

# A COMMUNITY OF COURT ADR PROGRAMS: HOW COURT-BASED ADR PROGRAMS HELP EACH OTHER SURVIVE AND THRIVE\*

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*This article discusses the community of alternative dispute resolution (ADR) professionals that has evolved as courts have incorporated ADR programs into the justice system. The article describes a number of challenges confronting court ADR programs, as well as efforts generated from within the community to confront those challenges. The article describes development of the Federal Judicial Center's Program for Consultations in Dispute Resolution and how the FJC designed and implemented this program, through which judges, ADR administrators, and researchers provide assistance to their peers in federal court ADR programs. The article also discusses an American Bar Association (ABA) project, Court ADR Program Advisors, modeled after the FJC Program, that provides assistance to state court ADR programs and how the ABA project has helped state courts address four challenges. In addition, the article discusses a study of court ADR administrators designed to help courts use information technology to evaluate their court ADR programs.*

**I**t has been almost three decades since Frank Sander articulated his vision of the multi-door courthouse (Sander, 1976), and in that time courts across the country have turned his vision into reality by creating dynamic and diverse alternative dispute resolution (ADR) programs. Sander envisioned a courthouse that would offer disputants alternatives to traditional litigation; these alternative "doors" include ADR processes such as mediation and arbitration and other services. Almost all states now have an ADR component in their court system, and many federal courts implemented ADR programs in the 1980s and 1990s (Niemic, Stienstra, and Ravitz, 2001; Plapinger and Stienstra, 1996). More programs proliferated in federal courts after the ADR Act of 1998, which required all federal district courts to "authorize by local rule . . . the use of alternative dispute resolution processes in all civil actions."

This article will discuss the community of court ADR professionals that has evolved over the past three decades as courts have incorporated ADR programs into the justice system. The article will describe a number of challenges confronting court ADR programs, as well as efforts generated from within the community to confront

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The programs in which these court ADR professionals work vary from state to state and even from county to county in some states; the concept of the multi-door courthouse has evolved into many different forms in state and federal courts across the country (McAdoo and Welsh, 2004). While the programs take varied forms, ADR processes have been transformed from what appeared to be a radical innovation to an accepted and even routine part of the justice system (Lande, 1997). The judges, staff, and practitioners who work with these programs have developed considerable expertise in creating and managing dispute resolution programs within the courts. These members of the court ADR community have traditionally been willing to share their expertise and experience to help courts in other jurisdictions build and improve their programs. Several national organizations have provided opportunities for court ADR professionals to meet and share their experiences. These include the Policy Consensus Initiative, the Association for Conflict Resolution Court Sector, the Federal Judicial Center, and the American Bar Association (ABA) Section for Dispute Resolution, which annually sponsors the National Conference on Court ADR. These opportunities are extremely valuable to members of this unique field, who come from a wide array of professions and disciplines and rely to a great extent on meeting with others to share their experiences and advice.

## THE CHALLENGES

Today's court ADR programs still face many of the same challenges that the first ADR programs faced, as well as new challenges that have emerged as programs have become institutionalized in the court system. There are a number of common challenges:

- *A disconnect between the rules and reality.* Many courts have a court rule authorizing the use of ADR processes for cases filed in the court, but the rule is rarely or seldom used (Brazil, 2002). Among the reasons for this disconnect is that some judges do not actively encourage ADR (McAdoo and Hinshaw, 2002), and judges are the essential catalyst for new or voluntary ADR programs, which depend upon judges for referrals (Plapinger and Stienstra, 1996).
- *Resistance from the bar.* In some jurisdictions, members of the bar resist the use of ADR or simply do not encourage their clients to use ADR for appropriate cases (McAdoo and Hinshaw, 2002). Part of this resistance

results from a lack of knowledge about ADR processes. For instance, some attorneys do not understand a significant difference between mediation and arbitration—the role of the neutral. Mediation involves a third-party neutral (the mediator) facilitating a negotiated agreement between the parties, whereas in arbitration, an arbitrator is empowered to make a final and often binding decision.

- *Lack of public awareness.* In many areas of the country, the general public is not aware of ADR and, therefore, litigants must rely upon their attorneys to recommend its use (McAdoo and Hinshaw, 2002). Those who do use ADR may not understand the process, for example, expecting the mediator to “decide” the case or otherwise have the same authority as a judge. These litigants may be dissatisfied with the process because it did not meet their expectations.
- *Risks to quality control.* In a time of too few resources, especially to fund ADR administrators, many court programs struggle with the need to ensure the quality of services and to enforce ethical rules for neutrals and attorney-representatives. While some courts have staff neutrals, many courts rely upon a panel of outside neutrals to provide dispute resolution services. Depending upon the court, these neutrals may be paid or may be pro bono volunteers. Several programs report that one disastrous mediation can become a legend and sour the legal community against the use of mediation in general. Program administrators try to avoid such legends and maintain a program’s reputation for quality services by taking steps to appoint and retain only well-qualified mediators for the court’s panel. These steps include establishing qualifications for panel membership, requiring advanced training, interviewing the mediators, soliciting participant evaluations through questionnaires, and observing mediation sessions.
- *Need for program evaluation.* Court ADR programs often conduct evaluations to monitor program quality and demonstrate that the program is meeting court-established goals, which vary from court to court and typically include reducing dockets, saving transaction costs, saving time, providing litigants with more options, and increasing client satisfaction (McAdoo and Welsh, 2004; Wissler, 2004).
- *Serving pro se litigants.* Many courts do not have a mechanism to provide an ADR option to pro se litigants, who cannot use ADR if they are required to pay a court administrative fee or to pay for the neutral’s services. Where litigants must pay additional costs to use ADR, pro se litigants are denied access to this alternative forum. Some courts also exclude pro se cases from their ADR programs because the pro se litigant may be disadvantaged, or may improperly pressure the neutral for help, when the other side is represented. Providing counsel to pro se litigants can ease these problems, but finding such counsel is often difficult.

- *Lack of funding.* Most courts struggle to maintain and increase their budget to provide ADR services (Brazil, 2002). Court ADR programs have to compete for their funding with other traditional court services, a competition that ADR programs often lose, particularly in recent years when state and federal budgets for nonessential programs have been slashed. Courts have experimented with a number of funding options, including filing fees, user fees, and certification fees (Skove, 1998), but the funding for many programs remains uncertain.
- *Retaining mediation's core values.* Many proponents of mediation in the courts hoped that mediation would provide a positive alternative to an adversarial, formal, and potentially alienating justice system. However, some ADR programs have evolved to incorporate many of the adversarial elements they were intended to avoid. Experts are concerned that in some courts, mediation has come to look more like settlement conferences, which tend to emphasize settlement rather than provide litigants the opportunity to work together to resolve the dispute (Senft and Savage, 2003).
- *Requiring good faith.* Court rules in some states require that parties "mediate in good faith." Court programs have grappled with how to administer these rules, and courts have grappled with how to interpret good-faith requirements. Experts recommend programs be designed with stakeholder input to prevent problems with a good-faith requirement (Lande, 2004; American Bar Association Resolution, 2004).

These challenges have been discussed in numerous publications and conferences attended by judges, court staff, attorneys, and neutrals, and in the last few years the Federal Judicial Center and the American Bar Association developed programs to build upon the cumulative knowledge of the court ADR community and proactively assist court ADR programs address these challenges. The projects rely upon the experienced members of the court ADR community to provide direct advice and assistance to courts needing their expertise.

### FJC PROGRAM FOR CONSULTATIONS IN DISPUTE RESOLUTION

In 2003, the Federal Judicial Center (FJC) announced the availability of a peer-to-peer ADR assistance project for the federal district and bankruptcy courts. The FJC's Program for Consultations in Dispute Resolution grew out of a conference convened in response to the ADR Act of 1998 and is designed to help judges and court administrators meet the act's requirement that each district court establish an ADR program. Eighty-four of the ninety-four district courts were represented at the conference. Some of the conference attendees suggested that all federal courts would benefit from a program through which federal courts could seek expert, on-site assistance in developing or improving an ADR program. The conference attendees recognized

that many federal courts had the desire to create vibrant ADR programs or renew ailing programs but that many lacked the skills, knowledge, and tools to establish an effective program. When the William and Flora Hewlett Foundation became interested in the idea of providing direct ADR assistance to the courts and made a grant to the Federal Judicial Center Foundation, FJC was able to establish the Program for Consultations in Dispute Resolution. The center convened an advisory committee to design the program and recruited twenty-four ADR experts, including judges, administrators, and academics, to serve as the peer-program consultants. The FJC invited all of the consultants to attend a training program before the program was launched in July 2003.

Each consultation begins when a judge or member of the court's staff contacts the FJC for assistance. A member of the project staff talks with the court about its needs, determines the court's goals, and identifies two consultants who best fit with the court's needs. Working with the court and the consultants, project staff prepare an agenda for the consultation and assemble documents and printed materials, some of which were written specifically for the consultation program, to support the on-site visit.

The Program on Consultations has, as of May 31, 2005, provided on-site consultations to twelve federal district and bankruptcy courts, and an additional two consultations are in the planning stages. Of these fourteen courts, seven sought assistance to establish a new ADR program; three sought assistance to revitalize an old program or an existing program that never got off the ground; two sought help in evaluating their ADR programs; one sought help streamlining its ADR administrative process; and one court sought guidance for its mediators on ethics in mediation. The consultations at three federal district courts illustrate how assistance from the FJC Program on Consultations has improved each court's ADR services.

***Middle District of Pennsylvania.*** In 2003 the Middle District of Pennsylvania contacted the FJC's Program for Consultations in Dispute Resolution for assistance in revitalizing a dispute resolution program that had been in place since 1994. The local rules in this district offer litigants three dispute resolution options: mediation, settlement conference, and summary jury trial (M.D.Pa. L.R. 16.7). However, these dispute resolution options were being used only sporadically, and since 1994 there had been only a slight increase in the number of cases referred to mediation. Some judges referred a significant number of cases to the mediation program, but most judges referred only a few cases each year. The district's judges perceived that the program was underutilized by both the bench and bar, and there was also the perception that the local bar was resistant to dispute resolution. The district's ADR program faced the same two challenges as the Western District of Texas—resistance from the bar and a disconnect between the rules and reality.

The FJC on-site consultation team included a judge from a district with an active ADR program and an experienced ADR administrator from another district with a very active and established program. The consultation team met initially with several key judges and staff and then met with the full bench—six active and seven

senior judges—during a regularly scheduled Board of Judges meeting. Based on a review of materials provided before the consultation and the opening discussion with key judges and staff, the consultation team made six broad recommendations for changes in the court's ADR program.

The court responded by making numerous structural, rule, and programmatic changes. First, the court established a Board of Judges' Alternative Dispute Resolution Committee to oversee the ADR program and ensure that it is an integral part of the court's services. Second, the court created a Mediation Advisory Group and invited prominent attorneys from the public and private sector, as well as representatives from the plaintiff and defense bars, to serve on the group. The Mediation Advisory Group reviewed all of the consultation team's recommendations and supported the changes to the existing program.

Third, with the support of the Mediation Advisory Group, the district implemented a pilot mandatory-mediation program. On July 26, 2004, the chief judge issued a standing order for the clerk of court to randomly refer 180 cases to the mandatory-mediation program over a two-year period beginning in October 2004. In addition, the court offered two courses to the members of the mediation panel, which the mediators were strongly encouraged but not required to attend: a six-credit continuing legal education course in Advanced Mediation Skills was offered at two different locations for the attendees' convenience, and a three-credit continuing legal education course in Representing Clients in Mediation was offered to members of the bar. The district hopes to offer these two courses annually if the budget allows.

The Middle District court reported that more cases are now being referred to mediation, but the court has not yet completed an interim program evaluation. The court plans ongoing evaluations of the mandatory-mediation pilot program but, as of this writing, the program has been operating for less than a year, so results are not yet available. The Middle District court was responsive to all of the recommendations, and the dispute-resolution-program administrator reports that the consultation revitalized the program and energized the court staff and judges about the use of ADR and mediation in particular.

***The Western District of Texas.*** In 2004 a judge in the Western District of Texas asked for a consultation to help one division of the court establish a new ADR program. This judge had often served as a mediator while in private practice, and two other judges in the division had previously served as state court judges, where they saw mediation help reduce their dockets and caseloads; these three judges believed an effective ADR program could do the same in the Western District. Although the district had a local rule allowing for mediation and other forms of alternative dispute resolution, the rule was rarely used (Tex. West. Dist. L.R. CV-88). The court's request for a consultation indicated it faced two of the common challenges for court ADR programs: a disconnect between the rules and reality and potential resistance from the bar.

The FJC consultation team consisted of two judges from courts with very active dispute resolution programs and a member of the FJC staff. On the first day of the

on-site consultation, the team met with the judges and court staff. The two judges on the consultation team explained and documented the operations of the ADR programs in their courts, including rules and forms necessary to provide the framework for a program. The next day, the consultation team and members of the court met with members from the local federal bar who had experience in mediation to discuss how an ADR program could be designed to serve litigants and members of the bar effectively. After the consultation, the Western District judges appointed several members from this local federal bar group to form a committee to amend the local rules to provide an operational framework for a new ADR program. As of this date, the committee has recommended several modifications to the court's current practices. These modifications include creating a uniform process for ordering a case to ADR; requiring litigants to submit an Initial Joint Case Status Report that would address a number of issues, among them the feasibility of ADR; and initiating a process to develop a list of ADR providers for cases where the parties cannot agree on the selection of a mediator. Though the judges who wanted an effective ADR program might have been able to design a new ADR program and draft new local rules without the consultation, the consultation was a catalyst for generating enthusiasm and moving the project forward much more quickly than would have been the case otherwise.

***Eastern District of New York.*** The Eastern District of New York refers approximately 10 percent of civil cases to ADR (Levy, 2005), which places a considerable demand on the ADR administrator. In the hope that the management of the ADR program could be streamlined, the court's ADR administrator and ADR oversight judge called on the FJC's Program for Consultations in Dispute Resolution in 2003 to help the court create better procedures for tracking the ADR cases. In particular, they were frustrated with their paper case-tracking system and sought to incorporate information about mediation and arbitration into the case-management and electronic case-filing (CM/ECF) system. The Eastern District's request to the FJC sought help in overcoming the common challenges of maintaining quality control and evaluating the program.

The consultation team for the Eastern District included ADR administrators from two district courts that had incorporated their alternative dispute resolution services into their electronic case-filing systems. The consultants met with the Eastern District's ADR oversight judge, the court's ADR administrator, and the court's information systems staff over a two-day period. The consulting ADR administrators provided samples and documents and demonstrated how their courts were using electronic case-filing systems to perform several key administrative functions for their ADR programs. Most important, the consultants helped the court outline each step of the ADR life of a case—initial referral, notice to counsel, selection of a mediator, etc.—and identify which steps could be assisted by the electronic case-filing system.

Within a few weeks after the consultation, the Eastern District's information systems staff had completed the necessary changes to the electronic case-filing system, and the ADR administrator is now able to use the system to track cases referred to the

ADR program. Among the changes made, all counsel and the ADR administrator are automatically notified by e-mail when a judge issues an order referring a case to mediation, permitting each to take the necessary steps to start the mediation process. The Eastern District plans to ask the FJC to help them develop a process for analyzing the dispute resolution information they are now able to collect.

## ADVISORS

Like the federal courts, many state courts have years and in some cases decades of experience implementing ADR programs. The judges and staff involved in these programs have been willing to share with other programs their expertise and the lessons they have learned. Court staff share innovations through their participation in associations such as the ABA and the Association for Conflict Resolution. Similarly, organizations such as the Policy Consensus Initiative and the National Center for State Courts provide support and information for court ADR programs.

In January 2003 the ABA Section of Dispute Resolution received a grant from the William and Flora Hewlett Foundation to replicate the Federal Judicial Center Program on Consultations to provide assistance for state court ADR programs. The ABA created an advisory committee to review the Program on Consultations and adapt the program to the needs of state court ADR programs. The advisory committee's challenge was to create a program that would systematize the informal and diffuse peer-assistance tradition that has arisen among court ADR personnel. The advisory committee modeled its efforts on the the FJC's program structure. The committee also sought to collaborate with other organizations with expertise in court ADR, such as the Association for Conflict Resolution, the National Center for State Courts, and the Policy Consensus Initiative, to provide a centralized resource for state courts seeking help with their ADR programs.

In September 2004 the American Bar Association announced the availability of the Court ADR Program Advisors (CAPA). The program is designed to provide many types of assistance, such as providing sample documents, rules, statutes, and educational materials; identifying and recruiting mentor courts; supporting dialogue on list serves; and referring the requester to regional resources where available. On-site consultations are available, but all of the requests submitted thus far have been handled through telephone or e-mail consultation.

Thus far, the CAPA project has received requests for assistance to overcome seven different challenges: crafting an effective good-faith rule; designing a nonbinding arbitration process; drafting ADR procedural rules; performing a statewide evaluation; providing services to pro se litigants; researching the merit of voluntary versus mandatory ADR processes; and drafting rules to prohibit a mediator from predicting the judge's ruling in a case filed before a particular court. The assistance provided by CAPA will be described in terms of the first four issues on which courts requested assistance from the advisors. These four issues illustrate the challenges state courts

face and the impact that assistance can have in helping courts overcome challenges. Because these courts are currently addressing these issues, the state and the court personnel involved are not identified.

**Good Faith.** A state supreme court sought assistance from the Court ADR Program Advisors in dealing with the state's ADR rules that require good-faith participation in mediation, a common challenge for court ADR programs. The lower courts found enforcing the good-faith rule problematic; the courts were unsure whether participants should be sanctioned when they failed to show up for the mediation without any notice, failed to bring documents requested, or failed to have a person with settlement authority at the mediation. The court wanted to know what penalties other jurisdictions and courts imposed upon parties who failed to meet the good-faith requirements.

CAPA assigned two experienced ADR administrators, one from a state court and one from a federal court, to work with the court staff as advisors. The advisors provided the court with background information, including law-review articles on good faith, the ABA Section of Dispute Resolution's policy on good faith adopted in 2004, and examples of good-faith rules adopted in other states. The advisors also talked with the supreme court personnel about how to draft the mediation rules and design the program to avoid raising good-faith issues. For instance, the advisors suggested the court reconsider its rule requiring the parties to attend the mediation for a minimum of three hours, as this rule might cause greater noncompliance.

The advisors also suggested authorizing judges to issue an Order to Show Cause where parties fail to attend mediation sessions. Other courts have found that there is greater compliance when they have this authority and the court staff informs attorneys that show-cause hearings can be held and sanctions issued for noncompliance. To handle the problem of parties attending the mediation without settlement authority, the advisors suggested that the parties list in the stipulation to mediation who will be attending and who will have settlement authority. If the persons with settlement authority do not attend then that failure could result in a show-cause hearing. The approach taken in the consultation was to offer rule revisions aimed at encouraging appropriate conduct, rather than to adopt a good-faith rule.

**Parties Proceed to Trial De Novo After Nonbinding Arbitration.** A state court asked the Court ADR Program Advisors to address the problem of parties going forward with a trial de novo after a nonbinding arbitration proceeding. While this request reflected circumstances unique to this particular court system, the requesting court sought to control the quality of the program by ensuring that the arbitration program was equitable and provided a service to the parties. The ABA assigned to this court an advisor whose court had confronted a similar challenge. The advisor first suggested that the court investigate the number of cases requesting a trial de novo that actually proceed to trial. The advisor's court had found that while many parties may request a trial de novo, most in fact settle shortly after the arbitration because the parties use the arbitration award to guide the settlement.

The advisor also recommended the court consider making changes to the arbitrator panel. The advisor's court had found that the parties were more likely to accept awards made by well-regarded senior attorneys serving as arbitrators. The advisor also recommended that the parties be provided with some degree of control over the choice of the arbitrator as this will make them more likely to accept the decision. Finally, the advisor suggested the court hold a focus group with some of the stakeholders and repeat-player parties, such as insurance companies, to hear and to try to address their issues. The advisor's court had learned that often parties request a trial *de novo* because they do not want to be on record as settling for a certain amount and, therefore, choose to settle privately.

**ADR Rules of Procedure.** Another request came from a state that sought assistance crafting an ADR rule for the state district courts with jurisdiction over all landlord-tenant cases, replevin actions, motor-vehicle violations, misdemeanors, and certain felonies. The Court ADR Program Advisors reviewed rules from existing federal and state courts and provided an extensive list of sample rules to the requesting state court. The requesting court staff referred the list of rules to the judges on the rules committee, and they used the sample rules to inform their decision making.

**Statewide Evaluation.** In the fourth request, help was sought in designing a statewide evaluation of all court ADR programs, tracking the cases courts referred to community mediation centers, and determining the settlement rates for those cases. The need to evaluate a program is a common challenge for state and federal court ADR programs; because of barriers that will be discussed below, very few states have been able to establish a statewide evaluation and data-collection mechanism. For this request, the ABA assigned a state court ADR administrator with significant experience designing and implementing a statewide evaluation program in court and community programs as advisor. This consultation is ongoing.

## SURVEY OF COURT ADR ADMINISTRATORS

We should now look at tools that might help with projects like those just described. Several requests to the FJC Program on Consultation and the ABA Court ADR Program Advisors asked for assistance evaluating a court's ADR program. A perennial challenge for a court-based ADR program is collecting and analyzing data about the program. Court ADR programs collect data to monitor their ongoing operations and to justify them to key stakeholders, including judges, the bar, and those who have control over the program budget, whether the administrative office of the courts, the state legislature, or a private funding source (McAdoo and Welsh, 2004). The data may be used to alter a program's design, demonstrate cost savings to support stable or increased funding, or justify the continuation of a program based on the satisfaction of litigants and attorneys.

In 2003 the Research and Statistics Task Force of the American Bar Association Section of Dispute Resolution embarked on a project to help court systems use their

information technology to collect the data needed for program evaluation. The task force worked with court ADR administrators and academics to survey court ADR administrators. The survey asked court ADR administrators to indicate the value of different data fields typically collected by programs, with the goal of developing a list of data fields that could be recommended for collection by all courts. The ABA task force also hoped the results of the survey would help determine which data-collection practices work best, improve the institutionalization of good data-collection practices, provide additional opportunities for program support, and promote uniformity in the types of data courts collect.

The task force then sent surveys to members of the ABA Section of Dispute Resolution's Court ADR Committee and also distributed the survey at the 2004 Court ADR National Conference in New York City. The survey asked respondents to rank the importance of fifty-six data-collection fields on a multipoint scale. The first version of the survey asked respondents to indicate whether their court currently collected the data in each of the fifty-six fields, and a second version asking open-ended questions about data-collection practices was sent to eighteen court administrators. In all, twenty-six responses were received from state and federal court program administrators.

Ten data-collection fields received an average importance rating of five or greater on a scale of one to seven and were identified as the most important data fields for courts to collect: These top-ten data fields, in order of importance, are as follows:

1. Was ADR used for this case (yes/no)?
2. What ADR process was used (mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial, other)?
3. Timing information (the date the claim docketed, date of first ADR session, the point in the docket duration that ADR occurred, and the final disposition date of the case).
4. Whether ADR disposed of any claims (yes/no)? If yes, all, some or one claim?
5. What precipitated the use of ADR?
6. Was there a settlement without ADR?
7. Case type (general civil, criminal, domestic, housing, traffic, small claims, etc.).
8. The cost of the ADR process (in dollars and time) to the participants and the court.
9. Whether the disputants used more than one form of ADR.
10. How satisfied the parties and court were with the process, outcome, and the neutral mediator or arbitrator.

These top-ten data fields also reflect recommendations from experts in the field (McAdoo and Welsh, 2004; Ostermeyer and Keilitz, 1997). However, a number of

the fields identified as “important” are not currently collected by the majority of courts represented by the survey respondents. For instance, the respondents rated information about the court system’s satisfaction with the process, outcome, and neutral mediator or arbitrator, and the amount of time each court system employee spends in case processing, as important to collect, but more than 75 percent of the respondents indicated they did not collect either type of information.

The categories of information rated less important by respondents included demographics of the disputants and neutral, content (substantive issues) of the dispute, and the identity of the attorney representing the litigants. Most of the courts represented in the survey reported that they did not collect these types of information, an indication that these court programs have created data-collection systems that focus on the information important to them.

When asked open-ended questions about their court system’s data-collection capabilities and limitations, several respondents indicated a number of obstacles they face in collecting data about their program’s effectiveness and made a number of recommendations for improvement. Several state court ADR administrators reported that the computer systems in different courts throughout the state are not unified, and the court’s case-management system does not capture the data relevant to the administration of the ADR program. Several court systems reported that they collect the data but do not have sufficient resources to enter the data into a computer system or to perform analyses. One respondent reported that the court has to rely upon persons outside of the court’s control, litigants and attorneys, to provide some of the data, such as attorney and party satisfaction and the litigants’ expenses.

Respondents were also asked what incentives they have to collect data. Some indicated that in their court systems there is little incentive to collect the data, while others indicated that they use the data to monitor the program’s quality, obtain additional funding, and justify continued funding. For instance, one respondent answered, “When you are able to collect information consistently over a significant period of time, you can then use the information, e.g., over \$30 million in reported savings to litigants over the past X years, to justify continuation of the program and to encourage the use of a particular form of ADR.” A federal court administrator indicated that the annual report to the court helps the judges make better policy and management decisions.

Court ADR administrators were also asked how much access they have to the information they feel it important to collect. A few indicated that they have access to all of the important information they need, but most of the other respondents indicated that they have limited access to the information they need. A number of administrators also expressed frustration with their limited ability to use the information collected. Court ADR administrators reported that they cannot analyze the information or produce useful reports based on the data collected and entered into a computer system. Essentially, their computer systems are large data dumps that cannot produce useful reports on the effectiveness of the program.

Several respondents indicated that they are using innovations in technology to ease the data-collection burden and improve the quality of the data collected. A few indicated that their court system is trying to reduce the data-entry workload by designing information-technology systems that allow mediators and participants to enter information directly into the computer through the Internet. Some state courts are investigating the use of scantron forms for litigants, attorneys, and neutrals. In the federal courts, administrators report that the case-management/electronic case-filing system (CM/ECF) has the potential to greatly increase access to relevant information.

When asked what tools or services are needed to improve the amount, quality, or usability of data collected, most respondents indicated that their court systems need additional resources for data entry and data analysis, as well as overall improvements to the court's information-technology system. One state court administrator stated, "Our IT staff is already under-resourced to create the basic systems courts need to perform complex case management. As such, adding ADR data elements is lower priority than other statutorily mandated data, which is front burner for the programmers." Another respondent identified a need for software programs that are specifically targeted to ADR tracking, monitoring, and evaluation. A federal court administrator indicated that ADR programs in federal courts need better automation assistance with CM/ECF and federal guidelines from the Administrative Office of the Courts and the Federal Judicial Center.

## CONCLUSION AND RECOMMENDATIONS

The FJC and ABA projects have helped courts address a number of the challenges commonly faced by court ADR programs, including resistance from the bar, the disconnect between appearance and reality, quality control, and program evaluation. These projects have taken advantage of the ADR community's expertise and used it to advance and strengthen the community. The members of this community of court ADR professionals, administrators, judges, academics, and attorneys have willingly volunteered their time and expertise to provide assistance through the FJC or ABA programs.

The survey of court ADR program data fields additionally builds upon the expertise of the community to create better and more-effective evaluation tools for the community, which will in turn provide court ADR programs with better monitoring systems and the information to justify the program or to assist with program modifications. There is still much to be done, particularly in the area of program evaluation. As we saw, the survey respondents suggested several recommendations for improvement. The community needs to expand its expertise to ensure that court information-technology systems meet the needs of court ADR programs.

Over the nearly three decades of its history, the court ADR community has shown its resilience, ingenuity, and commitment to improving the justice system. Through the ADR assistance projects and the survey of court ADR administrators, members of the community have volunteered their expertise to improve other court

ADR programs and the overall justice system. Thus far, nineteen courts have received assistance through the combined efforts of the FJC and ABA projects. The next challenge for the community is continuing these projects once funding from the William and Flora Hewlett Foundation is no longer available as the foundation has decided to discontinue funding for conflict-resolution programs. **jsj**

## REFERENCES

- ADR Act of 1998, 28 U.S.C.A. § 651(b) (West 2004).
- American Bar Association (2004). *Court-Annexed Alternative Dispute Resolution Program Survey*. [http://www.abanet.org/dispute/court\\_contacts.html](http://www.abanet.org/dispute/court_contacts.html) (last visited March 26, 2005)
- (2004). “Section of Dispute Resolution Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs.” <http://www.abanet.org/dispute/draftres2.doc> (last accessed March 26, 2005)
- Brazil, W. D. (2002). “Court ADR 25 Years After Pound: Have We Found a Better Way?” 18 *Ohio State Journal on Dispute Resolution* 93.
- Lande, J. (2004). “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs,” 50 *UCLA Law Review* 69.
- (1997). “How Will Lawyering and Mediation Practices Transform Each Other?” 24 *Florida State University Law Review* 839.
- Levy, R. (2005). “ADR in Federal Court: The View from Brooklyn” 26 *Justice System Journal* 343.
- McAdoo, B., and A. Hinshaw (2002). “The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri,” 67 *Missouri Law Review* 473.
- McAdoo, B., and N. Welsh (2004). “Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice,” in D. Stienstra and S. M. Yates (eds.), *ADR Handbook for Judges*. Washington DC: American Bar Association.
- Middle District of Pennsylvania Local Rule 16.7
- Neimic, R. J., D. Stienstra, and R. E. Ravitz (2001). *Guide to Judicial Management of Cases in ADR*. Washington, DC: Federal Judicial Center.
- Ostermeyer, M., and S. L. Keilitz (1997). *Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers*. Williamsburg, VA: National Center for State Courts.
- Plapinger, E., and D. Stienstra (1996). *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers*. New York: Federal Judicial Center and the CPR Institute for Dispute Resolution.



A COMMUNITY OF COURT ADR PROGRAMS

- Sander, F. E. A. (1976). "Varieties of Dispute Processing." Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, *70 Federal Rules Decisions* 111.
- Senft, L. P., and C. A. Savage (2003). "ADR in the Courts: Progress, Problems, and Possibilities," *108 Penn State Law Review* 327.
- Skove, A. E. (1998). *State Appropriations and Other Funding Sources for Court-Connected ADR*. Williamsburg, VA: National Center for State Courts.
- Western District of Texas Local Rule CV-88.
- Wissler, R. L. (2004) "The Effectiveness of Court-Connected Dispute Resolution in Civil Cases," *22 Conflict Resolution Quarterly* 55.