The AFDC Lump Sum Rule: How It Works and How to Avoid It

Deciding Who Swims with the Sharks: Boren Amendment Litigation

Alternative Dispute Resolution and the Poor

A Primer on Sexual Harassment Law

Part II: Dealing with Problems in Using ADR and Choosing a Process

Cooperation in the Pursuit of Medical Support as an Eligibility Condition for AFDC and Medicaid

The Unaffordability of Water and Sewer Costs for Low-Income Households: Causation and Approaches to the Problem

Special Note ➔ UNITING ADVOCACY SYMPOSIUM Announcement and Registration Form enclosed
Alternative Dispute Resolution and the Poor: Part II: Dealing with Problems in Using ADR and Choosing a Process

By Linda Singer, Michael Lewis, Alan Houseman, and Elizabeth Singer. Linda Singer and Michael Lewis are Executive Director and Senior Associate of the Center for Dispute Settlement, 1666 Connecticut Ave., NW, Ste. 501, Washington, DC 20009, (202) 265-9572. Alan Houseman is Director of the Center for Law and Social Policy, 1616 P St., NW, Ste. 450, Washington, DC 20036, (202) 328-5140. Elizabeth Singer is a Staff Attorney at the Washington Lawyers' Committee for Civil Rights Under Law, 1400 Eye St., NW, Washington, DC 20036, (202) 682-5900.

I. Introduction

Part I of this two-part article outlined the major ADR processes, traced some of the recent developments of ADR, and considered their relevance to legal services. /1/ It argued that legal services advocates should care about ADR because these processes already exist throughout the country. Advocates should ensure that their clients take advantage of existing ADR processes and that their rights are protected in the processes that they choose.

Despite the proliferation of ADR programs, large areas remain where advocates could design new processes or expand existing ones to benefit poor clients. Savvy advocates will learn to use helpful methods to their clients' advantage, while avoiding or transforming those that threaten clients' interests. Part II considers the reasons for which legal services advocates have been reluctant to use ADR and suggests ways to avoid impediments to making the fullest use of ADR, consistent with clients' interests. It recommends questions to ask and criteria to consider when choosing among available processes, including both traditional procedures and more recent alternatives. A suggested reading list for those interested in learning more about ADR is included.

II. Stumbling Blocks to the Use of ADR

For many reasons, both good and bad, most legal services programs have not been in the forefront of ADR innovations, even when the innovations directly affect poor clients.

A. "Second Class Justice"
Some of the early proponents of ADR sought to rid the courts of individual litigants with "minor" cases. They focused on moving cases involving small sums of money out of the courts and into other forums. Originally, tailoring the processes to the type of dispute, the relationship of the parties, or the outcome desired may have been less important than reducing court caseloads. This may also have been the motivation behind some of the early proposals for neighborhood justice centers and for diverting social security cases to magistrates.

In the past 15 years, however, much has been learned about the use of various processes in different situations with different parties. Corporations have discovered ADR and used it in all types of disputes. More than 600 of the country's largest corporations and their 1,800 subsidiaries signed a pledge to consider "negotiation or ADR techniques before pursuing full-scale litigation" with other companies that have signed the pledge. /2/ More recently, 150 corporate law firms signed a statement promising that "the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning the resolution of the dispute." /3/

In a different context, the new Standards of Conduct promulgated by the Academy of Matrimonial Lawyers provides that "an attorney should be knowledgeable about alternative ways to resolve matrimonial disputes." /4/ The comment on the standard states that alternatives to courtroom confrontation may result in a fair resolution, and that parties are more likely to abide by their own promises than by court-imposed outcomes.

In the public sector, major environmental disputes and conflicts over regulations of widespread application are being resolved outside of the courts through ADR with increasing regularity. The Colorado Bar Association recently recommended to the state's supreme court that it adopt an ethical rule requiring all lawyers to discuss with their clients alternatives to litigation before bringing suit. /5/

A former American Bar Association President recently warned that the courts could be left without litigants, except those too poor to afford what are coming to be viewed as the superior alternatives to the courts. /6/ It has become increasingly apparent that the poor are not faring well in the courts. Parties with continuing relationships may prefer to use mediation to settle disputes over litigation. Unfortunately, other than the ADR programs created by the courts and neighborhood justice centers, little creativity has been devoted to the delivery of dispute resolution services to the poor.

B. The Politics of ADR

Legal services advocates may have avoided ADR partly because of the political realities that have faced the legal services community since 1980. The same period that has witnessed the largest growth of ADR has seen programs fighting for their continuation. The effort simply to survive has channeled much of the poverty law community's creative energy away from experimenting with new alternatives.

In addition, ADR has been embraced by those opposed to vigorous representation of the poor. ADR was touted not as a tool for poverty lawyers to use, but as a substitute for effective
representation. Federal legislation proposed by Representatives McCollum, Staggers, and Stendholm would have required farmworkers' legal services lawyers to exhaust undefined administrative remedies and ADR mechanisms before being allowed the same access to the courts that is afforded to lawyers for all other litigants. /7/

The fact that some opponents of legal services have tried to use ADR to undermine an effective delivery system is not a good reason for ignoring ADR. First, for some types of parties and cases, mediation and other ADR techniques provide the most efficient and effective means of resolution. Second, persuasive arguments against using ADR inappropriately must be based on a sophisticated and precise understanding of which processes are appropriate in each circumstance. This understanding can come only from experience using ADR.

C. Unequal Bargaining Power

A legitimate concern about using ADR focuses on the disparity of knowledge, resources, and other forms of bargaining power often found between the parties to the disputes brought by poor clients to legal services. Although the context may vary, the underlying fear is the same: if one party is an individual and the other an institution, or if in a dispute between two individuals one has more money (a small landlord or merchant), or more clout (a parent in conflict with a teenager or an abuser with a subservient spouse), the less powerful may lose the protections that a court provides.

The answer is not simple and may vary with the particular parties, the nature of the dispute, the alternative processes and protections available, and the ability to compensate for the disparities between or among the parties within a particular ADR process.

1. Parties

Some parties simply are not competent to negotiate for themselves. These parties include persons with mental disabilities; the unusually inarticulate; many substance abusers, at least while they are impaired; and those whose extreme feelings of victimization or rage make it impossible for them to perceive what is in their own best interest.

Advocates--either lawyers, paralegals, or friends--may be needed for some of these people. Advocates should learn to use ADR processes, including mediation, although their role will be different from their role in court. In some mediations, for example, the parties should be encouraged to speak as much as they can, with advocates reminding them of points that they wanted to make and advising them about appropriate terms for an agreement. In other mediations, advocates may take the lead, especially in joint sessions when the parties and the mediator meet together. Some legal services advocates have pointed out that when clients speak in mediation not only are they empowered to speak for themselves, but they also demonstrate to the other side that it is not only the advocate that is arguing a particular point of view. /8/
2. Type of Dispute

Whether ADR is appropriate in disputes between legal services clients and more powerful parties may depend on the type of dispute. Some disputes can be resolved only through a determination that one party wins and the other loses. Disputes over eligibility for benefits are often of this type.

Other disputes permit multiple outcomes, including those with no clear winners or losers. Threatened termination of benefits for nonparticipation in the JOBS program falls into this category when the reason claimed for the failure to participate is based on the quality of the program or the lack of a needed service, such as child care. In this type of situation a participatory process may make sense, even if some adjustment is required to reduce the imbalance between the parties. In an institutional conflict, for example, an alternative may be to aggregate disputes involving several participants so that two or more participants are present to augment the balance of power.

Still other disputes, such as those involving domestic violence, may be inappropriate for ADR when enforcement of criminal laws is considered necessary to send a message that certain types of behavior will not be tolerated. In other areas, such as landlord-tenant law, some cases must be litigated to establish legal standards, to deter unfair practices, and to convince adversaries that legal services advocates will litigate if they do not reach satisfactory agreements.

3. Comparing ADR to Other Available Processes

Whether an ADR process makes sense for a particular conflict is a decision that must be made in light of the other available processes and protections. Even if it is less than ideal, mediation may make sense when the alternative is to litigate and lose or to win after an unacceptably long or costly battle. It is impossible to decide whether to mediate with a landlord or a violent spouse without considering the likely outcome in the absence of mediation. The difficulty is that the fewer the alternatives to mediation, the weaker a party's position within the mediation. Therefore, somewhat ironically, a legal services advocate may be more comfortable mediating with a landlord in a jurisdiction where tenants' rights are enforced than in one where they are not.

4. Ability to Compensate for Disparate Power

Power is never perfectly balanced between or among the parties to a dispute. The art of negotiation lies in making the most of the available alternatives. Advocates may be used, or other similarly situated parties added, to increase the negotiating power of poor clients. Other possibilities exist as well. Providing every client with an advocate for mediation or early neutral evaluation is not the only way to permit clients to make informed decisions among their alternatives.
Clients should be encouraged to consult with advocates before going to mediation and before signing agreements. Another possibility is providing clients with general information about legal rights and responsibilities in particular substantive areas, such as landlord-tenant or domestic relations, in simply written brochures, audio or videotapes, or group workshops. A third possibility is encouraging all mediators or neutrals to become familiar with poverty law concepts and to encourage parties to consult with attorneys in appropriate cases. One way to ensure that such knowledge and encouragement occurs is having advocates train neutrals. Another may be to furnish mediators with appropriate literature on poverty law concepts.

D. Lack of Precedent

When a definitive court ruling is needed to clarify, change, or enforce the law, a settlement-oriented procedure may not be an appropriate choice and litigation may be necessary. Unfortunately, the number of situations in which such litigation is desirable may be shrinking. Sometimes the filing of a lawsuit spurs negotiations. For example, the practices of a government agency may be changed without obtaining a final judgment. When a government agency creates an ADR program in an area under its enforcement, processes to settle individual cases may be combined with efforts to identify persistent violators for systemic enforcement. The Massachusetts Attorney General’s Consumer Protection Bureau instituted face-to-face mediation programs to resolve consumer complaints and included a monitoring system that tracks frequent violators and refers their files for litigation. The District of Columbia Department of Human Rights refers many of its individual complaints to mediation by the Center for Dispute Settlement, while retaining class actions or complaints against repeat offenders for enforcement. Programs must coordinate confidentiality policies and the types of releases individual consumers sign with its enforcement program.

In sum, the need to create new precedent or enforce existing legal standards should not obscure the advantages of more participatory processes to resolve disputes.

E. Uneven Quality and Dispersal of ADR Programs

Even lawyers who seek to maximize the use of ADR processes to benefit their clients face significant obstacles. In parts of the United States, no ADR programs exist. In these places, advocates must decide whether to work with courts or other groups to initiate programs that operate independently from legal services but accept large numbers of referrals of eligible clients, or to establish their own ADR programs.

A few legal services programs have opted to set up their own mediation programs. Due to limited resources and the potential conflicts of interest in those cases that do not settle in mediation and require subsequent representation, these have been a very small minority.

Other programs are attempting to encourage courts or other private groups, some church-related, to inaugurate ADR programs that are sensitive to their clients’ needs. Examples of such cooperation in Pennsylvania and Oregon include the participation in mediator training by legal
services attorneys and the use of legal services office space by private mediation programs during evening hours.

Finally, as with any innovation that is in the process of becoming institutionalized, ADR programs are not trouble-free. Particularly when new programs have been grafted onto existing bureaucracies in courts or agencies, advocates need to ask tough questions about the quality of the programs and their sensitivity to the needs of poor people. Programs that measure their success solely in terms of the number of cases settled are not in the position to answer such questions convincingly. Such programs run the risk of losing the very features that make ADR, and particularly mediation, attractive in the first place.

III. Questions to Ask About an ADR Program

In order to make intelligent choices on behalf of clients, as well as to participate in the design of new programs, legal services advocates should ask a number of questions about any ADR program.

A. Measuring Success

Counting cases settled and time saved simply is not enough. These numbers should be amplified with measures of a program's quality.

Indicators of a program's performance should include information about the results of resolved cases. Are individuals achieving some or all of their goals through settlement? Are some agreements producing results that would not have been obtainable in court? Are people satisfied with the process and the outcome? Did they feel coerced into settling? /10/ Would parties willingly participate in the program again or recommend it to others? If not, savings in time and money may be achieved at the expense of other, more important values.

B. Qualifications of Dispute Resolvers

Critical to the operation of any ADR program are the abilities, the training, and the experience or supervision of those responsible for resolving disputes. Unfortunately, there is no easy way to determine qualifications in this new and rapidly changing field. There is growing consensus that academic degrees in fields related to dispute resolution, such as law or mental health, do not ensure quality. /11/

Only experience and training that emphasizes experiential roleplaying have been correlated with success as a neutral. /12/ Yet, there are no hard and fast rules about how much training or experience is sufficient. Nor are there commonly accepted ways of testing critical skills. All that exists to date is a general agreement on some critical abilities, such as the ability to listen, to understand what is being heard, to be sensitive to cultural differences, and--for mediators--to help people develop their own solutions that respond to their needs.
Until more precise standards are developed, those seeking to evaluate dispute resolution providers should exercise some judgment about their sensitivity to poor people's experiences and concerns. The following are some of the major danger signals:

- a mediator who focuses only on the dollar amounts involved in a dispute or repeatedly pushes the parties to "split the difference";
- a family mediator who does not meet separately with each of the parties or find some other way of discovering their fears or concerns about dealing directly with each other;
- a commercial mediator who speaks only to the parties' attorneys, ignoring the disputants themselves;
- an arbitrator who knows nothing about the substance of the dispute being arbitrated; and
- a person who has not mediated a substantial number of cases, but offers mediation training to others.

A good arbitrator should be decisive, comfortable running a hearing, capable of distinguishing facts from opinions, and, when required, able to write reasoned decisions. A good mediator has a broader range of skills, which at a minimum should include being a good listener and a clear communicator, being able to identify and separate the issues involved in a dispute, and being sensitive to the disputants' values and priorities. A mediator needs to learn how to move the parties toward an agreement while still allowing them to make their own informed decisions concerning particular outcomes. /13/

C. Admissions Made in Mediation

Any decision about whether to require a mediator or a party to testify in court regarding information learned in mediation requires a balancing between two important policies: the importance of confidentiality and the courts' need for evidence. In many states, legislation protects from subpoena statements made in mediation sessions. /14/ In others, confidentiality in court-connected programs may be protected by court rules. The Administrative Dispute Resolution Act contains confidentiality provisions. /15/

Whatever the rule, there may be exceptions. Prosecutors, for example, may not be bound by confidentiality agreements reached between the parties to a mediation. Administrators of mediation programs generally believe that the almost universal statutory obligation to report allegations of child abuse supersedes mediators' confidentiality protection. Attorneys' obligation under state disciplinary codes to report alleged misconduct by other attorneys may prevail over the confidentiality of mediation proceedings. /16/

Regardless of the particular rules in force, two things must be considered: (1) the extent to which exceptions to general confidentiality provisions may benefit or harm poor clients; and (2) the importance of mediators' or attorneys' clarification to parties from the outset of what will and will not be held in confidence.
D. Standards Governing Dispute Resolvers

To the extent that neutrals are members of other professions, they are governed by the ethical or disciplinary standards applied to those professions. The dispute resolution profession is struggling to develop a set of standards. /17/ In addition, many of the court-connected programs are producing standards to govern the behavior of those who serve as neutrals, both as professionals and as volunteers. /18/

In labor-management mediation, responsibility for the fairness of the final agreement traditionally has belonged solely to the parties. In other contexts, most mediators would agree that it is inappropriate to assist parties in entering an agreement that is patently unfair or based on misleading or inaccurate information. /19/

Regarding the mediator’s responsibility for the fairness or adequacy of the ultimate agreement, the Society of Professionals in Dispute Resolution's standards require a mediator to inform the parties of concerns that he or she may have about the possible consequences of a proposed agreement. The mediator then has the option of educating the parties, referring one or more for outside advice, or withdrawing from the case while maintaining confidentiality.

IV. Conclusion: Choosing a Process

Most lawyers are oriented toward advocacy and decisionmaking and away from interest-based negotiation. Law professor Leonard Riskin has recognized this:

The philosophical map employed by most practicing lawyers and law teachers . . . differs radically from that which a mediator must use. What appears on this map is determined largely by the power of two assumptions about matters that lawyers handle: (1) that disputants are adversaries--i.e., if one wins, the others must lose--and (2) that disputes may be resolved through application, by a third party, of some general rule of law. . . . Moreover, on the lawyer's standard philosophical map, quantities are bright and large while qualities appear dimly or not at all. When one party wins, in this vision, usually the other party loses, and, most often, the victory is reduced to a money judgment. . . . [Nonmonetary] interests--which may in fact be the principal motivations for a lawsuit--are recognizable in the legal dispute primarily to the extent that they have monetary value or fit into a clause of a rule governing liability. /20/

John Arango some years ago argued that most legal services advocates have a strong "hands on help" orientation. /21/ If Arango's observation is correct, legal services advocates may have an easier time adjusting to using various ADR techniques than their private bar counterparts.

Other than the costs in time, money, and aggravation, the following considerations should govern the choice of a process:

- the extent to which a creative--not strictly monetary--result is possible or desirable;
- the value placed by the parties on their future relationship;
- the need for the parties to cooperate in implementing or complying with a solution;
the parties' desire to be listened to, to participate actively in the process, and to retain control over the outcome;
- the need for finality (and thus the avoidance of appeals or other challenges to the result);
- the desirability of establishing a principle to govern the resolution of future disputes; and
- the parties' preference for an objective standard of what the result should be versus their own notion of fairness. /22/

The particular choice that is made in a given case is less important than the fact that poor clients and those who represent them should have a choice. Providing a choice requires two developments: an understanding by those who represent the poor of the choices currently available, and the collaboration between advocates for poor people and others in the justice system to create new processes to meet poor clients' needs.

footnotes


2. The petition was circulated by the Center for Public Resources in New York, the organization that promotes the use of ADR by businesses and large law firms.


10. Here, it may be important to distinguish between coercion to attend an initial mediation session and coercion to settle in mediation. Requiring orientation to the process may be
acceptable as long as the process itself is not coercive and participants remain free to choose among outcomes.


12. Id.


17. ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (Society of Professionals in Dispute Resolution 1986).

18. SUPREME COURT OF NEW JERSEY TASK FORCE ON DISPUTE RESOLUTION, FINAL REPORT (1990); STANDARDS FOR PRIVATE AND PUBLIC MEDIATORS IN THE STATE OF HAWAII (Program on Alternative Dispute Resolution 1986); FLORIDA STANDARDS OF PROFESSIONAL CONDUCT FOR CERTIFIED AND COURT-APPOINTED MEDIATORS (Draft 1991); CODE OF ETHICS FOR STAFF AND MEDIATORS (Dispute Mediation Service of Dallas, Inc., 1986); STANDARDS OF CONDUCT (Family Court Servs., The Superior Court of California, Working Paper 1991).


22. See LINDA SINGER, supra note 13, at 177.

Suggested Reading List

1. ROGER FISHER & WILLIAM URY, GETTING TO YES (1981).


