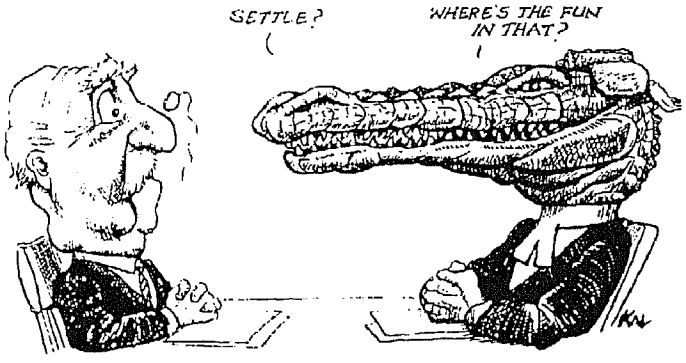
Alternative Dispute Resolution for Barristers

A Paper Delivered at the A.B.A. Conference, Darwin 4th July, 1990 by the Hon Mr Justice de Jersey of the Queensland Supreme Court.

I have been a public advocate of ADR for some years. It is easy to be. ADR is founded in no more than common sense. It is justified on this principal basis - it restores the focus to mediated settlement, a focus lawyers had come to ignore. I will not talk about the methods of ADR, or about its advantages and disadvantages. Those are the subject of an immense amount of discussion in the literature. I have myself spoken so many times on those matters, that if I do so again I may be tedious. I prefer therefore to concentrate more generally on the position of the Bar with respect to ADR, and two particular aspects: first, why, apart from its common sense justification, the Bar must embrace ADR; and second, how an alliance between the Bar and ADR affects the Bar's traditional role.

Why should the Bar embrace ADR?

First, the wrong reason. There is enormous public support for the trend towards ADR. A great amount of publicity has reminded litigants that they can resolve their disputes short of trial. They can save money and time. They can minimise damage to business relationships. Unfortunately, the public perception of lawyers is that they are primarily interested in taking matters to court: as the public sees it, because they thereby earn more money. Lawyers have been traditionally shy about settlement negotiations. To engage in such things has somehow been contrary to the ethos of the Bar. In all of these circumstances litigants have I think become somewhat distrustful of lawyers. That attitude has been augmented by the enthusiasm for Judges to talk about settlement in open court. Now they frequently do so. They are even bold enough to suggest that certain cases be taken to dispute resolution centres outside the court. The many pledges of support by business and commercial concerns for bodies like the A.C.D.C. confirm my feeling that many litigants want something new; something cheaper, something quicker, but something which will nevertheless give them a satisfactory and just result in the end.



In these circumstances, lawyers who plough on in the traditional way do so at their peril. The peril is that they will lose their clients. They will end up with dissatisfied clients. Word will get around. They will be perceived to be interested principally in large fees. I think that a clear sighted recognition of the ADR trend is important to the future of the Bar.

That is the wrong reason: matters of survival.

The true reason why the Bar should embrace ADR is that doing so will further the interests of the public. The rationale for the Bar's privileged position in society is that it exists to serve a vital public interest. Unfortunately at the moment it is not serving that interest to a large extent. That is because fees are so high that middle income earners are denied recourse to the courts. The trend towards ADR raises the prospect of some reduction in the cost of legal services. There is a real advantage here which the Bar should be quick to seize. If adopting the mechanisms of ADR reduces the cost of dispute resolution then it may enhance the public perception of the Bar, as well as increasing the Bar's capacity to serve the very interest for which it exists.

It is disappointing that the Bar has been tardy about pursuing this new trend. The Bar in Brisbane has recently set up an ADR facility. But participating in that is not inexpensive for the client. I cannot help thinking that a large part of the Bar's current tolerance for ADR is inspired by fear that it will otherwise lose part of its remunerative domain. Why not offer a facility for which the charge is merely nominal? It would be a great exercise in public relations.

I feel however that the particularly relevant role with relation to ADR, is for the individual, not for the Bar as a collective body. It is the individual barrister who should be turning his mind to negotiation. Experience in civil sittings indicates that many cases are still coming to court where there has been minimal attempt at negotiation. Many cases still settle at the court door, or after the case has been going for only a short while. What a waste of money.

When I was running the Commercial Causes List in Queensland, my mediation conferences were a great success with the clients. They loved them. And the procedure was so simple! They enhanced the settlement rate dramatically, accelerating settlements to a point in the litigation where great expense had not been incurred, where delay had not been suffered, and where relationships were not irreparably fragmented.

The Bar could organise attempts at mediation quite easily. Why not ask a senior to express a view on a case, however informally? He might even be prepared to do it for nothing.

That is why the Bar should embrace ADR: because it will truly help the litigants, and it will enhance the Bar's prospect of fulfilling the reason for which it exists. On a less altruistic level, it will help the Bar survive.

How then would an alliance between the Bar and ADR affect the Bar's traditional role?

As I have said before, the role of the Bar is to ensure access to the law for all. If utilising ADR mechanisms will lead to lower fees, then obviously the achievement of that role is assisted. Likewise if dispute resolution is accelerated.

Resort to ADR does involve some departure from the traditional role of barristers. It involves a concentration on ending the case as quickly and cheaply as possible, rather than

a focus on taking it to court and having the ultimate battle royal. Many sensible barristers have always considered the prospect of settlement at an early stage. But many have not. Many have engendered in their clients such a firm belief in the rightness of their cause that vindication in court has been the only acceptable way of bringing things to an end. This is not just the Bar's fault. Legal training also, with its concentration on the adversarial model, has contributed to this shackling of lawyers to their traditional role as gladiator in the court room. There is a great need to introduce flexibility and to do it soon. As I have said, it is simply a matter of common sense.

Desirably, a barrister should rarely go to court. I rarely see in court the barristers whose court performance I admire the most. That is very significant. To my mind the most successful barrister is the one whose clients most frequently settle. Such an approach perhaps leads to a less exciting life for the barrister, but much more fulfilling results for the clients.

Concentrating on ADR does not, to my mind, mean giving over to some new fangled fashion. All it means is diverting the focus away from the court room, back to the possibility of securing, by some reasonably satisfactory means, an early resolution, with a minimum of fuss and expense. There should be a renewed focus on, mainly, mediation. That is what the clients want. Changing one's tack should, for the barrister, be relatively painless.

Settlements at the court door are about the most depressing thing I experience as a Judge. I know that the parties have incurred all their costs, they have suffered all their delay, they have entrenched all their acrimony. Human resources have been wasted, human relationships fractured: although the lawyer has certainly nevertheless benefited. What a hollow result.

There is an alternative. Lawyers are so heavily criticised these days. In this area, there is still time to show a true willingness to serve that vital public interest and not be preoccupied with a narrow private one.

Bodies like the A.B.A. and the individual Bar Associations can adopt policies and express views about these things. But the real thrust must come from the individual barristers representing their clients. There is benefit here not only for the client but for the barrister as well. ❑

Legal Entrapment

"Fun is fun, but these lawyer jokes may be getting out of hand. We were frankly amazed to see how far anti-lawyer sentiment had gone on reading recently of the actions of the Virginia legislature. Before adjourning, the Virginians came close to passing a bill that would have established an attorney-hunting season. The State Game Board was ordered to study if it should classify lawyers as a nuisance species as well as establish regulations for trapping them. But the Virginians apparently wanted to make the hunt sporting. The use of cash as bait was prohibited, as was shouting "whiplash" or "ambulance" in order to trap the attorneys. This is really disgusting. Where are animal rights people when you need them?" ❑

"Section 92" in Europe

The two great issues presently facing European lawyers are the impending introduction of a single European market and the clamour from Eastern European countries to develop free market economies and join in. Both issues were treated in detail at the recent Strasbourg Congress of the International Union of Lawyers. Strasbourg was the obvious location for such a conference because of its location at the geographical and political heart of Europe.

The Conference was opened in typical French fashion, with a myriad of speeches, including speeches from the President of the European Parliament, the Vice President of the European Commission (Sir Leon Brittan) and the French Minister of Justice. The first working session of the Conference was led by Lord Alexander of Weedon QC who spoke on the challenges facing lawyers as we approach the year 2000.

I found greatest interest in sessions devoted to the proposed single market in Europe and the events currently taking place in Eastern Europe. A highlight was papers by East and West German lawyers on the fusion of their two legal systems.

In a paper I gave, I was able to point out that, notwithstanding the apparent remoteness of Australia from the heady events now taking place in Europe, we might be able to offer some assistance on issues that must arise as Europe moves closer to a single market. After all, we travelled the same path nearly a century ago. I know from David Vaughan QC, of the Inner Temple, who is the leader of the English EEC Law Bar, that s.92 cases are regularly referred to in the European Court and in other Courts in which free market problems arise for consideration.

There was an Australian contingent of more than 20 delegates and spouses at the Conference. The social programme included a river cruise one evening followed by a formal dinner at the Palais de L'Europe (the European Parliament). Day trips for spouses and those absenting themselves from the Conference included Baden-Baden and the castles of the Rhine. The last day of the Conference was given over to day trips to Colmar, along the Route du Vin, and to Freiberg in Germany. During the Conference I was appointed to the Comité de Direction (Executive Committee) of the UIA and will shortly be attending a meeting of the Comité in Paris followed by a visit to Budapest, at the request of the Hungarian Bar Association, with a UIA delegation. Other meetings of the Comité de Direction for the coming year are scheduled in Morocco, Rome, Toledo and Mexico.

The next Annual Congress of the UIA will be held in Mexico from 28 to 31 July 1991. The Conference should be well attended by American, as well as European lawyers. The programme includes sessions concerned with trade and investment between America and the Pacific, together with sessions relating to international litigation and arbitration, international civil procedure, and other matters of interest to barristers. Prior to the Mexican Conference the UIA is holding a Symposium in Rome at Easter on freedom of religion and beliefs. The symposium includes a Papal reception.

Anyone interested in joining the UIA, or attending either the Symposium in Rome or the Conference in Mexico, can make arrangements through me at 7/180 Phillip Street, Sydney 2000 (DX 399). ❑ Garry Downes QC