COLLAB ORATE
Peacemakers #4
Down the PDR Ladder

Rustling subsided after Commissioner Bedle slipped into his Department D chair. With no opposition, I expected my probate matter to be heard early; disputed cases were footed. Queued just ahead of me was a guardianship case. One issue in that matter was an attorney's fee request. The guardianship had spent more than $71,000 in fees litigating with counsel for the ward, and now sought $3,000 more. One previously litigated issue sought judicial determination whether the guardian acted appropriately in denying the ten-year-old ward use of his cell phone daily after 9:00 p.m. Of this case, I know little. Some issues must have been portentous. Still, I wondered about the civil litigation system. Was cell phone abuse a matter so laden that it required the attention of a superior court commissioner? I was most grateful not to have Commissioner Bedle's job.

Mohandas Gandhi, before he became India's peaceful revolutionary, worked as a South African barrister. Gandhi reports events, early in his career, that changed his assessment of the law. Dada Abdullah's business contract dispute involved substantial sums, tortured accountings, and allegedly-coerced promissory notes. The opponents, who were relatives and neighbors, engaged excellent barristers, who, at each client's urging, argued each precedent. They battled, at absurd expense, to stalemate. In 1893, Gandhi entered the case midstream, fresh from English law training, a very junior associate. Gandhi observed that animus hardened, and rising litigation costs threatened to obliterate recovery by either side. Gandhi felt disgust with the legal system. Even litigation's winners lose; the disputation culture gobbles any award. Gandhi got the case promptly arbitrated, and fought for terms of settlement payment workable for both parties. The case settled. Gandhi concluded that a lawyer's true work lies in appealing to the obscured goodness in disputants. An attorney inches into the troubled hearts of people in conflict. Lawyers mend sundered relationships, nurturing durable peace (Gandhi, *Autobiography: The Story of My Experiments with Truth*, 131ff).

As an attorney, during much of my career I have been too impatient and too lazy in negotiation, and much too quick to litigate. People need time and conversation to work out disputes. They must re-tell their conflict story to encompass their opponent's perspective. Counsel must be longsuffering and imaginative. Creativity in roiled relationships entails demanding, almost spiritual, practices. I see in many colleagues a presumption that a summons and complaint is where negotiation begins, rather than where failed negotiations end. A lawyer's work **begins** with working things out among conflicted parties. Conflict resolution should descend a ladder of increasingly structured interventions, from chat over coffee, to discussion with trusted friends, to facilitative face-to-face mediation, to collaboration with mental health and financial input, to shuttle mediation (with parties segregated), and finally to arbitration. These approaches are presently mis-named alternative dispute resolution ("ADR"). Only when all these steps have failed should litigation commence. Snohomish County local court rules teeter in this direction. Early mediation is now required (though seldom undertaken early and administered with laxity). Our mandatory arbitration rules are well-established (but amount to mini-trials with a vividly adversarial ethos). Alternative dispute resolution should be re-conceived as primary dispute resolution ("PDR"). Australian courts have adopted this rule in family law matters (with well-considered exceptions). ADR is PDR. One cannot commence family litigation without a certificate that non-litigated dispute resolution has been engaged but failed. Thus, out-of-court conflict solutions become a mandatory first resort before courts consent to consider claims (*Australian Family Law Act of 1975*).

Peacemakers climb down the ladder of PDR interventions with reluctance. If our job is to knit unraveling relationships, then litigation, with its lingering medieval heritage of trial by ordeal and adversarial jousting, cannot be our forum of first resort. We speak to human hearts. Few can speak freely or think creatively when litigation's sword is drawn. Peacemakers serve clients by hoping for and giving form to restored peace. PDR gives peacemaking a procedural structure. American courts should climb the trail Australia has blazed.

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