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Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*

Jean R. Sternlight**

I. INTRODUCTION

Professor Frank Sander has, for many years, been one of the most prescient commentators on the alternative dispute resolution (“ADR”)¹ movement. His 1976 Pound Conference speech² has been identified by many as marking the birth of the modern ADR phenomena.³ That speech, which compared some of the pros and cons of litigation and an array of other dispute resolution processes, has been summarized as proposing the concept of the “multi-door courthouse.”⁴

In contrast, Professor Sander’s more recent and very interesting review of the present and future of ADR makes little attempt to distinguish between mediation and binding arbitration, the two major forms of ADR.⁵ Instead, while it is clear Professor Sander knows the difference, he chooses to group the two techniques together as sub-species of ADR as he assesses whether ADR in general has made “amazing

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1. Some have suggested that the abbreviation “ADR” ought to be used to signify *appropriate* dispute resolution rather than *alternative* dispute resolution, to emphasize that litigation should not be treated as the only normal or standard dispute resolution process. See *infra* text accompanying notes 51-52.

2. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 114-18 (1976).

3. See, e.g., Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309 (1996).

4. *Id.* at 324. See Sander, *supra* note 2, at 113 (“What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?”). Professor Sander’s idea has come to be known as the “Multi-door Courthouse,” although this term does not actually appear in his article. See, e.g., Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 n.17 (1986). For text of other speeches given at the Pound Conference see THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

5. I call mediation and binding arbitration the two major forms of ADR in the sense that these are the two dispute resolution processes (other than litigation and negotiation) that are used most frequently, at least in the United States. These are also the processes which, other than negotiation, receive the most attention in ADR texts. See *infra* notes 10-11 for a list of the major texts in the field. Other so-called ADR techniques include early neutral evaluation, summary jury trial, mini-trial and non-binding arbitration.

progress” or is still a mere “grain of sand on the adversary system beach.”⁶ Many ADR advocates and critics have taken a similar broad-brush approach.⁷ Legislators⁸ and business groups⁹ often find it useful to group numerous processes together, and call them ADR. Even those commentators who have been particularly careful to distinguish between the processes, and who emphasize that all non-litigious methods should not simply be lumped “into one ADR blob,”¹⁰ have chosen to identify binding arbitration as a form of ADR, and to discuss it extensively in a text on ADR.¹¹ Yet, this ADR teacher and commentator has grown increasingly uncomfortable with categorizing binding arbitration as a form of ADR.

6. Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 3 (2000). Although Professor Sander often uses the term “ADR,” most of his remarks seem geared to mediation, and few if any focus explicitly on the issues surrounding binding arbitration. Of course it is quite understandable that Professor Sander would group a number of techniques together in giving the broad overview he was asked to present at the University of Missouri-Columbia School of Law.

7. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (jointly critiquing arbitration, mediation and other forms of ADR on the ground that they are more likely than litigation to subject minority group members to prejudice); Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3 (expressing concerns about attorney ethics in “ADR,” while focusing primarily on mediation) [hereinafter Menkel-Meadow, *Ethics in ADR Representation*]; Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) (recognizing that differences exist between mediation, arbitration and other forms of ADR, but nevertheless failing to rely on such distinctions in discussing concern that adjudication option may be at risk); Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW, Feb. 1994, at 53 (critiquing ADR in general by focusing predominately on binding arbitration); Stempel, *supra* note 3, at 340-41 (recognizing distinctions between various forms of ADR, but nonetheless writing about ADR in general in evaluating benefits and burdens of integrating ADR into court processes); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247 (1996) (defining ADR broadly to mean resolution of disputes through means other than courts, and outlining concerns with privatization); cf. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 44 (1991) (expressing concerns that ADR, in general, will be co-opted by litigation, but also calling for drawing greater distinctions between various ADR processes) [hereinafter Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*].

8. Statutes such as the federal Alternative Dispute Resolution Act of 1998 allow judges to choose among an array of “ADR” techniques including mediation, non-binding arbitration, and early neutral evaluation. 28 U.S.C. § 651 note (Supp. IV 1998) (Findings & Declaration of Policy) (defining ADR processes to include early neutral evaluation, mediation, mini-trial, and arbitration, and mandating each U.S. district court judge to authorize and encourage the use of ADR).

9. The Center for Public Resources asks companies to pledge to use “ADR,” by which it means mediation, arbitration, or various other techniques. The pledge appears on the CPR web site: CPR Institute for Dispute Resolution, *Corporate Pledge* (visited May 9, 2000) <<http://www.cpradr.org/corppol.htm>>.

10. See, e.g., LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION FOR LAWYERS* 7 (2d ed. 1997) (discussing rampant confusion about ADR terminology and observing that “[e]ven people who have a passing acquaintance with alternatives tend to confuse them in speech and writing”).

11. See EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE* 323-546 (1997) (discussing binding arbitration); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 233-70 (3d ed. 1999) (separately discussing arbitration); JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 440-54, 500-756 (2d ed. 1996) (discussing binding as well as non-binding arbitration); RISKIN & WESTBROOK, *supra* note 10, at 502-88, 593-610 (focusing explicitly on private and court-ordered arbitration); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, *ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS* 513-801 (1996) (discussing arbitration, law of arbitration, and arbitration applications).

As a purely semantic matter, the question of how to categorize binding arbitration or other processes has little interest for this author and likely for others. One can easily define ADR in such a way as to either include or exclude binding arbitration. If one defines ADR as anything other than litigation, surely binding arbitration qualifies.¹²

Alternatively, if one defines ADR to emphasize its informality, its focus on interpersonal relationships, its low cost or speed, or its ability to foster personal growth and awareness,¹³ binding arbitration does not necessarily fit the bill. While arbitration tends to be somewhat less formal than litigation, in that the rules of procedure and evidence are relaxed, increasingly it looks quite a bit like litigation,¹⁴ and may cost as much too.¹⁵ If one were to take a member of the public and plop them down in an arbitration proceeding, this person likely would not realize she was not in court, except that the venue would probably be a conference room, and the arbitrator would not be wearing robes. In the international business arena, it does not make sense to call binding arbitration the "alternative," as arbitration agreements are the norm.¹⁶

12. Indeed, one occasionally sees a t-shirt representing duelers and labeled "alternative dispute resolution." This is meant to be a joke, but perhaps is not. See Douglas H. Yarn, *Attorneys as Seconds: ADR Lessons from the Code Duello 7* (1999) (unpublished draft) (on file with author) (arguing that "[t]he underlying objectives of dueling were to avoid the courts, contain violence, and promote reconciliation," and describing the second's important role in promoting reconciliation).

13. One author reserves "the term 'ADR' for procedures for resolving disputes in litigation that, compared to the traditional litigation processes of adversarial negotiation, settlement, and trial, enhance parties' control over litigation outcomes or processes." Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1594 (1995). Another defines ADR as "techniques or processes for administering and attempting to conclude controversies that differ in some significant fashion from classical litigatory adjudication." Stempel, *supra* note 3, at 300 n.3.

14. Arbitrators may not be judges, but they hear testimony, make evidentiary rulings, issue subpoenas, and grant or deny motions. Some also allow discovery. See generally EDNA ASPER ELKOURI & FRANK ELKOURI, *HOW ARBITRATION WORKS* (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (summarizing law of labor arbitration); IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* (1994) (describing law of commercial arbitration in four volumes).

15. Arbitration is not necessarily quicker or cheaper than litigation, though historically this was often true. See, e.g., GOLDBERG ET AL., *supra* note 11, at 234-35 (observing that theoretical advantages of arbitration are not always fully realized); see also Richard S. Bayer & Harlan S. Abrahams, *The Trouble with Arbitration*, LITIG., Winter 1985, at 30; James Lyons, *Arbitration: The Slower, More Expensive Alternative?* AM. LAW., Jan.-Feb. 1985, at 107 (quoting then American Arbitration Association President Robert Coulson as stating "[p]eople used to promote arbitration [for its speed, economy, and justice] . . . like religious zealots . . . I don't think any of those words are entirely accurate"); Reuben, *supra* note 7, at 54-55 (using anecdotal information to question whether arbitration is really cheaper than litigation); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 452-76 (1988) (observing that many survey respondents disagreed that arbitration was faster and cheaper than litigation). A more accurate statement is that the cost and speed of arbitration, like all dispute resolution processes, varies substantially depending on the context.

16. Litigation is generally used internationally only where, because parties lacked the opportunity to contract in advance, there is no arbitration provision when the dispute arises. This is so because it is far easier to enforce an arbitral judgment in the international context than it is to enforce a court award. Whereas a major treaty (the New York Convention) requires signatories to honor arbitral awards issued in other countries, no comparable major treaty requires most countries to respect each others' judicial decrees. See generally GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 938-42, 1040-42 (3d ed. 1996) (contrasting enforceability of foreign court judgments to enforceability of foreign arbitral awards in the United States). For a sociological take on international arbitration, see

While the semantic question may be uninteresting, I suggest that it is useful to ask the normative question of how we *should* categorize binding arbitration.¹⁷ Again, there may be no clear “right” answer. Nevertheless, addressing the question of the appropriate categorization of binding arbitration provides a good means for rethinking the nature of binding arbitration, what we mean by ADR, and how the variety of dispute resolution techniques typically grouped together as ADR relate to litigation. Artificially grouping these disparate processes together under the “ADR” umbrella is beginning to prove problematic. While we may continue to use the phrase in some contexts, at minimum we should think more carefully about its implications.

II. THE HISTORICAL BENEFITS OF CALLING BINDING ARBITRATION ADR

When the recent ADR movement¹⁸ was in its infancy, it made a great deal of sense to group together such non-litigation processes as binding arbitration, mediation, and early neutral evaluation and to emphasize their joint differences from litigation. This distinction helped us to see the limits of the purely adversarial, litigation-oriented, public model of dispute resolution. Various people have advocated non-litigation dispute resolution methods for a host of reasons.¹⁹ Whatever the rationale, forming an alliance between the alternatives to public court adjudication made political sense. There is power in affiliation and power in numbers.

The alliance helped foster the amazing growth of ADR over the past twenty years. As Professor Sander and others have discussed, adherents of mediation and arbitration have secured federal and state legislation favoring ADR,²⁰ have formed

Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 L. & SOC. INQUIRY 285, 295 (1996) (“International commercial arbitration . . . has evolved into a relatively adversarial, formalized and legalized variety of offshore litigation.”).

17. Dezalay & Garth, *supra* note 16, at 288 (discussing “how the scientists of dispute resolution contribute to the production of representations that are very much part of the transformation of the practice and social role of dispute resolution”).

18. I use the phrase “recent ADR movement” to acknowledge the fact that mediation, arbitration, conciliation and other non-litigation dispute resolution processes have been employed in many societies for many centuries.

19. Some have emphasized supposed efficiency gains, specifically lower costs and time savings. Sander, *supra* note 6, at 4. Others have urged that ADR, even if not quicker or cheaper, is better, for example because it is claimed to provide disputants with more control or privacy or even to further their human potential. *Id.* at 6. See also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (urging that mediation be employed to achieve human transformation, rather than to achieve efficiency gains or even to resolve disputes).

20. See, e.g., Negotiated Rulemaking Procedure Act, 5 U.S.C. §§ 561-570(a) (1994 & Supp. IV 1998); Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-583 (1994 & Supp. IV 1998); Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (Supp. IV 1998). See generally GOLDBERG ET AL., *supra* note 11, at 9-11 (discussing great growth of ADR in various venues).

organizations advocating both techniques,²¹ have convinced most law schools in the country to at least teach an ADR survey course,²² have produced multiple case books,²³ and have even established their own ABA section.²⁴ Categorizing binding arbitration as ADR has arguably helped boost the popularity of mediation, because the linkage helps show ADR has been used extensively throughout history.²⁵ The grouping has also arguably increased the popularity of binding arbitration, allowing its proponents to draw on some of the vaunted advantages of mediation²⁶ in defending the more frequently criticized binding arbitration.²⁷ It is frequently

21. Such organizations include the Society for Professionals in Dispute Resolution ("SPIDR"), the American Arbitration Association ("AAA"), and the Center for Public Resources ("CPR"). Each organization promotes both mediation and arbitration. Each has a web site. See Society of Professionals in Dispute Resolution, *An international membership association committed to the advancement of the highest standards of ethics and practice for dispute resolvers* (visited May 9, 2000) <<http://www.spidr.org>>; American Arbitration Association, *Dispute Resolution Services Worldwide* (visited May 9, 2000) <<http://www.adr.org>>; CPR Institute for Public Resources, *CPR Institute for Public Resources* (last modified May 5, 2000) <<http://www.cpradr.org>>.

22. See Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583, 585-86 (1998) (stating that, as of 1997, almost all law schools offered dispute resolution courses, and most offered multiple courses).

23. See *supra* notes 10-11.

24. The Section was founded in 1993. However, it was preceded by the Special Committee on Resolution of Minor Disputes, founded in 1976, and then by a Standing Committee on Alternative Dispute Resolution. Further information is available regarding the Section at its web site. American Bar Association, *American Bar Association Section of Dispute Resolution* (visited May 9, 2000) <<http://www.abanet.org/dispute/home.html>>.

25. In the 1970s, binding arbitration was well established as a dispute resolution technique and mediation was comparatively unknown in this country. The alliance helped support the claim that ADR (often binding arbitration) has roots tracing back to ancient Greece or Rome. See, e.g., TRACHTE-HUBER & HUBER, *supra* note 11, at 29 (suggesting that ADR is "not a new or even recent development," and citing decision of King Solomon, Federal Arbitration Act of 1925, and use of arbitration (and mediation) to resolve trade and labor disputes). The alliance also allowed ADR advocates to boast of a current large non-litigation presence in dispute resolution. Many companies were including binding arbitration provisions in their contracts, long before the ADR boom of the 1970s. See, e.g., RISKIN & WESTBROOK, *supra* note 10, at v ("Numerous courts, government agencies, and private organizations now require--and many more push--the use of alternative processes, such as mediation and arbitration. Voluntary use of such methods also has become more common."). See generally JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 101-14 (1983) (discussing extensive use of commercial arbitration in 1920s and later).

26. Mediation has gained a great deal of popularity for its purported informality, low cost, furtherance of self-fulfillment, and enhancement of interparty relationships. See, e.g., John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOTIATION L. REV. 201, 235-61 (forthcoming Spring 2000) (summarizing studies discussing business executives' high satisfaction with mediation); David B. Lipsky, & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMPLOYMENT L. 133, 138 (1998) (summarizing survey of Fortune 1000 companies showing that more than 80% believe mediation saves money and time); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) ("Mediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants.").

27. Binding arbitration has been attacked for its potential to undermine substantive rights of consumers, employees and others. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1997) (critiquing the Supreme Court's interpretation of arbitration law for allowing "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997) (stating "[t]he Supreme Court has created a monster"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996)

asserted, albeit without adequate documentation, that arbitration is necessarily quicker, cheaper, and less formal than litigation,²⁸ though this is not always the case.²⁹

III. WHY IT MAY NO LONGER BE DESIRABLE TO CATEGORIZE BINDING ARBITRATION AS ADR

Given our progress to date, it is no longer necessarily desirable to categorize binding arbitration as ADR. Instead, by recognizing that it often now makes little sense to continue this confusing grouping, we can begin to focus on the unique characteristics of each dispute resolution process, and we can also begin to break down the artificial wall between litigation and all other forms of dispute resolution. In presenting this argument my main goal is not to convince readers that binding arbitration is not ADR but rather to raise questions about the value of identifying some techniques but not others as ADR.

A. *Categorizing Binding Arbitration as ADR Mixes Highly Disparate Processes*

ADR conferences often highlight the visceral disconnect between arbitration and mediation. One ABA Dispute Resolution Section conference on international ADR was even rather comical in this regard. The conference brought together many countries' high-powered international arbitrators, community mediators primarily from the U.S., and persons attempting to use mediation approaches to facilitate political change throughout the world.³⁰ Although these diverse groups were provided with separate conference time slots, they mingled over cocktails and meals. Pin stripes meet birkenstocks. Everyone was very polite, but it was an odd event. While perhaps extreme, the event was not atypical. Most "ADR" conferences reflect a similar discomfort, if not tension, between the two major forms of ADR.³¹

("Large companies such as banks, hospitals, brokerage houses and even pest exterminators are increasingly including mandatory binding arbitration clauses in the fine print contracts they require all customers, employees, franchisees and other little guys to sign."). Of course, the close association may also cause mediation to be tarred by the brush that has been used on arbitration. *See infra* text accompanying notes 40-45.

28. *See, e.g.,* GOLDBERG ET AL., *supra* note 11, at 234 (noting theoretical advantages of arbitration); Warren E. Burger, *Using Arbitration to Achieve Justice*, *ARB. J.*, Dec. 1985, at 3, 6 ("[I]n terms of cost, time and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases."); Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 *BUS. LAW.* 1081, 1091 (1988) (arguing that arbitration is potentially faster, cheaper, and more private for all parties).

29. *See supra* note 15.

30. ABA SECTION OF DISPUTE RESOLUTION, *RESOLVING DISPUTES IN THE GLOBAL MARKETPLACE* (Apr. 2-4, 1998) (program on file with author).

31. The Society of Professionals in Dispute Resolution ("SPIDR") counts both arbitrators and mediators among its members, and indeed traces its lineage in large part to labor arbitration. Yet, the vast majority of sessions offered at the annual SPIDR conference discuss mediation. By this author's count, the 1999 annual SPIDR conference included approximately 84 sessions on conflict resolution or negotiation, 56 sessions on mediation, and at most 6 sessions on arbitration. SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, *BEFORE THE MILLENNIUM: LEARNING FROM THE PAST AND LOOKING TO THE*

ADR survey courses echo this experience. Law professors who teach such courses frequently bemoan how difficult it is to move from teaching about negotiation and mediation to discuss binding arbitration. They complain that the arbitration material is less interesting and less fun to present, more traditional and doctrinal, and that the transition between the two parts of the course is awkward.³² For a few students the change is welcome, but it is nonetheless abrupt.³³

Another indicator of the disparate nature of arbitration and mediation is the extent to which practitioners and commentators in the two fields tend to specialize in one area or the other. Relatively few people attempt to be both mediators and arbitrators, and of them, only a portion succeed in obtaining substantial business in both fields. In academia, although many professors who teach about ADR offer a survey course covering both mechanisms, very few write about both arbitration and mediation.³⁴

B. Categorizing Binding Arbitration as ADR May Cause Confusion

Students and others often become understandably confused by the identification of binding arbitration as a form of ADR. They learn that ADR in general is supposed to involve more control by the parties, more informality, more speed, more efficiency, and in some cases more self-fulfillment. But, they then see that binding arbitration today is increasingly controlled by attorneys who treat it like litigation, conducting discovery and filing motions with the arbitrators, and indeed filing motions to compel arbitration or for enforcement in court. Where is the

FUTURE (Sept. 23-25, 1999) (program on file with author). Those few arbitration sessions that are offered are typically poorly attended. For a brief recounting of the history of SPIDR, see its web site. Society of Professionals in Dispute Resolution, *What is SPIDR?* (visited May 9, 2000) <<http://www.spidr.org/abt.htm>>.

32. I, too, experience a sharp change as I move into the arbitration material, although I actually enjoy this portion of the ADR course. After all, teaching about arbitration allows me the opportunity to talk about my own articles, an inherently fascinating endeavor.

33. ADR survey courses attract a diverse mix of students. Some are drawn to ADR because they are uncomfortable with adversarial approaches and litigation. Such students tend to enjoy the negotiation and mediation portions of the material and recoil a bit from arbitration. Others take the course because they believe it would be useful for litigation or because it meets at a convenient time. Some of these students prefer the traditional arbitration material, focusing on cases and doctrine, to what they perceive as more "touchy feely" content.

34. The professors who write about arbitration often also teach and write about contract law or civil procedure. Some also teach international law or labor law. Examples of such arbitration professors include Ian Macneil, respected for his writing on relational contracts and for his arbitration history and treatise; William Park, a well known arbitrator in the international arbitration area, who also teaches international banking and transactions; Alan Rau, co-author of texts on both contracts and alternative dispute resolution; Paul Carrington, who writes widely in the civil procedure area and has also written an important arbitration article; and Katherine Van Wezel Stone, who specializes in labor law, and also writes about arbitration. On the other hand, those law professors who focus on mediation tend to write exclusively in that area, on negotiation, or on professional responsibility. Some well known examples include Leonard Riskin, who writes about mediation and also teaches courses about understanding conflict; Robert Baruch Bush, who writes about mediation and also helps run a mediation clinic; and Carrie Menkel Meadow, who writes and teaches about mediation, negotiation, and professional responsibility. Very few professors, such as Tom Stipanowich, are expert in both areas.

empowerment? In what sense is binding arbitration really an alternative to litigation?³⁵

Further, while practitioners and professors of ADR tend to see mediation and arbitration as quite distinct, the public, non-specialist attorneys and even some commentators³⁶ and professors³⁷ tend to group the techniques together, and in fact often confuse them. On a more frivolous note, the Michael Douglas movie, "Disclosure," contains a scene, infamous among ADR practitioners and professors, which is called a "mediation" and yet involves a judge-like person telling the disputants how he will go about "deciding" their case.³⁸ Those few newspaper articles that even discuss ADR frequently talk about mediators' "findings" or "rulings," demonstrating a fundamental failure of understanding.³⁹

The confusion between mediation, binding arbitration, and other dispute resolution processes can affect discussion and implementation of public policy. For example, Professor Gerencser reports that one Florida jurisdiction calls juvenile mediation a "hearing" or even an "arbitration."⁴⁰ A Montana statute speaks to "nonbinding mediation,"⁴¹ suggesting that mediation might also be binding. As well, mediation advocates have been greatly peeved by the Rand study, which has been characterized as concluding that "ADR" is not necessarily cheaper or quicker than litigation.⁴² Despite commentators' efforts to criticize the study's blurring of

35. Of course, mediation does not necessarily result in empowerment either. Moreover, it should also be noted that binding arbitration may on occasion lead to self-fulfillment including empowerment or recognition.

36. Law and economics scholar Steven Shavell purports to do an economic analysis of ADR in general, without drawing a clear distinction between binding arbitration and mediation. Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 1 (1995) (claiming to discuss mediation as well as arbitration, and yet stating that all ADR processes "share the feature that a third party is involved who offers an opinion or communicates information about the dispute to the disputants"). Cf. Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 323 n.1 (1994) (critiquing Shavell for failing to focus separately on mediation, and proceeding to offer an economic rationale for mediation in particular).

37. Survey a random group of law professors, and many will not be quite sure as to the difference between the processes. Professors at an institution such as the University of Missouri-Columbia School of Law, which specializes in ADR, would be more educated on this issue. At other schools, where ADR is not a core part of the curriculum, it has been my experience that while the professors likely would not admit to confusion over the differences between the two techniques, they might well lack such an understanding. By contrast law students, who are increasingly taught something about ADR in their first year, more often have some comprehension of the critical distinctions.

38. DISCLOSURE (Warner Brothers 1994). See also Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed Into Mediation: Standards of Conduct Must be Changed*, 50 FLA. L. REV. 843, 846-47 (1998) (discussing Seinfeld episode which mislabeled arbitration by Newman over ownership of bicycle as mediation).

39. Several such articles are cited in Gerencser, *supra* note 38, at 847-48.

40. *Id.* at 850 n.41.

41. MONT. CODE ANN. §§ 39-71-2406 to -2408 (1999) (requiring mediators in the workers' compensation context to issue reports recommending a solution to all disputants). See also MONT. CODE ANN. § 27-6-606 (1999) (calling for "nonbinding mediation" of certain medical claims).

42. The actual study is more specific. See JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 4 (1996) (concluding court-attached mediation and early neutral evaluation programs could not be demonstrated to result in significant cost savings, nor to reduce time to disposition).

techniques,⁴³ and to argue in particular that mediation has benefits beyond saving time and money, it seems a foregone conclusion that many lawmakers will lack time to draw fine distinctions between specific forms of ADR. Confusion among the processes may also prove problematic for those who favor binding arbitration⁴⁴ and for those who seek to criticize one or more of the processes.⁴⁵

C. Grouping Binding Arbitration and Mediation Together as ADR Has Likely Caused a Blurring of Techniques

Many mediation advocates praise the facilitative version of mediation, in which mediators try to help parties reach a mutually acceptable solution without themselves evaluating the merits of the disputants' positions or offering a solution.⁴⁶ This form of mediation is quite different from binding arbitration. However, those who see mediation and arbitration as similar, two members of the ADR family, will more

43. See Elizabeth Plapinger, *RAND Study of Civil Justice Reform Act Sparks Debate*, NAT'L L.J., Mar. 24, 1997, at B18 (observing that mediation and ENE programs studied by RAND varied substantially in kind and in quality, that study underscored that ADR programs are not monolithic, and that success of programs will depend in large part on lawyer attitudes); see also Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 1-4 (1998) (summarizing criticisms and defenses of RAND Report).

44. Companies that agree to arbitrate their disputes may not want mediation, if they perceive it to be an open-ended "touchy feely" dispute resolution technique. Rather, some companies prefer arbitration. They do not seek to evade legal principles, but rather expect for private arbitrators to apply the "rule of law" more quickly, more predictably, more privately, and at lower cost than might a judge. Confusion between arbitration and mediation may lead some counsel to reject arbitration altogether, particularly if they have had a "bad experience" with mediation.

45. Blurring of the processes has allowed corporate defenders of mandatory arbitration to boast of ADR's low cost, informality, and fostering of interpersonal relationships, and these arguments have proved persuasive to many judges and courts, despite the lack of empirical support. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (suggesting that disputants may well choose arbitration over litigation because it is more expeditious and informal than litigation); *Stout v. J.D. Byrider*, 50 F. Supp. 2d 733, 737 (N.D. Ohio 1999) ("Private arbitration offers potential real benefits to both parties in cost effective and quick resolution of disputes that may arise."). The grouping may also prove problematic for those who seek to criticize mediation on the ground that it is inefficient, because it may not result in a final resolution, or on the ground that it is overly informal and non-legal, and thus unfair to women and minorities. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991) (arguing that mediation is neither more just nor more humane than adjudication, and that it can be destructive to many women and some men). See also Delgado et al., *supra* note 7, at 1359 (arguing that informal dispute resolution processes may injure the poor and disempowered, and further racial and ethnic prejudice). Professor Delgado and his co-authors do not argue that mediation is worse for minority group members than is binding arbitration, and in fact draw no distinctions between the two techniques. However, to the extent that Delgado and his co-authors are correct that informality permits prejudice to operate, mediation would seem more subject to criticism, in that it is less formal and less law-based than is arbitration.

46. See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) (laying out distinctions between evaluative and facilitative mediation); Symposium, 24 FLA. ST. U. L. REV. 839, 839-1010 (1997) (containing articles by James J. Alfini, Lela P. Love, Jeffrey W. Stempel, and Joseph B. Stulberg addressing the relative virtues of facilitative and evaluative mediation).

likely tend to accept or even favor evaluative mediation.⁴⁷ This is problematic for persons who believe evaluative mediation is improper.⁴⁸ Similarly, those who believe arbitrators should act like judges, and apply law, may be distressed by a grouping with mediation, that may lead arbitrators to be more informal or to “split the baby.”

*D. Grouping Various Techniques Together as ADR
May Cause Each to be Given Short Shrift*

From a very practical standpoint, grouping a variety of dispute resolution methods together as ADR may at this point be counterproductive to fostering knowledge of each of those techniques. For example, a school that offers a survey course in ADR may not feel it has the resources to also offer separate courses in both mediation and arbitration, much less separate courses in negotiation, interviewing and counseling, or advanced mediation skills. Yet, the single course or casebook can not possibly do justice to these diverse techniques. This is not surprising. It makes no more sense to group all these techniques together than it would to group together contracts, torts, property, UCC, etc. in a single three credit course called “private law.” While this can be done (and perhaps is in some countries) the decision to group diverse subjects inevitably results in less attention being paid to individual components of the group.

IV. REVISITING THE CONCEPT OF ADR

*A. Categorizing Binding Arbitration as ADR Fuels the Misperception
that ADR is Totally Distinct from Litigation*

By grouping binding arbitration, mediation and other techniques together, and calling them ADR, we emphasize that they are the “other,” and distinct from litigation. For many this tautological “otherness” is the attraction of ADR. Such advocates hope that ADR will tame the adversarial beast and worry that various forms of ADR are becoming too much like litigation. They urge lawyers and law professors to refrain from engaging in or teaching adversarial behavior,⁴⁹ and call for more separation and segregation between ADR in general and the litigation world of dispute resolution.

However, as detailed below, attempting to draw a sharp division between binding arbitration or other forms of ADR and litigation will not work, and is also

47. They are also more likely to accept a last minute conversion of a mediated agreement into an arbitration award, which some have proposed as a means to expedite enforceability of mediated agreements.

48. See, e.g., Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996).

49. Menkel-Meadow, *Pursing Settlement in an Adversary Culture*, *supra* note 7, at 5 (expressing fear that “the power of our adversarial system will co-opt and transform the innovations designed to redress some, if not all, of our legal ills,” and querying whether legal institutions can be changed “if lawyers and judges persist in acting from traditional and conventional conceptions of their roles and values”).

undesirable. The sharp division will not work because the various dispute resolution mechanisms including litigation are similar and dissimilar to one another across too many dimensions. They draw on many of the same types of analysis and other skills. The many commonalities between litigation and binding arbitration exemplify this point. Marking a sharp divide is also undesirable because, to the limited extent it succeeds, this bifurcation will ultimately undermine what ought to be a transformation of dispute resolution as a whole.⁵⁰

B. The Lines Between ADR and Litigation Are Blurred--These Processes Are Not Merely Complementary but Also Intertwined with One Another

Professor Sander explained in 1976 that litigation, arbitration, mediation, and the array of other forms of dispute resolution are complementary to one another in the sense that they each have their own strengths and weaknesses and are therefore appropriate in some situations, and inappropriate in others.⁵¹ Following his lead, many others have suggested we should think in terms of "appropriate" dispute resolution rather than "alternative" dispute resolution.⁵²

While endorsing this concept of complementarity, this Essay urges that we also recognize that the relationship among dispute resolution techniques is also more complex than a mere choice among alternatives. As Professor Sander recognized in 1976, "rarely do the processes occur in isolation."⁵³ Much to the chagrin of some ADR advocates,⁵⁴ who are concerned that litigators will co-opt or even destroy the alternative processes, those who represent clients in both arbitration and mediation are beginning to see the processes as closely connected to litigation. Indeed, several

50. Cf. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 892 (1997) (arguing that lawyer participation in mediation will probably both result in desirable transformations of litigation and also undesirably "co-opt, capture, and legalize mediation"); Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149, 176-81 (arguing, based on study of mandatory divorce mediation in Maine, that lawyers who participated in mediation had less adversarial behavior than their counterparts who did not); Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV. 1369, 1370-71, 1372 (1998) (drawing on work of Mary Ann Glendon in arguing that "[m]ediation offers enormous potential for lawyers to recognize and honor the missing human dignity dimension in current versions of adversarial lawyering" and suggesting that growth of ADR, and mediation in particular, "is slowly transforming the practice of law"); Riskin, *supra* note 26, at 44-45, 59-60 (arguing that mediation training may help lawyers break free of their "standard philosophical map" of adversariness of parties and rule-solubility of disputes, thereby aiding attorneys, their clients, and society).

51. Sander, *supra* note 2, at 118-26 (discussing criteria by which appropriate dispute resolution mechanism may be selected).

52. See, e.g., RISKIN & WESTBROOK, *supra* note 10, at v, 50-51 n.20; Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way - We Earn It*, 4 NEGOTIATION J. 55, 62 (1988); Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 8 (1999) (urging that law schools educate future lawyers to engage in "appropriate dispute resolution," and not just litigation); cf. Stempel, *supra* note 3, at 300 n.2 (choosing to call ADR "alternative" rather than "appropriate" dispute resolution, in recognition of its recent arrival on the modern historical scene).

53. Sander, *supra* note 2, at 117.

54. See, e.g., Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 7, at 3 ("Lawyers may use ADR not for the accomplishment of a 'better' result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage.").

major firms have renamed their Litigation Department to be the "Litigation & Alternative Dispute Resolution Department."⁵⁵

All dispute resolution processes including litigation are intertwined in part because, as Professors Mnookin and Kornhauser have explained, negotiations occur "in the shadow of the law."⁵⁶ Clearly, mediations occur in the shadow of the law as well, as do other non-binding dispute resolution techniques. Participants in such non-binding processes are typically aware that they have the option to go to court, if an agreement is not reached.⁵⁷ Thus, the likely monetary and emotional costs of pursuing litigation and the likely outcomes that would be reached in litigation will presumably influence (though not entirely determine) the result in the non-binding process.⁵⁸

The interdependence of the various dispute resolution processes goes still further, in that multiple processes may be employed simultaneously. With binding arbitration, although one of the goals of the process may be avoidance of court, the availability of litigation is crucial to support private arbitration. Where a disputant refuses to honor an obligation to arbitrate courts are asked to compel arbitration or stay litigation.⁵⁹ Courts may also be asked to rule on whether a dispute is arbitrable,⁶⁰ or to issue preliminary relief such as injunctions.⁶¹ Once the arbitrators have made their determination, the prevailing party can file a motion in court to "confirm" the arbitral award,⁶² and the loser can seek to have a court vacate the

55. One example is a New York firm, Proskauer Rose LLP. Its web site also states: "At Proskauer Rose LLP, alternative dispute resolution (ADR) is an integral part of the Firm's practice and capabilities. . . . In 1996, Proskauer renamed its 'Litigation Department' to reflect not only its strong commitment to ADR, but also the true nature of our present practice." See Proskauer Rose LLP, *Alternative Dispute Resolution* (visited May 9, 2000) <<http://www.proskauer.com/profiles/inserts/adr.html>>. Other examples include an intellectual property firm, Brinks Hofer Gilson & Lione. See Brinks Hofer Gilson & Lione, *Practice Groups: Litigation and Alternative Dispute Resolution* (visited May 9, 2000) <http://www.brinkshofer.com/brinkshofer.cfm?pg=prac_groups/home.cfm>. McCullough Sherrill, LLP, has a Litigation/Dispute Resolution Department. See McCullough Sherrill, LLP, *About our Litigation Practice Group* (visited May 9, 2000) <http://www.mslegal.com/Practice/home.html>>. Of course, many other firms emphasize an ADR specialty within their litigation department. See, e.g., Sidley & Austin, *Alternative Dispute Resolution* (visited May 9, 2000) <http://www.sidley.com/about/areas/alt_dispute.html> (observing that for many disputes ADR is more effective than litigation); Schulte, Roth & Zabel LLP, *Our focus is a desirable resolution* (visited May 9, 2000) <<http://srz.com/litarb.html>> (noting firm has signed CPR's ADR pledge); Clifford Chance LLP, *Litigation & Dispute Resolution* (last modified Apr. 12, 2000) <<http://www.rw.com/uk/our-expertise/litigation-dispute-resolution/index.shtml>> (discussing arbitration and mediation expertise).

56. Robert Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

57. As the old saying goes, "you can always sue," even if the suit won't get too far.

58. Making the argument that one does or does not have the legal right to do something will often end a dispute. Some might argue that certain community mediations do not occur in even the *shadow* of the law, but I disagree. While disputants may ultimately reach an agreement that is outside the boundaries of what a court might order, I believe that the disputants are or try to be conscious of relief they might or might not secure in court.

59. See, e.g., Federal Arbitration Act, 9 U.S.C. §§ 3-4 (1994).

60. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (default rule is that issue of arbitrability is for court to decide).

61. See, e.g., *PMS Distrib. Co. v. Huber & Suhner, A.G.*, 863 F.2d 639 (9th Cir. 1988) (holding that district court had authority to issue writ of possession, pending arbitration, even after issuing an order to arbitrate).

62. See, e.g., 9 U.S.C. § 9 (1994).

award.⁶³ A typical arbitration casebook or hornbook is filled with reams of reported court decisions, as these form the foundation of arbitration law.

The links between litigation and mediation or another ADR technique such as early neutral evaluation are particularly clear where the ADR process has been institutionalized in a court program. Here, courts order disputes to mediation or ENE only after cases have been filed in court, and in some jurisdictions require that discovery continue even as neutrals help parties search for early resolution.⁶⁴ Thus, the parties may be exchanging discovery or filing motions, connected to litigation, at the same time as they are attempting to negotiate or mediate.

Finally, just as litigation has an important influence over the other forms of dispute resolution, so too may these alternative processes influence litigation in various ways. Every lawyer who litigates also thinks about negotiation.⁶⁵ Increasingly, litigators are also considering taking the dispute to mediation or arbitration or perhaps to a mini-trial or summary jury trial.⁶⁶ The increasing use of court-ordered mediation and ADR, and the growth of contractual clauses requiring use of such dispute resolution processes, mean that "so-called" litigators also must use the other processes.⁶⁷

C. The Intertwining of the Various Dispute Resolution Processes Can Be a Good Thing

It is difficult to imagine how the various techniques we now refer to as ADR would *not* become intertwined with litigation. Even if we opted not to institutionalize such techniques in a court setting, or to use courts to support the techniques, disputants would almost inevitably find themselves in a position to choose whether to use litigation or non-litigation dispute resolution processes.

However, we need not necessarily mourn this entanglement. Rather, we can at least hope that insights gained from the non-litigation processes will begin to influence lawyers' mindsets in litigation. To the extent that such non-litigation processes for example emphasize the importance of non-monetary interests, or of non-legal solutions, these concepts will be introduced into litigation as well. Litigators will come to better understand that their job is to meet their clients' needs, and not simply to win a litigated case. A client may be better off deciding not to litigate a winnable case, or negotiating a remedy that would not have been available in court, than pursuing a suit through the courts. The emphasis on client-centered counseling draws on precisely these concepts.⁶⁸ Thus, while I share the concern

63. See, e.g., 9 U.S.C. § 10 (1994).

64. See, e.g., FLA. R. CIV. P. 1.710(c) ("Discovery. Unless stipulated by the parties or ordered by the court, the mediation process shall not suspend discovery.").

65. See Marc Galanter, *Worlds of Deals: Using Negotiations to Teach About Legal Process*, 34 J. LEGAL EDUC. 268 (1984) (coining term "litigotiation").

66. See generally Lande, *supra* note 50, at 841 (concluding that both dispute resolution techniques will influence the other).

67. See Stempel, *supra* note 3, at 301 ("ADR in some form will be part of the judicial system for at least the foreseeable future.").

68. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 2-15 (1991) (emphasizing importance of considering non-legal as well as legal concerns); Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for*

expressed by Professor Menkel-Meadow and others, that litigators may potentially co-opt and destroy mediation or other non-litigation processes, I am cautiously optimistic that litigators will instead learn to integrate the multiple processes.

V. NEXT STEP: DISPUTE RESOLUTION AT A CROSSROADS

Practically speaking, this Essay calls for a change in mindset and a shift of degrees, rather than a fundamental recasting of the dispute resolution world as we know it. I do not suggest we entirely eliminate the phrase "ADR" from our vocabulary. The term is still useful where we seek to refer to those dispute resolution processes other than litigation, and even this author will likely use it many times in the future. Nor need we, at least in the short term, eliminate all those books or courses that survey ADR.⁶⁹ They do, after all, serve a purpose. As long as these non-litigation techniques are neglected in other courses and books, they need to be addressed in special fora. Nor need we abolish the ABA Section on Dispute Resolution, repeal the ADR Act of 1998, nor throw the arbitrators out of ADR organizations.

We are, nonetheless, at an important crossroad in trying to think about dispute resolution processes as a group, and how they relate to one another. We should be more self-conscious of grouping together techniques that may often merit separate analysis. If we mean mediation we should say mediation, not ADR. If we mean non-binding dispute resolution techniques like mediation or early neutral evaluation as contrasted to binding arbitration or litigation we should say so. At other times we really mean to distinguish court-connected processes from those dispute resolution processes that are employed in a more private fashion, and we should make this public/private division our focus.⁷⁰

In the longer term, moreover, we should strive to break down the sharp distinctions between ADR and litigation in order to promote better and more just dispute resolution. As Attorney General Janet Reno explained in a speech to legal educators, we should emphasize that lawyers are responsible not merely for resolving legal disputes, but more broadly for solving problems and addressing clients' needs and interests.⁷¹ Along these lines, the first year course currently labeled "Civil Procedure" should be redesigned to emphasize that litigation is not the exclusive or even primary technique through which disputes are or should be resolved. Courses and texts on pretrial practice should include substantial emphases on techniques such as interviewing, counseling, and negotiation that are too

the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation, 47 WASH. & LEE L. REV. 819 (1990).

69. The author in fact teaches such a survey course, in the University of Missouri-Columbia School of Law LL.M. Program on Dispute Resolution.

70. As Professors Galanter and Lande have observed, no clear demarcation may be made between private courts and public authority, in that virtually all supposedly "private" courts in fact have public aspects. Marc Galanter & John Lande, *Private Courts and Public Authority*, in 12 STUDIES IN LAW, POLITICS AND SOCIETY 393 (1992) (urging an "eclectic and pluralist" perspective which values both the public and private institutions).

71. Reno, *supra* note 52.

frequently taught only in ADR offerings.⁷² Likewise, upper level courses and texts should not only emphasize appellate decisions, but should also discuss resolution of disputes through negotiation, mediation, arbitration, and other means.⁷³ While it may make sense to have separate courses on negotiation, mediation, and arbitration, it will eventually seem no more logical to combine all three techniques than it would be to throw in administrative law or litigation. Emphasizing the differences as well as commonalities between all dispute resolution processes, while at the same time eliminating the sharp distinction in our minds between forms of ADR in general and litigation, will also help us to think more creatively about dispute resolution. Labels and categories, while sometimes useful and even necessary, can also be inhibiting. By focusing less on debates about what “is,” we will free ourselves cognitively as well as temporally to think more about how we ought best to resolve disputes.

In sum, while we must be wary of the possibility that the litigation “win/lose,” “only money matters” mindset will entirely envelop and overwhelm any alternative vision, we cannot prevent this development by placing a false barricade between litigation and all other forms of dispute resolution. Rather, we must see that all forms of dispute resolution, including litigation, mediation, negotiation and binding arbitration, are part of a greater whole. Lawyers can learn to be problem solvers, and to concern themselves with more than just money or purely legal issues, without abandoning their role as advocates.⁷⁴ Familiarity with non-litigation modes of dispute resolution will help lawyers to broaden their horizons, and to apply their insights, even in litigation. By recognizing the distinctions between binding arbitration and other forms of ADR, we can also recognize the commonalities between various forms of ADR and litigation. These commonalities should be a source of strength, not fear, as we think about dispute resolution for the next century.

72. Some law schools are beginning to offer “lawyering” courses that do take such an approach. And, some pretrial litigation courses do already cover interviewing, counseling negotiation, and even mediation.

73. For an excellent discussion on ways in which law school curriculum should be reformed to incorporate problem solving techniques, see Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 14 (1999) (suggesting that problem-solving can be taught in law schools without the need for expensive studies or curricular reform). See also Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (1995); Alan M. Lerner, *Law and Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107 (1999); Reno, *supra* note 52 (urging that law schools focus on teaching problem solving, including ADR, as well as on teaching adversarial skills); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy and the Legal Profession*, 4 DUKE J. GENDER, L & POL'Y 119 (1997).

74. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 291-97 (arguing advocacy is not inconsistent with taking problem-solving approach).

