FLORIDA’S EXPERIENCE WITH DISPUTE RESOLUTION LEGISLATION: TOO MUCH OF A GOOD THING?

Robert M. Jones
Director
Florida Conflict Resolution Consortium
rmjones@mailer.fsu.edu
http://consensus.fsu.edu
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I. INTRODUCTION

Over the past 15 years the Florida legislature has passed over 75 separate ADR provisions addressing a wide range of issues being handled in judicial, administrative and community settings. There is strong public policy support in place in Florida for encouragement of negotiated settlements as alternatives to court and administrative litigation. Finally there has been a sustained public investment in ADR over the past 13 years through legislative and judicial support for two statewide centers focused on encouraging dispute resolution in the courts and in administrative and political settings.

In the early 1970’s Florida passed legislation establishing and providing funding support for “community settlement centers” as non-profit organizations with referral links to the courts. From the mid-1980’s with the passage of a comprehensive judicial dispute resolution statute governing court mandated mediation (Florida Statutes, Chapter 44) to the late 1990s the Florida legislature has established numerous and somewhat diverse ADR procedures for such issues as mobile home landlord/tenant disputes, insurance claims following disasters, condominium association disputes, disputes over development, growth and planning issues, private property rights, environmental and intergovernmental conflicts.

Has the proliferation of ADR statutes and the underlying policy support for ADR been a good thing for Florida? Have these laws helped to legitimize and increase the use of these problem solving and dispute resolution procedures? Have these laws led to confusion regarding under what conditions parties should consider the use of ADR procedures?

II. THE ARGUMENT FOR AND AGAINST ADR LEGISLATION AS GOOD THING

Over the past two decades, many in the dispute resolution field have suggested that well crafted dispute resolution legislation can reduce barriers to the greater use of ADR and provide the benefits of these procedures to a greater number of citizens, organizations and agencies. Those supporting legislative enactment of dispute resolution provisions have suggested they can help to:
• Clarify and support policy for using ADR in range of administrative and judicial disputes;
• Legitimize the use of ADR by providing explicit encouragement or requirements to use it;
• Increase the use and demand for services and create or enhance an ADR “market”; and
• Justify the spending of public resources to procure and make available dispute resolution services.

Others have suggested the experience with dispute resolution legislation at the state and federal level over the past decade has provided an important, but insufficient basis for increasing the informed use of dispute resolution. Some of reasons offered for exercising greater caution with regard to ADR legislation include:

• Those advocating ADR legislation can tend to overstate the problem and oversell the solution.
• Encouraging or requiring dispute resolution may fall short of the promises of better, faster, cheaper and more satisfying ADR for citizens;
• Often legislative drafters take a meat cleaver vs. a scalpel approach in designing ADR procedures;
• A “One size fits all” approach taken by legislation that encourages or requires all to use ADR without regard to needs in various contexts and to the distinctions among processes;
• Often legislators and lobbyists don’t sufficiently appreciate the importance of a balanced playing field, addressing access to the process, identifying and increasing the incentives, minimizing the barriers to utilizing ADR, and establishing clear and sound procedures for dispute resolution; and
• Often legislation which encourages or requires the use of dispute resolution ignores or poorly addresses questions of the “quality” of practice and the qualifications of practitioners.
• In some states, the proliferation of ADR procedures that are not consistent or connected leads to confusion about when it may or may not be appropriate to use them.

III. THE FLORIDA ADR LEGISLATIVE EXPERIENCE-A COMPLEX MIX OF HITS AND MISSES.

In Florida, the ADR legislative activity has focused on a variety of administrative and judicial contexts and has featured different kinds of statutory approaches. Below is a brief description and some examples.

A. ADR Statewide Statutory Institutional Recognition.

Florida’s two statewide dispute resolution centers, the Florida Dispute Resolution Center housed at the Supreme Court and affiliated with the FSU College of Law (F.S. Chapter 44 et seq.) and the Florida Conflict Resolution Consortium (F.S. Chapter 240. 702) housed in the state university system at FSU, have worked separately and together in the judiciary and within government to:
promote best dispute resolution practices;
• enhance and institutionalize access to ADR; and
• educate users and build ADR markets.

These centers have been called on to evaluate existing procedures, offer guidance in the
development of ADR legislation and participate in ways to implement complex procedures and
regulate or guide practice. In addition to this, each year for the past 8 years the Dispute
Resolution Center and the Conflict Resolution Consortium have jointly sponsored an annual
conference which draws over 700 mediators for continuing education.

B. ADR Encouragement for State Administrative Disputes.

In 1996 the Florida Legislature, recognizing the success of mediation in the
Florida court system, acted to begin integrating more ADR into the updated State
Administrative Procedures Act and the administrative process. The Act and the uniform
rules implementing it, called for agencies to include notices in all final orders stating
whether mediation is available and established provisions for the use of negotiated
rulemaking. In 1998 the legislature created the State Agency Administrative Dispute
Resolution Project to be administered by the Florida Conflict Resolution Consortium at
FSU. This project sought to demonstrate the value of these approaches through pilot
cases in the state agency context and to suggest ways to address legal, organizational,
budgetary, educational and leadership barriers to greater use of administrative dispute
resolution by state agencies.

In April, 2000 the project and its advisory group will issue a final project report
with recommendations to the Governor regarding administrative dispute resolution. The
project produced successful resolutions in over 31 of 36 state agency administrative
mediations, and provided training and consulting services to over 300 government and
private individuals involving 10 agencies and their staffs. Among the mediated cases
settling, parties reported potential savings in comparison to litigation costs exceeding $3
million. The project also produced a set of policy recommendations highlight the need
for continuing leadership support and education to achieve better decision making when
using ADR. Finally and suggest that progress will be made only if there is an investment
of resources to provide ongoing assistance to state agencies and citizens. The report also
calls for some statutory and budgetary changes to address barriers to greater use in
administrative disputes.

(See the FCRC’s website at http://consensus.fsu.edu/resolution.html for information on the
results of the legislatively supported State Agency Administrative Dispute Resolution project to
encourage state agency use of mediation and negotiated rulemaking and examine and
recommend actions to minimize barriers to increasing use.)

ADR Judicial Mandates and Encouragement. In 1986 the legislature passed F.S.
Chapter 44 (Mediation- Courts, Chapter 44 Arbitration- Courts, Chapter 44. Predictions in 1985:
Arbitration would take off and dominate; mediation would remain a poor relation. The
experience has been the reverse: approximately 100,000 civil mediations conducted annually-including circuit (above $15,000), county and family court cases- while only hundreds of civil arbitration conducted annually. The Center and Court’s operational premises could be summarized as: establish the system; study the impacts through the establishment of standing committees and the Dispute Resolution Center; review and revise the system periodically. Some examples of this ability to adapt included: a change in the statute in 1990 which provided that parties could select a mediator (certified or not) in a civil court mediation context; the establishment of a mentor/observation requirement for certification in 1992; the upgrading and refining the court’s training criteria in 1995.

The courts program established the concept of a market for dispute resolution services-civil litigants pay for the mediation service at the circuit level. Courts oversee services through a qualifications system. Some courts initially hired “court mediators” on staff for civil cases. This practice fell off in the 1990’s as private mediators increasingly provided services for hire. Over 2,500 mediators have been certified in state as county, family and circuit court mediators. There has been strong support from both the bar and judiciary for the dispute resolution programs. Relatively high settlement rates of over 60% for mandatory mediation were reported in a 1992 study

**Context Specific ADR Legislation.** Over the years the Florida Legislature has enacted a dizzying variety of over 80 ADR statutes addressing specific contexts such as:

- dispute resolution process for regional planning/development disputes (F.S. Chapter 186.509) and intergovernmental conflicts at the local level (F.S. Chapters 164, and 163.3189(3);
- mediation and special master processes for private property rights disputes (F.S. Chapter 70.50);
- Mediation of university campus master plan disputes with local government (F.S. Chapter 240.155)
- mediation and arbitration of condominium (F.S. Chapter 718) and cooperatives (F.S. Chapter 719.501);
- mediation of professional license complaints (F.S. Chapter 455.2235 & 475.25);
- mediation of workers compensation claims (F.S. Chapter 440.25)
- mediation of military base re-use plans (F.S. Chapter 288.975(12))
- mediation of consumer disputes (F.S. Chapter 570.07)
- mediation of grandparent visitation rights (F.S. Chapter 752.015)
- mediation and arbitration of continuing care contracts (F.S. Chapter 651.745)
- mobile home landlord tenant mediation (F.S. Chapter 723.033 et. Seq.);
- landlord/tenant mediation (F.S. Chapter 83.56 (5))
- mediation of insurance rates and contract disputes (F.S. Chapter 627.745);
- mediation of disputes involving funeral and cemetery services (F.S. Chapter 497.119);

A recent review of these statutes suggested that in many instances the statutory mediation encouragement or program is “observed in the breach.” In many settings the agency or the users have shown little interest in the process and have other alternatives or have little to gain from the
use and little to lose from the ignoring of the statutory ADR provision. In some instances the costs to the agency and other parties of retaining a third party has deterred the greater use of mediators. Many statutes, building on the judiciary programs, suggest that parties should pay equally for the services of a mediator. A few state agencies have tried, with little success, to provide mediators from their own staffs due to perceptions of neutrality or issues of competency.

IV. SOME INITIAL LESSONS FROM THE FLORIDA EXPERIENCE.

Based on Florida’s experience of a diversity of contexts where ADR legislation has been developed, the following are some lessons learned from the experience over the past 15 years.

A. The Value of Publicly Supported ADR Institutions. The creation of two state centers which have worked together and separately to deal with and assist in statutory and regulatory ADR implementation issues has been a largely successful strategy. Both centers have succeeded in building leadership and policy support for ADR, engaged the practitioner community in the development of ADR markets, offered educational and training programs to enhance the quality of practice, provided guidance in the development and refinement of ADR statutes and programs, and assisted in the evaluation of these ADR initiatives. For the state, the dividends from the investment in these centers has been dramatically greater use of ADR in the courts, deeper sophistication in the use of consensus building and ADR in the administrative and policy context and the related enhanced relationships among disputants and time and costs savings.

B. Enlist the Dispute Resolution Practitioner Community and Institutions to Assist in Study and Design of Legislative ADR Procedures. The Dispute Resolution Community needs to reach out to legislators and legislative staff to provide professional advice and guidance on ADR legislative initiatives. Florida often utilizes the two dispute resolution state centers to convene and solicit such guidance. California has utilized a statewide association of dispute resolution practitioners and programs to provide a voice in the development of ADR legislation.

C. Measuring Success When Legislating ADR. It is important for advocates and interests pressing for legislative ADR provisions to be clear on the measures for success when developing ADR legislation. What is the relative importance of objectives such as: increasing use of ADR procedures; realizing savings in terms of time and money; a high settlement rate; improving continuing relationships among repeat disputants; providing the public with opportunities to affect public decisions and policies, etc.? In addition, it is important to charge some institution or institutions with the responsibility of ongoing monitoring and measurement so that adjustments can be made in ADR laws that do no work or are not implemented as intended.

D. Seek to Establish Consistent Principles for ADR in Diverse Contexts. States often have a web of statutory provisions affecting the processing of disputes in the courts, in administrative hearings, in community programs. This can lead to confusion,
inconsistency and “forum shopping.” Greater attention needs to be paid to the design of statutory ADR in the face of complex interactions of and linkages with various court and administrative procedures. The development of consistent principles related key ADR concepts such as confidentiality and neutrality that may apply broadly can be an important design tool. States can turn to practitioner organizations such as the Society for Professional in Dispute Resolution, for policy guidance on such matters. As current efforts nationally to develop a uniform mediation act demonstrate, this is a complex and challenging activity. At the state level this activity can be assisted and facilitated by state ADR centers and can contribute to more consistent and coordinated statutory provisions for ADR.

E. Assess the Context, Reduce Barriers and Identify Incentives for the Use of Statutory ADR. Greater attention needs to be paid in drafting ADR legislation to identifying important context issues related to access, fairness and balance and offering contextual incentives. Legislative drafters should consider strategies for reducing structural barriers (i.e. legal, organizational, budgetary, educational and leadership) to using ADR in various contexts.

V. CONCLUSION

Has the proliferation of ADR statutes and the underlying policy support for ADR been a good thing for Florida? The answer is yes as these laws have indeed helped to legitimize and increase the use of these problem solving and dispute resolution procedures. However the proliferation of these laws has also led to some confusion regarding under what conditions parties should consider the use of ADR procedures and what procedures parties should chose from. Greater attention in legislative drafting to barriers that inhibit the use of the procedures is called for as is increased involvement of the dispute resolution community with legislatures and legislative staff in design questions.