THE LAWYER WITH THE ADR TATTOO

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There is definitely a reason to hide [it] at an interview even if you don’t plan to [keep hiding] it. Your interview is your first impression. It is how the employer remembers you. . . . Once you have established a good first impression, then you can gradually reveal more of your true self over time. . . . If anything, the fact that you covered it makes you at least look aware of basic interview protocol rather than defiant.1

“They said, ‘What can you do to hide that, because we don’t want our customers to be scared, or see us in some kind of way, so you got to find a way to keep it covered or you can’t have the job,’” he recalled.2

When you present yourself in the workplace, you need to recognize that people will naturally make a judgment about how you look. You need to look like you mean business.3

Should you hide it at the interview? For the first few months on the job? For longer, at least until you have figured out the workplace culture? If you don’t hide it, should you be concerned about the message you are sending to clients and colleagues about your professional competence? Your intellectual talents? Your ability to get the job done?

When it comes to lawyers and tattoos, the conventional wisdom is clear: hide the ink. Although more than 45 million Americans today have a tattoo,4 and although “creative” professions such

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as marketing and graphic design have readily adopted tattoo culture, more conservative industries such as law and finance still do not welcome visible tattoos in the workplace. Tattoos have historic associations with “sailors, criminals, the ‘savage’ races, and circus entertainers,” none of which are generally in keeping with what most believe a lawyer ought to look like. As one anonymous online poster puts it, “[I]f I walked into a lawyer’s office and noticed a lawyer had a tattoo I would walk straight out again.”

When it comes to lawyers and alternative dispute resolution (ADR), the conventional wisdom appears to be the same: hide it—that is, downplay any propensities toward creative, nonadversarial, collaborative practice. This conventional wisdom seems especially true for newly graduated lawyers seeking employment and junior law faculty seeking tenure. Despite the tremendous growth of ADR inside and outside traditional legal processes, many potential clients and employers still appear to yearn for the razor-sharp take-no-prisoners litigator or dealmaker. A recent and quite typical e-mail from a colleague illustrates the point:

A friend asked me if I can recommend a divorce attorney who is “not someone we’d all like to hang with, more like the person you’d least like to be opposite in a divorce case.”

I appreciate how collegial our state bar is and don’t particularly want to support lawyers who make the profession less so, BUT I get that question often enough that I am curious about the answer. Feel free to send replies to me privately.

This email reflects the familiar stereotype that too much ADR (without more) means too little lawyerliness. Conventional wisdom therefore suggests that the “lawyer with the ADR tattoo” is wise to keep it under wraps, especially when looking for a job.

5 Sara Dobosh, Piercing the Workplace Stereotype, FOXBUSINESS.COM (July 22, 2012), http://www.foxbusiness.com/personal-finance/2010/07/22/piercing-workplace-stereotype/ (quoting organizational consultant John Challenger: “We may never see visible tattoos on bankers, lawyers, accountants, or the clergy. However, areas such as advertising, marketing, sales and technology are more inclined to be progressive and more accepting of new fashion and lifestyle trends”) (last visited Sept. 21, 2012).


8 E-mail from Rebecca Flynn, Associate Director, Wayne Morse Center for Law and Politics, to Jennifer W. Reynolds, Assistant Professor of Law, University of Oregon School of Law (Aug. 1, 2012, 09:05 PST) (on file with author).

9 See infra Part II.
Of course, the problem with conventional wisdom is that it is often wrong. Certain clients and colleagues may indeed prefer lawyers who are proficient in ADR.10 A whiteshoe firm may pride itself on its associates’ multiple toolkits.11 An established law school may vaunt its ADR program and scholarship.12 And there is no doubt that even the most traditional lawyers use ADR techniques and processes all the time, from client counseling to negotiation to mediation to arbitration—even if those same lawyers profess no need for ADR.

The question is thus starkly posed: Should newly graduated lawyers list ADR-related credentials on their resumes when looking for jobs? In today’s highly competitive market for legal talent, does highlighting alternative competencies help young lawyers distinguish themselves, or does it actually harm their chances of getting an interview? The same predicament exists in legal academia, which historically has viewed ADR as useful and certainly popular but not really part of the serious study of law.13 Law professors who teach or write about ADR, especially those seeking appointments or tenure, must therefore consider whether and how an ADR focus supports or detracts from their professional goals.14

A tattoo is a useful metaphor for this conundrum, not only because of the iffy professional status of visible ink and the whiff of counterculture that hangs around both tattoos and ADR, but also because a tattoo suggests the broader concept of self-branding—here, the branding and packaging of the professional self before being sent to market. Branding is the development and deployment of resilient, arresting imagery and associations that denote features, characteristics, and distinctions of the branded object to

10 For example, the school district and teachers’ union in Springfield, Oregon, has publicly endorsed a collaborative process to govern their collective bargaining sessions. See, e.g., Jacqueline Raphael, Beyond the Bottom Line: Springfield Public Schools Makes the Best of a Bad Situation, EDUCATION NORTHWEST MAG., Fall 2009, at 18, http://educationnorthwest.org/webfm_send/574 (last visited Sept. 21, 2012).


13 As my beloved mentor, who is an accomplished legal scholar in civil procedure and copyright, explained to me over coffee: “In the castle of legal academia, the kings and queens are Constitutional Law and Jurisprudence; the earls and dukes, Copyright and Antitrust; below those are Evidence and Civil Procedure, as they do all the real work; and way, way below those are legal writing . . . clinics . . . and ADR.”

14 See infra Part II.A.
various audiences.\textsuperscript{15} For lawyers and legal academics wondering whether ADR is something to highlight or hide, an analysis of what the “ADR tattoo” or brand means and to whom is an important strategic, professional, and personal question.\textsuperscript{16}

This Article considers whether ADR presents a branding problem for legal professionals and, if so, how those professionals can reclaim the brand in productive, career-affirming ways. Whether one should self-identify as proponent, practitioner, or scholar of alternative practices implicates broad tensions not only around assimilating with integrity into any longstanding change-resistant profession, but also around the shortcomings of the adversarial system and the legitimacy of ADR.

Part I sketches out a possible “brand identity” for ADR, based on select characteristics of ADR’s adoption into American legal practice and consciousness. Note that this section does not analyze ADR’s actual positive and negative qualities, but rather attempts to articulate what some brand stereotypes of ADR might be. Part II explains how this brand identity may pose a branding problem for people who are trying to enter the legal field. Part III suggests some possible strategies for brand management on the part of junior lawyers and academics who are professionally predisposed in some way toward ADR.

\textbf{I. The ADR Brand}

The brand frame is an apt heuristic because much of modern ADR has been and continues to be an exercise in branding. Despite the widespread adoption of alternative practices in the legal system and beyond, proponents of ADR often find themselves “marketing” ADR to legal colleagues and clients: for example, by

\textsuperscript{15} See, e.g., Deven R. Desai & Spencer Waller, \textit{Brands, Competition, and the Law}, 2010 B.Y.U. L. Rev. 1425, 1431 (2010) (referring to Sidney Levy’s definition of a “brand as a complex symbol that incorporates consumers’ motives, feelings, logic, and attitudes”). I am using the same definition in an impressionistic and tentative way, recognizing that I am speaking for diverse constituencies when considering what “we” experience when “we” think about ADR.

\textsuperscript{16} I have been interested in ADR branding for some time now, and at the last International Law & Society Annual Meeting, I put together a panel exploring ADR branding issues from the perspective of supply/demand in various domestic and international markets. This was a fascinating discussion that took place on June 8, 2012, and included the following panelists: Amy Cohen, Hiro Aragaki, Eduardo Capulong, and Danya Reda. At that panel, however, we did not focus on the employment/tenure considerations that are the subject of the present Article. For more details, see notes on file with author.
explaining why mediation might work better than litigation in a particular case; or why allowing an opponent to save face could be a good strategic move; or why building trust between disputants might improve substantive outcomes. Likewise, ADR professors must “market” not only the academic chops of ADR classes, but also the benefits that ADR-oriented skills and perspectives could bring to the traditional study of law, including practical problem solving, skill building, emotional literacy, client-centered thinking, and mindfulness.17 All this marketing requires tenacious, accessible messaging to these diverse audiences—that is, branding.

So what messages does the ADR brand send to non-ADR types? I argue that the ADR brand conveys four separate but related messages. First, the word “alternative” signals to the marketplace that an ADR product or service is novel and different for legal consumers tired of litigation costs and delay (“new and improved!”). Second, within ADR, the differentiation of ADR processes creates more “tailor-made”18 offerings for various market segments and needs (“many flavors available!”). Third, the cultivation of professional specializations in ADR bolsters the legitimacy of ADR goods and furthers the brand’s reach (“experts waiting to help!”). Finally, the psychospiritual resonances of ADR work not only to encourage legal consumers to identify themselves as “law” or “ADR” types (“the same you, only better!”) but also, perhaps, justify state and corporate imposition of ADR processes on various peoples, from small claims court litigants to overseas communities seeking foreign aid.19

A. “New and improved”

Part of the ADR brand is that ADR goods are “new and improved.” Of course, many ADR practices are not exactly new. Mediation in its various permutations, for example, is one of the

oldest and most culturally widespread approaches for resolving disputes.\textsuperscript{20} Likewise, it is hard to imagine any human society without negotiation, defined broadly as communication designed to persuade.\textsuperscript{21} And arbitration has been around since at least the medieval period in Western Europe.\textsuperscript{22}

In the 1970s, what made ADR “new” in the American legal world was its qualitative, distinctive divergence—evident from the descriptor “alternative”—from the processes and assumptions of the traditional adversarial system. Early advocates of ADR stressed the shortcomings of conventional litigation and the procedural and substantive benefits promised by alternative practices.\textsuperscript{23} At the Pound Conference of 1976 (the event many consider to be the founding moment of modern American ADR), Chief Justice Burger decried the state of American litigation and “urged flexible and informal neighborhood tribunals, greater utilization of arbitration and correction of abuses of the pretrial processes in civil cases.”\textsuperscript{24} Conference speakers hoped that these “new” approaches might ameliorate American litigiousness and reduce the “back-breaking burden” suffered by overextended, overworked courts.\textsuperscript{25}

So ADR was not just new back then—it was “improved.” Specifically, ADR proponents promised procedural and substantive improvements to disputants, allowing for more efficient processes that enabled customized justice that brought parties into the decision making process and promoted, in that way, self-determination of individuals. Additionally, within the practice of ADR itself, there was a greater sensitivity toward the multiple (not just legal) dimensions of conflict and the possibility of finding value-creating outcomes by refocusing disputants on interests instead of positions.\textsuperscript{26} In this way, ADR represented an improvement on

\textsuperscript{20} See, e.g., Xiaobing Xu, \textit{Different Mediation Traditions: A Comparison Between China and the U.S.}, 16 AM. REV. INT’L ARR. 515, 515 (“Mediation is one of the world’s ancient modes of dispute resolution and is believed to be as old as human society itself.”).

\textsuperscript{21} See, e.g., Roger Fisher & William Ury, \textit{Getting to Yes: Negotiating Agreement Without Giving In}, at xvii (1991) (“Everyone negotiates something every day. . . . Negotiation is a basic means of getting what you want from others.”).


\textsuperscript{25} Id.

\textsuperscript{26} See Fisher & Ury, supra note 21, at 40-55 (explaining difference between interests and positions).
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traditional litigation in that it reached beyond the purely legal framework of a given dispute and empowered disputants to speak and decide for themselves, instead of being subjected to a binding third-party decision in a contentious and technical process that narrowed the dispute to its legal contours and failed to address some of the most human aspects of conflict.

Although ADR has permeated the legal landscape today, from Federal Rule of Evidence 16(b) settlement conferences to court-ordered mediation to binding arbitration clauses in consumer contracts, its brand association as “new and improved” remains. It remains “improved” in part because of the persistent critique that traditional litigation imposes unacceptable costs and delays on litigants.27 This critique is not always a support of ADR per se but nonetheless bolsters ADR’s market position by disparaging litigation.

Additionally, ADR remains “improved” because ADR processes are more malleable than conventional legal approaches and therefore have the potential of being more effective in dispute resolution than conventional litigation. For example, apologies have been shown to promote greater satisfaction among disputants and reduce the injured parties’ expectations concerning compensation.28 Yet many lawyers still counsel their defendant-clients not to apologize, typically for fear of incurring greater liability within the traditional assumptions of adversarial practice.29 Jonathan Cohen has argued that these knee-jerk legal responses to human suffering do not promote efficient or just outcomes, for either plaintiff or defendant.30 In his analysis of the Ferrero case, in which a hospital publicly and apparently genuinely apologized for its avoidable medical mistakes that caused the death of a child, Cohen points out that without this apology, the hospital would have been exposed to much greater liability and the ongoing cooperative relationship between the parents (who eventually funded a wing of the hospital) and the hospital would most likely not have developed.31 The im-

29 Id.
31 Id. at 98.
provement that ADR offers over traditional litigation, then, is the capacity to imagine and make possible the kinds of substantive responses that address core disputes in humane, meaningful ways.32

Likewise, ADR remains “new.” This is a little more confusing, considering that ADR is now foundational in legal practice and many business contexts, but could reflect institutional priorities. In law schools, as Michael Moffitt has argued, ADR courses are typically not part of the core curriculum but instead generally fall into one of four categories: “islands, vitamins, germs, and salt.”33 The least peripheral of these four is the “island” school, defined as having “richer curricular and co-curricular offerings than their competitors.”34 Yet even the islands do not necessarily employ tenure or tenure-track ADR faculty, as Moffitt points out, and so it is hard to draw conclusions around the island school’s actual institutional commitment to its academic ADR specialization.35 In any event, regardless of how students receive ADR education, all four of these models make clear that the ADR curriculum occupies a different space than does the traditional doctrinal curriculum, and therefore may seem new or cutting-edge by virtue of curricular positioning.

Moreover, the descriptor “alternative” suggests that ADR is perpetually new because it exists in contradistinction with whatever the current norms may be, a sort of legal counterculture that changes in response to shifts in the dominant legal discourse. Indeed, large areas of ADR remain new because designers keep reinventing and multiplying process choices, as described in the next section.

32 As Robbennolt points out, state laws are starting to protect apologies in disputes. See Jennifer K. Robbennolt, Attorneys, Apologies, and Settlement Negotiation, 13 Harv. Negot. L. Rev. 349, 350 (2008); see also 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, 342 (1999) (“In a mediation, the client, in an opening statement or in the course of subsequent discussion, can make it clear that she also cares about nonmonetary relief such as an apology, reinstatement, or establishing a new business relationship.”).


34 Id. at 26.

35 Id. at 56.
B. “Many flavors available”

One of the signature characteristics of the ADR brand is the importance that most alternative practitioners and theorists place on voluntary participation, self-determination, and consent. The ADR brand valorizes choice over coercion, and indeed much of ADR practice and theory centers on making those choices as informed and voluntary as possible. This emphasis on choice manifests in two ways: one, the ability to choose between (or even to create) multiple processes; and two, the consent required not only to enter the chosen process, but to continue with that process and to consent to whatever the ultimate outcome may be. Both of these manifestations combine together into “many flavors available” – the idea that ADR processes can be built to suit whatever idiosyncratic tastes disputants might have.

At that seminal Pound Conference in 1976, Frank Sander proposed the idea of a “[multi-door] courthouse” in which different disputants could choose different processes that most closely matched the kind of dispute they had. Austin Sarat referred to Sander’s vision as the “neoformalism” of ADR: the idea that disputants, disputes, and dispute processing methods can be meaningfully sorted and matched, if only there were sufficient categories at hand. Indeed, part of the ADR ethos is creativity and flexible process, and accordingly disputants today have recourse to such

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36 Carrie Menkel-Meadow et al., Mediation: Practice, Policy, and Ethics 91-96 (2006) (laying out the core values and benefits of mediation, including improved efficiency, greater control and participation, superior creative outcomes, and better relationship effects).

37 See, e.g., Jacqueline M. Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 Notre Dame L. Rev. 775 (1999); see also Donna Shesctowsky, Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little, 23 Ohio St. J. on Disp. Resol. 549 (2008). This is not too overstate or oversimplify the role of “choice” and “consent” in modern ADR, considering that compulsory ADR such as mandatory arbitration is on the rise.


process exotica as rent-a-judge, early neutral evaluation, mini-jury, med-arb, and dispute systems design.\footnote{The Oregon Law Review’s 2012 Scholarship Series examined the proliferation of ADR mechanisms in recent years. See Jennifer W. Reynolds, Foreword: ADR for the Masses, 90 On. L. Rev. 691, 693-94 (2012) (describing recent alternative process innovations).}

Within a particular process, ADR offers flexibility and opportunities for innovation. Mediation, for example, does not follow a strict procedure but may be modified to suit the needs of the parties and mediator.\footnote{See John W. Cooley & Lela P. Love, Midstream Mediator Evaluations and Informed Consent, 14 No. 2 Disp. Resol. Mag. 11 (2008) (examining substantive pitfalls and process possibilities when parties ask their facilitative mediator to provide legal evaluations in the middle of the mediation).} Parties in mediation can opt for pre-opening caucuses, no caucuses, all caucuses, or particular ground rules. Additionally, parties can agree that they prefer a certain substantive mediator style and are free to opt for a process guide (facilitative), a legal advisor (evaluative), a relationship manager (transformative), or a deconstructionist of overlapping stories (narrative).\footnote{See, e.g., John Winslade & Gerald Monk, Practicing Narrative Mediation: Loosening the Grip of Conflict (2008); Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation (1994); Michael Alberstein, The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations, 11 Cardozo J. Conflict Resol. 1 (2009) (examining how mediation interacts with social order and legal thought).} The law protects this freedom of choice in mediation, both by shielding mediation communications as confidential and by making it nearly impossible for parties to sue mediators, after the fact, for malpractice.\footnote{Michael Moffitt, Ten Ways To Get Sued: A Guide for Mediators, 8 Harv. Negot. L. Rev. 81, 83 (2003) (noting the “historical rarity of suits against mediators”).}

C. “Experts are waiting to help”

The development of the ADR field along with a professional class of ADR experts has created further brand distinctiveness for ADR.\footnote{Indeed, Susan Sibley argues that the growth of mediation was not “generated from below, by consumers demanding more or better law or citizens demands for alternatives to law,” but instead “arose as part of a professional struggle over appropriate space of law in contemporary society.” Susan S. Sibley, The Emperor’s New Clothes: Mediation Mythology and Markets, 2002 J. Disp. Resol. 171, 174-75 (2002).} The ABA and AALS both have sections on alternative dispute resolution, which draw professionals specializing in ADR to conferences that promote inter-ADR networking and address
issues that are of particular interest to those in ADR. The emergence of professional societies such as AAA, JAMS, and CPR, to name a few, has bolstered this sense of professional identity among ADR types and has created an accessible and vetted supply pool for clients who might be interested in seeking ADR specialists. The emergence of organizational ombuds offices and dispute systems design has signaled to the market that alternatives exist to pursuing traditional grievances or traditional litigation, and that these alternatives might be cheaper and better.47 Further deepening the ADR/non-ADR divide (and thus clarifying the ADR brand), law professors who teach and write in ADR can self-identify as ADR scholars working on ADR curriculum; and indeed the U.S. News & World Report, in ranking the top ten dispute resolution programs in law schools, thus provides external recognition that “dispute resolution” exists as a separate area of legal study.

It did not have to be this way. ADR could have developed as a supplementary skillbase for traditional doctrinal courses, more like legal writing than a separate professional discipline. Yet the market pressures and incentives pressing toward professionalization and specializations ended up defining an industry that, in large part, is not as fully developed as it might appear from the outside.

For example, the brand message that there are “ADR experts” has been so successful that students often believe that there are more ADR-specific professional opportunities than there really are. Students who ask about becoming professional negotiators, for example, are surprised to learn that, in fact, a lawyer is a professional negotiator. Similarly, when students ask about becoming mediators, they are often disappointed to learn that most successful professional mediators do not begin mediating right out of law school but instead must shine for years in “traditional” legal jobs to get the really plum mediation jobs. And when career services offices in law schools talk about “alternative” professions, they are


47 An ombuds is an employee of the organization situated in an “independent” office who manages complaints from a particular group, such as employees or consumers, and provides constructive feedback to the organization. See, e.g., Philip J. Harter, Ombuds: A Voice for the People, 11 No. 2 Disp. Resol. Mag. 5 (2005) (giving a general overview of the history, types, and roles of ombuds).
typically talking about public interest work, which can have an ADR focus but certainly does not have to (and often explicitly does not, considering that public interest lawyers are often seeking to vindicate particular legal and moral principles, not just create a more workable situation for the parties).

D. “The same you, only better”

The Oregon ADR Student Group consists of law students and graduate students in conflict resolution. At the first meeting of the group two years ago, one of the graduate students introduced herself this way: “For me, ADR is a way of life.” The statement hung in the air. Some of the students nodded and smiled. Others rolled their eyes. Others fidgeted nervously, like they were not sure whether they should be nodding and smiling or rolling their eyes.

From a brand perspective, it was a rather remarkable statement. Many brands aspire, after all, to become lifestyles. Lifestyle brands like Starbucks or Apple create a “brand experience” that goes beyond extolling the benefits of their products and creates resonant, evocative, subjective connotations around what choosing the brand means about the kind of person that the chooser is.

Whether ADR is a lifestyle brand depends in part on how one thinks about ADR. Is ADR more like a toolbelt that anyone can wear? Or is ADR more like a bicycle, something that is not only mechanical (and thus tool-like) but also generally associated with a broader set of priorities and lifestyle choices (eco-friendly, health-conscious, anti-establishment, organic, local, etc.)?

Within ADR, this is an ongoing discussion and debate. Yet even for people who believe that ADR is or should be more like a toolbelt than a bicycle, for ADR outsiders the ADR brand inevitably resonates with certain familiar values: peace, harmony, the validity of emotions, respect, relationships, and so on. As I have argued elsewhere, ADR is often positioned as the utopian alternative to dystopian law, the human-first response to a legal system that drags disputants through an expensive and time-consuming process before delivering suboptimal solutions that do not even address the core problems.48 ADR, on the other hand, “separates

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48 See Jennifer W. Reynolds, Games, Dystopia, and ADR, 27 Ohio St. J. on Disp. Resol. 477, 480-81 (2012) (“Part of our fascination with ADR, after all, comes from what might be thought of as a dystopian critique of the law, a critique that imagines law’s future as bad deals and unsatisfactory resolutions between parties who have little or no agency in the process and
people from the problem” and seeks solutions that are value-creating and responsive to not just substantive concerns but also demonstrate procedural justice and an awareness of the importance of relationship.

II. ADR’s Brand Problem

At first blush, the ADR brand sounds pretty good. In terms of skill sets, the brand speaks to new and improved methods for dispute resolution (and, in a sub-branding effort, for deal making as well)\(^49\) that offer more party choice, more opportunities for creating value, and better working relationships during and after dispute. At its most concentrated and lifestyle-oriented, the ADR brand promises both peace and justice, through progressive and nonjudgmental approaches to complex challenges that embrace procedural and substantive pluralism. What attracts many people to ADR, after all, is a combination of dissatisfaction with traditional adversarial values and a desire for more enlightened, participatory processes.

One might think, therefore, that such a brand would improve resumes and research agendas. Consider the audiences for the brand, however. The law is famously conservative and stodgy. Lawyers are known for being risk averse and worshipful of tradition. Clients for legal services are often in personal and/or professional crisis. With these particular audiences in mind, it is easy to imagine how the four messages of the ADR brand might not sound entirely appealing.

“New and improved,” for example, may sound like code for “can’t do” or “doesn’t like” bread-and-butter legal work. Multiple possible approaches for dispute resolution may equal unappealing learning curve and transaction costs for those unfamiliar with such approaches; and although the existence of experts waiting to help could ameliorate these costs, it could also portend greater competition in the marketplace for clients. Further, the idea that ADR offers a more enlightened, harmonious approach with superior val-

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\(^49\) See, e.g., Robert C. Mnookin et al., Beyond Winning: Negotiating To Create Value in Deals and Disputes (2000) (reworking interest-based negotiation precepts in modern legal dispute resolution and deal making).
ues is likely to be off-putting in a culture that has traditionally championed the noble ideals of justice through the truth-finding adversarial system. The oft-repeated critique that ADR prefers “peace over justice” is an example of the reaction that many traditional legal professionals have when confronted with the non-adversarial, non-judgmental, win-win tenets of modern alternative practice.50

Likewise, for those seeking clients who do not have much experience with the law, or whose only knowledge of the law comes from television courtroom dramas, “new and improved” probably does not sound as comforting as “tried and true.” Even experienced clients may not be able to choose sensibly between myriad options, much less be able to devise custom approaches, even with the assistance of experts. And although Americans may complain about greedy lawyers and our overly litigious culture, the fact remains that when Americans find themselves in court they often want the real or perceived due process benefits and safeguards of traditional litigation and lawyers.51

Further complicating the ADR brand identity for people who seek credibility as lawyers and legal academics is that two of the biggest fans of ADR are business and government. Students in ADR classes are always shocked to learn that the highly relational, value-creating methodology that they have been studying may be, in the eyes of some, nothing more than a tool for corporate and state interests. Business organizations, whether good or evil, generally prefer to avoid the courts; accordingly, many businesses have embraced mediation, consumer arbitration, internal dispute systems design, and ombudsmen. Governmental entities, whether well-intentioned or captured, generally seek to simplify complex decisionmaking and dispute resolution. The support of business and government complicates the ADR brand because such support suggests on the one hand that ADR-proficient lawyers might be more attractive to business and government employers; on the other, that ADR proficiency may be seen as antithetical to the

50 See, e.g., Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities, 38 S. Tex. L. Rev. 407, 448 (1997) (examining the “tension between dispute resolution goals (some consider it peace or harmony) and justice goals”) (citation omitted).

51 See, e.g., Richard C. Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949, 988 (2000) (“Institutional support [for ADR] is visibly high, but voluntary usage remains low and is marked both by a pervasive sense of silent skepticism by ADR outsiders and by mounting disappointment and disillusionment from ADR insiders.”).
practice and values of law itself, insofar as ADR can be used to thwart justice, undermine corporate regulation, retard social progress, and enervate the growth of public law.52

For those looking for jobs or approval in the traditional legal world, ADR undeniably has a brand problem. On the one hand, the brand speaks to skills and perspectives that equip lawyers to deal with some of the thorniest legal and public challenges that we have. On the other, the success of the ADR brand—which, one might argue, situates ADR as law’s opposite and accordingly attributes anti-law characteristics to ADR types, such as being non-competitive, non-assertive, passive—may prejudice those with decisionmaking power in legal settings against ADR.

But is this take on the ADR brand problem real or imagined? Part of what makes an analysis like this one so difficult is that it deals in speculations, perceptions, fears, aggregates, broad generalizations, and the unavoidably overdetermined and context-specific nature of why people do or do not get interviews, tenure, or as much professional respect as they deserve. With that in mind, I offer the following two recent data points that may help provide a more concrete picture of how ADR’s brand problem complicates the life of legal academics and newly graduated lawyers.

A. Seeking tenure

At the April 2012 ABA Dispute Resolution Section annual meeting, the plenary opening session for the Legal Educators’ Colloquium was “Approaches to Scholarship in ADR.”53 The session was intended to allow successfully tenured senior ADR professors to give advice to pre-tenure junior ADR professors.

In front of a packed audience, the panelists agreed that although ADR scholars certainly should research and write in ADR, it is nevertheless a poor tenure strategy not to connect ADR scholarship to a legal context, especially considering that, as one panelist put it, “you are in a law school.” The panelists advised having “legal hooks” in ADR scholarship that would make the scholarship


53 For more details on this session, see AMERICAN BAR ASSOCIATION, Legal Educators’ Colloquium, http://www2.americanbar.org/calendar/14th-annual-section-of-dispute-resolution-spring-conference/Pages/LegalEducators’Colloquium.aspx (last visited Sept. 21, 2012).
more credible and recognizable to non-ADR law professors. As one panelist wrote in the Scholarship Tips sheet, distributed afterward to all junior ADR professors and audience members:

DO write on issues that will appeal to broader audiences as well as to ADR types.

DO be conscious of what your school values, as well as what others schools value if you are hoping to be mobile.54

Indeed, all the scholars on the panel had significant non-ADR academic credentials; in addition to teaching ADR and identifying as ADR professors, the panelists were all well-regarded experts and published authors in the areas of civil procedure, arbitration, contracts, legal profession, and international law. The clear takeaway from the session for junior ADR scholars was, for strategy reasons, to model themselves after junior non-ADR scholars during the pre-tenure period, so as not to raise eyebrows on tenure committees. As one audience member put it at the end of the session: “Just suck it up and do what you have to do to get tenure. After that, you can do whatever the hell you want.”

Recasting this panel discussion in light of the ADR brand, the panelists and audience appeared generally to agree that ADR indeed has a brand problem in the academy—namely, that ADR scholars do not have the same credibility, rightly or wrongly, as non-ADR scholars. Therefore, ADR scholars must prove that they are entitled to be part of a law faculty by showing that they can do “legal scholarship,” at least until tenure decisions are made.

The costs of dealing with this brand problem are not insignificant. First, if it is true that the only way for ADR scholars to receive professional recognition in the academy is to admit that ADR scholarship needs to be hooked into non-ADR scholarship, then this necessarily denigrates the status of ADR scholarship. Moreover, such an approach may confuse junior academics (and law students, for that matter) who might not realize that indeed there is a difference between ADR scholarship and non-ADR scholarship; is it not true, for example, that dispute resolution is a central concern of both areas and therefore scholarship relevant to that concern would be necessarily relevant to both areas as well? Finally, such a strategy has a disparate impact on the ADR scholar because ADR research is frequently interdisciplinary and not driven by the steady stream of cases from the Supreme Court. For junior ADR scholars, this brand problem translates not only to

54 Tips sheet on file with author.
more hoops to jump through in the workplace but perhaps a shoehorning of research agendas and interests into scholarly formats that are not necessarily helpful or intellectually warranted.

B. Seeking non-academic jobs

In September 2012, I conducted an informal survey of some of my former co-editors of the *Harvard Law Review*, all of whom are now five years out of law school and many of whom now work in traditional legal fields (among my respondents: biglaw firms, non-biglaw firms, government, education, and public defender). I also sent the survey to a friend of mine who is now a partner at a boutique litigation firm. All told, I sent out about forty survey requests and received sixteen responses.

This survey is not a “survey,” at least in the empirical sense of the word. It does not provide a representative view of legal employers in the United States. It was written quickly and without benefit of review from empiricists, and it is distorted by the fact that my respondents not only know me personally; they know that I teach ADR. The survey was not meant as an empirical tool, however, but more as a fast way to gather some anecdotal information. The respondents are widely regarded as some of the most elite and promising young legal professionals in the country, so on balance it seems worthwhile to get a quick hit from them on the perceived value of ADR credentials on legal resumes.55

The survey questions focused on the intersection between class rank, an ADR certificate, and the presence or absence of other more traditional legal distinctions (moot court, law journal, etc.). In general, the respondents thought that resumes with only ADR credentials on them—regardless of class rank—were problematic. Some respondents identified ADR as the problem:

ADR is a very specific interest that doesn’t translate well to most right-out-of-law-school jobs (clerkship, private sector, DOJ).

[I w]ould show a more traditional legal background.

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55 To be clear, I am not interested in doing an “empirical” survey on ADR attitudes. I do not believe such a survey would be useful to anyone. Do we want to know that our legal culture supports ADR? If that’s so, then we will see that in our hiring/tenure statistics. Do we want to know that our legal culture devalues ADR? First, we already know that; second, having confirmation of that would be self-perpetuating and would needlessly disempower ADR-identified students, lawyers, and academics. I am open to argument on this point, however.
Activities like moot court and law review do more to develop the kinds of skills that are useful on a day-to-day basis, so they are (probably) better indicators of the type of passion and ability we look for in candidates.

Most respondents, however, stated that the problem is not ADR per se but rather ADR without more. So long as the resume contains some traditional legal activities, most respondents were indifferent to positive on the ADR credential. Some representative comments:

The ADR Certificate doesn’t hurt, but without more context (e.g. how much time did this certificate take?) any positive impact would be offset by wondering why they weren’t involved with other activities. I would expect students at this level to generally have other activities (e.g. journals) — so if this is the only thing listed on the resume, I think they will still fall behind similarly-situated students with moot court or journals on their resume.

If the only law school activity listed was ADR, then my reaction would be negative because there are no honors, no law review, etc; if the student had those other things, my reaction to the ADR likely would be positive or indifferent. In other words, I don’t think the interest in ADR during law school can possibly hurt the student; the issue is just whether that is the only honor listed.

One of the attributes I look for in candidates is that they are well-rounded. I would be impressed by someone who was successful in both competitive and collaborative environments.

The survey also asked whether there are particular legal sectors in which “hiding” ADR would be a good strategy for a young professional. Although most of the respondents skipped this question, the majority of those who answered advised against hiding, even if the applicant had no other traditional law school activities or honors. As one respondent put it:

I wouldn’t advise a student to downplay it, regardless of the prospective employer. I don’t think the interest in ADR during law school will hurt the student with any of the employers.56

Interestingly, none of those who advised against hiding ADR argued that ADR credentials actually provide a competitive advantage in the job hunt. Instead, they took a pragmatic “well, something’s better than nothing” position, reasoning that no activities

56 This is my favorite comment from the survey because it makes ADR sound like a youthful indiscretion that maybe one shouldn’t have done but hey, we all do things like this.
would look worse than just ADR activities. This may have been the result of survey design, since the term “hiding” may have started the respondents off in a negative frame. Of course, considering that these are my friends and they know I teach ADR, the lukewarm-ness of the responses may suggest that their actual feeling was more negative than reported. All that said, one tentative takeaway may be that although ADR may not yet be a killer entry on a legal resume, it may also not be a resume killer.

Which brings us back to the original question: what brand message does a new graduate send when she includes ADR on her resume?

III. ADR Brand Management

This Article started with a binary choice: whether or not to hide ADR when looking for a legal job or seeking tenure. Again, and importantly, we are setting aside the question of whether ADR is actually valuable. Instead we are focusing on whether and how to highlight ADR when looking for jobs or developing research agendas.

Given the discussion above, it may not be that the issue is hiding so much as it is framing and positioning. There is no need to get rid of the positive attributes of the ADR brand if there is a way to keep those upsides while minimizing the downsides of being associated with ADR. With that in mind, consider the following options.

A. Consider changing the label.

The word “alternative” may have been useful in the early days of the ADR movement, because it presented the distinction between ADR and litigation as a choice for disputants. Today, the word “alternative” is not as helpful, for at least two reasons. One, “alternative” suggests “second best” or “Plan B,” implying that the first-best solution of litigation is for some reason unavailable. This belittles ADR and, by association, makes those who focus on ADR seem like they are unable to compete in the non-ADR world. Two, “alternative” sounds like a lawyer chooses between doing only ADR or only litigation, which is not true in today’s legal landscape.
Traditional litigators routinely use ADR not as a substitute for litigation but as part of the overall representation. With this in mind, several groups have tried out different acronyms. The ABA Dispute Resolution Section dropped the “A” and now just goes with “DR.” Oregon Law, among others, kept the “A” but changed it from “alternative” to “appropriate,” to convey the broad array of tools that lawyers use, from litigation to non-litigation approaches. To draw the distinction more clearly, Sean Nolan of Vermont Law used “NLDR,” or “non-litigation dispute resolution,” in conducting a survey of law schools and ADR curriculum. Finally, specialty ADR areas typically append a descriptive first initial onto DR: for example, “ODR” (online dispute resolution) or “EDR” (environmental dispute resolution, sometimes called “ECR” for environmental conflict resolution).

There are downsides to some of these approaches. Although DR has been one of the more successful and widely adopted name changes in the ADR community, it still sounds like “ADR” and therefore might not fully differentiate itself from any negative connotations of the ADR brand. This may also cause problems for ODR and EDR, which create brand clarity by using the familiar “DR” suffix but also risk being associated with some of the negative brand attributes. In addition, both DR and especially NLDR require explanation, and although both might apply in litigation contexts both sound like they do not. “Appropriate” dispute resolution attempts to encompass both alternative and traditional practices (such as trial practice, advocacy, etc.), but the word “appropriate” can sound a little like “good and proper,” which is not really the sense of appropriate (that is, “fitting”) that “appropriate dispute resolution” seeks to convey. Additionally, “appropriate dispute resolution” hews pretty closely to “alternative dispute resolution” and does not change the acronym. Like “DR,” it may not make an appreciable strategic difference in terms of redefining or reclaiming the ADR brand.

Nancy Welsh has identified another renaming possibility for ADR that eliminates the need for acronyms altogether: “procedural law.” Since the major areas of ADR (mediation, arbitration, negotiation) are taught in law school as part of a lawyer’s toolset when engaging in procedure, she advises including them in the

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58 Professor Welsh made this comment at the roundtable “The ADR Brand” at the International Law & Society Annual Meeting, June 8, 2012.
broad umbrella of procedural law, which also includes civil procedure, bankruptcy law, and administrative law, among others. One of the benefits of this approach is not only that it situates ADR within a recognized legal context, ADR is in fact already within that context, so it is more accurate. Additionally, for those who suspect that ADR is code for “not good at / interested in regular law,” removing the ADR label and replacing it with a more law-like label may alleviate that concern. Of course, one downside is that any brand benefits arising from ADR’s distinctiveness from other areas of the law may be diminished by this name change.

B. Mix ADR with non-ADR.

As the panelists and respondents noted above, possible strategic benefits (or, alternatively, put another way strategic deflection of downsides) may accrue from showing a mix of ADR and non-ADR activities and strengths, with non-ADR first whenever possible.

New law graduates with ADR focuses who want to follow this mixing strategy should consider three things: the cover letter, the resume, and the interview. First, the cover letter should make the “competitive and collaborative” point by including something along the lines of: “I have thrived in competitive, high-pressure environments and also feel comfortable in more collaborative settings. For example, during law school, my favorite activities were [examples of competitive and collaborative work].” Second, the resume should highlight traditional legal honors and activities before moving to ADR honors and activities. (For those with only ADR-related activities, it may be that just replacing “ADR” with “procedural law” will answer any concerns that the ADR person does not have enough law on her resume or in her scholarship.) Third, at the interview, the interviewee should default to showing interest in traditional legal subjects and values before offering the additional perspective the interviewee has gained by alternative methods and theories.

Similarly, junior ADR academics who want to follow a mixing strategy need to think about three things: tenure committee, research agendas, and articles. First, as the ABA panelists pointed out, educating one’s tenure committee on what ADR scholarship is

\[\text{Here I am completely reliant on the advice of senior ADR professionals, because I am still pre-tenure. Additionally, I am writing from a public law school not ranked in the top fifty (al-}\]
important because without that knowledge they may not understand the value of what one does. Among other things, this means sharing research and writing with non-ADR faculty. Second, the development and/or recounting of one’s research agenda should tie to the law in a meaningful way, beyond just “dispute resolution” or “organizing society.” Court-annexed ADR processes, judicial decisionmaking, legal profession, and international contexts are four common hooks to the law that ADR scholars have made. Third, separate from the research agenda, junior ADR scholars should consider writing a “traditional law review article,” to demonstrate that they can participate in that kind of exchange, especially if their other scholarship is not obviously hooked into legal themes.

Selling out? Playing the game? Maybe so. To the extent that mixing is a strategic response to perceived brand challenges, it is important to bear in mind that such a strategy is highly context bound, in terms of the present moment and the workplaces involved. It may be that the particular legal or academic position in question has an ADR focus. It may be that ADR momentum is such that ADR becomes, at some point, as credible as non-ADR legal work and scholarship. It may also be that the distinction between ADR and non-ADR begins to dissolve, leaving us with a more expansive and integrative view of what procedural law looks like or what legal scholarship can be. Part of what this future looks like, of course, will depend on the choices that ADR-identified types make once they get into the workplace.

But beyond strategic considerations vis-à-vis getting a job and getting tenure, there are good substantive reasons for mixing ADR and non-ADR. First, separating the two may just perpetuate the illusion that the two areas are distinct and that there is a meaningful way one could be “ADR” without engaging with the law at all. For law students and law professors, this cannot be true. Second, to the extent that one is motivated to reform the law and/or make the world a better place using ADR, these goals are not served by cultivating a tiny community of ADR purists.

though our dispute resolution program is ranked), so there may be different ADR strategies for different academics.
C. Recognize that there are limits to how well you can manage your own image.

Just as a subject’s likeness in a mirror gets more indistinct as the subject moves further away, so too is one’s professional image less clear with distance and anonymity. It may be that the fine nuance of renaming an “ADR certificate” a “DR certificate” will make a positive difference in the sorting of applications; it may be that an article with the title “Procedural Law and Decisionmaking” will create a better first impression than “ADR and Decisionmaking.” It may also be, of course, that none of these changes will make any difference at all.

On the one hand, this is a little depressing, considering this Article’s ambition to provide clarity on an issue that many new law graduates and junior academics understandably find worrisome.

On the other hand, ADR’s brand uncertainty may create more space for institutional change, more freedom to define the self, and more opportunity for counterstories in the dominant legal discourse.60 This is more than just flowery ADR-lifestyle rhetoric. Regardless of the stodginess of legal hierarchy and the considerable pressures of finding and keeping a job, the problems that face our world today will not be solved by doing things the way they have always been done. For those trained in ADR theory and tools, part of the challenge is bringing these proficiencies to traditional practice with confidence and without internalizing negative change-resistant stereotypes.

IV. Conclusion

In describing the “new movement” of modern tattoo culture, cultural anthropologist Margo DeMello argues that the increased social discourse around tattoos—in magazines, newspapers, trade shows, television, movies, sports, and other media—has transformed traditional underground tattoo subcultures into a highly differentiated and complex tattoo community with a considerable amount of visibility and social capital:

60 See Hilde Lindemann Nelson, Damaged Identities, Narrative Repair 19 (2001) (describing a “counterstory” as, among other things, a device that a person can use to “repudiate an incorrect understanding of who she is, and [replace] this with a more accurate self-understanding”).
The tattoo is a powerful symbol of affiliation and identity. In earlier writing, I saw the primary source of tattoo power in terms of the literal ability to “write oneself” and subsequently be “read” by others. Today, I realize that tattoos are powerful in another way: as a site of discourse. People talk about tattoos. I contend that the increase in writing and speaking about tattooing, and the nature of that discourse, actually produces contemporary tattooing and the modern tattoo community.61

Moreover, the social and aesthetic ascendancy of the modern tattoo community is perhaps not just a product of how we talk about tattoos, but that we talk about them at all.

So it is with the modern ADR community, both at the entry level and beyond. What the ADR brand/tattoo “means” at any given moment comes, in large part, from the nature of discourse around ADR among the various audiences who might be interested in this discourse (employers, senior faculty, clients, and so on). And the nature of that discourse comes (or should come), in large part, from how those interested in ADR describe what the ADR brand is. And this description, as discussed above, may be more strategic and acceptable if couched in, or paired with, or translated through the prism of familiar, traditional legal concepts and values.

For ADR types, the tattoo analogy falters a little with talk of strategic hiding. Tattoos are permanent and though can be hidden are still potentially visible forever, but an ADR affiliation is not; and once a person starts hiding ADR tendencies, it is easy to fall into legal mainstream of adversarial values, competitive practice, and the denigration of possible value-creating or participatory options.

To that end, the final advice of this Article is to develop a tattoo narrative, an understanding and explanation of one’s interest in ADR.62 People are drawn to ADR for different reasons and to different degrees, and being able to explain one’s own place along that continuum is not only an invaluable guide for crafting

62 According to the New York Times, modern tattoo etiquette dictates that if one shows one’s tattoos, it is appropriate for strangers to ask about them. Good manners, therefore, require that the tattooed person must have a good story to go along with the tattoo. “[I]f the story behind [one’s tattoo] begins with ‘My sisters and I got really drunk at a bachelorette party,’ invent a better story.” Neil Genzlinger, Please Don’t Swat the Bug Tattoo, N.Y. TIMES, July 15, 2011, available at http://www.nytimes.com/2011/07/17/nyregion/tattoo-etiquette-in-new-york.html?_r=1&scp=1&sq=please%20don%27t%20swat%20the%20bug%20tattoo&st=cse.
job materials and research agendas, it is an important part of developing self-knowledge and professional preferences. Moreover, understanding and eventually owning one’s own “ADR tattoo” will not only change legal culture for the better (though the change may be slow) but will help ADR-identified lawyers resist the hierarchy and inertia of legal process and priorities.

In other words: whether you hide it or show it, own it.