Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship

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When we try to identify the practices associated with 'alternative dispute resolution,' we at once sense that here is a fugitive label attached to a range of disparate and contradictory, but entangled, projects.[1] Each of them has attracted its own sponsors at a political level, making it appear that ADR enjoys the support of almost everyone from conservative fundamentalists[2] to liberal utopian reformers and the modern left.[3] But this political consensus must not distract attention from the diversity of interests which is apparent behind it. While ADR offers to sustain disputants who seek to recover control by disengaging from the attentions of legal specialists, it also attracts a range of professional groups wanting to secure new areas of work; and the ensuing competition inevitably extends the range of interventions to which disputants are potentially subject. At the same time, a contemporary perception of crisis in the civil justice system has led judges to see ADR as a way to ease the present weight of judicial business,[4] while government is attracted to active sponsorship as a means of reduced spending on the courts.[5] So what promises to be a move to institutionalise *alternative* modes of dispute management, is at the same time part of the project to renovate litigation, potentially extending governmental provision and control into areas of dispute hitherto firmly in the 'private' sphere. These apparently inconsistent demands on ADR, and the seemingly identical prescription — the availability of 'mediation' — with which all are met, make it imperative to re-examine closely the forms of intervention which ADR might take, and their potential institutional locations, particularly the proximity to civil justice.

Whatever content is found behind the label of 'alternative dispute resolution,' it has to be seen in the context of a wider conversation about dispute processes. Lawyer negotiations and the process of litigation, as well as the whole range of adjudicatory procedures — courts, tribunals, arbitration — are presently under re-examination.[6] So interest in 'alternatives' comes at a moment when there is a

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1 The contradictory strands historically present in the alternative dispute resolution movement in North America are examined in R.L. Abel (ed), *The Politics of Informal Justice: The American Experience*, Vol 1 (New York: Academic Press, 1982); 'The Contradictions of Informal Justice' in Abel; J.S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983); C. Menkel-Meadow, 'Dispute Resolution: The Periphery Becomes the Core' (1986) 69 *Judicature* 300; C. Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture' (1991) 19 Fla St L Rev 2. For assessments which focus on Britain, see the contributions to R. Matthews (ed), *Informal Justice* (London: Sage Publications, 1988).

2 A. Thierer, *Judgement Day: The Case for Alternative Dispute Resolution* (London: Adam Smith Institute, 1992).

3 A. Coote, H. Harman and P. Hewitt, *The Family Way* (London: Institute of Public Policy Research, 1990).

4 See, for example, Lord Taylor, *The Judiciary in the 90s*, the Richard Dimbleby Lecture 1992 (London: BBC Education, 1993).

5 A working group within the Lord Chancellor's Department is currently investigating the potential of ADR in the civil justice system.

6 The establishment of the Civil Justice Review in 1985 signalled government's involvement in this process.

renewed self-consciousness about processes which are already 'there.' At the same time, alternatives themselves are as much about devoting new energy and attention to familiar phases in dispute processes preceding the resort to judgment as about the emergence of novel modes. These interventions converge upon three separate moments: the private efforts of parties to reach agreement at a point before resorting to specialist legal help; upon attempts to 'settle' somewhere along the path to the court once 'litigation' has formally commenced; and upon what happens in lawyers' offices. Where novelty is found, it tends to reside: in the development of new institutional locations for ancient lay forms of intervention, such as the growth of independent agencies offering mediation in party negotiations; in changing understandings as to the range of interventions which it might be appropriate for courts to undertake; and in shifts in established professional conventions as to the sort of capacities in which lawyers can properly act.

So discussion of ADR necessarily begins with, and continues to be located around, the foundational processes of 'settlement' and 'adjudication,' with their respective goals in negotiated agreement and imposed decision. Here, despite the analytical clarity of the distinction between negotiated agreement and imposed decision, and the considerable gulf which separates them in terms of both 'meaning' and the location of power, they cannot be seen as polar spheres in processual terms, as much of the time they represent different destinations ranged sequentially along a single route, 'litigation.'[7] Similarly, although 'settlement' in a narrow technical sense is something lawyers do, many disputes arise in locations remote from legal specialists and are attended to in the first instance by the parties themselves. Often, perhaps typically, a negotiated outcome is explored and the dispute passed to lawyers only when negotiations have broken down. Even when lawyers do come into the picture, the passage from 'party control' to 'lawyer management' of a dispute may be a gradual process rather than a clearly marked transition; and the same will be true of any subsequent move towards adjudication.

While the boundaries between the analytically clear-cut spheres of party control, lawyer management and judicial intervention remain indistinct in practice, I argue here that these spheres do nonetheless represent the locations within which different strands of 'alternative' intervention can be identified. Only by looking separately at processes supportive of party negotiations, innovative processes on the threshold of the court and novel forms of intervention by lawyers, can we get a clear view of what ADR might be and of its relationship to civil justice.

I ADR and the Field of Party Negotiations

Party negotiations provide one important site around which alternative forms of intervention are presently developing. An aspiration to party control presupposes a range of disputes which arise in contexts relatively remote from the attention of lawyers, away from the public justice system. It assumes that such disputes can and should be handled at this level through bilateral exchanges between the parties, pursued within a universe of meaning peculiar to them and concluded in a negotiated outcome. So this aspiration towards a realisation and expansion of 'private ordering' quite explicitly involves a retreat back from professional management, an escape

7 M. Galanter, 'World of Deals: Using Negotiation to Teach Legal Process' (1984) *Journal of Legal Education* 268.

from the forms of dependency associated with resort to lawyers and litigation. Correspondingly, any third party intervention would be confined to sustaining and, if necessary, reviving party negotiations. So ADR in this context suggests some form of minimal, facilitatory intervention, directed towards orchestrating communication and an exchange of information, leaving the parties as far as possible unconstrained in reaching an outcome informed by their own understandings and objectives.

The apparently simple and attractive idea that disputants should want, and be encouraged, to 'manage on their own,' reaching for a negotiated understanding with a minimum of outside help, has provided a major impetus for the growth of supporting institutions in North America since the 1960s. Similar growth has taken place in Britain since the late 1970s, notably in the family and community spheres, and looks set to continue. But the appearance and imminent expansion of agencies claiming expertise in supporting party negotiations raises some fundamental questions.

- In what sense can we speak of a discrete sphere of 'party control' over disputes?
- What limitations would one want to see upon the development of a culture in which voluntary party negotiations are seen as the primary and best means of resolving disputes?
- What forms of third party intervention can be compatible with, and supportive of, party negotiations?
- What professional group might offer such support?
- Within what kind of institutional framework could this support be provided? In particular, what might be the role of the state in such provision?

Some categories of dispute can certainly be viewed as originating at a distance from legal specialists and potentially running their course without attracting the attention of lawyers. Disputes within the family, between neighbours, those involving individual consumers and small suppliers of goods and services, even disputes in some work contexts, may well reach some kind of conclusion without more than bilateral exchanges between the parties primarily involved. But a clear-cut distinction between the parties' universe of meaning, and a corresponding universe furnished by legal norms and understandings is problematic. In any context, bilateral exchange must take place against a background in which legal norms have some place. Whatever reservations there may be as to the extent to which Mnookin and Kornhauser's argument can be taken, bilateral negotiations inevitably involve, to a greater or lesser extent, 'bargaining in the shadow of the law.'[8] It is also impossible to view all disputes as originating, and having the potential to remain, in an 'extra-legal' arena. In the corporate sphere particularly, disputes are unlikely to escape the attention of at least in-house legal specialists, and may well originate in their activities. In such a context, 'party control' and 'party negotiations' can mean no more than bilateral exchanges between senior executives, under the eye of their respective legal teams.

On one level, reservations about the institutionalisation of private negotiations as a preferred, primary means of dispute management might seem unnecessary, even absurd. It could be argued that in many respects a 'culture of negotiation' is already in place. The search for an agreed solution is widely seen as the first step, and resort to outside specialists and the assertion of legal rights through litigation

8 R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law' (1979) 88 Yale LJ 950. See the reservations about their argument by Menkel-Meadow at p 371 above.

very much a matter of last resort. But there is no general consensus on the beauty of freely negotiated settlement. As Twining shows (p. 384 *above*), Bentham vigorously opposed 'compromise' on the ground that it involves the denial of 'justice'. From one quite different perspective come concerns such as those expressed by Fiss, that the very foundations of the polity are endangered if disputes are deflected from the courts.[9] From another arises the worry that a growing fashion for mediated negotiations may operate to the disadvantage of weaker parties where significant imbalances of power are present. Although the warnings of Abel and his fellow contributors to the *Politics of Informal Justice*[10] centred upon informal processes sponsored by government, non-governmental agencies can also be seen as subject to covert regulation and co-option,[11] and the concerns expressed there touch upon any form of mediated negotiation where disparities of power exist. Nor is the feminist critique of mediation confined to state sponsored agencies.[12] It is also noteworthy that many mediators are reluctant to intervene in disputes where large imbalances of power are obviously present, or where any agreement reached might leave significant third party interests unprotected. Both of those indicators might serve as useful guides to the field within which private negotiations should enjoy third party sponsorship.

Looking to the possible nature and shape of any third party intervention in private negotiations, there is inevitably tension between the very idea of 'party control' and intrusion from outside which must inevitably transform the bilateral exchange. But where the communication essential to the conduct of negotiations is impossible without external help, the form of third party intervention most closely compatible with private negotiation is some form of minimal, facilitatory intervention, which brings the parties into contact in a secure context and is directed towards orchestrating communication and an exchange of information between them, but which leaves them as far as possible unconstrained in constructing an outcome within their own universe of meaning.

In Britain today there is already a number of agencies seeking to support private negotiations by offering 'mediation.' Many of these specialise in family disputes. The most extensive example is provided by the range of local agencies grouped together under the umbrella of the National Association of Family Mediation and Conciliation Services.[13] These fifty-seven services are self-consciously devoted to the support of parties who wish to retain control over their own disputes, fashion their own agreements and avoid surrendering responsibility for the conduct of the dispute to lawyers. They encourage parties to use lawyers in an advisory capacity and recognise that where negotiations are unsuccessful more extensive reliance upon legal expertise will probably follow. Other important, but more localised, initiatives are taking place in the community and neighbourhood sphere.[14]

9 O. Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073 discussed at p 279 above.

10 R.L. Abel (ed), *The Politics of Informal Justice*, cited at n 1 above.

11 B. De Sousa Santos, 'Law and Community: The Changing Nature of State Power in Late Capitalism' (1980) 8 *International Journal of the Sociology of Law* 379.

12 A. Bottomley, "What is Happening to Family Law? A Feminist Critique of Mediation", in J. Brophy and C. Smart (eds) *Women in Law* (London: Routledge, 1985).

13 The National Family Conciliation Council was founded in 1982 and relaunched at the National Association of Family Mediation and Conciliation Services in 1992.

14 eg the Southwark Mediation Centre founded in 1984. This agency offers mediation in neighbourhood disputes. For an evaluation of its work, see Quine, Hatton and Read, *Community Mediation of Disputes Between Neighbours* (London: The Grubb Institute, 1990).

Mediation is also offered across a broad range of disputes by a number of other agencies, most prominantly by IDR (Europe) Ltd, a company established in 1989 to offer private mediation.[15] The Centre for Dispute Resolution (CEDR) also lists mediation as one of the principal forms of intervention which it offers in commercial disputes.[16] But mediatory intervention in the commercial field almost invariably involves orchestrating the negotiation of teams which include legal specialists on both sides, giving the notion of 'party control' a different meaning. The whole milieu of intervention is thus far removed from that in the family or neighbourhood context. But the motivation to avoid too great a degree of control passing to legal specialists remains, as does the common goal of reaching an acceptable outcome without the financial cost of litigation.

While facilitatory intervention of the kind outlined above constitutes the declared core of 'mediation' offered by the agencies so far discussed, there is not yet a general consensus as to the scope and boundaries of what might be appropriate in support of party negotiations. Alongside mediation, in the narrow sense of supplying help with communications in support of bilateral negotiation, more active, directive styles of intervention are widely observable under which additional information and advice are fed into the process, influencing the content of ensuing negotiated agreements. Such intervention involves at least three further tasks: obtaining and assessing information about the disputants and their quarrel; identifying and evaluating the options available to them; and persuading the parties to adopt the courses of action which the intervener considers, in the light of professional experience, to be best suited to the particular circumstances. This form of intervention may even be cast in the form of an evaluation of the 'merits' of the case and a forecast of what a court might do if confronted with it. In the promotional writings on ADR, these forms of active, directive intervention are labelled 'evaluative' as opposed to 'facilitative' mediation.[17] Combining 'advice' with the less intrusive project of help with communication and so claiming to be an authoritative specialist, knowing better than the parties how the issues confronting them are to be resolved, an intervener thus significantly alters the universe of meaning within which any agreement is reached, coming to share control over the outcome with the parties.

A departure in a different direction is observable in the sphere of family disputes, where attempts are made to combine help with joint decision-making and some form of therapeutic examination of relationships within the family. The intervener undertakes an assessment of the parties' relationship and uses, openly or covertly, specialist therapeutic techniques to reveal and correct pathological elements before promoting joint decision-making in the light of the transformations thus achieved.[18] Here again, in aiming at a break with the original conversation in which the parties are engaged and invoking or imposing a new situation, the intervener inevitably shares control over the outcome with the parties.

The loss of definition which goes with attempts to combine help with communication and other forms of specialist intervention, has serious implications from the

15 IDR Europe's mediators are solicitors, drawn from a network of twenty four member firms, and given mediation training by the company.

16 The Centre was founded in 1990 under the sponsorship of the Confederation of British Industry and several large commercial law firms.

17 See, eg, the Report cited at n 34 below, p 14.

18 J. Walker and M. Robinson, 'Conciliation and Family Therapy' in T. Fisher (ed), *Family Conciliation within the UK* (Bristol: Familiy Law, 1990). Here the authors insist that 'one of the theoretical bases which informs the practice of conciliation is the systems theory of family therapy,' at p 61.

consumer's perspective. There is potential tension between the aspiration to party control and *any* institutionalised third party help. While this tension remains at a minimum so long as that help is confined to assistance with communication, it increases sharply once efforts are made to combine the provision of specialist advice with the primary responsibilities of the mediator. Directive or 'evaluative' mediation, or attempts to combine help with communication and therapeutic forms of intervention, must tend immediately to draw the parties back into a sphere of specialist control. Thus, parties opting for mediation to escape the attention of lawyers may, while retreating from one form of professional domination, become entangled in another. Further, it is obvious that interveners adopting directive or therapeutic approaches, while purporting to orchestrate joint decision-making, exercise enormous power over the parties. This power is potentially covert, in the sense that it may not be experienced as such by the parties; and unregulated, in that these private processes are not attended by any of the procedural safeguards which surround litigation.

The coexistence of this broad range of interventions under the generic label of 'mediation,' and the ensuing lack of clarity as to what mediation really is, in part simply reflects the diverse backgrounds from which emergent groups of mediators are drawn. But it also signals a struggle between these emergent groups and established professions; the former anxious to secure professional status, the latter to absorb mediation as part of existing practice. As long as established professional groups are successful in holding themselves out as providing mediation — accountants, family therapists, lawyers and social workers are already seeking to do so — the core component in the promised intervention is likely to remain submerged. There is also potential incompatibility between the mediator's achievement of professional status and the limited role for the intervener which party control over dispute processes requires. Could an aspiring professional group remain content with the modest task of providing the communications arrangements for other peoples' decision-making?

The institutional location for the provision of mediatory help with decision-making must depend on the outcome of the struggles just referred to. So far, voluntary agencies, almost wholly dependent on private and charitable funding, have achieved only patchy, localised provision. Even the network of fifty-seven agencies currently forming the National Association of Family Conciliation and Mediation Services provides very uneven cover across the country and many member agencies are precariously funded. Similarly, the mediators associated with IDR (Europe) Ltd and CEDR offer only localised specialist mediation.

What conceivable role could government play in sponsoring the institutional framework here? Can we imagine a state sponsored network of agencies providing facilitatory mediation? At first sight there is incompatibility between the aspiration to private ordering and such governmental sponsorship, given that government — alongside the Law Society and the Bar — is the major sponsor of the specialist dispute management complex which it is the central objective of this strand of ADR to disengage from. Such a project would vastly increase government's reach into an area which, with the small but important exception of its support for ACAS, it has hitherto made no attempt to enter. It would constitute an archetypal agency of 'informal justice,' representing from the consumer standpoint all the hazards of which commentators such as Abel have warned us.[19] Historically, government's centuries

19 See n 1 above.

old financial investment in dispute management through its provision of adjudication has never been a simple matter of providing neutral help for those subjects who have happened to quarrel with each other. In England, at least since Norman times, adjudication has been a central mode of government, and it is perhaps hard to imagine that any agency which government invested in to provide mediation would not be drawn into the governmental project, even if the opportunities for control were less visible and indirect.

Whatever these reservations, the ultimate test must depend upon the nature of the intervention sponsored and whether this could remain of a minimal facilitatory character. There are already signs, in the family sphere, that government might wish to combine any provision it made for 'mediation' with a multi-function information and advice agency of first resort, closely linked to 'the family court.' At first sight the generalisation of this idea might look attractive. But, as argued above, there may be a problem in trying to make available necessary information and advice, alongside help with joint decision-making, without there developing out of those diagnostic and assessment activities a route leading back to professional domination of the dispute process.

From goverment's standpoint, the provision of a general network of mediation agencies, parallel to the courts, must presently be almost unimaginable on grounds of cost. But there do not seem to be fundamental reasons of principle why it should not move in this direction. Government has professed a lifelong interest in dispute management. Paying for alternative modes would be just another way of intervening in a field where it has already asserted an extensive claim, hitherto realised through the provision of adjudication.

II ADR on the Threshold of Adjudication

> By the end of our work we were convinced that the case was made out for the courts themselves to embrace the systems of alternative dispute resolution. . . . We believe that ADR has much to offer in support of the judicial process. (*Beldam Report*, p 1)

This growth of independent agencies offering to mediate party negotiations exists alongside a parallel development in which ADR appears as part of the judicial repertoire of dispute management. Despite the powerful scholarly condemnation which 'informalism' received at the beginning of the 1980s, the linkage of ADR to the courts retains consistent advocates. In North America, for example, Frank Sander and others have long been arguing for the 'integration of alternative dispute resolution processes into the public justice system.'[20]

The 'Multi-door Courthouse' experiments which Sander proposed have now been realised in experimental form,[21] and increasingly numerous initiatives can be found right across the common law world, under which procedures are being set in place on the threshold of courts which the parties are required to traverse before they can get at adjudication. These procedures auxiliary to adjudication vary widely as to the form of intervention involved; their advisory or mandatory nature; whether they are conducted in or around the court, or involve reference to some outside

20 F.E.A. Sander, 'Alternative Dispute Resolution in the United States: An Overview' in *Justice for a Generation*, Papers of the 1985 London Meeting of the American Bar Association (St Paul, Minn: West Publishing Company, 1985) p 260.

21 L.J. Finkelstein, 'The D C Multi-Door Courthouse' (1986) 69 *Judicature* 305.

agency. They have in common that they are directed towards 'settlement' and involve postponement of access to adjudication as long as that objective is pursued.

In North America these experiments take place against a long history of judicial sponsorship of settlement,[22] while in Britain judges have been much more wary of involvement in negotiations. But there is already a number of examples of such procedures associated with English courts, of which the most widely publicised are the experiments which district judges have been making in the Divorce County Courts in proceedings relating to property and children. These procedures are used by different district judges in a variety of ways, all going beyond the traditional objective of the early appointment to review the preparations which parties, or their legal representatives, have made for the forthcoming trial. Some procedures involve no more than a meeting at which the advantages of settlement are drawn to the parties attention, together with the suggestion that further attempts to negotiate a settlement might be appropriate. Others involve a brief review of the case, following which the legal representatives are told bluntly that further efforts must be made to reach a settlement. In other courts these occasions are used as opportunities to forecast for parties and legal representatives the likely direction of adjudication, offering them the chance to reflect upon whether they want to experience it, and giving them an implicit push back into further party or lawyer negotiations. Elsewhere, the appointment is used to initiate mediatory intervention. The potential advantages of mediation may be drawn to the attention of the parties, it being left to them as to whether this avenue should be pursued. Alternatively, there may be direct attempts to mediate on the spot between the parties or their representatives, or an explicit reference to an outside mediation agency.

Procedurally, these interventions are extremely varied; sometimes they are managed by the judges themselves, but in cases involving children they may be left entirely in the hands of Divorce Court Welfare Officers. There is also no consistent pattern as to the category of actor towards whom these interventions are directed. In some cases, legal representatives are the chosen focus of intervention, but elsewhere the parties themselves represent the preferred primary audience.

A well-publicised example here is the 'in-court and financial property conciliation scheme' which has been operated at the Edmonton and Brentford County Courts since 1990.[23] Under this scheme, a 'general' or 'pre-trial' review is held some two months after the application for financial relief is made, but before formal discovery. The claimed objective of the review is to get 'the parties thinking positively about settlement at the earliest possible moment.'[24] Prior to the appointment, the parties are required to complete a questionnaire about their financial circumstances, support it with recent vouchers, passing it to the other party and to the court. The district judges concerned describe what then happens[25]:

> At the review itself, both parties and their legal advisors are expected to attend and the round-table discussions take place, often first between the district judge and the advocates, and thereafter with the clients. Such discussions would be informal and without prejudice. The

22 See, for example, M. Galanter, 'The Emergence of the Judge as Mediator in Civil Cases' (1986) 69 *Judicature* 257; M. Galanter, 'A Settlement Judge . . . Not a Trial Judge: Judicial Mediation in the United States' (1985) 12 *J of Law & Soc* 1.

23 See generally the accounts provided by the District Judges administering this experiment: G. Rose and S. Gerlis, 'Conciliation for Family Finance' (1991) 21 Fam Law 92; S. Gerlis and G. Rose, 'Financial In-Court Conciliation — An Update' (1992) 22 Fam Law 280.

24 S. Gerlis and G. Rose, 'Financial In-Court Conciliations — An Update,' cited in n 23 above, p 280.

25 *ibid.*

> district judge strives to encourage settlement, if necessary by suggesting to the parties the kind of order he thinks the court would be likely to make. In the event of settlement an order would be made on the spot . . . If, after full discussion, attempts at settlement fail, the district judge gives directions for trial.

The district judges operating this scheme claim that about 40 per cent of cases are 'settled' at the pre-trial review and that, of the cases listed for trial, a significant number are settled later.

Directions Appointments in proceedings under section 8 of the Children Act, 1989, are also widely used in Divorce County Courts as occasions for orchestrating negotiations towards settlement. In pursuit of that general objective, these appointments appear to be used in a variety of ways, with important differences observable from one court to another as to the personnel involved, the manner in which 'settlement' is pursued and the procedural character of what takes place. Generally, four broad routes lead out of these appointments: a welfare report as a prelude to an order; a reference away to further lawyer negotiations; some kind of conciliation of a more or less coercive nature by a judge or divorce court welfare officer on court premises; or a reference from the court to some outside mediation agency.

The management of these appointments is exemplified by the procedures adopted at the Croydon County Court in the months after the Act was brought into operation. There the parties and their legal representatives went on arrival to a meeting with a divorce court welfare officer before seeing a district judge at all. At this meeting the case was briefly 'reviewed' by the DCWO and in some instances an agreement reached. If this was not the case, the availability of 'conciliation' was explained to the parties and, if there seemed to the DCWO any chance that this would produce an agreement, the parties were offered a future appointment with a 'conciliator' from the South East London Family Mediation Bureau.[26] If this proposal was rejected, the DCWO told the parties that a welfare report would be recommended to the district judge. In either case, the parties then moved to another room for a meeting with a district judge who had available the DCWO's note of what had just taken place. If conciliation had been agreed to, the district judge informed the parties that he was taking no action and that further proceedings were postponed to conciliations outcome. If not, a welfare report was ordered and a tentative date for the trial fixed.

The recent Report of the Committee on Alternative Dispute Resolution, established by the General Council of the Bar under the chairmanship of Lord Justice Beldam,[27] argues for the generalisation of these kinds of threshold procedures in proposing a scheme of court-linked mediation across a wide range of civil disputes. The proposal is that 'facilitatory mediation,' in which 'the mediator would be expected to help the parties to reach solutions rather than suggesting them' (p 10), should be offered to litigants at an early point in the court process. A pilot experiment is advocated in the first instance, covering a number of county courts and at least one division of the High Court. As a preferred means of introducing the parties to the possibility of mediation, the Committee suggests either an 'entirely voluntary' scheme, triggered by a notice sent out with the originating process; or that, in suitable cases identified by the judge, a letter should be written to the parties 'suggesting'

26 Based in Bromley and founded in 1979, this is one of the pioneer out of court mediation agencies in Britain.

27 *Report of the Committee on Alternative Dispute Resolution*, General Council of the Bar, October 1991. Besides the Chairman, Sir Roy Beldam, the members were Anthony Scrivener QC, Philip Naughton QC, Christopher Chandler (Chairman of the Law Society ADR Working Party) and Jane Hern (of the Law Society's Practice Directorate).

mediation (p 11). Where the offer of mediation is taken up, it is proposed that, under the pilot, a mediator should be chosen 'from lawyers with at least seven years' post qualification experience' (p 10). Only in the event of mediation failing to yield a settlement would the case continue further in the court process.

These novel procedures growing up or being advocated in the vicinity of the court represent a sharp break with recent English practice in that they involve active judicial sponsorship of 'settlement' and postpone adjudication while such sponsored negotiations are pursued. Beyond that it is difficult to know how we should characterise them at this point. Should we see them as beginning to represent a new, relatively discrete, procedural phase interposed between lawyer-negotiation and the trial, during which an institutionalised search for settlement takes place? Or should we see them as part of the process of adjudication, radically transforming it, even making us re-examine our basic understandings of what a 'court' is? What should the critical response be to these embryonic schemes and proposals which seek to institutionalise settlement processes in the final run in to adjudication and implicate the courts actively in those processes? Can we join commentators like Karl Mackie who extend a general welcome to the increased readiness of judges to become directly involved in sponsoring settlement?[28]

While a number of justifications may be offered for court sponsorship of settlement, including financial and psychological advantages to the litigant flowing from an agreed solution, one driving force consistently found behind these experiments lies in the desire of the judges to control their caseloads. In conversation, district judges make enthusiastic claims as to the 'success' of these procedures in reducing the number of cases coming to trial.

Worries about court-linked schemes of 'alternative dispute resolution' have been widely articulated, notably in North America. These fall into two broad categories: those anticipating that general harm will come to the polity if the integrity of adjudication is damaged through judges' involvement with ADR; and those forecasting that disadvantage will be suffered by individual litigants or particular classes of litigant if judicial authority is lent to informal processes. Looking at the first of these worries, the argument is that judicial authority can be compromised if judges involve themselves, or even are perceived by the public to be involved in, the sponsorship of settlement through the management of negotiations. Historically, common law judges have presented themselves as remote, authoritative superiors with a rather narrow function in hearing argument and then formulating and imposing a decision. They have not on the whole become involved in the management of negotiations, or shown much eagerness to sponsor settlement. The authority which courts necessarily enjoy in the context of adjudication could be weakened if roles become blurred through judges being drawn into managerial activity and themselves 'strive to encourage settlement.'

There is a specific problem where the form of settlement-directed intervention involves the judge seeking to act as a mediator when a dispute first comes before the court. Facilitatory mediation demands a posture of the intervener, and a relationship between the intervener and disputants, quite different from those prevailing where the third party is authorised to make an imposed decision. It remains unclear whether it is feasible to shift back and forward between these two roles, even if it is understood that no intervener may exercise more than one role in a particular dispute.

28 *A Handbook of Dispute Resolution: ADR in Action* (London: Routledge, 1991) p 281.

The contemporary experiments in English courts with threshold procedures directed towards achieving settlement potentially compromise the integrity of adjudication. Whether this harm is realised will depend upon the direction in which these novel procedures develop. If they crystallise into a distinct, relatively autonomous phase in litigation, prior to 'the trial,' in which specialist personnel attempt to orchestrate settlement at a distance from the court, the compromise of judicial authority seems unlikely. But the harm envisaged may well materialise if these procedures become an integral part of the trial, with court personnel actively involved in the pursuit of settlement. The present picture remains unclear: while the contemporary practice of some district judges reveals a potentially damaging conflation of mediatory and adjudicatory roles, the Beldam proposals — apart from the suggestion that mediation be carried out on or near court premises — point towards the growth of a relatively discrete procedural phase.

The general hazards which court-sponsored ADR processes represent from the litigant's standpoint were identified long ago by scholars like Abel[29] and Auerbach[30] in North America, and by Freeman[31] here in Britain. The establishment of alternative agencies and the ensuing informal procedures, which enjoy the authority of the court but which are stripped of the procedural safeguards of adjudication, carry the risk of unregulated coercion and manipulation of weaker parties by stronger ones, and of both parties by the intervener. Attempts by courts to oversee and regulate hitherto private settlement-directed negotiations present the same dangers. These dangers flow from the nature of the authority which successful courts must of necessity enjoy. Courts are places where dominant seniors tell us what to do and judges are equipped with coercive powers in the event of our failure to comply with their orders. This circumstance in itself makes court sponsored negotiatory processes potentially problematic; and evidence so far available in Britain suggests that parties subject to such processes experience them as coercive.[32] It must be doubted whether uncoerced negotiations are possible at all under the supervision of court personnel. At the very least, there is a serious risk that meanings will become muddled in the minds of disputants if processes over which they supposedly retain control are conflated with those which are essentially directed towards the delivery of an imposed decision.

In this respect there does seem a crucial difference between allowing the looming prospect of a trial to encourage the parties towards a negotiated settlement and active steps on the part of a court to promote one. Once the court seeks to sponsor settlement, the difference between the self-constructed, negotiated outcome and the imposed third-party decision becomes blurred. The beauty of adjudication, if we can call it that, is that we know unambiguously what we are experiencing — the imposed decision of an authoritative superior. That clarity is lost once courts begin to involve themselves in the sponsorship of settlement.

III Lawyers and ADR: The Pretension to Neutrality

That strand of alternative intervention which focuses upon the provision of support for party negotiation implies a changed and diminished role for lawyers in some

29 Cited in n 1 above.
30 Cited in n 1 above.
31 'Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?' in J.M. Eekelaar and S.N. Katz (eds), *The Resolution of Family Conflict* (Toronto: Butterworths, 1984) p 7.
32 G. Davis and K. Bader, 'In-Court Mediation: The Consumer View' (1985) 15 Fam Law 42.

areas of dispute. At the very least it suggests that in the case of successful bilateral negotiations, lawyers would typically be confined to an auxiliary, advisory position, rather than a central managerial, representative role. The second strand, represented by the embryonic processes which are now developing around the threshold of the court, challenges the lawyer in other ways. The insertion of a phase of court-supervised negotiations — in which clients are potentially directly involved — in the period immediately before trial represents a major upheaval in existing procedure. It threatens the lawyer's control over both client and settlement process at a crucial moment, enforcing reconsideration of established habits surrounding late-stage negotiations.

It is much too early to suggest with any confidence what all this will mean for lawyers. But the early features of their response are already visible. First, they are becoming, and will continue to become, much more self-conscious about established aspects of their traditional partisan roles, notably settlement-directed lawyer negotiations. Second, they are beginning to develop new forms of practice. Here, early moves have led to the emergence of a third strand of alternative intervention. Under an explicit 'ADR' banner, lawyers are mapping out for themselves some novel modes of action in which the common theme is a pretension to neutrality. The Beldam Committee's proposal that lawyers should act as mediators, discussed above, here reinforces a direction of development that is already in train.

For some lawyers, increased self-consciousness about 'settlement' will involve no more than the continuation of established practice under which early settlement through negotiation remains the primary, preferred means of dealing with business.[33] For others it will mean a subtle, but fundamental, reorientation in the traditional partisan role. While settlement has always been the outcome of the vast majority of cases coming into the hands of lawyers, for some this has tended to be a late-stage affair, reached only after a lengthy journey along the path towards the court. For them the pressure to shift from later to early-stage settlement will constitute a major cultural change.

Some consequences for lawyer negotiations of the growing disposition of the courts towards active sponsorship of settlement are becoming visible in the context of Directions Appointments in applications under s 8 of the Children Act 1989. At the Croydon County Court, for example, the use of these appointments to promote settlement by the district judges quickly revealed the directions in which change might come about in negotiation behaviour. In the early months of the Act's operation, both clients and lawyers appeared in some confusion when confronted on arrival at Directions Appointments with Divorce Court Welfare Officers briefed to probe the possibilities of settlement. It was obvious that clients had not been prepared for this novel hurdle in front of the trial and that lawyers themselves had not given thought to the reality of their own participation in a phase of supervised negotiations. But very quickly the same lawyers began to appear at these meetings with agreement mapped out in areas where this had proved possible; and where it had not, the firm response that settlement had been thoroughly explored without success and the client wanted to come quickly to trial. Faced with the prospect of explaining to a client that a forthcoming trial may well be preceded by supervised negotiations, and with the loss of control involved in allowing clients to submit to mediation under court supervision, it seems probable that lawyers will quickly see to it that 'settlement'

33 Preference for early-stage settlement does not necessarily imply a reluctance to begin legal proceedings; the prompt commencement of litigation may be part of the strategy to achieve settlement.

is pursued earlier and under their own auspices. So the immediate consequence of the introduction of threshold procedures of this type may well be to push settlement back to an earlier stage rather than for the procedures themselves to provide the immediate arena for negotiation.

Alongside this renewed attention to the achievement of settlement through negotiations, lawyers are now rapidly beginning to show an active, propriatorial interest in ADR. IDR Europe's pool of mediators are solicitors drawn from a network of twenty four law firms. Both Bar and Law Society were initially cautious towards the ADR movement; but both organisations hastened to sponsor major reports during 1991. These Reports, prepared by Henry Brown for the Courts and Legal Services Committee of the Law Society,[34] and the Committee under Lord Justice Beldam for the Bar Council,[35] heralded ADR as something new and important, and identified central roles for lawyers in ADR processes.

The Reports confirm earlier exploratory initiatives which suggested that ADR for lawyers would come to involve a move towards adopting neutral roles in dispute processes. While in North America lawyers have long presented themselves in neutral capacities alongside their traditional adversarial roles,[36] in Britain this novel pretension to neutrality represents a fundamental departure from established habits of work, which for both barristers and solicitors have generally involved providing partisan support for a particular client. This shift to a neutral posture is observable in at least two kinds of intervention which lawyers are offering to embark upon.

First, there are early signs that lawyers are anxious to enter joint consultancy roles under which they offer expert advice to both parties, from a neutral standpoint, in contrast to providing partisan support for one side or the other. An early example of this radical departure was provided by an announcement in 1985 of the Family Law Bar Association that it was establishing a 'Conciliation Board' to administer a 'Recommendation Procedure' designed 'to give the parties the benefit of an impartial, confidential and economical recommendation how to settle their differences.'[37] Under this procedure, barristers offer neutral opinions on financial issues submitted to them by the solicitors to the respective parties. This procedure conceived 'in the hope that the intervention of a neutral and experienced outsider might nudge the parties towards a settlement' has not been widely used; those operating it indicate that advisory opinions have been sought in no more than a handful of cases a year.

Another context in which lawyers are presenting themselves in a neutral consultancy role is variously known as the 'mini-trial,' 'executive tribunal' or 'modified settlement conference.'[38] Here the legal teams of the respective parties present their cases *to the parties themselves*, sitting together with a 'neutral adviser,' with the objective of enabling them (in the case of corporations, senior executives) 'to assess the strengths, weaknesses and prospects of the case, and then have an opportunity to enter into settlement discussions on a realistic, business-like basis' (Brown Report, p 16). Executive tribunals can take place at any stage in a case: 'some disputants prefer to wait until after the pleadings have closed'; but the procedure can be followed at 'a very early stage of the dispute to maximise cost savings' (Brown Report, p 16).

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34 *Alternative Dispute Resolution. A Report Prepared by Henry Brown for the Courts and Legal Services Committee*, Law Society, Legal Practice Directorate, July 1991.

35 Cited in n 20 above.

36 See eg S.E. Purnell, 'Attorney as Mediator' (1985) 32 UCLA L Rev 986.

37 *The Family Law Bar Association Conciliation Board: Ancillary Relief and Family Provision*, brochure of the Family Law Bar Association.

38 Described in the Brown Report, cited at n 27 above.

The neutral adviser is seen as a key figure in the process, assisting the parties to question the lawyers, explaining aspects of the case to them and, 'if required, giving an opinion on the case.' The neutral adviser may be any person 'with authority in the field of the dispute,' but is typically a 'neutral lawyer' or retired judge (Brown Report, p 16).

Although the neutral adviser is presented by proponents of this procedure as the central figure, it is a drama in which the respective legal teams play a major role. They conceive the performance, propose it to their clients, and ultimately present it to them. This is a collaborative exercise through which the partisan lawyers, alongside the neutral adviser, are subtly transformed into caring neutrals who wisely but tactfully reveal to their clients the folly of the ultimate step into the judicial domain. So, in the executive tribunal, there is a dual transformation of the lawyer towards neutrality — as 'neutral adviser' and as presenter of a drama, the self-conscious objective of which is to coax the clients to settlement.

It is difficult to know what to make of this device. Proponents clearly see it as a means of instilling realism into clients, helping them to pull back from the catastrophe of adjudication. They argue that even in disputes between multinationals, clients 'get so involved and stressed that they won't give way despite lawyer advice.'[39] Yet it is not clear why all this cannot be achieved in the traditional 'settlement conference,' which has been widely used for just the same purpose with a high degree of success. Philip Gulliver's important insight,[40] that partisan supporters in bilateral negotiations often play a crucial role in guiding their respective principals to a mutually acceptable settlement, articulates explicitly something we have all subconsciously understood and practised in everyday life. Here the question must be how far the executive tribunal, with its neutral adviser, is in reality a means of damping down unrealistic expectations which the legal teams themselves have recklessly nourished, even created, at an earlier stage in the dispute process; and how far it is, as lawyers present it, a last ditch effort in a long drawn out struggle to bring impassioned and litigious clients to their senses?

The idea that lawyers might offer themselves to potential clients in neutral roles is also realised in contemporary moves by lawyers to act as mediators. The 'executive tribunal,' just considered, is one context where this is taking place. Once the 'neutral adviser' has acted as a consultant while the drama is being presented, he may then 'also adopt a facilitative or mediating role in any settlement discussions which follow' (Brown Report, p 16).

The idea of the lawyer as mediator is also central to the ADR pilot scheme proposed in the Beldam Report.[41] There it is suggested that litigants in a wide range of civil disputes coming before selected county courts should be encouraged by the court, either at the stage when the originating process is sent out or after the pleadings have been closed, to attempt a negotiated solution with the help of mediation. The form of intervention envisaged here is of a minimal facilitatory kind (see p 460 above). But in identifying 'mediation' as the appropriate form of ADR for a court linked scheme and drawing in a carefully circumscribed form of intervention, the Beldam Report concludes that in any pilot scheme this role would most appropriately be filled by lawyers. Despite noting the impressive achievements of non-legally qualified ACAS conciliators, the Committee offers the view that 'it may be preferable to choose the mediators from those with litigation experience who are barristers

39 A commercial QC speaking privately about his version of the 'modified settlement conference.'
40 In *Social Control in an African Society* (London: Routledge and Kegan Paul, 1962) pp 134–140.
41 Cited at n 27 above.

or solicitors and to arrange their supplementary training in mediation *so far as may be necessary*' (italics supplied) (p 11). The Report concludes: 'We would suggest that legal mediators should be chosen from lawyers with at least seven years' post qualification experience' (p 11).

There is an obvious tension here between the Committee's identification of a minimal form of facilitatory intervention as what is meant by 'mediation' and the immediately ensuing proposal that seasoned litigation specialists are likely to make good mediators. It is difficult to avoid the impression that, in their eagerness to embrace mediation as part of legal work, the Committee members have disregarded the considerable gulf which exists between the conduct of partisan advisory and representative roles and the delicate, complex task of orchestrating negotiations.

It is also unclear what these lawyer mediators are going to be doing. The Report does not address the question as to whether the mediatory intervention contemplated is to be focused upon reviving lawyer negotiations or upon re-establishing a dialogue between the parties themselves.[42] These two routes imply such widely different policy objectives, and the idea of interposing a mediator between negotiating lawyers is such a novel one that some clarification here is imperative. Under what general conditions might mediation be *necessary* between legal specialists engaged in negotiations? Are battle hardened trial lawyers the right sort of people to intervene in party negotiations? Again, it is hard to avoid the conclusion that lawyers are here rushing in to colonise an apparently promising area of work without pausing to consider what sort of role they could sensibly be performing.

While 'advisory' and 'mediatory' roles are analytically distinct, they appear in combination in some areas of contemporary practice. This is certainly the case in the field of family disputes where lawyers already claim to be acting in mediatory roles. Under the scheme operated by the Family Mediators Association (FMA), a solicitor may co-mediate with another professional 'with experience in marital or family work' in helping 'couples cope with the legal, financial and emotional problems of separation and divorce, as well as arrangements for children.'[43] This includes assisting parties 'to work out proposals for settlement' and reach joint decisions in the context of family breakdown.

While the FMA has given the label of 'mediation' to this innovatory form of lawyer intervention, it does not appear to be by any means limited to facilitating the communication between parties necessary to joint decision-making. Rather, at the core it is a matter of providing expert advice — to the parties jointly — upon the arrangements regarding children, finance and property necessitated by family breakdown; and providing the parties with the framework within which to put these arrangements in place. Although the Association has shown considerable reticence about the exact nature of the service offered, it thus appears that this is a form of divorce consultancy under which spouses seeking consensual disengagement are helped to put together a comprehensive package covering children, income and capital property. This form of intervention raises in an acute way fundamental questions as to the conditions under which advisory, mediatory and therapeutic interventions can be safely combined.

In aspiring to act as mediators, lawyers are already competing with a number of other professional groups — accountants, family therapists, social workers,

42 Nothing is said in the Report directly on this point beyond the cryptic aside: 'Legal representation in the mediation process should be available at the wish of a party' (p 10).

43 Publicity brochure, *Your Questions Answered*, Family Mediators Association.

surveyors — each intent on laying claim to this ancient lay method of dispute resolution. But so far, the Law Society and the Bar have hesitated to claim mediation as an existing part of legal practice. So although the Family Mediators Association is very much a creature of the Law Society and enjoys that body's enthusiastic support, it is clear that mediation is not yet seen formally as part of a solicitor's work. The Law Society's Guide to the Professional Conduct of Solicitors specifies that where a solicitor acts as a mediator 'this is a separate professional activity and not part of his legal practice.' Nonetheless, the tone of the Beldam Report, with its easy assumption that this is something that seasoned litigation specialists can take on, with perhaps a dash of training, is certainly proprietorial. Individual practitioners have not been so cautious. In a recent article in *Family Law*, a solicitor argues for the promotion of 'mediation by solicitors as a system which can reduce costs and animosity while maintaining client confidence,' claiming that mediation 'is an area of legal practice' which is 'being hijacked by other disciplines.'[44]

The presentation of mediation *as part of legal practice*, as opposed to something which lawyers might do on the side, has profound implications which lawyers should perhaps think carefully about. As with the forms of joint consultancy considered earlier, this aspiration to occupy a neutral role appears at odds with the image which the lay public has of lawyers, and with the image of the trusty partisan which lawyers themselves have chosen to cultivate. How far can these different personae be concurrently sustained? The blurring of these images could be much more costly, to the public and the profession, than any damage that might be caused to lawyers by ADR acquiring a life at a distance from the legal profession.

IV The Accommodation of ADR in Civil Justice

By incorporating ADR as part of the judicial repertoire of dispute management and approving the claim of lawyers to re-present themselves as mediators, the Beldam Report brings together what have been presented here as two separate strands of alternative intervention. The Committee makes no secret of what is happening. The language of co-option is absolutely explicit in the conclusion that the case is made out 'for the courts themselves to embrace the system of alternative dispute resolution' (p 1). In proposing that the courts should oversee and regulate the process of negotiation conducted by parties and their legal representatives in the period leading up to trial, the Committee seeks to extend judicial control over an area of activity hitherto in the 'private' domain.

The novel threshold procedures presently growing up in the County Courts, and this more extensive scheme envisaged by the Beldam Committee, thus inevitably recall the powerful concerns of the early critics of informal justice. But while we may feel extremely uneasy about any move towards judicial surveillance of settlement attempts in the pre-trial period, there are a number of different directions which oversight and regulation might take. Not all of these are equally vulnerable to the criticisms which have been advanced. So far, the use made of initial appointments by district judges in the county courts has been extremely varied; and out of these experiments a number of patterns seem to be emerging which are suggestive of possible models for a general scheme. Three broad possibilities can be outlined: a reference away for further bilateral negotiation; a reference to some form of out of court 'mediation'; and direct attempts by court personnel to promote settlement.

44 P. Raby, 'Mediation v Solicitors? The Reason for Concern' (1993) 23 Fam Law 10.

Model I

A pre-trial appointment, at which court personnel make a preliminary review of the case, draw the attention of parties to the financial and other costs of proceeding with the trial and recommend that the parties make further attempts to achieve a negotiated outcome before presenting themselves for trial.

Such an early stage appointment, at some point between the originating process being sent out and the pleadings being closed, might involve no more than a proposal of further attempts to settle, implying deflection from trial for as long as such attempts continue. The style of intervention at this point could be more or less homiletic in nature. The judge might go as far as to advise the parties of their options as he sees them; even forecast the probable result of adjudication. Such a reference away could be advisory, a suggestion without pressure to comply; or mandatory, requiring further attempts to settle as a preliminary to adjudication. Compliance could be indirectly mandated through manipulation on the part of the judge of the date in the future at which trial would commence.

The potential for coercion and manipulation presented to the court even where the tone of such an appointment remains muted should not be underestimated. Even the 'suggestion' of further negotiation on the part of a judge must weigh heavily with many parties. Such an occasion vigorously handled would impose enormous pressure on the parties to settle. A regime of this kind coerces the parties towards settlement, delays their access to judgment; but the spheres of 'settlement' and 'adjudication' remain distinct.

Model II

A similar pre-trial appointment involving reference away for further negotiations, this time 'mediated' by some third intervening party.

Such a reference could again be advisory, or made mandatory. Its implications would depend upon the nature of the third party to whom reference is made for mediation and the style of intervention practised. Currently, at preliminary appointments in family disputes coming before the county courts, the reference for 'mediation' is sometimes to a Divorce Court Welfare Officer, sometimes to some out of court agency offering family mediation. The most cursory survey also suggests that the forms of intervention involved vary from minimal attempts to provide communications between the parties in order to facilitate their negotiations, to active, directive interventions of an extremely intrusive kind.

On the whole, references away to out of court agencies, such as those affiliated to the National Association of Family Mediation and Conciliation Services, are to a form of intervention limited to facilitating negotiations between the parties; although anecdotal evidence suggests that some parties referred to out of court agencies by the courts experience the reference as an 'order' to participate in mediated negotiations. Intervention by Divorce Court Welfare Officers, often working on or immediately adjacent to court premises, are in their nature more problematic as the 'boundary' between DCWOs and court personnel may be much less clear to the parties. It is also clear that some DCWOs use techniques drawn from family therapy in providing 'conciliation,' leading to a combination of advisory and therapeutic help with assistance in joint decision-making. Where parties are referred for welfare reports or conciliation from the Wandsworth County Court, they are required to participate in a 'joint family meeting.' This is a therapeutic encounter

which follows the medical model of the Milan school of systemic family therapy, an approach devised for dealing with patients with severe mental disorders. It involves the use of machinery (video cameras and one-way screens) and methods which include hidden surveillance and manipulative questioning techniques. The central point here is that, in being referred by the court for welfare reports or conciliation, parties are exposed unknowingly and involuntarily to therapy, realising one ultimate nightmare which critics of 'informal justice' warn against.

The proposals of the Beldam Committee fall broadly within this model. While the idea of a minimal, facilitatory form of intervention suggests uncoercive help with joint decision-making, the proposal that mediation should take place on or close to court premises, and the suggestion that lawyers might be the most appropriate mediators, seems to convey a contradictory message. I have argued elsewhere that seasoned litigation specialists accustomed to occupying partisan advisory and representative roles are likely to experience difficulty in adapting to the low-key posture of impartial facilitator of other peoples' decision-making.

Model III

> A procedure under which mediation is built directly into the litigation process, and which involves attempts by court personnel to mediate in negotiations on court premises before the dispute moves on to trial.

How we view direct judicial involvement in settlement attempts must depend in part upon the nature of the audience toward whom these efforts are directed. A central ambiguity of the Beldam proposals lies in the fact that it is unclear whether the Committee envisage their lawyer-mediators intervening directly between the parties, or between their legal representatives. While there must be a question mark over the circumstances under which it is appropriate to interpose a mediator between negotiating lawyers (see p 466 above), the most serious worries about the possibility of coercion and manipulation fall away if the intervention is directed towards professional representatives, rather than the parties themselves. For the court to make sure that legal representatives have fully explored the possibility of settlement, attempting to push back the date of an agreement which would in statistical terms have materialised anyway at the door of the court, is quite a different matter to forcing on the parties themselves late-stage negotiations, at a moment when the parties anticipate that they are about to move to trial and judgment.

If there is to be a general move away from the traditional use of preliminary appointments as a means of making sure parties or their representatives have done everything they need to do in order for the trial to go ahead smoothly, this needs to be set up in such a way as to leave the distance between settlement and adjudication intact. This distinction is blurred once court personnel make direct efforts to orchestrate settlement by acting as mediators at some stage prior to judgment. Even where these efforts are self-consciously limited to facilitating communication between the parties, rather than helping to fashion the shape of the settlement, any distinction between the self-constructed, negotiated outcome and an imposed decision is problematic. The efforts which Judges Gerlis and Rose describe as they 'strive to encourage settlement' are clearly the honest attempts of enthusiasts who passionately believe what they are doing is in the best interests of litigants; but they cannot in their nature provide the backdrop to uncoerced decision-making. The authority of the court, historically deployed in the delivery of 'judgment' becomes linked to

'settlement,' so eroding the line between negotiated outcome and imposed decision which it has hitherto been in the hands of the parties to cross.

V Conclusion

Alternative dispute resolution presently has more than one 'life' in the sense that this label has become attached to areas of evolving practice in three significantly different locations. One of these lives, around the provision of support for party negotiations, is at a distance from civil justice; another, involving innovative forms of legal practice, is adjacent to it; a third, constituted of novel procedures on the threshold of the court, is part of civil justice itself. All three lives are linked rhetorically in laying claim to the shared objective of 'settlement' and a common mode of intervention in 'mediation.' They are also connected by struggles for professional identity and control which spill across their boundaries. While at present it appears that some vigorously independent groups of professional mediators will establish themselves, concurrent attempts are being made to absorb 'mediation' as part of the practice of accountants, lawyers, social workers, family therapists and the like.

This paper reasserts the importance of two naive distinctions: between party control over dispute processes and the sphere of professional management; and between negotiated outcomes and imposed decisions. While some strands in the ADR movement sustain these distinctions, others break them down; and ADR's polymorphous quality disguises the fact that this is taking place.