaction, using E-mail isolates the participants from one another. Mediators cannot assert that a face-to-face conversation is indispensable for transformation of the dispute and reconciliation of the participants, and simultaneously claim that the distance that prevents participants from ending their conflict will make their hearts grow fonder for one another.⁶⁸

Consider the actions of the traditional "go-between." As the go-between shuttles between opposing parties he:

is not a mindless communicator. He exerts influence by "rephrasing" the messages he delivers. He may manage to slip in a fair number of proposals of his own. And by his characterization of the flexibility or inflexibility of each side to the other, he may strengthen or weaken the bargaining position of one or the other.⁶⁹

65. See, generally, Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 B.Y.U.L. REV. 1305 (1998).

66. Jeffrey S. Wolfe, *The Hidden Parameter: Spatial Dynamics and Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 685, 700-01 (1997).

67. *Id.* at 701 (citing Elizabeth LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, LAW & PSYCHOL. REV., Spring 1984, at 83).

68. Eisen, *supra* note 65, at 1326-27.

69. SHAPIRO, *supra* note 4, at 4.

The *perceived* “good faith” of the go-between is often a factor in the perception of his representations, ultimately affecting resolution of the dispute.

Consider next the “cyber-settler.” In function, on-line settlement modalities best resemble the “go-between.” One such program, *Cybersettle*,⁷⁰ is lauded by some because its “approach is in direct contrast to positional bargaining, which erodes credibility and is inefficient to boot.”⁷¹ However, in the words of one lawyer, its benefits are restricted, “appropriate, of course, only when the sole issue left in a dispute is money.”⁷²

The problem with this haggling game is that it often destroys the credibility of the participants, especially when there is no effort to justify the numbers the parties bandy about. . . . The posturing that takes the place of analysis and reason frequently ends with failure. Perhaps the parties have offended each other or have painted themselves into a corner by issuing ultimatums from which they cannot retreat without losing face.⁷³

Still, the benefit of an ADR effort is not found in resolution by numbers alone. For many, ADR efforts are significant because they empower the parties to “resolve their own disputes” and “can often transform their disputes into a win-win scenario. The parties can end up transcending their particular disputes . . . and build long-lasting and closer relationships with their adversaries.”⁷⁴

In cyberspace?

The idea of mediating disputes online has captured the imagination of the dispute resolution profession. Mediators propose creating “spaces” in cyberspace where disputes would be resolved electronically. . . .

. . . .

[A]mong dispute resolution professionals, there is an almost limitless optimism about online mediation’s potential. One article confidently asserts, “In a relatively short amount of time, we will have virtual ongoing mediation and other confidential decision making forums on the Internet” Another proponent claims mediators could create “a virtual [dispute resolution] architecture that reflects our profession’s highest aspirations.” Mediators assert online dispute resolution can be done with today’s technology. They believe it will save the parties money [particularly travel costs], foster enhanced communication among participants, and reduce the emotional temperature of disputes.⁷⁵

The benefits of ADR, and particularly mediation, do not, however, correlate one-on-one with the current state of the cyberdynamic medium. Where “empowerment” is lauded in personal ADR encounters, “enhanced” communication is praised in cyberspace. Where the ability to build long-lasting relationships is

70. See Michael Palmer, *Focus-Technology: To Cybersettle or Not to Cybersettle*, 26 VER.B.J. & L. DIG. 23 (December 2000).

71. *Id.*

72. *Id.*

73. *Id.*

74. See Peterson, *supra* note 5.

75. Eisen, *supra* note 65, at 1307-08.

sought through interpersonal encounter, cyberspace offers “to reduce the emotional temperature” of disputes.

The use of cyberspace as a distinct medium hearkens to the early years of television and Marshal McLuhan, who adroitly observed that “the medium is the message.” Like television, cyberspace is a uniquely intriguing medium. And, like television, the fact of the use of the medium may itself dominate the substantive message.⁷⁶ The novelty of being able to “negotiate” online; or later proclaim participation in such online activity, may itself carry sufficient moral imperative as to construct a settlement trajectory of such force as to outweigh the absence of face-to-face communication.

Many, however, believe serious drawbacks remain to cyberspace ADR absent re-orientation of mediators and expectations of participants. “Electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation. Given the profession’s current orientation to listening and processing oral information, mediators would find it largely impossible to translate their skills to the online setting.”⁷⁷ Participants who eschew the courts, or even face-to-face settlement alternatives, may find themselves ill-equipped to incorporate non-verbal, i.e., written cues, into an otherwise emotionally driven dispute. “The predominantly written character of the online mediation proceeding would create communication breakdowns.”⁷⁸

In one writer’s view:

online mediation is an unwise idea until at least two substantial developments take place. First, the mediation profession must fundamentally reorient itself to take account of the different demands of the online medium. Second, and no less important, technology must progress to the point where replicating face-to-face interaction is universal, inexpensive, and easily understood by every participant.⁷⁹

Suppose, however, a future world had overcome the technological and psycho-cyber-dynamic shortcomings of the present era. What then?

76. See Nuffer, *supra* note 26, who observes:

As society becomes more attuned to instant information and decision making, and more familiar with other systems of justice around the world and works with more accessible branches of government, the public is less familiar with fundamental elements of the legal system.

Id.

Will the medium then supplant the system?

77. Eisen, *supra* note 65, at 1308.

78. *Id.*

79. *Id.* at 1310. Eisen further comments:

Could the use of E-mail accomplish the usual functions of mediation, which is predominantly oral? I believe online mediation’s electronic character creates severe limits on its current potential. *The most obvious set of shortcomings inheres in the substitution of writings for meetings.* The electronic character of the proceeding will make it difficult, if not impossible, to pursue important process values of mediation. Furthermore, the absence of face-to-face conversation in online mediation is problematic because mediators are not currently trained to mediate online *and because of asymmetries of computer resources exist.*

(Emphasis added). *Id.* at 1321.

VI. BUCK ROGERS IN THE TWENTY-FIFTH CENTURY!

Real-time connectivity. Sensory data input. Interactive neuro-sensory stimulation. In short, *virtual reality*. The time is ten years hence. A dispute has arisen between your company and a supplier. VR settlement clauses obtain, and *Virtu-Ate*, an online DR/CR (“Dispute Resolution”/“Conflict Resolution”) specialist is specified by the parties as the mechanism of resolution.⁸⁰

Taking your place on the DSIC (pronounced “dee-sick” for “data sensory input chair”); or for those less technologically motivated, “the sick couch,” you snap your headband into place as the chair quietly molds itself to your contours. One word or phrase (you choose it) and you find yourself in your virtual control setting—your ‘home page.’

“Beam me up Scotty!” And you’re there. *In situ*—a private virtual control center—a virtual world you interact with as if it were the real world. To your virtual self, the virtual attributes of this “intra-dimensional” world seem as real as “real-time”—yourself in the non-virtual world. From your control center you connect with the other parties—the *Virtu-Ate* DR specialists,⁸¹ the opposing parties and their counsel, as well as your own lawyer—each of whom are similarly connected and extant “with” you (and you, “with” them).

Newcomers, those stubborn few who eschew the “dream world,” are startled by the seamless reality of this non-existing existence. And startled still again by the others they meet – “persons” of other persona, garbed in assumed personalities and appearances. New rules have thus evolved in the implementation of VADR (“Vāder”)—rules promulgated by the AVAA (the “American Virtual Arbitration Association”)—which prohibit assumed “persona.” Persons adopting the AVAA rules must “appear” in VR as themselves.

The first order of business, therefore, is the “declaration”—the shedding of all assumed persona. It is a means of electronic identity verification, critical to “netting”— the rare circumstance of appearing as yourself in VR. Failure to comply results in immediate termination of the proceedings, followed by sanction, including revocation of VR access privileges.

All parties are seated about a traditional conference table. Once the introductory “comments” are made (consisting of multiple data streams, integrated into audio, visual and file downloads) each side meets with a designated “DR” specialist, who becomes the designated “peacemaker.” “Peacemakers” are the future “private judges,” coming to identify with “their” party, encouraging resolution on terms beneficial to both parties; yet able to make a final determination in the absence of agreement. Society has moved forward, accepting the need for “appropriate” dispute resolution, recognizing that advocacy is a highly specialized

80. Both parties agreed, pursuant to the FDRA (the “Federal Dispute Resolution Act”), that online resolution would be the “appropriate” procedure employed to resolve “any and all disputes arising between them.”

81. “Dispute resolution” specialists are utilized because this is a commercial, not personal issue. Personal issues (such as family law) require “conflict resolution” specialists—individuals more intensely trained in the psycho-dynamics of interpersonal relations.

form of resolution, to be reserved for “special cases,” not for commercial or personal disputes.⁸² Certified Peacemakers hold a valued place in VR, trusted persona whose presence is respected by all who seek VR resolutions. Their ability to interface seamlessly with all data streams serves a unique function, enabling simulated creation of potential resolutions. Peacemakers superintend enactment of proposed settlements, unique to VR—but conducted under strict auspices of the participating Peacemakers—three at a minimum, one “for” each party, and one neutral.

Speculation about resolution is dramatically revealed in the out-working of VR “solved” cases, enabling the parties to see first-hand the potential outcomes over time. The neutral Peacemaker is responsible for ensuring even-handed perspectives in each outcome. The “party-Peacemakers” act as guides, revealing the outcomes in all aspects. Termed “Dickens” visits, Peacemakers lead opposing parties through potential results of resolution; as well as failure to achieve an agreed-upon result. The resolutions are full VR enactments of life (be it corporate or personal) under a variety of high probability outcomes. Full VR immersion is powerful persuasion, and few decisions need ever be made by the neutral acting in his or her decision-making capacity.

Taking a deep breath, you connect with your lawyer. Fifteen minutes later you’re sitting about a large conference table, floating in the air. . . .

VII. MORE IMMEDIATE VENUES

The holding in *Lapine Technology Corp. v. Kyocera Corp.*,⁸³ casts a long shadow for the evolution of ADR. *Lapine* involved an arbitration case in which the parties provided for district court review of errors law. The trial court concluded that the parties could not, by their agreement, confer jurisdiction upon the court, applying the well-settled principle that jurisdiction cannot be conferred by agreement. It concluded “that its options were limited by the provisions of the FAA and may not be extended by agreement of the parties.”⁸⁴ The decision was two-edged: the court reinforced traditional notions of arbitral finality, refusing to review the arbitrators’ award for errors of law; but in so doing specifically disregarded the bargained-for dispute resolution mechanism chosen by the parties.

Though the Ninth Circuit later reversed *Lapine*,⁸⁵ the question for debate is philosophical. If the avowed public policy expressed by Congress in its 1925 enactment of the Federal Arbitration Act⁸⁶ was to negate judicial hostility⁸⁷ towards arbitration, *Lapine* would seem to indicate to the contrary. How then will ADR

82. See Nuffer, *supra* note 26, arguing:

In a season of many pressures, a controlling paradigm—a central vision—is needed to ensure that essential traditional values are retained, unnecessary and outmoded vestiges are discarded.

Id.

83. *Lapine Technology Corp. v. Kyocera Corp.*, 909 F.Supp. 697 (N.D. Cal. 1995).

84. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225 (1997).

85. *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997).

86. 9 U.S.C. § 10 (2000).

87. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 1647 (1991).

achieve creative evolutionary triumph if faced with defensive judicial hostility?⁸⁸ The reality is that present-day ADR exists within the confines of a traditional dispute resolution system; with attendant tensions of change conflicting with the jurisprudential inertia of proven methods. Current methodologies have been fired in the kiln of adversarial jurisprudence and the attendant boundaries of rights, due process and fundamental fairness have thus been well defined. Not so well defined are the “rights” associated with ADR. Indeed, the Federal Arbitration Act at Section 10 specifically references the ability of a participant to challenge an arbitral resultant in the event one’s “rights” have been infringed, *without defining what rights are being referenced*.⁸⁹

Still, the force of change persists. “The increasingly altered appearance of arbitration may also suggest that one of the principal messages of the ADR movement—that parties can experiment with dispute resolution, shaping and adapting different processes to meet their own particular needs—is at last beginning to percolate through the profession.”⁹⁰

One of the most critical areas of evolutionary change is in healthcare. This is increasingly an area of divergent need, given a proliferation of alternative healthcare delivery modalities, with confusing linkages underlying the corporate and legal delivery vehicles. Insurance plays a key role in the provision not only of healthcare, but also in associated dispute resolution systems. “Uninsured consumers have limited access to more informal, less costly dispute resolution procedures that are customarily available only members of health plans . . . The commonlaw tort system is cumbersome, expensive and often difficult to access unless the consumer has suffered significant damage.”⁹¹ Thus, many now argue for “an independent, integrated dispute resolution institution . . . [available] . . . to uninsured consumers who have disputes with providers from whom they obtained care and also from whom they sought, but were denied care.”⁹² The problem, of course, is found in *Engalla v. Kaiser Permanente*,⁹³ that is, where an in-house dispute resolution system is under the control of one of the parties.⁹⁴

88. See, e.g., Rau, *supra* note 84, at n.61, citing a number of cases which “have exalted concerns of efficiency over the value of consent,” rejecting structured agreements between parties requiring further court review subsequent to arbitration.

89. See 9 U.S.C. § 10 (2000).

90. Rau, *supra* note 84, at 260.

91. Kinney, *supra* note 21, at 388.

92. *Id.*

93. *Engalla v. Permanente Medical Group*, 938 P.2d 903 (Cal. 1997).

94. *Id.* at 975.

Kaiser entered into the arbitration agreement with knowledge that it would not comply with its own contractual timelines . . . Though Kaiser is not obliged by law to adopt any particular form of arbitration, the record shows that it did not attempt to create within its own organization any office that would neutrally administer the arbitration program, but instead entrusted such administration to outside counsel retained to act as advocates on its behalf. *In other words, there is evidence that Kaiser established a self-administered arbitration system in which delay for its own benefit and convenience was an inherent part, despite express and implied contractual representations to the contrary.*

(Emphasis added). *Id.* at 975-76.

Eleanor Kinney describes the preferred attributes of a healthcare dispute resolution system, recognizing “that no single design nor ideal list of process elements guarantees fairness to consumers.”⁹⁵ Interestingly, she seems to describe a system, which, in large measure is already in place in the form of the administrative judiciary assigned to Social Security Administration’s Office of Hearings and Appeals.⁹⁶

Professor Kinney calls for the following:

- Consumers should have full rights of discovery and credible expert assistance in the development of a case when medical facts are at issue.⁹⁷
- Further, if medical facts are definitive, the decision maker should have access to neutral expert testimony to evaluate the relevant medical facts in the adjudicative proceeding and in any appeal process.⁹⁸
- [T]he decision maker must be knowledgeable and unbiased. This is particularly a problem when the plan or provider “owns” the adjudicative process. The decision maker should also have the requisite discretion and authority to decide the matter, and provide a wide range of relief.⁹⁹
- Consumers should have the right to reconsideration and judicial review of an adverse decision in any adjudicative proceeding “owned” by the provider or plan.¹⁰⁰
- Finally, methods for empowering consumers in the process should be present. A process should be sufficiently informal and comprehensive so that appeals can be negotiated by consumers individually (at their option). However, a consumer should also have representation by counsel, or another advocate of their choice and access to free legal counsel.¹⁰¹

Apart from the obvious jurisdictional differences, federal administrative law judges, conducting hearings on questions of entitlement to federal disability benefits, provide essentially the system described.¹⁰² However, two critical issues arise with respect to such a system and are indeed problematic even today within the federal

95. Kinney, *supra* note 21, at 391.

96. See generally, Jeffrey S. Wolfe and Lisa Proszek, *Interaction Dynamics in Federal Administrative Decisionmaking: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L. J. 293 (1997).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Kinney, *supra* note 21, at 393.

102. See generally, 20 C.F.R. § 404.100 *et seq.* Federal administrative law judges hear complex legal/medical cases, involving children and adults alike. Interestingly, the so-called “Medicare Part C” cases present almost the exact scenario projected by Professor Kinney. Consumers (patients) disagreeing with decisions by health-care providers in so-called “Medicare Part C” cases have the opportunity to appeal the actual medical decision as to provision of medical care to federal administrative law judges. So-called “Part C” cases involve Medicare HMO decisions and place the judge in the position of effectively having to adjudicate the provision of medical care.

administrative judiciary.¹⁰³ First, while Professor Kinney advocates an “independent” adjudicatory system, the reality of such a system is unfortunately straightforward: once “owned” by the health-care provider all semblance of independence is lost.¹⁰⁴ Any such system must be carefully crafted to be independent, or else have as a necessary corollary the simple feature that proceedings be non-binding on patients, but binding on the provider, at the patient’s option.

Second, while the feature is not so described in Professor Kinney’s analysis, any “fundamentally fair” system must be adversarial in nature—a requirement that renders the decision maker neutral and passive. An inquisitorial system will fail if the decision maker is employed in any manner by the provider. Anything short of an adversarial process will cause the decision maker to be an active participant in the solicitation and production of evidence. To render the decision maker an “active” participant in the adjudicatory process builds unnecessary bias into the system, fostering serious limitations on resolution by “alternative” methodologies. If the decision maker is the only *other* participant in the process (i.e., there is no “opposing” side), the ability to “compromise” becomes, by definition, self-limiting. Why compromise, when a decision achieves the same result, i.e., a disposition?

Thus, formulation of healthcare dispute resolution systems must be substantively “alternative” as opposed to being “procedurally” so. If the procedural alternative is to create a *system* different from the extant court system simply because the courts are viewed as “too slow” or “too costly,” with the attendant consequence of eroding the substantive rights being administered, better resolution is found in existing ADR programs; i.e., neutral arbitration administered by the AAA or other, independent ADR administrators, unaffiliated with the healthcare provider *per se*.

Better the existing system (and expertise) of sitting federal administrative law judges be utilized than resort to a private system of the same ilk. A private system holds far too great a potential for subtle erosion of decider independence *via* company “ownership.” This is even an issue of significant magnitude in the current administrative judiciary.

If such a system were devised utilizing the current corps of federal administrative law judges, a fundamental reorientation of current proceedings would facilitate implementation of the ADR paradigm. Under the current regulatory scheme, proceedings are inquisitorial, the government unrepresented, and the judge charged with ensuring the record for decision is “fully developed” before a final decision is made. Such a system is termed “non-adversarial,” which, because of the

103. This reference is specifically to the system administered by the Social Security Administration, housing some 1,100 federal administrative law judges hearing some 550,000 cases annually.

104. *Engalla v. Permanente Medical Group*, *supra* note 93, is only one example. See also, *Hooters of America v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) for another example of a party “owned” system of arbitration, run by the company and so flawed as a result, to cause the following holding:

We hold that the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.

absence of the government as a party, limits 'deployment' of traditional ADR processes. Absent an "opposing" party, little distinction can be found between an adjudication and an ADR-based agreement.

Put differently, the efficacy of an alternative dispute resolution system depends upon there being a system to which it is an alternative. In the present system of administrative adjudication before the Social Security Administration, effective ADR can only be accomplished within a limited scope of existing outcomes, and then only if the judge and counsel accept—and act upon—the non-adversarial paradigm as if it were indeed true. If the goal of both counsel and the judge is to achieve the correct result, both should then be prepared to acknowledge the potential efficacy of all possible outcomes. This becomes difficult for a lawyer trained and active in the adversarial realm of the traditional courts when the only other possible outcome is *agreement* that his or her client loses.

As a practical matter, single-party inquisitorial systems limit the ADR paradigm unless the judge adopts a perspective which departs from accepted norms. Rather than stand in "neutral" territory, as an adversarial judge, the "non-adversarial" (or inquisitorial) judge in a single-party system must re-orient his role to that of inquiry, a distinctly non-passive role. The inquiry must be oriented to the perspective of the single extant party. In the case of Social Security appeals the question must become: "How can benefits be awarded (in a benefits entitlement program)?" Only when the judge determines that benefits cannot be awarded is a claim denied. This reorientation empowers counsel to admit that certain portions of the claim may not be efficacious while retaining the integrity of others. In effect, the re-orientation of the decision maker frees the lawyer to "negotiate with himself," thereby carving out an ADR result in a system not otherwise suited for same.¹⁰⁵

Professor Kinney decries the lack of equal access to dispute resolution mechanisms in healthcare dependent upon one's insured status.¹⁰⁶ However, to solve the problem via an in-house dispute resolution mechanism may be tantamount to no solution.¹⁰⁷ Effective "appropriate" dispute resolution methodologies require a

105. In such a system, many wonder whether there is any room for "settlement." In point of fact, alleged dates of disability onset can be negotiated, consistent with the extant medical record. A claimant might allege onset of disability five years ago, but a more supportable claim can be made as of two years ago—thus providing grist for amendment of the claim. Similarly, in a concurrent filing (the filing of a "disability insurance claim" under Title II of the Social Security Act, and an Supplemental Security Income (SSI) claim under Title XVI of the Act) the earlier-alleged onset date applicable to the Title II claim may not be supportable, while the later SSI claim may be—again providing maneuvering room for negotiation.

106. See Kinney, *supra* note 21, at 393:

It is unfair to treat similarly situated consumers differently with respect to available legal remedies for similar conduct. If the tort of bad faith breach and other common law torts are important sources of remedies for legitimate consumer concerns, they should be available to all. If they are not, then it is appropriate to limit or eliminate them, but on an equal basis.

Id. at 395.

107. Even seemingly neutrally administered programs fall prey to the "capture-effect" and become "owned" programs with attendant bias against the claimant. See, e.g., *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F.Supp.2d 940, 944 (N.D. Ind. 2000), wherein the court held:

The [arbitration] Agreement is not comparable to "any arbitration agreement calling for the use of a particular arbitration organization." Rather, the Agreement sets up a contractual

system of independent administration. These lessons have been hard-learned in the arbitration arena. Employing a system such as that already extant in the federal administrative judiciary provides many of the safeguards described. To make such a system of healthcare dispute resolution more responsive to the ADR paradigm, however, requires the active participation of the other (“opposing”) party. Only then will the full range of “appropriate” dispute resolution methods be truly available in this arena.

VIII. SUMMARY

The future of “ADR” lies in directions different from those foretold. “Appropriate” methods and solutions, rather than “alternative” methods and solutions reflect a fundamental change in dispute resolution thinking and chart the course for future vigorous experimentation. As a profession we are learning that the spectrum of disputes in modern society demands a corresponding spectrum of resolution methodologies. As technology changes, so too do the nature and character of the disputes. An “appropriate” spectrum of dispute resolution [“DR”] methodologies flexibly and creatively addresses the demand for effective DR in an

scenario whereby an employer becomes a third-party beneficiary to a contract entered into between the employee and the arbitrator or arbitration organization . . .

. . . .

[T]he arbitration agreement form in the context of the record shows that EDS is collaborating with Ryan’s in an elaborate ruse of mutual third-party beneficiary contracts, with EDS serving as the straw man in each contract—some with Ryan’s and its managerial personnel as the other contracting parties, and others with the applicants for employment as the contracting parties, and with the arbitration provisions binding and benefiting both sets of other contacting parties not only as such but as third-party beneficiaries of all the other contacts - all for the obvious purpose of giving Ryan’s all of the benefits of an employment contract with arbitration provisions but without any of the burdens of a written employment contract.

What then appears to be a facially neutral constellation of contracts, employing a seeming neutral third-party as “administrator” is yet again a variation on in-house ownership of the dispute resolution process. The true character of the program becomes even more plain in the foregoing case when the actual arbitration process is examined. EDS, the supposed neutral third party administrator, has complete control of the arbitration panel, specifying three categories or “selection pools” from which arbitrators are drawn. The problem: EDS is not neutral.

Mr. Penn asserts that the bias in an arbitration panel produced under the EDS rules and procedures stems from the fact that Ryan’s has a contract with EDS. According to Mr. Penn, one obvious ramification of this contract between Ryan’s and EDS is the incentive for EDS to “stack the deck” against Mr. Penn (or any employee) in its generation of the lists from which the arbitration panel results.

Id. at 945-46.

The court agreed, holding:

Further, the “safeguards” cited by EDS and Ryan’s are merely illusory . . . [A]ll three members of the panel have an incentive to favor the employer in the dispute

. . . .

[A]ll three members of the arbitration panel have an incentive to “scratch” the back of EDS in the hope that EDS will return the favor in the future, and there is no equalizer to this incentive such as that found in the collective-bargaining context. . . .

Id. at 947.

evolutionary dynamic society.

Defaulting the advance of such a spectrum of “appropriate” methodologies to the private sector fundamentally flaws the premises upon which dispute resolution mechanisms exist. Too much danger exists, apart from a truly neutral forum, for creation of an illusion of fair disposition, as opposed to its reality. Absent a cogent, identifiable entity ultimately responsible for societal dispute resolution, whether it be by litigation or otherwise, DR degenerates into nothing more than a highly sophisticated form of manipulated outcomes. Self-administered arbitration systems, for example, revealed through litigation to be biased toward the claimant, bear significant lessons.

The court system, therefore, stands as the final institutional arbiter of all disputes within society—for now and for the foreseeable future—not by litigation, but by any “appropriate” method. Evolution of the current adversarial system to one of “appropriate” resolution, administered by a recognized societal institution—the court—ensures continuance of fundamental fairness as a hallmark of American society. Nothing precludes parallel private evolution of DR mechanisms, but, absent recourse to a recognized neutral institution of integrity, such development is without a baseline standard.

Judges will then become experts, not in litigation, but in *dispute resolution* by a number of means. Indeed, court staff may, as it now does in some jurisdictions, include experts in dispute resolution, including arbitrators, mediators, ombudspersons and others,¹⁰⁸ operating as official court personnel, perhaps bearing titles such as “dispute resolution referee” or “commissioner.” The evolution of such processes will necessarily require adoption of new rules, no longer requiring initiation of litigation as the formal gateway to societally sponsored dispute resolution. Litigation will then assume its rightful place as an “appropriate” DR mechanism, but not as the premier standard. DR will evolve from its grounding on potentially destructive forces to potentially constructive forces.

As the pace of technological change pushes societal change, it becomes the duty of the legal profession to prepare for a dynamic and demanding future—one which contemplates and addresses the reality of a changing society—poised to keep pace with a technologically advanced culture, ever pushing the envelope, ever framing new areas now unknown and yet to be known.

* * *

Excuse me, but your server has inadvertently downloaded a metafile, corrupting certain elements of my operating system. As a result, my ISP was unable to grab the connection, which in turn caused me to miss my scheduled VR appearance. You owe me!

108. See, e.g., Julie M. Tamminen, *Using Alternative Dispute Resolution to Handle Client Disputes*, 11 ME. BAR J. 213 (1996), noting:

The many different types of ADR, as described by the American Bar Association Section of Dispute Resolution, include: Mediation . . . Arbitration . . . Conciliation . . . Ombudsperson . . .

DEDICATION

This article is dedicated to my friend and mentor, Marty Frey. A pragmatic visionary, Marty believes in people, the efficacy of the legal system, and most importantly, honor. Marty lives a “rightly ordered” life, putting all into perspective, having indelibly touched and changed thousands of lives; having set the example of what the best can be. For all that you’ve done, all that you are, and all yet still to be

Thanks Marty.