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Kevin Gibson
Marquette University

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Promises and Problems in Alternative Dispute Resolution for the Elderly

Is there a place for mediation and arbitration in elder law? These and other alternative dispute resolution methods may save money, stress, and heartache for seniors involved in disputes concerning care, placement, guardianship, and estate matters.

By Kevin Gibson

Could anything show a more shameful lack of culture than to have so little justice in oneself that one must get it from others, who thus become masters and judges over one?

—PLATO

Individuals are faced with significant outlays in time, money, and emotional strain in taking a case to court. Alternative dispute resolution (ADR) has been widely hailed as a solution for a wide range of conflicts, from international border disputes to schoolyard spats. Recently, ADR has been advocated for disputes involving the elderly. Mediation has been singled out as a desirable dispute resolution process in cases of out-of-home placement, family caregiving, guardianship, and inheritance. Here, I will describe some of the main forms of ADR, note some benefits it may bring, and then show problems that individuals and attorneys may encounter in dealing with ADR. Finally, I will suggest some guidelines for appropriate and inappropriate applications of ADR.

What Is ADR?

ADR is a term that encompasses a broad spectrum of practices aimed at managing conflict. Several different approaches can be found within this spectrum. They are “alternative” in that they avoid the formal mechanisms of litigation and courts for resolution of civil disputes. The central common feature is that all ADR processes are voluntary and therefore, all parties must assent to them. In addition, all ADR practices introduce a third party into the resolution procedure. The particular form and scope of ADR are chosen by the parties themselves. They may decide on the degree of privacy involved, and the amount of control they have over the process and outcome. Broadly speaking, ADR forms a continuum from processes that mimic formal court proceedings where a judgment is handed down from a third party, to those where the principals craft their own solutions, as in mediation.

Some contracts now mandate ADR prior to litigation and courts also may mandate it. However, ADR does not supplant traditional litigation and judicial adjudication. Instead, it is an ancillary means of resolving disputes.

Kevin Gibson is an experienced mediator and Assistant Professor of Philosophy at Marquette University in Milwaukee, Wisconsin, specializing in applied ethics.
Arbitration

An arbitrator is a third party who will render a decision or make an award. The arbitrator is mutually and voluntarily accepted by the parties, who agree to be bound by his or her ruling in the case. Arbitrators can be anyone the parties agree to. Sometimes it may be beneficial for the parties to employ a nonlawyer who has expertise in a substantive area, such as a social worker in cases of long-term care plans. Often though, retired judges or lawyers will be chosen because of their experience in assessing the merits of both sides of an issue.

While retaining the litigation-like aspect of a third party imposing a decision, arbitration offers greater flexibility than litigation. The arbitrator is usually not bound by legal rules of evidence or procedure, and the parties themselves can agree to the procedures they will use regarding discovery, presentation of evidence, resolution of motions, and other matters. Yet, arbitration is quasi-judicial, and parties may have legal representatives make their case or assist them in presenting it.

A variant of arbitration, known for its use in professional sports negotiations, is called “final offer” or “last best offer” arbitration. Here, the parties can make several rounds of offers. If they fail to reach agreement, they then each present a “last best offer” to the arbitrator who chooses between them.

There are also a number of hybrid processes. Non-binding arbitration, for example, allows the parties to find out what sort of award might be made by a third party. They then can choose to accept an arbitrated settlement as presented, continue negotiating, or move to litigation. Med-arb combines mediation and arbitration in sequence. That is, if mediation fails to reach complete settlement, the mediator schedules a separate meeting and rules on those issues as a binding arbitrator. Neutral fact-finding is an informal process where an individual selected by the courts is asked to make a report. This can be a voluntary process advanced by the parties, or may be initiated by the courts as described under Rule 706 of the Federal Rules of Evidence. A variant on neutral fact-finding is early neutral evaluation, a process in which the courts appoint an evaluator who meets with both sides and ascertains areas of agreement. The evaluator gives both sides candid assessments of the strengths and weaknesses of their case, the possible range of liability, and suggestions as to how the parties might expedite settlement. A mini-trial mimics formal court proceedings and is held before a neutral decision-maker who is often a retired judge, but usually without a jury. Similar to a mini-trial, a summary jury trial is not really a trial, but rather a structured settlement process. At pretrial conference, a judge may encourage or require that parties to a pending case hold one. The summary jury trial is usually held after discovery is complete, when both parties are ready to proceed to trial. The process involves a jury, typically impaneled from the regular list, that may not be aware that their decision is merely advisory. In truncated proceedings, attorneys present their arguments briefly, and rebuttal and reply are allowed. The judge instructs the jury, and once they render a verdict, the judge and the attorneys are allowed to question them about their perceptions of the case and the effectiveness of the presentations. Most often, after mini-trials and summary jury trials, the presiding officer meets with the parties to foster settlement in light of the new information about the strength of their cases and potential risks in an actual court proceeding.

Negotiation Theory and Roles

A common feature of these forms of ADR is that they operate within a framework of conventional negotiation theory. The working assumption is that there is a “fixed pie” of assets or resources, and the main purpose of a negotiator is to maximize his or her share. Each party will have a reserve price, below which they would rather walk away from the deal. If both parties are willing to accept a given trade, then there is a “positive bargaining zone” and a deal should take place, even if the offer does not match some amount that they would ideally like to pay or receive. Often, the negotiation is thought of as a win/lose endeavor, where a gain for one side is perceived as a loss for the other. The parties stake positions and may get emotionally attached to them, with the result that any concession is considered a sign of weakness. Understandably, this kind of approach fosters posturing, bluffing, and brinkmanship.

One value of an arbitrator, then, is that when parties recognize that it is in their interest to come to a deal, but reach an impasse over the precise terms, they can turn to a third party to determine the appropriate distribution. Arbitration is typical-
ly less emotionally charged than face-to-face negotiation, largely because the parties are making their case to a neutral third party rather than to someone they perceive as an adversary. Arbitrators can also serve a useful function in diffusing or deflecting the animosity of a contentious negotiation, since it may be more acceptable to have a negotiator explain that particular concessions or a suboptimal outcome was the result of a third party’s ruling rather than their shortcomings. A number of these procedures act as “reality checks” so that negotiators can make more realistic assessments of the likely outcomes and the strength of their cases, and thus make more rational choices about whether to settle or continue with litigation.

Arbitration can be much more efficient than litigation, because parties can achieve settlement rapidly and at less cost. Arbitration may also be less contentious than adversarial procedures. Arbitration echoes formal litigation, and works best when the issues are distributive, in the sense that there is a limited amount of resources to be shared among the parties. However, parties should realize that courts are very reluctant to interfere with a decision to which the parties have voluntarily assented. The basis of state legislation favorable to arbitration is the Uniform Arbitration Act, adopted by the Commissioners on Uniform State Laws and endorsed by the American Bar Association (ABA) in 1955. Under the Act, a judge is required to enforce a binding, voluntary arbitration award, and opportunities to challenge the award are limited to grounds such as fraud or corruption.11 Parties may potentially be bound by a settlement that they believe to be unjust without any legal recourse. Furthermore, arbitrated cases have no precedential force, and so outcomes may vary widely from case to case, even if fact patterns are similar.

The ombudsman does not just deal in grievances, but is open to all kinds of problems. Usually, ombudsmen deal with those who feel less powerful than others in an atmosphere that seeks to protect complainants from retribution. Because of the concern for confidentiality, very few records are kept, and most ombudsmen resist appearing as witnesses in judicial proceedings. While they have little power to unilaterally alter decisions, they work through both formal and informal channels to alert the organization to problems and advocate for victims of an injustice. Their functions include hearing the issues of a dispute or grievance, which may be important if the client’s main interest is in “venting” their problem rather than seeking redress; providing and receiving information, to clarify institutional policies, for example, or hear about unsafe practices; reviewing options with any party; providing referrals to experts or other resources; and providing direct assistance to solve practical problems.13 Assisting clients might be as straightforward as helping them write a letter. In other cases the ombudsman may act as a mediator or broker a settlement through “shuttle diplomacy,” representing the views of each party to the other without any direct confrontation. A good deal of an ombudsman’s work will involve fact-finding. For instance, an ombudsman may establish whether a payment was made on time, or whether a client is entitled to a subsidy, or who made a particular decision.

The federal government initiated its use of ombudsmen in 1972. The Ombudsman Program is now established in all states under the Older Americans Act, administered by the Administration on Aging (AoA) specifically to advocate on behalf of older residents of long-term care facilities. Under Title VII of the Older Americans Act, ombudsman officers investigate complaints by or on behalf of residents, provide information about facilities, represent the interests of residents before governmental agencies, and actively seek administrative, legal, or informal remedies.14 They are also charged to analyze laws pertaining to the health, safety, and welfare of residents; educate consumers; and provide technical support for the development of resident and family councils to protect the well-being and rights of residents. In 1998, more than 900 paid officers and 7,000 certified volunteers worked in 587 locations nationwide.15 Under government auspices, they regularly visit facilities, monitor conditions, and “pro-
provide a voice for those unable to speak for themselves." They supplied information on long-term care to some 200,000 people, and investigated roughly the same number of complaints. The majority of complaints dealt with lack of resident care due to inadequate staffing, accidents, lack of respect, and demands for care plans and resident assessment.

An ombudsman’s office is capable of bringing about timely remedies in a confidential manner. Ombudsmen can guide clients to appropriate resources and procedures to deal with concerns. Their role is often that of “fire-fighters” who deal with immediate problems as efficiently as they can. Their presence at the site of the grievance and ability to speak with those who can provide information brings many unsatisfactory situations to an end.

Generally, though, ombudsmen are not lawyers and are not qualified to give legal advice. Some cases, like suspected abuse or the denial of legal entitlements, could be short-changed if the institution chooses only to deal with the immediate case in the most expedient way possible. Therefore, clients need to be made aware of the legal options available and judge whether a court ruling would be more appropriate in any given case.

Mediation

Mediation occurs when a neutral third party is voluntarily invited to assist disputing parties to achieve a settlement. Mediators typically are accomplished negotiators who manage the process of bargaining between the parties. Unlike arbitrators, mediators have no power to impose an outcome on the parties. Another significant difference is that mediators tend to have a broader view of disputes and possible outcomes, which may be novel or inventive when contrasted to traditional notions of “splitting the pie.”

Chris Moore, author of The Mediation Process, suggests that when we negotiate three different interests work simultaneously. First, we seek to maximize the substantive outcome. Second, we also want to believe the process was fair and defensible. And, third, we need to feel psychologically satisfied with the settlement. The difficulty with looking only at a substantive solution is evident in examples such as paying for an item only to find it on sale for half the price in a different store. We feel aggrieved that we overspent. Moreover, whatever price we have paid, we would probably have misgivings if we felt “railroaded” into an agreement, a failure of the process. A sense of grievance also is very likely if we feel there was no opportunity to express our views, or if we didn’t trust the person we were dealing with. In these second and third examples, the substantive “win” may be offset by lack of satisfaction on the other dimensions of the negotiation. The three aspects of successful negotiation interact. For example, a customer may prefer to pay a higher price to avoid haggling when making a deal. In Moore’s terms, this is not a bad outcome, merely a trade of the substantive dollar amount for a greater degree of psychological welfare. Moore suggests that negotiators need to feel satisfied in all three dimensions for an agreement to be lasting.

Bargaining that attempts to maximally satisfy all three dimensions of interests begins with discovery of the parties' underlying concerns as opposed to the positions that they espouse. Finding out the reasons behind a stated claim does this. For example, a person who disputes the level of care provided for her husband in a nursing home may be doing so based on comparisons with the experience of friends in similar situations, because she feels guilty and compensates by browbeating the facility into doing extra services, or because she feels that the facility does poorly when compared to others in the vicinity. When the interests have been established—perhaps her need to justify her actions to her peers, her need to be assured that she is doing everything she can, or her feeling that she is not getting value for money—general criteria for agreement can be developed. The wife and the facility administration can, for example, adopt federal quality of care guidelines as a threshold of what is acceptable. They might make realistic comparisons with other service providers or provide more satisfying involvement for the wife in her husband’s level of care.

This level of abstraction allows the parties to generate multiple options for settlement. A key element is for the parties to find agreement in principle, again at a fairly abstract level. Thus parties may agree on, say, the principle of splitting assets equally among several children regardless of their individual needs or that “reasonable” pay in a given position would be an average of the wage paid for the same sort of job in the area. Many assert that it is easier to argue rationally about the
Mediators can take on many roles in a negotiation including, but not limited to, the following:

- Opener and facilitator of communication channels
- Process manager who provides a procedure and often formally chairs the negotiation session
- Trainer who educates novice, unskilled, or unprepared negotiators
- Resource expander who provides procedural assistance to the parties and links them to outside experts and resources, such as lawyers, technical experts, decision makers, or additional goods for exchange that may enable them to enlarge acceptable settlement options
- Problem explorer who enables people in dispute to examine a problem from a variety of viewpoints, assists them in defining basic issues and interests, and looks for mutually satisfactory options
- Agent of reality who helps build a reasonable and implementable settlement and who questions and challenges parties that have extreme and unrealistic goals.

Mediation also encompasses a wide range of approaches. Some mediators are more directive than others are, in that they actively intervene both in steering the process and in crafting options for settlements. Others see their role as facilitating meetings and allowing the disputants to come up with their own solutions.

Mediators usually have telephone or in-person interviews with the parties prior to joint sessions. Many mediators work in pairs, which gives them greater flexibility since they don’t have to simultaneously act as participant and observer of the negotiation. A typical session will begin with an opening statement by the mediator, establishing mutually acceptable ground rules. Then each side states how they came to be in mediation, the sort of settlement they are looking for, and what they believe their alternatives are if the mediation fails to give them a satisfactory outcome. The mediator will probably “reframe” the issues presented in terms of interests. Thus, a claim such as “My grandfather will never leave the house he was born in” (a positional assertion) might be recast by the mediator as “So, you believe that your grandfather has a strong emotional attachment to the house he lives in?” (an acknowledgment of one party’s psychological interest that shapes the pronouncement). Reframing is often done as a question, so that the speaker may choose whether or not the new statement is correct.

Once the various issues and interests are established, the mediator searches for common ground in order to establish an agreement in principle. Both sides then collaboratively generate options for settlement based on the interests that have been voiced and the criteria that are mutually acceptable. Mediators may also choose to “caucus,” or meet individually with one side or the other. The various options are then assessed and some final bargaining occurs.

Mediators actively seek integrative solutions, adding to the mix of issues and resources in the dispute, since one way to improve settlements is to “expand the pie,” or the range of elements in the negotiation. The solution can then integrate new facts or views and take some pressure away from the matters that have been causing the most difficulty. For example, children of elderly parents arguing over how to divide a given amount of time spent caring for the parents may not be aware of subsidized third-party care, which would widen the range of possibilities open to them. Adding third-party care may raise issues of who pays, who supervises, and whether the care is appropriate, but the additional help eases the current dilemma. Because mediation is not limited to simply allocating resources, settlements may be creative, novel, and legally unenforceable, yet parties will agree to them because they “own” the solution—rather than having it imposed on them—and believe it to be workable. Such discussions and settlements often are a more effective means of addressing issues such as anger or a need for respect than either positional bargaining or legal adjudication.

Mediation is especially effective where the disputants must or choose to continue their relationship beyond the immediate negotiation, as in family disputes or workplace issues where termination is not an option. It holds the possibility of educating the parties to deal with each other more effectively in the future. It is also very useful where settlement is complex since the issues are difficult to quantify since they are not limited to monetary awards or time allocations, such as multiparty or intrafamily disputes. Mediation is also most appro-
appropriate when the psychological aspects of the dispute are as important as the substantive issues, including cases in which an apology or taking the time to listen to concerns matters as much to a disputant as any eventual award. As Lisi and Burns, of the Center for Social Gerontology in Ann Arbor, Michigan, suggest:

[T]hrough mediation, the family may for the first time be able to focus on the needs of the proposed ward and the importance of having the care givers and family working together to provide the necessary care for the person. . . . Mediation offers a way to explore the real abilities and needs of the proposed ward, find services that can provide those needs, and work out conflicts while serving both the autonomy of the older or disabled person and improving family relationships.22

Mediation as guided problem-solving is not appropriate for every dispute. For success, both negotiating parties must at least make a commitment to the process of interest-based bargaining. They must be willing accept the mediator's techniques, which are likely to include open disclosure and treating the situation as a problem to be overcome rather than a contest to be won. Mediation presumes that people recognize what they want, that they are capable of autonomous choices, and that they will be able to articulate their desired outcome.

Some personality types and some kinds of disputes may not be suited to mediation because there is either no willingness to settle or the parties have a psychological need to engage in win/lose negotiation. In other cases, there may be no way to extend the amount of resources brought into the negotiation, and there are no other interests involved. This would be the case, for example, where two insurance adjusters meet to come to a financial settlement. In this kind of case, the question simply becomes one of allocation based on set guidelines.

Interest-based bargaining has great potential for reaching lasting settlements that satisfy specific interests in a way that promotes trust and good relationships. However, it does not automatically turn difficult disputes into ones that are easily resolvable. It takes time, a cooperative environment, and a willingness to disclose on the part of the parties. It is also quite a complex process requiring skill and practice. Everyone negotiates every day, but rarely with the creativity and trust that interest-based bargaining requires. In cases where the desired outcome is less clear than a black-and-white solution, interest-based bargaining does seem to offer a way for disputants to reach agreement so that both parties can feel satisfied, rather than one coming out as the loser. Empirical evidence suggests that mediated agreements are quicker, less expensive, and achieve more satisfactory solutions than litigated ones.23

Qualifications and Licensure
Mediators tend to come from two backgrounds, either the law or the therapeutic professions, like counseling or social work. At present, there are no standard qualifications for mediators, with the result that anyone can put himself or herself forward as a qualified mediator. Court-appointed mediators, however, are subject to minimum qualifications in at least 11 states.24 These credentials typically involve completing a course of training in mediation (usually between 25 and 40 hours) by an approved provider. Florida is perhaps the most stringent, requiring 20 hours of training and four observed mediations for county court mediators, and 40 hours of training, observed mediation sessions and supervised sessions, and bar membership for circuit court mediators. Florida family mediators require 40 hours of training, a relevant advanced degree or certification, two observed sessions, and two supervised sessions. Critics of credential requirements have claimed that some of the most able mediators do not have degrees, that mediation is as much intuitive as learned, and that bar membership, for example, effectively turns mediation into a franchise of the legal profession.25

A mediator may be associated with any of several professional associations, including the national Society of Professionals in Dispute Resolution (SPIDR) and the American Arbitration Association (AAA), and similar state organizations.26 Membership in a professional organization does not, by itself, guarantee a level of expertise, although one of the hallmarks of membership is adherence to a code of conduct for mediators. The ABA, AAA, and SPIDR have a joint set of standards of conduct.27 The section of that code on mediator competence states that mediators may be selected solely on the basis of client acceptance, although they recommend training and experience. It recommends that mediators should have information available for parties outlining their back-
Background and qualifications. Social workers who act as mediators have additional duties outlined under the National Association of Social Workers Standards of Practice, which requires additional training and education in dispute resolution theory. Individuals seeking mediation services should therefore be diligent in finding out the level of training and experience of individual mediators, whether they belong to a professional association, and if they are associated with a mediation organization that provides continuing education and feedback.

Courts have not yet recognized mediator malpractice. Because of disparate training and standards, mere ineptitude has not been actionable. It is plausible that mediators may be found guilty of malpractice based on standards of care derived from rules governing their professions of origin, such as social worker or psychologist. However, this is less likely to prevail if the mediator disclaims that profession while acting as a neutral.

Lawyers practicing mediation may face conflicting duties and be bound to disclosure or withdrawal from future dealings with the parties. ABA Model Rule 5.7 deals with the conduct of lawyers in providing other services “that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.” In Pennsylvania, Bar Opinion 96-39 clearly states that the mediation entity should not serve the firm’s clients, and the firm not take on any mediation customers as clients. Further, participants in mediation must not be led to believe that they are receiving legal services. States have differed on whether mediation participants may subsequently be represented by the mediator-lawyer in any matter that pertains to the mediation.

Attorneys also need to be aware that mediators are not advocates for either side. Rather, they have a professional duty to all parties at the table, even if only one side pays for the session. A lawyer should not give legal advice while serving as a mediator, and it is generally recommended that the parties consult another lawyer for help in the drafting and review of final agreements.

Confidentiality

Mediation is a confidential process, and most contracts to mediate will demand confidentiality from all parties. Generally, all settlement conferences are covered by Rule 408 of the Federal Rules of Evidence. The intention behind this is that individuals may state facts, explore issues, or extend offers more freely than they would if they knew that anything they said could potentially be used against them in court. Given this security, disputants may be encouraged to speak about their motives and their true bottom line. They need not posture or “play to the gallery”; as a result, discussions can be frank and open. Most states have statutes giving almost blanket confidentiality to mediation sessions. Although mediators have been subpoenaed, courts have generally held that maintaining the process as an expeditious way to settle disputes is a greater public interest than revelation of facts in particular disputes.

Power Imbalances

Mediators often claim to be process managers. This has generated some criticism, in that a truly neutral mediator may perpetuate existing power balances. For example, consider the instance of an elderly couple who is in dispute over the best way to disperse their assets among the children. It would not be unusual for one spouse to have made the important financial decisions throughout the marriage and to expect to continue to do so. This expectation is likely to extend even to a mediation setting. That individual’s superior power is unlike a litigation setting where, in theory at least, litigants come to the courthouse steps with equal power because they are represented by attorneys. Mediation has no similar safeguards.

Power imbalance is a serious concern, especially when mediation may involve traditionally underempowered groups. For example, a patient, typically seen in a passive and obedient role, may be reluctant to question authority figures, while a surgeon may be used to and comfortable in giving unequivocal recommendations. The mediator considers whether and how the power imbalance affects the negotiation and result. The mediator could justify allowing a negotiation with one side seemingly less powerful than the other, since any mediation is voluntary. However, the mediator may act to make sure that both sides come to the negotiation fully informed and autonomous. One simple technique is asking questions of the less powerful negotiator, such as “Is that what you really want at this point?” or “Do you think you may
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regret this decision when you look back on it in five years time?” Thus, despite a power imbalance, the less able negotiator may nevertheless be willing and able to reach an acceptable settlement.

Another option is for the mediator to act as a coach (but not an advocate) for one party, helping to articulate concerns and frame issues in a way that is more likely to lead to a lasting settlement. Perhaps an elderly patient does not want to undergo any more hospitalization, even at the risk of shortening his life. We can imagine that a mediator could help him express that wish in a way that causes the surgeon to respect the patient’s autonomous choice.

In a sense, this departs from mediator neutrality. However, the mediator can provide this guidance openly and with the consent of the “stronger” party. The mediator may explain that it is in the surgeon’s ultimate interests to allow the mediator to assist the patient despite his belief that treatment is medically necessary, since the patient who is effectively bullied into consent may be resentful and angry regardless of the medical result. Though the mediated outcome runs counter to medical advice, it minimizes subsequent exposure to legal action. A mediator should inform both clients about his or her approach and gain their consent for continuing the mediation.

Choosing the Appropriate Forum

Disputants have a number of choices in attempting to resolve their differences beyond private negotiation. Let us consider a short case:

A nursing home failed to follow an Advanced Directive for a deceased resident, leading to extensive life support and substantial extra costs. The daughter refused to pay these, and was taken to court by management.

As with most cases, the legal issues are not completely clear, and it is uncertain who would prevail in court. This means that the parties are likely to be engaged in adversarial proceedings, at considerable cost, over a period of many months or years. Given that alternative, it is probably in the interests of both parties to attempt ADR.

As it turned out, this dispute was resolved in mediation, although either arbitration or intervention by an ombudsman also could have been effective. The daughter had a deep need to express her anger and frustration at seeing her mother’s prolonged suffering. This prompted the manager to apologize for having lost the advance directive and starting resuscitation. Once the emotional issues had been aired, the manager offered to withdraw the bill for the extra costs, if the daughter paid the rest of the outstanding care bill. The daughter agreed and said that her mother had otherwise always been very happy at the home.

This sort of solution would be acceptable under current mediation practice since the daughter has had her psychological, process, and substantive interests served to her personal satisfaction. However, though the case may seem to be a clear success story for ADR, there may be reasons to object to this conclusion. First, the daughter might be owed significant compensation under previous court rulings if the case were litigated, yet she has agreed to accept the manager’s offer to waive the extra bill. There is little possibility of complaining of the mediated agreement in a future court action. Also, if there are few precedents for the type of dispute, others might be assisted by the record of the litigation in which the courts set a precedent of appropriate action in the case of failure to comply with advanced directives. The mediation, of course, is confidential and lacks any public record. Some critics of mediation suggest that the daughter is a victim of “second-class justice,” deprived of her legal rights and remedies. If a whole class of disputes of a certain type were subject only to mediation, no precedents to establish a guide for justice through the courts can develop.

The Administrative Dispute Resolution Act of 1990 advises that agencies consider not using ADR in the following circumstances:

1. When an authoritative precedent is needed;
2. When uniformity of result is important for policy reasons, and the use of ADR might result in different decisions;
3. When the matter significantly affects persons or groups that are not parties to the proceeding;
4. When a full public record is important; or
5. When the matter is one over which the agency will maintain continuing jurisdiction, with authority to alter the disposition in the light of changed circumstances.

These cautions need not deal a mortal blow to ADR. It holds the promise of efficient, nonadver-
sarial, and lasting settlements. Many clients would prefer instant remedies to having their cases serve as tests for determining social policy. Nevertheless, the cautions demonstrate that parties who use ADR should do so with full awareness of what the processes entail and the possible awards they may forgo when they don’t go to court. Moreover, anyone who considers ADR ought to be clear about the wider implications of their actions if they wish to provide a test of the issues that may benefit others, or if they want the gravity of a traditional judicial decision for themselves.

Institutions should implement safeguards to ensure that all cases proposed for ADR are screened for suitability before being sent to private resolution mechanisms. The District of Columbia Department of Human Rights, for example, retains all class actions or complaints against repeat offenders for enforcement. The department refers many individual complaints—including those of seniors—for mediation by the Center for Dispute Resolution in Washington, D.C.

Finally, these cautions about ADR reinforce the claim that lawyers should have an active role in monitoring cases diverted from the traditional justice system and in reviewing agreements drafted in informal negotiations.

Endnotes
6. See, e.g., Give Up Your Right to Sue?, CONSUMER REP., May 2000 8, 8 (describing uses of predispute arbitration clause and proposed legislation).
7. In Hadden v. Kaiser Foundation Hospitals, for example, the California Supreme Court ruled that public policy in California favors the expeditious, inexpensive, resolution of malpractice cases offered by arbitration. See 552 P. 2d 1178 (Cal. 1976). At least 13 states have legislation providing for enforcement of arbitration agreements covering medical malpractice, including Alabama, Alaska, California, Colorado, Georgia, Illinois, Louisiana, Maine, Michigan, Ohio, South Dakota, Vermont, and Virginia. See Rhoda M. Powsner & Francis Hamermesh, Medical Malpractice Crisis the Second Time Around, 8 J. LEGAL MED. 283, 286 (1987).
8. FED. R. EVID. 706 (regarding experts appointed by the court on its own motion to testify regarding matters at issue in a proceeding).
10. For decisions that support the right of a court to compel a reluctant party to participate in a summary jury trial, see McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. KY. 1988); Arabian American Oil Company v. Scarfone, 119 F.R.D. 488 (M.D. Fla. 1988).
11. See David Pantle, The Duty of an Attorney as Arbitrator to Disclose Possible Bias, 18 COLO. L. 859, 859 (1989).
14. Title VII of Older Americans Act is codified throughout 42 U.S.C § 3000.
15. At the time of writing, the AoA has an Eldercare Ombudsman Locator service at 1-800-677-1116.
17. See id.


31. See supra note 29.

32. See Fed. R. Evid. 408 which states, in part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.


35. See Craig, supra note 22, at 139.

36. See Fiss, supra note 34 at 1089.


38. See Craig, supra note 22, at 86.