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*Mediation, Arbitration, and
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Carrie Menkel-Meadow

cmeadow@law.uci.edu

University of California, Irvine ~ School of Law

Georgetown Law Center

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Mediation, Arbitration, and Alternative Dispute Resolution (ADR)

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University of California, Irvine, USA

Mediation, arbitration, and ADR ('alternative dispute resolution') are processes used to resolve disputes, either within or outside the formal legal system, without adjudication or decision by a judge. More recently, the terms '*appropriate dispute resolution*' and '*process pluralism*' have been used to express the idea that different kinds of disputes, variable by subject matter type, parties involved, or location of the dispute or transaction, may require different kinds of processes—no one legal or informal dispute process can serve for all human disputing.

Mediation is a process in which a third party (usually neutral and unbiased) facilitates a negotiated consensual agreement among parties, without rendering a formal decision. In *arbitration*, a single third party or a panel of arbitrators, most often chosen by the parties themselves, renders a decision, in terms less formal than a court, but often with a written award. *ADR* includes a variety of *hybrid processes* built on the basic processes of negotiation, mediation and arbitration, now including med-arb, minitrials, summary jury, or judge trials and early neutral evaluation, which vary in providing opportunities for settlement of cases, advisory opinions, or decisions in both public (court-annexed) and private settings. This article defines the basic ADR terms and reviews the theory, history, controversies, and future of alternative dispute resolution processes. As noted below, the full panoply of processes denominated under the rubric of ADR now includes a variety of primary and hybrid processes, with elements of dyadic negotiation, facilitative, advisory and decisional action by a wide variety of third party neutrals, sometimes combined with each other to create new formats of dispute processing (see

Negotiation and Bargaining: Role of Lawyers; International Arbitration; Litigation; Courts and Adjudication; Disputes, Social Construction and Transformation of; Legal Systems: Private; Lex Mercatoria; Legal Pluralism; Lawyers; Judges; Para-lawyers: Other Legal Occupations).

1 Definitions and Types of Processes

In an era characterized by a wide variety of processes for resolving disputes among individuals, organizations, and nations, *process pluralism* has become the norm in both formal disputing systems, like legal systems and courts, and in more informal, private settings, as in private contracts and transactions, family disputes, and internal organizational grievance systems. There are a number of factors that delimit the kinds of processes which parties may choose or may be ordered to use under rules of law, court, or contract.

The ‘primary’ processes consist of individual action (self-help, avoidance), dyadic bargaining (negotiation), and third party facilitated approaches (mediation), or third party decisional formats (arbitration and adjudication). ‘Hybrid’ or ‘secondary’ processes combine elements of these processes and include med-arb (facilitated negotiation followed by decision), minitrials (shortened evidentiary proceedings followed by negotiation), summary jury/judge trials (use of mock jurors or judges to hear evidence and issue ‘advisory’ verdicts to assist in negotiation, often conducted within the formal court system), and early neutral evaluation (third parties, usually lawyers or other experts, who hear arguments and evidence, and ‘advise’ about the issues or values of the dispute, for purposes of facilitating a settlement or structuring the dispute process). Increasing judicial involvement in dispute settlement suggests that judicial, and often mandatory, settlement conferences are another form of hybrid dispute mechanism. Retired judges provide a hybrid form of arbitration or adjudication in private ‘rent-a-judge’ schemes that are sometimes authorized by the state.

Dispute processes are also characterized by the extent to which they are voluntary and consensual (whether in predispute contract agreements, ADR *ex ante*, or voluntarily undertaken after the dispute ripens, ADR *ex post*), or whether they are mandated (by a predispute contract commitment) or by court rule or referral. The ideology that contributed to the founding of modern mediation urges that mediation should be entered into voluntarily and all agreements should be arrived at consensually (Menkel-Meadow 1995a). Nevertheless, as courts have sought increasingly to ‘manage’ or reduce their caseloads, and have looked to ADR processes as a means of diverting cases to other fora, even mediation may be ‘mandated,’ although it is usually participation in, not substantive agreement, that is required.

The taxonomy of different dispute processes also differentiates between binding and non-binding processes. Arbitration, for example, can be structured either way. Under some contractual and statutory schemes (such as the American Federal Arbitration Act), decisions by private arbitrators are final and binding on the parties, and subject to very limited court review, including only such claims as fraud, corruption of the arbitrator, or, in a few jurisdictions, serious errors of law or extreme ‘miscarriages of justice.’ Nonbinding processes, including nonbinding decisions in some arbitrations, allow appeals or follow-through to other processes, such as mediation or full trial. Many court annexed arbitration programs, for example, allow a *de novo* trial following an arbitration if one party seeks it, often having to post a bond or deposit for costs. The process of mediation itself is non-binding, in that, as it is a consensual process, a party may exit at any time; on the other hand, once an agreement in mediation is reached, a binding contract may be signed, which will be enforceable in a court of law.

Finally, dispute processes are often subject to different requirements depending on whether they are used in private settings (by contract, in employment or other organizational

settings) or in public arenas such as courts. Court related or 'court-annexed' ADR programs, now encompassing the full panoply of dispute processes, may be subject to greater legal regulation, including selection, training, and credentialing of the arbitrators or mediators, ethics, confidentiality, and conflicts of interest rules, as well as providing for greater immunity from legal liability.

ADR processes are often differentiated from each other also by the degree of control the third party neutral has over both the process (the rules of proceedings) and the substance (decision, advice, or facilitation) and the formality of the proceeding (whether held in private or public settings, with or without formal rules of evidence, informal separate meetings, or 'caucuses' with the parties, and with or without participation of more than the principal disputants). ADR processes are being applied increasingly to diverse kinds of conflicts, disputes, and transactions, some requiring expertise in the subject matter (such as scientific and policy disputes) and spawning new hybrid processes such as 'consensus building' which engage multiple parties in complex, multi-issue problem solving, drawing on negotiation, mediation and other nonadjudicative processes (Susskind et al. 1999).

Although there have been efforts to develop taxonomies or predictive factors for assignment of particular case types to particular processes (and some courts which assign or prohibit certain case types in some categories of dispute resolution), for the most part these efforts 'to fit the forum to the fuss' (Sander and Goldberg 1994) have been unsuccessful. Amenability of different cases to different processes just as often depends on the personalities of the disputants, parties, lawyers, and third party neutrals as on any particular case type characteristic.

2 Theory and History of ADR

The modern growth of arbitration, mediation, and other ADR processes can be attributed to at least two different animating concerns. On the one hand, scholars, practitioners, consumers, and advocates for justice in the 1960s and 1970s noted the lack of responsiveness of the formal judicial system and sought better 'quality' processes and outcomes for members of society seeking to resolve disputes with each other, with the government, or with private organizations. This strand of concern with the quality of dispute resolution processes sought deprofessionalization of judicial processes (a reduction of the lawyer monopoly over dispute representation), with greater access to more locally based institutions, such as neighborhood justice centers, which utilized community members, as well as those with expertise in particular problems, with the hope of generating greater party participation in dispute resolution processes (Merry and Milner 1993). Others sought better outcomes than those commonly provided by the formal justice system, which tend toward the binary, polarized results of litigation in which one party is declared a loser, while the other is, at least nominally, a winner. More flexible and party controlled processes were believed to deliver the possibility of more creative, Pareto-optimal solutions which were geared to joint outcomes, reduction of harm or waste to as many parties as possible, improvement of long term relationships, and greater responsiveness to the underlying needs and interests of the parties, rather than to the stylized arguments and 'limited remedial imaginations' of courts and the formal justice system (Menkel-Meadow 1984, Fisher et al. 1991). Some legal and ADR processes (like arbitration) are rule based, but other forms of ADR (negotiation and mediation) are thought to provide individualized solutions to problems, rather than generalized notions of 'justice.'

A second strand of argument contributing to the development of ADR was, however, more quantitatively or efficiency based. Judicial officers, including those at the top of the

American and English justice systems, argued that the excessive cost and delay in the litigation system required devices that would divert cases from court and reduce case backlog, as well as provide other and more efficient ways of providing access to justice (Burger 1976, Woolf 1996). This efficiency based impetus behind ADR encouraged both court-mandated programs like court-annexed arbitration for cases with lower economic stakes, and encouraged contractual requirements to arbitrate any and all disputes arising from services and products provided in banking, health care, consumer, securities, educational, and communication based industries. Modern ADR structures are related only loosely to their historical antecedents. In many countries, arbitration had its origins in private commercial arbitrations, outside of the formal court structure, and used principally by merchants when disputing with each other (Dezalay and Garth 1996). In the United States, labor arbitration developed to secure 'labor peace,' as well as to develop a specialized substantive 'law of the shop floor' (Fuller 1963).

Early use of mediation or conciliation occurred in some courts and communities seeking both to reduce caseloads and to provide more consensual agreements in ethnically or religiously homogeneous areas (Auerbach 1983). Indeed, mediation and other consensually based processes are thought to work best in regimes where there are shared values, whether based on common ethnicity, or communitarian or political values (Shapiro 1981). In Asian and other nations with more communitarian and harmony based cultures (as contrasted to more litigative or individualistic cultures), mediation is often the preferred form of dispute resolution, but it too has been used for system or political regime purposes beyond resolving the disputes of the parties (Lubman 1967). Thus, most political regimes have had to deal with both public and private forms of dispute resolution that often supplement, but sometimes challenge or compete with,

each other. Mediation is now promoted in trans-border disputes (where the applicable law may not be clear, see European Directive 2008/52/EC; Steffek 2011).

The introduction or 'revival' of multiple forms of dispute resolution (including mediation, arbitration, ombuds, and conciliation) within the legal system probably dates to the 1976 conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice' at which the idea of a 'multidoor courthouse' was introduced in order to meet both the caseload needs of the judicial system and the 'quality of justice' needs of consumers in a rapidly growing arena of legally and culturally cognizable claims (Sander 1976). More deeply contextualized study of the social transformation of conflicts into legally cognizable claims by a community of sociolegal scholars (Felstiner et al. 1980–81), drawing on anthropological, sociological, political, and psychological insights, also contributed to the theoretical, as well as practical, significance of pluralism in disputing. More recently, dispute resolution has been championed by those who focus on facilitating deliberative democracy in the larger polity as well (Menkel-Meadow, 2011, 2012).

3 Applications

Each of the ADR processes have their own logic, purposes, and jurisprudential justifications. Mediation and conciliation are often used to improve communications between parties, especially those with pre-existing relationships, to 'reorient the parties to each other' (Fuller 1971) and to develop future oriented solutions to broadly defined conflicts. Arbitration, on the other hand, being more like adjudication (Fuller 1963, 1978) is used more often to resolve definitively a concrete dispute about an event which has transpired and requires fact finding, interpretation of contractual terms, or application of legal principles.

These basic forms have been adapted to a number of subject areas and dispute sites. As regular use of these formats of dispute resolution becomes more common, mediation seems to be overtaking arbitration as a preferred method of dispute resolution (because of the ideology of party self-determination and the flexibility of agreements). Arbitration, still most commonly used in labor disputes, is now the method of choice in form contracts signed by consumers, as well as merchants. In the United States, mandatory pre-dispute contractual commitments to arbitrate a wide variety of consumer, health care, securities, and employment disputes have been sustained by the United States Supreme Court against claims these clauses violate due process or other constitutional rights to trial for disputes. Similarly, thus far many European courts have held that assignment to some form of ADR (mediation usually, but in some cases, arbitration as well) does not violate Art. 6 of the European Convention on Human Rights, granting basic hearing rights for human rights cases. Arbitration has, thus far, been the mode of choice for resolving international commercial, investment, and trade disputes, such as in the public law settings of the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT) and the International Centre for the Settlement of Investment Disputes (ICSID), and the more private international law settings of the International Chamber of Commerce or the London Court of Arbitration. Arbitration has also been deployed in new forms of disputes developing under both domestic and international intellectual property regimes. Various forms of mediation and arbitration are also being used increasingly to resolve transnational disputes of various kinds (political, economic, natural resource allocation, and ethnic violence) and are employed by international organizations such as the United Nations and the Organization of American States, as well as multinational trade and treaty groups (NAFTA, the European Union, and Mercosur) and nongovernmental organizations in human rights and other issue related disputes (Greenberg

et al. 2000). Arbitration (and occasionally other forms of dispute resolution) is now commonly used in sports disputes, such as for the Olympics and FIFA (the International Federation for Football (Soccer)), with a special tribunal to administer such dispute resolution, located in Lausanne, Switzerland.

Beginning in the United States, but now in use internationally, mass injury (class action) cases, both involving personal and property damages, have been allocated to ADR claims facilities, utilizing both arbitral and mediative forms of individual case processing. In legal regimes all over the world, family disputes are assigned increasingly to mediative processes, both for child custody, and support and maintenance issues. In many nations, this growth in family mediation has spurred the development of a new profession of mediators, drawn from social work or psychology, who sometimes compete with lawyers both in private practice and as court officers (Palmer and Roberts 1998).

In many jurisdictions some form of referral to ADR is now required before a case may be tried. Increasingly, however, parties to particularly complex disputes, such as environmental, mass torts, or governmental budgeting, may convene their own ADR processes, with a third party neutral facilitating a new form of public participatory process which combines negotiation, fact-finding, mediation, and joint problem solving. Such 'consensus building' processes have also been applied to the administrative tribunal processes of both rule-making and administrative adjudication in a new process called 'reg-neg' (negotiated rule-making or regulation).

Although ADR has been considered, until quite recently, principally an American alternative to courts, the use of ADR is spreading slowly around the world, being used to relieve court congestion, provide expertise in various subject matter disputes (e.g., construction, labor matters, family law), build transnational dispute systems for economic, human rights, and

political issues, and to offer alternative justice systems where there is distrust of existing judicial institutions. Increasingly, many national legal systems (e.g. the England and Scotland, Italy, Argentina) require some effort at ADR (usually mediation) before a case may proceed to trial in civil cases. There is increased education and training for dispute resolution professionals (including both lawyers and non-lawyers (social workers, psychologists, accountants, engineers and architects) in a wide variety of settings, both within universities and in trade schools and other programs. The use of ADR across borders and cultures, raises complex questions about intercultural negotiations (Salacuse 1998) and multijurisdictional sources of law or other principles for dispute resolution.

4 Controversies

The use of mediation, arbitration, and ADR processes, in lieu of more traditional adjudication, has not been without its controversies, reviewed briefly in this section.

4.1 Privatization of Jurisprudence

With the increased use of negotiated settlements, mediation, and private arbitration, there has been concern that fewer and fewer cases will be available in the public arena for the making of precedent (Fiss 1984), and debate about and creation of rules and political values for the larger community (Luban 1995). As settlements are conducted in private and often have confidentiality or secrecy clauses attached to them, others will not learn about wrongs committed by defendants, and information which might otherwise be discoverable will be shielded from public view.

Settlements may be based on non-legal criteria, threatening compliance with and enforcement of law. Claims are more likely to be individualized than collectivized.

Whether there is more privatization or secrecy in the settlement of legal disputes than at some previous time remains itself a subject of controversy as empirical studies document

relatively stable rates of non-judicial case terminations (at over 90 percent in many jurisdictions and across all types of disputes) (Kritzer 1991).

Related concerns about the privatization of the judicial system include increased indirect state intervention in the affairs of the citizenry through more disputing institutions, at the same time that the exit of wealthier litigants gives them less stake in the quality and financing of public justice systems (Abel 1982). The debate centers on whether dispute resolution systems can serve simultaneously the private interests of disputants before them and the polity's need for the articulation of publicly enforced norms and values (Menkel-Meadow 1995b).

4.2 Inequalities of Bargaining Power

A number of critics have suggested that less powerful members of society, particularly those subordinated by race, ethnicity, class, or gender, will be disadvantaged disproportionately in ADR processes where there are no judges, formal rules or, in some cases, legal representatives to protect the parties and advise them of their legal entitlements (Delgado et al. 1985, Grillo 1990–91). Responses from ADR theorists suggest that there is little empirical evidence that less advantaged individuals or groups necessarily fare better in the formal justice system, and that sophisticated mediators and arbitrators are indeed sensitive to power imbalances and can be trained to ‘correct’ for them without endangering their ‘neutrality’ in the ADR process. Many private ADR organizations have begun developing standards for good practices and Due Process protocols to protect the parties and ensure the integrity of the process.

4.3 Evaluation and Empirical Verification of Effectiveness

There are few robust research findings with respect to the effectiveness of ADR in meeting its claimed advantages. Recent findings from studies of ADR in the American federal courts have been contradictory about whether or not arbitration, mediation, and some forms of early neutral

evaluation do decrease case processing time or costs, either for the parties or the system. Preliminary studies from England demonstrate low usage of mediation schemes (Genn 1999). Yet studies continue to demonstrate high satisfaction rates among users of arbitration and mediation programs (MacCoun et al. 1992), and higher compliance rates with mediated outcomes than traditional adjudication (McEwen and Maiman 1986). In light of the variation in ADR programs, it is too early for there to be sufficient data bases for accurate comparisons between processes (Menkel-Meadow 2010).

4.4 Distortions and Deformations of ADR Processes

Within the nascent ADR profession there is concern that the early animating ideologies of ADR are being distorted by their assimilation into the conventional justice system. Within a movement that sought to deprofessionalize conflict resolution there are now competing professional claims for control of standards, ethics, credentialing, and quality control between lawyers and nonlawyers. Processes like mediation that were conceived as voluntary and consensual are now being mandated by court rules and contracts. Processes that were supposed to be creative, flexible and facilitative are becoming more rigid, rule and law based, and judicialized as more common law is created by courts about ADR, and more laws are passed by legislatures. The overall concern is that a set of processes developed to be 'alternative' to the traditional judicial system are themselves being co-opted within the traditional judicial process with its overwhelming adversary culture. Policy makers and practitioners in the field are concerned about whether a private market in ADR is good for 'disciplining' and competing with the public justice system or whether, on the other hand, there will be insufficient accountability within a private market of dispute resolution.

5 The Future of ADR

There is no question that the use of a variety of different processes to resolve individual, organizational, governmental, political, and international problems is continuing to expand. New hybrid forms of ADR (as in mediation on the Internet, Katsh and Rifkin 2001, and public policy mediation and consensus building) are developing to help resolve new problems, with greater participation by more parties. Large organizations are creating their own internal dispute resolution systems. There are clear trends in favor of mediation and arbitration in the international arena, where globalization of enterprises and governmental interests require creative and simple processes that are not overly attached to any one jurisdiction's substantive law, to promote goals of efficiency, fairness, clarity, and legitimacy, particularly in regimes with underdeveloped formal legal systems. It is also clear that there is competition over who will control such processes, and which processes will dominate in which spheres of human disputing and deal-making. The likely result is that the creative pluralism and flexibility of ADR will be subject increasingly to its own forms of formality and regulation in an effort to keep its promises of efficiency, participation, better quality outcomes, and justice.

See also:

Conflict and Conflict Resolution, Social Psychology of; Conflict: Anthropological Aspects; Conflict Sociology; Dispute Resolution in Economics; International Arbitration; Lex Mercatoria; Parties: Litigants and Claimants

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