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The Immediate Future of Alternative Dispute Resolution

THE HONORABLE DOROTHY W. NELSON*

The development and expansion of Alternative Dispute Resolution (ADR) methods have, in my opinion, been the most important developments in law reform in this century and will continue to be in the 1990's. As former Chief Justice Burger stated at the 1984 Mid-Winter Meeting of the American Bar Association, reliance on the adversarial process as the principal means of resolving conflicting claims is:

a mistake that must be corrected. . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.¹

This kind of encouragement from the Chief Justice, together with the establishment of the National Institute of Justice, have done much to encourage those interested in devising new means to resolve disputes in our society. There are at least 400 private and governmental agencies currently providing ADR services and close to 200 communities in thirty-eight states have established neighborhood or community justice centers. In addition, new forms of court-annexed ADR's involving arbitration and mediation have developed and expanded rapidly together with private experiments such as the "mini-trial" which are conducted completely outside the courts.

As we move into the 1990's, I am confident that we shall see continued development and expansion of ADR concepts in the following ways.

A. *The Multi-Door Courthouse—Community Dispute Resolution Centers*

Originally suggested by Professor Frank Sander of the Harvard Law School, the concept of the multi-door courthouse recognizes that

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1. Address by former United States Supreme Court Chief Justice Warren Burger, *American Bar Association* mid-winter meeting (1984).

a multiplicity of problems mandates a multiplicity of procedural responses. These courthouses or dispute resolution centers, which do not have to be located in a physically integrated unit, offer a variety of services to the applicant, from ombudsmen to mediators, arbitrators, or to a court setting (community or otherwise). The National Institute of Justice is currently funding centers in Washington, D.C., Tulsa, Oklahoma, and Houston, Texas.

B. Court-Annexed ADR's

In some districts of the Ninth Circuit, all civil cases involving a plea for \$100,000 or less must first go through nonbinding arbitration. Because of the success with this experiment, this form of arbitration will most likely expand through all districts in the Ninth Circuit as well as to other circuits.

The use of summary jury trials is gaining broad acceptance in federal and state courts throughout the country and is likely to expand. In this kind of trial, parties give opening and closing statements and written summaries of their evidence to an advisory six person jury selected from the regular jury venire. The presentations usually take no more than three hours. The jury deliberates and then gives its verdict. The great success with this method is attributed to the fact that many cases do not settle because of the unpredictability of the jury verdict. Once the verdict is in, even though advisory, the parties generally settle.

There should also be a great expansion of court referred mediation services, particularly in the area of family law. Again, as our former Chief Justice said so well at a meeting of the American Bar Association in 1982:

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that produce an acceptable result in the shortest possible time, with the least expense, and with a minimum of stress on the participants. That is what justice is all about.²

C. Private ADR's

In this decade many forms of private dispute resolution have been developing. One form has been the "mini-trial" approach. After a foreshortened period of pretrial preparation, lawyers make informal and abbreviated presentations of each party's "best" case before representatives of the parties with settling authority. Usually, a neutral third party advisor (not a judge or arbitrator) is available to advise the parties' representatives, if necessary, but the advisor's opinion is

2. Address by former United States Supreme Court Chief Justice Warren Burger, *American Bar Association* meeting (1982).

nonbinding, private, and inadmissible at a later trial. The mini-trials and their variations are very likely to expand as corporations and other business institutions find that large amounts of time and money are saved.

In contrast to the purely nonbinding qualities of the mini-trial, the use of a private judge or "referee" pursuant to a general reference statute, the so-called "rent-a-judge" program, has been established in some states and is being proposed in others. It permits disputants to obtain a fast, private, efficient, and competent resolution of their dispute while maintaining the benefits of a final, binding adjudication. This kind of program has the additional advantage of using the services of well trained and experienced retired judges, some of whom are taking early retirement to participate.

There are claims that some of these programs may promote collusion, secrecy, and combinations which might promote violations of public policy. However, if rights are not to be sacrificed, and if justice is not to be rationed in the interest of relieving pressure on the courts, we need other justice-dispensing institutions which can supplement, and in some cases supersede the old.

D. Research Institutions

In the 1990's, research institutions will be devoting many more research dollars to the study of ADR's. Currently, there is a plan under consideration to establish a Western Justice Center, north of the Federal Courthouse in Pasadena, California. It is proposed that a major component of such a center will be devoted to the study of ADR's.

One of the most interesting and beneficial products of research and development of ADR's has been the development of training materials which may have other useful purposes. For instance, the Community Dispute Resolution Center of Pasadena has developed an outstanding manual for the training of mediators. This training program is now being used in high schools to train teachers and students how to mediate problems. There should be a great expansion of these programs in the 1990's, even to the junior high and primary school levels. As children learn how to consult and how to mediate their own problems, there should be increasing reductions in the level of conflict in our society.

E. Role of the Law Schools

Law students will have to be trained to know and understand the various forms of ADR's. As President Derek Bok wrote in his Report to the Harvard Overseers in 1982:

[L]aw schools train their students more for conflict than for the gentler art of reconciliation and accommodation. . . . Over the next generation, I predict, society's greatest opportunities will lie in tapping the human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.³

Law students should be made familiar with the various forms of ADR. Law schools should begin to train students to be arbitrators and mediators, in such areas as family law, as an alternative career route. In addition, law schools should assume the responsibility to train other types of justice producing persons such as ombudsmen, mediators, and arbitrators. In the 1990's, the law school clinic will begin to include some of these alternatives. More law schools should and will, I believe, provide forums where students may discuss how we might "de-adversarialize" and "de-judicialize" matters that do not require the full panoply of court processes.

Our search for new ways of managing our differences can be seen as signaling a shift in public values. As stated by the Ad Hoc Panel of Dispute Resolution of the Justice Department in 1984, "[w]ith increasing awareness that 'we are all in this world together,' traditional win-lose, adversarial processes may be personally and socially less satisfactory than more participative, collaborative problem solving that reconciles the interests of all involved parties."⁴ That is why I believe that the great expansion of ADR's in the 1990's is well assured.

3. Derek C. Bok, *A Flawed System*, HARV. MAG. May-June 1983, at 45.

4. NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (1983), reprinted in L. KANOWITZ, ALTERNATIVE DISPUTE RESOLUTION, CASES AND MATERIALS 3, 8 (1986).