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Reflections of Pennsylvania's ADR Community: Paradise, Pragmatism, and Progress

Grace E. D'Alo*

Pennsylvania's alternative dispute resolution ("ADR") community is currently engaged in an initiative to collaboratively design a comprehensive and effective structure to deliver ADR services within Pennsylvania's public and private sectors. A question that Pennsylvania struggles with in this effort is whether the ideals of self-determination, empowerment, voice, and spontaneity can be preserved while pursuing resources and support from established organizations and funding streams. Agencies in state government, for example, may have resources to pay for services that the ADR community could provide. But these agencies also expect professions to have articulated practice standards, to apply licensing and certification requirements, and to be held accountable through quality assurance measures. Does satisfying these expectations inevitably and inexorably lead to the diminution of the goals of mediation?

Pennsylvania is not alone in its struggle to answer this question. As suggested by the title of the Pennsylvania State University Dickinson School of Law Symposium ("Symposium"), there is a growing "inquietude"¹ within the ADR community with respect to the institutionalization of ADR processes and the effect of institutionalization on the profession's ideals.²

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1. "Limbo is normal and 'good' The disquiet of optimal frustration is something that most of us deal with as individuals. We have ideal selves and our present selves fall short, and yet, we (for the most part) like and admire our present selves." David Sally, *Yearn for Paradise, Live in Limbo: Optimal Frustration for ADR*, 108 PENN ST. L. REV. 89, 111 (2003).

2. See Symposium, *Dispute Resolution and Capitulation to the Routine: Is There a*

“Capitulation to the routine” in ADR is seen by some as capitulating to the pressure generated by the courts’ desire to decrease caseloads and maximize efficiency. As Deborah Hensler observed at the Symposium:

I see the ADR movement as having a strong anti-law, anti-institution, self-empowerment, and populist ideology at its birth, which fairly rapidly eroded, as its key paradigm, mediation, was embraced first by courts (as a management tool), then by elitist business leaders (in an effort to take back some of the power that they felt they had delegated to lawyers), and then by lawyers themselves (as a revenue generating line of practice) I think it is increasingly clear that becoming a creature of the courts and of the formal legal system is transforming mediation in ways that are inimical to its original aims and that undercut the social contribution that the dispute resolution movement seeks to make In short, mediators do not need and should not seek more public structures to support them. They need to free themselves from these structures, so as to practice the alternative values that they preach.³

Hensler went on to state that credentialing mediators, especially when that credential gives an advantage to particular forms of mediation and to particular professionals, increases the likelihood that mediation becomes a reincarnated form of traditional settlement conferences with lawyers becoming the mediators of choice.⁴

If these are the problems with institutionalization, can they be avoided? Many of the people attending the Symposium were ADR professionals from Pennsylvania who have been involved for many years in efforts to create a statewide office for dispute resolution and to secure the passage of an accompanying legislative agenda.⁵ This paper presents their reflections on the Symposium materials in light of current initiatives at the state level to institutionalize ADR processes in Pennsylvania’s courts, state government, and to a more limited extent, its private sector. This article is based on the notes from a meeting that was held on the Saturday morning of the Symposium and includes relevant materials from other presentations from the Symposium.⁶

Way Out?, 108 PENN ST. L. REV. 1 (2003).

3. Deborah Hensler, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review).

4. *Id.*

5. PA. FUTURES COMM’N, ON JUSTICE IN THE 21ST CENTURY (June 1995).

6. The Symposium’s agenda described the meeting as: “[S]trategies envisioning how dispute resolution can ‘return to paradise.’ Regional focus: how can Pennsylvania’s institutionalization efforts be structured to avoid ‘capitulation’? What can Pennsylvania learn from the experience of neighboring states?” ROBERT ACKERMAN, DISPUTE RESOLUTION SYMPOSIUM AGENDA (2003) (on file with the Penn State Law Review).

This article is divided into three short sections. Part I provides a brief background of the ADR community in Pennsylvania and its past efforts to organize a statewide initiative. Part II highlights two particularly relevant presentations from the Symposium: Robert Dingwall's examination of the sociological and historical patterns of professionalization, and David Sally's economic analysis. Part III examines the discussion of Pennsylvania stakeholders that took place on the last morning of the Symposium. This discussion is examined in light of ADR's history in Pennsylvania and the perspective provided by the presentations highlighted in Part II.

I. Pennsylvania's ADR Community: Before the Fall

Approximately ten years ago, mediators from both public and private areas of practice across the Commonwealth began a dialogue through which they hoped to design and create opportunities for the expanded use of ADR in Pennsylvania.⁷ This dialogue was part of a larger investigation being carried out by the Futures Commission ("Commission"), which was established by the Pennsylvania Supreme Court.⁸ The broad mandate of the Commission was to investigate the public's access to the courts and the effectiveness of the justice system's services.⁹

Many public meetings were conducted throughout the Commonwealth at which stakeholders¹⁰ could voice their concerns and

7. These mediators included Robert M. Ackerman, Board, Pennsylvania Council of Mediators; Ann L. Begler, Chair, Allegheny County Bar Association ADR Committee; Grace D'Alo, Board, Pennsylvania Council of Mediators; David Harwi, Co-Chair, Philadelphia Bar Association ADR Committee; Gale McGloin, President, Pennsylvania Council of Mediators; James A. Rosenstein, Co-Chair, Philadelphia Bar Association ADR Committee; Mark Welge, Chair, Pennsylvania Bar Association ADR Committee.

8. The Futures Commission was established by the Pennsylvania Supreme Court to create a vision of the justice system in Pennsylvania. See PA. FUTURES COMM'N, *supra* note 5. The task was defined by Judge Klein:

The objective of this Conference is for us to articulate a shared vision of a preferred future justice system. To do this, we will:

1. Take a creative look at the goals and purposes of our entire justice system;
2. Take a fresh look at crime and punishment as well as civil dispute resolution;
3. Look at how new developments in science and technology will affect society and the justice system;
4. Ensure that there is true public participation at every stage and attempt to implement changes in our justice system;
5. Develop a list of important recommendations to make our vision a reality and a plan for their implementation.

Judge Richard Klein, Remarks at the Futures Conference (Mar. 15, 2003).

9. PA. FUTURES COMM'N, *supra* note 5.

10. Stakeholders included: academics, appellate judges, bar association members, representatives from business and media, court administrators, criminal justice attorneys and court personnel, government lawyers, legislators, administrators, and trial judges.

visions for the expanded use of ADR. The voices from the public meetings were captured in a report entitled, *Vision of Alternate Paths to Justice in 2020*.¹¹ The report advocated for expanding the use of ADR (including mediation, arbitration, neutral case evaluation, consensus building, and facilitation).¹² The vision for such expansion was stated as follows:

In the year 2020, we will no longer be promiscuous with our use of the traditional justice system, but we will have reserved these trial rights where essential to the fabric of our society. We will create a multi-door justice system where the mechanism to solve a dispute is appropriate to that dispute. To do this, in the year 2020, the justice system will:

1. Provide a variety of dispute solving processes, with jury trials where necessary. We will have skilled professionals to guide disputants into the proper process for their conflict.
2. Encourage parties to take shared responsibility for resolving their conflicts peaceably themselves.
3. Provide dispute resolution as an integral part of our educational system, beginning at the earliest level
4. Resolve disputes as close to the source of the conflict as possible—be it home, community or whatever environment will then be applicable.

. . . .

11. PA. FUTURES COMM'N, VISION OF ALTERNATE PATHS TO JUSTICE IN 2020 (1995).

12. *Id.* As Timothy Hedeem has commented, there existed an uneasy tension between community mediators, who were largely not attorneys, and those who viewed mediations as a logical extension of their legal practice: "Community mediation was embraced as an empowerment tool for individuals and communities to take back control over their lives from governmental institutions (the courts and regulatory agencies) that were seen not only as inefficient, but oppressive and unfair. This vision included equipping citizens to resolve their own disputes and building a truly alternative system that would keep many disputants from seeing the inside of a courthouse." Timothy Hedeem, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review). Hedeem contrasts this vision to the reformist vision, which grew out of the governmental initiatives such as the Futures Commission, which looked to alternative dispute resolution as a way of improving the efficiency of the courts and lessening caseloads. *Id.* To the extent that expanding the use of processes such as mediation was viewed in these governmental initiatives as primarily an opportunity to reduce the demands on the criminal and civil justice systems, the community justice center goals of individual and community empowerment were often viewed as being compromised. *Id.*

8. Coordinate and provide mutual support between:
 - a. The court system and other public sector dispute resolution agencies; and
 - b. Private and community dispute resolution systems.
9. Develop an adequate body of qualified and trained facilitators who are knowledgeable in dispute resolution techniques as well as the substantive law.
10. [Consistently make use] of judges, lawyers, and others involved in the system who are aware of the variety of available methods to resolve disputes.¹³

Unfortunately, the momentum generated by the Commission was abruptly halted as a result of the cumulative impact of several factors. First, it became clear that financial support for implementation of the Commission's recommendations through state government was unlikely. Key leaders, champions of the Commission's goals, also backed away from the Commission's efforts for personal and professional reasons. Finally, there was no satisfactory resolution to the conflict between lawyers and community mediators regarding credentialing, referrals, and acceptable practice standards.¹⁴ Although the Commission's report did not highlight the intensity of the debates on these issues, many, including the author, vividly recall that the Commission's reluctance to address these differences effectively exacerbated a negative type of skepticism between ADR constituencies. When the Commission's activities ceased, this skepticism was left in place.

The use of ADR, especially mediation, has dramatically increased in many states over the last decade. Pennsylvanians are slowly and sporadically increasing their use of ADR, although ADR in general and mediation specifically have not been widely incorporated into the state judicial system or into state government. The private sector has also had difficulty getting the public to recognize the benefits of using ADR in appropriate non-court related situations. Although ADR practitioners in all sectors of Pennsylvania's dispute resolution community have persevered in their desire to make Pennsylvania a more ADR friendly state, the progress toward this goal has been halting and slow.

In the fall of 2002, four major organizations renewed efforts to explore the advancement of ADR throughout the Commonwealth. These

13. PA. FUTURES COMM'N, *supra* note 5.

14. *Id.*

groups include the ADR Committee of the Pennsylvania Bar Association, the ADR Committee of the Allegheny County Bar Association, the ADR Committee of the Philadelphia Bar Association, and the Pennsylvania Council of Mediators. For the purposes of this article, this association of organizations will be referred to as the "Collaborative." The first joint activity sponsored by the Collaborative was to convene two focus group meetings, each involving a cross-section of interested Pennsylvania mediators. The focus groups were designed to elicit ideas on how to make Pennsylvania more mediation friendly and to elicit the concerns of the participants regarding the institutionalization of mediation. The information from the focus group meetings was compiled into a report.¹⁵

In addition, the Collaborative invited the Maryland Mediation and Conflict Resolution Office ("MACRO") to present its model for an inclusive statewide process to the Board of Directors of the Pennsylvania Council of Mediators, the largest organization of mediators in the Commonwealth. MACRO also offered to serve as a resource to those interested in moving Pennsylvania toward a process to promote and expand the use of ADR and provided the Collaborative with valuable technical assistance.¹⁶

In conjunction with its other activities, the Collaborative began exploring whether existing individuals and institutions would serve as champions in supporting and funding a larger process modeled on MACRO's experience. In April 2003, the Collaborative worked quickly to present a concept paper to the Chief Justice of the Pennsylvania Supreme Court and the Office of General Counsel.¹⁷

The Symposium occurred during the time that the Collaborative was drafting a concept paper. If one defines "paradise" in the mediation profession as the time when those practicing in the field are free from restraints that might limit who mediates and how they mediate, Pennsylvania is more or less in such a Garden of Eden, but yearning to leave.

II. Pragmatism from a Sociological and Economic Perspective

There were two presentations at the Symposium that seemed

15. ANNE L. BEGLER, ALTERNATIVE DISPUTE RESOLUTION COMM'N OF THE PA. BAR ASS'N, ALLEGHENY COUNTY BAR ASS'N, & PA. COUNCIL OF MEDIATORS, TRANSFORMING PENNSYLVANIA INTO A MEDIATION FRIENDLY STATE: A REPORT OF FOCUS GROUPS CONDUCTED ON JUNE 14, 2002 AND SEPTEMBER 13, 2002 (Jan. 23, 2003).

16. The technical assistance was funded by a Hewlett Foundation grant to support other states initiating statewide efforts.

17. ALTERNATIVE DISPUTE RESOLUTION COMM'N OF THE PA. BAR ASS'N, ALLEGHENY COUNTY BAR ASS'N, & PA. COUNCIL OF MEDIATORS, CONCEPT PAPER IN SUPPORT OF THE PENNSYLVANIA CONFLICT RESOLUTION INITIATIVE (Apr. 2003).

particularly timely and relevant to current ADR efforts in Pennsylvania: Robert Dingwall's *After the Fall . . . : Capitulating to the Routine in Professional Work*,¹⁸ and David Sally's *Yearn for Paradise, Live in Limbo: Optimal Frustration for ADR*.¹⁹

Robert Dingwall's presentation described how new services evolve into professions from a historical and sociological perspective.²⁰ In essence, he provided a roadmap showing the path to professional status and the obstacles in the way.²¹ His presentation detailed what service providers who seek professional status should expect to encounter both from within their membership and from the "establishment" that they are seeking to join.²²

David Sally's presentation examined where the profession of mediation is now; in terms of economic theory, described how a profession can determine an optimum level of tension between its goals and reality; and how an organization can operate successfully in that limbo.²³ In short, if Robert Dingwall provides a metaphorical map to the destination of professional status, David Sally provides the accompanying guidebook on how to optimize the profession's stay there. The discussion below highlights the sections of these sociological and economic perspectives that are pertinent to Pennsylvania's recent ADR efforts.

Quoting from an address by Everett Hughes to the American Nurse's Association, Robert Dingwall makes the following observation of what happens when an endeavor starts to become a profession:

There are certain symptoms to be seen wherever this happens. The people in the occupation get somewhat self-conscious about many things concerning their work; jealous of their name and badge . . . ; dreadfully afraid that some of their number will not observe company manners and so will hurt the reputation of all; not quite sure what their jobs are or ought to be and consequently not certain what their training should be.²⁴

18. Robert Dingwall, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review) [hereinafter Dingwall Presentation]. See also Robert Dingwall & Kerry Kidd, *After the Fall . . . : Capitulating to the Routine in Professional Work*, 108 PENN ST. L. REV. 67 (2003).

19. David Sally, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review); see Sally, *supra* note 1.

20. Dingwall Presentation, *supra* note 18.

21. *Id.*

22. *Id.*

23. Sally, *supra* note 19.

24. Dingwall & Kidd, *supra* note 18, at 68.

25. Dingwall Presentation, *supra* note 18.

As Dingwall notes, the effects of moving toward professionalization, leaving the amateur's unfettered world of practice behind, are manifested in at least three other ways.²⁵

First, when a profession becomes "licensed" in the broad sense, there is at least symbolic recognition of the propriety of the service being offered and of the appropriate terms of exchange between providers and consumers.²⁶ When professionals are also licensed in the narrow legal sense, the license confers a special place in the market for their service, protection of their title, and restriction of competition.²⁷

Second, as professional status rises, diversity in the forms of delivery of the service decreases.²⁸ As Dingwall observes:

It is only in the early stages of a new technology or a new market, they suggest, that we see very much diversity in the forms of delivery. Competition winnows out the participants but, in the process, encourages those who remain to model themselves on the most successful of their peers, regardless of whether the forms or strategies are right for them. By adopting the features of successful organizations, they make themselves legitimate even though the right strategy for an individual organization is not necessarily the right strategy for an entire industry.²⁹

Finally, there is an inevitable move toward the "mundane."³⁰ As a profession becomes recognized, protection of the professional title, ethics and quality of practice, job boundaries, and what is required of practitioners in terms of experience and formal knowledge becomes more routine and less controversial.³¹ Again quoting from Dingwall:

However, people are not sensitive about these on their own account. It is because they know that they have to have a good answer to questions from the people or organizations around them and from whom they hope to derive support and resources. If you want to restrict the use of your title, then you have to have an explicit way of determining who is fit to join and remain a member of your club. However, that process also has to accept people outside as legitimate. You will have a much easier time persuading them if you have membership tests that look like the tests used by other, better-established clubs and if your decision-making processes, whether about admission or about challenges to good standing, match those

25. *Id.*

26. *Id.*

27. *Id.*

28. Dingwall & Kidd, *supra* note 18, at 73.

29. *Id.*

30. *Id.* at 75-76.

31. *Id.*

used by your models.³²

Dingwall closes his article by pointing out that as mediation becomes professionalized there will inevitably be more public scrutiny and more demands in the form of regulation and criteria for public funding.³³ Regarding the profession of mediation, Dingwall suggests that mediators have started to “shuck off their amateurism, the notion that anyone with the right personality can settle disputes.”³⁴ He goes on to state that if the profession wants recognition and resources, it will have to provide evidence to legislatures and public agencies of practice standards, proper treatment of clients, fiscal integrity, and enforcement of ethical standards.³⁵ If mediation's creation myth is that a skilled mediator must be free of any oversight in order to creatively improvise as the situation demands, then the myth will have to be abandoned in favor of more pragmatic standards that allow for creativity.³⁶ The alternative of clinging to an idealized past leaves mediators in an endemic state of frustration and vulnerability—frustration from not having access to public funds, recognition, and acceptance, while vulnerable to accountability challenges routinely demanded of other professions.³⁷ David Sally suggests that this is not the optimal frustration point for a profession or the individuals in it.³⁸

Sally's analysis intersects with Dingwall's on the issue of professional status recognition but focuses more on the environment that a profession needs to maintain in order to flourish. Sally, like Dingwall, acknowledges the importance of a profession establishing ideals that are not unrealistically high because they rest on either a mythical past or an unattainable future.³⁹ As Sally writes, when one falls short of an impossibly high ideal, which is inevitable, the individual has three options: abandon the ideals altogether; adapt the ideals to reality in order

32. *Id.* at 75.

33. *Id.* at 83.

34. Dingwall Presentation, *supra* note 18.

35. Another way of phrasing this observation comes from Leo Smyth:

While there is a danger that insisting on systematized training for mediation professionals is simply creating a “closed shop” (some former judges may, after all, be good at it) on balance, the demand for professionalization is justified by the belief that mediation requires special skills that usually require systematic training. It does, however, imply that mediation is different in kind from legal process, a difference that crops up in several places.

Leo Smyth, Presentation at the Pennsylvania State University Dickinson School of Law Dispute Resolution Symposium (Apr. 11, 2003) (transcript on file with the Penn State Law Review).

36. Dingwall & Kidd, *supra* note 18, at 88.

37. *Id.*

38. Sally, *supra* note 1, at 101.

39. Sally, *supra* note 19.

to assure their fulfillment; or pursue the ideals “regardless of the costs and heedless of the gains and progress made thus far.”⁴⁰ Rather than be faced with these alternatives, Sally suggests that the optimal place to be for an individual pursuing any profession is between a goal that is realistic but hard to reach and the status quo; somewhere between G and G’ in his economic model.⁴¹ The ideals, the “G,” Sally identifies as realistic in mediation are: (1) creating value such that the parties gain a clearer understanding of their interests or transform their relationship; (2) allowing the voice of the parties to be dominant; and (3) creating a process where there is not a need for attorneys.⁴² The counter weight to G is G’; Sally defines the G’ in the ADR community as the status quo for ADR’s current status in the public’s eye.

If this economic analysis is applied to the mediation profession, then there is a considerable, but acceptable, discrepancy between ideals and the status quo between G and G’. Although to practitioners in the field the distance between G and G’ may be disquieting, Sally makes four suggestions to make this awkward tension between G and G’ tolerable and the profession successful.⁴³

First, he suggests that ADR practitioners secure G’.⁴⁴ That is, practitioners in the field should secure the gains that have been made in professional recognition by becoming part of the justice establishment: “Implement licensing and certification requirements In sum, neither the desire to achieve its aspirations nor disappointment in falling short should cause ADR to forsake pragmatic political and organizational efforts. Yes, the recommendation is that this movement with roots in the counter-culture should behave conservatively and become establishment.”⁴⁵

Second, he suggests that the field maintain and institutionalize ideals.⁴⁶ It is important to have goals that require the profession to stretch because the profession is more likely to move forward if it has appropriately high aspirations.⁴⁷ Being reminded of those goals with frequent and conspicuously placed cues is one simple way to guard against the erosion of the ideals.⁴⁸ In other words, keep the goal in sight

40. Sally, *supra* note 1, at 89.

41. *Id.* at 110.

42. *Id.* at 98. In his research on mediation, Sally found that in one study only eighteen percent of the settlements included non-monetary provisions; disputants spoke in thirty-seven percent of the cases but held the floor more than their lawyer in only six percent of the cases. *Id.* at 100.

43. *Id.* at 108.

44. *Id.* at 108-09.

45. *Id.* at 109.

46. *Id.* at 109-10.

47. *Id.*

48. *Id.*

by holding the bottom line. Keeping ideals in mind also helps on a very pragmatic level. For example, a mediator who keeps the ideal of value creation in mind can play an important role between two lawyers focused on quantitative distribution in a conflict.⁴⁹

The third suggestion Sally makes is that people in the field of ADR in general learn to appreciate the inquietude of optimal frustration.⁵⁰ By understanding that there may be dual and competing visions of who should be able to practice, what the goals of mediation should be, and how standards should be defined, the field can actually move toward resolving the contradictions as necessary.⁵¹

Finally, Sally suggests that the field limit introspection: "There is an entrapping, self-conscious awkwardness about rationally pursuing the 'irrationality' of faith, or for that matter, intentionally living in limbo."⁵²

III. Introspection or Where To Land After the Fall

On Saturday morning of the Symposium, several of those involved with Pennsylvania's ADR initiatives had an opportunity for limited introspection that was informed by both Sally's idea of finding an optimal limbo between two reference points and Dingwall's prediction of an inevitable movement toward the mundane.⁵³ The notes taken at the session and relied on below were circulated for comment and correction among all those who participated in the meeting.⁵⁴

All comments or revisions received were incorporated into the final version that is presented below. The notes are presented in four sections: Meeting Overview, Process, Reference Points, and Questions. After each section of the latter three sections, there is a brief discussion of how the Saturday discussion related to the information presented at the Symposium.

A. Meeting Overview

There was broad agreement that Pennsylvania's current efforts are

49. *See id.*

50. *Id.* at 110-11.

51. *See id.*

52. *Id.* at 111.

53. *See supra* notes 5-6 and accompanying text.

54. Participants included (in alphabetical order): Robert Ackerman, Penn State Dickinson School of Law; Winnie Backlund, Director of Mediation and Training, Montgomery County Mediation Center; Ann Begler, Pittsburgh, Private Practice; Edward Blumstein, Philadelphia; Ramona Buck, MACRO; John Lande, University of Missouri Law School; Kenneth May, Editor of *Labor Arbitration Reports*; Irene McLaughlin, Pittsburgh; Edward Pereles, Philadelphia Private Practice, Arbitration and Mediation; Jessie Smith, Attorney General's Office of Pennsylvania; Rachel Wohl, MACRO. The author facilitated the meeting.

at an informal convening stage.⁵⁵ All of the stakeholders have not been heard from, but many are working toward defining a larger formal process for establishing a state office of dispute resolution and expanding the use of ADR.⁵⁶ Although Pennsylvania engaged in efforts in the past to promote a statewide agenda, there was a consensus among those attending Saturday's session that the present interest in possibly championing our efforts by the Office of General Counsel, the Pennsylvania Courts, and some members of the legislature has rejuvenated the ADR community's desire to move forward.⁵⁷ It was also generally agreed that the people with access to these possible champions should use that access to educate them (as well as many others, such as the local bar associations) on the practical benefits and costs of mediation and other ADR processes.⁵⁸ In addition, ADR stakeholders must continue their dialogue with and education of members of the legislature.⁵⁹

Beyond these initial convening efforts, the participants in Saturday's session indicated that there is a need for a formal process in which all those interested in promoting, providing, or using mediation services could participate to shape a mechanism for providing services and a pervasive, wide-ranging acceptance of ADR in Pennsylvania.⁶⁰ In this second brainstorming stage, it is critical that those with commitment to ADR processes, the internal champions, are heard; the Maryland model from MACRO is such a process and could be adapted to meet Pennsylvania's unique needs.⁶¹

B. Characteristics of the Formal Process

It was agreed by those present on Saturday that the past efforts of Pennsylvania's ADR community should inform any new collaborative efforts.⁶² There was also agreement that it would be valuable to look at what is happening in ADR nationwide.⁶³ Although there was no specific plan discussed, the group seemed to agree that the next stage should be characterized by the following:

1. Leading with vision—the person or small group of people

55. See *supra* notes 5-6, 54 and accompanying text.

56. See *supra* notes 5-6, 54 and accompanying text.

57. See *supra* notes 5-6, 54 and accompanying text.

58. See *supra* notes 5-6, 54 and accompanying text.

59. See *supra* notes 5-6, 54 and accompanying text.

60. See *supra* notes 5-6, 54 and accompanying text.

61. See *supra* notes 5-6, 54 and accompanying text.

62. See *supra* notes 5-6, 54 and accompanying text.

63. See *supra* notes 5-6, 54 and accompanying text.

who are charged with initiating the broader process should have an evident and long-term commitment to collaboration;

2. Maximizing the opportunities already present and developing new ones;
3. Exploring opportunities to get interested members of the judiciary talking to each other. Other opportunities could be developed in terms of education of the legal community (e.g., testimonials) and the community at large (e.g., a directory that specifies areas of expertise as well as training, etc.);
4. Using the products of past efforts such as the Futures Commission's Report;
5. Drafting possible legislative initiatives;
6. Considering the financial realities of those trying to develop mediation or other types of dispute resolution practices;
7. Repeating processes as many times as necessary to insure inclusion and diversity, but at a minimum of somewhere around five years;
8. Keeping focused in any statewide effort on the broad goals while allowing for individuals to realize opportunities for their own benefit;
9. Identifying the givens; and
10. Valuing collective brainstorming.⁶⁴

The discussion, in the author's opinion, reflected Pennsylvania's ADR community grappling with defining its goals and the status quo: G and G'.⁶⁵ There was a repeatedly expressed belief that the work and efforts in the past need to be considered.⁶⁶ Efforts such as the Commission, in essence, set the ADR community's goals.⁶⁷ The

64. See *supra* notes 5-6, 54 and accompanying text.

65. See *supra* notes 5-6, 54 and accompanying text.

66. See *supra* notes 5-6, 54 and accompanying text.

67. Given the lofty statements of purpose by the Commission, it may be useful for

discussion, while acknowledging the time and effort that went into the Commission's work, also recognized the need for updating the work and re-examining goals. It was evident in the Saturday discussion that the participants wanted to protect and celebrate what progress there has been to date in Pennsylvania. In Sally's terms, *G'* is also being secured.⁶⁸ This was evident in the group's sentiment regarding the need to educate practitioners, possible champions, the bar, and others about ADR and its benefits.⁶⁹ Even if forward movement is desired, the participants in the room felt strongly that the good work currently being done needs to be acknowledged and celebrated.⁷⁰ In addition, the discussion around finding, maximizing, and assessing present and future opportunities reflected Robert Dingwall's observations that as a profession moves towards wider acceptance and asks for support and resources from recognized organizations, there will be sensitivity about concerns such as protection of the job title, the ethics and quality of practice, job boundaries, and formal and experiential knowledge requirements.⁷¹

C. Reference Points

Directly alluding to David Sally's presentation, the Saturday session participants identified a few considerations to keep in mind in defining possible reference points:

1. Setting reference points should come about as a result of opening up a dialogue between constituencies in the ADR

those involved with the current efforts in Pennsylvania to discuss whether "G" is unrealistically high. To be in a limbo of optimum frustration, stakeholders may be required to set new goals that are reachable rather than frustratingly elusive.

68. See *supra* notes 5-6, 54 and accompanying text.

69. See *supra* notes 5-6, 54 and accompanying text.

70. See *supra* notes 5-6, 54 and accompanying text.

71. See *supra* notes 5-6, 54 and accompanying text. The concerns raised during the symposium were summarized by one participant as follows:

1. mediators having to take cases referred by the court system which they felt were not really suitable for mediation;
2. in public dispute resolution, mediators coming under pressure to conduct meetings to the agenda of agencies who provide the funding—becoming "contractors" rather than mediators;
3. inappropriate measures of mediation productivity, especially in time of budgetary stringency;
4. loss of one of the essential features of mediation—the presence of the parties; and
5. inadequately trained personnel engaging in mediation, e.g., former judges.

Smyth, *supra* note 35.

Although these concerns were not directly expressed in the meeting of Saturday morning, they were, at a minimum, reflected obliquely in the comments and discussion not captured by the author's notes.

community.

2. This dialogue should shift from what has mostly been a philosophical and ideological debate on what mediation is or should be to include the economic realities for practitioners.
3. To keep efforts at an optimal level there needs to be an understanding among all of those involved about the tension between goals and the efforts made in pursuit of those goals.⁷²

D. Questions

The group also articulated the following questions and broadly discussed their possible answers:

1. What keeps a movement or effort alive?
2. How do we keep the buzz buzzing?
3. How do we as the ADR community come together to work things out?⁷³

David Sally would probably answer the first question by reiterating the need for what he describes as a profession's "self-management":

For a profession, cue placement can be achieved through mission statements, training modules, annual conferences, employed ideologues and gadflies, and bronze plaques. A quick comparison of the websites of the midwives and the mediators reveals a plethora of aspirational reminders in the former's site and a relative dearth in the latter's. Those with much more experience and knowledge can determine whether there is more that could be done to institutionalize ADR's ideals.⁷⁴

At the same time that this discussion was occurring, Pennsylvania's ADR Collaborative was engaged in the process of defining its objectives and in drafting a concept paper.⁷⁵ Many of the mediators at the

72. See *supra* notes 5-6, 54 and accompanying text.

73. See *supra* notes 5-6, 54 and accompanying text.

74. Sally, *supra* note 1, at 110.

75. The Concept Paper in Support of the Pennsylvania Conflict Resolution Initiative describes a statewide collaborative process to begin the institutionalization of ADR processes in both the public and private sectors. See ROBERT ACKERMAN, ANN L.

conference, as well as others who were connected to the writing process through the Internet, were actively sharing ideas and strategies. The objectives as expressed in the concept paper are the types of cues that merit prominent placement in ADR materials and organizational literature. The last draft of objectives read as follows:

The principal objective of the proposed Pennsylvania Conflict Resolution Initiative [PaCRI] is to identify various non-judicial conflict resolution processes (such as arbitration, consensus building, facilitation, mediation, neutral case evaluation, and structured dialogue) and, where appropriate, to expand their availability and enhance their public and private use throughout the Commonwealth to significantly achieve the following:

- Increasing the public's access to justice.
- Making the courts more efficient and user-friendly.
- Empowering more people and organizations to control the outcome of their own disputes.
- Promoting a more peaceful and civil society.
- Reducing the cost of conflict resolution.⁷⁶

In addition, the placement of other cues was given increased attention in the annual meeting of the Pennsylvania Council of Mediators ("PCM") in June 2003. The agenda for the annual meeting of the PCM, the largest statewide organization for conflict resolution in Pennsylvania, included, for the first time, a recognition award (a clock rather than a bronze plaque),⁷⁷ as well as speakers who are respected, dedicated, and employed "gadflies," including Rachel Wohl of MACRO and Marshall Cohen, a lobbyist from Western Pennsylvania who has represented several grass roots organizations. In addition, a pre-conference training was available, titled *Mediating with Heart in Mind*, which focused mediators' attention on the role of emotion in conflict management and mediation.⁷⁸

IV. Conclusion

Pennsylvania's ADR initiative may be viewed by some as the

BEGLER, GRACE D'ALO, DAVID HARWI, GALE MCGLOIN, JAMES A. ROSENSTEIN & MARK WELGE, CONCEPT PAPER IN SUPPORT OF THE PENNSYLVANIA CONFLICT RESOLUTION INITIATIVE (2003). It is currently being presented to those in the executive, judicial, and legislative branches of state government who might champion the effort. *Id.*

^{76.} *Id.*

^{77.} "For a profession, cue placement can be achieved through mission statements, training modules, annual conferences, employed ideologues and gadflies, and bronze plaques." Sally, *supra* note 1, at 110.

^{78.} The workshop was facilitated by Trisha Jones, Ph.D., a professor of Communication Sciences at Temple University and the editor of *Mediation Quarterly*.

beginning of the fall from paradise. As suggested by Deborah Hensler and many other scholars, it is problematic, if not impossible, for a movement with populist, anti-establishment roots to hold onto the essentials of its ideology and simultaneously realize the benefits of recognition by that establishment.⁷⁹ Robert Dingwall suggests that in order to be recognized as a profession and enjoy the privileges that such status provides, mediation professionals must be more frank about the need for regulation and licensing and more hopeful about what still can be achieved within such limitations.⁸⁰ And, as Sally suggests, if mediation is accepted and recognized as a distinct profession, then mediation professionals and organizations will likely find the optimal limbo in which to exert their efforts and practice their art. Within Pennsylvania, opportunities for introspection, such as the one provided by the Symposium, support Pennsylvania's current initiatives by helping the individuals involved to envision a limbo that preserves the ideals of self-empowerment, voice, and improvised value creation, while simultaneously incorporating standards of practice that allow the profession access to the resources and protection of private and public institutional champions.⁸¹

79. Hensler, *supra* note 3.

80. *See supra* note 18.

81. Another Symposium participant musing on the Symposium's value on his flight home posed the following:

I am wondering if many of the concerns raised at the seminar could be encapsulated in three general questions:

1. How to publicly fund mediation services while safeguarding the impartiality thereof?
2. How to help the legal profession balance the needs of income and efficient management with the values and practices that characterized early mediation efforts?
3. How to make mediation efforts contingent on circumstance and context?

See Smyth, supra note 35.

Although these concerns were not directly expressed in the meeting of Saturday morning, they were, at a minimum, reflected obliquely in the comments and discussion not captured by the author's notes.
