Numerous mandatory and nonmandatory alternative dispute resolution (ADR) referral programs have been developed in response to the multi-door, court-based ADR initiatives of the 1970s. The multi-door approach assumes that disputants need help to access ADR services and that there may be a lack of coordination among those services, necessitating guidance from courts. It was originally intended to provide many “doors” for dispute resolution so that a litigant could access mediation, conciliation, evaluation, or adjudication processes as required, with the court as the gateway.

A more recent trend, aimed at supporting ADR processes outside the court in industry, government, and the community, is a “multi-option” response. While the multi-door response locates ADR services within the court with referral operating once litigation has commenced, the multi-option approach locates services both within and outside courts, before and after litigation has commenced. This approach has required consideration of a broader definition of justice (see Sourdin, 2012b) and has implications for adjudication systems and processes.

Recently, Australia has introduced pre-action initiatives to encourage or require the early resolution of disputes without commencing proceedings in courts or tribunals. They exist outside courts at various points in the justice system and relate to institutions, courts, and judges in different ways. They are designed to lower costs, encourage cooperation between disputants, and avoid litigation wherever possible. For example, the Civil Dispute Resolution Act 2011 (Australia, Cth), requires disputants to file a “genuine steps” statement setting out what attempts have been made to resolve their dispute before commencing litigation. The legislation assumes that would-be litigants will access ADR before being permitted to access courts, subject to limited exceptions.
According to recent research, the effectiveness of pre-action requirements depends on participants’ compliance, and this can be supported by education, sanctions, incentives, and processes (Sourdin, 2012c: 170). Another finding was that there should be exceptions to any ADR referral—that is, not all disputes should be diverted from courts. The concern with a multi-option approach was that it might not support sophisticated ADR referral when compared with a multi-door approach.

A deficit of the multi-option model is that choice of process can be left to the disputants and their lawyers, who may not choose ADR or any other processes that can help resolve a dispute and save costs and time (Sourdin, 2012c: 170). On the other hand, this type of triaging might not take place within courts, and there is little evidence that multi-door systems have promoted sensitive referral to ADR.

This article suggests that both multi-option (outside the court) and multi-door (within the court or via court referral) processes can be supported so that both are effective and just and do not impose unreasonable burdens on litigants (Sourdin, 2012c: 170). It also makes recommendations to support the effective operation of these approaches.

WHERE ARE DISPUTE RESOLUTION OPTIONS LOCATED?

Dispute resolution options can be located within and outside of the court system and range from personal and private processes to formal and public court processes. Recent Australian family-law and federal-law reforms are based on the notion that people should be required to consider dispute resolution options more carefully and have a choice as to how they resolve their dispute. This approach stems from a wider view of justice than judicial determination and assumes that justice need not be solely associated with the courts.

Various pre-action arrangements encourage disputants to seek alternatives to resolve their dispute (either privately or via schemes) before they file in court. Pre-action requirements can operate in the social, workplace, community, health, family, business, personal-injury, online-consumer, and business sectors. Many disputes are resolved via legal help or nonlegal information and support. Boosted by online resources, these options are providing many disputants with accessible dispute resolution outside courts. These arrangements can be supported by organizational requirements. For example, many organizations assist with internal review of disputes (e.g., complaints handling), and some pre-action schemes incorporate requirements to arbitrate, conciliate, mediate, or use ADR or external dispute resolution (EDR).
While it seems that some U.S. multi-door options have extensive voluntary requirements that relate to action before and after filing, and that these activities are court supervised, this has not been the case in Australia in relation to pre-action (pre-filing) protocols, where these arrangements can also operate independently with little if any court supervision (other than limited case-law analysis).

Recent legislation has been proposed or enacted that applies these requirements to a broader category of disputes (Sourdin, 2012c: 55). Some ADR processes are also used by disputants and are not linked to schemes, and in some cases a “do-it-yourself” approach is assumed. The fact that some pre-action requirements have been strengthened by legislation is salient given the multitude of disputes that settle before court as a result of pre-action requirements or ADR in general. It has been suggested that only about 3 to 5 percent of civil disputes proceed to contested adjudication after court proceedings have been initiated, meaning that about 95 to 97 percent of disputes that are commenced in court are resolved without a full trial (Martin, 2012: 28; Fisher, 2000).

WHERE IS JUSTICE LOCATED IN AUSTRALIA?

The “location” of justice in Australia must be read in the context of a changed perspective about what comprises the justice system. The government and theorists have recognized that justice involves a broader concept than the court system and that adjudicative processes form only a part of the justice system (Sourdin, 2012b: 1). In this sense, ADR has complemented adjudication.

The Australian Commonwealth report, A Strategic Framework for Access to Justice in the Federal Civil Justice System, explored this broader view of justice, noting “just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice dispensing institutions. Ultimately, access to justice is not just a matter of
bringing cases to a font of social justice, but of enhancing the justice quality of the relations and transactions in which people are engaged” (Access to Justice Taskforce, 2009, citing Galanter, 1981: 161-62).

In Australia, justice is integrated within and outside of the court system, and mandatory referral to ADR is relatively common (Sourdin, 2012b: 8). Where commentators have raised the concern that ADR is at risk of displacing judicial adjudication, to the detriment of users, it might be noted that justice is delivered because “ADR may simply remove some disputes from the queue that forms as people wait to litigate” and “if they do not reach agreement, they can rejoin the queue” and further, that “access to justice and the courts is enhanced through the use of ADR as those disputants that require judicial determination are able to access it.” In addition, the broader view of justice includes the endorsement of “personal obligations to resolve disputes before enabling access to judicial adjudication except where this is not appropriate,” and as such, the broader justice system necessarily implies the inclusion of pre-action protocols, requirements, and schemes (Sourdin, 2012b: 12).

**MULTI-OPTION SYSTEM**

A multi-option system offers disputants various dispute resolution options where private and public services operate alongside one another. It might include mediation, mini-trials, arbitration, early neutral evaluation, expedited proceedings, referee-panel adjudication, administrative law forums, and traditional bench and jury trials (Ruhlin and Scheiber, 1996: 1). It might also provide access to private institutions such as neighborhood dispute resolution centers and community legal centers.

A multi-option model might involve a “triage” process, unconnected with the courts, and may facilitate the fulfillment of pre-action obligations or settlement of disputes via processes that do not involve any filing or attendance at court. It might be completely independent of the court system or form a precursor to subsequent court proceedings. Various studies in Australia have gauged the effectiveness of pre-action processes, and, indeed, dispute resolution mechanisms that exist independently of courts, and most measure participant perceptions of fairness of process, satisfaction with outcomes, and whether they saved time and money (Sourdin, 2012c). These elements tend to form the “measures of success” of such systems.

A recent study of multi-option frameworks in California comments on a Multi-Option Pilot Program of the Northern District of California administered by Magistrate Judge Wayne Brazil (Stipanowich, 2004: 10). However, unlike the Australian model, this Northern District model is court connected and involves court personnel in ADR processes and referrals. The assessment of this pilot (which used early neutral evaluation, mediation, and arbitration)
improved the settlement rates of cases and decreased case duration where settlement was not achieved. It is a good example of California’s use of court-connected ADR. Oregon is another state where multi-option models have been in operation for some time (in relation to parental-rights cases, landlord-tenant disputes, juvenile justice, and some criminal cases); however, once again they differ from the Australian model described in that they may be court administered and to some extent court supervised.

Canada’s proposed multi-option justice system is centered on court facilities but not focused on trials. The objective of settlement is central to the model, which requires a change in orientation on the part of stakeholders to justice—lawyers, judges, court administrators, and clients—and emphasizes that the goals should be early problem solving and dispute resolution, with trial as a last resort (Canadian Bar Association, 1996: 31). A 2012 report into the needs of self-represented litigants in the Canadian Justice System featured recommendations relating to court-connected “triage” and “multi-option” approaches to legal assistance (Farrow et al., 2012: 6).

The Australian multi-option system might have similar foci to the proposed U.S. and Canadian models; however, ADR and EDR (industry, community and government schemes located outside the court system) that are not as closely linked to court supervision play a key role in the Australian system.

To work efficiently and effectively, a multi-option justice system relies on effective referrals and process parameters. While the ultimate decision might be left to the parties and their lawyers, they need to be supported in making choices among ADR options to ensure adequate consideration of issues and that the process is fair and saves them time and money (Sourdin, 2012c: 170). While many lawyers have traditionally acted as “gatekeepers,” it is clear that this role might also be effectively supported by a form of “dispute counseling” (Sourdin, 2012a: 164). NADRAC describes “dispute counseling” as “a process in which a dispute resolution practitioner (the dispute counselor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.” This process might involve a face-to-face meeting, or may rely on the use of telephone or online processes. The proliferation of pre-action processes adds emphasis to the idea that dispute counseling will be important in the future. Dispute counselors
or Internet-enabled support (AI) might also investigate issues in dispute, contact other parties, and act as advocates for parties seeking services. They may also provide advice about issues and options (Sourdin, 2012a: 164).

**THE NEED FOR ADDITIONAL REQUIREMENTS**

Where dispute resolution processes form part of a multi-option justice system outside of the courts, the dispute counseling and educative resources (physical centers/kiosks, as well as online and other resources) support the referral to dispute resolution processes. In addition, it may be necessary to strengthen some of the requirements that place obligations on lawyers, clients, and ADR providers (for example, national mediator accreditation, which was introduced in Australia in 2008, supports greater understanding and clarity).

The “strengthening” of disputant obligations referred to in the overarching civil-procedure objectives imposed by the 2011 Civil Dispute Resolution Act Cth (CDRA) also makes it more likely that processes will be used before proceedings are commenced, as these require litigants to lodge a “genuine steps” statement about pre-filing steps in certain types of civil proceedings in the Federal Court and the Federal Magistrates’ Court of Australia.

In Australia, various requirements encourage would-be litigants to use courts as a “last resort” (Sourdin, 2012c: 39-40), much like the Canadian multi-option model. For example, in South Australia, legislation (Rule 33) requires that parties exchange written offers and responses, before filing a claim, within a certain time frame (Supreme Court Civil Rules, 2006 [SA]). Other state legislation requires different pre-litigation reporting standards and notice periods, all aimed at addressing efficiency and effectiveness (Law Society of NSW: Advocacy Rule 7; Tan, 2012; Sourdin, 2012c: 39-40).

Where parties are participating in a dispute resolution process as part of a multi-option system, they might also have “good faith” obligations placed on them (and their lawyers) by the CDRA in relation to mandatory or semi-mandatory ADR. “Good faith” is the most widely used standard of conduct prescribed by federal and state/territory legislation for those involved in ADR. However, there is limited legislative guidance on the meaning of the phrase in ADR (NADRAC, 2009), although there is an increasing body of case law to support the interpretation of requirements.

It may be necessary to complement the established state and federal legislation and legal services directions with further legislative obligations, cost sanctions, and case law to ensure that these processes work effectively and are well understood.

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**25 YEARS AGO**

**Multi-Door Courthouses and ADR**

The “multi-door” courthouse idea started at the American Bar Association’s 1976 Conference on the Causes of Popular Dissatisfaction with the Administration of Justice and had a significant impact upon the legal system, leading to a multi-option approach. A follow-up report called for establishing neighborhood justice centers, and the Department of Justice Neighborhood Justice Centers project provided grants to develop these local programs to resolve disputes quickly and effectively. In the 1980s and early 1990s, the term alternative dispute resolution was adopted to describe these nonadversarial methods of conflict resolution.
CONCLUSION

It is clear that there are ways in which both multi-option and multi-door processes can work in harmony and that it is possible to support them so that these processes are effective and just and do not impose costs or other burdens on disputants.

For these processes to work well, it is suggested that they require mechanisms for triaging and dispute counseling; the use of (and growth of) resources, such as educative agencies, legal centers, and online resources; a shift in focus for stakeholders of the greater justice system; and stronger obligations on participants (disputants and their lawyers) to undertake these processes. It is also critical that those within the litigation system understand and support these initiatives.

REFERENCES


