

Access to Justice through Alternative Dispute Resolution White Paper

ABA Section of Dispute Resolution

Task Force on Access to Justice and Alternative Dispute Resolution

I. Introduction of Access to Justice and Alternative Dispute Resolutions

Currently, a large gap exists between people who need access to legal services and those who can afford legal services. Many of the public services available, such as legal aid, pro bono lawyers and law school clinics, only have the resources to serve a very small portion of the needs of individuals with legal problems. Additionally, the income restrictions are so low that often only the very poor are eligible for services. As a result, many people represent themselves when resolving legal problems, often with little success.

“Access to Justice” initiatives have been researching these issues and attempting to make legal services more readily available to low income individuals. The American Bar Association has been a national leader in this area, with a Resource Center that supports the “growth and development of state-based Access to Justice Commissions” and collects and analyzes data used to fund civil legal aid.¹ Today, at least thirty-eight states have commissions dealing with these important issues.² Many of these state commissions, along with national organizations and commentators define “access to justice” as a way for low- and middle-income to have access to representation in order to help them fare better in the court system.³

The natural synergy of access to justice and alternative dispute resolution (ADR) processes is often overlooked because of the court-centered focus of most access to justice projects and research. This Task Force takes a broad view of access to justice to include not only access to the courts, but access to legal representation, access to resolution of issues, and access to quality processes that do not necessarily include the court systems. When access to justice is defined more broadly, the use of processes such as mediation, arbitration, negotiation, and other alternatives fits naturally in solving these problems.

This White Paper proceeds as follows. Section II will consider access to ADR services, such as low cost and free mediation and arbitration services that disputants can access with or without representation. Part III discusses how lawyers can “unbundle” their services to provide limited scope representation in ADR processes. Part IV considers the role that technology can play in resolving disputes online. Part V discusses the ethical aspects of this project, and Part VI

¹ American Bar Association Resource Center for Access to Justice Initiatives, *available at* http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

² American Bar Association Resource Center for Access to Justice Initiatives, ATJ Commission Movement, *available at*: http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html.

³ *See, e.g.*, Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 Conn. L. Rev. 741 (2015) (discussing access to justice initiatives).

concludes with recommendations for lawyers, the judiciary, educators, and state governments in order to continue and promote the good work that has already begun in this area.

II. Access to ADR Services

This Task Force recognizes that pro se litigations face a steep challenge in court with low odds of a favorable outcome. If those unrepresented parties have an opportunity to engage in a dispute resolution process (with or without legal counsel), they can benefit from the procedural informality involved as well as a focus on interests and resolution, as opposed to victory or loss in a court procedure. This section details the different types of ADR services available that help meet access to justice needs.

a. Mediation Services

i. Free Services Available

Access to mediation is one way to increase an individual disputant's access to justice. An unrepresented litigant can take advantage of mediation's flexibility and informality in the hopes of coming to a resolution to the situation. In some instances, litigants may have the opportunity to engage in the mediation process for free. This section considers some of these free programs.

Connecting volunteer mediators who want to provide pro bono mediation services to individuals who want to participate in mediation can be accomplished through "Mediator of the Day" programs set up in local jurisdictions, particularly at the small claims courts level. Access to these programs can be enhanced by online information available to the public such as the JUSTICE FOR ALL website in Tennessee, a project of the Tennessee Supreme Court.⁴

Online information about mediation, lists of local mediators, and community mediation centers with links to maps can help the public access alternative dispute resolution services without having to first appear in court to learn about this option. Online information can also be very useful in connecting mediators with court programs, faith-based programs, and community mediation centers to facilitate mediators providing pro bono mediation. Online information can also assist court personnel who are frequently asked about local alternative dispute resolution resources available to the public.⁵

Some jurisdictions have programs called "settlement day" or "settlement week," in which private mediators donate their time to resolve civil cases. These programs are available at the federal, state, and local levels. For example, the Kentucky Court of Justice explains that "Settlement Week provides timely and cost-effective justice. During Settlement Week, parties and counsel in selected lawsuits meet at the local courthouse for two hour private settlement conferences conducted by a volunteer mediator. The volunteers are a member of the local bar association who also have mediation training." In many of these programs, the court will order the parties to mediate and report back to the court after the mediation. The programs offer free

⁴ Justice For All, a Tennessee Supreme Court Initiative, at www.justiceforalltn.org (last visited 7/26/15).

⁵ Justice For All, *Alternatives To Court*, at <http://justiceforalltn.org/i-need-help/alternatives-court> (last visited 7/26/15).

or reduced cost mediation services for a limited amount of time, ranging from one or two hours of mediation services to a half or full day of mediation. These programs often report success in results and access to mediation services.

In addition to settlement week programs, many small claims courts have free mediation programs for their participants. Small claims court is a traditional entry point for low income individuals to enter the legal system. The fees for small claims court are usually lower than in district or county court. Although the amount of money at stake is low, small claims disputes are often very personal and emotional disputes for the participants. Small claims courts often have free or low-cost mediation programs run by volunteer mediators. The National Center for State Courts assembled a state-by-state directory of small claims mediation programs across the country. These programs offer a very important service to aid access to justice.

Community mediation centers are a wonderful resource for those who may need to have free mediation services. Community Mediation Centers, as defined by the National Association for Community Mediation, are generally characterized by, and/or committed to:

- Private non-profit or public agencies or programs thereof, with mediators, staff and governing/advisory board representative of the diversity of the community
- Use trained community volunteers as providers of mediation services
- The practice of mediation is open to all persons
- Provide direct access to the public through self-referral
- Strive to reduce barriers to service including physical, linguistic, cultural, programmatic and economic
- Provide services to clients regardless of their ability to pay
- Provide service and hiring without discrimination
- Provide a forum for dispute resolution at the earliest stage of conflict
- Provide an alternative to the judicial system at any stage of a conflict⁶

Many community mediation centers offer free services for people within their service areas.

ii. Reduced Fee Services Available

Some programs use a sliding-fee scale for fees based on a participant's income. For example, in the State of Nebraska, the six community mediation centers throughout the state⁷ do not turn away any client for inability to pay. Instead, the clients give certain income information to the center, and are assessed an hourly fee based on their yearly income. Each client is responsible for his or her portion of the fee, and often the parties pay different amounts. The parties pay an amount between \$20 and \$90 per hour, and the additional amount is subsidized by

⁶ National Association for Community Mediation, *Frequently Asked Questions*, at http://www.nafcm.org/?page=Frequently_Asked (last visited 7/26/15).

⁷ Those community mediation centers are: The Concord Center (Omaha); The Mediation Center (Lincoln); Nebraska Mediation Center (Kearney); The Resolution Center (Beatrice); Central Mediation Center (Kearney); and Mediation West (Scottsbluff). Each county in the State of Nebraska is served by one of these mediation centers. 29 Neb. Stat. 25-2903.

the State,⁸ grant funding, and fundraising efforts. As a result of this program, participants who would otherwise be unable to afford legal aid are provided quality services despite their limited income.

Sliding fee scales can be useful for a number of different policy reasons. First, sliding fee scales take into account the income of the participants, requiring them to pay a reasonable amount based on their income. When the participants are required to pay for a service, there is a higher likelihood that they will take the services seriously because they want value for their hard earned dollars. In addition, the community mediation centers receive some income from these clients, although often not enough to cover their expenses based on the fees alone.

b. Law School Clinics Offering ADR Services

Many law schools offer clinics in ADR services. The most common type of ADR clinic is a mediation clinic, where the students work as mediators or co-mediators for low income clients. Some clinics, like those at The Ohio State University Moritz College of Law⁹ and University of Oregon School of Law¹⁰ work with small claims cases. Student mediators receive basic mediation training and then mediate or co-mediate cases in the local small claims court. Other schools, like Indiana University Maurer School of Law,¹¹ trains students in family and divorce mediation and then students mediate cases involving divorcing parents. The University of Baltimore School of Law Mediation Clinic for Families offers a wide range of mediation services for families, including divorce mediation and mediation in cases involving guardianship and school bullying.¹² In their communities, these clinics provide a valuable mediation service for those who cannot afford a private mediator.

Other law schools offer clinical opportunities to represent clients in alternative dispute resolution processes. While these types of representation clinics are less common than clinics providing mediation services, the clinics do provide meaningful access to justice in the service areas provided. For example, Hamline Law runs an Employment Discrimination Mediation Representation Clinic that is a collaboration with the Equal Employment Opportunity Commission and the Minnesota Department of Human Rights so that students can engage in a limited scope representation of employees who have been referred to mediation.¹³ In addition, a number of law schools have clinics that represent investors in securities disputes, and those

⁸ The Nebraska Legislature passed two statutes that help fund the Mediation Centers. 29 Neb. Stat. 25-2909 (Dispute Resolution Act); 29 Neb. Stat. 43-2943 (Parenting Act).

⁹ Ohio State University Moritz College of Law, Mediation Clinic, at <http://moritzlaw.osu.edu/clinics/mediation-clinic/> (last visited 7/26/15).

¹⁰ University of Oregon School of Law, Clinics, at <https://law.uoregon.edu/explore/clinics> (last visited 7/26/15).

¹¹ Indiana University Maurer School of Law, Mediation Program and Viola J. Taliaferro Family and Children Mediation Clinic, at <http://law.indiana.edu/students/clinic/family.shtml> (last visited 7/26/15).

¹² University of Baltimore School of Law, Mediation Clinic for Families, at <http://law.ubalt.edu/clinics/clinics/familymediation.cfm> (last visited 7/26/15).

¹³ Hamline University School of Law, Clinic Offerings, at http://www.hamline.edu/law/experiential-learning/clinic-offerings/#Em_Dis_Med.

disputes often include mediation and arbitration services.¹⁴ Increased representation of indigent clients in law school clinics increases access to justice by providing representation services to those who cannot otherwise afford them.

One substantive area in which law school clinics may become more involved is foreclosure mediation. These clinics offer an opportunity for students to serve homeowners at a critical point in their lives, help the courts handle a large volume of cases, and make the cases flow more smoothly for lenders and the lawyers who represent them.

Law schools that develop these programs must confront a variety of service issues. For example, how many mediations must be conducted so as to make a difference to homeowners, courts and/or lenders? How will the clinic provide services when classes are not in session or the students are not yet trained? These issues relate to training issues such as how much substantive knowledge about foreclosure law students need and how to develop student capability to perform at a sufficiently high level. Partnering with existing mediation programs can help clinics address these issues. This can provide opportunities for co-mediation involving students and experienced volunteers, which is an excellent learning opportunity for the students.

As in other mediation clinics, a threshold question is whether law students will act as mediators or advocate on behalf of homeowners. Sometimes this question is answered by exploring what resources are currently available. If a court or community program, or even another law school clinic, provides sufficient mediators, it may be more beneficial to have students offer the additional service of representation. This also provides the opportunity for students to practice the skills they are most likely to use – representing clients in mediation – early in their legal careers. On the other hand, if a jurisdiction has insufficient mediators, student mediators may be of great benefit.

c. Reduced Fees in Arbitration

Many individuals are knowingly – or unknowingly¹⁵ – parties to arbitration agreements in their consumer and employment contracts. Many scholars have debated the appropriateness of arbitration for consumer disputes, and this paper will not go into those arguments here.¹⁶ Many of the major arbitration providers, however, have tried to make arbitration more accessible and

¹⁴ U.S. Securities and Exchange Commission, Arbitration/Mediation Clinics in California, District of Columbia, Florida, Georgia, Illinois, Michigan, New Jersey, New York, and Pennsylvania, *at* <http://www.sec.gov/answers/arbclin.htm>.

¹⁵ A recent study released by the Consumer Financial Protection Bureau found that “[c]onsumers are generally unaware” of whether their agreements with financial institutions contain arbitration agreements. Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a), §1.4.2 (2015).

¹⁶ For more information on the debate regarding arbitration in commercial and employment disputes, *see generally*, Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 Ohio St. J. on Disp. Resol. 267 (1995); Professor Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237 (2001); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 Ohio St. J. on Disp. Resol. 627 (2008); 7 Williston on Contracts § 15:11 (4th ed., 2015).

cost-effective for these types of “one shot players.” This section illustrates a few of the ways private arbitration service providers are encouraging access to justice.

The American Arbitration Association (AAA) has taken on a number of changes to rules to deal with the influx of consumer and employment cases. AAA created a Due Process Protocol in both of these areas to be transparent about the processes that these usual “one shot players” will be facing in arbitration, as well as to ensure fairness for both sides.¹⁷ These protocols are intended to ensure the principles of quality neutrals, cost effective dispute resolution, and fairness of the process.¹⁸ In addition, the AAA has special rules regarding fees in consumer cases, which limits the amount of money that a consumer pays and puts most of the financial burden on the business party.¹⁹ JAMS, formerly known as Judicial Arbitration and Mediation Services, has adopted a similar policy (Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness) to ensure fairness in consumer arbitrations.²⁰ JAMS also similarly caps fees paid by the consumer to \$250, which is meant to be an equivalent to court filing fees.²¹ Limited responsibilities for fees in these cases help make the arbitral forum as accessible as the litigation forum, at least financially.

The law of unconscionability has also played a key role in increased fairness to consumers and employees in arbitration. In efforts to make pre-dispute arbitration clauses enforceable, large companies are now inserting some consumer-friendly language into their agreements, including low fees and convenient locations. These pro-consumer provisions, however, are balanced by class action waiver provisions. Many large businesses, including banks and wireless telephone companies are trying to eliminate the option of a class action suit through the use of arbitration agreements, and the Supreme Court thus far has issued decisions in favor of the business interest.²² While consumers and employees have received many favorable arbitration contract provisions (in terms of fees, location, choice of neutral, discovery, etc.), the attempted removal of the class-action remedy is one that impedes access to justice.

d. Faith-Based Dispute Resolution Services

One barrier to alternative dispute resolution is the fact that often the first information an individual receives about mediation is when they appear in court for their case. Another delivery system for provision of free and reduced-cost mediation is through faith-based organizations. Connecting people in need in a place they already go to seek help with a problem using a referral model designed to pair volunteer lawyers with congregants in need can include mediation

¹⁷ See American Arbitration Association, Consumer Due Process Protocol (October 1, 2010); American Arbitration Association, Employment Due Process Protocol (November 14, 2011).

¹⁸ *Id.*

¹⁹ American Arbitration Association, Consumer Arbitration Rules, Costs of Arbitration (Sept. 1, 2014) (limiting the amount that the consumer pays to a \$200 filing fee).

²⁰ JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (July 2009), *available at* <http://www.jamsadr.com/rules-consumer-minimum-standards/> (last visited 5/14/15).

²¹ *Id.*

²² See *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011); see also Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 Fl. L. Rev. 711 (2015).

services using volunteer mediators. Programs such as the Tennessee Faith & Justice Alliance²³ support alternative dispute resolution by providing community education, training and a safe environment for mediations. Adding pro bono mediators to legal clinics in faith-based settings provides immediate access to dispute resolution in the same location, often utilizing legal resources that are nearby or in the same congregation. Faith-based programs help the house of worship staff by providing attorneys to help find the right resource to help meet the needs of the individuals, including mediation.

Faith-based settings also include academic settings and are often excellent locations for the education, training and implementation of alternative dispute programs. Collaboration between houses of worship and academic institutions with existing local resources such as community mediation centers and pro bono mediators through faith and justice initiatives help reach more individuals who need access to legal services but cannot afford legal services.

e. Family Mediation

Providing access to mediation for family law issues is one of the more readily-accepted forms of ADR, especially when the family in question has limited financial resources. However, determining how best to provide these services is not an easy matter. If all parents were expected to pay the full cost of mediation, it would be inaccessible for many families. Methods for providing mediators to families are varied. In the past, many courts provided free family mediation services, but with court budgets consistently decreasing, funding for mediation has often been cut, too. These reduced resources have led some courts to institute brief screening processes in which parents are assessed for likelihood of reaching agreement in a short, e.g., one hour, mediation.

Another way family mediation programs address this issue is with sliding fee scales. Sometimes called “low bono,” reduced rates can offer newer mediators a way to enter the field and families a way to access services. Sometimes all mediators who are listed on the court mediator roster are required to provide pro bono mediation services in exchange for getting paid cases referred to them. This may be on a case-by-case basis or by volunteering at the court for a specified time, such as one morning once a month.

Goals for a family mediation program can be wide-ranging. Courts often state a public policy interest in reducing conflict between parents so as to reduce the negative effects of that conflict on their children. Courts may require parenting education on top of the mediation efforts. One issue that is unique to family law is screening for intimate partner violence (IPV.) This can occur in any area of the law, but it is particularly important to screen for it in family cases and have a procedure in place to address it. Sometimes special programs are offered to allow for continuation of the ADR services, but with protections in place. Other important goals include reducing the amount of time spent in court and increasing the durability of agreements that are

²³ See The Tennessee Faith & Justice Alliance, at <http://justiceforalltn.org/i-can-help/faith-based-initiative> (last visited 7/26/15); The Tennessee Faith & Justice Alliance Implementation Manual, at <http://justiceforalltn.org/sites/default/files/08.26.2014%20Implementation%20Manual.pdf> (last visited 7/26/15).

reached. Though public legal aid has been limited for them in the past, it is likely given the current political momentum that LGBT families will soon be eligible for these benefits as well.

A critical consideration at the outset is which types of cases are amenable to being handled by the ADR program. The most prevalent programs are those involving mediation of custody issues between divorcing parents. Some programs only handle initial divorce proceedings, while others may handle post-decree matters. Court-sponsored programs that address financial aspects of divorce are not typical. Some programs will handle child support while dealing with parenting time and decision-making (formerly called visitation and custody). It is unlikely that a court-sponsored program will handle division of property, but for couples who need to divide debt, this could be a valuable service. Most often, these financial issues are left to lawyers and private mediators to resolve.

Even issues which are present in all mediation cases provide a unique challenge in the family law setting. For example, how is confidentiality ensured? This can be difficult if mediators are present in courtrooms and may be drawn into reporting on what happened in mediation. Another issue is ensuring fair allocation of any sliding scale or pro bono responsibilities among providers. Services are delivered by an array of providers, including court staff, private practitioners, non-profits—community mediation centers or legal clinics—or some combination of these. Being well-known and respected by judges may lead to certain mediators being asked in a disproportionate amount of cases to provide their services in exchange for lower, or no, fees. Of course the biggest issue in family cases is how to provide equal access to all parents.

III. Lawyers Use of Limited Scope Representation to Provide Settlement Assistance

In addition to providing free or low cost access to ADR services, another way to increase access to justice would be to structure legal services so that attorneys can provide affordable, limited scope representation to help clients settle cases. In today's legal market, the traditional model of limited scope representation is to help otherwise pro se clients with discrete tasks in a lawsuit, such as complaint drafting.²⁴ Professor Blankley previously wrote that the use of limited scope representation for standard litigation services is short-sighted because it does not help clients get what they usually want – a solution to their underlying problem.²⁵ Instead, Blankley suggests that attorneys consider offering limited scope representation services to help clients settle cases, not prolong them.²⁶ This section considers several types of limited scope representation attorneys could offer so that clients could gain additional access to justice.

A. Negotiation Services or “Settlement Counsel”

Lawyers are well suited to provide clients with advice and counsel during settlement negotiations. Acting as “settlement counsel,” could take a number of forms. The duties associated with being settlement counsel could entail any number of activities, including: factual

²⁴ Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 Ohio St. J. on Disp. Resol. 659, 662 (2013).

²⁵ *Id.* at 673.

²⁶ *Id.* at 674.

investigation, determining interests, generating settlement options, preparing for negotiations, attending negotiations, and reviewing any resulting agreement. To engage in this type of limited service, the lawyers should require a detailed engagement letter that delineates the services that the lawyer will and will not provide for the client.

Lawyers can fill an essential role as settlement counsel. Because parties are invested in the outcome of their dispute, they might be considered “too close” to the conflict in order to prepare realistic settlement offers and demands.²⁷ Lawyers, as neutral third parties, can help clients understand the realistic settlement options (both monetary and non-monetary) and can help give the clients what they really want – resolution to their underlying problem.

Settlement counsel could be used in a wide variety of areas. For instance, clients going through an amicable divorce could use settlement counsel to negotiate a division of property or a parenting arrangement for the children and draft agreements that would be acceptable by the courts. Landlord-tenant attorneys could prepare tenants to navigate public assistance or to negotiate with their landlords on issues such as repairs or return of a security deposit. Clients in foreclosure could learn from lawyers about programs that banks do not make publicly available, such as “cash for keys” options to walk away from a home and not be liable for outstanding mortgage deficiencies.

The attorney and client can strategically decide whether to disclose counsel’s limited involvement in the case. Except where required by ethical or court rules,²⁸ the scope of the attorney-client relationship is governed under ordinary rules regarding confidentiality and privilege.²⁹ If the lawyer suspects that disclosing the limited nature of the representation would be detrimental to the client,³⁰ then the lawyer could either not participate or not disclose the limited nature of the representation. The parties may decide that disclosing the limited nature of the representation could actually serve the party’s interests, especially if the lawyer and client believe that the opposing side or attorney would much prefer to deal with a representative than a pro se client.

Considerable flexibility exists in the attorney/client relationship for settlement counsel. The client can retain the lawyer for as much or as little as the client needs, provided that the client understands the limited nature of the services.³¹ The fee structure between the two parties can also be flexible and creative, ranging from a flat fee, to an hourly rate, to a contingency fee, provided that the fee is reasonable.³²

²⁷ The psychological phenomenon of the “overconfidence bias” is clearly at play in this situation. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051, 1091 (2000) (defining “overconfidence bias” as the “belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us”); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 Vand. L. Rev. 1653, 1659 & n.22 (1998) (describing underestimation and overestimation while citing almost 200 articles in support of claim).

²⁸ See Neb. Ct. R. of Prof. Cond. § 3-501.2.

²⁹ See ABA Model R. of Prof. Conduct R. 1.6.

³⁰ Perhaps the lawyer would be concerned that the other side would be willing to “wait it out” until the lawyer concludes.

³¹ See ABA Model R. of Prof. Conduct R. 1.2(c).

³² See ABA Model R. of Prof. Conduct R. 1.5.

B. Mediation Services

Similar to providing settlement counsel services, an attorney could alternatively provide mediation representation services to a client on a limited scope basis. In addition to the types of tasks that a lawyer may provide parties for settlement services, mediation representation might include the additional tasks of: attending the mediation, preparing the client for mediation, drafting mediation communications, and reviewing mediated agreements.

Although mediation is an informal process, some scholars argue that an unsophisticated party could be at a strategic disadvantage in mediation if a significant power imbalance exists between the parties.³³ In these types of cases, a lawyer's presence at the mediation table may be particularly valuable to the client and allow for meaningful access to the mediation forum. Many states now require mediation in cases involving parenting time or custody arrangements,³⁴ and availability of representation for a marginalized spouse could promote greater equality in bargaining power and more significant access to justice for the parties. The same could be said for consumers, tenants, and employees who mediate against large, institutional players.

Lawyers are in a unique position to counsel clients on whether and when they should try mediation. They can explain to clients how the mediation process works and whether it is a good choice for their particular situation. The lawyer ethics' rules specifically allow lawyers to counsel clients on non-court options,³⁵ and some experts in the field argue that the lawyer's duty should go so far as to counsel every client about the possibility of different types of settlement procedures.³⁶

Acting as mediation counsel is also a good way for lawyers to engage in limited pro bono services. For instance, in Los Angeles, California, the Public Counsel Appellate Law Program

³³ Margaret B. Drew, *Collaboration and Coercion*, 24 *Hastings' Women's L.J.* 79, 91 (2013) ("The enhancement of the imbalance of power to the detriment of the target in mediation and in other settings has been the primary concern of domestic violence lawyers in opposing ADR schemes."); C. Quince Hopkins, 35 *Harv. J.L. & Gender* 311, 349 n.184 (2012) ("Mediation does not necessarily require or presuppose complete equal bargaining power; most mediators must – as a matter of course – negotiate differentials in bargaining power between parties to the mediation. However, it is inappropriate in cases where bargaining power between the parties is grossly unequal. In many, if not all, cases of intimate partner violence, one of the central dynamics of these relationships is the excessive exercise of power and control by the batterer over the victim. These bargaining power inequalities in IPV relationships can lead to unfair settlements, despite the mediator's skill.").

³⁴ Neb. Rev. Stat. § 42-364; Illinois Cook Co. Cir. Ct. R. 13.4 (d)-(e); Cal. Fam. Code § 3170 (West 1994 & Supp. 2002); Del. Fam. Ct. C.P.R. 16; Idaho Civ. P.R. 16(j); Haw. Rev. Stat. § 580-41.5 (Supp. 2001); Haw. Fam. Ct. R. 94(a); Fla. Stat. Ann. § 44.102(c); Me. Rev. Stat. Ann. tit. 19-A § 251 (West 1998); Nev. Rev. Stat. Ann. § 3.475 (Michie 1998); N.C. Gen. Stat. § 50-13.1(b)-(c) (2001); Okla. Stat. tit. 43, § 107.3 (2001); S.D. Codified Laws § 25-4-56 (Michie 1999); W. Va. Code Ann. § 48-9-202(3)(b) (Michie 2001); Utah Code Ann. § 30-3-39; Washington SPR 94.08.3; Oregon Lane Co. Cir. Ct. R. 12.001.

³⁵ See ABA Model R. of Prof. Conduct R. 2.1 (2011). The comments to the professional rules state: A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matter, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations. Model R. of Prof. Conduct R. 2.1 cmt. (2011).

³⁶ *Id.* ("Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.").

has encouraged lawyers to take on a pro bono representation for the limited purpose of representing a client in appellate mediation.³⁷ Of course, counsel need not take on these cases pro bono. They could engage in any number of billing arrangements, such as flat fee, hourly fee, or fixed fee rates.

C. Arbitration Services

Arbitration agreements are standard contract terms when dealing with certain industries, such as the cellular telephone industry, the securities industry, and the banking industry.³⁸ Many large employers also use arbitration agreements to resolve workplace disputes.³⁹ Given the popular nature of arbitration agreements in consumer contracts, low-income and middle-class consumers and employees may find themselves as parties to arbitration when they have a disagreement with a business regarding a service, product, or their employment.

The arbitration process is often similar to the litigation process, but it usually boasts relaxed procedural rules and expert decision-makers.⁴⁰ To cut down on expenses, parties in arbitration are not expected to engage in protracted discovery or motion practice prior to the hearing.⁴¹ Hearings are expected to be relatively brief compared to civil trials.

Given the many similarities between arbitration and litigation, lawyers should naturally have the skills that clients need to act as arbitration counsel. The time frame for most arbitrations is less than a year from filing to award, compared to well over a year for most civil litigation to conclude.⁴² The shorter time frame and limitations on discovery and motion practice would likely make this type of limited representation feasible from the lawyer's perspective, and valuable to the client under any reasonable fee arrangement the parties enter.

D. Collaborative Practice

Collaborative law is, by definition, a limited practice. Collaborative lawyers agree with their clients at the beginning that the lawyer will work with the client, the other collaborative

³⁷ Meehan Rasch, *A New Public-Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono "Triage" for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461, 488 (2010) (noting that a small handful of cases received pro bono assistance for helping indigent pro se parties with mediation representation).

³⁸ Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 Case W. Res. L. Rev. 91, 92 (2012) ("Arbitration is omnipresent. If you have a bank account, a credit card, or a cell phone, you have an arbitration agreement."). Note, too, that some major companies, such as Bank of America, are moving away from using arbitration agreements in their consumer contracts.

³⁹ This paper considers only those employment agreements outside of the context of a collective bargaining situation. Although multi-step grievance procedures culminating in arbitration is common in collectively bargained agreements, a union generally offers additional procedural protections for individual employees than a non-unionized workplace.

⁴⁰ See, e.g., John Arrastia Jr. & Christi L. Underwood, *Arbitration v. Litigation: You Control the Process v. the Process Controls You*, Disp. Resol. J., November 2009-January 2010, at 32-33 (discussing flexible rules and arbitrators that have more experience than a judge or jury).

⁴¹ See *id.* at 35-36.

⁴² *Id.*

lawyer, and the other side to exchange information and resolve the case amicably.⁴³ If the collaborative process does not yield a solution, then the lawyers withdraw from the case, and the parties are required to hire new lawyers for the litigation process.⁴⁴ Currently, collaborative law has gained the most traction in the area of family law,⁴⁵ but its use continues to expand into other areas of the law, such as medical malpractice, and other types of civil litigation.⁴⁶ Currently, most collaborative lawyers charge an hourly fee, but other types of reasonable fee agreements could be made with clients.

E. Summary

Limited scope representation is an innovative way to turn “nobody’s clients” into represented parties. It also allows clients to get critical assistance at critical moments in their lives. Finding creative ways to increase lawyer services to those who cannot afford “full service” representation also promotes access to justice. Given the considerable flexibility that lawyers and clients have to limit the scope of representation and to charge reasonable fees, we anticipate increased use of limited scope arrangements to give additional resources to otherwise unrepresented parties.

IV. Online Dispute Resolution

Online Dispute Resolution (“ODR”) also provides an opportunity for increased access to justice for individuals with legal and other disputes. The ODR umbrella includes a large range of services that utilize technology to help resolve disputes. Those technologies can be as simple as email correspondence or as complex as using a platform to complete an entire mediation session online.

ODR offers a variety of benefits, especially for those of limited means. ODR can significantly cut costs associated with travel time because individuals can participate from their homes or places nearby.⁴⁷ The cost of an experienced neutral may also be lower if travel costs are greatly reduced or eliminated.⁴⁸ Most people have technology capable of allowing them to participate in ODR. Notably, a computer, webcam and microphone are necessary if the parties

⁴³ See, e.g., Lawrence P. McClellan, *Expanding the Use of Collaborative Law: Considerations of its Use in a Legal Aid Program for Resolving Disputes*, 2008 J. Disp. Resol. 465 (2008) (describing the potential for a pro bono program involving collaborative law, and posing a suggestion that due to the fact that the model requires two collaborative lawyers, that the program could be limited to cases in which both parties are represented under the program). See also Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. Disp. Resol. 163, 163 (2008) (“The ability of the attorneys to limit the scope of our services based upon written informed decision making (i.e., consent) of the client is mainstay of both unbundled client coaching of pro se litigants and of Collaborative attorneys.”).

⁴⁴ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-44, at 2 (2007).

⁴⁵ See, e.g., Deborah Cantrell, *The Role of Equipoise in Family Law*, 14 J. L. & Fam. Stud. 63, 71 (2012) (“[C]ollaborative law is now an established way in which a family law matter may be handled.”).

⁴⁶ Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 Ohio St. J. on Disp. Resol. 659, 677 n.66 (2013).

⁴⁷ Noah Ebner, “E-Mediation,” *Online Dispute Resolution Theory and Practice*, Chapter 17 (May 2013), www.mediate.com/pdf/ebner1.pdf.

⁴⁸ Ebner, pg. 377.

wish to be able to videoconference in real time. In other circumstances, a telephone and access to email will be sufficient technology to resolve the dispute.

For transactions that begin online, parties may expect that they would resolve their disputes online, as well.⁴⁹ For those dispute resolution consumers who were born into Generation X or the Millennial Generation (who have generally been using computers most or all of their lives), using online methods to resolve disputes might be comfortable, if not ideal.⁵⁰ Often, online transactions involve parties at a great distance nationally or internationally, and resolving those disputes online alleviates these types of distance concerns.⁵¹

Although ODR offers these, and other, advantages, the process is not without some concerns. Not everyone has access to reliable equipment or services that would be ideal for ODR. Even in this day and age, not everyone owns a computer, and not every computer owner has access to high-speed services necessary for some ODR platforms.⁵² Individuals who relied on the computer and internet services of a family member or public library in order to make the online purchase at issue may be unwilling or uncomfortable to use those resources to resolve a dispute online.⁵³

Another disadvantage of ODR is the loss of communication dimensions that are present in face-to-face (F2F) negotiations. In normal conversation, only 7% of meaning is conveyed through word choice.⁵⁴ Upwards of 38% of meaning is conveyed through the tone, tenor and pitch of the speaker's voice, while the remaining 55% of meaning is conveyed through nonverbal communication.⁵⁵ Given these findings, text-based ODR potentially loses upwards of 93% of the meaning that people normally ascribe to conversations.

Some types of disputes may be predisposed to being resolved online. For instance, if the dispute surrounds a transaction that began online, then resolving the dispute online may make perfect sense.⁵⁶ Custody cases involving parents who live great distances apart may also be good candidates for ODR because dealing with child custody issues is time-consuming, and one party

⁴⁹ Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. Tol. L. Rev. 193 (2006).

⁵⁰ *Id.* at 210 n.91 (noting that as the public begins to use and become familiar with these types of technologies in their lives, "individual parties may feel more comfortable using these types of programs in the context of online mediation.").

⁵¹ *Id.* at 205.

⁵² See, e.g., Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, American Community Survey Reports, ACS-28, U.S. Census Bureau (2014). (In 2013, 83.8% of U.S. households reported computer ownership. Also, 74.4% of households reported Internet use, with 73.4% reporting a high-speed connection).

⁵³ Blankley, *supra* note 26, at 206.

⁵⁴ Pamela Peters, *Gaining Compliance Through Non-Verbal Communication*, 7 Pepp. Disp. Resol. L.J. 87, 87 (2007). See generally Albert Mehrabian, *Silent Messages* (1971); See also V. Hale Star & Mark McCormick, *Jury Selection* § 12.02 (2001) (finding that non-verbal communication accounts for 65-70% of total human communication).

⁵⁵ Peters, *supra* note 31, at 87.

⁵⁶ See generally Am. Bar Ass'n Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Disputes in Electronic Commerce* (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf>.

or the other may not be able to travel.⁵⁷ International disputes are also good candidates for ODR.⁵⁸

ODR takes a wide variety of forms, and the process can be tailored to meet the needs of the parties and the mediator. For instance, the parties in an interstate custody conflict may need to use videoconferencing or teleconferencing technologies so that everyone can be “present” at the same time for the process. For ecommerce disputes, parties may agree to use entirely online platforms,⁵⁹ designed specifically for these types of issues. In other circumstances, communicating via email, text messages, or other text-based resources may be sufficient.

Because of the potential cost-savings, ODR is a possible avenue for access to justice. The ability to engage in conflict resolution from the comfort of a person’s own home and computer may empower more people to resolve conflicts – especially conflicts that are relatively low in dollar value (but not low in importance).

V. Ethical Issues Involved

a. Pro Bono Aspirations

Many codes of professional conduct and ethics have aspirational goals for the amount of pro bono hours for the members of the profession. For instance, the American Bar Association Model Rules of Professional Conduct for lawyers suggests that lawyers should “aspire to render at least (50) hours of pro bono” legal services per year.⁶⁰ In a handful of states, lawyers are required to report their pro bono activities with the state bar when they renew their registration or pay their dues.⁶¹ In some other jurisdictions, reporting of pro bono hours is voluntary.⁶²

ADR opportunities provide a natural synergy with these pro bono aspirations. Taking on a pro bono client, especially as a litigation client, can be a daunting task that requires an unknown amount of time. More attorneys may be willing to engage in pro bono service if they

⁵⁷ Melissa A. Kucinski, *The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases*, 2010 J. Disp. Resol. 297, 298 (2010) (discussing barriers to mediating custody issues face-to-face such as a parent being unable to travel due to practical or logistical reasons including high costs or the inability to obtain a visa).

⁵⁸ See generally Mary Shannon Martin, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. Int’l L.J. 125, 125 (2002).

⁵⁹ Such as Modria (*available at* <http://modria.com>) and Net-Arb (*available at* <http://www.net-arb.com>). See Paul W. Breaux, *Online Dispute Resolution: A Modern ADR Approach*, 62 La. B.J. 178 (2014). (Fix? More Explanation?)

⁶⁰ See ABA Model R. of Prof. Conduct R. 6.1.

⁶¹ See Fl. R. Prof’l Conduct 4-6.1; Hawaii S. Ct. Rule 17(d); Ill S. Ct. R. 756(f); Ind. R. Prof’l Conduct 6.7; Md. R. Procedure 16-903; Miss. R. Prof’l Conduct 6.1(e) & 6.1(f); Nev. R. Prof’l Conduct 6.1(b); N.M. Bar R. 24-108(C).

⁶² The states that have voluntary reporting include Arizona, Connecticut, Georgia, Kentucky, Louisiana, Michigan, Montana, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington. See American Bar Association Standing Committee on Pro Bono Service and the Center for Pro Bono, *available at* <http://apps.americanbar.org/legalservices/probono/reporting/pbreporting.html>.

knew that the engagement would be limited, either as an advocate or as a neutral.⁶³ Working as an advocate on a limited scope arrangement to provide ADR services would not only give meaningful assistance to a client but also would be a task that a lawyer could easily handle in terms of time commitment.

Equally important, lawyer-neutrals could volunteer their time in cases where the clients cannot afford to pay. Lawyer-neutrals could work on these cases either through their personal practice or by working with community centers and volunteering their time to the community center. For example, if community mediation centers schedule two-hour mediations, a lawyer who donates fifty hours of time to that mediation center could work on twenty-five cases per year while meeting the bare minimum of the bar's recommendations. Another option may be to donate the first two hours for free, and then allow the lawyer to charge a regular fee for any additional time. Lawyer-arbitrators should also consider taking on cases through public agencies or pro bono, including programs like settlement week or small claims.⁶⁴

Any number of options exists for providing pro bono ADR services to those who cannot otherwise afford to pay. Increasing awareness of these opportunities will hopefully result in additional access to justice for those who otherwise cannot afford to pay.

b. Dealing With Pro Se Litigants as Mediators

Special ethical concerns arise when a lawyer mediator is working with at least one pro se party. These concerns exist whether or not the client is a paying client, so they are not necessarily unique to these types of access to justice issues. We briefly discuss them here because we recognize that mediation clients who are struggling with access to justice issues will likely be unrepresented in the process.

1. Legal Information and Legal Advice in Mediation

Mediation is generally understood to not be the practice of law.⁶⁵ The ABA Section of Dispute Resolution acknowledged in its resolution that practicing mediation, including discussing legal issues and making certain predictions about the case or settlement options, would not constitute the practice of law.⁶⁶ The ABA warns, however, that in certain cases, unrepresented persons may believe that the mediator is acting in their best interest, especially if discussing things like legal options and consequences.⁶⁷ This assumption may be exacerbated if

⁶³ Kristen M. Blankley, *Adding by Subtracting, How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 Ohio St. J. on Disp. Resol. 659 (2013).

⁶⁴ See ABA/AAA Standards of Conduct for Commercial Arbitrators, Canon I(A) (“[A]n arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.”).

⁶⁵ ABA Section of Dispute Resolution, Resolution on Mediation and the Unauthorized Practice of Law, Adopted by the Section on February 2, 2002 (“Mediation is not the practice of law. Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law.”).

⁶⁶ *Id.* at cmts 5 and 6. The ABA recognized that certain states prohibit mediators from making these types of predictions and discussing legal consequences of cases. *Id.* (citing laws from Virginia and North Carolina).

⁶⁷ *Id.*

the mediation takes place in caucus and the mediator appears to be giving advice to one party in a setting that is confidential even from the other party.

In cases involving unrepresented parties, attorney mediators have the affirmative obligation to disclose their status and education as attorneys, while also explaining to the parties that the mediator is not there to represent one or both of the parties.⁶⁸ The purpose of the disclosure is to make the parties aware of the mediator's education and training and to set expectations at the beginning that the mediator will not be entering into an attorney-client relationship with the participants. It is particularly important that the mediation clients do not believe that the mediator is acting in an attorney role and protecting client interests.⁶⁹

One situation that can be problematic is when a pro se party seeks legal advice from the mediator because the party cannot afford legal counsel. In this situation, the best practice for the mediator would be to explain to the party that the mediator is not there to give anyone legal advice and that the party may want to seek his or her own counsel before coming to any decisions. The mediator may wish to provide the party with a list of attorney referrals, including the names of lawyers who are willing to provide limited scope representation.⁷⁰

2. Power Imbalances

In mediation cases in which only one party is represented, a significant imbalance of power between the parties may exist. As noted above, pro se litigants fare particularly poorly in litigation, and some critics argue that the informal nature of mediation has the potential to make power imbalances worse.⁷¹

Mediators, of course, have an ethical responsibility to ensure that the process is fair and that all parties have a chance to be heard. Under the Model Standards, mediators must ensure the "quality of the process," which includes promoting "party participation, procedural fairness, party competency and mutual respect among all participants."⁷² Mediators should certainly be mindful of all potential power imbalances, especially in the area of domestic relations, where the power imbalances can be more subtle than the presence or absence of a lawyer.

The least controversial way to remedy a power imbalance is to treat both parties with equal dignity and respect. By treating the parties as co-equal, then they will hopefully be able to communicate with or through the mediator as such. Some mediators will try to balance

⁶⁸ Model R. Prof'l Conduct R. 2.4.

⁶⁹ When courts determine whether or not an attorney/client relationship exists, they almost uniformly consider this question from the point of view of the client, not the attorney. Restatement (Third) of Law Governing Lawyers § 14 cmt. c (2000) (indicating it is the client's perspective which determines whether an attorney-client relationship has been formed).

⁷⁰ The Mediation Center, a community mediation center in Lincoln, Nebraska, maintains such a list of lawyers in the community willing to work with pro se parties on a limited basis. The mediators are instructed not to endorse one attorney over another and to provide this list of references to any party who would like one.

⁷¹ See, e.g., Richard L. Abel, "The Contradictions of Informal Justice," in 1 *The Politics of Informal Justice: The American Experience* 297-98 (R.L. Abel, Ed., Academic Press 1982); Owen Fiss, "Against Settlement," 93 *Yale L. J.* 1076 (1984).

⁷² Model Standards of Conduct for Mediators, Standard VI, Quality of the Process.

informational disparities by giving legal information or other type of assistance to a party of lower power, but these techniques may raise issues of the mediator's bias in favor of the disempowered party.⁷³

3. Bias

Closely associated with issues of power imbalances are issues of bias. Mediators who attempt to "fix" power imbalances may appear biased in that parties' favor. On the other hand, mediators also need to be careful to not be biased *against* unrepresented parties. Neutrality is one of the most highly regarded expectations of mediators. Under the Model Standards of Conduct for Mediators, "impartiality" is defined as "freedom from favoritism, bias or prejudice."⁷⁴ Mediators must avoid both actual bias as well as the appearance of bias.⁷⁵ (Arbitrators, too, must be careful of both actual and perceived bias.⁷⁶)

In mediation, bias issues can easily swing both ways. On the one hand, an unsophisticated party may not have a polished appearance or speak in a polished manner. The unsophisticated party may not be able to make cohesive legal arguments and may be asking for remedies that are simply unavailable. All too easily, a mediator may dismiss the interests, issues, and legal arguments of this party, especially if the other side is sophisticated or represented by counsel. The converse situation, however, may also jeopardize a neutral's neutrality. Coming to the aid of an unsophisticated party, either through emotional or legal support, may tilt a neutral's bias *toward* the unsophisticated party.

One way to handle bias issues is to treat every party with equal dignity and respect. Treating all parties alike will hopefully convey the message that each party has worth in the eyes of the neutral, but not that one party is better or worse than the other. In addition, continual self-awareness of potential bias issues is crucial for ensuring that a neutral does not favor one side or the other. As soon as a neutral is aware of a potential bias, the neutral should determine whether or not such bias can be put aside. If not, then the neutral should withdraw from the situation.⁷⁷

4. Participants' Ability to Relate to Mediators

Access to justice issues, by definition, deal with underserved populations. These populations often include parties that are minorities (as defined by race, gender, sexual orientation, religion, etc.). The pool of dispute resolution specialists, however, is disproportionately Caucasian and male. Efforts to increase employment opportunities for women and minorities in dispute resolution have been initiated to increase diversity,⁷⁸ but this is an area that can use increased attention and support.

⁷³ Model Standards of Conduct for Mediators, Standard II, Impartiality.

⁷⁴ Model Standards of Conduct for Mediators, Standard II(A), Impartiality.

⁷⁵ Model Standards of Conduct for Mediators, Standard II(A & B), Impartiality

⁷⁶ ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon I(B)(1) ("One should accept appointment as an arbitrator only if fully satisfied . . . that he or she can serve impartially.").

⁷⁷ Model Standards of Conduct for Mediators, Standard II, Impartiality.

⁷⁸ The American Bar Association Section of Dispute Resolution has committees dedicated to increased presence of women and minorities in dispute resolution, such as Women in Dispute Resolution (WIDR) and Minorities in Dispute Resolution (MIDR).

Cultural diversity (and competency) is particularly important in dealing with unrepresented parties in mediation. Conflict is personal to each individual, and understanding culture aids in mediation.⁷⁹ For the many mediators who take a broad view of their role as dispute resolution specialists,⁸⁰ understanding cultural issues is key to resolving disputes. Increased diversity in the mediator pool will greatly aid in access to justice and understanding of marginalized populations.

Where possible, a co-mediation model can help with diversity issues. For example, a co-mediation pair of a man and a woman can be helpful in a parenting dispute. Mediators of different races or religions may be helpful in cases involving discrimination. Even when disputes are not motivated by race, gender, or other differences between the parties, a co-mediation team that reflects the genders, races, religions, sexual orientations, lifestyles, or other unique characteristics of the disputants may help the parties feel comfortable with the process.

VI. Recommendations and Conclusions

Implementing ADR as a tool to improve access to justice would involve a number of strategies. They would include educating judges and court staff; educating lawyers; providing on-line, user-friendly services; increasing the use of skilled volunteers; and increasing funding.

a. Educating the Judiciary and Court Personnel

Making the judiciary aware of the opportunities for affordable, quality ADR services would be a good first (and continuing) step for increased access to justice. As this Paper demonstrates, opportunities exist for low- and moderate-income clients to receive access to justice through quality processes. These processes would help them reach conflict resolution in a manner that is quicker, more cost efficient, less stressful, and more likely to meet the underlying interest of the disputants than traditional court processes.

Although this recommendation sounds like Professor Sander's famous "multi-door courthouse,"⁸¹ the idea of channeling different disputants with different needs to different processes should increase access to resolution of problems. This practice is already underway in a number of jurisdictions, using titles such as "multi-door courthouse," "differentiated case management," and case triage.⁸² Expanding these types of programs into other jurisdictions using resources already available could expand access to justice.

⁷⁹ See, e.g., Farhana Chowdhury, *Cultural Diversity in Mediation and Conflict Resolution* (January 2014), available at mediate.com/articles/ChowdhuryF1.cfm.

⁸⁰ Prof. Leonard Riskin developed a now-famous grid of different mediator orientations. For those mediators who engage in a broad, facilitative practice, recognizing cultural issues will be particularly helpful.

⁸¹ Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) ("[O]ne might envision. . . a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process. . . most appropriate to his type of case.").

⁸² See, e.g., David A. Hoffman, *Certifying ADR Providers*, Bos. B.J. 9 (1996) ("[O]utstanding court-connected programs, such as those offered by the Massachusetts Office of Dispute Resolution (MODR) and the Middlesex and Worcester Multi-Door Courthouses."); N.Y. Ct. R. 202.19 (McKinney) (differentiated case

In addition, research supports the use of ADR programs and participants' satisfaction with the processes.⁸³ This established research should give courts confidence that when they refer cases out to ADR processes, they are not subjecting the people who enter their courthouses to "second-class justice."

Mediation centers, lawyers, and court administrators should take the lead in preparing educational programming for the judicial branch. If the service providers can speak first-hand about the programs that are available within their own jurisdictions, then the courts can have increased confidence referring their cases to these other available services.

In addition, court personnel should also be educated on alternative avenues for increased access to justice. Court clerks, bailiffs, and other personnel often receive calls from unrepresented parties looking for help. If the entry points into the system know about these additional avenues for justice, then the disputants can learn about other options that can help them.

b. Educating Lawyers

In addition to increased education for the judiciary, increased education for lawyers on their role in ADR processes will also increase access to justice. Lawyers have a central role to play in this arena, both as a referral source and as a participant in the process.

i. Best Practices

Going forward, the development of explicit "best practices" for lawyers would significantly help guide lawyer conduct and give increased legitimacy to these concepts. Those best practices should cover both the lawyer's role as a neutral in mediation as well as the lawyer's role as an advocate in ADR processes. This Paper will hopefully serve as a good first step towards the development of more concise "best practices."

ii. Education on Limited Scope Representation

Additional education on the issue of unbundling would be extraordinarily helpful for attorneys. The area of limited scope representation is still new, and despite assurances to the

management); Oh. Domestic Violence L. § 5:4 ("Effective "triage," or ranking of priority for prosecution according to an agreed-upon set of criteria, requires the following considerations. . . .").

⁸³ See generally Cynthia F. Cohen & Murray E. Cohen, *Relative Satisfaction with ADR: Some Empirical Evidence*, Disp. Resol. J., 57 Disp. Resol. J. 37 (2003) ("The processes in which the student subjects had the most control over both the process and the outcome (*i.e.*, negotiation, mediation and med-arb) were rated higher. . . ."); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 Harv. Negot. L. Rev. 137, 176 (2000) ("Approximately three-quarters of respondents who had some personal experience with ADR were satisfied with both the process (76%) and results (73%)."); James S. Kakalik, Inst. Civil Justice, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, 42 (1996) ("[I]n three of the four mediation districts studied, a greater percentage of litigants from mediation cases report satisfaction than from the comparison cases.").

contrary, some long-practicing attorneys still have concerns about the ethics of something other than “full service” representation. As discussed above, nothing is *per se* unethical about limited scope practice. In many situations, limited scope representation might be the most cost-effective avenue for quality access to justice.

If more lawyers were aware of the possibility of providing limited scope services, as well as the related ethical responsibilities of the practice, then more lawyers may be willing to provide these much-needed services. To help educate lawyers, this area is particularly ripe for continuing legal education programming, legal articles (both in law reviews and in bar journals), as well as networking opportunities for lawyers who provide these services. Once a critical mass of limited scope attorneys are present in a jurisdiction, a section of the local bar can be created in order to organize additional educational and networking opportunities.

c. Additional Clinical Instruction

Legal education is shifting toward more experiential learning. Students can gain valuable real life experience when they work in a legal clinic. Some of the current clinical offerings in ADR, both acting as a neutral and as an advocate in ADR processes, are detailed above. Although some law schools are starting to make strides in the area, additional clinical instruction in ADR would increase access to justice by providing ADR services to the indigent.

One of the biggest challenges in running law clinics is that they are costly programs. Under ABA accreditation guidelines, the student/faculty ratios cannot be more than eight students to one professor, and often the clinical instructors do not teach courses other than the clinics. In other words, a large amount of human capital (often in addition to clinical space and support staff) provides opportunities for only a limited amount of students. Some law schools are experimenting with classes called “practicums,” that have a limited experiential component in addition to a classroom component, and these courses are not necessarily bound by the traditional eight-to-one ratio.

In addition to clinical instruction, law schools could make a greater effort to use externship placements in ADR fields to facilitate access to justice. Community mediation centers, state agencies, and non-profit ADR organizations would likely welcome law students (and perhaps students from other disciplines) to work with them for a semester or year. These students would be able to earn course credit while supporting the organization and perhaps adding capacity to help the low- and middle-income families that most often use those services.

d. On-Line, User-Friendly Services

Finally, this paper recommends that the services provided to unsophisticated parties be user-friendly, understandable and online. As noted above, many pro se litigants in the justice system lose their cases, in part, because the system is complicated and difficult to navigate. Access to justice could be increased by disseminating legal information in a format that is accessible, readable, and user-friendly.

For example, Arizona created an extensive handbook to help parents understand the various types of custody arrangements available.⁸⁴ The handbook includes information on child development and gives ideas for plans depending on the child's age and other circumstances. This type of publication is used to help parents prepare for mediation and open up possibilities for developing parenting plans. The information gives the parents a good baseline that can be used during the mediation. Making it available online would add to its accessibility and decrease the cost of distribution.

Other jurisdictions have made available a comprehensive list of online forms that can aid self-represented litigants.⁸⁵ The purpose is for the litigants to be able to determine what information they need and complete legal forms with little assistance. Fillable forms do help those who have computer access and know where to find them. Making this type of legal information readable and easy to find can help any access to justice plan.

Forms and additional information could be developed to help parties going into mediation. For instance, pre-mediation forms could have parties consider the facts and story they want to present in mediation, consider questions to ask of the other party, and develop potential options for resolution. In the arbitration sphere, parties could be guided to prepare statements and present evidence. The informality involved in ADR procedures should give parties a less steep learning curve, and guided forms and other information may help prepare self-represented litigants. Combining technology and ADR would significantly increase access to justice.

e. Increased Funding

Increased funding would greatly aid access to justice, including providing no or low cost ADR services. The Section understands that in this time of tight budgets this recommendation may appear "easy" on paper, but is actually very difficult. Nonetheless, increasing funding for ADR services would be a tremendous step towards making the recommendations in this paper a reality. Funding sources could come from a variety of places, including sliding fees based on ability to pay, court filing fees, settlements, government funds, grant funding, private donations, income-generating services such as training, and other creative funding sources.

One example is the support of foreclosure mediation in Illinois by the Illinois Attorney General⁸⁶ through funds obtained under the national mortgage settlement between five big banks and a number of state attorneys general. This provided \$5 million in funds that are being expended over four years to provide foreclosure mediation services in areas not previously served.

VII. Conclusion

This white paper serves as an introduction to how the access to justice movement can benefit from increased intersection with alternative dispute resolution. To date, access to justice

⁸⁴ Arizona Supreme Court, *Things You Should Know About Custody and Parenting Time* (2003).

⁸⁵ Neb. Judicial Branch Public Forms Website, *available at* <https://supremecourt.nebraska.gov/forms>.

⁸⁶ http://www.illinoisattorneygeneral.gov/pressroom/2013_04/20130425.html

has largely focused on access to the court system. A broader view of access to justice should include access to quality processes and access to resolution of disputes. This broader view would have the effect of gaining longer, lasting solutions that meet the disputants' needs in ways that might never be possible in the traditional justice system.