Alternative Dispute Resolution and Consumer Protection: An "Odd-Couple" Thriving in the Offices of State Attorneys General

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Alternative dispute resolution (“ADR”) and consumer protection are an “odd-couple.” ADR elicits images of peacemaking while consumer protection evokes thoughts of rigorous governmental regulation and aggressive law enforcement on behalf of the consuming public. Both ADR and consumer protection have had a roller-coaster history of application in the United States. The emergence of each as a concept with significant social impact has been cyclical, and, historically, their respective cycles have been “out of sync.” Only in the last twenty years have their cycles been merged successfully in the public’s interest. Surprisingly, this has occurred where one might least expect—in the law enforcement activities of the state attorneys general. This article will briefly examine 1) the nature of ADR and consumer protection, 2) the cyclical history of ADR and consumer protection and their recent synchronization, and 3) the operation of ADR programs in consumer protection divisions of several representative state attorneys general offices.

A New Consumer Remedy: Product Recall

Frank M. Covey, Jr.*
Bruce H. Schoumacher**

Scope of the Problem

One of the principal focuses of the American tort law system is the two-pronged objective of discouraging the marketing of unsafe, dangerous, or defective products1 and, where that is not accomplished, compensating those injured by or because of such products.2 Until recently, the law has devoted little or no effort to getting products that have proved unsafe, dangerous or defective out of the homes, schools and playgrounds of consumers.

For the purposes of this article, it is immaterial whether the product was (a) defectively designed or manufactured, or (b) considered to be safe and beneficial to consumers when manufactured and distributed, but later determined to be dangerous.3 Once such products are placed in the chain of distribution, whether...
EDITOR'S NOTE:
The Loyola Consumer Law Reporter

Consumer law has come into its own. Many law schools now offer classes in consumer law, and most state attorneys general offices have departments devoted to consumer complaints. Law firms have begun to specialize in consumer law, and legislators are more frequently debating bills dealing with consumer protection and information.

In light of these developments, the Loyola Consumer Law Reporter was founded to provide a timely overview of those issues directly affecting consumer transactions. The Reporter's articles will address issues such as advertising, financing, and debt collection. Issues involving product safety, professional services, and consumer credit will be explored. The Reporter's articles may also address issues in environmental law, health and medicine, poverty law, and antitrust law when they are germane to consumer law and practice.

The aim of the Reporter is to inform its readers—both lawyers and non-lawyers—of current, significant court decisions, agency determinations, and legislation affecting consumers. The Reporter will not endorse any particular point of view but will attempt to report the manifold developments in this growing field. Consequently, the Reporter should be of serious interest to law firms, consumer organizations at the federal and state levels, state attorneys general, legal clinics and individuals involved in consumer law and practice, as well as to law school, college, and public libraries. In order to insure its continued growth and refinement, the Reporter welcomes comments and suggestions from its readers.

Alternative Dispute Resolution and Consumer Protection (from page 1)

Alternative Dispute Resolution Defined

ADR is comprised of three principal mechanisms for resolving disputes. Listed in order of decreasing finality and formality, they are: arbitration, mediation, and conciliation. Arbitration is the process of submitting a dispute to a third or "neutral" party (either an individual or a panel) which reviews evidence, hears arguments, and renders a decision. Arbitration normally consists of six stages: initiation, preparation, prehearing conferences, hearing, decision making, and award.\(^1\) In arbitration, the neutral party imposes its decision on the parties.

In mediation, an impartial intervenor (the neutral) helps disputants reach a voluntary settlement of their differences through an agreement defining their future behavior. Mediation consists of eight stages: initiation, preparation, introduction, problem statement, problem clarification, generation and evaluation of alternatives, selection of alternatives, and agreement.\(^2\) A mediator does not impose a decision on the parties. A mediator is effective, despite the lack of formal decision-making authority, for several reasons:

1. Parties are more likely to disclose important information concerning their true settlement objectives to a mediator than to an arbitrator, judge, or another party with decision making authority;

2. A mediator is able to work with each party in defining its realistic settlement range or solution, often discovering an overlap in settlement ranges or solutions that can lead to a prompt agreement;

3. By focusing on problem-solving rather than fault-assignment, a mediator keeps the parties in a settlement frame of mind rather than an adversarial one;

4. Mediation is confidential, and involves virtually no risk to the parties since they cannot be bound by the mediator; and

5. If the parties cannot agree, each is free to terminate the mediation—this freedom allows the parties to consider more creative solutions than are likely to emerge from an adversarial process.\(^3\)

In short, in mediation, the parties can avoid posturing and move quickly to the issues about which they disagree.

In conciliation, the neutral tries to lower tensions, improve communications, interpret issues, provide technical assistance, and explore potential solutions, all as a prelude to mediation. Conciliation is frequently used in volatile conflicts, and in disputes where the parties are unable, unwilling, or unprepared to negotiate their differences.\(^4\)
Arbitration, mediation, and conciliation are the principal ADR processes. These processes are sometimes used in conjunction with fact-finding (commonly used in labor negotiation and mediation), a neutral expert, or both. Combinations of these processes include Med-Arb (a combination of mediation and arbitration), the mini-trial (akin to arbitration), and the summary jury trial (a condensed trial before a jury whose verdict is advisory). In the state attorneys general offices, the ADR processes are tailored to meet the specific needs of each office.

**Consumer Protection Defined**

One commentator has defined consumer protection, or “consumerism,” as: an effort to put the buyer on an equal footing with the seller. Consumers want to know what they're buying. What they're eating. How long a product will last. What it will do and will not do. Whether it will be safe for them and/or the environment. Consumers do not want to be manipulated, hornswoggled or lied to. They want truth, not just in lending, labeling and packaging, but in everything in the whole, vast, bewildering marketplace.

This definition suggests consumers need protection from sellers who deliberately, through acts of commission or omission, defraud or injure them. Focusing on the precise interest to be protected, the same author points to the following testimony presented to Congress in 1969 by a representative of the Consumers’ Union of the United States:

> The consumer interest is not the interest of individuals as such, but of all citizens viewed from the point of view of consumption.... [It concerns] itself with the question of both the best use of productive resources from the point of view of consumers and also the matter of distribution of these resources.... It should be considered at the highest levels of government, not only to increase consumption, but also to forcefully contribute to creating a better economic structure and thus contribute to the creation of a better society.... The consumer interest cuts across the entire spectrum of economic problems.

Thus, consumer protection is generally concerned with the fundamental nature of the seller-consumer relationship, and strikes at the very heart of our economy. Since ADR is primarily concerned with the resolution or management of conflicts, its application to consumer protection in recent years is not surprising. But the reason ADR was not applied to consumer protection until about the last third of this century is not completely clear. In order to better understand this current “marriage” of movements, particularly in the public sector, and to predict the potential for future co-existence, one needs to examine their history and the social, economic, and political factors which precluded their earlier association.

**Early Applications of Alternative Dispute Resolution in the U.S.**

As an identifiable concept, ADR is much older than consumer protection. ADR can be traced to ancient Greek culture, or before? The use of ADR as a process outside the formal legal system, spread throughout Europe over succeeding centuries and surfaced in America during the early colonial period. On the basis of religious beliefs, Pilgrims, Quakers, and Mormons all separated themselves from external legal regulation. Disagreements which arose in these close-knit religious communities were invariably settled through various forms of mediation. As one commentator has noted:

> ...[i]nsular religious colonies which avoided the legal system had two motives. The communities sought, first, to regulate conduct based on Christian principles and, second, to establish and preserve community harmony. Litigation was antithetical to both of these goals; it represented self-aggrandizement at the expense of group security, ignoring important religious tenets. Those who were unwilling to accept these restrictions could not be tolerated, and were expelled from the community.

Nineteenth century communities attempted to follow their seventeenth century predecessors and adopt non-court methods of resolving disputes. In the early nineteenth century, Pennsylvania, New York, Massachusetts, and South Carolina experimented with arbitration as an alternative to litigation. But these experiments were short-lived. A skeptical judiciary and a dissatisfied, competitive mercantile community caused non-legal forms of dispute settlement to virtually disappear. By the mid-nineteenth century, the once widespread use of ADR processes in religious, community, and mercantile settings had substantially abated. Social change had diluted community insularity; religious and immigrant minorities were being acculturated into mainstream society. Immigrants became more inclined to turn to the courts to seek justice, though some ethnic communities clung to their culture-dictated methods of dispute resolution.
During the second half of the nineteenth century, aside from a few flourishes of interest, ADR withered almost into obscurity. As one author remarked:

"...the modern conciliation movement began in Cleveland, where a conciliation branch was planted and the concept of consumer protection began in the early 1960's and extends to the present time. Interspersed among these three cycles were cycles of increased societal interest in ADR. In the early 1960's, the cycles intersected and began to proceed in the same direction. At present they appear to be "in sync."

During the last half of the nineteenth century, the use of ADR was in remission but consumer protection, through regulation of industry, flourished. That period, as well as the first decade and a half of the twentieth century, was marked by the passage of several significant federal statutes favoring consumers. Between 1868 and 1887, after several states had passed "Granger laws" protecting farmers from the perceived abuses of railroad practices, more than 150 bills for railroad regulation were introduced in Congress. Eventually, the Interstate Commerce Act of 1887 was enacted into law. This legislation was significant to consumer protection because it established the Interstate Commerce Commission—the first independent regulatory commission. Later, during the presidency of Theodore Roosevelt, the political climate became increasingly responsive to social change. Public dismay with unsafe drugs spread by unregulated manufacturers, and disclosure of the filthy conditions in Chicago meat-packing houses, in Upton Sinclair's book, The Jungle, forced the passage of two bills: the Food and Drug Act of 1906 and the Meat Packing Act of 1907. The year 1912 marked the formation of the Better Business Bureau, which grew out of the "vigilance committee" of the Advertising Men's League of New York. In 1914, near the end of the first consumer protection cycle, another significant consumer protection statute was enacted, establishing the Federal Trade Commission. Shortly afterward, however, the "onset of World War I, with its prosperity and distractions, ushered in a [quiet] period of consumer protection," which lasted until the era of the Great Depression.

Between 1906 and 1917, when interest in consumer protection was beginning to decline, public interest in ADR was on the upswing. In 1912, Roscoe Pound, a Harvard law professor, told a convention of lawyers that the American legal system had become the tarnished target of "unsparing criticism." In the years which immediately followed, there was a flurry of activity in legal circles to find new, flexible procedures to make law and the administration of justice more responsive, efficient, and economical. This period generated some of the most enduring legal reforms of this century, including: small claims courts, domestic-relations and juvenile courts, public defender agencies, legal aid societies, and industrial accident commissions.

The modern conciliation movement began in 1913 in Cleveland, where a conciliation branch
of the municipal court was empowered to assist litigants unable to hire lawyers to settle their small claims. The Cleveland plan was soon adopted in New York, Iowa, Illinois (Chicago), and Pennsylvania (Philadelphia). While conciliation operated on the periphery of the legal system, arbitration functioned in tandem with its core.

Arbitration was nurtured by government regulation at the beginning of the twentieth century. Commercial arbitration “fit neatly into… [the] vision of industrial planning; it permitted businessmen to solve their own problems ‘in their own way—without resort to the clumsy and heavy hand of Government.’”

Fuelled by the New York Chamber of Commerce and the national bar, the legal profession’s infatuation with commercial arbitration lasted over a decade. Then, on January 29, 1926, after a year long process of negotiation between two warring pro-arbitration groups, the American Arbitration Association was formed. Arbitration reached its maturity in 1930, but as history reports, “the bubble of arbitration euphoria was punctured by the Depression.” With the advent of the Depression, both conciliation and arbitration procedures receded from the limelight.

ADR being in the wings, consumer protection once again occupied center stage. With the onset of the Depression, several books on consumer issues dominated the marketplace. The Depression itself caused millions of Americans to distrust big business. The public looked to government to cure the woes of a failing economy. The government responded by establishing numerous governmental agencies, including the National Recovery Administration (with its incorporated Consumers’ Advisory Board), the Agricultural Adjustment Administration, and the Bituminous Coal Commission. The Food and Drug Act of 1906 was strengthened by the passage of the Food, Drug, and Cosmetic Act of 1938. Also in 1938, the Wheeler-Lea Amendment to the Federal Trade Commission Act expanded the mandate of the FTC to include “unfair and deceptive practices in commerce.”

The advent of World War II ended the second major cycle of consumer protection. Twenty years passed before consumer protection again seized the public’s interest.

World War II forced consumer protection into hibernation. For the public, the war required rationing and self-sacrifice. During this time, ADR understandably experienced a resurgence. Because of the war’s labor needs, labor and management made a no-strike and no-lockout pledge, with the quid pro quo being the federal government’s pledge to decide the merits of all labor disputes affecting the war effort. The Tripartite War Labor Board, established to effectuate that pledge, soon found it had neither the resources nor the inclination to be the final step in the grievance process. Accordingly, it fashioned what is known today as the “standard arbitration clause.” When labor contracts contained no arbitration clause, the Tripartite War Labor Board ordered arbitration to occur for the duration of the emergency. Hence, modern labor arbitration was born. Later, mediation was imposed as an optional predicate to arbitration in disputes between labor and management. Interest in commercial arbitration was revitalized after World War II and by the 1950’s, according to one (perhaps exaggerated) estimate, “nearly three-quarters of all commercial litigation was being diverted from courts to arbitrators.”

Throughout the 1950’s, litigation “nibbled at arbitration until the similarities were more conspicuous than the differences.”

At the inception of the Kennedy administration in 1960, the ADR and consumer protection movements began to unite. In 1962, the Kefauver-Harris Amendment to the Federal Food, Drug, and Cosmetic Act was passed, establishing new procedures for testing the safety and effectiveness of all new drugs prior to their sale to the public. In the mid-1960’s, an obscure lawyer named Ralph Nader quickly rose to national prominence while testifying before certain Senate Committees in support of the National Traffic and Motor Vehicle Safety Act and the Wholesome Meat Act. During the same period, the Fair Packaging and Labeling Act was passed. Since 1966, these consumer protection measures have been followed by countless others.

The consumer protection activities of the 1960’s coincided with a rekindling national interest in mediation and conciliation. For example, the U.S. Justice Department’s Community Relations Service used mediation and conciliation measures to resolve volatile conflicts in communities blighted by poverty and racism. The 1970’s marked the beginning of a renaissance period for ADR which is still in bloom. In 1971, only three minor dispute resolution centers existed nationally; by January, 1988, there were four-hundred such centers. In 1977, the American Bar Association had one entity with ADR initiatives; now, the ABA has twenty-three such entities. Approximately one-half of the state court systems in the United States now require certain complaints to be referred to arbitration prior to trial. Moreover, thirty-three jurisdictions require family disputes regarding custody and visitation to be brought into mediation. Similar court-annexed arbitration and mediation initiatives are present in the federal court system.

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In partial response to the inability of federal agencies to fully protect consumer interests at the local level, New York and Rhode Island established “deceptive trade practice enforcement” in 1957, followed by Washington and Alaska in 1961. By 1973, forty-four states had established consumer protection bureaus or divisions in their attorneys general’s or governor’s offices. These bureaus enabled the attorneys general’s offices to hear complaints and mediate differences without resort to formal proceedings. In at least one attorney general’s office (Maryland, see infra), arbitration has been instituted as a dispute resolution alternative. With these types of programs, ADR and consumer protection have finally successfully merged.

ADR and Consumer Protection in State Attorneys General Offices

The idea of peacemaking ADR processes combining with aggressive law enforcement activities of state attorneys general seems less paradoxical after examination of ADR processes and public governmental benefits. The remainder of this article describes the various ADR programs and consumer protection initiatives in attorneys general offices. The tangible results of these initiatives, for the consumers and the states, are also described. This article looks at Illinois, Indiana, Maryland, Massachusetts, Texas, and Wisconsin.

Illinois

The Consumer Protection Division (the “Division”) of the Illinois Attorney General Office has principal offices in Springfield and Chicago, as well as smaller regional offices. The Division employs eighteen full-time assistant attorneys general and nine consumer advocates. The latter are non-lawyers who screen consumer complaints and mediate certain of them. In 1987, the Division processed 35,000 consumer complaints. Although sixty-nine categories of complaints exist, the five highest-volume categories are:

1. travel and leisure;
2. automobile purchases, new and used, and repairs;
3. home repairs;
4. mortgage fraud or financial oriented complaints; and
5. telemarketing or mail order complaints.

A consumer complaint or inquiry is usually received by phone through the Attorney General’s Intake Center. Initial screening is performed to determine whether the Office has an ongoing lawsuit against the respondent or whether the complaint should be referred to a regional office for action. A consumer advocate (or “advocate”) then determines whether the Office has jurisdiction over the subject matter of the complaint. If not, the complaint may be referred to one of the following agencies: the Illinois Department of Insurance, the Illinois Commerce Commission, the Illinois Department of Professional Regulation, the State Savings and Loan Commission, or the Mortgage Banking Division. The advocate also determines whether the complainant has filed a private lawsuit regarding the subject matter of the complaint. If so, the office will not accept or process the complaint.

Once a permanent file for the consumer is opened, the mediation process begins. A letter is mailed to the consumer acknowledging that a particular advocate has been assigned to his or her complaint. At the same time, a letter acknowledging receipt of the consumer complaint and a copy of it are sent to the respondent. The respondent is requested to file a written reply to the complaint within ten days. On a daily basis, the Office’s Consumer Computer Network System automatically indicates which cases are due to receive a written response from the respondent. If no response has been received, a “nag” letter is sent informing the respondent that his or her reply to the complaint is requested, and that he or she is being given an additional ten days to respond. If the respondent fails to forward his reply within the allotted time, the advocate will contact the respondent by phone. If a reply is received, a copy is sent to the complainant. The complainant then has fifteen days to answer the respondent’s reply. However, if the consumer fails to respond within fifteen days, the case is tentatively closed “assuming satisfaction.” But, if the consumer responds within thirty days, the case is reopened for further mediation procedures.

Based on the respondent’s reply, the matter is handled in one of several ways. Usually, the advocate will be able to settle the complaint by calling both the consumer and the respondent and attempting to reach a mutually satisfactory agreement. In these cases the responsibility falls upon the advocate to see that the terms of the agreement are carried out and that both the consumer and the respondent are satisfied with the outcome. If the consumer complaint is factually more complex or requires more in-depth negotiation procedures, the advocate may hold an informal “hearing.” In such cases, both the consumer and respondent are requested to come to the Attorney General’s Office in order to personally verbalize their positions in the matter. This informal hearing process is not legally binding on either of the parties. In many instances, the complaint is reduced to a simple

5. By 1973, forty-four states had established consumer protection bureaus or divisions in their attorneys general’s or governor’s offices. These bureaus enabled the attorneys general’s offices to hear complaints and mediate differences without resort to formal proceedings. In at least one attorney general’s office (Maryland, see infra), arbitration has been instituted as a dispute resolution alternative. With these types of programs, ADR and consumer protection have finally successfully merged.

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factual dispute or misunderstanding. Often, in the informal hearing procedure, a settlement satisfactory to both parties can be reached. However, there are instances where a compromise can not be reached and a stalemate occurs. It is the Division’s policy to keep such files open for at least ninety days, in order to provide enough time to reach a settlement. However, if a deadlock does occur, the consumer is instructed to re-evaluate the issues of his or her complaint and decide the true monetary value of the complaint. If the consumer feels that further action should be taken, the following strategies are recommended: 1) hiring a private attorney to continue with the settlement procedure but with the option of filing a private lawsuit, or 2) filing a suit in the Small Claims Court or Pro Se Court, if the true monetary value of the consumer’s complaint falls within those courts’ limits.

Indiana

The Indiana Attorney General’s Consumer Protection Division (the “Division”) mediation process operates similarly to that of Illinois. Although the number of complaints received is much less than that in Illinois, the number of complaints and the amount of recoveries by mediation and litigation activities in Indiana’s Division in 1987 was significantly greater than the number in 1971, the year the Indiana Division was created. From 1984 through 1987, both the number of complaints and the amount of recoveries rose at near-parallel rates of increase:

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints</th>
<th>Recoveries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>3,120</td>
<td>$691,740</td>
</tr>
<tr>
<td>1985</td>
<td>3,746</td>
<td>$809,740</td>
</tr>
<tr>
<td>1986</td>
<td>3,734</td>
<td>$984,500</td>
</tr>
<tr>
<td>1987</td>
<td>5,221</td>
<td>$1,366,251</td>
</tr>
</tbody>
</table>

In 1987, automobile sales and service complaints continued to dominate in terms of number and frequency, followed by vacation promotions and, then, by complaints related to home improvements. While mediation does not totally account for the success in monetary recovery of the Indiana Division, it clearly plays a substantial role.

Maryland

The Maryland Consumer Protection Division’s Complaint Handling Unit (the “Unit”) operates quite differently than the Illinois model in two important respects. First, the Maryland Unit is staffed almost entirely by volunteers (most of whom are senior citizens and former business people), with full-time staff persons serving as supervisors. Secondly, in addition to mediation, the Unit offers an arbitration alternative for resolving consumer complaints. In the Maryland model, volunteer complaint handlers, or “Volunteer Consumer Affairs Specialists,” conduct mediation both in person and in face-to-face meetings with complaints and respondents. They are generally encouraged to follow the “principled” approach to negotiation and mediation espoused by Roger Fisher and William Ury of the Harvard Negotiation Project in their best-selling book Getting to Yes. The volunteer complaint handlers are given the following instructions:

1. Try to create a proper physical environment with relative peace and quiet, and with appropriate resource material handy.
2. Introduce yourself to the consumer—who you are, whom you represent—and explain our mediation process.
3. Remember that you want to diffuse anger and instill trust. The tone of your voice and the feedback you provide will help to determine your success in creating a conciliatory atmosphere.
4. Let each party relate his problems. Take notes and listen, listen, and listen. Separate the people involved from the issues at hand. Be soft on the people but hard on the problem.
5. Call the business and repeat the same procedures you utilized with the consumer. It is very important to relate to the business what our office does.
6. If appropriate, place a three way conference call in which all parties listen and participate in a single discussion.
7. Remembering your role as a mediator or negotiator, ask open-ended questions; do not make judgmental statements. Look for areas of agreement. Stay away from untenable positions and find mutual interests.
8. Take time out to pause and reflect on the information presented. Analyze, discuss, and plan a strategy leading toward resolution. Ask yourself: Do you need more facts? Do you need to visit a facility? Do you need to talk to the parties again, separately or together? Do you need to contact other agencies or discuss the available options for resolution with your supervisor?
9. Move toward agreement. Come up with creative suggestions: “what if,” “how about,” “have you thought of,” and so on.
10. Know when to move toward closure. Be aware of the time the case has been pending and of issues which have remained unsolved. Proper timing is essential in getting the parties to reconcile.

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11. Put in writing the substance of the resolution or agreement and the objective criteria upon which it was based.

To summarize:
1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Create a variety of possibilities before deciding what to do.
4. Insist that the result be based on some objective standard.57

In its brochure entitled, Binding Arbitration by the Office of the Attorney General, Resolution of Consumer Disputes: The Attractive Alternative to Litigation, the Maryland Consumer Protection Unit contends that its arbitration is "the only state-sponsored program of its kind in the nation."58 In researching this article, nothing was found to contradict this claim. It appears to be a unique public sector application of ADR that should be studied by other state attorneys general. (Of course, since 1972, the Better Business Bureau has been using arbitration procedures in addition to mediation to resolve consumer complaints in the private sector).59

Maryland's Arbitration Unit of the Consumer Protection Division is completely separate from the Enforcement Unit. It is supervised by a Chief Arbitrator who has no involvement with any enforcement actions and who is prohibited from discussing any pending arbitration with enforcement attorneys. Decisions of the Arbitration Unit are final; no review is possible even by the Attorney General himself. The arbitrators are appointed by the Chief Arbitrator from a pool of volunteer arbitrators. These volunteer arbitrators are distinguished individuals from all walks of life, selected for their maturity, judgment, honesty, fairness, and diligence. If a party objects to an arbitrator, the Chief Arbitrator appoints another arbitrator, until the parties are satisfied with the selection of the neutral.

Over nine-hundred Maryland businesses are pre-committed to using arbitration.60 In order to proceed to arbitration, the parties must have attempted to mediate and must agree to arbitrate. The parties incur no administrative costs if they elect arbitration. Usually the arbitration hearing is held wherever the parties agree to hold it. For example, it can be held at the Attorney General's Office, a business location, or even a consumer's home, depending on what the Chief Arbitrator determines to be the best location for convenience and evidentiary reasons. Parties in arbitration may be represented by attorneys, however, experience has shown that attorneys are seldom used or needed at arbitration hearings. In addition, a party may have an employee or friend help present the case. A party need not be present at the hearing so long as his designated representative appears. At the hearing, the rules of evidence are not strictly adhered to and evidence is submitted informally. Usually, a court reporter is not present, but if requested in advance of the hearing, the requesting party may, in the discretion of the Chief Arbitrator, be required to advance costs of the reporter's fee and transcription. Arbitration awards must be issued by the arbitrator within 30 days of the hearing. The award must be accompanied by a statement of reason and may be enforced under the provisions of Maryland's Uniform Arbitration Act.61

On the average, 240 complaints are processed by the arbitration procedure annually. In 1987, Maryland's Complaint Handling Unit processed approximately 7,300 written complaints and mediated 67% of them to settlement.62

Massachusetts

The Massachusetts ADR-Consumer Protection Program is unusual in that it has three separate components: 1) an "in-house" consumer complaint mediation section staffed largely by student interns, 2) local consumer programs, and 3) face-to-face mediation programs.

The "in-house" consumer complaint mediation section uses approximately thirty to thirty-five interns each semester and fifteen full-time interns during the January Inter-Session. Students are not paid for their services, but may receive academic credit from their institutions. After undergoing a training session, interns are generally responsible for investigating consumer complaints, applying state laws to the facts of the complaint, and conducting informal mediation by phone or mail. This section mediates approximately 7,000 complaints annually.63

The local consumer programs consist of twenty-seven local consumer groups which are partially funded by the Attorney General's Office. In 1988, these local programs, usually found in community action programs or city halls, handled over 16,823 consumer complaints.64 Through an informal process of telephone mediation, the local consumer programs were able to return to consumers about $3.2 million.65 Complaints typically involved automobile repairs and sales, home improvement transactions, landlord tenant disputes, and time share issues. When telephone mediation fails to resolve a dispute, the local consumer programs have the option of referring the matter to one of the face-to-face mediation programs, which are also funded by the State Attorney General's Office.
In 1988, seven full-time face-to-face mediation programs emerged, each operating with one paid staffer and twenty to twenty-five trained, community volunteer mediators. Mediations involved landlord/tenant or consumer disputes. Referrals came from local consumer programs, small claims courts, landlord or tenant advocacy programs, and other community agencies. In 1988 the face-to-face programs conducted a total of 557 face-to-face mediation sessions; 85% of these sessions resulted in written agreements and 96% of the agreements endured. In addition, 271 cases were resolved over the telephone by face-to-face staff.

Texas

The Consumer Protection Division of the Texas Attorney General’s Office has seven regional offices covering different regional and environmental areas of the state. Each office has at least one complaint analyst. The Dallas and Houston offices each have two complaint analysts. Additionally, each office has one mediation coordinator, who performs primarily secretarial and administrative tasks. Because of the low level of staffing in this area, all consumer complaints are handled by mail. Consumers can either send a letter detailing their complaint, or they can call on the telephone and request a complaint form. All complaint forms are mailed on the day the request is received.

The Texas Consumer Protection Division has invested a substantial amount of time implementing a computer-assisted mediation system. This system allows easy, consistent, access to complaints in each of the offices. The system keeps track of individual and group statistics, and prints a wide variety of reports. Further, the system tracks the date that the complaint was received, the date that each letter is sent, the response date, and the standard industrial code of the respondent business. Additionally, the system can track the final disposition of each complaint.

Once the complaint has been received, the mediation coordinator enters the name of each consumer and the respondent business they are complaining about. The mediation coordinator also enters the date that the mail was received, designates the analyst who will handle the complaint, and assigns the complaint a unique number. The mail is then reviewed by the appropriate complaint analyst (in offices with multiple analysts, one analyst handles complaints against businesses whose names start with A-L, and the other analyst handles M-Z). The analyst enters the business’ standard industrial code, a code indicating the allegation against the business, and a code indicating the method of marketing the product. Finally, the analyst determines the disposition of the complaint.

Complaint analysts have four primary choices: they can 1) file the complaint for information, 2) refer the complaint to one of the other regional offices of the Consumer Protection Division (normally to the office closest to the business), 3) refer the complainant to a list of several hundred state, local, and federal agencies, or 4) mediate the complaint.

Wisconsin

In 1987 a record-breaking 23,862 consumers lodged complaints with the Wisconsin Justice Department’s Office of Consumer Protection (the “Office”). Of this total, 12,841 filed their complaints in writing. The office recovered $1,093,969 for consumers through its complaint mediation program. Mail order purchases topped the industry categories of complaints in 1987. Other heavy complaint areas included used motor vehicles, travel and tourism, motor vehicle repairs, and landlord/tenant disputes.

In Wisconsin, when a consumer complains to the Office, he or she is asked to explain, in writing, the circumstances surrounding the complaint and to send copies of any supporting documents. Each complaint received by the Office is then individually reviewed by a complaint mediation team, made up of a staff attorney, investigator, and consumer specialist, to determine whether the problem falls within the statutory jurisdiction of the Office.

The main function of the consumer specialists is the mediation of individual consumer complaints. Their duties include reviewing the complaint file, preparing appropriate letters, completing the computer data form describing each complaint, mediating complaints, developing case files on respondent companies so that appropriate enforcement action can be initiated, acting as a source of information on consumer protection matters for the general public, initiating consumer alert ideas, and reporting to the Complaint Processing Coordinator. All legal questions and all letters citing a statute or rule are reviewed by the attorney assigned to the mediation process.

If the complaint falls under the jurisdiction of another state or federal agency it is appropriately referred and the consumer is notified of where the complaint has been sent. If the complaint appears to involve a private dispute or matter which is not within the Attorney General’s power to resolve, the complainant is advised to consult with his or her personal attorney or legal aid agency regarding private rights and remedies.

In most cases, the business or person complained against is contacted to tell its side of the dispute. The consumer is kept informed of these contacts as they are made. Frequently, this part (continued on page 16)
Alternative Dispute Resolution and Consumer Protection (from page 15)

of the mediation process opens up communication between the parties and a resolution is reached.

Information from each complaint is recorded in the consumer protection data bank which was established in 1970 to help process and analyze the growing number of consumer complaints received by the Office and other state and local complaint receiving agencies. The data bank operates as a statewide clearinghouse for consumer complaints and, as such, it has helped combat many of the diverse and sophisticated selling schemes foisted on the Wisconsin consuming public each year.

In addition to keeping a cumulative file of complaints, the data bank has been especially useful in organizing and analyzing most of the 195,000 complaints which have been filed over the years. The information gathered in the data bank is useful both to consumers and the Office. All complaints entered on the computer are used for making monthly analyses and for spotting statewide trends. The data bank is a cooperative effort by the Wisconsin Justice Department and other enforcement and consumer oriented groups including various state departments and county district attorneys offices. Twice a year, the district attorneys receive county printout listings for their respective localities. In addition to the monthly reports, specific industry-wide or trade practice printouts, containing statistics regarding legislation or proposed trade regulations, can be obtained.

Conclusion

There may be a simple explanation for why Americans have historically experienced alternating episodes of alternative dispute resolution and consumer protection. And, there may be an even simpler explanation for why, in the 1970's and 1980's, alternative dispute resolution and consumer protection are thriving in the offices of state attorneys general. As to the former, it seems that the episodic character of the two was caused, in part at least, by the often competing tensions of government and business power. As to the latter, it seems that the marriage of alternative dispute resolution and consumer protection in attorneys general offices is really a compromise solution in the perennial power struggle between government and business. On reflection, maybe the "odd-couple" isn't so odd after all.

2. Id. at 266.
9. Id.
10. Id. at 746 (footnotes omitted).
12. Id. at 48-49.
13. C. Cooper, supra note 8, at 747.
14. J. Auerbach, supra note 11, at 57.
15. Id. at 67.
16. Id. at 57-60.
17. Id. at 60-65.
18. L. FELDMAN, supra note 5, at 7.
19. Id. at 10-12.
20. Id. at 16.
23. M. NADEL, supra note 21, at 23.
28. L. FELDMAN, supra note 5, at 11.
29. Id. at 12; M. Nadel, supra note 21, at 16.
30. J. AUERBACH, supra note 11, at 95.
31. Id.
32. Id. at 97-98.
33. Id.
34. Id. at 101.
35. Id. at 104-08.
36. Id. at 111.
37. L. FELDMAN, supra note 5, at 13.
38. M. NADEL, supra note 21, at 20.
41. L. FELDMAN, supra note 5, at 14-15.
42. Id. at 16; M. Nadel, supra note 21, at 22.
43. J. AUERBACH, supra note 11, at 113-14.
44. Id. at 114.
46. L. FELDMAN, supra note 5, at 15.
The United States Supreme Court recently held that an order of the Federal Energy Regulatory Commission which allocated the costs of power purchased from a newly constructed nuclear facility among Mississippi Power & Light Company and the other subsidiaries of Middle South Utilities, pre-empted a prudence inquiry by a state utility commission into the management decisions leading to the construction of the facility. Mississippi Power & Light ex rel. Moore, 108 S. Ct. 2428, 101 L.Ed.2d 322 (1988). The Court further held that in setting retail prices for power, a state utility commission is required to allow a utility to recoup costs incurred through its purchase of wholesale power at a price set by the federal commission. The Court concluded that the Supremacy Clause of the United States Constitution compelled the state commission to allow Mississippi Power & Light Company to recover costs incurred as a result of payments for the federally mandated allocation through its retail rates. As a result of this decision, Mississippi ratepayers will face rate increases for power capacity that will not be used and will bear the cost burden of Mississippi's membership in an interstate power pool.

Background

Mississippi Power & Light Company ("MP&L" or "the Company") provides electric power to 333,000 customers. The Company, along with Middle South Utilities' ("MSU") three other subsidiaries, is part of an energy supply system serving Arkansas, Mississippi, Missouri, and Louisiana. The Federal Energy Regulatory Commission ("FERC" or "the Commission") regulates the Company's wholesale sale of electricity, while the local Mississippi Public Service Commission ("MPSC") regulates its retail sales.

While MSU's generating plants were mainly fueled with oil or gas through the 1950's and into the 1960's, the system in the late 1960's planned to meet projected increases in energy demand by requiring each of its subsidiaries to construct a nuclear power plant. Although MSU originally assigned MP&L the construction of Grand Gulf 1 and 2, two nuclear facilities in Port Gibson, Mississippi, the Company was unable to finance the project alone. Accordingly, MSU formed a new subsidiary, Middle South Energy, Inc. ("MSE"), which acquired title to the Grand Gulf properties and hired MP&L to build and operate the plants. In 1974, MPSC authorized the plants' construction, noting MP&L's status as part of an integrated energy system.

In the late 1970's, it became clear that future demand for electricity would be less than had been anticipated, thus, the Grand Gulf capacity was unnecessary. As a result of the reduced projected demand for electricity, along with cost overruns and regulatory delays, construction of Grand Gulf 2 was halted. Grand Gulf 1 was completed in the belief that the relatively low cost of nuclear fuel would cause its power to be less expensive than that of alternative sources.

Although the original estimated cost of both nuclear facilities had been approximately $1.2 billion, the actual cost to complete Grand Gulf 1 was more than $3 billion. Consequently, the cost per kilowatt of capacity rose from an estimated

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