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Point/Counterpoint: Mandatory Alternative Dispute Resolution

(Left Column/Point) Give the People Their Day in Court

by Jenna Lynn Ellis

About the Author

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To help mitigate the overwhelming caseload clogging the channels of justice in the courts, legal scholars and the judicial system itself have focused on ways to expand the use of alternative dispute resolution (ADR). One proposal is to employ court-ordered—or mandatory—participation in ADR in even more scenarios than currently is being used. According to the Colorado State Judicial Branch,[1] the Colorado districts vary in their implementation of mandatory ADR. Some courts have blanket ADR orders for cases that fall within specific criteria (including subject matter or procedural posture); others order ADR on a case-by-case basis; and others are still developing their ADR processes. Though this proposal and the current usage of ADR has a large advocacy group, the harms of mandatory ADR on the individual parties and on the judicial system as a whole cannot be ignored.

In his Counterpoint article, Don Toussaint gives a good definition of ADR and talks about the fact that some parties request (and some contracts enforceably require) arbitration. This type of elective ADR implementation is outside the purview of "mandatory ADR" and is not being criticized here, because it is voluntary; parties agreed to arbitration either at the inception of the dispute or all the way back at the formation of the contract. Court-mandated arbitration, conversely, affects parties who have not elected to seek ADR, but rather have already filed a lawsuit and are seeking to have their claim litigated in the traditional judicial setting under the procedural rules to resolve the issue or issues

at bar.

The primary problem with court-ordered ADR is that it makes it more difficult—and in some cases impossible—for parties to seek relief from the judicial system. Regardless of the arguments in favor of mandatory ADR—some of which are notably persuasive—the threshold issue cannot be ignored: mandatory ADR infringes on the parties' constitutional right to sue and have meaningful judicial access.

Petitioning the Government: A Fundamental Right

The First Amendment grants people the right to "petition the government for redress of grievances."[2] Historically, the right to petition described

> any nonviolent, legal means of encouraging or disapproving government action, whether directed to the judicial, executive or legislative branch. Lobbying, letter-writing, e-mail campaigns, testifying before tribunals, filing lawsuits, supporting referenda, collecting signatures for ballot initiatives, peaceful protests and picketing: all public articulation of issues, complaints and interests designed to spur government action qualifies under the petition clause. . . . [3]

The right to petition has been upheld by the U.S. Supreme Court in countless holdings,[4] manifestly securing this freedom as a fundamental right. Petitioning the government in the form of filing lawsuits and having the opportunity to have a claim litigated in a judicial setting is the right that mandatory ADR would abridge.

Skeptics may counter with the argument that the parties initially are petitioning the government and that requiring ADR is merely how the judiciary is responding to that petition. However, this line of thinking contravenes the intention of meaningful judicial access and the notion of judicial remedy—that is, the right to petition and receive a meaningful and prompt response from the government in the form of traditional judicial civil dispute resolution. Passing the buck to ADR (particularly under the pretext of "assistance with heavy caseloads") restricts access to the courts and undercuts the hallmark of the American judicial system of "having a day in court." Some jurisdictions in Colorado will not even schedule a trial in a civil case until the parties have gone through the ADR process.[5] This can result in significant delay and expense for litigants.

Proponents of mandatory ADR argue that parties are not being barred from the opportunity to litigate, because if they do not reach an agreement through ADR, they still may elect to pursue litigation. This response may seem to appease the constitutional argument upfront, but it fails in its end result: the parties did not receive their remedy from the judiciary, and judicial access is limited and delayed (or denied, when ADR means binding arbitration). In theory, an alternative resolution requires that both parties agree to the settlement. In practice, however, the added expense involved in ADR, procedural differences, time delay, possible prejudice, and any number of additional factors that can and do contribute to parties quickly agreeing to a settlement shows ADR working for reasons other than equity and justice.

Procedural and Ethical Implications

Even if it could be established that mandatory ADR does not contravene the right to petition, implementation would present several significant harms. First, the procedural differences are substantial:

> Part of the difficulty in establishing whether one party or the other benefits more from litigation or arbitration is the inherent differences in the cases that reach one forum or the other.[6]

Because ADR is outside the scope of the rules of civil procedure and evidence, the ability to persuade an arbitrator with judicially impermissible evidence may encourage a party to seek mandatory ADR for this or other strategic advantages. This conflicts with traditional notions of fairness by creating a loophole the adversarial system is designed to minimize. Similarly, if one forum uses mandatory ADR more than others, this would encourage even more "forum shopping," which would inherently limit legitimate forum selection. This impacts the initial preparation of the lawsuit, either for the plaintiff or the defendant, and severely impedes the lawyers' ability to advocate effectively in their primary functions of predicting and advising.

Second, mandatory ADR, even where currently employed, raises judicial ethics considerations, along with ethical issues intrinsically imbedded in ADR (including good-faith participation, privacy, and enforceability). Although many statutory allowances for mandatory ADR already are codified, the apparent benefits of ADR have yet to be thoroughly explored and evaluated. As one commentator noted:

> Court systems are eager to introduce mandatory mediation as a means to meet their needs to reduce case loads and adversarial litigation, and participants who understand the empowerment of mediation to self-determine their own agreements are equally as eager to embrace mediation as an alternative to costly and potentially harmful litigation. These benefits are touted and proclaimed often at the expense of neglecting to evaluate the costs associated with delayed litigation, general confusion from non-uniform guidelines, and legal implications of power imbalances played out.[7]

Finally, changes this profound to the judiciary process may significantly undermine the judiciary's actual and perceived legitimacy.

> Judicial legitimacy is only derived from the power of the pen and the public's faith in the righteousness of its outcomes. This faith is maintained primarily through the public's perception of an apolitical judicial branch.[8]

Our profession rests on the public's faith in and use of the judicial system. We want adversaries to use the judicial system as a peaceable social tool to resolve disputes. Were we to step so far outside its traditional jurisprudential process of conflict resolution for mere convenience, we just might inspire the layman to do so at his peril.

Mandatory Mediation Not the Answer

If the judiciary's rationale for employing mandatory ADR is simply to divert the case flow of an overloaded judicial current, then this should fail an ethics challenge, as well as constitutional review. Mandatory ADR cannot adequately reflect the procedural standards and requirements of a judicial setting, and therefore falls short of providing a justifiable, equitable remedy.

Notes

1. An overview detailing how mandatory alternative dispute resolution (ADR) is being used in various cases among the judicial districts can be found on the Colorado State Judicial Branch website at www.courts.state.co.us/userfiles/File/Administration/Executive/ODR/Resources/ADR_Snapshot_Overview.pdf.

2. U.S. Const., Amend. I.

3. Hahnenburg, "Right to Petition the Government" (Grand Valley State University, Oct. 15, 2004), *quoting* Copley, Illinois First Amendment Center, "Court Cases," available at www.illinoisfirstamendmentcenter.com/petition.php.

4. *See* Illinois First Amendment Center at www.illinoisfirstamendmentcenter.com/research_CourtCases_RightToPetition.php.

5. According to the Colorado State Judicial Branch, some Colorado courts have standing administrative orders from their chief judges requiring ADR in civil cases. *See* www.courts.state.co.us/userfiles/File/Administration/Executive/ODR/Resources/ADR_Snapshot_Overview.pdf.

6. Sherwyn, "Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims," *Cornell Hospitality Reports*, Vol. 6, No. 9. (2006).

7. Rifleman, "Mandatory Mediation Implications and Challenges" (Mediation Services, Oct. 2005), available at adrr.com/adr9/jeff.htm.

8. Katz, "A Continuing Question of Legitimacy: Countermajoritarianism, Stare Decisis, and Supreme Court Jurisprudence" (Univ. of Oregon, 2000), available at gladstone.uoregon.edu/~uofla/Fall00/katz.html.

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(Right Column/Counterpoint) Mandatory ADR Paves Way to Justice

by Don Jesse Toussaint

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Some may argue that advocating the use of mandatory alternative dispute resolution (ADR) is akin to writing the epitaph of modern litigation. Though I will concede that the growing use of this vehicle will continue to transform the legal process, it is by far not a requiem to the traditional legal process.

My position regarding mandatory ADR probably will unnerve Nelnet student loan underwriters concerned about loan repayment and perhaps my Point/Counterpoint colleague, Jenna Ellis, who may see mandatory ADR as an infringement on an individual's right to court access. Be that as it may, I am no Judas Iscariot. The legal process must be more efficient and affordable to the public for the system to work effectively, and for legal practitioners to be able to make a living practicing law. An inefficient system does not help anyone.

ADR Defined

To quell the ensuing rebellion, an explanation of what ADR is and how it functions in our industry is in order. ADR typically refers to any mode of dispute resolution that does not use the court system, such as arbitration, neutral evaluation, and mediation.[1] ADR traditionally has been used where both parties have agreed, either in advance or after a dispute has arisen, to submit their dispute to a private forum.[2] ADR is premised on the intention that by providing disputing parties with a process that is confidential, voluntary, and adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved.[3]

In recent years, however, there has been substantial growth in the use of mandatory ADR in judicial and private contractual settings.[4] State and federal courts increasingly order parties to employ ADR processes, including arbitration, mediation, summary jury trial, and neutral third-party case evaluation, as a prerequisite to trial or even appellate review.[5] Although procedural rules, such as Federal Rule of Civil Procedure 16 (and its state counterpart, Colo. R. Civ. P. 16(16)), provide courts discretion to employ extrajudicial procedures for settlement purposes, the use of ADR in the civil courts has become more institutionalized and systematic.[6]

Upsides of Mandatory ADR

My counterpart Jenna Ellis probably would agree that judges who mandate the use of ADR are not doing it for nefarious reasons. It appears that the growing use of mandatory ADR relates more to the congestion of the court system. Court dockets are overwhelmed with new causes of actions created by statutory mandates, as well as more complex legal issues and criminal dockets absorbing more institutional resources and manpower. For example, 246,728 new cases were filed in Colorado district courts in fiscal year 2011.[7] Of that number, 125,597 were civil cases. When you take into account the numerous pleadings, motions, hearings, and conferences each case can bring into the system, alternate routes of achieving justice are required—if only to relieve the backlog or create an allied construct to keep the system running at its peak of efficiency. Justice delayed by congestion could well become justice denied altogether.

Aside from the obvious benefits to the court system, mandatory ADR has benefits to the parties engaged in litigation. The use of court-ordered participation in ADR has been lauded for increasing settlement rates and providing a forum for more creative, efficient, and satisfying resolutions of disputes.

There is no question that taking a case to trial can be financially

devastating for one or even both parties. Oftentimes, the cost of litigating can far exceed the actual value of the case. This reality may cause a party of lesser financial means to forgo his or her pursuit of justice. Conversely, when parties are mandated to attend ADR early in the litigation process, the likelihood that the issue will be settled relatively cheaply goes up as costs associated with the drawn-out process of discovery and motions are eliminated.

Additionally, court-mandated ADR can empower the parties to engage intimately (and early) in the disposition of their case. Parties will have greater control over the decision-making process, especially in the identification and presentation of evidence. Most important, they may perceive the process as fair, especially in the sense of the perceived openness of the procedures and the opportunity to have a voice in the proceedings.[8] It also cannot be ignored that the compliance rate for judgments from ADR is greater than from judgments arrived through the litigation process.[9]

Quelling the Critics

However, no good deed goes unpunished in the legal realm. Some critics of mandatory ADR view the process as "coerced settlement."[10] Critics also argue that the process deprives parties of their day in court and increases litigation costs against their will.[11] This argument, however, is a gross exaggeration. Parties compelled to mediation or other forms of ADR are not denied access to the courts. Rather, compulsory participation in ADR only defers access to the courts. If the parties are unable to reach a compromise, they still can pursue litigation. Because confidentiality agreements are intrinsic to ADR proceedings, risk of prejudice is not a factor.

Moreover, under certain circumstances, parties can request relief from such orders. The Dispute Resolution Act provides that "[a]ny court of record may, in its discretion, refer any case for mediation services or dispute resolution programs. . . ."[12] Parties who feel that an order compelling mediation or some other ADR vehicle is unwarranted can challenge it and request relief.[13]

Considering that the overwhelming majority of disputes are settled before they reach the courthouse door, it makes sense to compel parties to try to reach a settlement earlier rather than later, when expenses can balloon exponentially. Attorneys who zealously litigate for their client may lose focus on this very aspect and employ a "scorched earth" strategy for months before deciding to seek ADR. This ill-fated strategy only hurts the consumer of the legal service and, in the end, not only damages the credibility of the attorney but also affects the bottom line of the attorney’s business. Any strategy attorneys apply to the

conduct of litigation must, at the end of the day, benefit the client.

A Worst-Case Scenario

In a perfect world, it is preferable for the litigators to agree to an armistice early and seek assistance from a third-party neutral without the direction of the court. Litigators are bred to fight, however, not to play nice. An excellent example of this dilemma is the *Pearson v. Chung*[14] case. Roy L. Pearson, who was an administrative law judge in Washington, DC, sued his dry cleaner for $67 million because the dry cleaner lost his trousers. Despite several offers to settle, Judge Pearson dug in his heels and demanded that his inconvenience, mental anguish, and attorney fees for representing himself was worth no less than $54 million. Needless to say, Judge Pearson lost. The bigger loser, though, was Mr. Chung. The cost of defending the suit was tens of thousands of dollars, which could be the kiss of death for any small business.

I will admit that Judge Pearson is an anomaly, but there are difficult practitioners out there who would test the limits of decency and justice. Court-mandated ADR can rope these individuals in and help thwart abuses.

Legislation and local court rules increasingly include provisions requiring parties to participate in court-ordered ADR "in good faith" or "in a meaningful manner."[15] Through their inherent authority, under procedural rules, or by legislation, courts sanction parties for violations of a good-faith-participation requirement, such as for failing to attend or participate in an ADR process or for engaging in a pattern of obstructive, abusive, or dilatory tactics.[16]

Looking Beyond the Status Quo

The ideal legal system is one that provides affordable access to justice for all and does not leave either party feeling abused by the process. If there is any hope of achieving this ideal, we must continuously monitor the court system and be open to modifying its practices and procedures. Employing court-mandated ADR is one way to help relieve the stresses that can occur during the litigation of a case. It is a viable complement to our familiar litigation process and one that provides satisfaction and justice to the participants, allowing a strained legal system to achieve a sense of renewal.

Notes

1. Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation

Program," *Cardozo J. of Conflict Resolution* 479, 480 (2010).

2. Weston, "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality," *Indiana L.J.* 591, 599 (2001).

3. *Id.* at 599.

4. *Id.*

5. *Id.*

6. *Id.*

7. Table 12: District Court Caseload FY 2002 to FY 2011, available at www.courts.state.co.us.

8. Ward, "Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?" *St. John's L.Rev.* 77, 89 (2007).

9. Quek, *supra* note 1 at 482.

10. Weston, *supra* note 2 at 592-93.

11. Streeter-Schaefer, "A Look at Court Mandated Civil Mediation," 49 *Drake L.Rev.* 367, 388 (2001).

12. CRS § 13-22-311(1).

13. *Id.*

14. *Pearson v. Chung*, 961 A.2d 1067 (D.C.App. 2008)

15. Weston, *supra* note 2 at 596.

16. *Id.*