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Larry R. Spain

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# ALTERNATIVE DISPUTE RESOLUTION FOR THE POOR: IS IT AN ALTERNATIVE?

LARRY R. SPAIN\*

## I. INTRODUCTION

Access to a forum for the resolution of disputes for all persons, regardless of their financial circumstances, is essential to accord our system of justice legitimacy. Although the Legal Services Corporation<sup>1</sup> served more than 1.4 million individual clients in 1992 through 321 separate programs,<sup>2</sup> there still exists an enormous unmet need for civil legal services to the poor.<sup>3</sup> However, the settlement of disputes exclusively through formal, adversary proceedings in a traditional litigation model has often left the poor without equal access<sup>4</sup> to conflict resolution because of the necessity for the use of lawyers.<sup>5</sup>

Numerous studies<sup>6</sup> have documented that, despite efforts of publicly funded legal service programs and contributions of the private bar through organized pro bono programs,<sup>7</sup> the poor continue to have a significant unmet need for resolution of their legal problems.<sup>8</sup> Without a

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\* Associate Clinical Professor/Director, Legal Clinic, University of North Dakota School of Law; J.D., 1976, Creighton University School of Law, Omaha, Nebraska; B.A., 1973, University of Iowa, Iowa City, Iowa.

1. The Legal Services Corporation [hereinafter the Corporation] is a private, nonprofit corporation established by Congress in 1974 to provide civil legal assistance to those who otherwise could not afford the services of an attorney. The Corporation receives an annual appropriation from Congress to make and administer grants to programs that provide legal services to the poor in local communities across the country.

2. Legal Services Corporation, *1992 Annual Report* 1.

3. AMERICAN BAR ASSOCIATION WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 21 (February 1992).

4. LOIS G. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? 14 (1984) (arguing that the poor do not have equal access to the courts).

5. It has been suggested that in our complex legal system, with all of its procedural and evidentiary requirements, representation by an attorney is essential to fully participate in the right of access to the courts. Talbot D'Alemberte, *The Role of the Courts in Providing Legal Services: A Proposal to Provide Legal Access for the Poor*, 17 FLA. ST. U. L. REV. 107 (Winter 1989).

6. See, e.g., Jessica Pearson and Nancy Thoenes, *Assessing the Legal Needs of the Poor in Colorado* 20 CLEARINGHOUSE REV. 200, 206, 207 (June 1986).

7. In 1992, there were over 800 voluntarily organized pro bono programs across the country in which 133,000 lawyers donated their time to provide a wide range of legal services to those without access to counsel in civil cases. Remarks by ABA President-Elect R. William Ide III to the Gwinnett County, Georgia Bar Association, ABA CENTER FOR PRO BONO EXCHANGE, Aug. 1993, at 19.

8. A national survey of the civil legal needs of the poor, conducted between 1973 and 1974, projected "that approximately 80% of the legal problems of the poor go unaddressed." SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS OF THE AMERICAN BAR ASSOCIATION, CIVIL JUSTICE: AN AGENDA FOR THE 1990s, REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990s, 20, 21 (1991) [hereinafter CIVIL JUSTICE]. These results were recently confirmed by a study which found that 71% of low-income households surveyed with legal needs did not obtain relief from the civil justice system. See FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY COMMISSIONED BY THE AMERICAN BAR ASSOCIATION'S CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, INSTITUTE FOR SURVEY RESEARCH, TEMPLE UNIVERSITY, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM

right to counsel in civil cases,<sup>9</sup> the poor have been largely excluded from the primary and traditional means of resolving disputes through the courts.<sup>10</sup> If our ideal is to provide access to justice for all, we must necessarily consider what options exist for measurably increasing the access to a variety of forums for the resolution of disputes by the poor and other disadvantaged groups who have fared rather poorly under our present system of justice.

## II. ADR AND THE POOR'S ACCESS TO JUSTICE

While the poor have often been excluded from the legal system, during the past decade, faced with ever-increasing case loads,<sup>11</sup> some courts<sup>12</sup> have begun to experiment with and, in fact, institutionalize, a wide variety of alternative methods of dispute resolution, including mediation, arbitration, private judging, mini-trials, and summary jury trials.<sup>13</sup> We should consider whether these alternative dispute resolution (ADR) techniques may offer better access to dispute resolution through the availability of more options, particularly for individuals who increasingly cannot afford, in terms of time and cost, to pursue litigation through the traditional adversary system.<sup>14</sup>

Proponents of ADR argue that it provides a more efficient and cost-effective method of conflict resolution than the traditional adversary sys-

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THE COMPREHENSIVE LEGAL NEEDS STUDY 21 (1994). In North Dakota, it has been estimated that only 5% of the civil legal problems of the poor are met through existing resources. JOEL D. MEDD ET AL., CIVIL LEGAL SERVICE COMM. OF THE STATE BAR ASS'N OF NORTH DAKOTA, THE NORTH DAKOTA TRIAL LAWYER'S ASS'N AND THE NORTH DAKOTA SUPREME COURT, A WORKABLE PLAN FOR CIVIL LEGAL SERVICES FOR THE POOR OF NORTH DAKOTA: A PRACTICAL, EQUITABLE AND POLITICAL PROPOSAL FOR BAR LEADERSHIP 58 (1989).

9. Although a right to counsel has been recognized in criminal cases, *Powell v. Alabama*, 287 U.S. 45 (1932), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), no similar right to counsel has been established for all civil cases. While attorneys are crucial for our justice system to function, the system does not guarantee that all persons in need of an attorney will be provided one.

10. In an important work which is still relevant today, Reginald Heber Smith concluded that "[t]he administration of American justice is not impartial, the rich and poor do not stand on equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons." REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 8 (1919).

11. For example, from 1981 to 1991, filings in North Dakota District Courts, courts of general jurisdiction, increased by nearly 55%, despite a decrease in the number of judges during that same time period. NORTH DAKOTA JUDICIAL COUNCIL ANNUAL REPORT 1981 6; ANNUAL REPORT OF THE NORTH DAKOTA JUDICIAL SYSTEM, CALENDAR YEAR 1991 2.

12. At least 27 states and the District of Columbia have either enacted statewide legislation or created task forces to plan statewide, court-connected ADR programs. Patrick F'n'Piere and Linda Work, *On the Growth and Development of Dispute Resolution*, 81 KY. L.J. 959, 962 (1992-93).

13. Sharon N. Jennings, Note, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or "Second Class" Justice?*, 6 OHIO ST. J. DISP. RESOL. 313 (1991). In 1990, the National Center for State Courts reported that nearly 1,100 ADR programs were being operated by state courts or had cases referred to them by state courts. David I. Tevelin, *The Future of Alternative Dispute Resolution*, NAT'L INST. DISP. RESOL. FORUM 15 (Winter 1992).

14. David A. Hoffman, *ADR: An Opportunity to Broaden the Shadow of the Law*, 21 HUMAN RIGHTS 20 (Winter 1994).

tem.<sup>15</sup> It has been suggested that increased utilization of ADR mechanisms could decrease legal costs, thereby increasing access to dispute resolution.<sup>16</sup> The question remains, however, whether ADR offers a viable and worthy solution to the problem of access to justice for the poor. Unfortunately, there has been little systematic research conducted on ADR and the poor, and there has been little experience with the use of ADR by the poor.<sup>17</sup> It is, therefore, difficult to reach any definitive evaluative judgments as to whether ADR can provide an alternative forum for securing fair and just resolution of disputes by the poor.<sup>18</sup>

#### A. ADR MAY PROVIDE ADDITIONAL FORUMS FOR THE POOR

One of the objectives in promoting ADR is to increase individuals' access to a variety of forums that can resolve disputes and, presumably, increase the total amount of resources devoted to dispute resolution.<sup>19</sup> In fact, the proliferation of ADR<sup>20</sup> has infused a significant amount of additional resources into the field of conflict resolution, resources that even the most generous federal or state legislature either could not or would not provide.<sup>21</sup> Thus, ADR does have the potential of increasing access to justice for the poor by providing additional forums for the resolution of disputes, particularly when substantially increased resources enabling lawyers to represent the poor in traditional litigation do not seem probable.

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15. David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 381 (1989); Linda R. Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569, 571 (Dec. 1979).

16. James W. Meeker and John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2227 (1993).

17. In fact, in the most recent comprehensive national study of legal needs, the use or consideration of ADR processes by the poor, such as mediation or arbitration, was much less frequent than the use of court or administrative hearings by the poor. Alternative dispute resolution processes were being utilized in only 4%-5% of the situations identified by low to moderate income households. CIVIL JUSTICE, *supra* note 8, at 30. Recently, however, in the first program of its kind, the largest private ADR firm in the country, Judicial Arbitration and Mediation Services, Inc., offered to provide up to \$1,000,000 in ADR services to low-income clients represented by Legal Services Corporation attorneys or pro bono counsel. Lauren Hallinan, *JAMS Offers Pro Bono Dispute Resolution to Legal Aid Programs*, NLADA CORNERSTONE, Summer 1993 at 1.

18. Alan W. Houseman, *ADR, Justice and the Poor*, NAT'L INST. DISP. RESOL. FORUM 9 (Summer/Fall 1993).

19. LINDA SINGER, *THE GROWTH OF NON-JUDICIAL DISPUTE RESOLUTION: SPECULATIONS ON THE EFFECTS ON JUSTICE FOR THE POOR AND ON THE ROLE OF LEGAL SERVICES* 10 (1980) [hereinafter NON-JUDICIAL DISPUTE RESOLUTION].

20. The ABA Standing Committee on Dispute Resolution reports that more than 450 programs and as many as 2,000 resources currently provide ADR services in communities throughout the country. Marilyn Park et al., *Developing a Legal Services Program Policy on Alternative Dispute Resolution: Important Considerations for Older Clients and Clients With Disabilities*, 26 CLEARINGHOUSE REV. 635, 636 (Oct. 1992).

21. A. Leo Levin, *A Fresh Way to Deliver Justice*, DISP. RESOL. DEVICES IN A DEMOCRATIC SOC'Y 5 (1985).

## B. NEIGHBORHOOD JUSTICE CENTERS AND SMALL CLAIMS COURT

The original impetus for neighborhood justice centers<sup>22</sup> was policy-makers who sought to remove individual litigants with "small claims" from the courts and refer them to other forums in order to make room on the court docket for more substantial cases.<sup>23</sup> Neighborhood justice centers promised to be an innovative form of ADR for the poor. It provided an opportunity for access to dispute resolution which otherwise may not have been available to the poor. Similarly, the creation and development of small claims courts, which removed minor disputes from the regular civil justice system, provided an innovative ADR technique for establishing access to courts.<sup>24</sup> However, neighborhood justice centers and small claims courts have been criticized by some for not fulfilling the ideal of creating a forum for the resolution of personal disputes. These critics have maintained that neighborhood justice centers and small claims courts merely provide an inexpensive collection method for businesses.<sup>25</sup>

Although a small claims court, as a form of ADR, can prove to be an effective resource for those without access to counsel in appropriate cases, it suffers from its jurisdictional limitations<sup>26</sup> and its inability to arrive at equitable solutions in personal disputes.<sup>27</sup> Just as the limitations of small claims courts should be recognized, care should be exercised to

22. Neighborhood justice centers were community-based programs established in the late 1960s to provide mediation services and other forms of ADR. Neighborhood justice centers resolved disputes among neighbors, families, landlords and tenants, consumers and businesses, through informal and voluntary methods of intervention. Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 6, 11 n.68 (1993).

23. Daniel McGillis, *What's Gone Right—And Wrong—For Justice Centers*, 23 CLEARINGHOUSE REV. 48, 48 (May 1989).

24. Small claims courts provided access to courts for claims involving relatively small sums of money which could be handled in an informal forum without the necessity of lawyers. In 1990, small claims case filings constituted 38.2% of all civil case filings in courts of limited jurisdiction. JOHN A. GOERDT, *SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS*, 182 app. D (1992).

25. CHRISTINE B. HARRINGTON, *SHADOW JUSTICE, THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 79 (1985). In fact, debt collection cases dominate the caseloads of small claims courts, accounting for 68% of the cases filed in a survey of 12 urban courts. GOERDT, *supra* note 24, at 46.

26. In North Dakota, the jurisdiction of the small claims court is limited to "cases for the recovery of money, or the cancellation of any agreement involving material fraud, deception, misrepresentation, or false promise, where the value of the agreement or the amount claimed by the plaintiff or the defendant does not exceed three thousand dollars." N.D. CENT. CODE § 27-08.1-01 (Supp. 1993).

27. JOINT SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION FOR THE POOR, *AN INVENTORY OF DISPUTE RESOLUTION SERVICES AND ACTIVITIES IN NORTH DAKOTA WITH ATTENTION TO THE NEEDS AND DILEMMAS OF POOR AND NEAR POOR PERSONS 27-28* (1993) [hereinafter JOINT SUBCOMMITTEE]. Since the jurisdiction of small claims courts is primarily limited to providing monetary relief, such forums do not have the ability to fashion equitable relief, particularly among individuals or entities with ongoing or continuing relationships. As an informal litigation model, it suffers from the same limitations that litigation suffers pursuant to its "winner take all" outcome. *Id.*

prevent the promotion of ADR as the poor and other disadvantaged groups' substitute for their right to litigate and enforce, in appropriate cases, constitutional and statutory rights.<sup>28</sup> We should, therefore, be cautious that alternative methods of dispute resolution do not "create a two-track justice system that dispenses informal 'justice' to poor people with 'small' claims and 'minor' disputes, who cannot afford legal services, and who are denied access to courts."<sup>29</sup>

### C. CONCERNS AND ADVANTAGES OF ADR'S USE BY THE POOR

Some commentators have questioned whether the poor can adequately participate in ADR processes without the assistance of advocates because of their unequal bargaining power and lack of understanding of their rights.<sup>30</sup> Clearly, it will be necessary for individuals, and particularly the poor, to make informed decisions as to when and how to use ADR appropriately so as not to prejudice their rights.

Other commentators<sup>31</sup> have suggested that ADR increases the likelihood of class-based prejudice against persons of color and other disadvantaged groups, such as the poor. Consequently, any discussion of ADR and the poor must, of necessity, consider the appropriate use and particular limitations of utilizing such processes for individuals who have historically lacked consistent access to the more traditional methods of resolving disputes.<sup>32</sup> Thus, not all disputes will necessarily be appropriate for ADR, as the poor will continue to need access to lawyers and the traditional adversary system in some instances.<sup>33</sup> Criteria should be developed to clearly delineate the circumstances under which ADR may be appropriate for the poor and those in unequal bargaining positions.

While those representing the poor may have some reservations about the use of ADR for their clients because of the disparity in knowledge and resources and the inequality of bargaining power,<sup>34</sup> mediation and other

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28. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 124 (1983).

29. *Id.* at 144.

30. Linda Singer et al., *Alternative Dispute Resolution and the Poor Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE REV. 142, 153 (May/June 1992) [hereinafter *Part I*].

31. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1361 nn.9-11 (1983).

32. Most agree, for example, that domestic violence cases are not appropriate for ADR. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (Summer 1993); Kelly Rowe, Note, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not be Mediated*, 34 EMORY L.J. 855 (1985).

33. Meeker and Dombink, *supra* note 16, at 2227.

34. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (Jan. 1986).

methods of nonadjudicative ADR may nevertheless offer some parties<sup>35</sup> the most effective and efficient means of resolving controversy.<sup>36</sup> Those providing legal services to the poor have long been concerned with providing the poor the means by which they could become personally empowered. One of the advantages of ADR is that it has the potential for providing individuals the means to resolve their own disputes without the necessity of relying upon lawyers to which the poor often lack access in any event.<sup>37</sup> Consequently, providing a forum for the resolution of disputes which is less formal and more flexible, and where access does not require the services of an attorney, has the potential for substantially increasing access to dispute resolution for the poor.

Increasing the availability of ADR services to the poor may allow lawyers serving the poor to redirect their focus from attempting to serve numerous individual clients to addressing systematic problems encountered by low-income individuals through litigation with wider potential impact.<sup>38</sup> Thus, providing alternative forums for dispute resolution for those without access to counsel may provide greater access to justice for those who otherwise could not take their disputes to the courts and, therefore, would have received no resolution of their disputes.<sup>39</sup> The creation of more options should result in more flexibility for individuals with diverse needs.

Despite the rapid expansion of ADR programs for the poor,<sup>40</sup> there is a need to develop innovative new programs or modify existing ones.<sup>41</sup> The cost of providing ADR services should not act as a barrier to the resolution of disputes. Consideration must be given as to how we can ensure that such services are provided to all persons regardless of their financial ability. If the existing programs are not modified to provide bet-

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35. For example, it has been suggested that mediation is most beneficial when an ongoing relationship exists, such as that between landlord and tenant, facility staff and resident, employer and employee, neighbor and neighbor, or family members. Park et al., *supra* note 20, at 638. Personal involvement in fashioning the particular resolution of a dispute will encourage compliance and cooperation in the future. *Id.*

36. Linda Singer et al., *Alternative Dispute Resolution and the Poor Part II: Dealing with Problems in Using ADR and Choosing a Process*, 26 CLEARINGHOUSE REV. 289 (July 1992) [hereinafter *Part II*].

37. NON-JUDICIAL DISPUTE RESOLUTION, *supra* note 19, at 47.

38. *Id.* at 54. In the delivery of legal services to the poor, a continuing debate has existed regarding the value of individual case representation as opposed to group representation on issues affecting large numbers of poor people which can have more substantial impact. Such a debate is particularly relevant in times when the need for legal services has greatly exceeded available resources. In light of such scarce resources, legal service providers have been required to make difficult choices in prioritizing services to clients, leaving large numbers of individuals without any access to relief through the courts. *Id.*

39. *Id.* at 21.

40. More than 450 nonprofit dispute resolution centers are operating nationwide. F. Woods, *National Overview of Alternative Dispute Resolution*, ABA Standing Committee on Dispute Resolution (June 5, 1992).

41. *Part II, supra* note 36, at 288.

ter access to the poor, the poor will be excluded from ADR processes in the same manner in which they have lacked access to the legal system generally, on the basis of their lack of ability to pay.

Unfortunately, other than court-annexed ADR programs and neighborhood justice centers, there has been little consideration given to methods of delivery of dispute resolution services to the poor.<sup>42</sup> The issue becomes whether the poor can take advantage of ADR processes, or whether they will be relegated to the more traditional methods of dispute resolution through litigation because they are too poor to afford the alternative methods which are, in many contexts, seen as superior alternatives to the courts. It would be ironic, indeed, if the poor were seen as recipients of "second class justice," by being forced to settle their disputes through the courts, because the courts represented the only forum available to them.

### III. FINDINGS AND SUGGESTIONS OF THE NORTH DAKOTA JOINT SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION FOR THE POOR

In November 1992, the Joint Committee on Civil Legal Services to the Poor<sup>43</sup> recommended the creation of a Joint Subcommittee on Alternative Dispute Resolution for the Poor [hereinafter Joint Subcommittee]<sup>44</sup> to explore "the use of alternative dispute resolution forums for resolving legal problems which most often affect low-income people in a more cost-effective manner than that which presently exists."<sup>45</sup> Several states have previously created committees or task forces to review the utilization of ADR mechanisms and to make recommendations to policymakers as to future uses of ADR.<sup>46</sup> Although previous studies have not specifically dealt with the provision of ADR services to the poor as a

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42. *Id.* at 289.

43. The Joint Committee on Civil Legal Services to the Poor was created in 1987 as a joint bench, bar, and legal services committee with the appointment of attorneys, judges, and public members by the North Dakota Supreme Court, the State Bar Association of North Dakota, and legal service programs in North Dakota. The Committee is to study, promote, and improve legal services to the poor in the state.

44. The Joint Subcommittee on Alternative Dispute Resolution for the Poor consists of representatives appointed by the the Joint Committee on Civil Legal Services to the Poor, the Alternative Dispute Resolution Committee, and the Volunteer Lawyers Advisory Committee of the State Bar Association of North Dakota. Its members include: Diane Avery, Brenda Blazer, Cynthia Feland, Lolita Romanick, Larry Spain, Lawrence Spears, James Vukelic, and Joy Wezelman.

45. Letter from Arnold V. Fleck, Chair, Joint Committee on Civil Legal Services to the Poor, to Brenda L. Blazer, Chair, Alternative Dispute Resolution Committee, State Bar Association of North Dakota (October 6, 1992).

46. See, e.g., Janie S. Mayeron, *Preface to the Minnesota Supreme Court and Minnesota State Bar Association Task Force on Alternative Dispute Resolution, Final Report* (1990), reprinted in 15 *HAMLIN L. REV.* 69 (1991).



means of increasing their access to justice, there is much that could be learned from their review and reflection.

One of the first undertakings of the Joint Subcommittee was to assess the current status of the availability and use of ADR in North Dakota and to identify unmet needs for such services.<sup>47</sup> Although the assessment of current ADR activities and services within North Dakota resulted in the conclusion that they were quite limited, services available to low-income and other disadvantaged populations were notably nonexistent.<sup>48</sup> Others have concluded that the North Dakota bar, for the most part, seems "either resistant to, skeptical, or at least cautious about ADR as a viable litigation alternative."<sup>49</sup> Of course, those least familiar with ADR options and its utilization are the most reluctant to use or recommend it in their own practice. Likewise, the lack of public understanding and utilization of alternative methods for resolving disputes without litigation is the most substantial barrier to further expansion of ADR services in a state such as North Dakota.<sup>50</sup>

The manner in which ADR forums can be made available to those regardless of their ability to pay raises important policy questions. Access to ADR by the poor will require both public subsidies and effective outreach and education by ADR providers.<sup>51</sup> Otherwise, ADR could have the effect of privatizing justice, thereby creating a two-tiered system of justice: one for those who could afford to make use of ADR mechanisms, and one for those who could not. Ultimately, we must consider the social cost of leaving numerous disputes unresolved by any means.

#### A. ADR OPTIONS FOR THE POOR

##### 1. *Publicly Funded Dispute Resolution Centers*

One possibility to consider is publicly funded dispute resolution centers. The Joint Subcommittee studied the experience of Nebraska, which in 1991 enacted the Nebraska Dispute Resolution Act<sup>52</sup> to promote and develop the use of mediation. Through the Office of Dispute Resolution in the Administrative Office of the Courts/Probation, the Nebraska legislature funded six regional mediation centers that serve the state of Nebraska.<sup>53</sup> During the first three months of operation, 66% of the cases

47. JOINT SUBCOMMITTEE, *supra* note 27, at 1-2.

48. *Id.*

49. REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA (September 29, 1993), *reprinted in* 69 N.D. L. REV. 739, 792 (1993).

50. JOINT SUBCOMMITTEE, *supra* note 27, at 3.

51. Houseman, *supra* note 18, at 10.

52. *See* NEB. REV. STAT. §§ 25-2901 (Supp. 1992).

53. Interview with Kathleen M. Severens, Director, Office of Dispute Resolution, Administrative Office of the Courts/Probation, State of Nebraska.

mediated involved individuals with annual incomes of less than \$10,000. Fees were waived in 20% of the cases with each mediation center operating on a sliding fee scale.<sup>54</sup> The six regional mediation centers in Nebraska are staffed by a total of 6.45 paid mediators and 124 volunteer mediators.<sup>55</sup>

It has been suggested by some that as courts are publicly financed and ADR mechanisms are "alternatives" to court, ADR should likewise be publicly funded.<sup>56</sup> However, the Joint Subcommittee concluded that publicly funded ADR programs are not feasible in the current economic and political climate of North Dakota, although such programs could represent a long-term goal. Such publicly funded programs also raise the question of competition for scarce resources between litigation-oriented models and providers of ADR services.

## 2. *Subsidization By Those Using The Court System*

Another option to consider is to have those who use the courts through litigation to subsidize the cost of providing dispute resolution services to those who wish to avoid litigation.<sup>57</sup> This type of program has been successfully used in California, and should be given serious consideration in North Dakota.

## 3. *Trained Volunteer Mediators*

One more option considered by the Joint Subcommittee is the use of trained volunteer mediators to settle disputes. However, exclusive reliance on volunteers to provide access to ADR has its own limitations, particularly as the demand outpaces the supply of volunteers.<sup>58</sup> Thus, such an option may not be the most effective in conjunction with other options or alternatives.

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54. NEBRASKA OFFICE OF DISPUTE RESOLUTION, SUMMARY OF FIRST QUARTER REPORT, JULY 1, 1992-SEPTEMBER 30, 1992, at 1.

55. *Id.* at 4. The use of volunteer mediators, of course, reduces overall costs and permits the centers to serve those without an ability to pay for services. *Id.*

56. Barbara McAadoo, *The Minnesota ADR Experience: Exploration to Institutionalization*, 12 *HAMLIN J. PUB. L. & POL'Y* 65, 86 (Spring 1991).

57. For example, the 1986 Dispute Resolution Programs Act, CAL. BUS. & PROF. CODE, §§ 465-471.5 (West 1990 & Supp. 1994), authorizes counties to assess a court users fee, which provides a source of funds for nonprofit dispute resolution programs. *Id.* § 470.3.

58. Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 *U.S.F. L. REV.* 343, 400 (1992).

## B. ADR AND FAMILY DISPUTES

The Joint Subcommittee determined that the problem of access to counsel in family law cases<sup>59</sup> is, without doubt, the most significant unmet need for the poor in North Dakota, as it is in most states. The Joint Subcommittee chose, therefore, to initially focus its efforts on considering how ADR could facilitate access to the legal system in matters involving family disputes, particularly child custody and visitation issues.

Particularly in family law matters, the adversarial system is not necessarily the ideal forum for resolving disputes in a manner which will encourage cooperation and compliance among parties who will, by necessity, have a continuing relationship when minor children are involved.<sup>60</sup> The availability of alternative forums for resolving family disputes could reduce significantly the demands placed on those providing services in contested proceedings. At least twenty states already require mediation in family law disputes, principally when custody, visitation, or child support is an issue.<sup>61</sup>

The North Dakota Volunteer Lawyers Panel<sup>62</sup> historically has had difficulty recruiting attorneys to accept family law cases on a pro bono basis.<sup>63</sup> One solution to this problem would be to train attorneys to mediate family law cases as part of their pro bono obligation.<sup>64</sup> This is not necessarily a novel idea, as it has been suggested by others as a means of making ADR available to the poor.<sup>65</sup> A panel of volunteer attorney mediators in family law cases would increase the availability of mediation services to low-income clients and, at the same time, would encourage more attorney involvement on a pro bono basis in the substantive area with the greatest need.

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59. In calendar year 1991, domestic relations cases, excluding juvenile cases, comprised nearly 57% of the cases filed in District Courts. ANNUAL REPORT OF THE NORTH DAKOTA JUDICIAL SYSTEM, CALENDAR YEAR 1991, at 6 (1991).

60. Ellen Bloom, *Dispute Resolution and Its Relationship to Pro Bono*, 11 PBI EXCHANGE 8 (Winter 1993).

61. Katz, *supra* note 22, at 11 n.68.

62. The North Dakota Volunteer Lawyers Panel is a program sponsored by the State Bar Association of North Dakota. It is composed of all licensed attorneys in the state unless they have affirmatively opted out. The program provides civil legal services to indigent clients on a pro bono basis. The State Bar Association of North Dakota also sponsors a Low-Income Divorce Panel which consists of participating attorneys who have agreed to handle uncontested divorces for low-income clients at a reduced fee.

63. This is understandable, considering the almost unlimited hours and expense that these cases can consume in an adversarial contest.

64. The Joint Subcommittee has proposed implementing a Family Mediation Training Pilot Project under which attorneys who volunteer would be provided 40 hours of mediation training without cost. In return, the attorneys would agree to provide, on a pro bono basis, a minimum of 20 hours of family law mediation services each year to low-income individuals referred by the State Bar Association of North Dakota Volunteer Lawyers Program.

65. See D'Alemberte, *supra* note 5, at 122.

Since 1987, Chapter 14-09.1 of the North Dakota Century Code has authorized courts, in their discretion, to order mediation in certain contested child custody proceedings.<sup>66</sup> Utilization of such authority, however, has been limited by the additional cost of mediation.

The problems of access to courts in family law matters has resulted in an ongoing study of the advisability of reintroducing a Family Court System in North Dakota which would utilize ADR methods and summary proceedings to provide easier access to low-income clients.<sup>67</sup> Of course, there are special problems which must be studied, and consideration must be given to providing appropriate protection to vulnerable parties, particularly victims of spousal and child abuse.<sup>68</sup>

The Joint Subcommittee has identified a number of areas in which ADR, if made available to the poor, could play a significant role in providing greater access to justice for the poor.<sup>69</sup> These areas are not exclusive,

66. Such mediation is not permitted in cases when there are issues of physical or sexual abuse. N.D. CENT. CODE § 14-9.1-02 (1991).

67. An Ad Hoc Bench Bar Family Court Committee has been formed to study and recommend changes in family law proceedings.

68. JOINT SUBCOMMITTEE, *supra* note 27, at 29.

69. *Id.* at 29-30. Included are the following examples:

1. Family Law
  - A. Custody disputes;
  - B. Disputes regarding establishment, enforcement, or restriction of visitation rights by noncustodial parents;
  - C. Changes in residence of the minor child by the custodial parent;
  - D. Establishing, enforcing, and modifying child support;
  - E. Division of property and debts in divorce;
  - F. Relinquishment of parental rights in adoption;
  - G. Choice of a guardian for minors or incapacitated persons.
2. Consumer Law
  - A. Debt collection and harassment;
  - B. Defective merchandise;
  - C. Unauthorized, excessive, or defective repairs;
  - D. Public utility deposits and terminations;
  - E. Unfair sales practices.
3. Employment Law
  - A. Wage disputes;
  - B. Conditions of employment;
  - C. Discrimination and harassment.
4. Housing and Landlord/Tenant Law
  - A. Failure to make repairs;
  - B. Return of security deposits;
  - C. Disputes regarding nonpayment of rent and damages.

since there are certainly additional areas of dispute which are not adequately resolved through existing resources and which would be amenable to ADR.

#### IV. CONCLUSION

Unless it is believed that access to justice can only be achieved through providing equal access to the courts, consideration must be given to providing access to alternative forums for resolving disputes for the poor. Additional study and analysis should be undertaken to assess whether ADR mechanisms can effectively be utilized in a cost-effective manner so as to significantly expand access to justice for the poor while supplementing the delivery of legal services through the traditional adversary system. While it may be unwise, in selected instances involving the poor, to substitute mediation and other methods of ADR for legal advocacy, dispute resolution processes should not be denied simply because of one's inability to pay. The Bar should continue to explore means by which equal access to justice by the poor may be realized.