

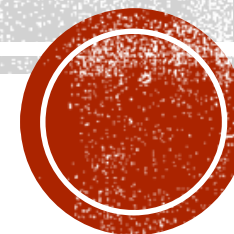
ELIMINATING DELAY THROUGH ADR

Presented by Julie-Ann Ellis Bradley

CAJO 6th Biennial Conference

Belize City,

October 2019



- *“The increasing caseload of traditional courts, rising costs of litigation, time delays, desire for confidentiality and the desire of parties to have greater control over the selection of the individual or individuals who will decide their dispute, contributed to the fact that many countries have started to consider alternative dispute resolution techniques (ADR)”* - **Alternative Dispute Resolution and the Judicial Domain** ENCJ report on ADR and the Judicial Domain 2016-2017, adopted GA Paris, 9 June 2017



THE ISSUE OF DELAY

- Increasingly litigious societies.
- Improvement of access to the courts (n.b not synonymous with access to justice)
- Longer timespan between commencement of judicial proceedings and their final resolution, including appeals.
- Congested Court dockets and rising backlog of cases.
- Ineffective judicial management of cases.
- Process driven by prosecutors and advocates.
- Giving everyone their 'day in court'



ADR PROCESSES

- Party driven solution oriented processes aimed at the resolution of conflict with the assistance a neutral third party without the need for judicial adjudication. These processes include:
- **Conciliation** – Neutral Third Party meets with parties in dispute to assist them in resolving their differences by reconciling views, encouraging the parties and making suggestions.
- **Early Neutral Evaluation** - Non-binding balanced evaluation of the facts and the issues presented by parties to a neutral case evaluator, usually an expert. The evaluation identifies the strengths and weaknesses of the respective positions and the likely decision of an adjudicator should the matter be litigated.
- **Mediation** – A consensual and structured process wherein a neutral third party facilitates the negotiation and discussions among parties with the aim of arriving at a agreed outcome.
- **Arbitration** – A neutral third party selected by the parties determines the matters in dispute.
- Hybrid Processes e.g. Med-Arb or a combination of other ADR processes





Which remedies work better and cost less?





<https://www.goodrx.com/blog/brand-vs-generic-drugs-whats-the-difference/>



ALTERNATIVE / SUBSTITUTE

- The stigma of alternative - Brand vs Generic
- **ADR is only one alternative, not the method of choice.**
- *“Most lawyers—and hence the companies they serve—(INSERT Judges/ judicial officers) still view ADR as the alternative rather than the primary or preferred method of settling disputes. Such companies see the procedure as a way of settling peripheral, less important disputes, or, ...they simply abandon it when they fail to get the result they want. In any event, they have not decided to make dispute avoidance and early resolution the prime mission of the legal department (INSERT Justice system).”*
- ADR processes have been promoted, taught and understood largely as secondary to litigation.
- Using the word alternative connotes or implies there is a gold standard or first choice and the other process are corollary, stand ins, less superior or weaker options.



SOLUTION — ~~ADR~~ DRP

- A rethink of how we consider, categorize, teach and advocate the various conflict management options as Dispute Resolution Processes.
- This would include litigation as **one of** the Dispute Resolution options as opposed to litigation being in a league of its own and the “other processes” seen as alternatives to litigation.
- Taking a multi-door approach in finding optimal ways to manage and resolve conflict, “fitting the forum to the fuss”.
- Until then...



WHY ADR PROCESSES WORK

- Generally less cost, less formality and more efficient (less time) than a trial
- Generally private, confidential and less stressful than litigation proceedings
- Superior at preserving relationships and achieving social harmony
- More appropriate for multi-party disputes.
- Parties are empowered by the processes and gain deeper insights and understanding of their issues and those of the other parties and how to more effectively manage conflict.
- Parties get to choose their neutral.



WHY ADR PROCESSES WORK CONT'D

- Reduces caseload and reduces backlog so that only cases that require judicial attention proceeds to trial.
- More appropriate use of judicial time and resources.
- Reduces appeals as outcomes are generally consensual.
- Increased satisfaction with outcome and compliance because parties play a more active role in resolving their own disputes which results in creative longer-lasting outcomes, greater satisfaction and improved relationships
- Allows for a more complete resolution of disputes with joint gains/ win-win options, whereas in litigation parties are bound by specific claims, pleadings cause of action.
- Resolutions more thorough and lasting outcomes because they address the cause unlike the court which is bound to apply the law which only deals with the symptoms.



THE KEYS TO ELIMINATING DELAY THROUGH ADR

- Understanding why people use litigation –
 - The Principle
 - To hurt / punish/ settle scores/ teach a lesson
 - They feel powerless and see litigation as a means of gaining power
 - To set precedent for future disputes
 - To resolve legitimate issues and vindicate legal rights
 - Poor conflict management skills
 - Ignorance of other dispute resolution options
 - Poor understanding of available conflict management options.
 - Ill advised as to pros and cons of litigation and prospects of success
 - Public policy issues



THE KEYS TO ELIMINATING DELAY THROUGH ADR CONT'D

- Understanding your Role of dispute resolvers in customizing the dispute resolution process to fit the need of the parties and the characteristics of the conflict.
- Making ADR more user friendly – Educate users of the processes
- Making the User more friendly to ADR – ADR Advocacy for Counsel and Judiciary to enable and encourage effective use of the process. This includes understanding what about each process has the potential to eliminate delay.
- Commit to the use of and give it appropriate priority.
- Ensuring that as far as possible only deserving cases go to trial





<https://urbannaturale.com/junk-food-vs-healthy-food-fuels-body-better/>



TENSIONS IN HARMONIZING THE JUDICIAL & ADR PROCESSES

- Despite all the positive indicators that ADR processes are just as good and in many instances, superior to adjudication through litigation... there is still hesitation to make the more wholesome choice. This may be due to:
 - Mistrust, misunderstanding or misuse of the processes
 - The judicial bent/ mandate/ predisposition /wiring to adjudicate
 - Pride in process of adjudication and need to preserve and not whittle away its importance.
 - Need to faithfully perform judicial function-aren't litigants being shortchanged if I rob them of their day in court?
 - Fear of the unknown- less favored status- What am I sending litigants into, do these alternative processes have sufficient safeguards to ensure justice is served?
 - Some ADR processes add further delays to the judicial process. – potential for wasting time, effort and resources.



ALLAYING FEARS

- Most processes are robust
- Processes respect party autonomy as paramount
- Informed consent is a requirement for most processes
- Code of ethical standards applicable to Court connected processes
- Legislative initiatives to regulate most ADR processes are in place or there are initiatives to implement appropriate legislative safeguards.



MAKING THE PROCESSES USER FRIENDLY

- Understanding and educating yourself about the process- one of the Recommended minimum standard of ENCJ report on ADR and the Judicial Domain 2016-2017 Appropriate training should be available to all judges to recognise the advantages and risks together with the potential need for ADR procedure
- *On the other hand ADR may limit the access to a fair trial, so Court related ADR procedures should be regulated by legislation to an extent that would provide the most basic procedural safeguards*
- Educating the parties.
- Selecting appropriate process
- Seeing ADR as options/ multidoor approach to justice rather than as a substitute. Chnaging the ethos and culture of how we resolve conflict/ - Multiple options



PITFALLS TO AVOID

- Using ADR to abdicate judicial role – There are some cases that require judicial intervention and action
- Reducing party autonomy
- Sanctions to parties/ penalizing for not settling - driven by “fierce litigiousness, arrogance, and greed,”. Ensure right of the citizen to a fair trial is respected.
- Bear in mind that ADR processes are to enhance and empower not to eliminate litigation.
- ADR as currently practiced too often mutates into a private judicial system (litigation in disguise) that looks and costs like the litigation it’s supposed to prevent.
- ADR is not a panacea



“The main conclusion of the Project Team is, that ADR can promote social harmony and at the same time consolidate the position of the judiciary, in the sense that judicial proceedings in modern societies should be the last resort for dispute resolution. The Project team concluded that ADR should be adopted and promoted not just as a social value but as a legal one as well. It should be made available to the parties to civil proceedings at the earliest possible stage in the dispute in all appropriate cases...”

- European Network of Councils for the Judiciary report on ADR and the Judicial Domain 2016-2017, adopted GA Paris, 9 June 2017



USEFUL REFERENCES

- **Alternative Dispute Resolution: Why It Doesn't Work and Why It Does** [Todd B. Carver](#) and [Albert A. Vondra](#) May–June 1994 issue of Harvard Business Review
- **Fitting the forum to the fuss: A Userfriendly guide to Selecting and ADR procedure.** Article by Professors Frank E sander and Stephen Goldberg, Negotiation Journal Vol.10. Issue 1, 1994
- **European Network of Councils for the Judiciary report on ADR and the Judicial Domain 2016-2017, adopted GA Paris, 9 June 2017**



Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.” – Abraham Lincoln, July 1, 1850



VS



Images: <https://www.chauffeurdriven.com/news-features/in-this-issue.html?start=514> and <https://www.noolawllc.com/areas-of-practice-2/alternative-dispute-resolution/>





Title of Session: Eliminating Delay through the use of ADR

Session Chairperson: The Hon Mr. Justice Shiraz Aziz

Session Panelists:

The Hon Mme Justice Nancy Flatters

The Hon Mr Justice Francis Belle

Mrs. Julie-Ann Ellis Bradley

Objectives of Session:

At the end of this session, participants will be able to:

- a. Identify some main ADR practices, and
- b. Explain how these ADR practices can be used to eliminate delay

Key points from presentations

The use of ADR as a high priority activity will resolve the long delay between the commencement of judicial proceedings and their final resolution.

It will also markedly reduce the backlog of cases in the courts.

The Hon Mme. Justice Nancy Flatters

1. Using ADR to eliminate delay in judicial Court cases and prevent on-going disputes is of vital importance. It may also lead to improved relationships in the settlement of issues. This is because a third -party is engaged in the settlement.
2. Additionally, the Court is built for judges and their staff. As a result, judges think in such a way as to minimize risks and improve the consistency of the court in decision making.
3. Mediation and Judicial Dispute Resolution/Settlement can be incorporated into court proceedings. Judges need to become problem-solvers and resolve issues for example through judicial settlement conferences.
4. In family matters, evidence has proven that delay is detrimental to children who often have to wait up to three years before the matters are resolved. There are too many

adjournments and court dates being handed out instead of resolutions and disposals of cases.

5. Our countries are diverse and therefore judges need to be culturally literate. The indigenous peoples in Belize are still ruled by the British based colonial system which implement British laws and mechanisms into their processes without being concerned about meeting the needs of the court users.
6. It is important for judicial officers to restore relationships and repair the landscape of the country by truly knowing the people. The question becomes, how can we transfer the knowledge of the indigenous peoples into our courts. One example is restorative justice circles which American courts have used to integrate principles from their indigenous peoples into the court.
7. By switching the systems, delay is eliminated. There is no need to continue the same practices as was in place in British Colonial times. There is no need to pay experts because the judges are the experts.

Mrs. Julie-Ann Ellis Bradley

1. Instead of proposing ADR as an alternative or substitute, it should be a method of choice. Generally, issues tend to be resolved in our society by litigation and ADR tends to lag behind.
2. Added that dispute resolution processes cost less than litigation, is informal, quicker and more efficient than a trial. Persons tend to go to the court as a show of power. The principle behind it is that you hurt, punish or teach persons a lesson due to the fact that they feel powerless.
3. The key to eliminating delay through ADR is to make ADR more user friendly. It is important to educate users of the processes. We want to teach advocates and focus on training when it comes to ADR to encourage persons to commit to using the process.

The Hon Mr Justice Francis Belle

1. Delay can be eliminated by the use of ADR by educating parties and having them select the appropriate process through the Civil Procedure Rules.
2. There are 2000 judges managing the process alongside 25 rules. 90 % of auxiliary matters were resolved by alternative dispute mechanisms.
3. It is important to give the juries all the time they need.