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# ADR and the Federal Courts: Questions and Decisions for the Future

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At least since Roscoe Pound's historic address in 1906 on the Causes of Popular Dissatisfaction with the Administration of Justice, political and professional leaders have railed against cost and delay in the resolution of disputes, and for as long as the problem has been named, there has been a search for its causes. Courts, attorneys, litigants, Congress, and the very nature of our society have all been blamed. Looking back from the perspective of history and comparing our present justice system to the English common-law courts and to pre-Federal Rules practice in the United States, it is easy to place the blame on a tradition of excessive and irrational attachment to procedural technicalities.

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But the perspective changes when one looks at the present rather than the past—when one considers current proposals for reform rather than those that have acquired the respectability that comes with age. Inevitably, any proposal for procedural reform encounters opposition founded on perceptions of due process, fairness, and equality. Every procedural change has an impact on the relationship of parties to the dispute resolution process, and so there are bound to be different perceptions about who are the winners and who are the losers.

So it is with alternative dispute resolution. The judgment of history remains shrouded in the future. But without the benefit of historical perspective, ADR must stand or fall on its own merits. That makes it incumbent on those with responsibility for dispute resolution to seek answers and to develop the facts. To do that we must know what questions to ask.

Though there are many questions about ADR—and I will touch on some of them below—there is strong support for the general proposition that people with disputes should have alternatives for the resolution of those disputes. Speaking about the demands growing caseloads are placing on the federal district courts, the Chief Justice recently noted that the future may require dramatic changes in the way disputes are resolved. One model he described "posits that many litigants may have a greater need for an inexpensive and prompt resolution of their disputes, however rough and ready, than an unaffordable and tardy one, however close to perfection."

A strong perception of such a need is reflected in a 1992 survey of federal judges conducted by the Federal Judicial Center. For example:

- 66% of district court judges disagreed with the proposition that courts should resolve litigation through traditional procedures only;
- 86% disagreed with the proposition that ADR should never be used in the federal courts;
- 56% thought that ADR should be used in the courts because in some cases it produces fairer outcomes than traditional litigation; and
- 86% thought that the role of the federal courts should be to assist parties in resolving their dispute through whatever procedure is best suited to the case.

We know as well that authorization for ADR, either through local rules or Civil Justice Reform Act plans, has grown rapidly in the federal district courts over the past several years and that the litigation environment is more sympathetic to ADR today than just a few years ago.

## What is the purpose of ADR, and how do we measure its effects?

But important questions remain, and one of the most fundamental asks, "What is the purpose of ADR?" It is easy enough to say that it serves the ends of Rule 1 of the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive" resolution of every dispute. But why ADR prodedures instead of more limited variations in traditional litigation processes? Does ADR simply offer convenient methods for dealing with heavy caseloads? Do ADR procedures reflect a failure of the courts to solve their own problems of providing civil justice? Or is ADR itself an appropriate solution for those problems? Do ADR procedures perhaps offer even superior methods for resolving some disputes by delivering outcomes that are not only less expensive and more timely but also more satisfactory to the parties?

The answers to these questions may vary with the perspective of the questioner. Approaching ADR from the point of view of courts confronted with docket problems may lead

to different answers than approaching it from the point of view of the litigant seeking a dispute resolution method appropriate for his or her particular case. So we must ask: What is the proper balance between public and private interests, between enabling the courts to provide justice in all cases and meeting the needs of individual litigants for timely and just resolutions?

Achieving the optimum balance requires, as a first step, examining and understanding the effects of ADR. We need to ask:

- Does ADR lead to speedier, more satisfactory, and less expensive outcomes, or does it simply create another layer of litigation, increasing rather than decreasing costs?
- Does ADR improve access to justice for those who are not well off and cannot afford the costs of litigation, or is it a device that provides second-class justice for cases the courts consider unimportant?
- What are the trade-offs between the advantages of ADR—such as privacy, speed, and reduced adversariness—and the advantages of traditional adjudication—such as vindication, comprehensive relief, and precedent?
- Does ADR lessen the burdens on the jury system and thereby improve access, or does it obstruct access to jury trials and diminish the opportunities for adjudication?
- Does ADR lighten the burdens on the courts, or does it divert judicial and court staff resources from more useful or productive activities?[1]

In addressing such questions, we need to move beyond generalizations and facile assumptions and try to learn the facts.

There is still a surprising dearth of information about the process of resolving disputes, either by traditional means or by the procedures we call alternatives. We know little, for example, about the comparative cost and time effects of different forms of ADR and the traditional litigation process. We also know little about what litigants are seeking when they come to court; what prompts some litigants and not others to consent to ADR; what litigants value and what satisfies them. Much remains to be learned about assessing the effects of ADR. To begin with, we need to determine *what* we should be measuring. We have data, for example, on participant satisfaction, but we need to know what other indicia we should consider and what weight they should be given. By what standards should one measure the success of ADR? This, of course, brings us back to the question of the purpose of ADR; by defining the purpose, one also defines the criteria for measuring its effects.

Of course, speaking of ADR in generic terms does not advance our understanding very much. There are a variety of ADR programs, both voluntary and mandatory, and the choice between them is a crucial issue. ADR includes mediation, arbitration, early neutral evaluation, and summary jury trials, among others. These programs are not interchangeable, and relevant questions must be asked for each type.

The courts—both as individual courts and as an institution—confront a series of challenges as they consider and adopt ADR procedures. One is to select in each particular case a procedure appropriate to the needs of that case. It is here that the close link between ADR and case management becomes visible. One judge recently told us, "You can't do good ADR without good case management." Another responded, "You can't do good case management without good ADR." So at the nuts-and-bolts level, a recurring question is whether ADR will advance sound management in the particular case, which type of ADR will be most useful, and how it can be most effectively integrated into a judge's or court's overall case-management program.

## Decisions about ADR compel us to answer fundamental questions

Dealing with all these questions requires an understanding of ADR processes and their relationship to civil justice. Like the National ADR Institute for Federal Judges, this issue of *Directions* does not advocate ADR. Rather, we hope to further understanding by examining questions such as those I have raised here.

The articles that follow can help all of us think more clearly about ADR and enhance the ability of courts to make informed decisions about the use of ADR, to create sound programs where programs are appropriate, to make wise choices about referral of cases to ADR, and to further the effective use of ADR by counsel and parties. The hope is to foster the optimum, not necessarily the maximum, use of ADR for those courts that choose to implement it.

As you read the articles that follow, consider the context in which ADR has gained a significant role—a time in which courts find themselves under great pressure as well as close scrutiny. The circumstances that have driven the development and spread of ADR compel us to address the fundamental question: What are the courts for? We cannot think about ADR without also thinking about the role of the federal courts and federal judges and the values we associate with this institution—all in all, a daunting challenge but also an opportunity for self-examination and creative response.

### *Notes*

1. A forthcoming Center publication will examine this issue. The paper, by Donna Stienstra and Thomas Willging, is part of a series in support of the judiciary's long-range planning efforts. It will lay out the arguments for and against court-based ADR.