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# The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel

## **Cover Page Footnote**

The author acknowledges with thanks the assistance in preparing these remarks of Assistant Corporation Counsel Michael Pastor, as well as the advice of many of his colleagues at the New York City Law Department.

## THE USE OF ADR INVOLVING LOCAL GOVERNMENTS: THE PERSPECTIVE OF THE NEW YORK CITY CORPORATION COUNSEL

*Michael A. Cardozo\**

### PRELIMINARY REMARKS

Before I begin I want to say just a few words about the man for whom this Dispute Resolution Center is named, John Feerick. I have known John for many years in a variety of contexts, as a friend, as a chair of numerous committees, as an arbitrator, and as a mediator. I succeeded him as chair of one committee, the Fund for Modern Courts, and I was fortunate enough to be the extraordinary beneficiary of another committee he headed, the Nominating Committee of the City Bar Association. I have tried cases before John in his role as an arbitrator, including a case involving one of John's few mistakes, the Latrell Sprewell—choking the coach—NBA matter.<sup>1</sup> But I have prevailed in other arbitrations before John, including one argued in the New York Court of Appeals earlier this week—living proof that he usually calls them right. And for two years I worked with John as he served as one of three Special Masters in the *McCain* homeless family rights litigation.<sup>2</sup>

Based on my long acquaintance with John I can say without fear of contradiction that not only does he excel, with the exception of the Sprewell case, in whatever he does, but if John, in his low key but very effective way of speaking, says “I think you should do X, Y or Z,” the person to whom his comments are directed inevitably tries very hard to do as John suggests. As Linda Gibbs, the Deputy Mayor for Health and Human Services and the former Commissioner of the Department of Homeless Services, said from this podium just a few weeks ago at the dedication ceremonies for the John Feerick Center, “While I hated to compromise, when John

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\* Michael A. Cardozo is New York City Corporation Counsel. This speech was delivered at the Fordham Dispute Resolution Society Symposium on October 13, 2006. The author acknowledges with thanks the assistance in preparing these remarks of Assistant Corporation Counsel Michael Pastor, as well as the advice of many of his colleagues at the New York City Law Department.

1. See generally Mike Wise, *NBA Star Who Choked Coach Wins Reinstatement of Contract*, N.Y. TIMES, Mar. 5, 1998, at A1.

2. *McCain v. Koch*, 70 N.Y.2d 109 (N.Y. 1987).

made a suggestion I found it very hard to say no.” “He taught me,” Linda said, “how to compromise for the greater good.”

Fordham Law School, and all of New York City, is very fortunate to have John Feerick spearhead this Center, and certainly this Symposium is an auspicious beginning for the work the Center will do.

### INTRODUCTION

I want to advance my central thesis at the outset: alternative dispute resolution can *sometimes* be a very useful and powerful tool in resolving social problems in which local governments find themselves. But ADR is *not* the answer to resolving much of the litigation involving disputes over governmental policy. In fact, serious adverse social consequences can result from the too frequent demand that some form of alternate dispute resolution—rather than the courts—be used to resolve a particular controversy.

Generally, there are three different types of governmental disputes potentially susceptible to ADR treatment.

To the first category—money disputes between the City and a claimant or group of plaintiffs—I give a blinking green light to the use of ADR. To the second category—land use and environmental controversies involving the City and citizens claiming to be aggrieved by a particular zoning, environmental, or development decision—I give a blinking red light. The final category, to which I will devote most of my attention this morning, involves claims by a particular group of people, usually an advocacy group on behalf of the poor, that a specific social policy being pursued or not pursued by the government is somehow illegal. And to that category of cases I post a yellow light.

### MONEY DISPUTES

The first topic I will discuss will be the hundreds if not thousands of damages suits any local government, and certainly New York City, faces every year. While such cases are not the focus of this Symposium, briefly discussing when ADR should be used to resolve such cases offers some guidance on when and how ADR can be used to resolve social policy disputes, which is our primary focus today.

Each year New York City faces over 8,000 damages suits. These cases result in the City, and therefore City taxpayers, paying on average more than \$515 million a year in judgments and settlements, although the good news is that the number has been somewhat declining in recent years. This is a tremendous amount of

money; in fact, it reflects approximately three percent of the discretionary portion of New York City's entire budget.<sup>3</sup> Therefore, every effort must be made to ensure that payments are being made only to those who have in fact been damaged by improper City action, that those injured are being compensated only for the amount of their injuries and not more, and at the same time that those injured by wrongful City action are in fact being fairly compensated.

The damages cases faced by the City range from minor sidewalk slip-and-falls to multi-million dollar medical malpractice claims, to discrimination litigations and suits under federal civil rights statutes challenging the legality of a particular governmental action, usually involving the police or correction departments. While these are primarily individual damages suits they also include larger tort claims, such as health claims arising from 9/11,<sup>4</sup> the deaths and serious injuries resulting from the Staten Island Ferry disaster,<sup>5</sup> or class action discrimination suits, including one that Ken Feinberg helped to resolve.

Frequently disputes of this type, like comparable cases in the private sector, can and should be resolved through alternate dispute resolution. But, and I underscore the "but," this is not always true. There are two very important considerations in damages suits involving the government that are not always present in private sector disputes, considerations that often point to rejecting alternate dispute resolution mechanisms as a means for resolving the case.

First, if every would-be plaintiff is under the impression—and too many in fact are—that if she sues the City, no matter how weak the case, the courts will force the City to use alternative dispute resolution to settle for some amount of money, the taxpayer will unfairly suffer. A government must make crystal clear that it is not a deep pocket waiting to be picked. This is all the more true when the volume of litigation faced by the City is recognized. New York City is a party to over twenty percent of all civil litigation in the state courts in the five boroughs and to approximately twenty to

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3. See NEW YORK CITY OFFICE OF MANAGEMENT AND BUDGET, FINANCIAL PLAN SUMMARY, FISCAL YEARS 2007-2011, at 23 (2007), available at [http://www.nyc.gov/html/omb/pdf/sum1\\_07.pdf](http://www.nyc.gov/html/omb/pdf/sum1_07.pdf), (listing "controllable" agency spending at \$18.88 billion).

4. See Kenneth R. Feinberg, KEYNOTE ADDRESS, 34 FORDHAM URB. L.J. 785 (2007).

5. For an account of the disaster, see for example, Janny Scott & William K. Rashbaum, *The Ferry Crash: Overview; 10 Die as Staten Island Ferry Slams into Pier*, N.Y. TIMES, Oct. 16, 2003, at A1.

thirty percent of all civil cases in the Southern District of New York. And in federal cases the City is often facing an additional demand for attorney's fees authorized by many federal statutes. Thus, when the City takes a "no-settle" position because the case is particularly egregious in its lack of merit, or a plaintiff with an arguably valid claim insists upon inflated damages, the City will not (and I submit should not) be asked to go to some form of ADR—usually mediation—and resolve the case for a few dollars simply because the City will otherwise incur litigation costs.

Unlike many private litigants, for whom settling the occasional damages suit will be less expensive than litigating, for the City to resolve meritless disputes for even a relatively minor amount is wrong and expensive. Mediators and courts, which see a token settlement via ADR as a useful means to clear their crowded dockets, should not ask the City to engage in such tactics. To do otherwise would result in an increase, not a decrease, in litigation, and would cost the taxpayer still more money.

In evaluating whether the City should use some form of mediation to resolve damages cases, a second important variable that is not always present in a private sector dispute is the needed preparation time. Effective ADR generally requires the attorneys on each side to become familiar with the facts of the particular case. Given the volume of City damages suits—approximately fifty tort cases are sent to trial every week—and the need for both the Corporation Counsel's Office and the Comptroller's Office to approve any settlement, the City simply cannot afford the time to prepare to resolve through ADR even a fraction of such cases. Many of those cases settle just before, or during, trial. It is simply not cost effective for the City to spend time preparing to resolve a \$25,000 case through ADR—particularly a labor intensive summary jury trial as some have suggested—when the odds are overwhelming that such a case will be resolved anyway.

Those caveats aside, ADR in government damages litigations, especially as some form of mediation, may be an effective process. Over the last ten years, the City, by using court-mandated mediation in the typical tort case, has been able to resolve meritorious claims more quickly and less expensively, and to reduce its backlog of pending cases by half. In the larger damages cases, ADR may also be an effective tool, as highlighted by a recent successful pilot

program the City engaged in involving major medical malpractice cases.<sup>6</sup>

I hasten to add that this does not mean that every major damages case in which a governmental entity finds itself should be resolved by ADR. For example, there may be critical issues of law that first need to be resolved. If the government prevails on the legal issue, not only will no liability result, but an important precedent will have been established that will guide future conduct.<sup>7</sup> Moreover, resolving large damages cases through ADR, particularly at an early stage before legal issues are resolved and discovery has been completed, may encourage plaintiffs to bring still more, frequently non-meritorious cases.

A scalpel, not a sledgehammer, must therefore be the standard when deciding whether ADR should be used to help resolve damages suits against a city. This is why, as I said above, I apply a blinking green light to this first category of cases.

#### LAND USE DISPUTES

This brings me to the second category of public disputes potentially resolvable by ADR: land use cases. I am referring here to claims of arbitrary zoning decisions, inadequate environmental reviews, or conflicts of interest over a particular redevelopment project.

Consider the typical land use transaction. In one scenario, the government planning commission decides that as a result of changing times and needs, zoning in a particular neighborhood needs to be altered from manufacturing to commercial. In another case, a private entity proposes to buy an under-used or vacant public building and put it to a new use. In a third example, the govern-

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6. Pursuant to this pilot program, of the nineteen cases where the parties participated in mediation, thirteen reached settlement. The program demonstrated some of the numerous positive attributes of ADR. First, the parties to these mediations—plaintiffs, defendants, and their attorneys—viewed them as “fair, satisfying, and responsive to their interests.” Chris S. Hyman & Clyde B. Schechter, *Mediating Medical Malpractice Lawsuits Against Hospitals: New York City’s Pilot Project*, 25 *HEALTH AFF.* 1394, 1398 (2006). Second, transaction costs were notably lower in comparison with litigation. Indeed, attorneys for both sides estimated that they spent approximately one-tenth the amount of time preparing for mediation as they would have spent preparing for trial. Lastly, the study demonstrated an association (if not a causal link) between defendants’ ability to offer an apology in the appropriate case and settlement. *See id.*; *see also* Amy G. London, *Mediation Offers Promise, But No Cure for System’s Ills*, N.Y.L.J., Feb. 16, 2006.

7. *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 *TUL. L. REV.* 1, 17-18 (1987) (arguing that ADR proponents undervalue positive law and the guidance function of court decisions).

ment decides it should convert private property to a particular public use, such as a homeless shelter. In each of these examples affected residents of the community or the general public, unhappy about the proposed change in their neighborhood, sue after the governmental decision has been reached, claiming that the relevant statutes were somehow violated. Should the court, on the return date of the inevitable preliminary injunction motion, direct the parties to seek to resolve the matter by resorting to some kind of alternate dispute mechanism? In most cases, the answer should be a loud “No!” In fact, to insist upon some kind of mediation in these cases subverts the very land use process that the plaintiffs usually argue was not followed.

Recent concrete examples of these hypothetical controversies include the disputes over the development of the West Side railroad yards,<sup>8</sup> the Atlantic Yards development in Brooklyn,<sup>9</sup> the construction of a new Yankee Stadium,<sup>10</sup> the sale and redesign of the Huntington Hartford Gallery of Modern Art in Columbus Circle,<sup>11</sup> the reopening of the 91st Street Waste Transfer Station,<sup>12</sup> and the relocation of tenants from the Bronx Terminal Market.<sup>13</sup> And for each headline-grabbing dispute of this nature there have been scores of other less publicized local land use controversies, ones that nevertheless affect a significant portion of a particular community.

In these kinds of cases, the challenged governmental decision has already been preceded by an extensive public review process mandated by state and local law. In effect, that process has already provided for alternate dispute resolution, albeit before the litigation began. In New York City, for example, under the Charter-mandated Uniform Land Use Review Procedure, popularly known as ULURP,<sup>14</sup> before any major land use or zoning change can be made, there is an extensive public review process that, on average,

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8. *Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth.*, 799 N.Y.S.2d 186 (App. Div. 2005), *appeal dismissed as moot*, 5 N.Y.3d 878 (N.Y. 2005).

9. *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 816 N.Y.S.2d 424 (App. Div. 2006).

10. *Save Our Parks v. City of New York*, No. 110836/06, 2006 N.Y. Misc. LEXIS 2365 (N.Y. Sup. Ct. Aug. 15, 2006).

11. *Landmark West! v. Burden*, 790 N.Y.S.2d 107 tbl. 1 (App. Div. 2005).

12. *ACORN v. Bloomberg*, No. 114729/05, 2006 N.Y. Slip Op. 51750U (Sup. Ct. Sept. 19, 2006).

13. *See Sigmund Strauss, Inc. v. Strategic Dev. Concepts, Inc.*, No. 103443/05, 2006 N.Y. Slip Op. 50008U (Sup. Ct. Jan. 3, 2006).

14. For more details on the New York City Uniform Land Use Review Procedure, see New York City Dep't of City Planning, Uniform Land Use Review Procedure, <http://home.nyc.gov/html/dcp/html/lupro/ulpro.shtml> (last visited Mar. 6, 2007).



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lasts eight months. It includes preparation of a detailed environmental impact statement, public hearings before the local community board, Borough President review, a public hearing by the Planning Commission, and often City Council hearings and approval.<sup>15</sup>

In addition, recent years have seen the emergence of so-called Community Benefit Agreements in which a developer, in the give and take before a zoning or land use change is approved, agrees in writing to make certain benefits available to the community, such as hiring a certain percentage of construction workers from within the borough, providing for affordable housing, or planting more trees. In effect, the Community Benefit Agreement, in which the community and the developer reach compromises on the particular transaction, is a form of mediation before litigation even begins. In fact, in some high profile development disputes, a trained facilitator has been part of the discussions between the community and the developer.

Therefore, when a final decision in a land use case is challenged in court, the back and forth and inevitable compromises resulting from the public process have already taken place. For a court then to direct the parties to see if, through an alternative dispute resolution process, they could somehow resolve factual disputes already decided—or compromise still more of their differences—ignores the compromises that have already occurred and will make compromises in future disputes difficult to reach. Insisting on ADR in these cases will encourage litigation—after all, the neighborhood advocacy group will know they may gain still more by suing—and will discourage would-be developers from compromising during the public process, since they will know they may have to make still further concessions when the suit is commenced and the matter is sent to ADR.

An additional pernicious consequence of sending disputes like these to ADR is significant delay. When a land use challenge is brought, the court, on the return date of the motion, will invariably ask the City not to move ahead until it has had an opportunity to review the papers. While this is certainly an understandable response from the court, the cost to the public can be huge. The project is not allowed to go forward until the judge decides the

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15. *See generally* N.Y. ENVTL. CONSERV. LAW § 8 (McKinney 2006); N.Y. COMP. CODES R. & REGS. tit. 6, ch. 6, pt. 617 (2006); N.Y. CITY CHARTER §§ 197-c, 197-d (2005); N.Y. CITY, N.Y., RULES tit. 62, § 5 (2005); N.Y. CITY, N.Y., RULES tit. 43, § 6 (2005).

motion. While theoretically the law requires a plaintiff seeking a preliminary injunction against a project to post a bond,<sup>16</sup> as a practical matter judges, particularly in state court, tend to avoid the requirement—or require only a token bond—on the theory that the challenge is being brought in the public interest.

While the problem of delayed decision making in cases like these exists even without court-ordered ADR, the potential of an ADR alternative compounds the problem of delay. The project is stalled while the ADR representative selected by the court tries to resolve the matter consensually. The delay continues until, as will invariably be the case, the mediator and the court are finally persuaded that the City will refuse to make any concessions in the ADR process for the reasons to which I have alluded. Only then will the court that has put off deciding the matter in the hope it will be resolved through ADR begin to review and then finally decide the case. On some occasions, the litigation becomes a form of coercion; the City is forced to make concessions, despite all the concerns about compromise I have just expressed, because the delay engendered by the litigation—compounded by the matter's referral to ADR—threatens to derail the entire project.

By saying this I do not mean to suggest that the challenged governmental action should be immune from judicial review. That is not the case. If the environmental review is deemed inadequate, if the government action is found arbitrary, or if the public official was compromised, it is the obligation of the court to so rule. In sum, it is wrong for the court, after all the public process that preceded the court proceeding, to try to force a compromise concerning the challenged action.

### SOCIAL POLICY DISPUTES

I come now to the third category of government disputes that might be susceptible to ADR resolution, and the one that this Symposium is particularly focusing upon: public policy disputes involving the poor. And to this area of dispute I apply a yellow light. ADR can be a highly constructive method of seeking to resolve public policy disputes—in the right case, at the right time, with the right processes, and with the right mediator.

By public policy disputes I mean cases against the government involving the rights and treatment of the most vulnerable in our society: children, the poor, the elderly, and the homeless. Unlike

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16. See FED. R. CIV. P. 65(c); N.Y. C.P.L.R. 6312(b) (McKinney 2006).

the land use cases these disputes are usually not matters where the litigation has been preceded by a lengthy public process; and unlike most damages or land use cases, the aggrieved parties are generally the indigent. During my tenure as Corporation Counsel, I have found these public policy cases to be the most difficult to resolve, either consensually or by litigation.

While sub-dividing these types of cases is somewhat artificial, they fall into three broad areas: constitutional challenges, statutory interpretation issues, and factual disputes over whether the government is complying with particular mandates. The latter is the most promising source of ADR treatment.

I share the view of many scholars who have expressed concern over delegating to persons other than duly selected judges determination of major public policy issues involving constitutional questions.<sup>17</sup> To be overly simplistic, many argue that whether the Constitution prohibits separate but equal treatment of minorities is not something that can or should be decided by any institution other than the judiciary. Closer to home, the question of whether the New York State Constitution requires local governments to provide shelter to the homeless,<sup>18</sup> or mandates that the State spend the money to provide all public school children with a sound basic education,<sup>19</sup> are questions that should not be resolved in an ADR context. The government, the argument goes, should not be taking it upon itself to delegate the critical public policy choices that stem from answers to these weighty constitutional issues. Given the extraordinary economic and social consequences that flow from such decisions—for example, a requirement that the State increase by up to \$5.6 billion each year the amount of money it provides for the education of New York City's school children<sup>20</sup>—it is essential

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17. See, e.g., Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986) (“An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values.”); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that the role of courts is not to “maximize the ends of private parties, . . . but to explicate and give force to the authoritative texts such as the Constitution and statutes”).

18. See *McCain v. Koch*, 502 N.Y.S.2d 720 (App. Div. 1986), *rev'd on other grounds*, 70 N.Y.2d 109 (N.Y. 1987).

19. See *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (N.Y. 2003). For a discussion of Ohio's efforts to mediate disputes over school funding, see Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 437-438 (2003) (citing failure of mediation in Ohio school dispute but arguing that mediation may work under certain conditions).

20. See *Fiscal Equity*, 100 N.Y.2d at 929-30.

that, for the public to accept such results, they must be rendered by the branch of government created to decide such matters, not privately selected decision makers. Similarly, whether a statute requires the government to provide certain services or take particular action are issues that should be decided by judges, not by contractually selected mediators.<sup>21</sup> Even if questions like these could be compromised in some way, it is wrong of government not to insist that the issues be decided by the courts.

But when the questions presented are primarily factual—such as whether the shelter system is providing adequate shelter, as relevant statutes require, or whether the City is meeting the statutory requirements of providing bi-lingual education, or timely processing food stamp applications—the questions may be ones that are ripe for decision outside the usual judicial framework.<sup>22</sup> ADR allows factual disputes of this nature to be resolved informally, outside the glare of the publicity of a courtroom, and permits the parties to work together to try to reach an agreement on resolving particular problems.

In discussing this issue, I want to begin by emphasizing one critical point that is too frequently overlooked by many. Judicial supervision of a government agency or program—either through injunctions or consent decrees—is bad social policy and should be used only as a last resort. Under our system of government it is mayors and commissioners, not courts or special masters or mediators or outside monitors, that are supposed to run the government. It is the mayor and the City Council, not the courts, who have been elected to decide how particular social problems should be resolved, and how scarce City resources should be allocated. The difficult question presented by these social policy disputes is what the courts should do when it is alleged, and sometimes proven, that the government is not doing what the constitution and statutes require. How do you insist that the government come into compliance with the law and, at the same time, not make the

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21. See Peter R. Streenland & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 807-08 (1996) (citing cases where the federal government requires a court's statutory interpretation).

22. See Edwards, *supra* note 17, at 680 (citing positively to employment discrimination cases as suitable for mediation as they are "highly fact-bound" and subject to established principles of law); see also Michelle Ryan, Comment, *Alternative Dispute Resolution in Environmental Cases: Friend or Foe?*, 10 TUL. ENVTL. L.J. 397, 412 (1997) ("[M]ost analysts agree that ADR techniques should only be used in disputes involving well-established legal principles where the main dispute is factual.").

agency a ward of the court forever, hamstringing the creativity and independence of the particular commissioner?

Three cases involving social policy disputes in New York City, each invoking ADR at a different stage in the litigation, offer some useful examples of what does and does not work when an ADR approach is used to help resolve a public policy dispute.

Let me start with the *Sheppard* case,<sup>23</sup> which involved alleged violence by prison guards in a maximum-security unit at Rikers Island. As the trial date approached, the parties agreed to use the experts each had separately retained for trial to jointly assist them in reaching what became the Stipulation of Settlement. The Stipulation, which imposed certain mandatory obligations on the City, could be terminated by the court after two years, on defendant's motion, unless the court found "that prospective relief remains necessary to correct a current and ongoing violation of the plaintiff class' constitutional rights."<sup>24</sup>

At the end of the first two-year period, the City, after reviewing the joint experts' report, agreed to extend the stipulation for an additional period in order to further the goal of full compliance. As the next potential ending date approached, both experts were in agreement that the City had changed its procedures sufficiently to allow the stipulation to expire. The court, after reviewing the expert reports, terminated the stipulation, noting that the experts had concluded that facility management had made "substantial progress in institutionalizing the important remedial measures embodied in the stipulation."<sup>25</sup> The court emphasized that the expert consultants had been "crucial" to the success of the settlement.<sup>26</sup>

What did the ADR process achieve here? It allowed for two highly recognized experts to assist the parties in finding common ground, to offer their views of whether compliance had been achieved and, as a result of that role, to participate in helping the City devise better methods to solve the underlying social problem: the control of violence in a particular prison unit. When the changes their presence had encouraged were implemented—and were proven to be successful—the case came to an end. Rather

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23. See *Sheppard v. Phoenix*, 210 F. Supp. 2d 450 (S.D.N.Y. 2002).

24. Stipulation of Settlement at ¶ 103, *Sheppard v. Phoenix*, 210 F. Supp. 2d 450 (S.D.N.Y. 2002) (No. 91 Civ. 4148).

25. See *Sheppard*, 210 F. Supp. 2d at 458 (internal citation omitted).

26. *Id.* at 459. The court also hailed the work of all parties in implementing the Stipulation's reforms: "[The parties'] combined actions showed not only attention to detail in crafting the Stipulation, but also diligence in overseeing its implementation in the highest tradition of the legal profession." *Id.* at 459-60.

than publicly litigating for years over whether the City's changes had resulted in compliance, the experts, working with the parties, helped reform the practices in this maximum-security unit.

A second case, *Marisol*,<sup>27</sup> involving a long running challenge to the way that New York City monitored and served the welfare of the City's children, offers a different approach. On the eve of trial, and after years of litigation in the Southern District of New York, the parties reached a settlement. The settlement agreement imposed no injunctive relief. Instead, the court and the parties agreed to the appointment of an outside advisory panel of experts that would have no coercive powers except to the extent it would file periodic (and purely advisory) reports with the court regarding the City's efforts in reforming its child welfare agency. The case could be reinstated, or interim injunctive relief sought, only upon a finding by the panel that the City's child welfare agency was "not acting in good faith in making efforts toward reform."<sup>28</sup> After two years, when the advisory panel found that the City was making substantial progress in the challenged areas, the case was, for all intents and purposes, over. The commissioner, however, citing the constructive role the panel had played, voluntarily agreed to have the panel continue making periodic reports to him.

Although there were no mediators used in resolving the *Marisol* litigation, the resolution of the case itself contemplated the future use of outside experts, as opposed to constant court supervision. The case ended without either a consent decree or an injunction. Through the selection of highly qualified experts, who publicly reported on progress the agency was making in areas of reform, litigation over a major social problem involving one of the most vulnerable sectors of our society—children at risk—was dismissed, and the need for a trial and subsequent court intervention and supervision was avoided.

It is the homeless litigation, known as *McCain*,<sup>29</sup> and particularly my personal experiences with it, from which I have learned the most about the role ADR can play in resolving social policy disputes when the government is involved. While the case, and ADR efforts to resolve it, could be the subject of a book, not simply short mention in a speech, what follows is a brief description. In 1986

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27. See *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999).

28. Settlement Agreement at ¶ 26, *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999) (No. 95 Civ. 10533).

29. See generally *McCain v. Koch*, 70 N.Y.2d 109, (N.Y. 1987); *McCain v. Bloomberg*, No. 41023/83, 2005 N.Y. Slip Op. 51435U (N.Y. Sup. Ct. Aug. 16, 2005).

the Appellate Division, First Department, in the context of affirming a preliminary injunction, ruled there was a state constitutional right to shelter in New York.<sup>30</sup> Over the next twenty years, and continuing up to today, there have been scores of applications to the court, resulting in more than fifty separate orders, in which the plaintiffs claimed that the City was not providing the required shelter benefits in violation of the constitution, various state and local laws, regulations, and policy directives. These laws range from the type of shelter to be provided, to the type of health services to be afforded, to the time of day when shelter applications must be processed.

At first, these applications, which frequently alleged that the City was in contempt, were heard directly by the court, with the inevitable publicity that accompanied such proceedings. In 1994, the court, with the consent of the parties, appointed a mediator/facilitator, my friend Ken Feinberg, to help resolve such applications.<sup>31</sup> For the next eight years Ken, and later an individual designated by him to serve on his behalf, heard the complaints made by plaintiffs, ably represented by Steve Banks of the Legal Aid Society, alleging that the City was doing something wrong, either in regard to a specific family or on a more systemic level.<sup>32</sup> Many of those disputes were resolved behind the scenes by the mediator, but others played out in the public sphere as one side or the other took its case to the public, or sought relief before the judge when conflicts could not be consensually resolved. Suffice it to say that for over eight years the homeless litigation was in the public eye. The City was often found to have been in violation of the law, and the mediator strove mightily to resolve issue after issue that arose. The role of the mediator was primarily to evaluate, and to try to resolve, specific factual disputes raised before him.

Fast-forward to 2002, and the beginning of the Bloomberg Administration. For a while there was no mediator at all and things seemingly went from bad to worse, with contentious contempt and related applications being made directly to the court.<sup>33</sup> Finally, after intense negotiations over ADR process, a new approach was tried. Four crucial elements were agreed upon by the parties and

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30. *McCain*, 70 N.Y.2d at 120-21.

31. See Nichole M. Christian, *Expansion of Homeless Center Hours Is Urged*, N.Y. TIMES, Oct. 30, 1998, at B5.

32. See *id.*

33. See Jennifer Steinhauer, *Mayor's Style Is Tested in Sending Homeless to Old Jail*, N.Y. TIMES, Aug. 16, 2002, at B1.

the court. First, there would be a three-person ADR panel, composed not only of a traditional ADR specialist—here the Dean of ADR, John Feerick—but also two non-lawyers who were trained and had extensive experience not in ADR, but in the very social science and social welfare issues that lay at the heart of the homelessness issues. Second, this three-person panel was given the authority to resolve disputes, privately, with the right of appeal to the court by either side sharply limited. Third, the panel was charged with the duty not only to resolve these disputes but also to evaluate all aspects of the family shelter system and to recommend improvements. Finally, the panel was given the role, by the end of the two-year period during which this ADR agreement existed, to recommend how the litigation should be brought to an end.

The ultimate results were excellent—attributable, I believe, to each of these four elements. For the two years the Stipulation was in effect the Department of Homeless Services was freed from the constant threat of being hauled into a public court proceeding, under the threat of contempt, for alleged violations. Instead, when there was claimed wrongdoing the dispute was resolved, usually consensually, with the aid of the Special Master Panel (the “SMP,” as we affectionately referred to it) in the privacy of an SMP hearing. Not a single ruling of the SMP was appealed to the court. This meant that Department of Homeless personnel, rather than being under constant siege to testify and justify their actions at depositions and court hearings, could concentrate instead on how to solve the underlying problems, and to focus on new ways of approaching them. The paralysis engendered by the threat of constant litigation, which had engulfed the agency for many years, had been removed.

At the same time the SMP, charged with the duty of working with the parties to resolve the underlying problems and to recommend how the litigation should be brought to an end, did just that. It took it upon itself to study the issues, it issued three far-reaching reports on homelessness issues, and it worked with the parties in forging new responses to this fundamental societal issue.<sup>34</sup> The result was not only the absence of litigation but the implementation

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34. See N.Y. CITY FAMILY HOMELESSNESS SPECIAL MASTER PANEL, FAMILY HOMELESSNESS PREVENTION REPORT (2003), available at <http://www.nyc.gov/html/dhs/downloads/pdf/preventionreport.pdf>; N.Y. CITY FAMILY HOMELESSNESS SPECIAL MASTER PANEL, REPORT ON EMERGENCY ASSISTANCE UNIT AND SHELTER ELIGIBILITY DETERMINATION (2004), available at <http://www.cccnewyork.org/publications/SMP%20EAU%20and%20SED2.pdf>.



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of a new and highly successful approach to many of the City's homeless problems.<sup>35</sup>

Unfortunately, the SMP was unable to bring an end to the litigation. Consistent with its mandate to recommend when and how the litigation should be brought to a close, the SMP, in its final letter to the court wrote, "after twenty-two years of system-wide litigation involving homeless families with children the City of New York has earned the opportunity to go forward into a new era."<sup>36</sup> The SMP added that, although it could not agree on an exact time frame for ending the case, it envisioned dismissal, stating that it did not believe it "appropriate, . . . in light of all the changed circumstances, for this Court to remain in perpetual supervision of the system for homeless children in New York City."<sup>37</sup> But because only the court could end the case, and, despite intense efforts of the panel, the parties could not reach an agreement as to how this could be achieved, this last goal was never reached. The matter is now back in court, with the City having made what is now a pending motion to end the case.

The homeless case, and the other social policy litigations involving the City which have been resolved (at least in part) through ADR, lead me to conclude that ADR is the appropriate vehicle to help to resolve many social policy disputes. The proper role of the ADR mechanism and when it should be invoked, however, will vary widely depending on the circumstances.

If, as may have been true at the outset of the homeless case, the government is simply trying to put its house in order in the face of continued findings of illegal conduct, the ADR role may be limited to being a mediator, assisting in the resolution of the particular individual dispute. In other cases, as exemplified by the prison litigation, the right ADR mechanism may be outside experts who can advise the court of what is proper. The wisdom and knowledge of these experts can help bring the parties into agreement, and they can play a major role in advising the court when it is time to end the case. In still other cases the moral suasion of an outside panel, such as in *Marisol*, can be used to report on the progress of the agency after the case has otherwise come to end. Finally, when a

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35. See sources cited *supra* note 34.

36. Letter from John D. Feerick, Daniel Kronenfeld, and Gail B. Nayowith, Special Masters, to Justice Helen E. Freedman, New York State Supreme Court, at 3 (submitted Feb. 9, 2005) (dated January 18, 2005) (on file with the Fordham Urban Law Journal).

37. *Id.*

completely new approach to solving the problem is needed, especially after years of litigation have created an inability of the parties to communicate effectively with one another, as was true in the homeless litigation, a broader role, such as that exemplified by the SMP, may be the answer.

In negotiating a potential ADR solution in these kinds of cases two issues are frequently encountered in the discussion. First, what will the power of the master or mediator be: adjudicator, mediator, or monitor? Second, when will the ADR process, and the case itself, come to an end so that the agency will be free of judicial or special master oversight? As to this latter point a successful ADR mandate must recognize that it is the executive branch, not the courts or the advocates, that should run government agencies. To paraphrase the letter from the SMP in the homeless case, "We do not believe it appropriate for this Court to remain in perpetual supervision of the system." In seeking an ADR solution for a public policy dispute, the ultimate goal must be both to stop the alleged illegal practice, and to put solutions to public policy problems back where they belong, in the hands of elected government officials.

#### CONCLUSION

I therefore end where I began. ADR is not the answer to the resolution of every governmental dispute. On the other hand, ADR, conducted by the right people, at the right time, in the right role, can play a major constructive role in bringing social policy disputes involving the government to an end.