

Kluwer Mediation Blog

Mind the Gap – the dangers of losing track of the narrative.

Rosemary Howell (University of New South Wales) · Monday, April 22nd, 2024



I've just been in London presenting at the terrific UIA Mediation Forum and my daily train travels constantly exposed me to this image. As the conference themes developed, the image took on an even more significant meaning for me.

Let me explain.

An early speaker, Kimberlee Kovach (Founding Officer and Past Chair of the American Bar Association DR Section) took us on a journey tracing how mediation became part of the successful dispute resolution process in the United States.

She noted the significance of the 1976 Pound Conference – a belated apology by the profession and the judiciary to Dean Roscoe Pound, whose paper *'The Causes of Popular Dissatisfaction with the Administration of Justice'* presented at the 1906 American Bar Association Conference provoked extraordinary disapproval.

The Pound Conference, held at the same venue as Pound's original address, is best remembered for the [paper](#) presented by Professor Frank E.A. Sander – commonly referred to as introducing the concept of the *'multi-door courthouse'*.

However, as Kovach pointed out in her address, Sander's paper did not use this title at all and instead named his concept the *'comprehensive justice center'*. The 2012 [Dispute Resolution Magazine](#) in an article by Earl Johnson called *'The Pound Conference Remembered'* makes it clear that even before the Pound Conference was over, Sander's concept had been given a new title. Dean Dorothy Nelson, who chaired a breakout group at the conference, is quoted as saying the participants in her group *'sort of liked Frank Sander's many-doored courthouse...'*

Johnson's article notes that following the conference a magazine editor used the new title for an article about Sander's speech and from then on the title became umbilically attached to Sander's work.

So what?

There are 2 elements of this hijack which are worth further exploration.

1. Narrative hijack is usually quick and very hard to come back from

This is a terrific and significant example of how quickly a narrative, over which we have laboured, can be hijacked and become something that does not represent our work. This event happened quickly despite the absence of social media and with a much more limited system for transmitting ideas.

With the benefit of hindsight it appears that Sander did not identify or see the danger in the gap between his ideas and how they came to be characterised. He did not consider this as something he might have been wise to call out. The record shows that he was happy to adopt the outcome. In an [interview](#) at Harvard in 2008 Sander said:

“ After this Pound talk in the summer of 1976, one of the ABA [American Bar Association] publications had an article about this talk. On the cover, they had a whole bunch of doors, and they called it the multi-door courthouse. I had given it a much more academic name, the “comprehensive justice center,” but so often the label you give an idea depends a lot on the dissemination and the popularity of the idea. So, I am indebted to the ABA for having this catchy name—multi-door courthouse.”

2. What are the consequences of this hijack?

While things appear to have ended well – in so far as '**multi-door courthouse**' is a deeply embedded concept and well-recognised phrase for many of us – the importance of Sander's message has been obscured.

For the ongoing discussion Sander hoped to provoke, things have not ended so well and the focus on '**courthouse**' has been a serious distraction.

He talked about '*a flexible and diverse panoply of dispute resolution processes*'. He talked about a structure that was '*not simply a court house but a Dispute Resolution Centre where a screening clerk directs cases to the most appropriate process for the type of case*'.

Rather than a court-centered process, Sander explained his goal was to '*shift preoccupation with the judicial process*' .

So one of the consequences of the distraction which the hijack represents is that we have not made great advances in the triage process that Sander was foreshadowing. We still have courts handling much of the diversionary process and we are still fighting about '**ripeness**' as a test for whether diversion is appropriate.

What can we do?

While current commentaries recognise (as a footnote) that the ‘multi-door courthouse’ was not Sander’s phrase, I think we need to do more. We need to acknowledge that the change of narrative has dislodged us from the platform of Sander’s remarkable ideas to become firmly lodged on the track of distraction. We have failed to mind the gap. British Rail would not be pleased!

We need to return to Sander’s narrative of choosing the right process for the right reason (and his paper reviewed these reasons very usefully). This means we need to:

- Keep talking about triage – Sander’s notion of *‘fitting the forum to the fuss’* – and keep exploring models from other environments from which we can learn.
- Follow new developments in AI which might support this.

For example, my Australian colleague, Danielle Hutchinson, has recently patented a [diagnostic tool](#) for dispute resolution and complaints handling.

Part of the basis of the patent is to assist third-party neutral selection. The invention also *‘incorporates AI to remove human bias, continuously learn and ultimately refine the system’s ability to predict human behaviour, including the likelihood of resolution depending on the dispute resolution process used.’*

- Broaden our thinking about early intervention. Lawyers are accustomed to thinking in terms of causes of action and legal remedies. However, there are very many disputes where it will be difficult to identify a cause of action or a good outcome which the law is empowered to impose. Lawyers have a role in supporting their clients to identify non-judicial processes which can provide opportunities for a good outcome.
- Keep this discussion alive. Conferences like the UIA Mediation Forum are a great opportunity for us to discuss where we have come from as a way to inform our exploration of where we want to go and how we want our rich field to keep developing.

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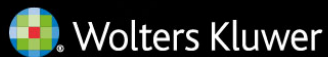
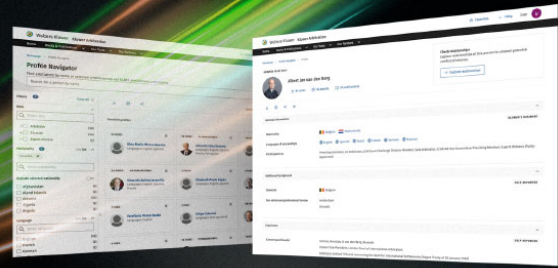
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