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# *Special Section: Frank Sander and His Legacy as an ADR Pioneer*

## **Before the Big Bang: The Making of an ADR Pioneer**

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### **ADR's Big Bang Moment**

Frank Sander's 1976 speech at the Pound Conference on "The Causes of Popular Dissatisfaction with the Administration of Justice" (Sander 1976) is widely seen, particularly within the legal academy, as the "big bang" moment in the history of alternative dispute resolution (ADR).

At the Pound Conference, Frank articulated his observation that traditional litigation systems process only certain kinds of disputes effectively. He suggested that the remaining types of disputes might better be addressed through other mechanisms. Frank wondered aloud whether the courts of the future (in particular, courts around the year 2000) might help to screen incoming complaints, sorting them according to criteria aimed at matching the case with the most appropriate form of resolution. Within Frank's vision, some disputes would go to trial. Others would go to arbitration, to mediation, to fact-finding, or to some other mechanism well tailored for the particulars of the dispute in question. The cover of a magazine

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reporting on Frank's speech at the Pound Conference showed a courthouse with a series of separately labeled doors, and thus the term "multidoor courthouse" was born.

From this idea, that disputes might be "processed" in different ways, the story of modern ADR explodes forward, with burgeoning activity in courthouses, in scholarship, in law school curricula, in legislation, and in practice. As the many articles in this issue suggest, Frank Sander has contributed to each of these post-Pound developments in significant — and often quiet — ways. Virtually no participant in the modern justice system is unaffected by the past three decades of developments in ADR. It is appropriate, therefore, that we spend time examining some of Frank's many contributions to the field over the past thirty years.

By starting the story with the Pound Conference, however, we risk missing what Frank Sander did *before* the Pound Conference. In this very brief essay, I offer a few observations about Frank and his work predating the ADR explosion in an effort to fill in some pieces of the historical picture of this pioneer in our field.<sup>1</sup>

## A Brief Biographical Sketch

Frank Ernest Arnold Sander was born in Stuttgart, Germany, in 1927. He left the country at the age of eleven, shortly after *Kristallnacht*<sup>2</sup> and the internment of his father. Separated from his family, he traveled with one other boy through the Netherlands to the south of England, where he went to school for two years before coming to the U.S. His family eventually reunited near Boston.

Frank had more than one area of interest in the years before his legal career. Although he studied mathematics at Harvard College, his passion was music. During an interlude in his studies, he played the flute and piccolo in the U.S. Army Band at West Point, and his love of classical music — particularly "anything composed before the twentieth century" — persists to this day.

Following World War II, Frank attended Harvard Law School. He then clerked for Justice Felix Frankfurter on the U.S. Supreme Court during the years when the Court rendered its famous *Brown v. Board of Education* opinion.

Frank joined the faculty of the Harvard Law School as an assistant professor of law in 1959. In the early years, taxation was Frank's primary teaching and research interest. Several years after Frank began teaching, then dean Erwin Griswold of Harvard Law School sought to increase the number of faculty members teaching in the area of "Persons," which was the predecessor to the modern course on family law. Frank agreed to add this to the package of courses he taught regularly. He gained tenure in 1962 and was promoted to the rank of full professor.<sup>3</sup>

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In 1965, Frank helped to create a summer program at Harvard aimed at encouraging promising black students to consider careers in law. In its second year, he became the program's director. The program was largely responsible for the enormous increase in Harvard's enrollment of African-American law students during the late 1960s. Frank later served as chair of the Council on Legal Educational Opportunity, which was an effort to expand the Harvard program to law schools across the country.

Frank's contributions at the Pound Conference are typically the focus of any biographical account of his life. Regarding the gap between his early years at Harvard Law School and the time when he delivered the now-famous address, two different stories have developed among those who know Frank and his work. Historical support exists for each one.

### **One Origin Myth: "It Came out of Nowhere"**

In 1975, as part of a sabbatical, Frank took his family to Sweden. He went as an accomplished scholar, having published textbooks on both taxation and on family law. While in Sweden, however, Frank was disconnected from his daily routine, and he was taken away from the research materials in which he would normally immerse himself. Frank described his time in Sweden as "time to think" (Sander 2006a) and to "rationalize the various things [he] was doing" (Sander 2006b).

Somehow, during his thinking time, Frank made a critical observation about American courts and about our civil justice system. In his view, looking from afar, courts appeared to handle tax disputes reasonably well, and labor disputes were routinely resolved through arbitration without enormous difficulty or waste. The same legal system, in Frank's assessment, however, handled family disputes far less effectively. In short, the traditional legal system was having different impacts on different kinds of disputes.

Like many profound observations, once articulated, Frank's now seems obvious. Apples fall to the earth. The shortest distance between two points is a straight line. And litigation handles some kinds of disputes better than others.

Frank "put some thoughts on paper" (Sander 2006a) (which he later called merely "some musings" [Sander 2006b]) describing his observations, and he sent them to several colleagues at Harvard Law School, seeking their thoughts. One of these colleagues was Robert Keeton. Keeton forwarded word of Frank's ideas to Leo Levin, a professor at the University of Pennsylvania Law School, who was coordinating with U.S. Supreme Court Chief Justice Warren Burger on the content of the upcoming Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.

Not long after Frank returned from Sweden, he received a telegram from Burger, inviting him to Washington, DC to discuss the ideas. With characteristic modesty, Frank described himself at the time as "totally

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unqualified to do it” (Sander 2006a), but he was persuaded to speak with Burger, and, eventually, to make a presentation at the Pound Conference.

The contribution for which Frank is probably best known — his speech at the Pound Conference — did not represent the culmination of decades of scholarly work or practice on alternative dispute resolution. Chief Justice Burger did not invite Frank to the conference as an expert in the field. Indeed, at the time, no one would have considered such a field to exist. Instead, Frank’s public contributions to ADR *began* with the speech at the Pound Conference.

Frank had an entirely successful career in two well-established areas of legal scholarship. Most scholars would have been content with only one. And virtually all would have confined themselves to two areas of focus. Frank embraced not just a third area, but a domain that was largely yet to be created.

According to this narrative, Frank’s initial contribution was almost impossible to predict — the product of an amazing individual taking advantage of a cascade of fortuitous events. In Frank’s words, it was a series of “coincidences,” and an example of “being in the right place at the right time and having enough chutzpah to think that [I] could pull it off” (Sander 2006b).

### **A Competing Origin Myth: “The Ingredients Were There All Along”**

According to another narrative, the various threads of Frank’s life were inevitably leading up to his involvement in the development of dispute resolution.

The substantive areas of law on which Frank focused match precisely with the need for alternative approaches to resolving disputes. Family law, in particular, has been among the practice areas in which ADR has been the most prominent. Furthermore, virtually all family disputes involve complex tax implications and opportunities for efficient out-of-court settlements, provided the parties recognize these opportunities. Frank even served occasionally as a labor arbitrator, bringing him in close contact with the one legal domain in which alternatives to litigation were already entrenched as the norm.

Frank’s early publications also demonstrate a dedication to interdisciplinary exploration, a perspective considered foundational to modern dispute resolution. For example, Frank’s 1966 book, *Cases and Materials on Family Law*, like virtually all other casebooks at the time, includes court cases and statutes (Foote, Levy, and Sander 1966). His book goes on, however, to include not only significant numbers of social science studies on family dynamics, but also sophisticated critiques of the statistical methodologies underlying the studies. Frank and his coauthors included Department of Labor studies alongside excerpts from Alfred Kinsey’s studies on

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human sexuality. Similarly, in Frank's 1970 textbook, *Readings in Federal Taxation*, he and his coauthor rely heavily on international and comparative studies (Sander and Westfall 1970). Frank's early writing demonstrates an interdisciplinary perspective that provides a glimpse of the way in which ADR would draw materials from across the humanities and social sciences, rather than be captured by one discipline or another.

Furthermore, Frank's early writing foreshadows the pedagogical experimentation one commonly finds in modern dispute resolution classes. His family law casebook includes extensive opportunities for problem-based exploration of the topic. The book also provides materials for students to engage in experiential learning, for example, by having them negotiate the terms of a separation agreement. Finally, his taxation book devotes an entire chapter to exploring the particular ethical issues posed by tax practices, including multiple hypothetical scenarios designed to illustrate the conceptual problems. Just as one commonly sees a variety of alternative approaches to instruction in ADR courses, many of Frank's pre-Pound publications encourage the same kind of experimentation.

Finally, Frank initiated his exploration of dispute resolution within a fertile context, with many others having already begun to pave the way for what would become the ADR explosion. For some time, "community justice centers" had been operating in various cities, bringing alternative approaches to resolving a category of disputes. These centers, themselves, were inspired by earlier work by the Community Relations Service at the Department of Justice, which had aimed to address racial conflict in the 1960s (Menkel-Meadow 2005). Furthermore, a few professors at other law schools had begun teaching courses on negotiation and dispute resolution.<sup>4</sup> In his own words, after he agreed to Burger's request to speak on the topic, Frank "went on a crash course," reading "everything [he] could lay [his] hands on" (Sander 2006a). He also consulted with colleagues, including Lon Fuller, a pioneer in some aspects of the jurisprudence of ADR. Frank could only go on a crash course, obviously, if materials already existed in some form. The slate was not blank. Frank's observations built on the work of dispute resolution pioneers spanning back decades.<sup>5</sup>

## **The Heart of a New Field**

Befitting Frank's ability to see beyond simple dichotomies, the appropriate conclusion is surely that *both* of these narratives are true or, at least, that each one holds some truth. If Frank had not spent years studying the tax system, labor law, and family law, he likely never would have been confronted with the stark discrepancies in the legal system's handling of each variety of dispute. Without his interdisciplinary penchant and experience, he would have been unlikely to spot the potential contributions many different disciplines offer to the question of how to resolve disputes

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effectively. And to be sure, he profited from the earlier works of many other scholars and practitioners who had contributed to the literature existing at that time.

Still, Frank's contribution was remarkable. He was certainly not the only law professor to have taught tax and family law. He certainly was not the only one to do interdisciplinary work. And he certainly was not the only one whose faculty appointment at a prestigious university gave him access to those in the best position to influence the public dialogue. Something clicked for Frank during that sabbatical, congealed in his conversations with colleagues at Harvard, and came out in its now-familiar form at the Pound Conference.

What happened before the Big Bang? Plenty — both for Frank and for the nascent field. To say that much predated the Pound Conference, however, does not suggest that Pound was somehow not a “big bang” moment. It was. Those of us who are progeny or beneficiaries of that event should understand what made it happen and what made it special. Frank Sander is at the heart of both.

## NOTES

1. Except as otherwise noted, the information in this essay is drawn from interviews and conversations I have had with Frank Sander over the past fifteen years, from Harvard's published biographical materials on Frank, from transcripts of Frank's comments on April 27, 2006, at the gathering of the International Academy of Mediators, and from the speaking notes of David Wilkins' tribute to Frank at Harvard Law School on May 15, 2006. Typical scholarship is characterized by a dispassionate treatment of the subject. This is admittedly no example of that, as Frank Sander has been among the most influential people in my professional life and I count him as a mentor, friend, and colleague.

2. *Kristallnacht*, German for “crystal night,” is the name commonly given for a massive pogrom carried out against Jews in Germany and Austria on the night of November 9, 1938.

3. Frank has been the Bussey Professor of Law at Harvard Law School since 1981. From 1987 until 2000, he also served as an associate dean.

4. For more on the evolution of instruction on negotiation and dispute resolution, see Matthews (1953), White (1967), and Menkel-Meadow (1983).

5. For a useful survey of the multidisciplinary predecessors to the development of ADR, see Menkel-Meadow (2005).

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