Alternative Dispute Resolution: Past, Present, and Future

An Honors Thesis (HONRS 499)

By

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Abstract

This research project examines Alternative Dispute Resolution; the most frequently used alternative method to the traditional litigation proceedings. The most popular forms of ADR were defined and examined, concentrating particularly on the processes of mediation and arbitration and their economic and time benefits. This assessment of ADR included the examination of the history of ADR in the legal system, the current weaknesses in the Adversarial system of justice, criticisms and benefits of the ADR process, and the statistical analysis of the current effectiveness of ADR. Through this evaluation it was projected that because of ADR’s benefits of brevity and less restrictive economic cost, ADR will form a partnership within the adversarial system and become the dominant form of settling civil disputes.
One of the oldest institutions in America is our justice system. As the years, decades, and century’s progress so do the changes in societal values and perceptions. These progressions can be traced most easily through our court system and through the law, which is fluid and constantly changing to address the shifting needs of our growing society. However, what has remained virtually unchanged in over two hundred years is the actual structure of our court system and the idea of adversarial justice. Although the overall structure and purpose of the American justice system has remained the same, the ideas about the best methods of serving justice have been of great debate. In the mid 1800’s Abraham Lincoln, a former attorney who became one of our country’s most influential presidents, had these words to say about the American justice system:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses, and wastes of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man. There will always be enough business. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it. (Hill, 1996, pp.102-103)

It is hard to imagine that the attorney who spoke these words and practiced law in our country did so more than 100 years ago. Lincoln was by far one of the most influential Presidents of the United States, however, it seems remarkable that Lincoln would express almost perfectly the sentiments that are now being embraced regarding changes in our legal
system. As illustrated by Lincoln so long ago, "the nominal winner is often the real loser-in fees, expenses, and wastes of time" (Hill, 1996, p.102-103), with these words Lincoln successfully illustrated some of the major problems facing our American adversarial justice system. These problems, including the cost of litigation and time in which a dispute requires to be settled, are in fact at the heart of the movement to find alternate methods of litigation. Perhaps the most widespread and fastest growing of these new movements is that of Alternative Dispute Resolution.

Alternative Dispute Resolution, commonly referred to as ADR, has become one of the most popular and debated reform initiatives in our legal system to date. Many legal circles have embraced this initiative referred to as the ADR Movement, which advocates the use of ADR methods in place the tradition method of litigation (Schellenberg, 1996). Alternative Dispute Resolution offers parties in a dispute the option to settle their case outside the courtroom. ADR incorporates many different methods such as arbitration, mediation, early neutral evaluation, conciliation, and mediation-arbitration (Cornell Law Review, 2003).

Two of the most popular and successful forms of ADR within the legal system are that of arbitration and mediation. The processes of arbitration and mediation are very similar. Both processes involve a neutral third party that oversees and administers the entire ADR process (Abadinsky, 2003; Burton, 1996; Folberg & Taylor, 1984; Marcus & Senger, 2001; Schellenberg, 1996; United States Office of Personal Management, 2003). Those involved in these processes can include attorneys, the third-party neutral, and the parties involved in the dispute. Following a discovery stage, the parties then meet, advocate each opposing side, and attempt to reach the terms of a settlement (Abadinsky, 2003; Burton,
The defining difference between mediation and arbitration is that the results of an arbitration process can be legally binding and offer no method of appeal (Abadinsky, 2003; Burton, 1996; Folberg & Taylor, 1984; Marcus & Senger, 2001; Schellenberg, 1996; United States Office of Personal Management, 2003). Although mediation and arbitration are the most widely accepted methods classified as ADR, many of the other ADR forms are becoming acceptable alternatives to traditional litigation. These two methods, as well as some of the emerging forms of ADR, will be examined further throughout the discussion of ADR.

Just as the methods of ADR vary, the extent to which ADR can be found within our court system is considerably diverse. Each state has its own program that defines the extent and appropriate use of ADR within its independent legal structure. The Federal Government has adopted policies and laws that help define the use of ADR within federal disputes. Alternative Dispute Resolution is not only relevant to our Justice System; the methods of mediation and communication that are often used in this type of legal method have become very popular for many different types of groups. These methods appear within communities, civil relationships, labor disputes, the medical profession, university disciplinary systems, and of course law. In short, ADR has the potential to affect many different people in very different circumstances.

Through the evaluation of the current methods and role of ADR in the American Justice system, and by identifying the necessity to improve the adversarial system of justice a better understanding of ADR will be provided. This evaluation will first define the methods of ADR to provide a better idea of what types of procedures and objectives the
term ADR encompasses. Once the term ADR has been clearly defined, the history of the inclusion of this process within our justice system will be examined, followed by an assessment of our current adversarial system of justice and criticisms of the ADR movement. To conclude the evaluation of ADR, arguments for the inclusion of ADR will be highlighted, as well as, a review of specific facts and success rates illustrating where ADR is in today’s justice system. Ultimately, through this evaluation the future involvement of ADR within our legal system will be shown to be both extensive and necessary to lessen our burdened and increasingly ineffective system of justice.

Defining the Methods of ADR

There are more than 10 forms of Dispute Resolution, which include such methods as conciliation, dispute panels, early neutral evaluation, mediation-arbitration (med-arb), and the most popularly utilized methods of mediation and arbitration. A more in-depth look at mediation and arbitration shows that these methods are continually being professionalized and standardized to improve the general process of ADR.

Mediation

As earlier defined, mediation is a process where a neutral third party attempts to aid disputants in reaching terms of a settlement (Abadinsky, 2003; Burton, 1996; Folberg & Taylor, 1984; Marcus & Senger, 2001; Schellenberg, 1996; United States Office of Personal Management, 2003). This process is not binding and either or both of the parties can choose to forgo the mediation process and move into traditional methods within the court system (Abadinsky, 2003; Burton, 1996; Folberg & Taylor, 1984; Marcus & Senger, 2001; Schellenberg, 1996; United States Office of Personal Management, 2003). In a recent analysis of mediation, Schellenberg (1994) identified five defining principles as key to the
mediation process. These five principles are: (a) mediation is confidential and private, (b) mediation is voluntary, (c) disputants retain responsibility, (d) the mediator is a neutral third party, and (e) the mediation process is assisted negotiations.

To more fully understand this process an expansion of these five characteristics is needed. The first of the characteristics is the confidentiality of mediation and is one of its most important characteristics. Because mediation is not conducted within a courtroom or as a court proceeding, it does not therefore adhere to the same laws regulating information as within legal proceedings (Folberg, 1984). As a result, there then becomes a greater opportunity for more personal and confidential information to be shared. For this reason, mediation sessions have no official record of discussion and are conducted in a private place (Schellenberg, 1996).

The second characteristic of mediation is that it is entered into voluntarily. In most cases this is true. Both parties of a dispute make a decision to attempt to settle their case through the mediation process; however, mediation can be a result of a court order (Schellenberg, 1996). In cases where the mediation process is court mandated, mediation allows either party to cease with the process at any point. This ability for the disputants to discontinue in negotiations or to not accept an agreement allows mediation to be considered voluntary (Schellenberg, 1996). In addition, it is important to note that mediation does not invoke any type of sanctions if the disputants are unable to reach an agreement (Schellenberg, 1996). The ability to agree or disagree equally is another trademark of the voluntary aspect of ADR.

The third characteristic is the responsibility of disputants. This is so important to the success of mediation and another overriding characteristic of ADR. Through mediation, the
mediator only seeks to help guide and open the lines of communication between disputing parties (United State Office of Personal Management, 2003). It is the goal of mediation that the decisions and terms of an agreement in a settlement will be decided upon by the disputing parties themselves (Abadinsky, 2003; Burton, 1996; Folberg, 1984; Marcus & Senger, 2001; Schellenberg, 1996; United States Office of Personal Management, 2003). Once the terms of an agreement are decided, it is customary that the terms be put into a written agreement, which serves as the conclusion of the process (Schellenberg, 1996). This is the characteristic of ADR that makes it so appealing to many; the ability to take an active role in the ultimate decision of a case, which is something very different from our traditional litigation process (Abadinsky, 2003). However, mediation provides no guarantee to a conclusion of the dispute. For this reason if mediation fails, it is the generally accepted that the dispute will then move to a traditional litigation process.

The fourth characteristic of mediation is the neutrality of the third party. The mediator is a trained professional who is generally hired, because of their neutrality, by the clients to administer the process (Schellenberg, 1996). This characteristic simply means that the mediator avoids taking sides and instead focuses on the process and the communication of the two parties (Abadinsky, 2003; Burton, 1996; Folberg, 1984; Marcus & Senger, 2001; Schellenberg, 1996; United States Office of Personal Management, 2003). The idea of a neutral party in disputes is similar to the idea of a judge; the obvious difference here however is the responsibility of the disputants to arrive at their own conclusions.

Finally, the fifth characteristic of mediation is that mediation is assisted negotiations. This may seem like an obvious characteristic of mediation, but simply put it means that the mediator is present to help aid and facilitate negotiations between conflicting
parties who are unable to do so by themselves (Schellenberg, 1996). The purpose of this aid is to keep the focus on communication and problem solving to ensure that the mediation process is being conducted properly and effectively (Schellenberg, 1996).

Although the role of a mediator is constant throughout independent mediation processes, the “degree of directness” (United State Office of Personal Management, 2003, ADR Techniques or Methods section, sub-section Mediation, ¶ 3), varies greatly between individual mediators. Some mediators may simply establish a foundation from which the parties can negotiate, communicate, and potentially reach settlement (United State Office of Personal Management, 2003). Other mediators choose to take a proactive role, sometimes involving themselves in the actual negotiation process (United State Office of Personal Management, 2003), this direct involvement is a characteristic more commonly found among arbitrators.

Arbitration

Arbitration is both similar and vastly different than mediation. One of the very basic differences between arbitration and mediation is the complex nature of arbitration. Unlike mediation, there are many different forms of arbitration. Arbitration can be a combination of the following: (a) binding or non-binding, (b) voluntary or mandated, and (c) interest or rights arbitration (Schellenberg, 1996). These different approaches allow arbitration to take on many different forms and be used for many different purposes.

Voluntary versus Involuntary or Compulsory Arbitration is the difference between parties agreeing to undergo the arbitration and being compelled to do so (Schellenberg, 1996). If parties in a conflict through their own initiative decide to undergo arbitration this is voluntary, however, voluntary arbitration is very rare (Schellenberg, 1996). More often
parties in a dispute have, through interactions prior to their legal dispute, mandated
themselves to adhere to arbitration proceeding in the event of a conflict. In these situations
individuals have committed to using arbitration in the event that disputes arise involving
specific issues (Schellenberg, 1996). When particular issues fitting into the pre-determined
framework arise, individuals must automatically utilize the arbitration process, this is when
arbitration is considered compulsory or involuntary (Schellenberg, 1996).

Non-binding versus binding arbitration is the difference between the requirement of
parties to be bound by the decision of the arbitrator or to simply use the decision as advisory
(Schellenberg, 1996). In non-binding arbitration the arbitrator can be most closely
compared to a mediator. The arbitrator listens to the disputing sides and puts forth an
agreement for the parties to consider. The parties are under no obligation to accept the
agreement and may use it as advisory only (Schellenberg, 1996). Non-binding arbitration is
best used for cases when: (a) the parties wish to have increased control over the process, (b)
wish to utilize a third party neutral to settle the dispute but want to have some control over
who that third party neutral is, and (c) when the parties prefer to have a more expedited
process to litigation in settling their disputes (United States Office of Personal Management,
2003).

When an arbitration process is binding, which is the most common form, the
arbitrator will listen to both parties and then form terms of an agreement that are to be
followed (Schellenberg, 1996; United States Office of Personal Management, 2003). Often
if arbitration is binding it is also compulsory. The binding aspect of this is that the parties
are mandated to uphold the decisions reached through arbitration. The compulsory aspect,
as mentioned earlier, simply means that the parties have previously agreed to arbitration
pertain to certain issues and have conceded that they then become bound to uphold the decisions on these issues reached through arbitration (Schellenberg, 1996). Ultimately a binding arbitration simply means that once the terms of an agreement are set, the parties are obligated to adhere to them (United States Office of Personal Management, 2003).

Finally, Schellenberg (1996) outlines the difference between interest and rights arbitration. Interest arbitration most often deals with "basic economic issues" (p. 196), such as issues involving contracts. Rights arbitration, however, involves grievances. In this type of arbitration, agreements attempt to find what is most appropriate "within agreements already established" (Schellenberg, 1996, p. 196). In these cases, arbitrators must work with the original contract or agreement, listen to the disputing parties, and determine what is the most suitable agreement based on the merits of the case (Schellenberg, 1996).

As described, it is clear that arbitration can be a difficult and somewhat complicated process. Arbitration like mediation utilizes a neutral third party or an arbitration panel as the representative third party neutral. An arbitration panel is most commonly comprised of three individuals, but can be of higher or lesser number that is agreed upon by the parties (United States Office of Personal Management, 2003). The selection of an arbitrator either for individual use or for the purpose of serving on a panel can be as complex as the process itself.

Arbitrators can be selected in several different ways. It is almost always the case however that the parties involved in a dispute have the discretion to choose a particular arbitrator. It is possible that parties may jointly pick from a provided list of arbitrators (United States Office of Personal Management, 2003). In cases where a single arbitrator is to be used, generally the parties decide together on the neutral third party from a provided
list (United States Office of Personal Management, 2003). If the case will be utilizing a neutral third party the process is slightly different. In these cases, the most common form of picking the panel is that each party may choose an arbitrator who is impartial, yet sympathetic to their particular side. These two arbitrators then choose the final panel member. This arbitrator is the most impartial of the three and has the most influence in the decision of the case (Schellenberg, 1996).

The difference between the public and private sector of arbitration are some of the last major distinctions within ADR. Arbitrators may be members of a public entity or group such as the government, or they may work in the private sector for a firm or for themselves (Schellenberg, 1996). One defining difference between public and private practice is that private practice receives no funding for special services, unlike public agencies (Folberg & Taylor, 1984). The flexibility and formality of ADR also varies between the private and public sector. If an ADR process takes place through a government or other public agency, the formality of the process is much greater (Folberg & Taylor, 1984; Schellenberg, 1996). Public agencies are subjected to greater rules of procedure because of funding and their government relations, which try to maintain a consistent and methodical process when dealing with many different issues and people (Folberg & Taylor, 1984; Schellenberg, 1996). The private sector does not have these governmental relations or responsibilities to consistency; and therefore, has the freedom to move in and out of different structures and entities and can be involved in far less formal proceedings (Folberg & Taylor, 1984; Schellenberg, 1996). Depending on the type of dispute, the formality and classification of a public or private ADR process can be very important in choosing the right type of process for a particular case.
Although mediation and arbitration are of the most popular forms of ADR, there are several other alternative dispute methods. Early Neutral Evaluation and Conciliation were cited earlier as two additional forms of ADR that are commonly used in this process. In reality, there are over ten additional forms of settling dispute at varying levels of legality that can be classified as forms ADR. One of these additional forms is that of mediation arbitration, also known as "med-arb". A brief overview of some of these select forms of ADR is a perfect means in which to illustrate the diversity that ADR offers as an alternative form of legally settling disputes.

*Early Neutral Evaluation*

Early neutral evaluation is in reference to the settlement. In short, it is an advisory process that is used widely in many different courts. This process again utilizes a neutral third party. In this particular process the neutral individual listens to both arguments and then issues a statement about the strengths and weaknesses of each case (United States Office of Personal Management, 2003). The types of cases most suited for these types of processes usually fall into one of two categories. First, these cases are either those in which the parties disagree about the strengths of their cases or second, are cases in which an expert is needed due to the "technical or factual issues that lend themselves to expert evaluation" (United States Office of Personal Management, 2003, ADR Techniques or Methods section, sub-section Early neutral evaluation, ¶ 2)

*Conciliation*

The conciliation process could be considered the process before the process. Conciliation consists of a third party or conciliator attempting to bridge an initial relationship and communication between two differing parties (United States Office of
Personal Management, 2003). The conciliator must not always be neutral and may even have some relationship with one of the parties. It is the main goal of the conciliator to bring understanding between the two parties and attempt to establish some form of trust and communication. (United States Office of Personal Management, 2003) The nature of conciliation makes it a perfect combination and precursory to other forms of dispute resolution. Most commonly, conciliation is partnered with mediation or facilitation (United States Office of Personal Management, 2003), however it can be an important process for any additional involvement with ADR.

Mediation-Arbitration

Mediation-arbitration or med-arb is the final form of dispute resolution that will be discussed. As the name indicates, med-arb is a combination of the characteristics of the mediation and arbitration process (United States Office of Personal Management, 2003). What is appealing about this process is its ability to offer the “best of both worlds”. The qualities shared between mediation and arbitration are the same as in med-arb. In the med-arb process a neutral third party is used to help the disputing parties communicate and develop an agreement (United States Office of Personal Management, 2003, ADR Techniques or Methods section, sub-section Med-Arb, ¶ 1). However, in med-arb if an impasse is reached the third party then has the authority to issue a binding agreement based on the differing cases or an opinion on the rationale for the impasse. This condition is agreed upon by the parties prior to their commitment to the process (United States Office of Personal Management, 2003). It is the focus on communication and party responsibility coupled with the ability of the third party neutral to take an enforceable action against the parties that make med-arb a true combination of these two ADR programs.
A variation of the med-arb process would be that two third party neutrals be utilized. In this variation, a mediator would be used to facilitate communication and a settlement. Once the mediation process has concluded, the second third party would address any remaining issues and possibly make a determination as the terms of the settlement (United States Office of Personal Management, 2003). The med-arb process is appealing to many individuals because it virtually eliminates any concern about the process. “If handled by one third party, [it] mixes and confuses procedural assistance (characteristic of mediation) with binding decision making (a characteristic of arbitration)” (United States Office of Personal Management, 2003, ADR Techniques or Methods section, sub-section Med-Arb, ¶ 2). This process provides individuals with more confidence in the process keeping it as neutral as possible and allowing better communication knowing that the individual.

The History of ADR in the American Legal System

The movement to legitimize Alternative Dispute Resolution as a means of settling legal disputes can be attributed to many different conditions and factors within our current system of litigation and within changing academia within our nation. One of the precursors to the ADR movement was the peace movement. It is important to recognize this movement and it’s relationship to ADR because it helped to establish a mentality and preference toward, “a broadly based effort at understanding and promoting nonviolent means of resolving conflicts” (Schellengberg, 1996, p. 188). The peace movement eventually developed into adoption of Peace Studies programs that allowed the development of theory and methods of conflict and it’s resolution.

The peace movement was an important foundation to the beginning of what is now known as the ADR movement. However, there are a select number of factors that seem to
be at the heart of the ADR movement in America and perhaps the catalyst needed to bring this movement into the national spotlight. One important factor is the lack of flexibility within the present court system. This lack of flexibility prevents the courts from adequately addressing the social issues involved in a dispute and to allow the parties more involvement in the legal process (Abadinsky, 2003). ADR allows parties the ability to be directly linked with their cases and participating directly in the mediation or arbitration process (Abadinsky, 2003). Another factor in the popularity of this movement is the lack of procedural or substantive justice provided to minor offenders (Abadinsky, 2003). Finally, as Lincoln identified over 100 years ago the cost, time, and effectiveness of our legal system must be questioned (Hill, 1996). These early criticisms of the justice process in America have carried over into current criticism of the process. Lengthy trial procedures and the growing cost of litigation are conditions within our current system and are factors legal scholars still wrestle. It is perhaps these final two factors alone that make ADR such an appealing alternative to litigation.

The beginning of the inclusion of ADR within the legal framework of our country can be traced back over 100 years ago. Mediation has been traced throughout history although its form and method of execution has varied. However, the real beginning of the American ADR movement, as we know it today, can be seen as early as 1964. The Civil Rights Act of 1964 not only created equality for minority groups in America, but also began one of the first programs to incorporate mediation as a tool in settling disputes (Abadinsky, 2003). As part of this act, the Community Relations Service of the Department of Justice was created. The Community Relations Service was charged to handle cases dealing with discrimination based on race, national origin, or color. As part of this service the
Community Relations Service assisted, "...people in resolving disputes through negotiation and mediation rather than having them utilize the streets or the judicial system." (Abadinsky, 2003, p. 359) The legislated involvement of mediation into the process of resolving disputes showed recognition by the U.S. of the validity and legality of mediation as a method of settling disputes.

The year 1970 marked the first step toward bringing ADR into our legal system and could be considered the actual beginning of the Federal Government's effort to incorporate ADR into the Federal court system. In 1970 the United States joined the United Nation's convention on The Recognition and Enforcement of Foreign Arbitral Awards (Cornell Law Review, 2003, Alternative Dispute Resolution: An Overview 3). As early as 1979 the first courts began requiring mediation in custody and visitation disputes, as well as, domestic relations cases. In these cases, the mediation efforts become binding upon the judge reviewing the results of the mediation and enacting a court order (Abadinsky, 2003). However, it was nearly twenty years later that the United States would make steps toward incorporating mediation and arbitration into our own legal system.

In 1988 the U.S. made its first significant expansion of ADR in the federal system. In 1988 Congress authorized 10 district courts to incorporate voluntary arbitration programs and additional 10 districts courts were required to enact mandatory programs (Abadinsky, 2003, p. 359). The most significant expansion of ADR came in 1990 with adoption of two Acts. These two acts helped expand ADR within the American legal framework.

Regardless of the initial cause for the ADR movement in America, it is clear through recent legislation and current number of Federal and State programs that ADR is a growing reality in our legal system. It is important to note that the ADR movement has been much
broader than within the confines of our court system; community, business, and labor relations are all areas where ADR has made significant movements.

*The Civil Justice Reform Act 1990*

The first act in 1990 and the least comprehensive of the two, was the Civil Justice Reform Act of 1990. This Act helped reinforce the growing effort of the government to encourage the use of ADR. The Act required each district court to create a district plan for reducing the costs and delay in civil litigation (Abadinsky, 2003). To help in the creation of these policies, a team of local scholars, attorneys, and citizens would be created to help guide the principles of the plan (Abadinsky, 2003). As part of this Act, six case management principles were outlined within the statute; one of these principles was ADR (Abadinsky, 2003). Although not as comprehensive as many pieces of ADR legislation, this Act helped establish the growing credibility and importance of this type of legal reform.

*The Administrative Dispute Resolution Act*

The second of the ADR acts and the more significant of the two, was the Administrative Dispute Resolution Act of 1990. This Act marked the first “comprehensive” federal effort to enact and promote ADR (Marcus & Senger, 2001, p. 713). The Administrative Dispute Resolution Act of 1990, also referred to as the ADR Act, required executive agencies to (a) “adopt a policy that addresses the use of alternative means of dispute resolution”, (b) “designate a senior official to be the dispute resolution specialist of the agency”, (c) “provide for training on a regular basis”, and (d) “review each of it’s standard agreements for contracts, grants, and other assistance [to] encourage the use of alternative means of dispute resolution” (Administrative Dispute Resolution Act of 1990, (1994) ). The Administrative Dispute Resolution Act was a result of growing concerns and
problems with the traditional forms of dealing with disputes (Marcus & Senger, 2001); specifically, disputes between the public and agencies and those between two different federal agencies (U.S. Department of Labor Office of the Secretary: Overview of Alternative Dispute Resolution, 1995). The major concerns with the traditional methods were the prolonged litigation, increasing cost, and pointlessness of bringing cases to court beyond the discovery stage to determine suitable settlements.

Although the ADR Act marked a triumph for alternatives in dispute resolution, it was flawed by several problems. In an examination of ADR during the Earl F. Nelson Memorial Lecture at the University of Missouri Law School, several problems with the ADR Act were highlighted. One problem examined in the lecture addressed by Marcus and Senger (2001), was a clause within the law that allowed agencies to nullify the results of the arbitration agreements within thirty days. The inclusion of this clause virtually stripped the overall purpose of the legislation, which was to create a means of effectively using arbitration within agency disputes. Not only could the government back out of terms established by arbitration agreements, but also it made private litigates hesitant to agree to the procedure knowing that the government could easily break the provisions of the settlement (Marcus & Senger, 2001). A second problem of the Act was that it “...contained no mediation exception to the Freedom of Information Act, which provides public access to government documents” (Marcus & Senger, 2001, p. 714). This lack of provision caused problems in regards to the information available while conducting and after the conclusion of arbitration hearings.

In 1996 the Administrative Dispute Resolution Act was amended to address some of the problems created by the original document. The first issue addressed was the ability of
the government to nullify awards resulting from arbitration. The Act was amended to no longer allow government agencies to nullify results of arbitration once they had agreed to the process (Administrative Dispute Resolution Act of 1990, (1994), (amended 1996)). The second amendment was to the Freedom of Information Act, which no longer allowed free access to documents exchanged between a party and the mediator of a dispute. These changes alleviated many concerns with the ADR process and as a result more individuals began seeking this method to resolve their disputes (Marcus & Senger, 2001).

*The Alternative Dispute Resolution Act of 1998*

Two years later, in 1998, the Alternative Dispute Resolution Act was passed. This Act targeted district courts mandating that they promote the use of ADR within their jurisdictions. Specific provisions of the Alternative Dispute Resolution Act of 1998 included that all district courts, (a) “encourage and promote the use of alternative dispute resolution”, (b) “provide litigants in all civil cases with at least one alternative dispute resolution process”, (c) “require that all litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation”, (d) “devise and implement its own alternative dispute resolution program”, and (e) “encourage and promote the use of alternative dispute resolution in its district” (Alternative Dispute Resolution Act of 1998).

This Act successfully provides courts the authority to require some type of alternative dispute resolution in cases such as, bankruptcy and civil actions (Alternative Dispute Resolution Act of 1998). This discretion gave the courts the ability to promote and enforce the use of ADR. Although the Act provided significant amounts of discretion to the
courts, lack of funding from the federal government has made the implementation of ADR services and programs mandated by the Act difficult to realize (Marcus & Senger, 2001).

The government by far has been the leader in implementing and utilizing the ADR process. According to Marcus & Senger (2001), “The United States or its agencies are party in nearly one-third of all federal district court civil litigation” (p. 710). This caseload is one of the major factors in the government’s aggressive attempt to promote the use of ADR. Much of this campaign can be attributed to former Attorney General Janet Reno who was successful in advocating that many of these ADR laws be passed. Reno additionally instituted courses in ADR in the popular Attorney General’s Advocacy Institute that provides a workshop annually for young attorneys (Marcus & Senger, 2001). Not only did Reno implement a course, she also attempted to break popular mentalities on the prominence of litigation by including a national award for the use of ADR in the prestigious John Marshall Awards Series. The Attorney General in Washington awards this honor annually to an outstanding young attorney (Marcus & Senger, 2001). With the work of legislation and support from prominent members of the legal profession, it has been possible to begin the incorporation of ADR into our legal system. Nevertheless, the adversarial system of American justice is still prominent and necessary to understand in order to see the implications of ADR within it.

The Adversarial System

Earlier mentioned was former Attorney General Janet Reno’s attempt to improve the perception of ADR among legal professionals through prestigious awards. A wise decision, this perception is in fact one of the greatest challenges facing the ADR movement. The Adversarial justice system, which embraces litigation and courtroom justice, is a national
institution in itself. It could be argued that the, “mentality has been around so long that it has become institutionalized” (Marcus & Senger, 2001, p. 714). Litigation and courtroom savvy is continually glorified in areas such as movie, film, and media. Shows like *Alley McBeal, Law and Order, A Few Good Men, A Time to Kill* and even cable networks such as Court TV perpetuate the ever-popular perception and idea about how the legal system operates. The reality of our legal system, however, is much different. In fact, it is the very nature of our current adversarial system that provides the best argument for the promotion of ADR as a reputable area of law. ADR, unlike the adversarial system of justice, does not focus solely on the outcome of the case. Adversarial justice focuses on a winner, an outcome for an individual. ADR is inquisitorial and does not focus on blame or guilt, but rather is more concerned with the truth or “…what is best for the society as a whole, or at least what is best for both disputants” (Abadinsky, 2003, p. 358).

As we examine the adversarial system in America and some of the major problems that exist within it, it is possible to conclude that ADR is necessary to improve the avenue of justice in America. The American Justice System has often been praised as the ideal example of what justice should be. It is hard to find someone who cannot associate these common phrases in American society “Innocent until proven guilty” and “Justice for All”; but are they true? The American Justice system operates on the belief that justice is obtained through our courts. The core of our justice system is the idea of adversarial advocacy; a system designed where attorneys plead cases on behalf of individual people or groups they are paid to represent. These attorneys, pitted against each other, argue before the court each attempting to convince a judge or jury that their side is the right side, the side that falls on justice. More simply put, “…the defining quality of the adversary system is that
the proceedings are in the hands of the parties” (Martin, 1997, ¶7). Manning (2002) stated, “Justice is a process. Whatever the result may be, its propriety, its efficacy is determined by the fairness, honesty and decency of the process, the path we travel to the outcome, not the outcome itself” (¶ 9). In a country where the recent civil trial rate was found to be 3.7% for those cases actually filed and actually reaching trial (Marcus & Senger, 2001), is the idea of an adversarial system even meeting our needs? The small percentage of cases reaching trial, the economic burden, and the disparity of quality in representation make one question if our process of adversary justice is really fair, equal, or the appropriate process for today’s judicial system.

There is great debate globally about the use of an adversarial system of justice. In America, the debate over the ethics in our adversarial system seems to mainly involve the discussion of the economic factors. However, it is important to recognize that others have also developed ideas of what could improve the use of an adversarial justice system. First, it is important to establish that the adversarial system is not only an issue in America. Many other countries are experiencing increased problems with this type of judicial ideology. One of the best examples of this change in judicial thinking can be found in the United Kingdom, the origin of many of the principles of our own justice system. Both the United Kingdom and the United States have been addressing the growing problems with an adversarial justice system and are now making attempts at reform.

In a report by the Commonwealth Director of Public Prosecutors, the following statement was made regarding the current system in the United Kingdom: “It is clear that principles and procedures encompassed within the adversarial model in the system allow tactics of delay and obfuscation which do not serve the public interest of fairness or the
administration of justice” (Martin, 1997, ¶ 6). In the United Kingdom, reform of the adversary system is focused on the misuse of attorneys’ power to delay and obstruct the trial proceedings (Martin, 1997). For the adversarial system in the United Kingdom, the focus of reform is to increase the power of judges to oversee and control the courtroom proceedings. This increase in demand for more judicial power is described as, “...a trend towards increased judicial powers and an attenuation of the traditional adversary system” (Martin, 1997, ¶ 8). Martin further contends that increased judicial powers will help eliminate “time-wasting” and “over-elaboration” in the current trial process. By eliminating these types of attorney initiated hindrances, it is the hope of justice system reformers that the process will be opened up to serve not only the accused but also the community in a more fair and just manner.

The discussion of the adversary system in America takes a much different view. In America, judicial power is already viewed by many as too great and the use of discretion to holistic. The leading issue to be examined for our justice system is the effect that economic status has on the adversarial system in America. Of the major criticisms of the ADR process, the creation of a “poor man’s” system of justice is one of the greatest. Critics of ADR argue that because the cost of litigation is so expensive, if ADR were to become a prominent method of settling disputes, the poor would be forced to use this less costly process. However, is it fair to criticize ADR as a legal process when the current process of adversarial justice has failed to address the economic disparities within its own system?

One economic injustice of the adversarial justice system is that it does not truly operate on the premise of justice, but rather justice within the structure of an economic disparity. Ethical questions concerning the adversarial model address the issues of the
attitudes, which our courts adopt when our rich are dealt with by the system, compared to the poor. The dilemma here is that often it is the rich who are given the advantage even in sight of greater fault. There seems to be a growing belief in the American justice system that America consists of two different justice systems, “...one for the wealthy who can afford representation before the court, and those who are poor and rely on court appointed representations” (Spriggs, 1999, p. 3). The premise that those who are wealthy can afford the best attorneys and the best representation and those that cannot suffer at the cost of their justice has developed into an idea refereed to as “Resource Differential Intolerance Ratio” (Spriggs, 1999, p. 3). The idea of Resource Differential Intolerance Ratio (R.D.I.R.) is that a person’s character and actions can be judged based solely on their economic status. R.D.I.R. addresses the perception that those who are poor inherently lack the same amount of values as upper class citizens (Spriggs, 1999). This perception goes so far as to suggest that when the actions of the poor are compared to the identical actions of the upper middle class or upper class citizens, the actions of the poor are somehow more criminal or detrimental to society (Spriggs, 1999).

It seems hard to believe that this would be the underlying ideal of our justice system in the 21st century, yet when actual court cases are examined it is hard to refute such a claim. A perfect example of the type of discrepancy and unethical treatment between different economic classes can be seen in the case involving Mr. Michael Wise, former executive of Silverado Savings and Loan of Denver and Anne Liv Slemmons, Wise’s young file clerk. Wise pled guilty to the theft through wire fraud of 8.7 million dollars. He was convicted and sentenced to 42 months in jail with payments of $300 a month in restitution to the victims of his crime (Spriggs, 1999). At his sentencing hearing the judge used the word “borrowing”
and "loan" to refer to the gross amount of money stolen by Wise. In total, it will take 2,430 years to repay the "loan" of Mr. Wise back to the investors of the Silverado Savings and Loan of Denver from whom it was stolen (Spriggs, 1999). Slemmons, Mr. Wise's file clerk, was convicted of stealing $110,000 and was sentenced to 96 months in prison with no early release for good behavior (Spriggs 1999).

It is obvious from the comparison of the sentence of Wise and Slemmons that our justice system is not operating in the most ethical manner. Although the aforementioned case is a criminal case, the overriding principles are the same and can be applied to criminal and civil court cases alike. One only needs to refer to cases involving large corporations and individual cases involving insurance claims and employee versus employee cases where, "...[the advantages] are heavily weighed in favor of the employer..." to realize that the economic disparity of an adversarial system is prevalent (Abadinsky, 2003, p. 7).

Unfortunately these stories of blatant injustice between defendants are not uncommon in America. The idea of Resource Differential Intolerance Ratio and the unjust way in which the courts view defendants from different economic and social backgrounds is not the only economic issue facing the fairness of our adversary system. It is important to also look at the economic discrepancies created when individuals are required to obtain attorneys to advocate on their behalf.

The American justice system through the principles of adversarial justice relies almost completely on the use of attorneys in administering justice to individuals. What happens to individuals who cannot afford an attorney, but must have one to represent them in the courtroom? The famous Supreme Court case of 1963, Gideon v. Wainwright, sealed the right for every American who could not afford an attorney to be provided an attorney by
the State. *Gideon v. Wainwright* (1963) was a major step toward improving the ethics of our adversary system; after all it is hard to find justice between disputing parties if there are not two attorneys representing each case at trial. Attorneys are in reality a "necessity" (Manning, 2002) to our trial process. However, what began as the right step toward making our adversary system of justice equal in America has faltered along the way since 1963, and has additionally failed to address the issue of economic bias in civil court. It seems that much of our system and the justice found within it rest on the shoulders of our attorneys. How fair is this system then, when every American cannot afford an attorney, and every attorney does not have the equal time and resources to spend on every case? Those less economically stable can often times only afford the attorney who offers the lowest fee. These attorneys are often young and inexperienced lawyers. Here the adage, “You pay for what you get” applies. Wealthier individuals can afford better attorneys with more adequate resources and time to handle their clients’ cases. This poses the ethical question, can our justice system be equal and ultimately just if it is so dependent on the attorney’s fee tied to quality representation?

The clearest illustration of such a disparity in adversarial law can be taken from criminal court. Our adversary system could be compared to a boxing match. No one would think it fair to match a featherweight against a heavy weight; the advantage would be too great for the better equipped heavy weight. As a society, it is unreasonable to assume that justice could come from matching our underpaid, under funded “poor man’s” attorneys against the highly paid and adequately funded “heavy weights” afforded by the wealthy. In many ways we can expand this idea of “heavy weight” attorneys to our entire group of attorneys, both sides of our criminal and civil adversarial systems.
The problems with the current justice system are clear and it is important to recognize that many justice reformers are beginning to examine ways to improve our system. The Committee to Promote Public Trust and Confidence in the Legal System, an organization in New York comprised of representatives ranging from legislators and attorneys to victims' rights groups and media, has recognized these very issues of economic equality in their solutions and suggestions for improving the justice system. A report by this committee recognized that "The reduction of public funding of legal services for the poor both at the national and state levels has exacerbated the situation" (Committee to Promote Public Trust and Confidence in the Legal System, 1999, section Public Trust and Confidence in the Legal System Examined: subsection 2 Access to Justice, ¶ 3). Possible solutions created by the committee for this problem in American justice included creation of a permanent fund for civil legal services, increased compensation for assigned counsel, increased money for the public defenders' office, and the increased encouragement of *pro bono* work by attorneys (Committee to Promote Public Trust and Confidence in the Legal System, 1999).

In the American justice system today, we face increased problems with ethical issues. As we look toward other nations that use similar systems of justice, specifically the United Kingdom, we realize that other nations are dealing with their own ethical issues concerning the adversary system. Since our system faces the increased problem of economic equality, it is imperative to follow others initiatives and recognize the need for reform. Today's American system of adversary justice creates bias toward those of lower economic status. In a system where justice can rely heavily on the skills and abilities of the attorneys representing individuals at trial, it is increasingly important to determine whether
the adversarial goal of finding blame or guilt is serving justice in our society or if the idea of inquisitorial justice should become equally important in our legal system. Not only is the issue of economic disparity important, but also the time and effectiveness of such a process.

Although there exist legitimate criticisms of our current adversarial system, the process of litigation, and the mentality of a victory oriented justice system, these criticism do not justify the incorporation or credibility of the ADR process. To demonstrate more fully the benefits and multifaceted possibilities of ADR, it is essential to in turn understand more definitively the criticisms of the ADR process and how effectively it is currently being utilized in our justice system.

Criticisms of ADR and the Arguments for ADR

Although the use of ADR as a credible and effective measure to settling disputes has increased significantly, it is still highly criticized by individuals both within and outside the legal profession. The legal profession itself is conflicted on the appropriateness of an ADR process within our legal system. It is from this source that many of the criticisms of ADR stem. "Many attorneys see the ADR procedures as undermining the basic practices of the American court system. On the other hand, some attorneys and judges see the nonadversarial nature of mediation as a great advantage..." (Schellenberg, 1996, p. 190).

Medley (1994) with the helped of Schellenberg, conducted a study in the state of Indiana between January 1, 1992 and spring of 1994, to gauge the attitudes of legal professionals regarding ADR. Medley and Schellenberg purposefully used the time frame of when ADR laws were enacted until roughly two years after implementation. What was found was that after a few years of incorporating the ADR process, judges more often than attorneys favored the process, and of those attorneys who favored ADR more were likely to
be young (Medley & Schellenberg, 1994). It is evident that there is division among support of ADR methods. These criticisms often revolve around economic issues and maintaining the integrity of our current justice system.

One of the greatest arguments against the ADR process is the effect that it may have on litigation. The argument here against the use of ADR is not the quality or effectiveness of the process, but rather the effect that the shift from formal methods of settlement will have on the litigation process (Abadinsky, 2003). It is a realistic assumption that no matter how popular the process of ADR becomes there will continually be the need for court litigation in certain cases. The effect that growing popularity of ADR will have on litigation is best compared to the public school system:

...Just as public schools deteriorate when affluent parents send their children to private schools, so the argument goes, court performance will deteriorate further when affluent litigants no longer have to face delays and costs which burden the rest of the litigating populace. (Abadinsky, 2003, p. 374)

ADR, if conducted properly, can provide settlements with less cost and in considerable less time. These two factors alone are largely appealing to many individuals, especially those who cannot afford the time or money to invest in a long, expensive litigation process. While the deterioration of the current system of justice is of concern to many individuals, it is possible another economic issue will be created by the increasing use of ADR.

Supporters of ADR argue that the economic cost of an ADR process is significantly less than that of litigation. Critics suggest that because ADR is less expensive those who are economical unfortunate are almost mandated into using the non-traditional system of justice.
(Abadinsky, 2003). By providing a less expensive remedy to individuals, those who are poor are excluded from the more expensive process of litigation. "By diverting poor people's cases to less formal forums do we lessen the chance that the courts will be made fairer to poor people..." (Abadinsky, 2003, p. 374). In effect, the argument is that by adopting ADR programs we would be excluding the poor from litigation and turning the court process into a method available only to the wealthy. Critics argue that ADR adoption would have the effect of separating our justice system through a type of economic segregation. The poor would be forced to use ADR and the wealthy would have the advantage of utilizing our traditional court system. This disparity would obviously conflict with America's ideals of equal protection and rights to our judicial system.

Another criticism of ADR is that because disputes are handled outside of the courtroom, often without the presence of a judge, the outcomes of these settlements are extremely subjective to the situation at hand (Abadinsky, 2003). Some would argue that this is a benefit to ADR, in that each individual case is settled most appropriately for the two independent parties. However, the argument against this characteristic of the ADR process is that it virtually eliminates all predictability on the outcome of particular types of cases and overall undermines the integrity of the law by establishing and failing to adhere to legal precedents and standards (Abadinsky, 2003). The ability of our legal system to see every case equally and to offer some type of standard for behavior and conduct are some of its strongest characteristics. Without the litigation process this ability becomes more difficult.

One of the most popular and perhaps credible arguments against ADR is that the "...informal justice systems merely widen the net without reducing the burden on formal systems..." (Abadinsky, 2003, p. 373). Critics of ADR attack the idea that ADR benefits the
formal court system by alleviating the growing burden of cases. In fact, ADR does not alleviate any burden, but if anything creates a greater problem for the formal system by accepting cases that would not be recognized under stricter trial laws (Abadinsky, 2003). What happens in effect is that informal methods accept not only cases that could be heard in the courtroom but also those that could not. Because time is spent on these later cases the ability to alleviate formal caseload decreases significantly.

Another difficulty that ADR faces in effectively alleviating caseloads is the situation created when informal means of settling disputes fails. One characteristic of ADR is that it is almost always a voluntary effort by the parties, and this can be a great benefit to reaching a settlement. However, it also allows either or both parties to leave the proceeding at anytime. This factor potentially allows a case to proceed for months and then face the possibility to begin over again through trial if one or more of the parties change their mind about or become uncomfortable with the ADR process. It is also important to recognize that those who agree to arbitration often enter into a binding settlement; however, many individuals who choose to utilize ADR do so through mediation. Mediation unlike arbitration is not binding. A party may proceed with the entire mediation process and then disagree with the proposed settlement. At this point, parties are forced to utilize the traditional form of litigation. This does not alleviate the system’s burden, it merely prolongs when that case will begin moving through the trial process. Clearly, some of the characteristics that can make ADR appealing are also weaknesses to the processes ability to alleviate caseloads for our traditional legal system.

Understanding the resistance to ADR and examining the criticisms of ADR are important to improving the process and finding positive ways to integrate ADR most
effectively into our current system. The success to date of ADR within our system is impressive to say the least. Examination of the current effectiveness and role of ADR in American justice clearly illustrates that despite criticisms of ADR it will become an ever-growing alternative to litigation.

ADR in Today’s Justice System

Understanding the process of mediation and arbitration and the flaws within our current adversarial system is important in recognizing why the use of ADR is becoming an increasingly valuable and effective alternative to litigation. Through the previous explanation of mediation and arbitration, it is clear that ADR has become a more professional and clearly defined process, and as a result its successes and usage has grown substantially. The most recent analysis of ADR within the court system comes from the United States Department of Justice’s Office of Dispute Resolution. According to the United States Department of Justice (2002), the total number of cases completed through the use of an ADR process within federal disputes has grown from 509 in 1995, to approximately 2870 in the year 2002. This is nearly six times the amount of cases settled through ADR only seven years prior. It is clear that ADR is expanding into a new frontier of legal remedy. What is even more promising than the increasing numbers of cases utilizing ADR, is the effectiveness and benefits that ADR offer the legal system.

A chief criticism of ADR is that because of its lower costs it creates a system not enabling the poor but rather confining the poor to a separate legal system. The very nature of this argument implies that because this process is different than our traditional adversarial system that it is not as effective in providing justice to parties of a dispute. What in truth is clear from a recent study conducted by the Office of the Deputy Senior Counsel for Dispute
Resolution is that ADR is in fact significantly cheaper than litigation and does not diminish the quality of justice, but is rather an effective method in settling disputes (Senger, 2000). This study was led and conducted by Deputy Senior Counsel for Dispute Resolution, Jeffrey N. Senger. In his study 828 civil cases involving Assistant United States Attorneys (AUSAs) were examined over a five-year period to determine the effectiveness of the ADR process. What the research showed was a cost effective, time-efficient, out-come effective alternative to litigation.

One of the most promising findings of this study was the cost-savings of ADR. The study found that the average cost of fees paid to mediators was $867, the average time spent for preparation was 12 hours, and the average time spent in mediation was 7 hours (Senger, 2000). Perhaps this does not seem impressive until these costs are compared to that of litigation (Senger, 2000). The AUSAs were asked to estimate the benefits of ADR in relation to the cost that would have been incurred from the litigation process. The study found that the average litigation cost for one of these cases would be roughly $10,700 compared to the $867 in mediation (Senger, 2000). Secondly, in regards to the amount of time typically spent by attorneys and paralegals on a case, approximately 89 hours was saved through the use of ADR (Senger, 2000).

Finally, the study found that average litigation time saved or time that a case would have normally taken through the litigation process was six months (Senger, 2000). ADR not only proves itself to be a less expensive form of justice, but it is also an effective form of justice. In a report of this study I was concluded that ADR was:

Successful in settling almost two-thirds of the cases where it was used....the process had other benefits, even where it did not settle, in another 17 percent of
the cases. These benefits included gaining insight into the plaintiff's case, preventing future disputes, and narrowing the issues in the case. (Senger, 2000, p. 25)

Only 20% of the cases examined reported no benefits from the ADR process. However, this number seems small when compared to the four-fifths of cases which ADR provided some benefit in settling the dispute (Senger, 2000). Additional benefits expressed by attorneys working within ADR included statements such as, "...free discovery and insight into plaintiff's position", "...gave the plaintiff a reality check and moved negotiations much closer", and finally, "Mediation showed the court the good faith conduct of the government in dealing with the pro se plaintiff" (Senger, 2000, p. 3).

Other issues explored in the effectiveness were the mandated or voluntary use of ADR. In this aspect, the effectiveness of ADR showed a significant disparity between mandated or court-ordered ADR and voluntary ADR. Voluntary ADR proved overwhelmingly to be more successful in settling disputes. Of those 828 cases examined in Senger’s (2000) study, where voluntary ADR was utilized 71% of the cases were settled. This is compared to the 50% of cases settled in court-ordered ADR (Senger, 2000). Both for voluntary and mandated ADR cases, regardless of the outcome, 18% of these cases were successful in creating other benefits (Senger, 2000). What is most interesting is the number of cases between mandated and voluntary ADR that had incurred no benefits whatsoever. In those voluntary ADR cases only 11% of the cases had zero benefits at the conclusion of the process. However, in the court-ordered ADR 32% of the cases produced no benefits (Senger, 2000). What seems apparent from this study is that the effectiveness of ADR can be influenced significantly by mandating its use. As recognized by the original study, the
effect of a requirement to use ADR has not been shown in previous research to be a significant factor in its effectiveness (Senger, 2000). However, this more recent study seems to contradict that conclusion. It may be concluded that ADR has a greater likelihood of being effective when it is approached voluntarily rather than by a forced mandate of the court.

One of the greatest benefits to ADR and an important aspect of the effectiveness of the process examined in Senger’s (2000) study is the time frame in which the case utilizes an ADR process. The study found that when ADR was used fewer than 90 days before trial, 72% of the cases settled. In addition, Senger found that when ADR was used 90 or more days before trial, 53% of the cases settled. What this showed in effect was that ADR was more effective the closer it was used to trial. The interesting findings from this study however, is its comparison to the amount of time saved through this the use of this process in relation to the time ADR is implemented. In cases where ADR was used fewer than 90 days before trial, litigation costs saved were $5,125, the litigation time saved was three months, and the staff time saved was 73 hours (Senger, 2000). In cases where ADR was used 90 or more days before trial litigation costs saved was $10,000, litigation time saved was six months, and staff time saved was 89 hours (Senger, 2000). What can be concluded here is that although using ADR later in cases is more effective, the cost savings will be less.

A final factor, which can help indicate the potential effectiveness of ADR, is the amount of the final settlement. As the amount of settlement in the cases studied increased, the effectiveness of the ADR process also increased. The study found that in those cases where the final settlement ended up being less than $30,000, ADR was 78% effective. In cases where the settlement was between $30,000 and $120,000, ADR was 85% effective
Finally, Senger found in the most effective ADR cases, 90% occurred for those whose settlements exceeded $120,000. This positive relationship between the settlement amounts and effectiveness of ADR seems to imply that larger-dollar cases prove to be more appropriate for utilizing ADR. Unfortunately, the study offered no explanation for this relationship between the size of monetary disputes and effectiveness. One assumption is that since the potential loss is greater for the parties involved, they are more willing to engage and aid the effectiveness of the ADR process.

Senger's (2000) study of the ADR process within our courts proves that ADR is an effective and beneficial method of justice. Senger's study also proved that ADR can operate effectively and in tandem with our adversarial system. The study provides empirical proof that ADR is a legitimate and effective means in resolving civil litigation, but also resolving medical and labor disputes where ADR proved to be significantly more effective than traditional litigation.

The Future of ADR

Throughout this examination of Alternative Dispute Resolution one aspect of this process has become clear, it works. Many authors and organizations have recognized the benefits to the ADR process, both for the parties involved and the justice system. The overwhelming success and benefits exhibited in Senger's (2000) ADR study alone serve evidence to this claim. This study showed the benefits of ADR in saving individuals thousands of dollars, the success rate for many types of these cases to be well over 50 percent, and for those cases where a settlement could not be reached through means of legal remedy, ADR proved a successful catalyst and producer of benefits to aid the traditional system in ultimately settling the dispute. ADR proved to be an effective time saver, shaving
months off the time usually spent in our traditional legal process. What is most promising about the future of ADR is the growing success and popularity within our legal system. In a seven-year period, the rate of cases successfully utilizing ADR increased nearly five times. Yet, what does this all mean for the future of ADR within our system of justice?

Through this discussion of ADR our current adversarial system was examined. Thus far, ADR has been successful in working in tandem with our current legal system; this is perhaps one of the qualities that will allow ADR to continue to be successful. Through the discussion of the American adversarial system several flaws and weaknesses were highlighted. Many of these flaws centered on the length of court proceedings, the inability of our court system to deal with ever growing caseloads, and the economic burden of sending disputes through such a lengthy and detailed process. As if ADR were meant to be a partner to the adversarial system, the very weaknesses of the adversarial court system are strengths of ADR. ADR has been shown to cut economic costs of legal proceedings nearly in half, the time spent by all parties is cut by months, and the ability of ADR to handle cases before they reach trial, make ADR an important resource for our legal system.

Earlier mentioned was the future role that ADR will play in our legal system. ADR, specifically mediation and arbitration, exhibit qualities that emphasize the individual, communication, and simplicity of the process. Through ADR the justice system has an opportunity to reform and still keep many of the positive aspects of the adversarial system. It is not foreseeable that one day ADR and a system of restorative justice will ever completely dominate our legal system. It is not possible for ADR to address appropriately ever type of legal case. One such type of law that is not suitable for ADR is criminal law. In criminal law the accused has committed a crime against society, and the focus of the
justice system becomes justice and punishment through our courts. This goal of punishment is the opposite of the accepted goals of communication, peaceful settlement, and compromise of ADR. This is but one of the reasons the incorporation of ADR into criminal law would be unsuccessful.

The future of ADR within our court system lies with the confines of civil law. Civil law attempts to remedy a situation between two disputing parties. Often these differences have to do with individual loss, domestic law, and the need for compensation. The aspects of communication, party responsibility, and reconciliation allow ADR to serve as the perfect alternative to a civil court proceeding. Indeed, it is the area of civil law that deals with individuals, the individualistic aspect of this type of law parallels the individual aspect of an ADR process. As discussed earlier, each ADR process is unique to the particular case, which it is being applied. The goal of arbitration, mediation or any ADR process is to find the best and most just results for individuals based on their own communication and suggestions. The Federal government has dominated the movement to include ADR within the justice system, however, the majority of States have adopted some type of ADR legislation dealing with civil law, and in the near future it is likely that every State will have adopted such provisions. This legislative breakthrough will serve as a precursor to the eventually preference of individuals to the ADR process in civil disputes.

ADR will not be the sole change in the future of America’s justice system. It is more likely that ADR will serve as part of many changes likely to come in the future. As the popularity of ADR grows, it will improve our justice system through its attention to communication, brevity of time, and the decreased economic burden eventually becoming the leading method in settling civil disputes. The future of ADR and our legal system is an
adjustment and melding of the two. Alternative Dispute Resolution is a process that deals with individuals on an individual level. As Abraham Lincoln asserted so many years ago, "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses, and wastes of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man" (Hill, 1996, p. 102-103).
References


