

# A History of Alternative Dispute Resolution

The Story of a Political,  
Cultural, and Social Movement



Published in affiliation with  
the Association for Conflict Resolution

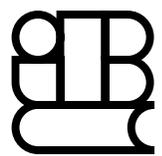


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Jerome T. Barrett,  
with Joseph P. Barrett

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## Foreword

I am pleased to have the opportunity to write this Foreword for Jerry Barrett's much-needed book on the history of alternative dispute resolution (ADR).

I met Jerry Barrett over thirty years ago, when I served as President Nixon's assistant secretary of labor. At that time, Jerry headed a new office providing advice to state and local governments and their unions on establishing procedures for resolving disputes. When I became national director of the Federal Mediation and Conciliation Service (FMCS) in 1973, I asked him to leave the Department of Labor and head the newly created Office of Technical Assistance at FMCS. In that capacity, he managed mediator training, preventive mediation, and the start of FMCS work outside the labor-management field.

Jerry has outstanding credentials to present this history of ADR. Having worked as mediator, arbitrator, and trainer—often on the cutting edge of new approaches to conflict resolution—he knows the field as a practitioner. On the scholarly side, he has armed himself with several degrees and displayed a curiosity about the past by writing extensively as historian of FMCS and its predecessor organization, the U.S. Conciliation Service, and the Society of Professionals in Dispute Resolution.

It is actually surprising that an ADR history book of this kind was not written much earlier, given the growth of ADR in the past twenty years and the extraordinary growth in the number of ADR practitioners and users in the United States and elsewhere. This publication is long overdue.

Having spent all of my adult life as a negotiator, mediator, and arbitrator, I found this book most informative and useful, because it presents the centuries-long ADR history that I have been a part of without knowing it. In that respect, I am sure I am no different from many other ADR practitioners in lacking knowledge of the origins of the profession in which we justifiably take great pride. While much has been written in the past twenty years describing and explaining ADR, no other book has connected the ADR work of the twenty-first century with that of previous centuries.

Readers can try to link their current ADR practice to that of ancient practitioners, such as an ancient Phoenician negotiating an agreement in the eastern Mediterranean in 700 B.C., or a Chinese mediator practicing his art in the Western Zhou Dynasty 2,000 years ago, or a Panch (arbitrator) making binding arbitration awards 2,500 years ago in India. This book presents numerous other examples displaying the rich history with which today's ADR practitioners and users are linked.

Readers will enjoy ADR examples from early American history: Thomas Jefferson mediating the relocation of the nation's capital to the Potomac River, George Washington including an arbitration clause in his will, and Lewis and Clark's ironic horse negotiations with Native Americans.

Some ADR practitioners may believe ADR history began the day they discovered it, others mark its beginning as the 1976 Pound Conference, when lawyers turned their attention to ADR as legal reform. Still others see the start in the civil-rights protests of the 1960s. As former director of FMCS and former secretary of labor, I know that labor-management negotiations, mediation, and arbitration can trace their roots at least as far back as the creation of the U.S. Conciliation Service (USCS) during the Wilson administration.

This book identifies much deeper roots. By researching and identifying the precursors of ADR, the author traces ADR roots over two thousand years.

Playing up the human-interest side of the ADR story, the book identifies ADR's unsung heroes—Benjamin Franklin, the Great

Compromiser Henry Clay, Howard University founder General Oliver Howard, presidential assistants Colonel Edward House and Dr. John Steelman, and others.

With war, terrorism, and violence currently dominating media attention, this book provides an important reminder that peaceful ways of resolving conflict have existed throughout human history. From the Kalahari Bushmen and Hawaiian Polynesians to the formation of the United Nations, both traditional and developed societies have fashioned peaceful practices for resolving their conflicts.

The wealth of information in this very readable book provides useful references for making a speech on ADR or offering cogent illustrations in the midst of a dispute. It is a valuable addition to the library of all ADR practitioners and users.

I strongly recommend this enlightening history of ADR to both practitioners and scholars of the field, and anyone with an interest in finding new and better ways to work out our differences.

William J. Usery  
Secretary of Labor, 1976–1977

*This book is dedicated to the unsung heroes of ADR who have expanded our options for achieving a more peaceful and just future.*

## Preface

From the beginning of time, there have been those who sought to exploit their advantages—physical, financial, familial, technological—to dominate others. Kings and dictators, robber barons, and Enron executives all have benefited from a rigged system that allowed them to ignore the good of others.

But there have also always been those who have appealed to higher ideals—fairness, common interests, the greater good, a sense of community—to put aside power and try to work out differences without resorting to fighting. From the Kalahari Bushmen, who emphasize group harmony over discord, to the ancient Athenians, who appointed all men during their sixtieth year as “arbitrators,” and on to the “win-win” negotiators of today, there is a long history of those who have attempted to resolve disputes peacefully and to the benefit of all.

This book is about all of these unsung heroes who have struggled to find a level playing field that allows the weak and strong to address their differences based on rights and interests. The book describes alternative paradigms for how disputes can be resolved, paradigms largely ignored and even denigrated, by the powerful who focused exclusively on their own rights and interests.

The subject of this book is the history of alternative dispute resolution (ADR), a movement born of the social unrest—and progress—of the 1960s. Many authors trace ADR’s roots to the tumult of that period and stop there. I strongly argue that the movement’s roots are much deeper and go back much further.



I have been a practitioner of ADR for more than forty years. I have seen ADR work in labor-management, civil rights, and community disputes, and I have helped spread it to a dozen countries. Starting with the 1960s, some of this history is my own. But I have also long been fascinated by the history of the processes that came before ADR flowered in the 1960s, beginning with some writing I have done on the history of the Federal Mediation and Conciliation Service and its predecessor, the U.S. Conciliation Service. This book seeks to capture even earlier history. It looks for the roots of the ADR processes as it traces the parallel histories of what I call ADR precursors: negotiation, arbitration, and mediation. Before we can understand how ADR came about, we must first understand what came before it. Before we can understand where to take ADR from here, we must first understand the obstacles faced by those who came before us.

In some ways, ADR is defined by what it is not. It is an alternative to solving problems by power, the courts, violence, or any other forum in which one party's inherent advantages rule out a fair settlement. It can be applied to any problem between individuals, groups, or nations, from labor strife to trade issues to marital discord. In its purest form, it seeks to get beyond the cloud of the present difficulties and resolve matters in a way that does not just stop the fighting but allows the participants to build a better relationship for the future.

The social and political environment in any given period provides both the need and opportunity for ADR. Here are five illustrations:

- On the islands of ancient Greece, disputes between city-states over property or money could quickly boil over into warfare. For this reason, smaller islands often appealed to more powerful city-states to arbitrate their disputes. Often these decisions would be “published” by inscribing them on the walls and pillars of the

famous temples of Delphi and elsewhere, placing ADR at the very foundation of Western civilization.

- With their own courts outlawed by Rome and later the Christian-dominated Middle Ages, Jews developed a system resembling arbitration to handle disputes within their community. In Jewish tradition and law, the concept of compromise and dispute resolution was highly valued, a further encouragement of negotiations and mediation.

- As the railroads grew in importance to the U.S. economy in the late 1800s, Congress passed a number of laws dealing with employment issues exclusively in that industry. When those laws failed to provide a process to resolve disputes on a continuing basis, railroad unions and management developed their own bill and persuaded Congress to pass the Railway Labor Act of 1926. Working together, labor and management were able to create their own level playing field, with a professional staff at their service, greatly reducing strife in this vital industry.

- The Great Depression and high unemployment of the 1930s resulted in great hardship, protests, and riots. In response, Congress passed the National Labor Relations Act, guaranteeing the rights of workers and providing conflict resolution processes. The number of conciliators already available in the Department of Labor was greatly expanded to deal with the increased number of unions attempting to negotiate collective bargaining agreements.

- The conflicts caused by the civil rights movement, the Vietnam War protests, and the cultural revolution of the 1960s nudged both private sector and governmental action to encourage peaceful conflict resolution. The Civil Rights Act of 1964 created the Community Relations Service with full-time conciliators to provide services in community conflicts. The Ford Foundation funded the National Center for Dispute Settlement in Washington, D.C., and the Center for Mediation and Conflict Resolution in New York. Both centers experimented with using the labor-management dispute settlement process of mediation and arbitration in community conflicts.

A strong component of the ADR story, especially in the United States, is expansion of rights to more and more groups. Up to the nineteenth century, rights were essentially limited to white male property owners. Gradually, this changed as workers, women, and blacks and eventually other minorities won increased recognition. Although the story of ADR begins with efforts at resolving conflicts between the powerful—businesses, governments, and the like—ADR would truly flourish when it was applied to disputes affecting the groups that had been traditionally excluded from processes that allowed them to get a fair hearing.



This book examines these developments in the history of ADR and identifies the movement's unsung heroes and the conditions favorable to ADR. The story begins with the roots of ADR from prehistoric times to the era of the European law merchant. Next, Chapter Two traces the history of ADR in diplomacy. Then we turn to ADR in early America in Chapter Three. Chapter Four discusses how the Civil War shows the limits and the promise of ADR. Chapter Five traces the history of ADR in business settings. The rest of the book explores the history of ADR in the United States in the twentieth century, from the early struggles for worker rights that first opened up the possibility of ADR use, through expansion of ADR to other disputes, including the civil rights movement, and on to the flowering of ADR in the 1980s and 1990s. The final chapter focuses on ADR in the twenty-first century—both the challenges it faces and its vast potential.

This may seem like a bad time to talk about solving problems peacefully. The United States has adopted an our-way-or-the-highway foreign policy. Large companies use the continuing threat of competition as a club to beat back employee gains at the bargaining table. The greed of corporate executives has been exposed in a series of scandals. But there are also strong signs of hope. Schools across the country are teaching students how to resolve their differences amicably. ADR practitioners are spreading their

message and working through problems on the job site, in city governments, and even in the home.

No matter how thorny the dispute, how dark the clouds of international conflict, this book demonstrates that ADR has worked and can work even better in the future.

## Acknowledgments

For a number of years, I thought about writing a book on alternative dispute resolution in labor-management disputes focused on the Federal Mediation and Conciliation Service and the U.S. Conciliation Service. Unable to find an interested publisher, I wrote a number of papers and articles on the subject. As labor-management disputes declined in number and impact and ADR continued to expand in other arenas, the prospects for the book that I wanted to write declined further. I explained my dilemma to Bill Breslin, managing editor of the *Negotiation Journal*. He suggested that I contact Alan Rinzler of Jossey-Bass, and the rest is history.

Writing this book was an amazing experience: challenging, discouraging, exhilarating, overwhelming, exhausting, satisfying, all-consuming, and more. Given the nature of this book—covering the broad field that ADR has become in the past forty years and the historic precursors of ADR—help was crucial. Some of those listed below offered their help and were aware they were helping. Others helped by just talking with me or exchanging e-mails with me, maybe unaware they were helping. The valuable writings of others are listed in the bibliography. To each, I offer my sincere appreciation and gratitude. I could not have done it without their help:

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While expressing my thanks for their help, I also want to relieve them of any responsibility for errors, omissions, or misstatements. I accept responsibility for any such shortcomings.

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Other family members sacrificed for this book also. My son John helped me at a crucial time after I broke my arm in February 2003. John flew from his home in Salt Lake City and helped for ten