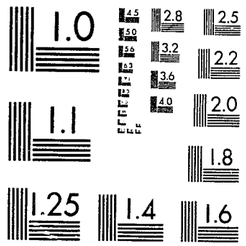




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# Paths to Justice: Major Public Policy Issues of Dispute Resolution

## Report of the Ad Hoc Panel on Dispute Resolution and Public Policy

*January 1984*



Prepared by the
National Institute for Dispute Resolution

## THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY

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## INTRODUCTION

Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.

This perspective is evident in the growing interest in dispute resolution at many levels in the public and private sectors of society. Dispute resolution has been the subject of cover page articles in prominent newspapers and national magazines. Chief Justice Warren E. Burger has repeatedly called for a "comprehensive review of the whole subject of alternatives to courts" for settling disagreements. Harvard University President Derek C. Bok describes the American legal system as flawed and calls for a hard look at reform.

Attorney General William French Smith and Griffin Bell, his predecessor, advocate exploring methods other than litigation to settle differences. State and federal courts are implementing a wide range of alternatives to adjudication. An increasing number of jurisdictions have established court-annexed dispute resolution programs in which cases are referred to mediation or non-binding arbitration before they are tried. Other courts are experimenting with innovative ways to facilitate settlement.

The Administrative Conference of the United States recommends testing the use of negotiations as a way of improving the rulemaking process and developing better rules. Some federal and state agencies are trying new procedures to

reduce massive backlogs of pending complaints and appeals as well as to improve policy development generally.

Legislatures, too, have demonstrated interest in alternative dispute resolution techniques. Congress passed the Dispute Resolution Act in 1980 to encourage the development of methods for resolving civil and criminal disputes without litigation and to create a dispute resolution clearinghouse. As yet, no funds have been appropriated to implement the Act. A number of states have enacted dispute resolution legislation and, in some instances, established statewide dispute resolution programs.

There are also significant private sector initiatives which provide for the resolution of consumer complaints, small commercial disputes, insurance claims, and conflicts between businesses by such means as mini-trials, "rent-a-judge" and the increased use of arbitration and mediation. Grievance procedures within institutions, such as hospitals, universities, prisons, and schools, have been created. Ombudsmen, media action lines, medical malpractice screening panels, and divorce mediation are other examples of alternative dispute resolution approaches which are receiving more attention.

In the first half of 1983 alone, major national conferences were conducted on peacemaking and conflict resolution, family dispute resolution, environmental dispute resolution, and consumer dispute resolution. The American Bar Association, through its Special Committee on Dispute Resolution, has encouraged the development of neighborhood justice centers--now totalling more than 200 across the nation--and currently is working to establish several "multi-door courthouses." The American Arbitration Association has expanded its activities to include conflict resolution, training, and technical assistance in a broad range of areas. The Society of Professionals in Dispute Resolution has similarly grown to reflect diversification in the field.



Mediation is being used to address complex, multi-party controversies and to develop consensus positions on difficult policy issues. Applications include intergovernmental disputes and issues involving the environment, land and natural resources, Indian claims, civil rights, corrections, and community conflicts.

But, just as alternative dispute resolution mechanisms offer great promise, they also raise many questions and create their own problems. Just what are the respective roles of courts and the various alternatives? How should they relate to one another? How should it be determined which dispute resolution mechanism is most appropriate in a particular case? Do alternatives really save time or money? How should they be financed? How should settlements be enforced? Are alternatives to the courts "second-class justice"? What are the standards by which dispute resolution mechanisms should be evaluated?

## CREATION OF THE PANEL

In early 1983, the National Institute for Dispute Resolution convened the Ad Hoc Panel on Dispute Resolution and Public Policy under the sponsorship of the U. S. Department of Justice. The Institute assembled this group of prominent citizens to identify public policy issues associated with the ways Americans settle their disputes and to suggest strategies for furthering public knowledge about dispute resolution.

This was an inquiry, not by dispute resolution practitioners or court reform experts, but by members of the general public from their perspective as potential disputants, as citizens, and as taxpayers. Individuals on the Panel were chosen for their first-hand knowledge and demonstrated leadership in a diversity of areas: labor, business, health, education, welfare, civil rights,

housing, consumer affairs, the media, federal regulation, public and judicial administration. Some represent the interests of particular populations: the poor, women, blacks, hispanics, the elderly. Members served as individuals, not as representatives of any organization. They were invited to raise--not resolve--issues.

A Steering Committee was responsible for directing the work of the Panel, including assembling its members, preparing discussion papers for its consideration, and drafting this report. What follows are highlights of the discussions of the Ad Hoc Panel on Dispute Resolution and Public Policy as they occurred during three one-day meetings in Washington, DC.

## DEFINING DISPUTE RESOLUTION

The Panel defined the scope of its inquiry to include all methods, practices, and techniques, formal and informal, within and outside the courts, that are used to resolve disputes. Although the term "dispute resolution" and the frequently used phrase "alternative dispute resolution" have come to suggest ways of settling disputes without going to trial, the Panel included litigation among dispute resolution options to be considered. Because the traditional system and the so-called alternative systems are inextricably bound, the Panel explored them as one. Table 2 in Appendix 1 represents different ways of conceptualizing the range of dispute resolution methods.

Dispute resolution techniques can be arrayed along on a continuum ranging from the most rulebound and coercive to the most informal. Specific techniques differ in many significant ways, including:

- whether participation is voluntary;
- whether parties represent themselves or are represented by counsel;



- whether decisions are made by the disputants or by a third party;
- whether the procedure employed is formal or informal;
- whether the basis for the decision is law or some other criteria; and
- whether the settlement is legally enforceable.

At one end of the continuum is adjudication (including both judicial and administrative hearings): parties can be compelled to participate; they are usually represented by counsel; the matter follows specified procedure; the case is decided by a judge in accordance with previously established rules; and the decisions are enforceable by law. Closely related is arbitration, which is less formal, proceeds under more relaxed rules, and may be binding or non-binding.

At the other end of the continuum are negotiations in which disputants represent and arrange settlements for themselves: participation is voluntary, and the disputants determine the process to be employed and criteria for making the decision. Somewhere in the middle of the continuum is mediation, in which an impartial party facilitates an exchange among disputants, suggests possible solutions, and otherwise assists the parties in reaching a voluntary agreement. Options among these alternatives may be combined in various ways, including what is known as med-arb. The terms used above and others, like conciliation, ombudsman, and mini-trial, are defined more fully in the lexicon in Appendix 2.

Most forms of dispute resolution have been in use for years. That they are now being characterized as innovative reflects the extent to which they are being institutionalized and applied in new situations, and the increased level of expectation being attached to them.

The wide boundaries that the Panel set for its discussions of dispute resolution include:

--All disputes which could go to civil court, including disputes between individuals such as those which occur within families, among acquaintances, and

in neighborhoods; disputes among organizations and institutions, for instance, between citizen groups and corporations or governments; and disputes pitting individuals against institutions, such as against corporations or a governmental agency.

--Matters subject to criminal law, especially those conflicts within a family or neighborhood that could be heard in civil forums and defused before it is necessary to involve the police and courts; disputes that end up in criminal court because one or all sides lack the information, influence, or funds to pursue a civil remedy; and disputes which are a criminal matter in one jurisdiction but a civil matter somewhere else.

--Disputes heard by administrative agencies, for instance those related to the development and implementation of governmental regulations; the allocation of federal, state, and local resources; and a broad range of complaints and grievances such as the tens of thousands of cases involving Social Security, veterans' benefits, black lung payments, and other federal compensation programs.

--Disputes that are now left unresolved for the lack of a suitable forum. Perhaps one party is intimidated by the forum which is available, lacks the funds for access to it, or has little confidence in it. In other instances, no single forum can, or will, address the kind of dispute presented (for example, a homeowner's objection to little league baseball games on the church lot across the street). Unresolved, these disputes may fester, causing social antagonisms and escalation of a minor controversy into a major problem.

--Disputes that could be prevented or limited. A significant number of actions to define and challenge legislation and regulations could be avoided if interested parties were more involved in their development and the disputes that new programs might engender were anticipated. Similarly, there are complex



social issues (involving school desegregation, environmental concerns, allocation of public resources) that might be better addressed through multi-party participation in the formulation of policy rather than through later court challenge.

Lastly, the Panel recognized that some conflict contributes to and, indeed, is essential to a healthy, functioning society. Social change occurs through disputes and controversy. Some observers attribute the long-term stability of the country to its ability to hear and reconcile the disagreements of its diverse population. Thus, one should focus not only on avoiding disputes, but also on finding suitable ways of hearing and resolving those that inevitably arise.

## DISPUTE RESOLUTION AND THE U.S. LEGAL SYSTEM

Many experts within the legal establishment are joined by lay critics in believing that the country is suffering from "too many laws, too many lawsuits, too many legal entanglements, and too many lawyers." Contrary to popular belief, however, the problem does not seem to be excessive litigation. Although there has been a rapid growth in the number of cases filed, only 5-10 percent of filings actually go to trial. The number of cases litigated does not appear to be increasing at a rate faster than the population is growing. This increase is rather modest in a country that is experiencing as much social and technological change as is the United States.

So the issue is not so much one of caseload as of complexity, prohibitive cost, and delay in using the courts. In fact, the United States has the largest bar and the highest rate of lawyers per capita of any country in the world--the number having more than doubled since 1960, to more than 612,000. And yet, it

has been estimated that 1 percent of the U.S. population receives 95 percent of the legal services provided. As Derek Bok points out, "the elaborateness of our laws and complexity of our procedures...raise the cost and delay of legal services such that countless poor and middle class victims (must) accept inadequate settlements or give up any attempt to vindicate their legal rights."

This is a situation with important implications. Not only is the largest segment of our population precluded from real access to the justice system, the biggest users of legal services--corporations and wealthy individuals--pay an enormous price. Legal expenditures are growing at a rate faster than increases in the gross national product. Productivity is affected by the drain on time and money available for other endeavors.

Enthusiasm for a wider range of dispute resolution options is tied, then, to a hope that new methods will not only reduce the burden on the courts and the economy, but will provide more satisfying means to justice for a larger portion of the population. In fact, the search for new ways of managing our differences can be seen as signaling a shift in public values. With increasing awareness that "we are all in this world together," traditional win-lose, adversarial processes may be personally and socially less satisfactory than more participative, collaborative problem solving that reconciles the interests of all involved parties.

It was within this larger social context that the Panel examined dispute resolution options.

## CHOOSING AMONG DISPUTE RESOLUTION OPTIONS

No one approach is best for resolving all disputes. The nature of the dispute and the disputants will, in large measure, determine which dispute



resolution method is most appropriate. Among the characteristics that might suggest one approach over another are whether the relationship among disputants is of a continuing nature, the disputants' financial circumstances, their desire for privacy and control of the dispute resolution process, and the urgency of resolving the dispute.

One must be wary of ascribing particular attributes to one or another method of dispute resolution, however. Litigation is not always final, although that is a commonly perceived benefit; mediation may not enable parties to work together in the future, as is often suggested; arbitration may not always be less expensive than pursuing a case in court. And all dispute resolution methods may have unanticipated consequences that make them more or less desirable in particular instances.

With that caveat, the Panel reviewed the advantages and disadvantages of three major kinds of dispute resolution methods: litigation, arbitration, and mediation. Readers may wish to refer to Tables 3, 4, and 5 in Appendix 1.

### Advantages and Disadvantages of the Courts

The concern expressed repeatedly by the Panel is that courts are simply too expensive and too time consuming. Although the government subsidizes many of the costs of running the courts, their full use requires expensive lawyers and the time of the disputants. This means that courts are generally inaccessible to all but the most wealthy parties. Hence, the courts tend to be the province of large organizations and concomitantly the ten-year anti-trust case consumes a disproportionate share of judicial resources. Thus, although courts are vitally important for protecting private rights and concerns, the delay and costs may render them ineffective in discharging this critical duty.

Because of the relatively structured approach courts use, the range of remedies available to the court may be quite limited. Indeed, lawyers may have to reframe the issues separating the parties to fit a particular legal doctrine and, thus, may change the nature of the dispute. As a result, the court is often not able to address the real issues and tailor an appropriate remedy.

Courts largely rely on a formal adversarial process that may further antagonize the disputing parties. Thus, a judicial approach may not be the preferred forum for settling disputes in which the parties will continue to have a close working or living relationship. Further, because the process is also somewhat mystifying to many laymen, they may become estranged from the court.

Some disputes require a technical expertise for their resolution and, since judges are necessarily generalists, courts may be inappropriate for some controversies. In others, even though judges could be educated sufficiently to make the decision, that may not be an efficient use of resources. Moreover, the existing expertise of the parties is generally not tapped in shaping a resolution because of the way roles are defined. Table 1 in Appendix summarizes some problems with using the courts.

These concerns notwithstanding, courts continue to provide indispensible services to society. They are the appropriate forum when the purpose is to establish a societal norm or legal precedent. Thus, for example, if the underlying cause of a dispute is not a disagreement over how to apply an accepted norm but rather a need to create such a principle, then courts--or the legislature--are the appropriate forum. Groups and individuals who lack economic power or social status are likely to need the courts to protect their rights and preserve their leverage in dealing with others.

Courts are also the preferred method of establishing a record of something that happened in the past. If the resolution of a dispute turns on



reconstructing the facts--or at least on developing an authoritative version of the facts--then courts best serve that function. They also provide the official recognition and basis for enforcement which society demands in the resolution of some disputes, such as divorce and bankruptcy, for example.

Some cases get to court not because they have these characteristics that commend them for judicial resolution, but because of the exigencies of the situation. Some issues are sufficiently controversial that at least one of the disputants does not want to take the responsibility for voluntarily participating in its resolution. Instead, the dispute will be submitted to adjudication to deflect responsibility for the eventual, possibly unpopular, decision. School desegregation and other sensitive cases involving elected officials often fall into this category. Another example is the corporate dispute where the stakes are too high for a middle level officer to take responsibility for losing and, hence, the matter is submitted to a court to neutralize responsibility. Courts are also used sometimes when one party wants to delay a decision for as long as possible.

Most cases that are filed do not go all the way to judicial resolution. Nevertheless, filing a lawsuit may serve important functions and be a necessary prelude to using other methods for resolving disputes. It crystallizes the issues and provides the disputants with ways of compelling participation, procedures for sharing information, motivation for taking action, and deadlines for doing so. Thus, many cases are resolved through "bargaining in the shadow of the law."

In fact, courts themselves engage in a variety of dispute resolution techniques. Judges and other court officials attempt to promote pretrial settlements in virtually every case that comes before them. A judge who tries to bring parties together for a settlement is engaging in a form of mediation.

Sometimes, to avoid any bias, this is done by a magistrate or a judge other than the one who would preside should the case move to trial. Here, the judge may push very hard for settlement short of trial, and the parties may accede for fear of alienating the decisionmaker. This kind of judicial mediation should be distinguished from the purer and less interventionist forms discussed later.

Courts also use special masters and referees as fact-finders, whose findings then are used to help parties reach settlements. An increasing number of jurisdictions have court-annexed mediation and arbitration programs for special categories of disputes. Unaided negotiations between counsel for the parties are also common.

Indeed, only a small minority, roughly 5-10 percent, of the cases filed actually go to trial. The remainder are resolved before trial--some by abandonment, some by judicial ruling, and the majority by settlement between the parties. Those that do reach a decision become "public goods" that establish the standards against which future cases are negotiated or activities governed. To an extent, however, this norm-setting might be enhanced with even less litigation if settlements were also published; alternately, some argue that settlements might be inhibited by publishing.

## Advantages and Disadvantages of Other Forms of Dispute Resolution

Arbitration and mediation are the two most widely known nonlitigative methods of dispute resolution. Arbitration, widely accepted and used in labor and management grievances and in some commercial settings, has special advantages over the courts, among them:

--It can be initiated without long delays; the procedure is relatively short; and a decision can be reached promptly.



--Relaxed rules of evidence enhance flexibility and the process is more streamlined than a judicial proceeding.

--The parties may select the applicable norms--that is, they can specify a particular body of law as a basis for a decision that might not be relevant in a court setting.

--The parties are able to choose the arbitrator.

--The arbitrator can be required to have expertise in the subject matter of the dispute.

--The resolution can be tailored to the circumstances.

--The dispute can be kept private since the decision is not necessarily a public document, as it would be in a court proceeding.

--Arbitration may be less expensive than going to trial.

--An arbitrator's decision is final and may be binding on the parties.

--The award in binding arbitration usually is enforceable by a court with little or no review.

In sum, with arbitration, decisions can be reached with relative speed and finality. Arbitration has proved especially valuable to parties that have a large number of disputes which must be resolved during the course of a contractual relationship. Labor-management and contractor-subcontractor relationships are examples.

But the efficiency of arbitration sometimes may be achieved at the expense of the "quality of justice" in an individual decision. In commercial and labor cases, where there is a high volume of cases with fairly low stakes, trade-offs between an expeditious, inexpensive arbitration process and the assurance of a more studied decision in each case may be acceptable. In other types of disputes, parties may not agree to arbitration because they want the protection offered by the courts, or they want to maintain control over a settlement

through a process of negotiation. Thus, for example, a party may be more willing to use arbitration to determine the amount in controversy than initially to establish liability.

Further, arbitration has become so formalized in labor relations that it has developed some of the problems of procedure and delay present in judicial process. It should be noted, too, that an arbitration hearing may be more expensive and time consuming than the negotiated settlement which might otherwise have occurred.

Mediation is a valuable approach to the many disputes that are better settled through negotiation than adjudication. Among the benefits of mediation:

--It may provide an opportunity to deal with underlying issues in a dispute.

--It may build among disputants a sense of accepting and owning their eventual settlement.

--It has a tendency to mitigate tensions and build understanding and trust among disputants, thereby avoiding the bitterness which may follow adjudication.

--It may provide a basis by which parties negotiate their own dispute settlements in the future.

--It is usually less expensive than other processes.

But mediation, too, has potential shortcomings. It can be time consuming, lack an enforcement mechanism when done outside the courts (although agreements may be enforceable as contracts), and depend on the voluntary participation of all parties to a dispute and their willingness to negotiate in good faith. It does not always result in an agreement and, therefore, the resolution of a dispute.

It also raises a series of considerations related to the role of the mediator. In general, mediation works best when the parties have a rough parity



of power, resources, and information. But, what is the responsibility of the mediator if there is a significant power imbalance among parties or if one party is uninformed or misinformed about the law or facts needed to make a sound decision? Should the mediator, or anyone else, have the responsiblity to make certain an agreement has a principled basis and is not reached out of ignorance or fear? Should a mediator refuse to take part in resolving a dispute if one or another party may be hurt in the process or have their confidences disclosed? What are the consequences if the mediator becomes interventionist and is not perceived as impartial? In sum, assuming they can be defined, how are the ethics of the mediator assured? And, what is the appropriate role for the lawyer when a client is attempting to reach a mediated settlement?

Beyond the specifics of arbitration and mediation, there are general concerns about nonjudicial methods of dispute resolution. These methods, which might reach settlements without the use of lawyers or counselors, may lead disputants to make choices they would avoid if they were better informed. This is an area of particular concern related to women, the poor, the elderly, persons for whom English is a second language, and other classes of disputants who are traditionally less powerful or less skilled at negotiation than their opponents. Further, nonlitigative methods may merely give the appearance of resolving some disputes while avoiding a finding of more extensive liability or leaving fundamental issues unsettled (e.g., an individual settlement in a products liability case while the company keeps manufacturing the defective part or an individual settlement of a discrimination complaint while the organization continues the prohibited practice).

Nonlitigative methods usually carry with them no element of coercion to force participation in settling a dispute, so they may not be practical for a large category of disputes. This is particularly so for the disenfranchised

trying to pursue disputes with the government, because government agencies may not agree to a voluntary process. Further, settlements reached through nonlitigative methods of dispute resolution may lack enforceability.

It should also be noted that efforts to settle disputes may not be productive if the parties have not sufficiently narrowed the issues, developed the facts, and concluded that compromise is in their best interests. Disputes somehow must be ripe for resolution before they can be settled satisfactorily. Table 3 in Appendix 1 notes these and other potential problems in using nonlitigative methods.

## DISPUTE RESOLUTION PRINCIPLES

Comparison of various methods of dispute resolution raises complex issues. More empirical information is needed before any definite statements can be made about the appropriateness of one method over another in a particular kind of dispute. The Panel was able to conclude, however, that there are a number of major criteria by which a dispute resolution mechanism can be judged:

1. **It must be accessible to disputants.** This means that the forum for resolution should be affordable to disputants as well as accessible in terms of physical location and hours of operation. Parties should be comfortable in the forum and feel that it is responsive to their interests.

2. **It must protect the rights of disputants.** In cases where there is a parity of resources, influence, and knowledge, this may not be a concern. But where one party is at a disadvantage, his or her rights may be jeopardized by choice of the forum. For instance, the poorer litigant may not be able to afford full discovery, expert witnesses, etc. Similarly, without counsel in a mediation, a party may unnecessarily forfeit rights.

3. **It should be efficient in terms of cost and time** and, so, may have to be tailored to the nature of the dispute. Time is very important in many instances, and the forum for settlement should respond to this imperative. For example, it is obviously vital to the elderly that their disputes be settled quickly. Some disputes, especially those involving highly charged emotional



issues, may take some time to settle; factual disputes may be more amenable to expeditious handling.

4. **It must be fair and just** to the parties to the dispute, to the nature of the dispute, and when measured against society's expectations of justice.

5. **It should assure finality and enforceability of decision.** Although the mechanism itself can discourage appeals, it may be the disputants' belief that the process was fair that will be the principal component of finality. In coercive situations, due process concerns will require that there are proceedings for review of decisions.

6. **It must be credible.** The parties, their lawyers, and other representatives must recognize the forum as part of a legitimate system of justice. People who practice the alternatives, especially as judicial adjuncts, must be competent, well-trained, and responsible. Society, too, must have faith in the alternative and recognize its legitimacy.

7. **It should give expression to the community's sense of justice** through the creation and dissemination of norms and guidelines so that other disputes are prevented, violators deterred, and disputants encouraged to reach resolution on their own.

The Panel recognized that it is unlikely that any dispute resolution mechanism will be equally strong in all of the seven criteria. Rather, choices will have to be made concerning which qualities are the most essential with respect to particular kinds of disputes. It is through this process of decisionmaking and monitoring outcomes that some assessment can be made of the real implications of various forms of dispute resolution. For instance, one could argue that mediation is a better approach to resolving property and custody issues in a divorce because of the interest in facilitating a workable long-term relationship; however, some fear that without counsel present during negotiation, a woman, unused to asserting herself, will settle for less than she would be awarded through judicial proceedings; others observe that courts are generally biased against awarding custody to men. These differences in perspective demonstrate that there is much information needed before dispute resolution methods for particular kinds of disputes can be prescribed.

It should also be noted that an assessment of what is at stake--and, therefore, what forum to use--might be different from the perspective of the disputants than if viewed from the larger societal perspective. For instance, what outsiders might term as a minor dispute may be of major importance to at least one of the disputants. Further, just because many dollars are at stake does not mean that a more formal process is required. There is no automatic correlation between the money involved in a dispute and the forum that is appropriate. Rather, it is the nature of the dispute that is important. For example, a contest over $200 in back rent may be as important to the tenant as a $2 million contract suit is to a large corporation, and they may be of similar complexity to resolve.

## INSTITUTIONALIZING DISPUTE RESOLUTION METHODS

Central to the discussion of dispute resolution are issues related to institutionalizing methods of non-judicial dispute resolution--financing them, implementing them, and defining their relationship to each other and to the courts. It is in this area that more questions than answers surface. Our ability to address these concerns is limited until we know more about existing and proposed mechanisms and can assess the usefulness and implications of various approaches to resolving particular disputes. For example, although there is a growing popularity of court-annexed arbitration programs, some experience shows that about the same percentage of cases get settled without the required arbitration as with it; while the arbitrated cases tend to be settled faster, the cost of settlement may now include the arbitrator's fee. Analysis is further limited because there are, as yet, no measures of impact and effectiveness that allow comparison of different dispute resolution techniques.



Among the areas addressed by the Panel and requiring further inquiry are the following:

### Funding and Incentives for Alternatives

Financing alternative means of dispute resolution will likely continue to be a problem. Those that now exist are funded from a variety of sources, including user fees, foundation and corporate support, and government appropriations. Many programs are financially insecure.

Some programs may be funded privately from user fees when all parties to a dispute can afford to pay, as in inter-corporate disputes. Arbitration has been funded this way historically, and some of the newer programs, such as the mini-trials and rent-a-judge, are similarly supported. But the alternatives will need public funding if they are to gain widespread use. Most probably they will have to be appended to the courts and funded from judicial appropriations or from fees generated from litigation.

In addition, however, it may be desirable to fund mechanisms to help resolve disputes that do not, or should not, reach the level of a formal complaint. An example of this might be a dispute resolution center where an elderly resident could take a complaint with a nursing home or a neighbor could take a complaint about noise. It may also be desirable to have a publicly funded program that is not publicly controlled when the government itself may be a party to a dispute or when the subject matter may be inappropriate for government involvement, such as some areas of controversy and political or First Amendment issues.

If alternative methods of dispute resolution are to gain widespread acceptance, incentives will have to be found both to establish appropriate programs and to use them. Theoretically, the best incentive would, of course,

be that the mechanism dispenses better justice--according to the criteria enumerated earlier--than other more traditional means. Nonetheless, it is likely that there will be resistance to these new vehicles. Incentives will have to be developed for lawyers and clients alike to ensure the acceptance and use of alternatives to litigation. In addition, the programs' financing will remain precarious unless largely publicly supported.

If that is the case, officials will have to be persuaded that establishing nonlitigative dispute resolution programs is in the public interest: that the programs save the public money in the long run; reduce demands on the courts and government personnel; reduce the time and overhead costs required to settle disputes; and increase public satisfaction. Alternately, even without a determination of cost savings, the government may conclude the alternatives do indeed provide a better path to justice and should be established for their own sake.

Dispute Resolution and the Legal Profession

Many practical aspects of the legal profession as it is now structured need to be considered in conjunction with any strategy to improve courts and to increase use of alternatives to the court.

Lawyers serve as the gatekeepers for disputes. People typically consult with lawyers when they have a controversy that has reached an intolerable stage. As a result, disputants rely on lawyers' advice on the appropriate path to follow for resolving their problem. Currently, law school curricula take inadequate account of the fact that lawyers spend more time negotiating than litigating. What is needed, therefore, is to train lawyers in the less adversarial negotiating skills and in how the various alternative methods of



dispute resolution work. In that way, they can assess the optimal path to take to resolve a conflict and may not automatically be inclined toward court.

We also need to look at the economics of the legal system to see if that breeds an excessive dependence on litigation to resolve disputes. For example, the three major ways of financing attempted resolution of a dispute--the hourly charge, contingency fee, and fixed fee--shape how a dispute might be resolved. It has also been suggested that various forms of fee shifting might encourage parties to pursue a particular course of dispute resolution. Some examples that might be considered are: shifting either attorney's fees or the cost of the forum, or both, to the loser; assessing additional costs if an offer of settlement is rejected and the decision does not reflect a significant improvement for the disputant; increasing the cost of appeal if the appellant's position is not improved through appeal. It should also be noted, however, that these changes might have a substantial effect on discouraging some cases that society views as important. For a number of reasons, the changes should not be implemented before extensive and careful study.

Noting that some attorneys are already uncomfortable with excessive reliance on adversarial approaches, the Panel questioned whether there are modifications of the current incentive structure that would encourage more lawyers to make greater use of dispute resolution alternatives. It was suggested that some attorneys may specialize in alternatives to litigation. This approach may appeal to some portion of the large number of recent law school graduates as they try to differentiate their skills. The legal professional must also be encouraged to look to the future and to explore pre-paid legal clinics, legal insurance, and other mechanisms to make legal services affordable to a larger portion of the population.

Ways must also be found to prevent some lawyers from abusing the litigation process by excessive reliance on courts, by filing frivolous appeals, and by providing inadequate service to their clients. Part of this problem is that neither the parties themselves nor the lawyers bear the full costs of processing cases that have a very small chance of success. Indeed, there are incentives on the lawyer's part to pursue them: the lawyer is paid for the effort, and it is arguably unprofessional not to pursue any available avenue. Thus, means must be found to have the disputant and the lawyer make value choices as to whether the process should be pursued. When the process is abused, proper sanctions should be imposed.

The Relationship of Alternatives to the Courts

If nonlitigative methods of dispute resolution are to gain broad use, participation may have to be compulsory. The disputing party without influence may not be able to summon other parties to a nonlitigative forum if it is voluntary. It may be appropriate in some instances to require parties to use non-binding arbitration or mediation before submitting certain types of dispute to litigation. For example, a court could require a complainant against an auto company to submit the dispute to a consumer action panel (CAP) before the court would hear it. A creditor could be required to attempt to reach settlement through mediation prior to going to court. Divorce cases could be referred initially to mediation for settlement of custody and property issues.

Some suggest that judges need increased statutory authority to invoke this broader use of alternatives. Certainly, these examples add more weight to the suggestion that society pay for options to the court just as it pays for the courts. Further, requiring the use of forums other than the courts may raise



constitutional due process questions unless disputants eventually could obtain a court hearing. Such hearings could either be narrow appellate-type reviews or trials de novo.

To reduce the pressure on judges, adjuncts--such as masters, referees, and magistrates--could be used more widely, even in highly complex litigation, and they could engage in a broader range of dispute resolution techniques.

Whether the use of alternative processes is mandatory or not, it has been suggested that a centralized system be established to screen complaints and refer them to appropriate dispute resolution mechanisms. This is an idea worth examining and testing, as the American Bar Association has been advocating through experimentation with "multi-door courthouses."

Alternatives and the Public

Public acceptance of the full range of dispute resolution methods depends, in part, on acceptance of people who provide these services. This raises questions of professional responsibility, ethics, and accreditation. Should it be assumed that practitioners have to be lawyers? Is it the unauthorized practice of law, as some bar associations assert, for practitioners other than lawyers (social and health care workers or community volunteers, for example) to serve as mediators? There are a number of professional codes of ethics which have been debated extensively over the years and which may need revision to keep up with new developments in this field.

Because some nonlitigative methods are not well known to large segments of the general public (including the legal profession), education of potential users about these methods and removal of barriers to their use are important steps in the institutionalization process. Part of this involves accurately

differentiating techniques from each other, something not currently done by the press or the public.

Many disputes are already handled in tribunals within the community and internal to a number of institutions--schools, churches, trade groups, businesses, for instance. There may be potential for enhancing their ability to resolve disputes more effectively and for extending their responsibilities to include new areas of concern. In fact, widespread use of alternative methods of dispute resolution is critically dependent on their acceptance by existing institutions and at the grassroots level generally. It is when disputes are not resolved at these levels that people turn to lawyers and the law.

## FUTURE DIRECTIONS

To date, concern with problems of the courts and with the establishment of alternative dispute resolution mechanisms has come primarily from judges, court administrators, dispute resolution practitioners, a few lawyers, academicians, and special-interest groups. However, the success that various methods of dispute resolution will have in reducing court caseloads, minimizing cost and delay, increasing public satisfaction, and contributing to the health and productivity of society is directly related to the extent that they are well defined, widely understood and supported, adequately funded, used in the appropriate circumstances, evaluated, and modified as necessary. These are objectives that practitioners and scholars cannot achieve alone, but which will also require the participation of users, elected officials, and the general public.

It was with this understanding that the Panel formulated its recommendations to further two basic objectives:



- To ensure that dispute resolution mechanisms operate in the public interest, including that they

  --are accessible to disputants;

  --protect the rights of disputants;

  --are efficient in terms of cost and time;

  --are fair and just;

  --assure finality and enforceability of decision;

  --are credible; and

  --express the community's sense of justice.

- To increase public awareness of dispute resolution so that it becomes an important part of the public policy agenda for the country.

As the Panel members considered the principles which should guide the development of systems of dispute resolution, they expressed frustration with the limits of available information. Clearly, there is a great deal of activity within the field. There are more than two hundred neighborhood justice centers; a range of corporate innovations (mini-trials, rent-a-judge, etc.); family, divorce, and child custody mediation; programs attached to the courts; methods of deciding public policy disputes (such as annexation, allocation of block grants, siting of hazardous facilities, etc.); regulatory reform; and well-known, established programs such as labor-management arbitration, the Community Relations Service, and the Federal Mediation and Conciliation Service.

But very little of the experience with these programs has been documented. The information that does exist is fragmented and housed in many separate places. The result is that, while jurisdictions have problems in common, there is no mechanism for finding out what has been tried elsewhere and with what success. Moreover, dispute resolution methodologies are developing in various substantive areas with little cross-fertilization. As a result, knowledge, experience, and resources are wasted.

Thus, better information is necessary for the kinds of analyses that will determine the impact of different dispute resolution approaches, and assess how they measure up against the public policy criteria listed earlier.

This information must be disseminated to a number of special target audiences--some of which are not yet aware that dispute resolution should be among their concerns. Development of this interest and better understanding can come, in part, through education of the media. Further, information must be specially tailored to the audience--researchers have different needs and interests than policymakers; the general public has different concerns than does the legal profession.

The Panel concluded that future action should emphasize experimentation, evaluation, and dissemination of information. The Panel members suggested a comprehensive and integrated strategy that focuses on:

--Pilot programs and research to test various approaches to, and assumptions about, dispute resolution;

--Centralized collection, analysis, and dissemination of information on dispute resolution options; and

--Efforts to expand public awareness and debate on dispute resolution.

The Panel identified a number of specific initiatives to advance the examination and use of dispute resolution alternatives:

- Resource Center or Clearinghouse - A central location, in or out of government, should be established to collect, analyze, and disseminate information on dispute resolution. This information is relevant to the concerns of a wide range of people and should be presented in different ways depending on the needs of the audience: dispute resolution practitioners, potential disputants, possible funders or sponsors of programs, educators, legislators, researchers, the bar, the media, and the general public. Information must be readily available to localities and at little or no cost. Computer networking, production of bibliographies, newsletters, topical analyses, and a technical assistance capability are program components to be considered.



- Experimental Programming and Research - There is a need to inventory existing dispute resolution mechanisms and to establish new pilot efforts to determine what works, what does not, and what characteristics seem to be associated with success and failure. There should be efforts to identify model programs which can be replicated. There are many concepts which warrant testing. Based on what is known, they may seem like good ideas; and yet, without careful research, their actual impact can only be guessed.

- Creation of State Committees - Special committees of state bars could be established to study dispute resolution. Advice and information could be provided to the states through a mechanism established at the federal level.

- National Conference on Dispute Resolution - A national conference could be scheduled to focus public attention and generate debate on dispute resolution in the United States. It could provide essential information on what is happening in many areas and the attendant academic analysis; reflect the concerns and interests of the government in the area; establish important networks and coalitions; stimulate local initiative; and heighten the public's interest in the subject. The Panel observed that for a conference to maximize its impact, it must be part of a longer term effort which includes collection of information, preparation of materials, and the capability for follow-up.

- Legal Professional Education - This could involve collaborative efforts among the existing continuing legal education programs, the American Bar Association, and foundations to sponsor seminars and short courses for lawyers interested in improving their negotiating skills. Bar associations and judicial training programs should be similarly encouraged to include alternative dispute resolution methods in their programs. Law school curricula should incorporate less adversarial and nonlitigative approaches to dispute resolution.

- Outreach to Other Professional Associations - There is a wide range of special target audiences who sponsor their own annual meetings and training seminars at the local, state, and national levels. Sessions on dispute resolution could be developed and offered for inclusion in their programs. This approach would considerably increase knowledge about and interest in dispute resolution among a diversity of groups of the population.

- Television and Radio Programming - Programs on specific substantive areas in dispute resolution and the topic in general would make a significant contribution to public education and awareness.

- Hearings - To generate national attention and increased commitment to alternatives, congressional committees could hold hearings on the need for a broad approach to dispute resolution.

This is only a partial listing of possible strategies to fully develop and effectively disseminate information on dispute resolution. As suggestions, they are based on the recognition that interest and activity in the field are not enough. Careful inquiry, continual policy analysis, and public involvement are needed to ensure that new initiatives move society closer to having a system of dispute resolution that better reflects the commitment to justice for all.

# APPENDICES

## Appendix 1: Tables

### General Observations on the Comparison and Evaluation of the Various Dispute Resolution Mechanisms

- Dispute mechanisms do not exist in isolation, but in close proximity to one another. They interact with and influence one another. Thus, for example, many mechanisms that work by agreement depend on the threat of resort to institutions with coercive powers. Much of what coercive institutions do, in fact, is to induce and ratify agreements between disputants.

- We usefully distinguish pure types like adjudication and mediation, but institutions usually do not operate in accordance with a single prototype. In practice, these types are combined, and much dispute processing deviates from the avowed prototype. This is particularly true of courts, where what starts as adjudication may end up as a form of mediation. And, generally, the mechanisms employing third parties with the power to make binding decisions often create a setting for negotiations between the disputants.

- Each of the types listed on the tables that follow is a composite, spanning a wide range of actual instances. For example, arbitration includes court-annexed arbitration, arbitration by standing bodies of experts within trade associations, commercial arbitration by ad hoc arbitrators supplied by the American Arbitration Association, etc. Hence the list of qualities associated with a particular mechanism can only be general and suggested and must be reassessed in relation to any specific stance of the type.

- In accounting features as strengths (advantages) or weaknesses (disadvantages), we should recall that this depends on what we want to achieve. For example, absence of a constraint to decide according to pre-existing rules may be accounted an advantage if we seek primarily resolution of the dispute at hand but may be a disadvantage if we seek to set a precedent for resolution of large numbers of claims or to forward public policy embodied in a rule.

- We must examine the advantages and disadvantages of the alternative mechanisms in both the public and private sectors. In seeking such comparisons, we must avoid false comparison between the ideal functioning of one institution and the actual functioning of another.



TABLE 1: Some Major Criticisms of the Traditional Court System of Dispute Resolution

COST, DELAY

- the process is expensive; costs often exceed benefits
- litigation does not provide timely resolution of the dispute; delay imposes additional costs
- in the aggregate, the process consumes resources that could be applied to solve the problem (e.g., compensating victims)

ACCESS, PARTICIPATION

- court processes are mystifying and difficult to understand
- using courts requires employment of expensive intermediaries
- differences in knowledge of the system and in ability to bear costs, delay and uncertainty create inequities between parties

INAPPROPRIATENESS OF FORUM

- courts may lack expertise in the subject matter of the dispute
- courts transform disputes in ways that obscure the genuine issues between parties
- courts may be unable to give a remedy that addresses the underlying causes of the dispute
- the adversary setting polarizes parties and deflects them from the search for an optimal solution

WIDER EFFECTS

- adversarial nature of proceedings disrupts continuing relations between parties
- court decisions may channel energy to preparation for further adversary encounters rather than preventive action/aggregate problem solving

## TABLE 2: Current Efforts to Improve Dispute Resolution

A. Reforming the Courts

1. Improved administration of courts -- e.g., efficient use of judge time
2. Improved management of cases -- e.g., limited continuances
3. Reform of procedures -- e.g., control of discovery
4. Diversion to simplified and expedited procedures -- e.g., small claims or arbitration
5. Requirement of preprocessing -- e.g., screening panels
6. Settlement facilitation -- e.g., at pretrial conferences

B. Creating forums separate from the courts

7. Labor management dispute institutions -- arbitration, mediation, grievance procedures
8. Arbitration of commercial disputes
9. Private judging -- e.g., the "mini-trial," "rent-a-judge"
10. Locally-based dispute resolution -- e.g., neighborhood justice centers
11. Media-sponsored complaint handling -- e.g., "action lines"
12. Industry (or individual firm) sponsored complaint programs -- e.g., Consumer Action Panels (CAPs)
13. Grievance procedures within institutions -- e.g., hospitals, prisons, schools, etc.
14. Ombudsmen
15. Mediation of large scale multi-party controversies -- e.g., environmental, land use, and community disputes
16. Divorce mediation
17. Policy consensus-building programs -- e.g., National Coal Policy Project, Negotiated Investment Strategy

C. Systemic changes

18. Delegalization -- e.g., no fault compensation systems
19. Regulatory innovations -- e.g., the "bubble" approach to air-quality control
20. Enhancing the ability to avoid or handle disputes -- lay education, do-it-yourself, low-cost legal clinics

Adapted from Marks, Szanton & Johnson, Taking Stock of Dispute Resolution: An Overview of the Field, commissioned by the National Institute for Dispute Resolution, (1981)

## TABLE 3: Some Criticisms of Alternative Methods of Dispute Resolution

COST

- may not save significant time or money
- lack of finality may increase expense and time

ACCESS

- may not be known to potential clientele
- may not be available except to wealthy disputants

DEFICIENCIES OF PROCESS

- may lack due process and other safeguards
- may not involve needed expertise
- may not redress power imbalances
- may lack finality
- may lack power to induce settlements
- may lack power to enforce its decisions

WIDER EFFECTS

- may hide dispute from public scrutiny
- may be impermeable to public standards
- may not induce preventive solutions
- may pull into system cases that would best be settled elsewhere
- may de-fuse pressure to reform courts
- diversion of larger disputes may remove constituencies vital to the courts
- relegation of smaller disputes to alternatives may increase alienation from courts

TABLE 4: Advantages/Disadvantages Associated With Dispute Resolution Mechanisms

| 1. Court Adjudication | 2. Arbitration | 3. Mediation/ Negotiation | 4. Administrative Decision-Making | 5. Ombudsman | 6. Internal Tribunal |
|---|---|---|---|---|---|
| - announces and applies public norms | - privacy | - privacy | - defines problems systematically | - not disruptive to ongoing relations | - privacy |
| - precedent | - parties control forum | - parties control process | - devises aggregate solution | - flexible | - responsive to concerns of disputants |
| - deterrence | - enforceability | - reflects concerns and priorities of disputants | - flexibility in obtaining relevant information | - self-starting | - enforceability |
| - uniformity | - expeditious | - flexible | - can accommodate multiple criteria | - easy access | |
| - independence | - expertise | - finds integrative solutions | | | |
| - binding/ closure | - tailors remedy to solution | - addresses underlying problem | | | |
| - enforceability | - choice of applicable norms | - process educates disputants | | | |
| - already institutionalized | | - high rate of compliance | | | |
| - publicly funded | | | | | |
| - expensive | - no public norms | - lacks ability to compel participation | - no control by parties | - not enforceable | - not independent |
| - requires lawyers and relinquishes control to them | - no precedent | - not binding | - not independent | - no control by parties | - no due process safeguards |
| - mystifying | - no uniformity | - weak closure | - not individualized | | - not based on public norms |
| - lack of special substantive expertise | - lack of quality | - no power to induce settlements | | | - may reflect imbalance within organization |
| - delay | - becoming encumbered by increasing "legalization" | - no due process safeguards | | | |
| - time-consuming | | - reflects imbalance in skills (negotiation) | | | |
| - issues redefined or narrowed | | - lacks enforceability | | | |
| - limited range of remedies | | - outcome need not be principled | | | |
| - no compromise | | - no application/ development of public standards | | | |
| - polarizes, disruptive | | | | | |

TABLE 5: Partial Listing of Characteristics That May Argue For One Or Another Type Of Mechanism As Appropriate

| | Adjudication | Arbitration | Mediation/Negotiation |
|---|---|---|---|
| ARGUES FOR | - need to create a public norm | - high volume | - desire to preserve continuing relations |
| | - need to offset power imbalance | - premium on speed, privacy, closure | - emphasis on future dealings |
| | - need for decision on past events | | - need to avoid win-lose decision |
| | - need to compel participation | | - premium on control by disputants |
| | | | - multiple parties and issues |
| | | | - absence of clear legal entitlement |
| ARGUES AGAINST | - high volume, low stakes | - need for precedent | - need to compel participation |
| | - continuing relations | | - need to enforce agreements |
| | - need for speedy resolution | | - need to create a public norm |

## Appendix 2: Lexicon

Some new terms and the ambiguous use of old ones characterize the terminology being used to describe innovative conflict resolution processes. For example, the word "mediation," traditionally viewed as a formal, structured process, is now being used by some to describe any effort by a third-party neutral to bring disputants to a voluntary settlement of their differences. Others have coined phrases such as "Rent-a-Judge" to describe a variation of the arbitration process. The following is intended to clarify some of the common terminology in the field of alternative dispute resolution.

Alternative Dispute Resolution mechanisms or techniques generally are intended to mean alternatives to the traditional court process. They usually involve the use of impartial intervenors who are referred to as "third parties" (no matter how many parties are involved in the dispute) or "neutrals." Some define Alternative Dispute Resolution more broadly to mean finding better ways to resolve disputes, including those that have not reached--and may never reach—the courts or other official forums. Others place the emphasis specifically on the need for ways to alleviate the burden on courts.

Alternative dispute resolution is not a new concept to the judiciary. Many states encourage and utilize **Diversion** programs which remove less serious criminal matters from the formal administration of justice system. Most civil cases are settled before going to trial by using a variety of techniques to bring about voluntary settlements including Pre-trial **Settlement Conferences**, mediation by magistrates and, at times, mediation in chambers by the judge.

Arbitration, widely used in commercial and labor-management disagreements, involves the submission of the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form, **Binding Arbitration**, the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute. In **Last Offer Arbitration**, the arbitrator is required to choose between the final positions of the two parties. In labor-management disputes, **Grievance Arbitration** has traditionally been used to resolve grievances under the provisions of labor contracts. More recently, **Interest Arbitration** has been used when collective bargaining breaks down in the public sector, where strikes may be unlawful.

Court-Annexed Arbitration is a newer development. Judges refer civil suits to arbitrators who render prompt, non-binding decisions. If a party does not accept an arbitrated award, some systems require they better their position at trial by some fixed percentage or court costs are assessed against them. Even when these decisions are not accepted, they sometimes lead to further negotiations and pretrial settlement.

Conciliation is an informal process in which the third party tries to bring the parties to agreement by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or, in a subsequent step, through formal mediation. Conciliation is frequently



used in volatile conflicts and in disputes where the parties are unable, unwilling or unprepared to come to the table to negotiate their differences.

Facilitation is a collaborative process used to help a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of the participants. The facilitator functions as a neutral process expert and avoids making substantive contributions. The facilitator's task is to help bring the parties to consensus on a number of complex issues.

Fact Finding is a process used from time to time primarily in public sector collective bargaining. The Fact Finder, drawing on both information provided by the parties and additional research, recommends a resolution of each outstanding issue. It is typically non-binding and paves the way for further negotiations and mediation.

Mandated Settlements and Negotiated Settlements. Alternative dispute resolution techniques involving the use of neutrals are often divided into two categories: (1) settlements negotiated by the disputants and (2) settlements mandated by a third party. A more recent development has been the merging of the two; if the parties are unable to resolve their differences voluntarily, the third-party is authorized to dictate the terms of the settlements (see Med-Arb below).

Med-Arb is an innovation in dispute resolution under which the med-arbiter is authorized by the parties to serve first as a mediator and, secondly, as an arbitrator empowered to decide any issues not resolved through mediation.

Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behavior of the parties. The mediator uses a variety of skills and techniques to help the parties reach a settlement but is not empowered to render a decision.

The Mini-Trial is a privately-developed method of helping to bring about a negotiated settlement in lieu of corporate litigation. A typical mini-trial might entail a period of limited discovery after which attorneys present their best case before managers with authority to settle and, most often, a neutral advisor who may be a retired judge or other lawyer. The managers then enter settlement negotiations. They may call on the neutral advisor if they wish to obtain an opinion on how a court might decide the matter.

The Multi-Door Center (or Multi-Door Court House) is a proposal to offer a variety of dispute resolution services in one place with a single intake desk which would screen clients. Under one model, a screening clerk would refer cases for mediation, arbitration, fact-finding, ombudsman or adjudication. The American Bar Association plans to experiment with multi-door centers in three cities in 1983.

Negotiated Investment Strategy is a mediation process which has been used on a limited basis to bring together federal, state and local officials and community members to resolve differences, disputes and problems related to the allocation and use of public resources.

Neighborhood Justice Center (NJC) was the title given to the three local dispute resolution centers (Atlanta, Kansas City and Los Angeles) funded by the Department of Justice in an experimental alternative dispute resolution program in the mid 1970's. That experiment contributed to the start of about 180 local centers now operating throughout the country under the sponsorship of local or state governments, bar associations and foundations. NJC's deal primarily with disputes between individuals with ongoing relationships (landlord-tenant, domestic, back-yard conflicts, etc.) Many draw their caseloads from referrals from police, local courts or prosecutors' offices with which they affiliated. The dispute resolution techniques most often offered by the centers are mediation and conciliation. Some centers employ med-arb. Referrals to other agencies are a common feature. Many centers earn some income providing training and technical assistance services. They are also known as **Community Mediation Centers, Citizen Dispute Centers**, etc. (See ABA's Dispute Resolution Program Directory)

An Ombudsman is a third party who receives and investigates complaints or grievances aimed at an institution by its constituents, clients or employees. The Ombudsman may take actions such as bringing an apparent injustice to the attention of high-level officials, advising the complainant of available options and recourses, proposing a settlement of the dispute or proposing systemic changes in the institution. The Ombudsman is often employed in a staff position in the institution or by a branch or agency of government with responsibility for the institution's performance. Many newspapers and radio and television stations have initiated ombudsman-like services under such names as Action Line or Seven on Your Side.

Public Policy Dialogue and Negotiations is aimed at bringing together affected representatives of business, public interest groups and government to explore regulatory matters. The dialogue is intended to identify areas of agreement, narrow areas of disagreement and identify general areas and specific topics for negotiation. A facilitator guides the process.

Rent-a-Judge is the popular name given to a procedure, presently authorized by legislation in six states, in which the court, on stipulation of the parties, can refer a pending lawsuit to a private neutral party for trial with the same effect as though the case were tried in the courtroom before a judge. The verdict can be appealed through the regular court appellate system.



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## STEERING COMMITTEE FOR THE AD HOC PANEL

**Madeleine Crohn**, president of the National Institute for Dispute Resolution, was formerly executive director of the Pretrial Services Resource Center.

**Robben W. Fleming**, board chairman of the National Institute for Dispute Resolution, formerly was president of the Corporation for Public Broadcasting and the University of Michigan and is an experienced labor arbitrator. He chaired the Panel's meetings.

**Marc Galanter**, professor of law and South Asian studies at the University of Wisconsin, has served on the Council on the Role of the Courts and written widely on dispute resolution.

**Philip J. Harter**, an attorney and consultant specializing in government regulation issues and the regulatory process, has written on negotiating federal regulations.

**Stanley E. Morris**, associate deputy attorney general of the United States, was formerly a senior official concerned with regulatory matters in the Office of Management and Budget.

**Michael Robinson** represented **Jonathan Rose**, the assistant attorney general, Office of Legal Policy, of the U. S. Department of Justice.

**Richard A. Salem**, a mediator and consultant in dispute resolution, has served as midwest director of the Justice Department's Community Relations Service. He facilitated the Panel's meetings.

**Ann Jacobs** was director of the project with day-to-day responsibility for the Panel's work. She was previously a staff associate at the Pretrial Services Resource Center.

**Helen Lessin Shaw**, administrator of the Federal Justice Research Program of the Office of Legal Policy, served as the project monitor.

**Brooks Johnson** recorded the Panel's meetings.

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The National Institute for Dispute Resolution is a private, non-profit charitable organization created through the initiative of five foundations. The Institute seeks to answer a number of basic questions about dispute resolution and to help put into general practice new and more satisfactory methods for resolving disputes without resorting to litigation. The Institute addresses these goals by providing financial support and guidance for well-conceived projects in dispute resolution and by providing technical and informational services.

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