Alternative Dispute Resolution and the Poor

Part I: What ADR Processes Exist and Why Advocates Should Become Involved

The Color of Money: Barriers to Access to Private Health Care Facilities for African-Americans

Stopping Defaults with Late Payments

The Medicare Limiting Charge: An Issue of Implementation and Enforcement
Alternative Dispute Resolution and the Poor Part I: What ADR Processes Exist and Why Advocates Should Become Involved

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I. Introduction

A 1979 Clearinghouse Review article urged members of the legal services community not to be "uncharacteristically silent about the growth of nonjudicial remedies and the role of the poor in their design and operation." /1/ The author encouraged advocates to become active players in "the design of [alternative] programs, their accountability, and the allocation of resources." /2/ In the interim, innovations have been made not only in settling disputes out of court, but also in supplementing or replacing the processes used by legislatures to budget funds and by agencies to promulgate rules and respond to complaints. New institutions and methods for resolving conflicts, such as those among neighboring families, now exist. These various developments are known by the acronym "ADR," for alternative dispute resolution.

Part I of this two-part article outlines the ADR processes, tracing recent developments in ADR and considering their relevance to legal services. Part II will suggest questions that advocates should ask about ADR processes and examine the benefits and drawbacks for poor clients and poverty law issues.

II. ADR Processes

A. The Major ADR Methods

New methods of resolving disputes have emerged in courts, agencies, businesses, and communities. Although diverse, they generally share the following characteristics:

- They exist between the opposite alternatives of doing nothing or adjudicating through full, trial-type procedures.
They are less formal and more private than court or administrative adjudication. They allow more active participation and control over the resolution processes than traditional methods of dealing with conflict. Many attempt to preserve or strengthen relationships between disputants, such as family members, employees and employers, and clients and caseworkers. Almost all were developed initially in the private sector, although courts and administrative agencies have borrowed and adapted some of the more successful techniques.

ADR includes both new alternatives to litigation and old methods adapted to current needs. Following is a summary of the most common ADR techniques.

1. Mediation

Sometimes called conciliation or facilitation, mediation employs someone who is not a party to the dispute and has no power to decide the outcome or order a resolution, to aid the parties in negotiating a settlement. The parties often are present and are encouraged to participate in fashioning a solution. Most mediators meet separately with each party and jointly with all of the parties and their attorneys in an effort to understand everyone’s interests and to help develop options that will settle the dispute.

Traditionally, mediation has been used primarily in labor-management disputes. In the past few years, however, mediators have resolved disputes such as the siting of the Storm King Dam on the Hudson River, the development of EPA’s rules on clean air, the settlement of landlords’ suits against tenants for rent or possession, and the custody of children following their parents’ divorce. Another area in which mediation has grown tremendously is private use of professional or volunteer mediators to settle complex litigation over contracts, torts, defamation, or environmental issues prior to trial. Mediation of divorces or other family disputes also has become more widespread.

Neighborhood or municipal "justice centers" or mediation services rely on volunteer mediators to resolve a range of disputes. /3/ Some of these centers are closely connected with a court, prosecutor, or the police. Such centers tend to have a steady flow of cases. Other centers have no connection to the formal justice system, relying instead on case development by volunteers. Specialized consumer, farmer-lender, school, and welfare mediation programs also exist. A few neighborhood justice centers are operated by or housed in legal services offices. More than 350 of these centers are in operation, defying the predictions of many who believed that community justice centers would not survive the end of their original federal or private grant funding.

The Justice Department’s Community Relations Service (CRS) has employed mediators since the late 1960s to help resolve ethnic and racial disputes. In the early years, much of CRS’s work involved black/white disputes, but as the country has grown more ethnically diverse, CRS employees have become increasingly active in disputes involving Asian and Hispanic communities.
2. Arbitration

The most court-like of the alternatives, arbitration, places the dispute in the hands of a third party who has no interest in the outcome. Unlike mediation, where the parties control the outcome, in arbitration a neutral arbitrator decides. Like mediation, arbitration has traditionally been used in labor-management disputes. It is also used extensively in commercial disputes, and increasingly by courts to resolve small civil cases. Although traditional arbitration binds all parties and permits appeal only on the extremely narrow grounds of jurisdiction or fraud, court-based arbitration is nonbinding and permits parties dissatisfied with the result to proceed to trial.

3. Mini-Trials

The term mini-trial is a misnomer, because the process need not be "mini," nor is it a trial in the traditional sense. The fundamental characteristic of the mini-trial is that a summary of the evidence is presented to the principals. Following the presentation, those with authority to settle attempt to negotiate a solution, often out of the presence of their attorneys. A neutral advisor may be added to manage the proceedings, to mediate, or to give an opinion on how a court might be expected to decide the case.

4. Summary Jury Trial

In a summary jury trial, a judge impanela jury to hear a shorter version of the evidence than would be presented at trial. The jury is asked to render a verdict, generally without being told that its verdict will be advisory only. Once the verdict has been announced, individual members of the jury may be questioned by attorneys for both sides. In responding to this questioning, the jurors may provide insight into why they gave more credence to some testimony than to other testimony. Armed with this information, the attorneys and parties negotiate.

5. Early Neutral Evaluation

In early neutral evaluation (ENE), a neutral party, often a lawyer with expertise in a particular area of law, listens to a summary of each party's case, then attempts to predict how a jury would decide and the probable range of awards. The neutral party may also act as a mediator, conferring with the parties in an effort to help settle the dispute, either before or after rendering an opinion.

6. Ombudsperson

An ombudsperson is someone selected by an institution to investigate complaints or grievances by its constituents, clients, or employees. The Older Americans Act /4/ requires each state to have a long-term care ombudsperson, to whom all nursing home residents must be given
access. Complaining to an ombudsperson is a voluntary, confidential, and informal process. The findings and recommendations issued generally are nonbinding.

**B. ADR Programs**

Dispute resolution programs now exist for a wide range of substantive areas of poverty law. /5/ Although participation in many of these programs is voluntary, an increasing number of courts and some administrative agencies have made participation mandatory. Until very recently, no federal policy on ADR and little statewide legislative or judicial policy had been established. Several states have legislated policies through statute or court rule and have appointed statewide coordinating bodies to implement them. /6/ Despite these developments, much of the implementation of ADR efforts has been sporadic, depending in large part on individual interest and local initiative.

Below are descriptions of some of the ADR programs of special interest to legal services advocates. This list is not an exhaustive catalog of all existing programs; it simply suggests the wide range of contexts in which ADR is being used and others to which it might be extended.

1. Civil Cases

Until the past few years, the only regular use of ADR processes was nonbinding arbitration. The use of nonbinding arbitration that began in Pennsylvania in the 1950s has increased dramatically in the past decade. It currently is in place in more than 20 state court systems and 10 federal district courts. /7/ The arbitration programs are designed to settle civil cases up to a jurisdictional limit that varies by locale. Cases are referred to single arbitrators or panels, usually local bar members, who listen to a truncated form of the evidence and make an arbitration "award." The parties may accept this judgment or request a trial de novo. In some states, a party requesting a trial must pay costs if the damages awarded at trial do not exceed the arbitration award by a set percentage. /8/

Used by very few court systems ten years ago, mediation is now in place in a growing number of state and federal courts. /9/ While mediation programs have been largely voluntary, a trend toward mandatory referral now exists. Both Florida and Texas law allow trial judges to require the parties in civil or family cases to participate in mediation or nonbinding arbitration. /10/ Florida Supreme Court Rules permit a judicial circuit's chief judge to decide that all civil cases of a certain type will be automatically referred to mediation or nonbinding arbitration, unless a party makes an affirmative showing that its case should be exempt. /11/ In some states, the parties pay the mediator's fee; in others, courts pay the mediators or rely on volunteers. Voluntary standards to guide court-connected mediation programs should be published in 1992. /12/

In the early 1980s, judges and lawyers in Orange County, California, tried to reduce a substantial backlog of civil cases by creating "Settlement Week." During this time, courts would not hold trials; instead, they would cooperate with members of the bar in offering mediation. The Settlement Week idea has since spread to a number of states. /13/
Approximately 40 to 50 percent of the cases mediated during Settlement Weeks have been settled. /14/ In addition to spurring settlement, these programs have exposed large numbers of lawyers to mediation, and satisfaction rates of both lawyers and clients have been high. /15/

Federal courts also have been using a variety of ADR processes. The District Court for the District of Columbia offers litigants mediation and early neutral evaluation programs. The ENE program in Washington was modeled after that created in the Northern District of California. A number of federal appeals courts have created mediation programs to narrow issues on appeal and to encourage settlements. Although the federal appellate programs generally involve staff attorneys as neutrals, the program in the D.C. Circuit relies on volunteer lawyers to mediate appeals.

Some of the increased use of ADR by courts can be attributed to the ABA's work in sponsoring Multi-Door Courthouses. The Multi-Door concept envisioned a courthouse offering a variety of dispute processes and a well-trained staff referring disputants to the proper process for each dispute. /16/ The original Multi-Door Courthouses were created in Washington, D.C., Houston, Texas, and Tulsa, Oklahoma. Others, including Burlington County, New Jersey, and Middlesex County, Massachusetts, have adapted the idea to their court systems.

Court-based use of ADR processes in civil cases should continue to increase for the foreseeable future. Pressure for this increased use comes from a number of sources, and is fueled by those concerned about the cost, delays, and limited solutions dictated by court processes. Statutes such as the Civil Justice Reform Act of 1990 /17/ will only encourage the spread of ADR processes.

2. Small Claims Disputes

Courts in several states now require litigants in all small claims cases to attempt mediation before trial. /18/ Mediators are volunteers, many of them retired. Few are lawyers. About two-thirds of all cases mediated in small claims courts are settled. Somewhat surprisingly, mediation settles almost as many disputes among strangers as among people with ongoing relations.

A comparison of the outcomes of mediated small claims in Maine with outcomes of cases heard in courts where mediation was unavailable revealed several advantages of the mediated settlements. Not only did participants greatly prefer mediation to trial, but mediation was much more likely to produce compliance with the resulting agreement. Of the mediated agreements with monetary settlements, 71 percent were paid in full, in contrast to only 34 percent of the court orders.

In interviews, 73 percent of the defendants who mediated said that they felt a legal obligation to pay, compared with only 12 percent of the defendants who went to court. In addition, mediation participants understood more of what was going on, believed that they had a greater opportunity to explain their side of the case, and in general were more satisfied with their overall experience than participants whose cases were decided by a judge. /19/
3. Consumer Disputes

Small claims courts, and the mediation programs that are attached to them, attempt to settle the disputes between businesses and their customers that reach court. Increasingly, neighborhood and citywide mediation centers, such as those in Washington, D.C., Houston, and Atlanta, mediate complaints between individuals and businesses as part of their broader caseloads. To date, however, their clientele largely has been limited to small businesses and their customers. /20/

Large numbers of specialized consumer programs exist solely to resolve disputes between businesses and their customers. The Office of Consumer Affairs lists more than 500 such programs, three-fourths of them less than 15 years old, in addition to those run by individual companies for complaints by their own customers. /21/ Most of the independent programs are operated by government agencies at the city, county, or state level. Some programs are sponsored by trade associations and Better Business Bureaus. Still others are run by newspapers or radio stations that deal with businesses on behalf of consumers. Most of these programs rely on written and telephone communication rather than in-person hearings. In Massachusetts, however, the Attorney General's office runs a statewide in-person consumer mediation program. /22/

Beyond these methods, organizations increasingly are developing their own in-house programs, such as the nearly 4,000 complaint handlers who now work in hospitals throughout the country to respond to patients' concerns. /23/ Both company and trade association programs have received mixed reviews. /24/

4. Landlord-Tenant Disputes

Housing courts in some major cities, including Philadelphia, New York, Boston, and Hartford, offer or require mediation between landlords and tenants as a first step in resolving disagreements over housing. These programs generally employ full-time housing specialists. Some of these programs have been criticized for paying too little attention to tenants' defenses, for telling tenants what to do in the guise of mediation, and for failing to devote enough time to each case to make a thorough exploration of all available options. Others have been praised for giving an active role to legal services advocates, helping to ensure that unrepresented tenants are not overwhelmed by the landlord or the landlord's attorneys, and producing generally good results for tenants. /25/

ADR techniques also have been tried in public housing. Since 1975, local PHAs have provided hearings before administrative grievance panels for tenants threatened with eviction. The panels provide an informal, on-site forum that may be less intimidating than housing court. A typical panel has three members: one chosen by the tenants' association, one chosen by the PHA, and one neutral party, such as a minister. Instead of simply deciding whether to evict, the panels often devise creative, compromise solutions on a case-by-case basis. For example, a panel might issue a no-trespass order for a person accused of drug dealing, instead of evicting the
entire family. Alternatively, a panel might allow the person to stay if he or she enrolls in a drug treatment program.

If the panel finds for the tenant, no further action can be taken by the PHA. On the other hand, if the panel rules to evict, the tenant has the right to appeal the decision in court. Even if the panel approves eviction, the grievance procedure may benefit the tenant, who learns about the specific charges being made and has the opportunity to confront the government's witnesses. Since there is often no pretrial discovery prior to a court eviction hearing, the grievance panel may be the only chance the tenant has to learn the facts that the PHA will use in court.

In the past few years, HUD has weakened the role of the grievance panels. Believing that the administrative procedure causes too much delay, Secretary Jack Kemp issued "due process determinations" for the 39 states and District of Columbia that allow local PHAs to waive the grievance procedure. /26/

Finally, many neighborhood justice centers, including a few that are run by legal services offices, mediate private landlord-tenant matters. Wayne County Neighborhood Legal Services of Detroit operates a specialized landlord-tenant mediation center with voluntary participation by both landlords and tenants. These programs seem to attract primarily smaller landlords and those with a personal relationship with their tenants. /27/

5. Family Disputes

a. Mediation in Ongoing Families

In a small but increasing number of programs, mediators deal with conflicts within ongoing families. /28/ In most programs, volunteer mediators attempt to smooth rifts between parents and their adolescent children. The mediators are part of publicly supported programs that work with families that have been referred by juvenile courts, schools, police, or social workers. /29/ Disputes generally involve situations in which teenagers have failed to attend school, run away, or committed minor crimes. Often, their parents have given up dealing with them and have attempted to turn them over to juvenile authorities as "beyond parental control."

Researchers studied the results of a parent-child mediation program, the Children's Hearings Project, begun in Massachusetts in 1980. Although mediation could not and did not intend to address the underlying financial and emotional problems of the working-class families that used the program, it clearly eased communication between parents and teens and changed the way in which they handled conflict. The majority of participating families reached written agreements, generally after two or three mediation sessions. Agreements covered specific details of family life, such as curfews and family chores. Of those settling their disputes in mediation, two-thirds reported several months later that the agreement was working wholly or partially and that it had helped the overall family situation. The great majority were satisfied with their mediation experience. Seventy percent of the family members reported that arguing and fighting at home had decreased. /30/
A subsequent study of the Washington, D.C., program reported even more positive results from mediation in low-income minority families. /31/

b. Divorce Mediation

In view of the advantages of family mediation, it is ironic that the greatest growth in its use has been in connection with divorce. Divorce is an event that demands decisions about the custody and support of children and division of property and debts. If the parties do not make these decisions for themselves, a judge will do it for them. It is becoming a cliche that courts are poorly suited to settling these problems. Unfortunately, the separating parties generally are ill-equipped to get through the legal and emotional consequences of the separation unaided.

Almost four million single parents in the United States, the great majority of them mothers, are entitled to receive child support payments. In fact, most of them do not. /32/ Noncustodial parents, usually fathers, often disappear from their children's lives. By the second year after divorce, nearly one-third of all divorced fathers see their children less often than once every three weeks; many do not see them at all. /33/

Divorce mediation, despite some of the claims made by its advocates, cannot solve all of these problems. Indeed, its most extreme critics argue that no women should use mediation in dealing with family law problems. "Only the legislatures and courts can create, develop, and expand and enforce women's rights. Mediation offers no protection, no deterrence, no enforcement, and no opportunity to expand women's rights." /34/

Others advocate the knowledgeable and discriminating use of mediation by poor clients in dealing with divorce, child custody, and support. /35/ Mediation clearly is not appropriate for every client, even though it does promise to reduce the hostilities and the time required in the ordeal of divorce.

Divorce mediation occurs in three settings: the private sector, courts, and community justice centers. Since the quality of both the mediators and the administration of programs varies, no single program is preferable for poor clients. Advocates report different experiences; one prefers court-run programs "because they offer a guarantee that the mediators have been trained" and provide "a greater opportunity for input into court-operated programs by legal services advocates"; /36/ another reports greater satisfaction with private mediators--despite being unable to convince courts to pay mediators' fees if clients are indigent--and volunteer mediators at community justice centers. /37/

6. Disputes in Public Schools

a. Preventing Violence in School

Between 100 and 150 schools now have school-based mediation programs. /38/ Professional mediators, often from local dispute centers, train students to help other students handle their
own conflicts. The centers also train student-teacher teams to conduct occasional mediations between students and teachers or parents.

These programs aim to reduce school violence, to provide an alternative to suspension, and, perhaps most importantly, to help students learn ways of responding to conflict other than by fighting or dropping out. One sign of the programs' success is the number of students who go through mediation as disputants and then ask to be trained as mediators. Another is that some students, after taking part in mediation as disputants or as mediators, take problems to the programs on their own initiative without waiting for fights or school-imposed discipline.

Participating in mediation gives students a chance to cool off, to express their anger in a nonthreatening atmosphere, and to discuss the causes of their scuffles, preferably before they escalate. Preliminary observations of the New York City program suggest that the student mediation efforts, in addition to keeping students in school, have reduced school violence to some extent and have improved teachers' attitudes toward student discipline. The programs' most dramatic effect, however, has been to improve the self-image of the students who serve as mediators, often themselves former disciplinary problems. /39/

It is too early to tell whether these efforts can be expanded to encompass conflicts between students and their parents and teachers or administrators as well as disagreements with other students.

b. Resolving Disputes About Educating Children with Disabilities

In a slightly different context, parents and school administrators are using mediation to deal with disagreements over educating children with disabilities. Massachusetts was first to use the process in 1976; now, more than half of the states provide for mediation between local school officials and the parents of disabled children. /40/ Mediation is used to avoid the costly, time-consuming, and emotionally draining administrative hearings that are permitted annually under the Education for All Handicapped Children Act (EHCA). /41/

The purpose of the EHCA is to ensure that children with disabilities receive an appropriate education at public expense. To meet this goal, the act provides federal funds to state and local school systems. In order to qualify for federal aid, a state must provide the parents of a child with disabilities with an annual "impartial due process hearing" if the parents disagree with the school's plan for educating their child. If they dispute the state agency's final decision, the parents may file suit in federal court.

Although no form of dispute settlement other than court or formal administrative hearings is mentioned in the statute, several states have devoted significant resources to mediating disputes over special education. /42/ In most programs, mediators are employees of the state educational agencies that hear parents' appeals from local plans. They offer parents the option of mediating before convening formal hearings. Although the quality of programs and the number of disputes actually resolved vary considerably, most of the programs appear to settle about three-fourths of the cases that they mediate. /43/
7. Disputes Between Farmers and Lenders

State legislatures in the farm belt and Congress turned to mediation as part of recent efforts to deal with the crisis in loans to farmers. Nationally, farmers are in debt by an estimated $200 billion to banks, insurance companies, and federal agencies such as the Federal Land Bank and the Farmers Home Administration. Newly created programs offer mediation between farmers and lenders in an effort to stave off foreclosure.

In 1986, Iowa and Minnesota passed legislation requiring creditors to attempt mediation before beginning proceedings for foreclosure or repossession of farmers' property. At the same time, Wisconsin enacted a voluntary program. Once these programs were in place, other farm states quickly followed suit. Indiana, Kansas, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, and Wyoming adopted voluntary programs; Colorado and South Dakota chose mandatory farmer-lender mediation. Several other states have legislation that was recently enacted or is pending.

As a result of the state programs' initial successes, the Agricultural Credit Act of 1987 authorized matching grants of up to $50,000 to states to finance their efforts to mediate farm loan disputes. The federal law prohibits lenders from conditioning loans on waiver of mediation rights and requires all federally supported farm credit institutions to participate in "good faith" in any state agricultural loan mediation program and to present proposals for restructuring debts in the course of mediation.

The Nebraska Legal Aid Society operates a statewide Farm Mediation Service, in collaboration with the Interchurch Ministries of Nebraska. The office receives both state and federal farm mediation funds and is operated independent of LSC. Mediators are community volunteers, who receive training from the Legal Aid Society. Legal Aid also trains specialized borrower advocates, who may accompany farmers to mediation sessions.

8. Conciliation in the JOBS Program

Under the Family Support Act of 1988, every state is required to develop and operate a conciliation procedure to resolve JOBS program disputes. Generally, the law envisions conciliation as a less formal, more rapid process for resolving program disputes than the fair hearing process. As used in the statute, the term "conciliation" appears to mean the same thing as the more commonly used term, "mediation." A state fair hearing process must be available for disputes not resolved in conciliation.

Conciliation generally is used when a person has failed to participate in a JOBS activity without good cause. In that situation, the conciliation seeks to attain participation and prevent a sanction, such as a grant reduction. Beyond that, a joint report by the Center for Law and Social Policy (CLASP) and the Center for Dispute Settlement (CDS) argued that the conciliation process should be available to address any dispute relating to program participation. Other disputes may arise regarding the propriety of an assignment to a particular activity or provider, or a JOBS participant may want to dispute an assignment without refusing
to participate. Disputes may arise over the nature or adequacy of child care or other supportive services, or a participant may object to a decision concerning the employability plan. Conciliation must occur before a notice of intent to sanction is issued to a participant. If the dispute is not resolved during conciliation and a notice of adverse action is issued, the individual may contest the proposed sanction through the hearing process. /53/

Although states may contract out the conciliation process, they must determine whether an individual has "good cause" for not participating in JOBS. /54/ HHS regulations require states to "assure that any conciliation performed by a contractor be fair and impartial." /55/ If conciliation is contracted out, the state must develop specific criteria for the contractor and, for cases not falling within the specific criteria, the contractor may make only a recommendation to the welfare agency. /56/ States have a broad array of choices for conciliators. Although HHS has suggested that the process may involve disinterested third parties, many state plans simply indicate that conciliation will be performed by the JOBS case manager or a supervisor. /57/ Others use workers from other parts of the organization. A few use outside dispute resolution professionals.

The CLASP-CDS review of state JOBS plans revealed that many states tend to articulate the purpose of conciliation in one of two ways: (1) as an opportunity for "one more warning"--for example, to inform the individual that he or she must comply or be sanctioned, or, in the case of an exempt volunteer, lose program priority; or (2) as an attempt to identify the barrier to participation and work to address ways to overcome the barrier. /58/ To some extent, the warning component must be present in any state procedure, because individuals need to know the agency's next step if conciliation fails to resolve the dispute. States emphasize the purpose of conciliation differently, however, and in some states it is difficult to identify the intended purpose. /59/

9. Disputes over Public Policy

   a. Siting Public Facilities

The social costs of stalemate in the siting of a necessary public facility are significant. According to a recent guide to negotiating public disputes:

In the United States we are at an impasse. Public officials are unable to take action, even when everyone agrees that something needs to be done. . . . Almost every effort to build prisons, highways, power plants, mental health facilities, or housing for low-income families is stymied by nearby residents. There has not been a single hazardous waste treatment facility built in this country since 1975, even though everyone agrees that such plants are needed to avoid "midnight dumping" of dangerous chemicals. Public officials find that even substantial electoral victories do not translate into the power needed to build such facilities. /60/

A few of the larger, longer-established community justice centers are no longer dealing solely with individuals' disputes but are using their experience to settle highly emotional conflicts among groups of citizens or between citizens' organizations and businesses or government
agencies. ADR has a potentially enormous role to play in resolving disputes about the siting of homeless shelters, halfway houses, and group homes. Disadvantaged clients may be on more than one side of these disputes, with the interests of residents of facilities on one side and those of neighbors, who may also be poor, on the other.

Poor neighborhoods probably have the most to gain from ADR, since they tend to have the least power to keep out unwanted facilities through political action or litigation. In an unusual negotiation over the siting of a waste treatment facility in North Carolina, an agreement between a city and the private company that would operate the facility provided citizens who had complaints about the facility’s operation with a multi-step complaint procedure, culminating in binding arbitration, for the mostly poor residents of the city. /61/

b. Negotiating Governmental Regulations

Government agencies at the federal, state, and local levels issue thousands of regulations each year. In order to give those who will be affected by the rules some input into their development, drafts of federal rules are published in the Federal Register for notice and comment. Once a final rule is promulgated, dissatisfied groups may take their complaints about the legality, the substantive provisions, or the process used in enacting the rule to court.

This process often satisfies no one. According to a former EPA official:

In the traditional rulemaking process, a few individuals in a back room at EPA come up with a draft rule that is circulated around EPA for comment, then published in the Federal Register. That process ignores the collective thinking of the impacted parties who then take shots at the published rule and are immediately positioned in adversarial relationships. Litigation usually follows. /62/

EPA and five other federal agencies have attempted to change this process by involving diverse parties in negotiating the content of rules. /63/ They formed ad hoc committees, representing the interests affected by a new rule and, aided by a mediator or facilitator, they charged each committee with drafting a proposed rule. If the committees reach a consensus, the resulting rule is published for comment in the same manner as rules issued through traditional methods. Some of the agencies have agreed in advance to publish the committees’ rules as their own drafts; others have agreed only to consider them seriously. /64/ As a result, many of the committees have reached agreement, and so far no regulation produced through the process has been challenged in court.

Agencies often ask mediators to recommend participants so that the result will be credible to constituencies. In this situation, the mediators contact dozens of individuals asking them to suggest others who should be included in order to give the resulting rule broad public acceptance. An announcement of the negotiations is published in the Federal Register so that anyone interested in attending may request admission or simply show up.

As in other face-to-face negotiations, participants find that the process dissipates some of their stereotypes and forces them to work together. Many of the participants see the greatest benefit
as the opportunity to deal directly with one another, rather than to be relegated to submitting reams of paper to an invisible agency.

In late 1990, Congress passed the Negotiated Rulemaking Act (NRA), /65/ to legitimize and clarify the regulation negotiation process. In an effort to ensure the representation of all interests affected by a regulation, the legislation gives agencies the authority to reimburse the expenses of representatives of parties who, if not reimbursed, might not have been able to participate in the negotiations. Although to date most regulation negotiations have involved highly technical subject matters, such as environmental hazards, the labor and consumer areas have also each had a negotiation. The process has not yet spread to regulations involving public benefits; however, the NRA may spur greater activity by agencies most closely connected to the needs of the poor.

c. Negotiating Government Budgets

In addition to facilitating the drafting of regulations, mediators succeeded occasionally during the 1980s in bringing together parties with diverse interests to agree on priorities for spending public money. In Connecticut, mediation was used to distribute cutbacks in federal funds available for social welfare services. /66/ The director of the state Department of Social Services agreed to send the legislature the recommendations of a group representing private organizations and local governments if the group could reach a consensus on distributing the remaining funds. It did, and the legislature adopted the group's recommendations.

The mayor of Malden, Massachusetts, convened a similar group in 1980 after Massachusetts voters approved Proposition 2-1/2, a law limiting state and local taxes. /67/ The mayor, who had been elected recently by a narrow margin, anticipated substantial controversy over any reductions in city services that the budget would force him to make. Teams of citizens, businesses, and city government officials were charged with developing a plan to handle the burgeoning budget deficit that resulted after the law was passed. Each team met with a mediator in order to develop a consensus on the city's most pressing needs. The entire group then convened and produced a draft final agreement, which was published in the local newspaper. Taking citizens’ comments into account, the group then produced a final series of recommendations, most of which were implemented by the city.

Convening and working with teams of citizens and government officials require so much time on the part of participants and mediators, as well as money to pay the mediators, that only a few problems have provided the incentive to bring all parties together. Participants in the mediations that have taken place generally report satisfaction with the process. /68/ The negotiations occur on a state or local level, so the problem of long-distance travel is not as acute as in federal-level mediations. Furthermore, the issues generally are less technical than in the regulation negotiations, and participation is more accessible to all who are interested.

III. Why Advocates Should Care About ADR
A. ADR Processes for Poor Clients Already Exist

Legal services advocates should care about ADR because many of these processes already exist in most parts of the country. Advocates must ensure that clients take advantage of existing ADR processes and that their rights are protected in each of the mechanisms they use. So many possibilities exist that legal services advocates should not miss the opportunity to devise or help shape ADR programs to benefit their clients.

A 1987 survey conducted by the National Center for State Courts and the National Institute for Dispute Resolution identified 458 operating court-annexed dispute resolution programs in 44 states and the District of Columbia. /69/ Experimental programs also exist in some federal courts, at both the district and appellate level. The Civil Justice Reform Act of 1990 mandated the creation by every district court of advisory committees on civil cost and delay and charged them with considering the applicability of ADR to their courts. /70/ Thus, while ADR mechanisms are not in general use in all courts, they are well on their way to becoming so.

In 1990, Congress enacted the Administrative Dispute Resolution Act (Act). /71/ The Act sets out guidelines for the use of dispute resolution processes by federal agencies and requires each agency to appoint an ADR Coordinator and to develop and publish a policy on its use of ADR. Although nothing in the Act mandates the creation or use of new procedures, the heightened awareness generated by the legislation is already producing new initiatives in federal agencies. /72/ Even President Bush has acknowledged the importance of ADR. In October 1991, he issued an executive order stating that "it is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies." The order prescribes that all counsel who participate in civil litigation on behalf of the federal government be trained in dispute resolution techniques. /73/

In addition, legal services programs will have to understand ADR because Congress may consider legislation in 1992 that includes a requirement to consider ADR in all cases. Under the proposed legislation, all LSC-funded programs must adopt policies, consistent with applicable ethical rules, requiring advocates to negotiate settlements or use ADR mechanisms when such mechanisms are appropriate and available. The legislation would allow legal services attorneys to file suit only when professional responsibility to the client requires that litigation be commenced without negotiation or use of ADR.

B. ADR Can Create New or Improved Problem Solving Mechanisms

Recent congressional enactment of the Fair Housing Amendments Act /74/ and the Americans with Disabilities Act, which refer explicitly to ADR, /75/ will require multiple determinations of "reasonable accommodation" in rental housing, public services, public facilities operated by private entities, and transportation. Once some standards have been established by regulations and perhaps by some precedent-setting litigation, mediation would seem to be particularly well suited to tailoring the "reasonable accommodations" mandate to individual situations.
Possible areas for new dispute resolution programs include health care disputes between patients and their doctors or hospitals; disputes over Medicare or Medicaid coverage, including reimbursement of nursing home costs; conflicts between nursing homes and their residents; and disputes within school systems over placements, tracking students, and at-risk programs.

ADR processes promise faster results than traditional legal or bureaucratic processes, at a fraction of the cost and with greater degrees of compliance. Yet, savings in cost and time and the possibility of achieving increased compliance are not the only reasons for the increasing use of ADR. The enthusiasm for more participatory ADR processes lies in the reactions of both disputants and dispute resolvers. People gain satisfaction from taking an active role in settling their own and other people's conflicts. Many disputants care about preserving relationships even when they differ. All of us care about controlling the outcome of our disputes. Even corporate executives are more satisfied with the process and the results when they are actively involved in shaping outcomes than when their affairs are placed in the hands of outside professionals.

The idea of active participation by clients in their own advocacy is consistent with the original conception of the legal services movement that contemplated joint action by lawyers and the community:

The important philosophical and political difference underlying the new programs after 1964 was that the poor were to be empowered and trained to conduct their own political advocacy and to exercise their own power in the larger political system, rather than simply to receive the technical services of professionals serving as just another agency of legal aid, encouraging continuing dependency on those who already had power.

Decisions produced by collaboration among those who must live with the results can be tailored to the parties’ needs. A schedule for caring for their children that is devised by divorcing parents themselves, for example, is more likely to reflect their preferences and other commitments than a schedule imposed by a judge or negotiated by lawyers. Negotiated or mediated settlements also are far more likely to preserve a continuing relationship between the parties than is a court battle. For some disputants, ongoing relationships with landlords, employers, or neighbors provide the most persuasive reason to attempt various settlement techniques.

Growing evidence also suggests that people who reach agreements themselves are more likely to abide by their agreements than people who are told what to do, whether by a judge or by a bureaucrat. They are also more willing to renegotiate their agreement as circumstances change. This observation has implications for a broad range of people and problems, from fathers who refuse to pay child support to companies whose products pollute the environment.

The potential virtues of ADR should not obscure the possible pitfalls of using alternative processes for some types of clients or some types of legal problems. ADR programs need to take into account the special problems and competencies of particular populations of legal services clients. Some clients should not be expected to negotiate for themselves without the help of advocates, either within the dispute resolution process or as an adjunct to it. Some tenants and many victims of domestic violence may fall into this category. Other clients may be
able to function well in mediation, as long as the mediator is sensitive to inequalities of bargaining power and ensures that all parties understand their rights and the resources available to them. Many who have worked with the elderly believe that they fall into this category. /79/

IV. Conclusion

Current dispute resolution programs differ tremendously in their quality. /80/ A bewildering variety of programs have sprung up, with widely varying degrees of thoughtfulness, planning, and careful implementation. /81/ The treatment by legislatures and courts of issues such as confidentiality, the enforcement of mediated agreements, and the liability of neutrals is still in flux. /82/ Furthermore, the development, implementation, and monitoring of standards by courts, government agencies, and professional associations are still in their infancy. /83/ Picking and choosing among programs, and deciding which clients and problems can benefit from them, requires both knowledge and sensitivity on the part of legal services advocates.

footnotes


2. Id.


10. FL. STAT. ANN. Sec. 44.302; TEX. CIV. PRAC. & REM. CODE ANN. Sec. 152.003.

11. FL. R. CIV. P. 1.700-1.760, 1.800-1.830.
12. The advisory board to the project, supported by the federally funded State Justice Institute, includes two legal services attorneys.


14. Id.

15. LINDA SINGER, supra note 5, at 79.

16. The Multi-Door concept was the brainchild of Harvard Law School Professor Frank Sander; see Frank Sander, Varieties of Dispute Resolution, 70 F.R.D. 111 (1976).


18. LINDA SINGER, supra note 5, at 127.


20. LINDA SINGER, supra note 5, at 90-94.

21. Id.

22. Id.

23. Id.

24. Id.


27. Daniel Pearlman, supra note 25, at 3-6, 8.

28. LINDA SINGER, supra note 5, at 33.

29. These programs are supported by local government funds. Some may be suffering reduction or elimination due to current local budget crises.

31. GERALD STAHLER & JOSEPH DUCETTE, FINAL EVALUATION REPORT ON THE USE OF FAMILY MEDIATION TO PREVENT AND TREAT ADOLESCENT NEGLECT (1987).


33. Id. at 19.


35. Penny Willrich, Resolving the Legal Problems of the Poor: A Focus on Mediation in Domestic Relations Cases, 22 CLEARINGHOUSE REV. 1373 (Apr. 1989); telephone interview with Jacquelynne Bowman, Director of Family Law Unit, Greater Boston Legal Services (July 6, 1990) [hereinafter Bowman interview].

36. Penny Willrich, supra note 35, at 1378.

37. Bowman interview, supra note 35.

38. LINDA SINGER, supra note 5, at 153.


40. See LINDA SINGER & ELEANOR NACE, MEDIATION IN SPECIAL EDUCATION (1985).


42. See LINDA SINGER & ELEANOR NACE, supra note 40.

43. Id.

44. LINDA SINGER, supra note 5, at 95.

45. IOWA CODE ANN. Sec. 654A.6; MINN. STAT. ANN. Sec. 583.26.

46. WIS. STAT. ANN. Sec. 93.50.

47. IND. CODE ANN. Sec. 15-7-6-12; KAN. STAT. ANN. Sec. 74-545; MISS. CODE ANN. Sec. 69-2-45; MONT. CODE ANN. Sec. 80-13-201 (expired); NEB. REV. STAT. Sec. 2-4808; N.D. CENT. CODE Sec. 6-09.10-04; WYO. STAT. Sec. 11-41-108; COLO. REV. STAT. Sec. 6-9-104 (repealed); S.D. CODIFIED LAWS ANN. Sec. 15-13-10.


50. Telephone Interview with Kathleen Severens, Managing Attorney, Nebraska Legal Aid Society (July 18, 1990); Kathleen Severens, Speech to the Rural Advocacy Section of the NLADA Annual Conference, Serving the Unseen Rural Poor: New Insights and Strategies to Rural Delivery (Nov. 13, 1989).


52. CENTER FOR LAW AND SOCIAL POLICY & CENTER FOR DISPUTE SETTLEMENT, CONCILIATION IN THE JOBS PROGRAM, CHOICES FROM THE ALTERNATIVE DISPUTE RESOLUTION MOVEMENT (1991) [hereinafter CLASP-CDS REPORT] (available from CLASP). As part of the project, CLASP and CDS identified a number of possibly relevant principles, then conducted a day-long meeting with a group of JOBS administrators, advocates for program participants, and representatives of other interested groups to explore how well the principles apply to JOBS.

53. 45 C.F.R Sec. 250.36(b); 54 Fed. Reg. 42176 (Oct. 13, 1989).


55. Id.

56. Id.

57. CLASP-CDS REPORT, supra note 52.

58. Id.

59. Id. at 5.

60. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 3 (1987).


63. LINDA SINGER, supra note 5, at 145-46.
64. Id.


66. LINDA SINGER, supra note 5, at 150-52.

67. Id.

68. Id.

69. Reported in State Adoption of Alternative Dispute Resolution, 12 STATE CT. J. 2 (Spring 1988), and Divorce Mediation in the States: Institutionalization, Use, and Assessment, 12 STATE CT. J. 4 (Fall 1988).


72. LSC is not a federal agency and none of the new laws or executive orders applies to its operations.


75. Americans with Disabilities Act, 42 U.S.C. Sec. 12212.


78. See, e.g., Craig McEwen & Richard Maiman, supra note 19.


80. See, e.g., Daniel Pearlman, supra note 25.

82. See LINDA SINGER, supra note 5.

83. See, e.g., SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES (1989); SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (1986).