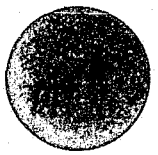
Department of Justice



REMARKS

OF

THE HONORABLE ARNOLD I. BURNS
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

IMPROVING DISPUTE RESOLUTION: OPTIONS FOR THE FEDERAL GOVERNMENT

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I am glad to be here, and I am glad that the Administrative Conference has decided to give additional attention and focus to the subject of Alternative Dispute Resolution.

This is a subject in which I have been very interested for some time, and one that I support, as I will make clear. But before saying anything further, I think I should come clean and put my personal bias on the table for all to see. My courtroom boxing gloves are never far from my desk. That is due to both my training and my experience.

Having said that, I can nonetheless also state: Ich bin ein ADR proponent. What I like about ADR is that unlike other proposed reforms it does not seek to alter the structure of our legal institutions or the norms by which disputes are resolved.

As you would expect from an old-fashioned litigator, I do not view ADR as a full substitute for the common-law, adversarial civil justice system. Nor do I regard our adversarial system as anything less than the best system ever devised for arriving at the truth in resolving disputes. But at the same time, from my own experience as a practicing lawyer in the private sector for three decades and now in the Justice Department for a year and a half, I have arrived at the same conclusion as have many others in the legal profession: our courts, overburdened by an overly litigious society -- undoubtedly the most litigious society in the history of the world -- needs a safety valve. Furthermore, in our adversarial legal culture we have become too fastidious about our legal rights as ends in themselves -- too determined to

insure that no injury however trivial in the overall scheme of things goes unredressed regardless of fuss or muss. We need to recover the ability to settle for adequate and quick but perhaps less-than-perfect justice -- rough justice -- in all but the truly important and irreconcilable cases.

I would like to address the reasons for this in a general way, while leaving many of the specifics to my Justice Department colleagues Assistant Attorneys General Richard Willard and Hank Habicht, whose bailiwicks cover much of the civil litigation that our department, as the "nation's law firm," engages in.

Fortunately, many superior techniques of ADR exist, and have existed for a long time. ADR is not a new idea. It is receiving a new wave of attention just now, but it is actually as old as disputes themselves.

The Puritans, the Dutch, and the Quakers who settled large portions of what are now the northeastern states brought with them a rich tradition of arbitration, mediation, and conciliation. George Washington mediated a commerce dispute between Virginia and Maryland in 1785. To avoid getting involved with our civil secular courts, some immigrant groups had community or religious courts of their own.

Abraham Lincoln's career in private practice abounded in what we would now call ADR. Once a man came to him determined to sue another man for $2.50 that the other man owed him. He would not be dissuaded. So Lincoln demanded a ten-dollar retainer. He gave half of it to the man who owed the $2.50, who then repaid

his debt to the man who wanted to bring suit. Thus, Lincoln was five bucks to the good; the debtor was $2.50 to the good, plus his debt was repaid; and the creditor was satisfied that justice had been done, even though he was $7.50 lighter.

In the 1960s and 70s the federal government began using forms of ADR to resolve disputes arising under the various civil rights acts. The Department has been actively involved in these efforts.

The Department of Justice has repeatedly endorsed the use of ADR methods as a technique for reducing the time and money spent in litigating cases in federal court. The Report of the Attorney General's Tort Policy Working Group, issued in February 1986, "strongly support[ed]" ADR and urged organized bars, legislatures and jurists to be "more receptive to alternative dispute resolution proposals." The Department's United States Attorney's Manual echoes this view, stating that "the United States favors the use of alternative dispute resolution methods such as minitrials, arbitration and mediation." And, in a Departmental Directive issued on August 21, 1985, my predecessor, Deputy Attorney General D. Lowell Jensen, stated that "the Department of Justice supports efforts in numerous contexts to explore means of alternative dispute resolution in order to reduce the number of cases that must endure the expense of trial in the courts."

We applaud the growing realization that ADR methods pioneered in the civil justice system can be useful for

administrative agency rule- and decision-making that touches on virtually everty aspect of American life.

In the multitude of cases where federal agencies are parties to litigation, Department of Justice attorneys are participating in an experimental program of mandatory arbitration presently underway in ten federal district courts around the country. Sponsored and run by the Federal Judicial Center, the program removes certain classes of cases from the usual judicial process and submits them for resolution to a streamlined hearing before a neutral arbitrator. Although only underway for approximately two years, preliminary results indicate that the programs may have induced early settlements, reduced time and costs associated with litigation, and increased litigants' satisfaction with the judicial process.

Department attorneys have also participated in a number of other ADR methods. Negotiated rulemaking, which brings together interested private parties with agency officials, is a growing trend. The Administrative Conference can take great pride in the several negotiated rulemakings that have already taken place, since a 1982 ACUS recommendation was instrumental in developing this form of ADR. In this procedure (unsurprisingly dubbed "Reg-Neg"), the regulatory agency in question meets with a number of interested parties under the supervision of a mediator, and ground rules are set for the particular piece of regulation in question. This has greatly eased the shock that sometimes accompanies the promulgation of new regulations by the

government. It has also undoubtedly reduced the litigation produced by the aftershock of new regulations.

The Department has also been involved in mini-trials and summary jury trials -- which are truncated trials resulting in nonbinding decisions and which seek to force the principals in the lawsuit to settle their differences without resort to a full-blown trial. The parties present their cases in abbreviated form to a jury which then renders an advisory verdict. The parties can still go to trial afterwards, but they do so armed with the knowledge of how a typical jury will respond to the basic facts of the case. It's remarkable how many litigants choose to settle once they have this knowledge.

Mediation, a more structured form of arbitration in which the mediator becomes actively involved in helping the parties achieve a settlement, is on the rise. And Department lawyers have appeared before special masters and magistrates to whom federal judges have referred matters, although we will acquiesce in such referrals only when the master may appropriately assume jurisdiction.

The Department has also actively and enthusiastically supported the development of the Claims Court's new General Order Number 13. Members of the Department's Civil Division served on and worked closely with the committee appointed by the Chief Judge which developed the substance of the order.

In our view, the approach adopted by the order presents the ideal approach to the initial use of ADR in government

litigation. It is voluntary. It involves the use of an official -- a trial judge -- who has been appointed by the President and confirmed by the Senate to evaluate a lawsuit in a neutral manner. It will avoid prejudicing or the appearance of prejudicing the judge who will decide the case if a settlement is not concluded. For these reasons, we look forward to the use of the procedures established by the General Order Number 13 and, if they prove effective, to further initiatives of this type.

Within the Department itself, the Community Relations Service helps perform ADR functions. Established by Title X of the Civil Rights Act of 1964, the Service is required by law to provide "assistance to communities and persons therein resolving their disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin, which impair the rights of persons in such communities under the Constitution or the laws of the United States which affect or may affect interstate commerce." Former Attorney General WIlliam French Smith has noted the important role that the CRS regional offices play in helping address and resolve many serious conflicts throughout the nation.

Most suits brought against the government reach court only after exhaustion of administrative procedures which are themselves forms of ADR. Two examples are the administrative claims settlement procedures of the Federal Tort Claims Act and the negotiating procedures built into the Contract Disputes Act.

These "ADR procedures" insure that we receive for litigation only the hard-core cases.

The fact is that the vast majority of suits brought against the government either settle, are dismissed, or result in ultimate findings of no liability. This rebuts the myth that any substantial amount of our resources is being devoted to the trial of cases which should have been settled by us.

And this is as it should be, for good lawyers have traditionally been conciliators -- strange as that may sound in this era of gladiatorial litigation. Lincoln once advised fellow lawyers:

> Discourage litigation. Persuade your neighbor to compromise whenever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

I should share with you my perception that the stronger the litigator -- the more competent the lawyer -- the more secure the man or woman advocate -- the better the chance of resolving a dispute without resort to actual litigation. If you have a 750 pound gorilla on your side, you're more likely to get people to talk sense.

To illustrate further how non-radical ADR is, reflect that the filing of a lawsuit is often itself a form of ADR, in the sense that with increasing frequency lawyers have no intention of taking a case to trial. The sheer volume of lawsuits that are in fact settled out of court suggests that such is often the outcome intended by those who initiate the suits.

The reasons for the revival of interest in ADR are not hard to discern. The courts are too backlogged. This is obvious, and pretty non-controversial. "Justice delayed is justice denied," the saying goes. ADR is an answer to the problem of providing justice at a time when the civil justice system is grindingly slow.

In the short run, this problem of delay means we must increase participants' awareness of available alternatives and their opportunities to use them. Longterm, nothing less can be accepted than a retooling of the roles of lawyers, and particularly government lawyers -- a retooling that will deemphasize "gladiatorial" or adversarial behavior and give greater weight to the lawyer as problem solver and negotiator who can resolve controversies before they escalate into major disputes or proceed to a full hearing.

Indeed, I view this change in attitude or "culture" as the central challenge for the legal profession. Lawyers as a class are imbued with a will to win. The formal adversary system allows (if not encourages) a "win-at-all-costs" attitude, pitting lawyers as paladins in combat. Unfortunately, open combat is not always in the best interest of clients or of the justice system. A new set of "Marquis of Queensbury" rules must be added to the "fight" theory of justice -- rules which revive the notion of the attorney as problem solver and conciliator. This point is particularly applicable to the government lawyer. His client is not just his agency but, in a larger sense, the public.

Therefore, the government lawyer needs to learn to suppress his will to triumph over his adversary if a quicker or fairer or generally equitable resolution of the dispute can be achieved short of formal processes.

Thus, a major task during the next few years will be promoting changes in agencies' "cultures" so as to let them make more effective use of ADR. This change, which really involves teaching lawyers that in some situations "losing is winning", will not come easily. We need to get the message across that the best solution to a dispute is often one in which both parties go away unhappy -- minimally unhappy, one hopes, but unhappy nonetheless. Creating the awareness, ability, and willingness to resort to ADR will demand leadership from high-level officials.

Some suggested means of further use of ADR include training government personnel in mediation skills, giving greater authority to agencies to use ADR techniques, creating rosters of neutrals to mediate disputes, changing review structures for some settlements, and amending job descriptions and SES agreements to encourage expertise in and effective use of ADR. Though any of these actions are likely to have costs as well as benefits, some initiatives will merit close scrutiny by the Department of Justice and other agencies.

We need ADR, not just to put some breathing room into court calendars; not just to save millions of dollars a year in litigation costs that might otherwise go into productive uses; not only to insure that those who truly require litigated

resolution of cases will not be denied access to our courts because of overload and clotting of the system; but also for sound social reasons. The courts can't solve everyone's problems. We Americans, inveterate politicians and litigators that we are, have tried to make the political system and the legal system take on that burden, but it won't work. The effort, meanwhile, has significantly undercut the roles of the family, religious institutions, community organizations -- the whole panoply of mediating institutions.

As Chairman Marshall Breger argued in an article on the litigation explosion in the May 1983 Villanova Law Review:

> The logic of the judicialization of our culture is a social condition of "total redress" in which no injury is permitted to stand unaddressed by the government or the courts. While this condition may be beneficial to individual desires, it may create intolerable strains on the gossamer threads of communal solidarity. Courts cannot "fill the void created by the decline of church, family and neighborhood unit." For a social order to survive, citizens must possess some "other-regarding" concerns. They must focus on their societal duties as well as their rights.

Now must of us, on reflection, can probably agree with that; but we still have to bring it to the attention of the general public, and in particular we have to get it into the law schools and the law firms. Most law schools are naturally geared towards training its students to play the game, and the game, of course, is litigation. This tendency is reinforced by the tendency of firms to hire on the basis of the new lawyers's likely effectiveness in litigation. Some even hire or promote on the

basis of the lawyer's ability to generate new litigation -- "rainmaking," they call it.

We have to encourage the addition of ADR and dispute resolution to the mix of skills that law schools teach and that law firms demand. Without prejudice to litigating skills, dispute resolution skills have to come into demand as well. I would hope that other government lawyers, prominent private practitioners, and also the ABA would take up this issue and do some public diplomacy on it.

One reason often assigned for court congestion is that there are too many lawyers. To insure they have something to do they are out there churning up trouble and encouraging litigation. With the change in culture of which I speak the more lawyers, the merrier.

Let me now jump back to a point I made at the beginning, because it bears repeating. Nothing can fully replace traditional litigation. Many conflicts cannot be resolved short of a judge, a jury, and a verdict. The point of ADR is not to restructure our legal system, but rather, to provide it with a steam valve that it desperately needs.

All things considered, ADR is not just an idea whose time has come, but an idea whose time keeps on coming throughout legal history. It is time for our the legal community to take off its boxing gloves -- while keeping them on a hook close to hand.

Given the escalating drain -- in time, money, opportunity costs, and human resources -- occasioned by our late-20th century

legal system, I believe that we have a unique opportunity to point the way toward more productive, less contentious paths. It is not too far a notion to suggest that the future of the profession is at stake.

Thank you very much.

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