

Are Environmental Issues Suitable Subject Matter for Alternative Dispute Resolution Methods?

ALEX HALEM*

* Juris Doctor Candidate, Rutgers School of Law, Expected May 2007. Staff Member on the Rutgers Conflict Resolution Law Journal.

Introduction

Alternative Dispute Resolution ("ADR") refers to ways of settling disputes outside of the traditional courtroom setting.¹ ADR techniques typically involve settling legal conflicts and disputes using methods such as arbitration, mediation, and negotiation, however other types of ADR are also used.² As the costs associated with litigation rise, and the courts have become backlogged with cases causing severe delays in reaching final decisions, many states have started to experiment with and implement various types of ADR programs in an effort to combat some of these issues.³ In addition to a pilot project in Oregon, "ten federal district courts currently have mandatory programs of court-annexed, non-binding arbitration that are funded by Congress."⁴

Some of these programs are voluntary and others are mandatory. In recent years, "dispute resolution techniques have caught the public imagination as a painless way to reconcile conflicting positions."⁵ "The techniques have also been sold as providing fast resolution to a broad spectrum of dispute types."⁶ In recent years, alternative dispute resolution techniques have gone from being thought of as a new way of settling disputes to being a preferred method of conflict resolution for many subject areas.

Given the new acceptance of ADR in the courts and among people interested in avoiding the costs and lag time associated with the court system, are alternative dispute resolution techniques appropriate for use in all types of conflict, or just certain subject areas? Namely, is ADR an appropriate method for resolving some types of environmental conflicts?⁷ Should certain environmental litigation cases be required to go directly to dispute resolution, as are family law issues in New Jersey? If so, is there a limitation on the types of environmental cases that should be subjected to ADR? How is

that determined? This paper will focus on these questions through an analysis of ADR, its benefits, how it is currently being used in the courts and why it is seen as an appropriate alternative.

First, we will begin with a brief overview and definition of ADR. In this overview, we will discuss the techniques and criteria for determining the types of cases that are typically thought of as appropriate for alternative dispute resolution. It will also look briefly at the benefits of dispute resolution typically experienced by participants in this process. Next, we will conduct a short review of the current state of environmental dispute resolution. When and how this technique is being used when it comes to environmental disputes and what successes have been made in solving environmental disputes using conflict resolution?

We will then proceed to look at the New Jersey court-annexed mediation program. We will review the history and rationale behind that program, as well as the current areas where cases are referred to mediation in New Jersey prior to a court hearing. Thereafter, we will examine the characteristics of these cases and explore why it is felt that these types of issues are appropriate for alternative dispute resolution methods, what is gained from ADR, and the reasoning behind this requirement. Finally, we will summarize with a comparison of the cases currently recommended for mediation and environmental cases. Do their differences and/or similarities dictate a different handling or recommendation when it comes to ADR?

Based on this analysis, it will become clear why many of the issues addressed in environmental law cases, due in part to the public policy and societal interest inherent in

these cases, are suitable for alternative dispute resolution methods and a good match for the New Jersey court-annexed mediation and arbitration program.

Dispute Resolution: An Overview

The U.S. Department of Justice defines dispute resolution as “encompass[ing] a number of processes that involve the presence of a neutral person who assists other people in addressing a problem or issue.”⁸ Three methods of dispute resolution methods are often used in ADR – negotiation, mediation and arbitration – though several others are available. Some additional methods of ADR include conflict consulting and coaching, conciliation and transformative interventions.⁹ The method which is implemented or preferred often depends on the issue in dispute. Some parties prefer that a binding decision be reached, while others simply want a neutral third party to assist with discussion and guide the parties towards a settlement. All of these methods will be referenced in various ways throughout this note.¹⁰

Dispute resolution can complement, and is often an alternative to, the typical judicial process. This process is different than traditional litigation in that rather than a judge determining the final outcome, these alternative methods “allow all parties or stakeholders in a dispute to reach a mutually satisfactory agreement on their own terms.”¹¹ As an example, one of the ADR processes, mediation, allows all of the interested parties to present their issues and concerns and encourages these parties to come to a mutually acceptable decision. This is typically accomplished with the help of an impartial mediator.¹² In short, dispute resolution encourages a different path from standard litigation and the adversarial process, a path that can often save all parties time and money.

Why are ADR techniques becoming an attractive alternative to the standard adversarial court process? There are several reasons for this trend. For one, ADR seeks to ensure that the interests of all parties are heard, discussed and considered beyond a simple legal analysis. Through ADR, “stakeholders who work toward a shared, positive outcome can often achieve better results than they would have received in court.”¹³ Other benefits of mediation include: giving the parties involved greater control over the final outcome of the dispute;¹⁴ enabling cooperation among all of the interested parties as a final agreement is reached;¹⁵ reducing the time and cost often associated with traditional litigation;¹⁶ and achieving greater compliance with agreements than with court-imposed judgments.¹⁷ Another primary benefit is that the dispute resolution process is confidential, which means parties can avoid public disclosure of information.¹⁸

The federal and state governments recognize that this method of dispute resolution has the potential to benefit both the court system and the parties involved in a conflict. Because of this, many court systems have ADR and mediation programs governed by rules and guidelines.¹⁹ In addition, the ADR field has many research centers and organizations dedicated to exploring appropriate uses of ADR and reporting statistics relating to the practice of ADR across the world. Some examples of the growing use of ADR include: the creation of the Alternative Dispute Resolution Act (ADRA) of 1998, which requires federal district courts to adopt an official ADR program; the Federal Mediation and Conciliation Service now employs nearly 200 full-time mediators; and the U.S Postal Service’s REDRESS program through which the nation’s oldest employer conducts over 10,000 mediations a year.²⁰

Though there are benefits to approaching certain conflicts through ADR, people versed in the field agree that several factors must be present in order for ADR to work successfully. ADR is being applied to many cases regardless of subject-matter and is typically encouraged by the courts and attorneys where appropriate; however, experts find that ADR is most likely to be successful when all parties participate voluntarily.²¹ While this may seem inconsistent with the idea of court ordered mediation (forcing parties into negotiation proceedings), statistics show that about 2% of all civil actions go to verdict and the majority of cases sent into court-ordered mediation result in voluntary settlement.²² Thus, states have found that “the potential benefits of compelled mediation to the parties and to the court far outweigh the risk that the mediation will be unsuccessful.”²³ In most cases, what is being directed by the courts to these parties is not that they must resolve the conflict without going to court, but simply that prior to the expense and process of a full trial, the parties meet to discuss the conflict and try to come to a mutually acceptable solution.²⁴

Despite this, there are still characteristics that a case should have which are favorable to mediation. These are things the courts and others should look at prior to recommending, participating in or compelling mediation: 1) one of the attorneys requests mediation or admits that mediation may work, 2) there is indication that prior discussions were attempted but unsuccessful, 3) the cost of litigation outweighs the amount at issue, 4) the plaintiff’s recovery is likely to be small, 5) the trial is likely to be long or complex, 6) all parties have experienced representation, 7) the parties have a relationship, which they will likely have to continue after the trial is over, 8) the parties involved are able to

understand and articulate their interests, or 9) the case has gone through discovery and evaluation and is still unsettled.²⁵

Environmental Dispute Resolution

Environmental Conflict Resolution, or ECR, is ADR applied to environmental conflicts. Though the intended outcome is the same that is, achieving resolution to legal issues through the use of mediation rather than litigation, the sometimes complex nature and unique characteristics of environmental disputes can change the application of ADR to these issues.²⁶ Some of these characteristics are the fact that environmental disputes often involve multiple interested parties, the information reviewed in these cases is often presented in technical scientific language and complex terms, there is often a degree of scientific uncertainty at issue, an unequal balance of power, and issues of public interest involved.²⁷ In essence, “[e]nvironmental disputes are a unique breed. They are not particularly well-suited for judicial determination because they are so technically complicated and incredibly expensive to try.”²⁸ Because of this, many courts and attorneys are looking to ECR as an alternative solution for solving these disputes.

As discussed above, the factors that lend themselves to successful ECR are the voluntary participation by all parties involved, ability of all parties to actively participate in the ECR process, the option to withdraw and go to litigation always being open, and the fact that the mediator is not directing but rather guiding the parties towards a mutually acceptable agreement and that there is an agreement by parties in the beginning to accept the ultimate resolution of the dispute.²⁹ Despite these differences from other types of cases often seen as appropriate for mediation, the application of conflict resolution to environmental issues applies similar techniques and processes. But are environmental

dispute resolution programs effective? The data indicates that it is, but there are challenges to evaluating ADR programs. Some of this challenge is related to the private nature of the disputes.

New Jersey Court Mandated and Voluntary Dispute Resolution

So far we have seen some general information regarding ADR and ECR. We have looked at ADR techniques, benefits and applications to cases that would normally follow the traditional litigation channels. We have also listed some different programs in place that address the need for mediation in the court system and in government agencies. Although many states have rules regarding which cases are appropriate for mediation and when issues should be sent to mandatory mediation by judges, we will look at New Jersey rules as an example. First, we will look at the background and current state of the New Jersey arbitration rules. Then, we will review which cases are recommended for arbitration in New Jersey and why. Finally, we will evaluate whether the types of cases identified as potentially good for mediation proceedings are in fact appropriate.

Court mandated arbitration began in New Jersey with the creation of the Supreme Court Committee on Complementary Dispute Resolution in 1983.³⁰ This was accompanied by legislation mandating that automobile negligence cases where the claim for non-economic losses valued at less than \$15,000 were submitted for mandatory arbitration and later, non-economic losses valued in excess of \$15,000 went to arbitration on a voluntary basis.³¹ The intent of this mandate was “to establish an informal system of settling tort claims arising out of automobile accidents in an expeditious and least costly manner, and to ease the burden and congestion of the state courts.”³²

In July 2000, the Supreme Court expanded court annexed arbitration to include commercial cases as well as all automobile and other personal injury cases, except for complex cases as defined by the rules or by judicial consent upon application of the parties.³³ The commercial cases that fall under this rule are identified as, "all actions on a book account or instrument of obligation, all personal injury protection claims [no fault benefits] against plaintiff's insurer, and all other contract and commercial actions that have been screened and identified as appropriate for arbitration"³⁴

As we see from the cases identified in the rules above, New Jersey recognizes that sending certain cases to ADR has benefits beyond helping parties come to non-adversarial agreements and realizing a cost savings.³⁵ Sending cases to court-annexed mediation also helps relieve the backlog of cases experienced by the courts caused by litigating cases that either do not have a high economic gain for the prevailing party, or that are not overly complex to require the legal expertise of a presiding judge.³⁶ While these cases are appropriate for mediation, this rule fails to take into account the other end of the spectrum, i.e. cases that have high monetary stakes or those that include several parties and involve matters of a complex scientific and regulatory nature; cases like those that come up in the environmental law arena.

Environmental Cases: Appropriate for ADR in New Jersey?

So, what about environmental disputes? What characteristics are similar to those identified in the last section as being appropriate for mediation in New Jersey? Many supporters of ECR cite the nature of environmental conflict as lending itself more towards ADR methods than traditional litigation, as follows:

The [environmental ADR] field had been proving that mediating and assisting parties created better and more timely solutions, . . . [i]t's not just a way of

eliminating court delays, but also reducing the costs of environmental litigation and the unsatisfactory conclusions of litigation. Also, in complex environmental cases, often the real issues aren't what comes out in court--and the parties that can really solve the problem often aren't at the table.³⁷

Under New Jersey law, judges can send environmental cases into court ordered mediation. One such example is a New Jersey Supreme Court case, *Spaulding Composites Co., Inc. v. Aetna Cas. and Sur. Co.*³⁸ Here, in a case that seeks to establish the responsibility for cleanup of lead contamination at a waste site, the district court ordered the parties into mediation to decide the amount of insurance coverage owed for cleanup costs at the superfund site.³⁹ In another New Jersey Supreme Court case regarding who has the insurance liability for cleanup, the opinion sites mediation as being the preferred method of resolution in such cases.⁴⁰ Each of these cases (and others not cited here) involve the interests of several parties, primarily large corporations and intricate matters of environmental regulation and application of law.

Other New Jersey cases illustrate the same conclusion – there is recognition by judges that where cases involve complex matters of environmental dispute, the benefits of court-annexed mediation, or voluntary negotiation among the parties are viable and often preferable ways to settle such disputes. Is this an appropriate decision? Looking back to the earlier discussion of ADR, the research bears this out. ADR methods are simply better at addressing the issues and interests that arise from environmental law cases, and are primary candidates for the successful implementation of ADR.

Conclusion

ADR is expanding into areas that were once thought to be the exclusive domain of judges and lawyers. Health care, education and community conflicts are all benefiting from the advantages that alternatives methods of dispute resolution have to offer. The

question then becomes, should we mandate that parties attempt mediation, negotiation or arbitration in cases where this seems to work? The answer is yes. Despite the lack of parties' free-will that comes with court-mandated ADR, the research shows that this does not necessarily impede all mandated ADR cases. This impediment can be overcome if the parties become involved and the subject matter meet other criteria for success.

The win-lose adversarial approach forced by litigation typically does not resolve controversies satisfactorily for all parties and can lead to continued conflict. This is an especially undesirable result in the environmental arena where the decisions being made and policies enforced can have far-reaching impacts beyond the interests of the parties in court. We want to create sound and logical environmental guidelines, and not be bound by the procedural ropes that often tie the hands of judges in a court of law.

Environmental conflict resolution seeks to resolve some of these issues by mandating the elimination of the adversarial process, and replacing it with a forum in which everyone involved has a chance to express their interests and concerns, and where the third-party mediators are not bound by the same rules and restrictions that often tie judge's hands in these cases. ECR should be mandated by the New Jersey courts and courts throughout the country as a preferred, if not primary, means of resolving environmental conflicts. It makes sense in terms of the benefits it offers, not only to the plaintiff and defendant, but also to the public impacted by its outcome.

¹ Wex, *Alternative Dispute Resolution: An Overview*, at <http://www.law.cornell.edu/topics/adr.html> (last visited Nov. 25, 2005).

² *Id.*

³ *Id.*

⁴ Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts*, 1 (1990), available at [http://www.fjc.gov/public/pdf.nsf/lookup/courtannarb.pdf/\\$File/courtannarb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/courtannarb.pdf/$File/courtannarb.pdf).

⁵ Jennifer Girard, *Dispute Resolution in Environmental Conflicts: Panacea or Placebo?*, at <http://www.cfcj-fcjc.org/full-text/girard.htm> (last visited Dec. 28, 2005).

⁶ *Id.*

⁷ *Id.*

⁸ <http://www.ojp.usdoj.gov/eows/cdr/cdterms.htm>

⁹ For a more complete list see <http://www.adrbroker.com/ADRCategories.htm>

¹⁰ See Association for Conflict Resolution, *Frequently Asked Questions about Conflict Resolution*, at <http://www.acrnet.org/about/CR-FAQ.htm> (last visited Dec. 28, 2005)(providing an additional list of ADR categories).

¹¹ U.S. Institute for Environmental Conflict Resolution, *What Is Environmental Conflict Resolution*, at <http://www.ecr.gov/what.htm>.(last visited Dec. 28, 2005).

¹² *Id.*

¹³ U.S. Institute for Environmental Conflict Resolution, *supra* note 12.

¹⁴ Association for Conflict Resolution, *supra* note 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Air Force ADR Program, *Other ADR Links & Resources*, at http://www.adr.af.mil/other/state_states.htm (last visited Dec. 28, 2005) (listings of state government ADR programs).

²⁰ Association for Conflict Resolution, *How Widespread Is the Practice of Conflict Resolution?*, at <http://www.acrnet.org/about/CR-FAQ.htm#widespread> (last visited Dec. 28, 2005) (examples of the pervasive use of mediation, arbitration, and other forms of alternative dispute resolution).

²¹ Richard M. Barron, *Which Cases are Most Suitable for Court Ordered Mediation*, (Oct. 2004), at <http://www.mediate.com/articles/barronMR1.cfm> (last visited Dec. 28, 2005).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 6 (Rosemary O’Leary & Lisa B. Bingham, eds., Resources for the Future 2003).

²⁷ *Id.*

²⁸ Michael D. Young, Esq., *Resolving Environmental Disputes With Environmental Team Mediation: A New Model*, at <http://mediate.com/articles/youngm1.cfm#> (last visited Dec. 28, 2005).

²⁹ *Id.*

³⁰ New Jersey State Bar Association, *NJSBA Report on Arbitration* (2004), <http://www.njsba.com/activities/index.cfm?fuseaction=arbitration#1> (last visited Dec. 28, 2005).

³¹ *Id.*

³² *Id.* See also N.J.S. 39:6A-24; L. 1983, 353 §1.

³³ See New Jersey State Bar Association, *supra* note 32.

³⁴ *Id.* See also R. 4:21A-1(a)(3).

³⁵ See New Jersey State Bar Association, *supra* note 32.

³⁶ *Id.*

³⁷ Environmental Health Perspectives, *Finding Middle Ground: Environmental Conflict Resolution* (Volume 111, Number 12, September 2003),

<http://www.ehponline.org/members/2003/111-12/spheres.html> (last visited March 27, 2006).

³⁸ 819 A.2d 410 (N.J. 2003).

³⁹ *Id.* at 213.

⁴⁰ *Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634, 643. (N.J. 1998).