

RUNNING HEAD: EFFECTS OF COURT APPOINTED MEDIATION

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*You say you haven't been the same since you had your little crash
But you might feel better if they gave you some cash
The more I think about it, Old Billy was right
Let's kill all the lawyers-- kill 'em tonight (Henley & Frey, 1994, par.2)*

Reading about the processes of alternative dispute resolution (ADR) reminds me of reading about how wonderful computers were going to be when they reached the classroom. It's true that I would not be "at" Pacifica doing this paper if it were not for the Internet, but the whizz-bang of electronic learning has not worked out quite as the visionaries of the 80s expected. Neither has ADR. The effects of this new tool is to relieve some of the backlog of court cases by spreading the disputes to new areas, but the solution has caused some problems, as solutions tend to do.

Alternative Dispute Resolution (ADR) has become very popular because of growing dissatisfaction with traditional ways of adjudication. ADR offers alternatives to the adversarial courtroom model: arbitration, mediation, and negotiation. Voluntary mediation allows the participants to work out their differences, be they marital or employment or industrial, as long as the mediator is skilled and the participants want to settle their differences and work out an agreement. Participants who go through the mediation process learn better skills, in some cases allowing the company ADR division to avoid outside mediation ("ADR Vision," 2001). The federal government has used mediation especially for EEOC disputes as a way to save costs for taxpayers and participants ("ADR Vision" 2001). In 1994, Intel and AMD, microchip manufacturers settled an arbitration dispute based on a contract clause that had lasted seven years and cost over \$100 million in favor of more informal mediation (unclear: was the settlement that they would enter into mediation?) (Rubin, 1996). Steenland suggests: "the goal that we

have is to get those cases that are susceptible to settlement resolved earlier, so that our lawyers can spend more time on the matters that either should not or cannot be settled" (cited in "ADR Vision," p.15). ADR might open the courts to settle disputes that should become part of the law, as litigation has traditionally done. Galanter says "ADR's real impact has been to expand the perception of options available for dispute resolution...and to bring resolution techniques to disputes much earlier in the process before the conflict escalates into legal warfare" (cited in Rubin, 1996, p.55).

But coerced mediation (without legal protections?) may be just as costly and stressful as traditional litigation without legal protections. Some companies (Hooters, Permanente Medical Group, ARCO Products, B-G Maintenance Management) have written arbitration agreements aimed at preventing claims from employees or clients by making the claim process difficult and expensive.(Landsman, 2005) Persistent plaintiffs have taken these issues to court, and have shown them to be unenforceable in some cases:

An employee who can show that it would cost him or her much more to arbitrate an employment discrimination claim than to bring it before a court should not be forced into arbitration, even if the employee has signed a contract agreeing to arbitrate employment disputes. (Hellwege, 2001, par. 1)

Employers should consider the knowledge, possible biases, and rights of an arbiter to award punitive damages, and to recognize what if any grounds for appeal may exist before requiring arbitration over litigation, as employees do have the right to a jury trial in federal cases (Bompey & Pappas, 1993). According to Steenland: "it is in the employer's interest not just to deal with arbitration, but to create a comprehensive system so that most of these issues can be resolved early on without ever needing to think about [arbitration or litigation]" (cited in "ADR Vision." 2001, p. 19) Nevertheless, Bingham found that for employers who had "repeat-player" status, one or more arbitrations in the past, had a 5 to 1

advantage over the employee, while the employee was favored 2.4 to 1 for "non-repeat players" (cited in Rubin, 1996, p.61). Economic considerations encourage some mediators to extend mediation sessions and to use tactics to make more money and come to less than ideal solutions to keep up their success rate, which can cause more companies to become "repeat players".(Rubin, 1996, p. 62).

According to Trenary: "because ADR is increasingly advanced as a tool for social justice, it is necessary to examine general propositions about the influence of race on people, and therefore, on the ADR process." (cited in "Race and Dispute," 2000, p. 101) Few laws and fewer standards for mediators exist, but mediation is becoming a business venture which does not require a law degree and which offers many loopholes for unethical practitioners. Google lists 1.6 million hits for "ADR Mediation Training." Lawyers do not always make the best mediators because they forget that they are not to give legal advices in the mediator role, only administrative and ministerial information; non-lawyers are more aware of this limitation and tend to depend on other kinds of skills such as counseling. (Daiker, 2005) Additionally, non-lawyers do not have the training in the adversarial position to overcome (very good point). According to Friedman:

"Attorneys accustomed to seizing power in law practice must learn to give it away to the parties in a mediation. That's counterintuitive for lots of lawyers whose habits are such that they felt the essence of being a good lawyer is controlling their client." (cited in Rubin, 1996, p.57)

Some states are creating criteria for mediators to ensure fairness and reduce conflict of interest. Indiana has a 40-hour block of training, to be followed up every five years with six additional hours of training, recently revised to allow training for specific areas of interest (Lucas, 2003) Tennessee, Arkansas, and New Jersey have similar programs. Information on ADR, rules and standards are available on the ADR website: <http://www.adr.org> .

Who benefits from ADR, and it is worth the struggles to get it through its adolescence? According to Schachter:

At the beginning stages, it was the defense lawyers, really through corporate counsel, who were more interested in mediation. The plaintiffs' lawyers were very much opposed because of the mantra of "we need to get to the jury." If we can just get to the jury, there'll be a big outcome for us. Over time, I think the plaintiffs' bar has come to realize that the sooner you can reach a resolution, there may be benefits both to the plaintiffs' lawyer and to the client, that these long time frames, this very extended litigation process, is very expensive both to the client and to the counsel. So over time we've seen more receptivity from the plaintiffs' bar both because of their own self interest, and arguably for the interest of their clients.(cited in "ADR Vision," 2001, p12).

Workers too can benefit, not only in reduced costs, but also, according to a study done in Baltimore, it is "plausible that ADR has additional, less tangible benefits, such as increasing participants' satisfaction and perceptions of fairness, and minimizing the adverse impacts of the litigation on employer-employee relationships." (Mandell & Marshall, 2002, p. 14) Studies at Stanford and Harvard show that "the more attorneys and their clients learn about mediation, the more that people with problems are drawn to mediation and its transformative power." (Rubin, 1996, p.56)

Much like the development of the Internet and its myriad of resources, ADR has much to offer citizens in the way of choosing how to assure that they are treated fairly, for companies to spend their time making money instead of building legal cases, and for the courts to try the cases that need to be tried to benefit the nation as a whole. However, also like the Internet, the buyer must beware, taking nothing at face value and reading the agreement clauses carefully before "submitting." Just as putting a computer, even with DSL in a classroom requires learning new skills to use it effectively, so does ADR fit into a spectrum of available resources. The key

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to its best use is not to allow big companies and big government and big mediators to bargain away the rights and fairness to the individual. The strength of the Internet is that anyone that can access it can benefit; so too is ADR for those who can learn to mediate.

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