

Special Feature: The CPR-Georgetown Ethical Principles for ADR Providers

ETHICAL GUIDELINES

ADR Provider Organizations should Increase Transparency, Disclosure

Margaret L. Shaw*
Elizabeth Plapinger**

The past five years have seen a remarkable number of efforts to define, regulate, re-regulate and refine ADR practices. Most of this activity has centered on the role of the individual neutral and his or her professional responsibilities to the parties, the processes and the public.

While this regulatory work was proceeding, other policy and market developments were calling attention to the organizations that deliver ADR services, commonly known as ADR provider organizations. These largely unregulated entities, sometimes described as "independent", have begun to play increasingly visible roles in our intertwined public and private justice systems. ADR provider organizations administer mediation and arbitration services in a variety of public and private, mandatory and voluntary ADR systems in the full range of contemporary disputes, including employment, business, health, product liability, consumer, banking, discrimination, securities, and environmental disputes.

In 1996, the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR convened a group of ADR practitioners, academics, judges, and senior executives from various ADR provider organizations, to consider the advisability of developing standards of responsible practice to provide guidance for the expanding field of ADR provider organizations.¹ As the courts were beginning to scrutinize the fairness, independence and integrity of dispute resolution services offered by ADR provider organizations,² the CPR-Georgetown Commission set out to identify core principles and establish a common framework for independent and responsible practice by ADR provider organizations. Propelling this work was the conviction that ADR provider organizations play, and will continue to play, a central role in the delivery of fair, impartial and quality dispute resolution services.

The draft Principles for ADR Provider Organizations which follow this article are the result of this multiyear effort. The excerpted version appearing here omits the commentary, footnotes and appendices that comprise the full document. We encourage readers to consult the full text of the draft Principles at www.cpradr.org and at www.abanet.org/dispute.

The CPR-Georgetown Commission released the draft Principles for ADR Provider Organizations for public comment in June 2000 and welcomes all comments submitted by Oct. 15, 2001.

Disclosure, transparency and the rule of reason

In developing these standards, the drafters relied on three central ideas -- disclosure, transparency and the rule of reason. Disclosure is central to most ADR regulation because it allows consumers to make meaningful decisions about their dispute resolution choices, while permitting a variety of practices to develop in the marketplace. Transparency of operations is another mainstay of regulation in emerging fields, because it too facilitates access to information needed by consumers, the public and policy makers for informed decision-making and policy making. Lastly, flexible standards governed by rules of reason, rather than prescriptive rules, are also suited to regulating this new, diverse and dynamic field, in which a huge array of practices co-exist.

Guidance for responsible practice

The drafters developed the draft Principles to provide a blueprint for responsible practice among ADR provider organizations, and to establish a benchmark for fair, impartial and quality dispute resolution services. The draft Principles embody the idea that ADR provider organizations have special responsibilities as justice providers. In concept, approach, and scope, the draft Principles build upon the significant policy directives of the past decade, including the National Standards for Court-Connected Mediation³ and the Employment Due Process Protocol and its progeny.⁴ Like those documents and other policy guidelines, the Principles are not intended to establish liability or specific ethics obligations.

The nine principles

The draft Principles for ADR Provider Organizations are composed of nine standards, which apply to the spectrum of public, private and hybrid ADR provider organizations. While other duties and responsibilities of provider organizations could be identified, the nine articulated in this document comprise the principles the drafters considered core to good practice.

The first Principle establishes the core responsibility of ADR provider organizations for the quality and competence of the services offered under their auspices. Under Principle I, provider organizations must maximize the likelihood that the organization's affiliated neutrals are qualified and competent to handle both the kinds of cases the organization will generally refer to them and the specific matters referred.

Recognizing that private provider organizations come in a variety of forms, with various degrees of involvement in the services provided by neutrals under their auspices, this Principle articulates a rule of reason in describing the nature of each organization's responsibility. For example, the Principle requires each organization to take all reasonable steps to maximize the quality and competence of its services. It does not require the organization to ensure the quality and competence of its services or even to maximize the quality and competence of its services. Additionally, the Principle also allows an organization to evade this responsibility if it clearly and prominently publishes a disclaimer to that effect.

The second Principle specifies the kind of information organizations should provide to consumers about their services and operations. Five types of information are specified: information relating to the organization's services, operations and fees; relationships with its affiliated neutrals; policies regarding confidentiality, conflicts and ethics; the training, qualifications and affiliation criteria for its neutrals; and the way neutrals are selected for service. Again recognizing the variety of forms assumed by private providers, the standards apply a rule of reason to the extent and form of the required disclosures.

Principles III and IV recognize the obligation of provider organizations to ensure the impartiality and fundamental due process fairness of the ADR services provided under their auspices and to take reasonable and appropriate steps to provide access to their services for low-income parties.

Principle V addresses organizational conflicts of interest (as distinguished from conflicts of the individual neutrals providing services under the organization's auspices). Consistent with the other standards, this section relies on disclosure to effectuate its goals and recognizes the application of a rule of reason in requiring provider organizations to disclose interests or relationships that might either affect the organization's impartiality or independence, or create the appearance of bias.

The remaining Principles VI through IX advise provider organizations to have complaint and grievance mechanisms, to conduct their administrative and financial affairs in an ethical manner, to require their neutrals to subscribe to a recognized ADR code of ethics, to avoid knowingly making false or misleading communications about their services, and to protect confidentiality.

Organizational conflicts and disclosures

Some of the Principles are likely to be more controversial than others. Indeed, a few have provoked and continue to provoke vigorous debate among the members of the drafting committee. Perhaps foremost among these debates are those addressing organizational conflicts of interest. While recognized ethical standards for individual mediators and arbitrators routinely require disclosure of the kind of information that could raise concerns about actual or perceived bias, standards that impose a similar requirement on provider organizations strike out in new territory.

Under proposed Principle II, the ADR provider organization is directed to disclose "the relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals." Required disclosures under Principle V include (1) financial or other interest by the organization in the outcome, (2) significant relationships the organization has with any of the parties or their counsel and (3) any other significant source of bias or prejudice.

Some ADR provider organizations may see this requirement as unduly burdensome, irrelevant and/or intrusive. However, these standards reflect a concern among the majority of drafters⁵ about the problem of repeat players. Specifically, the increased use of provider organizations by parties on a repetitive basis -- whether to service their in-house dispute resolution program, handle a stream of cases arising from a class action or simply handle numbers of unrelated cases over a period of time -- could lead to a concomitant increase in the potential for actual or perceived conflicts in the administration or provision of neutral services.

Conflicts could occur either because the neutrals have a financial interest in the organization's profits or because they want to ensure that they are referred cases in the future. For the drafting committee, the critical issue is what information the consumer should know about actions or interests of the provider organization that might affect or be seen to affect the impartial administration of services or the delivery of services overall.

Some drafters argue that Principle V and the required disclosures in Principle II regarding the organizations' services and operations will be unduly burdensome. They suggest that the burden is unwarranted and will severely complicate record-keeping and retrieval for large, national ADR provider organizations, as well as for smaller organizations that have been providing services over a significant period of time. Given the relative paucity of research on the repeat player syndrome referenced in the principles, is the burden warranted, especially since, parenthetically, it may be bad for business?

Some may also argue that there should be a lower level of disclosure for ADR provider organizations offering mediation rather than arbitration services. Also likely to be controversial will be Principle II's required disclosure of relevant economic, legal, professional or other relationships between the ADR provider organization and its affiliated neutrals. Shouldn't parties believe the neutral's own statement of impartiality?

Ultimately, the majority of the drafters believed that the wisest balance between these concerns included reasonable disclosures and organizational transparency. Under the Principle's rule of reason, for example, organizations have the option to give a standard disclosure supplemented by a statement offering additional information upon specific request. Given the central role ADR provider organizations now play in our increasingly privatized system of justice, there is a critical need to ensure public confidence in that system.

Disclaiming responsibility

Another potentially controversial provision gives ADR provider organizations the ability to use a simple disclaimer to escape their responsibility to maximize the quality and competence of their services. Why would standards designed to raise the bar of good practice allow such an out?

One of the difficulties in drafting standards such as these is the variety of forms and contexts in which organizations hold themselves out as managing or administering ADR services. Some organizations, for example, simply list neutrals available in a given jurisdiction without making any representation as to the quality of services they provide. While it is hoped that all provider organizations will reach for the very highest levels of quality assurance, some practical recognition of these differences seemed warranted.

Low-income clients

Finally, some may object to the obligation described in Section IV that providers make their services available at reasonable cost to low-income clients. There is no comparable obligation for providers of traditional legal services. Indeed, not every state imposes a pro bono obligation on attorneys, and none imposes such an obligation on law firms themselves. Will this provision require providers to make services available to low-income parties on demand?

Ultimately, the drafters believed that such a provision was important and consistent with the dual role of ADR provider organizations as justice providers and private organizations. Consistent with other provisions, the principles recognize that this access-to-services provision can be satisfied in a variety of ways commensurate with the size and nature of the ADR provider organization.

Request for comments

A hallmark of the current regulatory work is its receptivity to and embrace of public comment. From the Uniform Mediation Act to the ABA's efforts to revise the Model Rules of Professional Conduct, the rigorous review of proposals by the community of ADR practitioners, scholars, consumers and policy makers has enhanced each regulatory effort. We invite the readership to weigh in on the significant issues covered by the draft Principles and look forward to the community's insight and guidance. Comments can be directed by e-mail to Kathleen Scanlon at providerprinciples@cpradr.org until Oct. 15, 2001.

* Margaret L. Shaw is the co-chair of the committee of the CPR- Georgetown Commission on Ethics and Standards of Practice in ADR that drafted the Principles for ADR Provider Organizations (Draft for Comment, June 2000). She is also principal of ADR Associates, LLC, and an adjunct professor at NYU Law School. She can be reached at margaretshaw@mindspring.com.

** Elizabeth Plapinger is co-chair and reporter of the committee of the CPR-Georgetown Commission. She is a fellow and senior consultant to the CPR Institute for Dispute Resolution, and a lecturer in law at Columbia Univ. Law School in New York City. She can be reached at elizplap@optonline.net.

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The draft Principles were drafted by a Commission committee co-chaired by Margaret L. Shaw and Elizabeth Plapinger. The Drafting Committee members are: Prof. Majorie Corman Aaron, Howard S. Bellman, Christopher Honeyman, Prof. Carrie Menkel-Meadow, William K. Slate, II, Prof. Thomas J. Stipanowich, Hon. John L. Wagner, and Michael Young. A second committee of the Commission, chaired by Charles Pou, developed the definition of ADR provider organization used in the Principles, as well as a taxonomy of ADR provider organizations. The Taxonomy can be found at www.cpradr.org, as Appendix A to the draft Principles.

² Much of the policy and case law development in this area has and continues to be focused on the fairness and integrity of ADR forums that provide compulsory arbitration pursuant to form contracts in areas of consumer services, securities, health and employment. See, e.g., *Duffield v. Richardson Stephens & Co.*, 144 F.3d 1182 (9th superth Cir.), cert. denied, 119 S. Ct. 465 (1998); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Engalla v. Kaiser Permanente Medical Group, Inc.*, 15 Cal. 4 superth 951 (1997); *Armendariz v. Foundation Health Pysyhcare Services, Inc.*, 24 Cal. 4 superth 83 (2000).

³ CENTER FOR DISPUTE SETTLEMENT AND INSTITUTE FOR JUDICIAL ADMINISTRATION,

NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION (1992)(Linda Singer, Margaret L. Shaw, Edna Povich, reporters).

⁴. TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995)(generally known as the "Due Process Protocol"). Two other protocols have followed this effort, the CONSUMER DUE PROCESS PROTOCOL (AAA, 1998) and the HEALTH CARE DUE PROCESS PROTOCOL (AAA, ABA, AMA 1998).

⁵. Not all members of the drafting committee support proposed Principle V as currently written.