Alternative Dispute Resolution: Overview

by Michael K. Lewis, November 2020

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(a) The compulsory diversion of disputes.

(1) Federal Courts

In the United States there is widespread compulsory diversion of disputes to ADR mechanisms outside the formal judicial machinery. The first major impetus for using various forms of ADR in the federal court system came with the passage in 1990 of the Civil Justice Reform Act. That act required each of the 94 federal district (trial) courts to create plans to reduce cost and delay in civil litigation. The Act specifically identified ADR processes as valuable case management tools and placed the burden on each of the district courts to develop a program consistent with its culture. The programs take different forms in different courts, as each District court has created local rules that govern the manner in which their ADR program operates. The variety of processes adopted by the courts include:

- *court-annexed mediation,* where a neutral facilitates discussions between or among the parties to resolve the case
- *early neutral evaluation (ENE)*, where a subject matter expert evaluates the case for the parties in an effort to bring them to a resolution
- *court-annexed arbitration,* where a neutral hears the parties' arguments and issues a non-binding decision
- *summary jury or summary bench trial,* where the parties learns make summary arguments to a jury or judge, and the decision-maker issues an advisory decision
- *settlement week,* where a court establishes a week — setting aside courtroom space for parties who are ready for trial to use the space to mediate disputes with the aid of experienced mediators
- *special masters,* where a judge, pursuant to Federal Rule of Civil Procedure 53 appoints a respected lawyer, former judge, academic, or magistrate judge to mediate.

Congress followed the Civil Justice Reform Act by passing the Alternative Dispute Resolution Act of 1998. The ADRA requires every federal district court to create an ADR program that offers at least one form of ADR to parties in civil cases. The ADRA permits courts to require litigants to participate in ADR but limits that authority to mediation and ENE. In addition to process choices, the ADRA permits courts to decide such issues as the qualifications and compensation of ADR neutrals. Many district courts have established panels of mediators (generally lawyers) who mediate cases in their courts. Often those neutrals must meet certain experience and training requirements. Some programs provide training for volunteer mediators. Others do not but require the volunteers to obtain training elsewhere. Some courts require parties to compensate the neutrals. Other courts provide that ADR services are to be provided gratis.

Some courts use existing judicial resources, in the guise of Magistrate-Judges, to mediate cases in their courts. A very few have a small administrative staff that recruits, trains, and supervises panels of (primarily) volunteer mediators to whom cases are referred by the court. There is generally no government subsidy of these programs, except to the extent that a program has dedicated staff — a minority of the existing programs. Most programs provide mediation free of cost to the litigants regardless of their economic station. A few programs in the federal system permit mediations to charge a low hourly fee.

In these programs, an agreement reached through mediation generally is reduced to writing and treated legally as a contract. Thus, if one of the parties decides that it is dissatisfied with the agreement, post-signing, a court generally would not go behind the agreement to permit the parties to re-litigate the matter, but would instead, review the agreement as it would any other contract.[1]

In 1974, the Second Circuit Court of Appeal[2] was the only federal appellate court with a Settlement Conference program. By 2005, with the adoption of a mediation program in the Federal Circuit, all thirteen federal circuit courts of appeal had adopted mediation or settlement conference programs. The operative authority for the programs is Appellate Rule 33. It was amended in 1994, with the most salient changes being:

- permitting courts to require clients to attend mediation sessions with their attorneys;
- requiring attorneys to consult with clients to obtain settlement authority;
- authorizing settlement as a topic during Rule 33 conferences;
- permitting telephone conferences; and
- authorizing non-judges to preside over conferences.

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1 The Federal Judicial Center's website, www.fjc.gov, contains much useful information about the use of ADR in federal courts.

2 The information for this section was gathered from, Mediation and Conference Programs in the Federal Courts of Appeal: a sourcebook for judges and lawyers, Robert J. Niemic, Federal Judicial Center, 2006.

The thirteen programs differ in major respects. Most circuits employ attorneys who mediate the cases. In some circuits, senior federal judges or retired state judges serve as mediators for some of the program caseload. The only two circuits that use volunteer attorney mediators for some of their caseload are the District of Columbia and Federal Circuits. None of the programs mediate criminal cases.

(2) State Court Use of ADR

It is beyond the scope of this paper to describe completely the use of ADR in the 50 state court systems (plus state courts in the District of Columbia and Virgin Islands). The use of ADR in state court systems is widespread. There are many state court systems (Florida, Texas and California are examples) in which a combination of state legislation and court rules has created statewide ADR systems. There are other states, such as Arkansas, Alabama and the Virgin Islands, in which ADR has made very few, if any, inroads. The great expansion of the use of ADR in state court systems began in the early to mid-1980s. Texas and Florida both had extensive state-wide systems by 1990. Since then, there has been both retrenchment and expansion, but the general trend appears to be expansion.

As with the federal courts, state courts have shown a strong preference for mediation as the process of choice. Also, as with the federal courts, the providers in court systems tend to be mediators external to the court system — private mediators who volunteer in some systems, and who are on panels that are paid for their mediating in other systems.

State court appellate mediation programs also have seen substantial expansion in the past thirty years. The programs have been established through both legislation and court rule. Common characteristics are:

- the parties' participation is mandatory
- either the Court or the parties can initiate an ADR provers
- almost all of the programs have had a positive impact on the court
- the programs have produced significant numbers of settlements.[3]

(b) The voluntary or consensual diversion of disputes.

There are a number of vehicles through which parties can gain access to practitioners of ADR for the resolution of their disputes. This paper will list a few important examples. Some federal administrative agencies, such as the Equal Employment Opportunity Commission (EEOC) offer mediation to some of those who file discrimination complaints. The EEOC has staff who offer conciliation, and rosters of volunteer mediators in some field locations.

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3 *ADR Programs in the State Appellate Courts,* Frank G. Evans, ADR Handbook for Judges, ABA Section of Dispute Resolution, 2004

FERC, the Federal Energy Regulatory Commission, has mediators on staff who regularly mediate among stakeholders in energy-related matters. Two major electricity markets, PJM Interconnection and MISO, which, taken together manage the market for electricity in 28 states, the District of Columbia and Manitoba, Canada, each employ mediation and arbitration to resolve disputes between and among members of their respective organizations.

In implementing the Individuals with Disabilities Education Act (IDEA), many states created mediation fora in which advocates and school personnel could resolve issues related to the appropriateness of education plans for students with disabilities. The Act contained two principles that made the use of mediation particularly useful: that parents (and their advocates) had a right to participate in the development of an education plan for their child, and the principle that every child deserved an individual education plan tailored to address her or his particular set of disabilities.

Many states in which agriculture is a major portion of the economy have created farmer-lender mediation programs to help resolve disputes over farm credit.

Many states have a network of community mediation centers (CMC) that offer low or no-cost mediation to individuals in their locales. There may be as many as 300 CMCs spread across the US. Some states, such as New York, provide funding to centers through the diversion of court filing fees. Other CMCs are forced to rely heavily on contributions from users and the general public. A typical CMC would have a relatively small staff, and a larger roster of volunteer mediators. The disputes brought to the CMCs are largely interpersonal but might involve anything from neighbors disputing a boundary line to divorce.

Non-profit organizations such as the American Arbitration Association (AAA) and The International Institute for Conflict Prevention and Resolution (CPR) maintain rosters of neutrals available for use by the public. CPR, an organization that brings together corporate general counsel and the law firms providing legal services to them, created two policy statements for its members in 1982. One policy statement was designed to be adopted by corporations, and the second by law firms. The Corporate Policy Statement read in part:

In the event of a business dispute between our company and another company , which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation.

The policy statement for law firms contained similar thoughts, but also obligated the firm adopting the pledge to provide sufficient training in ADR for firm lawyers so that they could advise their clients on its use in a dispute. CPR now maintains a roster of neutrals, who, for a fee will conduct mediations or arbitrations.

Perhaps the largest for-profit provider of neutrals in the United States is JAMS, Inc. JAMS has offices in 28 locations, primarily in the US, but also in Canada and the United Kingdom. There are approximately 300 full-time, professional neutrals on the JAMS

panel. They offer a range of dispute resolution services, focused primarily on mediation and arbitration.

(c) Policy drivers behind the development of ADR

There are many reasons why ADR may make sense. Among the most oft-cited reasons are:

- speed and efficiency in resolving a case
- preserving relationships among the disputants
- preserving scarce court resources by moving to ADR those cases that can be resolved without judicial intervention, thus helping to eliminate court backlogs
- providing a forum for those of limited economic means with a way to resolve their disputes without having to rely on (expensive and scarce) lawyers and judges.

Much of the impetus for the development of ADR programs in US courts came from a speech given by then Harvard Law School Professor Frank Sander at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. That speech spurred US Attorney General Griffin Bell to establish an office in the US Department of Justice Office for Improvements in the Administration of Justice, and prompted the funding of the first Neighborhood Justice Centers in the US. There was much focus at the 1976 Pound Conference on issues of cost, delay and the general inaccessibility of adjudication. There was at the same time, however, a focus on whether adjudication was the best way of resolving all disputes for all parties. The tension between efficiency and the quality of outcomes for the parties involved remains a live topic.

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