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ALTERNATIVE DISPUTE RESOLUTION SYMPOSIUM

ALTERNATIVE METHODS OF DISPUTE RESOLUTION: AN OVERVIEW

Frank E.A. Sander*

I. INTRODUCTION**

Beginning in the late sixties, American society witnessed an extraordinary flowering of interest in alternative forms of dispute settlement. This interest emanated from a wide variety of sources ranging from the Chief Justice of the United States Supreme Court to corporate general counsel, the organized Bar and various lay groups. Following a decade or so of virtually unabashed enthusiasm, serious questions and doubts are now being raised. Additionally, we are slowly accumulating limited data concerning viable models and empirical effects. Hence, this may be an opportune time for evaluating and exploring promising future directions.

Perhaps a good place to begin is with some definitions. What exactly do we mean by “alternative dispute resolution mechanisms” (ADRM)s? Alternative to what? Presumably “alternative” is used as a substitute for the traditional dispute resolution mechanism, the court. Interestingly enough, however, courts do not resolve most disputes. The literature on dispute processing and dispute transformation has delineated ways in which grievances may be turned into ongoing disputes, and the myriad ways in which disputes may be resolved by means other than court adjudication. In fact, disputes that cannot be readily adjusted may be presented initially to a whole host of dispute processors such as arbitrators, mediators, fact-finders or ombudsmen. If the dispute is ultimately filed in court, approximately 90-95 percent of these disputes are settled by negotiation, with little or no court litigation. Hence, the argument for “alternatives” is not based on the need to find a substitute for court adjudication.

** This paper is a revision of a draft paper prepared for a conference on the lawyer’s changing role in dispute settlement, held at Harvard Law School in October 1982. The paper differs somewhat from that delivered at University of Florida College of Law in Fall 1984.
Rather, it is based on the need to gain a better understanding of the functioning of these alternative mechanisms and processes.

Alternatives to courts are not a new phenomenon. Yet, the current resurgence of alternative dispute resolution seems to have a freshness about it. The movement appears to have a much broader theoretical and practical base. It might therefore be useful briefly to speculate on the confluence of events that have led to the current renewal of interest in alternatives.

The sixties were characterized by considerable strife and conflict, emanating in part from the civil rights struggles and the Vietnam War protests. An apparent legacy of those times was a lessened tolerance and a greater tendency to turn grievances into disputes. Also relevant was a significant increase in the statutory creation of new causes of action.

A noteworthy development from these events was that courts found themselves inundated with new filings, triggering cries of alarm from the judicial administration establishment. This judicial congestion led to claims that equal access to justice had been denied. Spurred in part by these conditions, parties attempted to resolve some of these disputes through alternative dispute resolution mechanisms. In the 1964 Civil Rights Act Congress established the Community Relations Service in the United States Department of Justice to aid courts and others in settling intractable racial and community disputes. The Ford Foundation established the National Center for Dispute Settlement and the Institute of Mediation and Conflict Resolution to study dispute settlement mechanisms.

Any attempt to isolate the roots of a complex and ill-understood movement is bound to suffer from oversimplification. One can readily identify a number of other social forces that contributed to the recent flowering of the alternatives movement. One contributor is the waning role of some of society's traditional mediating institutions such as the family, the church, and the ward healer. A second influence is the discernible recent mood of anti-professionalism. Both these conditions point towards the creation of alternative indigenous mechanisms such as community mediation centers and family dispute settlement tribunals. Of course, need alone does not always lead to constructive solutions. Fortunately, for the alternatives movement, the Law Enforcement Assistance Administration (LEAA) took a firm interest in developing and testing ADRMs, even if the required nexus with the criminal law system at times distorted the proper emphasis.

Certain intellectual developments paralleled these social forces. Over the past 15-20 years some cultural anthropologists have attempted to apply their study of foreign dispute settlement to the local scene. Contemporaneous with that effort has been the work of other legal scholars, most notably the late Lon

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7. See J. Marks, E. Johnson, Jr. & Szanton, supra note 1.
Fuller, who have attempted to analyze characteristics of various dispute processes such as mediation and arbitration. These scholars proposed some useful conclusions about the strengths and limitations of particular processes for particular types of disputes.9

From this brief and fragmentary history, four goals of the alternatives movement emerge:
1) to relieve court congestion, as well as undue cost and delay;
2) to enhance community involvement in the dispute resolution process;
3) to facilitate access to justice;
4) to provide more "effective" dispute resolution.10

These goals might overlap and conflict. Consider, for example, the problem of "excessive" access. If society is too ready to provide access for all kinds of disputes, this will lengthen the queue and aggravate the congestion problem. Similarly, measures aimed at relieving court congestion would take a very different form from measures designed to enhance community control over dispute settlement. Hence, it is essential to think clearly and precisely about the reasons for pursuing ADRMs.

Considering the complex social conditions that have led to court congestion and concomitant delay,11 it seems specious to assume an appropriate use of alternatives can significantly affect court case loads. This is not to say that a cautious and informed use of ancillary mechanisms to screen court cases is not worth undertaking. On the contrary, such a program holds considerable promise. But the notion that a pervasive use of arbitration and mediation will solve "the court crisis" seems misguided. The principal promise of alternatives stems from the third and fourth goals set forth above. Our primary efforts should be directed toward these two goals. And since the access goal can only be fulfilled by providing access to an ADRM that is appropriate for the particular dispute, the third and fourth goals in effect coalesce.

II. CURRENT TYPES OF DISPUTES AND PROGRAMS

This section presents a brief overview of the rich variety of ADRMs presently in use. Of necessity the picture will be somewhat fragmentary and conclusory.12

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10. Although no definitive work has been done with respect to how to measure "effectiveness," presumably to be taken into account are such factors as cost, speed, satisfaction (to the public and the parties) and compliance. Cf. Getman, Labor Arbitration and Dispute Resolution, 88 YALE L.J. 916 (1979).


12. For further elaboration, see E. Green, S. Goldberg & F. Sander, Dispute Resolution (1983); J. Marks, E. Johnson & P. Santon, Dispute Resolution in America: Processes in Evolution (1984) (National Institute for Dispute Resolution pamphlet); Singer, Non-Judicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor, 1979 CLEARINGHOUSE REV. 569. E. Johnson,
Because many mechanisms involve a blend or sequence of different dispute processes, it might be useful first to provide a brief restatement of the basic processes.

The most common and familiar form of dispute settlement between two parties is bargaining or negotiation. Negotiation offers the great advantage of allowing the parties themselves to control the process and the solution. Sometimes, however, disputants are unable to settle the dispute, and a third party must be engaged. If a third party joins the negotiations, the parties must determine whether he or she has power to impose a solution on the parties, or whether the third party is simply to help the disputants arrive at their own solution. The latter role is commonly referred to as conciliation or mediation. The former might entail some form of adjudication, by a court, an administrative agency, or a private adjudicator, also known as an arbitrator.  

A. Labor Mediation and Arbitration

The model for many of the current mechanisms is the system developed during World War II for handling grievances arising under collective bargaining agreements. Typically, such agreements, provide for a series of steps whereby an employee with a grievance first complains to his foreman. Next a meeting occurs between the Union Committee and the Plant Committee. Finally, if the matter cannot be resolved within the plant by negotiation, the parties select an outside arbitrator, often with the assistance of the American Arbitration Association or the Federal Mediation and Conciliation Service. This procedure is comparatively expeditious and inexpensive, even though recent complaints suggest it is becoming more formal, costly, and time-consuming. In short, it is too much like the court system it was originally designed to circumvent.

This procedure for dealing with disputes arising under collective bargaining agreements should be contrasted with disputes which arise in reaching such agreements. With collective bargaining, negotiation and mediation are the principal dispute settlement tools, because economic terms of employment are rarely externally imposed on the parties. Hence, if an agreement cannot be achieved by these means, the principal economic weapon, the strike, might be deemed necessary. However, in certain public sector industries where strikes cannot be tolerated fire departments, police departments and schools, compulsory arbitration is sometimes utilized.

Troublesome questions have also been raised when employees present claims arising under recent enactments guaranteeing non-discrimination on account of sex, race or age. Such cases have often created bitter contests, with sharply


13. There are of course a host of hybrid processes, such as fact finding, inquiry and final offer selection. E. Green, S. Goldberg & F. Sander, supra note 12.


15. Occasionally in these situations final offer arbitration is used. Here the arbitrator can select only one side's or the other's best offer, nothing in between. An obvious effect of this mechanism is to induce more serious bargaining. E. Green, S. Goldberg & F. Sander, supra note 13.
differing factual assertions. Therefore, some commentators have suggested that adjudication is unsuitable because of its "win-lose" nature and have argued for resolving some of these cases by a process of mediation.  

B. Commercial Arbitration

Long before the rise of labor arbitration, commercial contract disputes were submitted to arbitration by a panel of experts in the industry. This mechanism works particularly well in industries where a continuing relationship exists between the parties. Such cases necessitate an expeditious and amicable method, by which one or more individuals familiar with the trade practices can resolve the disputes. The American Arbitration Association now handles close to 10,000 of these disputes each year. In addition, an untold number are handled similarly under private industry agreements.

C. Consumer Disputes

In a sense, consumer disputes could be subsumed under the category of commercial arbitration. Consumer disputes, however, typically involve smaller claims. Additionally, consumer contract agreements rarely provide for arbitration of disputes.

In recent years several mechanisms have been developed for extra-judicial handling of consumer disputes. Some states have created consumer protection divisions within the attorney general's office, where such claims are sought to be mediated, often by volunteers. Likewise, some industry groups, such as the Better Business Bureaus, have established procedures for arbitrating such claims. Some industries (e.g., automobiles and major appliances) even set up panels providing free arbitration of the consumer's claim. Of course, consumer claims also can be presented in small claims court and, where available, to media action programs such as Call for Action, where the service provided is not really dispute resolution but information and referral. Because of the clout wielded by these latter groups, they sometimes act in effect like mediators or ombudsmen in adjusting consumer grievances. A recent study, however, suggests the effectiveness and accessibility of some of these mechanisms may be suspect.


17. One exception is medical care agreements that provide for the handling of malpractice claims by an arbitration tribunal. See Henderson, Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice, 58 Va. L. Rev. 947 (1972).

18. E. Johnson, V. Kantor & E. Schwartz, supra note 12, at 67.


20. See infra notes 40-41 and accompanying text.

D. Interpersonal Disputes

One of the best examples of the need for new dispute resolution mechanisms can be seen with respect to various types of interpersonal disputes. Here, the tendency of courts to look backwards and produce winners and losers is least responsive to the needs of the parties, who usually are seeking to resolve present controversies and avoid future disputes. Mediation, which helps the parties settle their problems jointly, is far more suited to this task than adjudication.22

1. Neighborhood Justice Centers

In the past decade well over two hundred community dispute centers have been created.23 These are known by various names, ranging from “citizen complaint center” to “neighborhood justice center.” These centers are either free-standing institutions or are affiliated with the court.24 Center referrals are received from the court, prosecutor, police or other community agencies; some disputants also come on a walk-in basis. The kinds of cases handled varies widely, from landlord-tenant disputes to domestic and neighbor quarrels.25

Although dispute centers vary greatly, two differing prototypes deserve exploration. One, commonly attached to a prosecutor’s office, features rapid screening of a large number of cases to determine whether quick settlement might be possible and desirable. These programs involve high-volume processing in very short sessions, which law students often conduct. Whether this process should be viewed as true mediation is open to question.

In contrast to this approach is the more typical mediation, conducted by a professionally trained mediator or by a person drawn from the neighborhood who has received mediation training. Two or three mediators often conduct these mediations, which typically last three to four hours. These meetings allow disputants a full opportunity to present their views, and permit the mediators to meet with each of the disputants separately before attempting to reach agreement.

On the whole, the experience with these projects has been encouraging, although further public education is needed to stimulate greater resort to these unfamiliar institutions. Americans appear too prone to presume that anyone engaged in a dispute should take it to a lawyer or court. Ironically, the individuals who do use the new projects find them helpful and satisfying, and the agreements reached appear to endure.26 New York recently became the first state to recognize the value of these agencies by providing public funding for them.27

22. Fuller, Mediation, supra note 9.
24. Recently, a number of church groups have also sponsored such programs. See, e.g., R. Kravbill, Repairing the Breach, Ministering in Community Conflict (1982).
2. Divorce Mediation

Although some neighborhood justice centers handle divorces, these cases often present more challenging problems of dispute settlement because complex legal and tax issues arise, as well as difficult questions of child custody. In 1981, California became the first state to require mediation to resolve all child custody disputes. In a number of other jurisdictions, mediation services are available in court-connected agencies. The principal development in divorce mediation, however, has occurred outside the courts, as lawyers and mental health professionals perform mediation as a private service. Although public interest in this alternative to the traditional legal process is widespread, the institution of divorce mediation remains in a state of infancy. Questions yet to be resolved include: Who should be the mediators? What kind of training should they receive? How should their services be compensated? How, if at all, will representative lawyers fit into this process? Should a new form of regulation be developed for this newly emerging profession? 30

3. Parent/Child Disputes

Another subcategory of cases that might be heard in neighborhood justice centers, but is sometimes handled in separate projects, involves various types of parent/child disputes. A recent study attempted to inventory such projects. 30

One such project is the Children’s Hearing Project in Cambridge, Massachusetts, which is patterned on a similar proceeding in Scotland. Both projects utilize citizens from the community to help parents and children settle their disputes.30

E. Intra-institutional Disputes

Some institutions have recently applied the grievance machinery model of the labor sector to their intra-institutional settings. For example, a California prison established a grievance committee comprising prisoners and supervisory personnel to air prisoner complaints. If the case could not be resolved internally, it would be submitted, at least in an advisory capacity, to an outside arbitrator. This process features initial consideration by a group with representation from both sides, and the possibility of ultimate submission to an outside authority. 31 This process has been replicated in other correctional facilities 32 and other institutional settings, such as schools. 33


31. For elaboration of other essential aspects of such a grievance mechanism, see Keating & Kolze, AN INMATE GRIEVANCE MECHANISM: FROM DESIGN TO PRACTICE, 39 FED. PROBATION 42 (1975).


33. See RESOLVING CONFLICT IN HIGHER EDUCATION (J. McCarthy ed. 1980).
Despite the analogy to the collective bargaining context, there are obvious differences between labor and prison contexts. In the prison all power is on one side, and that side is often reluctant to surrender any power, even to an outside arbitrator’s advisory review. Hence, the success of grievance mechanisms in the more complex prison setting has been questioned. Alternative ways of resolving prisoner disputes, which make up a very large proportion of the recent caseload growth in the federal courts, are voluntary mediation of prisoner grievances, and ombudsman mechanisms. The latter method involves a third party of great ability and integrity who is empowered to investigate complaints or grievances. Following completion of the inquiry, the ombudsman makes recommendations to the individual in charge of the institution. Usually an ombudsman has no coercive power, but if he is highly regarded, his judgment is given considerable respect. It would be difficult for the institution’s presiding authority wholly to ignore a prestigious ombudsman’s report that a meritorious grievance had been unfairly ignored. Therein, of course, lies a principal reason for institutional resistance to this mechanism.

F. Claims Against the Government

The ombudsman institution first arose in Scandinavia in response to citizen’s complaints against the government. A number of American states and municipalities now have ombudsmen. An analogue of the ombudsman concept has been the development of media action lines such as Call for Action on television.

G. Public Disputes

Most of the controversies considered previously involve two disputants, with relatively concrete, defined concerns. In recent years, however, more large-scale disputes have arisen involving a multiplicity of parties and interests. Examples of such disputes are community conflicts over whether a facility should be built in the area, certain racial controversies, major claims to land holdings by native Americans, and environmental disputes. Such cases have proved to be far more intractable, and have often required a combination of litigation and mediation. A number of organizations, most of them privately sponsored, have sought to develop special expertise in the handling of such cases.

H. Court-Annexed Mechanisms

Most of the mechanisms discussed thus far are primarily found in the private dispute resolution sector and are not a part of the formal court structure. In an attempt to make courts more responsive to the emerging alternatives movement, ADRMs have been incorporated in one way or another into the court

34. See G. Cole, R. Hansen & J. Silbert, supra note 32.
35. See id.
system. In that respect, these developments represent a partial foreshadowing of the "multi-door courthouse" notion more fully explored in Section III below.

1. Small Claims Adjudication and Mediation

Over fifty years ago courts were recognized as too elaborate and expensive for simple cases involving only small claims. This led to the creation of small claims court, where litigants themselves, without lawyers, can present their disputes. These actions normally involve claims of not more than $1,000 and result in a type of quick, rough justice. Some scholars have recently raised serious questions about the efficacy of small claims courts. Nevertheless, the institution appears to be an essentially durable one that has carved a place in the catalog of useful dispute settlement mechanisms. An interesting recent variant has been utilization of mediation in small claims court.

2. Compulsory Arbitration

Following a 1950's experiment in Philadelphia a number of jurisdictions have recently passed legislation requiring all monetary claims cases up to a certain limit (generally around $10,000-$15,000) to be initially processed by arbitration. In view of the prevailing right to trial by jury, a right to de novo review must then be accorded in the courts. However, such recourse to the courts might be subjected to cost sanctions if the petitioner does not prevail in court. Absent such a sanction, the net result might be to substitute two proceedings for the previous one. A similar program was begun on an experimental basis in three federal district courts. Preliminary data from these experiments are encouraging, and show that even where a sizeable percentage of the cases are appealed to court, very few proceed to trial.

3. Malpractice Screening

Following the malpractice "crisis" in the mid-seventies, a number of states set up special procedures for malpractice actions. Often the parties are initially required to arbitrate their differences. In other jurisdictions, such as Massachusetts, a screening panel is established, consisting of a doctor, lawyer and judge. The panel determines whether a prima facie case is established. If not, the plaintiff may proceed only by putting up a bond for the defendant's costs.

44. See Note, Recent Medical Malpractice Legislation — A First Checkup, 50 Tul. L. Rev. 655 (1976); Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417.
The success of these experiments has varied. In some states, the special procedures have been abandoned or declared unconstitutional. In others, the mechanisms have worked well to screen out spurious claims.

4. Large Litigation

Many of the devices discussed above are applicable only to what has sometimes been referred to as "minor disputes." Some devices have also been developed to deal specifically with large and complex litigation.

a. Rent-a-Judge

Arbitration often employs experienced individuals such as retired judges to arbitrate difficult cases. Such use of arbitration, by consent of the parties, is quite different from that discussed in Section 2 above, where reference to arbitration is compulsory rather than consensual.

A variant of this practice has developed in some jurisdictions, notably California. It calls for parties to select a retired judge to hear the case, much as an arbitrator would. The procedures applied are the same as those that would apply in court, except as otherwise modified by the parties. Most notably, the judge's decision has the same force and effect as a judgment entered by a regular court.

The Rent-a-Judge procedure raises important policy questions. For example, should parties be able to hire the best available judges under circumstances where their decision has the full force of law, just as if the case had been decided in court? How does this practice square with the notion of equal access to the courts regardless of means? What will be the impact of such a practice on the regular judiciary? These questions and others deserve more discussion than they have received thus far.45

b. Mini-Trial

Ten years ago some imaginative litigants in the federal district court in California developed an innovative extrajudicial mechanism to aid in the settlement of complex and protracted litigation.46 The procedure calls for the parties to select an experienced individual to preside at a two-day information exchange. Each party has one day to present its case in any form it desires, including questions for the opposing side. The highest official of each party, assuming a corporate litigant, must attend this hearing. At the end of the proceeding, the two top officials confer, without their lawyers, to evaluate the case. If an agreement is not reached, then the presiding official will give his view.

47. Id.
concerning how the case would be resolved in court. The parties then use this additional information to discuss settlement. If settlement is not achieved, the procedure has no evidentiary effect and the case returns to court. In virtually all cases which have utilized this procedure, however, settlement has been achieved. The procedure has the additional virtue that it can be readily adapted to different situations (e.g., the presider can be dispensed with, more or less time can be allowed for the presentations).

III. Problems and Prospects

As noted earlier, the recent resurgence of the alternatives movement has now passed through several phases. After the initial period of exhuberant expansionism, a more critical and reflective phase has ensued, and a number of difficult and fundamental questions are emerging. The remainder of this paper will attempt to address some of these questions.

A. Relation of ADRMs to Each Other and to the Court System

Implicit in the preceding discussion is the notion that dispute resolution mechanisms are dispersed throughout the social fabric. The mechanisms are either public or private, mandatory or optional. Wherever disputes arise among individuals or organizations, a complex network of possible grievance mechanisms appears to be available for the venting of these grievances. The question which naturally arises is what, if any, relationship should exist among the different types of mechanisms. This question assumes importance not only for the disputant who might benefit from some guidance concerning where to take any particular dispute, but also for a society seeking to provide a coherent response to these grievances.

One can envision a system possessing a hierarchy and structure within the formal public dispute resolution system, complemented by a vast and ill-understood network of indigenous dispute mechanisms. In essence, that is our present system. Disputants might first try to utilize the array of informal mechanisms provided in the particular arena where the dispute arises. Then, as a last resort, disputants might take the controversy to the public forum, the court. That is the paradigm but in fact, informal private mechanisms are frequently not available, or if they are, they are not resorted to. The result is often the typically American tendency to take the case immediately to court. The net effect is that

49. See Galanter, supra note 2.
50. At present, it is almost accidental if community members find their way to an appropriate forum other than the regular courts. Several other modes of dispute resolution already are available in many communities. Still, since they are operated by a hodge-podge of local government agencies, neighborhood organizations, and trade associations, citizens must be very knowledgeable about community resources to locate the right forum for their particular dispute.

many disputes presented to court are not appropriate for court adjudication and could be better handled by some other mechanism.  

This situation led me to suggest, in a paper delivered at the Pound Conference in 1976, a more comprehensive and diverse mechanism known as a Dispute Resolution Center. This center would provide a variety of dispute resolution processes, according to the needs of the particular dispute. This concept was later termed "the multi-door courthouse" (MDC). What would such an institution look like? A provisional first-step type of MDC could consist essentially of a screening and referral clerk who would seek to diagnose incoming cases and refer them to the most suitable ADRMs. Depending on the available mechanisms in the particular community, referrals might be made to mediation, arbitration, court adjudication, fact finding, malpractice screening, media action lines or an ombudsman. Such a model would be subject to all the familiar deficiencies of a referral scheme. For example, slippage often occurs between the act of referral and the receiving agency's actual handling of the case. A more ideal model would contain all the "doors" under one roof, as part of an integrated dispute resolution center. Such a mansion might feature the following doors:

(1) effective and accessible small claims adjudication;
(2) services for family, landlord/tenant, and other continuing relations cases;
(3) ombudsmen for the processing of disputes between citizens and large bureaucracies;
(4) social service agencies providing mental health counseling and treatment of alcohol and drug related problems;
(5) trial court of general jurisdiction for novel statutory and constitutional claims, as well as major criminal cases; and
(6) compulsory arbitration for small monetary claims.

Additional dispute processing forums might include those mediating or arbitrating juvenile matters and those handling ordinance violations such as bad checks and health code and building code violations.

Recently, under the auspices of the American Bar Association, three cities, Tulsa, Houston and Washington, D.C., have been selected for experimental multi-door courthouse projects. These programs are now in their initial eighteen month pilot phase. At the end of that period mid-course corrections will be made in the structure of the referral scheme to take account of malfunctioning or missing "doors." In a final six month phase, the ABA hopes to draw on the learning of these experiments to develop a nationally replicable model. An integrated multi-door courthouse would have a number of benefits as well as potential pitfalls. First, such a full-service MDC would provide an efficient way of availing a wide range of dispute processes. It could also serve

52. Id
53. See E. Greek, S. Goldberg & F. Sander, supra note 13, at 514.
54. See McGillis, Minor Dispute Processing: A Review of Recent Developments, in Neighborhood Justice, supra note 25, at 60.
as a major source of information and referral, transcending the particular "doors" that are available. Second, bringing such diverse ADRMs under the court umbrella would solve the increasingly difficult question of how to fund alternative mechanisms. Likewise, it would avoid the pro-court adjudication bias inherent in the present system where the state pays the costs of court adjudication but not those of other, often more suitable, mechanisms.

Third, because of the predominant emphasis on courts in our society, most alternatives are seldom used. This caseload drought is ironic in light of the generally high satisfaction rate among those parties using alternative mechanisms. Thus, a major difficulty appears to be popular unfamiliarity with these mechanisms. This requires additional public education, but it also argues for building ADRMs into an expanded court system.

These are some of the substantial benefits that might be derived from such an ADRM experiment. However, major obstacles exist as well. A critical feature would be the initial screening which would require a highly skilled intake worker rather than a bureaucratic court functionary. Accordingly, a crucial question is whether ADRM specialists presently have sufficient knowledge of the particular characteristics of various dispute processes and mechanisms. This knowledge is necessary to confidently refer particular types of cases to one or another mechanism. While this science is at a primitive stage, one could posit a number of plausible criteria for determining the suitability of various dispute mechanisms.

1. Nature of Case

ADRM should be designed to handle a novel claim challenging the constitutionality of a statute quite differently from a claim applying established principles to a specific set of facts. Only the former merits the unique skills and resources of a court. The latter can be more expeditiously and inexpensively dealt with by arbitration.

2. Relationship of Disputants

Adjudication typically seeks to make a definitive determination with respect to past events, while mediation attempts to restructure the relationship of the disputants. Thus, mediation best resolves cases involving long-term relationships extending into the future. For example, a mediator is more likely to resolve effectively a mid-contract dispute between a landlord and tenant, or even a divorce, than is a judge. Not only will a mediator be better equipped to restructure future relationships, but the open-ended and non-coercive process of mediation is also more likely to teach the parties to recognize and resolve


57. See E. Green, S. Goldberg, & F. Sander, supra note 12; CORC, supra note 11.

58. See Fuller, Mediation, supra note 9.
future controversies. Mediation thus gives maximum durability to the settlement the parties have crafted.

A significant qualification, however, is presented in the case where the two disputants have substantially disparate bargaining power. In such a case, mediation is either pointless, or worse yet, threatens to take undue and unfair advantage of the weaker party. ADRM specialists must learn far more about the optional combination of formal adjudicative and informal mediation processes for this type of case.59

3. Size and Complexity of Claim

Society has already taken some account of the size and complexity criterion in establishing, on an optional basis, small claims courts for the processing of minor disputes. Some states have even experimented with the use of different tracks for cases of different complexity.60 Generally, however, transaction costs in processing disputes have largely been ignored. To be sure, certain cases (e.g., a serious crime or a major constitutional challenge) should not be measured by the amount in controversy. Beyond those cases and others raising similar considerations, however, should not we lawyers be more attuned to the immense public cost every time a lawsuit is processed in court? If a case involves only $1000 and does not raise larger issues of public policy, should society not require such a case to be processed in small claims court or its functional equivalent? The counterargument, of course, is that for the low-income consumer a claim of $1000 over his defective refrigerator is as important as a multi-million dollar claim is for General Motors. That argument, however, misses the point. If the larger claim is also a straightforward collection action, it also does not deserve access to the deluxe adjudication model. These factors and others need further exploration. Indeed, one of the potential benefits of such a tentative typology is that it will permit the acquisition of significant additional data to test some of the stated hypotheses.

In addition to the cited general criteria, certain programmatic channels might also be proposed. For example, medical malpractice claims would be directed to the appropriate screening tribunal. Prisoners’ claims might be sent to an internal grievance mechanism to be initially processed.61 And if the jurisdiction had an ombudsman, claims against the government would be directed there.

As appealing and efficient as such a scheme might be, it would undoubtedly have its costs. First, intelligent central referral presumes the intake official is

59. For example in an environmental dispute where the situational power resides predominantly in the polluter, an initial adjudication might be required to more nearly equalize the power relationship and bring the more powerful respondent to the bargaining table.

60. See Action Commission to Reduce Court Cost and Delay, Attacking Litigation Cost and Delay 7 (ABA 1984).

61. Cf. 42 U.S.C. 1997e (1982), authorizing stay of a federal civil rights action up to 90 days to permit Pannsauction of an internal grievance mechanism, provided such remedy has been found to be "plain, speedy, and effective." This statute suggests the desirability of developing procedures for certifying certain ADRMs as meeting minimal requirements of fairness and efficacy — a kind of “Good Dispute Processing Seal of Approval.” Such ADRMs might be given priority in funding and referrals. Id.
completely aware of all the facts. However, disputants are often notoriously inarticulate in voicing their real grievances. In such a case, the true complaint does not surface until much later in the proceeding. Second, any new institution also runs the risk of sinking to the lowest bureaucratic level, and thereby eliminating the benefits that emanate from decentralized, indigenous dispute resolution. A related bureaucratic nightmare has the MDC simply shunting difficult and undesirable cases to an endless series of "alternatives" from which the disputants emerge dissatisfied and disillusioned.

A final question is whether the referral process should be optional or compulsory. A system of mandatory referral raises different questions of law and policy than would a merely advisory reference. No single uniform answer to this question is required. At the outset, referral should undoubtedly be voluntary, while necessary information is obtained about the workings of the system. But once that level of experience and understanding is attained with respect to a particular class of cases, that particular referral process might become mandatory. For example, sufficient data now exist to warrant the initial compulsory referral of small monetary claims to arbitration.\textsuperscript{62} However, ADRM specialists must first learn more about what types of cases are particularly suitable for such treatment, and what types of cases are not.\textsuperscript{63}

\textbf{B. Data Drought}

Despite all of the recent developments in alternative modes of dispute settlement, relatively little is known about the critical questions of ADRMs.\textsuperscript{64} For example, ADRM specialists have essentially no sophisticated data concerning the relative time and cost of alternative dispute settlement mechanisms such as arbitration and mediation. No doubt this problem is due to the difficult questions that would be posed by such an inquiry. What, for example, are the appropriate ingredients of cost? What is the aggregate cost to the system? What is the cost to the parties? And how does one determine the comparative cost of a case in court? Should cost be determined on a marginal or an average basis? What is the appropriate time frame?

Suppose, for example, that a particular court case cost $462, while a mediated solution cost $597. Does this show that mediation is more costly, even if the effect of the mediation were not only to settle the present dispute but to prevent future ones? This question suggests the difficulty of measuring potential benefits to be derived from particular forms of dispute settlement. Perhaps these questions explain why so little sophisticated research has been published.

Nevertheless, reliable data now exist confirming one's intuitive assumption that mediation leads to higher disputant satisfaction — even where no settlement is reached — and concomitantly to greater compliance with the terms of the settlement. Although such results might be suspect in situations where the mediated cases resulted from self-selection, some of the studies involve a process

\textsuperscript{63} See An Evaluation of Alternatives, supra note 55.
\textsuperscript{64} See E. Green, S. Goldberg & F. Sander, supra note 13, at .
akin to random assignment.\textsuperscript{65} Hence, these results are extremely important and encouraging, particularly in fields like child support enforcement where non-compliance is a significant problem.\textsuperscript{66}

C. Critiques

In recent years the alternatives movement has been severely attacked from a number of quarters. Perhaps the most pervasive of these has emanated from the political left. The argument suggests that providing ADRMs for the poor and powerless constitutes the establishment's attempt to "cool out" legitimate grievances by negotiating or mediating away poor people's legal rights.\textsuperscript{67}

To the extent that this argument rests on implicit premises of distributive justice, it goes well beyond the issues of formal versus informal justice. In fact, little evidence suggests that the courts can, barring very exceptional situations, bring about major redistributions of wealth and power. Indeed, given the existing constraints of restricted access to the courts and the summary treatment accorded many litigants, it is far from clear that disputants fare less well in the informal system.\textsuperscript{68} Moreover, the limited empirical evidence supports the conclusion that disputants prefer the informal system.\textsuperscript{69} Perhaps, from a radical perspective, this only proves that the courts themselves are an instrument of capitalist domination. However, that argument takes us considerably beyond the issue of formal versus informal justice.

If the focus is narrowed to the actual operation of the informal system, a number of legitimate issues arise. Particularly where alternatives are considered for minor criminal cases, questions arise concerning the availability of various procedural and constitutional protections.\textsuperscript{70} Perhaps this question becomes essentially one of fair notice and free choice. If the "defendant" prefers the informal process after having been fully apprised of the protections and consequences in each system, there can be little complaint. This goal, however, might be difficult to achieve in practice. In fact, some programs fail to fully disclose the different procedures and consequences of each system. Occasionally,
those programs effectively push the complainant into the informal system, for example, by sending him a letter on District Attorney stationery so "suggesting."71 Where the program is overtly compulsory, in court-annexed arbitration, different types of issues arise, such as whether the legally required right of access to the courts, following exhaustion of the alternative mechanism, can be significantly burdened, as by imposing various "costs" on the judicial petitioner.

Other problems stem from inadequate conceptualization of ADRM processes. For example, if a substantial power disparity exists between disputants then mediation will be inappropriate because it threatens to exploit the apparent powerlessness of one disputant.72 Perhaps here again it is largely a question of full information coupled with free choice.73 Or, as noted with respect to a comparable situation in an environmental dispute, we need to learn more about the optimal interrelationship between the formal and the informal legal processes. ADRM specialists should strive to combine the court's power-equalizing role with the greater participation, flexibility and range of choices offered by the mediative process.74

D. Role of Lawyers in ADRMs

What is the proper role of attorneys in alternative dispute resolution mechanisms? First, ADRMs must distinguish between a lawyer's role as a representative of the disputants, and a lawyer's role as a dispute resolver. With respect to the former, much turns on the nature of the proceeding. If, for example, the dispute is a low-key squabble between two neighbors, lawyers might not be needed. However, if the dispute is a complex divorce case involving technical issues in a zero sum context, the argument for legal representation becomes much more compelling. In short, the issue of legal representation in ADRMs is not unlike that in court. The mere fact that the

71. See F. Sander, supra note 19.
72. Consider the power inequity between an overweening husband, with access to professional resources, and a meek, subservient wife. See M. Levine, Power Imbalances in Vermont Law School Dispute Resolution Project, A Study of Barriers to the Use of Alternative Methods of Dispute Resolution 137 (1984).
73. For example, in the marital example in the previous footnote, the wife would first have to receive competent legal advice concerning her "rights" in court. If she then, for her own good reasons, knowingly opts for the informal system that should be no cause for objection.
74. The individually tailored quality of most mediative solutions, however, might prove to be a disadvantage when dealing with recurring violations. For example, if a vendor has committed various consumer regulation violations, and settlement by mediation is considered for each claim, the underlying issues are never likely to be rectified. What is needed here is some form of "aggregate" remedy, akin to the "pattern and practice" litigation the Massachusetts Attorney General sometimes brings as a result of repeated complaints to the mediation branch of the Consumer Protection Division. See also the operation of the Swedish Consumer Complaint Board described in M. Eisenstein, The Swedish Public Complaints Board: Its Vial Role in a System of Consumer Protection, in 2 Access to Justice 491 (Cappelletti & Weisner eds. 19). This is another task that might be better fulfilled in the Multi-Door Courthouse central screening intake. Of course that could not deal with the problem of multi-jurisdictional violations; other techniques would be needed there. Cf. T. Ehrlich & J. Frank, Planning for Justice (1977) (published by Aspen Institute).
alternative process is nonadversary does not necessarily indicate that lawyers have no legitimate role.\textsuperscript{75}

When the lawyer's role as dispute resolver is considered, the lawyer's claimed expertise must rest on a different footing. Unfortunately, much of a law student's training is in adversary dispute settlement rather than accommodative problem-solving. This situation is rapidly changing, however. Increasingly, legal education encompasses mediation and other ADRM training.\textsuperscript{76} Hence, lawyers should be neither specially qualified or disqualified for alternative dispute resolution. Depending on the case in question, lawyers with appropriate training might often possess excellent credentials for alternative dispute resolution.

The new roles outlined above present an exciting challenge to the legal community. If it is to be successfully met, the new system will require

1) the continued support of the legal education community (include the continuing legal education establishment);
2) an open mind on the part of the legal ethics committees who will be asked to sanction the work done by these newly created professionals;
3) some institutional mechanisms capable of providing training and possibly financial support to aid traditional lawyers in making appropriate vocational changes; and
4) possible regulation and certification of the new professionals.

IV. Conclusion

The alternative dispute resolution movement is at a critical turn in the road. Too often in the past, hopes of a coordinated program of experimentation and research have been dashed as the dispute resolution program fell victim to the budgetary ax. The establishment of the National Institute of Dispute Resolution may represent the final opportunity for the sound development of this promising movement.

Successful ADRMs require a broad effort to expand our presently limited understanding of the field. Progress will require continued experimentation and research, as well as further attempts to conceptualize the field. Enhanced public education about the benefits to be derived from alternative modes of dispute settlement will be necessary. Above all, the ADR movement will require the broadened involvement and support not only of the legal and legal education establishments, but also of the political and social orders and the public at large.

\textsuperscript{75} Consider, for example, the varying possible roles for representative lawyers in divorce mediation. See J. Folberg, & A. Taylor, Mediation (1984); Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L.Q. 107 (1982). A lawyer might act simply as adviser to the mediator. See, e.g., O. Coogler, Structured Mediation in Divorce Settlements (1978). Alternatively, each spouse could be urged to consult an attorney after a tentative agreement has been reached, or even at the outset of the entire process. See Samuels & Shawn, The Role of the Lawyer Outside the Mediation Process, 2 Med. Q. 13 (1983).

\textsuperscript{76} See, e.g., Riskin, Mediation and Lawyers, 43 Ohio L.J. 29 (1982). A 1982 conference for law teachers engaged in or interested in dispute settlement drew well over 100 participants, and questionnaires sent out to all ABA-accredited law schools showed a sizeable proportion having some curricular and/or extra-curricular program in alternative dispute settlement.