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Umpiring the multi-option justice system

Directing disputants to the proper forum in a multi-option justice system requires a gatekeeper, but a fuller analysis of the merits, and potential problems, of the gatekeeper concept is needed.

by Charles Ruhlin and Harry N. Scheiber

In its recent final report, Justice in the Balance: 2020, the Commission on the Future of the California Courts envisions a justice system that would pull together various dispute resolution options into one multi-option justice center. Such a center would provide a varied menu of dispute resolution processes, including mediation, minitrials, arbitration, early neutral evaluation, expedited proceedings, referee-panel adjudication, administrative law forums, and traditional bench and jury trials. It would operate side by side with a variety of private mechanisms already in place such as neighborhood dispute resolution centers and private judging.

In this hybrid system public and private institutions would interact symbiotically, with innovative practices and norms diffusing across institutional boundaries as providers learn how to match disputes with “appropriate” (as opposed to “alternative”) procedures. How and by whom disputes are matched with different institutions and procedures in this multi-option justice system is a key question. Central to the commission’s proposals, and to multi-option plans under consideration elsewhere, is the gatekeeper.

In a multi-option justice system the gatekeeper, or assessment officer, counsels disputing parties about the resources and processes appropriate for them both within the public justice system (where the gatekeeper is situated) and outside it, in the array of private processes and agencies available. In the California proposal, gatekeepers would be lay rather than judicial personnel. To enhance the effectiveness of their function, multimedia kiosks in public locations (parks, city streets or squares, office building lobbies) would allow disputants direct access to the gatekeeper without actually setting foot in the courthouse.

Assigned to the gatekeeper is the vital task of educating disputants about the appropriateness—that is, the comparative advantages and disadvantages—of the specific public and private forums and processes available. Proponents of giving the gatekeeper this key role argue that the chances of disputing parties’ obtaining clear, unbiased information on which to base their choices of forum are much greater with gatekeepers than with lawyers, court managers, other professional court staff, ADR providers, or even judges.

Are gatekeepers necessary?

The California commission’s plan suggests that conscious, deliberate reforms are necessary to improve coordination of dispute resolution ser-

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lution institutions seem to be naturally coevolving, with agents in each sector incorporating innovative practices common in the other. Currently, ADR services such as mediation and arbitration are provided predominantly by the private sector, but California courts have begun to experiment with court-annexed arbitration and mandated mediation, as well as with mechanisms such as settlement conferences, settlement weeks, early neutral evaluation, and minitrials. At the same time, private judging (or rent-a-judge) programs have begun to emerge.

The fact that private sector alternatives are emerging suggests the dispute resolution market works effectively. From an efficiency perspective, a program of more conscious and deliberate reforms, such as the commission's gatekeeper proposal, might be unnecessary or even counterproductive. This is true especially where important features of proposed reforms—most notably the consolidation of court administration and unification of the provision of traditional adjudicative, ADR, and administrative law services—are occurring already. This is due either to legislative mandate (such as California's Trial Court Re-alignment and Efficiency Act of 1991 and the 'Trial Court Delay Reduction Act of 1986), or because judges in different jurisdictions are experimenting with innovative mechanisms in response to varying pressures. Viewed in this light, simply improving case management practices may obviate the need for deeper reforms.

Proponents of the commission's proposal and others like it argue that whether courts should be permitted to sanction settlements in which the losing party in effect buys a "win" through sealing of the settlement—but also upon the more embracing issue of how to sustain the vitality of the norm-setting functions of the justice system. See, e.g., Resnick, From Cases to Litigation, 54 LAW & CONTEMP. PROB. 54 (1991).

Potential problems
The caveat in the commission's proposal, however, is that the gatekeeper

3. Criticism of reform proposals has centered not only upon procedural questions—e.g.,
judges and other judicial experts vast information in order to match whether that would be sufficient to gatekeepers must provide them with criteria that are highly objective, but it is a serious question whether that would be sufficient to complete information. The reduction of information asymmetries and strategic behavior prompted by a gatekeeper-led system could very well reduce discovery abuse and lead to more efficient litigation decision making by all parties. Yet having a gatekeeper mandate the dispute resolution forum (and prohibiting any appeals of this decision) might well diminish parties' satisfaction with the system and their perceptions of procedural fairness.

A preliminary evaluation of one of the nation's first multi-option justice centers, the Middlesex MultiDoor Courthouse in Cambridge, Massachusetts, showed high client satisfaction with the process. In large part, this may have to do with the fact that the final choice of dispute resolution process is left to the parties and their counsel. Comparing multidoor courthouse participants' experience with that of a control group involved in traditional adjudication, the evaluation noted that, while both groups expressed satisfaction with their respective processes, the multidoor courthouse group expressed consistently higher levels of satisfaction with "the manner in which legal matters were addressed, ...the manner in which non-legal matters were addressed, ...the opportunity to participate in structuring the outcome of the case, ...and the fairness of the process." 15

Reducing strategic behavior

The extent to which the problem of perceived satisfaction exists in a multi-option justice context depends in part on the relative position of parties and the degree to which they rely on the court system to resolve their disputes. More powerful parties with a greater range of dispute resolution options already resolve many disputes via private mechanisms such as arbitration, most often involving contractual matters between themselves or even with more risk-averse parties such as workers or consumers. The presence of a gatekeeper probably would not affect the incentives of parties to participate in the court system in these types of cases, perhaps on the margin making them more likely to refer disputes to private sector alternatives.

Though parties with greater bargaining power are attempting to minimize the extent to which they have to deal with litigation by writing arbitration clauses into contracts, they will undoubtedly continue to face the threat of litigation from smaller parties with whom they have no contractual relationship. But even when they are forced to litigate, these stronger parties often still possess a strategic advantage insofar as they are often able to bear the costs of delay and hence can credibly threaten to go to trial, using the discovery process to grind down an opponent with fewer resources.

Thus, having a gatekeeper order parties to resolve a dispute under court-annexed arbitration may do nothing to prevent the party better able to bear the costs of delay from requesting a trial, provided the arbitration is non-binding (as it is in California). Post-arbitration user fees and cost-shifting sanctions, as called for by the commission, do little to change this scenario. The party with the strategic advantage can simply change his or her presentation at the arbitration hearing to reduce the probability of being penalized when

4. On a constitutional level, one may ask if such a subordinate judicial officer should have the authority to assume case management responsibilities traditionally handled by judges. Article VI, Section 22 of the California Constitution states that "the Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." To the extent that gatekeepers simply follow assessment and referral guidelines handed down by a judge, there seems little doubt that their work would qualify as a subordinate judicial duty within the scope of Section 22. However, problems may arise where gatekeepers exceed their authority or even have to exercise discretion in cases that are not covered clearly in the guidelines. Some mechanism could be established in such cases where a gatekeeper can consult with judges in deciding which dispute resolution service is most appropriate for the parties. Of course, such consulting takes up judges' precious time and reduces the potential time and cost savings.

A stronger party can afford to delay and is less sensitive than more risk-averse opponents to any sanctions that might be imposed because he or she can spread the risk of these losses. Postarbitration fees and sanctions seem more likely to harm risk-averse individual disputants at a bargaining disadvantage. These weaker parties would have to bear more risk to obtain information through post-arbitration discovery than they would to obtain the same information through pretrial discovery if arbitration was not ordered. Assuming the powerful party is more likely to strategically reject the arbitration award and seek to string this plaintiff along, the decision for the weaker disputant then becomes one between abandoning the case to avoid additional postdiscovery costs or swallowing them in the hope that eventually a trial will result. In these types of cases, forcing arbitration or mediation might only benefit the stronger party with more options, unless the more risk-averse party can somehow overcome this bargaining disadvantage (say, by joining with others similarly situated in a class-action suit). In either case, the current system where judges have more control over the process (and perhaps the parties) seems to work perfectly well compared to reform proposals.

**Forum assignment**

Where options are not available to one side to counter the other's manipulation of the justice process, it becomes especially important that the court assign parties to an appropriate forum. Any assessment and referral guidelines, if adopted, should specify that the gatekeeper look for signs of bargaining power asymmetry that might lead to strategic behavior by the more powerful party. What those signs might be, how a nonjudicial officer would be able to spot them, or how judges would in effect transfer their experience and savvy into written guidelines are troubling issues.

Forum assignment, at the very least, should not exacerbate asymmetries in bargaining power. Rather, judges and, under the commission's proposal, gatekeepers need to be able to spot quickly when the more powerful party engages in delaying tactics that force the weaker side to pile up huge legal costs, and, in all likelihood, bow out of the case. In these types of cases there should be no referrals to processes like court-annexed arbitration or any other that allows the more powerful disputant room to act in this way. Instead, they should move the case to trial as expeditiously as possible, using all possible techniques (settlement conferences, settlement weeks or months, etc.) to reduce strategic behavior. This is essentially an argument for the status quo in these types of cases, for it is difficult to believe that a gatekeeper who is not a judge could assign cases in a way that is not only cost-effective but also credible in the eyes of powerful litigants.

Where smaller, more risk-averse parties are in conflict with each other, the concern with the commission's plan is that control of the case by a gatekeeper will cause disputants to become dissatisfied with the process. Under these circumstances, the gatekeeper needs to help parties understand that regardless of whether they agree on what is an appropriate forum, the one chosen will nonetheless provide each side with a fair hearing from a neutral third party. This might help allay any dissatisfaction parties may feel from not being able to have the final say over the choice of forum. Still, a disputant's sense that procedural justice has been served is likely to be stronger when it is a judge telling him or her what forum will hear the case, or, as in the Middlesex County experiment, when the choice of forum is left with the parties.

Moreover, it may be difficult to distinguish between cases involving two parties who are risk-averse and relatively evenly matched and cases involving unequal bargaining power. In these latter cases, gatekeepers' potential bias for one forum over another may diminish protection of weaker parties. Take, for instance, divorce cases where mediation has become more popular in recent years due to its alleged superiority over court and lawyer ordering in empowering the couple to arrange their post-divorce lives. Some legal scholars have challenged this view, claiming that mediators' intervention leads to custody, financial, and other arrangements that are more favorable to husbands than those obtained through lawyer-led bargaining in the shadow of reformed custody and divorce laws. This bias is likely exacerbated in divorce cases involving domestic violence. Once again, the burden is on proponents of the commission's plan to show how gatekeepers would be trained to be aware of the potential for such biases.

Dispute resolution institutions as they are currently evolving are plagued by information asymmetries and strategic behavior. Given the piecemeal fashion by which reforms of the system typically are initiated, it seems desirable to design a multi-option justice system where gatekeepers can objectively evaluate parties' positions and place them in a forum where their dispute is handled most efficiently and fairly. But proponents of reforms such as the one outlined by the Commission on the Future of the California Courts must show how mechanisms ensuring the preparedness and accountability of gatekeepers are to be put in place, and how these reforms would improve the quality of justice. Their proposals sound appealing, but they must prove to be feasible. Only then can a multi-option justice system help improve court management—and allow judges to focus their energies on tasks they do best and in which they can best serve the public.