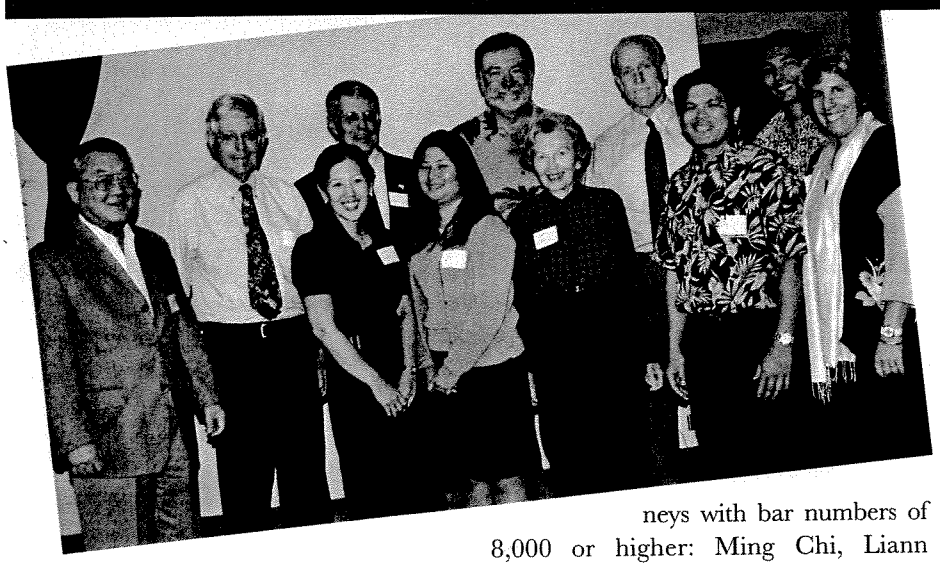
By Ryan Au and Elizabeth Kent

Two groups of lawyers recently came together, one group to interview the other about Alternative Dispute Resolution (ADR) in Hawaii. This article attempts to capture some of the wealth of information and wisdom from these interviews.

The Effect of ADR on the Legal System: A Long-Term View

Above: (Left to Right) Jill Hasegawa, Justice James Duffy, Ryan Au

The interviewees, whose extensive experience in litigation and ADR can be inferred from their low bar numbers (mostly three digits), were: Bernie Bays, Associate Justice James Duffy, Chief Justice Ronald Moon, Patricia Park, James Paul, Thomas Stirling, Judge Michael Town, and Retired Judge Betty Vitousek. The interviewers were attorneys with bar numbers of 8,000 or higher: Ming Chi, Liann Ebesugawa, Jill Hasegawa, Mihoko Ito, and William Tanaka.



Above: (Clockwise starting on the Left) Chief Justice Ronald Moon, Justice James Duffy, Thomas Stirling, James Paul, Bernie Bays, William Tanaka, Liann Ebesugawa, Jill Hasegawa, Retired Judge Betty Vitousek, Ryan Au, and Elizabeth Kent (not pictured: Patricia Park, Judge Michael Town, Ming Chi, and Mihoko Ito)

During the interview process, a number of similar themes emerged from the participants' observations.

The Increase in ADR Use is Part of the Evolution of the Practice of Law

Chief Justice Moon observed: "Over the last 25 years, our justice system has changed significantly in a number of ways--one of which was the introduction of ADR at the district, family, circuit, and appellate courts . . . Our over-crowded court dockets and nearly unmanageable backlog of 20 or 25 years ago would probably still exist if not for the incorporation of ADR within our judicial and legal system as a whole."

Fully supportive of ADR, Chief Justice Moon cautioned that it should not be a wholesale substitute for the traditional system and should be considered a means to complement it. "Maintaining a workable balance is the key to administering our judicial system in a fair, effective, and efficient manner," he said.

There is little doubt that ADR use has transformed the way that courts and trial lawyers deal with disputes. Paul recounted how unusual mediation was twenty-five years ago and that the norm then was to go to trial without any prior ADR process, other than a settlement conference with the judge. Today, by contrast, it is almost impossible to go to a civil trial in federal or state court without first going through an ADR process. Most often, that process is mediation.

Stirling related that mediation "took off' in divorce cases, especially in the last ten years. Initially skeptical and lukewarm about mediation, he now finds that mediation is a much better way to resolve cases. Stirling said, "I keep score and at least ninety percent of my cases that go to mediation are successful. But not always. Some cases, for whatever reason or combination of reasons, need to be tried. Now it is rare that I have more than one or two trials a year."

Attorneys' Opinions of ADR

With the introduction of ADR programs at every level of the court system, more attorneys are exposed to ADR. Over the years, their opinions and attitudes about ADR have changed. Chief Justice Moon noted that the Rules of Court promoting the philosophy and use of ADR probably contributed to the changed attitudes and opinions.

When ADR was first introduced into the legal system, many lawyers viewed a suggestion of mediation as an indication of weakness in a party's case. James Paul said, "I don't think that is the case today. Now lawyers are expected to explore mediation." In fact, Patricia Park noted that more often mediation is accepted by attorneys as the first choice for resolving disputes, with litigation as the second choice.

Benefits of Mediating are Becoming Well Known

Ownership of the Solution: Judge Town noted an increase in community satisfaction with dispute resolution and trust in people's ability to resolve disputes on their own. "Mediation reduces the amount of litigation and increases the satisfaction of dispute resolution. Compared with litigation, the 'shelf life' of a mediated agreement is much longer when the parties agree upon terms rather than having terms imposed upon them. And there's no appeal." Park and Paul agree that the parties' ability to declare an impasse and walk away from the mediation is itself another incentive.

Use of Time: Paul discussed time constraints: "It's rare," he said, "that a judge would be able to spend six to twelve

Above: (Left to Right) Ryan Au, Retired Judge Betty Vitousek, Thomas Stirling, Elizabeth Kent, James Paul, and Chief Justice Ronald Moon.

hours intensely trying to help settle a case. A mediator will reserve at least a full day to focus on that case. Theoretically, there is no difference between a good judge and a good mediator, but a judge obviously has constraints on the amount of time available." Paul also pointed out that even in cases that do not settle in mediation, something is generally accomplished. He described a case in the first circuit in which a judge did an exceptional job of facilitating a settlement that had been "unsuccessfully" mediated for many days by a very experienced mediator. Although no settlement was reached in the mediation, the judge was able to settle the case quickly because of the many ideas that "flowed" during the mediation sessions.

Cost Control: Park related that parties are better able to control fees and costs in mediation. She further observed that Rule 408 of the Hawaii Rules of Evidence also protects the parties and that if they are acting in good faith, they can exchange information to help resolve the claims. Bays stated, "Mediation can be incredibly inexpensive and can save resources. The earlier the parties can engage in mediation, the better."

Unbiased Ideas: Stirling sees mediation as far preferable to trial as a way of resolving many disputes. He stated, "One of the benefits of mediation is that the mediator can float proposals or potential solutions in a way that has the greatest possibility of being favorably considered by the other side." The problem with direct negotiations is that one side is automatically predisposed to dislike a solution simply because the proposal came from the other side, whereas if the proposal appears to have come from the independent mediator, it may be more likely to be considered.

Reasonably Certain Outcome: Judge Vitousek said "of course mediation is better than a court order because the parties own it. One reason that mediation is so successful is because the outcome in court is never certain. You can be fully convinced of the rightness of your position, but you can't guarantee it. So I think that the security and the satisfaction of mediation is a tremendous plus. You are responsible for your clients and are ethically bound to do what is right for them. It is very hard to see how it is more right to take them to court rather than to mediate."

Holistic Approach: Justice Duffy noted, "The beauty of ADR, and mediation in particular, is that it addresses humanistic needs as well as legal rights and remedies. A lawyer in an ADR proceeding can be flexible and creative in finding a resolution that is satisfactory to the parties, as you are not limited to specific legal remedies."

Factors That Can Make ADR Successful

The most effective mediation model is one in which the parties feel free to be candid. All those interviewed agreed that choosing a skilled and experienced mediator is critical. According to Paul, parties are more likely to be candid when they are satisfied that the information shared during the mediation will not be used against them if the case does not settle.

Stirling observed that one of the benefits to mediation is that the mediator can

Above: (Left to Right) Liann Ebesugawa, Justice James Duffy, William Tanaka, and Jill Hasegawa

"lance the boil" by identifying non-legal parts of a dispute that a judge could not consider and that may be irrelevant to the law or the facts. He further noted, "It might have been some verbal or emotional slight that, real or imagined, happened ten years ago. Until that can be identified and dealt with, it will prevent the parties from settling the case."

Paul and Stirling also note how important it is for the lawyers to be well prepared. Although mediation is less formal than litigation, it is as important to prepare for mediation as it is for trial, including preparing the client for the mediation process.

"So much depends on the attorney," Judge Vitousek said. "If the attorney believes in mediation, he or she will prepare the client. If you have an attorney who is doubtful or has some other agenda then it won't work. It's like we used to say in court, 'if you had two good attorneys, you didn't care how bad the case was because it was manageable.'"

ADR Has Its Disadvantages

Bays believes that the value of mediation has deteriorated over time. Although at first it was effective in resolving cases because it was quick and cheap, the broader range of participants (who may be less determined to settle) and the varied range of skills that mediators bring has resulted in a less effective mediation process. He notes that, "...it may take twice as long as trial and cost twice as much to get a result [and] the benefit of ADR really depends on the people conducting it and the receptiveness of the participants."

Paul reports that mediation could be more costly than many people expect. "Some are surprised to learn that some mediators can charge $10,000 - $15,000 a day. But when you have millions of dollars at stake, experienced and skilled mediators earn these fees when they facilitate the settlement of such large disputes that could otherwise cost hundreds of thousands of dollars to resolve through trial [with its] uncertain outcome."

Park notes the cost of arbitration can be high, especially when multi-panel arbitrators are used and when substantial deposits have to be made before the first prehearing conference. She says, "The upfront deposits sometimes have the salutary effect of encouraging settlement; these also may be offset by avoiding 'scorched earth discovery' because an experienced arbitrator has greater control over the scope and manner of discovery."

Stirling agrees: "Not every case needs to be mediated. It is still quite possible to resolve cases directly between counsel. Mediation is not cheap, at least in my experience, and it is not something that you leap into lightly. There should be an assessment that we really need to get this case into mediation." He tells his clients "that there is no guarantee of success ... but the rates of resolution through mediation are high."

Judge Vitousek points out:

"Everything has pitfalls. If you have very unequal clients in their positions, economically and physically, then there probably are occasions when the safest thing to do is to go to court, but you have to be very sure that it is so. Your job is to protect your client."

Mediation is not Appropriate for All Cases

Most of the interviewees do not favor mandatory mediation and note that mediation is voluntary by its very nature. For example, Stirling feels that "mandatory mediation is inherently limiting. Anybody who goes to mediation not wanting to be there stands a good chance of sabotaging the whole procedure. It is just wasting everybody's time." Chief Justice Moon says, "Not all cases are suited for ADR. Mandating ADR in every case could end up costing litigants more time and money."

Justice Duffy summarizes, "Personally, I do not favor mandatory mediation. As a mediator, I preferred handling cases where the parties came as willing participants." Additionally he outlined two instances when ADR may not be appropriate. They are "(1) when seeking to enforce a constitutional right, and (2) in precedent-type cases (for example, in a products liability situation where a party might not want to set a precedent for paying out)."

Desirable Traits for Effective Mediators and Arbitrators

Generally, parties want to have a successful mediation with workable solutions. This is evident in the efforts parties make to select a mediator. The parties believe that the mediator, a person whom they can trust, can assist them in resolving the case after their side of the story has been heard. The parties want their dispute resolved and an effective mediator can propose creative resolutions that may not be available if the parties go to court or arbitration.

There are certain attributes that parties look for when they propose and select a mediator. Specifically, parties want mediators who are well prepared, effective, compassionate, creative in proposing

alternatives to resolve disputes, and someone all of the parties trust.

Chief Justice Moon believes that effective mediators are good listeners, compassionate, and are creative and innovative thinkers. Judge Vitousek added that effective mediators are those who have a deep desire to help their clients and can establish a rapport with the clients to build trust. Judge Town suggests that a capable mediator should "stay in the moment, be open to other peoples' truths, not get positional (take sides), have heart for everyone, and have a teachable spirit."

Park agrees that an effective mediator has the ability to listen closely, and understands both what is being said and not said. Paul also believes that an effective mediator is someone that each party respects and who can understand the parties' real interests in a way that the parties themselves may not fully understand.

Although expected, impasses are difficult to overcome and can result in the termination of mediation. To increase the parties' willingness to continue, many of the interviewees indicated that a break in a mediation session frequently helps. According to Justice Duffy, "There are many ways to resolve an impasse during a mediation session. One way is to suggest a break in the mediation, and to ask the parties to come back after they have had a chance to further evaluate their position based upon what they learned in the first session of the mediation." Another way to address an impasse might simply be to get the lawyers out of the room and let the parties talk.

Overall, the interviewees look for arbitrators who are fair and impartial, competent, good listeners, well prepared, have common sense, keep an open mind, and are able to apply the legal rules. Justice Duffy believes that competence is an important quality because "the parties are placing their fate in the hands of another person, and have limited rights to appeal from an arbitration decision."

Paul agrees that parties do not want an arbitrator who will reach a firm conclusion too soon. Instead, they want the arbitrator to keep an open mind. An effective arbitrator should be firm to control the proceedings, make them efficient, and do it in a fair way. Bays agrees that an effective arbitrator can streamline the time it takes for the proceeding, without sacrificing the integrity of the proceeding, and can listen to the evidence and apply the legal rules in a fair way.

Advice for Newer Lawyers

There is general agreement that new lawyers may have difficulty being accepted as arbitrators and mediators. As Bays notes "One very important aspect of being a mediator is gaining the respect of the parties, and it may be hard to do that without being experienced and having a reputation." A few interviewees note the appropriate amount of legal practice for lawyers is at least ten, and preferably twenty, years. Other advice:

•Sit in on an arbitration or mediation. When I served as an arbitrator, an attorney brought a summer law clerk to the arbitration. No one objected. That was a great experience; there is nothing like sitting in and watching the ADR process first hand. Of course, there are terrific seminars available as well. (James Paul)

•Find one or more attorneys who can be mentors to you. You can't do it alone. I was fortunate to have many excellent attorneys who helped me along the way and I'll be ever grateful to them, especially the partners at Ashford & Wriston. (Thomas Stirling)

•New lawyers provide a great service to their clients when they provide a realistic and candid assessment of their case. If you can paint a picture for them of the litigation experience, including trial and appeal; the costs involved, financially and emotionally; and the chances of recovery, your clients may be more willing to actively participate in mediation. (Chief Justice Ronald Moon)

•The one piece of advice I would give to young lawyers is to check very carefully on selecting mediators or arbitrators before you use them. Talk to people who have used the mediator or arbitrator, and find out what their success rates are. The effectiveness of ADR in most cases will largely depend on the selection of a mediator or arbitrator. (Bernie Bays)

Some Final Thoughts

The attorneys mentioned in this article (i.e., those with three digit bar numbers) attended law school at a time when classes in negotiation, mediation, or arbitration were rare, if available at all. Conversely, almost all the interviewers (i.e., those with bar numbers beyond 8,000) started their legal practice already equipped with a solid ADR foundation. (The Richardson School of Law, for instance, was a pioneer in offering ADR classes.)

Thus, it is highly likely that the interviewers and the interviewees in this article have different mindsets and experiences in dealing with ADR. Although this article focuses on the experiences of our "elders," it would undoubtedly be interesting to learn about the experiences and wisdom of our *younger* attorneys. These attorneys have had the luxury of not having to break through expectations that "disputes are resolved through litigation" because ADR processes were likely stressed both in their education and early in their careers. It is also possible that the newer attorneys benefit from clients who do not have pre-conceived ideas of the need for litigation, given recent efforts made to educate the public about the advantages of ADR.

Perhaps next year's ADR article for the Hawaii Bar Journal will showcase the wisdom and experience of our newest attorneys, as they learn to resolve issues with the benefit of ADR as a focus in their educational backgrounds. Clearly we can learn from both those with years of experience in the field, and also from those who have "grown up" knowing that ADR is a crucial component to an efficient and effective legal system.

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