ADR: An Opportunity to Broaden the Shadow of the Law

21 HUMAN RIGHTS 20 (Winter 1994)

ADR: An Opportunity to Broaden the Shadow of the Law

The ABA's new Section of Dispute Resolution, created in August 1993, marks another milestone in the coming of age of alternative dispute resolution (ADR) as a permanent feature of our legal landscape. Should advocates for the cause of individual rights join in celebrating this milestone or sound warning bells about the ascendancy of ADR? I suggest that the answer is yes to both questions.

On the plus side, ADR brings with it the promise of greater access to our justice system and more options for people who cannot full-blown litigation in our courts. None of the rights we seek to protect have any real meaning if barriers of cost prevent vindication of those rights. Too many Americans of ordinary means cannot afford legal representation, yet earn too much to qualify for what little publicly funded legal services is available. Some ADR procedures can be handled pro se and mediation and arbitration, even when a lawyer is needed, typically result in dramatically reduced costs for resolving disputes as compared with litigation.

At the same time, many civil rights and civil liberties cases cannot and should not be diverted from litigation to ADR because of the need for a statement by a court defining what the law is. This is especially true in rapidly developing areas of the law, such as sexual harassment, gay rights, and disabilities law. ADR providers also point out that cases involving domestic violence may be poor candidates for mediation and other settlement-oriented ADR procedures. Even the staunchest advocates of ADR readily acknowledge that there are cases for which ADR is not appropriate.

Notwithstanding these limitations, ADR has the potential to open the door to millions of Americans who currently cannot have their "day in court" because both they and the judicial system lack the resources to proceed with litigation. The opportunity to be heard—if only by a court-appointed mediator or a privately retained arbitrator—is an essential component of both formal and informal dispute resolution.

As more and more dispute resolution becomes privatized, however, we must ponder what sort of "justice" lies behind the new ADR doors that are opening. What are the preconditions for resolving disputes fairly and in a manner that comports with the protection of individual rights? I suggest that there are at least three equally important elements and that they are the same as those that are needed in litigation.

First, the parties to a dispute cannot reach a fair resolution if they lack knowledge of the law that would govern its outcome in court. Because the resolution of disputes always occurs "in the shadow of the law," the parties need access to information about that shadow. For example, a low-income tenant facing eviction needs to know about warranties of habitability and the rudiments of consumer protection law in the tenant's jurisdiction before the tenant can stand on an even remotely level playing field with a landlord in an ADR proceeding. The tenant may believe that the landlord is entitled to possession and back rent, notwithstanding violations of the state sanitary code and other defenses to eviction. Yet, most ADR providers would agree that they are not the appropriate source of such information because many of them are nonlawyers—not licensed to provide such information—and assuming such a role would undermine their neutrality.

The solution to this problem lies in greater funding for legal services and a higher level of participation by the bar in pro bono programs. This is not to say that all participants in ADR must have lawyers at their elbows throughout the proceedings. It does mean, however, that some opportunity for consultation with an attorney is essential to a fair resolution of any dispute in which the parties do not already know the law.

A second precondition to the fair resolution of disputes is a system of laws that appropriately protects the rights of all individuals in our society. This objective lies at the heart of why the Section of Individual Rights and Responsibilities was created 27 years ago. In a larger sense, however, this is an objective for which the organized bar as a whole must take some responsibility. For example, in a jurisdiction in which residential tenants do not have a right to safe and sanitary housing, even a well-informed tenant, who is represented by counsel throughout an ADR proceeding, may not be able to obtain a resolution of the dispute with the landlord that would satisfy commonly shared notions of justice.

The third precondition to justice in our newly emerging system of ADR is a greater measure of "economic justice" than we now have in our society. Even with the most able attorney and ample legal protection, a low-income individual may be unable to negotiate a fair resolution of a dispute against a better-heeled adversary. For example, the landlord may suddenly double the rent on a tenant's apartment and adopt a take-it-or-leave-it attitude in negotiations. If the market conditions will permit the landlord to obtain the higher rent (and the landlord has satisfied the legal requirements for notifying the tenant of the rent increase), ADR cannot protect the tenant and the "opportunity to be heard" will be unavailing. In a case of that kind, only regulation of the market for housing or a system of income support could level the playing field. Economic justice—an objective that is controversial not only in the organized bar but also in the country generally—is thus a factor in whether ADR produces a "just" result.

To be sure, many proponents of ADR would contend that justice is not the standard to which ADR should be held and that procedural fairness is the only objective. Moreover, even if substantive legal protections and economic justice are considered essential preconditions for the just resolution of disputes, concepts of justice vary widely. Although mediators and arbitrators often ponder the question of their responsibility for accomplishing justice, I would suggest that all of us, individually and as a society, must answer that question.

At the same time, we should look carefully at how mediation, arbitration, and other ADR proceedings, which are generally private, affect outcomes as compared with litigation. A recent study of gender bias in Massachusetts courts showed that women received smaller child support amounts in mediated cases than in cases in which a judge decided the amount of support. Such disparities suggest the need for monitoring the impact of ADR.

We also should remember that disputes are not diseases which need to be eradicated. Disputing is one of the quintessential activities of our society—it is the forum in which societal norms are hammered out and competing rights are balanced. The current resurgence of interest in ADR has its origins in the social movements of the 1960s, in which people asked whether ADR might provide a more participatory, consensus-based model for resolving disputes. In short, the idea was not simply to process disputes more efficiently, but to resolve them in a wholly different manner—perhaps even to view dispute resolution as a tool in healing the divisions in our society and building both a sense of community and an evolving consensus about the norms of justice which our communities would enforce.

In welcoming the new Section of Dispute Resolution to the ABA and its mission of "Justice for All, All for Justice," we should encourage its members to join with us as advocates, not only for opening the doors of justice more widely, but also for improving the quality of justice which lies beyond.

—David A. Hoffman

David A. Hoffman, of Hill & Barlow in Boston, is a member of the IR&R Section Council and chairs the ADR Committee of the Boston Bar Association.