

Alternatives

TO THE HIGH COST OF LITIGATION

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INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION VOL. 26 NO. 11 DECEMBER 2008

A Guide for Policymaking That Emphasizes Principles, and Public Needs

BY JOHN LANDE

In the more than 30 years since the Pound Conference, the ADR field has grown tremendously. It now needs a sophisticated approach to policymaking for the future.

The 1976 Pound Conference, held in St. Paul, Minn., often is considered a landmark—the birthplace of the modern alternative dispute resolution movement. It is where Harvard Law School Prof. Frank Sander proposed the creation of multi-door courthouses, with multiple dispute resolution options. Since then, ADR has become institutionalized in the courts, legal profession, government, business, and other organizations.

Of course, ADR isn't used universally, or even used as much as it should be. It has, however, gained broad acceptance. Dispute resolution providers offer a wide range of services that are used in virtually every type of dispute.

In the years following the Pound Conference, the focus was on refining par-

ticular dispute resolution practices, such as negotiation, mediation, arbitration, and other alternatives to traditional litigation.

Now, more than three decades later, it is important to focus also on broader issues of ADR policymaking. ADR's increased acceptance and institutionalization calls for a more expansive approach to policymaking.

ADR policymaking in this article refers to planned efforts to promote productive dispute resolution, which not only includes statutes, common law, and other rules but also a wide range of nonregulatory approaches, such as training for disputants and professionals, dispute referral mechanisms, technical assistance for ADR organizations (such as advice for courts about operating their ADR programs), and grievance mechanisms for parties in ADR processes.

This article summarizes proposed principles to guide such policymaking. For the purpose of this article, ADR policymakers (or "leaders") include not only rulemakers (such as legislatures, courts, and government agencies making rules about ADR) but also authoritative professional organizations (such as *Alternatives'* publisher, the CPR Institute, and the American Bar Association) that may influence government policymakers. These principles also may be adapted by leaders of private organizations for dispute resolution within their organizations.

DEVELOPING A PLURALISTIC SYSTEM

When setting up an ADR system or program, dispute resolution professionals should aspire to a goal of developing a good overall dispute resolution system, with a variety of

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ADR REGULATION

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ADR Policymaking

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desirable processes and approaches for disputants and practitioners to choose from.

This goal is to develop a pluralistic dispute resolution system that values the differences between processes, rather than seeks to promote a generally superior process. Thus professionals should seek to avoid orthodoxies that insist that particular processes are—or are not—appropriate.

Moreover, recognizing that the dispute resolution system is continually evolving, in part responding to changes in the larger world, dispute resolution leaders generally should encourage flexible and dynamic models, and avoid static, brittle programs and systems. Leaders should maintain a careful balance between preserving important values of dispute resolution innovations and being flexible enough to satisfy needs of the legal system, practitioners, and the public.

It follows that the dispute resolution field should embrace strong roles for negotiation and adjudication, facilitative and evaluative mediation, Collaborative Practice and Cooperative Practice, and so on. (In Collaborative Practice, lawyers make binding commitments not to represent parties in contested litigation if they do not reach agreement; Cooperative Practice is similar but does not use the lawyer disqualification agreements that characterize Collaborative Practice.)

All dispute resolution processes have problems and limitations. The dispute resolution field should work to improve all the processes, including litigation. Although trial should normally be the last resort for resolving disputes, dispute resolution leaders and practitioners should appreciate the significant social value that the legal system contributes to U.S. society.

IMPROVING DECISION MAKING

Dispute resolution leaders should encourage professionals to help their clients evalu-

ate process options that might reasonably satisfy the clients' interests, giving greater priority to the clients' interests than to the professionals' philosophical preferences for or against different processes.

For example, although government agencies and corporations may appropriately develop general preferences for mediation

decision making to the extent appropriate. Specifically, within a given dispute resolution process, professionals should encourage party decision making about substantive and procedural issues as much as the parties want, and is appropriate in particular circumstances.

In some cases, clients do not want or are not capable of making certain decisions. But professionals should not simply assume that clients' decision-making participation should be sharply limited.

Lawyers representing mediation clients, for example, should not generally assume that clients should not speak much. Attorneys sometimes have legitimate concerns about potential risks from clients' statements—but lawyers should balance the risks against the benefits of active client participation in appropriate situations.

When developing policies about dispute resolution processes, policymakers should use dispute system design, or DSD, procedures and principles as much as feasible given their circumstances. DSD involves systematically managing a series of disputes rather than handling individual disputes on an ad hoc basis. In general, it entails assessing the needs of disputants and other stakeholders in the system, planning to address those needs, providing necessary training and education for disputants and relevant dispute resolution professionals, implementing the system, evaluating it, and making periodic modifications as needed.

When developing dispute resolution processes, designers should engage party representatives and other stakeholders as much as appropriate, and consider offering a variety of processes to satisfy various parties' interests and preferences.

GOALS AND OPTIONS

In devising strategies to promote dispute resolution, leaders should consider a broad range of policy goals and options, and take advantage of the complementary benefits

ADR Policies and Principles

The thesis: ADR has grown up. Development should be encouraged with sophisticated deliberation.

The need: Dispute resolution serves many societal purposes. Ad hoc laws/regulation/design can still be ad hoc, but it's time for principled policymaking to underlie the actions affecting, installing and supporting ADR.

What does that mean for practice? It means that there's a lot going on. The maturing of ADR is accompanied by big new process developments. Operating your case, or program, or whatever, under 'general assumptions' won't cut it.

or early neutral evaluation over arbitration and litigation, ADR policies should be flexible enough for parties to consider the latter when they might be appropriate.

Similarly, even if Collaborative lawyers believe that Collaborative Practice is generally the best dispute resolution process, they should encourage potential clients to consider mediation, Cooperative Practice, or traditional litigation when those processes might be in the clients' interest.

Leaders also should promote party de-

of various approaches.

For example, many people focus on goals of terminating disputes and reducing litigation time and costs, which obviously are quite important. Leaders also should consider a range of other goals, including: (1) promoting substantive and procedural fairness; (2) satisfying disputants' substantive interests; (3) satisfying disputants with the dispute resolution process itself; (4) reducing risks related to disputes; (5) reducing harm to disputants and others, including society generally; (6) providing greater choice in dispute resolution processes for disputants and ADR professionals; (7) increasing disputants' capabilities to handle other disputes; (8) promoting productive relationships between disputants; (9) satisfying disputants with the services of dispute resolution professionals; (10) improving the culture of disputing for disputants, professionals, and society, and (11) promoting compliance with social policies expressed in the law, such as non-discrimination.

Just as leaders should consider a wide range of policy goals, they also should consider a wide range of options to achieve the goals. Rules sometimes are appropriate ADR policy tools, but ADR leaders should not consider them as the first or only option. It is especially tempting for legislators, judges, lawyers, and legal scholars to propose new rules. Rules are our tools. And they can be excellent tools for achieving a variety of important goals.

But strategies that rely exclusively or primarily on regulation can create significant problems. In the name of promoting uniformity, regulation can restrict or discourage legitimate choices by disputants and dispute resolution professionals. It can also increase costs and create counterproductive barriers to creative dispute resolution.

Rather than promoting "reflective practice," regulation can promote *unreflective* practice, when practitioners increasingly operate on automatic pilot. Reflective practice is designed to increase practitioners' awareness of the impact of contextual factors; appropriate responsiveness to actual situations in real time, and experience-based knowledge.

Before proposing new or revised legal rules, policymakers should consider whether other tools would be more appropriate for achieving the desired dispute resolution

goals. Other policy options include: (1) use of explicit agreements about appropriate dispute resolution goals and process in individual cases; (2) development of general protocols (such as checklists, guidelines, and voluntary standards) in dispute resolution practice communities; (3) provision of training for disputants; (4) use of dispute referral mechanisms; (5) improvement of dispute resolution professionals' skills through training, peer consultation, and mentoring; (6) provision of technical assistance for dispute resolution organizations; (7) education of the general public; (8) use of grievance mechanisms to deal with problems arising in dispute resolution processes; (9) credentialing of dispute resolution professionals, and (10) provision of sufficient resources to implement policies. Normally, policymakers should consider strategies that combine various policy options.

APPROPRIATE REGULATION

Although ADR regulation normally should not be the first policy option to consider, it is appropriate in several types of situations.

First, rules are needed to regulate and restrict the use in litigation of communications from ADR processes. For example, it is appropriate to prohibit use in the legal system of most mediation communications. This not only protects against use of inappropriate evidence in legal proceedings, but also protects the mediation process from parties' worries that their statements could be used against them in court. Without such protection, some parties are less likely to be candid, and mediation can become an improper appendage of the legal system.

Second, regulation is appropriate to address the relationship between ADR processes and the courts. Thus, rules are needed to establish requirements about issues such as when parties are required to use ADR, or when the courts will enforce ADR process results. Legal rules also are appropriate to establish legal consequences such as when a court may sanction parties for failing to attend court-ordered mediations. Moreover, rules are needed for courts to determine whether to enforce mediated agreements and arbitration awards.

Third, some regulation is appropriate

to protect ADR consumers. Consumer protection is a challenging task and should be done cautiously and often in coordination with non-regulatory policies.

For example, it may be appropriate to require dispute resolution professionals to obtain clients' informed consent in certain situations. In Collaborative Practice, where lawyers make binding commitments not to represent parties in contested litigation, rules are appropriate to require such lawyers to obtain clients' informed consent before undertaking the process. Regulation alone is unlikely to induce full compliance, and thus an informed consent requirement is likely to be more effective when coupled with initiatives to train professionals and develop clear materials to be used in an informed consent process.

Fourth, default rules for ADR processes are appropriate when a substantial number of people have actually encountered significant problems because their ADR agreements were silent or ambiguous about particular issues. For example, the Revised Uniform Arbitration Act includes various default rules to avoid recurrent problems resulting from problematic arbitration agreements.

* * *

Although ADR has become institutionalized in many parts of the courts, legal profession, and society, the ADR movement is still vital, spawning new innovations such as Collaborative Practice, Cooperative Practice, and settlement counsel. The challenge is to develop ADR in ways that increasingly meet public and societal needs. This requires commitment to key principles such as the use of sound dispute system design techniques in policymaking; promotion of informed decisionmaking by the principals in disputes; openness to continued innovation; development of comprehensive strategies with sound use of regulatory and other policy options, and maintenance of appropriate relationships with the legal system and other social institutions.

If the ADR field follows these principles, it will be more effective in improving the ways that people, companies, and organizations of all sizes handle their disputes. ▀

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