

**New Horizons for the ADR Field:
Where Are We Headed, and Where Can We Go?
Appreciating our Legacy and Engaging the Future Conference
June 18, 2019
Noam Ebner with Ava Abramowitz, Michael Green,
Chris Guthrie, Lela Love, and Nancy Welsh**

The **Appreciating our Legacy and Engaging the Future** conference held at Pepperdine Law School and co-sponsored by the Straus Institute for Dispute Resolution, ABA Section of Dispute Resolution, and Texas A&M's Aggie Dispute Resolution Program got off to a wonderful start, with over 150 ADR educators and professionals filling the room. After opening remarks, the conference's first plenary discussed the ADR field's achievements and legacy. The field has come such a long way, and has done so much good! And yet, panelists and audience alike clearly felt that not all had gone as planned, some things require fixing, and there is still a whole lot of work to be done.

This experience set the stage for the second plenary, entitled *Engaging Our Future: Opportunities and Challenges*, which this post describes. The session brought together a panel including Ava Abramowitz (George Washington, professional federal mediator), Michael Green (Texas A&M), Chris Guthrie (Vanderbilt), Lela Love (Cardozo), and Nancy Welsh (Texas A&M). I (Creighton) was fortunate and thrilled to serve as moderator for this group and this session.

We recognized, however, that even the diverse and considerable experience of those onstage paled beside the collective experience and wisdom that was gathered in the room. Our session, therefore opened with a brief informal polling of participants, to get a sense for who this larger group, so concerned with the future of ADR, comprised.

While we did not collect precise numbers, my impression was that most of the participants attending the conference identified as teachers, more or less equally divided between adjunct and full-time faculty. Most identified as practitioners, to one extent or another, reflecting the pracademic profile typical to the field. Most identified as having experience in mediation, and most had a background in law. When exploring the time-horizon of the group, a not-insignificant number of people indicated that they were planning on retiring, stepping down, pulling back or otherwise decreasing their involvement in the field over the next 2-3 years. This number expanded substantially at the 5-year mark. On the other hand, a fair number of hands were raised to express intentions of remaining in the field for another 20 years.

The session proceeded with each of the speakers sharing a vision for one or more possible futures, regarding one area or aspect of the field. The point was not to capture *all* of the possible futures for the field in its entirety – but, rather, to serve a quadruple purpose, in addition to sharing each speaker's core vision to:

- **orient** participants' mindset towards the future, for the remainder of the conference;
- **frame** some of the issues to be discussed in detail in later sessions of the conference;

- **model** future-oriented thinking; and
- **demonstrate the range** of micro or macro levels of the field's activity that would benefit by a future-orientated examination.

Below, the speakers in this session summarize their remarks in their own words

Forced Arbitration and Arbitrator Diversity / Michael Green

One of the biggest opportunities and challenges will be the impact of so-called “forced arbitration” when it is employed by powerful businesses to limit recovery, process, and transparency for the powerless in our society — or what Jean Sternlight has called the “little guys.” Specifically, after failures to limit the spread of forced arbitration through the courts and Congress, what processes will be developed as a response to social movement pressures and public criticism? And finally, how will the color line and gender line for neutrals be addressed in a comprehensive manner?

For arbitration to be considered a successful form of ADR in the future, it must shift from the use of power imbalances (present in individual forced arbitration and class arbitration waivers) that leave concerns about fairness and transparency. Finally, arbitration processes will need to establish and employ a critical mass of diverse arbitrators who reflect more precisely the make-up of the powerless parties attempting to resolve their disputes with large businesses. However, the real challenge presented regarding diversity is to recognize that the parties, especially the big businesses, must agree to select diverse arbitrators.

Unlike general concerns about improving workplace interactions by promoting diversity, employers and big businesses face negative ramifications in choosing diverse arbitrators who can make rulings that the parties do not like. For many, arbitration represents a fair process in which the arbitrator decides who wins and who loses the dispute. If parties (especially big businesses) advocate for a specific arbitrator as a means to promote diversity, then those parties face backlash for their diversity pursuits if the arbitrator rules against the positions they argued at the arbitration. This result has led me to suggest that the only resolution may rest upon finding a way in which parties may arbitrarily select arbitrators from a pool involving a critical mass of diverse arbitrators.

ADR Vision Meets ADR Reality / Lela Love

Part of the initial excitement in our field had to do with the development of a process — mediation — that went beyond, outside, the adversarial process. In that vision, mediation had the intention and capacity for the development of human understanding, creative collaboration, and interest-based, sometimes integrative, agreements. What if that vision is evaporating in the world of practice? Here in California, most commercial mediators exclusively use caucuses having eliminated the joint session, relate to the lawyers as their clients, and host a process more akin to settlement conferences and neutral evaluation. Would we remain excited about the field if we taught to that model instead of the classical facilitative model?

Some of you may have been to the ICC International Commercial Mediation Competition in Paris, held each year in February. Participation there leads one to think that cultivating listening skills, the ability to excel in option development, and the art of closing a deal is the future of mediation. Is that competition — and others like it — a fairy tale and, in reality, we are on course to wake up again in a very adversarial world? What if our foundational mediation concepts are not where we're at now?

Mediation in Search of Soul: Three Pathways / Nancy Welsh

Much of our focus in the field has moved to the business of dispute resolution — i.e., what it takes to be a successful mediator or arbitrator, how to make money, what referring lawyers want, how to represent clients successfully in mediation and arbitration, and how to assure the enforcement of outcomes. For law professors, this real-world focus makes sense, as we prepare our students to move into practice. But is there still a “soul” to the field of dispute resolution, especially mediation? What are we trying to achieve besides institutionalization?

In response to these questions, I foresee the future of mediation as going in three distinct directions. The first direction accepts the focus on mediation as a business — and as an honorable craft. Mediators and lawyers need not aim for goals as high-minded as self-determination, justice, or enhanced understanding between people. Rather, their aim may be described quite simply, as helping people to end their current all-consuming conflicts and move on. There can be nobility in this humbler vision of mediation, and within law schools, we need to prepare our students for it.

A second direction also accepts, to some degree, this focus on mediation as an institutionalized business — but demands accountability, and requires mediation to demonstrate that it is providing access to justice, meaningful and informed consent, and procedural justice. This policy-focused direction requires greater transparency, data, and research than presently exists. Increasingly, there are court administrators who are leaders in this area, influenced by what they learned in law school.

A third direction does not accept or support mediation as an institutionalized business. Indeed, it bears no loyalty to mediation at all. Rather, mediation represents a transitional mode, midwifing other, more humanistic successor processes and practices. This direction requires us to identify and innovate with the most important components that supposedly comprised mediation's “soul.” Collaborative Law is one such successor process. Certain visions of ODR may also incorporate these critical components. A third successor group may be non-neutral advocates serving as quasi-mediators. Finally, lawyers and law students might themselves become successors, if we can sufficiently identify and teach them the tools of communication and understanding that are most critical to the “soul” of mediation.

ADR Provides Foundations for Leadership / Chris Guthrie

I am convinced that those of us steeped in ADR have much to offer as teachers / scholars in the field of leadership *and* as leaders. Unfortunately, leadership, as a field, is under-developed in Law, at least relative to Business / Management, Education, and Public Policy.

One *possible* future for ADR is to provide the (or, more likely, a) theoretical foundation (and the practical skills) for law school-based teaching / training / scholarship in leadership. In my remarks, I tried to make the case that dispute resolution teachers / scholars can provide law students with the theory and skills they need not only to succeed as advocates in dispute resolution processes but also as leaders (which, as future lawyers, they will almost inevitably become).

Reframing ADR as an Essential Skill / Ava Abramowitz

In today's world — and more importantly, in tomorrow's — students need more than the teaching we ourselves received in order to make it. I don't think ADR's academic future is dim. Far from it: It can shine brightly, if we choose to reframe it substantially, actively including risk management, value creation, and problem-solving, as well as dispute resolving and deal-making. Considering what is going on in society today, if we think and teach that expansively, the world is ours.

It is skills development that demands the heavy lifting. What skills do our students need? Other disciplines studying this issue suggest four skills that all students of any discipline – law students included — require. Each of these can be learned through a negotiations course specifically crafted to teach those four skills. These skills are generally called “The Four Cs”:

- **Critical thinking and problem solving:** With people, and their interests and needs as the nexus and not just the demands of the law;
- **Communication skills:** With one-way communication, or advocacy, taking the back seat to joint communication for shared understanding;
- **Collaboration skills:** Enabling our students to cope with, if not enjoy, all the rough-and-tumble that working together exacts; and
- **Creativity:** Learning to think and to create options that fall outside of the Pareto curve.

Why these four skills? Because it is these skills that will maximize law student utility in whatever they choose to do. It is these skills that will allow them to function effectively in groups which, increasingly, is how things get done. It is these skills that clients want and are willing to pay for. It is these skills that that will make them the “go-to” attorney who can not only resolve disputes, but can also solve problems and even make deals, when deal-making is called for - as it so often is. It is these core skills that society needs in order to move forward more productively. And finally, it is conveying

these four skills to our ADR students that will distinguish them most sharply from the majority of typical graduates of the typical American law school of today.

Bringing Mediation into the 21st Century: Thriving Through Technological Adoption / Noam Ebner

I myself had planned to talk about technology, and the necessity to incorporate it across all of the field's activities in order to preserve the field's relevance, utility, and indeed its very viability, in the future. To be sure, other conference sessions related to technology, yet this was in a specific way. For example, one session focused on technology's role in actual negotiation and dispute processes, and in teaching courses in our field. In another session, Colin Rule's excellent presentation on Online Dispute Resolution (ODR) put this area on the table, front and center. However, ODR is but one aspect of the field's relationship with technology, and regrettably, it tends to overshadow other important aspects, such as the [use of technology to support mediators conducting traditional face-to-face processes](#).

My vision for ADR's future included a blueprint (or at least, an initial set of guidelines) for developing an ADR field thriving through incorporating technology into *all* its activities: process management, business structures, public engagement, research, [teaching](#), and more.

However, time was as scarce, as not only were the other speakers' visionary ideas legion; the session also got off to a late start. So, I did not present this vision of a technology-infused ADR field and the guidelines for achieving it; I'd be happy to discuss it further with anybody who is interested.

The session culminated with an interactive exercise designed to elicit ideas from participants. We plastered the atrium with whiteboard-sized paper, divided into areas according to each speaker's topic. Through making short notes on these sheets, we asked participants to comment on each area, by responding to a series of questions. This part of the session was abbreviated for the reasons noted above, and challenged by acoustics, the complexity of moving 150 participants from point A to point B in on a tight schedule, and the fact that throwing said number of participants together in an atrium meant that old friends were constantly meeting and couldn't help but catch up. Still, amidst the hubbub and the hugs, a good portion of participants did engage with the activity. We are currently reviewing those comments, and if we are able to pull together themes, we will share them in a follow-on piece.

It seemed to us that, abbreviated elements aside, the session achieved its main goals: Participants' mindset shifted from the past to the future, and they experienced and engaged in intentional future-oriented creative thinking. Speaking for myself, the futures described by the speakers were all very exciting, highly motivating, or both. This powerful combo of excitement and motivation conveyed throughout the rest of this wonderful conference.