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Chapter 2

The Mediation of Civil Disputes: "Who's Tending the Garden"

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The subject of my presentation today—"The Mediation of Civil Disputes"—was a topic suggested by the conference organizers. It was based, I suppose, on the knowledge that the Better Business Bureau Foundation's Dispute Settlement Center handles a wide variety of disputes outside the scope of the Office of Court Administration/Community Dispute Resolution Centers Program (Note 1).

I must confess that I quickly and enthusiastically accepted the topic because I felt it gave me permission to address just about any pet subject I wanted to tackle. We often hear the community dispute resolution centers described as "a program to mediate minor criminal disputes." While I have seen a number of unusual matters included in parties' agreements to enter mediation or arbitration, I have yet to see one where the issue was "an alleged violation of Section 240.25, Subsection 1, of the Penal Law of the State of New York (Note 2)" and the resolution sought by the parties was either a "verdict of guilty with the maximum appropriate sentence" or "innocent."

The Community Dispute Resolution Centers Program works because it is a "civil" dispute resolution process, in both senses of the word. Allegations of minor criminal wrongdoing are reduced to civil issues, such as claims for money or property, changes in present behavior, or requests for formal "codes of conduct" in future interactions between the parties. It is these "civil" issues that we are attempting to resolve. In many cases, a criminal court has granted an "adjournment in contemplation of dismissal" with the understanding that resolution of these civil matters will make further criminal action unnecessary (Note 3).

So, no matter where we're located and what our sources of case referrals are, we're all actively involved in the mediation of civil disputes.

However, of all the community dispute resolution centers throughout New York State, none comes closer to the "multi-door" model (Note 4) than does the Better Business Bureau Foundation's Dispute Settlement Center. This is so because in addition to the variety of community dispute programs—including family and juvenile cases—we all handle, the Foundation handles a very substantial "commercial/consumer" caseload as a consequence of its direct affiliation with the Better Business Bureau.

Last year, that "commercial/consumer" caseload included serving as the dispute settlement mechanism for mediation and arbitration of automotive warranty disputes under a program called "Project AUTO LINE." Under this project, unresolved disputes relating in some manner to an auto manufacturer's warranty are mediated—and, if necessary, arbitrated—by volunteer neutrals provided through the Better Business Bureau Foundation (Note 5).

In addition to AUTO LINE, which generated over 400 formal arbitration hearings last year, we handle home improvement-related disputes under contracts with the Buffalo Urban Renewal Agency's Neighborhood Revitalization Corporation and the City of Dunkirk's Core Area Preservation Corporation. The Foundation recently signed an agreement to administer a test program for manufactured housing dealers and manufacturers in a designated target area in New York State. We have also been engaged in conducting a rather specialized type of auto insurance arbitration, wherein the arbitrator resolves disputes over the valuation of a vehicle which has been "totaled" by the company.

Finally, the Foundation handles formal mediations and arbitrations of a variety of regular consumer disputes which cannot be resolved by the Better Business Bureau through its normal complaint conciliation efforts (Note 6).

Roughly 14 years ago, the Buffalo Better Business Bureau established its Consumer Arbitration Program. At approximately the same time, here in Rochester, the American Arbitration Association, in cooperation with the local community, was establishing its Community Dispute Services program—initially to deal with issues arising out of the desegregation of the Rochester schools.

All of us involved in the establishment of various alternative dispute resolution projects found ourselves dealing with skeptical—and sometimes downright hostile—segments of our communities, including the formal legal community, various regulatory and other public agencies, private social service agencies, and potential program users. In attempting to persuade these groups to give mediation and arbitration a fair trial, I can recall shamelessly overusing Chairman Mao's garden analogy—"Let a thousand flowers bloom..." I must confess, however, that at the time, I was less concerned with the "thousand flowers" than with my own fledgling program which, I feared, would be mistakenly plucked as a

weed before it ever had a chance to take root.

Although I probably would not have believed it at the time, now—14 years later—it is almost literally true that the "thousand flowers" of dispute resolution have bloomed in New York State. As we all know, one of the significant "gardeners" tending these blooms is the New York State Office of Court Administration. It is, however, hardly the only "gardener." If we don't take care, we may discover that we've got too many gardeners inadvertently weeding the garden right out of existence.

It is from the perspective of a center which handles a high volume of both consumer/commercial cases and community disputes that I'll be speaking, and it is in the context of the oversight and regulation of dispute resolution mechanisms in New York and elsewhere—that I will focus the remainder of my remarks.

An example might serve to illustrate some of the significant issues I see looming before all of us.

Let us assume that your community dispute resolution center has established an excellent reputation for neutrality and professionalism within your geographic area. Let us also assume that your center—like most across the country—is looking for innovative programs and new sources of funding. In this context, you are approached by the area's largest local used car dealer. He tells you that he is impressed with your program and that he'd like to include a mediation/arbitration process in his used car contracts. He is willing to enter your dispute mechanism upon the request of his customer, and he is further willing to agree that he will be bound by any decision or recommendation your neutral makes, but that his customer is free to accept the settlement or go to court. Finally, he offers to retain the services of your center at a rate of $1,500 per year, with a case fee of $125 to be paid following the conclusion of each case.

His only condition is that you must agree to administer the program consistent with any applicable regulations, and that you sign a formal contract containing all the terms and conditions I've just outlined.

Before you set your pen to that document, be aware that you may be taking on much more than you might have thought you were.

Of course, as a community dispute resolution center, you are aware of the various administrative and operational requirements imposed under the terms of the Judiciary Law. You might well assume that if you simply keep the records and follow the procedures established for the Community Dispute Resolution Centers Program, you'd be on fairly solid footing.

You might be wrong.

Should the car dealer incorporate your center's program into his used car warranty, your center will fall under the terms of the New York State "Used Car Lemon Law" (Note 7). Incorporated into that state law are all the requirements imposed under the Federal Trade Commission's rules for informal dispute settlement mechanisms (Note 8). The state "lemon law" imposes record-keeping requirements that are different from (and in addition to), those required by either the Office of Court Administration or the Federal Trade Commission. You are required to provide additional training for your neutrals. You will be required to provide each user with a "Bill of Rights" under the lemon law. Your neutrals will be required to know and apply the substantive terms of the law in reaching a resolution. Both the New York State Attorney General and the Federal Trade Commission may bring an action against the dealer if his mechanism (your center) fails to comply with these requirements. The FTC penalty for noncompliance can be as high as $10,000 per day, per offense.

I doubt that most of you will be resolving used car lemon law cases tomorrow morning, and all this may sound just a bit esoteric. Let's take a few other examples.

Confidentiality is a significant issue for the entire alternative dispute resolution field. I believe I can address this issue with some knowledge, since the Better Business Bureau Foundation became the first mechanism in the state—to my knowledge—to successfully test the confidentiality requirements contained in the Community Dispute Resolution Centers legislation (People v. Snyder, Decision and order dated July 25, 1985, by Acting Supreme Court Justice John J. Connell, to quash a subpoena issued by the Erie County District Attorney's Office).

The state legislation provides that, with a few limited exceptions, "...all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding." The law further provides that "...Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication." (Note 9)

Other legislation—primarily dealing with consumer or commercial dispute resolution—is either silent on the subject of confidentiality or, as in the case of the new and used car lemon laws, requires substantial disclosure of material facts relating to the individual cases handled by the mechanism.

Let's look at another area.

The knowledge and application of substantive law and regulation by mediators and arbitrators is a fairly complex subject which can prompt some heated discussions when neutrals and program administrators gather. It is generally, but not universally, accepted that mediators are dispute resolvers and not legal counselors. This is considered so even when the attorney is serving in the role of mediator. Thus, the mediator should avoid interjecting his or her understanding of the law into a dispute. In the case of arbitration, courts across the country have held that arbitrators deal in "equity" rather than law. Courts have fairly consistently refused to overturn an arbitrator's decision solely on the grounds that he or she either failed to apply or misinterpreted the substantive law.

Under the recent amendments to the New Car Lemon

Law (Note 10), arbitrators are not merely encouraged to consider the law's requirements, they are specifically directed to apply the law in arriving at their decisions.

Let us take a look at the qualifications of neutrals. The Community Dispute Resolution Centers Program says only that a center must provide "...neutral mediators who have received at least 25 hours of training in conflict resolution techniques" (Note 11). The amendment to the New Car Lemon Law provides that neutrals must be trained in the lemon law. (Note 12). The original lemon law makes reference to the Federal Trade Commission Rule on Informal Dispute Settlement. The federal rules require that "...at least two-thirds (of the deciders) shall be persons having no direct involvement in the manufacture, distribution, sale, or service of any product (Note 13). "Finally, one version of legislation introduced to divert child custody cases from court into mediation expressly provides that the mediators must be either attorneys or state-certified counselors/psychologists (Note 14).

As the alternative dispute resolution movement continues to gain momentum, more and more units of federal or state government will enact laws or promulgate regulations which affect, if only indirectly, the operation of mediation and arbitration programs. I must make clear that it is not the promulgation of new rules or laws that concerns me so. I believe the public interest demands that alternative dispute resolution programs (which in many cases are not really alternatives—they are the only readily-accessible game in town) be regulated in some manner.

I am deeply concerned that the present state of affairs can only lead to two very undesirable ends. The first involves the very real probability of conflicting laws, where compliance with the provisions of one set of worthwhile regulations puts the center and its neutrals in violation of an equally worthwhile set of regulations.

The second problem involves a lemming-like, "follow-the-leader" instinct which seems to overtake well-meaning regulators and legislators. If a particular clause or regulation is good in one piece of law, it ought to be good in all others. Quite frankly, it is the second area that gives me the most trouble, since it has a potentially chilling effect on the long-term success of dispute resolution in New York and elsewhere.

Have you ever really looked at the volume of new and amended legislation which crosses the governor's desk every year? It's substantial. What happens to informal dispute resolution when legislators routinely adopt the idea of inserting a clause in each new law—a clause which requires mediators or arbitrators to apply substantive law in arriving at a settlement? If it is a good idea for arbitrators to apply the lemon law in automotive disputes, isn't it an equally good idea for arbitrators to apply substantive housing law in landlord/tenant disputes? Shouldn't mediators be required to ensure that settlement agreements are consistent in all respects with the Domestic Relations Law?

I believe I have already stated this, but let me reiterate—I am not only not opposed to regulations for informal dispute resolution mechanisms, I'm convinced that some form of regulation serves an essential public purpose. I am, however, deeply concerned that not only does the right hand not seem to know what the left hand is doing, the right thumb seems blissfully unaware of the existence of the right index finger.

Regulation of dispute resolution? Yes. But thoughtful regulation—the absolute minimal amount necessary to protect the public interest while preserving the greatest degree of flexibility for the entire dispute resolution movement.

I would like to use this opportunity to call on the Office of Court Administration and the Legislature to establish a more formal legislative review process—a process to identify those pending laws and regulations which impact upon the alternative dispute resolution movement, assess the problem which the law proposes to address and, where necessary, recommend additions or modifications which preserve, to the greatest extent possible, the necessary flexibility of the mediation and arbitration. I suspect the state could count on the support of the community dispute resolution centers and the American Arbitration Association in such a process. Certainly the Better Business Bureaus across the state would welcome and support this effort.

Without such a process—and soon—we're going to find ourselves in a field where the only thing blooming is a thousand gardeners.

You've probably all heard the term "oxymoron" by now. For those of you who lead sheltered lives, an "oxymoron" is a combination of contradictory or incongruous words like "cruel kindness" or "military intelligence." I've been told that the shortest monosyllabic oxymoron in the English language is "brief"—as in "legal brief".

I've tried to be brief. I trust I've been legal. And I hope you will join me in promoting what I hope will not turn out to be another oxymoronic collection of words—"thoughtful regulation" of alternative dispute resolution.

Notes Accompanying Presentation

Mediation of Civil Disputes— "Who's Tending the Garden"

1. See 1981 McKinney's Session Laws of New York, ch. 847, 1. The act amended Section 170.55 of the Criminal Procedure Law by adding a new subdivision 4, and amended the Judiciary Law by adding a new article, 21-A.
2. Harassment, one of the most common types of disputes mediated by community dispute resolution centers.
3. Subsection 170.55 of the Criminal Procedures Law.