

National Conference on Dispute Resolution  
- and the State Courts (1988: Baltimore, Md.)

**National Conference on  
"Dispute Resolution and the  
State Courts"**

November 16-18, 1988 /  
Omni International Hotel  
Baltimore, Maryland

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# Agenda

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Sponsored by The National Institute for Dispute Resolution  
The State Justice Institute  
The National Center for State Courts

These organizations were asked to nominate leaders in their respective fields to attend the National Conference on Dispute Resolution and the State Courts.

AFL-CIO

Academy of Family Mediators  
Alliance of American Insurers  
American Arbitration Association  
American Bar Association, Business Law Section  
American Bar Association, Judicial Administration Division  
American Bar Association, Litigation Section  
American Bar Association, Standing Committee on Dispute Resolution  
American Bar Association, Tort and Insurance Practice Section  
American Chamber of Commerce Executives  
American Corporate Counsel Association  
American Institute of Architects  
American Insurance Association  
American Judges Association  
American Judicature Society  
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Federal Judicial Center  
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Institute for Civil Justice, Rand Corporation  
Institute of Judicial Administration  
International Association of Defense Counsel  
Lawyers Conference, American Bar Association,  
Judicial Administration Division  
National Association of Attorneys General  
National Association of Counties  
National Association of Independent Insurers  
National Association of Insurance Commissioners  
National Association of Manufacturers  
National Association of State Judicial Educators  
National Association of Women Judges  
National Association for Community Justice  
National Association for Court Management  
National Bar Association  
National Conference of Administrative Law Judges  
National Conference of Federal Trial Judges  
National Conference of Metropolitan Courts  
National Conference of Special Court Judges  
National Conference of State Legislatures  
National Conference of State Trial Judges  
National Conference on Peacemaking and Conflict Resolution  
National Council of Juvenile and Family Court Judges  
National Governors' Association  
National Judicial College  
Society of Professionals in Dispute Resolution  
United States Chamber of Commerce

The sponsors of the conference gratefully acknowledge the support of the National Institute of Justice in the production of case-study videotapes prepared by the National Institute for Dispute Resolution for use in the workshops.

They gratefully acknowledge a contribution from Aetna Life & Casualty for the conference participants' notebook and for production of post-conference reports.

The sponsors greatly appreciate the transcription services contributed by the National Shorthand Reporters Association.

Special thanks to Christopher Koch of Koch TV Productions and Thomas Brady for the production of the videotape series "Dispute Resolution and the Courts."



**A**

# National Conference on Dispute Resolution and the State Courts

November 16-18, 1988  
Omni International Hotel  
Baltimore, Maryland

## Agenda

### Wednesday, November 16, 1988

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- 8:30 am-5:30 pm    Registration—International Promenade
- 1:30-2:45 pm    **OPENING PLENARY SESSION**—International Ballrooms A, B, and C
- Welcome and Introductions**  
                    Madeleine Crohn  
                    President, National Institute for Dispute Resolution
- Hon. Gordon R. Hall  
                    Chief Justice, Utah Supreme Court and Chair of the Board of Directors, National  
                    Center for State Courts
- David I. Tevelin  
                    Executive Director, State Justice Institute
- Conference Keynote: ADR—The Jury Is Still Out**  
                    Hon. C. C. Torbert, Jr.  
                    Chief Justice, Supreme Court of Alabama and Chair of the Board of Directors, State  
                    Justice Institute
- Plenary Session: What We Know And Don't Know About Dispute Resolution In  
                    The Courts**
- Setting the Scene—A Briefing  
                    Jonathan B. Marks  
                    President, Endispute, Incorporated  
                    Washington, D.C.
- 2:45-3:00 pm    Refreshment Break

3:00-5:30 pm **SOCRATIC PLENARY PANEL**

Understanding and Evaluating The Scene—A Panel Led By  
Charles R. Nesson  
Professor, Harvard Law School, Cambridge, Massachusetts

*Participants:*

William Davis

Administrative Director of the California Courts, San Francisco, California

Hon. Hilda R. Gage

Judge, 6th Judicial Circuit of Michigan, Pontiac, Michigan

Gordon M. Griller

Administrator, Maricopa County Superior Court, Phoenix, Arizona

Deborah Hensler

Director of Research, Institute for Civil Justice, The Rand Corporation,  
Santa Monica, California

Francis McGovern

Professor, Schools of Law and Public Health, University of Alabama, Birmingham,  
Alabama

Hon. Joshua W. Martin III

Judge, Superior Court of Delaware, Wilmington, Delaware

Paul S. Miller

Vice President and General Counsel, Pfizer, Inc., New York, New York

Sheldon Miller

Member of the Executive Committee, American Trial Lawyers Association, Detroit,  
Michigan

Hon. Thomas J. Moyer

Chief Justice, Supreme Court of Ohio, Columbus, Ohio

Justice John K. Trotter (Ret.)

Judicial Arbitration and Mediation Service, Santa Ana, California

6:30-7:30 pm **Reception**—International D and Foyer

7:30-10:00 pm **Banquet**—International Ballroom A, B, C

**Presiding:**

Robben W. Fleming

Past Chair, Board of Directors, National Institute for Dispute Resolution

**Welcome and Introduction:**

Hon. Kurt L. Schmoke, Mayor, Baltimore, Maryland

**Address:**

Getting America's Disputes Resolved: Life and Times Around the Courthouse

Hon. Robert C. Murphy

Chief Judge, Maryland Court of Appeals

NATIONAL INSTITUTE FOR  
DISPUTE RESOLUTION

1901 L STREET NW SUITE 600 WASHINGTON DC 20036 • TELEPHONE (202) 466-4764

VIDEOTAPES

from the National Institute for Dispute Resolution

Four color videotapes showing actual and simulated case studies of procedures used in court-annexed dispute resolution receive their first showings at the National Conference on Dispute Resolution and the State Courts. They include interviews with court officials.

Produced by the National Institute for Dispute Resolution with additional funding from the National Institute of Justice, the case studies are part of a continuing series Dispute Resolution and the Courts.

1. **Community Justice Mediation.** Shows an actual community justice center mediation between a homeowner and a contractor over construction repair. Taped at the Justice Center of Atlanta, Inc. Time: 30 minutes.
2. **Court-Ordered Arbitration-Minneapolis.** Shows a simulated court-annexed arbitration within the Hennepin County court system. The case involves a tort claim stemming from an automobile accident. Time: 28:12.
3. **Court-Ordered Arbitration-Pittsburgh.** Shows an actual court-annexed arbitration within the Allegheny County court system. The case involves a shopping mall owner attempting to evict a restaurant for nonpayment of rent. Time: 28:22.
4. **Summary Jury Trial.** A re-enactment involving the actual lawyers of a summary jury trial held by Judge Richard A. Enslin of the U. S. District Court for the Western District of Michigan. The case involves a groundwater contamination damage action filed by 29 plaintiffs against a major corporation. Time: 30:48.

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# National Conference on Dispute Resolution and the State Courts

Omni International Hotel, Baltimore, Maryland  
November 16-18, 1988

November 16, 1988

Dear Conference Participant:

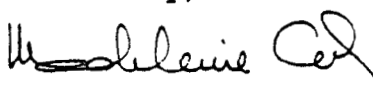
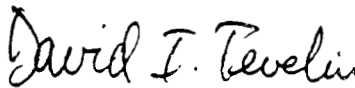
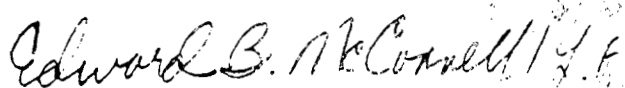
Welcome to the National Conference on Dispute Resolution and the State Courts. On behalf of the three sponsoring organizations and all the groups that nominated you to be invited, we thank you for joining us.

In the past few years, dispute resolution in its many forms has begun to receive wide acceptance. This approach now has the potential to become a principal part of national efforts to simplify and accelerate case settlement, and reduce the costs borne by disputants and, perhaps, the judicial system. As with all new methods, we must give close attention to designing, managing, and evaluating dispute resolution programs. We hope this conference helps us reach informed judgments about how the tests of fairness, efficiency, and effectiveness are met.

We recognize, with appreciation, the Faculty of the Conference. Through their speeches as well as their plenary session and workshop leadership, they will provide the substantive content for our common deliberation.

Finally, let us thank you again for lending your time and expertise to this conference.

Sincerely,

		
Madeleine Crohn President National Institute for Dispute Resolution	David I. Tevelin Executive Director State Justice Institute	Edward B. McConnell President National Center for State Courts

MC:DIT:EBMcC/jh

Co-Sponsors: The National Institute for Dispute Resolution • The State Justice Institute  
The National Center for State Courts

Conference Committee: William R. Drake (NIDR), Richard Van Duizend (SJI), Geoff Gallas (NCSC)

Conference Secretariat: Suite 600, 1901 L Street, NW, Washington, DC 20036 • Telephone (202) 466-4764

## **Thursday, November 17**

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8:00-8:30 am Coffee and Pastry Available

8:30-10:00 am **PLENARY SESSION: The Privatization of Dispute Resolution**—Liberty Ballroom

A point/counterpoint dialogue with follow-up questioning and panel discussion.

*Introduction:*

Arthur H. Snowden II

Administrative Director of the Alaska Courts, President, Conference of State Court Administrators, Anchorage, Alaska

*Moderator:*

Ernest C. Friesen

Professor, California Western School of Law, San Diego, California

*Point/Counterpoint:*

Robert Robinson

Senior Vice President and Chief Counsel, CIGNA Corporation Litigation Department, Philadelphia, Pennsylvania

Hon. Gerald T. Wetherington

Chief Judge, 11th Judicial Circuit, Miami, Florida

*Comments:*

Barbara Ashley-Phillips

President, American Intermediation Service, San Francisco, California

Carl F. Bianchi

Administrative Director of the Courts, Boise, Idaho

10:00-10:15 am Refreshment Break

10:15 am-12:15 pm **CONCURRENT WORKSHOPS: Getting Down To Cases: Court-Annexed Dispute Resolution in Practice**

(Sessions will be repeated from 3:30 pm to 5:30 pm)

Multiple workshop sessions using newly-produced videotapes and simulations to illustrate procedures and assist group discussion.

**Court-Ordered Arbitration**—Pratt B Room

Videotapes of actual and simulated arbitrations of civil cases will be used to stimulate discussion, definitions, and comparisons.

*Facilitator:*

Thomas A. Fee

Senior Program Associate, National Institute for Dispute Resolution, Washington, D.C.

*Resource People:*

Stevens Clark

Professor, University of North Carolina, Institute of Government, Chapel Hill, North Carolina

Hon. Charles A. Flinn

Chair, Joint Minnesota Supreme Court/State Bar Committee to Study Dispute Resolution in Minnesota, St. Paul, Minnesota

Kathy Stuart

Director of Dispute Resolution Programs, Administrative Office of the Courts, Raleigh, North Carolina

**Judicial Settlement—Hopkins Room**

Judges and attorneys will simulate and discuss how a judge can apply mediation techniques to facilitate settlement.

*Facilitator:*

Barry Mahoney

Senior Staff Associate, Institute for Court Management of the National Center for State Courts, Denver, Colorado

*Resource People:*

Hon. Rufus King III

Judge, Superior Court of the District of Columbia, Washington, DC

Hon. Ronald T.Y. Moon

Judge, First Circuit Court, Honolulu, Hawaii

David Neubauer

Professor, Department of Political Science, University of New Orleans,  
New Orleans, Louisiana

**Handling Mass Torts—Poe Room**

An experienced special master, plaintiff, and defense attorney will help participants examine various approaches to resolving mass torts.

*Facilitator:*

Francis McGovern

Professor, Schools of Law and Public Health, University of Alabama, Birmingham, Alabama

*Resource People:*

Gene Locks

Senior Partner, Grehzer & Locks, Philadelphia, Pennsylvania

Marianna Smith

Executive Director, The Manville Trust, Washington, D.C.

**Summary Jury Trial—McKeldin Room**

A videotape of a Michigan "SJT", reenacted by the judge and attorneys who conducted it, will set the stage for discussion.

*Facilitator:*

Marie Provine

Professor, Syracuse University, Syracuse, New York

*Resource People:*

Charles D. Edelstein

Director of Trial Program and Professor, University of Miami Law School, Coral Gables, Florida

Hon. Eugene N. Hamilton

Judge, Superior Court of the District of Columbia, Washington, D.C.

Maurice Rosenberg

Professor, Columbia University School of Law, New York, New York

Clifford J. Zatz

Associate, Akin, Gump, Strauss, Hauer, & Feld, Washington, D.C.

**Civil Mediation—Pratt A Room**

The session will demonstrate a portion of a simulated mediation of a large civil case, discuss how well the process achieves its goals in practice, and raise policy questions.

*Facilitator:*

Linda Singer

Executive Director, Center for Dispute Settlement, Washington, D.C.

*Resource People:*

John A. Clarke

Trial Court Administrator, Superior Court of Hudson County, Jersey City, New Jersey

David U. Strawn

Attorney at law and former judge, and President, Dispute Management, Inc., Orlando, Florida

**Domestic Relations Mediation—Mencken Room**

Following a videotaped simulation, mediation of divorce, custody, and property settlement matters will be discussed.

*Facilitator:*

Michael Lewis

Senior Advisor, National Institute for Dispute Resolution, Washington, D.C.

*Resource People:*

Stan Cohen

Executive Director, Association of Family Conciliation Courts, and Professor, Department of Psychiatry, Oregon Health Sciences University, Portland, Oregon

Hon. Gladys Kessler

Judge, Superior Court of Washington, D.C.

Jessica Pearson

Director, Center for Policy Research, Denver, Colorado

Patrick Phear

Director, Family Mediation Associates, Boston, Massachusetts

**Small Case/Minor Dispute Mediation—Schaeffer Room**

A videotape of an actual mediation in Atlanta will highlight techniques and the court's role followed by discussion.

*Facilitator:*

Craig McEwen

Professor, Bowdoin College, Brunswick, Maine

*Resource People:*

Hon. Joann Bayneum

Chief Judge, Magistrate Court, Atlanta, Georgia

Andrew Thomas

Executive Director, Center for Dispute Settlement, Rochester, New York

12:30-1:30 pm **LUNCHEON—International Ballroom**

*Presiding:*

Richard Van Duizend

Deputy Director, State Justice Institute

International participants will be presented to the conference



1:45-3:15 pm **PLENARY SESSION: Developing Integrated State Dispute Resolution Programs—**  
Liberty Ballroom  
An examination of the relationship of court-annexed innovations to other state initiatives.  
*Introduction:*  
David I. Tevelin  
Executive Director, State Justice Institute, Alexandria, Virginia  
*Moderator:*  
Margaret L. Shaw  
Executive Director, Institute of Judicial Administration, New York, New York  
*Panelists:*  
Howard Bellman  
Mediator and Arbitrator, Madison, Wisconsin  
Hon. John Cratsley  
Justice, Suffolk County Superior Court, Boston, Massachusetts  
William R. Drake  
Vice-President, National Institute for Dispute Resolution, Washington, D.C.  
Mary C. McQueen  
State Court Administrator, Olympia, Washington

3:15-3:30 pm Refreshment Break

3:30-5:30 pm **CONCURRENT WORKSHOPS—**(Repeat of morning workshop offerings)

5:30-6:30 pm **SPECIAL BRIEFING—**Poe Room  
Representatives of the Society of Professionals in Dispute Resolution's Commission on Qualifications will present its preliminary report on determining qualifications for neutrals.

6:00-7:30 pm **Reception—**Calvert Ballroom  
Lord Baltimore Radisson Hotel

## **Friday, November 18**

8:00-8:30 am Coffee and Pasty Available

8:30-10:15 am **PLENARY SESSION: Implementing and Improving Court-Annexed Dispute Resolution Procedures—**Liberty Ballroom  
An exploration of the policy and operational questions that affect the implementation of new court-annexed procedures and the improvement of existing programs.  
*Introduction:*  
Frank E. A. Sander  
Professor and Chair of the ABA Standing Committee on Dispute Resolution, Harvard Law School, Cambridge, Massachusetts  
*Moderator:*  
Peter B. Edelman  
Professor, Georgetown University Law Center, Washington, D.C.

*Panelists:*

Peter S. Adler

Director, Judiciary Program on Alternative Dispute Resolution, Honolulu, Hawaii

Hon. B. Michael Dann

Chief Presiding Judge, Superior Court of Arizona, Phoenix, Arizona

Geoff Gallas

Director, Research and Special Services, National Center for State Courts,  
Williamsburg, Virginia

Sanford M. Jaffe

Director, Center for Negotiation and Conflict Resolution, Rutgers Law School,  
Newark, New Jersey

Robert Lipscher

Administrative Director of the New Jersey Courts, Trenton, New Jersey

Linda Singer

Executive Director, Center for Dispute Settlement, Washington, D.C.

10:15-10:30 am Refreshment Break

10:30 am-12:30 pm **MULTIPLE WORKSHOP SESSIONS: Putting the State of the Art into Practice—  
Problems of Implementation**

Workshops that focus on implementation issues for

**Urban Courts**—Hopkins Room

*Facilitator:*

Barry Mahoney

Senior Staff Associate, Institute for Court Management of the National Center for  
State Courts, Denver, Colorado

*Resource People:*

Kent Batty

Court Administrator, Third Judicial Circuit, Detroit, Michigan

Janice Roehl

Vice-President, Institute for Social Analysis, Washington, D.C.

Hon. Fred Ugast

Chief Judge, Superior Court of the District of Columbia, Washington, D.C.

**Rural Courts**—Preston Room

*Facilitator:*

Fred Miller

Senior Staff Attorney, National Center for State Courts, San Francisco, California

*Resource People:*

Kathryn Fahnestock

Co-Director, Rural Justice Center, Montpelier, Vermont

Tom Lehner

Administrator, Supreme Court of Vermont, Montpelier, Vermont

Arthur Snowden II

Administrative Director of the Alaska Courts, Anchorage, Alaska

James L. Stovall

Coordinator, Oklahoma Agricultural Mediation Program, Oklahoma City,  
Oklahoma

**Family Courts—McKeldin Room**

*Facilitator:*

Michael Lewis

Senior Advisor, National Institute for Dispute Resolution, Washington, D.C.

*Resource People:*

Frederick B. Beane, Jr.

Clerk of the Court, Superior Court of the District of Columbia, Washington, D.C.

Hon. Lawrence W. Kaplan

Judge, Court of Common Pleas of Allegheny County, Pennsylvania, Family Division, Adult Section, Pittsburgh, Pennsylvania

Hon. Robert W. Page

Judge, Superior Court of New Jersey, Trenton, New Jersey

**Appellate Courts—Calhoun Room**

*Facilitator:*

Richard Van Duizend

Deputy Director, State Justice Institute, Alexandria, Virginia

*Resource People:*

Joy Chapper

Senior Staff Associate, National Center for State Courts, Arlington, Virginia

Hon. John Kern III

Senior Judge, Court of Appeals of the District of Columbia, Washington, D.C.

Hon. Angelo G. Santaniello

Senior Associate Justice, Superior Court of Connecticut, New London, Connecticut

**Statewide Programs—Poe Room**

*Facilitator:*

David O'Connor

Executive Director, Massachusetts Mediation Service, Boston, Massachusetts

*Resource People:*

Holly Bakke

Special Deputy Commissioner, Department of Insurance, State of New Jersey, Trenton, New Jersey

Thomas A. Fee

Senior Program Associate, National Institute for Dispute Resolution, Washington, D.C.

Franklin E. Freeman, Jr.

Administrative Director of the North Carolina Courts, Raleigh, North Carolina

Susan Keilitz

Staff Attorney, National Center for State Courts, Williamsburg, Virginia

A separate workshop on Research and Evaluation scheduled for Friday morning has been cancelled.

After further discussion with the faculty, the planning committee concluded that it would be more beneficial to include a focus on research and evaluation in each of the Friday workshops rather than focusing the topic in a single workshop.

12:30-2:30 pm **CLOSING PLENARY LUNCHEON SESSION**—International Ballroom

*Introduction:*

Hon. Gordon R. Hall

Chief Justice, Utah Supreme Court and Chair of the Conference of Chief Justices,  
Salt Lake City, Utah

*Address by:*

Eleanor Holmes Norton

Professor, Georgetown University Law Center and former Chair, U.S. Equal  
Employment Opportunity Commission, Washington, D.C.

2:30 pm Adjournment

# The Convening Organization of the National Conference on Dispute Resolution and the State Courts

The **National Institute for Dispute Resolution (NIDR)** is the nation's only private grantmaker devoted solely to conflict resolution. It funds projects primarily in the areas of the courts, legal and professional education, and public policy mediation. A major Institute program has supported the growth and development of court-ordered arbitration and other court-annexed dispute resolution methods in a number of state courts. The Institute's founding organizations and original funders are the Ford Foundation, the William and Flora Hewlett Foundation, the John D. and Catherine T. MacArthur Foundation, the American Telephone and Telegraph Company, and the Prudential Foundation.

The **State Justice Institute (SJI)** is a private, nonprofit corporation established by Congress to provide financial support to projects designed to improve the administration and quality of justice in the state courts. An important statutory mission of the Institute is to assure the public ready access to a fair and effective system of justice. To that end, the Institute's Board of Directors has identified the evaluation of innovative court-related dispute resolution programs and procedures as an area of special interest. The Institute presently supports a variety of projects to evaluate, demonstrate, and educate judges and court personnel about dispute resolution.

The **National Center for State Courts (NCSC)** is a nonprofit organization dedicated to improving the administration of justice in the nation's state and local courts. The Center is active in four primary areas: research on courts and court-related topics; education and training programs for court personnel; direct technical assistance to state and local courts; and information exchange. It serves as secretariat to eight state court organizations, including the Conference of Chief Justices, the Conference of State Court Administrators, the National Conference of Metropolitan Courts and the National Association for Court Management.

## *Organizational phones and addresses:*

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804/253-2000

**B**

NATIONAL CONFERENCE ON DISPUTE RESOLUTION  
AND THE STATE COURTS

November 16 - 18, 1988

CONTENTS

Tab A	Program
Tab B	Table of Contents
Tab C	List of Participants
Tab D	Opening Plenary Session and Overview
Tab E	Socratic Plenary Panel: Understanding and Evaluating the Scene
Tab F	The Privatization of Dispute Resolution
Tab G	Court-Ordered Arbitration
Tab H	Civil Mediation
Tab I	Domestic Relations Mediation
Tab J	Judicial Settlement
Tab K	Mass Torts/Complex Litigation
Tab L	Small Case/Minor Dispute Mediation
Tab M	Summary Jury Trial
Tab N	Developing Integrated Dispute Resolution Programs
Tab O	Implementing and Improving Court-Annexed Dispute Resolution Procedures
Tab P	Society of Professionals in Dispute Resolution Commission on Qualifications: Preliminary Report
Tab Q	Suggested Bibliography

**C**



# National Conference on Dispute Resolution and the State Courts

Omni International Hotel, Baltimore, Maryland  
November 16-18, 1988

## PARTICIPANT LIST

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OPENING PLENARY SESSION AND OVERVIEW

- (To be inserted) Slides from Plenary Session: What We Know and Don't Know About Dispute Resolution in the Courts, Jonathan B. Marks.
- "The Processes and the Players," from Beyond Adjudication, Jonathan B. Marks, Eric D. Green, and Deborah O. Croom, Draft, To be published by the National Institute for Dispute Resolution.
- "Criticisms and Characteristics of Dispute Resolution Methods," from Paths to Justice: Major Public Policy Issues of Dispute Resolution, U.S. Department of Justice Report of the Ad Hoc Panel on Dispute Resolution and Public Policy (National Institute for Dispute Resolution, January 1984).
- "Comparative Chart," from Dispute Resolution, Stephen E. Goldberg, Eric D. Green, and Frank E.A. Sander (Little Brown and Company, 1985) and Supplement (1987).
- "State Adoption of Alternative Dispute Resolution: Where Is It Today?" Susan Keilitz, Geoff Gallas, and Roger Hanson, 12 State Court Journal 4-11 (Spring 1988).
- State by state survey, "Summary of Alternative Dispute Resolution Program Characteristics," Conference of State Court Administrators and the National Center for State Courts.





# National Conference on Dispute Resolution and the State Courts

Omni International Hotel, Baltimore, Maryland  
**November 16-18, 1988**

SLIDES

PREPARED BY

JONATHAN B. MARKS  
ENDISPUTE, INC.

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## **ADR GOALS:**

- 1. Reducing Judicial Workload and Court Overcrowding.**
- 2. Reducing Disputants' Costs and Lowering Barriers to Access.**
- 3. Achieving Superior Resolutions.**

# **EXAMPLES OF COURT-ANNEXED ADR PROCEDURES**

**SETTLEMENT CONFERENCES  
COURT-ORDERED ARBITRATION  
CASE VALUATION PROGRAMS  
LAWYER MEDIATION  
NON-LAWYER MEDIATION  
SUMMARY JURY TRIALS  
USE OF SPECIAL MASTERS**

# **ADJUDICATION AS PARADIGM**

- BINDING AND ENFORCEABLE  
DECISION**
- LAW-TRAINED PROFESSIONALS**
- DETAILED PROCEDURAL AND  
SUBSTANTIVE RULES**
- PARTY-CONTROLLED AND  
ADVERSARIAL DECISION-MAKING  
PROCESS**



- **Small percentage of all lawsuits resolved by the binding decision of a judge or jury after hearing adversary presentations by lawyers, either at the end of a trial or on earlier motion directed to the judge.**

- **For lawsuits, just as for disputes generally, negotiation is the primary mechanism for resolution.**



**"On the contemporary American legal scene, the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it is litigation.**

**There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call *litigation*, that is, the strategic pursuit of a settlement through mobilizing the court process. Full-blown adjudication of the dispute -- running the whole course [to trial] -- might be thought of as an infrequently pursued alternative to the ordinary course of litigation."**

**Alternatives to adjudication,  
whether court-annexed or private,  
typically attempt to change the  
process of resolution or the *dispute*  
*resolver*, or both.**

## **Nature of Third Party**

## **Kind of Procedure**

### **\* SITTING JUDGES**

**SETTLEMENT CONFERENCE**

**SPECIALIZED SETTLEMENT PROGRAM**

**SUMMARY JURY TRIAL (AS PRESIDER)**

### **\* MAGISTRATES, JUDGES PRO TEM**

**SETTLEMENT CONFERENCE**

**SPECIALIZED SETTLEMENT PROGRAM**

**SUMMARY JURY TRIAL (AS PRESIDER)**

### **\* JURORS**

**SUMMARY JURY TRIAL (AS ADJUDICA-**

**TORY DECISION MAKER)**



**\* ATTORNEYS AND FORMER JUDGES**

**COURT-ORDERED ARBITRATION**

**OTHER CASE VALUATION PROGRAMS**

**-- MICHIGAN MEDIATION**

**-- EARLY NEUTRAL EVALUATION**

**SPECIAL SETTLEMENT MASTER**

**MEDIATION**

**MEDIATION**

**SPECIAL MASTER**

**NEUTRAL EXPERT**

**MEDIATION**

**\* SUBJECT MATTER EXPERTS**

**(E.G., CONTRACTORS, ACCOUNTANTS,  
PSYCHOLOGISTS, COUNSELORS)**

**\* COURT STAFF**

**(E.G., COUNSELORS)**

# **BARRIERS TO NEGOTIATED SETTLEMENTS**

**OUTCOME PREDICTION BARRIERS**  
**EMOTIONAL BARRIERS**  
**COMMUNICATION BARRIERS**  
**ATTORNEY BARRIERS**  
**BARRIERS ARISING FROM**  
**COMPLEXITY**  
**EXTERNAL AND SITUATIONAL**  
**BARRIERS**



## **ROLE OF THIRD PARTY**

**\* DETERMINE LIABILITY AND DAMAGES**

**\* DETERMINE SETTLEMENT VALUE**

**\* ADVISE ON SETTLEMENT VALUE  
AND/OR ADVISE ON STRENGTHS &  
WEAKNESSES OF CASE  
AND LIKELY OUTCOME**

## **KIND OF PROCEDURE**

**\* COURT-ORDERED ARBITRATION  
SUMMARY JURY TRIAL**

**\* SOME CASE VALUATION PROCEDURES  
-- MICHIGAN MEDIATION**

**\* MOST SETTLEMENT CONFERENCES  
SPECIAL JUDICIAL SETTLEMENT  
PROGRAMS**

**JUDICIAL MEDIATION PROGRAMS  
SOME CASE VALUATION PROCEDURES  
MOST LAWYER MEDIATION PROGRAMS  
SOME OTHER MEDIATION PROGRAMS**

**\* SERVE AS INTERMEDIARY IN ATTEMPT  
TO HELP PARTIES DETERMINE AND  
HONESTLY COMMUNICATE "BOTTOM LINES"  
TO DETERMINE WHETHER CASE SETTLEABLE**

**\* SERVE AS INTERMEDIARY TO HELP  
UNDERSTAND INTERESTS AND SEEK  
MUTUALLY ACCEPTABLE SOLUTIONS**

**\*SERVE AS INTERMEDIARY TO DEFUSE  
EMOTIONS, CIRCUMVENT LACK OF TRUST  
AND OTHERWISE TRY TO FACILITATE  
COMMUNICATIONS TOWARDS SETTLEMENT**

**\*MOST SETTLEMENT CONFERENCES AND  
OTHER JUDICIAL SETTLEMENT  
EFFORTS**

**SOME CASE EVALUATION PROGRAMS  
MOST LAWYER MEDIATION PROGRAMS  
OTHER MEDIATION PROGRAMS**

**\*MOST SETTLEMENT CONFERENCES  
AND  
SOME OTHER JUDICIAL SETTLEMENT  
EFFORTS**

**OTHER MEDIATION PROGRAMS**

**\*MOST SETTLEMENT CONFERENCES  
AND**

**SOME OTHER JUDICIAL SETTLEMENT  
EFFORTS**

**OTHER MEDIATION PROGRAMS**

### PRIVATE DISPUTE RESOLUTION PROCESSES

**Voluntary** - DO THE PARTIES HAVE A CHOICE WHETHER TO PARTICIPATE? - **Mandatory Only By Contract**

**Non-Binding** --- MUST THE PARTIES ACCEPT A THIRD PARTY'S DECISION ? --- **Binding By Agreement**

**No Third Party** ----- WHAT ROLE , IF ANY , FOR A NEUTRAL? ----- **Third Party**

**Informal** ----- WHAT RULES AND PROCEDURES, IF ANY, ARE FOLLOWED? ----- **Formal**

### COURT-ANNEXED DISPUTE RESOLUTION PROCESSES

**Voluntary** ---DO THE PARTIES HAVE A CHOICE WHETHER TO PARTICIPATE?--- **Court-Mandated**

**Non-Binding** --WHAT INFLUENCES ON THE PARTIES 'ACCEPTANCE OF THIRD PARTY'S DECISION ?-- **Coercive**

**No Third Party** -----WHAT ROLE, IF ANY, FOR A THIRD PARTY NEUTRAL?----- **Third Party**

**Informal** -----WHAT RULES AND PROCEDURES, IF ANY, ARE FOLLOWED?----- **Formal**

- **IN CONTEXT, "ADR IN THE COURTS" STILL EXPERIMENTAL**
  - \* **2,253 GENERAL JURISDICTION STATE COURTS**
  - \* **13, 231 LIMITED JURISDICTION**
  - \* **NCSC/NIDR 1987 -- 458**  
**OPERATING ADR PROGRAMS IN**  
**44 STATES AND D.C.**
  - \* **OF THOSE, 152 COA.**
  - \* **306 NON-COA**
  - \* **ADD OTHERS-CA 500 NON-COA.**

# **THE JURY IS STILL OUT!**

- **ADR STILL FAR FROM AN ESTABLISHED PART OF MOST STATE JUSTICE SYSTEMS**
- **LOTS WE DON'T KNOW**
- **HOST OF INTERESTING CHALLENGES AND ISSUES**



- \* HI CONCENTRATION OF ADR PROGRAMS IN A FEW STATES.**
- \* LOW LEVEL OF DIFFUSION ELSEWHERE.**
- \* LIMITS ON KINDS OF CASES AND JURISDICTIONAL AMOUNTS.**



- **LOTS WE DON'T KNOW ABOUT WHAT WORKS, WHAT DOESN'T WORK, AND ABOUT HOW TO MAKE THINGS WORK.**

- \* SCARCITY OF GOOD EVALUATION.**

- \* CRUCIAL LACK OF COMPARATIVE DATA -- ADR CASES VS. SIMILAR CASES HANDLED TRADITIONALLY.**



# **COURT-ORDERED ARBITRATION:**

- **HOW DOES IT COMPARE WITH TRADITIONAL WAYS OF HANDLING CASES?**
- **SOMETIMES AN IMPROVEMENT. BUT . . .**

- **IN SOME JURISDICTIONS, COA IMPROVES PACE AT WHICH CASES ARE RESOLVED. BUT . . .**
- **IN SOME JURISDICTIONS, LOWER PER CASE COST OF CASES REFERRED TO ARBITRATION. BUT . .**
- **HIGH LEVEL OF PARTICIPANT SATISFACTION. BUT . . .**
- **ISSUES RELATING TO ACCESS AND FAIRNESS**



- **ONE KEY FINDING -- THE IMPORTANCE OF MANAGEMENT**

**"LOOSELY STRUCTURED PROGRAMS, LAX ENFORCEMENT OF DEADLINES, TOLERANCE OF INEFFICIENCIES . . . CONTRIBUTE TO SLOW AND INEFFECTIVE ARBITRATION PROCESSES."**



- **QUESTION -- ARE POSITIVE RESULTS ATTRIBUTABLE TO ARBITRATION REALLY THE RESULT OF INCREASED ATTENTION TO GOOD CASE MANAGEMENT?**

- HOST OF INTERESTING CHALLENGES AND ISSUES BEYOND CENTRAL ONES OF WHAT WORKS AND WHAT DOESN'T WORK.
  - \* HOW SHOULD COURTS RESPOND, IF AT ALL, TO APPARENTLY GROWING "PRIVATIZATION" OF DISPUTE RESOLUTION?

**\* WHAT IS THE RELATIONSHIP OF  
INTEREST IN ADR AS COURT-  
ANNEXED PROCESS AND  
INTEREST IN ADR IN BROADER  
CONTEXT OF DELIVERY OF  
SERVICES BY STATE GOVERNMENT?**

## THE OBJECTIVE:

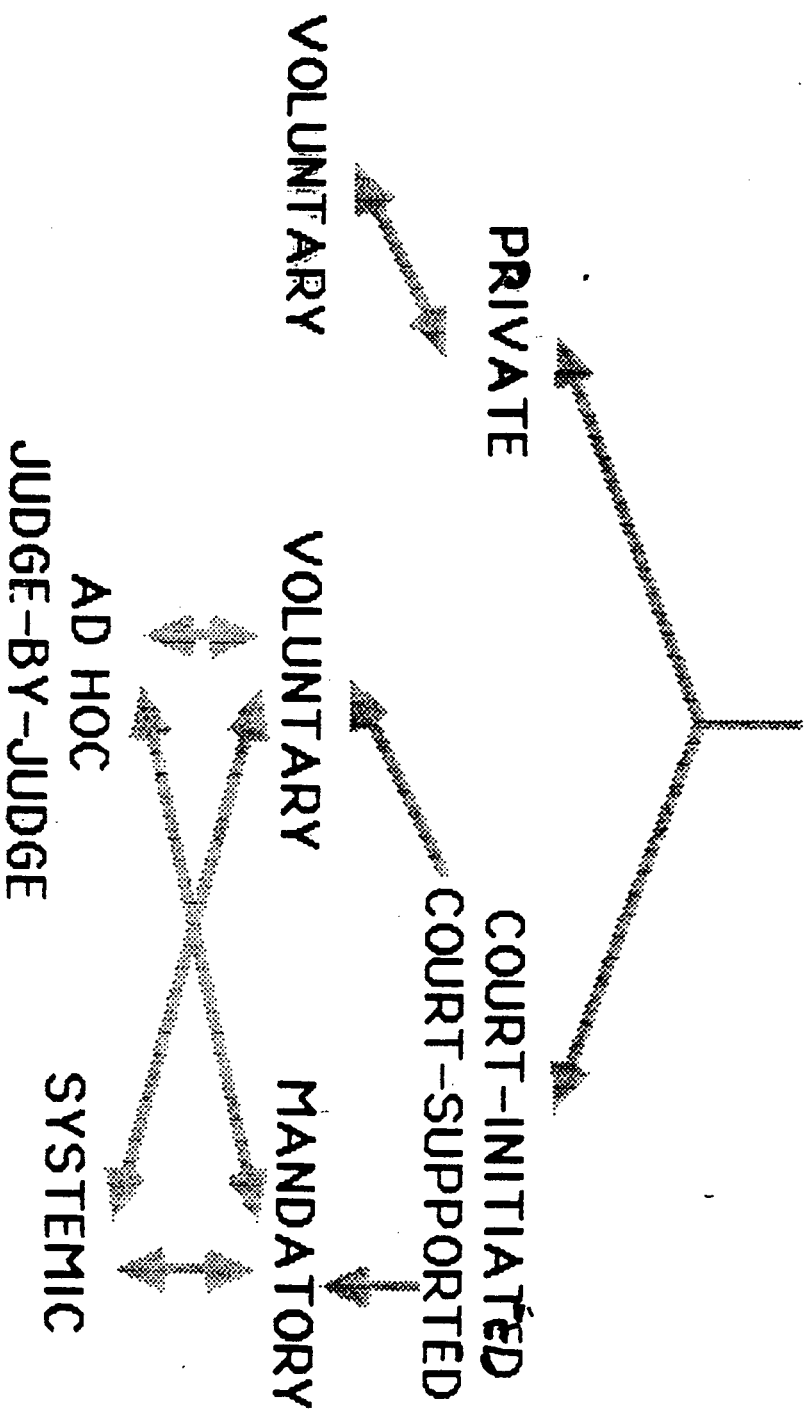
- MOVE THE POINT OF RESOLUTION
- CUT THE TRANSACTION COSTS OF GETTING TO THAT POINT

## THE REDINED PROBLEM:

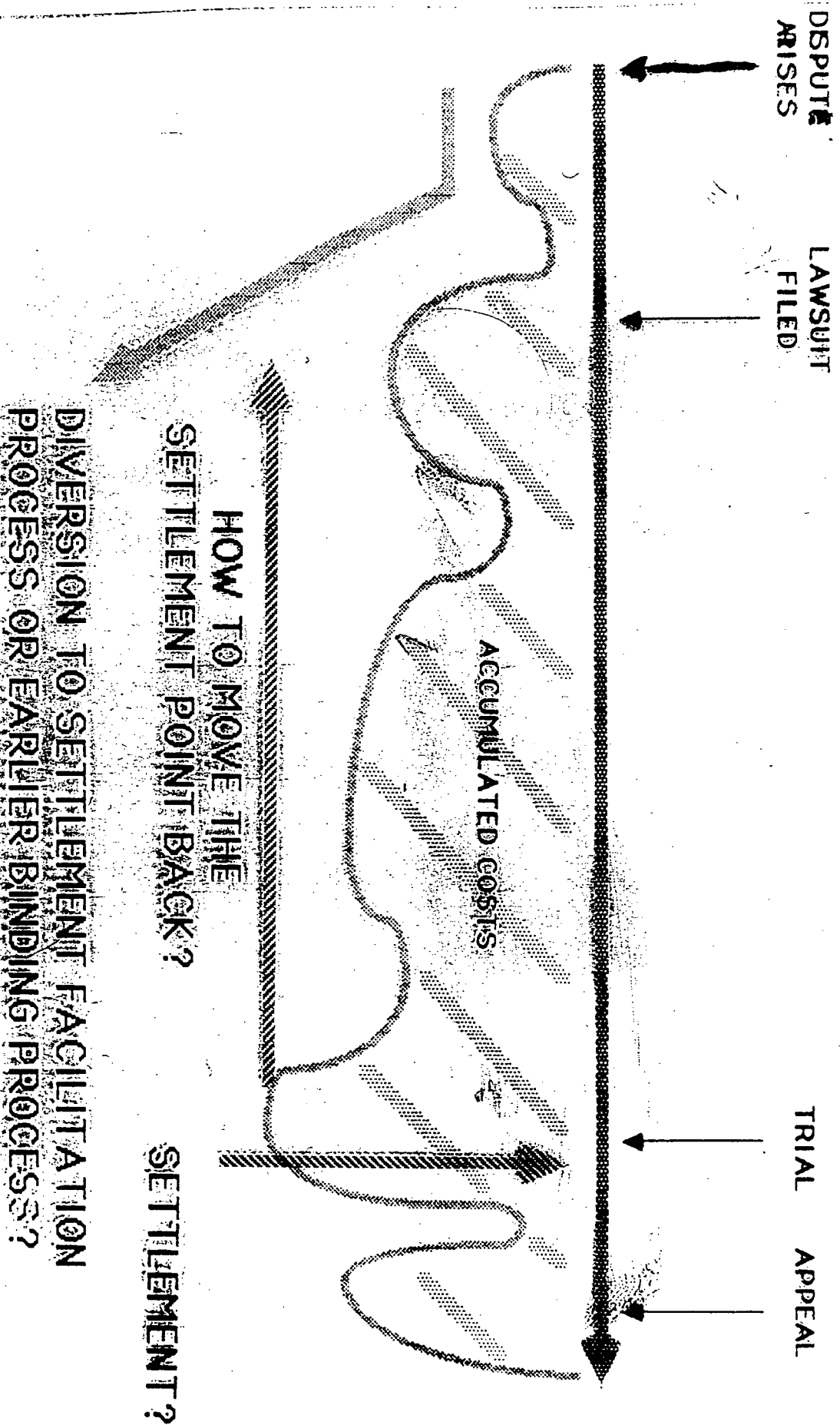
- HOW TO ACHIEVE EARLIER, FASTER RESOLUTIONS?



# WHAT KIND OF DIVERSION?



# CASE TIME LINE



"TRIAL PRACTICE DEMANDS THAT THE ATTORNEY BE ABLE TO RESPOND IMMEDIATELY AND EFFECTIVELY TO THE UNEXPECTED. ONE SECRET TO GOOD PRACTICE IS TO REDUCE THAT UNEXPECTED TO THE ABSOLUTE MINIMUM THROUGH GOOD PREPARATION.

"PERHAPS ONLY 5% OR LESS OF THAT PREPARATION WILL BE USED, BUT THE BALANCE IS NECESSARY AND ECONOMICALLY JUSTIFIED BECAUSE THE IDENTITY OF THE PRECISE 5% CANNOT BE PREDETERMINED. BY PREPARING FOR ALL REASONABLE CONTINGENCIES, ONE IS BETTER PREPARED FOR THE UNKNOWN."

**DRAFT**

# **BEYOND ADJUDICATION**

**Alternative Dispute Resolution  
in the Courts**

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## The Processes and The Players

### A. Putting Dispute Resolution Into Perspective

1. Traditional processes. America's court system is a fundamental institution for the processing and resolution of disputes. State and federal civil trial courts are commonly perceived as resolving disputes through the process of adjudication. The adjudicatory model is deficient, however, in the context of the day-to-day reality of the courts, unless it is considered that the process of adjudication includes the elements of pretrial maneuvering and preparation which are comprehended by the term "litigation." Most civil trial judges spend a significant proportion of their time resolving disputes over preparation for trial and considering efforts to end litigation without trial on motions to dismiss and for summary judgment, as well as trying cases. Thus, the core of the business of courts is that of *managing* an adjudicatory process which leads through a series of formal preliminaries either to a negotiated settlement or, in a small percentage of cases, to a trial.

Many lawsuits, particularly collection cases, end in default by one party and the entry of judgment by the court. Many other lawsuits, as for example many divorce matters, are uncontested, generally involving the court only to rubberstamp approval of what the parties already have agreed. More important, the vast majority of contested lawsuits -- perhaps as high as 95 percent -- end in a voluntary settlement. For these lawsuits, as for disputes generally, direct negotiation is the primary mechanism for resolution. However, courts are more or less involved in management of the settlement process, depending on what point during the lawsuit settlement occurs. The generally accepted wisdom is that a large percentage occur quite late in the process, at or near the time

of trial.

**"Litigotiation."** Where a dispute has "matured" into a lawsuit, negotiation is most likely to take place between lawyers for the parties or, at least, under the control of attorney representatives. The reality of most lawsuits is that they will be settled sooner or later, after the filing of the lawsuit and a series of other litigation proceedings involving discovery, motions, conferences with the court, and occasional discussions between counsel about the possibilities of settlement. Recognizing this, the process of handling and resolving lawsuits has been characterized by Professor Mark Gallanter as "litigotiation."

As Professor Galanter explains:

"On the contemporary American legal scene, the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it is litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process. Full-blown adjudication of the dispute -- running the whole course [to trial] -- might be thought of as an infrequently pursued alternative to the ordinary course of litigotiation." <sup>3</sup>

2. Classification of traditional processes. Traditional methods for resolving disputes -- adjudication and direct negotiation -- can be classified according to several variables, each of which reflect separate but related ways in which disputing parties retain or give up control of the ability to resolve the dispute themselves:

Voluntary <-----> Mandatory  
Non-Binding <-----> Binding  
No Third Party <-----> Third Party  
Informal <-----> Formal

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Galanter, Worlds of Deals: Using Negotiation to Teach About the Legal Process, 34 J. Leg. Ed. 268, 268 (1984).

Adjudication is the process which requires the parties to give up the most control because:

- It is an involuntary process for at least one of the parties.
- Once the jurisdiction of a court is obtained by the action of one party, a third party not of the disputants' choosing has the power to impose a binding decision.
- The process is highly formal. The parties participate by presenting proofs and arguments rather than engaging in proceedings designed for this special purpose. Most often working through lawyers, they bear full responsibility for investigating the facts, researching the law, and structuring the adversary presentations to follow legal precedents. Outcomes tend to be win/lose decisions based on or bounded by precedent and principle, and remedies are narrow -- money damages or a limited form of equitable relief.

By contrast, direct negotiation offers the highest degree of party control over resolution of the dispute because:

- It is a voluntary process which results in a resolution only if all parties agree.
- It does not employ a third party.
- The structure of the process can be as informal as the parties desire.

*"Litigotiation."* A variant of direct negotiation is "litigotiation" or court-annexed negotiation. The scene of attorneys negotiating a settlement of a lawsuit in the hallways or on the steps of the courthouse often is viewed as the model of a party-controlled dispute resolution process. With the exception of certain court rules which mandate that the parties undertake settlement negotiations at particular points in the litigation, such negotiations are not institutionalized. However, neither are they entirely free of coercion or conducted without formality or the influence of a third party. For example:

- The parties may know that unless they reach a negotiated settlement the judge will decide a potentially dispositive motion or empanel a jury to start the trial. The parties' negotiations may have been instigated precisely because the judge has told them that they have one last chance. The judge may be a crucial third party to the negotiations, even if not physically present.
- Quite apart from any pressure which the judge may be exerting on them, the parties may find that they prefer to compromise their previous negotiating positions

to avoid the risk and uncertainty associated with putting their fate in the hands of a judge or jury. The very imminence of a judge's decision or a trial can have a coercive effect.

- There may be well-accepted conventions within the particular courthouse or legal community about how such negotiations are conducted, about who usually makes the first offer, or about the reasonable expectations of each party regarding the amount of "give" which will be present in any offer or demand.

But, recognizing that the process of negotiation is always subject to an range of external pressures, it nevertheless is true that supplementary processes involve more external influence or involvement and less party control in terms of one or more of the four variables. They involve the addition of pressures, influences, sanctions, and incentives aimed at moving the parties toward the resolution of their dispute. In one way or another, these additional elements are designed to deal with the failure of the parties to reach a negotiated agreement. That requires either abandoning negotiation as a vehicle for resolution or finding a way to change the negotiation process.

3. Supplementary processes. In disputes where the parties are unable or unwilling to reach a voluntary resolution of their dispute whatever the degree of incentive and formality, direct negotiations can be supplemented by procedures which change the *process* of resolution or the *dispute resolver*, or both. For example, supplementary procedures may encourage voluntary resolution by incorporating more external influence or involvement and less party control. Alternatively, the process of negotiation can be abandoned as a vehicle for resolution in favor of a supplementary procedure which results in a decision by a third party. Supplementary procedures have two key objectives:

- As a relative matter, they aim to facilitate resolutions which are, both individually and viewed as a class, better than those which would have been achieved under a traditional approach.
- As an absolute matter, they aim to achieve resolutions with procedures which are as simple, understandable, inexpensive, and quick as they can be consistent with basic principles of fairness and the development of legal standards.



Whatever the variation in form, these supplementary procedures all encourage ongoing assessment by the parties of their goals and the likelihood of achieving those goals. They are designed to overcome the barriers to a settlement agreement negotiated by the parties and their attorneys, including:

- Emotional barriers, as where there is antagonism or lack of trust between the parties and/or counsel, or where the parties and/or counsel are unable to evaluate or communicate rationally.
- Communication barriers, as where one or both parties are unwilling to negotiate because of the risk of being perceived as weak, or where one or both parties are unwilling to be honest about settlement positions because of strategic considerations stemming from lack of knowledge of the other side's position.
- Barriers arising from differing views of the law, the facts, and the likely adjudicatory outcome.
- Representation barriers, as where the attorney fails to adequately prepare the case or is inattentive to the case, or where economic incentives do not favor early resolution.
- External and situational barriers. For example, the parties may view the risk of uncertainty of a third party decision differently, as where a repeat institutional litigant faces few consequences from an adverse verdict but the individual litigant faces ruin. Or, the dispute may be linked to other disputes, as where the litigate/settle decision of a party is not limited to a single case.

4. Classification of supplementary processes. Supplementary procedures can be classified according to the same variables as the traditional processes,

Looked at more generally, court-annexed processes can be evaluated against a set of standards acceptable for measuring any dispute resolution procedure. As set out in Paths to Justice, NIDR, at 16, the key standards are that the processes be:

- Accessible to disputants, in terms of physical location, hours of operation, responsiveness of forum, and costs.
- Protective of the rights of disputants, especially with respect to power imbalances caused by wealth, knowledge or skills.
- Efficient, in terms of costs and time.
- Fair and just, both from the parties' perspective and that of the society.
- Final and enforceable.
- Credible, as part of a legitimate system of justice.
- Expressive of the community's sense of justice.

falling at some point along a continuum linking adjudication and direct negotiation. The two primary methods for resolving disputes other than direct negotiation and adjudication are arbitration and mediation. A host of hybrid procedures either combine characteristics of the primary processes or are variants of one of them. Classification illustrates key differences not only between traditional and supplementary procedures but between private and court-annexed procedures as well.

*Voluntary vs. Mandatory.* The first variable determining the degree to which the supplementary procedure moves away from direct negotiation is whether the procedure is imposed on the parties. Disputants must agree at some point to participate in the private procedures.<sup>5</sup> However, participation in court-annexed procedures may be mandated by the court. There is wide variety in the nature and extent of the mandate:

- A court rule or statute may require that all cases of a particular kind -- civil damage cases, child custody disputes, lawsuits claiming less than a set dollar amount -- must be diverted to the court-annexed procedure before being eligible for placement on the trial calendar.
- A judge may have the discretion, either on the judge's own motion or on the motion of a party, to divert a particular case to the supplementary procedure, even over the objections of some or all parties.
- The court may provide the court-annexed procedure if all parties to a particular case stipulate to it.

There are legal constraints on the power of courts and legislatures to mandate the use of court-annexed procedures.<sup>6</sup> Neither legislatures nor courts can mandate a form of

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5

Although all parties must agree to participate in private procedures, there also may be an element of coercion. For example, the agreement to participate in a private dispute resolution process may precede the dispute as where it is part of a broader contractual agreement to do business. Often one party comes to a private hearing reluctantly because of a demand by the other party under a contract. Sometimes, where the other party obtains a judicial order enforcing the dispute resolution clause in a contract, the reluctant party may be forced to the hearing.

6

Constitutional and other legal constraints are treated in detail in Section Three,

court-annexed binding arbitration for disputes where one or both parties have a constitutional right to a jury trial. Nor can the mandatory use of non-binding procedures be so burdensome as to unconstitutionally impede a disputant's right ultimately to have a jury trial if an acceptable resolution cannot be reached. Further, courts and legislatures generally cannot mandate the acceptance of a non-adjudicatory result, such as an arbitration award. However, they can impose burdens on those who are unwilling to reach a voluntary settlement or to accept the award of an arbitrator but instead seek to exercise their right to a jury trial. These burdens are usually financial and can be more or less coercive depending on their nature and how they are imposed.

*Binding vs. Non-Binding.* Private procedures may be binding by agreement, as in traditional arbitration, or nonbinding, as in various mediation processes.<sup>7</sup> Mandatory court-annexed procedures cannot be made binding on the participants; they are binding only upon voluntary agreement. Nonbinding processes, whether private or court-annexed, result in a resolution only if all parties agree. There is, of course, always a risk that a party may be out-negotiated or manipulated in some way as inequalities between disputants -- knowledge, wealth, power, or experience -- increase. Parties may choose a binding procedure because they believe the barriers to direct negotiation are either insurmountable or will be so difficult and costly to overcome as to make the binding procedure preferable. Where parties agree that a court-annexed process will be binding, as when they stipulate to an order of reference trial, the procedure's result will be enforceable in much the same way as a traditional adjudicatory result or a private arbitration award.

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Chapter xx.

7

Where the private procedure is binding, parties often have even less ability to affect the dispute's outcome than in adjudication. For example, appeal of binding arbitration awards is limited to a few specific grounds -- corruption, fraud or misconduct in the process, or an arbitrator's exceeding a grant of authority.

In many non-binding court-annexed procedures, such as a judicial settlement conference before a judge who will not later try the case, there may be no "cost" or "burden" associated with the failure to achieve a resolution, other than the expense and the loss of time associated with participating in the process. However, there is a class of court-annexed procedures which by design impose burdens or additional risks on a party unwilling to accept the result of the supplementary procedure. Such burdens are primarily used in court-annexed procedures which are similar to adjudication. Courts may employ various types of incentives, usually financial, to attempt to encourage the parties to accept the third party decision or to otherwise resolve the dispute without resort to adjudication. There is a wide variety of possible burdens, with different degrees of coerciveness depending on their nature and applicability:

- A party may be required to pay an additional filing fee or the costs of the supplementary procedure simply for the right to file a request for a trial *de novo*.
- A party may not face any immediate additional burden in rejecting the results of a supplementary procedure, but may risk the imposition of substantial costs if the rejecting party fails to better in a trial the result of the supplementary process. Such costs may include the attorneys' fees of the other party.
- A party may, in place of or in addition to the above burdens, risk having the recommendation or opinion of a neutral third party admitted in evidence at a trial if an acceptable settlement cannot be reached after the parties have considered the third party's views.

***No Third Party vs. Third Party.*** The majority of supplementary procedures, whether private or court-annexed, make use of a neutral in one or more of a wide variety of roles. Private procedures allow parties to choose or have a large say in the choice of the third party. In court-annexed procedures, the parties may or may not have a say in the choice of the neutral. The neutral may be a judge of the court and may or may not be the same judge as will hear the case should a trial be required. Magistrates and judges pro tem also serve as third parties in supplementary procedures, as do jurors, attorneys and former judges, subject matter experts, and even court staff.

The role of the third party is quite similar in many of the procedures, regardless of the training and professional background of the neutrals. Possible roles include:

- Determining liability and damages.
- Determining or advising on settlement value.
- Advising on the strengths and weaknesses of the case and its likely outcome.
- Serving as an intermediary
  - \* To help the parties honestly communicate "bottom lines" to determine whether the case can be settled.
  - \* To help the parties understand their interests and seek mutually acceptable solutions.
  - \* To defuse emotions, circumvent lack of trust, and otherwise try to facilitate communications towards settlement.

*Informal vs. Formal.* Supplementary procedures vary widely in the degree of formality employed. All are more formal than direct negotiation and less formal than adjudication. Private procedures allow the parties to choose the rules and procedures to be followed. Court-annexed procedures may or may not allow the parties a say in the choice of rules and procedures. Many court-annexed processes are governed by a set of generally applicable rules of procedure while other rules are applied on an *ad hoc* basis by particular judges dealing with individual cases. The procedures, particularly those which are mandatory for certain classes of cases, may be set out in detailed court rules. In other circumstances, individual judges may have standard orders with regard to procedures which they follow or there may be nothing more than the case-by-case discretion of the judge to determine when and how an alternative is to be pursued. The use of such discretion may be encouraged by rule, as for example by Federal Rule of Civil Procedure 16, which requires judges to consider settlement and the possibilities of extra-judicial dispute resolution at early status conferences.

As a general matter, the closer the outcome of the court-annexed procedure resembles an adjudicatory decision, the more formality is to be found. However, court-annexed supplementary procedures rarely involve the level of formality of a traditional trial and often may be relatively unstructured. Private procedures are, by definition, confined to the parties, their attorneys, and the neutral or neutrals, unless all the participants agree otherwise. Court-annexed procedures may be confidential or public.

## **B. Adopting Dispute Resolution Procedures**

1. Debate over use. Over the past decade, there has been increasing interest in the extent to which civil trial courts should expand their "inventory" of procedures for resolving disputes. At least since the influential Pound Conference, formally titled the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," in 1976, there has been an escalating debate about the proper role of courts and judges in the resolution of disputes. Lawyers, scholars, and judges, including the former Chief Justice of the United States, have pilloried the current system of handling disputes as too litigious and too adversarial, as inefficient and ineffective.

Such critics have called for broad reforms including the restructuring of the courts. Some advocate the establishment of "multi-door" courthouses offering a cafeteria of dispute resolution procedures and argue for an expanded judicial role in settlement efforts. They assert that relying simply on dispute resolution procedures which stand at polar extremes -- in-court adversarial adjudication and direct negotiation -- ignores the reality of a range of procedures which are better suited to deal with many disputes. They reject the traditionalist view of courts as properly passive and reactive, limited by the confines of the adversary system, of rules of procedure and jurisdiction, and of choice of remedy. Rather, they believe a civil court should have the mission of providing, within the limits of due process,

whatever procedures are best suited to the handling and resolution of disputes.

Supporters of supplementary procedures recognize the host of reasons, particularly those stemming from inequalities of power and wealth, why voluntary resolution procedures cannot be pursued to the exclusion of all others. However, they argue that the adoption of a variety of procedures will supplement and enhance, rather than eliminate, the adjudicatory role of the courts. They believe that the adoption of court-annexed supplementary procedures will allow courts to allocate the time of judges in adjudicatory matters more cost-effectively and that adjudicatory procedures will be used only for those disputes to which they are best suited. Supporters recognize that the resolutions achieved through such procedures generally will be reached with reference to (1) statutory and case law, as interpreted or handed down in adjudicatory processes, and (2) the reactions of judges and juries in adjudicatory trials to the facts and evidence likely to be presented if the dispute in question went to trial rather than through some other procedure.

Others decry the criticisms, questioning the validity of data allegedly supporting "hyperlexis" and extraordinary litigation costs in average disputes. They question whether making settlement less expensive, rather than making trial more expensive, is any solution to expanding caseloads. They warn about the dangers of overemphasizing settlement in courts and of requiring judges to act as managers rather than as adjudicators. Fearing that the proposed cures, including a departure from the court-based adjudicative model, might be worse than the perceived disease, they express concern that supplementary procedures will replace the rule of law with nonlegal values. They further claim that mere resolution of a dispute is no proof that the public interest has been served.

2. Varied objectives of supporters. Although proponents of supplementary procedures recognize that there are many ways in which efforts to facilitate or encourage voluntary settlement can be criticized, proposals for modifying court

procedures to offer or require something other than adjudication arise from many sources -- from judges, lawyers and judicial administrators, from legislators, from special interest groups, and from users of court services. Such proposals generally cite as objectives reducing delay and congestion, cutting court and disputant costs, and achieving better resolutions. However, not surprisingly, different constituencies have different motives for seeking to depart from a traditional approach to a court's handling and resolving of disputes.

One major constituency, composed primarily of those dealing with the problems of major metropolitan state courts and many federal courts, seeks solutions to what are perceived as enormously heavy judicial workloads and unacceptable backlogs. Members of this group view court-annexed supplementary procedures as a way to reduce overall demands on court and judicial resources, eliminate case backlogs, and enhance the quality of justice for those cases which require a final adjudication by judge or jury.

Another major constituency seeks to reduce the overall costs of litigation to the disputants. This group believes that a highly adversarial adjudicatory system inevitably results in costly time delays and excessive expense. The group contends that, for lower- and middle-income disputants, a reduction in costs may be the difference between some and no access to the courts. For well-off individuals and corporate disputants, it argues that supplementary procedures may provide a vehicle for more efficient resolution of litigation.

A third constituency sees the use of court-annexed supplementary procedures as necessary to improve the results of dispute resolution. This group believes that the lawyer- and judge-dominated process of adjudication not only makes disputes more difficult to settle but also diverts disputants' attention from the underlying problems which gave rise to the dispute. Thus, commercial disputants are seen as being constrained from finding a



solution which might preserve a business relationship. Those involved in divorce proceedings are seen as being driven apart into further hostility, rather than as being helped to restructure their relationship in order to deal with the emotions and economics of separation and the problems of child custody.

3. Systematic and experimental growth. Whether or not supplementary procedures ultimately prove their worth, the past ten years have seen an explosion both in the systematic adoption of court-annexed supplementary dispute resolution procedures and in the court-by-court and case-by-case experimentation with such procedures. For example, federal courts increasingly are experimenting with various procedures, including mandatory arbitration, summary jury trials, and settlement conferences. The number of states which have enacted laws requiring, promoting, or funding dispute resolution procedures grew from five at the beginning of 1976 to at least twenty by 1987.

Further, at least two state court systems, Hawaii and New Jersey, have reached policy decisions to develop what they label "comprehensive judicial dispute resolution systems." A Florida commission has recommended the "establishment of a comprehensive dispute resolution system to function under the supervision of the judicial branch of government." This system would include automatic referral of contested civil actions to mediation, court-ordered small claims mediation, court-ordered non-binding arbitration, and court-annexed voluntary binding arbitration. During the 1987 session, the Florida legislature authorized mandatory mediation of all contested civil actions in circuit or county courts. This legislation is effective 1 January 1988.

In New Jersey, a comprehensive justice center known as a Dispute Resolution Assistance Center has been established in one county as a demonstration project. The project provides that all cases filed in county court become subject to a set of dispute

resolution programs and processes, including arbitration for all cases with damages under \$15,000 and mediation for small claims, neighborhood disputes, and child custody cases. For major cases, mediation, factfinding, summary jury trial, and a process whereby attorneys select their own judge, if agree to be bound by decision, are available.

In addition, courts in Houston, Tulsa, and Washington, D.C., are well into the development of experimental "multi-door" courthouse programs.<sup>8</sup> Although the three pilot programs differ in structure and operations based on variations in local conditions, the multi-door model offers an array of dispute resolution services as part of the justice system and provides individualized screening to match the dispute with the most appropriate service. The first phase of the experimental projects, implementing intake and referral centers, is complete and the second phase, developing and improving dispute resolution "doors," is underway. A third phase will evaluate the overall project and assess whether the program should be expanded to other jurisdictions.

4. Current situation. An emphasis on settlement in civil litigation and the increased use of supplementary procedures in recent years by all manner of courts is not intended to imply that similarities are more important than differences in the organization and function of trial courts around the United States. Trial courts in large metropolitan areas with large numbers of judges and lawyers function very differently and generally face very different problems than trial courts with one or a handful of judges located in small, close-knit legal communities. In some courts, lawyers and judges may feel that a pending load of hundreds of cases and a time from filing to trial date availability of a year constitutes a serious problem and a heavy burden. In other courts, lawyers and judges may feel that a

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8

Professor Frank E.A. Sander of Harvard Law School proposed the multi-door concept during the 1976 Pound Conference. The experimental programs were established by the American Bar Association working through its Special Committee on Dispute Resolution.

pending caseload of thousands and a time to trial of three years is normal and no cause for worry.

Thus, from jurisdiction to jurisdiction, and from court to court within a jurisdiction, there are enormous variations in functioning and in the attitudes of judges and lawyers as to what is appropriate. The following section examines in detail various programs which have been or will be implemented in federal and state civil trial courts to deal with all manner of perceived problems.

TABLE 1: Some Major Criticisms of the Traditional  
Court System of Dispute Resolution

COST, DELAY

- the process is expensive; costs often exceed benefits
- litigation does not provide timely resolution of the dispute; delay imposes additional costs
- in the aggregate, the process consumes resources that could be applied to solve the problem (e.g., compensating victims)

ACCESS, PARTICIPATION

- court processes are mystifying and difficult to understand
- using courts requires employment of expensive intermediaries
- differences in knowledge of the system and in ability to bear costs, delay and uncertainty create inequities between parties

INAPPROPRIATENESS OF FORUM

- courts may lack expertise in the subject matter of the dispute
- courts transform disputes in ways that obscure the genuine issues between parties
- courts may be unable to give a remedy that addresses the underlying causes of the dispute
- the adversary setting polarizes parties and deflects them from the search for an optimal solution

WIDER EFFECTS

- adversarial nature of proceedings disrupts continuing relations between parties
- court decisions may channel energy to preparation for further adversary encounters rather than preventive action/aggregate problem solving

Excerpted from: Paths to Justice: Major Public Policy Issues of Dispute Resolution, U.S. Department of Justice Report of the Ad Hoc Panel on Dispute Resolution and Public Policy (National Institute for Dispute Resolution, January, 1984).

TABLE 2: Current Efforts to Improve Dispute Resolution

**A. Reforming the Courts**

1. Improved administration of courts -- e.g., efficient use of judge time
2. Improved management of cases -- e.g., limited continuances
3. Reform of procedures -- e.g., control of discovery
4. Diversion to simplified and expedited procedures -- e.g., small claims or arbitration
5. Requirement of preprocessing -- e.g., screening panels
6. Settlement facilitation -- e.g., at pretrial conferences

**B. Creating forums separate from the courts**

7. Labor management dispute institutions -- arbitration, mediation, grievance procedures
8. Arbitration of commercial disputes
9. Private judging -- e.g., the "mini-trial," "rent-a-judge"
10. Locally-based dispute resolution -- e.g., neighborhood justice centers
11. Media-sponsored complaint handling -- e.g., "action lines"
12. Industry (or individual firm) sponsored complaint programs -- e.g., Consumer Action Panels (CAPs)
13. Grievance procedures within institutions -- e.g., hospitals, prisons, schools, etc.
14. Ombudsmen
15. Mediation of large scale multi-party controversies -- e.g., environmental, land use, and community disputes
16. Divorce mediation
17. Policy consensus-building programs -- e.g., National Coal Policy Project, Negotiated Investment Strategy

**C. Systemic changes**

18. Delegalization -- e.g., no fault compensation systems
19. Regulatory innovations -- e.g., the "bubble" approach to air-quality control
20. Enhancing the ability to avoid or handle disputes -- lay education, do-it-yourself, low-cost legal clinics

Adapted from Marks, Szanton & Johnson, Taking Stock of Dispute Resolution: An Overview of the Field, commissioned by the National Institute for Dispute Resolution, (1981)

TABLE 3: Some Criticisms of  
Alternative Methods of Dispute Resolution

COST

- may not save significant time or money
- lack of finality may increase expense and time

ACCESS

- may not be known to potential clientele
- may not be available except to wealthy disputants

DEFICIENCIES OF PROCESS

- may lack due process and other safeguards
- may not involve needed expertise
- may not redress power imbalances
- may lack finality
- may lack power to induce settlements
- may lack power to enforce its decisions

WIDER EFFECTS

- may hide dispute from public scrutiny
- may be impermeable to public standards
- may not induce preventive solutions
- may pull into system cases that would best be settled elsewhere
- may de-fuse pressure to reform courts
- diversion of larger disputes may remove constituencies vital to the courts
- relegation of smaller disputes to alternatives may increase alienation from courts

TABLE 4: Advantages/Disadvantages Associated With Dispute Resolution Mechanisms

1. Court Adjudication	2. Arbitration	3. Mediation/Negotiation	4. Administrative Decision-Making	5. Ombudsman	6. Internal Tribunal
<ul style="list-style-type: none"> <li>- announces and applies public norms</li> <li>- precedent</li> <li>- deterrence</li> <li>- uniformity</li> <li>- independence</li> <li>- binding/closure</li> <li>- enforceability</li> <li>- already institutionalized</li> <li>- publicly funded</li> </ul>	<ul style="list-style-type: none"> <li>- privacy</li> <li>- parties control forum</li> <li>- enforceability</li> <li>- expeditious</li> <li>- expertise</li> <li>- tailors remedy to solution</li> <li>- choice of applicable norms</li> </ul>	<ul style="list-style-type: none"> <li>- privacy</li> <li>- parties control process</li> <li>- reflects concerns and priorities of disputants</li> <li>- flexible</li> <li>- finds integrative solutions</li> <li>- addresses underlying problem</li> <li>- process educates disputants</li> <li>- high rate of compliance</li> </ul>	<ul style="list-style-type: none"> <li>- defines problems systematically</li> <li>- devises aggregate solution</li> <li>- flexibility in obtaining relevant information</li> <li>- can accommodate multiple criteria</li> </ul>	<ul style="list-style-type: none"> <li>- not disruptive to ongoing relations</li> <li>- flexible</li> <li>- self-starting</li> <li>- easy access</li> </ul>	<ul style="list-style-type: none"> <li>- privacy</li> <li>- responsive to concerns of disputants</li> <li>- enforceability</li> </ul>
<ul style="list-style-type: none"> <li>- expensive</li> <li>- requires lawyers and relinquishes control to them</li> <li>- mystifying</li> <li>- lack of special substantive expertise</li> <li>- delay</li> <li>- time-consuming</li> <li>- issues redefined or narrowed</li> <li>- limited range of remedies</li> <li>- no compromise</li> <li>- polarizes, disruptive</li> </ul>	<ul style="list-style-type: none"> <li>- no public norms</li> <li>- no precedent</li> <li>- no uniformity</li> <li>- lack of quality</li> <li>- becoming encumbered by increasing "legalization"</li> </ul>	<ul style="list-style-type: none"> <li>- lacks ability to compel participation</li> <li>- not binding</li> <li>- weak closure</li> <li>- no power to induce settlements</li> <li>- no due process safeguards</li> <li>- reflects imbalance in skills (negotiation)</li> <li>- lacks enforceability</li> <li>- outcome need not be principled</li> <li>- no application/development of public standards</li> </ul>	<ul style="list-style-type: none"> <li>- no control by parties</li> <li>- not independent</li> <li>- not individualized</li> </ul>	<ul style="list-style-type: none"> <li>- not enforceable</li> <li>- no control by parties</li> </ul>	<ul style="list-style-type: none"> <li>- not independent</li> <li>- no due process safeguards</li> <li>- not based on public norms</li> <li>- may reflect imbalance within organization</li> </ul>

**TABLE 5: Partial Listing of Characteristics That May Argue  
For One Or Another Type Of Mechanism As Appropriate**

	<u>Adjudication</u>	<u>Arbitration</u>	<u>Mediation/Negotiation</u>
ARGUES FOR	- need to create a public norm	- high volume	- desire to preserve continuing relations
	- need to offset power imbalance	- premium on speed, privacy, closure	- emphasis on future dealings
	- need for decision on past events;		- need to avoid win-lose decision
	- need to compel participation		- premium on control by disputants
			- multiple parties and issues
			- absence of clear legal entitlement
<hr/>			
ARGUES AGAINST	- high volume, low stakes	- need for precedent	- need to compel participation
	- continuing relations		- need to enforce agreements
	- need for speedy resolution		- need to create a public norm



Table 1-1

*"Primary" Dispute Resolution Processes*

CHARACTERISTICS	Adjudication	Arbitration*	Mediation	Negotiation
<i>Voluntary/Involuntary</i>	Involuntary	Voluntary	Voluntary	Voluntary
<i>Binding/Nonbinding</i>	Binding, subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract	If agreement, enforceable as contract
<i>Third Party</i>	Imposed, third-party neutral decisionmaker, generally with no specialized expertise in dispute subject	Party-selected third-party decisionmaker, usually with specialized subject expertise	Party-selected outside facilitator, usually with specialized subject expertise	No third-party facilitator
<i>Degree of Formality</i>	Formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
<i>Nature of Proceeding</i>	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
<i>Outcome</i>	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
<i>Private/Public</i>	Public	Private, unless judicial review sought	Private	Private

\* Court-annexed arbitration is involuntary, nonbinding and public.

Table 1-2

*"Hybrid" Dispute Resolution Processes*

CHARACTERISTICS	Private Judging	Neutral Expert Fact-Finding	Mini-Trial	Ombudsman	Summary Jury Trial
<i>Voluntary/Involuntary</i>	Voluntary	Voluntary or involuntary under FRE 706	Voluntary	Voluntary	Involuntary
<i>Binding/Nonbinding</i>	Binding, subject to appeal	Nonbinding but results may be admissible	If agreement, enforceable as contract	Nonbinding	Nonbinding
<i>Third Party</i>	Party-selected third-party decisionmaker, may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court	Party-selected neutral advisor sometimes with specialized subject expertise	Third-party selected by institution	Mock jury impaneled by court
<i>Degree of Formality</i>	Statutory procedure but highly flexible as to timing, place and procedures	Informal	Less formal than adjudication; procedural rules may be set by parties	Informal	Procedural rules fixed; less formal than adjudication
<i>Nature of Proceeding</i>	Opportunity for each party to present proofs and arguments	Investigatory	Opportunity and responsibility to present summary proofs and arguments	Investigatory	Opportunity for each side to present summary proofs and arguments
<i>Outcome</i>	Principled decision, sometimes supported by findings of fact and conclusions of law	Report or testimony	Mutually acceptable agreement sought	Report	Advisory verdict
<i>Private/Public</i>	Private, unless judicial enforcement sought	Private, unless disclosed in court	Private	Private	Usually public

# National Center for State Courts

300 Newport Avenue  
Williamsburg, Virginia 23187-8798  
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Edward B. McConnell  
President

November 7, 1988

This section of the conference notebook contains findings of two surveys of ADR program activity in the states conducted over the past year and a half by the National Center for State Courts. Both surveys were carried out with support from the National Institute for Dispute Resolution and under the direction of the Conference of State Court Administrators Committee on Alternative Dispute Resolution. The summary of ADR Program Characteristics and "State Adoption of Alternative Dispute Resolution," 12 State Court Journal 2 (Spring 1988), present the results of the first survey (COSCA/NCSC ADR Survey), which asked state court administrators to report all ADR programs operating in their state. The listing of divorce mediation programs and "Divorce Mediation in the States: Institutionalization, Use, and Assessment," 12 State Court Journal 4 (Fall 1988) are products of the second survey (COSCA/NCSC Divorce Mediation Survey), which focused on ADR programs engaged in divorce mediation. Because the divorce mediation survey built upon the first ADR program survey there is considerable overlap between the two surveys.

The State Justice Institute recently approved a NCSC proposal to create an electronic database of state ADR programs. The two COSCA/NCSC surveys and the ABA Dispute Resolution Program Directory will serve as the starting point for gathering information for the ADR program database. Although the COSCA/NCSC surveys and the ABA Directory contain over 700 programs, no doubt many more programs exist throughout the United States. In the course of creating the database, the NCSC will attempt to survey all ADR programs. You can help insure that the database will indeed be comprehensive by providing the name, address and telephone numbers of ADR programs known to you. NCSC project staff ask that you take a moment either at the National Conference on Dispute Resolution and the State Courts or when you return home to review the two COSCA/NCSC surveys and report any programs known to you that are not reported here. The accuracy of the data will also improve if you can note any errors you may find in the two survey lists.

Please give or send your information to:

Susan Keilitz  
National Center for State Courts  
300 Newport Avenue  
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Thank you for your assistance in developing the ADR program database.

# State Adoption of Alternative Dispute Resolution *Where Is It Today?*



Susan Keilitz • Geoff Gallas • Roger Hanson

The adoption of innovative programs over time can be plotted on a graph as a J-curve. At first, a few pioneers conduct pilot programs. These programs are represented at the base of the curve. If these initial experiments are positive and are effectively presented to others, a few more adopt and refine the initial experiments, and the curve rises somewhat, but the programs remain largely ignored by the rest of the population, which may be skeptical, immersed in day-to-day responsibilities, or engaged in other experiments or reforms. These other efforts may be related to the innovation or they may address other concerns. After the refined experiments prove successful, the total population realizes their impact. The innovation—now a tested program—is then adopted by the larger group. The adoption rate increases exponentially, forming the rising stem of the J-curve.

This view of the diffusion of innovation is both a useful description and a policy guide regarding the adoption of alternative dispute resolution (ADR) programs. The guidance comes in the form of questions that ADR practitioners and court administrators can ask to illuminate their circumstances. Where do we stand on the J-curve? Are we at the beginning of the process—the base of the curve—where uncertainty exists about whether ADR's promised benefits can be achieved? Are we refining an experimental and innovative product, with the adoption curve rising only gradually? Or, in fact, are ADR programs well on their way to reaching the larger population, with the rate of adoption swiftly rising?

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EDITOR'S NOTE: This research was supported by a grant from the National Institute for Dispute Resolution (NIDR). The views expressed in this article are those of the authors and do not necessarily represent the policies of NIDR.

Susan Keilitz is a staff attorney with the National Center for State Courts. Dr. Geoff Gallas is director of research and special services with the National Center for State Courts. Dr. Roger Hanson is currently a visiting scholar with the National Center. Temon Burton, a student at the Marshall-Wythe School of Law, College of William and Mary, helped conduct the survey upon which this article is based.

Proponents of ADR have made strong claims about how the efficiency and quality of justice might be improved by processing disputes outside the adversarial arena of the court: mediated settlements are longer lasting than court decisions; disputants have greater access to justice; long court delays are avoided; disputants can assess the strengths and weaknesses of their cases more realistically; disputants feel that their claims have been adequately addressed by ADR procedures.<sup>1</sup> If ADR fulfills these promises, it

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The claim is  
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will be widely adopted and provide substantial benefits for the courts and the public. Widespread adoption will turn ADR into a proven innovation and a proven innovation into settled and meritorious policy.

On the other hand, if ADR benefits the courts only marginally, the ADR movement will slow, or worse, ADR will be used extensively and will replace an established process with an imperfect and inadequate substitute.

ADR is intended to overcome deficiencies in the justice system and provide a superior, more-accessible process than traditional court processes. Therefore, its level of acceptance should be measured by comparing the number and nature of jurisdictions that have adopted ADR to the

total number of jurisdictions that could adopt ADR.

How far has the alternative dispute resolution movement penetrated the 2,253 state courts of general jurisdiction and 13,231 state courts of limited jurisdiction in the United States? Previously, Deborah Hensler estimated that court-annexed arbitration programs operated in 200 trial courts.<sup>2</sup> If her estimate is correct, then the number of courts with arbitration programs is still very small, and we are clearly in the pioneering stage with much more innovation, experimentation, and refinement yet to come.

The claim is frequently heard that alternative dispute resolution programs have grown substantially and extended widely into the state courts. Statistics on the total number of programs nationwide are generally cited as evidence of this diffusion pattern.<sup>3</sup> Furthermore, nationwide figures are interpreted as a sign that alternative dispute resolution programs are meeting an unfulfilled need.<sup>4</sup> Yet, despite the fact that the number of programs nationwide has increased in a relatively short period of time, it is important to examine the diffusion of ADR programs in the court in reference to the total potential field of adoption.

Through survey research supported by the Conference of State Court Administrators (COSCA) and funded by the National Institute for Dispute Resolution (NIDR), we have charted the ADR movement's progress state by state and within the states where it has taken hold. These data, gathered from all fifty states and the District of Columbia, help to put various statements about the spread of alternative dispute resolution into perspective: How many states have programs? In states where programs exist, do they encompass almost all, most, some, or a few jurisdictions? Does program eligibility tend to target a full or limited range of cases?

This article will explore these questions. After describing our survey's methodology and findings, we draw some broad conclusions about where the ADR movement is today and what sorts of issues need examination and greater resolution before the diffusion process can accelerate.

## Survey design

In 1986 the Conference of State Court Administrators (COSCA), seeing the

need for court managers to have a clearer picture of the extent to which individual states had adopted ADR programs, formed a committee on alternative dispute resolution (known as the ADR Committee).<sup>5</sup> COSCA charged the ADR Committee with analyzing the growth, use, acceptance, and effects of ADR programs.

Because no study had fully reported the extent of ADR adoption in the state courts, the ADR Committee decided first to survey each state court administrative office for a list and description of all ADR programs operating in each state. Two considerations led the ADR Committee to reason that the state court administrator's familiarity with ADR programs would serve as a barometer of the influence the ADR movement has in individual state court systems. First, in states where court administration is for the most part centralized, state court administrators should be aware of all court-related programs because the administrators would likely have played a major role in any decisions to introduce ADR. Second, because most ADR programs rely, at least in part, on the courts for referrals or require some cooperation with the court, organizations or agencies wishing to initiate ADR programs would most likely contact the state court administrator's office at some point in their planning process.

In January 1987, COSCA members were mailed a questionnaire soliciting information about the number, identity, and characteristics of court-annexed arbitration and other ADR programs in their states. Court-annexed arbitration was distinguished from other ADR programs because at the time of the survey, court-annexed arbitration had experienced a growth spurt, and state court administrators had become particularly interested in its promise and effects.<sup>6</sup>

Follow-up phone calls were made to each state that had identified ADR programs. The questionnaire and follow-up calls were designed to capture the following information about ADR programs in each state:

- type(s) of ADR programs;
- jurisdictions in which programs operate;
- when and by whom the programs were initiated;
- citations to authorizing statutes or court rules;
- types of cases eligible for the programs;

Table 1  
Characteristics of State Court-Annexed Arbitration Programs

State	Dollar Limits	Case Types	Statewide	Mandatory
Arizona	Varies	Civil		X
California	\$50,000	Civil	X	X
Colorado	\$50,000	Civil		X
Connecticut	\$15,000	Civil		
District of Columbia*	No Limit			
District of Columbia*	\$50,000	Civil		X
Delaware	\$30,000	Civil		X
Florida	No Limit	Civil		
Georgia	\$25,000	Civil		X
Hawaii	\$150,000	Torts		X
Illinois	\$15,000	Civil		X
Louisiana	\$2,000	Small Claims	X	
Michigan	No Limit	Civil		
Minnesota	\$50,000	Civil		X
Nevada	\$3,000	Motor Vehicle Damage		X
New Hampshire	No Limit	Civil		
New Jersey	\$15,000	Automobile Torts	X	X
New York	\$6,000	Civil	X	X
North Carolina	\$15,000	Civil		X
Ohio	Varies	Civil		Varies
Oregon	\$15,000	Civil		X
Pennsylvania	\$20,000	Civil	X	X
Washington	\$25,000	Civil		X

\*The District of Columbia has both a mandatory and a voluntary program.

- whether program participation is mandatory or voluntary;
- descriptive materials and evaluation studies that could be made available; and
- whether the program was considered exemplary.

To complete the picture of the number and characteristics of ADR programs, the *American Bar Association Dispute Resolution Directory* 1986-87 and other sources were reviewed.<sup>7</sup> The discussion of the survey findings and the conclusions drawn below are based on all of these information sources.

## Findings

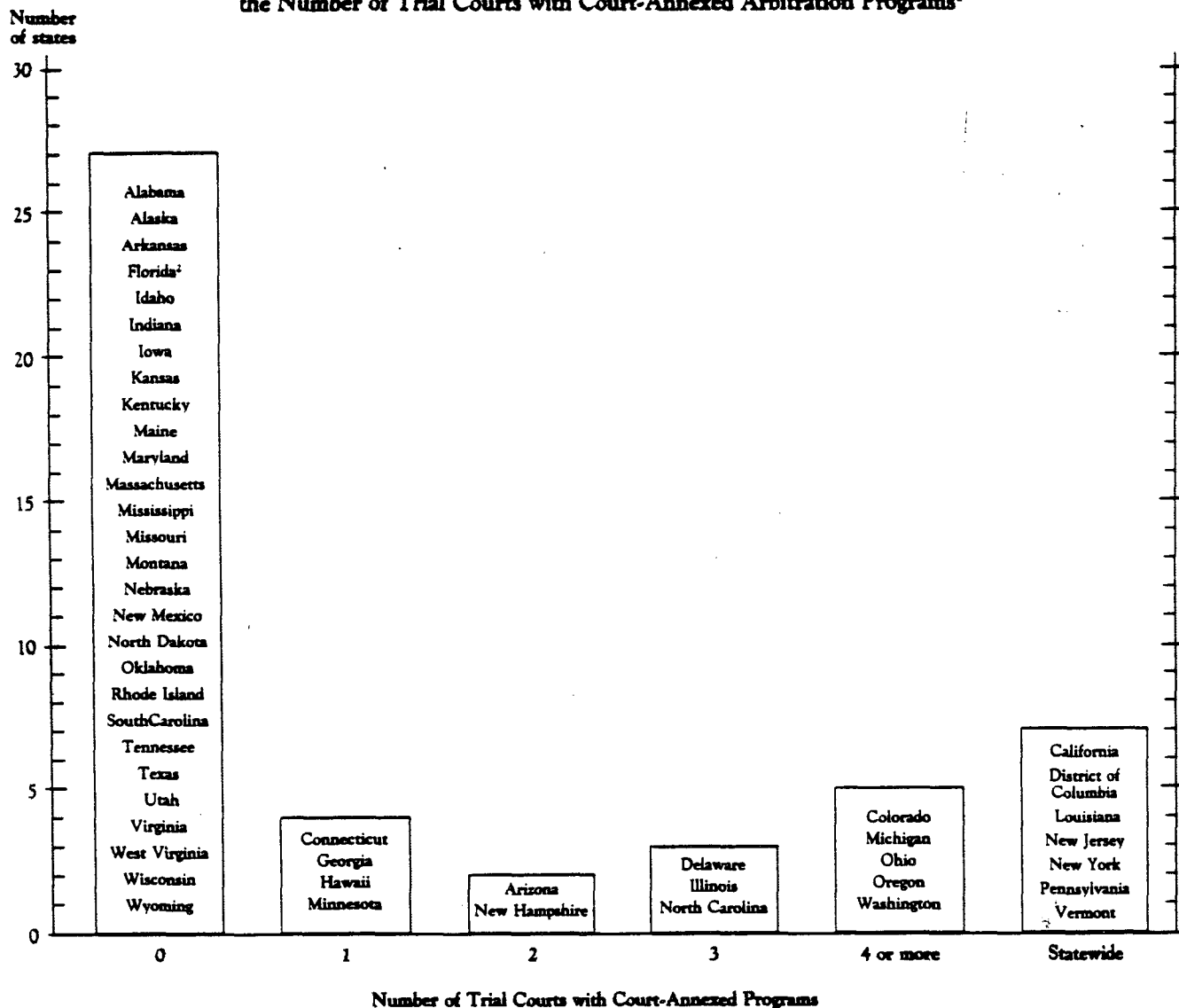
State court administrators in forty-four states, the District of Columbia, and Puerto Rico reported 458 operating alternative dispute resolution programs.<sup>8</sup> The types of ADR programs ranged from mandatory, court-annexed arbitration and mediation programs to statutory provisions for discretionary referral processes.

The type of cases that the various ADR programs treat include minor criminal and some felony charges and many types of civil disputes. As discussed below, court-annexed arbitration and other ADR processes are concentrated in a few states; most states with court-annexed arbitration do not have statewide programs, and where court-annexed arbitration is statewide, limits on dollar amounts and case types restrict the scope of the programs.<sup>9</sup>

## ADOPTION OF COURT-ANNEXED ARBITRATION

The survey indicated that court-annexed arbitration programs operate in courts in twenty-two states and the District of Columbia.<sup>10</sup> Table 1 lists the states with court-annexed arbitration programs, including program dollar limits, eligible cases, whether the programs operate statewide, and whether the programs are mandatory. Programs are mandatory in nineteen of twenty-three jurisdictions programs, and most programs apply to civil cases for money damages up to speci-

**Table 2**  
**Distribution of States and the District of Columbia According to**  
**the Number of Trial Courts with Court-Annexed Arbitration Programs<sup>1</sup>**



- 1 The number of states does not equal 51 because South Dakota's arbitration program is an appellate settlement program and Nevada's motor vehicle damage program is seldomly used.
- 2 Florida's legislature authorized court-annexed arbitration after the survey was completed.

fied limits. The upper limits on mandatory programs range from a low of \$6,000 in New York to \$150,000 in Hawaii, but most upper boundaries lie somewhere between \$15,000 and \$50,000. New Hampshire's mandatory program has no limits. A few court-annexed arbitration programs are voluntary. For example, the District of Columbia has a voluntary arbitration program and an experimental,

one-year mandatory program for cases up to \$50,000; California and Minnesota allow the parties to stipulate to submit their case to arbitration regardless of the amount in controversy.

In several states, court-annexed arbitration programs operate for only particular types of civil cases. For example, Louisiana has a voluntary program for small claims under \$2,000, and the Vermont

legislature has authorized voluntary arbitration of medical malpractice claims. A Nevada statute mandates arbitration of claims of \$3,000 or less for damage involving motor vehicles, and the South Dakota Code allows voluntary appellate settlement conferences for workers compensation, domestic relations, and money judgement cases as well as administrative appeals. In addition to its mandatory

arbitration program. Delaware operates an arbitration program for matters related to family law.

Although court-annexed arbitration programs operate in nearly half the states, the adoption of court-annexed arbitration programs has been by no means uniform, and program characteristics vary widely across the states. One striking observation is that program adoption tends to encompass a limited percentage of jurisdictions in each state. As Table 2 illustrates, six states (California, Louisiana, New Jersey, New York, Pennsylvania, and Vermont) and the District of Columbia have programs operating statewide; five states (Arizona, Delaware, Georgia, Minnesota, and New Hampshire) have programs in only one or two jurisdictions; and two states (North Carolina and Illinois) have experimental programs underway or planned in only three counties.

Court-annexed arbitration has been adopted statewide in four highly populated states, but in many large states, such as Texas and Massachusetts, the process is not used at all. A few large cities (Phoenix, Atlanta, and Minneapolis) have programs, but in other major metropolitan areas (for example, Chicago and Boston) court-annexed arbitration has not been employed. This irregular pattern of adoption in large cities is well illustrated in Colorado. There, an experiment has just begun with programs in eight jurisdictions, but Denver and Colorado Springs, which have the state's two largest court caseloads, are not included.

The scope of court-annexed arbitration programs is also limited by the limits on dollar amounts and case types that many states have established. Table 3 presents selected characteristics of statewide arbitration programs. It shows that five of the six states that have shown a strong commitment to court-annexed arbitration by implementing statewide programs have not set jurisdictional limits at a level sufficient to cast the widest net. In New York, although all civil cases are covered by arbitration, upper monetary limits (\$6,000) are the lowest of all mandatory arbitration programs in the country. New Jersey's automobile arbitration program, which handles personal injury claims not exceeding \$15,000 for non-economic losses arising from automobile negligence, was only recently expanded to include nonautomobile torts in several

Table 3  
Characteristics of Programs in States with  
Statewide Alternative Dispute Resolution Programs

State	Dollar Limit	Types of Cases	Selection
California	\$50,000	All Civil	Mandatory
District of Columbia	\$50,000	All Civil	Mandatory
Louisiana	\$2,000	Small Claims	Voluntary
New Jersey	\$15,000	Automobile (noneconomic losses)	Mandatory
New York	\$6,000	All Civil	Mandatory
Pennsylvania	\$20,000	Tort, Contract	Mandatory
Vermont	No Limit	Medical Malpractice	Voluntary

counties. Louisiana's arbitration program applies only to small claims cases under \$2,000, and Vermont's program covers only medical malpractice claims. Finally, Pennsylvania's court-annexed arbitration initiative, although the country's oldest and most well known, limits program eligibility to civil cases involving \$20,000 or less.

Generally, in states where program limits are higher, programs have not been implemented statewide. For instance, Minnesota's only mandatory court-annexed arbitration program has a \$50,000 limit (although an experimental voluntary program has no limits), and New Hampshire's program, which operates in only two counties, sets no monetary limits. Hawaii's program, which covers personal injury and property damage torts, has the highest monetary limit at \$150,000. California, which recently raised its statewide judicial arbitration program limits to \$50,000, is an exception to this pattern.

In summary, the use of court-annexed arbitration tends to be concentrated in a small number of more-populated states. Only a few states have implemented programs statewide, and those programs have been designed to deal with only a limited portion of the court's caseload. Hence, the distribution of court-annexed arbitration adoption among the states suggests that its acceptance is tentative.

#### USE OF OTHER ADR PROGRAMS

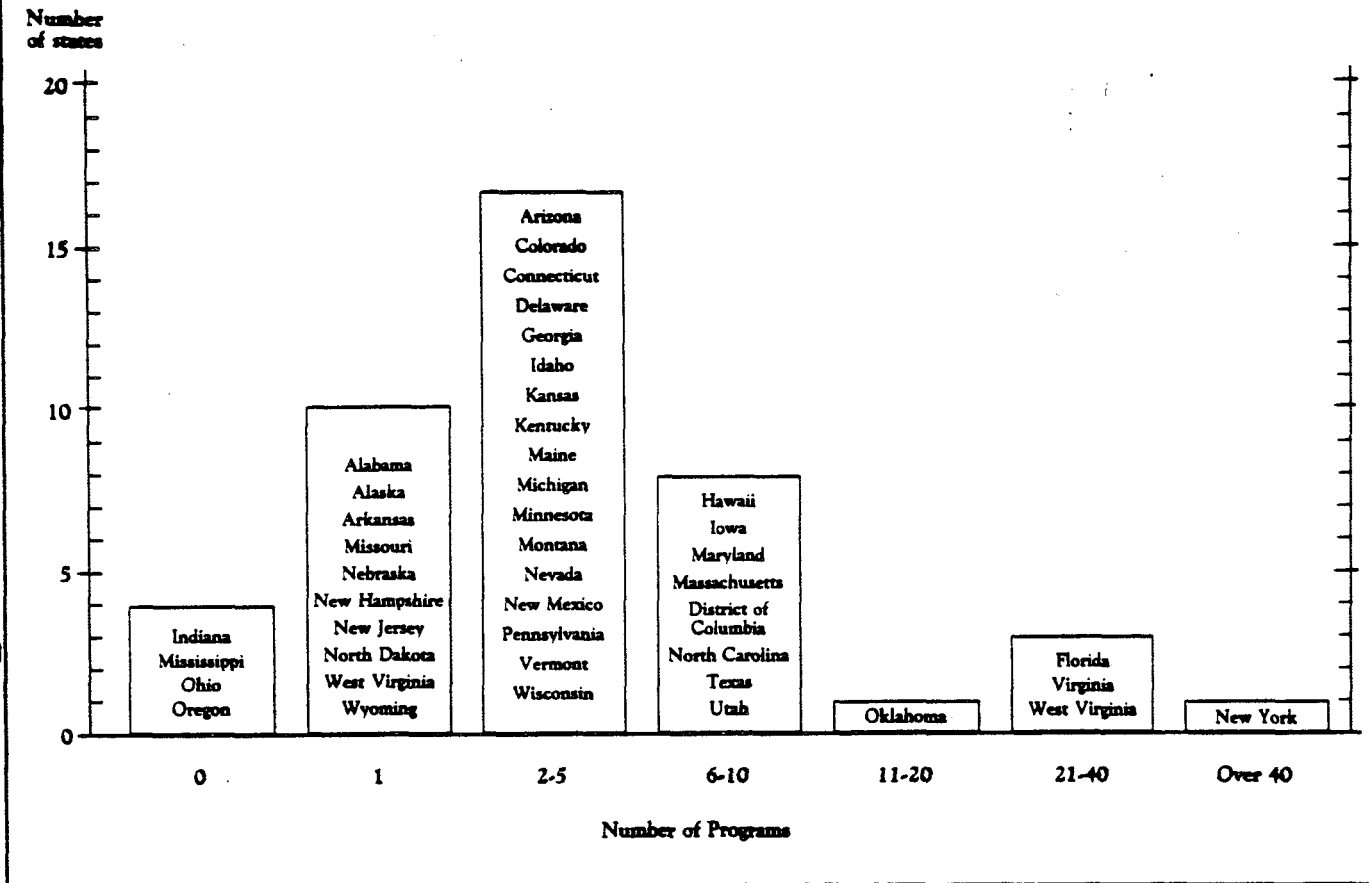
All but ten state court administrators identified some type of alternative dispute resolution program other than court-

annexed arbitration operating in their state. A total of 306 such programs were reported, the bulk of which were mediation programs. The range of cases mediated include domestic relations, contracts, small claims, motor vehicle, environmental disputes, misdemeanors, juvenile delinquency, neighborhood conflicts, and consumer-merchant, farmer-creditor, landlord-tenant, and employer-employee conflicts. Other reported ADR methods were pretrial settlement, summary jury trials, and medical malpractice screening.

As we noted above, the ABA *Dispute Resolution Directory* provided additional information regarding the extent of ADR adoption and program characteristics. By combining our survey findings with the programs profiled in the ABA *Dispute Resolution Directory*, we estimate that the total number of ADR programs, excluding court-annexed arbitration, is 500.<sup>11</sup> Although this number initially suggests that the ADR movement is a growth industry, a different picture emerges when one examines changes in the number of new ADR programs. According to one researcher, after steady growth since 1975, the number of new programs began to drop off in 1984 and had declined to a total of five in 1985.<sup>12</sup> The ABA *Dispute Resolution Directory*, published in 1986, indicates that only seventeen ADR programs had been initiated in the year and a half prior to publication, whereas fifty-eight programs began operations during the preceding eighteen months.<sup>13</sup>

Reports of national statistics about ADR programs also fail to support the

**Table 4**  
**Distribution of States According to**  
**Number of ADR Programs Reported in Survey**  
**(Court-Annexed Programs Not Included)**



conclusion that ADR is being widely adopted across the country. As is the case with court-annexed arbitration, not all states have embraced ADR programs to the same degree. For example, of the 279 ADR programs profiled in the *ABA Dispute Resolution Directory*, 118, or 42 percent, were concentrated in four states (California, Florida, Massachusetts, and New York). As Table 4 indicates, our survey also found high concentrations of programs in a few states (e.g., Florida, New York, Oklahoma, and North Carolina) and relatively few programs in the majority of states. This lack of uniform adoption comes as no surprise given the diversity of state judicial systems, the varying economic and social conditions of the states, and the differences in the size of the population. Notwithstanding the inherent demographic diversity among the states, however, differences in ADR adoption across the states cannot be explained

by demographics alone.<sup>14</sup>

For example, population size clearly does not account for differences in the level of ADR adoption. As reviewed above, most ADR programs profiled in the *ABA Dispute Resolution Directory* are in only four states. These states, California, New York, Florida, and Massachusetts, rank first, second, fourth, and twelfth respectively in population. However, many other states with higher populations than Massachusetts have relatively few ADR programs.

On the other hand, some states with moderate or small populations have considerable ADR activity. Hawaii, for example, has five mediation programs and two ADR research programs in addition to its mandatory court-annexed arbitration program. Maryland reported eight ADR programs in our survey, and the District of Columbia's multi-door courthouse offers six ADR programs. Finally, in Minnesota,

whose population ranks twentieth, eighteen ADR programs operate in addition to a court-annexed arbitration program in Hennepin County (Minneapolis).

The distinction between urban and rural environments also does not serve as a reliable predictor of ADR adoption. Chicago, for example, reportedly has only one ADR program—a neighborhood justice center, which, according to the *ABA Dispute Resolution Directory*, scheduled 200 cases and, of those, mediated only 85. Boston, on the other hand, has five ADR programs, while Miami, with two programs that resolve neighborhood disputes, falls between Chicago and Boston in the number of programs. One of Miami's programs, the Citizen's Settlement Program, schedules 1900 cases annually and mediates 700. And while many rural states have little ADR activity, in North Carolina and Oklahoma, two



predominantly rural states, major ADR initiatives are under way.

While, for most types of cases, the adoption of ADR programs has been tentative and uneven, ADR programs appear to have found widespread acceptance in the domestic relations arena. Twenty-seven states, the District of Columbia, and Puerto Rico operate ADR programs for domestic relations cases (family, child custody, and divorce). Several of the domestic relations programs are mandatory, and some states have implemented programs statewide or in several jurisdictions.

In brief, the diffusion of ADR programs other than court-annexed arbitration does not present a clear pattern. Nearly all states have at least one ADR program, although some states have considerably more ADR activity than others. This sort of diffusion suggests that the ADR movement is in its developmental stages.

### Where is the ADR movement today?

In some jurisdictions, to be sure, the use of alternative processes to resolve disputes has taken a firm hold or become institutionalized. Pennsylvania, for example, has had a long and successful experience with court-annexed arbitration. California has steadily extended and expanded its once experimental judicial arbitration program. Florida, Massachusetts, Minnesota, New York, and North Carolina all have established extensive systems for resolving disputes outside the courts.

The extent of ADR adoption, as demonstrated by the number of ADR programs, provides some indication of the success of alternative processes in fairly and efficiently resolving disputes. While some states have embraced ADR, many others have followed the path of cautious adoption of ADR. The high concentration of ADR programs in a few states, the slowed growth of ADR adoption, and the low ratio of ADR programs to courts suggest that the ADR movement is in the formative stage of its development, that is, at the base of the J-curve.

The responses to our survey together with the ABA *Dispute Resolution Directory* and Deborah Hensler's 1986 tally of court-annexed arbitration programs have

some implications for the ADR movement.<sup>15</sup>

In our survey, some state court administrative offices reported the existence of many ADR programs at the local court level but explained that they did not monitor or keep track of these programs. Some were unaware of a few programs, while others reported no programs even though several operate in their states. This lack of supervision and information about existing state ADR programs at the highest level of court administration indicates to us that the proponents of the ADR movement and state court administrators have yet to establish a close working relationship. In our view, such a relationship must be forged

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... the movement  
is poised for a  
second generation  
of programs  
that will refine  
and improve  
ADR processes.

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before ADR can meet its potential as a complement to traditional litigation.

State court administrators are in a position to generate state-level support for new program ideas. Their support may be in the form of providing direct financial aid, providing coordination and administrative services, or merely acknowledging an idea's value and encouraging its support by others. Hence, as with any proposed innovation in the state courts, state court administrators can influence the development of ADR. While they cannot always independently secure federal, state, private, or local funds for ADR programs, they can introduce and promote such support. State court administrative offices can facilitate the institution and refinement of ADR programs by collecting

and disseminating information about local programs; at a minimum, they can endorse the efforts of local court administrators and others to experiment with new ADR programs. Without acceptance of ADR by state court administrators, widespread adoption of ADR processes will be slowed or perhaps even stopped. It is also clear that the needed support will not be given without more information about whether ADR works, how it works, and what it actually costs.

The current lack of a close working relationship between ADR advocates and state court administrators reflects a wait-and-see attitude among many court administrators. This attitude exists because those who would introduce ADR have yet to demonstrate its overall value and thereby convince court administrators that it can benefit operations in their court or their state.

Part of the promise of the ADR movement is that alternative processes are more flexible and expedient and, therefore, more adaptable to the needs of the disputants than court adjudication, with its procedural and evidentiary rules and often long delays. The early growth of community dispute resolution programs as well as court-annexed programs suggests that alternative processes are also highly transferable from one jurisdiction to another. ADR processes no doubt possess these qualities in some measure, but the high concentration of programs in a few states, the low level of diffusion elsewhere, and the lack of comprehensive ADR information at the state level of court administration indicate that the flexibility, adaptability, and transferability of ADR has yet to be demonstrated persuasively.

In sum, our research suggests that the adoption of ADR is hovering around the base of the J-curve. As others have suggested, the movement is poised for a second generation of programs that will refine and improve ADR processes.<sup>16</sup> In order for this second generation of programs to lift ADR adoption higher on the J-curve, ADR proponents must fortify their relationship with the administrators of the judicial systems they seek to enhance. This relationship can be strengthened with solid information about ADR's benefits—information that is effectively communicated to court administrators.

scj

## NOTES

1. See, e.g., Craig A. McEwen and Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent," 18 *Law and Society Review* 11 (1984); Jay Folberg and Alison Tavior, *Mediation* (Jossey-Bass: San Francisco, 1984); Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986); Thomas Lambros, "The Summary Jury Trial—An Alternative Method of Resolving Disputes," 69 *Judicature* 286 (1986); Jane W. Adler, Deborah R. Hensler, and Charles E. Nelson, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program* (Santa Monica, Calif.: The Rand Corporation [1983]; Stephen Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution* (Little, Brown and Co.: Boston, 1985).

2. Deborah Hensler, "What We Know and Don't Know About Court-Administered Arbitration," 69 *Judicature* 307 (1986).

3. *Ibid.*

4. Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986).

5. The members of the COSCA Committee on Alternative Dispute Resolution are Carl F. Bianchi (chair), Samuel Conti, Robert Duncan, Franklin E. Freeman, Thomas J. Lehner, J. Denis Moran, Larry Spansky, Arthur H. Snowden, and Janice Wolf. The committee members do not necessarily subscribe to the views expressed in this article.

6. Most court-annexed arbitration programs require civil cases under a specified amount, usually between \$15,000 and \$25,000, to be submitted first to an arbitration procedure. Litigants who are not satisfied with the arbitration award may appeal and receive a trial *de novo*. Consequently, if large percentages of litigants reject the arbitration award and seek a new trial, case backlogs will not have been reduced and more, rather than fewer, court resources will have been spent on cases sent to arbitration.

7. *American Bar Association Dispute Resolution Directory 1986-1987* (Washington, D.C.: American Bar Association Special Committee on Dispute Resolution, 1986).

8. The ABA *Dispute Resolution Directory* reports programs in five of the remaining six states. Mississippi is the only state with no ADR programs reported in either the ABA *Dispute Resolution Directory* or our survey.

9. Complete, detailed findings are available upon request from the National Center for State Courts, 300 Newport Avenue, Williamsburg, Va., 23187-8798.

10. Florida, Alaska, and New Mexico are not included in this count of court-annexed arbitration programs. Alaska and New Mexico have statutory authority for court-annexed arbitration programs but have not implemented any such programs. The Florida legislature authorized voluntary court-annexed arbitration after our survey was conducted.

11. This figure is an estimate because there is considerable overlap between the ABA *Dispute Resolution Directory* and our survey, and we were not able to determine in every case whether a particular program reported in our survey was the same program profiled in the ABA *Dispute Resolution Directory*.

12. Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986).

13. Another indication that the absolute number of ADR programs may not reflect the complete and correct extent of adoption is the rate at which the programs are used. The ABA *Dispute Resolution Directory* illustrates this point: 119 of the 279 U.S. programs it profiles have annual caseloads of 500 or less. In an evaluation of dispute resolution alternatives, Jessica Pearson reports that voluntary mediation programs do not attract large numbers of disputants and that attrition rates are high. See Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication," 7 *The Justice System Journal* 420 (1982). This apparent reluctance on the part of disputants to take their grievances to an alternative forum suggests that individuals have not embraced ADR in proportion to the number of reported programs.

14. ADR's diffusion has not been stymied by a lack of publicity. The vast literature on ADR programs and COSCA's interest in finding out more about how they work demonstrate that the existence of ADR is widely known.

15. Deborah Hensler's article (cited above) incorporates information from a series of studies on court-annexed arbitration programs conducted by The Rand Corporation's Institute for Civil Justice. These studies have charted the growth and characteristics of court-annexed arbitration programs, evaluated the effect of these programs on court systems, and measured the attitudes of litigants and attorneys who participate in the programs.

16. See Peter B. Edelman, "Institutionalizing Dispute Resolution Alternatives," 9 *The Justice System Journal* 2 (1984); James J. Alfani, "Alternative Dispute Resolution and the Courts: An Introduction," 69 *Judicature* 5 (1986).

## Washington Perspective continued

them to do so by passing the kind of legislation that I've suggested."

The ACLU official was the only witness to testify against the proposed legislation but a statement in opposition also was filed by the Legal Defense Fund of the NAACP.

The three bills at issue, S. 1512, S. 1515, and Sec. 614 of S. 1482, were sponsored respectively by the Conference of Chief Justices, the American Bar Association, and the Judicial Conference of the United States. The American Judges Association and other bar and judicial organizations have joined in their support. All would bar fee awards against state judges under 42 U.S.C. 1988, but S. 1515 also would bar injunctive relief under 42 U.S.C. 1983 "unless a declaratory decree was violated or declaratory relief was unavailable." An amendment that would extend similar protection to federal judicial officers also has been proposed.

Witnesses favoring the legislation were Chief Justice Edwin J. Peterson of the Oregon Supreme Court, chairman of the Conference of Chief Justices Committee on Judicial Immunity; deputy assistant attorney general Kevin R. Jones, Office of Legal Policy, Department of Justice; Associate Justice George E. Danielson, California Court of Appeals, member of the Committee on Federal-State Jurisdiction, Judicial Conference of the United States; Judge Ira J. Raab of New York City, chairman, Legislative Committee, American Judges Association; and three representatives of the American Bar Association: Justice Joseph R. Weisberger, Supreme Court of Rhode Island; Circuit Judge Philip J. Roth, Portland, Oregon; and attorney Thomas A. Hamett, New York, New York.

As this is written the subcommittee has not scheduled markup on the bills. But their sponsors are hopeful that legislation along the lines of S. 1515 will be reported soon to the full committee. Other members of the subcommittee that will make the initial decisions, in addition to Senator Heflin, are Dennis DeConcini (D-AZ), Howard Metzenbaum (D-OH), Charles Grassley (R-IA), and Strom Thurmond (R-SC). scj

CONFERENCE OF STATE COURT ADMINISTRATORS\*

SUMMARY OF ALTERNATIVE DISPUTE RESOLUTION PROGRAM CHARACTERISTICS

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
ALABAMA		X	Masters/Referee System in Mobile, Birmingham, and Montgomery	Supreme Court Rule 53 of Alabama, Rules of Civil Procedure 1977	Juvenile and child support disputes	Voluntary (court may order)			
ALASKA		X	Conflict Resolution Center		Fee Arbitration General Mediation Arbitration Divorce Mediation	Voluntary	Yes		Private, non-profit
ARIZONA	X		Court Annexed Arbitration	Legislature (1971) Ariz. Rev. Stat. Ann. §12-133 (1971)	Civil	Mandatory, but dollar amount may vary depending on court rule	Yes	Mike Planet Maricopa County Superior Court 201 W. Jefferson Phoenix 85003	
		X	Phoenix Community Mediation Program	City of Phoenix	Minor disputes; noise violations, landlord/tenant, trespass	Voluntary	Yes	Harry Kaminsky 8841 N. 7th St. Suite #17 Phoenix 85020	
		X	Community Relations Unit Mediation	Attorney General's Office	Neighborhood disputes; zoning, city-ordinance violations, minor criminal matters, landlord-tenant, etc., active in Phoenix justice of peace courts.	Voluntary	Yes	Phillip A. Austin Chief Counsel Civil Rights Div., Mediation 1275 W. Washington Phoenix 85007	

\* This survey was conducted with funding provided by the National Institute for Dispute Resolution and the National Center for State Courts.

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
		X	Court Alternative Mediation Program	Pima County Justices of the Peace, Pima County Attorney, Action/Vista	Court diversion, minor matters less than \$2,500	Voluntary	Yes	Robert B. Donfeld Justice of the Peace 115 N. Church Tucson 85701	
ARKANSAS		X	Mediation	Pulaski County Municipal Court	Municipal Court Referrals Criminal and Civil	Voluntary	Yes		Contact: Bob Jones (501) 372-8510 Evaluation reported
CALIFORNIA	X		Judicial Arbitration	Legislature Cal. Code Civ. Proc. §§1141.10-1141.31 (West 1987)	Civil up to \$50,000	Mandatory in Superior Courts with 10 or more judges; in other Superior Courts and municipal courts county may choose to adopt mandatory arbitration; all trial courts (superior, municipal and justice) must provide a system for voluntary arbitration (by stipu- lation or plaintiff's election)	Yes		Evaluation reported

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
		X	ADR	Cal. Bus. & Prof. Code §465 - 471.5 (West 1986)					A state program administered at the local level to promote a variety of private and non- profit ADR Programs; California AOC does not monitor or collect information on local programs
COLORADO	X		Court-Annexed Arbitration	Colo. Rev. Stat. §13-22-401 (1987)	Civil, money damage claims up to \$50,000	Mandatory			Evaluation reported (future)
		X	Court Sponsored Mediation Program	Colo. Rev. Stat. §13-22-301 (1983)	Domestic, juvenile, civil, some minor criminal	Voluntary		Ed Zimny (303) 861-1111	
		X	Judicial Arbiter Group (State of Colorado)	Colo. Rev. Stat. §13-22-201 (1975)	Civil	Voluntary		Jerry Lockwood (303) 449-1945	Arbitration Private
		X	Dispute Settlement Inc.	Colo. Rev. Stat. §13-22-201 (1975)	Civil	Voluntary		Hal Nierenberger (303) 733-9403	Arbitration Private
CONNECTICUT	X		Arbitration	Judicial Dept. (1981) Conn. Gen. Stat. §§52-549q to -549aa (1981) and Conn. Practice Book Chapter 20 §546L-546S	Jury under \$15,000	Voluntary	Yes		Evaluation reported
		X	Small Claims Commissioner	Legislature (1976) Conn. Gen. Stat. §§52-549a to -549d (1976)	Small Claims	Voluntary	Yes		Evaluation reported

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
		X	Fact-Finding	Judicial Dept. (1981) Conn. Gen. Stat. §§52-549q to 549aa (1981)	Civil Contract Non-Jury under \$15,000	Mandatory	Yes	David M. Jackson (203) 566-8020	Evaluation reported (informal)
		X	Attorney- Referee	Judicial Dept. (1984) Conn. Gen. Stat. §52-534 (1984) and Conn. Practice Book §§434-444	Non-Jury	Voluntary*	Yes	David M. Jackson (203) 566-8020	*Consent required after 5/20/86 Evaluation reported
		X	Magistrate	Judicial Dept. (1985) Conn. Gen. Stat. §§51-1931 to -193u (1985) and Public Act 85-464	Motor Vehicle & Small Claims	Mandatory	Yes		Evaluation reported
DELAWARE	X		Superior Court Arbitration	Superior Court Civil Rule 16C (9/84)	Civil with trial available; Complaints, Mechanics liens, Mortgages	Mandatory-less than \$30,000 Voluntary-over \$30,000			Evaluation reported (informal)
	X		Family Court Arbitration	Family Court New Castle County (6/1/77), Kent County & Sussex County (9/1/77) Criminal or Juvenile Delinquency Rule 6A	Specified Juvenile Delinquency & Adult Criminal Cases	Voluntary (court can make decision whether dispute should be arbitrated)	Yes		

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
DISTRICT OF COLUMBIA	X		D.C. Superior Court's Multi- Door Dispute Arbitration Program	D.C. Superior Court's Multi- Door Dispute Resolution Program (3/16/87) Superior Court Rules I through XVII	Civil, less than \$50,000	Mandatory	Yes		Program is a one year experiment
	X		D.C. Superior Court's Voluntary Arbitration Program	Superior Court (2/19/82)	Civil, money damages No limit	Voluntary			
		X	D.C. Multi-Door Dispute Resolution Program's Small Claims Mediation Program	D.C. Superior Dispute Resolution Court, 1985	Small claims, limit \$2,000	Voluntary		(202) 879-2828	
		X	D.C. Multi-Door Dispute Resolution Program's Domestic Relations Mediation Program	D. C. Superior Dispute Resolution Court, 1985	Domestic relations (all types)	Voluntary		(202) 879-2828	
		X	Accelerated Resolution of Major Civil Disputes		Major civil disputes			(202) 879-2828	
		X	Settlement Week	D.C. Superior Court, May 1987 and April 1988	Most civil	Mandatory; some voluntary		(202) 879-2828	
		X	Intake and Referral Center	D.C. Superior Court, 1985					Parties to disputes are assisted in finding alternatives to litigation

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
FLORIDA	X		Court-ordered Mediation and Arbitration	Legislature (January 1988) Fla. Stat. Ann. §§44.301--306	Most civil cases	Mandatory (Mediation and non-binding arbitration)			
		X	Judicial Mediation*	Joint program of the 11th Judicial Circuit and the Dade County Bar Association (March 1986) Local court rule	Personal injury, no minimum or maximum dollar limit	Voluntary			*Arbitration procedure used in program
		X	Family Mediation Program (14)	Fla. Stat. Ann. §44.101 (West 1981) and Fla. Stat. Ann. §61.183 (1986) and CS/HB 379 (1987)	Contested divorce	Voluntary	Yes		
		X	Citizen Dispute Settlement (16)	Fla. Stat. Ann. §44.201 (1985)	Civil and Criminal	Voluntary	Yes		Evaluation reported
		X	Landlord/Tenant- Small Claims (5)	Local court rule and CS/HB 379 (1987)	Landlord/tenant	Voluntary	Yes		
		X	Summary Jury Trial 19th Judicial Circuit	Administrative Order of 19th Judicial Circuit (1984)	Money damage disputes, contracts	Voluntary; Judge and attorneys of the parties decide if case is appropriate for summary jury trials			Final report due in September 1988
		X	Medical Malpractice	Legislature (1988) Chapter 88-1	Medical negligence	Voluntary non- binding arbitration			



STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
GEORGIA		X	Motor Vehicle Arbitration	Legislature (1988)	Motor vehicle warranty disputes	Voluntary			
	X		Civil Arbitration Program	Superior Court (1984) Superior Court Rule	Civil Damages under \$25,000*	Mandatory	Yes		*Medical malpractice suits excluded
		X	American Arbitration Association	Georgia, Alabama Tennessee	Insurance Claims, Commercial Leasing, Contracts, Specific Industries (roofing)	Voluntary	Yes		
		X	Neighborhood Justice Center of Atlanta, Inc.	Superior Court DeKalb and Fulton Counties; all other counties	All except child abuse, spouse abuse, bad checks & felonies	Mostly Voluntary; Child support and custody in DeKalb County mandatory	Yes		
HAWAII		X	Neighbor to Neighbor Justice Center, Inc.	Superior Court of Chatham County & Magistrate Court of Effingham County	Domestic Relations, Landlord/Tenant, Small Claims, Juvenile, Consumer/Merchant domestic matters)	Voluntary and some mandatory (state court, magistrate's court for civil cases, some domestic matters)	Yes		
	X		Court Arbitration Program	Supreme Court of Hawaii (1985)	Personal Injury & Property Damage Torts up to \$150,000	Mandatory	Yes	Peter Adler (808) 548-3080	Evaluation reported (ongoing)
		X	Public Disputes Project (State of Hawaii)	Administrative Office of the Courts (1987)	Public Interest	Voluntary	Yes	Peter Adler (808) 548-3080	Evaluation reported (ongoing)

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
		X	Neighborhood Justice Center of Honolulu		Family, small claims, and juvenile restitutions	Voluntary	Yes	Leland Chang (808) 521-6767	Independent, non- profit ADR
		X	Mau'i Mediation Services		Family, small claims, and juvenile restitution	Voluntary	Yes		Independent, non- profit ADR
		X	Kuikahi Mediation Program (Island of Hawaii)		Family, small claims, and juvenile restitutions	Voluntary			Independent, non- profit ADR
		X	Kauai Economic Opportunity Mediation Program		Family, small claims, and juvenile restitutions	Voluntary			Independent, non- profit ADR
		X	American Arbitration Association		Arb. and Med., mostly commercial and construction	Voluntary		Keith Hunter (808) 531-0541	
		X	State of Hawaii Judiciary Program on ADR*				Yes	Peter Adler (808) 548-3080	*Planning, Research, Development
		X	University of Hawaii Program on Conflict Resolution*				Yes		*Research and Evaluation
IDAHO		X	Domestic Relations Third and Fourth Judicial Districts Custody and Visitation		Child custody, Child custody visitation (spring 1987)	Voluntary	Yes	Hon. Patricia G. Young, Judge of the Magistrate Division P.O. Box 126 Idaho City, ID 83631 (208) 392-4452 (Idaho City) (208) 383-1209 (Boise)	

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
ILLINOIS	X		Mandatory Arbitration/ Winnebago County	Legislature (1987) Ill. Rev. Stat. ch. 110 para. 2-1001A et seq. (1985) Ill. Sup. Ct. R. 86-95 (1987)	Civil, money damages, \$15,000 limit	Mandatory (If Judge orders)	Yes		Evaluation reported (future)
INDIANA		X	Not-for-Profit Dispute Resolu- tion Center	Legislature (1987) P.A. 85-756, Chapt. 37, Parts 851-856	Cases referred by courts and others				
IOWA		X	Polk County Small Claims Mediation Project, Polk County District Court	Authorized by local court rule since 1985	Covers any disputes in small claims	Voluntary			Court sponsored Evaluation reported (informal)
		X	Informal Dispute Resolution Centers	Iowa Code §679 (1977)	Mediation of small claims type cases, bad checks, neighbor- hood disputes, landlord/tenant, and domestic relations	Voluntary			Private, non-profit. Centers operate in 6 of the larger counties. Some court involvement.
		X	Farmer/Lender Mediation		Farm debts	Mandatory			
KANSAS		X	Topeka	Judge Carpenter 1985		Voluntary (Judge refers)			Pilot Program

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
		X	Statutory Provision for Mediation	Kan. Stat. Ann. §38-1522 et seq. (1985)	Divorce matters (support, custody, and visitation)	Voluntary			
		X	Kansas Bar Association Pilot Program in Olathe		Property owner- ship, landlord/ tenant, nuisance	Voluntary			Private, non-profit
		X	Community Dispute Resolution Program in Wichita		Property owner- ship, landlord/ tenant, nuisance	Voluntary			Private, non-profit
		X	Farm Mediation Program		Farm disputes				Quasi-public
KENTUCKY		X	Jefferson County Dispute Mediation	Local Court Rule 1979 and Supreme Court Rule of Kentucky	Criminal Misdemeanor	Voluntary	Yes	John Hendricks General Manager Pretrial Services (502) 564-2350, Ext. 343	Evaluation reported
		X	Fayette County Dispute Mediation	Local Court Rule 1979 and Supreme Court Rule of Kentucky	Criminal Misdemeanor	Voluntary	Yes	John Hendricks General Manager Pretrial Services (502) 564-2350, Ext. 343	Evaluation reported
		X	Kenton County Dispute Mediation	Local Court Rule 1979 and Supreme Court Rule of Kentucky	Criminal Misdemeanor	Voluntary	Yes	John Hendricks General Manager Pretrial Services (502) 564-2350, Ext. 343	Evaluation reported
		X	Campbell County Dispute Mediation	Local Court Rule 1979 and Supreme Court Rule of Kentucky	Criminal Misdemeanor	Voluntary		John Hendricks General Manager Pretrial Services (502) 564-2350, Ext. 343	Evaluation reported

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
LOUISIANA		X	Boone County Dispute Mediation	Local Court Rule 1979 and Supreme Court Rule of Kentucky	Criminal Misdemeanor	Voluntary		John Hendricks General Manager Pretrial Services (502) 564-2350, Ext. 343	Evaluation reported
	X		Small Claims	Judicial Planning Committee (1977), La. Rev. Stat. Ann. §13:5200 et Seq. (West 1977)	Civil under \$2,000	Voluntary	Yes		
		X	Child Custody and Visitation Mediation	Bar and Legislature (1984) La. Civ. Code Ann. art. 146 (West 1984)	Separation or Divorce	Court may require mediation on the court's motion or on the motion of either party			
MAINE		X	Court Mediation Service	Me. Rev. Stat. Ann. Tit. 19 §§, 214, 581, and 752 (Mandatory Mediation) §§636 and 665 (voluntary) (1984) Me. Rev. Stat. Ann. Tit. 4 §§18 (1980) (established Court Mediation Service as part of Judicial Depart- ment)	Divorce matters, small claims, and other civil matters	Mandatory in contested domestic rela- tion cases involving minor children  Voluntary in small claims, uncontested divorces, and other civil matters	Yes	Lincoln H. Clark Director 207-879-4700	
		X	Referee Referral	Maine Court Rules of Civil Procedure Rule 53 (1985)	Civil cases, mostly land disputes	Voluntary (Judge may order)			

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
MARYLAND		X	ADR Pilot Project Superior Courts of Knox and York Counties	Supreme Judicial Court (9/1/88)	All civil except appeals from District Court and administrative agencies, medical mal- practice and domestic relations	Voluntary, but Judge may order			
		X	Pretrial Settlement	Bench & Bar (Dec. 1986)	Divorce (Contested)	Mandatory	No		
		X	Pretrial Settlement	Bench & Bar (Feb. 1987)	Civil, Jury (Motor Tort, Contract) Ex. car accident Civil	Mandatory	No		
		X	Pretrial Settlement	Bench (Co. Admin. Judge) (July 1986)		Mandatory	No		
		X	Community Arbitration Anne Arundel County	1974	Juvenile misdemeanors and less serious offenses	Mandatory	Yes		
		X	Custody Mediation Services Baltimore City	Jan. 1984	Custody/ Visitation	Voluntary	Yes		
		X	Community Relations Service United States	1964	Racial/Ethnic	Voluntary	Yes		
		X	Maryland Consumer- Business Binding Arbitration Program State of Maryland	1978	Consumer/Merchant	Voluntary	Yes		

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
MASSACHUSETTS		X	Montgomery County Office of Consumer Affairs Montgomery County	1971	Consumer/Merchant	Voluntary	Yes		
		X	Suffolk County Pilot Mediation Project	Office of Chief Administrative Justice; began in Suffolk County Superior Court in November 1987	All civil cases	Voluntary		David O'Connor (617) 727-2224	2-year pilot program
		X	Hampden County Mediation Program	May 1986 Initiated by a regional Admin- istrative Justice of Superior Court Dept. with the approval of Chief Justice of the Superior Court Dept.	Civil, greater than \$25,000	Voluntary			Evaluation reported
		X	Housing Court	Mass. Gen. L. ch. 185C §§1-22	Landlord/tenant, eviction, security deposits	Voluntary			Evaluation reported (informal)
		X	Boston Municipal Court (BMC) Crime and Justice Mediation Program	Standing Order of Court 1980	Criminal misdemeanors	Voluntary			Evaluation reported
		X	Probate and Family Court	Standing Order of Court issued by Chief Justice of the Probate and Family Court 1978	Divorce matters (custody, visitation and support)	Voluntary (Judge may order)			Evaluation reported

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
MICHIGAN		X	Mass. Mediation Service	Grant received from National Institute for Dispute Resolution (NIDR) 1985	Public disputes, environmental disputes, and health care concerns	Voluntary		David O'Connor (617) 727-2224	Not court sponsored
	X		Mediation	Wayne County Circuit Court (1971) Michigan Court Rule 2.403*	Civil, Property division, Money damages	Voluntary (Judge may order)	Yes	Sandra Smith (517) 772-5934	Evaluation reported *35 Circuit Courts and 3 District Courts have Supreme Court approved administrative orders for mediation
		X	Domestic Rela- tions Mediation Program	Supreme Court of Michigan, Michigan Rule of Court 3.211 (10/1/87)	Domestic relations	Voluntary (stipulation of parties; motion of one party; judge's order)			Evaluation reported (future)
		X	Medical Malpractice Arbitration Act	Mich. Comp. Laws §600.5040 (1975)	Medical malpractice suits	Voluntary			
		X	Uniform Arbitration Act	Mich. Comp. Laws §602.5901 (1961)		Voluntary			
		X	Community Dispute Resolution	Legislature (1988)	Civil	Voluntary			



STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
MINNESOTA	X		Fourth Judicial District Arbitration	Fourth Judicial District (7/1/85) Minn. Stat. Ann. §484.73 (West 1985)	Civil actions for money damages less than \$50,000; Other cases shall be submitted to arbitration upon order of the Chief Judge or judge assigned to the case or upon agreement of all parties.	Mandatory		Janet Marshall (612) 649-5934	
		X	Fourth Judicial District Mediation	Legislature 1987 Minn. Laws Chapter 404 §186, (Minn. Stat. §484.74 Supp. 1987)	Civil cases for for money damages over \$50,000	Mandatory if Judge orders			Experimental program applies to cases having notes of issue filed on or after April 1, 1988
		X	Custody Mediation	16 counties Minn. Stat. Ann. §518.619 (West 1986)	Contested Custody Matters	Voluntary			
		X	Divorce Mediation	Second Judicial District Court Special Rule 2nd Judicial District Rule 17 §7 (1986)	Non-custody divorce matters	Mandatory			
		X	Farmer/Lender Mediation	Legislature (1986)	Secured farm debts of \$5,000 or more	Mandatory at option of debtor		Cathy Mangum (612) 625-9721	
		X	Other private and non-profit mediation	Minn. Stat. Ann. §484.74 (West 1987)					

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
MISSISSIPPI	X*								*Mandatory arbitration bill pending; would require arbitration of all civil money damages in excess of \$500 but not more than \$50,000
		X	Farm Mediation Program	Legislature (1988)	Farm debts	Voluntary			
MISSOURI		X	22nd Judicial Circuit Child Custody Mediation	22nd Judicial Circuit 12/19/86 Local Court Rule 68.6	Child custody Disputes	Mandatory	Yes		
MONTANA		X	Uniform Arbitration Act Mont. Code Ann. §27-5-101		Labor agreements				(Some district court judges send some disputes to mediators on a discretionary
		X			Domestic, civil, and labor disputes				
NEBRASKA		X	Summary Jury Trials	1987 Neb. Laws §25-1154-25-1157 August 30, 1987	Civil	Voluntary			No state courts have yet held a summary jury trial
		X	Uniform Arbitration Act	1987 Neb. Laws §25-2601-25-2622 August 30, 1987	Civil				
		X	Farm Mediation Act	Legislature (1988)	Agricultural loans	Voluntary			

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
NEVADA	X		Motor Vehicle: Damages	Legislature (1971) Nev. Rev. Stat. §38.215 (1971)	Damage from motor vehicles if less than or equal to \$3,000	Mandatory	Yes		Rarely used
		X	Medical Malpractice Screening Panel	Legislature (1985) Nev. Rev. Stat. §41A.016 (1985)	All medical malpractice cases	Mandatory	Yes		Evaluation reported (future)
		X	Mediation of Domestic Relations Matters	Eighth Judicial District Court Rule 5.70 (1987)	Domestic Relations	Mandatory	Yes		Evaluation reported (future)
NEW HAMPSHIRE	X		Superior Court Rule 170 Arbitration	Supreme/Superior Courts/ Bar Assn. (1/1/87) Superior Court Rule 170	Equity (except marital), Civil Jury, Civil Nonjury, No dollar limit	Mandatory	Yes	Thomas T. Barry (603) 271-2521	Evaluation reported (future)
		X	Superior Court Rule 171 Summary Jury Trial - January 1, 1987 General Jurisdiction Trial Courts	Superior Court Rule 171	Civil Jury	Voluntary if counselors for the parties request Voluntary (Judge may order)	Yes	Thomas T. Barry (603) 271-2521	
NEW JERSEY	X		Auto Arbitration Program-all counties	N.J.S.A. §39:6(A)24-35 (1984)	Auto negligence personal injury claims not exceeding \$15,000	Mandatory/ Non-binding	Yes	Jane F. Castner Statewide programs (ongoing) (609) 292-8470 Don Pheilan (Pilot programs) (609) 984-5032	Evaluation reported (future)
	X		Auto Arbitration Program	New Jersey Supreme Court Order (1986)	Auto Negligence and "other torts" & contract cases	Mandatory/ Non-binding			Evaluation reported (future)

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	X		Personal Injury Arbitration	N.J.S.A. 2A: 23A-20 et. seg. (1988)	Non-automobile personal injury claims of \$20,000 or less	Mandatory (Voluntary for cases over \$20,000)			
		X	New Jersey Dept. of the Public Advocate, Center for Public Dispute Resolution	N.J. Stat. Ann. §52:27E-40 (1974)	Public Disputes	Voluntary			Other court sponsored ADR includes custody mediation, small claims and civil dispute mediation
NEW MEXICO	X		Arbitration 2nd Judicial District (Albuquerque)	District Court Rule 58 June 1, 1988	Civil monetary damages \$15,000 or less	Mandatory	Yes		
		X	1st Judicial District (Santa Fe) Mediation of Custody/ Visitation Disputes	District Court Rule 72 (July 1, 1986)	Custody & Visitation	Mandatory for visitation and custody disputes Voluntary for other civil cases	Yes		
		X	2nd Judicial District (Albuquerque) Court Clinic	Second Judicial District Court Rule 27A (1984)	Custody & Visitation	By court order	Yes	Bonnie Musselman, M.S.W. (505) 841-7409	
		X	Metropolitan Court Mediation Center		Domestic Relations, Property Disputes Landlord/Tenant, Consumer/Merchant, Officer/Citizen Juveniles	Voluntary	Yes		

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NEW YORK	X		Civil Dispute Resolution Arbitration	N.Y. Civ. Prac. L. & R. 3405 (McKinney 1978)	Civil up to \$6,000	Mandatory	Yes	Ronald Stout (212) 587-4781	Evaluation reported
		X	Small Claims Assessment Review	N.Y. Real Prop. Tax Law §1A (McKinney 1981)	Property Assessment Review	Voluntary	Yes	Ronald Stout (518) 474-1038	Evaluation reported
		X	Community Dispute Resolution Centers Program	N.Y. Judiciary Law §21A (McKinney 1981)	Civil, Criminal, and Family	Voluntary	Yes	Thomas F. Christian (518) 473-4160	Evaluation reported, mediation centers operate in 60 of New York's 62 counties
NORTH CAROLINA	X		Court Ordered Arbitration	N.C. Bar Assoc. 1985 N.C. Sess. Laws 698 §23	General Civil under \$15,000	Mandatory non-binding	Yes	Dan Becker (919) 733-7107	Pilot Program Evaluation report will be available in early 1989
		X	Dispute Settlement Centers	Henderson County Guilford County Wake County Buncombe County Durham County Polk County Chatham County Orange County Forsyth County  Iredell County (serves Davie & Alexander Counties) Mecklenburg Cumberland Wayne Alamance UNC - Chapel Hill (Initiated locally beginning in 1980)	Minor Criminal & Civil Dispute	Voluntary	Yes		

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		X	Custody Mediation Program Mecklenburg and Gaston Counties	Legislature (Mecklenburg, 1983 Gaston, 1987)	Child Custody Visitation	Mandatory	Yes		Evaluation reported
		X	Summary Jury Trial Wade County Mecklenburg County Buncombe County	Local court rules		Voluntary			
NORTH DAKOTA		X	Contested Child Proceedings Mediation	Legislature (1987) Chapter 14-09.1	Child Custody, Support, Visitation	Voluntary	Yes		
OHIO	X		Court Ordered Arbitration, Hamilton County Common Pleas Court	Ohio Revised Code Ann. §2711.04, --.21 (1972) and local court rule	Personal injury \$25,000 limit.	Voluntary (Judge may order)			Evaluation reported
	X		Court Ordered Arbitration, Cuyahoga County Common Pleas Court	Local court rule adopted by Civil Rules Committee of Cuyahoga County Common Pleas Court (1970)	Civil \$20,000 Limit	Mandatory (subject to judicial interpretation)			Evaluation reported
	X		Court Ordered Arbitration, Stark County		Civil \$15,000 limit				
		X	Settlement Weeks; several counties	Supreme Court and state bar association	Civil	Voluntary			

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OKLAHOMA		X	Oklahoma Media- tion/Arbitration Service*	1986	Varied, mostly insurance	Voluntary			*This is a private for profit center
		X	American Arbitration Association						
		X	Tulsa County Bar Resolution Resources		Any case referred	Voluntary			Private
		X	Pawnee County Dispute Mediation Program First Floor, Pawnee County Courthouse Pawnee, OK 74059	Dispute Resolu- tion Act Title 12 §1801 et al. (1983, revised 1985)	Small civil cases some criminal cases	Voluntary			Evaluation reported (future)
		X	Oklahoma Victim Restitution/ Juvenile Offender Responsibility Program Department of Human Services P. O. Box 25352 Oklahoma City, OK 73125	Dispute Resolu- tion Act Title 12 §1801 et al. (1983, revised 1985)	Juvenile offenders and their victims	Voluntary			Evaluation reported (future)
		X	Attorney General's Dispute Resolu- tion Act Program Office of the Attorney General Public Protection Division 112 State Capitol Building Oklahoma City, OK 73105	(1983, revised 1985)	Consumer/ merchant disputes	Voluntary			Evaluation reported (future)

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		X	Payne County Dispute Resolution Center Payne County Courthouse, Rm 204 Stillwater, OK 74074	Dispute Resolu- tion Act (1983, revised 1985)	Small civil matters Some criminal cases	Voluntary •			Evaluation reported (future)
		X	Community Dispute Mediation Center 1613 No. Broadway Oklahoma City, OK 73103	Dispute Resolu- tion Act (1983, revised 1985)	Small civil cases and some criminal cases	Voluntary			Evaluation reported (future)
		X	Early Settlement, A Precourt Hearing Program Police Cts Bldg 600 Civic Center Tulsa, OK 74103	Dispute Resolu- tion Act (1983, revised 1985)	Civil and some criminal	Voluntary			Evaluation reported (future)
		X	Agriculture Mediation Program Department of Agriculture 2901 Classen Blvd Oklahoma City, OK 73146	Dispute Resolu- tion Act (1983, revised 1985)	Farmer/creditor disputes	Voluntary			Evaluation reported (future)
		X	Department of Corrections 3400 Martin Luther King Ave P. O. Box 11400 Oklahoma City, OK 73136 Attn: Fred Woods	Dispute Resolu- tion Act (1983, revised 1985)	Incarcerated offender and his or her victim mediate a review of the offender's sentencing and treatment plan	Voluntary			Evaluation reported (past and future)



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OREGON		X	Merit Protection Commission Dis- pute Resolution Program with Oklahoma Merit Protection Commissioner 310 NE 28th Suite 201 Oklahoma City, OK 73105	Dispute Resolu- tion Act (1983, revised (1985)	State government employee disputes	Voluntary			Evaluation reported (future)
		X	Major County Dispute Mediation Program, Major County Courthouse P.O. Box 130 Fairview, OK	Dispute Resolu- tion Act (1983, revised (1985)	Small civil matters and criminal cases	Voluntary			Evaluation reported (future)
	X		Benton County (Circuit & District Courts)	Or. Rev. Stat. §§33.350-33.400 (1983, revised (1987)	Civil District Court up to \$10,000 Circuit Court up to \$25,000	Mandatory			
	X		Clackamas County (Circuit Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Domestic Relations (only property disputes) & Civil up to \$25,000				
	X		Deschutes County (District Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil up to \$10,000	Mandatory			
	X		Jackson County (Circuit & District Courts)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil District Court up to \$10,000 Circuit Court up to \$25,000 and Domestic Relations	Mandatory			

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	X		Josephine County (Circuit & District Courts)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil & Domestic Relations (only property disputes) District Court up to \$10,000 Circuit Court up to \$25,000 and Domestic Relations	Mandatory			
	X		Lane County (Circuit Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil Up to \$25,000	Voluntary			Evaluation reported
	X		Lincoln County (District Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil up to \$10,000	Mandatory			
	X		Linn County (Circuit & District Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil District Court up to \$10,000 Circuit Court up to \$25,000	Mandatory			
	X		Marion County (Circuit & District Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil District Court up to \$10,000 Circuit Court up to \$25,000	Mandatory			
	X		Multnomah County (Circuit & District Courts)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil & Domestic Relations (only property disputes) District Court up to \$10,000 Circuit court up to \$25,000	Mandatory			

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	X		Union County (Circuit Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil \$25,000	Mandatory			
	X		Wallowa County (Circuit Court)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil \$25,000	Mandatory			Evaluation reported
	X		Washington County (Circuit & District Courts)	Or. Rev. Stat. §§33.350-33.400 (1983)	Civil Circuit Court up to \$25,000 District Court up to \$10,000	Mandatory			
PENNSYLVANIA	X		Compulsory Arbitration	Legislation in the form of enabling legislation (1952) 42 Pa. Cons. Stat. §7361	Tort; Contract; where amount in controversy doesn't exceed statutory limit; (\$10,000-\$20,000) Title to real estate expressly excluded	Mandatory in almost all jurisdictions	Yes	Senior Judge Ethan Allen Doty*	*Compulsory Arbitration, Philadelphia Evaluation reported
		X*							*Many alternative dispute resolution programs but AOC does not maintain systematic data
		X	Mediation in Philadelphia Municipal Court	Landlord/Tenant Program Initiated in 1984 Small Claims Program initiated in 1982	Landlord/tenant \$5,000 Small claims \$5,000	Voluntary agreements reached are binding and nonappealable			Evaluation reported

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		X	Municipal Court's Arbitration Program	National Center for Dispute Settlement 1971	Private criminal com-plaints filed with District Attorney's Office	Voluntary			
PUERTO RICO		X	Dispute Resolution Center	Office of Court Administration (February 1983) (Center funded by Legislature since November, 1983)	Family, Contract Landlord/Tenant Misdemeanor, Money damages to \$2,500, neighbor- hood disputes, animal noises, harassment, consumer/merchant	Voluntary		Mildred E. Negron-Martinez Director (809) 763-4813	Evaluation reported
RHODE ISLAND	X		Providence	Legislature (June 1988)	Civil				Bill enacted June 1988; program rules not final; program to start in fall of 1988
		X	Juvenile Services Youth Diversionary Unit (YDU)	Dolores Murphy Chief Intake Supervisor (1974)	First offenders, Early offenders, Truancy, Obedience, Shop- Property, Shop- lifting and Tort cases	Voluntary, alternative to mandatory court appearance	Yes		Evaluation reported
SOUTH CAROLINA		X	South Carolina Automobile Reparation Reform Act of 1974	Legislature 1974	Property damage claims from automobile accidents	Voluntary			Infrequently used

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SOUTH DAKOTA	X		Appellate Settlement Conferences	SD Supreme Court (July 1, 1986) S.D. Codified Laws Ann. §15-26B (1986)	Worker's Comp.. Domestic Rel.. Administrative Appeals, Money Judgments	Voluntary	Yes		
		X	South Dakota Farm Loan Mediation Services	Legislature (January 1988) Program began May 1988	Farm debts of \$50,000 or more	Mandatory; Voluntary for debts under \$50,000		Russell Stone (605) 773-5841	
TENNESSEE			No Programs Reported						
TEXAS		X	Texas Alternative Dispute Resolution Act	Legislature (1987) Tex. Civ. Proc. & Rem. Code Ann. §154.001 et. seg.	All civil cases	Mandatory if court orders			
		X	Dispute Resolution Center Marie Mullineaux, Director 512 East Riverside, Suite 206 Austin, TX 78704						
		X	Nueces County Dispute Resolution Center Georgia Flint, Program Director Nueces County Courthouse 901 Leopard, Suite 110 Corpus Christi, TX 78401						
		X	Dispute Mediation Service Herbert V. Cooke, Jr., Exec. Director 3310 Live Oak, Suite 202 LB9 Dallas, TX 75204-6133						
		X	Dispute Resolution Services of Tarrant County, Inc. Robert L. Wolff, Exec. Director 1300 Summit Street, Suite 222 Fort Worth, TX 76102-4416						

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X Dispute Resolution Centers  
Melinda Ostermeyer, Director  
301 San Jacinto  
Criminal Courts Building  
Houston, TX 77002

X Center for Dispute Resolution  
of Denton County, Inc.  
Lynell Wiley, Exec. Director  
P. O. Box 1282  
1020 West Main Street  
Lewisville, TX 75067

X Regional Center for Dispute Resolution  
Janet Lane, Program Coordinator  
P. O. Box 3730  
Lubbock, TX 79452

X Bexar County Mediation Center  
Jose E. Castillo, Director  
Heritage Plaza  
436 South Main  
San Antonio, TX 78204-1027

X Better Business Bureau  
Sharon Richardson-Eaves,  
Director of Arbitration  
476 Oakland Avenue  
Beaumont, TX 77701

UTAH

X Divorce Mediation Administrative  
order issued by  
court  
Commission on  
Criminal and  
Juvenile Justice  
(Nov. 1, 1985)

Divorce, child  
custody, visita-  
tion, and  
support

Evaluation reported  
(ongoing)

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		X	Domestic Relations Commissioner	Legislature (1969) Utah Code Ann. §30-3-4.1 et al. (1985)	Domestic Relations	Mandatory			
		X	Mental Health Commissioner	Legislature (1981)	Involuntary Commitments	Mandatory			
		X	Juvenile Court Referees	Legislature (1965) Utah Code Ann. §78-3A-14 (1965)	Traffic offenses, Status offenses Truancy	Mandatory			Evaluation reported (informal)
		X	Bail Commissioner	Legislature (1965)	Fix bail in misdemeanor offenses	Mandatory			
		X	Western Arbitration Association		All	Voluntary			
		X	Better Business Bureau		Same	Voluntary			
		X	Legal Services, Inc.		Landlord/Tenant	Voluntary			
		X	Arbitcourt		All	Voluntary			
		X	Prelitigation Medical Malpractice Panel	Utah Code Ann. §78-14-12	Medical Malpractice Claims	Mandatory			Evaluation reported (informal)
VERMONT	X		Medical Malpractice Arbitration	Legislature (1975) Vt. Stat. Ann. tit. 12 §7001 et seq. (1975)	Medical Malpractice	Voluntary	Yes		Evaluation reported

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VIRGINIA		X	Divorce Mediation Pilot Program	Initiated by Court Administrator in 1986	Divorce (property, custody, visita- tion, and support)			Tom Lehner (808) 828-3281	Evaluation reported (future)
		X	Small Claims Mediation	Local court rule 1985	Small claims limit \$2,000			Tom Lehner (808) 828-3281	
		X	Special Education	Legislature (1988)	Special educa- tion disputes	Voluntary			
	X		Fairfax County Circuit Court	Local court rule 1986	All civil	Voluntary			
		X	Richmond Alternative Dispute Resolution Center	Joint Committee on Consumer and ADR of Virginia State Bar and the Virginia Bar Association, Better Business Bureau (October 1987)	Consumer and neighborhood disputes	Voluntary			
		X	16th Juvenile & Domestic Relations Dist. Court Mediation Program* Nancy H. Scott/ Joanne Jackson Court Services Director, 411 E. High Street, Charlottesville, VA 22901 (804) 979-7191	1983 by grant	Child Custody & Visitation	Voluntary			*25 of 34 Juvenile and Domestic Relations Court Service Units provide mediation services; in addition to those listed here, programs operate in Judicial Districts 7, 8, 18, 19, 20, 27 and 29



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		X	VA Beach Juvenile & Domestic Relations Court Mediation Program (2nd Judicial District) Bruce Bright Court Services Director Municipal Center Princess Ann St. Virginia Beach VA 23456 (804) 427-4361	Local court rule 1980	Child Custody, Visitation and Support	Voluntary (Judge may refer case to mediation)			Evaluation reported (informal)
		X	2A Judicial District William J. Weaver Director Judicial District, P.O. Box 446 Accomack, VA 23301 (804) 787-1822						
		X	4th Judicial District Mr. Kevin J. Moran Director Juvenile Court Service Unit 800 E. City Hall Avenue P.O. Box 809 Norfolk, VA 23501 (804) 623-8311						
		X	9th Judicial District Mr. T. Robinson Smith Director Judicial District P.O. Box 62 Providence Forge, VA 23140 (804) 966-2603						

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		X	10th Judicial District Mr. Roland B. Murphy Director Judicial District P.O. Box 26 Appomattox, VA 24522 (804) 352-8224						
		X	11th Judicial District Mr. Wilbur Sirles Director Judicial District 27 E. Tabb Street Petersburg, VA 23803						
		X	12th Judicial District Mr. Robert W. George Director Judicial District P.O. Box 20 Chesterfield, VA 23832 (804) 748-1372						
		X	13th Judicial District Mr. F. A. Hare Director Judicial District 2000 Mecklenburg Street Richmond, VA 23223						
		X	14th Judicial District Mr. John J. Willis Director Judicial District P.O. Box 27032 Richmond, VA 23273 (804) 747-4692						
		X	15th Judicial District Mr. Alvin N. Chaplin Director Judicial District 601 Caroline Street 4th Floor Fredericksburg, VA 22401						

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		X	17th Judicial District Mr. Carl J. Beyeler Director Judicial District P.O. Box 925 Arlington, VA 22216 (703) 558-2174						
		X	21st Judicial District Ms. Jan C. Reed Director Judicial District P.O. Box 929 Martinsville, VA 24114 (703) 632-3424						
		X	22nd Judicial District Mr. Harry Ayer Director Judicial District 106 N. Main Street Rocky Mount, VA 24151 (703) 483-1615						
		X	23rd Judicial District Mr. Michael Lazzuri Director Judicial District P.O. Box 1374 Salem, VA 24153 (703) 387-6016						
		X	24th Judicial District Mrs. Mae G. Pickford Director Judicial District P.O. Box 60 1101 Court Street Lynchburg, VA 24504						

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		X	25th Judicial District Mr. Henry L. Whitelow Director Judicial District P.O. Box 1336 Staunton, VA 24401 (703) 885-0848						
		X	26th Judicial District Mr. C. Douglas Tucker Director Judicial District 5 N. Kent Street Judicial Center Winchester, VA 22601 (703) 667-5770						
		X	31st Judicial District Mr. Ira Faidley Director Judicial District 9311 Lee Avenue Manassas, VA 22110 (703) 335-6200						
		X*	Accomack Accomack Dept. of Social Services P.O. Box 299 Onancock, VA 23417 (804) 787-1530 Contact: Ms. Libby Beasley						*Twelve mediation programs administered by local Departments of Social Services. listed below
		X	Hampton Hampton Dept. of Social Services 1320 LaSalle Avenue Hampton, VA 23669 (804) 722-7931 Contact: Ms. Annette Arrington						
		X	Isle of Wight Isle of Wight Dept. of Social Services Isle of Wight County Court House Isle of Wight, VA 23430 (804) 357-3191, Ext. 300 Contact: Ms. Gloria Wilson						

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		X	Lynchburg Lynchburg Department of Human Services Division of Social Services 701 Hollins Street Box 955 Lynchburg, VA 24504 (804) 847-1551 Contact: Ms. Mary Ellen Truley						
		X	James City James City County Dept. of Social Services P.O. Box 69 Lightfoot, VA 23090 (804) 565-6855 Contact: Ms. Iris Street						
		X	Newport News Newport News Department of Social Services 2410 Wickham Avenue Newport News, VA 23607 (804) 247-2300 Contact: Mr. Joel Kirsch						
		X	Norfolk Norfolk Dept. of Social Services 220 W. Brambleton Avenue Norfolk, VA 23510 (804) 627-4861 Contact: Ms. Bertha Wright						
		X	Roanoke County Roanoke County Dept. of Social Services 220 East Main Street P.O. Box 31 Salem, VA 24153 (804) 347-6087 Contact: Ms. Betty R. McCrary						

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		X	Southampton Southampton Dept. of Social Services P.O. Box 405 Welfare Building State Route 35 North Courtland, VA 23827 (804) 653-2523 Contact: Ms. Doris Magetti						
		X	Virginia Beach Virginia Beach Dept. of Social Services 3432 Virginia Beach Avenue Virginia Beach, VA 23452 (804) 486-7223 Contact: Ms. Kitty Hill						
		X	Williamsburg Williamsburg Dept. of Social Services P.O. Box 371 400 N. Boundary Street Williamsburg, VA 23185 (804) 229-3626 Contact: Ms. Barbara Stewart						
		X	York-Poquoson York-Poquoson Dept. of Social Services 2177 George Washington Highway P.O. Box 917 Grafton, VA 23692 (804) 898-7284 Contact: Mr. Rashid Shabazz						
WASHINGTON	X		Mandatory Arbitration	State Legislature (1979) Wash. Rev. Code §7.06 (1979)	Civil up to \$25,000	Mandatory (also mandatory for child support modifications and payments)	Yes		

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	X		Benton County	State Legislature (1985) Wash. Rev. Code §7.06 (1984)	N/A	Mandatory	Yes		
	X		Chelan County	State Legislature (1984) Wash. Rev. Code §7.06 (1984)	Civil up to \$15,000	Mandatory	Yes		
	X		Douglas County	State Legislature (1985) Wash. Rev. Code §7.06 (1985)	Civil up to \$15,000	Mandatory	Yes		
	X		King County	State Legislature (1983) Wash. Rev. Code §7.06 (1983)	Civil up to \$25,000	Mandatory	Yes		
	X		Kitsap County	State Legislature (1983) Wash. Rev. Code §7.06 (1983)	Civil up to \$15,000	Mandatory	Yes		
	X		Mason County	State Legislature (1984) Wash. Rev. Code §7.06 (1984)	N/A	Mandatory	Yes		
	X		Pierce County	State Legislature (1984) Wash. Rev. Code §7.06 (1984)	Civil up to \$15,000	Mandatory	Yes		
	X		San Juan County	State Legislature (1985) Wash. Rev. Code §7.06 (1985)	N/A	Mandatory	Yes		
	X		Snohomish County	State Legislature (1984) Wash. Rev. Code §7.06 (1984)	Civil up to \$25,000	Mandatory	Yes		

STATE	COURT ANNEXED ARBITRATION	OTHER ADR	PROGRAM NAME/ JURISDICTION	INITIATED BY/DATE	CASE TYPES	VOLUNTARY/ MANDATORY	INFORMATION AVAILABLE	CONSIDERED EXEMPLARY/CONTACT	COMMENTS
	X		Spokane County	State Legislature (1985) Wash. Rev. Code \$7.06 (1985)	Civil up to \$25,000	Mandatory	Yes		
	X		Thurston County	State Legislature (1984) Wash. Rev. Code \$7.06 (1984)	Civil up to \$25,000	Mandatory	Yes		
	X		Yakima county	State Legislature (1983) Wash. Rev. Code \$7.06 (1983)	Civil up to \$25,000	Mandatory	Yes		
		X*					Yes		*30 programs sponsored by various organizations.
WEST VIRGINIA		X	Juvenile Referee System	W.Va. Code §§49-5A-1 to -6a (1982)	Juvenile offenses	Mandatory			Evaluation reported
WISCONSIN		X	Mediation (Dane County)	Locally initiated	Custody, Medical Malpractice, Farm- Credit disputes, Certain civil	Voluntary			
		X	Medical Malpractice Mediation	Wis. Stat. §655 (1986)	Medical malpractice	Mandatory			
WYOMING		X	Arbitration*	Wyo. Stat. §§1-36-101 to -119 (1977)	Property damage, auto, and labor disputes	Voluntary			*Statutory procedure for arbitration; neither court sponsored nor mandatory
		X	Agriculture Mediation Service	Legislature					



**E**

Tab E

SOCRATIC PLENARY PANEL:  
UNDERSTANDING AND EVALUATING THE SCENE

- Conference Discussion Materials

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National Conference  
on  
Dispute Resolution  
and the  
State Courts

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Conference Discussion Materials

## INTRODUCTION

A hypothetical case, "Dispute Resolution in the State of New Hope," establishes the framework for discussion at our forthcoming conference. Materials describing the hypothetical include:

- Materials **setting the scene** for the case study.
- Materials discussing **private dispute resolution** in New Hope.
- Materials relating to the **integration of government and private initiatives**.
- Materials outlining **implementation issues for court-annexed programs**.

**Setting the Scene.** These materials provide background for the discussion of issues during the sessions to be held on Wednesday afternoon, November 16th.

They consist of a letter from the Chief Justice of the New Hope Supreme Court to the State Court Administrator and a responding memorandum which outlines the current status of court-annexed dispute resolution programs in New Hope.

**Private Dispute Resolution.** These materials establish a framework for the dialogue and discussion which will begin the Conference on Thursday morning, November 17th: "The Privatization of Dispute Resolution."

The reading materials take the form of a Sunday magazine article for a daily newspaper. Based on interviews with individuals knowledgeable about dispute resolution within the state, the article focuses on the trend toward privatization and describes the issues raised by private ADR efforts as well as the relationship of private procedures to the courts.

**Integration of Government and Private Initiatives.** These materials provide background for the plenary session on Thursday afternoon, November 17th: "Developing Integrated State Dispute Resolution Programs."

The reading materials consist of a task force report to the Governor of New Hope. The task force was formed to make findings and suggest alternatives for action regarding the integration of private initiatives and court-annexed programs into a comprehensive statewide program.

**Implementation Issues for Court-Annexed Programs.** These materials establish a framework for the plenary session which will begin the Conference on Friday morning, November 18th: "Implementing Court-Annexed ADR Procedures."

The reading materials consist of a cover letter and a draft outline of key issues to be considered before and during the implementation of court-annexed alternative dispute resolution procedures.

## Supreme Court of New Hope

Chief Justice William Martin

October 12, 1988

Mr. Stanfield Sanders  
State Court Administrator  
Administrative Office of the State Courts  
Supreme Court Building  
Belgravia, New Hope 00041

Dear Stan:

As you know, the National Institute for Dispute Resolution, the State Justice Institute, and the National Center for State Courts are co-sponsoring a National Conference on Dispute Resolution and the State Courts on November 16-18, 1988, in Baltimore, Maryland. As one aspect of the program, the sponsors have kindly agreed to convene a panel of distinguished experts to advise us on how to move forward with our court-annexed dispute resolution efforts in the State of New Hope.

As a preliminary to the advisory session, it seems to me that we all would benefit from an overview of court-annexed programs currently in operation and planned throughout the state. Your assistance in compiling this information would be very much appreciated.

I look forward to hearing from you.

Yours sincerely,

William Martin  
Chief Justice

WM:dc

## ADMINISTRATIVE OFFICE of the STATE COURTS

Supreme Court Building  
Belgravia, New Hope 00041

### MEMORANDUM

To: Attendees of the National Conference on Dispute Resolution and the State Courts  
From: Stanfield Sanders  
Date: November 8, 1988  
Subject: Current Status of Court-Annexed Dispute Resolution Programs in New Hope

Court-annexed dispute resolution programs have become an integral part of New Hope's state court system, which serves a population of six million divided among 36 urban, semi-urban, and rural counties. There are four levels of distinct courts. The levels are defined by subject matter and geographic jurisdiction, and they are linked to one another by routes of appeal.

Limited jurisdiction courts -- in New Hope, the district courts -- occupy the first level. The 151 judges of these courts, which operate in each New Hope county, hear a variety of civil cases, including small claims, domestic relations, and traffic violations, up to the jurisdictional ceiling of \$10,000. Criminal jurisdiction includes misdemeanor and limited felony cases. Cases may be appealed from the district courts to the superior courts or to the court of appeals.

The second level is comprised of the general jurisdiction courts of New Hope -- the superior courts. The county superior courts have 72 judges to hear cases ranging from tort and contract claims to administrative agency appeals. Criminal cases include misdemeanor and triable felony. There were over 92,000 civil case filings in the general jurisdiction courts last year, of which about 85% were cleared. Cases from the superior courts may be appealed to the court of appeals or the New Hope Supreme Court.

An intermediate appellate court, with 12 judges which sit in panels, occupies the third level.

The court of appeals has mandatory and discretionary jurisdiction. The New Hope Supreme Court, the highest level, functions as the court of last resort. It also has mandatory and discretionary jurisdiction.

Court-annexed alternative dispute resolution programs operate to some extent at all levels of the court system except for the New Hope Supreme Court. This memorandum focuses on court-annexed programs currently in operation and those planned for the state's general jurisdiction courts. The programs discussed are those in which the court has some active role. Thus, they include not only those programs administered by the court but those in which the court's role is one of referral. Table 1 identifies the counties and the active court-annexed programs in each.

#### A. Court-Ordered Arbitration.

Court-ordered arbitration programs provide for pending civil cases, generally those seeking damages less than a specified amount, to be ordered to an informal hearing before a third party, usually one or more private attorneys. The arbitrators make a decision on liability and damages after hearing arguments and reviewing evidence. A party can reject the award and obtain a "trial *de novo*" but may incur additional costs or risk a penalty in doing so. If no party rejects the award, it is entered as the judgment of the court.

Current court-ordered arbitration programs build on six-year-old experimental programs in four counties. The initial programs, authorized by state court rules, were scrutinized in 1985 during special session legislative hearings. Following these hearings, the legislature passed a statute to allow any county superior court to mandate arbitration in cases for money damages under \$50,000. Legislation requiring the adoption of such programs has been introduced in the past two legislative sessions but has failed to gain enough support for passage.

Court-ordered arbitration programs have spread in the past three years from the population centers of the state to semi-urban and rural counties. Most of the new programs are patterned after

**Table 1:**

County (Civil Caseload)	Court-Ordered Arbitration	Judicial Mediation	Case Valuation	Non-Judge Mediation	Masters/ Experts	Case Management
Abbott (2,412)			✓		*	
Belgravia (5,906)	✓	✓		✓	✓*	
Comb (912)		✓			*	
Daval (2,734)				✓	*	
Fitch (1,430)			✓		*	
Golusia (3,414)			✓	✓	*	
Hill (2,503)	✓	✓		✓	*	
Jarard (1,898)	✓			✓	*	✓
Levy (754)	✓				*	
Mallow (2,174)		✓	✓		*	✓
Marua (2,508)	✓	✓			*	
Nachua (1,280)	✓				*	
Santos (3,542)		✓	✓	✓	*	✓
Tella (1,180)				✓	*	
Tri-County (12,448)	✓	✓	✓	✓	*	✓
Welling (3,316)		✓	✓		✓*	✓

\* Courts in all counties may use neutral experts on a selective basis.



or combine characteristics of the Belgravia and Tri-County programs. Two additional programs are expected to be in operation by January, 1989, and programs are under active consideration in three other semi-urban counties. Further, voluntary arbitration programs are gaining in popularity in several counties. For example, Daval County has begun an experimental program whereby a plaintiff seeking monetary damages of less than \$50,000 must indicate whether or not agrees to binding arbitration. When the plaintiff chooses arbitration, the answer must indicate the defendant's agreement. Courts in several rural counties have considered and rejected court-annexed arbitration programs, deeming them unnecessary for effective operation. Table 2 sets forth program characteristics for each county currently operating a COA program.

*Issues.* Questions concerning effective and efficient operation of court-ordered arbitration programs continue to arise, even with regard to the more-established programs. For example, in Belgravia County, current debate centers on the advisability of more stringent disincentives to appeal. Another area of concern is the proposal to transfer management responsibilities from overburdened court personnel to a newly-created not-for-profit dispute resolution organization being set up by the University of New Hope's Law School. Recent actions in both Belgravia and Tri-County to raise the jurisdictional ceiling will fuel debate as more cases are referred to arbitration.

In the Tri-County area, program administrators seek ways to increase familiarity with the mandatory arbitration program. An experiment is underway whereby a videotape of a demonstration arbitration hearing is made available to first-time participants. Concerned with the often elusive savings to represented litigants, there are ongoing discussions in Hill County concerning the adoption of a fixed fee schedule for attorneys involved in arbitration.

Further evaluation is needed before conclusions can be drawn with much confidence about the success of experimentation in these or other areas. Little beyond anecdotal material is available to indicate whether court-ordered arbitration programs enhance the quality of the dispute resolution

Table 2:

County Classification Calendaring System	Belgravia urban master	Tri-County urban individual	Hill semi-urban master	Jarard semi-urban individual	Manua semi-urban master	Levy rural master	Natchua rural individual
Authority for Program	statute	statute	statute	statute	statute	statute	statute
Start Date	1982	1982	1986	1987	1988	1986 <sup>1</sup>	1988
Jurisdictional Ceiling	\$50,000 <sup>2</sup>	\$25,000 <sup>3</sup>	\$20,000	\$15,000	\$15,000	\$10,000	\$25,000
Types of Cases	personal injury/ prop damage <sup>5</sup>	all cases for money damages	automobile torts	tort/contract cases	all cases for money damages	all cases for money damages	torts <sup>4</sup>
Number of Cases Handled 1987	147	500	69	46	N/A	21	N/A
Time from--Filing to Referral --Referral to Hearing	30 days 10 months	30 days 9 months	60 days 6 months	N/A 4 months	30 days 60 days	N/A 30 days	15 days 30-60 days
Neutral(s)--Identity --Compensation	panel/3 lawyers \$50/case	single lawyer \$200/case	single lawyer \$50/case	single lawyer <sup>6</sup> \$50/day	panel/3 lawyers volunteer <sup>7</sup>	single lawyer volunteer	single lawyer volunteer
Evaluation	end of 1988	end of 1988	none planned	1989--using control group	1990--using control group	none planned	1989
Disincentives to Appeal Appeals Filed Appeals Tried	arbitrators' fees 40-45% 4-5%	arbitrators' fees 25-30% 6%	appeal bond 10-15% 4-6%	none 50-55% N/A	appeal bond N/A N/A	none 9-11% 3%	arbitrators' fees N/A N/A
Time to Disposition <sup>8</sup> --75% --90%	1 year 3 years	10 months 13 months	9 months N/A	N/A N/A	N/A N/A	4 months N/A	N/A N/A
Administration	court	priv. org.	arbitrator	arbitrator	panel chairman	court	arbitrator

<sup>1</sup> The initial voluntary program became mandatory in 1987.

<sup>2</sup> The jurisdictional ceiling was raised in 1986 from \$25,000.

<sup>3</sup> The jurisdictional ceiling was raised in 1985 from \$10,000.

<sup>4</sup> One court offers voluntary binding arbitration by presiding or other active judge for any contested civil action.

<sup>5</sup> The initial program included contract and collection cases as well.

<sup>6</sup> Parties can stipulate to a non-lawyer arbitrator.

<sup>7</sup> Arbitrators will begin to be compensated for their services if the program is continued after the initial evaluation period.

<sup>8</sup> For cases referred to the court-ordered arbitration process.

process. Further, there is little hard evidence indicating what is needed to make an arbitration program effective or how differences between jurisdictions affect program operation. For example, it is not known how to decide what the optimum jurisdictional limits would be for any given program. Neither is it known how much court control is necessary to safeguard individual rights while allowing the court to maximize speed and efficiency. There is little data regarding the correlation between arbitration awards and trial outcomes; similarly, it is difficult to compare definitively times to disposition for arbitrated cases and for tried cases.

Information on cost savings to courts with arbitration programs is insufficient to draw reliable conclusions. Neither is there sufficient information regarding savings to litigants. Preliminary findings indicate that attorneys' fees are the major expense for arbitrants and that there may be little savings to plaintiffs who retain attorneys on a contingent fee basis. The related question of whether the process results in any savings to attorneys which are available to be passed on to clients has not been answered.

#### **B. Judicial Mediation.**

In this procedure, a judge serves as a neutral intermediary in negotiations between the parties. The judge may perform a variety of functions, ranging from serving as a shuttle diplomat to opining on the merits of the case. In some courts, judicial mediation is a mandatory element of pretrial case processing, as where attorneys and perhaps clients are required to meet with a judge in a mandatory settlement conference. In other courts, judicial mediation is *ad hoc*, occurring on a case-by-case basis, either at the instigation of the parties or the judge. Judges may be specially assigned as mediators or special periods may be set aside during which several judges put aside their trial calendars and hold settlement conferences in large numbers of cases.

Detailed data is not available for all New Hope counties regarding judicial mediation as a dispute resolution procedure. A best guess is that some type of judicial settlement conference is used at least on an *ad hoc* basis in most, if not all, general jurisdiction courts in New Hope.

However, the extent of judicial mediation which takes place during such conferences is likely to vary widely. The judge's role may be limited to directing the parties to negotiate rather than expanded to actively facilitating those negotiations. <sup>1</sup> Table 3 sets forth program characteristics for those counties with specific programs.

**Issues.** As with court-ordered arbitration, there are issues unresolved regarding the success and efficiency of direct judicial intervention in settlement negotiations. Cases vary in the extent and degree of use of judicial mediation, even for the same judge. Further, wide variations in local rules and customs, as well as in case loads, preclude valid comparisons among courts. Studies to date rely more on anecdote and intuition than on hard data. Most of the data which are available focus on a quantitative rather than a qualitative assessment, fueling fears that the statistics of case disposition will take precedence over the quality of disposition.

Aside from its effectiveness, judicial mediation raises ethical concerns. A mediating judge holds broad and often unreviewable discretion regarding the method and extent of intervention in settlement negotiations. In addition, where the mediating judge also will be the trial judge, especially in a bench trial, at least the appearance of impartiality is called into question.

### C. Case Valuation.

Several related court-annexed alternatives seek to encourage a negotiated settlement by using a third party other than a judge to provide the parties with a neutral assessment of each party's position and the overall value of the case. In some courts, either on an *ad hoc* or systematic basis, panels of lawyers hear a summary presentation of the case by the parties' lawyers. Among

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1

In one New Hope county, a judge has gone beyond the settlement conference format to experiment with a voluntary court-annexed mini-trial for inter-corporate disputes. With the judge presiding, lawyers for the parties present the essence of their cases to senior executives with settlement authority. If the negotiations which follow are unsuccessful, the judge offers an opinion of the likely outcome if the dispute were litigated.

Table 3:

County Classification Calendaring System	Belgravia urban master	Tri-County urban individual	Hill semi-urban master	Mallow semi-urban individual	Manua semi-urban master	Santos semi-urban individual	Welling semi-urban hybrid	Comb rural master
Program <sup>1</sup>	judicial mediation conference	mandatory settlement week" <sup>2</sup>	judicial mediation conference	specialty assigned judge	judicial mediation conference	judicial mediation conference	mandatory settlement conference	mandatory settlement conference
Authority for Program	local court rule	local court rule	judge rule	local court rule	local court rule	judge rule	local court rule	local court rule
Extent of Operation	court-wide	court-wide	one judge	court-wide	court-wide	one or more judges	one or more judges	one or more judges
Types of Cases	civil suits for money damages	contested civil suits	cases expected to take over one month to try	money and property cases	civil suits for money damages	contested civil suits	contested civil suits	contested civil suits
Number of Cases Handled 1987	475	1250	23	340	62	N/A	89	N/A
Time of Hearing	at close of discovery	sessions held quarterly	at close of discovery before trial date is set	at close of discovery before trial date is set	on day of trial	on or near day of trial	after trial date is set	after trial date is set
Neutral(s)--Identity	trial judge	mediation judge	trial judge	mediation judge	trial judge	trial judge	judicial officer <sup>3</sup>	trial judge
Evaluation	end of 1988	1989	N/A	N/A	1990	--- 4	N/A	N/A

<sup>1</sup> The majority of remaining courts allow judges the discretion whether to address settlement during any pretrial conference for a particular case. Many of these courts allow for voluntary settlement conferences, either before the judge assigned to the case or before a judge selected by the parties.

<sup>2</sup> Patterned after the program used successfully in the Superior Court in Orange County, California. Cases are screened at the close of pleadings; those deemed appropriate are then scheduled for a quarterly "settlement week."

<sup>3</sup> Settlement conferences may be presided over by the trial judge, an attorney acting as judge *pro tem*, or a magistrate.

<sup>4</sup> Monitoring of "success" of conferences by individual judge.

other things, the panels offer their own settlement valuation as a relevant standard to encourage the parties to come to an agreement. In other courts, lawyers make a summary presentation of a civil case to an advisory jury which renders a non-binding verdict. The verdict then becomes a factor in follow-up negotiations.

These techniques both provide the parties with a neutral evaluation of a case. However, they may operate very differently. Lawyer valuation programs, often termed Early Neutral Evaluation after the program created by the Northern District of California, generally are structured to occur early in the litigation process. They are informal and require little in the way of court resources. Advisory jury programs, termed summary jury trials, by contrast are much more elaborate. They take place just before trial, are formal, and consume many court resources, including judge and jury time and courtroom space.

A variety of court-annexed programs are in operation in New Hope which afford the parties a neutral evaluation of a case before it comes to trial in an attempt to promote settlement. Valuations are most often made by one or a panel of experienced trial attorneys; however, in some courts, valuations occasionally are made by a six-member advisory jury. Two additional semi-urban counties are developing lawyer evaluation programs. Table 4 sets forth program characteristics for those counties which currently have specific programs.

*Issues.* Controversy arises with respect to certain forms of case valuation programs. For example, it is crucial to the effective operation of lawyer evaluation programs that the litigants understand the process. For this reason, several early programs recently have been modified to exclude those cases in which the litigants are appearing *pro se*. Data from Mallow County indicates that completion of evaluations in a timely fashion may be another problem faced by some programs.

In Santos County, the practice of letting non-judicial court personnel preside over summary trials is drawing fire from some lawyers who have used the procedure. The lawyers

Table 4:

County	Tri-County	Abbott	Golusia	Mallow	Santos	Welling	Fitch
Classification	urban	semi-urban	semi-urban	semi-urban	semi-urban	semi-urban	rural
Calendaring System	individual	master	master	individual	individual	hybrid	master
Program	summary jury trial	lawyer evaluation	lawyer evaluation	lawyer evaluation	summary jury trial	panel hearing	lawyer evaluation
Authority for Program	court rule	local court rule	local court rule	local court rule	court rule	local court rule	local court rule
Start Date	1988	pilot--1988	1987	1986	1988	1985	1988
Types of Cases	personal injury <sup>2</sup>	no restrictions	contract/tort	domestic relations	- - - - 1	medical malpractice	personal injury
Number of Cases Handled 1987	9	120	98	57	6	28	- - - - 3
Time of Hearing	after final pretrial conference and before trial	30-60 days after complaint is filed	at close of discovery	within 60 days after complaint is filed	2 weeks before trial	within 90 days after complaint is filed	within 90 days after complaint is filed
Neutral(s)--Identity --Compensation	6-member jury regular stipend	panel/3 lawyers volunteer	panel/3 lawyers volunteer	one lawyer volunteer	6-member jury regular stipend	panel/3 or 5 voluntary	one lawyer volunteer
Evaluation	none planned	1989	end of 1988	completed 1987 <sup>4</sup>	- - - -	- - - -	none planned
Administration	individual judge	local bar association	court	local bar association	individual judge	court	individual judge

<sup>1</sup> Used for cases where credibility of a witness is not a major factor and which require only application of existing law.

<sup>2</sup> This experimental program is targeted to a large number of similar tort cases now consolidated and pending in one superior court. Representative cases will be assigned to summary jury trials.

<sup>3</sup> Procedure not often used.

<sup>4</sup> Evaluation of the program's first year of operation was cautiously optimistic. Interviews with participants indicated that the program was successful in forcing early case preparation and in clarifying issues. In addition, cases assigned to the program were, on the whole, resolved more quickly than similar cases assigned to regular processing. However, it is still unclear whether the program will result in any savings of judge time or reduction in the number of trials.

charge that the forced brevity of case presentations often results in ill-advised and unrealistic verdicts which can push the parties away from settlement. The extent to which the procedure can be mandated also has been called into question. Recent decisions by various federal courts are conflicting.

#### **D. Non-Judge Mediation.**

In these procedures, non-judge volunteers or court employees seek under court auspices to help the parties negotiate a voluntary settlement. Some such efforts are mandatory; others are merely made available to the parties. Whether voluntary or mandatory, the focus is more on improving the negotiation process, and thus encouraging voluntary settlement, than on case valuation.

In New Hope, such procedures most often have been adopted to deal with particular types of disputes. The majority of existing programs are targeted to domestic relations issues. Pursuant to a state statute, each superior court has the discretion to mandate mediation of divorce, custody, and visitation disputes. The statute follows from the demonstrated success of a pilot program in Belgravia County. Other programs include small claims and landlord/tenant cases. However, in recent years, some courts have begun to broaden existing programs to offer non-judge mediation for a range of civil case types. Because the class of case to which mediative techniques are being applied vary so widely, program designs can be quite different. **Table 5** sets forth program characteristics for those counties with specific programs.

*Issues.* Domestic relations, small claims, and landlord/tenant cases offer unique opportunities for mediation. However, many argue that widespread use of the technique is dangerous. They fear that, among other things, mediation by non-judges:

- Will diminish judicial development of legal rights.
- Will not adequately protect the rights of a less powerful party.
- Will work in favor of institutional litigants.



Table 5:

County Classification Calendaring System	Belgravia urban master	Tri-County urban individual	Daval semi-urban master	Golusia semi-urban master	Hill semi-urban master	Jarard semi-urban individual	Santos semi-urban individual	Tella rural master
Program	mandatory mediation 3	----- 1	mandatory mediation 4	voluntary mediation	mandatory mediation 5	mandatory mediation	mandatory mediation	----- 2
Types of Cases	divorce; child custody/ visitation	domestic relations-- includes financial/ property issues	child custody/ visitation; small claims	divorce proceedings where one or more minor children	child custody/ visitation; child support	L/T; discrimination in sale or rental or property	contract/ motor vehicle negligence	any civil case
Number of Cases Handled 1987	over 300	547	112	26	87	43	74	N/A
Neutral(s)	attorneys/ counselors 7	----- 6	non-lawyers	non-lawyers	non-lawyers	magistrates	attorneys	legal assistant
Evaluation	end of 1988	monthly report	end of 1989	questionnaires	questionnaires	none planned	questionnaires	end of 1988
Compliance with Agreement	voluntary 8	court order	court order	voluntary 9	court order	court order	court order	court order
Administration	court administrator	court	court	court	court	court	private organization	private organization

- 1 This program provides for arbitration to follow if mediation is unsuccessful.
- 2 The current voluntary program is intended to develop a market for services without the court having to mandate use. The court has contracted with a group of professionals to develop market.
- 3 The initial conference is mandatory for all referred cases. Parties to a divorce proceeding may choose to withdraw from mediation after the first conference; parties to custody disputes must continue until the neutral determines that the mediation is unsuccessful.
- 4 This two-year demonstration program builds on a court-sponsored voluntary mediation service which has been expanded and made mandatory.
- 5 This program incorporates elements of case valuation in that a formula and guidelines for its application have been established for determining support payments.
- 6 Courts in the Tri-County area contract with various community dispute resolution centers to provide mediation, arbitration, and conciliation services for referred cases.
- 7 In this experimental program, the court contracts with private professionals who make up mediation teams. The mediators are available during and outside of regular business hours, including evenings and Saturdays.
- 8 Follow-up sessions can be required if there are problems with compliance.
- 9 If a mediated agreement is broken, it is entered by the court as a judgment.

Not all of these concerns apply with equal force to all areas where mediation is widely used. For example, mediation is less likely to fail to protect or to develop legal rights in a neighbor/neighbor dispute than in a child custody dispute. Similarly, mediation raises fewer questions in a small claims dispute between relatively equal parties than in a dispute where an individual faces an institutional litigant.

Specific issues which have arisen in New Hope include the current controversy in Belgravia, where mediation for domestic relations cases is mandatory across the board. Dissension centers on the need to provide ways to exempt those cases which are not appropriate for mediation. Such an exemption provision is especially crucial in the domestic relations area for those cases where there is evidence of physical abuse or neglect. Critics believe that the mediation process, in such instances, cannot adequately protect the rights of the abused party, most often women or children. Other issues center around those institutional litigants likely to be a party to landlord/tenant or property disputes. For example, critics claim that the mediation program in Jarard County has become nothing more than a collection system for rental management firms, loan companies, banks, and other insitutional litigants.

Questions also arise with regard to the extent of power appropriate for a non-judge mediator. Programs patterned after that in Belgravia grant the mediator power to exclude counsel from mediation proceedings and to call in other professionals where necessary for advisory purposes. These programs allow the mediator to make recommendations to the court as well, unlike those such as in the Tri-Counties which protect the confidentiality of the proceedings.

Disputes over widely varying standards for mediators may be settled by legislation. A bill pending in the state legislature would establish standards for public and private mediators state-wide. This bill would standardize training practices as well.

**E. Special Masters and Court-Appointed Experts.**

Courts have the power to appoint outside neutrals for various purposes, including to serve as factfinders and settlement masters. These procedures generally are used in large complex cases which require an expertise or time commitment that other court-annexed procedures do not provide. For example, the appointment of a neutral expert factfinder may facilitate settlement in a case that turns on a complex issue of fact subject to widely different assessments by the parties and their experts. Similarly, the appointment of a special master can increase chances of settlement by helping the parties to explore or design settlement options.

Courts in New Hope take advantage of the appointment power with varying frequency. Most appointments of a special master to date have been in connection with managing a group of similar cases or with oversight of the implementation of a court order. However, masters also may be appointed as mediators. For example, a judge in Belgravia currently is considering the appointment of a special master to explore the possibilities of settlement in a class action civil rights case. In Welling County, a special master recently was appointed to mediate a complex toxic tort case. The Tri-Counties currently are exploring the feasibility of appointing a special master in a public dispute involving a proposed bypass highway.

Neutral experts occasionally have been appointed in cases where it is necessary to make sense of highly technical evidence or to provide a balance for party-hired experts. They appear to be used most frequently in medical malpractice cases. However, New Hope judges also have used experts in a few contract, antitrust, and intellectual property cases. Some courts make it known to the jury that an expert is court-appointed; others believe this may cause the jury to give too much weight to the expert's testimony.

*Issues.* Special masters can be most effective when appointed with the consent of the parties. The extent of the court's authority to appoint neutrals over the objections of the parties has

not been resolved. Confidentiality becomes an issue where the special master is serving as both case manager and mediator. As case manager, one of the duties of the special master is to make recommendations to the court. However, a special master mediator, to be effective, must be able to preserve the confidential mediator/party relationship.

Neutral experts are infrequently used for a number of reasons. Judges often express concern that the experts will take away from the roles of other participants, including the judge, lawyers, and jury. In addition, there is the fear that the jury will be unduly influenced by the opinion of a court-appointed expert.

#### **F. Case Management**

A variety of systems which are designed to make better use of available court resources exist in New Hope. These case management systems attempt to cure court congestion by encouraging voluntary settlement through some mix of court control of caseflow and modifications of procedural rules. For example, an Economical Litigation Project (ELP) in Santos County, patterned after a California program, encourages attorneys to focus on substantive issues early in the litigation process.

The Tri-Counties have begun a pilot program which integrates procedural simplifications similar to those of the California ELP with caseflow management techniques like those used in a successful Kentucky program. Further, the Tri-Counties recently moved from a master to an individual calendar system in an effort to increase efficiency and speed of disposition. Several other counties have switched to the individual system as well; at least one county is experimenting with a hybrid system which attempts to combine the flexibility of the master calendar with the accountability of the individual calendar.

*Issues.* There is data to suggest that earlier settlement of disputes, with associated cost savings to courts and parties, can be achieved by better judicial management of the litigation

process. Careful scheduling can force attorney attention to the case and establish the contact between the parties needed to stimulate settlement negotiations. It is unclear, however, what precise mix of management techniques is most effective. Further, courts in New Hope, as elsewhere in the country, have found that programs which are successful in one region may require revision to work equally well in a locale with different resources and court structure. Many believe that the strict judicial control necessary for a successful case management program is possible only with an individual calendaring system; others stress that it is not the calendar system that is the crucial element but the willingness of all those involved in managing the litigation process to coordinate their efforts.

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I hope that this memorandum will prove helpful, both as a preparation for the National Conference and as a general source of information. I look forward to seeing you at the Conference later this month.

**F**

Tab F

THE PRIVATIZATION OF DISPUTE RESOLUTION

- Conference Case Study: The Privatization of Dispute Resolution
- Mazadoorian, Harry N., "For-profits take firm hold on field," 14 Bar Leader 22-25 (September-October 1988).
- Thompson, Mark, "Rented Justice," California Lawyer 42-46 (March 1988).
- Tannon, Elizabeth M., "Implementing A Successful Minitrial," 52 Kentucky Bench and Bar 12-13, 50-51 (Winter 1988).
- Mazadoorian, Harry N., "Alternative Dispute Resolution," Journal of the American Corporate Counsel Association (Winter 1988).

The Privatization of  
Dispute Resolution

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Thursday Morning  
November 17



Tab F

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- Mazadoorian, Harry N., "For-profits take firm hold on field," 14 Bar Leader 22-25 (September-October 1988).
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*The Belgravia Banner*

Sunday Magazine

## THE PRIVATIZATION OF DISPUTE RESOLUTION

WHAT IS IT AND WHAT DOES IT MEAN FOR NEW HOPE

*Private organizations provide  
court-like services  
-- but more quickly and at less cost.*

Private individuals and organizations in increasing numbers are making a profit by offering dispute resolution services that traditionally have been provided by government-run court systems. This is a form of competition in which, seemingly, everyone wins. Private services -- which offer everything from conciliation and mediation to private judges and juries -- provide disputants with a choice that is billed as offering greater efficiency at lower cost. Proponents claim that the handling of disputes by private systems cannot help but alleviate the chronic backlogs faced by many state courts. And the entrepreneurs offering for-profit dispute resolution services cannot help but be gratified by the response to their services.

"Sure, we're competing with the courts," admits Paul Devonshire, Vice-President of New Hope Mediation Arbitration Service. "And we're competing successfully. The reason for this success is that we can provide the same services as a court but more quickly and at less cost -- and that even though the court is free." Devonshire cites the growth in the volume and complexity of lawsuits as the driving force behind the trend toward private alternatives. "People are just fed up with the long delays, high costs, and outmoded procedures of the public system, notwithstanding the long and venerable history of American legal tradition. It is time for change. The goal of my organization is to develop private alternatives into a tradition of civil justice which rivals that of the government."

*Debate is fueled by the number and variety of services now available.*

The availability of alternatives is not new -- private organizations such as the American Arbitration Association have been providing dispute resolution services for many years. Entities such as Better Business Bureaus and community dispute settlement centers also are traditional private providers. Neither is the law relating to the authority of the private providers new -- reference statutes which allow retired judges to handle all or part of a case and statutory provisions providing for court enforcement of arbitration awards and settlement agreements have not changed. What is new, and what is fueling debate, is the number and variety of services -- many for profit -- now being offered and sought.

More and more businesses are adopting a policy of experimenting with alternative dispute resolution procedures. For example, a number of large corporations have signed a statement which commits them to consider the use of alternatives before pursuing full-scale litigation. Insurance companies, too, are responsible for initiatives. A high-level manager for Statewide Insurance explains that his company, concerned with high transaction costs and perceived deficiencies of court services, views private dispute resolution as a crucial and important way to handle disputes. Financial institutions, including banks, are developing alternative dispute resolution resources. Individual disputants also are more often choosing alternative forums which range from religious-based conciliation services to school clinics to dispute settlement centers to for-profit organizations.

*Proponents of justice for profit  
dismiss or explain away charges that  
alternative procedures such as  
private courts make a mockery  
of the civil justice system.  
Few critics accept the easy answers.*

Notwithstanding such lofty goals, there are some clouds on the horizon, with the most severe criticisms aimed at private court systems and private judging. Critics fear that "bad" private dispute resolution results will spread, that increased use of alternative processes will undermine the

rule of law and erode procedural and constitutional protections, that private forums will exacerbate discrepancies between society's "haves" and "have nots" to create a second class justice. They favor instead a continued reliance on traditional tried and true dispute resolution systems and propose an emphasis on improving case management and other existing court-based techniques.

Proponents believe such proposals miss the mark. "I certainly am not opposed to public courts getting their act together," states Joseph McRaney, President of ALTS, a private dispute resolution firm. "However, I believe that disputants should have a choice, whether that choice is between an efficient and effective public dispute resolution system and an efficient and effective private dispute resolution system or between a costly and inefficient public system and an efficient and effective private system."

*Although all are  
equal under the law,  
in private courts some are  
more equal than others.*

Asked whether the same choice must be extended to those disputants who cannot afford to pay for the efficient and effective private system, McRaney offered a qualified yes. "I believe that for-profit neutrals will function similarly to for-profit attorneys -- foregoing a certain percentage of profit in favor of *pro bono* services. That will almost certainly not be sufficient to provide everyone with a choice. However, while it would be nice if everyone had the same choices, in a justice system and otherwise, it is not realistic." Continuing, McRaney stated, "The public justice system is available for all citizens. The fact that some of those citizens will choose a private alternative instead does not negate the availability of the public system or automatically relegate the poor to a lesser standard of justice. The critics who claim that public courts are less desirable because they don't offer the advantages of private courts also claim that private forums will somehow abridge the rights of less powerful individuals or groups, including those without financial or political resources, because they're not public. They can't have it both ways."

Charges that private courts tend to favor institutional litigants are answered with the

explanation that a private judge who exhibits a personal or financial bias will soon find himself without a clientele. Critics may find the easy answer less than sufficient, however. "Institutional litigants are more powerful by their very nature," states noted legal scholar Joseph Coates. "We're not just talking here about a judge who displays bias during a private proceeding. We're talking about instances where weak parties are pressured into agreeing to a private proceeding or where naive parties agree to resolve a dispute privately without adequate knowledge of what that means."

*The jury is still out  
on the question whether the lucrative  
private courts will reduce the number of  
qualified and experienced judges  
available to the public system.*

Proponents also dismiss claims that the proliferation of private courts will cause a burdensome loss of qualified judges from the public court system. "It is in the interest of few judges to leave the public system before retirement age," explains former superior court judge Gerald Wright. "Further, since not all, or even most, retired judges will choose to become active as a private judge, a pool will be preserved to be 'on call' for sitting judges." Critics counter that the experience of California, where private judging is most prevalent, indicates otherwise. "California is experiencing a very high rate of turnover of senior judges right now," says Lawson Graddis, state court administrator. "And a high proportion of these judges are becoming part of a private system." Graddis cites several factors responsible for the turnover. "Public judging is a high pressure job for low pay and, increasingly, low status. These days, judges in the public court system not only give up what is or could be a lucrative career as a lawyer. If they continue to serve as a public judge until they reach retirement age, they also are giving up, or at least postponing, what could be a lucrative career as a private judge."

*The private/public debate intensifies  
where private procedures are sanctioned  
by the public courts, as where  
an order of reference is used.*

Daniel Harcor, a recently retired well-known and respected trial attorney, discusses the links between public courts and private procedures. "Clearly, it is not within the power of the

government to prevent private disputants from settling their cases out of court. However, court involvement in such private settlements worries me. Court action can take the form of court orders conferring the status of a legal judgment on private arbitration awards and settlement agreements. Or, in a state such as New Hope with an order of reference statute, it can take the form of allowing appeal of a retired judge's decision after a private trial in the same manner as that by a jury or active judge."

Such circumstances raise the specter of private cases going to the head of the line for court action without waiting through the regular civil calendar. Further, Harcor suggests that court action and opportunity for appeal, while important, are not sufficient safeguards of either private rights or public interests. He points out that there is at least an appearance of secrecy about private proceedings and that it is difficult for interested outside parties to intervene. In addition, "a lack of public record allows disputants to use the secrecy of private proceedings for private advantage, as where one or more parties go private in order to cover up two sets of books." Harcor compares this to a public system which can make special arrangements for confidentiality of financial or other data, based on a reasoned balance of public and private interests.

*Private procedures increasingly are  
used not only by businesses and  
individuals but by  
the public courts themselves.*

Not only can courts take action with respect to cases voluntarily in a private forum but they can require those cases filed in court to go through a private proceeding as a prerequisite to trial. Indeed, courts increasingly are contracting out services traditionally provided by the court. For example, several courts in New Hope contract with community-based centers to provide dispute resolution services, including conciliation, mediation, and arbitration. Further, more attention is being given to how the public system can compete with the private and how private processes can be adapted and annexed to the courts. Courts are using non-court people, including attorneys and lay persons with special expertise, to help with various stages of the litigation process in an attempt to resolve disputes more efficiently and effectively. These private assistants serve in a variety of

roles, including as arbitrators, mediators, and case evaluators.

Regardless of the outcome of the debate over their desirability, it is unlikely that private alternatives will disappear as an option for those seeking to resolve a dispute. Both proponents and critics of the privatization trend agree that there must be improvements in the quality of dispute resolution services in New Hope. Continued emphasis on efficiency and accessibility is likely to mean that specialized procedures, both public and private, will be limited only by imagination and resources.



# For-profits take firm hold on field

By Harry N. Mazadoorian

Probably the most telling factor in the expansion of ADR is the rapid proliferation of for-profit ADR service providers. These vendors are "private court companies" that offer services to arrange and conduct mediation, arbitration, mini-trial and other processes and to furnish capable third-party neutrals to help resolve disputes.

[Note: Specific ADR providers will be mentioned only for the purposes of illustration. These references should not be considered an endorsement. Failure to mention most providers is not a lack of endorsement.]

The best-known provider probably is the American Arbitration Association, which was formed in 1926. Besides resolving disputes, AAA also has engaged in a broad-based public education effort to encourage greater use of alternatives.

Long before the formation of the AAA, commercial disputes were brought before alternative tribunals. It is reported that the New York Chamber of Commerce offered this service as early as 1768.<sup>1</sup>

Until recently, however, providers were largely limited to non-profit, business-related dispute resolution centers, community-oriented, neighborhood mediation centers, court-affiliated programs or consumer affairs programs.

The for-profit service provider

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arrived about the same time as the ADR revolution, generally considered to be at the American Bar Association/Roscoe Pound Conference in 1976.

It is not always easy to distinguish a for-profit from a non-profit provider. For example, many non-profit entities are engaged in ADR but utilize neutrals who are professionals and earn their livelihood from the dispute resolution business. In many instances, profits and nonprofits are equally interested in generating revenue.

With early successes such as the California "rent-a-judge" statute (California Code of Civil Procedure, Section 638) and the development of the "mini-trial" procedure, segments of the legal community began to show a greater willingness to experiment with a wider variety of third-party neutrals and ADR processes.

The gradual use of private entities exploded early in the 1980s as alternatives demonstrated promise in reducing the high cost, delay and inefficiency of traditional litigation. While private services were offered by only a handful of entities five years ago, the number has increased more than tenfold.<sup>2</sup>

Though providers vary substantially in the types of their services and their approaches to providing them, a number of common elements pervade the industry. The basic services offered by most for-profit providers include:

- Helping the client contact the adversary to propose and promote participation in ADR.
- Conducting ADR proceedings through staff or independent third-

party neutrals. Many providers also offer administrative services.

- Providing statistical and other administrative follow-up to the client so the procedures can be evaluated.

- Providing educational programs for law firms, corporate entities or other prospective clients to teach the client about the types and most appropriate uses of ADR.

## Differences among providers

Despite the similarities, for-profit providers differ substantially in key areas. These areas include type of service, degree of formality, use of third-party neutrals, support services, fees and training.

## Types of processes

While several providers seek to offer virtually every ADR process, including arbitration, mediation and the mini-trial, others focus on one or more areas in which they have established an expertise or which is conducive to settlement. Providers also differ as to the types of cases they prefer, with most concentrating on moderate-size tort-related matters. A few national providers, such as Endispute, frequently handle medium and large, complex, multi-party cases. Other national providers, such as American Intermediation Services, also handle major cases, and small, higher-volume cases.

## Degree of formality

Most ADR is much less formal than the traditional courtroom. Citing informality as a major element contributing to the success of ADR, providers feel that any ex-



pedited process must be more easily accessible, faster and less bound to the rules of evidence and civil procedure than common litigation.

Nevertheless, varying degrees of formality can be found among ADR providers. Judicate, believed to be the only publicly-owned for-profit provider, has built courtroomlike settings, complete with a bench for the judge, a witness stand, the American flag and bible. Parties also can have matters heard by a former judge cloaked in the traditional judicial robe. Judicate also has its own rules of procedures, modeled after the federal rules of civil procedures. Of course, Judicate also offers less formal processes if disputants prefer.

#### Neutrals utilized

Another major difference in the operation of many private for-profit ADR providers is the method of selecting the third-party neutral. Some rely on an outside panel of neutrals, generally former judges or attorneys. Sometimes the parties are allowed to choose the panelist they prefer; other times the provider selects the panelists, with the parties having a "veto" or "strike" right.

In contrast is the employee model, in which the third-party neutral is an employee or principal of the provider. Occasionally, a provider will use more than one model. For example, the AAA traditionally has used outside neutrals, but recently started an experimental program in Georgia with an in-house mediator.

#### Other services

Another distinguishing characteristic among providers is the degree of administrative support provided to clients. Most providers supply initial administrative services, particularly contacting the other side and urging participation in ADR. Frequently this is a critical service, as a delicate blend of persistence and diplomacy may be needed to convince the opposing party to use ADR.

Providers also differ substantially in their capabilities to provide

status reports, educational statistics and materials. Several have developed ADR training and negotiation/mediation instruction programs as a focus of their services.

#### Fees

Fees charged by the private ADR providers also vary substantially. Some providers charge an hourly rate, while many charge a straight unit fee depending on the type of process selected. Some charge extra for the administrative services associated with contacting the adversary, while others charge for these services only if they succeed.

Several providers suggest that fees be split equally among the parties. Those providers argue that this

avoids the appearance of bias toward the party that foots the bill and enhances the provider's image as a neutral. Financial participation by each party generally provides more of a commitment toward making ADR work.

#### Experience

Probably the most important characteristics on which providers differ are experience, training and qualifications. Corporations and law firms who regularly utilize services of ADR providers report wide variations in the ability to effectively and competently resolve disputes. Potential clients should inquire about the number and qualifications of the neutrals, types of ADR offered, success rates in getting opposing parties to the table and chances of resolving the matter. References should be solicited and past users be queried on fairness and impartiality. Great care must be taken to ensure that the neutrals can get the job done. For example, a retired judge may have an outstanding record as a jurist and trial judge, but may not be effective in close, one-on-one mediation.

#### Experience with providers

CIGNA's first major exposure to for-profit ADR service providers was in connection with the ADR program conducted by our property-casualty insurance subsidiaries, where large numbers of moderate-sized third-party claims were referred to ADR. Rather than select a single provider in a region, the ADR manager in the property-casualty claims management division and I chose to identify several providers, preferably with complementing strengths. This allowed us not only to test the capabilities of various providers, but also to insure that our references would be handled by the best providers available.

We preferred mediative ADR processes, partly because of their non-binding nature, and the high degree of control retained by the parties made the processes more acceptable to opposing counsel. We

## ADR providers

The following groups are among a growing number of national, private ADR providers:\*

- American Arbitration Association, New York City
- American Intermediation Services, San Francisco
- Arbitration Forums, Tarrytown, N.Y.
- Better Business Bureau, Arlington, Va.
- Center for Public Resources' Judicial Panel, New York City
- The Duke Private Adjudication Center, Durham, N.C.
- Endispute, Washington, D.C.
- Judicate, Philadelphia
- United States Arbitration, Inc., Seattle, Wash.

\* See the Bureau of National Affairs' *Alternative Dispute Resolution Report*, (June 11, 1987, pages 90-92 and Dec. 10, 1987, pages 331-333); *Dispute Resolution Directory*, National Institute of Dispute Resolution (January 1984).

sought out providers who had the capability to provide "full-line" ADR services, and the capacity to furnish administrative support services such as contacting the other side and arranging for physical facilities. Although preferring full-line providers, we sometimes used single-line providers with no national network if we liked the quality of their services.

#### **Blurring of lines**

The recent rapid growth of the for-profit ADR providers overshadowed long-established nonprofit providers, community or business-oriented centers and the hundreds of neutrals. But now many not-for-profits have broadened their services to the point where the line between them and for-profits seems to be blurred.

For instance, the AAA has long handled commercial and labor disputes and has operated on a nonprofit basis since 1926. But it now has developed new programs. One is an insurance program operating in each of its 31 offices. Many large insurance carriers with ADR programs use AAA in much the same way they would use a for-profit provider.

Similarly, Duke University's Private Adjudication Center, also a nonprofit entity, has developed a nationwide network of former judges. It, like for-profit providers, has the capacity to hear a wide variety of cases.

Also expanding their capabilities are several community dispute resolution centers. While the centers initially handled matters that revolved around neighborhood, domestic relations and small consumer matters, they can handle a much broader range of ADR. Several centers have undertaken commercial disputes—with encouraging success. Among the best-known centers is the Atlanta Neighborhood Justice Center, one of the pioneer voluntary mediation programs started in 1977. ANJC has handled thousands of criminal and civil cases and has conducted acclaimed mediation training programs in 14 states and provinces.

#### **Hybrid providers**

Another major ADR network is provided by the Better Business Bureau. By far the largest program among a number of BBB efforts is AUTOLINE, administered through 153 local offices in 50 states. It is an out-of-court forum to resolve disputes between auto purchasers and manufacturers. The program operates through some 15,000 community volunteers who handled 172,705 consumer complaints in 1987. The process uses media-

### **The fact that for-profit ADR services have become a growth industry cannot be disputed.**

tion and arbitration, and cases were completed in an average of 49 days. The network of mediators, as well as the institutional capability established by the BBB, makes it a likely candidate for expansion into other areas.

One type of ADR service that has been growing is the national ADR panel. Probably the best-known panel is that organized under the auspices of the Center for Public Resources in New York City. Its national panel consists of more than 60 visible, credible practitioners and academics, many with judicial or government experience, who handle complex matters, generally involving corporate disputants. Among the panelists are Griffin Bell, William Coleman, Nicholas Katzenbach, Bowie Kuhn, Walter Mondale and Elliot Richardson. Recently, CPR expanded its "judicial panel" concept to certain regions and identified well-known local panelists. The panels have great potential to handle a wide variety of disputes nationwide.

For some time, law firms have embraced the ADR movement.

What has been their role? As the interest in ADR progressed, law firms extended their capabilities well beyond that of adviser and advocate in connection with specific litigation. In a model that could involve many firms in the future, the law firm/ADR provider furnishes a full range of ADR services, including analysis of the dispute for ADR appropriateness, selection of the appropriate mechanism and implementation.<sup>3</sup> Among other services provided are development of in-house dispute resolution systems and services in neutral capacities. A major new dimension is the expansion of well-established ADR techniques into the area of business decision-making, and the identification of needs and interests underlying nonlegal conflicts and business decisions.

#### **Challenges ahead**

The fact that for-profit ADR services have become a growth industry cannot be disputed. New providers are entering the industry, and competition continues to generate an even greater intensity to the service providers. Moreover, as more corporations begin to formalize and institutionalize ADR processes, as law firms create ADR departments and as legislatures and courts encourage or mandate mediation and arbitration, the need for competent providers escalates. However, the future of the industry is by no means certain. A number of critical issues must be resolved before the private service provider can be assured a role in the dispute resolution process.

#### **Regulation**

For example, relatively little regulation of the industry has developed, and existing regulation has not been uniform. While a number of public ADR programs involving courts, public agencies and local governments impose minimal standards of experience, education and training, these standards are much less common in the private and for-profit areas. Most for-profit providers rely on panelists from the judiciary or private practice to

convince clients that the neutrals are competent.

The future will likely bring a greater degree of regulation, either imposed externally or through some form of self-regulation. The form and content of such regulation will play a significant role in determining the growth of the for-profit sector.<sup>4</sup>

### Economic viability

In addition, skepticism exists as to whether the amount of ADR business available can sustain the growing number of providers. Judgments about the viability of providers are still being made on scanty information. As more providers enter the field, competition will increase and a number probably will drop by the wayside.

A related issue involves supply and demand. To date, a regular demand for ADR services has not been institutionalized. Until ADR fully establishes itself with business and in the public consciousness, the viability of the service provider will not be permanently established.

### Objections

Not all ADR experience has been positive, and a substantial body of resistance continues.<sup>5</sup> Some critics have challenged the very efficiency and fairness of the process, alleging that private mechanisms seek settlement at any cost, do not pursue justice and lack legal protection for all parties.

Until these objections and resistances are squarely addressed, the true potential of private mechanisms will not be realized and the growth of the private sector will plateau or perhaps decline.

Finally, if for-profit providers continue to work independently of litigation and public ADR programs sponsored by the courts, public agencies and local governments, they will not achieve their full potential. One option for achieving this synergy is the multi-door courthouse concept.

It is unrealistic to expect the private sector dispute resolution industry to succeed in the face of

increasing public mechanisms allowing greater and cheaper access to dispute resolution processes unless the private and public ADR networks are able to work with greater synergy. □

1. Auerbach, Jerold S., *Justice Without Law? Resolving Disputes Without Lawyers*, p. 101, Oxford University Press (1983).

2. Koenig, Richard, "More Firms Turn to Private Courts to Avoid Expensive Legal Fights," *Wall Street Journal* (Jan. 4, 1984).

3. Millhauser, Marguerite, "ADR Partner Analyzes Law Firm Programs and Their Goals," *BNA Alternative Dispute Resolution Report*, p. 117, (June 25, 1987).

4. George Nicolau, President of the Society for Professionals in Dispute Resolution, has recently appointed a study group to consider regulatory and accreditation options. A report is expected to be released at the group's annual meeting in October.

5. Millhauser, Marguerite, "The Unspoken Resistance to Alternative Dispute Resolution," *Negotiation Journal* (January 1987).

## New York

*Continued from page 19*

arbitration. The centers also are referring parties to drug and alcohol programs, family counseling, mental health clinics, shelters for victims—and to court, for prosecution in cases in which a situation appears to be dangerous or violence has occurred.

Additional legislation was passed in 1986 allowing selected felonies to be referred to dispute resolution centers. Felonies were not included in the original legislation because legislative staff felt it would not be acceptable to the more conservative legislators. Appropriate felony cases often involve relatives, friends, acquaintances, neighbors or co-workers.

Citizens who use the dispute resolution services normally pay no fees, though one of 12 New York judicial districts has initiated a \$3 filing fee for the complainant and the respondent. State law allows a nominal fee, with no cost to individuals.

### The road ahead

What about future funding? A

filing fee might be needed for all centers. Or perhaps a higher court filing fee for civil matters, with a portion going to dispute resolution centers, will be adopted.

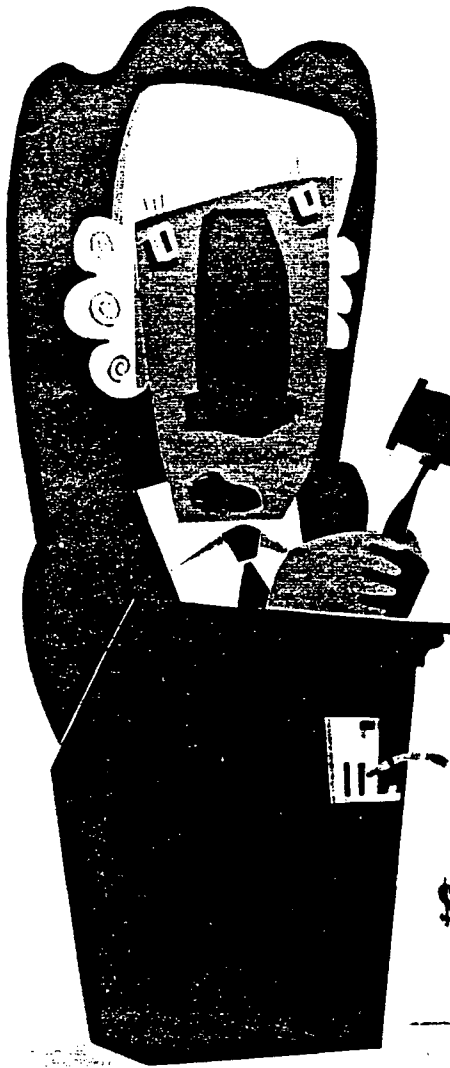
In New York, the funding from the state court system is a firm foundation. In addition, local funding from municipal and county governments, United Way agencies and other state agencies are necessary. Many centers receive grants from the state's Division for Youth, the Department of Social Services and the Department of Education.

The interest in teaching young people conflict management skills in the schools may be another source of funding. The centers also have developed training packages and market their services. The centers in New York have also developed a statewide association and are looking for areas to create a more independent status. They have worked with the Office of Court Administration to put on national conferences and a training video. These activities have generated some, though not enough, funding.

Money for mediation is an important priority each state and community must consider. Although some New York mediators receive a stipend to cover expenses, most are volunteers who are trained by state-approved professionals. Therefore, the cost for dispute resolution services are much less than other traditional methods.

For a statewide effort to be effective, a number of state and local agencies must work together to bring a wide base of support to this concept. If all contribute some financial support, the centers can continue to work effectively.

New York is proud of its network of community dispute resolution centers and considers its money for mediation a sound investment. The state reaps rewarding dividends in constructive citizen involvement, the diffusion of potentially violent disputes and in teaching people of all ages how to resolve and manage conflicts. □



# R · E · N · T · E · D J · U · S · T · I · C · E

By Mark Thompson



**O**VER TIME, LESTER OLSON has resigned himself to being called a rent-a-judge. He doesn't like the expression and would prefer not to use it himself. But he acknowledges that the way he describes his job on his business card—"Private Dispute Resolution"—doesn't exactly roll off the tongue either. Olson has tried, but he can't come up with a better moniker for his profession, so he has decided, "Whenever I hear a lawyer sort of groping for a term, I'll help him out by saying 'rent-a-judge.'"

Since it was coined a decade ago, the term "rent-a-judge" has lost much of its sarcastic edge, and the concept of a private sector justice system has become a fact of life for many lawyers. After bitter experience in the public courts, lawyers and litigants are discovering that the world of private justice inhabited by Olson and other rent-a-judges is quite simply a better place to go for a quick, well-reasoned resolution of a dispute.

The debate about the rent-a-judge system these days is less about whether it is good than about how the public system can compete. Lawyers who venture into the private court system discover they can accept more informal and less contentious ways of litigating a case while still vigorously protecting their clients' rights. Rent-a-judges and lawyers also say the private system illustrates the need for an adequate number of well-paid judges.

Though the rent-a-judge system once was decried as a private preserve for the rich, major corporate clients are not the only litigants who can't afford to wait the years it takes to conclude a case in many public courts. Increasing numbers of personal injury cases, medical malpractice claims, divorce proceedings and employment disputes are winding up in the private justice system. Though the hourly fees charged by private judges might seem high for a service offered

free in the public courts, droves of lawyers and litigants are voting with their checkbooks that the expense is worth it.

"The [private] system may be elitist, but only in the sense that it's so good," says Diane Levinson, executive director of the Bay Area's Judicial Resources Inc. "I sit here and see people come in, and believe me, they're not rich. They're ordinary people who have claims and who don't want their attorney to run through an expensive discovery process, with witnesses and hearings on ad infinitum," Levinson adds. "They come in here and a few hours later their case is done. It's over."

Drawn by the growing demand, more than 150 judges in California have already gone private. Dozens work as free-lancers, while others are offered for hire by one of the handful of companies in California that sell private justice in package deals. Forty retired judges in San Diego, Santa Ana and Los Angeles

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# Business is booming for rent-a-judges, and the courts could learn from their success

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work for the Santa Ana-based Judicial Arbitration & Mediation Services Inc., a rapidly growing one-stop private justice firm offering everything from settlement conferences and old-fashioned arbitration to full-scale private trials complete with a rented judge and rented jury. Thirty-three retired judges have agreed to handle cases under the auspices of Judicate, a Philadelphia-based private justice company. And 36 more judges are affiliated with the San Francisco-based Judicial Resources Inc.

Not all of those who have announced their availability are busy. But the several dozen most active rent-a-judges in California are solicited for far more work than they can handle, and more of the judiciary's best are going private every month.

In addition to losing judges who leave the bench for private judging, the courts are also losing the back-up services they traditionally have received from retired

judges. Presiding judges from across the state are rallying behind a bill now before the Legislature that would permit the courts to pay more for the services of retired judges sitting by assignment. The bill, SB 1363 (Herschel Rosenthal, D-Los Angeles), provides for a \$150 per diem fee, in addition to pension payments. Retired judges currently are paid at the rate of 92 percent of the full compensation of judges on the court to which they are assigned, a fee paid in lieu of regular retirement. The judges who accept that offer are essentially those willing to volunteer their services. And fewer and fewer competent retirees are willing to do that, given the private sector alternative.

Even \$150 per day may not be enough. "I personally believe that \$300 per day would be more appropriate since retired judges are now receiving \$200 an hour when sitting under a rent-a-judge plan," wrote S.S. Schwartz, presiding judge of the Los Angeles County Superior Court in Van Nuys, in a letter to the Los Angeles County Bar Association.

**S**TILL, NOT EVERYONE is convinced that private judging is becoming a major force in the marketplace for judges and litigants. Its successes so far have been a consequence of localized distress in the public system, the skeptics say. "I think the attention it is getting is beyond the actual significance of the private system," says Los Angeles Superior Court Judge Robert I. Weil. "Where the court backlog is less than it is in Los Angeles, the impact is even slighter. I don't think you'd find much demand for this in Santa Clara County."

Robert D. Morrill, senior litigator at Skjerven, Morrill, MacPherson, Franklin & Friel in Santa Clara, agrees. He says in his practice he has never run across a rent-a-judge. "Court delay is not a problem in Santa Clara County," Morrill says. "It is more of a problem in San Francisco, but it's still nothing like Los Angeles."

Even in crowded counties, one large category of lawsuits will never enter the private system: those filed for the purpose of obfuscation and delay. And then there is an entire category of lawyers who will never make it out of the clogged and contentious public courts. "Let's face it," says Olson. "There are some lawyers who wouldn't agree that today is Wednesday. They're just obnoxious. They're never in this system be-

cause no matter who the judge is, they wouldn't agree to it. They're eliminated. And that's a pleasure."

Only a certain type of case handled by agreeable lawyers is suited for settlement outside of the traditional courts, Weil says, and that type tends to settle one way or another anyway. In that sense, as Weil sees it, private judges are more in competition with traditional dispute resolution specialists such as rabbis and priests than with the public courts. Except for a handful of retired judges well-connected enough to be chosen by both sides to play the role of confidante and referee, the skeptics say, most judicial entrepreneurs had better not count their fortunes before they're in the bank.

Olson is one who successfully defied that advice. The announcement for his retirement party was illustrated with a drawing of the judge skiing down a slope making a giant dollar sign in the snow. "Before he left the bench, lawyers told him they'd be sitting on his doorstep when he retired. Everybody knew he was going to make a ton of money," says Richard Chernick of Gibson, Dunn & Crutcher, who describes Olson as one of the most highly esteemed rent-a-judges.

In his three years as a rent-a-judge, Olson has been as busy as he ever was during his 20 years on the Los Angeles County Superior Court. "He literally has people standing in line for his work," Chernick says. Drawn by his reputation for delivering hard-nosed and carefully reasoned legal decisions on complex business disputes almost immediately, litigants will pay up to \$300 an hour for his services. Obtaining a similar judgment from a far more distracted judge in a public court would take years in Los Angeles and other crowded courts around the state.

Judges working for JAMS take home \$135 an hour. Peter Donald, the company's president, declined to release earnings figures for his stable of rent-a-judges. But he noted that those who choose to stay fairly busy can easily pocket more than \$100,000 a year, in addition to their pensions.

Investors may also have a chance to profit from the rent-a-judge boom. Donald says JAMS plans to go public in two or three years. H. Warren Knight, the company's founder and owner of a majority of its shares, is convinced that JAMS has a very bright future. The private judging business is "going to grow

by leaps and bounds, in big huge numbers, over the next several years," he predicts. Increasingly, heavy consumers of legal services—realtors, hospitals, insurance companies and others—are writing into contracts a clause requiring private mediation instead of court trials, he adds. "People are fed up," Knight says. "Everybody is looking for some way to avoid litigation in the courts."

**G**IVEN THE ALTERNATIVE, especially in Los Angeles, the private system is not that hard to sell, some attorneys say. Olson describes the process by which many litigants decide to opt out of the court system: They prepare for trial on the scheduled day. They get to court with their employees who will be witnesses standing by ready to testify. But the case gets continued for lack of a judge. Then the lawyers hand their clients a bill for \$10,000.

"They look at it and they say, 'What have we gotten for this?' And the answer is they've gotten zero because they haven't gotten one step further toward resolving their case," Olson says. "The client is going to be discussing that with the lawyer, sometimes in terms that would turn the air blue. The client is very likely going to say, 'Is there any way we can speed this thing up?' And the lawyer says, 'There is a possibility. We could take the case private.'"

Perhaps the ultimate indignity of the public courts is demonstrated by the Los Angeles County court's beeper system. Lawyers with priority cases—those with an aging plaintiff or those approaching the five-year limit—can get a shot at courts that come unexpectedly open. They take a beeper and agree to call the court within 10 minutes of the beep to say whether they will accept the judge. Then they must appear at the court ready for trial within an hour, or pay a fine. Some attorneys are on the beeper for months and have to plan their days around the possibility that it may beep at any time.

Rent-a-judges believe there are thousands of attorneys and litigants out there fuming at similar preposterous conditions in the public courts who are ripe for the picking by the private system. "As time goes by, people are going to be more aware of the fact they can

*Mark Thompson, a lawyer, is senior writer of California Lawyer based in Los Angeles.*

**The invitation  
to Lester Olson's  
retirement party  
predicted his success  
as a private  
judge.**



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Los Angeles, California 90012*

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Superior Court Judges,  
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LESTER E. OLSON

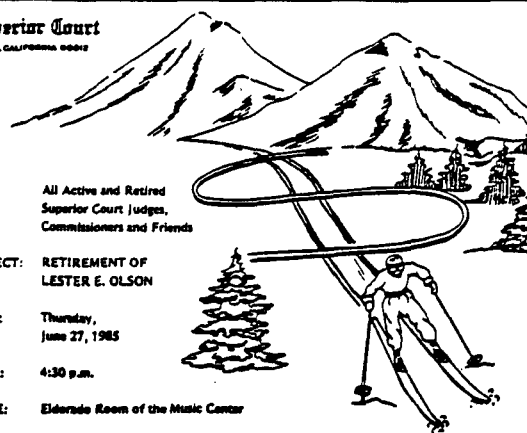
DATE: Thursday,  
June 27, 1985

HOUR: 4:30 p.m.

PLACE: Eldorado Room of the Music Center

In about 1,224 hours, 17 minutes and 40 seconds, LES will retire from the formal life of a sitting judge and, with computer in hand, slide rather comfortably into the peak and cushy role of private judge (retired) with trailing calendar and prepriced bills (medium three-figure range) for services to be rendered.

Join us in wishing LES all the best and much \$uccess\$



control their own destiny," Knight says.

In fact, many of the attorneys who are resorting to private mediation say they are doing so because they have no choice. The private system is viewed by some attorneys as the lesser of two evils, says Marshall Grossman of the Century City firm Alschuler, Grossman & Pines. One disadvantage of using private judges is that they sometimes cause the number of proceedings—and fees—to proliferate. For example, to speed up litigation, some attorneys are now using private judges for discovery motions while the case stays on the law and motion calendar in the public court. Shutting between the parallel courts ends up escalating the costs and complications of the case—a stiff price for saving time.

And in the end, the rent-a-judge's ruling may not be a clean resolution of a lawsuit after all. Under the state statute permitting the public courts to refer cases to a private judge when both parties agree, the loser has the right to appeal. And sometimes the losers exercise that right, as they have in four of the cases handled by Olson in his three years on the private bench.

Despite his own qualms about the system, Grossman says his firm uses rent-a-judges in one capacity or another in 15 to 20 percent of its cases. Private judges were used in "zero to 1 percent" of cases five years ago, he adds. "I would much prefer to work within the traditional justice system. But I've used rent-a-judges extensively because delay through the normal system has proven to be unconscionable," Grossman says.

"I believe the success of the rent-a-judge system is essentially an indictment of the level of performance of the traditional justice system."

**S**OME OF THE FANS of the private system are more enthusiastic about it. They insist it offers many advantages besides an escape from the slow-motion tumult of the public courts. It also is a proving ground for methods of resolving disputes that one day might be used to untangle the logjam in the courts.

The ability to select the judge is one of the chief advantages of the rent-a-judge system, lawyers say. The idea of respected, retired judges taking up work as private jurists is a "natural," Chermick says. The top dozen rent-a-judges are "smart, well-respected. They have a track record. We've socialized with them, tried cases before them, and attorneys like me are comfortable dealing with them."

The choice of a judge is a particularly important advantage in complex cases. The judge dealt out by the luck of the draw in superior court might not understand convoluted accounting or arcane computer terminology. But a rent-a-judge can be selected for his track record in cases involving those issues. Robert C. Hinckley, a Santa Clara attorney specializing in computer law, says the wave of the future will be two- or three-person mediation teams serving as judges in complex disputes involving science and technology. "You can get a judge and an engineer to advise the

judge, and away you go," says Hinckley, of Skjerven, Morrill, MacPherson, Franklin & Friel.

"Even if your arbitrators are not experts in the subject matter, it's much easier to educate them," says Robert Raven, a partner with San Francisco's Morrison & Foerster. "You can actually send them to school and teach them everything they need to know. To do that in court, you have to enter evidence in the record, put on experts, the whole works." Raven is representing the Japanese computer maker Fujitsu Ltd. in on-going arbitration proceedings with IBM Corp. over a complicated copyright dispute that was tied up in litigation for four years before the two arbitrators—a computer expert and a law professor—decided to dispense with the traditional legal machinery and handle the case informally themselves. Nine months later the disagreement on the software copyright issue was resolved.

Public sector judges could hire special masters to provide advice on technical matters, "but judges are loathe to do that," Hinckley says. If they care to win back some of the business that is leaving the public sector courts, however, they will have to take a lesson from their private sector counterparts and accept the advice of technical experts, lawyers say.

Besides having a better foundation to handle a particular case, private judges are able to give a matter undivided attention. They can deliver a well-reasoned opinion within days. Other aspects of the litigation are quicker as well. In the cooperative atmosphere of the private courts, attorneys usually agree to create an abbreviated record. And the magic of the marketplace even assures that transcripts of proceedings are produced on demand. "When you have used an outside reporter, you just tell them to jump and pay them the right amount of money and you're going to have a transcript when you want it," says Olson.

The flexibility of the private justice system is yet another important advantage. Rent-a-judges acknowledge that the streamlined process in the private courts is partly a consequence of the types of attorneys, rather than judges, involved. Lawyers in the public courts have much of the same leeway to waive the rules of evidence and civil procedure, but they rarely have sufficient rapport with their opponents to do so. They are simply a more combative breed.

## Why Not Rent a Jury, Too?



Knight: 'Nothing was different.'

Nothing was out of place: There was a judge in a black robe with a gavel, several attorneys, litigants, a bailiff and a court reporter all assembled in a courtroom in the local hall of justice. When the panel of prospective jurors filed in, there was nothing to indicate that the judge was a private entrepreneur selling justice for a profit.

In fact, in the several instances in California when rent-a-judges used rent-a-juries, the jurors evidently never knew they were participants in a private trial. "So far as I'm aware, no one made a point of telling them," says Charles Woodmansee, a private judge in Los Angeles who presided over a private jury trial between a boxer and a boxing manager in 1986. The jurors were selected from the county court's jury pool, just as they would have been selected for a trial in the public courts, and Woodmansee used a vacant room in the traffic court building to try the case.

When H. Warren Knight of the Santa Ana-based Judicial Arbitration & Mediation Services Inc. took the bench in a Kern County courtroom to preside over a private jury trial in an airplane crash case, he explained to jurors they had never seen him around town because he was a judge from Orange County sitting by assignment. "Nothing was different," says Knight.

Judges in the public courts have been willing to lend vacant courtrooms for private jury trials to help clear cases from the docket. The presiding judges of the superior courts in Los Angeles and Orange counties have agreed to provide jury panels and vacant courtrooms to Knight's company for private trials. Knight says a couple of new private jury trials are now in the works, although he insists it is a misnomer to call them rent-a-juries since the litigants pay the juror fees even in the public courts.

"They rented me. They didn't rent the jury," Knight says of his Kern County trial. "In a civil trial, whoever demands the jury pays for the jurors anyway."

Nonetheless, critics have serious qualms about the concept. Robert Gnaizda, an attorney with Public Advocates Inc. in San Francisco, calls the system a form of involuntary servitude. He says it is nothing more than a profit-making justice company co-opting jurors who were empaneled under the guise of performing a public service.

But Knight rejects that view of the process. The case that has gone private is "a case that's waiting to go to a jury trial anyway," Knight says, adding that as far as the jurors are concerned, "it's the same function no matter who is presiding."

And if renting a trial judge and jury doesn't produce the desired results, litigants who go private now also have the option of renting an appellate justice. Judicial Arbitration & Mediation Services has four retired district court of appeal justices in its stable of rent-a-judges. In half a dozen cases, litigants have submitted the results of a trial to one of the retired justices for an appellate ruling.

So far, though, no one has assembled a rented supreme court. "The parties agreed to be bound by the appellate ruling," says Knight. "The agreement to hire the justice was framed in such a way that they could not go back into the court system."

—MARK THOMPSON



rent-a-judges say, though as the alternative arena for resolving disputes in a relatively amiable manner becomes more visible, lawyers may come to realize the folly of their ways.

Because rent-a-judges are agreed upon by both parties, they have extra leverage against even combative attorneys and litigants. "Because they have confidence in someone whom they have selected by mutual agreement, the parties usually don't even attempt to make a formal record," says Spurgeon Avakian, a seven-year veteran of the private bench and a former judge on the Alameda County Superior Court. "A private judge is also freer to urge parties

to agree on certain issues because the attorneys have already persuaded their clients that the judge is fair," Avakian adds.

The freedom from calendar pressures does encourage some innovations that may never be possible in the public courts. Avakian notes, for example, that superior court judges can rarely devote as much as a full day to a settlement conference. As a rent-a-judge, he has presided over settlement conferences that last for days. One went nine days. That's a seemingly interminable settlement conference, but, Avakian says, the parties expected the case to take six months to try.

**L**EAVING THE PUBLIC COURT system acts almost as a symbolic shedding of worn-out ways, rent-a-judges have observed. "For the last 10 years of my 20 years on the bench the technology to have conference calls existed," Olson says. "I probably had three a year. They were really rare. Lawyers would come trooping in and have an appearance. Now, I do business every week with conference calls. That kind of cooperation flows from the kind of cooperation that got the thing started. And then the same thing happens at the trial.

"I don't rant and rave about the lawyers stipulating to waive foundation for documents. It just sort of happens," Olson adds. "The lawyers seem to always exchange their exhibits in advance. They all seem to cooperate at a much higher level than before. It doesn't mean that these lawyers are any less contentious. They just push away all of the nonsense and try to come down to the nub of things."

Lawyers fighting it out in the public courts could learn something from their colleagues who use the private system, rent-a-judges say. Rent-a-judging could show lawyers and judges a way out of the morass of formalism and litigiousness and help them get on with the business of actually resolving disputes rather than jumping through procedural hoops.

"I like to see the competition with our court system," says Raven, the Morrison & Foerster partner and president-elect of the American Bar Association. "I think the day will come when we drop the A out of ADR. Alternative dispute resolution will become part of the system." That is already happening in some places, Raven adds. For example, the U.S. District Court for the Northern District of California has an "early neutral mediation system" in which cases in the early stages are sent out to neutral lawyers for an evaluation.

"Judges and lawyers are very much slaves of inertia," Avakian says. "It takes a lot of energy to examine old ways and to explore the unknown. But as lawyers resort to private judges and learn they can save time without jeopardizing their legitimate concerns, it will lead to a re-examination of the public courts. And the judicial process will benefit in a significant way." □

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# IMPLEMENTING A SUCCESSFUL MINITRIAL

Elizabeth M. Tannon

In the search for cost-effective litigation alternatives, the minitrial has emerged as one of the most promising alternative dispute resolution mechanisms. In June, 1986, Commercial Dispute Resolution, Inc., a Kentucky not-for-profit corporation ("CDR"), and the Louisville Chamber of Commerce joined forces to offer minitrial services to the Kentucky legal and business communities. The program is the first of its kind in the country.



Elizabeth M. Tannon - B.A., with Honors, University of North Carolina at Chapel Hill; J.D. University of Virginia; President of Commercial Dispute Resolution, Inc.

In essence, the minitrial is a structured settlement technique. After limited discovery, business executives and their respective attorneys conduct a hearing at which a neutral advisor of their mutual choosing presides. After the hearing, the neutral advisor and the parties meet to fashion a settlement to their dispute.

By focusing on key issues, limiting discovery and providing for a prompt hearing, the minitrial can afford parties a quick, cost-effective technique for resolving disputes. Additionally, parties can resolve disputes more creatively, because they are not limited to the comparatively narrow remedies available to a judge, jury or arbitrator. Finally, because of the amicable and confidential setting, the minitrial often enables parties to preserve business relationships.

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This article will review the problems most often encountered in negotiating and conducting a minitrial and suggest solutions to those problems.

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The issues most often confronted in negotiating and conducting a minitrial are the following:

- How should the parties evaluate a dispute for minitrial potential?
- How should one party attempt to convince another that a minitrial makes sense?
- What should the parties include in the minitrial initiating agreement?
- How should the parties choose the neutral advisor?
- How should the parties structure the settlement discussions which follow the "information exchange"?

Each of these issues will be addressed in turn below.

## I. How Should The Parties Evaluate A Case For Minitrial Potential?

While the presence or absence of certain factors may enhance the prospects for successful dispute resolution through use of a minitrial, virtually every commercial dispute has minitrial potential. Only cases where legal issues

predominate - and early motions to dismiss or gain summary judgment are likely to succeed - make poor minitrial candidates. Yet even in these instances, the entire facts and circumstances must be considered. A courtroom victory can sometimes yield a hollow result, such as the severance of a promising business relationship.

Significantly, the effort required to stage a minitrial is a fraction of the same effort that must be undertaken if the parties decide to stage more extensive proceedings, such as arbitration or traditional adjudication. Given the minitrial's aim of providing a cost-effective, "win-win" resolution of the dispute, any party seeking in good faith to resolve a matter should consider the minitrial before proceeding with "win-lose" arbitration or protracted litigation.

While virtually all commercial disputes are minitrial candidates, a consensus is emerging within the alternative dispute resolution field that the following cases present the best minitrial candidates:

(a). *The case in which few parties are involved.* While minitrials can resolve disputes involving numerous parties, the difficulties encountered in multi-party cases are more substantial than in two-party litigation. Conventional wisdom suggests that convincing two parties to conduct a minitrial or to settle a dispute is easier than convincing multiple parties. Minitrials provide an excellent vehicle for resolving portions of multi-issue, multi-party litigation.

(b). *A case in which the parties have an ongoing business relationship.* If the parties wish to preserve their business relationship, the parties will be more highly motivated to reach a settlement through the minitrial process.

(c). *A case in which there is a straightforward commercial dispute.* Claims of fraud, dishonesty or bad faith may make a minitrial less likely to succeed, especially if either or both management representatives are objects of such accusations. If the case presents a straightforward commercial dispute, however, the parties will not be distracted by "personal issues," and they may preserve their dignity by resolving the matter on a sensible, pragmatic basis.

Although these characteristics indicate greater minitrial potential, minitrials have successfully resolved cases not conforming to this "profile". Easily the most important factor is a clear motivation to end the dispute.

## II. How Should One Party Attempt To Convince Another That A Minitrial Makes Sense?

Although the minitrial has been used successfully by many of the nation's largest corporations and has been endorsed as an effective alternative dispute resolution technique by the American Bar Association,<sup>1</sup> many members of the bar remain skeptical.

This skepticism arises for a variety of reasons. First, lack of familiarity quite naturally breeds suspicion. Many lawyers are more comfortable with traditional litigation or unstructured settlement procedures, simply because they are accustomed to such procedures. Second, the lawyer may be reluctant to recommend that his client try to resolve the matter at an early stage rather than to rely upon the lawyer's skills as advocate to achieve complete victory. Third, counsel may feel the opposition will interpret adopting the minitrial process as a sign of weakness by both the initiating party and its counsel.

The most effective approach when dealing with such skepticism is to emphasize that the minitrial is an extension of a proceeding with which most litigators are quite familiar: a settlement conference. While it is more structured and requires greater preparation than most settlement conferences, it is not a foreign proceeding. Similarities between the minitrial and any formal hearing should be emphasized.

Most practitioners have concluded that if the party proposing the minitrial does so correctly, the opposing party will not view the proposal as a sign of weakness. Indeed, if approached properly, the opposition may conclude that the proponent is sufficiently confident about his or her case that the opposing party can be persuaded to

(turn to page 50)

21. If applicable to your office, do you bill at a separate rate for paralegal time? ☐yes ☐no If yes, please state the billing rate. \_\_\_\_\_per hour

22. Do(es) your paralegal(s) have one person to whom (he/she) reports, and who is responsible for the performance of the paralegal(s)? ☐yes ☐no  
Person responsible: (title) \_\_\_\_\_

23. Are the duties among associates, paralegals, and legal secretaries clearly defined in your office?  
☐yes ☐no

24. Considering the education of your paralegals, are you using each paralegal to his/her maximum potential for responsibility? ☐yes ☐no

25. Do you make an effort to delegate increasingly more challenging responsibilities to your paralegal?  
☐yes ☐no

Part III:

Please do part I and send to the Committee any additional comments that you believe will be helpful. Thank you.

## IMPLEMENTING

(from page 13)

utilize the minitrial to settle on favorable terms.

Outside counsel should encourage their business clients, and inside counsel their companies, to adopt an alternative dispute resolution policy. If, for example, a company has signed the Policy Statement prepared by CDR, its counsel may raise the possibility of a minitrial as a routine application of company policy.

Those unfamiliar with the minitrial also frequently express concern about strategic implications, if the minitrial does not result in settlement. If a party reveals the greatest strength of his or her case, is that party placed at a significant disadvantage later if the matter is not settled?

While one encounters some risk in previewing one's case, this risk must be weighed against what the party has to gain by reaching a prompt, confidential and potentially creative resolution of the matter. Given the broad scope of discovery, few, if any, real surprises for the opposition will exist in most cases. Moreover, given the abbreviated nature of the minitrial, the parties frequently explore only the general contours of the case rather than the details likely to reveal "surprises," if such surprises exist at all.

In some cases, the level of acrimony between the parties is such that a minitrial proposal will not elicit a positive response. In these cases, the party interested in pursuing a minitrial can take one of two steps. First, he or she can bring in another person, previously uninvolved in the litigation, to discuss the minitrial with the opposition. A CDR representative, for example, could be retained to initiate and/or facilitate negotiations leading to a minitrial. If this first option is not attractive for any reason, the minitrial proponent can encourage the judge in whose court the case is pending to conduct a pretrial conference to explore use of the minitrial or other alternative dispute resolution procedure.

### III. What Should The Parties Include In The Minitrial Initiating Agreement?

To minimize legal expenses and avoid the possibility that disagreements over the terms of a minitrial initiating agreement will derail the proceeding, the parties may choose to utilize form CDR minitrial agreements. CDR recommends this procedure, since it should circumvent some threshold arguments and produce substantial savings of time and legal expense.

However, even CDR form agreements provide choices with respect to certain minitrial fundamentals. The parties must confront these issues in any event:

First, how much discovery should be permitted prior to the information exchange? While each case is unique, only the minimum discovery should be allowed. If protracted discovery is to be undertaken, the parties partially defeat the purpose of the minitrial. Of course, if the minitrial process is initiated after the parties have undertaken extensive discovery, the issue is academic. In any event, discovery should be limited to the central issues in the case.

Second, how much time should the parties allow for the minitrial hearing or information exchange? Experiences show that one day should be sufficient. The proceeding necessarily will be abbreviated. Except for the most complicated cases, the central issues can be covered in one day with settlement negotiations conducted the following day.

### IV. How Should The Parties Choose The Neutral Advisor?

Although lawyers unfamiliar with minitrials often express concerns about selection of the neutral advisor, the selection process has not proven to be a significant obstacle in implementing the minitrial. In fact, assuming some flexibility and a desire on the part of both parties to select an objective individual to preside at the minitrial, this may be one of the easier aspects of the proceeding.

Selection of a neutral is a most important step, since the neutral advisor will actively attempt to assist the parties in reaching a settlement. While each case may suggest the need for certain expertise or qualifications, the most important factor is objectivity.

To preside at minitrials, CDR has specially trained a Panel of Neutral Advisors, which is subdivided into a business panel and a legal panel. The business panel features highly qualified, prominent and well-respected members of the business community who possess vast and varied business experience. These individuals can draw on their business experience and acumen to help parties resolve creatively those disputes where factual issues predominate. The legal panel features prominent retired judges and highly respected attorneys who preside at minitrials where legal issues predominate.

With CDR's assistance, parties to a minitrial select the Neutral Advisor of their choice. Parties may choose one or more neutral advisors to preside at their minitrial.

If none of the individuals on the Panel of Neutral Advisors is acceptable to the parties, CDR will specially train any individual that the parties wish to preside over their minitrial.

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## The Settlement Discussions?

At the close of the information exchange, the parties will engage in discussions designed to lead to settlement. Two important questions must be considered with regard to the structure of the settlement negotiations.

First, should counsel be present? Because of the attorney's role as advocate, the attorney may hinder a free and open exchange in the settlement negotiations. However, successful minitrials have been conducted in which the lawyers remained throughout the negotiation session.

Second, should the neutral advisor be present during the settlement discussions? Minitrial commentators differ on whether the neutral advisors should be present throughout settlement negotiations. Most conclude that the neutral advisor should help the parties assess what has occurred during the information exchange and help foster a positive atmosphere for the settlement discussions. In any event, the neutral advisor should be given some discretion in determining whether his or her presence is beneficial, and the

neutral advisor must be available should the parties break down in their discussions. Only if the presence of the neutral advisor would appear to inhibit the executives in their settlement discussions should the neutral advisor not be present.

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The probability of successfully conducting the minitrial turns largely on the parties' flexibility, objectivity and desire to resolve the matter quickly and privately. Common pitfalls should be anticipated and the prospects for avoiding them analyzed before attempting to implement a minitrial. CDR is available at every stage of the process to assist the parties and enhance the prospects for achieving a successful minitrial and its attendant benefits.

<sup>10</sup>"The Effectiveness of the Minitrial in Resolving Complex Commercial Disputes: A Survey." American Bar Association, Section of Litigation, Special Report, July 1, 1986.



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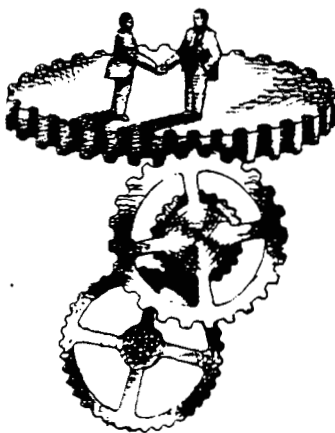
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# Alternative Dispute Resolution

## *The Unique Role of Inside Counsel*



by Harry N. Mazadoorian

The past decade has witnessed a major movement involving the increased use of alternative methods of dispute resolution (ADR) in connection with a wide variety of disputes. This movement, which involves putting old and well-established procedures to new and creative uses, has taken on an especially new vitality in the past several years. While it is difficult to identify exactly when the modern ADR effort first took its current shape, most experts credit the 1976 American Bar Association-Roscoe Pound Legal Conference with having given the movement its status.<sup>1</sup>

A number of factors have fueled the fires of interest in ADR—including increasing numbers of law suits filed annually, substantial delay and inefficiency associated with traditional litigation, unacceptable backlogs in a number of state and federal jurisdictions, high costs, unpredictability, and volatility of results.

In their simplest form, alternative dispute resolution mechanisms involve expediting the settlement process in connection with the 90 to 95 percent of all law suits which are filed but never tried. Most students of ADR view the movement as encompassing a continuum of activities ranging from (1) dispute prevention to (2) more efficient private resolution processes to (3) more active court-annexed dispute resolution processes to (4) better litigation management.

Among those alternative dispute resolution mechanisms having received the greatest attention in the past several years have been arbitration, mediation, the mini-trial, and the summary jury trial. Numerous articles and texts have been published elaborating on the theory of ADR and discussing many models in substantial detail, and a wealth of helpful literature now exists for the ADR practitioner.<sup>2</sup>

The current movement has proceeded along two basic routes, one private and the other court-annexed or court sponsored. Most ADR mechanisms can be utilized in either the private or court-annexed setting. While ADR mechanisms may differ substantially, all contain a number of common elements including:

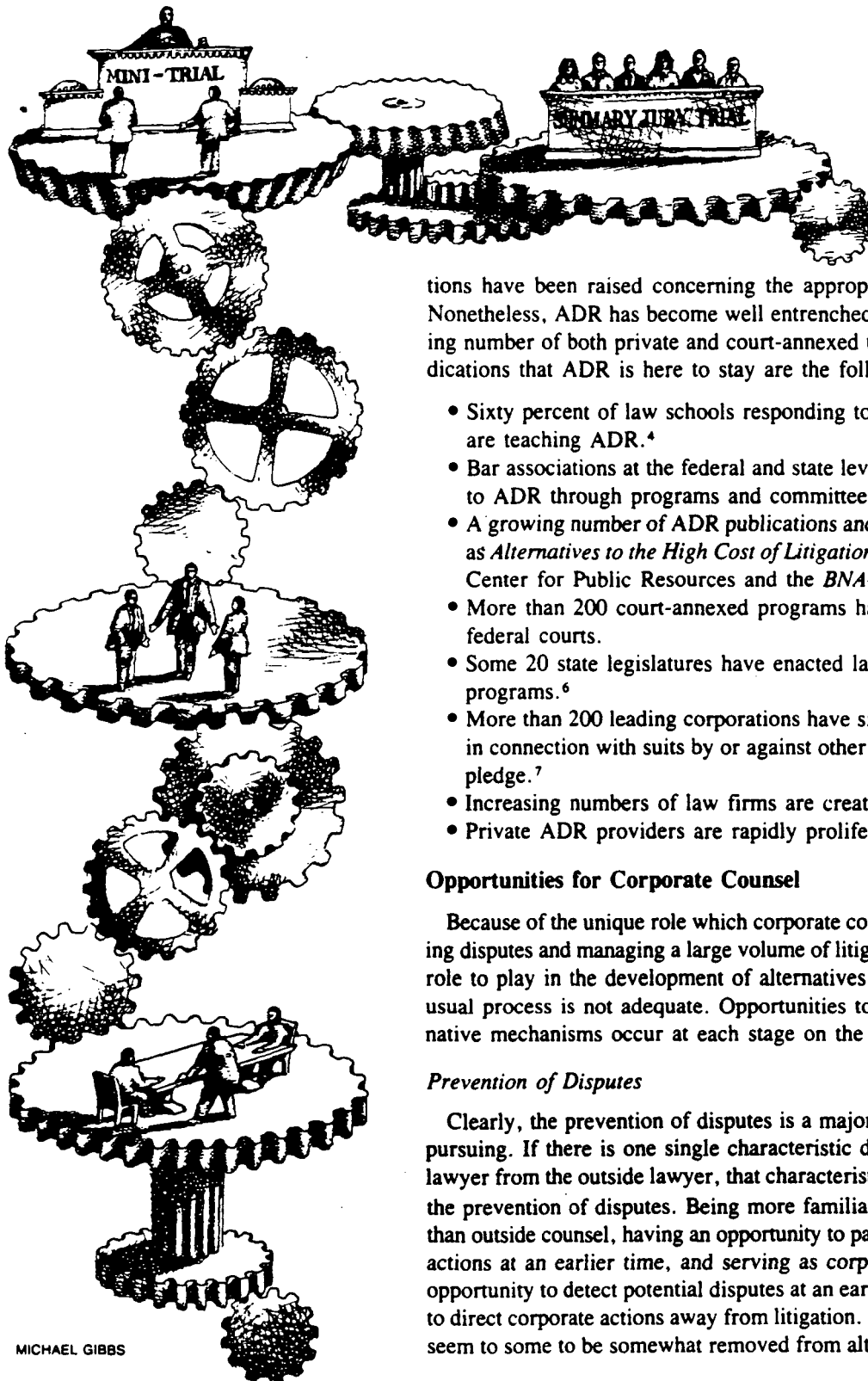
- Greater participation by the parties,
- Less formality than traditional litigation,
- A greatly expedited process, and
- The utilization of a third party neutral.

Despite its current popularity however, the alternative dispute resolution movement has not met with unanimous approval, and a number of criticisms and ques-

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*Among those alternative dispute resolution mechanisms having received the greatest attention in the past several years have been arbitration, mediation, the mini-trial, and the summary jury trial.*



MICHAEL GIBBS

tions have been raised concerning the appropriateness of alternative processes.<sup>3</sup> Nonetheless, ADR has become well entrenched in the past few years with a growing number of both private and court-annexed uses. Among the more dramatic indications that ADR is here to stay are the following:

- Sixty percent of law schools responding to a recent survey reported that they are teaching ADR.<sup>4</sup>
- Bar associations at the federal and state level continue unprecedented attention to ADR through programs and committees.<sup>5</sup>
- A growing number of ADR publications and reporters are being published such as *Alternatives to the High Cost of Litigation*, published by the New York based Center for Public Resources and the *BNA-ADR Reporter*.
- More than 200 court-annexed programs have been implemented in state and federal courts.
- Some 20 state legislatures have enacted laws encouraging or requiring ADR programs.<sup>6</sup>
- More than 200 leading corporations have signed a "pledge" to consider ADR in connection with suits by or against other corporations also signatories to the pledge.<sup>7</sup>
- Increasing numbers of law firms are creating ADR departments.<sup>8</sup>
- Private ADR providers are rapidly proliferating.

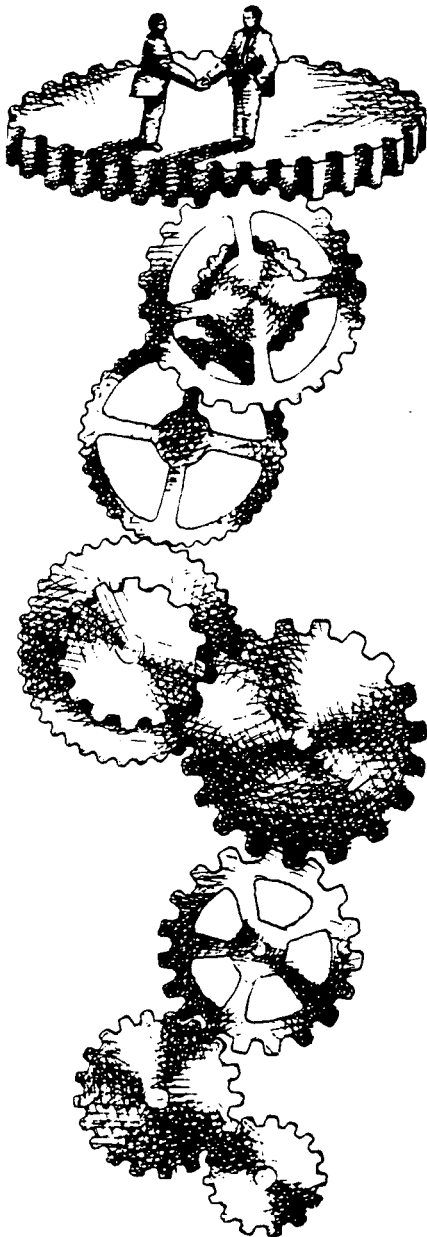
### Opportunities for Corporate Counsel

Because of the unique role which corporate counsel play in giving advice concerning disputes and managing a large volume of litigation, we have a particularly critical role to play in the development of alternatives when the traditional, litigation-as-usual process is not adequate. Opportunities to accelerate the utilization of alternative mechanisms occur at each stage on the continuum of ADR activities.

### Prevention of Disputes

Clearly, the prevention of disputes is a major goal that inside counsel should be pursuing. If there is one single characteristic distinguishing the role of the inside lawyer from the outside lawyer, that characteristic is inside counsel's special role in the prevention of disputes. Being more familiar with the businesses of our clients than outside counsel, having an opportunity to participate in business plans and transactions at an earlier time, and serving as corporate counselor, we have a unique opportunity to detect potential disputes at an early time and to provide legal counsel to direct corporate actions away from litigation. While "preventive lawyering" may seem to some to be somewhat removed from alternative dispute resolution, it is ac-

*Opportunities to accelerate the utilization of alternative mechanisms occur at each stage on the continuum of ADR activities.*



tually a very important stage in the alternative dispute resolution process and has received increased attention lately.<sup>9</sup>

The preventive role in dispute resolution takes two basic forms, the first being dispute avoidance and the second being dispute anticipation—together with the development of dispute resolution mechanisms before the dispute occurs.

Two specific opportunities that are available to inside counsel for dispute avoidance and anticipation are the following:

- **Dispute Avoidance**—Utilization of the “legal audit” whereby corporate procedures and processes are analyzed for compliance with applicable case law, statutes, and regulatory requirements. In addition to the process-oriented legal audit, counsel also has an opportunity to assess potential for litigation on specific projects and transactions and to guide the course of corporate activity accordingly.
- **Dispute Anticipation**—Utilization of a contract clause, where permitted, to require or encourage that disputes in connection with the contract be resolved by alternative means. Identifying the dispute resolution process before the dispute has actually arisen is far less difficult than trying to fashion a creative ADR procedure in the heat of battle when suspicions are high. These clauses may range from traditional clauses requiring binding arbitration to more recent variations requiring mediation or advancing a two-tiered dispute resolution process.<sup>10</sup> Goldberg, Sander & Green point out that certain ADR models, (such as the mini-trial or mediation) may be especially attractive to business people because they are consistent with the traditional bargaining that usually takes place in business relationships.<sup>11</sup> Clauses calling for these types of dispute resolution procedures are, of course, much more likely to be acceptable than more unfamiliar “legally oriented” procedures.

#### *More Efficient Private Dispute Resolution*

Once a dispute has erupted, however, and if no prior dispute resolution process has been agreed upon, corporate counsel have another opportunity to play a key role in channeling the dispute away from the traditional course of litigation toward one of several alternative methods.

The very first step in which corporate counsel should engage is to analyze the dispute to determine which process is the most appropriate. Certainly, the conclusion may be reached on many cases that litigation or early discovery stages of litigation is, in fact, the most appropriate process. On many other matters, however, it may very well be concluded that some alternatives should be attempted.

Another step which should be considered is implementation of an early intervention program whereby inside counsel take quick action on all new suits instituted against their companies to see if early resolution is possible. At CIGNA, for example, the life and health claim attorneys at our Connecticut General Life Insurance Company subsidiary successfully resolve more than one half of all new life and health claim suits through an aggressive early intervention program. In this program the inside attorney, without retaining outside counsel (or retaining outside counsel solely for the purpose of taking action to preserve procedural safeguards such as removal options) contacts the plaintiff’s counsel and seeks a lawyer-to-lawyer, frank, realistic evaluation and disposition of the case.

In order for corporate counsel to be truly effective in successfully evaluating cases for ADR potential, some preliminary steps must first be taken within the law department to better position us for this role. Among these are the following:

- Becoming sufficiently familiar with ADR processes, providers, and the experiences of others. If inside counsel are not “ADR literate” we will certainly not be able to recognize the cases that are the best ADR candidates nor to align the most appropriate procedure with the appropriate case. There is no “best” ADR process and the ADR practitioner can only make intelligent choices by thoroughly understanding *all* major alternative procedures.

- Enlisting support from the very top of the legal department and the corporation. We will not be very effective in convincing either outside counsel or our colleagues inside to take ADR seriously if we cannot demonstrate that senior management of the legal department and of the corporation itself are strong advocates. Sending letters to outside counsel stating a corporate position on ADR, signing the Center for Public Resources ADR pledge, and inviting senior management to favorably comment upon alternatives at legal division meetings are just three activities which would demonstrate a company's commitment to ADR.
- Providing direction to the attorneys within the department. While it's very important that attorneys handling or managing litigation maintain their independence in doing so, one common mistake law department managers make when advocating ADR is not giving enough direction concerning its use. Simply uttering an amorphous or unstructured urging to utilize ADR will not go very far. To be effective, attorneys need to be given some general guidelines suggesting when to use ADR and also some specific directions as to the providers who are available and how they are to be accessed. The mechanics of ADR are all too often ignored in a blitz of discourse on theory and policy, leaving departmental attorneys to conclude that ADR is simply a concept but not a practical tool.
- Developing educational programs, so attorneys can get a better sense of what ADR procedures are like and become sensitized to the special skills needed in ADR, as they are not necessarily the same as advocacy skills required in litigation. These educational programs should contain a carefully planned mixture of theory and practice.
- To insure that attorneys are truly able to relate to specific cases, actual case histories should be presented so that ADR can be viewed in a real-world context.

Additionally, in-house counsel must have a realistic appraisal of just what ADR *can* and *cannot* accomplish so that too much is not expected too soon.

#### *Utilizing Court-Annexed ADR Programs*

A growing number of jurisdictions have instituted voluntary or mandatory court-annexed ADR programs to assist in easing the backlog and delay often faced by litigants. Many of these programs provide excellent opportunities to bring about early resolution of the lawsuit. Litigation managers must familiarize themselves with these programs and encourage their use.

A common mistake made by in-house counsel, however, is to assume that court-annexed ADR programs take care of themselves and do not require much discretion. In truth, most court-annexed programs lend themselves to substantially more flexibility than is frequently recognized. Even "mandatory programs" are structured so that counsel can often opt into the program despite the fact that their cases do not meet some clear statutory guidelines. For example, if counsel wants to opt into an ADR program despite the fact that the amount at stake is above the statutory threshold amount requiring court-

annexed ADR use, the matter might be brought within the jurisdiction of the court-annexed program simply by waiving the statutory limit. Of course, if a court-annexed program is voluntary, inside counsel must assess the program's effectiveness and encourage trial counsel to request its use if the program is deemed appropriate.

Another unfortunate tendency is to no longer consider private ADR mechanisms when court-annexed ADR programs are available. In fact, private ADR procedures are still very much appropriate if the available court-annexed program fails to satisfy the needs of the litigants. Two specific reasons why an otherwise acceptable court-annexed program might not prove suitable are if the court-annexed program does not become operative at an early enough stage in the litigation, or if the court-annexed program is too inflexible in the specific ADR mechanism offered. (Many court-annexed programs, for example, offer only arbitration even though the parties may be interested in mediation.)

In addition, counsel should become thoroughly familiar with ADR statutes which are already in existence. All too frequently, at a time when more and more legislatures are enacting comprehensive ADR and court-annexed ADR statutes, we lose sight of the fact that a number of vehicles are already in existence. For example, the frequently-cited California "Rent-A-Judge" statute is in fact not a new statute at all but was a originally enacted in 1872. Similarly, Connecticut has long had a statute permitting "amicable" suits—allowing the court to actually hear a controversy without the filing of a formal action.<sup>12</sup>

Finally, counsel should be familiar with specific ADR procedures which lend themselves especially to court situations, such as the summary jury trial which utilizes an advisory jury under court supervision.<sup>13</sup>

#### *More Efficient Litigation Management*

Even in those cases where a dispute cannot be prevented, has not been resolved at an early stage, and must proceed through the full litigation process, many opportunities are present for corporate counsel to utilize creative and active case management procedures to insure that the litigation proceeds in an orderly and efficient fashion toward prompt resolution. Among these opportunities are the following:

- Better scoping out the objectives of the corporation when referring the matter to outside counsel. In many cases, outside counsel are unfairly criticized for prolonging the life of a case when in fact they are merely taking appropriate steps to insure that the objectives of the client-corporation—as *perceived by outside counsel*—are being met. If inside counsel feels, for example, that discovery should be limited, that certain defenses are not appropriate, or that other action be taken or not taken, this must be impressed upon outside counsel at an early time. In the absence of any such instructions, outside counsel will assume the corporate instructions are to vigorously and exhaustively explore all avenues of defense.
- Insuring that all appropriate court procedures, including



the state and federal Rules of Civil Procedure, are utilized in such a way as to achieve maximum efficiency. Opportunities presented within certain Federal Rules such as Rule 16's emphasis on more active judicial management, Rules 12(c)'s and 56's early determination opportunities, and Rule 26's emphasis on limiting discovery abuse must be seized.

A good example of aggressive use of the Federal Rules to achieve prompt disposition of litigation may be seen in the instructions which Xerox general counsel, Robert Banks sent to outside law firms specifically citing appropriate Federal Rules and urging their aggressive use.<sup>14</sup>

- Utilizing a "litigation audit" to ensure that all cases have been analyzed for the appropriateness of the action undertaken, and evaluated for both sufficiency of legal positions advanced and efficiency of procedures utilized. The litigation audit can be a powerful tool in the arsenal of in-house counsel and should be more regularly utilized on an ongoing basis.<sup>15</sup>

### **Additional Prerequisites to An Effective ADR Program**

In addition to the specific activities above under the critical points on the ADR continuum, some additional prerequisites are necessary for a truly effective ADR program. Among these are:

#### *Be aware of potential resistance to ADR*

Resistance to ADR is to be expected from outside counsel, from members of the legal department, and from non-legal staff members who will be asked to work on ADR matters. The litigation manager must be aware of the common rationales which will be offered for not using ADR including:

- "This case isn't quite ready."
- "Just a little more discovery needed."
- "Let's show the other side we mean business."
- "We're too close to settlement to talk ADR."

The single most effective step which inside counsel can take to effectively increase ADR activity in connection with disputes that have already matured into litigation is to give strong direction to outside counsel that ADR initiatives are expected and that the usual excuses for *not* using ADR will be challenged.

Additionally, counsel must be aware of how best to structure an ADR proposal so as to increase the likelihood of acceptance by the other side. Is binding arbitration likely to be unacceptable to the plaintiff's counsel? If so, will mediation likely prove more palatable? Is a third party neutral who is a former judge more acceptable to the plaintiff's counsel than would be, a private practitioner or an academic? Clearly, there are a number of steps which can be taken in structuring the ADR proposal to make it more acceptable to the other side.

#### *Develop a process to institutionalize ADR—the utilization of systematic processes to insure ADR uses are considered*

Most of the early ADR successes have come from an *ad hoc* utilization of an alternative process. An *ad hoc* approach

may be successful to "break the ice" of the first ADR case, but for an ADR effort to be truly effective, a process to institutionalize ADR on a widespread basis—according to policy and guidelines—is necessary. The Center for Public Resources has studied opportunities for institutionalizing or "mainstreaming" ADR applications within a law department and is in the process of preparing some general recommendations for law departments. Among those recommendations urged to date are:

- developing a publicized pro-ADR policy;
- identifying types of cases where ADR is most likely to be successful;
- identifying a central ADR coordinator as "point person"; and
- developing a process to handle cases referred to ADR so that a clearly defined structure will be available.

A number of additional methods are available to insure that ADR will be considered for each case. One such method is the utilization of the corporation's litigation tracking system, whether it be computerized or manual, as a forcing mechanism to insure that ADR is being considered in every case. So too, if litigation managers are truly expected to regularly consider and advocate the use of ADR, such expectations must be documented in their key job elements and position descriptions and made a part of the formal performance evaluation.

#### *Developing guidelines for those cases which are likely to be the best ADR candidates*

While any case which does not fall within one of several ADR "exceptions" should be considered to be good ADR candidate, an ADR program is more likely to be successful if specific categories of cases likely to prove successful are identified. These categories, of course, will differ from corporation to corporation, but some are common to all. Among the more obvious categories where ADR is indicated are the following:

- The parties may have an ongoing business relationship and want to preserve it;
- The parties need to resolve the dispute, but in a private non-public function;
- Legal fees have become, or are likely to become, disproportionately high in relationship to the amount at stake;
- Discovery has taken a life of its own and no end appears in sight to an ongoing onslaught of depositions, interrogatories and production activities;
- The case is exceedingly complex in terms of technical or factual material and an evaluation or determination by an expert third party neutral would be useful;
- Animosity has developed between the parties to the point where productive settlement discussions cannot take place because of communications breakdown.

#### *Recognizing those instances where ADR may not work*

The successful ADR advocate within a corporation must be able to recognize those instances where ADR is *not* likely to be successful. Included in this category are:

- the case where precedent may be needed;
- the case involving matters of statutory or constitutional interpretation;
- the case where extraordinary relief is required, such as a declaratory judgment; and
- the case where the other side is motivated by other than the merits of the case, i.e., pursuing litigation for delay or to satisfy a grudge.

However, it must be stressed that, despite the fact that some cases do not meet the profile of the ideal ADR case and may appear to fall into one of the "exception" categories cited above, it is important that inside counsel not write off any case for ADR, for no case is absolutely precluded as a good ADR candidate.

#### *Actively participating in the development of case-specific ADR strategy*

Merely referring a case for ADR exploration is only the first step in moving a case toward resolution. To maximize greatest success, care must be taken in the selection of the best ADR provider and neutral and in the selection of the most appropriate ADR process. A host of very specific questions need to be answered about the format and ground rules for each proceeding. For example, should the process selected be binding or non-binding, adjudicatory or mediative, formal or informal? As inside counsel knows the case best, he or she should participate actively in these procedural and strategy determinations and not leave them to others.

#### *Keeping ADR in proper perspective*

Above all else, corporate counsel must keep ADR in proper perspective. ADR does not seek to replace the traditional civil justice system and it is not a panacea for all litigation related problems. Rather, it is a supplement to the judicial system and simply another tool and opportunity for litigation managers.

#### **Special Challenges for Corporate Counsel**

As the Alternative Dispute Resolution movement intensifies and as wider uses of alternative procedures become apparent, some special challenges present themselves to corporate counsel. These challenges require corporate counsel to be especially mindful of their obligation to represent their corporations in such a way as to fully protect the interests of the client while achieving maximum efficiency and cost saving.

Among these special challenges are the following:

*Responding to a growing expectation by corporate management that all reasonable new avenues will be explored toward the goal of reducing transactional costs associated with dispute resolution.* The time has long since past when the decision as to whether or not to use alternatives to traditional litigation is made solely by the in-house attorney. Today, corporate management has become extremely sophisticated as to the nature of legal expenses being incurred and creative approaches to stem the growing tide of legal costs.

The in-house counsel who waits too long before utilizing alternatives to litigation may very well find that the client will make the decision for him.

*The obligation to ensure that alternative processes provide sufficient safeguards.* As previously mentioned, a number of objections and concerns have been raised about the use of alternative dispute resolution procedures. Some critics refer to ADR procedures as assembly line or second class justice and others feel that it does not provide adequate procedural safeguards.<sup>17</sup> Corporate counsel has a particular obligation as the principal attorney for the client and also as an officer of the court to ensure that the alternative dispute resolution procedures *do* provide adequate safeguards and *do* provide good quality justice. If all ADR has to offer is a faster and cheaper process without protecting the rights of the party, then it is not a viable alternative to litigation as usual.

In those instances where an alternative process is not deemed to be sufficient to provide procedural safeguards, corporate counsel must insist that the rights of the parties not be compromised and that more formal and traditional legal procedures be utilized or that additional safeguards be built into the alternative process.

*Developing a better base of empirical data on ADR.* It has frequently been said that if ADR suffers from one major shortcoming, it is the lack of a good base of empirical data proving its effectiveness.<sup>18</sup> If ADR is truly to become institutionalized and incorporated into the mainstream of the corporate conflict resolution process, its effectiveness must be demonstrated through quantitative data. To date, most endorsements of ADR are based largely on anecdotal rather than empirical analyses. Because inside counsel has the opportunity to work with such a large volume of cases, we have a unique role to play in generating and quantifying data concerning the effectiveness of ADR.

*Developing answers to the next generation of ADR issues.* As the ADR movement grows stronger, a number of emerging legal and regulatory issues will receive greater attention. Among these issues are: the enforceability of ADR awards and decisions, the maintenance of ADR confidentiality, and the regulation of an ever-increasing number of ADR providers and procedures. Because corporate counsel are at the forefront of ADR activity, we can be expected to play a critical role in the definition and resolution of these various issues and to be major players as the new case law of ADR develops.

#### **Conclusion**

The past decade has witnessed some remarkable ADR successes and there can be little doubt that current and emerging alternatives hold even greater promise for the future. As a supplement to the traditional litigation system it affords opportunities for flexibility, efficiency and more private dispute resolution over which the parties have greater control. In addition to substantial cost savings, ADR can also improve the durability of the resolution achieved and allow for far less disruption in normal business relationships.

The current ADR revolution has been brought about in very large measure by the initiatives of corporate America together

with leading academicians, the courts, private practitioners, and private foundations. For ADR to reach its next plateau of success and effectiveness, it must receive even greater attention from corporations and their in-house counsel in the years ahead. Despite the strong advances made since the 1976 Roscoe Pound Legal Conference, ADR is still in a stage of relative infancy—it is, in fact, at a crossroads. For its full potential to be realized it needs to be infused with an even greater volume of cases of both routine and unique dimensions.

The next generation of ADR successes will only be proven after a larger number of cases are processed through increasingly more sophisticated alternative mechanisms and resolved to the satisfaction of all parties. No participants in the litigation and dispute resolution process play a more important role than inside counsel and litigation managers who shape the disposition process that their corporations will pursue.

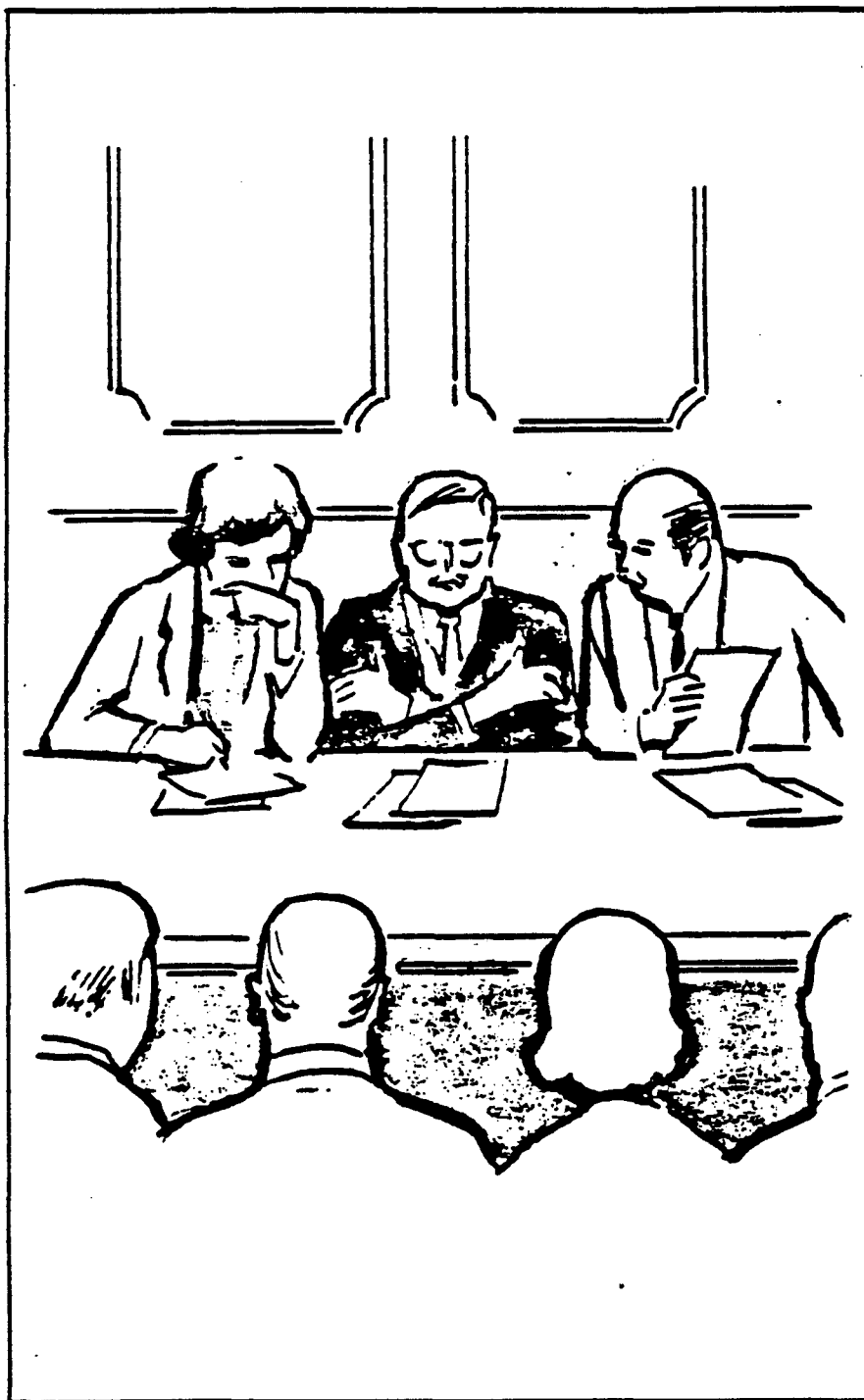
### Notes

1. See 70 F.R.D. 79.
2. See Goldberg, Stephen B., Green, Eric D. and Sander, Frank E.A., *Dispute Resolution*, Little Brown & Company, Boston; *Alternative Dispute Resolution*, An ADR Primer, ABA Standing Committee on Dispute Resolution, 1987; *Resolving Disputes Without Resolution*, A BNA Special Report, 1985; Kanowitz, Leo, *Alternative Dispute Resolution, Cases and Materials*, West Publishing Company, 1986; Coulson, Robert, *Business Arbitration—What You Need to Know*, American Arbitration Association; Ray, Larry and Freedman, Lawrence *Alternative Dispute Resolution: New Tools for a Tough Task*, *The Compleat Lawyer*, Vol. 3, No. 4, Fall 1986; Sandere, Frank E.A., *Alternative Methods of Dispute Resolution: An Overview*, 37 *University of Florida Law Review*; Ready, James A., *Alternative Dispute Resolution—A Trial Lawyer's Primer* *Insurance Counsel Journal*, April, 1986.
3. See Edwards, Harry T., *Alternative Dispute Resolution: Panacea or Anathema*, 99 *Harvard Law Review*, Vol. 99, 668, January 1986; Fiss, Owen M., *Second Hand Justice*, *The Connecticut Law Tribune*, March 17, 1986; Fiss, Owen M., *Against Settlement*, 93 *Yale Law Journal* 1073, (1984).
4. *Alternatives to the High Cost of Litigation*, Volume No. 10, October 1986. See also *Directory of Law School Dispute Resolution Courses and Programs*, Monograph Series No. 4, ABA Standing Committee on Dispute Resolution, 1986.
5. *Dispute Resolution Handbook for State and Local Bar Associations*; Monograph Series, No. 3, ABA Committee on Dispute Resolution, 1986.
6. See the recently enacted New Jersey and Texas ADR Statutes, both of which are comprehensive in their scope: *Alternative Procedure for Dispute Resolution Act*, NJSA 2A:23A-1; *Texas Alternative Dispute Resolution Procedures*: VTCA, Civil Procedures and Remedies Code, Title 7, Chapter 154, Sections 154.001 et seq.
7. *200th Company Signs CPR Corporate Pledge on ADR*, *Alternatives to the High Cost of Litigation*, March, 1986.
8. Millhauser, Marguerite, *ADR Partner Analyzes Law Firm Programs and Their Roles*, 1 *Alternative Dispute Resolution Reporter* 117, BNA, June 25, 1987; Stichnoth, John A., *Law Firm Leaders in ADR*, *Alternatives to the High Cost of Litigation*, Vol. 4, No. 10, page 1, October, 1986.
9. Jones, Ronald L., *Practice Preventive Corporate Law*, ALI-ABA, 1985; Brown, Louis M., *Lawyering Through Life: The Origin of Preventive Law*, Fred B. Rothman & Co., Littleton, Colorado, 1986.
10. *Dispute Resolution Contract Clauses*, *Alternatives to the High Cost of Litigation*, Vol. 2, No. 8, August 1984; see also Goldberg Green and Sander, *Dispute Resolution*, *supra*, at p. 540 (dispute resolution clauses).
11. Goldberg, Green and Sander, *Id* at p. 542.
12. *California Code of Civil Procedure*, Section 638 et seq. *General Statutes of Connecticut* 52-406.
13. See Lambros, Thomas D. *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 *Judicature*, 286, February-March 1986.
14. Xerox: *Reining in the Lawyers*, *Alternatives to the High Cost of Litigation* Vol. 3, No. 4, April 1985, p. 1.
15. See Ayre, J. Randolph, *Corporate Law Departments*, *Strategies for the 1980's*, *Practicing Law Institute*, 1984, p. 103-104; Goldberg, Green and Sander, *supra*, p. 548.
16. For a good review of the many common fears and objections to ADR, see Millhauser, Marguerite, *The Unspoken Resistance to Alternative Dispute Resolutions*, 3 *Negotiation Journal*, 29 January 1987.
17. See Fiss, *supra* at footnote 3; for a good discussion of some concerns about ADR frequently raised by lawyers, see *Alternative Dispute Resolution: An ADR Primer* published by the ABA, *supra* at footnote 2.
18. For a discussion of the need for empirical research see Goldberg, Stephen B., Green, Eric D. and Sander, Frank E.A., *ADR Problems and Projects: Looking to the Future* 69 *Judicature*, 291, 294, February-March 1986; See also *Dispute Resolution Will Be Dead in Ten Years*, *Dispute Resolution ABA Committee on Dispute Resolution Quarterly Update* Fall 1985, Issue No. 17.

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COURT-ORDERED ARBITRATION

- Hensler, Deborah A., "What We Know and Don't Know About Court-Administered Arbitration," 69 Judicature 270-278 (February-March 1986).
- Drake, William R., and Thomas A. Fee, editors, Court-Ordered Arbitration, A Report on the First National Conference on Court-Ordered Arbitration," Dispute Resolution Forum (National Institute for Dispute Resolution, August 1985).
- "The Role of Management in State Court-Annexed Arbitration," Roger Hanson, Geoff Gallas, and Susan Keilitz, 12 State Court Journal 14-19 (Spring 1988).
- DISPUTE RESOLUTION AND THE COURTS -- Case Studies: Court-Ordered Arbitration in Minneapolis and Pittsburgh (two half-hour videotapes produced by the National Institute for Dispute Resolution).



## What we know and don't know about court-administered arbitration

by Deborah R. Hensler

Over the past decade, interest in alternative dispute resolution has increased enormously. Initially, attention focused on establishing alternative forums, such as neighborhood justice centers, outside the court system. Proponents of such alternatives believed that they would relieve pressure on the criminal and civil justice systems, while providing a qualitatively better form of dispute processing—one that would be more reflective of community norms and better tailored to the needs of individual disputants. Although many communities now have community-based dispute resolution programs, the available evidence suggests that most disputants do not seek out these programs on their own.<sup>1</sup>

In recent years, as the dispute resolution movement has acquired legitimacy, attention seems to have shifted to the use of alternative dispute resolution procedures within the court system. Most of these alternatives provide some sort of arbitral or mediative process, diverting particular classes of cases from the regular trial court calendar while retaining administrative control over them. Some legislatures view the establishment of such alternatives primarily as a means of reducing judicial workload, and hence, reducing the demand for new judgeships. Judges and court administrators frequently view them as components of a differentiated strategy for caseload management, in which specific categories of cases are assigned to different treatments. Lawyers may view the alternatives as a means of clearing the trial calendar for "more important" litigation. Public and private interest groups may regard alternative dispute resolution procedures as a means of saving litigants' time and money, while perhaps providing a better quality of justice. Just what is meant by "better quality" is often unclear.

Despite the attention that the dispute resolution movement has drawn, there has been little systematic study of its outcomes. It is difficult to determine how much implementation there is to back up the rhetoric, what types of procedures have been established, and what has resulted from different approaches. Thus, it is difficult for policymakers to decide whether they should adopt any of the available approaches and to determine how to design a specific procedure to

maximize its potential for producing benefits to the courts, lawyers and litigants.

Since 1979, the Institute for Civil Justice (ICJ) at the Rand Corporation has been engaged in a program of research on a particular alternative dispute resolution procedure, *court-administered arbitration*, that many court officials and lawyers feel has particular promise for civil lawsuits. In the course of this research we have monitored the spread of court-administered arbitration programs, evaluated the effects of implementing programs, and studied the implications of alternative program designs. Our work has encompassed systematic surveys of court officials, case studies of specific programs, surveys of lawyers' and litigants' attitudes toward court arbitration, and technical assistance to local court officials involved in designing or modifying court programs. This article describes what we have learned to date, and what questions remain to be answered.

### A profile

Court-administered arbitration programs may be established by statute, by supreme court rule, or by local court rule. However established, all programs authorize trial courts to require arbitration of civil damage suits that fall within a specified jurisdictional limit, as a precondition for placing those suits on the trial calendar. Arbitration results in a verdict that has the force of a court judgment. If any of the parties is dissatisfied with the verdict, however, he or she may reject it and request that the case be calendared for a trial *de novo*. In many programs, appellants who request *de novo* trials are required to reimburse the court for the arbitrators' fees; in addition, in some programs, court costs and attorney fees may be levied on unsuccessful appellants. Such fees are intended to discourage frivolous appeals.

This article is based in part on a presentation delivered by the author to the First National Conference on Court-Administered Arbitration, sponsored by the National Institute for Dispute Resolution, May, 1985.

1. Merry and Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

2. Adler, Hensler, and Nelson, *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* (Santa Monica, CA: The Rand Corporation, 1983).

3. Ebener and Belancourt, *COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE* (Santa Monica, CA: The Rand Corporation, 1985).

## Court-administered arbitration is neither voluntary nor binding.

In all court-administered arbitration programs, cases assigned to arbitration are heard by one or more private attorneys or retired judges who volunteer to serve as arbitrators. Usually, attorneys' time is provided, at least in part, *pro bono*, since they typically receive only a small honorarium for their participation. Arbitration hearings are private, informal, and usually quite brief, the proceedings are generally not recorded, and relaxed rules of evidence prevail. In particular, in lieu of witnesses, medical and other reports are usually sufficient as evidence. In some programs only limited discovery is permitted prior to the hearing. Before they begin the hearing, some arbitrators may ask the parties if they would like assistance in attempting to settle the case, but once a hearing begins, arbitration proceeds as an adjudicative process. The facts of the dispute are heard, albeit in an abbreviated fashion, and the litigants are usually present and may testify. The neutral third party(ies) deliberates and issues a verdict, usually within a few days.

Although court-administered arbitration shares many features with other alternative dispute resolution procedures, it is distinguished from them in several important ways. Unlike private commercial arbitration, court-administered arbitration is neither voluntary nor binding. Unlike a traditional mediator, the arbitrator is not trying to help the disputants fashion a mutually agreeable compromise. And unlike most judicial settlement conferences, there is a true hearing of the case and an opportunity for litigants to participate in that hearing.

### The spread of arbitration

The first court-administered arbitration program was established in 1952, in Philadelphia, by amending an 18th century

statute that provided for the referral of trial cases to arbitrators. By the 1960s, similar arbitration programs had been established in courts across Pennsylvania, and word of their success in resolving small money damage suits had spread outside the state's limits.<sup>2</sup> In the early 1970s, as many trial courts were struggling to find ways of dealing with sharply increasing civil caseloads, a number of states adopted mandatory arbitration programs patterned after Pennsylvania's.

More recently, during the late 1970s and early 1980s there was a third wave of program adoption. By December 1984, 16 states had authorized mandatory court-administered arbitration programs.<sup>3</sup> A national conference on court-administered arbitration, sponsored by the National Institute of Dispute Resolution in May 1985, may have given further impetus to this recent wave of adoptions; by October 1985, two additional states had passed legislation authorizing mandatory arbitration programs (Illinois and North Carolina).

Early interest in court-administered arbitration was confined to the state court systems. But in 1978, the federal courts decided to experiment with mandatory arbitration in three district courts. Following the formal completion of the experiment, one of the three courts discarded its program while the remaining two maintained theirs. In 1984, under Public Law 98-411, Congress appropriated \$500,000 of fiscal year 1985 funds to support a new arbitration initiative in the federal district court system. The new funds are being used to mount mandatory arbitration "demonstrations" in eight districts, bringing the total number of federal courts with authorized systems to ten. Table 1 lists the states and federal district courts that have authorized mandatory court-administered arbitration programs to date.

Once established, arbitration programs have tended to spread within regions from one state to another, and within states from one jurisdiction to another. Table 1 indicates what we learned about the status of local arbitration programs in the course of our last national survey. Based on this information, we estimate that court-administered arbitration programs now exist in approximately 200 of the country's trial courts.

Court-administered arbitration pro-

**Table 1 Mandatory court-annexed arbitration programs**

Jurisdiction	Program title	Authorization	Earliest date authorized	Current scope
<b>State courts</b>				
Alaska	Arbitration of Small Claims	State Law—A.S. 09.43.180	1972	Never implemented; jurisdictional limit too low to make program useful
Arizona	Arbitration of Claims	State Law—A.R.S. 12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law—C.C.P. 1141.10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law—Conn. Statutes 52-648N	1983	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(c)	1984	Program began statewide in mid-1984
Illinois	Mandatory Arbitration	State Law—C.C.P. Ch. 110 Part 10A	1985	Rule drafting underway
Michigan	Mediation	Supreme Court Rule (except Wayne County Court): General Court Rule 316	1978	Operational in 28 of 55 circuit courts
Minnesota	Judicial Arbitration	State Law—Minn. Statutes 48A.73	1984	Experimental implementation in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law—N.R.S. 38.215-246	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damage cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law—Laws of N.J. Ch.358	1983	Statewide implementation
New Mexico		Supreme Court Rule	1984	Awaiting funding
New York	Alternative Dispute Resolution by Arbitration	State Law 22 N.Y.C.R.R. Part 28	1970	Operational in 31 counties, including New York City
North Carolina	Court-ordered Arbitration	State Enabling Act	1985	Pilot program authorized in 3 districts
Ohio	Varies by county	Local Judicial Rules—Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law—Ch. 670 Oregon Laws	1983	Operational in 9 counties
Pennsylvania	Compulsory Arbitration	State Law—Pa. Con. Stat. Ann. Title 42 7101	1982	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law—R.C.W. Ch.7.06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
<b>Federal district courts</b>				
California—Northern Dist.	Court-annexed Arbitration	Local Rule—Rule 600	1978	Ongoing program
Florida—Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Michigan—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Missouri—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
New Jersey	Court-annexed Arbitration	Local Rule	1985	Operational
New York—Eastern Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by January 1988
North Carolina—Middle Dist.	Court-annexed Arbitration	Local Rule—Part VI Rules of Practice and Procedure	1984	Operational
Oklahoma—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational
Pennsylvania—Eastern Dist.	Court-annexed Arbitration	Local Rule—Civil Procedure 8	1978	Ongoing program
Texas—Western Dist.	Court-annexed Arbitration	Local Rule	1985	Operational

Sources: Ebener, and Betancourt, *Court-Annexed Arbitration: The National Picture* (Santa Monica, CA: The Rand Corporation, 1986); updated to January 1, 1986.

grams have also expanded by extending their case jurisdiction: typically, the first arbitration program(s) within a state is established with a monetary jurisdictional limit in the neighborhood of \$15,000; over time the limits are increased to \$25,000 or more. In recent years, the initial jurisdictional limits of programs have been set higher, especially in the federal district courts. Figure 1 shows the change in monetary jurisdictional limits across courts from 1979 to 1985.

### Program objectives

Whatever their historical origins, most court-administered arbitration programs now share the following objectives:

- Reduce congestion on the civil trial calendar by diverting and disposing of

cases through arbitration;

- Reduce (or stabilize) court costs by reducing judicial time spent on the civil caseload;

- Reduce time to disposition by providing an expedited process for arbitration-eligible cases and by removing these cases from the trial queue, thereby reducing time to trial for other cases;

- Reduce litigation costs for parties;
- Improve access to court for diverse users by reducing the time and expense required and by providing a simpler and, perhaps, fairer form of dispute resolution.

Supporters of court-administered arbitration programs do not generally expect to change case outcomes. Instead, the distribution of outcomes prevailing prior to establishing an arbitration pro-

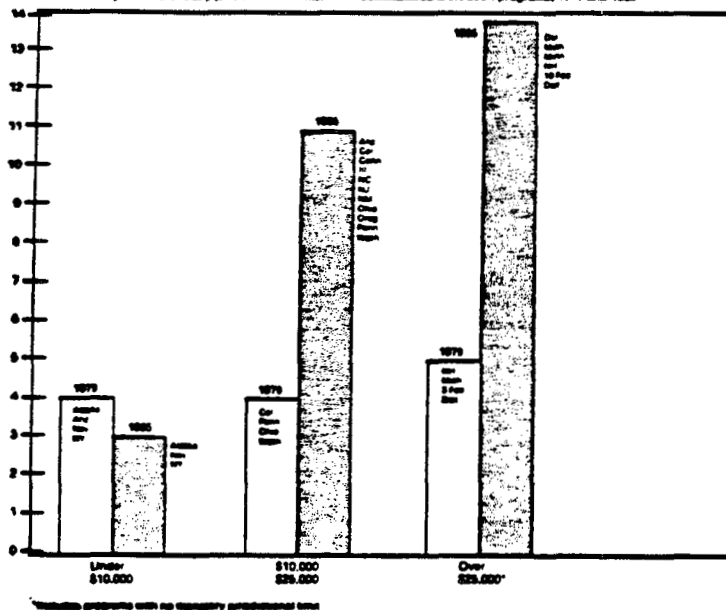
gram is frequently viewed as the benchmark for assessing arbitration's effect on equity, and a program is viewed as successful if it does not perceptibly alter that distribution to the advantage or disadvantage of any of the major participants in the system.

### Evaluating effectiveness

As in the case of other "court reforms" there has been no comprehensive attempt to evaluate court-administered arbitration programs' effectiveness in meeting these objectives. During the past five years, however, the ICJ has conducted evaluations of arbitration programs in California, Pittsburgh (Allegheny County) and Bucks County, Pennsylvania, and Burlington and Union Counties in New Jersey that shed considerable



Figure 1. Mandatory prelitigation trials, court-administered arbitration programs, 1970 and 1985



light on the issue.<sup>4</sup> The empirical data from these studies suggest that court-administered arbitration can contribute significantly to reducing court congestion, costs and delay and to diminishing the financial and emotional costs of litigation for parties. But the data also indicate that arbitration's ability to fulfill this potential is critically dependent on program design and implementation decisions, and on lawyers' responses to arbitration, and that arbitration cannot, by itself, be depended upon to "solve" all of the problems that characterize contemporary civil litigation.

**Reducing court congestion.** In both California and Pittsburgh, about 60 per cent of civil money suits (including personal injury, property damage and contract disputes) are diverted to arbitration; in Bucks County the percentage is closer to 90 per cent. The percentage of cases diverted by any particular program is dependent on the program's eligibility rules, the proportion of cases that are eligible under those rules and the procedures that are used for determining eligibility. Some state program rules permit

so few cases to be diverted to arbitration that local jurisdictions have been reluctant to invest resources in program implementation. Some assignment procedures provide incentives and opportunities for parties and their lawyers to bypass arbitration and obtain placement on the trial calendar. And in every court it is possible for arbitration cases to appear on the court's trial calendar after arbitration is completed, as a result of the trial *de novo* process.

It is clear, however, that it is possible for any court to develop rules and procedures that will result in the diversion of a substantial fraction of its civil money suits and it is likely (as we shall see below) that most of these cases can be permanently diverted. Policymakers should note, though, that a court's total civil damage caseload may only represent a modest fraction of its overall caseload, which will generally include many criminal cases, family law cases, equitable disputes, and other matters. As long as arbitration is considered appropriate only for civil damage suits, and only for the lower-value cases among these,<sup>5</sup> it

may ease court congestion but cannot eliminate it.

**Reducing court costs.** Cost savings due to arbitration depend on three factors: how much the court would spend on arbitration-eligible cases in the absence of an arbitration program, how much it costs to administer the arbitration program itself, and how many cases require court attention after arbitration. Unfortunately, most courts cannot provide reliable data on all three factors, making estimation of savings due to arbitration extremely problematic.

The best data available relate to program administration costs. These generally have two components: costs to process cases (determining eligibility, notifying parties of assignment to arbitration, selecting arbitrators to hear specific cases, etc.) and fees to arbitrators. How much it costs to administer an arbitration program depends critically on program design and implementation decisions. California's statutory requirement that the court assess whether a case is eligible for arbitration placed a new burden on judges' time. In addition, a complex procedure that provides for the parties' attorneys to participate in arbitrator selection adds to the tasks that must be carried out by the program's administrative staff. An honorarium of \$150 per day paid to the single arbitrator who hears each case further drives up the cost of the program. A recent Judicial Council report estimated that the cost to process a case through arbitration in California in Fiscal Year 1982 was about \$123 for each case assigned to the program, and about \$299 for each case actually heard by an arbitrator.<sup>6</sup> These estimates do not include the cost of judge time allocated to determining arbitration eligibility.

In Pittsburgh, when the plaintiff's attorney files a case, he or she is asked whether it is eligible for arbitration. If it is declared eligible, the court clerk automatically assigns it to the program and schedules a hearing date for it. Arbitrators are assigned to hear cases on the day of the hearing, using a pragmatic approach to achieve a roughly random assignment. Three-person panels hear each case, but in a single day they are likely to hear four or five cases. Although each arbitrator is paid \$100 per day, the average arbitrator fee per case works out to about \$65. When

4. The California study, conducted during the first year of program implementation, focused on arbitration's potential for cutting congestion, court costs and delay (Hensler, Lipson, Rolph, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (Santa Monica, CA: The Rand Corporation, 1981)). The Pittsburgh study focused on the effects of arbitration on litigants (Adler et al., *supra* n. 2). Bucks County is one of three sites in an on-going ICJ study of litigants' perceptions of "procedural justice." Burlington and Union Counties were pilot sites for the New Jersey arbitration program; the

ICJ collaborated with the Administrative Office of the New Jersey Court in designing and analysing surveys of lawyers and litigants (see Hensler, REFORMING THE CIVIL LITIGATION PROCESS: HOW COURT ARBITRATION MAY HELP (Santa Monica, CA: The Rand Corporation, 1984)).

5. This assumption is being challenged in some locales which are considering broader jurisdiction for arbitration programs.

6. Judicial Council of California, ANNUAL REPORT, 1984.

fee reimbursements from appellants are taken into account, this amount is reduced even further. The average cost to process a case diverted to arbitration in Pittsburgh in 1982 was about \$76 for each case assigned to the program, and about \$175 for each case heard.<sup>7</sup>

Figure 2 compares the costs of processing arbitration cases to the costs of processing non-arbitration cases that remain on the civil trial calendar. In the upper section of the figure, we see the cost differential between the average per case processing costs for California and Pittsburgh. In the lower section, we have broken out the costs of those cases "tried" (either by arbitrators or jury). These comparisons suggest that, overall, arbitration offers a three- to five-fold savings over traditional civil case processing. The difference in the average cost to "try" a case in arbitration and the average cost to try a case before a jury is many times greater.

The cost differentials shown in Figure 2 may be deceptive, however, if a substantial fraction of the arbitrated cases turn up on the trial calendar thereafter, as a result of *de novo* appeals. It is reasonable to assume that cost savings will be substantial where appeal rates are low, and smaller or non-existent where they are high. (Indeed, one can imagine situations in which arbitration programs would actually increase the net costs of processing civil cases.)<sup>8</sup>

Across the country, *de novo* appeal rates vary substantially from program to program. In California, the rate of appeal has been running in the neighborhood of 50 per cent. In the older Pennsylvania programs it ranges between 15 per cent and 25 per cent of all cases heard, and some court administrators elsewhere report even lower appeal rates.<sup>9</sup> But the majority of appealed cases in all jurisdictions settle without trial. In California, a Judicial Council docket study in a sample of four Superior Courts found that the rate of trial after arbitration was about seven per cent.<sup>10</sup> In Pittsburgh, the ICJ found that three-quarters of all cases that were appealed settled without trial.<sup>11</sup> It is an open question whether the costs to courts of disposing of these *de novo* appeals generally outweigh the savings attributable to arbitration.

**Expediting disposition.** Success in expediting cases through arbitration de-

pends on formal program rules and informal implementation practices. When courts want to use arbitration to speed case disposition, when they have the resources available to process cases efficiently, when they are not unduly constrained by statutory or other formal limits on the speed of disposition, and when attorneys cooperate in making the program work, arbitration can result in speedy case disposition.

In California, we found that arbitration's effectiveness in reducing time to disposition was constrained by the availability of judge time to assess case value, by statutory requirements that established relatively lengthy time intervals for different stages of the process, by the practice of placing administrative control over the hearing process in the arbitrators' hands, and by the lack of court resources to monitor the arbitrators' performance in carrying out these responsibilities. As a result of these factors, we found that in some courts arbitration did little to expedite case resolution, while in others it *increased* time to disposition. Time to disposition by arbitration varied between nine months and more than three years.

In Pittsburgh, on the other hand, the practice of scheduling cases for arbitration at the time of filing, a policy of encouraging all active bar members, regardless of type or length of expe-

rience, to serve as arbitrators, and a centralized form of program administration combine to expedite case processing. The average time to reach arbitration hearing in Pittsburgh is three months from the filing date; awards are decided immediately after the hearings and sent to the parties at the close of business each hearing day. Other Pennsylvania courts have achieved similar results: in Philadelphia in recent years cases have reached arbitration hearings within eight months of filing. In Bucks County, cases are heard within four months of the filing of a certificate of readiness.

Whether speeding cases through arbitration actually reduces the time to disposition for cases on the regular trial calendar is still an open question. The factors that affect time to disposition generally are so complex and so difficult to measure that there has yet to be an empirical analysis of the connection between expediting arbitration cases and expediting regular jury trial cases.

**Reducing costs to litigants.** Some supporters of court-administered arbitra-

7. Cost information for 1982 provided to the author by Mr. Charles Starrett, Allegheny County Court Administrator.

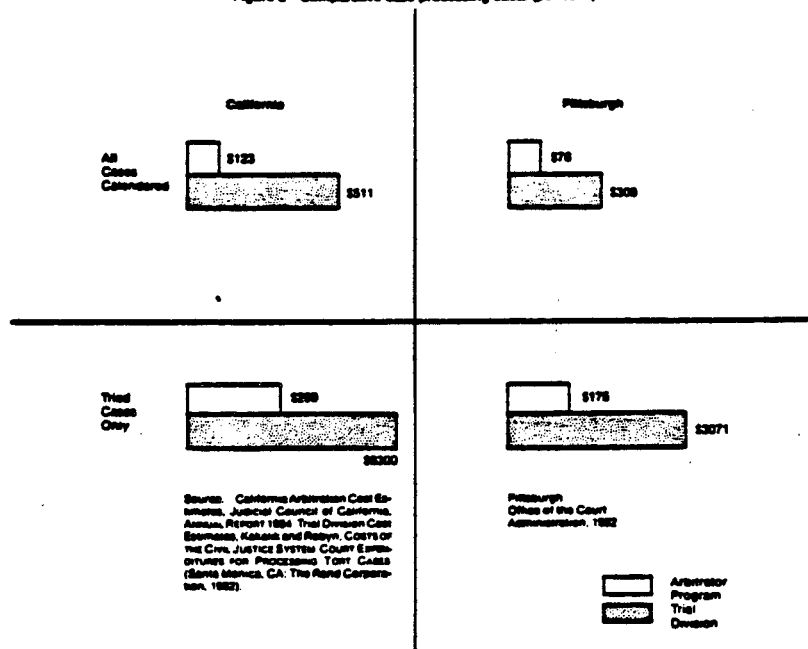
8. Hensler et al., *supra* n. 4, at 62-67.

9. In most programs, 25 to 50 per cent of the cases assigned to arbitration settle before the hearing date. Thus, the per cent of appeals as a fraction of all cases assigned to the program may be as little as 5 to 10 per cent.

10. *Supra* n. 6, at 9.

11. *Supra* n. 2, at 46.

Figure 2 Comparative case processing costs (per case)



tion assume that it will produce substantial cost savings for litigants. Our research suggests that such savings are possible, but whether they are realized depends on the behavior of lawyers in response to arbitration.

Individual plaintiffs' costs to litigate generally have three components: the value of their own time spent on the process, lawyers' fees, and expert witness and other direct expenses. In Pittsburgh and New Jersey we found that litigants on average spent 1 to 1½ days preparing for and participating in arbitration hearings. As might be expected given liberal evidentiary requirements, they spent less than \$50 on expert witness fees and other direct expenses.

Lawyers' fees were by far the largest component of litigants' expenses. Plaintiffs in Pittsburgh either had a traditional contingent fee arrangement with their lawyer (typically paying one-third the amount obtained in arbitration or settlement) or paid a flat fee to the lawyer (usually \$250) for preparing the case and representing them at the hearing. Lawyers offering flat fee arrangements to clients usually conducted a high volume arbitration practice, representing several different clients at hearings in the course of a single morning. This type of practice was made possible by the brief duration of the hearings (45 minutes on average) and tightly-administered hearing schedule. Efficient use of attorney time was also reflected in hourly rate defense costs of approximately \$400 per arbitrated case.

In California and New Jersey, on the other hand, most plaintiff and defense lawyers have apparently not changed their billing practices as a result of arbitration.<sup>12</sup> Thus, any cost savings due to the streamlined arbitration procedure may be passed on to defendants, who are usually billed on an hourly rate basis, but not to plaintiffs who retain lawyers on a contingent fee basis.<sup>13</sup>

Even if fee arrangements are not sub-

stantially revised litigants on both sides should save when their cases are arbitrated rather than tried, because they will generally spend less of their own time in arbitration than at trial, and they will pay less in expert witness fees and other direct expenses. In the absence of arbitration programs, however, most civil money damage suits are not tried, but settled. The difference between litigants' costs to arbitrate cases and their costs to settle these cases is not yet known.<sup>14</sup> Current ICJ research comparing litigants' outcomes when different modes of disposition are used may shed some light on this question.

### Access to justice

When considering the adoption of court-annexed arbitration programs, some policymakers assume that litigants must benefit from the provision of a rapid, inexpensive form of dispute resolution. Others, however, are concerned that arbitration, with its abbreviated procedures and rapidly decided outcomes, will provide "second-class" justice. Our study of court arbitration in Pittsburgh systematically examined what litigants obtain from the program and how they feel about it. We investigated the pattern of program usage, the distribution of arbitration awards, and the role of the appeals process. We also measured litigants' satisfaction with arbitration, and, in particular, their views of the fairness of the arbitration procedure. More recently, we have been able to replicate some of these analyses among New Jersey and Bucks County litigants.

Based on the results of these analyses, we have concluded that court-administered arbitration delivers generally acceptable outcomes and is viewed by most individual litigants as a fair way of resolving civil disputes. Attorneys sometimes demur at court arbitration's departure from traditional trial norms, but most view arbitration as an acceptable procedure for resolving smaller civil

damage suits.

**Program usage.** In Pittsburgh, we found that the program was used by a diverse set of litigants, with a broad range of disputes involving money. Arbitrated cases included consumer disputes (sometimes brought by the consumer, sometimes brought by a business person seeking payment), contract disputes, automobile and other property damage cases, and personal injury cases. The amount of money involved in these cases was generally less than \$5000. (At the time of our study the jurisdictional limit in Pittsburgh was \$10,000.) The types of disputants included private citizens, small and large businesses, and public agencies. Our Bucks County sample was limited to personal injury cases, although the program handles all money damage suits worth \$20,000 or less. Preliminary data analyses in Bucks indicate that arbitration litigants are a cross-section of that county's population.

**Case outcomes.** About 80 per cent of the Pittsburgh plaintiffs whose cases we sampled obtained some amount of compensation from the arbitrators. Burlington County, New Jersey pilot program data indicate a similarly high level of plaintiff victories. Of course, in both Pittsburgh and Burlington many plaintiffs obtained lower awards than the amount they originally claimed. In Pittsburgh, there was some variation in the relative success of plaintiffs (i.e. award amount compared to prayer) but we could find no evidence that any particular class of litigants or suits is disadvantaged by arbitration. The only exception in this finding regards *pro se* litigants: surprisingly numerous in Pittsburgh, these litigants appeared to be systematically disadvantaged when they faced represented opponents.

**Outcomes of appeals.** About 25 per cent of the arbitrated cases in our Pittsburgh sample were appealed, but most of the appealed cases were settled without further court intervention. After examining the outcomes of settlement and trial after appeal, we concluded that the appeal mechanism serves its intended purpose as a corrective device for individual arbitration errors or misjudgments, while preserving the pattern of outcomes delivered by the arbitrators. We also concluded that the costs of appealing were rarely worth the mone-

12. It may be that volume arbitration practices of the sort we observed in Pittsburgh take many years to develop.

13. Insurance company representatives frequently assert that lengthy court calendars increase their transaction costs for small cases. If arbitration reduces time to disposition for these cases, these defendants may obtain additional cost savings as a result.

14. In many jurisdictions, plaintiff lawyers charge a somewhat lower contingent fee for settling a case rather than trying it, for example, 33 per cent com-

pared to 40 per cent. In California and perhaps elsewhere plaintiff lawyers may treat the arbitration hearing as a trial, charging the same percentage of the amount won if a case is arbitrated as they would if it had been tried. Since many cases that reach arbitration hearings formerly would have been settled, plaintiffs could actually be paying increased fees with the advent of arbitration. Of course, if outcomes at arbitration are significantly better for plaintiffs than plaintiffs might nevertheless obtain a net benefit.

tary gain obtained post arbitration.

**Litigants' perceptions.** We have now measured litigant satisfaction with arbitration programs in four different jurisdictions, with substantially different program rules. In each jurisdiction, the overwhelming majority of individual litigants whom we surveyed were quite satisfied with the program. Although winners are generally more satisfied than losers, a majority of the latter are at least somewhat satisfied with the program. This high level of satisfaction is apparently attributable to litigants' satisfaction with the arbitration *procedure* itself. We have found that most individual litigants have a simple definition of what constitutes a fair dispute resolution procedure: they want an opportunity to have their cases heard and decided by an impartial third party. In courts that offer an arbitration alternative, unlike most metropolitan courts in which an expen-

sive and time-consuming trial is the only alternative to settlement, litigants with small suits are accorded this opportunity. Most find it a fair process.

### Program design variations

As should be clear from the discussion above, although all court-administered arbitration programs share certain key features, program design varies substantially. Even within a state, where all programs are operating under the same authorizing statute, there may be considerable variation from jurisdiction to jurisdiction. Typically, programs are designed in part through legislative decisionmaking (with inputs from state judicial councils or court administrative offices, from the bar, and from other lobbying organizations) and in part through the formal court rulemaking process. Often special bench and bar committees are established locally as well to draft

rules of local program operation.

Historically, there was a tendency for these groups to fashion new programs after previously established programs in neighboring states and jurisdictions. Now that information about program design is more readily available, the process of program design may be somewhat more systematic. But ensuring that a program is acceptable to key constituencies—lawyers, insurance companies, public advocates—is still a key component of program design. Our evaluation research suggests that there are many ways of designing court-administered arbitration programs to meet their objectives.

ICJ researchers have identified a small number of key decisions that must be made in designing and implementing court-administered arbitration programs. We discuss the range of options open to policymakers and administrators in making these decisions, and their implica-

## The coming evolution in court-administered arbitration

by Robert Coulson

Prophets have enjoyed a lackluster record in recent years. Nevertheless, I am prepared to forecast that court-administered arbitration programs will flourish in both state and federal court systems and that they will change in fundamental ways, and for the better.

As discussed in the accompanying article by Deborah Hensler, mandatory court-annexed arbitration programs for relatively small civil disputes have been a major, recent reform in the American civil justice system. As news of this experiment percolates through the judicial community, court after court has been contemplating the installation of some such alternative dispute resolution system. Numerous judicial conferences on the subject have been scheduled in recent years where advocates for court arbitration have argued that this is an idea whose time has come.<sup>1</sup> Indeed, I am one of those enthusiasts.

My experience with the voluntary processes of the American Arbitration Association, moreover, convince me that evolutionary pressures will inevitably change the structure of these court programs. Similar pressures have influenced the various rules and procedures

of the AAA.

The primary influence, as would be expected, will come from the bar. At present, lawyer-arbitrators on court-annexed panels have been willing to serve as volunteers or for whatever nominal fee may have been established by local court rule or by the legislature. There will be steady pressure to increase such fees. Some of the programs have already had to raise the level of compensation.<sup>2</sup> When the arbitrators are paid several hundred dollars per case or some amount that covers their overhead approaching their normal professional billing rate, the cost of such programs must increase, perhaps becoming prohibitive.

At that point, there will be pressure on courts to use a single arbitrator, rather than the panel of three. Such a change may also be required to accommodate to the impediment that some busy lawyers will no longer be willing to serve as arbitrators on matters which they regard as relatively trivial, below their level of expertise. (Many civil disputes being arbitrated under these programs require the arbitrators to put a price on personal or property damages and do not require sophisticated legal skills.) Thus, both

economic and professional factors will nudge such programs towards using a single arbitrator.

Another tendency is likely to present itself. Now, arbitrators are instructed to evaluate the case. They are warned not to attempt to mediate a settlement. That instruction seems sound because the program uses a rotating panel of lawyers, most of whom do not have mediation skills.

But as lawyer-arbitrators become experienced with these programs, and particularly when they serve frequently as sole arbitrators, they may become activists. Rather than serving as relatively passive arbitrator-evaluators, they may participate more actively in settlement negotiations—in effect, becoming mediators. In part, this may occur because they are encouraged to do so by the parties' attorneys.

Our experience with somewhat sim-

1. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 247 (1982); Salem, *The Alternative Dispute Resolution Movement: An Overview*, 40 ARBITRATION J. 9 (Sept. 1985).

2. *Court-Annexed Arbitration in the State Trial Court System*, Statement by Deborah R. Hensler, Institute for Civil Justice, The Rand Corporation, prepared for Senate Judiciary Committee Subcommittee on Courts, February 1, 1984, at 7.

tions for program outcomes, in a manual entitled *Introducing Court Arbitration: A Policymaker's Guide*.<sup>15</sup> Below I briefly summarize this material, highlighting the most significant design features.

*What cases should be eligible for the program?* Most programs are limited to money damage suits that fall below a specified dollar amount. The higher a program's jurisdictional limit, the greater the proportion of the caseload that may be diverted from the trial calendar, and the greater the potential for reducing congestion on that calendar.

15. Rolph, *INTRODUCING COURT ARBITRATION: A POLICYMAKER'S GUIDE* (Santa Monica, CA: The Rand Corporation, 1984).

16. Plaintiffs' attorneys may bypass arbitration because they wish to delay setting a value on the claim, because they want to send a signal to the defense regarding the strength of their position, or because they object to the program per se.

17. Multiple-arbitrator panels are often constructed to represent plaintiff and defense perspectives, which may lead to greater acceptance of their decision.

ilar programs in the private sector indicates that trial attorneys, when selecting between binding arbitration and professional mediation, select mediation more than 75 per cent of the time. This observation is based on our experience with thousands of cases where representatives of the AAA have been authorized by insurance companies to offer that option to claimant attorneys.<sup>3</sup>

True, the setting is somewhat different in a court program. AAA representatives are offering the choice of binding arbitration before an experienced trial attorney or mediation with a trained, professional lawyer-mediator. Nevertheless, the preference expressed by claimant attorneys towards mediation appears consistently throughout the United States.

If a similar preference becomes reflected in court-administered programs

*Who should determine eligibility?* In the normal court routine, the court does not attempt to determine the dollar value of a suit, and the plaintiff's own assessment has a strategic purpose, which raises questions about its accuracy. If court personnel assess case value, they can be assured of diverting most eligible cases to arbitration, but the time they must take to do so increases court costs. If litigants (e.g., the plaintiff's attorney) assess eligibility, a considerable number of cases may evade the program<sup>16</sup> and be placed on the trial list, but the court will be spared additional expense.

*What qualifications should be required of those who volunteer to serve as arbitrators?* If arbitrators are required to have extensive and/or specialized experience (e.g., at least five years of personal injury trial experience), then they are more likely to deliver awards that are satisfactory to other practitioners. But

the candidate pool will be limited, and the supply of arbitrators may therefore be insufficient to hear cases in a timely fashion. If qualifications are loose, the supply will be greater but the decisions may be less acceptable, leading to more appeals for trial.

*How many arbitrators should decide a case?* If only one arbitrator is required to hear each case, it will be easier to administer the program and easier to meet the demand for volunteer arbitrators. But attorneys may be more inclined to question the decision of a single arbitrator, leading to a higher rate of appeal. If three or five arbitrators are required, the task of administering the program will be greater, and the per case costs for arbitrator fees may be more, but practitioners may be more inclined to accept the arbitration outcome.<sup>17</sup>

*Who should select the arbitrators to hear each case?* If the attorneys have

where attorneys are offered the choice between arbitration (evaluation) or mediation, the courts may be persuaded to provide mediation as an option. Then, they may need to identify lawyers who are qualified and prepared to serve as mediators. Perhaps a selected group of lawyers will require specific training in mediation skills.

In my recent book, *Professional Mediation of Civil Disputes*,<sup>4</sup> I suggested that the creation of a profession of Certified Public Mediators would offer lawyers an alternative career, in addition to providing the courts with an attractive, off-budget, auxiliary service. If my expectation about the evolution of court-administered arbitration is accurate, mediation programs will appear in the courts in coming years. If lawyers prefer mediation, as our experience in the private sector would indicate, there is no reason for courts not to offer that service.

Many members of the bar are acquiring experience and training as mediators and are looking for fields in which to practice those skills.<sup>5</sup> Mediation is the sleeping giant of alternative dispute resolution. Again, AAA experience would confirm that notion. In cases actually me-

diated under the AAA's insurance alternative dispute resolution program, nine out of 10 are settled. This compares favorably with the settlement record of court-administered arbitration programs.

Moreover, the quality of the mediation process is better than court-administered arbitration where the award is based on a perfunctory presentation by the parties and an evaluation by a panel of three non-specialized lawyers. In mediation, the parties have an opportunity to discuss the issues at their leisure, reaching an agreement that reflects a mutually acceptable compromise. The clients themselves are more involved in mediation than they would be in an arbitration hearing.

I believe that court-administered arbitration programs will evolve inevitably towards mediation. The mediators will be lawyers who have become specialists in dispute resolution. They will operate under the overall supervision of the local courts. This will constitute one long step towards a new profession of Certified Public Mediators. □

ROBERT COULSON is President of the American Arbitration Association.

3. American Arbitration Association ADR Insurance Program caseload statistics for October 1, 1984 through October 31, 1985.

4. Coulson, *PROFESSIONAL MEDIATION OF CIVIL DISPUTES* (New York: American Arbitration Association, 1984).

5. American Bar Association, Special Committee on Alternative Means of Dispute Resolution. *ALTERNATIVE DISPUTE RESOLUTION: WHO'S IN CHARGE OF MEDIATION?* (Washington, D.C.: 1982).

some say in the selection, they may be more inclined to accept the award, but providing for attorney participation may require a cumbersome and time-consuming process. If the court is in charge of assigning the arbitrators, the process may be expedited but litigant and attorney satisfaction may decrease.

*Where should the hearings be held?* If they are held outside the courthouse, there is no need to set aside space for them, and litigants will be spared the possible emotional strain of coming into court. But it will be more difficult for the court to monitor the scheduling of hearings, and the arbitrators may grow lax in adhering to the court's guidelines for timely disposition. If the hearings are held in the courthouse, court personnel can maintain control over the schedule and the litigants may be more inclined to feel they have had their "day in court." Rather than moving cases "out of the courthouse," however, the court will simply have set up another specialized division to resolve cases.

*Should there be a financial disincentive for appeal?* If there is no disincentive, the rate of appeals may be so high as to wipe out any reductions in the size of the trial list due to case diversion. If the disincentive is too high, achieving political acceptance of the program will be difficult, and the disincentive itself may ultimately be declared an unconstitutional burden on the right to trial.

*Who should fund the arbitration program?* If a legislature requires courts to adopt the program, perhaps the state should pay for the additional administrative expenses. (Traditionally, most trial court expenses are borne by county governments.) But if the program effectively reduces trial court workload, the court should experience savings in the trial division that it can divert to supporting the arbitration program and it may, over the long run, actually experience a reduction in total court costs. Alternatively, if arbitration provides litigants with a more expeditious and less expensive means of resolving their disputes, perhaps they should pay a special arbitration fee to support the program. If the court requires such a payment, however, it is put in the perhaps questionable position of charging litigants with small-value suits a higher fee to file their cases than is charged for filing

higher-value, trial-bound cases.

### Necessary information

With the multiplication of research monographs and conferences on court-administered arbitration, judicial policymakers may find themselves in the position of having more assistance in designing and implementing programs than they can handle. But it is too early to conclude that we understand the full ramifications of instituting mandatory arbitration requirements. As pressure from legislatures and interest groups to adopt and expand arbitration mounts, I believe we need to give more attention to answering the following questions.

*What kinds of cases are not good candidates for arbitration?* As jurisdictions become comfortable with arbitration, there is often a move to expand the jurisdictional limits of a program, either by incorporating new kinds of cases, or raising the monetary limits on money damage suits, or both. Is it sensible to subject all kinds of civil suits to mandatory court arbitration? In my conversations with court officials and practitioners, I frequently ask: "What kinds of cases do you think are inappropriate for arbitration?" The usual reply is that some cases are simply too complicated to be amenable to a streamlined process: they require extensive discovery, briefing of the issues and the full panoply of a court trial. Complicated cases, I am told, occur with some frequency among smaller value monetary claims and there are simple cases in which large amounts of money are at stake. Should we relegate all small cases to alternative dispute resolution mechanisms, while preserving more expensive traditional procedures for big stakes cases whether or not they "need" them? We need to do more hard thinking, and perhaps some careful experimentation, regarding this question.

*What factors affect decisions to appeal?* Most judicial policymakers feel that some financial disincentives are necessary to discourage frivolous appeals from arbitration but that it is improper (and probably infeasible) to require that litigants pay substantial amounts of money as a precondition for appeal. We know very little about how the average litigant decides whether to appeal, or indeed whether the lawyer or the litigant plays the primary role. Where appeal rates

from arbitration are low, we tend to assume that most litigants find the arbitration verdicts roughly acceptable; instead, they may simply decide that they have no other option but to "lump it."<sup>18</sup> Institutional litigants presumably assess the costs of appeal somewhat differently; even if these costs outweigh the amount at stake in the individual case, they may take appeals as a matter of policy, in order to "keep the system honest"—that is, operating in a fashion that is acceptable to them. Understanding the role of appeals in the arbitration litigation process is important to understanding the equity implications of instituting mandatory arbitration programs.

*How does arbitration affect settlement?* Much of the discussion and research about arbitration focuses on differences between arbitration and trial, but most cases that are currently arbitration-eligible have little or no likelihood of being tried. The real significance of instituting arbitration may lie in its effects on the settlement process. How does arbitration affect lawyers' and insurers' negotiation strategies? How does it affect the timing of settlements? Perhaps most important, how does it affect settlement outcomes? We need to focus more attention on these questions as well.

*How does arbitration affect the practice of law?* Finally, underlying all these questions is perhaps the most important of all, how does arbitration affect what lawyers do? Lawyers in many jurisdictions are understandably wary of arbitration programs. Some believe mandatory arbitration represents a small but dangerous step away from the right to jury trial. Some see it as moving further in the direction of production line litigation that is the antithesis of the individually-crafted form of lawyering that they learned at school. Underlying many lawyers' discomfort with arbitration is a concern about its impact on their fees. How lawyers modify their behavior in the light of arbitration may ultimately determine the future of this form of alternative dispute resolution. □

18. Felshtiner, Abel, and Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 *Law & Soc'y Rev.* 631 (1980-81).

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# **Court-Ordered Arbitration Issue**

A Report on the  
First National Conference on  
Court-Ordered Arbitration



## The First National Conference on Court-Ordered Arbitration

In May 1985 more than 200 judges, lawyers, court administrators, legislators, scholars and other citizens interested in improving America's system of civil justice met in Washington for the First National Conference on Court-Ordered Arbitration.

Of the 16 states which have authorized the use of court-ordered arbitration, 15 were represented at the conference. Representatives of all 11 states recognized as actively considering the authorization of court-ordered arbitration programs attended the conference. So did representatives of several federal district courts where court-ordered arbitration programs are in use. Forty-four judges were present, ranging from the Chief Justice of the United States and state supreme court justices to trial court judges. At the conference also were 52 court or court arbitration program administrators, eleven representatives of state bar alternative dispute resolution committees, three state bar presidents and a total of 30 practicing attorneys.

Sponsored by the National Institute for Dispute Resolution in cooperation with ten court-related and bar organizations, the conference had several purposes:

- To be a forum for debate and discussion of the usefulness, fairness and implementation of court-ordered arbitration as well as of its relationship to other judicial settlement processes;

- To stimulate wider replication of court-ordered arbitration programs;
- To give national recognition to a method of dispute settlement which has the potential to simplify, accelerate and reduce the costs of civil justice processes; and
- To strengthen the network of judges, lawyers and others who are using, promoting or considering court-ordered arbitration programs.

The conference marked an important step in a continuing Institute program announced last year to help expand the use of court-ordered arbitration nationwide. The program also includes technical assistance, grants for program development, implementation and evaluation, information sharing and guidance on provisions of statutes and court rules.

In this special issue of Dispute Resolution FORUM, we share with our readers highlights of the May 29-31 conference. Readers interested in the other parts of the court-ordered arbitration program, including its technical assistance and grants programs, are invited to write the Institute for information.

Madeleine Crohn, *President*  
National Institute for Dispute Resolution



*Chief Justice Warren E. Burger Told a Luncheon Audience at the conference that "lawyers and judges are rather difficult to persuade to change their habits and their methods. We've got to persuade them. We've got to pursue the court-annexed arbitration program."*

William R. Drake, deputy director of the National Institute for Dispute Resolution, and Thomas A. Fee, conference coordinator, prepared this report on the First National Conference on Court-Ordered Arbitration.

### Dispute Resolution FORUM

The National Institute for Dispute Resolution publishes Dispute Resolution FORUM several times a year as a medium for discussion and debate of the principal questions in the field. Each edition focuses on a single subject and, in addition, includes a brief summary of new information about dispute resolution under the heading "In The Process" and announcements of Institute programs and activities in a section titled "NIDR Notes." Readers wishing to submit letters, provide information for "In The Process," or be placed on the FORUM's mailing list should write Dispute Resolution FORUM, 1901 L St., N.W., Washington, D.C. 20036. Single copies of the FORUM are available without cost; bulk copies are available at a nominal price. William R. Drake, Editor

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## Court-Ordered Arbitration

At the conference, court-ordered arbitration was seen as a response to the challenge of devising and adopting an alternative to litigation which achieves two goals:

- Provides prompt, relatively inexpensive, fair and less formal resolution of a great many civil cases.
- Preserves, at the same time, the procedural and substantive rights of citizens involved in law suits.

Court-ordered arbitration differs significantly from traditional, commercial arbitration which is voluntary but binding on the parties. The key characteristics of court-ordered arbitration are that it is compulsory—the court orders the parties to present their case for arbitration—but non-binding in that either party can decide to appeal the decision reached in arbitration. Court-ordered arbitration is also known as court-annexed arbitration, judicial arbitration and court-administered arbitration.

In jurisdictions where court-ordered arbitration applies, a judge appoints an arbitrator or arbitrators, almost always attorneys, to hear evidence in civil suits that involve claims which are at or under set dollar amounts. The arbitration hearing occurs in a relatively informal setting with simplified procedures and, sometimes, a set time limit. If one or more parties in a suit refuses to accept the decision reached in arbitration, the action then can be pursued through formal litigation by requesting a trial *de novo*. Litigants do not lose their rights to the full course of court action if that is what they prefer. However, in some jurisdictions there are disincentives for appealing a judgment reached in arbitration. If parties accept decisions rendered in arbitration, the decisions are enforceable as judgments of the court.

The hallmarks, then, of court-ordered arbitration are that it is mandatory but nonbinding. It is also flexible in its applications, as discussions at the conference made clear. Details of programs differ from state to state or federal court district, for example, in the types of suits to which court-ordered arbitration may be applied; the ceiling on dollar amounts that can be involved in suits; the selection and payment of arbitrators; the disincentives to pursuing litigation; the level of involvement of the judiciary; or the point in the judicial process at which a case is referred to arbitration.



*Speakers at the Opening Session of the Conference were Chief Justice Robert N. C. Nix Jr. of the Pennsylvania Supreme Court (left), Dr. Deborah Hensler, senior social scientist at the Rand Corporation's Institute for Civil Justice, and Robben W. Fleming, chair of the National Institute for Dispute Resolution.*

## Background and Status

Pennsylvania is the testing ground of court-ordered arbitration. So it was to that state's experience that the conference's attention was directed first in presentations about the background and status of court-ordered arbitration. As Chief Justice Robert N. C. Nix Jr. of the Pennsylvania Supreme Court noted, his selection as conference keynote speaker was recognition that his state "since 1952 has accepted court-annexed arbitration as a viable, expeditious, alternative method of dispute resolution." A total of 53 of the state's 67 counties currently have court-ordered arbitration programs.

Chief Justice Nix cited studies which showed that in Philadelphia courts during the first decade of use of a court-ordered arbitration system, more than 66,000 cases were filed and slightly less than 65,000 were resolved. In the second decade, "the arbitration program continued to grow with nearly 103,000 actions filed and approximately 100,000 cases disposed of," he said. "It is anticipated that the system will dispose of between 200,000 and 225,000 cases in the decade of 1980 to 1990 in shorter time periods and at a lower cost than previously disposed of in the decade between 1970 and 1980."

"Of all cases that go into arbitration, the appeal rate (requests for trial *de novo*) runs in the range of eight to 11 percent," he said. "Most important—and all of these figures must be gauged by this consideration—is that the quality of dispute resolution is maintained so that there is not a sacrifice in the quality of the decision when you make the change from the traditional system to the annex or adjunct arbitration disposition," the chief justice said.

As described by Chief Justice Nix, the current arbitration program in Philadelphia provides that civil cases where the amount in controversy is \$20,000 or less be submitted to a panel of three attorney-arbitrators. Excluded are cases involving title to real estate and equity cases barred by law from the program. The state legislature is considering raising the limit to \$40,000. When an applicable suit is filed, a hearing date is set 240 days hence.

### Savings

Since a new arbitration center opened in Philadelphia in 1982, 48,500 cases were disposed of by way of arbitration settlement at an estimated savings in court costs of more than \$50 million,

according to Chief Justice Nix. "Similar successes have been achieved by the Pittsburgh arbitration program," he said. "In 1980 the program was responsible for about 60 percent of all civil case dispositions in the Court of Common Pleas (for Allegheny County), or a total of 10,689 cases. The average time between case filings and arbitration hearings was under—and this is unbelievable—three months. In contrast, a civil case filed in the regular trial division of that system required about two years to reach disposition."

For all the successes he cited for the programs in Pennsylvania, Chief Justice Nix cautioned that other jurisdictions should not move hastily or recklessly into various court-ordered arbitration formats.

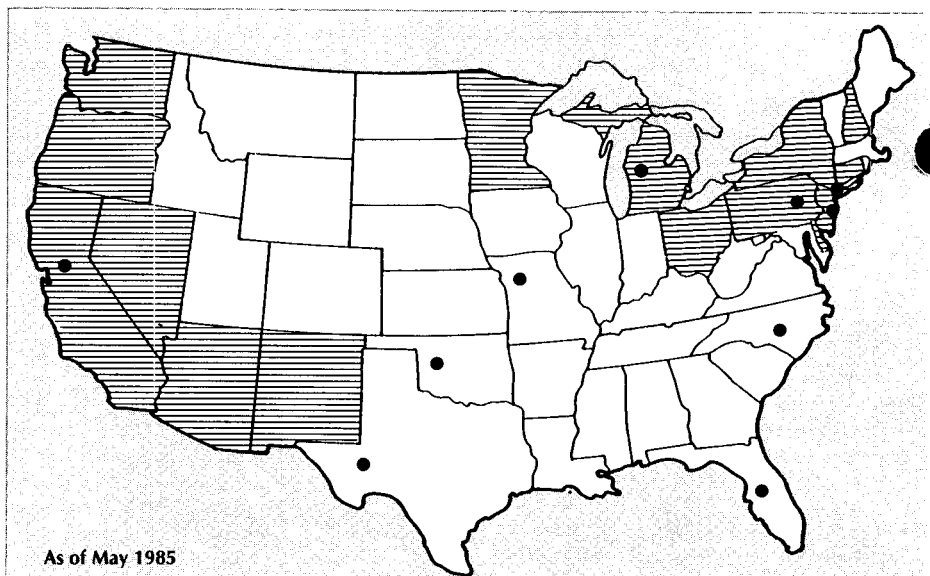
"Primary in the structure of any dispute resolution system is the maintenance or enhancement of the quality of the procedure," he said. "... The expeditious disposition, the cost saving, cannot be justified if the proceeding that we use as an alternative is in fact the proceeding which lowers the quality of dispute resolution. It is important that the courts oversee the workings of these programs, ... that they be court-related and court-controlled and court-supervised."

## Nationwide Overview

For an overview of court-ordered arbitration nationwide, the conferees heard from Dr. Deborah Hensler, a senior social scientist at Rand Corporation's Institute for Civil Justice. Her comments were based on her research and that of colleagues.

Dr. Hensler noted that by 1979 seven states had followed Pennsylvania's lead and authorized court-ordered arbitration programs. The states, clustered in the West and Northeast, were New Hampshire, New York and Ohio and Arizona, California, Nevada and Washington. "There's a regional pattern to the spread of arbitration ... that ... says something interesting about the way courts learn about this system and share their experiences," Dr. Hensler observed.

Still more or less clustered along regional lines, eight more states by 1984 had authorized programs:



Shaded areas on map show states (other than Alaska) which have authorized court-ordered arbitration programs. Dots signify federal district courts that have authorized programs.

Alaska, Connecticut, Delaware, Michigan, Minnesota, New Jersey, New Mexico, and Oregon. In addition, ten federal court districts had authorized programs. The accompanying map notes the states and federal court districts that have authorized court-ordered arbitration programs.

## Program Adoption

Within individual states, the pattern of adoption of court-ordered arbitration programs "is that quite frequently, as one court adopts the program and feels it's successful, the program spreads," according to Dr. Hensler.

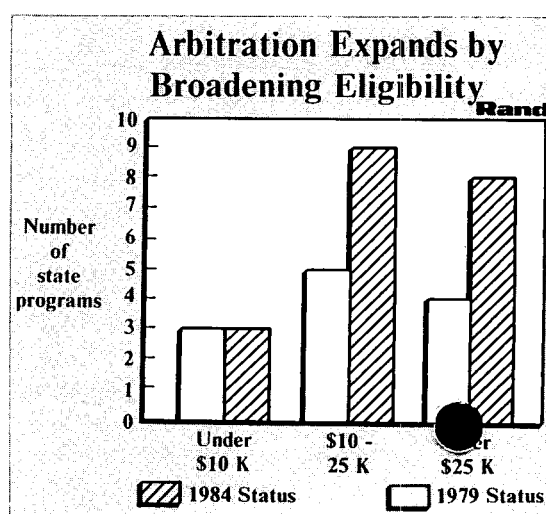
Still another way in which court-ordered arbitration grows is through expansion of the dollar limit for eligible cases. This expansion is noted in the accompanying chart, which the Rand Corporation prepared for Dr. Hensler's presentation. As she noted, there is "in particular a really substantial growth in the number of states that have authorized programs over \$25,000."

And so there has been in terms of court-ordered arbitration "an enormous amount of program adoption in a relatively short period of time," according to Dr. Hensler. She estimated that currently about 200 trial courts are operating court-based arbitration programs.

## Program Popularity

Dr. Hensler attributed the popularity of these programs to their promise of maintaining acceptable outcomes while achieving several goals: reducing court congestion; saving taxpayers' money; expediting smaller civil suits; and improving access to the court for diverse users by reducing costs imposed on litigants, simplifying the process of dispute settlement and providing a procedure that is viewed by litigants and their attorneys as fair.

Dr. Hensler graded the success to date of court-ordered arbitration programs in achieving the following goals.



**Reducing court congestion:** Here she found that "with jurisdictional limits of \$10,000, \$25,000 and above, most courts are able to divert a substantial portion of their civil case load and dispose of that case load through the arbitration program. In the courts that I've examined, somewhere between 60 and 80 percent of all money damage suits are handled through arbitration programs." The actual percentage depends on the types of cases in the particular program, the types of cases eligible for arbitration and how cases are assigned.

**Saving taxpayers' money:** The potential

division." Dr. Hensler said that when more information and analyses are available, "I suspect . . . we will see cost savings as a result of arbitration, but I'm not willing to assign a grade until I can get some more numbers . . ."

**Expediting cases:** "In every court that I've looked at, it is possible to get a case through arbitration more quickly than . . . through trial," Dr. Hensler said.

**Serving diverse users:** Dr. Hensler gave high marks to court-ordered arbitration programs for serving diverse



*Chief Justice Herman Lum of the Hawaii Supreme Court addressed a question to the panel on the background and status of court-ordered arbitration.*

is clear, Dr. Hensler said, but until more information is available she could give no grade on how well court-ordered arbitration saved taxpayers' money. She noted that "the cost of the jury trial is many, many times the average cost of hearing a case in arbitration." But a problem in using currently available figures "to infer cost savings is that many of the cases that are adjudicated through arbitration would never have been tried either at civil jury trials or bench trials," she said. In addition, she said, "To do a really careful analysis you have to understand more about the cases that move between . . . arbitration and the trial

users. In the words of a Rand Corporation study of Allegheny County, Pennsylvania's program, "All kinds of cases go through the program." The cases include tort, contract, collection and consumer disputes and involve both individual and institutional litigants who reflect a cross section of the population, including those who have attorneys and those who do not have representation (so-called *pro se* litigants).

**Saving litigants' money:** "The jury is still out on how arbitration affects litigants," according to Dr. Hensler. She said "the question mark has to do with

When we speak of arbitration, mediation and other non-courtroom methods for dispute resolution, we invariably refer to them as alternatives to the traditional adjudicatory forum. I believe the use of the word "alternative" may be misleading (in the context of court-ordered arbitration) because it connotes a certain degree or an element of antagonism or separateness . . . It would be more appropriate to use the term "adjunct" when referring to court-enacted methods of dispute resolution.

"Adjunct" implies an extension or an arm of the courtroom system, and this indicates cooperation, or the idea of working together. Thus . . . court-annexed dispute resolution programs should not be viewed strictly as alternatives to the traditional role of trial in courts in our society, but rather as adjuncts to those court systems which, when maximized, will enhance the quality of civil justice.

While these adjuncts serve to remedy some of the deficiencies inherent in our traditional adjudicative process, their purpose should not be to replace the well-entrenched role of the trial in appellate courts in our system. Whether perceived as good or bad, we cannot escape the fact that America is a litigious society and that our state and federal judicial systems are viewed as the primary forums for dispute resolution.

From the Conference keynote speech of  
Chief Justice Robert N.C. Nix Jr.  
Supreme Court of Pennsylvania

attorney's fees." In Pittsburgh, researchers found that, where defense attorneys charged on an hourly basis, it was possible to get through arbitration for about \$400, she said, adding, "That seemed like a fairly reasonable amount in relation to the amounts of money that were at stake in these cases." Researchers also found in Pittsburgh a sizeable number of attorneys who took cases through arbitration for an aver-

age flat fee of \$250. But, Dr. Hensler said, "It was still the norm in Pittsburgh as elsewhere for plaintiffs' attorneys to take these (arbitration) cases on a contingency basis, and that is where the question mark arises." She noted that some judges and legislators have suggested that plaintiffs' attorneys might charge a somewhat lower contingency fee for cases in court-ordered arbitration programs because, among other reasons, the cases require less time and preparation. "By and large, at least based on the observational or anecdotal data that I've been able to collect . . . that doesn't happen," she said. "Generally attorneys seem to stick to their one-third contingency fee." Dr. Hensler indicated that more information is needed before a definitive assessment can be made on whether court-ordered arbitration saves litigants money.

**Simplifying the process:** "It's clear that arbitration does this," Dr. Hensler said, adding that in her research she has "yet to hear of a program that is unduly complex." Hearings generally run for a half hour to two hours. When asked whether arbitration hearings are formal or informal, and how they feel about hearings outside the courtroom, litigants say they experience about "just the right amount of formality," she said. Litigants surveyed about court-ordered arbitration also said that

the process is easy to understand, they feel more or less comfortable with it, and they "don't view it as being undignified or being careless or, in any sense, a second-class type of process," according to Dr. Hensler.

**Fairness:** "Litigants seem to view arbitration as giving them the same amount of care and fairness as trial did, and where there's an edge, the edge seems to be in favor of arbitration," according to Dr. Hensler whose observations were based on surveys of litigants.

### The Acid Test

Noting similar comments by Chief Justice Nix, Dr. Hensler said the acid test for court-arbitration programs is to study outcomes.

Summarizing what is known about outcomes of arbitration hearings, she said appeal rates range at the 20 percent level for many long-established programs to around 50 percent for some new programs, including some programs "on the West Coast where appealing seems to be more in style."

But "appeal rates don't necessarily mean that the cases go to trial," Dr. Hensler observed. "In fact, they probably tell us more about legal practices than they do about the acceptability of outcomes. The real test is the actual trial rates and . . . the percentages range somewhere between three and ten percent, again depending on the jurisdiction and perhaps . . . on how

long the program has been around."

Dr. Hensler said that Rand Corp. researchers examined the arbitration program in Allegheny County to see if there was evidence of a systematic pattern of advantage or disadvantage toward certain types of litigants or cases. The purpose was to determine whether the program was producing fair outcomes. The researchers could find no "overwhelming differences suggesting there was some kind of bias," she said.

The only possible exception she has found to date in regard to the question of biased outcomes involves *pro se*s, Dr. Hensler added. In Allegheny County, unrepresented parties fared worse when they faced parties with representation. But when unrepresented parties faced each other, "it was just the same" as when represented parties faced each other, she said. "What we were looking at was the disadvantages that unrepresented folks face in our legal system," she observed. "It doesn't seem to be wiped out by arbitration."

Finally, she said, in Allegheny County the researchers examined the results of appeals. "We thought that if the arbitration awards did have some kind of underlying bias in them, then we'd see a major swing when we looked at the appeal outcomes," Dr. Hensler said, adding, "We didn't see anything like that."

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## Debating Court-Ordered Arbitration

To provide a framework for discussion, conferees were presented with a series of papers examining the State of New Hope, a hypothetical jurisdiction where court-ordered arbitration has been in place in several counties for almost four years. New Hope merges the characteristics of many jurisdictions "into an amalgam which, if it does not qualify as an 'average' court-ordered arbitration jurisdiction, at least falls in the center of the continuum of jurisdictions which now have or are considering such programs." The words are those of Jonathan B. Marks, president of EnDispute, Inc., who created New Hope as a centerpiece of conference discussions.

Nowhere were those discussions more useful than in a panel session prodded into lively debate by Professor Charles Nesson of Harvard Law School. The twelve panel members brought to the session a diversity of backgrounds and knowledge of court-ordered arbitration. They were judges, lawyers, court administrators and consultants, a legislator and a representative of the insurance industry. Having read the conference papers on New Hope, the panel members were familiar with the laws and politics of the hypothetical state.

Professor Nesson, in the manner of a Socratic dialogue, explored several key issues surrounding court-ordered

arbitration. His technique encouraged a spirited give-and-take and the assumption of clearly defined positions among panel members. The issues Professor Nesson raised included the roles of judges and legislators in determining the structure and substance of court-ordered arbitration programs; the question of who should serve on arbitration panels; the role of attorneys in supporting programs and their compensation for serving on panels; the support of the insurance industry for court-ordered arbitration; and the dollar ceilings affecting the eligibility of cases for court-ordered arbitration programs.

To begin the session, Professor Nes-



*A Twelve-Member Panel Debated the Promise and Potential of court-ordered arbitration during the conference's second day.*

son asked the panel to assume that in 1981 he, as New Hope's chief justice, put through a rule that permitted court-ordered arbitration and that a few jurisdictions implemented programs. Then recently, "like a moving train," court-ordered arbitration became a center of controversy. The governor and the head of the Senate Judiciary Committee want to get in on the act. Legislative hearings are scheduled on the effectiveness of pilot court-ordered arbitration programs and whether they should be continued. The chief justice is "interested in pushing this thing . . . On the other hand, (he's) quite sensitive to the political problems of it." What should the chief justice do about the hearings?

Edited excerpts from the transcript of the session:

### **Courts and Legislature**

*Alan B. Morrison*, a lawyer with the Public Citizen Litigation Group in Washington, D.C.: It seems to me that a lot of the impetus for this is coming from judges who don't like little cases . . . They want to try big, important cases . . . And most of the people I represent are little people and they're wor-

ried . . . whether they're going to be shunted to the side, they'll never see any judges, they're going to get stuck with a bunch of lawyers . . . That doesn't sound like a very good idea. I don't know that the judge should be deciding this at all . . . You ought to tell the legislature that it's their responsibility if they want to change the system of justice . . . We didn't elect you.

*Chief Judge Richard Dunn*, Wayne County, Michigan Circuit Court: Doesn't the Constitution give the legislature the rule-making power for our trial divisions? Haven't we got to rely on the legislature if we want to expand this program?

*Professor Nesson*: They can take it away if they want . . . How (do) I keep control of it?

*Sheldon Miller*, a Detroit lawyer: It should come from the bar because if the lawyers don't accept it, nobody is going to shove it down their throats.

*Judge Dunn*: As chief justice, of course, you have the rule-making power for the Supreme Court, and . . . the court is exclusive in its rulemaking powers when it involves procedure . . . You would be making a mistake to let the legislature shape the rule for you rather than you doing it yourself.

*Presiding Judge Edward Bradley*, Philadelphia Court of Common Pleas: I disagree thoroughly . . . We have got to have the cooperation of the legislature. If this program is going to be expanded, it's going to take money . . . You don't have the power of the purse. The legislature has to be kept on board and kept interested . . .

*Professor Nesson*: I can feel a move coming to break up the lawyer domination of the arbitration panel . . . Ms. Sytek, I'll bet you don't want lawyers in the arbitration panel . . .

### **Arbitration Panels**

*Donna P. Sytek*, chair, House Judiciary Committee, New Hampshire State Legislature: There is a great deal of feeling on the part of legislators that we would like to satisfy our constituents. We're looking out for the little people, too, and so I think what you have to look at in any program is the public's satisfaction with the way it works . . . If they go before a little panel of lawyers and are unhappy with the results, and at least half the people who go before them are going to be unhappy, . . . you've got a serious problem. So I

would suggest you work hand in hand with the legislature . . .

**Mr. Morrison:** Do arbitrators get paid?

**Professor Nesson:** Yes.

**Mr. Morrison:** You've got a new job program for lawyers. Is that right?

**Professor Nesson:** Yes.

**Mr. Morrison:** That sounds like a pretty good deal. How do the people get involved?

**Professor Nesson:** You want to have just regular people on these arbitration panels?

**Mr. Morrison:** Yes, just like a jury . . . Why shouldn't we have at least some people who are not lawyers . . . on these programs?

### "Lawyers Settling Cases"

**Professor Nesson:** You've got to understand what this arbitration thing is about . . . It's lawyers settling cases . . . And the best people to make lawyers settle cases are going to be other lawyers.

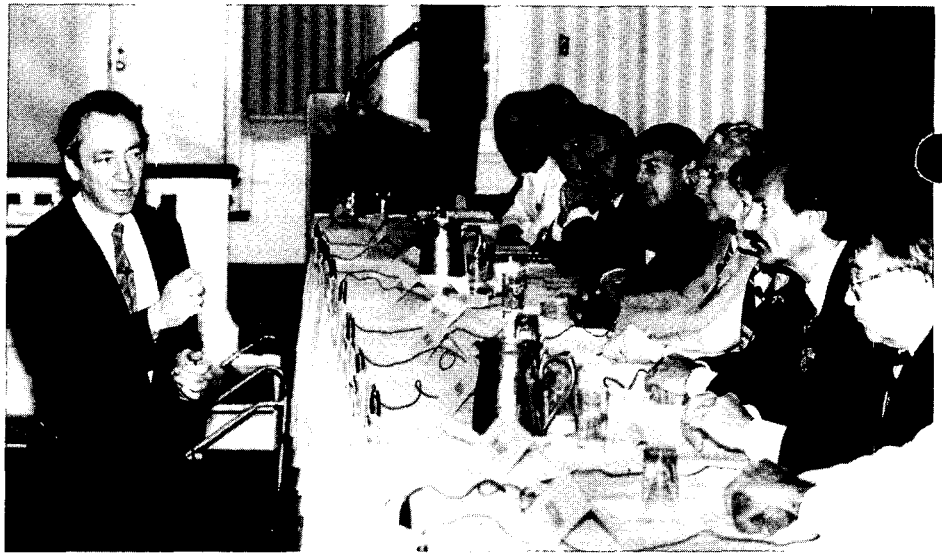
**John Keigher,** a Rochester, NY, lawyer: The (court-ordered) arbitration system is . . . designed to deliver legal services to constituents, to litigants, to people, to consumers. The lawyers involved in the system are not consumers of those services. They are the deliverers. They're operating in a way that so far in our state has proven to be very economical and very satisfying to those who are involved in it . . . In the legislature you have got to stress that you're trying to develop . . . and expand a system to provide affordable legal services for disputants in cases that warrant this kind of system.

**Professor Nesson:** Mr. Lesniak, do you want just lay people as your arbitrators?

**Walter Lesniak,** arbitration administrator, Allegheny County, Pittsburgh: No, I would prefer lawyers . . . because all 6,000 lawyers in Allegheny County agree with our arbitration program. They're happy with it. Furthermore, we move in swift resolution of all of the cases, and naturally a lawyer moving his case more promptly is going to get paid sooner.

**Professor Nesson:** How do you get good lawyers as your arbitrators?

**Mr. Lesniak:** The first selected on



**Professor Charles Nesson of Harvard University Law School** led the panel through a "Socratic dialogue" on key issues surrounding court-ordered arbitration.

each panel is a lawyer with three or more years trial experience . . . He's flanked by two other lawyers of less trial experience.

**Professor Nesson:** And how much do you pay them?

**Mr. Lesniak:** \$100 a day.

**Professor Nesson:** Do they do it for the money?

**Mr. Lesniak:** I'm sure some of them do it because I always have a gallery every day, hoping that some arbitrator doesn't show that morning so that he can be put in.

**Justice James G. Exum,** North Carolina Supreme Court: How do you really know that your lawyers are happy with the program?

**Mr. Lesniak:** Of all these cases tried in arbitration, our appeal rate is only about 28 percent.

### "Who are These Lawyers?"

**Professor Nesson:** Tell me more about this. Who are these lawyers . . . ?

**Judge Bradley:** These are lawyers who are fresh out of law school. They really know the law . . . In Philadelphia, we have 4,000 lawyers who participate as arbitrators, which is 50 percent of our entire bar . . . We pay them \$200 a day . . . Most lawyers aren't doing it for the money. They might not want to do it if they weren't getting paid anything, but I don't think most of them look upon it as a bonanza . . . I think they are doing it because they

think the program is helpful in dealing with our civil backlog . . . It's important that you . . . enlist . . . the plaintiff bar, the defense bar and the insurance companies. I think you'll be able to persuade the legislature if you need their cooperation.

**Professor Nesson:** Justice Dolliver, who do you get as your arbitrators?

**Chief Justice James M. Dolliver,** Supreme Court of Washington: (In) King County (Seattle), we've . . . 950 people who are arbitrators . . . One reason they do it (is that) if they don't do it, something worse is going to happen to them . . . Now they have control of a program which they can make work . . . Part of it is self-interest, which is one of the great engines of the world, and the self-interest is, "If we don't make this work, somebody else would for us," and that's spelled L-E-G-I-S-L-A-T-U-R-E. And nobody wants that.

**Professor Nesson:** Explain the self-interest . . .

**Chief Justice Dolliver:** In our state at least, the climate of opinion is such . . . that (if) the problem of backlog and delay is not addressed by the bar, it's going to be taken away from the bar.

**Professor Nesson:** (Are lawyers) going to make more money if (court-ordered arbitration systems) work?

**Chief Justice Dolliver:** You will assure you'll continue to make whatever you're making now. I don't know whether you're going to make more



money. You'll assure that the profession's position will be maintained . . .

**Mr. Keigher:** Lawyers will make more money because we will be able to handle more cases (and) be able to dispose of more cases in an equitable fashion.

**Dr. Maureen Solomon,** court management consultant, Lakewood, Colorado: The evidence we have from many courts around the country is that the attorneys openly concede that when they are able to get more cases concluded in a just manner over a shorter period of time, actually their income goes up.

## The Insurance Industry

**Professor Nesson:** I'll bet Mr. Berryman . . . likes these arbitration programs.

**Charles Berryman,** assistant vice president, Alliance of American Insurers: We're one of several groups that like them. The plaintiffs' attorneys tell us they can't afford to handle the smaller cases. The defense bar tells us it's uneconomical for them to provide that type of defense in these small cases, and, as far as the carriers, we're getting eaten alive by legal expenses.

**Professor Nesson:** You're really excited about this arbitration stuff . . . because your companies (are) going to save a bundle. And if you're saving a bundle, who's losing the bundle?

**Mr. Berryman:** Saving doesn't mean anyone's losing. This we would violently disagree with. It's money that can help keep insurance rates reasonable . . .

**Mr. Keigher:** There's plenty of work out there?

**Mr. Berryman:** Absolutely.

**Mr. Keigher:** For defense lawyers?

**Mr. Berryman:** Absolutely.

**Mr. Keigher:** If they get rid of more files, there's still plenty more files coming in?

**Mr. Berryman:** Unless the defense bar can handle these cases at an economical level, more and more carriers are going to turn to their own in-house counsel . . . The defense bar and the private practice sector are going to lose . . . opportunities to serve, so it's in everyone's best interest to contain the cost of litigation.

## Jurisdictional Limits

**Professor Nesson:** I'm curious about the jurisdictional amount (on court-ordered arbitration cases) . . . What's your limit in Philadelphia?

**Judge Bradley:** \$20,000.

**Mr. Berryman:** You've got to be very careful when you go to raise the limit . . . I wouldn't go from \$20,000 to \$100,000 overnight . . . I would have to sound out how . . . both the plaintiffs' bar and the defense bar feel about raising the limits.

**Judge Bradley:** And the insurance community, as represented through the defense bar . . . We're now contemplating . . . asking the legislature (in Pennsylvania) to raise the limits to \$40,000. But I've told the bar and the insurance industry that even if we get the authority, we will only raise it in the first instance to \$30,000 and then check our experience under that.

**Professor Nesson:** Why are you being so cautious?

**Judge Bradley:** Because . . . the program depends on the support of lawyers. If they don't support it, then it's not going to work . . . In our system, the lawyers determine whether or not the case is going to arbitration. We don't tell them, "Your case is worth \$40,000 or \$20,000." They say, "My case is worth \$20,000 and I want it in arbitration." . . . If we raise (the limit) to \$40,000 and the lawyers haven't bought that, they will not say, "This case is worth \$40,000." They'll say, "It's worth more," and not go into arbitration. So we want the bar to say, "Yes, we want this case in arbitration."

**Judge Dunn:** I would be violently opposed to letting lawyers determine the forum. The forum has to be determined by the court, not the lawyers.

**Mr. Keigher:** As long as there is a right to a trial, if you don't like the results of the arbitration, there is no reason to put any limit on it at all. If it works for one case, it works for all cases.

**Professor Nesson:** Mr. Morrison, be a plaintiff's lawyer for me. Can you imagine a case you wouldn't want to go into arbitration?

**Mr. Morrison:** If the other side had done a lousy job on discovery . . . and

Despite some recent advances, it is still true that the quality of justice one receives in our courts depends far too much on the size of one's bank account. It also is true that litigation costs so much in this country that there's no place for anyone to resolve many of the most common forms of disputes. And it is still true we have been very, very slow to offer disputants any choice of how they go about resolving their differences, at least if they want to use a government-funded forum.

And so . . . we should be asking how arbitration and other court-centered alternatives can be designed to address the fundamental problems of equal justice and equal access that continue to plague the American court system.

From the Conference banquet  
speech of  
Justice Earl Johnson Jr.  
California Courts of Appeal

they hadn't found out what was really going on and what happened, if I've got to go through my whole case (in arbitration) as a dress rehearsal, (my opponent) may get very well educated and that's not going to make me very happy. So . . . (if) there's sort of a free round of discovery for the defendant, and I think I can do much better in front of the jury, . . . I don't want to go to arbitration.

At the panel's conclusion, Professor Nesson offered his own observations as "a relative newcomer" to the subject of court-ordered arbitration. "What's impressive to me about this subject is its youth. It's an incredibly young and vigorous field. It's just got muscle all over the place . . . Driving this, it seems to me, is a combination of two things. First, it's got enormous popular appeal. This idea of simplification in adjudication is just an extraordinarily attractive image, a kind of anti-lawyer image, even though it's lawyers that have a lot to do with the process. And, secondly, . . . it's very hard to see where the enemies of this are . . . So it looks like a real growth stock."



*Friesen*



*Mackoff*



*Goldberg*



*Lambros*

**Putting Court-Ordered Arbitration Into a Broader Context** was the theme of a panel discussion on the conference's final day. The session focused on integrating court-ordered arbitration with existing court procedures and other court-annexed dispute resolution programs.

U.S. District Court Judge Thomas Lambros of the Northern District of Ohio discussed the summary jury trial which he uses "in those hard-core, durable cases that have defied resolution through the usual process." Professor Stephen B. Goldberg of Northwestern University School of Law explored the appointment of special masters who attempt to mediate the "very few . . . , very complex cases which individually take a lot of time to try." Judge Benjamin S. Mackoff of the Cook County, Illinois Circuit Court described his court's mediation program which

uses six judges to handle between 13,000 and 15,000 cases a year, primarily automobile injury negligence suits.

Moderator of the panel was Ernest C. Friesen, dean of California Western School of Law in San Diego and former director of both the Institute for Court Management and the Administrative Office of the U.S. Courts. Friesen told the panel "the best disposition of a case is when two well-prepared, competent lawyers agree on the settlement, no one having an advantage of the bargain based upon wealth or other factors." He said rigorous judicial case flow management is essential to achieving such settlements. "There are five basic concepts of case flow management, and they all deal with managing the case from beginning to end," Dean Friesen said.

The first concept is early judicial

control. "It doesn't mean waiting until the lawyers say they're ready," he said. "It means making sure the lawyers get ready . . . And the reason we get so many settlements before the arbitration event occurs is because lawyers got ready for the arbitration. They got prepared. They evaluated their case. And they settled it and closed it."

The second concept is continuous control which means judges monitor events, according to Dean Friesen. He said that he could point to two arbitration programs that failed because sending cases to arbitration was only a diversion and placed them in "limbo."

The third concept is short scheduling which "means that you don't let things out there very long before you have something happen," he said. "You have to set up systems that bring the lawyers' attention to the matter about two weeks before an event's going to occur," Dean Friesen said. "If you want an arbitration to be effective, you'd better have them (lawyers) do something within the two-week period before they go, or what will happen? They'll go in and need a continuance . . . because they're not prepared."

The fourth concept is that judges must reasonably accommodate attorneys, according to Dean Friesen. "With these two-week intense periods, you have to let them have some leeway," he said. "They've got to practice law and make a living. If you don't, they'll figure out ways to beat the system."

The final concept is that the system works, whether it involves an arbitration, mediation or pretrial conference "only if the events occur when they're scheduled to occur," Dean Friesen said. "You set up an arbitration that doesn't occur when it's scheduled, the system breaks down," he said.

Summing up, Dean Friesen stressed again the importance of getting "lawyers prepared so that they can make the best settlement possible between prepared lawyers, competently dealing with their cases."



# Workshops on Court-Ordered Arbitration

An important feature of the conference was a series of discussion workshops in which participants from diverse backgrounds and different jurisdictions searched for a common understanding of the benefits of court-ordered arbitration and of questions about its use. Facilitated by five specialists in dispute resolution, these sessions were not intended to produce consensus reports. But a number of common themes were heard when workshop leaders presented three questions for discussion:

- What are the objectives of court-ordered arbitration?
- How is success in achieving these objectives measured?
- How does court-ordered arbitration relate to other judicial settlement and dispute resolution methods?

**Objectives of court-ordered arbitration.** Conferees numbered among the principal objectives of court-ordered arbitration reduction of civil case inventories and judicial backlogs; speedier settlements of cases; improved access to courts; simpler and less formal hearing procedures; reduced costs to parties; cost savings to courts and the public; improved use of judicial resources; increased con-

sensual settlements through acceptance of arbitration awards by all parties; and, ultimately, increased satisfaction of the parties with the process and the outcome of their cases.

**Measuring success.** Workshop participants called for rigorous measurement of court-ordered arbitration programs both during design and after implementation. They acknowledged the methodological difficulties associated with evaluating judicial processes. Nonetheless, they emphasized the need to develop evaluation mechanisms, both qualitative and quantitative, which compare the efficacy of traditional court-ordered arbitration procedures with other dispute resolution and settlement methods.

Although the conferees had divergent perspectives on how to measure the success of court-ordered arbitration programs, they tended to focus on fundamental questions that should be asked when developing and evaluating programs. They suggested that agreement on a list of questions would make developing methods for measuring success less difficult.

**Court-ordered arbitration and other settlement methods.** Workshop participants noted that the goals of court-ordered arbitration and other settlement methods are often very similar. There was a sense within discussion groups that court-ordered arbitration should be considered as one of several methods of dispute settlement that can be used to promote a fairer and more efficient civil justice system.

Negotiation, mediation, evaluation, arbitration, the use of special masters and settlement conferences are some of the processes which may be used as complements to trial in producing a more effective and more manageable court system. The workshop participants noted that, along with court-ordered arbitration, these processes share similar objectives such as earlier settlements, consensus among parties, reduction of case inventories, backlog and congestion and the improved use of judicial resources.



*Addressing the Concluding Session of the Conference, Madeleine Crohn, president of the National Institute for Dispute Resolution, told conferees, "We have recognized that court-ordered arbitration holds the promise for adoption in a markedly increased number of jurisdictions and can make a vast contribution to resolving the great mass of civil suits that are filed each year. If managed wisely, court-ordered arbitration each year can provide millions of litigants with fair yet speedier handling of their cases. . . . In sum, court-ordered arbitration can become one of the main complements to litigation within our civil justice system."*

*Of the conferees, she said that "never before has an assembly as knowledgeable about the issues and interested in the advancement of court reform . . . addressed the principal questions surrounding court-ordered arbitration." She called on them and others interested in court-ordered arbitration to make use of the resources available through the Institute's court-ordered arbitration program.*

The five workshop facilitators were Thomas R. Colosi, vice president for national affairs, American Arbitration Association; William R. Drake, deputy director, National Institute for Dispute Resolution; Sanford M. Jaffe, director, Dispute Resolution Assistance Center, Institute of Judicial Administration; Jonathan B. Marks, president, EnDispute, Inc.; and Russell Wheeler, deputy director, Division of Continuing Education and Training, Federal Judicial Center.



*Wade Barber Jr., Chairman of the Alternatives to Litigation Task Force of the North Carolina Bar Association, moderated one of several conference workshops.*

## Court-Ordered Arbitration Grants

As part of its comprehensive court-ordered arbitration program, the National Institute for Dispute Resolution so far has awarded grants and contracts totaling \$113,300 to assist in the examination and adoption of court-ordered arbitration programs. The Institute has reserved a total of \$450,000 for grants of this type.

### Grants

The American Bar Association received \$5,800 for a planning meeting which explored implementing an arbitration process as part of the ABA's Multi-Door Courthouse project in Houston, Tulsa and the District of Columbia.

The Boston Bar Association received \$3,000 to help sponsor a statewide conference of judges whose discussions focused on court-ordered arbitration as one of several alternative dispute resolution processes.

The Hawaii Judiciary Program on Alternative Dispute Resolution received \$2,500 to fund travel for judicial and bar leaders to the Institute's conference.

The Institute of Civil Justice (ICJ) of the Rand Corporation received

\$16,200 to survey the status of court-ordered arbitration nationally. ICJ published the survey's results in a report titled *Court-Annexed Arbitration: The National Picture*.

The New Jersey Administrative Office of the Courts received \$20,000 to support demonstration projects developed by the New Jersey Supreme Court's Committee on Complementary Dispute Resolution Programs.

The North Carolina Bar Foundation received \$5,800 to assist its task force on alternative dispute resolution in considering introduction of court-ordered arbitration in the state. Task force members visited states with court-ordered arbitration programs and developed recommendations for implementation. (The North Carolina legislature adopted legislation authorizing court-ordered arbitration programs in July, 1985.)

The Private Adjudication Center, Inc., at Duke University received a \$15,000 renewable matching grant to evaluate the newly established court-annexed arbitration program in the Middle District Federal Court

in North Carolina.

The Wisconsin Office of the Governor received a \$10,000 grant, to match another \$10,000 in state funds, to support a task force on civil justice made up of state executive, legislative and judicial officials. The task force is to explore the uses of court-ordered arbitration and other methods for resolving civil suits.

### Contracts

The Dispute Resolution Assistance Center of the Institute of Judicial Administration, directed by Sanford M. Jaffe, received \$10,000 to provide technical assistance to state court systems and bar groups which are considering adopting court-ordered arbitration programs.

EnDispute, Inc., Jonathan B. Marks, president, received \$10,000 to assist the Institute in preparing an issues manual and other publications growing out of the court-ordered arbitration conference.

For further information on the Institute's grants program, write to William R. Drake, deputy director.

## Conference Acknowledgments

The following organizations cooperated with the National Institute for Dispute Resolution in sponsoring the First National Conference on Court-Ordered Arbitration:

- American Arbitration Association
- American Academy of Judicial Education

- American Bar Association, Special Committee on Dispute Resolution
- American Judicature Society
- Conference of State Court Administrators
- Coordinating Council of National Court Organizations
- Dispute Resolution Assistance Center, Institute of Judicial Administration

- Institute for Civil Justice, Rand Corporation
- National Association of Trial Court Administrators
- National Judicial College

Several members of the Institute's Board of Directors took an active part in the conference: Robben W. Fleming, Institute chair and former president of the University of Michigan and of the Corporation for Public Broadcasting; Rhoda H. Karpatkin, Institute secretary/treasurer and executive director of Consumers Union of the United States, Inc.; Ambassador Donald F. McHenry, professor of diplomacy and international affairs at Georgetown University; and Judge Ernst

John Watts, former dean of the National Judicial College at the University of Nevada.

Dr. Mark Cannon, executive assistant to the Chief Justice of the United States, and James K. Stewart, director of the National Institute of Justice, lent valuable assistance to the conference.

The following persons led discussions at various conference sessions:

Wade Barber Jr., chairman, Alternatives to Litigation Task Force, North Carolina Bar Foundation, Pittsboro, NC; Michael Bridenback, director, Judicial Management and Coordination, Office of the State Court Administrator, Tallahassee, FL; William B. Eldridge, Ph.D., director, Research Division, Federal Judicial Center,

Washington, DC;

Judge Phillip Etheridge, Fulton County Superior Court, Atlanta, GA; Carole Green, King County arbitration administrator, Seattle, WA; Michael E. Kunz, clerk, U.S. District Court, Philadelphia, PA;

Judge Jerome Lerner, Cook County Circuit Court, Chicago, IL; Susan E. Mako, assistant director, Ohio Supreme Court, Columbus, OH; Judge Joshua W. Martin III, Superior Court of Delaware, Wilmington, DE;

Chief Judge Wendell A. Miles, U.S. District Court, Grand Rapids, MI; Michael Planet, judicial administrator, Maricopa County, Phoenix, AZ; Judge Irving A. Shimer, Los Angeles Superior Court, Los Angeles, CA;

Kathy Shuart, court administrator, Durham County Superior Court, Durham, NC; Justice John E. Simonett, Minnesota Supreme Court, St. Paul, MN; Terry Simonson, director, Multi-Door Courthouse Project, Tulsa, OK; Alan Slater, executive officer, Superior Court, Orange County, CA;

Linda Stamato, associate director, Dispute Resolution Assistance Center, Institute of Judicial Administration, New York, NY; Carmon Stuart, Private Adjudication Center, Duke University School of Law, Chapel Hill, NC; Judge Harold Takiff, Court of Common Pleas, Philadelphia, PA; Russell Woods, Westfield, NJ.

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## IN THE PROCESS: Resources for the Field

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By Robert M. Jones

### JOURNALS AND NEWSLETTERS

The *New Jersey Center for Public Dispute Resolution*, one of the five State-wide Offices of Mediation supported by NIDR, now publishes a newsletter on its activities. For more information, write to the Center, Department of the Public Advocate, CN 850, Trenton, N.J. 08625. . . . The *Mediation Quarterly's* Volume 7 is titled "Mediating between Family Members" and includes six articles focusing on disputes between family members throughout the life cycle. Volume 8 is titled "Making Ethical Decisions" and focuses on various model standards of practice that have been developed. . . .

### CLEARINGHOUSES

The Center for Public Resources has announced that, as a part of its legal program, it has started a *Computerized Information Clearinghouse* providing information on dispute resolution, cost effective litigation management, discovery control, dispute prevention and judicial application of dispute resolution. For more information, write CPR Legal Program, Erika Fine, Vice President, 680 Fifth Avenue, New York, NY 10019. . . .

The Wisconsin Law School's Dispute Resolution Clearinghouse recently published the second issue of its newsletter, *Dispute Resolution Notes*, which focuses on teaching of dispute resolution in family law. . . .

The Dispute Resolution Information Center, established at the National Criminal Justice Resource Service, has published an annotated bibliography titled *Dispute Resolution: Techniques and Applications, a Selected Bibliography*. For further information, contact Ellen Mowbray at the Center (Box 6000, Rockville, MD 20850). . . .

### BOOKS AND ARTICLES

The first commercially published law textbook on dispute resolution is now available. *Dispute Resolution* (Little

Brown and Co., Boston, 1985, 625 pp) by Professors Goldberg, Green and Sander provides both an overview of various dispute resolution processes as well as a series of problems testing the student's ability to apply what has been learned. A teacher's manual is also available. Development of the book was in part funded by NIDR. Timothy Sullivan's *Resolving Development Disputes Through Negotiations* (Plenum Press, New York, 1984, 238 pp) presents an insightful analysis of the context and special problems of negotiations over development projects. The author argues that only when laws provide specific support and endorsement for negotiated development similar to those provided by labor law for collective bargaining will the benefits of negotiated processes in development and environmental disputes be realized. As Sullivan points out, mediators play a major role in development bargaining efforts because parties are often negotiating with each other for the first and last time and possess little training in negotiations. This book is part of a series edited by Larry Susskind and titled "Environmental Policy and Planning," which also includes Professors Bacow and Wheeler's book, *Environmental Dispute Resolution* (Plenum, New York, 1984, 368 pp). . . .

The Institute for Environmental Negotiation at the University of Virginia has recently published *Not in My Backyard! Community Reaction to Locally Unwanted Land Use*, a collection of conference papers by scholars in philosophy, psychology, planning, law, sociology and dispute resolution exploring the ethical, philosophical, political and legal considerations that come into play when a LULU (locally unwanted land use) is being proposed. For more information, write IEN, Campbell Hall, University of Virginia, Charlottesville, VA 22903. . . .

James Wall's new text, *Negotiation: Theory and Practice* (Scott, Foresman and Company, Glenview, Illinois, 1985, 176 pp) covers in detail various negotiation strategies, tactics and maneuvers as well as a variety of factors that have an impact on negotiations such as third parties, negotiator-

constituent relationships, and negotiators' experience. . . . BNA Books has recently published the fourth edition of Elkouri and Elkouri's definitive *How Arbitration Works* (Bureau of National Affairs, Washington, D.C., 1985, 898 pp., \$65.00) which continues to be used both as a scholarly treatise and a practical handbook for those interested in labor arbitration. . . . Also from BNA is Arnold Zack's *Public Sector Mediation* (1985, 216 pp., \$20.00) which provides an overview of public sector labor mediation and a detailed discussion of various problems encountered by parties before and during mediation

. . . . *Discretion, Justice and Democracy: A Public Perspective*, Iowa State University Press (Ames, Iowa, 50010, 1985 pp., \$26.50) is a collection of essays focusing on the history and current opportunities for discretionary behavior within the legal system and the ways in which government attempts to monitor them to ensure fairness and access to justice. One essay by Richard Salem, titled "Mediation as an Alternative to Civil Rights Litigation," chronicles the efforts of the Justice Department's Community Relations Service in mediating racial disputes over housing, corrections, employment and voting rights. . . .

William Ury's *Beyond the Hotline: How Crisis Control Can Prevent Nuclear War* (Houghton Mifflin Co., Boston, MA, 1985, \$14.95) outlines a comprehensive crisis control system which would establish centers in Washington and Moscow in order to create a forum for communication between the superpowers before and during a crisis. . . .

*The Hundred Percent Challenge: Building a National Institute of Peace*, edited by Charles D. Smith (Seven Locks Press, P.O. Box 27, Cabin John, MD 20818, \$9.95, paper) is a series of essays on issues surrounding the creation of the National Institute of Peace including the rationale for the Institute, its legislative history, Congress' intent and program suggestions. . . .

*International Negotiation* (Art and Science) is a recent report on a conference of the same name organized by the Center for the Study of Foreign

Affairs, the Foreign Service Institute. The book is edited by Diane Bendahmane and John McDonald and is available at no charge from Center for the Study of Foreign Affairs, 1400 Key Boulevard, Arlington, VA 22209. . . .

John Allen Lemmon's new book *Family Mediation Practice* (Free Press/Macmillan, New York, 1985, 214 pp., \$22.50) focuses on the application of mediation techniques in disputes involving family members and on problems associated with establishing an effective practice. . . .

The National Institute of Corrections has published *Alternative Dispute Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation*, by Messrs. Feeley, Cole, Hanson and Silbert. For more information write to NIC, U.S. Department of Justice, Washington, DC 20534. . . .

*The Environmental Impact Assessment Review*, edited by Larry Susskind, features several articles on environmental dispute resolution in Volume 5, No. 1. For more information, contact the publishers, Elsevier Science Publishing Co., Inc., P.O. Box 1663, Grand Central Station, New York, NY 10163. . . .

Judge Thomas Lambros recently published an article titled "The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States," which appears in 103 *Federal Rules Decisions* 461 and outlines the settlement technique Judge Lambros has pioneered in the Federal Northern District Court of Ohio. . . .

*The Villanova Law Review* has recently published a special volume titled "Alternative Dispute Resolution," which includes articles on various aspects of dispute resolution. For more information, contact the *Villanova Law Review*, Villanova University School of Law, Villanova, PA 19085. . . .

## **MEDIA AND DISPUTE RESOLUTION**

The PBS 12-part series on life in modern China, *In the Heart of the Dragon*, featured a 60-minute episode titled

"Mediating," which contains a fascinating look at public divorce mediation practice taking place in China through the mediation proceedings of a particular case. For information on rental or purchase, contact Time-Life Video, toll free 800-526-4663. . . . A few years ago anthropologist Laura Nader produced a 60-minute documentary titled *Little Injustices* for PBS broadcast. The film explores the development of our consumer culture and disputes it has engendered and features a cross-cultural comparison of dispute resolution in rural Mexico and urban America. For information on rental or purchase, contact PBS Video, 800-344-3331. . . .

*The Art of Negotiating*, an interactive software computer program developed by Experience In Software, Inc. (2039 Shattuck Ave., Suite 401, Berkeley, CA 94704), based on Gerald Nierenberg's "The Art of Negotiation" seminars, is available for \$495 (IBM PC and compatibles; a 256K memory and a hard disk on two disk drives are required). The program focuses on preparing for negotiations by identifying and evaluating strategies and positions of parties in the negotiation.

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## **NIDR NOTES**

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A report recently published by the National Institute for Dispute Resolution concludes that mediation works successfully in resolving disputes between parents and school officials over individual education programs for handicapped children. The report's authors examined mediation in the special education field in two states and found that "satisfaction with mediation processes studied in Massachusetts and California is broad and deep."

Several factors contribute to the successful use of mediation in disputes involving special education," according to Madeleine Crohn, the Institute's president. "Among them are the clear framework of laws governing special education cases; the availability of strong advocates who

care about the needs of handicapped children; and broad community interest in resolution of special education disputes."

The 16-page report, *Mediation in Special Education: Two States' Experience*, was written by Linda R. Singer, executive director of the Washington, D.C.-based Center for Community Justice, and Eleanor Nace, an attorney.

In 1983, the Institute asked the Center for Community Justice to examine whether disputes between parents and school administrations over special education plans can be mediated successfully. The question arises because a 1975 federal law gives parents due process safeguards allowing them to become directly involved in the development of specific educational plans for handicapped children.

If parents object to a local school administration's planning or provision of special education services, the federal law gives them the right to an "impartial due process hearing." But hearings and possible appeals can be time-consuming and expensive. After the law was passed, several states incorporated mediation into their due process system for special education.

Singer and Nace focused their study on California and Massachusetts because mediation in special education disputes was being used extensively in both states. They found that "in California, of those cases where mediation was completed, mediators were involved in the successful resolution of 45.5 percent in 1981, 60 percent in 1982, and 68 percent in 1983. The percentage of all cases filed each year that are resolved through mediation also is increasing. In 1981, 26 percent of petitions filed were resolved by mediation. That figure was 28 percent in 1982 and 37 percent in 1983. In Massachusetts, according to the authors, "51 percent of all cases filed in the 1982-83 school years were settled through mediation."

The authors cite several reasons for the willingness of parents and school administrations to mediate successfully their disputes. One

strong inducement to settlement "is the specter of the alternative, a full-blown due process hearing," they write. "The aversion to this process is strong, and is clearly a motivating factor contributing to the resolution rate." Singer and Nace add, "Perhaps, ultimately, the reason that mediation is so successful in this arena is that it is a process that nurtures rather than destroys the trust and cooperation that the framers of the governing statutes envisaged among people with an interest in the education of special children."

The report is the first in a series of

*NIDR Reports* through which the Institute will publish the results of its research and other projects.

"Through *NIDR Reports*, the Institute intends to share information it has developed with the growing number of Americans who are using the tools of dispute resolution to settle differences in a diversity of areas," according to Crohn.

Copies of *Mediation in Special Education: Two States' Experience* are available without charge by writing the Institute at 1901 L Street, N.W., Suite 600, Washington, D.C. 20036.

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## LETTERS TO THE FORUM

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To the Editor:

I have just had the opportunity to read the FORUM issue on Family and Divorce Mediation. I thought Bishop's overview essay was superb, particularly in emphasizing the importance of statements representing a consensus of groups of respected practitioners at a time when mediation has become the focus of so much favorable attention, lest the irresponsible activities of a few give it a bad name in the absence of any standards to which one can point and show how these were not being met in particular unfortunate situations.

As a psychiatrist with longstanding interest in the process of dispute resolution in no-win situations where the parties must continue living in some sort of on-going relationship, if not actually living together, and with involvement in family therapy that goes back to the late 1950's, I have for many years seen mediation and instruction in negotiation as crucial elements in family therapy. Having effectively practiced family therapy from this perspective under a variety of circumstances, including having been the individual therapist of one of the family members prior to, and even concurrent with the family therapy, or having it gone on to see one or more of them individually following the family encounter, I would register an objec-

tion to the Association of Family and Conciliation Courts standards, Section II.B.1, dealing with the impact of a prior relationship on neutrality.

While impartiality may indeed be compromised, or equally confounding, perceived by one or the other parties as compromised by prior relationships, this need not be, and granted the assessment is subjective, I have never found it to be the case. Of course the issue must be discussed in advance; any factor that might be perceived as compromising neutrality must be discussed. Often enough the very act of raising the issue by the mediator will relieve a considerable amount of concern about the issue. Naturally, where there has been an intense personal relationship with one of the parties, I make it a requirement that I have the opportunity to meet individually with the other member for as long as is necessary for me to obtain critical background information and for that person to become comfortable with me.

Objective assessment of impartiality is a chimaera. We are left, then, with the perceptions of the disputants and the mediator's actual feelings of impartiality. Perhaps it is merely something that comes with experience, but over the years I have discovered that how-ever much regard I may have for the

parties individually, when they get into dealing with areas of unresolved conflict, even as I may see the justice of both their claims, my personal reaction is a neutral, impartial, "A plague on both your houses."

While my legal credentials are not as strong, for similar reasons, I would also object to the American Bar Association's Standard I.H. *Commentary*, and Standard III.A, both of which are concerned with other legal relationships the mediator might have with the parties. In analogy to the therapy situa-

tion, if it is agreeable to the other party, I see no reason why a mediator who has represented one of the parties on another issue beforehand, cannot undertake mediation at a later time. Similarly, if agreement is reached, I question the wisdom of precluding the mediator from assisting the parties, as attorney, in its implementation; while I can see that there might be some concern that the venal interest of the mediator might lead him to improperly press for agreement, the prohibition smacks too much of making work for

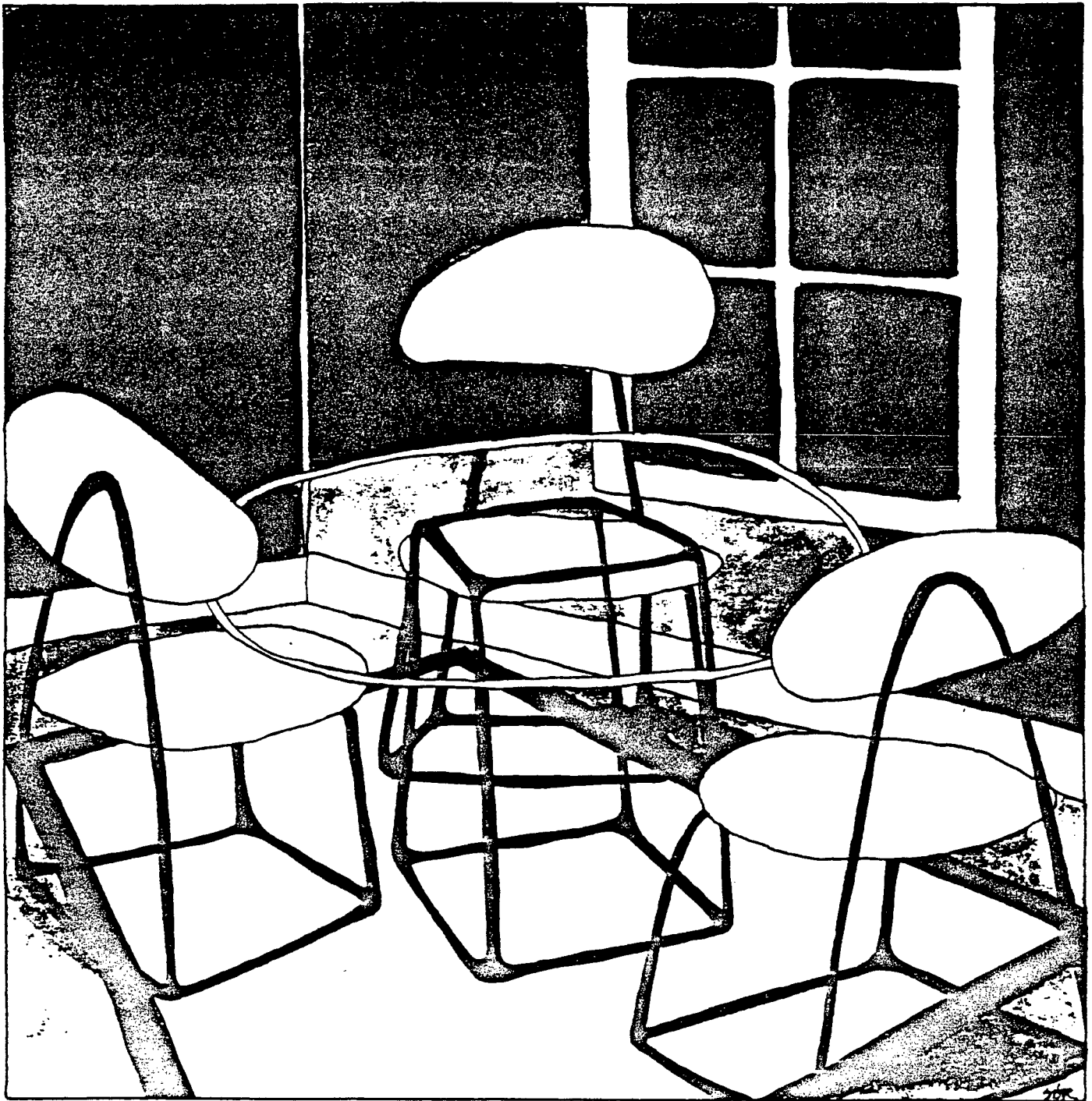
lawyers. Similarly, I would ask, "Why prevent an individual who has faith in the competence of an attorney from subsequently utilizing the services of that attorney on a different issue, simply because that attorney once served the party as a mediator?"

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# The Role of Management in State Court-Annexed Arbitration



*Roger Hanson • Geoff Gallas • Susan Keilitz*



According to proponents of alternative dispute resolution, many of the problems linked to traditional court processes can be reduced by introducing viable options to these traditional processes. Alternatives permit individuals to shape the final resolution of their conflict and to avoid the psychological, temporal, and financial costs associated with court procedures. Furthermore, when disputants participate more directly in creating the agreements that resolve their disputes, the agreements last longer than court orders.<sup>1</sup>

One of the most important developments in the alternative dispute resolution (ADR) movement is court-annexed arbitration, a method by which courts refer some portion of their caseload to another forum for third-party resolution. Court-annexed arbitration is used for cases in which money damages fall within a certain range, generally between \$10,000 and \$50,000. An arbitrator (or group of arbitrators) meets with the parties and, after hearing the evidence and testimony, renders an award. If accepted, the award is binding. Parties not accepting the award may appeal and seek a court trial *de novo*.

Despite the fact that twenty-three states and the District of Columbia now use some kind of arbitration program,<sup>2</sup> its widespread adoption is still at the formative stage. This is because in several of those jurisdictions, arbitration has been introduced only in selected trial courts to deal with particular types of cases, and not necessarily in courts with the largest caseloads.<sup>3</sup>

It is fair and accurate to say that pressing questions about court-annexed arbitration are being asked in nearly all states.

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Dr. Roger Hanson is a visiting scholar with the National Center for State Courts. Dr. Geoff Gallas is the National Center's director of research and special services. Susan Keilitz is a staff attorney with the National Center for State Courts.

In most of the twenty-four jurisdictions where court-annexed arbitration is in place, the questions being asked are whether to expand arbitration by broadening eligibility, to extend it to more trial courts, or to modify its structure and process.

In the remaining twenty-seven states, the questions revolve around whether to even introduce court-annexed arbitration. North Carolina, for example, is currently comparing court processing and

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## One of the most important developments in the alternative dispute resolution (ADR) movement is court-annexed arbitration . . .

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arbitration as part of a pilot project, and Colorado recently initiated an experimental arbitration program in eight trial courts. This wait-and-see approach to court-annexed arbitration suggests that states view the process not as a proven idea simply awaiting implementation but as an innovation that is yet to be proven.

One manifestation of this ambivalence toward arbitration is the Conference of State Court Administrators' (COSCA) expression of interest in the topic. Instead of fully endorsing arbitration and urging its rapid establishment, COSCA passed a resolution supporting a more systematic inquiry.<sup>4</sup> This article responds to the concerns behind that resolution. State court administrators, who must advise judges and legislators on whether to introduce, expand, or institutionalize court-annexed arbitration, want to know what has been learned from past

experience with this procedure. Is it a promising innovation? What makes for an effective arbitration program? How can it be best organized?

Interestingly, some prominent researchers are in striking disagreement as to what has been learned. For example, research performed by Rand's Institute on Civil Justice suggests that state court-annexed arbitration has made considerable progress in achieving its main objectives. In contrast, others argue that the Rand research lacks evidence of either arbitration's effectiveness or its ineffectiveness.<sup>5</sup>

The purpose of this essay is threefold. First, to suggest that there is a middle ground between these opposite views. Reviewing the literature on state court-annexed arbitration, we conclude that something is known about arbitration's relationship to the pace, cost, and quality of dispute resolution but that methodological shortcomings limit the generalizations that we can make when drawing on available research.

A second objective is to draw attention to the crucial role of management in the process of dispute resolution. Past evaluations of arbitration have neglected management's role in affecting the pace, cost, and quality of both court processing and arbitration.

And finally, we point out that the significance of management in shaping the success of court-annexed arbitration is consistent with the proposition that organization is essential to court reform in general.

### Why isn't more known about court-annexed arbitration?

This review will synthesize prior research about the connection between court-annexed arbitration and key outcomes, such as the pace, cost, and quality of dispute resolution. The complex issue of quality is broken down into participant satisfaction, integrity, access, and fairness. By seeing how research findings fit into this scheme rather than merely summarizing each study, we place what is known into a broader context and highlight the questions that remain unanswered.

### PACE OF DISPUTE RESOLUTION

One of the common objectives of court-annexed arbitration is to reduce the time



from case filing to disposition. Hensler (1986) paints a mixed picture of what arbitration actually accomplishes. In Pittsburgh, arbitrated cases move faster than those on the regular court calendar, while in some California jurisdictions arbitrated cases move slower. These observations are tentative, however, because they are not based on rigorous comparisons between arbitration and court processing.<sup>6</sup>

An experimental research design should be used to draw the most valid conclusions comparing the pace of court cases to arbitrated cases. That sort of design involves the comparison of a randomly assigned group of arbitrated cases with a randomly assigned control group of court cases. By establishing equivalent experimental and control groups and varying only the forum of resolution, the effects of extraneous factors are screened out. Observable differences in the pace of resolution can then be related logically to the presence or absence of arbitration.

Where random assignment is not possible, researchers can approximate the experimental/control group design by comparing matched samples of cases adjudicated before and after the introduction of court-annexed arbitration. If arbitration is working as intended, there should be a positive change in the pace of dispute resolution between the two samples. However, this approach also requires researchers to examine cases which remain on the court calendar because they are not eligible for arbitration. Past research has not taken this step.

Arbitration may deal with its assigned cases expeditiously, but only by drawing attention away from the rest of the court's caseload. Judges do not rid their calendars simply by referring cases to arbitration; they or their representatives must monitor and review arbitration cases. Additionally, judges and court staff must still resolve arbitration cases requesting trials *de novo*.

As prior studies have demonstrated, the introduction of an innovation also requires a considerable portion of the time and attention of the chief judge and court manager to keep the implementation process moving forward.<sup>7</sup> All of these factors consume the time and resources available for handling cases not referred to arbitration. Hence, it is possible that the pace of arbitration may be swift, but

the rest of the court's caseload may suffer. Hensler admits that the question of a serious, negative side effect of arbitration on the remaining court calendar is open, which means that more thorough analyses are called for in the future.<sup>8</sup>

#### COST OF DISPUTE RESOLUTION

Any thorough study of the cost of dispute resolution must consider both the cost to the parties and the cost to the court. Hensler's survey of what is and is not

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known about state court-annexed arbitration reveals a major void in our knowledge about costs to the parties. Hensler reports on the amount of time the parties spend and what fees they pay to their lawyers for arbitrated cases, but she presents no time or cost data on comparable court cases. She correctly observes that any reduced fees to the parties depends in part on the attorneys' billing structures and their willingness to pass along savings to their clients. However, the primary question of whether there is any savings for attorneys to pass on to their clients remains unanswered.<sup>9</sup>

Hensler compared the expenditure per case of all cases referred to arbitration with all those remaining in the court system to determine the cost of arbitration to the court. In both California and Pittsburgh, the per-case cost of arbitration was lower. She also compared the cost of all cases that actually went to an arbitration

hearing with those court cases that went to trial and found that the per-case cost of arbitration was lower.

For at least three reasons, however, these positive results should be taken with a note of caution. First, the lower cost estimates do not reflect any time that the court spends in monitoring or reviewing arbitrated cases. Second, as Hensler recognizes, information is lacking on the ultimate resolution of arbitration appeals, which, like trials, consume a disproportionately large share of the court's available resources compared to cases that do not go to trial. The cost of appeals, of course, must be charged against arbitration. Consequently, because these cost factors have been omitted, the total cost of arbitration is underestimated by an unknown amount.

Third, one should avoid drawing broader conclusions than are warranted from per-case cost figures. These figures measure the relative efficiency of court processing versus arbitration. Efficiency is calculated for court processing and arbitration separately by dividing equivalent resources (e.g., personnel) by the number of cases in each respective forum. However, even if arbitration has a lower per-case cost, this efficiency does not translate into a cost savings to the court. To reach conclusions about cost savings, we need to know how arbitration affects the allocation and distribution of court resources. After arbitration is introduced, what adjustments, if any, are made in the number and assignment of judges, staff, and other personnel? Does the court shift resources out of the civil division because some cases are now being arbitrated? If cases are siphoned off for arbitration, do the judges spend more time on complex civil cases? Or is the efficiency associated with arbitration simply absorbed with no change in resource allocations by the court? These sorts of questions need to be addressed before conclusions about cost savings can be reached.

#### QUALITY OF DISPUTE RESOLUTION

One of the most complex issues in the study of law and society is the quality of legal services. From our perspective quality in the context of court-annexed arbitration encompasses four key components: (1) participant satisfaction, (2) integrity, (3) access, and (4) fairness.

**Participant satisfaction.** Concerning participant satisfaction, positive assessments by parties who have gone through an arbitration process are among the most heralded findings. Hensler reports that the overwhelming majority of arbitration participants, including those who lost their disputes, are satisfied with the procedure. Hensler's positive findings corroborate an earlier review of participants' reactions to mediation programs.<sup>10</sup>

Despite these affirmative judgments from the users of arbitration, some questions are still outstanding.<sup>11</sup> In a more strict comparison of parties in experimental (arbitration) and control (court processing) groups, if members of the two groups are asked to rate arbitration or court processing on a common scale, how would the ratings compare? Moreover, would the ratings vary according to the nature of the case, the length of time taken to resolve the dispute, the mode of disposition, the winning or losing side, and so forth?

The basis for the positive evaluations by the users of arbitration also needs to be clarified. Are there identifiable facets of arbitration that predict high or low satisfaction? Are these facets subject to manipulation? Answers to these questions are needed to determine what specific procedures or particular values should be incorporated into the design, implementation, and management of arbitration programs.

**Integrity.** The integrity of the dispute resolution process reflects the degree to which parties adhere to agreed-upon arbitration awards, settlements, or court orders. Noncompliance with these agreements signals that the process is marked by miscommunication, misunderstanding, or misrepresentation. The failure to render services, to pay damages, or to discharge other obligations imposes a deprivation on one of the parties. Finally, the inability to execute arbitration awards or court judgments calls into question the authoritative nature of the arbitration or court process.

Although there is very little information on the relative integrity of state court-annexed arbitration, this dimension has been explored by McEwen and Maiman in the related area of small claims mediation.<sup>12</sup> They find that parties to mediation are twice as likely as their court counterparts to fully live up to their obli-

gations. This startling difference is one of the reasons some policymakers are attracted to small claims mediation despite intellectual criticisms of it.<sup>13</sup>

However, compliance is not an either/or distinction; compliance may be partial. In sorting out the relative importance of several factors influencing the degree of compliance, McEwen and Maiman find that the type of arena in which the dispute was resolved does not have an independent impact on the likelihood of compli-

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## The fairness of dispute resolution processes is of universal concern . . .

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ance. Other factors are even more powerful influences. McEwen and Maiman find that compliance is inversely and most strongly related to the size of the award: the larger the award, the lower the degree of compliance. Hence, it remains to be seen whether state court-annexed arbitration, where the dollar amounts in controversy are much larger than in small claims, has an impact on compliance.

**Access.** Access to justice is a value arbitration offers to disputants because it presumably is more rapid and less expensive. The meaning of access is not, however, altogether obvious. If it is assumed that arbitration is as fair or fairer than court processing and so more closely approximates the ideal of due process, then the level of its use is an appropriate indicator of access. That assumption begs the question, however. The critics of ADR make the opposite assumption; they maintain that arbitration provides sec-

ond-class justice partially because of its reputed speed. This contrary assumption calls into question, of course, the validity of program use as a measure of access to justice.

Although access to justice is inextricably bound to notions of fairness, both the proponents and the critics of ADR might agree that the parties' ability to make their claims known and understood by the court (or the arbitrators) is an essential component of access. For this reason, we believe it is fruitful to frame the issue of access in terms of factors such as the parties' views of whether they are able to present their claims, whether their ultimate goals are taken into account, and whether the process is orderly. If they have counsel, their beliefs as to whether their attorneys are able to be prepared, make effective arguments, and answer questions posed by the court (or the arbitrators) are relevant issues.

Hensler reports that most participants in state court-annexed arbitration believe that this process allows them the opportunity to be heard and to have their decisions rendered by an impartial third party. While this information is pertinent in a general way to our notion of access, it is important to recognize that Hensler's observation is not based on any relevant comparison. It is not based on a comparative assessment between arbitration and court processing by the parties in arbitration. It also is not based on a comparison of the judgments by parties in arbitration with equivalent judgments by parties in courts. Hence, there is a need to build on Hensler's work and to design a more-complete set of measures of access.

**Fairness.** The fairness of dispute resolution processes is of universal concern. Even if a given route to resolving a dispute is clearly the shortest or the most efficient, a lack of fairness is sufficient in itself to warrant the search for a different path. Although the emphasis is commonly placed on the procedural notion of fairness, we believe that decisions rendered by a process are equally important to any assessment of its fairness.

The appropriateness of analyzing decisions in dispute resolution arises from the debate over who is and who is not disadvantaged by the choice of dispute resolution forums. Generally, the proponents of alternatives to court processing claim that greater parity in the bargaining strength

and power of both parties is achieved outside the court arena. Critics contend that it is precisely the parties with the least resources, the lesser skills, who are the most dispossessed, who are the least successful when disputes are resolved by some alternative process.

One contribution that research can make to this debate is clarifying the various claims. While the proponents contend, for example, that parties with less clout tend to do better in arbitration than in court, the question is, how much better? Do these parties simply increase their chances of winning, or do they emerge as the prevailing party in at least a majority of the disputes? Do the advantages of mediation for less-powerful parties hold true in arbitration, which is a more adversarial process than mediation?

On the other hand, do the critics contend that parties with less clout do even worse in arbitration than they would do in court? Or is it that the critics see the parties with the least clout as not doing any better than before? Part of any future research agenda should be to determine if the attributes of the parties (such as race, gender, occupation, income, and type of legal representation) are associated with variations in the patterns of awards, settlements, or court orders.

In summary, court-annexed arbitration has been found in some instances to be an improvement over court processing. Some applications of court-annexed arbitration have been linked to more-expeditious, more-efficient, and more-satisfying dispute processing. Yet, our review has shown that court-annexed arbitration is not always superior, and in some instances is inferior, to court processing. If court-annexed arbitration is not a magic bullet guaranteeing faster, cheaper, and fairer dispute resolution, then other factors are influencing arbitration's success. These other factors deserve attention if arbitration is to realize its maximum potential.

## Management: The forgotten variable

A search of different studies reveals one consistent finding—the success of arbitration hinges on its administration.<sup>14</sup> Simply stated, loosely structured programs, lax enforcement of deadlines, and tolerance of inefficiencies are believed to contribute to slow and ineffective arbitration processes.

These observations have gone somewhat unrecognized because they are post hoc conclusions based on examinations strictly of arbitration programs rather than explicit and controlled comparisons between the management of arbitration and court processing. Nevertheless, these observations raise the larger issue of the role of management as a key variable in shaping dispute resolution.

We know from court-related research that the management of litigation affects the pace at which cases are resolved.<sup>15</sup> However, the mere referral of cases to arbitration may not expedite the court's remaining caseload. In theory, siphoning off cases to arbitration, with the corresponding reduction in court congestion, should improve the pace of litigation for the remaining cases. Yet recently completed research on case processing time in eighteen jurisdictions indicates that arbitration does not necessarily speed the processing of cases that remain on the court's docket.<sup>16</sup> Nine of the courts in this study, including four of the fastest and three of the slowest, had mandatory arbitration programs for at least a portion of their civil caseloads. Moreover, the fast courts were observed to have effective leadership, performance standards, monitoring of performance against standards, and tight control over case processing. According to the researchers' conclusions, management determines the efficiency of case processing. Court-annexed arbitration, in and of itself, does not have an impact.

On the basis of that inquiry, one can infer that the positive results attributed to arbitration actually arise because of the increased attention given to case processing. Heightened concern, even without the establishment of arbitration programs, might produce similar positive effects. This argument has considerable support. For example, evaluations of delay reduction programs have found that the greatest decrease in case-processing time occurs before the implementation of delay reduction procedures. The explanation is that greater interest in and a greater focus on case processing among judges and court staff are sufficient to move cases more promptly.<sup>17</sup> A judge or court administrator, therefore, may reasonably believe that if attention and resources are aimed at court processes, the improvements are likely to be similar to those achieved by creating an alternative to court process-

ing. In fact, that inference may be behind COSCA's resolution calling for research on alternative dispute resolution.

## Looking beyond

Based on our understanding of the literature, future research should examine the extent to which different approaches to management affect the pace, cost, and quality of dispute processing. For example, arbitration may be a more-efficient and rapid method of resolving cases than court processing because the court fails to apply its own rules and fails to exercise adequate control over litigation. On the other hand, when a court monitors case processing, its management approach may be transferred to the arbitration process, as Mahoney *et al.* posit is the case in four speedy, well-managed courts.<sup>18</sup> Consequently, the two dispute resolution processes may function in much the same way because of the common management framework.

The vital role of management in the study of court-annexed arbitration relates to the larger issue of court reform. The history of planned change is studded with examples of ideas that are discussed but never introduced, experiments that begin but are only partially implemented or never institutionalized. Some scholars have commented that one of the most important ingredients in the successful introduction of new policies is organization.<sup>19</sup> Unless programs to implement policies are structured in such a way that they can deliver the intended services, the prospects of positive results are dim. We would like to add to that proposition the parallel idea that management is essential to successful reform. When reforms are monitored in terms of performance, adjusted, and kept on track, they have a chance of succeeding. This is no prescription as to what is the most potent reform, but it is a necessary condition underlying the execution of any idea. Because dedicated management takes so much time, it supports Arthur T. Vanderbilt's adage that reform is not for the short-winded. *scj*

## NOTES

1. See Lon Fuller, "Mediation—Its Forms and Functions," 44 *Southern California Law Review* 305 (1971); Richard Danzig, "Toward the Creation of a Complementary Decentralized System of Criminal Justice," 26 *Stanford Law Review* 1 (1978); Laura Nader and Linda Singer, "Dispute Resolution in the Future: What are the Choices?" *California State Bar Journal* 281 (1976); Frank E. A. Sander, "Varieties of Dispute Processing," 70 *Federal Rules Decisions* 79 (1976); Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law and Society Review* 95 (1974); Earl Johnson et al., *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (Williamsburg, Va.: National Center for State Courts, 1977); Philippe Nonet and Philip Selznick, *Law and Society in Transition* (New York: Harper and Row, 1978); David Aaronson et al., *The New Justice: Alternatives to Conventional Criminal Adjudication* (Washington, D.C.: Institute for Advanced Studies in Justice, The American University, 1977); Paul Wahrhaftig, "Citizens Dispute Resolution: A Blue Chip Investment in Community Growth," 1978 *Premial Services Annual Journal* (1978); Stephen Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution*, (Boston: Little, Brown and Co., 1985).

2. In early 1987, the National Center for State Courts surveyed all state court administrators to determine the extent of alternative dispute resolution activities, including court-annexed arbitration, in the states. For a discussion of this survey, see Susan Keilitz, Geoff Gallas, and Roger Hanson, "State Adoption of Alternative Dispute Resolution," *State Court Journal*, 12 No. 2, (Spring 1988).

3. See Keilitz, Gallas, and Hanson, *supra*. Other reasons ADR adoption can be said to be still in the formative stage are that some programs have low ceilings on the dollar amounts in controversy (e.g., \$6,000 in New York) while other programs are restricted to certain case types (small claims in Louisiana; family law in Delaware, medical malpractice in Vermont, motor vehicle cases in Nevada, and automobile property and medical damages in New Jersey). Whereas this does not suggest that arbitration has negative consequences, it does indicate that its full potential has yet to be realized.

4. The members of the COSCA Committee on Alternative Dispute Resolution include Carl F. Bianchi (chair), Samuel Conti, Robert Duncan, Franklin E. Freeman, Thomas J. Lehner, J. Denis Moran, Larry Polansky, Arthur H. Snowden, and Janice Wolf. Although the committee members do not necessarily subscribe entirely to the views expressed in this article, they have supported a closer analysis of court-annexed arbitration's effects on the efficiency and quality of the administration of justice. In our opinion, their actions indicate that pressing questions about arbitration's consequences remain unanswered.

5. For the point of view that court-annexed arbitration has made considerable progress in achieving its goals, see Deborah R. Hensler, "What We Know and Don't Know About Court-Administered Arbitration," 69 *Judicature* 307 (1986). (Hensler's article is a synthesis of two detailed

studies in which she participated: see Jane W. Adler, Deborah R. Hensler, and Charles E. Nelson, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, [Santa Monica, Ca.: Rand Corporation 1983]; and Deborah R. Hensler, Albert J. Lipson, and Elizabeth S. Rolph, *Judicial Arbitration in California: The First Year*, [Santa Monica, Ca.: Rand Corporation, 1981].) For the opposing viewpoint, see James J. Alfini and Richard W. Moore, "Court-Annexed Arbitration: A Review of the Institute for Civil Justice Publications," 12 *Justice System Journal* 260, (1987). Parallel work on federal court-annexed arbitration does not reconcile disagreement surrounding state court-annexed arbitration. (E. Allan Lind and John E. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* [Washington, D.C.: Federal Judicial Center, 1983].) The federal court research, based on a study of three programs, places arbitration's effectiveness in some doubt. Arbitration was successful in only two of the three jurisdictions, and where there was the strongest evidence of its success, the program was abandoned. Although other federal courts are now experimenting with arbitration, the results are not yet in.

6. A similar picture of arbitration emerged from the Federal Judicial Center's study of three federal district courts: arbitrated cases terminated earlier in the District of Connecticut and the Eastern District of Pennsylvania, but later in the Northern District of California. (See Lind and Shapard, *supra*.)

7. See, for example, Alexander B. Aikman, Mary E. Elsner, and Frederick G. Miller, *Friends of the Court: Lawyers as Supplemental Judicial Resources* (Williamsburg, Va.: National Center for State Courts 1987). The acute need for someone to spend large amounts of time and energy to resolve inevitable obstacles to implementation is a general phenomenon. Eugene Bardach's theory of policy change develops the notion that someone must adopt the role of an extremely dedicated "fixer" to keep innovations from unraveling. See Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law* (Cambridge, Mass.: MIT Press, 1979).

8. Related research compares the pace of court cases with those handled by the American Arbitration Association (AAA) in five states. It concludes that arbitrated cases "tend" to be faster in reaching termination (i.e., arbitration is faster for tort and contract cases but not in all states for both types). (See Herbert M. Kritzer and Jill K. Anderson, "The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts," 8 *The Justice System Journal* 6 [1983].) This evidence lends support to the claim that court-annexed arbitration is faster, but it is more suggestive than conclusive. It is based on extremely small numbers of cases per state, typically less than 40 arbitrated cases and less than 100 state court cases. Additionally, the comparison is contaminated because the stakes are reported to be higher in the AAA cases than in the state court cases.

9. Cost to the parties may, in fact, prove to be higher in arbitration. Kritzer and Anderson (*supra*, p. 17) recommend that "one should not turn to

arbitration if the goal is to save processing costs (lawyers' fees); if anything, the AAA may be a little more expensive."

10. Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication," 7 *The Justice System Journal* 420 (1982).

11. Hensler's study lacks data on arbitration users' views of case processing. Her data describe reactions strictly to arbitration rather than judgments between arbitration and adjudication. Without any comparison, the reported high level of satisfaction is not strong evidence of arbitration's advantage. Whereas the lack of comparative assessments is the case in many other studies (see Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* [Washington, D.C.: National Institute of Justice, 1986], pp. 53-74), that larger void accentuates the need for more rigorous tests of satisfaction in regard to court-annexed arbitration.

12. Craig A. McEwen and Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance through Consent," 18 *Law and Society Review* 11 (1984).

13. See James McKenna, review of *Justice Without Law?* by Jerold Auerbach, 68 *Judicature* 45 (1984).

14. See Hensler (1986), Kritzer and Anderson, (1983), and Lind and Shapard (1983), *supra*.

15. See American Bar Association Action Commission to Reduce Court Cost and Delay, *Attacking Court Costs and Delay* (Washington, D.C.: American Bar Association, 1984); Steven Flanders, *Case Management and Court Management in United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977); Ernest C. Friesen, "Cures for Court Congestion," 23 *The Judges' Journal* 5 (1984); Larry L. Sipes, "Where Do We Go From Here?" 23 *The Judges' Journal* 45 (1984); Maureen Solomon, *Caseflow Management in the Trial Court* (Chicago: American Bar Association Commission on Standards of Judicial Administration, American Bar Association, 1974).

16. Barry Mahoney et al., *Caseflow Management and Delay Reduction in Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, 1988).

17. John Paul Ryan, Marcia T. Lipsetz, Mary Lee Luskin, and David Neubauer, "Analyzing Delay Reduction Programs: Why Do Some Succeed?" 65 *Judicature* 58 (1981). After the pre-implementation stage and delay reduction procedures are in place, the pace of litigation tends to improve in a more uniform manner. Fewer cases fall through the cracks or inadvertently take a long time to resolve after the procedures are in place. Consequently, meaningful change is achieved with the introduction of new procedures despite the dramatic change that occurs in the gestation period.

18. General jurisdiction trial courts in Phoenix, Arizona; Dayton, Ohio; Portland, Oregon; and Cleveland, Ohio, all have mandatory arbitration programs and are relatively fast courts.

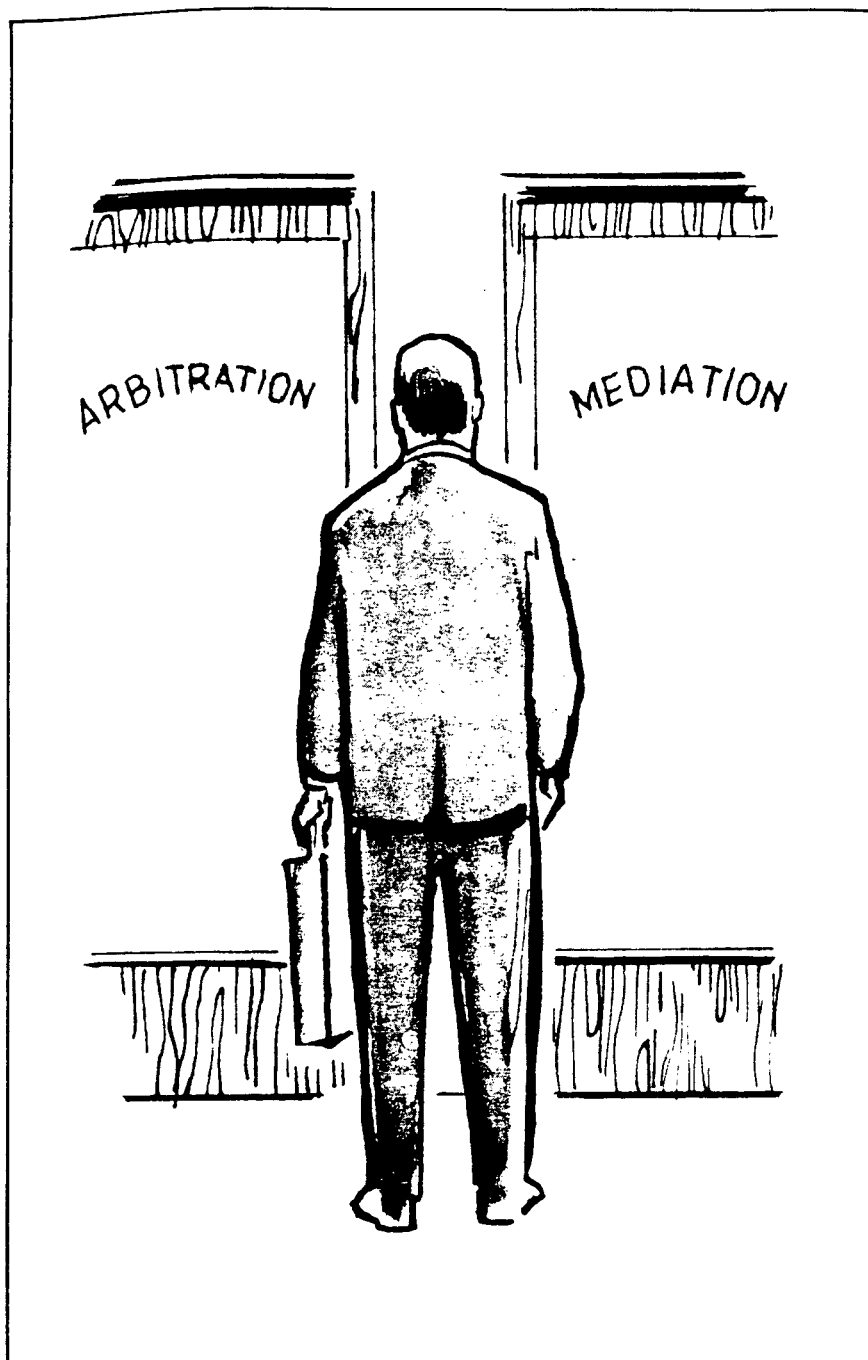
19. Malcolm Feeley and Austin Sarat, *The Policy Dilemma* (Minneapolis: University of Minnesota Press, 1981).

**H**

Tab H

CIVIL MEDIATION

- Cooley, John W., "Arbitration vs. Mediation — Explaining the Differences," 69 Judicature 263-269 (February-March 1986).



# Arbitration vs. mediation— explaining the differences

by John W. Cooley

This article is adapted from a version that appeared in the CHICAGO BAR RECORD (January-February, 1985).

1. Robins, A GUIDE FOR LABOR MEDIATORS 6 (Honolulu: University Press of Hawaii, 1976).

2. *Id.*

3. Elkouri and Elkouri, HOW ARBITRATION WORKS 24 (Washington, D.C.: BNA, 3rd ed. 1973).

4. *Id.* at 25.

**A**n amazing number of lawyers and business professionals are unaware of the differences between arbitration and mediation. Their confusion is excusable.

In the early development of the English language, the two words were used

interchangeably. The *Oxford English Dictionary* provides as one historical definition of arbitration: "to act as formal arbitrator or umpire, to mediate (in a dispute between contending parties)." The Statutes of Edward III (1606) referring to what today obviously would be called a commercial *arbitration* panel, provided: "And two Englishmen, two of Lombardie and two of Almaine shall (be) chosen to be mediators of questions between sellers and buyers."<sup>1</sup>

Modern labor relations statutes tend to perpetuate this confusion. As one commentator has observed:

Some statutes, referring to a process as "mediation" describe formal hearings, with witnesses testifying under oath and transcripts made, require reports and recommendations for settlement to be made by the neutral within fixed periods, and either state or imply the finality of the "mediator's recommendations." In one statute the neutral third parties are called, interchangeably, mediators, arbitrators and impasse panels.<sup>2</sup>

The Federal Mediation and Conciliation Service (note the absence of "arbitration" in its title) performs a basic arbitration function by maintaining a roster from which the Service can nominate arbitrators to the parties and suggest "certain procedures and guides that [the Service believes] will enhance the acceptability of arbitration."<sup>3</sup>

The National *Mediation* Board (emphasis added) performs important functions in the promotion of arbitration and the selection of arbitrators for the railroad and airline industries.<sup>4</sup>

Libraries also assist in perpetuating the arbitration/mediation definitional charade. Search under "mediation" and you will invariably be referred to "arbitration." In the midst of this confusion—even among congressional draftsmen—it is time to explain the differences between the processes.

The most basic difference between the two is that arbitration involves a *decision* by an intervening third party or "neutral;" mediation does not.

Another way to distinguish the two is by describing the processes in terms of the neutral's mental functions. In arbitration, the neutral employs mostly "left brain" or "rational" mental processes—analytical, mathematical, logical, technical, administrative; in mediation, the neutral employs mostly "right brain" or "creative" mental

processes—conceptual, intuitive, artistic, holistic, symbolic, emotional.

The arbitrator deals largely with the objective; the mediator, the subjective. The arbitrator is generally a passive functionary who determines right or wrong; the mediator is generally an active functionary who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.

Because the role of the mediator involves instinctive reactions, intuition, keen interpersonal skills, the ability to perceive subtle psychological and behavioral indicators, in addition to logic and rational thinking, it is much more difficult than the arbitrator's role to perform effectively.<sup>5</sup> It is fair to say that while most mediators can effectively perform the arbitrator's function, the converse is not necessarily true.

Besides these differences the two processes are generally employed to resolve two different types of disputes. Mediation is used where there is a reasonable likelihood that the parties will be able to reach an agreement with the assistance of a neutral. Usually, mediation is used when parties will have an ongoing relationship after resolution of the conflict. Arbitration, on the other hand, is generally appropriate for use when two conditions exist: there is no reasonable likelihood of a negotiated settlement; and there will not be a continuing relationship after resolution.<sup>6</sup>

If the two processes are to be used in sequence, mediation occurs first, and if unsuccessful, resort is made to arbitration.<sup>7</sup> Viewed in terms of the judicial process, arbitration is comparable to a trial and mediation is akin to a judicial settlement conference. They are as different as night and day.<sup>8</sup> The differences can best be understood by discussing them in terms of the processes of arbitration and mediation.

### The arbitration process

Arbitration has had a long history in this country, going back to procedures carried over into the Colonies from mercantile England. George Washington put an arbitration clause in his last will and testament to resolve disputes among his heirs. Abraham Lincoln urged lawyers to keep their clients out of court and himself arbitrated a boundary dispute

between two farmers. Today, arbitration is being used more broadly for dispute settlement both in labor-management relations and in commercial transactions.

Aside from its well-known use in resolving labor disputes, arbitration is now becoming widely used to settle inter-company disputes in various industries, including textile, construction, life and casualty insurance, canning, livestock, air transport, grain and feed and securities.<sup>9</sup>

Simply defined, arbitration is a process in which a dispute is submitted to a third party or neutral (or sometimes a panel of three arbitrators) to hear arguments, review evidence and render a decision.<sup>10</sup> Court-annexed arbitration, a relatively new development, is a process in which judges refer civil suits to arbitrators to render prompt, non-binding decisions. If a particular decision is not accepted by a losing party, a trial *de novo* may be held in the court system. However, adverse decisions sometimes lead to further negotiation and pre-trial settlement.<sup>11</sup>

The arbitration process, court-annexed or otherwise, normally consists of six stages: initiation, preparation, prehearing conferences, hearing, decisionmaking, and award.

**Initiation.** The initiation stage of arbitration consists of two sub-stages: initiating the proceeding, and selecting the arbitrator. An arbitration proceeding may be initiated either by: submission; "demand" or "notice;" or, in the case of a

court-annexed proceeding, court rule or court order.

A submission must be signed by both parties and is used where there is no previous agreement to arbitrate. It often names the arbitrator (or method of appointment), contains considerable detail regarding the arbitrator's authority, the procedure to be used at the hearing, statement of the matter in dispute, the amount of money in controversy, the remedy sought and other matters.

On the other hand, where the description of a dispute is contained in an agreement and the parties have agreed in advance to arbitrate it, arbitration may be initiated unilaterally by one party serving upon the other a written "demand" or "notice" to arbitrate.

However, even where an agreement contains a "demand" or "notice" arbitration clause, parties sometimes choose also to execute a submission after the dispute has materialized. In the court-annexed situation, a lawsuit is mandatorily referred to an arbitration track and the parties must select an arbitrator from a court-maintained roster or otherwise by mutual agreement.<sup>12</sup>

Several types of tribunals and methods of selecting their membership are available to parties who wish to arbitrate. Parties may choose between the use of a "temporary" or "permanent" arbitrator. They can also choose to have single or multiple arbitrators. Since success of the

5. As one American professional mediator put it, the mediator "has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing, at most, a few guiding stars and depending mainly on his personal power of divination." Meyer, *Function of the Mediator in Collective Bargaining*, 13 INDUS. & LAB. REL. REV. 159 (1960).

6. In labor relations arbitrations, of course, condition (2) is normally not present. Labor disputes are generally divided into two categories: rights disputes and interest disputes. Disputes as to "rights" involve the interpretation or application of existing laws, agreements or customary practices, disputes as to "interests" involve controversies over the formation of collective agreements or efforts to secure them where no such agreement is yet in existence. Elkouri and Elkouri, *supra* n. 3, at 47.

7. Because of ethical considerations, the arbitrator and mediator normally are different persons. It should also be noted that mediation is frequently effective when it is attempted, with the concurrence of the parties, during the course of an arbitration with a neutral other than the arbitrator serving as the mediator. Often the unfolding of the opponent's evidence during the course of arbitration leads to a better appreciation of the merits of their respective positions and hence an atmosphere conducive to settlement discussions.

8. The stark distinction between mediation and arbitration was well made by a professional mediator who became chairman of the New York State

Mediation Board: "Mediation and arbitration... have conceptually nothing in common. The one [mediation] involves helping people to decide for themselves, the other involves helping people by deciding for them." Meyer, *supra* n. 5, at 164, as quoted in Gulliver, *DISPUTES AND NEGOTIATIONS, A CROSS-CULTURAL PERSPECTIVE*, 210 (New York: Academic Press, 1979).

9. Cooley, *Arbitration as an Alternative to Federal Litigation in the Seventh Circuit*, REPORT OF THE SUBCOMMITTEE ON ALTERNATIVES TO THE PRESENT FEDERAL COURT SYSTEM, SEVENTH CIRCUIT AD HOC COMMITTEE TO STUDY THE HIGH COST OF LITIGATION, 2 (July 13, 1978).

10. *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, Appendix 2 (Washington, D.C.: National Institute for Dispute Resolution, October, 1983).

11. *Id.* See also EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Washington, D.C.: Federal Judicial Center, 1981).

12. Cooley, *supra* n. 9, at 4. Elkouri and Elkouri, *supra* n. 3, at 183-86. Domke on Commercial Arbitration, §§14:00-14:05 (Rev. Ed. 1984). Arbitrators, if chosen from a list maintained by an arbitration organization or court-maintained roster, are normally compensated at the daily rate fixed by the organization or the court. Arbitrators selected independently by the parties are compensated at the daily or hourly rate at which they mutually agree. In such cases, the parties equally share the expense of the arbitrator's services.



arbitration process often hinges on the expertise of the tribunal, parties generally select a tribunal whose members possess impartiality, integrity, ability and experience in the field in which the dispute arises. Legal training is often helpful but not indispensable.

Information concerning the qualifications of some of the more active arbitrators is contained in the *Directory of Arbitrators*, prepared by the Bureau of National Affairs, Inc., and in *Who's Who* (of arbitrators) published by Prentice-Hall, Inc. Also, the Federal Mediation and Conciliation Service (FMCS), the National Mediation Board (NMB) and the American Arbitration Association (AAA) provide biographical data on arbitrators.<sup>13</sup>

**Preparation.** The parties must thoroughly prepare cases for arbitration. Obviously, a party must fully understand its own case to communicate effectively to the arbitrator. Depending on the nature of the case, prehearing discovery may be necessary and its permissible extent is usually determined by the arbitrator. The advantages of simplicity and utility of the arbitration mode normally weigh against extensive discovery. During this stage, the parties also enter into fact stipulations where possible.<sup>14</sup>

Ordinarily, most or all of the arbitrator's knowledge and understanding of a case is based upon evidence and arguments presented at the arbitration hearing. However, the arbitrator does have some "preparation" functions. Generally, where no tribunal administrator (such as AAA) is involved, the arbitrator, after accepting the office, designates the time and place of the hearing, by mutual agreement of the parties if possible. The arbitrator also signs an oath, if required in the particular jurisdiction, and determines whether the parties will have representation, legal or otherwise, at the hearing.<sup>15</sup>

**Prehearing conferences.** Depending on the complexity of the matter involved, the arbitrator may wish to schedule a prehearing conference, which is normally administrative in nature.<sup>16</sup> Brief-

## Arbitration is a process in which a dispute is submitted to a third party to render a decision.

ing schedules, if necessary, are set on motions attacking the validity of claims or of the proceeding. But generally, briefing is minimized to preserve the efficiency of the process. Discussion of the underlying merits of claims or defenses of the parties are avoided during a prehearing conference. *Ex parte* conferences between the arbitrator and a party are not permitted.<sup>17</sup>

**The hearing.** Parties may waive oral hearing and have the controversy determined on the basis of documents only. However, an evidentiary-type hearing in the presence of the arbitrator is deemed imperative in virtually all cases. Since arbitration is a private proceeding, the hearing is not open to the public as a rule but all persons having a direct interest in the case are ordinarily entitled to attend.

A formal written record of the hearing is not always necessary; use of a reporter is the exception rather than the general

practice. A party requiring an interpreter has the duty to arrange for one. Witnesses testifying at the hearing may also be required to take an oath if required by law, if ordered by the arbitrator, or on demand of any party.<sup>18</sup>

Opening statements are made orally by each party in a brief, generalized format. They are designed to acquaint the arbitrator with each party's view of what the dispute is about and what the party expects to prove by the evidence. Sometimes an arbitrator requests each party to provide a short written opening statement and issue statement prior to the hearing. Occasionally, a respondent opts for making an opening statement immediately prior to presenting initial evidence.<sup>19</sup>

There is no set order by which parties present their cases in arbitration, although in practice the complaining party normally presents evidence first. The parties may offer any evidence they choose, including personal testimony and affidavits of witnesses. They may be required to produce additional evidence the arbitrator deems necessary to determine the dispute. The arbitrator, when authorized by law, may subpoena witnesses or documents upon his or her own initiative or by request of a party. The arbitrator also decides the relevancy and materiality of all evidence offered. Conformity to legal rules of evidence is unnecessary. The arbitrator has a right to make a physical inspection of premises.<sup>20</sup>

The parties make closing arguments, usually limited in duration. Occasionally, the arbitrator requests post hearing briefs. When this occurs, the parties usually waive oral closing arguments.<sup>21</sup>

**Decisionmaking.** When the issues are not complex, an arbitrator may render an immediate decision. However, when the evidence presented is voluminous and/or time is needed for the members of an arbitration panel to confer, it might require several weeks to make a decision.

The award is the arbitrator's decision. It may be given orally but is normally written and signed by the arbitrator(s). Awards are normally short, definite, certain and final as to all matters under submission. Occasionally, they are accompanied by a short well-reasoned opinion. The award is usually issued no later than 30 days from the closing date of the hearing. When a party fails to appear, a default award may be entered.<sup>22</sup> Depend-

13. Elkouri and Elkouri, *supra* n. 3, at 24-25.

14. Elkouri and Elkouri, *supra* n. 3, at 197; (for preparation checklist see pp. 198-99); Domke, *supra* n. 12, §§24:01 and 27:01.

15. *Id.*

16. Some of the matters which might be discussed at a prehearing conference are: whether discovery is needed and, if so, scheduling of same; motions that need to be filed and briefed or orally argued; and the

setting of firm oral argument and hearing dates.

17. Cooley, *supra* n. 9, at 4-5; Elkouri and Elkouri, *supra* n. 3, at 186-90.

18. Cooley, *supra* n. 9, at 5.

19. Elkouri and Elkouri, *supra* n. 3, at 224-25.

20. Cooley, *supra* n. 9, at 5; Elkouri and Elkouri, *supra* n. 3, at 223-28.

21. Elkouri and Elkouri, *supra* n. 3, at 225.

22. Cooley, *supra* n. 9, at 6.

ing on the nature of the award (i.e., binding), it may be judicially enforceable and, to some extent, reviewable. The losing party in a court-annexed arbitration is entitled to trial *de novo* in court.

### The mediation process

Mediation is a process in which an impartial intervenor assists the disputants to reach a voluntary settlement of their differences through an agreement that defines their future behavior.<sup>23</sup> The process generally consists of eight stages: initiation, preparation, introduction, problem statement, problem clarification, generation and evaluation of alternatives, selection of alternative(s), and agreement.<sup>24</sup>

**Initiation.** The mediation process may be initiated in two principal ways: parties submit the matter to a public or private dispute resolution organization or to a private neutral; or the dispute is referred to mediation by court order or rule in a court-annexed mediation program.

In the first instance, counsel for one of the parties or, if unrepresented, the party may contact the neutral organization or individual and the neutral will contact the opposing counsel or party (as the case may be) to see if there is interest in attempting to mediate the dispute.

**Preparation.** As in arbitration, it is of paramount importance that the parties to a dispute in mediation be as well informed as possible on the background of the dispute, the claims or defenses and the remedies they seek. The parties should seek legal advice if necessary, and although a party's lawyer might attend a typical nonjudicial mediation, he or she normally does not take an adversary role but is rather available to render legal advice as needed.

The mediator should also be well-informed about the parties and the features of their dispute and know something about:

- the balance of power;
- the primary sources of pressure exerted on the parties;
- the pressures motivating them toward agreement as well as pressures blocking agreement;
- the economics of the industry or particular company involved;
- political and personal conflicts within and between the parties;
- the extent of the settlement authority of each of the parties.

## In mediation, an impartial intervenor helps the parties reach a voluntary settlement.

The mediator sets the date, time and place for the hearing at everyone's convenience.<sup>25</sup>

**Introduction.** In the mediation process, the introductory stage may be the most important.<sup>26</sup> It is in that phase, particularly the first joint session, that the mediator establishes his or her acceptability, integrity, credibility and neutrality. The mediator usually has several objectives to achieve initially. They are: establish control of the process; determine issues and positions of the parties; get the agreement-forging process started; and encourage continuation of direct negotiations.<sup>27</sup>

Unlike a judge in a settlement conference or an arbitrator who wields the

clout of a decision, a mediator does not, by virtue of position, ordinarily command the parties' immediate trust and respect; the mediator earns them through a carefully orchestrated and delicately executed ritual of rapport-building. Every competent mediator has a personal style. The content of the mediator's opening remarks is generally crucial to establishing rapport with the parties and the respectability of the mediator and the process.

Opening remarks focus on: identifying the mediator and the parties; explaining the procedures to be followed (including caucusing);<sup>28</sup> describing the mediation function (if appropriate) and emphasizing the continued decisionmaking responsibility of the parties; and reinforcing the confidentiality and integrity of the process.<sup>29</sup> When appropriate, the mediator might invoke the community and public interest in having the dispute resolved quickly and emphasize the interests of the constituents in the successful conclusion of the negotiations.<sup>30</sup>

Finally, the mediator must assess the parties' competence to participate in the process. If either party has severe emotional, drinking, drug, or health problems, the mediator may postpone the proceeding. If the parties are extremely hostile and verbally abusive, the mediator must endeavor to calm them, by preliminary caucusing if necessary.<sup>31</sup>

**Problem statement.** There are essentially two ways to open a discussion of the dispute by the parties: Both parties give their positions and discuss each issue as it is raised; or all the issues are first briefly identified, with detailed exposition of positions reserved until all the

23. Salem, *Mediation—The Concept and the Process*, in *INSTRUCTORS MANUAL FOR TEACHING CRITICAL ISSUES* (1984, unpublished). See generally Simkin, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 25 (BNA, 1971). Court-annexed mediation is a process in which judges refer civil cases to a neutral (mediator or master) for settlement purposes. It also includes in-court programs in which judges perform the settlement function full-time.

24. See generally Ray, *The Alternative Dispute Resolution Movement*, 8 *PEACE AND CHANGE* 117 (Summer 1982). The process of mediation and the roles and strategies of mediators have been generally neglected in studies of negotiation. As one author remarked, "Mediation still remains a poorly understood process." Gulliver, *supra* n. 8.

25. Meagher, "Mediation Procedures and Techniques," 18-19 (unpublished paper on file in the Office of the General Counsel, FMCS, Washington, D.C.). Mr. Meagher is a former commissioner of FMCS.

26. The success of the introductory stage is directly related to two critical factors: (1) the appropriate timing of the mediator's intervention, and (2)

the opportunity for mediator preparation. A mediator's sense of timing is the ability to judge the psychological readiness of an individual or group to respond in the desired way to a particular idea, suggestion or proposal. Meagher, *supra* n. 25, at 5, see also Maggiolo, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* 62 (Dobbs Ferry, NY: Oceana Publications, 1971). The kinds of preparatory information needed by the mediator are discussed in the text *supra*. In many instances, such information is not available prior to intervention and thus it must be delicately elicited by the mediator during the introductory stage.

27. Meagher, *supra* n. 25, at 26-27. Wall, *Mediation, An Analysis, Review and Proposed Research*, 25 *J. CONFLICT RES.* 157, 161 (1981).

28. Caucusing is an *ex parte* conference between a mediator and a party.

29. Meagher, *supra* n. 25, at 28; Maggiolo, *supra* n. 26, at 42-44.

30. *Id.*

31. Ray, *supra* n. 24, at 121; Maggiolo, *supra* n. 26, at 52-54.

issues have been identified. The second procedure is preferred; the first approach often leads to tedious time-consuming rambling about insignificant matters, sometimes causing the parties to become more entrenched in their positions.<sup>32</sup>

Generally, the complaining party tells his or her "story" first. It may be the first time that the adverse party has heard the full basis for the complaint. The mediator actively and empathically listens, taking notes if helpful, using listening techniques such as restatement, echo and non-verbal responses. Listening is the mediator's most important dispute-resolving tool.<sup>33</sup>

The mediator also:

- asks open-ended and closed-ended questions at the appropriate time and in a neutral fashion;
- obtains important "signals" from the behavior and body movements of the parties;
- calms a party, as necessary;
- clarifies the narration by focused questions;
- objectively summarizes the first party's story;
- defuses tensions by omitting disparaging comments from the summary;
- determines whether the second party understands the first party's story;
- thanks the first party for his or her contribution.

The process is repeated with the second party.<sup>34</sup>

**Problem clarification.** It is in this stage that the mediator culls out the true underlying issues in the dispute. Often the parties to a dispute intentionally obfuscate the core issues. The mediator pierces this cloud-cover through separate caucuses in which he or she asks direct, probing questions to elicit information which one party would not disclose in the presence of the other party. In a subsequent joint session, the mediator summarizes areas of agreement or disagreement, being careful not to dis-

## The arbitrator's function is quasi-judicial in nature.

close matters which the parties shared with the mediator in confidence. They are assisted in grouping and prioritizing issues and demands.<sup>35</sup>

**Generation and evaluation of alternatives.** In this stage, the mediator employs two fundamental principles of effective mediation: creating doubt in the minds of the parties as to the validity of their positions on issues; and suggesting alternative approaches which may facilitate agreement.<sup>36</sup> These are two functions which parties to a dispute are very often unable to perform by themselves. To carry out these functions, the mediator has the parties separately "brainstorm" to produce alternatives or options; discusses the workability of each option; encourages the parties by noting the probability of success, where appropriate; suggests alternatives not raised by the parties and then repeats the three previous steps.<sup>37</sup>

**Selection of alternative(s).** The mediator may compliment the parties on their progress and use humor, when appropriate, to relieve tensions; assist the parties in eliminating the unworkable options; and help the parties determine which of the remaining workable solutions will

produce the optimum results with which each can live.<sup>38</sup>

**Agreement.** Before the mediation is terminated, the mediator summarizes and clarifies, as necessary, the terms of the agreement reached and secures the assent of each party to those terms; sets a follow-up date, if necessary; and congratulates the parties on their reasonableness.

The mediator does not usually become involved in drafting a settlement agreement. This task is left to the parties themselves or their counsel. The agreement is the parties', not the mediator's.<sup>39</sup>

A mediator's patience, flexibility and creativity throughout this entire process are necessary keys to a successful resolution.

## The "neutral's" functions

To fully appreciate the differences (or the similarities) between the two processes, and to evaluate the appropriate use of either process, it is instructive to focus on considerations which exist at their interface—the function and power of the "neutral." This is a particularly important exercise to acquire a realistic expectation of the result to be obtained from each process.

The arbitrator's function is quasi-judicial in nature and, because of this, an arbitrator is generally exempt from civil liability for failure to exercise care or skill in performing the arbitral function.<sup>40</sup> As a quasi-judicial officer, the arbitrator is guided by ethical norms in the performance of duties. For example, an arbitrator must refrain from having any private (*ex parte*) consultations with a party or with an attorney representing a party without the consent of the opposing party or counsel.<sup>41</sup>

Moreover, unless the parties agree otherwise, the arbitration proceedings are private and arbitrators must take appropriate measures to maintain the confidentiality of the proceedings.<sup>42</sup> It has generally been held that an arbitrator may not testify as to the meaning and construction of the written award.<sup>43</sup>

In contrast, a mediator is not normally considered to be quasi-judicial, unless he or she is appointed by the court as, for example, a special master. Some courts have extended the doctrine of immunity to persons termed "quasi-arbitrators"—persons empowered by agreement of the parties to resolve disputes arising be-

32. Meagher, *supra* n. 25, at 30; Maggiolo, *supra* n. 26, at 47.

33. Ray, *supra* n. 24, at 121; Salem, *supra* n. 23, at 4-5; Robins, *supra* n. 1, at 27; Maggiolo, *supra* n. 26, at 48-49.

34. Ray, *supra* n. 24, at 121.

35. *Id.* at 121-22; Meagher, *supra* n. 25, at 57-58; Robins, *supra* n. 1, at 43-44; Maggiolo, *supra* n. 26, at 49-50.

36. Maggiolo, *supra* n. 26, at 12. Other basic negotiation principles which some mediators use to advantage throughout the mediation process are found in Fisher and Ury, *GETTING TO YES*, (New York: Penguin Books, 1983. Those principles are: (1)

separate the people from the problem; (2) focus on interests, not positions; (3) invent options of mutual gain; (4) insist on using objective criteria.

37. Ray, *supra* n. 24, at 122. Meagher, *supra* n. 25, at 48-49, describes additional techniques of "planting seeds," "conditioning," and "influencing expectations."

38. Ray, *supra* n. 24, at 122.

39. *Id.*

40. Domke, *supra* n. 12, §23:01, at 351-53.

41. *Id.* §24:05, at 380.

42. *Id.*

43. *Id.* §23:02, at 355.

## A mediator has little systemic-based power.

tween them.<sup>44</sup> Although the law is far from clear on this point, a very persuasive argument may be advanced that mediators are generally immune from lawsuits relating to the performance of their mediation duties where the agreement under which they perform contains a hold-harmless provision or its equivalent.

In absence of such contractual provision, it would appear that a functionary such as a mediator, selected by parties to perform skilled or professional services, would not ordinarily be immune from charges of negligence but rather is required to work with the same skill and care exercised by an average person engaged in the trade or profession involved.<sup>45</sup>

Of course, weighing heavily against a finding of negligence on the part of a mediator is the intrinsic nature, if not the essence, of the mediation process which invests the parties with the complete power over their destiny; it also guarantees any party the right to withdraw from the process and even to eject the mediator during any pre-agreement stage.<sup>46</sup>

Also, in contrast to arbitrators, certain ethical restrictions do not apply to mediators. Mediators are permitted to have *ex parte* conferences with the parties or counsel. Indeed, such caucuses, as they are called, are the mediator's stock-in-trade. Furthermore, while one of the principal advantages of a privately-conducted mediation is the non-public or confidential nature of the proceedings, and although Rule 408 of the Federal Rules of Evidence and public policy considerations argue in favor of confidentiality, the current state of the law does not provide a guarantee of such confidentiality.<sup>47</sup> However, in most cases

a strong argument can be made that the injury from disclosure of a confidential settlement proceeding is greater than the benefit to be gained by the public from nondisclosure.<sup>48</sup>

Finally, unlike the arbitrator, the performance of whose function may be enhanced by knowledge, skill, or ability in a particular field or industry, the mediator need not be an expert in the field which encompasses the subject of the dispute. Expertise may, in fact, be a handicap, if the parties look wrongly to the mediator as an advice-giver or adjudicator.<sup>49</sup>

### Comparative power

The arbitrator derives power from many sources. The person may be highly respected in a particular field of expertise or widely renowned for fairness. But aside from these attributes which emanate from personal talents or characteristics, the arbitrator operates within a procedural and enforcement framework which affords considerable power, at least from the perspective of the disputants. Under certain circumstances, arbitrators may possess broad remedy powers, including the power, though rare, to grant injunctive relief.<sup>50</sup> They normally have subpoena power, and generally they have no obligation to anyone, not even "to the court to give reasons for an award."<sup>51</sup>

In general, a valid arbitration award constitutes a full and final adjustment of the controversy.<sup>52</sup> It has all the force and effect of an adjudication, and effectively

precludes the parties from again litigating the same subject.<sup>53</sup> The award can be challenged in court only on very narrow grounds. In some states the grounds relate to partiality of the arbitrator or to misconduct in the proceedings, such as refusal to allow the production of evidence or to grant postponements, as well as to other misbehavior in conducting the hearings so as to prejudice the interests of a party.<sup>54</sup>

A further ground for challenge in some states is the failure of the arbitrator to observe the limits of authority as fixed by the parties' agreement—such as determining unsubmitted matters or by not dealing definitely and finally with submitted issues.<sup>55</sup> In Illinois, as in most states, a judgment entered on an arbitration award is enforceable "as any other judgment."<sup>56</sup> Thus, from a systemic perspective, the arbitrator is invested with a substantial amount of power.

In striking contrast, with the exception of a special master appointed by the court or a neutral appointed by some governmental body, the mediator has little if any systemic-based power. Most if not all of a mediator's power is derived from experience, demonstrated skills and abilities, and a reputation for successful settlements.

Any particular mediator may wield power by adopting a particular role on what might be described as a continuum representing the range of strengths of intervention: from virtual passivity, to

44. See *Craviolini v. Scholer & Fuller Associated Architects*, 89 Ariz. 24, 357 P.2d 611 (1960), where an architect was deemed to be a "quasi-arbitrator" under an agreement with the parties and therefore entitled to immunity from civil liability in an action brought against him by either party in relation to the architect's dispute-resolving function. Compare *Gammell v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955), where certified public accountants, selected for the specific purpose of making an examination and of auditing the books of a corporation to ascertain its earnings, were held not to have acquired the status of arbitrators so as to create immunity for their actions in the performance of such service, simply because the report was to be binding upon the parties.

45. *Domke*, *supra* n. 12, §23:01, at 352-53.

46. As two professional mediators have poignantly commented: "Unlike arbitration and other means of adjudication, the parties retain complete control... If they do not like the mediator, they get another one. If they fail to produce results, they may end the mediation at any time." Phillips and Piazza, *How to Use Mediation*, 10 A.B.A.J. OF SECT. OF LIT. 31 (Spring, 1984).

47. See *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84 (E.D. N.Y. 1981) (Court granted a motion to enforce a subpoena *duces tecum* involving a report prepared by a neutral fact-finder on the effects of certain price-fixing activities). See generally Restivo and Mangus, *Alter-*

*native Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence? Alternatives to the High Cost of Litigation*, 2 LAW & BUS. INC./CTR. FOR PUBLIC RESOURCES, 5 (May, 1984). Parties can assist the preservation of confidentiality of their mediation proceedings by reducing to writing any expectations or understanding regarding the confidentiality of the proceedings and by being careful to protect against unnecessary disclosure both within their respective constituencies and the outside world, *id.* at 9.

48. See, e.g., *NLRB v. Joseph Macaluso*, 618 F.2d 51 (9th Cir. 1980); *Pipefitters Local 208 v. Mechanical Contractors Assn. of Colorado*, 90 Lab. Cas. (CCH) ¶ 12,647 (D. Colo. 1980).

49. Phillips and Piazza, *supra* n. 46, at 33.

50. In re Ruppert, 29 LA 775, 777 (N.Y. Ct. App. 1958); In re Griffin, 42 LA 511 (N.Y. Sup. Ct. 1964). See generally Elkouri and Elkouri, *supra* n. 3, at 241-51.

51. *Domke*, *supra* n. 12, §29:06, at 436.

52. *Donoghue v. Kohlmeier & Co.*, 63 Ill. App. 3d 979, 380 N.E.2d 1003, 20 Ill. Dec. 794 (1978).

53. *Borg, Inc. v. Morris Middle School Dist. No. 54*, 3 Ill. App. 3d 913, 278 N.E.2d 818 (1972).

54. *Domke*, *supra* n. 12, §33:00, 463.

55. *Id.* In Illinois, the court's power to vacate or modify arbitration awards is narrowly circumscribed. See ILL. REV. STAT. ch. 10, ¶¶ 112, 113 (1981).

56. ILL. REV. STAT. ch. 10, ¶114 (1981).

**Table 1: A comparison of arbitration/mediation processes**

Arbitration	Mediation
<b>1. Initiation</b> Submission Demand or notice Court rule or order Selection of arbitrator	<b>1. Initiation</b> Submission Court rule or order Assignment or selection of mediator
<b>2. Preparation</b> Discovery Prehearing conference Motions Stipulations Arbitrator's oath Arbitrator's administrative duties Arbitrator does not seek out information about parties or dispute	<b>2. Preparation</b> Usually, no discovery Parties obtain background information on claims, defenses, remedies Mediator obtains information on parties and history of dispute Usually, no mediator oath
<b>3. Prehearing conference</b> Administrative Scheduling No discussion of underlying merits of claims or defenses No <i>ex parte</i> conferences	<b>3. Introduction</b> Mediator: Conducts <i>ex parte</i> conferences, if necessary, for calming Gives opening descriptive remarks Develops trust and respect Emphasizes importance of successful negotiations Helps parties separate the people from the problem
<b>4. Hearing</b> Not generally open to public Written record, optional Witnesses and parties testify under oath <b>Opening statement</b> Made orally Sometimes also in writing <b>Order of proceedings and evidence</b> Complainant party usually presents evidence first Arbitrator may subpoena witnesses Evidence rules relaxed Arbitrator rules on objections to evidence; may reject evidence <b>Closing arguments</b> Oral arguments normally permitted for clarification and synthesis Post-hearing briefs sometimes permitted	<b>4. Problem statement</b> Confidential proceeding, no written record Parties do not speak under oath Issues identified Issues discussed separately; stories told Mediator listens; takes notes Mediator asks questions; reads behavioral signals Mediator calms parties; summarizes stories; defuses tensions Mediator determines whether parties understand stories Mediator usually has no subpoena power
<b>5. Decisionmaking</b> If issues non-complex, arbitrator can issue an immediate decision If issues complex, or panel has three members, extra time may be required	<b>5. Problem clarification</b> Mediator: Culls out core issues in caucus Asks direct, probing questions Summarizes areas of agreement and disagreement Assists parties in grouping and prioritizing issues and demands Helps parties focus on interests, not positions
<b>6. Award</b> Normally in writing, signed by arbitrator(s) Short, definite, certain and final, as to all matters under submission Occasionally a short opinion accompanies award Award may be judicially enforceable or reviewable	<b>6. Generation and evaluation of alternatives</b> Mediator: Creates doubts in parties' minds as to validity of their positions Invents options for facilitating agreement Leads "brainstorming;" discusses workability; notes probability of success of options
	<b>7. Selection of alternative(s)</b> Mediator: Compliments parties on progress Assists parties in eliminating unworkable options Helps parties to use objective criteria Helps parties determine which solution will produce optimum results
	<b>8. Agreement</b> Mediator: Summarizes and clarifies agreement terms Sets follow-up date, if appropriate Congratulates parties on their reasonableness Usually does not draft or assist in drafting agreement Agreement is enforceable as a contract and subject to later modification by agreement

"chairman," to "enunciator," to "prompter," to "leader," to virtual arbitrator.<sup>57</sup> The mediator who can adopt different roles on this continuum, changing strategies to fit changing circumstances and requirements of both the

57. Gulliver, *supra* n. 8, at 220.

58. *Id.* at 226.

59. Where a settlement agreement is reduced to a judgment, for example, through intervention and assistance of a special master, the "consent judgment" is generally enforceable, if necessary, before the court in which the consent judgment is entered.

disputants and himself, is inevitably more effective in accumulating and wielding power which is real, yet often not consciously perceptible by the disputants themselves.<sup>58</sup>

Since, in the ordinary case, the result of the mediation process is an agreement or contract not reduced to a court judgment,<sup>59</sup> the result is binding on the parties only to the extent that the law of contracts in the particular jurisdiction requires.

And to the same extent, the result is enforceable by one party against another. As a practical matter, where a party breaches an agreement or contract which is the product of mediation and the agreement is not salvageable, prudence would seem to dictate that in most cases the underlying dispute—and not the breach of agreement—should be litigated.

## Summary

It is clear that both the functions and the levels of power of the arbitrators and mediators are dramatically different. Counsel must assess the nature of the dispute and the personalities of the disputants prior to determining which process, arbitration or mediation, has the best chance to achieve a successful resolution of the particular conflict.

For example, arbitration would probably prove to be the better dispute resolution choice where the dispute involves highly technical matters; a long-standing feud between the disputants; irrational and high-strung personalities; and no necessity of a continued relationship after resolution of the conflict.

On the other hand, mediation may prove to be the most effective choice where disputants are stubborn but basically sensible; have much to gain from a continued relationship with one another; and conflict resolution is time-critical.

Arbitration and mediation are two separate and distinct processes having a similar overall goal (terminating a dispute), while using totally different methods to obtain dissimilar (decisional vs. contractual) results. These differences are best understood by viewing the processes side-by-side in Table 1.

The benefits of arbitration and mediation to litigants, in terms of cost and time savings, are just beginning to be recognized by lawyers and business professionals alike. It is hoped that this discussion of the arbitration and mediation processes and their differences will help lawyers feel more comfortable with these two methods of dispute resolution and to use them to their clients' advantage in their joint pursuit of swift, inexpensive, simple justice. □

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**I**

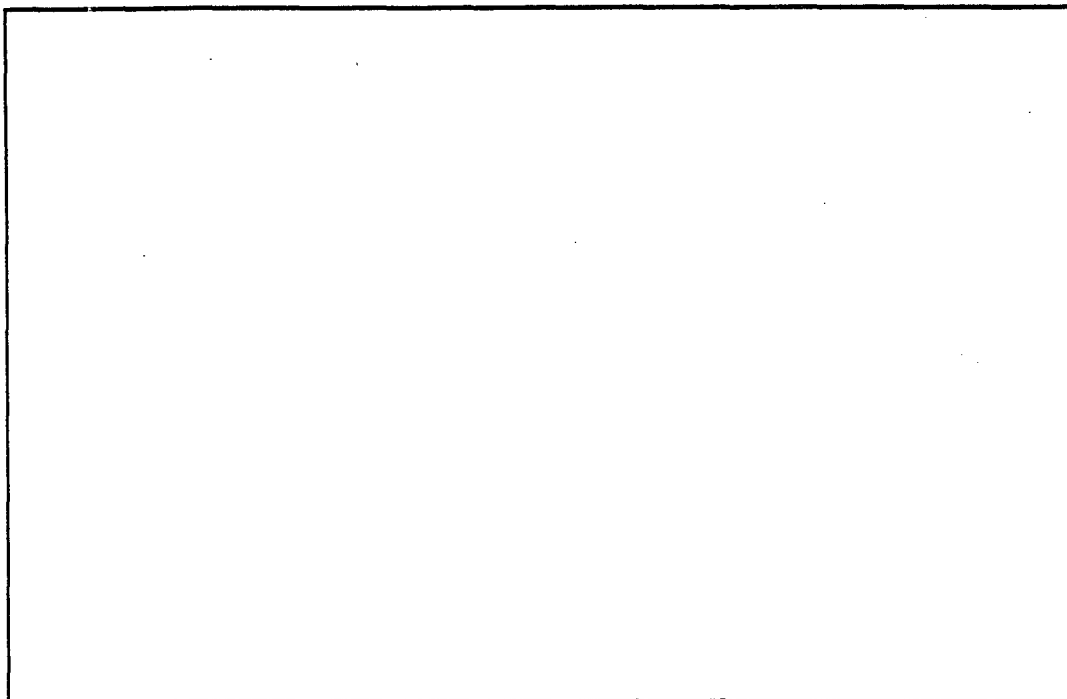
Tab I

DOMESTIC RELATIONS MEDIATION

- "Divorce Mediation in the States: Institutionalization, Use, and Assessment," Susan Meyers, Geoff Gallas, Roger Hanson, and Susan Keilitz, 12 State Court Journal (Fall 1988).
- Survey, "Divorce Mediation Programs, By State," National Center for State Courts (1988).
- Kressel, Kenneth, "Research on Divorce Mediation: A Summary and Critique of the Literature," The Role of Mediation in Divorce Proceedings: A Comparative Perspective, Vermont Law School Dispute Resolution Project (1987).
- Clark, Lincoln, and Jane Orbeton, "Mandatory Mediation of Divorce: Maine's Experience," 69 Judicature 310-311 (February-March 1986).

# Divorce Mediation In the States: Institutionalization, Use, and Assessment

Susan Myers • Geoff Gallas • Roger Hanson • Susan Keilitz



**D**uring the past several years, dispute resolution has taken on new forms as either complements or alternatives to traditional court processing of disputes. Many dispute resolution programs have been instituted by the courts to encourage earlier settlements and thereby reduce congestion and delay as well as costs to the court and the disputants. Besides increasing efficiency in resolving disputes, court-instituted pro-

grams seek to ensure that the quality of justice they deliver equals or betters the quality of traditional court adjudication. Other dispute resolution programs operate outside the control of the courts but maintain institutional links to them, either through referrals or funding. In addition, there are a number of dispute resolution programs that are private and have no formal relationship to the courts.

Alternative dispute resolution (ADR) processes have been applied in virtually all types of civil cases and in many minor criminal matters. As can be expected with every innovation, the development of these ADR programs has attracted the attention of and stirred controversy among court administrators, researchers, academics, and dispute resolution practitioners. While the debate over the merits of ADR has continued, the number of programs throughout the United States has reached an estimated 700.<sup>1</sup> Although the adoption of ADR programs is less pervasive among the thousands of individual

state trial courts than this estimate might suggest,<sup>2</sup> a majority of states have turned to ADR in domestic relations cases.

Mediation's significant potential as an alternative to the court's handling of domestic relations cases was underscored by the results of a 1987 survey of state court administrators conducted by the National Center for State Courts (NCSC) at the direction of the Conference of State Court Administrators (COSCA) Committee on Alternative Dispute Resolution (COSCA/NCSC survey).<sup>3</sup> The COSCA/NCSC survey documented that alternative programs for resolving divorce-related disputes were more pervasive than other types, including court-annexed arbitration. This finding prompted the COSCA Committee on Alternative Dispute Resolution to take a closer look at the development of divorce mediation programs in particular. NCSC, therefore, developed a survey focusing on divorce mediation programs in the 50 states and the District of Columbia (COSCA/NCSC

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The authors are all with the National Center for State Courts. Susan Myers is a research consultant, Geoff Gallas is director of research and special services, Roger Hanson is a senior staff associate, and Susan Keilitz is a staff attorney.



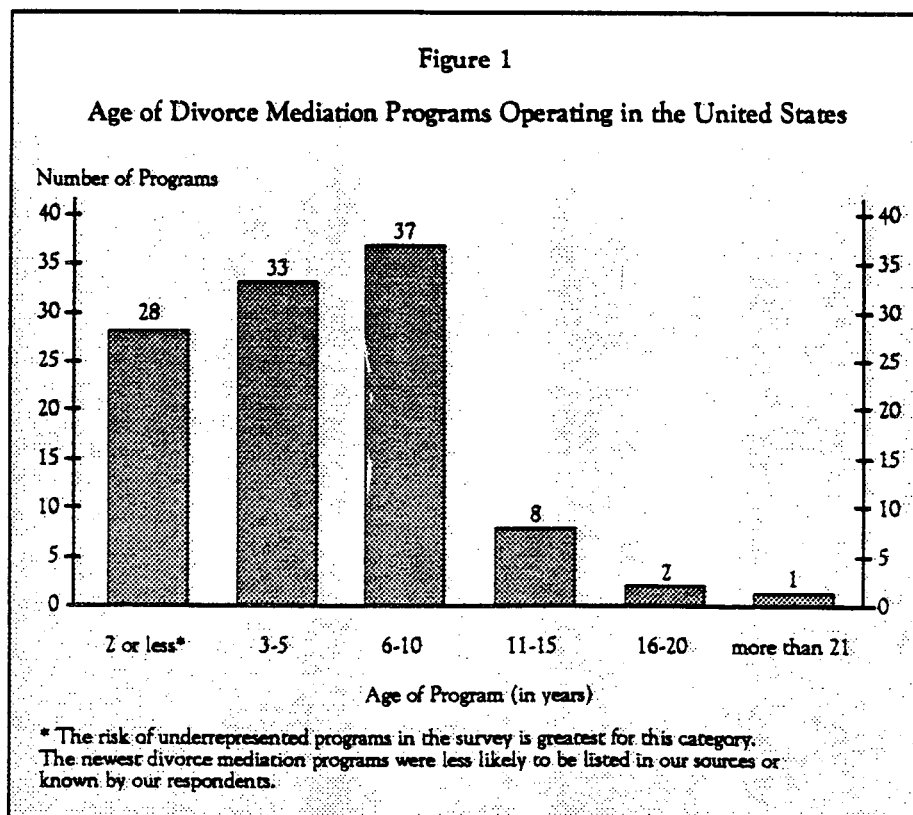
divorce mediation survey). This survey indicated that divorce mediation programs operate in 36 states and the District of Columbia.

The large number of states with divorce mediation programs indicates a greater willingness of policymakers to institute alternative processes—primarily mediation<sup>4</sup>—for divorce-related disputes. Enthusiasm for divorce mediation (measured by the number of new programs initiated per year) continues to be strong today, even though the rate of program creation peaked in the late 1970s and early 1980s (see Figure 1). This willingness to experiment with alternative forums seems to stem from a perception that family conflicts are better resolved through consensual rather than adversarial methods.

Yet, despite its more widespread adoption, divorce mediation has not escaped criticism. Critics of divorce mediation primarily question the effects of mediation on the relative bargaining power of the divorcing parties.<sup>5</sup> They contend that the power of the court is needed to protect the interests and rights of the party in the weaker position, often the woman, who might tend to acquiesce to the demands of the dominant party. Even among divorce mediation advocates there is controversy over a number of matters, including the scope of issues that mediation programs should address (i.e., custody, visitation, child support); whether mediation should be mandatory or voluntary; the proper role of mediators; and what kind of training and academic preparation divorce mediators should have.

Three findings of the COSCA/NCSC divorce mediation survey indicate that the pattern of adoption of divorce mediation processes reflects that, to date, experience with divorce mediation has been insufficient to settle the debate over the use and benefits of divorce mediation. These findings, which are discussed below, are (1) a pattern of limited diffusion, (2) differences in the willingness to include child support among issues to be mediated, and (3) tremendous variation among the state courts in methods of adopting divorce mediation.

First, although 36 states and the District of Columbia have at least one divorce mediation program, thirteen of these states have a program in only one trial court jurisdiction, and only eight have programs statewide (see Figure 2).



The limited diffusion of divorce mediation programs suggests that many policymakers are still evaluating mediation as an appropriate method of resolving divorce-related disputes.

Second, while all programs surveyed mediate custody and visitation, only 62 percent mediate child support; further, there is no discernible pattern in how support negotiations are handled among those programs that do mediate support. The levels of child support orders and compliance with those orders are perhaps the most critical issues arising from divorce disputes. How these issues are resolved has tremendous significance to the interests of children, the economic well-being of custodial and noncustodial parents, and federal and state resources. (EDITOR'S NOTE: See "Deficiencies in Child Support: Consequences for Children and Implications for Courts," on page 4.) The less-pervasive use of mediation for child support by those who are willing to try alternative procedures for other types of disputes reflects hesitancy to entrust the resolution of child support issues to a process that has not yet worked out uniform standards for protecting rights within the context of direct negotiation between disputants.

Third, the characteristics of programs in such areas as institutionalization, program scope, and mediator qualifications are as diverse as the views among divorce mediation advocates. This diversity indicates that practitioners are far from reaching consensus on how best to adopt divorce mediation, suggesting the need for empirical research on varying models of adoption.

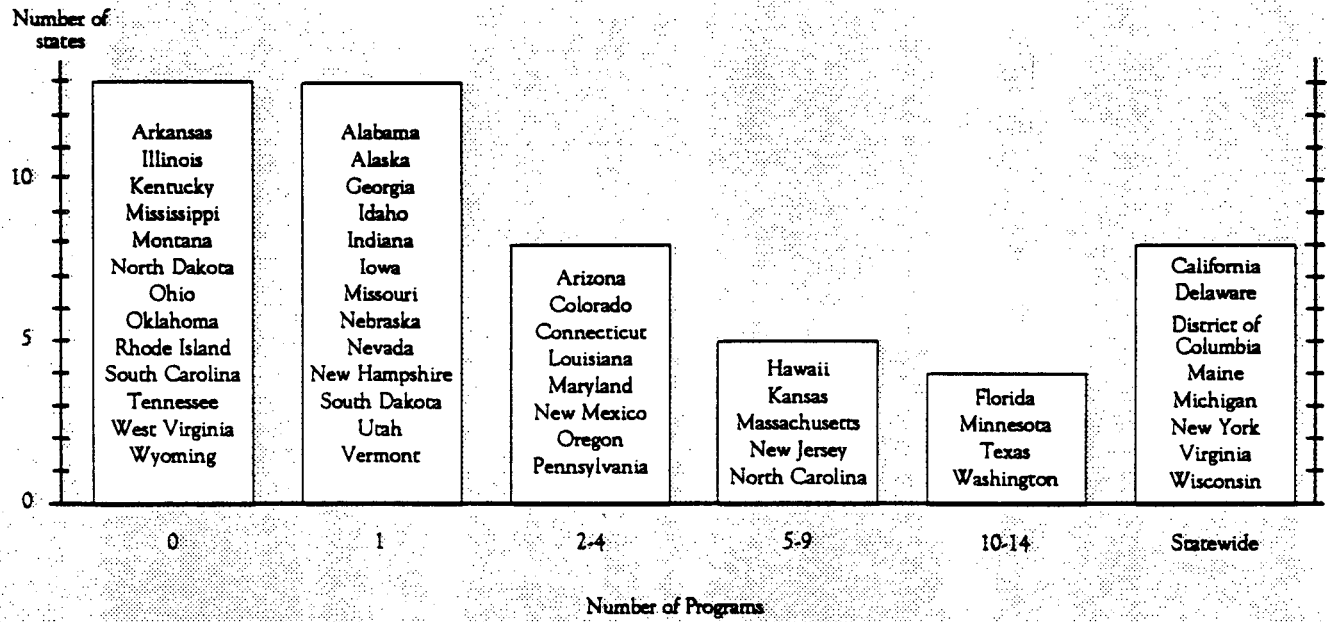
This article will present information from the COSCA/NCSC divorce mediation survey and place the survey findings within the context of the debate over how and when divorce mediation is used to the greatest advantage of court systems and disputants. After briefly discussing the survey's design, we will describe the mediation programs in terms of their institutional framework, utilization, features, and self-assessment. Finally, we will discuss the implications of the survey for future evaluation of divorce mediation.

## Survey design

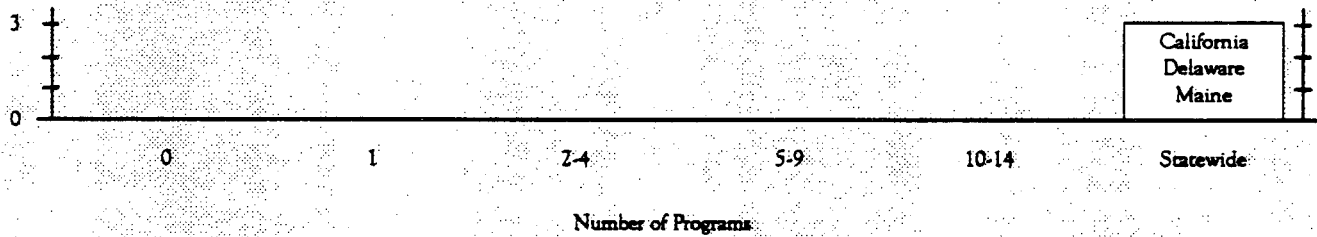
After studying the findings of the COSCA/NCSC survey of ADR programs operating in the states in January 1988, the COSCA Alternative Dispute Resolution Committee asked the NCSC staff to

Figure 2

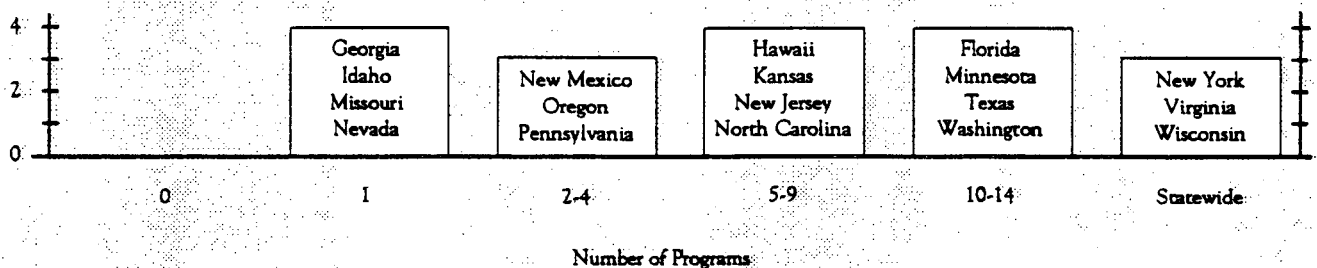
Total Number of Divorce Mediation Programs by State



Programs State-mandated in Whole or Part



Programs Locally Mandated in Whole or Part



take a closer look at divorce mediation programs in the states. The committee decided to devote special attention to divorce mediation for two reasons: (1) this innovation's apparent diffusion across the states and (2) the promise of this dispute resolution procedure for resolving critically important social issues, including those that affect the interests of children.

In carrying out the COSCA/NCSC divorce mediation survey, NCSC staff tried to identify every program (private and public) that is engaged in some type of divorce-related dispute settlement (divorce, custody, visitation, child support modifications, and paternity). The basic sources were the COSCA/NCSC survey of alternative dispute resolution programs<sup>6</sup> and the American Bar Association's 1986-87 *Dispute Resolution Program Directory*. This produced a list of 201 programs potentially offering divorce mediation. It should be noted that while this list of programs was more comprehensive and accurate in terms of locating divorce mediation programs than either of the sources we used, we do not claim comprehensiveness for our survey. Because enthusiasm for and development of divorce mediation programs is growing, a one-time survey can claim only to accurately reflect the activity at that particular time. Also, while we were able to confirm whether the programs listed by our two sources were still extant and involved in divorce mediation, we did not attempt to supplement those lists, except where follow-up calls to program administrators allowed us to ask questions about the mediation network in that particular jurisdiction or state. Because of these limits we would expect *private* mediation practices (a single attorney, for example, who has added mediation to the services offered by his or her practice) to be under-represented in our data.<sup>7</sup>

Each program was sent a questionnaire that solicited the following information: the date the program was initiated; whether the program is experimental or permanent; its funding sources; the types

of issues it mediates; its referral process; its annual number of divorce cases; its annual number of child support cases; its relationship to the court; and the number of staff members and their professional training. In addition, the survey recipients were asked to indicate the availability of a variety of program and evaluation information, including institutionalization (e.g., how their program was established); mediation outcomes (e.g., rate of settlement, average amount of child support orders); efficiency (e.g., cost per case); evaluations (e.g., specified program goals and measures of achievement); disputant

ated? What are the qualifications of mediators? Do programs monitor their performance for self-improvement?

## INSTITUTIONAL FRAMEWORK

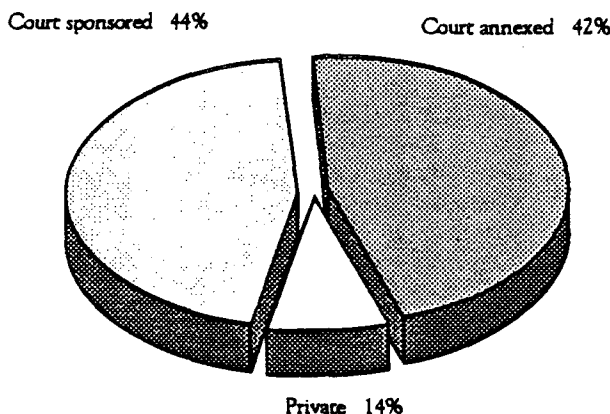
When policymakers or administrators decide to create a divorce mediation program, they are confronted with several important choices. These include the extent to which it will be related to the courts (court annexed, court sponsored, or private); methods of referring cases to mediation (participation can be voluntary, mandated, or at the court's discretion); the criteria used for sending cases to mediation where that choice is at the court's discretion; and whether there is or should be a statewide policy on the use of divorce mediation, or if it is or should be instituted by individual jurisdictions instead.

### Ties to the court

Eighty-six percent of the programs that responded to the divorce mediation survey indicated that they have some strong, institutional connection to the courts, where funding and use are shared by the courts or where the courts use a regular procedure of referring cases to mediation. Forty-two percent of these programs are court annexed, while the other 44 percent are court sponsored. The remaining 14 percent are private programs, but even they may have some court relationship, if only as a substitute for court services. (See Figure 3.)

The question of divorce mediation's dependence on courts for funding and referrals is controversial, with some divorce mediation proponents advocating program autonomy from the courts.<sup>9</sup> Yet despite this debate, most of the programs we surveyed were related to the court. This connection does not indicate that the goals of mediation have been subordinated to court-related imperatives nor does it mean that mediation has become a substitute for court processing. In general, mediation complements traditional litigation processes. That discretionary and voluntary programs are more widespread than mandatory programs and that mediation seems to specialize in issues of

Figure 3  
Institutionalization of Divorce Mediation Programs



characteristics (e.g., income level, age); and the process (e.g., range of issues addressed, average number and length of mediation sessions).

One-hundred-fifty-five programs completed and returned the questionnaire for a response rate of 77 percent. However, 37 of the responses were eliminated because they came from programs not engaged in divorce mediation. The net sample of eligible respondents thus included 118 divorce mediation programs.<sup>8</sup>

## Findings

This section will describe the institutional framework, utilization, program characteristics, and available assessments of divorce mediation programs. What is the organizational connection between the programs and the courts? How widespread is their adoption? How many cases do they handle? Which issues are medi-

visitation and custody while the courts remain more involved in child support seem to support this conclusion. There appears to be a loose division of labor between litigation and mediation, with disputants and policymakers still finding complementary reasons to use each forum.

#### ***Discretionary, mandatory, or voluntary***

Discretionary programs are those in which the judge can decide which cases to send to mediation. An element of consent generally remains in those cases because parties ultimately choose whether they will participate in mediation. Strictly voluntary programs leave the choice to initiate mediation to the parties themselves, while mandatory programs require cases to be submitted to mediation. In Kansas, for example, parties are required to attend at least one mediation session before the court will hear the case. Eighty-five percent of the programs are either discretionary or voluntary. Thirty-seven percent of the programs surveyed are mandatory in some aspect.

Overlap between the 85 percent and 37 percent figures occurs because over one-fourth of the programs reported that mediation is voluntary for some case types and mandated for others. Minnesota mandates custody mediation, while individual programs may make participation in the mediation of visitation, support, and modifications voluntary. Maine's Court Mediation Service carries out a statewide mandate for mediating contested divorces involving minor children but makes participation voluntary for families without minor children. Virginia's 25th Judicial District court service unit in Staunton mandates mediating motions to amend divorce decrees as a means of clearing the docket, but other issues are mediated voluntarily. The De Kalb County Superior Court in Georgia mandates mediating custody and visitation issues but not support or settlement modifications. And the Fort Lauderdale, Florida, Family Mediation and Conciliation Program mediates divorce, visitation, and custody issues on a voluntary or discretionary basis when they occur before a decree is issued, but mandates mediating motions for postdecree custody and visitation modifications.

Although a majority of programs are not mandatory, the fact that 37 percent do

require participation makes it clear that many policymakers and court administrators are persuaded that at least one attempt to mediate should be required under certain circumstances. However, opinion is far from unanimous on which types of cases benefit most from mandatory mediation. The criteria used for choosing to mandate mediation include the type of case, whether motions are made before or after a decree is issued, and the ages of any children involved.

How divorce mediation is adopted and institutionalized is important because it shapes the authority of mediators, the integrity of agreements produced in mediation, and the extent to which parties must at least attempt mediation. Behind the formal labels of mandatory versus voluntary mediation, however, there is rich diversity of program details, such as the scope of issues subject to mediation and the authority of the mediators. California, Maine, and Delaware, which all have statewide mandatory mediation of custody disputes, illustrate the differences on these matters. In California, all parents who petition the courts for a custody or visitation hearing must first attempt mediation (California Civil Code 1981), but mediation may not include support issues. Mediators may exclude attorneys from mediation sessions and may exercise the powers to render a decision. In the case of an unsuccessful attempt to reach a consensual settlement, mediators in California may make a recommendation to the court regarding custody or visitation.

In Maine, mandated mediation of all contested custody and visitation cases was adopted in 1984. The mandate applies to cases involving separation, unmarried parents who seek parental rights or child support, and parties seeking temporary, permanent, and postdivorce orders. Unlike California, all contested issues in Maine, including child support, may be subject to mediation, and attorneys' participation is encouraged. Mediators in Maine also have no authority to report or make recommendations to the court when the parties cannot come to agreement.

The Delaware mandatory mediation program differs from the programs in both California and Maine. Delaware mandates mediation of all contested visitation, custody, and support cases. Mediation of support is constrained, however, by a formula prescribing awards based on

family size and income. If mediation fails to result in stipulation, parties next must use a quasi-judicial process where masters hear the disputes and issue orders. Only then can the parties appeal to the court. On appeal, the court's jurisdiction is confined to the facts presented to the master.

The diversity among states with respect to how mandatory programs are institutionalized is paralleled in states where divorce mediation services can be ordered at the court's discretion or made available for voluntary use by the parties according to statute, court rule, or local practice.<sup>10</sup> As Figure 2 shows, in the states where programs are not state mandated, the number of available programs varies widely. Eight of these states report ten or more programs, while thirteen report only one program. Three of the states with divorce mediation programs operating statewide (New York, Virginia, and Wisconsin) lack statutory provisions or supreme court rules specifically authorizing courts to refer cases to divorce mediation but, nevertheless, make such programs available in most jurisdictions.

In Virginia, for example, 25 general jurisdiction trial courts offer divorce mediation through court service units. Some of the jurisdictions mediate custody, visitation, and support issues, while others confine themselves to custody and visitation issues. Twelve social service departments also mediate divorce disputes, exclusive of child support issues. The grassroots growth of mediation to resolve custody, visitation, and support disputes is under study by the state legislature, as recommended by a 1987 Governor's Commission on Alternative Dispute Resolution. In addition to legislative initiatives, Virginia's 1986-88 Comprehensive Judicial Plan calls for a feasibility and cost-effectiveness study for expanding dispute resolution services, including divorce mediation, in the Commonwealth.

States that are devising policies on divorce mediation need to decide how to institutionalize mediation: Should it remain available through private programs, be used by and coordinated with court programs, or be contained wholly within the context of court programs?; How should cases be referred to mediation?; What cases are appropriate for mediation?; Who best serves as the mediator? Profiles of caseloads and program

characteristics will be very different if mediation is strictly voluntary, at the court's discretion, or mandated. These policy choices concerning institutionalization will affect the purposes that programs serve and how widely they are used.

## UTILIZATION

The utilization of divorce mediation can be measured by the extent to which states have adopted it and the degree to which disputants choose it. A common view expressed in the literature is that the adoption of mediation programs has reached significant levels.<sup>11</sup> The number of programs adopted nationally is generally cited to support this view. Yet, national-level data reveal very little about the distribution of programs across the states.<sup>12</sup> This observation applies to the adoption of divorce mediation programs as well.

The COSCA/NCSC divorce mediation survey responses show that 36 states and the District of Columbia have at least one divorce mediation program (see Figure 2). In one sense, this figure is remarkable; many reforms in judicial administration never attract the attention of more than a few states, and considering the short period of time since the contemporary alternative dispute resolution began in the 1970s, the overall adoption of divorce mediation is relatively high.

A closer look at the numbers reveals, however, that most of the states have a very limited number of individual programs. In fact, five states (California, New York, Texas, Virginia, and Wisconsin) account for over one-half of all reported programs. Thirteen states (Alaska, Alabama, Georgia, Iowa, Idaho, Indiana, Missouri, Nebraska, Nevada, New Hampshire, South Dakota, Utah, and Vermont) have only one program, and eight more report fewer than five programs. Several highly populated states (California, Florida, New York, Texas, and Virginia) have numerous programs, whereas other similarly populated states (Illinois, Ohio, and Pennsylvania) report limited activity. Some urban areas (Los Angeles, Seattle, Minneapolis-St. Paul, Ft. Lauderdale,

Detroit, Phoenix, and Las Vegas) claim their share of divorce mediation programs, but several major urban areas (Miami, New York, Chicago, Cleveland, and San Francisco) report very little diffusion of divorce mediation programs. In fact, given the fact that at least 2,420 individual state trial courts have jurisdiction over divorce cases, it is clear that most jurisdictions have chosen not to employ mediation to handle divorce-related disputes.<sup>13</sup>

Caseloads of divorce mediation programs are also generally low (see Figure 4). The COSCA/NCSC divorce media-

derdale, Detroit, Phoenix, and Las Vegas. Twenty percent of the respondents did not report caseload figures.

As Pearson observed several years ago, the limited use of programs is linked to their voluntary nature.<sup>14</sup> Two of our survey findings corroborate her generalization. Most of the programs surveyed are discretionary or voluntary (85 percent) and a majority (66 percent) dispose of fewer than 1,000 cases per year.

## PROGRAM CHARACTERISTICS

Three factors shape what divorce mediation programs look like and contribute to the wide variation in program profiles. They are (1) the range of issues mediated, (2) the extent to which participation is voluntary, and (3) the mediators' qualifications and roles. The particular combination of these variable factors influences the organizational structure, focus, and method of rendering services of any given mediation program.

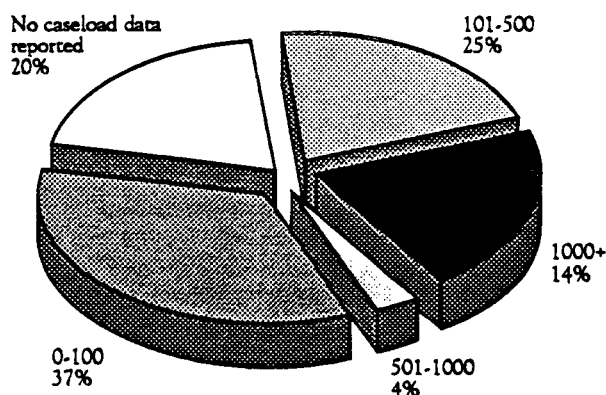
### Range of issues mediated

There are several inter-related questions concerning the scope of issues mediated whose answers identify the basic orientation of a program. How many and which issues will a program mediate? Are the issues construed broadly or narrowly? The survey data indicate that private mediation programs tend to consider a wider range of issues (all issues affecting the child, including social and financial interests) and use longer sessions than do public mediation programs, which tend to focus specifically on custody and visitation.

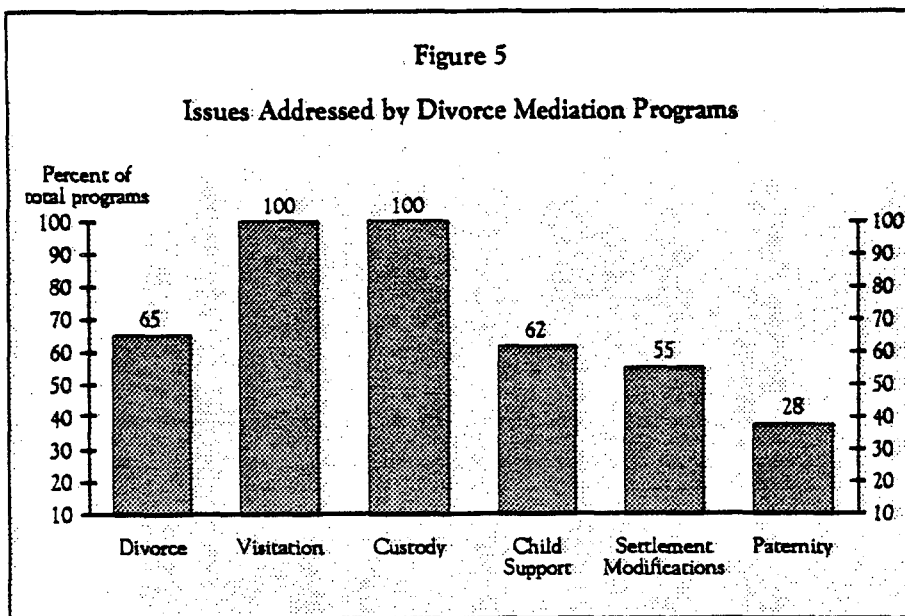
As Figure 5 shows, all of the divorce mediation programs responding to our survey mediated custody and visitation. Programs were less frequently involved in the settlement of the divorce itself, child support, settlement modifications, and paternity. The reluctance to mediate issues other than custody and visitation is more widespread among court-related than private programs. Of the mediation programs that are court related (86 percent), only half mediate child support issues; most of the private programs extend their scope to include support issues.

Figure 4

Caseloads of Divorce Mediation Programs



tion survey found that 44 programs disposed of 100 or fewer divorce cases per year. In many comprehensive alternative dispute resolution programs, divorce mediation comprises only a small portion of the caseload, which may consist predominantly of neighborhood or consumer disputes with only a smattering of domestic cases occurring in any given year. For programs that focus almost exclusively on divorce mediation, the low case volume reflects a small staff and budget and a limited service area. Approximately 25 percent of the programs reported caseloads of 100-500 cases per year, and only five programs reported handling 500-1,000 cases per year. Caseloads of more than 1,000 per year were reported by 14 percent of the programs, but these high-volume figures reflect figures reported by statewide programs, such as California, Delaware, and Maine, or programs located in population centers, such as Seattle, Minneapolis and St. Paul, Ft. Lau-



While many programs (38 percent) do not deal with child support issues (e.g., mandatory mediation in California and mediation within Virginia's Department of Social Services), many commentators have questioned whether in the bargaining context it is sound public policy to separate financial issues from custody and visitation disputes. Some argue that the issues are indivisible and that dividing them advantages the noncustodial party in the bargaining process.

If mediation is restricted to custody and visitation disputes . . . and areas in which mothers have traditionally been favored in court, fathers stand to gain more. It therefore seems incumbent on advocates of custody mediation also to be advocates for issues of particular concern to women in divorce, namely adequate financial settlements.<sup>15</sup>

Others contend that the beneficial impact of mediating custody and visitation issues will spill over into support issues that are not formally mediated. Sixty-two percent of the programs responding to the COSCA/NCSC divorce mediation survey handle child support issues as well as custody and visitation (see Figure 5). It is possible that mediation of child support will diminish if states continue to institute advisory and presumptive child support guidelines. Still, the application of such guidelines is often subject to negotia-

tion and, therefore, is an appropriate issue for mediation. For example, how the parties' incomes are determined—often the basis for setting support levels—is open to different interpretations.

#### **Mandatory versus voluntary participation**

With respect to the issue of the mandatory versus voluntary nature of mediation, disputants do not resoundingly volunteer to settle disputes through mediation. Pearson and Thoennes found, in a study of custody mediation between 1979 and 1981 in Denver, Colorado, that one-third of the respondents refused voluntary free mediation.<sup>16</sup> Even when participation is mandatory, up to one-fifth of those required to attend at least one session still find ways to avoid participation.<sup>17</sup> Much of this resistance can be explained by lack of familiarity with mediation and a preference to stay with the known quantity represented by litigation.

Although the COSCA/NCSC divorce mediation survey did not uncover the reasons for the lack of interest in or the resistance to mediation, the survey data suggest that the nonmandatory nature of most programs is consistent with the disputants' preferences. That is, courts are providing an alternative forum but are not imposing it on unwilling individuals.

Furthermore, some observers reject the idea of mandatory mediation because they regard it as a fundamental contradiction: forcing parties into a consensual process seems a denial of mediation's

promise of autonomy and participation for disputants. There is evidence, however, to suggest that satisfaction by the participants in voluntary and mandatory mediation programs is virtually the same.<sup>18</sup> The reason why satisfaction levels are the same may be based on the distinction between coercion "into" the mediation forum through mandatory programs and coercion "in" the process of mediation itself.<sup>19</sup> Although participants may be forced into the mediation arena, coercion is absent in the mediation process, which is marked by the same attributes of self-determination, autonomy, and consensus as is voluntary mediation.

#### **Qualifications of mediators**

Finally, the issue of the appropriate qualifications of mediators is marked by conflict between those who claim mediators should have social work backgrounds and those who prefer attorneys. We cannot conclusively report the professionalization of mediators from the COSCA/NCSC divorce mediation survey because the survey question regarding staff training was too broad, and only 59 percent of the respondents answered it. In spite of the low response to this particular question, several observations can be made. First, a relatively small proportion of mediators are attorneys. Of the 74 programs responding to the question, the total number of attorney mediators on staff numbered only 12, whereas a total of 62 mediators with a social work or court service background were reported. The high number of social workers and court service officers working as mediators may reflect the large proportion of programs with links to the courts responding to the survey (86 percent).

Another interesting note is that many of the programs rely in part or largely on volunteers to fill mediator posts. Of the programs responding to the question, a little more than one-third (25 out of 74) reported the use of unpaid, trained workers to mediate cases. One question the survey did not ask was whether the program's reliance on volunteers has increased or decreased over time. Practitioners and policymakers often appear at odds on the issue of professionalization of domestic mediation. Practitioners philosophically aligned with the community development tradition hold that those most qualified to mediate are people with diverse backgrounds but a common com-

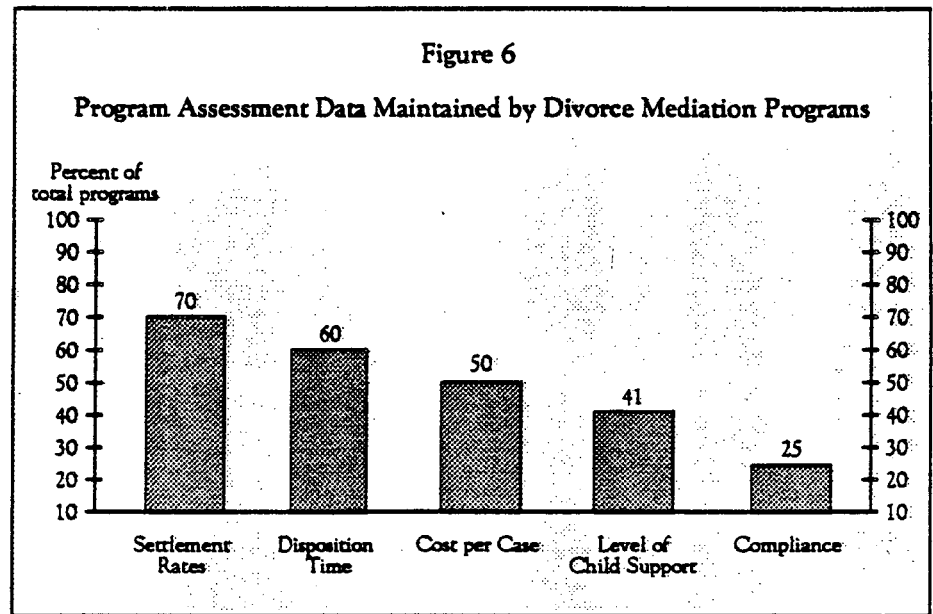
mitment to community service. Legislative policymakers and court administrators, on the other hand, because of their concern with the provision of uniform access to justice, tend to favor professionalization, clear academic requirements, and standard regulations for licensing mediators. Survey respondents reported pervasive but diverse requirements for special training in mediator skills in addition to or as a substitute for academic training or career experience. The number of hours of mediation skills training required of paid and volunteer staff ranged from 24 to 216, but programs most commonly used a 40-hour, in-house or outside training program.

Efforts to enunciate mediator standards are intensifying as states move to define their policies on divorce mediation. As requirements for fair and uniform settlements increase (especially in custody and support disputes) and as the number and range of cases diverted from courts to mediation multiply, the question of professional training will continue to be debated.

Legislatures trying to establish the relationship between mediation, quasi-judicial processes, and litigation are attempting to standardize mediator qualifications by specifying training and experience requirements. For example, courts in California, Connecticut, Nevada, and Oregon require that family mediators have a master's degree in counseling, social work, or a related field as well as substantial experience. In New York and Texas, mediators in state-approved dispute resolution programs do not have to be attorneys, but they must have extensive training. Family mediators in Florida must be certified by a judge and may be trained in social work, mental health, behavioral sciences, psychology, or law.

#### PROGRAM ASSESSMENT

The COSCA/NCSC divorce mediation survey indicates that although divorce mediation programs do gather information on their performance, program assessment is still in the developmental stage. While most programs (61 percent) have stated goals, fewer than half have identified criteria for evaluating the success of their program. For example, fully 76 percent of the programs reported that they had not developed explicit criteria for defining a fair settlement. This suggests that further study of program out-



comes is needed, not only by researchers, but also by practitioners and administrators who must manage and justify programs to others to secure both willing participants and necessary funding.

Seventy percent of the programs maintain records on settlement rates, and 60 percent of the programs have information on case-processing time. Only half of the programs have kept cost-per-case information. Furthermore, evaluation data concerning mediated agreements are limited. Forty-one percent of the programs that mediate child support cases have data on the average amount of support orders, and only 25 percent keep records of non-compliance with mediated settlements (see Figure 6).

Program assessment activity is strikingly limited when one considers the value of assessment research in designing, implementing, and improving the programs. If past research could adequately guide policymakers, court managers, and practitioners, the need for program assessment would not be as acute. However, academic research on divorce mediation is marked by two qualities that make practical use of existing findings difficult. First, much of the research is characterized by sharp ideological differences. The division of many researchers into camps favoring and opposing the use of mediation in divorce related disputes hinders the production of more neutral program evaluations with clear policy relevance. Second, while some progress has been made in conducting empirical research on

divorce mediation, many unresolved questions remain about the context in which divorce mediation is used and how well it works. There is a need for research to answer these key questions so that decisions about whether to modify, expand, or adopt divorce mediation are grounded in experience and focused on desired outcomes.

#### Directions for the future

The data from the COSCA/NCSC divorce mediation survey show that the diffusion of divorce mediation programs is occurring, but with considerable diversity among and within the states concerning how it is institutionalized. Many states and jurisdictions are now in the difficult process of choosing how to implement divorce mediation—but without complete assessments of existing programs and in the face of untested claims and counter-claims about divorce mediation's merits and limitations. Less than a handful of states (eight) have adopted statewide divorce mediation programs; most report programs in a few jurisdictions with no uniform policies on the relationship of these programs to the courts and no systematic means of evaluating program results.

Research is clearly required to address key unresolved questions. Three examples will make this point. First, how does divorce mediation affect dispute settlement outcomes such as custody, child support, and compliance? If, for example,



mediation promotes greater compliance, will this benefit be at the expense of lower child support awards? Though many studies have examined the impact of mediation on the shape of custody and visitation agreements, none to date have evaluated the impact of the forum on either the dollar level of or compliance with child support orders. Given the great magnitude of the impact of child support on the lives of children and the interests of both state and federal governments in enforcing child support orders, the need for careful study of the effects of mediation on child support is paramount.

Second, what types of cases and disputants are most amenable to settlement through mediation? The answer to this question has important implications for the efficient and effective resolution of divorce disputes. If divorce mediation is applied inappropriately to "the wrong" cases and disputants, its use will result in multiplied costs, decreased confidence in the courts, and increased court congestion.<sup>20</sup>

Third, how can management improve the processing of disputes, both through mediation and court adjudication? In jurisdictions where mediation succeeds in improving quality and lowering case-processing time and costs, is the adoption of mediation the specific cause? Or are the positive effects the result of administrators affirmatively managing cases and effectively turning attention to the issues of case-processing time and cost? A study of divorce mediation in Arizona, for example, found that affirmative case management was a greater influence on settlement rates than was the formal introduction of mediation.<sup>21</sup> This study suggests that mediation would have the greatest likelihood of success in well-managed jurisdictions and that well-managed courts that adopt quasi-judicial processes to handle divorce disputes, as well as courts that simply make improvements in case management, would experience similar improvements.

The next step in divorce mediation research should address these and other questions through a comparative study of states that have adopted mediation. The time for such research is now, when state policymakers are searching for an informed base on which to design new programs as well as to improve the current uses of alternative processes for resolving divorce-related disputes. scj

## Notes

1. This estimate is derived from the combined findings of the *American Bar Association Dispute Resolution Directory 1986-1987*, and a survey of alternative dispute resolution programs conducted by the National Center for State Courts in 1987 at the request of the Conference of State Court Administrators Committee on Alternative Dispute Resolution. See Susan Keilitz, Geoff Gallas, and Roger Hanson, "State Adoption of Alternative Dispute Resolution," 12 *State Court Journal* 2 (1988), pp. 4-11. See also Roger Hanson, Geoff Gallas, and Susan Keilitz, "The Role of Management in Court-annexed Arbitration," 12 *State Court Journal* 2 (1988), pp. 14-19.

2. Keilitz, Gallas, and Hanson, 1988.

3. The members of the COSCA Committee on Alternative Dispute Resolution are Carl F. Bianchi (chair), Samuel Conti, Robert Duncan, Franklin E. Freeman, Thomas J. Lehner, J. Denis Moran, Larry Polansky, Arthur H. Snowden, and Janice Wolf. The committee members do not necessarily subscribe to the views expressed in this article.

4. The mediation process can be defined as one in which the disputants negotiate directly (rather than through attorneys) in the presence of a neutral third party (the mediator) who may guide the negotiation process but who must respect agreement outcomes reached by the disputants. Mediation may be contrasted to arbitration, where the third party is empowered not only to guide the process but also to determine its outcome.

5. Martha Fineman, "The Use of Social Science Data in Legal Policy Making: Custody Determinations at Divorce," Institute for Legal Studies, *Working Papers*, Series 2, Madison, Wisconsin (1986).

6. Keilitz, Hanson, and Gallas, 1988.

7. True comprehensiveness in a divorce mediation data base requires an ongoing effort. This is one goal of the Comprehensive Data Base of Alternative Dispute Resolution Programs in the United States, recently approved by the State Justice Institute, to be carried out by NCSC in 1989.

8. The 118 programs that responded to the divorce mediation survey are used as the base figure in calculating the percentage of programs that fall into particular categories (e.g., the percentage that are mandatory, private, or handle caseloads over 1,000 per year).

9. Albie Davis, "Mediation in the Judicial Environment," paper presented, February 25-26,

1988, Tallahassee, Florida (conference sponsored by the Dispute Resolution Center).

10. In 25 states and the District of Columbia, a statute or rule specifically authorizes divorce mediation. These states are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Texas, Utah, and Virginia (COSCA/NCSC survey of ADR programs and COSCA/NCSC divorce mediation survey).

11. Daniel McGillis, *Community Dispute Resolution Programs and Public Policy* (Washington, D.C.: National Institute of Justice, 1986).

12. Keilitz, Gallas, and Hanson (1988).

13. The NCSC Court Statistics Project reports that 2,420 general and limited jurisdiction courts report having jurisdiction over marriage dissolution.

14. Jessica Pearson, "An Evaluation of Alternatives to Court Adjudication," 7 *Justice System Journal* 420 (1983).

15. Robert Emery and Melissa M. Wyer, "Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents," 55 *Journal of Consulting and Clinical Psychology* 1 (1987).

16. Jessica Pearson and Nancy Theonnes, "Reflections on a Decade of Divorce Mediation Research," in Kressell & Pruitt, editors, *The Mediation of Disputes: Empirical Studies in the Resolution of Conflict* (San Francisco: Jossey-Bass, 1987).

17. Melanie R. Trost and Sanford L. Braver, "Mandatory Divorce Mediation: Two Evaluation Studies," Arizona State University. Report presented to the Conciliation Court of the Supreme Court of Arizona, Maricopa County, 1987.

18. Pearson and Theonnes (1987). Also, Craig A. McEwen and Richard J. Maiman, "Mediation in Small Claims Court: Achieving Compliance through Consent," 18 *Law and Society Review* 1 (1984).

19. Stephen B. Goldberg, Eric D. Green, and Frank E.A. Sander, "ADR Problems and Prospects: Looking to the Future," 69 *Judicature*, p. 291-299 (1986).

20. Pearson and Theonnes (1987); Trost and Braver (1987).

21. Trost and Braver (1987).



Divorce Mediation Programs, By State

Note: Unless otherwise marked, all programs responded to the NCSC/COSCA divorce mediation survey. Programs marked by a '\*' received the survey, but did not respond; therefore their status has not been verified. Programs marked by a '\*\*' will be added to the survey in the future, but have not yet had an opportunity to respond to it.

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**RESEARCH ON DIVORCE MEDIATION:  
A SUMMARY AND CRITIQUE OF THE LITERATURE**

**KENNETH KRESSEL\***

With the explosive growth of divorce mediation services in the last five years have come the inevitable questions about efficacy: Are the increasing amounts of money, time, and energy which are being spent on mediation producing results commensurate with the expense? Specifically, is divorce mediation a "better way" than the exclusive reliance on traditional legal procedures?

As I shall shortly argue, whether mediation is "better" than lawyers and the courts is an oversimplified question, which, if taken too much at face value, is likely to lead us seriously astray. Nonetheless, research has been done which is addressed to this issue. I shall begin by summarizing that work and reviewing some of its methodological limitations. I shall then suggest what, to my mind, are more useful questions to ask about mediation's efficacy and review what is now known on those subjects. The infant research literature is unable to provide robust answers to any of the matters I shall be addressing. I shall therefore close in the pediatric mode with some suggestions regarding the types of research that I believe will suit this particular baby's needs most adequately.

Before proceeding let me note that the number of empirical studies on divorce mediation can be counted on the fingers of two hands. I shall therefore include in my purview investigations of other forms of mediation when these seem germane. In addition, I shall be summarizing rather than reporting in detail. The reader desiring a precise look at the literature under consideration may wish to consult my primary sources which may be found in Kressel (1985) and Kressel & Pruitt (1985). Finally, even as I write, somebody is starting, in the middle of, or ending a research project on some form of mediation. In such a rapidly changing climate conclusions about divorce mediation's strengths and limitations must obviously be viewed as provisional.

**THE EVIDENCE ON DIVORCE MEDIATION'S EFFICACY**

There are some very positive things to say about divorce mediation based on the early returns. To begin with, people who have experienced the process appear relatively well-satisfied. On the order of 70-90% of mediation's consumers say they were pleased with the process, would recommend it to a friend, think it should be available to people in similar circumstances, and things of this kind. These data compare nicely with consumer satisfaction with kindred services such

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as divorce therapy (60-85% satisfaction rates), the use of attorneys (66%), and the role of the courts (40-50%). For whatever it is worth, user satisfaction with divorce mediation also does not suffer in comparison to consumer satisfaction with non-divorce related services, such as medical care, where patient satisfaction rates are in the 45 to 70% range.

Divorce mediation also fares reasonably well if one looks at its ability to produce settlements. Across studies, settlement rates fall in the 40 to 70% range. These may appear modest figures by contrast with the 90% settlement rate achieved by attorneys, but it is important to remember that, for the most part, the figures for divorce mediation are for the more intractable cases, where attorneys have already tried and failed to produce settlement. Divorce mediation's record on achieving settlements also compares well to the performance of the long valued and highly institutionalized process of labor mediation, where settlement rates typically fall in the 28 to 60% range.

Favorable comparisons between mediation and the traditional use of lawyers and the courts have also been reported on such important outcomes as compliance with the settlement terms, amount of compromise occurring during negotiations, and relative costs (Pearson & Thoennes, 1984). It would strengthen belief in divorce mediation's effectiveness if there were more studies confirming these findings, but these early reports are promising.

We now turn to less cheering vistas. The scene is darkened by both substantive and methodological clouds.

On the substantive side, the major problem is that some of the much ballyhooed virtues of divorce mediation have thus far failed of confirmation. Thus, research does not show that children whose parents reached a mediated settlement are better adjusted than children whose parents reached settlement without the benefit of mediation; a large proportion of persons say either that the mediation experience had no effect on their ability to cooperate and communicate with the other parent and a small, but distinct minority (10%) say mediation actually made things worse; and there are contradictory findings on whether or not mediation improves visitation or reduces the likelihood of post-divorce litigation.

Finally, many of the benefits associated with mediation accrue only to those who are able to reach settlement. For the 40 to 60% who cannot settle, the impact of mediation may be no better, and on some variables actually worse, than the impact of lawyers and the courts on individuals with no exposure to mediation (Kressel, 1985).

In addition to the mixed returns on matters of substance we must also reckon with some significant methodological problems. The simplest one is the paucity of studies and the fact that these few investigations are all concerned with the

mediation of custody and visitation disputes. Comprehensive divorce mediation, in which economic matters are also dealt with, has not yet been systematically evaluated. Yet the private practice of divorce mediation is very much concerned with such negotiations and it is precisely this form of mediation which is at the heart of "we can do it better than lawyers" debate.

A second significant problem is the rather crude designs which typify the research literature. Typically, only two true treatment conditions are compared, a mediation group vs. an adjudicatory or "adversary" group of couples proceeding in the traditional way. This simple design makes it impossible to estimate the extent to which mediation's putative advantages are the result of the enthusiasm and zeal with which it has been administered rather than with any ingredients unique to it. To make matters worse, in some studies mediation is provided free of charge while those in the comparison group are paying the hefty sums typically charged by attorneys.

In short, we have the very real threat of placebo effects and no way of estimating their magnitude. Placebo effects are most likely to contaminate measures of client satisfaction, precisely those on which mediation's superiority has been most consistently documented.

The simple dichotomous designs also prevent us from evaluating the extent to which mediation's effectiveness is attributable to important psychological changes with which mediation is associated but which are by no means solely its own to produce. I refer to such matters as increased knowledge, sense of control, and the salience of cooperative norms. One might achieve such changes by means less costly and more straightforward than mediation; e.g. by court-sponsored lectures on settlement negotiations. Such possibilities remain to be assessed.

Another serious difficulty is that pretreatment differences between mediated and non-mediated couples confound the interpretation of the data in all the existing studies. These differences come about in a number of ways. Frequently, the most disputatious, unstable couples are screened out of mediation by the courts on the apriori grounds that such cases are unsuitable for the process. In other studies, the mediation group have voluntarily sought mediation, a highly unusual choice in the current climate and one which suggests that such couples are psychologically quite different from those with whom they are being compared. Finally, on occasion, random assignment of couples to mediation vs. control conditions has been attempted (Pearson & Thoennes, 1984). Random assignment is intended to assure that there are no pretreatment difference between experimental groups, a crucial purpose of good experimental design. However, the purpose of random assignment has been defeated by the fact that half of those randomly assigned to mediation refused the invitation!

The upshot is that in all the available studies, there is very little doubt that the couples in the mediation group differ systematically from those in the adversary conditions and in ways which, by themselves and independent of any presumed effects of mediation, are predicative of more favorable settlement outcomes. Thus, in Pearson's Denver custody mediation study there is evidence that those who accepted mediation were less conflictual, better able to communicate, more affluent, better educated, and more willing to work together than those who refused (Pearson, Thoennes, & Vanderkooi, 1982). Statistical analyses can help us evaluate the extent to which pretreatment differences of these or any other kind are affecting the data and it is useful to perform such analyses. However, statistical control cannot rule out other, unmeasured and unknown differences between groups which are likely associated with such extreme deviations from random (i.e. unbiased) assignment to conditions.

Finally, the available studies tend to assume that those in the "control" conditions are receiving a homogeneous and distinctively different "treatment" than those in the mediation condition. This assumption partly reflects the void of systematic data on what actually transpires in the legal system. Hearsay and anecdote portray the "adversary" system as a monolith of competitive advocacy. We are beginning to have evidence that this is a grossly oversimplified portrait. Until we incorporate into our research designs a more adequate representation of "traditional" legal procedures we will be left scratching our heads trying to figure out if our mediation sample merely looks better because we are comparing a group of people who reached their own settlement (the mediation cases) with a heterogeneous group, some of whom reached their own agreement through lawyers, (a fairer comparison to the mediation group), mixed in with others who experienced a custody evaluation and then settled on their own, with still others who had to go all the way to a judicial mandate, to still others who experienced judicial "muscle mediation," with others who experienced God knows what.

Let me summarize the case for divorce mediation based on the empirical record as it presently stands:

1. Divorce mediation appears to be reasonably satisfying and workable for many couples who try it and at least as satisfying as other professional services in divorce, including legal ones.
2. The degree of mediation's efficacy is probably inflated in the work done thus far for the methodological shortcomings noted.
3. There are number of important outcome dimensions on which evidence for its usefulness is equivocal or absent.
4. As yet, there is no compelling evidence that mediation is better than whatever it is that is meant by "the adversary system."

In presenting these views to professional audiences I have had some interesting experiences. Lawyers have asked me to testify against divorce mediation at legislative hearings; divorce mediators have been more circumspect, but it is clear that in certain circles I am not exactly regarded as the life of the party. I believe that these reactions reflect the polemical climate surrounding divorce mediation, rather than any lack of clarity on my part. Nonetheless, I should like to add to the summary list above the following salient points:

5. By comparison with other relevant lines of research, the work on divorce mediation is a model of energy and planning. Sprenkle and Storm (1981) have made this point in comparison with research on divorce counseling; I have done the same regarding research on the lawyer's role (Kressel, 1985) where the number of studies can be counted on the fingers of one hand.

6. If we had more decent research on what actually transpires among attorneys and their clients the data on divorce mediation's effects might seem positively euphoric. It is ironic, and perhaps more than a little unfair, that the mixed returns to date should be seized upon in certain legal circles as evidence of mediation's shortcomings compared to the presumed virtues of legal representation.

7. Much of the evidence on divorce mediation's effectiveness comes from studies of relatively inexperienced mediators, given the hastiest of training, working under severe constraints of time (a session or two) and significant ambiguities of practice. As the field of mediation becomes better established and more confident in its methods, research evaluations will become more appropriate and are likely to yield more positive results.

#### **SOME BETTER QUESTIONS TO ASK REGARDING MEDIATION'S WORKABILITY**

I noted at the outset that I believe that there are better questions for us to be asking than the global "Does mediation work?" and "Is mediation 'better' than the adversary system?" Let me turn now to that subject.

In my view, a better query regarding the management of divorce conflict is "What kind of dispute resolution process for what kinds of disputes?" Other students of social conflict have made the same general suggestion (Goldberg, Green, & Sander, 1985; Pruitt & Rubin, 1986). This question is predicated on the assumption that there is an array of intervention approaches all of which, under certain conditions are the most effective and appropriate. The trick is to specify what those "certain conditions" are and to get a lot clearer than we are at present about the various intervention possibilities. (I note, by the way, that "intervention possibilities" refers both to type of intervention - e.g. arbitration, mediation, mini-trial, formal

adjudication, etc. - and to style of intervention within a given type (e.g. muscle mediation vs. something more non-directive). We are obviously a long way from being able to fill such a tall order.

While we are waiting for the millennium - and in the hopes of speeding its arrival - let me sketch the research evidence on two subsidiary, but directly related queries: "What kinds of disputes are most suitable for divorce mediation?" and "What kinds of mediator activities are most effective?" It is quite evident that even these questions are beyond current knowledge to answer definitively, but there are some consistent and interesting findings. Because there are so few studies on any one type of mediation, the evidence comes from research on labor, small claims, and neighborhood mediation, as well as divorce mediation. Again, since my goal here is simply to summarize, the reader wishing more detail is referred to Kressel (1985) and Kressel and Pruitt (1985).

#### WHAT KINDS OF DISPUTES ARE MOST SUITABLE FOR MEDIATION?

a. **Moderate levels of conflict.** There is one finding which stands out across all domains of mediation research: The lower the level of conflict the better the prognosis that mediation will produce a mutually satisfactory agreement. This is not to say that mediation works only when there is little tension or disagreement. The research only suggests that where there is a history of exacerbated conflict, including such things as physical violence or the threat of violence, innumerable disputed issues, the significant embroilment of third parties in the dispute, and little if any trust or perceived ability to cooperate, then the prospects for a mediated settlement are significantly reduced.

b. **The availability of divisible resources.** The less there is to divide the less successful the mediator is likely to be. This appears true for labor mediation when the employer is in financial disarray and in divorce mediation when the couple have limited resources. The simplest explanation for this association is that resource scarcity diminishes the chances of finding mutually acceptable compromises and trade-offs.

c. **Receptivity to mediation.** A number of findings suggest that the parties' belief and acceptance of the process shapes the prospects for success. Thus, in studies of labor mediation, joint, as opposed to unilateral requests for assistance, are positively correlated with settlement and the mediators' perceptions that the parties' trust in them was low are negatively correlated with outcome. There is also evidence from divorce mediation that when the parties' attorneys are against mediation - and, thus, presumably, the parties' own enthusiasm for the process somewhat dampened - that the prospects for agreement are reduced.



d. High motivation to reach settlement. In industrial mediation, the mediators' perception that the parties are unmotivated to reach agreement has been correlated with the failure of mediation. Contrariwise, under strike conditions (when, presumably, the parties are more motivated to find a way out of their impasse), mediation is more likely to succeed than under no strike conditions. In divorce mediation, the negative impact of a low motivation to settle may be discerned in the finding that mediation is less successful when one spouse has a high level of continuing psychological attachment to the other or refuses to accept the divorce decision (Sprenkle & Storm, 1983). (Note, however, that Thoennes and Pearson, 1985, do not corroborate this finding.)

There are several things to note about this summary. First, there are no surprises and no profundities. Certainly the Nobel Peace Prize will not be won by establishing that mediators have a hard time when conflict is intense and the desire of the parties to reach agreement small. Still, it is useful to have such basic concepts supported.

Second, other cherished ideas in the growing clinical literature on mediation are thus far unconfirmed. Thus, there is as yet no evidence that when the parties are of unequal "power" (e.g. differ significantly in self-confidence, articulateness, financial wherewithal) that the chances for success in mediation are reduced.

Thirdly, it is impossible to say whether the findings are describing the conditions hospitable to effective mediation or are simply describing circumstances in which any form of negotiation is likely to thrive. Until we have comparative investigations this important issue remains open. For whatever it is worth, in divorce negotiations, resources scarcity and intense conflict appear to be as fatal for lawyer-orchestrated negotiations as they are for mediated ones (Hochberg & Kressel, 1983).

Finally, relatively small amounts of outcome variance are explained by the dispute characteristics just enumerated. This suggests either that our measures of these characteristics are not as reliable as we can get them and/or that other important determinants of mediation outcomes remain unmeasured.

#### WHAT TYPES OF MEDIATOR BEHAVIORS ARE MOST EFFECTIVE?

On this important subject we may be even briefer than on the situational characteristics associated with favorable mediation outcomes. Of the almost limitless number of mediator activities which one may find described in the writings of expert practitioners only three basic kinds have been documented to have any reliable association with results.

a. Efforts to establish rapport. The need to have the trust and confidence on the parties is perhaps the most fundamental belief in the mediation literature. There is

surprisingly little data on whether the use of strategies designed to inculcate such feelings have the postulated beneficial effect. Two investigations of labor mediation suggest, however, that outcomes are favorably affected when mediators have had prior experience with the disputants or take the time to have preliminary private caucuses with them.

b. **Improving the negotiating climate.** It is evident from the practitioner literature that improving the climate between the parties is viewed as a key mediator function. There is an exceedingly large array of mediator behaviors which may be conceptualized as serving such a function. A number of them have received at least limited empirical support. These include: facilitating communication, providing clarification and insight into the issues, acting as a communications link, helping the parties manage important constituents, and helping them explore the disputed issues in private caucuses.

c. **Mediator assertiveness.** As we all know, mediators gain their ends by being instruments of sweetness and light who eschew any hint of belligerence, arm-twisting, or pressure. Except, of course, if you believe the empirical literature! Here, the single most consistent finding at present is that the ability to produce settlements, at least in very intense conflicts, is associated with such highly aggressive mediator behaviors as threatening to quit, suggesting that arbitrators be called in, and being highly active and directive. (In divorce mediation, the most recent, and detailed findings of this type may be found in Donohue, Allen, and Burrell, 1985).

We must allow for the possibility that high levels of mediator pressure will eventually be shown to have more deleterious effects than is apparent in the current record (especially since that record is weak on long term follow-ups). Still, those of use who have twisted a few arms in the hurly burly of mediation and felt low and unworthy for doing so are entitled to a moment of sweet contemplation. I do not intend to spoil it any further.

As with the situational determinants of successful mediation, the few available studies on strategies of intervention explain relatively small amounts of outcome variance and a good many efforts to correlate this or that aspect of mediator behavior with outcomes have yielded nonsignificant results.

#### **SOME IDEAS ON THE DESIGN OF MEDIATION RESEARCH**

My rapid overview of the current scene is intended to make clear that we are in the very early stages of systematic research on the mediation process. We know that mediation "works" for many divorcing couples but there is much that we do not know. This is not surprising. The psychotherapy research folks have been at it for about 40 years now and they are still arguing with each other. With any luck, 40 years from now we will doing the same!

I do think, however, that the moment is fast approaching for serious dialogue on the conduct of mediation research. Let me conclude with a brief discussion of the kinds of studies I believe we should be doing.

1. Efforts at true experimental designs, employing random assignment and more than two "treatment" conditions. Randomized designs are the best ones for comparing the relative benefits of various treatments. If random assignment to treatment conditions is not to be defeated by high refusal rates among those offered mediation, then concerted efforts to convince bench and bar to vigorously support such studies will be necessary. In addition, we need to be creative and flexible in planning such investigations. Space does not permit a discussion of the possibilities available to us in handling the inevitable problems with randomized experimental designs in field settings, but solutions are possible. (For an excellent introduction to the topic see Cook and Campbell, 1979).

As noted earlier, our studies would benefit from designs in which mediation was not the only novel treatment with which the use of lawyers and the courts is compared. "Treatments" which capture some of the psychological properties of mediation (e.g. increase in relevant knowledge, expectation of being helped, motivation to behave cooperatively, etc.) without mediation's specific trappings and costs would enable us to form more accurate estimates of the degree to which the mediation experience has something unique to offer beyond generalized and possibly short-lived placebo or placebo-like effects.

It is also clear that we need to extend our horizons beyond custody/visitation to include evaluations of mediation in which property and other "cash" equivalents have been negotiated. Such comprehensive divorce mediation represents an important segment of the mediation community and may have properties and consequences which differ in important respects from the child-focused mediation which dominates the research literature to date.

2. Detailed pre-treatment assessments of the dispute and the disputing parties which make use of observational, as well as self-report measures. If we are to gradually draw a bead on the question, "What type of intervention for whom?" then we need to begin systematically and thoroughly describing our samples before they are exposed to any substantial intervention.

One great virtue of the work done thus far is that it has identified reasonably well some of the major variables which are likely to have a significant impact on the mediation process. It now remains to assess more rigorously these variables. The major candidates for such assessment include conflict intensity, resource availability, balance of power, relative motivation to divorce, issue complexity,

motivation to mediate, and level of external stress and tension.

Most of these variables have multiple meanings. Therefore, we need to measure them in multiple ways. Take "power," for example. Practitioner discussions of this variable indicate that "power" can refer to such diverse things as the parties' relative economic resources, their respective levels of self-confidence or "ego strength," their post-divorce prospects in the social market place, and the degree to which each is eager to end the marriage. Linda Singer has also made the intriguing suggestion at this conference that "power" also refers to the ability of one partner to press the "explode" button of the other at strategic moments in the negotiations. All of these meanings of "power" are potentially measurable. We need to make these measurements and then ascertain the degree to which these various measures of "power" are, a) related to one another, and b) affect the success of this or that form of intervention.

In addition to these discreet variables, more global assessments of the couple's interactive and decision-making patterns are very much in order. My colleagues and I have made an initial foray in this direction in our delineation of autistic, enmeshed, disengaged, and direct styles of divorce decision-making and have suggested that these patterns of interaction may be prognostic of the ability to make successful use of mediation (Kressel, 1985). Others have suggested that these patterns may also be of diagnostic value to mediators in planning strategies of intervention (Folberg & Taylor, 1985).

I claim no unique virtues for this particular typology. Our sample was small and our method of classification highly subjective. My main point is that some such composite approach to capturing a couple's patterned manner of interacting is likely to be especially useful for predicting differential responsiveness to alternative modes of intervention, because different types of intervention capitalize on different styles of problem-solving, decision-making, and conflict management. The trick will be to develop psychometrically sound indices of this kind. Work in other areas of family treatment and research suggests that this can be done (Olson, 1981).

We also need to get away from our too heavy reliance on the judgement of the parties or the impressions of the mediators. I am not arguing that we should abandon efforts at asking the participants for their views on the mediation experience, only that these subjective accounts need to be compared with other, more objective perspectives. My own preference is for characterizing the parties and their dispute through video-taped interactions elicited in a structured pre-treatment interview and then using these tapes to develop reliable measures of the characteristics of the dispute and the disputing parties. Post-treatment inter-

views, similarly constructed and taped, could also provide the basis for developing reliable outcome measures.

A word more about measurement of outcome. The early research has measured outcome in obvious ways: settlement rates, compliance, incidents of post-settlement conflict, satisfaction. I believe that these are all reasonable measures. I take it as axiomatic, however, that a questionnaire jammed under somebody's nose ten minutes after the completion of mediation is an insufficient measure of mediation outcome. Indeed, any single measure is probably an unreliable measure since people's attitudes towards an experience as complex and important as mediation is bound to change as events unfold and contemplation of a more reflective kind becomes possible.

The general solution to these problems is to encourage long-term follow-ups, to supplement the parties' perceptions with those of a less reactive kind, and, where possible, to use sophisticated and well-trained judges in making ratings of such complex things as the couple's ability to cooperate and engage in mutual problem-solving.

3. In vivo observations of the mediation process, based on notions of reciprocal influence, stages of negotiations, key incidents, and styles of intervention. Many of the general observations I have just made regarding the characterization of the dispute and the disputing parties apply as well to the study of mediator behavior.

In the first place, the work done thus far has identified the mediator behaviors most likely to affect outcomes. These include mediators' efforts to establish rapport, their diagnostic activities and acumen, level of directiveness, substantive expertise, skill at facilitating communication and joint problem-solving, and overall activity level. Each of these variables has been shown in one or more studies to have a significant bearing on outcome or is strongly felt to have such a relationship by influential practitioners.

Second, as with measuring dispute characteristics, we can no longer be content with subjective reports of what transpired during mediation. Such reports are unlikely to be terribly reliable and cannot possibly capture the complexity of the mediation process. Clearly, we need direct observations of mediators at work and coding schemes which do this work justice. Let me say a few words about the kinds of things I believe these coding schemes should take into account.

First, mediation, is a process of reciprocal influence; the mediator influences the parties and vice-versa. Our descriptions of mediation will be on firmer ground if we utilize coding schemes which attempt to capture this reality, rather than simply reporting the frequency with which the mediator did this or that. There are good signs that this approach is already being incorporated into divorce mediation

research (Donohue, Allen, & Burrell, 1985; Slaikeu, Culler, Pearson, & Thoennes, 1985).

Second, studies of mediator effectiveness need to relate mediator activity to some notions of the phase or stage of a dispute in which intervention is occurring; the same behavior which may have one meaning or effect early in a dispute, may have totally different impact at some later stage. Here again, the simple frequency count approach to mediator behavior is inadequate.

Third, not every mediator act has equal importance. Much of what occurs in mediation is just plain boring. The scene is transformed every now and again, however, by bursts of mediator energy and activity at certain critical moments. The ability to gauge these moments, seize upon them to change the direction of the conflict, and perhaps, even to create them, may be at the heart of truly skillful intervention. We need to learn more about such moments and take them into account in our measures of mediator behavior.

Fourth, just as mediator acts differ in importance, so too do mediators. Put simply, I believe that we should make every effort to study the people who are thought to do mediation best rather than those who are just doing it. There is by now a sufficient cadre of "old hands" to make such designs more feasible.

Fifth, my personal prejudice is that it is most interesting to study mediation as an organized gestalt, rather than a piece-meal bag of tricks. There are various levels of organization of mediator behavior on which one might choose to focus, but I believe an interesting case can be made that there are rather encompassing and contrasting "styles" of mediation (See Kolb, 1983, and Merry, 1985 for some data on this). The two leading candidates might be referred to as the "hard" and "soft" varieties. In the "hard" approach, the mediator is highly active and may use tactics of confrontation and pressure to achieve desired ends. Such mediators also tend to be comfortable expressing - sometimes pressing - their views on matters of substance. In the "soft" approach - also the more familiar and traditional approach - the mediator is non-directive, focusing on tactics of empathy and assisting the flow of communications, and eschewing pressure tactics or the vigorous expression of personal opinions.

I think it would be fruitful to ascertain if such styles can be reliably measured and if so, under what conditions of conflict and with what types of couples they are most and least effective. In short, my instincts as a clinician, as well as a researcher, tell me it will be profitable to characterize both the disputants and the intervenor along certain global stylistic dimensions and trace the "chemistry" of their reaction to one another.

4. Systematic documentation of what actually transpires in the so-called "adversary" system. Much of what I have

been saying about systematically studying mediation applies as well to studying the so-called "adversary" system - except more so! At the moment our understanding of mediation's strengths and weaknesses is very much hindered by our ignorance of the alternative with which mediation is being compared. In the existing literature, as I have indicated, the "adversary" control group is nothing more than a big black box onto which everybody projects his favorite horror story of the worst the legal system has to offer. We must do better.

One place to begin, and a beginning is under way (Erlanger, Chambliss, & Melli 1986; Hochberg & Kressel, 1983) is with good descriptive accounts of what actually happens between and among lawyers and their clients and the judges and court personnel with whom they interact. The early evidence is that this is an extremely diverse and heterogeneous universe. It is necessary to know at least as much about its diversity as we now know about the diversity of mediation. This approach can be done apart from studies of mediation, but it can also be done - indeed, it needs to be done - in all studies which purport to be systematic evaluations of mediation vs. the traditional legal approach.

5. Systematic case studies to begin to capture the complexities and demands of the mediation process. I have confined most of this paper to a consideration of experimental design and its concomitants in evaluation studies of the mediation process. In closing, I should note that such projects are by no means the only kind that need to be done. Indeed, I believe that in-depth case studies of mediation are very much in order. Investigations which convey the richness, headaches, and complexities of the mediation role can help us formulate sound hypotheses regarding the kinds of couples and the kinds of interventions which are most likely to fit well together. Studies of this type are also needed, I believe, to dispel what I believe are myths about the mediation process; things like, "mediators must never take sides" or "mediators should not be confrontative."

One last word: I believe research on divorce mediation will be enriched in direct proportion to the degree to which those who study mediation have some direct experience as mediators. Studying mediation in the absence of such experience can be done competently but it seems to me that things of importance must inevitably elude such an investigator. As Mark Twain remarked, "by holding a cat up by the tail you learn things that you can learn in no other way." Or, to paraphrase Kurt Lewin on a more serious level -if there is nothing so practical as a good theory, there may be nothing so theoretical as good practice.

## Mandatory mediation of divorce: Maine's experience

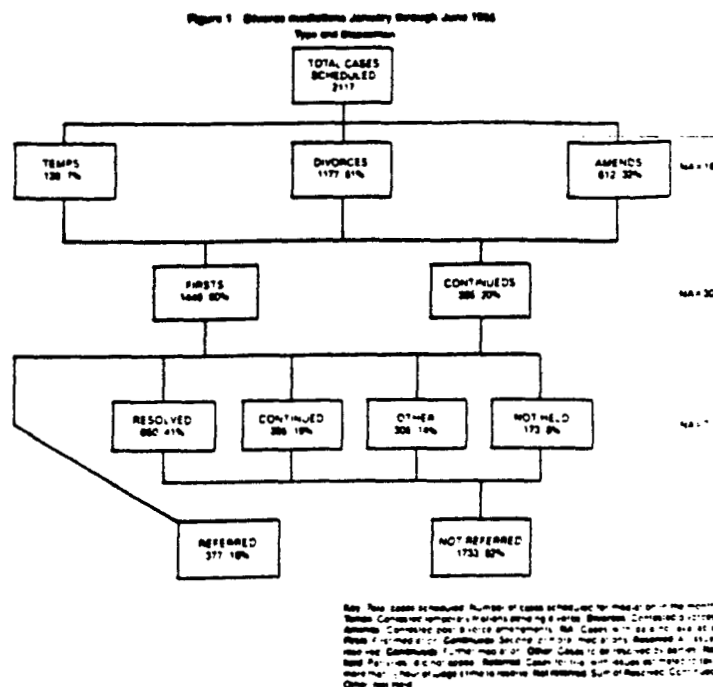
by Lincoln Clark and Jane Orbeton

Voluntary mediation of divorces has been utilized in Maine and in other states for several years. Mandatory mediation of divorces in which child custody or visitation is a contested issue was introduced in California in 1981<sup>1</sup> and in Maine in 1984.<sup>2</sup> Maine's statutes, based on the laws of California and other states, were passed after public hearings that included testimony of judges and members of the Court Mediation Service on their experience with voluntary mediation. Also influential were the report of the Commission to Study Child Custody and testimony given by members of the commission. The legislature, concerned over how best to protect the interests of children in divorce, decided on mandatory mediation.

Maine's statute provides for mandatory mediation of all contested cases in which the parties have minor children. Mandatory mediation also applies to unmarried parents seeking an order on parental rights and responsibilities and child support.<sup>3</sup> It applies to judicial separation,<sup>4</sup> and to parties seeking temporary, permanent, and post-divorce orders.<sup>5</sup> In Maine, mediation is a step in the domestic relations process, an opportunity for the parties to try one more time to settle the issues in their legal action before a trial in court.

The case that is settled proceeds to an uncontested hearing on the basis of the agreement. The case that is not settled may return to mediation again, may be negotiated toward settlement outside mediation or may proceed to a contested trial. Parties in cases that have not settled have frequently thanked the mediators for the opportunity to talk with their spouses and with the mediators. Parties in cases which have settled have left mediation with a plan for the future that they fashioned, and that can serve as a foundation from which to parent co-operatively. It was these goals which the Maine legislature was seeking when they instituted mandatory mediation.

The number of cases handled by the Court Mediation Service is approaching 5000 per year, of which about 4000 are contested divorce actions. There are 60



mediators serving all 50 of Maine's district and superior courts. Complete agreements are reached in a single mediation session in 41 per cent of all divorce cases. Another 19 per cent are continued to a second or third mediation. Fourteen per cent are resolved after the mediation by the parties without the participation of a judge or a mediator. Eight per cent were withdrawn by the parties (see Figure 1). The remaining 18 per cent go to the court for trial.

The Court Mediation Service is governed by Maine statutes and the policies of the Court Mediation Committee. This committee, chaired by the chief justice, is composed of four judges, the state court administrator, and the director of the Court Mediation Service.

Maine's Court Mediation Service is distinctive in that it has become completely financed by the state's Judicial Department. In addition to divorces, it handles a wide variety of other types of cases—small claims, landlord-tenant, and major civil litigation cases. The mediator decides whether the case should be continued for further mediation or referred to court for trial. Mediators recruit, nominate, train, assign and evaluate other mediators. The scheduling of mediations is done cooperatively with

clerks of court.

## Start-up problems

That there were several problems at the beginning of mandatory mediation was no surprise. There were a flood of cases and an insufficient number of trained mediators, many attorneys were unfamiliar with mediation, there was a lack of rooms for mediations, and parties failed to appear or cancelled. The first few months following the passage of the statute in July 1984 were hectic. Now, less than a year later, scheduling systems and operating procedures are running quite smoothly and rarely must a case wait more than a month for a mediation date.

Many prospective participants were apprehensive about mandatory mediation. The mediators themselves feared recalcitrance of parties to participate actively. They now report no significant difference in the degree of cooperation of the parties between mandatory and voluntary mediation. Some parties simply accept mediation as a required step in the procedure to obtain a divorce; mor

1. California Civil Code §4107

2 19 Maine Revised Statutes §214, 581 and 75  
(1984)

3. 19 M R S. A. 6214 (1984)

4. 19 M R S.A. 6581 (1964)

3. 19 M R S A \$752 (1984)



seem to welcome mediation as an alternative to a trial in court.

Attorneys' fears that concessions or compromises in mediation might prejudice ongoing litigation have diminished. Some attorneys have reported that they are negotiating more agreements—a desirable trend that is reducing the number of contested cases. Mediation is particularly useful when parties with their attorneys cannot resolve their differences by negotiation. More and more attorneys are expressing appreciation when mediators offer creative proposals to break impasses blocking negotiation. Polls of attorneys report no noticeable overall effect on legal costs—lower when mediation succeeds, higher when it fails.

### Comparing states

While both Maine and California have legislated mandatory mediation, there are many significant differences. In California, mediation is restricted to custody and visitation issues. In Maine, all disputed issues must be mediated if the parties have minor children and also when there are no minor children if so ordered by a judge. The broader range of issues covered in Maine's mediation stems from the conviction that many issues in a divorce affect the children. Where the children will live, which parent gets the family residence, how the mortgage will be covered, who will get the family car, who will pay the overdue doctor's bills and whether there will be support payment are subject to mediation.

Mediators in California may exclude attorneys from the mediation session where the mediator deems exclusion of counsel to be appropriate or necessary. In Maine, attorneys are encouraged to participate and, indeed, they may not be forced to leave the mediation. Practice and procedures vary with the mediator, the court, and the region in Maine with regards to the manner in which attorneys participate. Sometimes they are present for the entire mediation, sometimes they are present for part or they consult with their clients before a final decision is made. The choice is made by the party and attorney together. Most attorneys participate cooperatively with the parties and the mediator to work out

an agreement. In addition, attorneys are an essential resource when legal issues arise since the mediators are cautioned not to give any legal opinions or advice.

In California, as of January 1, 1984, all mediators were required to have a masters degree in psychology, social work, marriage, family and child counseling or psychotherapy. The backgrounds of Maine's mediators are very heterogeneous. In addition to counselors, they include retired business executives, chaplains, college presidents, community service leaders, professors, school teachers, social workers, a Navy captain, a probation officer, and attorneys not engaged in the practice of domestic relations.

We disagree with the tendency in many states, and the special interest pressures in other states and in Maine, to establish mandatory background qualifications in the absence of any tested evidence of their relevance. We have not found any correlation between mediator background and performance; much more important than professional background are attributes which can only be judged subjectively. A series of interviews can attempt to determine if the prospective mediator is a paragon who can elicit and propose creative solutions (paramount because mediation is most useful when neither the parties or their attorneys could negotiate a solution), is impartial, empathetic, able to control emotional outbursts, and facilitate communication between the parties and attorneys. The recruitment problem is further compounded by lack of agreement on how to measure performance. We think the mediator is truly successful if he or she initiates a process that results in the parents undertaking to resolve their common child rearing problems after they are separated—but we do not know how to measure this. Clearly "Who will be a good mediator?" is no easier to answer than "Who will be a good judge?"

The California statute declares the mediation proceedings to be private and confidential. It also provides that communications from the parties to the mediator are deemed to be official information and are therefore inadmissible in court. In Maine, the privacy of mediation is insured by an amendment to the Maine Rules of Evidence: "Evidence of conduct or statements by any party or mediator at a court-sponsored domestic

relations mediation session is not admissible for any purpose."<sup>6</sup>

Mediators in California may make a recommendation to the court as to custody or visitation of the child or children and may recommend mutual restraining orders. When an agreement has not been reached, the mediator may recommend that the court order an investigation of the family prior to a contested hearing. Mediators in Maine do not have authority to report or make such recommendations to the court. It is felt that this limitation on the power of the mediators enhances their role as impartial catalysts for settlement and increases the trust which the parties feel toward the mediators.

### Fine tuning

An amendment to the statutes passed March 31, 1985 remedied two problems encountered with the statute of July 25, 1984—delays in motions pending and the absence of sanctions for failure to make a good faith effort to mediate or to appear.<sup>7</sup>

There are three possible court divorce proceedings: a temporary order, called a "motion pending;" the divorce; and a motion to amend the divorce decree. The statute mandates mediation in all three of these stages. There are situations described in some motions pending, however, which, for the sake of the family, warrant an immediate decision by a judge. The amendment authorized a judge to hear a motion pending on any issue for which good cause for temporary relief has been shown. The parties then go to mediation on any remaining issues.

The statute provides that "when agreement through mediation is not reached on any issues, the court must determine that the parties made a good faith effort to mediate the issues before proceeding with a hearing." It may prove difficult to enforce that provision. Nevertheless, the legislature's Judiciary Committee rejected the idea of removing the "good faith" requirement from the statute—parties should mediate in good faith.

Sometimes a mediation cannot be held because one party, usually the defendant, fails to appear. The resulting additional costs, inconvenience, and time lost are resented by the participants who have kept their appointment. While one absence is usually "forgiven," repeated absences of a party may be brought to the attention of the court. If the court finds

6. Rule 408, Maine Rules of Evidence.

7. Chapter 53, Public Laws of 1985.

that either party failed to make a good faith effort to mediate or failed without good cause to appear for mediation after receiving notice of the scheduled time for mediation, an appropriate sanction may be applied. The court may order the parties to submit to mediation, dismiss the action or any part of the action, render a decision or judgment by default, or assess attorney's fees and costs.

### **The future**

In addition to divorces the Court Media-

tion Service has also been handling over a thousand small claims cases a year and the volume is quite certain to increase. Possible new directions are mediations of probate, guardianship and child protection proceedings, infractions of building codes and zoning ordinances, boundary disputes, and more landlord-tenant cases.

The expansion of mediation in Maine is due to so many factors that perhaps it can only be explained by the cliché that it is an idea whose time has come. But it would not have started without the sup-

port of the Maine Bar Association and the sponsorship of the Judicial Department; it would not have grown so rapidly without competent mediators and the statutory action of the legislature. Inquiries show the widespread national interest in Maine's innovative efforts to reduce adversarial confrontations in court. □

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**J**

Tab J

JUDICIAL SETTLEMENT

- Galanter, Marc, ". . . A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States," 12 Journal of Law & Society 1-18 (Spring 1985).

**" . . . A Settlement Judge, not a Trial Judge:"  
Judicial Mediation in the United States**

MARC GALANTER\*

INTRODUCTION

Legal scholarship has much to say about the deciding of cases but little to say about their settlement. This is a curious inversion. For, on the contemporary American scene at any rate, the negotiated settlement of civil cases is not a marginal phenomenon; it is not an innovation; it is not some unusual alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that might fancifully be called LITIGOTIATION. By this ludicrous term I refer to the strategic pursuit of resolution through mobilizing the court process. In this process, full-blown adjudication is an infrequently occurring alternative to negotiated settlement — though one that remains a compelling presence even when it doesn't occur.

The common law is hostile to compromise: decisions are all-or-none, winner-take-all.<sup>1</sup> But beside this image we must place our common knowledge that most disputes that come to the courts are resolved without a decision imposed by the court. 'Bargaining in the shadow of the law' is the prevalent means of resolving civil cases in American courts: fewer than ten percent of cases are tried.<sup>2</sup> Typically, settlement negotiations involve only counsel for the parties, but in many instances the negotiations are encouraged, brokered or actively mediated by the judge. Most American judges participate to some extent in the settlement of at least some of the cases before them and this has become a respectable, even esteemed, feature of judicial work.<sup>3</sup>

There have always been a lot of settlements in American civil courts. It is not clear that the percentage of cases terminated by settlement has markedly increased, although it has certainly not declined.<sup>4</sup> And, if there

\* *Law School, University of Wisconsin, Madison, Wisconsin 53706 USA* This paper is the Journal of Law and Society Lecture, delivered at University College, Cardiff, 10 May 1984. It is drawn from an ongoing study of the role of judges in promoting settlements that has been supported by the National Science Foundation and the Graduate School of the University of Wisconsin. I am grateful to my hosts at Cardiff whose kind invitation provided a timely occasion for an initial reconnaissance and whose discerning response has enriched my inquiry. The opinions and conclusions in this paper are solely the responsibility of the author and do not represent the views or policies of my benefactors. The title of this paper is taken from a lawyer's description of a United States District Court Judge, as reported in Holland, "William J. Campbell: A Case Study of an Activist U.S. District Judge," (1977) 3 *Justice Systems Journal* 143, 144.

has been an increase, it is unclear that it is caused by the increased intervention of judges. But there has been a pronounced change in the way that judges talk about settlement and think about their role as judges.<sup>5</sup>

Some state courts experimented with settlement conferences in the 1920s and 1930s. The adoption of the Federal Rules of Civil Procedure in 1938 made the pre-trial conference a feature of litigation in the federal courts of the United States. Some proponents viewed the new reformed procedure as a vehicle for judicial arrangement of settlements. The prevailing view among leading spokesmen for the federal judiciary was insistence that the function of the pre-trial conference was to prepare cases for trial; settlement was seen as a desirable 'by-product' of the pre-trial conference. By the 1960s the preparation for trial rhetoric had faded away and there was heightened emphasis on judicial promotion of settlements. By the 1970s whatever reticence remained among federal judges was barely perceptible. There was a forthright and ardent embrace of active participation in settlement negotiations. This was based on a warm endorsement of settlement as preferable to adjudication not only on the ground of administrative convenience but because it produced superior results.

#### THE VIRTUES OF SETTLEMENT

Settlement and judicial efforts to promote it are applauded for a variety of reasons. The most frequently encountered justification is the notion that settlement is necessary to protect the court from a crushing overload of cases, thus reducing backlog and delay and saving the court's limited resources for those cases most needful or deserving of its attention. This assumes, of course, that judicial participation actually produces more settlements — an assumption we shall examine below.

Second, there is the notion that a trial might lead to results that are unacceptably harsh or calamitous, so that the law cannot be allowed to run its course but must be deflected with an eye to avoiding such consequences. Thus one federal judge, trying a contract claim that might have threatened the existence of the Westinghouse Corporation, sought to avoid a decision based on contract law and pressed the parties to settle, explaining that "the future of thousands of jobs", would be jeopardized if "certain captains of industry could not together work out their problems."<sup>6</sup>

Third, the concern to avoid unsuitable outcomes may not be specific to the case at hand, but may be generalized. That is, such results may be thought to be inherent in the trial process. Judges may be unconvinced that the application of formal rules in an adversary adjudication will lead to an optimal outcome. Thus, new federal judges at a training session were counselled by a veteran that:

One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.<sup>7</sup>

An outline distributed to the new judges reiterated that:

In most controversies, most court cases, the highest quality of justice is not the all or nothing, black or white end result of a trial but is in the grey area — in most cases a freely negotiated settlement is a higher quality of justice which is obtainable earlier and at less cost. Approximately 90 per cent of all suits filed in federal courts are disposed of without trial.<sup>8</sup>

Settlement is thought to permit compromise positions that are unattainable through adjudication. (And, by implication, the prevalence of settlements is taken as evidence of their desirability and hence of the quality of the courts' performance.)<sup>9</sup>

Other virtues are claimed for settlements: they are thought to produce greater disputant satisfaction with the decision or with the courts generally. Thus one judge surmises that:

... parties and attorneys who have reached a settlement agreement feel that they have received their day in court and achieved a fair and reasonable result under the circumstances because it is the parties' own agreement. Each party feels that its positions has received some vindication. Satisfaction with the system of justice is a commodity too precious to ignore.<sup>10</sup>

In most of these observations, it is implicit that the alternative to judicially-promoted settlement is full blow adjudication; thus, commendation of settlement is taken as justifying judicial promotion of settlement. There is an element of false comparison here since most cases presumably would be settled even without judicial intervention. Evaluation of the benefits of judicial participation requires comparison with settlements that occur without judicial participation.

Some arguments do go beyond urging the virtues of settlement generally to argue specifically that judicially-brokered settlements are superior to bi-lateral ones. Some judges claim that judicial participation offsets inequality of bargaining power, protects the weaker or less ably represented party, and generally enhances the rationality of the proceedings.<sup>11</sup> These very significant claims for the higher quality of settlements with judicial participation have not, as we shall see, been subjected to any systematic testing.

In addition to these quality claims, there is an administrative argument that judicial participation controls the timing of settlements and thus permits the more efficient use of court resources. But apart from these, there is little attention to the specific virtues of the judicially-arranged settlement. The commendation of settlements is generally taken to imply commendation of judicial participation, for the latter is assumed to produce more of the former.

Implicit in the praise of judicial intervention is a notion of the proper judicial role— a notion most boldly put by a federal judge, addressing a 1977 seminar for newly appointed federal judges:

... I urge that you see your role not only as a home plate umpire in the courtroom, calling balls and strikes. Even more important are your functions as mediator and judicial administrators.<sup>12</sup>

In this view, the mediator and administrator roles are not merely ancillary to the adjudicator role, but should join it — if not replace it as central.<sup>13</sup> Judge Lacey tells his audience of novice judges that:

... the judge should actively and firmly (but not coercively) seek to settle every case on his docket. . . I suggest that no more than five per cent of each year's civil terminations should result from fully tried cases. The other ninety-five percent, if not settled by counsel themselves, should be settled with the judge's active intervention.<sup>14</sup>

#### TECHNIQUES OF JUDICIAL PARTICIPATION

These judicial observations are made in the course of discussions of what to do and how to do it, discussions aimed at an audience of other judges and presented as exemplary or at least acceptable models of judicial behavior. From these discussions we can compile a brief catalogue of devices which are commended for promoting settlement.

Some devices do not involve intervention into the settlement process. Foremost among these are policies about trial dates and continuances. As one leading judicial promoter of settlement observes, "there isn't any settlement device better than a firm trial date that the lawyers can't get continued."<sup>15</sup> Some judges, persuaded that this is the most effective and acceptable way of promoting settlements, make relentless movement toward trial their exclusive device for promoting settlement.

But many judges intervene more directly and purposively in individual cases.<sup>16</sup> The typical vehicle for judicial participation is one or another form of conference. The literature is replete with descriptions of mandatory or voluntary settlement conferences, combined with or separate from the pre-trial conference. But the conference need not be formally convened by the judge. As one judge puts it, "I make myself available."<sup>17</sup> Another judge tells us that lawyers know they can ask him confidentially to convene a conference to talk settlement without his revealing that they initiated it: "I will find some reason to call the conference that is not patently to discuss settlement."<sup>18</sup> The judge need not wait passively for such informal contacts, but may initiate them himself, as did the judge who gave a series of cocktail parties for lawyers involved in a complex litigation to warm them up to discussing settlement.<sup>19</sup>

There is a wide agreement that in settlement conferences the judge should be a mediator:

I don't think it's a judge's role to decide the case without a trial. . . . We are catalysts in settlement. Our role is not that of a traditional judge. Our role at that stage is that of a mediator.<sup>20</sup>

In the light of the frequent judicial observation that counsel are unwilling to initiate settlement discussions for fear of betraying weakness, one might expect intervention confined to breaking the ice and initiating discussion. But few judges would so restrict the mediator role. Most of the public advice includes some affirmative push toward convergence.

Judges will often attempt to define "the present value of this case" or



otherwise suggest the terms of settlement.<sup>21</sup> A number of judges proudly sketch what some call the 'Lloyds of London method': lawyers are asked to estimate what they think the case is worth and the probability that they will prevail; by combining these calculations the judge produces a figure that is "the synthesis of the probabilities of liability and the possibilities of damages."<sup>22</sup> This is, of course, a fancy version of splitting the difference — a prospect which some find undisturbing since "All [that equally competent lawyers] . . . need from the court is an indication that a figure somewhere between their two figures is fair."<sup>23</sup> Other judges pursue the search for agreement by asking the parties to reveal their best offer: each hands the judge a slip of paper and the judge, comparing them, can tell whether there is a possibility of agreement.<sup>24</sup>

Often the search for convergence is conducted by separate conferences with opposing counsel.<sup>25</sup> Judge Lacey explains:

After separately conferring with each counsel, I then ask counsel if they have an objection to my presenting a figure (or a formula) for settlement. If they do not, I will then present something in terms of an "area" rather than a fixed figure and state that, of course, it is intended only as a "bridge" between their differences.<sup>26</sup>

Of course the process need not stop there. The possibilities for shuttle diplomacy are obvious if the judge is so inclined. A Wisconsin trial judge in the 1950s provided this vivid account of his practice:

I then proceed to go from one side to the other, all the time narrowing the margin that may separate them from an agreement. When I feel one party or the other is making an eminently fair offer, I begin to bear down with all possible pressure. I do not recommend any figure as a settlement basis until I feel clearly it should be accepted. It is not long after this that the parties reach an agreement, if one is, indeed, reached. As a last resort, it is sometimes necessary to telephone the insurance company, if one is involved, explain the negotiations and urge a settlement.<sup>27</sup>

Lawyers are seen as disinclined to go to trial, but needful of making proposed settlements acceptable to their clients. Judges are advised to give the lawyer something to 'take back' to his client — often a calculation or estimate that has the judge's imprimatur on it.<sup>28</sup> Some judges warn against attempts to influence litigants, but others include clients in settlement conferences and even hold private discussions with parties.<sup>29</sup>

Settlement efforts sometimes continue even after trial has begun. One Massachusetts judge described how "he continues his settlement efforts throughout the trial. . . . At the end of each day, he calls counsel into his lobby, discusses the progress of the case, and informs them of the settlement amounts he would recommend their clients accept."<sup>30</sup> A similar practice was observed in Wisconsin in 1982. A judge had tried to settle a large personal injury case, but these efforts failed and the case proceeded to trial. The judge proposed to opposing counsel that he would provide periodic feedback on how the case was going that might be relevant to further attempts at settlement. The parties felt that "it would be helpful to get the judge involved on the liability and damages issues as a 13th juror." During the second week of the trial, the case was settled when the judge

"shuttled between the parties from about nine a.m. until the settlement was agreed to at about one-thirty p.m."<sup>31</sup>

Other judges have created structural devices to increase the incentives to settle. A federal judge in Ohio invented a procedure dubbed the summary trial. This is a half-day proceeding in which opposing counsel are given one hour each to summarize their cases before a panel of six jurors chosen from the jury pool, who then deliberate and give an advisory verdict.<sup>32</sup>

Another federal judge has developed a procedure for having the parties submit sealed demands/offers to the clerk. If the offers overlap the clerk splits the difference and notifies the parties. If the offers are close, the parties are given the option of a conference with the judge or having the judge appoint an independent mediator. Where the case is tried, costs may be assigned against the party whose demand was unreasonable in the light of the judgment.<sup>33</sup>

A different kind of pressure toward settlement was applied by a judge who ordered that the boards of directors of the parties to a complex corporate suit attend the trial, which he predicted would take five months. His order, issued after twenty-six days of court-ordered settlement negotiations had failed to resolve the dispute, was reversed by the Court of Appeals.<sup>34</sup>

Not only is promoting settlements a policy of individual judges, but it is institutional policy, built into court organization. This can be through the adaptation of the pre-trial conference into a forum of settlement, or through the establishment of mandatory settlement conferences.<sup>35</sup> It can take the form of routine referrals to the magistrate or the clerk to mediate cases. Or it can be through such extraordinary devices as the "trial holiday" in which a court makes a sustained attack on its backlog. In one such exercise, all civil trials were cancelled for a week; five panels of three judges were set up; they reviewed the file of pending cases; held hearings in each, conferred with the attorneys, and "formulated a settlement recommendation." It was believed that parties would "give high consideration to the opinion of three judges on the probable outcome of the dispute."<sup>36</sup>

As this proliferation of innovations indicates, judges have been liberated to try their hand at promoting settlements. This is a composite account. No one judge does all of these things or subscribes to all of these justifications. Nor can I claim that these views and practices are representative. They are taken, for the most part, from the minority that writes and publishes — a minority drawn heavily from the party of those who favour participation in settlements. Active participation is unmistakably the "established church" in these matters.<sup>37</sup> Judges who are activists are invited to give seminars to new judges; their views are broadcast by publication in Federal Rules Decisions and disseminated in booklets by the Federal Judicial Center. But the vociferous evangelizing suggests that there are some unconverted out there, some worshippers of the old gods,<sup>38</sup> even though they don't break into print very often.

Formal recognition of the activist position came in the 1983 amendment of Rule 16 of the Federal Rules of Civil Procedure to explicitly recognize that the pre-trial conference might "consider and take action with respect to the possibility of settlement of the use of extra-judicial processes to resolve the dispute."<sup>39</sup> The Advisory Committee that proposed the change noted that this new clause recognized "that it has become commonplace to discuss settlement at pre-trial conferences." The Committee recommended that requests for a conference indicating a willingness to talk settlement "normally should be honored" and that "a settlement conference is appropriate at any time."<sup>40</sup> Although these practices are not universal, they have been legitimated and institutionalized.

Several recent surveys give us a shadowy profile of contemporary patterns. In a nation-wide survey of trial judges, only twenty-one and eight tenths (21.8) percent of the 2,545 respondents described their typical posture as one of non-intervention in settlement discussions: they did not intervene but "allow[ed] the opposing counsel to try to reach a settlement on their own." Over three quarters of the judges described their typical posture in settlement conferences as one of intervention. Of these sixty-seven and nine tenths (67.9) percent described their typical role as "intervene subtly — through the use of cues/suggestions;" ten and three tenths percent described their typical practice as "intervene aggressively — through the use of direct pressure."<sup>41</sup>

In a study of federal and state courts in five localities, judges were asked about the practices they follow "most or all of the time." Seventy-five percent of federal judges and fifty-six percent of state judges reported that they initiated settlement talks in jury cases; forty-one percent of federal judges and fifty-six percent of state judges reported that they suggested terms of settlement in such cases. (For bench trials, the figures are lower in every category).<sup>42</sup>

But if three quarters of the judges do it, it does not follow that it is done in three-quarters of the cases. The Civil Litigation Research Project (CLRP) interviewed 1,214 lawyers involved in pre-trial settlement of recently closed cases in five localities. Seventy-three percent of these indicated no judicial role in the settlement; only twenty-seven percent "indicated that the judge or hearing officer played some role in the negotiations."<sup>43</sup> In Kritzer's analysis of a smaller sample of CLRP lawyers, sixty two and eight tenths (62.8) per cent reported at least one settlement-related action by the judge. But while judges reported that they almost always engaged in some settlement-related activity, this activity was rarely very intense. Kritzer concluded that "the judges are using some low-intensity interventions frequently and [are] seldom, if ever, using the more intensive types."<sup>44</sup> Lawyer interviews revealed that "in a third to a half of the cases judges did something like set a firm trial date, indicated a willingness to participate in settlement discussions, tried to initiate settlement discussions, or actually participated in such discussions. Lawyers reported the more specific, intensive activities in only one percent to twenty-one percent of the cases."<sup>45</sup>

Another survey of federal and state judges listed a large number of settlement "techniques" and asked if judges had ever used them; it found that ninety percent had "talk[ed] with both lawyers together about settlement", sixty-nine percent "inform[ed] the attorneys how similar cases have been settled" and more than half (fifty-five percent of state judges, fifty-nine percent of federal) had actively brokered a settlement by "ask[ing the] amount each would concede, going back and forth to break settlement into small steps." Virtually all lawyers report encountering the first and about two-thirds report encountering the latter two.<sup>46</sup> We can conclude that such techniques are used by many judges sometimes.

It appears that a large number of judges do participate actively in some of the cases before them. They tell us that they are more likely to do so where it is a jury case than a bench trial. We have only some fascinating hints about which cases attract judicial settlement efforts and which judges are most inclined to undertake them. For example, Ryan and his collaborators found that judges reported more intervention where they viewed attorneys as lacking settlement skills and where they viewed themselves as excellent negotiators.<sup>47</sup>

#### WHAT DIFFERENCE DOES IT MAKE?

The various reasons for praising judicial promotion of settlements can be boiled down to two basic arguments. The first of these, which we might call the production argument, is that courts that promote settlements will as a result handle more cases — that is, they will do more of what they are supposed to do with the limited resources available to them. The second set of arguments suggests that judicial promotion of settlements will result in outcomes that are superior to those that would occur in its absence. We might call this the better product argument or, for short, the quality argument.

##### *The Production Argument*

That judicial participation increases the number and speed of dispositions is, for its proponents, an article of faith. But the few studies that have undertaken systematic observation have found little evidence that judicial efforts bring about production gains. In a study of state courts of general jurisdiction in twenty-one cities, Church and his collaborators found that dedicating judicial resources to active participation in settlement neither speeded dispositions nor increased the productivity of judges (measured by cases they disposed of annually).<sup>48</sup> Five courts were examined in detail and ranked from the most intensively involved in settlement to the most aloof:

The two settlement-intensive courts make less use of jury trials than those with less court settlement activity, but there is no clear linkage to judicial productivity. Those courts that exert the most effort in settling cases do not necessarily dispose of more

cases per judge than those courts where less judicial settlement effort is expended. The only obvious relationship . . . is the perfect inverse relationship between amount of court settlement activity and median disposition time. The most settlement intensive courts are the slowest courts. We are not in a position to assert causality here. It seems clear, however, that fast courts on civil case processing need not be "settling" courts.<sup>49</sup>

Several studies of federal district courts arrive at similar conclusions. Flanders studied six federal district courts and found no relation of settlement involvement to the number of cases terminated. There was even a suggestion that the relationship was inverse:

The court with the strongest and most vigorous settlement role had the fewest civil terminations per judgeship per year. The court with the least settlement involvement has the second most civil terminations.<sup>50</sup>

An earlier study of federal courts by Gillespie found that courts that dispose of a greater portion of their civil cases by trial tend to be those courts that dispose of a larger number of civil cases per judge.<sup>51</sup> A controlled experiment with appellate settlement conferences failed to find production effects: random assignment of cases into pre-appeal conferences produced no reduction in the percentage of appeals that were briefed and argued.<sup>52</sup>

Thus the 'production' argument for judicial participation is weak or at least unsubstantiated — at least so far as production is measured by the number of cases disposed of. This limited efficacy is not surprising if we recall that most cases would settle anyway. Thus, very intensive and time-consuming settlement activity would have to be undertaken with considerable selectivity to save in those cases in which it made a difference as much time as was consumed in treating all the cases in which it didn't make any difference.

That the dynamics of settlement are relatively independent of judicial intervention is suggested by a feature that has surfaced consistently in reports that if the judicial settlement conferences are held too early (i.e., too long before the possibility of trial), they do not produce settlements.<sup>53</sup> This suggests that lawyers' readiness to settle is related to time and to the imminence of trial and not to judicial intervention *per se*.

Nevertheless, active judicial participation is experienced by the judge as effective, since he sees cases settling all around. With a ninety-five percent 'success' rate, it is easy to conclude that the judicial effort makes a difference. Where judicial initiative is routinized and predictable, local lawyers might adopt these conferences as the setting for ordinary settlement activity, thereby avoiding the onus of initiating settlement discussions — and augmenting the sense that the judge's activity makes a difference.

Lawyers do perceive that judicial activity has an impact. Kritzer found a strong correlation of the judge's "activity level" with the perception by lawyers that the judge had an impact on the case. The perceived impact was also correlated with specific kinds of judicial activity. Curiously the correlation was strongest with the most general activities ("participated in

settlement discussions," "expressed a willingness to participate in settlement discussions") and less strong with the less frequently used activities Kritzer elsewhere describes as more "intensive" (e.g. "met separately with the two sides," or "requested that clients be present during the discussions").<sup>54</sup> At the very bottom of the list — impressing the lawyers as having no impact whatsoever was "set a firm trial date early in litigation." Wall and his collaborators find that lawyers not only regard the latter as ineffectual, but that it excites the Bar's intense condemnation: forty percent of lawyers judged it "unethical" for the judge to "set . . . inexorable trial date to raise pressure to settle." They, too, find that greater effectiveness is attributed to the most general techniques.<sup>55</sup> This curious pattern suggests that the most general techniques are applied to the "easiest" cases, but more specific techniques are tried only on the "harder" cases that have not succumbed to the general techniques.

There may be other, more specialized measures of production. For example, judicially produced settlements may be more valued by court administrators because they don't disrupt trial schedules, causing holes in the calendar — times when there are judges and courtrooms available but no cases ready for trial. Conceding that "there is little evidence that settlement conferences reduce the number of trials," one commentator commended them because "the trial calendar becomes more solid as the cases settle earlier (i.e. not on the courthouse steps). . .".<sup>56</sup>

Although any increase in the portion of cases settled remains to be demonstrated, it does appear that there has been a move toward more judicial involvement. Cases that might have settled by negotiation between opposing counsel are now settled with the participation of the judge (or other court functionary). Does that make any difference? This brings us back to what I called the quality argument — a set of questions that has remained entirely unexplored.

#### *The Quality Argument*

How can we tell if judicial participation in settlements is a good thing? The existing studies have used only administrative or managerial measures of effects: cases terminated per judge, number of trials, speed of disposition. But this is only a small part of the possible range of effects that such practices might have. Even if these 'production' effects are absent or minimal — even if they are negative — it may be that there are 'quality' effects that would lead us to support — or oppose — various species of judicial participation. The specification of such quality effects and the devising of techniques for measuring them is the unexplored frontier in the study of judicial settlement.

At this point it is possible only to suggest the range of such effects and in a few instances to suggest plausible arguments for their occurrence. Which of these are connected with which kinds of judicial intervention in which kinds of cases remains to be established by field investigation. (In some

cases there are profound problems of research methodology that suggest that we may never get definitive answers.)

These effects may be divided into special effects, — i.e., effects on the case at hand and on the actors there — and wider systemic effects.<sup>57</sup> Wider effects in turn can be divided into aggregate effects — i.e., effects of the cumulation of special effects, such as the establishment of new patterns and channels — and general effects that come about by the communication of information about special and aggregate effects.

First, there are the special effects of judicial participation on the case at hand:

(a) Process qualities

1. Timing: settlement may occur at a different stage of the dispute.
2. Information: there may be more development and utilization of information, more disclosure, fuller sharing, etc.
3. Exploration: there may be fuller consideration of options, greater inventiveness in visualizing possible outcomes.
4. Finality: the result may be accorded greater finality by the parties.
5. Stability: the agreement may be more likely to elicit compliance, less likely to be dishonoured or challenged. (In a very suggestive study of small claims cases, McEwen and Maiman found the rate of compliance with mediated outcomes to be significantly higher than compliance with negotiated outcomes.)<sup>58</sup>
6. Cost: judicial involvement may result in lower cost in time and money to reach settlement.

(b) Normative character

7. Legalization: settlements with judicial involvement may display greater permeation by legal norms; they may be based on more accurate assessment of legal rules.
8. Normatization: negotiation in civil cases may take into account norms that are not legally prescribed for authoritative decision by the court.<sup>59</sup> Does participation by the judge extend the range and influence of these 'non-legal' norms or does it curtail them?
9. Insulation from non-legal factors: judicial participation may reduce the influence of such non-legal factors as skill of counsel, inability to withstand costs of trial, attractiveness of plaintiff, etc.

(c) Lawyers' Negotiating Style

10. Lawyers may be more cooperative, less competitive, rely less on threats. Judicial participation may enable lawyers to adopt co-operative stance and make concessions without appearing weak. By guaranteeing observance of norms of reciprocity, the judge's presence may undermine competitive 'no concessions' tactics.

(d) Experiences and Perceptions of Parties

11. Perceived fairness: the outcome may be perceived as fairer by participants.
12. Litigant satisfaction: litigants may be more satisfied.
13. Litigant relations: parties may be more inclined to restore or continue relations.
14. Stress: parties may experience less stress, etc.

Second, there are wider systemic effects:

15. Uniformity: there may be greater uniformity, less variability in the treatment of similar cases.
16. Precedent: judicially-promoted settlements may function more effectively than bi-lateral settlements as precedents for negotiation of subsequent cases.
17. Negotiating Style: judicial participation may affect the style of lawyers in conducting bi-lateral negotiations — for example, by making bi-lateral negotiations more cooperative or more norm-infused.
18. Judicial Style: settlement activity may affect the styles of judges when they are trying cases, ruling on motions, etc.

Of course, one might imagine many other effects — including effects of a character quite opposite to those suggested in this list. But to recognize the ramifying effects that might occur is to recognize that more is implicated in judicial promotion of settlements than the managerial concerns that underlie the production argument.

#### EXPLAINING JUDICIAL INTERVENTION

The judicial embrace of settlement promotion described here should be viewed as part of a landscape in which there is a general and pervasive displacement of adjudication into negotiative processes. Changes in judicial settlement behaviour have been seen as incremental adjustments in a setting where there are powerful pressures toward settlement. Negotiated settlement has long been the modal disposition of American disputes — civil, criminal, and administrative.

The most prevalent explanation of these patterns is that they are distortions or expedients resulting from massive caseloads and resource shortages that prevent institutions from operating as they are designed and supposed to operate. Plea bargaining then is the result of the immense crush of criminal cases; settlements of civil and administrative matters are a response to overburdened forums with long queues, etc.

A series of incisive analyses have demolished the notion that non-trial dispositions in criminal cases are a recent response to pressures of caseload. Heumann has shown that the proportion of non-trial dispositions had been fairly constant in the Connecticut courts since the late years of the nineteenth century.<sup>61</sup> The finding that dispositional practices are not



much different in high volume and low volume courts<sup>62</sup> holds up when controls for available personnel are introduced.<sup>63</sup> A natural quasi-experiment on an occasion when some courts had their workload substantially reduced revealed no shift toward more trials.<sup>64</sup>

An alternative perspective attributes the gravitation toward settlement to fundamental strategic considerations rather than to temporary institutional conditions. In this 'strategic' view, all of the participants, seeking to achieve their goals while avoiding unacceptable risks, find full-blown adjudication inexpedient. Lawyers find trials distasteful: they may bring little financial gain, they disrupt one's practice, they require extensive preparation, and they expose one to risks of losing or revealing lack of expertise.<sup>65</sup> If trial offers parties hope of complete victory or vindication, it also involves additional cost, protracted delay and a risk of losing all. And parties may find it attractive to trade off where they assign different values to different components of the outcome.

If it is understandable that lawyers and parties often prefer that adjudication decompose into something more controllable and less risky, why should the court — whose mandate is to render and enforce an authoritative decision — concur in this shift? Yet nothing is more ordinary than for the court (or other decision-maker with binding authority) to postpone invoking its arbitral power while allowing the parties to arrange a decision that is mutually agreeable to them. What does the court get out of it? A number of reasons suggest themselves:

1. Resource Savings: imposed decisions require the decision-maker to employ elaborate procedures and to supply elaborate justifications.
2. Avoidance of Supervision: settlements are largely unreviewable and their occurrence increases the autonomy of the forum from its hierarchic superiors.
3. Minimization of Enforcement Problems: imposed decisions are less likely to be complied with than decisions that are consented to.<sup>66</sup>
4. Political Credibility: imposition endangers credibility since at least one party is aggrieved with the forum. Settlement enables avoidance of untoward results which would attract attacks on the forum.
5. Sense of Accomplishment: participation in settlements induces a feeling of accomplishment and control.<sup>67</sup>
6. Fun: finally, participation in settlements may strike a judge as an engaging activity that enables him to employ beneficially his talents as a negotiator.<sup>68</sup>

But these reasons why judges, too, find settlement preferable to imposed decision are not new. Why should judicial participation have become more widespread, more commendable? It is the received wisdom that the new respectability of judicial participation is due to the increased volume of cases congesting the courts.<sup>69</sup> Judicial intervention is portrayed as a response to an ominous trend of increasing caseloads.<sup>70</sup> This is a

functionalist restatement of the production argument: since more settlements are needed, more judicial participation is forthcoming. But as we have seen, there is reason to doubt the claims of the production argument. Many judges perceive that the functionalist argument is valid, but that shift in judicial culture deserves a more satisfying explanation.

Space permits only the most preliminary sketch of what a 'strategic' explanation might look like. It would view the movement toward judicial participation in settlements as part of a wider search for 'alternatives' that may be seen as an attempt to adapt the American pattern of litigation to changes within and without the legal system.<sup>71</sup>

There is more law — more legislation, more administrative regulation, more published judicial decisions. This proliferation of legal controls responds to and stimulates higher expectations of protection and redress among wider sections of the public. As the body of authoritative material becomes more massive, more complex and more refined, decision-makers (and other actors) are both constrained and supplied with resources and opportunities for legal innovation.

Adjudication has become more complex, more expensive, most protracted, more rational — and more indeterminate. It is freer of arbitrary formalities, more open to evidence of complicated states of fact, and responsive to a wider range of argument. As the cost and complexity of litigation increases, both the potential inputs as well as the possible outcome of the trial become a source of bargaining counters that can be used at other phases of the process. An enlarged right to conduct discovery or to select a 'representative' jury, for example, are not only contingencies that affect those specific stages of the proceedings. They are sources of counters and strategems throughout the process.<sup>72</sup> As the process became more costly and complex, it creates new strategic options for litigants while subjecting them to new contingencies. Litigation becomes a strategic quest for information about what the other side wants, what juries are likely to believe or award, how the judge might respond at a multiplicity of low visibility, highly discretionary choice points.

Demand for brokers who can help secure this information at low cost and risk converges with changes in judicial ideology. Judges share the widespread elevated expectations of a beneficent result at the same time that they have less faith that legal doctrine provides a single right answer; or that full-blow adjudication will produce the most appropriate outcome. Concern with outcomes is juxtaposed with the realization that outcomes are affected by the contingencies of the process — by cost, delay, uncertainty, bargaining power and so forth. Process is seen as a variable involving choices to be made on substantive as well as administrative concerns. Judicial promotion of settlements, along with interest in arbitration, mediation, and various alternatives, is a response to these concerns.

Openness to these processual variations marks a salutary shift of focus from the smaller world of adjudication, to the big world of litigation. It

implies an acceptance by the courts of responsibility to make policy not only for the cases that are fully adjudicated, but for all the cases that arrive at the court and even for the penumbra of disputes that never arrive. It is a responsibility that encompasses the bargaining process. It takes up the challenge of the quality argument, which is really the challenge of doing substantive justice in the cases — and they are the great majority — in which the courts' presence is ghostly, intermittent and indirect rather than plenary and direct.

If the question is one of upgrading the litigotiation process, it is evident that judicial mediation is but one of a large number of options. Some involve displacing disputes to other forums like arbitration and mediation. Others involve changes in the quality and incentives of the bargaining process by training or certification of negotiators; development of ethical controls; malpractice remedies; peer review; or adoption of fee-shifting rules. In the United States, we are in a period of experimentation with and research about these devices and their effects. We may expect a rapid growth of our systematic knowledge about both judicial mediation and about the devices that are its companions and rivals. But such knowledge requires that we develop adequate measures of the quality of processes and outcomes.

I have tried to suggest the range of what we don't know and ought to know about the bargaining processes which constitute the larger part of the American legal system and about the role of judges in that process. I want, finally, to suggest the rich possibilities for comparative study. I have spoken here about the United States, but these issues are not confined to America. The legal systems of at least some other industrial societies are also largely systems of litigotiation, or bargaining in the shadow of the law. Judges may intervene in negotiations rarely, as in Britain, or frequently, as in Germany. In all such systems, the problems of substantive justice are in some measure the problem of assuring high quality bargains or settlements.

#### NOTES AND REFERENCES

<sup>1</sup> Coons, "Approaches to Court Imposed Compromises — The Uses of Doubt and Reason" (1964) 58 *Northwestern L. R.* 750. Critics have suggested that other systems, less well-endowed in other respects, produce results superior to the rigid 'winner-take-all' decrees of modern courts.

<sup>2</sup> Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale L. J.* 950; Galanter, "Justice in Many Rooms" in *Access to Justice in the Welfare State* (1981; ed. M. Cappelletti) p. 147. On disposition patterns, see Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *UCLA L. R.* 4.

<sup>3</sup> This paper focusses on judicial participation in settlements that is discretionary, rather than those special classes of cases where judicial approval is mandatory, such as class actions or cases involving minors.

<sup>4</sup> See Galanter, *supra* n. 2 (1983).

<sup>5</sup> See Galanter, "The Emergence of the Judge as a Mediator in Civil Cases, 1930-1980,"

- Working Paper (1984) Disputes Processing Research Program, University of Wisconsin — Madison.
- <sup>6</sup> *The New York Times*, 11 February 1977, p. 1, quoted in Macaulay, "Elegant Models, Empirical Pictures, and the Complexities of Contract" (1977) 11 *Law and Society Review* 507.
- <sup>7</sup> Will et. al., "The Role of the Judge in the Settlement Process" (1977) 75 *Federal Rules Decisions* 203.
- <sup>8</sup> Compare Fox, "Settlement: Helping Lawyers to Fulfill Their Responsibility" (1971) 53 *Federal Rules Decisions* 129.
- <sup>9</sup> Compare Holland, "William J. Campbell: A Case Study of an Activist U.S. District Judge" (1977) 3 *Justice Systems Journal* 143, 144.
- <sup>10</sup> Fox, *op. cit.*, n. 8, p. 142. Compare Lynch, "Settlement of Civil Cases: A View From the Bench" (1978) 5 *Litigation* 57, 58.
- <sup>11</sup> See, for example, Fox, *id.*, p. 143.
- <sup>12</sup> Lacey, "The Judges Role in the Settlement of Civil Suits" (1977) presented at a Seminar for Newly Appointed Judges. This talk is noteworthy because it was subsequently published as a booklet and widely distributed by the Federal Judicial Center.
- <sup>13</sup> There is a strain, not shared by all interventionist judges, that we might label abolitionist in that it would virtually eliminate adjudication. See Neubauer, "Judicial Role and Case Management" (1978) 4 *Justice System Journal* 223, 227. Compare Aldisert's calendar control plan which was designed "not to expedite trials but to eliminate them." Aldisert, "A Metropolitan Court Conquers Its Backlog" (1968) 51 *Judicature* 247, 250.
- <sup>14</sup> Lacey, *op. cit.*, p. 4.
- <sup>15</sup> Will et. al., *op. cit.*, p. 219 (Hon. Alvin B. Rubin). Compare Aldisert, *op. cit.*, p. 249.
- <sup>16</sup> Expression of enthusiasm for judicial participation is often accompanied by a countervailing concern about the possible coercive overtones of mediation by one who holds decision-making power. Lacey, *op. cit.* p. 24; Fox, *op. cit.*, p. 143; Will et. al., *op. cit.*, p. 224, quoting Rubin. This often takes the form of a provision for having another judge try the case. There is general agreement that the prospect of a jury trial gives the judge greater freedom to plunge into the negotiations than does a bench trial.
- <sup>17</sup> Will et. al., *id.*, p. 217 (Hon. Robert R. Merhige, Jr.).
- <sup>18</sup> *Id.*, p. 224 (Hon. Alvin B. Rubin).
- <sup>19</sup> *Id.*, p. 213.
- <sup>20</sup> *Id.*, p. 205. Compare Fox, *op. cit.*, p. 148. In keeping with the mediator role, many judges counsel informality in atmosphere.
- <sup>21</sup> Will et. al., *op. cit.*, p. 206; Aldisert, *supra*, n. 15; Yankelovitch et. al., *Study of the Role of Courts* (1980) Office for Improvements in the Administration of Justice, U.S. Justice Department.
- <sup>22</sup> Will et. al., *id.*, p. 207; Title, "New Settlement Techniques for Trial Judges" (1979) 18 *Judge's Journal* 42; see also Franklin N. Flaschner Judicial Institute, Inc. Materials for conference on "The Judicial Role in Case Settlement" (1980) (Hereafter "Flaschner"), p. 11.
- <sup>23</sup> Lacey, *op. cit.*, p. 14; Will et. al., p. 223, quoting Rubin. Compare Fox, *op. cit.*, p. 153.
- <sup>24</sup> Fox, *id.*, p. 151; McIlvaine, "The Value of Effective Pre-trial" (1961) 28 *Federal Rules Decisions* 158; Lerman, "A Slice of Legal Culture in Rural America: Green Country, Wisconsin" (1984) unpublished paper.
- <sup>25</sup> Title, *op. cit.*, p. 44; Will and Rubin, "Some Suggestions Concerning the Judge's Role in Stimulating Settlement Negotiations" (1977) 75 *Federal Rules Decisions* 227.
- <sup>26</sup> Lacey, *op. cit.*, p. 21.
- <sup>27</sup> Ryan and Wickhem, "Pre-trial Practice in Wisconsin Courts" (1954) 1954 *Wisconsin L. R.* 5; compare J. Lobenthal, *Power and Put-on: The Law in America* (1970) pp. 145-49. Lobenthal presents a fictionalised account of New York City in the 1960s — in which judges actively broker settlements by successive *ex parte* conferences and a dose of deception as to the opposite party's bottom line.
- <sup>28</sup> Wright, "The Pretrial Conference," (1962) 28 *Federal Rules Decisions* 141.

- <sup>29</sup> Title, *supra*, n. 22; Will *et. al.*, *op. cit.*, p. 217 quoting Merhige; Avakian, "How One Trial Judge Settles Cases" (1978) 35 *Guild Practitioner* 15, 18; see also Flaschner, *op. cit.*, p. 10.
- <sup>30</sup> Flaschner, *id.*, p. 9.
- <sup>31</sup> Block, "A Case Study in the Judicial Role the Settlement of Civil Cases" (1983) unpublished paper.
- <sup>32</sup> Jacobovitch and Moore, *Summary Jury Trials in the Northern District of Ohio* (1982).
- <sup>33</sup> Flaschner, *op. cit.*, p. 7.
- <sup>34</sup> "Forced Attendance Limited", *The National Law Journal*, 23 January 1984.
- <sup>35</sup> Aldisert, *supra*, n. 15.
- <sup>36</sup> Title, *op. cit.*, p. 44.
- <sup>37</sup> Compare Renfrew, "Negotiations and Judicial Scrutiny of Settlements in Civil and Criminal Anti-Trust Cases" (1975) 57 *Chicago Bar Record* 130, 131.
- <sup>38</sup> See Neubauer, *op. cit.*, p. 228.
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.*
- <sup>41</sup> Ryan *et. al.*, *American Trial Judges: Their Work Styles and Performance* (1980) p. 177. The phrasing of the question here may lead to some over-estimation of settlement intervention. Although the authors draw conclusions about judicial participation in "settlement discussions", the judges were asked which role they typically assume "in [civil] settlement conferences." Since settlement conferences may be a setting in which by definition the judge is likely to address the question of settlement, the responses may overstate judicial propensities to intervene because non-interventionist judges may be reluctant to hold such a conference. Compare the Flaschner survey of eighty-five Massachusetts judges: sixty-four per cent characterized their role in settlement of pre-trial conferences as that of "catalyst for further discussions between counsel." Fifty-five per cent viewed themselves as "Mediator who shares with counsel his own view of a fair settlement."
- <sup>42</sup> Yankelovitch *et. al.*, *op. cit.*, p. 83 (1980). This study is based on interviews with seventy-five of the two hundred and sixty-five state judges and twenty-nine (of forty-one active) federal judges in the five localities studied by the Civil Litigation Research Project.
- <sup>43</sup> Trubek, "The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword" (1980-81) 15 *Law & Society Review* 727, 731.
- <sup>44</sup> Kritzer, "The Judge's Role in Pre-trial Case Process" (1982) 66 *Judicature* 28, 34.
- <sup>45</sup> *Id.* Presumably the more "intensive" activities referred to are things like "Assessing the costs of empaneling a jury against parties or counsel who unreasonably delay settlement until the day of trial; . . . discussing previously tried cases during settlement discussions . . . undertaking an insurance-like analysis of liability . . . suggesting a fair settlement figure. . . ." *Id.*, p. 31.
- <sup>46</sup> Wall, Schiller and Ebert, "Should Judges Grease the Slow Wheels of Justice? A Survey of Effectiveness of Judicial Mediator Techniques" (1983) unpublished paper.
- <sup>47</sup> Ryan, *et. al.*, *op. cit.*, p. 185.
- <sup>48</sup> T. Church *et. al.*, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (1978) p. 32.
- <sup>49</sup> *Id.*, p. 33.
- <sup>50</sup> Flanders, "Case Management in Federal Courts: Some Controversies and Some Results" (1978) 4 *Justice System Journal* 147, 161.
- <sup>51</sup> Gillespie, "The Production of Court Services: An Analysis of Scale Effects and Other Factors" (1976) 5 *Journal of Legal Studies* 243, 254.
- <sup>52</sup> Goldman, "The Preappeal Conference and Effective Justice" (1979) 1 *Law and Policy Quarterly* 101, 114.
- <sup>53</sup> Boies, "The Executive Judge" (1933) 167 *Annals of the American Academy of Political and Social Science* 12; Aldisert, *supra*, n. 13.
- <sup>54</sup> Kritzer, *op. cit.*, p. 64. Compare *id.*, p. 34.
- <sup>55</sup> Wall *et. al.*, *supra*, n. 46.
- <sup>56</sup> Friesen, *op. cit.*, p. 186. Compare Aldisert, *supra*, n. 13.
- <sup>57</sup> On the various types of effects, see Galanter, "The Radiating Effects of Courts" in *Empirical Theories About Courts* (1983; eds. K. Boyum and L. Mather) p. 117.

- <sup>58</sup> McEwen and Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent" (1984) 18 *Law & Society Review* 11, 21.
- <sup>59</sup> Eisenburg, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking" (1976) 89 *Harvard L. R.* 637; Mnookin and Kornhauser, *supra*, n. 2.
- <sup>60</sup> Woll, "Informal Administrative Adjudication: Summary of Findings" (1960) 7 *UCLA Law Review* 436.
- <sup>61</sup> Heumann, "A Note on Plea Bargaining and Case Pressure" (1975), 9 *Law & Society Review* 515.
- <sup>62</sup> Feeley, "Pleading Guilty in Lower Courts" (1979) 13 *Law & Society Review* 461. Heumann, *op. cit.*,
- <sup>63</sup> Nardulli, "The Caseload Controversy and the Study of Criminal Courts" (1979) 70 *Journal of Criminal Law and Criminology* 89.
- <sup>64</sup> Heumann, *op. cit.*,
- <sup>65</sup> Wessel, *The Rule of Reason: A New Approach to Corporate Litigation* (1976) p. 37; P. Hermann, *Better Settlements: Through Leverage* (1965). Compare Rosenthal, "Client Participation in Professional Decisions: The Lawyer Client Relationship in Personal Injury Cases" (1970) unpublished paper, p. 172.
- <sup>66</sup> MacEwen and Maiman, *supra*, n. 57.
- <sup>67</sup> Flanders, *op. cit.*, p. 161-62.
- <sup>68</sup> Flanders, *id.*, p. 161; compare Ryan *et. al.*, p. 191.
- <sup>69</sup> Benjamin and Morris, "The Appellate Settlement Conference: A Procedure Whose Time Has Come" (1976) 62 *American Bar Association Journal* 1433.
- <sup>70</sup> Title, *op. cit.*, p. 12, 1979.
- <sup>71</sup> On the embrace of "alternatives," both to and within the courts, see Abel, *The Politics of Informal Justice*, Vol. 1 (1982); Tomasic and Feeley, *Neighborhood Justice: Assessment of An Emerging Idea* (1982); Green, "Getting Out of Court — Private Resolution of Civil Disputes," 91984, *Boston Bar Journal* 28 (3), p. 11.
- <sup>72</sup> Engel and Steele (1979), "Civil Cases in Society: Legal Process, Social Order" 2 *American Bar Foundation Research Journal* 295.

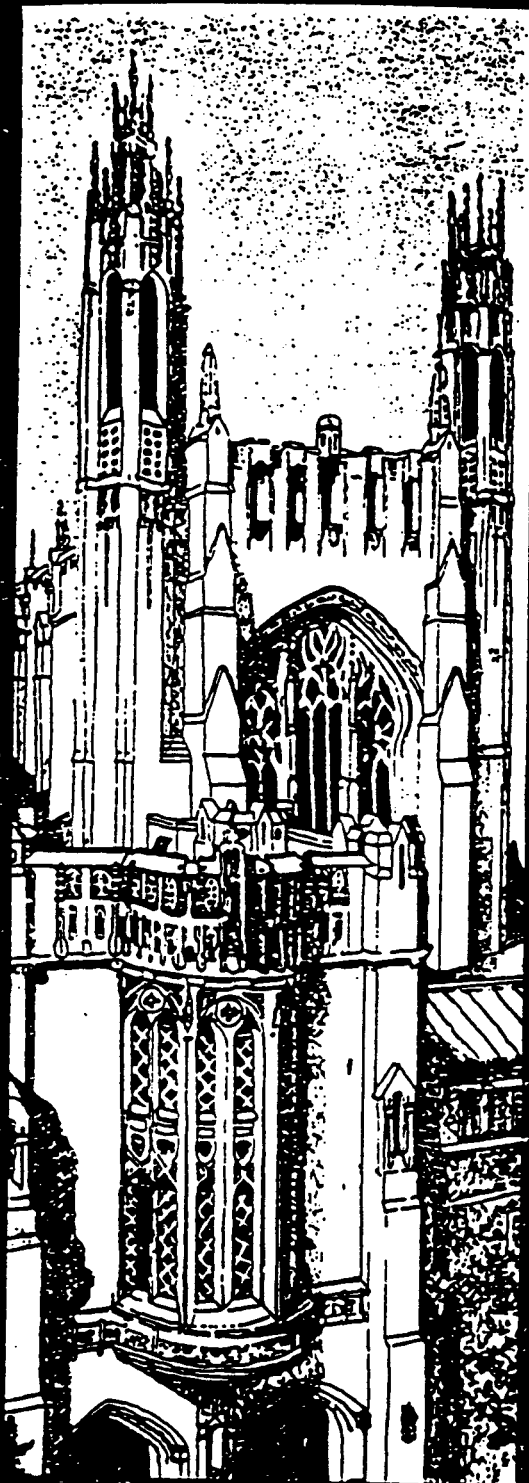
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Tab K

MASS TORTS/COMPLEX LITIGATION

- Materials will be distributed at the workshop.





# Civil Liability Program

Center for Studies in Law,  
Economics, and Public Policy

YALE LAW SCHOOL

RESOLVING MATURE MASS  
TORT LITIGATION

Francis E. McGovern

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## INTRODUCTION

This is the third in a series of articles designed to suggest a functional approach for managing complex litigation. The thesis of these articles has been that there is sufficient flexibility in our system of civil litigation for us to adapt to the changing needs of evolving forms of dispute resolution. Effective use of judicial management and more frequent use of cooperative and inquisitorial techniques in experimental applications, it has been proposed, will lead inductively to superior approaches for coping with difficult cases.

The subject matter of this article is "mature mass torts", that is, mass tort litigation where there has been full and complete discovery and, after completing the rites of passage through multiple jury verdicts, there remains significant vitality in the plaintiffs' contentions. This is litigation where there will be little or no new evidence developed, where there has been significant appellate review of any novel legal issues, and where there has been at least one full cycle in the strategies of trial counsel. The cases presented in this article--asbestos and Dalkon Shield--are examples of mature mass torts.

In 1983 this author noted the following trend in mass tort litigation: "[t]he traditional view of litigation as an individualistic, rights-based adjudicatory system dedicated to the compensation of victims by free market mechanisms in an adversary setting is being challenged by a view of the legal

process as a mechanism to further the collective interests of society by centralizing rule making and inquisitorial fact finding to maximize utility in deterring undesired activity." This article contains case studies of two mature mass torts that push the envelope of this trend: (1) the East Texas asbestos class action in Jenkins v. Raymark and (2) the Dalkon Shield bankruptcy in In re A. H. Robins Company.

The case study methodology used is consistent with that used in the earlier articles. There is a statement of the problems confronted by the court and then a description of the court's diagnosis of those problems--a discussion of the factors that seem to drive perceived difficulties. Then there is a prescription or a proposed procedural solution to the problems with a detailed discussion of the effect of that prescription on the parties, the issues, and the information generated to assist in decision-making. Finally, there is a description of the results of the procedural innovation with an evaluation from different perspectives. There is the economic effect--the cost in time and money of the new process, as well as any opportunity or error costs. There are various fairness concerns--values of predictability, rationality, and equality of opportunity and strategy. There are also other, perhaps less tangible, values that may be useful in evaluating a proposed procedure: the way the procedure affects the dignity and autonomy of the individual, the litigant's sense of participation and control, the public's right to informa-

tion and full exposure, and the values informing the applicable substantive law.

The final portion of this article suggests alternative functional approaches for managing mature mass torts based upon the experience gained from the procedural innovations used in the two case studies. Some of these alternatives are currently available for use and some would require a change in various existing laws, rules, and procedures.

ASBESTOS: HAS JUDGE ROY BEAN RETURNED?

#### PROBLEM

East Texas is the fertile crescent of asbestos litigation. One of the first asbestos disease workers' compensation claims had been resolved there; the first major jury verdict and appellate opinion came from there; and the first group settlement occurred there. Aside from Y.A. Tittle and Bill Moyers, it often seems that the most famous people from East Texas are asbestos plaintiffs' attorneys.

From 1979 to 1982, when the Manville Corporation filed for bankruptcy, 429 asbestos cases were filed in the federal courts of the Eastern District of Texas. There were 3 cases tried to a jury verdict; a total of 59 plaintiffs settled their cases; and 377 cases were pending. Between 1982 and December of 1985 an

additional 1,727 cases were filed, \_\_\_\_\_ tried, and \_\_\_\_\_ settled. 1,858 asbestos disease cases were pending on January 1, 1986. In addition, there were \_\_\_\_\_ cases pending in state courts in East Texas where there had been a total of \_\_\_\_\_ trials and \_\_\_\_\_ settled cases.

When Judge Robert M. Parker was appointed to the federal bench in May of 1979, the entire Eastern District confronted a caseload of 2125 lawsuits, 173 of them related to asbestos exposure. The saga of his efforts at case management is a microcosm of the attempts by American courts to cope with asbestos litigation.

In 1980 he tried his first asbestos case to a jury in a traditional first-come, first-serve manner. He eventually tried approximately 40 cases involving more than 120 plaintiffs to a jury verdict with the plaintiffs winning almost 90%. In none of those cases was there a finding that the asbestos in question was not defective. Many of these cases were selected as test or bellweather cases which could provide the attorneys with representative case values. As his work progressed, Judge Parker concluded that the traditional automobile accident model of dispute resolution simply would not move all of the asbestos cases filed in his court through the python of the litigation process. At the same time, Judge Parker experienced a high level of frustration from seeing the inefficient allocation of resources by the parties. The attorneys seemed trapped in a syndrome of escalating expenditures for litigation battles in a

war they could not win. He started to devote substantial attention to devising new systems for resolving these disputes.

Judge Parker started to experiment. First he focused on pre-trial problems. Although the Judicial Panel on Multidistrict Litigation had declined to transfer all asbestos cases pending in federal courts to one jurisdiction under MDL, Judge Parker created a unified pre-trial order that standardized and abbreviated the discovery process. In particular, it took much of the initiative for discovery from the attorneys by eliminating redundant depositions and motions to produce and by shortening time periods for available discovery. Yet the cases were not moving to his satisfaction.

Judge Parker started to experiment with trials. He empanelled five juries to hear five different cases at the same time; the juries first heard the same evidence on liability issues common to all plaintiffs and then they heard individualized causation and damage evidence separately. Three juries returned verdicts for plaintiffs and two juries decided for defendants. The lack of consistency in outcomes doomed this method.

Faced with hearing virtually identical evidence on liability in case after case, and with a preponderance of verdicts for plaintiffs on the factual issues, in 1982 Judge Parker ruled that offensive collateral estoppel or in the alternative, stare decisis or judicial notice, precluded the defendants' assertion in future trials that they were not liable for asbestos related

injuries. The Fifth Circuit Court of Appeals reversed his ruling.

He consolidated ten plaintiffs for trial at the same time--there were two plaintiff and eight defendant verdicts. He then consolidated 26 plaintiffs for trial in four groups. The idea was to try all relevant issues for the first group of plaintiffs, have the jury render a verdict on that group, and then use the same jury, by now familiar with the issues and capable of proceeding quickly, to determine the outcome for each successive group. On interlocutory appeal the Fifth Circuit allowed the first group to be tried but stayed the use of the same jury for the subsequent groups.

Judge Parker finally consolidated 30 plaintiffs for trial on common issues with a continued presentation of evidence to the same jury on individual causation and damage issues for each plaintiff. The jury awarded \$7.9 million for the first four plaintiffs and the remainder of the consolidated cases settled.

Notwithstanding these heroic and arguably draconian measures, Judge Parker's overall caseload stood on January 1, 1986, at 1824 with \_\_\_\_\_ asbestos disease cases. Even though many had been tried and settled, even more new asbestos disease cases had been filed.

#### DIAGNOSIS

The roughly contemporaneous filing of large numbers of asbestos disease cases in selected jurisdictions in the U.S.



created a gigantic logjam when they reached the scarcest resource in our litigation system--judicial trial time. Although over 95% of the cases eventually settled, the settlements generally occurred only after each plaintiff had been given a trial date. The challenge was to have them settle sooner without the necessity for clogging a trial docket. This situation was particularly acute in the Eastern District of Texas.

East Texas trial lawyers often view themselves as latter day gunslingers with a perceived duty to test "Truth" in the crucible of litigation fire by trying cases to a jury verdict. Yet over 90% of cases filed in the federal courts in East Texas settle, so this propensity for litigation does not fully explain the lack of movement in the asbestos cases.

Jury verdicts in personal injury cases in East Texas are generally high and in asbestos cases particularly high. Indeed, defense coordinators for mass tort cases typically note that East Texas values are unconscionably high in comparison to the value of identical cases in other parts of the country. While plaintiffs' attorneys complain that defendants will not settle cases at their full trial value, defense attorneys argue that the plaintiffs refuse to discount the value of their cases to reflect early settlement. They argue that some plaintiffs' attorneys are more concerned with maintaining a reputation for obtaining high awards than they are for insuring that their clients receive a fair value in a timely fashion. It oftentimes seems easier for a plaintiffs' attorney to obtain new cases if he can point to high

verdicts rather than early settlements. Some plaintiffs' attorneys take a middle approach which also results in settlement difficulties--they resolve their disputes with a few defendants in order to obtain some money for their clients and then push for full trial value from the remaining defendants.

In addition, defendants argue that an agreement to settle cases at a high value in Texas would set an unbearable precedent for other jurisdictions. It seems easier for them to justify paying full value under the gun of East Texas justice than to acquiesce to exorbitant settlements. At the same time, there is a general perception among defendants that East Texas judges are plaintiff-oriented, and that agreements for early settlements might unwarrantedly encourage similar pro-plaintiff behavior on the part of others in the judicial system.

There are also some concerns specific to asbestos litigation that constituted impediments to early settlement. Prior to Manville's filing for bankruptcy in 1982, there had been a reasonably defined hierarchy of defendants and their insurers, so that conflicts among defendants were minimal; through trial and error the defendants had created a rough equilibrium of relative contributions to a settlement amount for cases in any particular jurisdiction. In the absence of Manville and with increased insurance coverage litigation, it became substantially more difficult to get all the defendants to put together a settlement fund in any given case prior to that case being set for trial. Some defendants, typically those with large amounts of insurance

or those with admittedly very few resources, tended to settle with plaintiffs early in order to reduce transaction costs and to reduce the risk that plaintiffs' cases would increase in value. Other defendants, typically those with less insurance coverage or with moderate or limited resources, usually desired to prolong the pre-trial process to conserve indemnity dollars and slow the velocity of payments, particularly if their insurance provided for unlimited defense costs while indemnity coverage remained.

The advent of the Asbestos Claims Facility in June, 1985, seemed to change the expectations of many parties concerning the opportunities for settlement. Defendants and insurance carriers had been negotiating for more than four years in an attempt to consolidate their defense energies. Some judges and plaintiffs' attorneys perhaps unrealistically anticipated that once a common defense mechanism was established, the disputes among defendants that had arguably thwarted early settlements would be resolved and the case resolution rate would accelerate dramatically. In some jurisdictions there was a hiatus in settlements because of the anticipation of the opening of the Asbestos Claims Facility.

The members of the Asbestos Claims Facility were generally not interested merely in increasing the rate of settlements. There were major concerns that the quality of new filings was deteriorating, that is, more recently filed cases involved less serious, if any, asbestos related injuries. It was also felt that the velocity of case resolution was already too high to accommodate the limited resources available to the defendants. There

were substantial conflicts in claims handling practices among the various members of the facility and there were perceptions among the plaintiffs' bar that a hard line trial strategy predominated. This was particularly true in East Texas where the plaintiffs' attorneys concluded that the only way to resolve cases with the ACF was through a jury trial. Yet there is some evidence to the contrary: there had been roughly 6000 asbestos disease cases settled prior to the formation of the Asbestos Claims Facility and 19,000 settled during its two years of existence.

Finally, there was the problem of punitive damages. Prior to Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981) the Texas Supreme Court had held that an award of punitive damages would not stand appellate review unless there was "an entire want of care" on the part of a defendant. There were very few successful punitive damage awards in personal injury cases. The new test was "that the defendant was consciously, i.e., knowingly, indifferent to . . . rights, welfare, and safety." Thus the massive uncertainty associated with the threat of punitive damage awards against several of the asbestos defendants became important in negotiations. Values that were arguably high went higher. Yet Judge Parker ~~did~~ not submit a punitive damage issue to a jury in an asbestos case until after Jackson v. Johns-Manville in 1984. The only punitive damages awarded by a jury in his court were the \$1 million apiece to the first four plaintiffs in his 30 plaintiff consolidation case. Thus the threat of a large punitive damage award, or no punitive damage

award at all, may have created some incentives for settlement because of natural risk aversion on each side.

#### PRESCRIPTION

Judge Parker had tried first-come, first-serve trials; test cases; multiple juries; collateral estoppel; and consolidation. He had not used reverse bifurcation--trying causation and damages first and liability later--nor a class action. He concluded that by first having a single trial on liability, common defenses, and punitive damages for all plaintiffs, he would then have the cases in a posture where they could settle or, at worst, would need only abbreviated trials on individual causation and damages. He concluded that a Rule 23(b)(1)(B) mandatory class was not certifiable because of the lack of evidence of a limited fund. His only alternative was a 23(b)(3) voluntary class.

Upon a motion filed by plaintiffs who were concerned that their cases might not come to trial in the near future, he certified a class action styled Jenkins v. Raymark and granted an interlocutory appeal. The Fifth Circuit Court of Appeals affirmed the class certification writing: "The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."

1. Parties. The class consisted of all plaintiffs who had filed suit in the Eastern District of Texas prior to December 31, 1984. Of the 805 potential class members, 52 opted out, their

attorneys convinced that the class action approach would deprive them of control over their own cases and afraid that any lump sum resolution would result in their clients being short changed. Four class counsel represented 534, 89, 63, and 46 respective class members. The Judge appointed a lead counsel and a counsel committee with four members. Two of the plaintiffs' lawyers were noted for their propensity to try cases to a jury verdict and two had reputations as attorneys who would work toward settlements if it were possible to avoid a trial. There were 13 named trial plaintiffs who represented the class.

There also were 13 named defendants. Eight were represented by a single counsel selected by the Asbestos Claims Facility for liability issues with separate counsel for each ACF defendant on punitive damages issues. Five defendants had their respective counsel but generally deferred to the ACF trial lawyer as lead counsel.

2. Issues. The plaintiffs contended that the defendants' asbestos containing products were defective, that is, unreasonably dangerous, because of a failure on the part of the defendants to warn potential users of health hazards caused by exposure to asbestos. The defendants asserted the state of the art defense, that is, they could not possibly warn of hazards associated with exposure to asbestos until they were aware, or should have been aware, of those hazards. The defense evidence varied considerably from defendant to defendant and product to product, but the general thrust was that the specific types of

harms suffered by the plaintiffs were simply unknowable risks at the time when they were exposed to asbestos. The plaintiffs countered by arguing that the defendants not only knew of the dangers from use of their products, but were consciously indifferent in exposing plaintiffs to them.

From other trials, discovery, and special submissions by the defendants to the court, the Judge prepared a notebook containing a comprehensive product list, complete with the text of warnings attached to each and every asbestos product to which plaintiffs alleged exposure. The notebook also indicated when each product first carried a warning. The Judge planned to give the notebook to the jurors and to submit special issues to them inquiring when each of the thirteen defendants knew, or should have known, of certain types of hazards associated with each of their products. Finally, the jurors would receive special interrogatories concerning each defendant's alleged conscious indifference. If they found that punitive damages were warranted, they would be asked to decide an appropriate amount. Judge Parker had originally considered asking the jurors for a single dollar amount. After the Fifth Circuit opinion, he decided to submit an issue requesting a single number--such as 0, .5, 1 or 3--that would then be used in each case to multiply by an eventual award of compensatory damages to compute the punitive award. The jury's findings on all of the common issues would then be applied to the entire class.

3. Information. Aside from the usual decisions common to any asbestos trial concerning liability and state of the art, the jury would be asked to determine a multiple of compensatory damages to be awarded to an entire class of plaintiffs. Normally, either the jurors would have an opportunity to receive evidence concerning each plaintiff or the plaintiffs would be so similar that evidence on any representative plaintiff was virtually identical to the evidence on the others. In most personal injury cases, however, the mechanics of causation and the extent of damages tend to vary considerably from plaintiff to plaintiff.

Judge Parker decided to appoint a special master, the author of this article, to gather relevant information concerning each member of the class so that the jury could benefit from an individualized as well as a collective view of class members (1) for analyzing the proportionality of any award of punitive damages and (2) for appreciating the typicality of the named representative class plaintiffs. The special master decided that the most effective approach would be to seek the cooperation of the parties and view the entire project as a joint venture. Rather than making it solely a court project, the parties' participation would both reduce cost and add to legitimacy.

The special master commenced negotiations with the parties to devise a data collection protocol that would elicit all of the information the parties thought was relevant for evaluating asbestos disease cases. Experts hired by the special master



began the process by devising a proposed list of critical variables. Once there was agreement among the parties on the appropriate information that ~~needed~~ to be collected, negotiations began on a format for collecting that information. The court's experts then designed a data collection instrument. Eventually everyone agreed on two ~~virtually~~ identical protocols--one to be completed by the plaintiffs and one by the defendants--containing 109 questions requesting 512 ~~separate~~ pieces of data. Paralegals and attorneys for the parties, under the supervision and instruction of a team of carefully screened public health professionals hired by the special master, filled out their respective protocols. In addition, the neutral professionals spot checked a percentage of the protocols to insure accuracy.

Once the data had been collected, it was entered into a central computer. A total of approximately 2.3 million items of information had been gathered. The special master in conjunction with neutral programmers prepared a system of programming logic that organized the data from the protocols into an aggregate compilation of information for presentation to the court, jury and parties. There was a composite of the class members' average age, sex, vital status, income, and alleged disease, as well as the distribution of ~~these~~ characteristics among the class plaintiffs. The special master also prepared the same type of composite and distribution of information regarding year first exposed to asbestos, total years of exposure to asbestos, level of exposure to asbestos, employment, smoking history, knowledge

of asbestos danger, use of protective devices, statute of limitations defense, and exposure to other substances. There was also a medical data composite and distribution that included clinical symptoms, pulmonary function tests, radiographic findings, blood gas studies, pathology/biopsy results, type cause and origin of cancer, other diseases, and medical expenses. The special master and experts prepared a computer program that would display this same information for each individual plaintiff. The special master also prepared a series of slides so that the characteristics of the class members could be presented to the jury in an intelligible fashion. Finally, he made a video tape of his proposed presentation for the jury.

It was contemplated that there would be two separate presentations to the jury by the special master. First, there would be introductory evidence concerning the general characteristics of the plaintiffs and a preview of their more detailed asbestos exposure and medical history. Once these jurors had received an opportunity to hear the presentation of testimony by plaintiffs and defendants concerning liability and general causation, there would be a further presentation of evidence from the special master on exposure and medical data.

Once the parties had seen the programming logic, the data, the slides, and the video tape, they agreed to have all this information presented to the jury with the special master available to answer questions as necessary. The data collection process was begun on December 23 and ended with the trial presentation on March 12--less than 3 months.

## RESULTS

Jenkins v. Raymark was tried for 20 days. The trial commenced with the special master's presentation of vital statistics of the members of the class and a preview of further data to be presented after the jury had heard evidence concerning exposure and medical aspects of asbestos related disease. The plaintiffs used 13 witnesses, but before the defendants presented their case, the cases settled for a total of \$137 million--\$107 million in new money to be paid over three years and \$30 million from earlier partial settlements made by various defendants. The settlement allocated a separate amount of money to each plaintiffs' attorney and provided that the attorney, subject to review by the court, would allocate the money among his clients. The judge examined the award to each class member, reviewed the awards in light of the composite and individual data gathered by the special master, and made several changes. The average value of the class action cases was 25% lower than the mean of settlement values established prior to the class action trial.

The court also reduced the attorneys' fees by limiting the normal 30% to 40% contingent fee contracts to no more than 20%. The lead counsel for the plaintiffs also received 1% of the settlement for his role in the trial.

1. Economy. The cost to the judicial system in time and money was substantially less for the class action approach than for the anticipated number of individual trials that would otherwise have occurred, even taking into account the supplemental

judicial resources devoted to appeals, pre-trial matters, and settlement negotiations. The time and dollar cost to the parties was more than for a trial with a smaller number of plaintiffs. In addition, the parties bore the expenses of the lead trial counsel and the special master. Yet if their costs were pro-rated over the entire class, the per plaintiff transaction costs were substantially less than for a similarly situated group of plaintiffs.

The opportunity costs were negligible, but the potential error costs were considerable. The defendants argued vociferously that a jury was incapable of making error-free decisions when confronted with such a large amount of complex information; the decision-making process was simply unworkable. Jurors would satisfice, average, anchor or utilize emotional techniques to help them cope with an otherwise unintelligible mass of data. The plaintiffs, however, contended that by asking the jury to look at the big picture--all relevant asbestos products over a large period of time in the context of who knew what and when--there was a greater chance for accuracy and consistency.

The special master's presentation concerning the members of the class helped alleviate some of these concerns, particularly in regard to punitive damages. Rather than answering questions concerning individual plaintiffs, the jury could focus on the group as a whole and benefit from the tyranny of large numbers. They could be wrong in any specific instance but, as long as

their aggregate analysis was correct, the overall error rate would be low, probably lower than it would be for disaggregated cases. The data was also effective in the attorneys' and judge's allocation of monies among the class plaintiffs.

2. Fairness. The defendants protested that the entire process failed on grounds of predictability, rationality and equality of opportunity and strategy. A number of plaintiffs' attorneys agreed but, since they decided to opt out of the class, their arguments were unheard.

Notwithstanding the guidelines in the Federal Rules of Civil Procedure, Rule 23 had never been used in the context of a mass tort trial before Jenkins. The defendants viewed the class action as frontier justice with an inevitable conclusion that they would be railroaded into an exorbitant settlement. There was simply too much at stake in an extremely unfavorable forum; all the cards were stacked against them. Instead of resolving the 753 cases individually over a several year period, they were being forced to pay all of these claims at once. Many of them would be paid long before resolution of similarly situated claims in other jurisdictions.

Although it was possible that a jury might not find liability or award punitive damages, it was unlikely. The consensus among attorneys for both sides was that a \$300 million punitive damage award was probable. The defendants felt that they simply couldn't take the risk, even if an appellate court might look

more favorably on their plight. A single \$300 million award would be devastating to the Asbestos Claims Facility.

The plaintiffs' attorneys representing the class had a somewhat different reaction. They felt certain that the courts in East Texas were not going to devote a disproportionate amount of trial time to asbestos cases, and the backlog would continue to grow. They were afraid they would face a situation similar to that in Philadelphia or Boston. The scarcity of trial time in Philadelphia means that under current disposition rates a case filed in 1988 will reach trial in 2007. Under that type of situation there is a major shift of bargaining power from plaintiffs to defendants; it is the defendants who have unilateral power to settle prior to the case being set for trial and to inflict unrecoverable costs on the plaintiffs. When plaintiffs' attorneys realize that they will not get full trial value for quite some period of time, they discount their cases to present value and are willing to settle them much more reasonably. The net effect may be a more rapid resolution of cases, but at a substantially lower value.

Faced with this alternative, the weaknesses the plaintiffs' attorneys saw in the class action approach seemed almost trivial. They disliked the single roll of the dice, judicial control over attorney's fees and the elimination of liability and punitive damages from individual trials. They were concerned that, if the cases did not settle, subsequent trials on individual causation and damages would result in lower verdicts; the "heat" generated

by the defendants' documents, testimony, and trial strategy would not be available to stimulate a large jury award.

The same type of opt out class action for punitive damages was used in state court in In re Salmonella Litigation, the salmonella milk mass tort in Chicago, with substantially different results. The defendants conceded liability and the only issues submitted to the jury were whether there was willful or wanton conduct and what an appropriate single payment of punitive damages would be. The court did not utilize a special master's report. The defendants appealed the class certification, dropped their appeal during trial and received a defense verdict from the jury.

The special master's report in Jenkins was received more benignly than the class certification. Defendants opposed the study because it seemed to advance the use of the class action device and vice versa for the plaintiffs. Both plaintiffs and defendants were skeptical of its value and cost effectiveness. Once completed, however, the data presented by the special master seemed to provide each side with sufficient support for their respective positions to warrant its use. In general, it suggested that the parties had little factual disagreement. The data revealed that plaintiffs and defendants had similar information on the fundamental characteristics of the plaintiffs' cases--items such as their age, family history, income, asbestos exposure, and smoking history. They differed, however, on the legal and factual implications of this shared information.

There was also significant variance in the parties' medical data. Plaintiffs contended that they suffered from more, and more severe, asbestos related diseases. For example, the defendants' medical experts had generally found only pleural plaques or thickening in their analysis of radiographic evidence, whereas the plaintiffs' doctors often found interstitial fibrosis. On balance, the data revealed that the members of the class were very similar in their work and personal histories. There were enough strengths--quite a few very serious injury cases--and weaknesses--systematic denials of workers' compensation benefits--to present each side with ample opportunity for argument. In particular, the defendants relished the opportunity to exhibit that the representative plaintiffs presented to the jury were not "representative" at all.

Once the case was settled, the data provided an opportunity to evaluate the perceived unfairness of a group settlement caused by inequalities in the distribution of funds. Because there was extensive information concerning individual plaintiffs, it was possible for the court to review each plaintiff's case and insure that the allocation of monies was equitable. In addition, the court had significant reassurances that the overall settlement amount was adequate.

3. Other Values. The plaintiffs' attorneys were interested in resolving their cases at full value and they were confident that the class action would result in either a favorable verdict or settlement. They were willing, therefore, to sacrifice some



of their normal emphasis on individual autonomy, dignity, participation, and control in order to facilitate the mass resolution of their cases. There was a small enough number of plaintiffs' attorneys involved in the class action that there was a high level of individual control. In fact, the settlement allocated separate lump sums of money to each attorney for their respective clients. The plaintiffs' attorneys who had opted out of the class had more strenuous objections. They felt that they would have lost control over their clients' fate to the lead plaintiffs' counsel and would have had diluted participation in the trial and potentially in attorneys' fees. They also viewed the risks associated with the class action and the potential precedential effect of the use of a class action somewhat differently. Although East Texas might be an acceptable forum for plaintiffs, there were other parts of the country where the tables could easily be turned and they might find themselves looking down the other end of the rifle.

There was a vigorous debate whether the class action approach was consistent with the values informing the underlying substantive law. The defendants contended that an award of punitive damages could not be determined without reference to each plaintiff and each plaintiff's compensatory damages. The Fifth Circuit Court of Appeals held that the purpose of punitive damages under Texas law was "to create deterrence and to protect the public's interest." Because the jury would be asked to focus on the defendant's conduct, there was no requirement for the

decision on punitive damages and compensatory damages to be made concurrently. It was necessary, however, for the court to insure that there was reasonable proportionality between compensatory and punitive awards. Arguably the jury's award would be a more precise deterrent because it would be founded on more broad based information than would normally be available in single plaintiff trials.

DALKON SHIELD: ARE MASS TORT BANKRUPTCIES BANKRUPT?

#### PROBLEM

On August 21, 1985, the A.H. Robins Company filed for bankruptcy. A proud company whose chairman was noted for his philanthropic activity, Robins had been sued by approximately 16,000 plaintiffs because of alleged defects in its Dalkon Shield intrauterine device. Almost 9,500 cases had been settled for \$530 million; 60 cases had been tried to a jury verdict with the plaintiffs winning 33 and Robins 27; and 7,000 lawsuits were pending. Among the jury awards were two large judgments for punitive damages--one for \$7.6 million and one for \$6.2 million.

Once it filed for protection under Chapter 11 of the Bankruptcy Code, Robins attempted to establish a bar date unlike the bar dates obtained in similar bankruptcies. The norm was to have the court declare a date certain for filing claims against the debtor; that is, all claimants who had filed lawsuits or whose

causes of action had accrued prior to the bar date would be required to file a claim in the bankruptcy or their claims would be disallowed. Robins also wanted a bar date for all unaccrued causes of action against the debtor--all persons in the future who might eventually have actions for personal injuries associated with the use of the Dalkon Shield.

Also unlike other similar bankruptcies, the A. H. Robins Company desired to establish a closed-ended fund to compensate those claimants who had not been barred. All the liabilities from Dalkon Shield related claims would rest with a trust fund and the company would be free to proceed unencumbered in its normal business operations. Bankruptcy would create "global peace" except for actions against the trust fund.

When the case was filed in Richmond, Virginia, where the headquarters of Robins was located, it was automatically referred to U.S. Bankruptcy Judge Blackwell N. Shelley. Upon motion by Robins, U.S. District Judge Robert R. Merhige, Jr., entered an order retaining the non-core portions of the proceedings. On November 21, 1985, Judge Merhige approved Robins' motion for the bar date and its proposal to spend \$4.5 million advertising to all present and future claimants--generally wearers of the Dalkon Shield--that they must file a claim in the bankruptcy court by April 30, 1986, or be forever barred from receiving any Dalkon Shield related compensation. By March of 1986 it became obvious that the bar date had created a new problem for the debtor: instead of an anticipated 30-50,000 claims, the advertising

campaign was generating filings at a rate that would eventually total 300,000 from over 100 countries.

Some of the claims were misguided--one claimant asserted that she was positive that it was the Dalkon Shield that caused her health problems because she had taken three a day for the last several years. Some of the claims were poignant--a claimant who alleged suffering sterility and the death of a child with a subsequent divorce and crippling psychological problems.

In an effort to obtain more information concerning the claims, the court sent out a two page questionnaire to each of the claimants requesting certain basic information: name, address, nature of injury, and details of Dalkon Shield use. The parties had estimated that up to one third of the claims were duplicates, made in error, or involved no injuries. The court questionnaire was designed to give Robins an opportunity to object to a claim that was not valid on its face and to eliminate the claims of those who failed to return the questionnaire. Even with that fallout, there would still be 200,000 claimants remaining, about 193,000 of whom had never entered the tort system during the 15 years of Dalkon Shield litigation.

#### DIAGNOSIS

Chapter 11 of the Bankruptcy Code is premised upon negotiated solutions. Not unlike labor negotiations, the parties are typically united by a common interest in maximizing the returns from a fixed asset base that diminishes over time. They have

each other in a bear hug with no party capable of achieving a unilateral solution. They own a common resource and their only salvation comes from an agreement to share that resource. In the Robins case, however, the natural bargaining strengths of the parties were somewhat different. Forty percent of the debtor was owned by a management that had an agenda that placed the integrity of the company very high. They continued to run the company without significant interruption; profits and salaries increased; and prospects for future earnings were not significantly diminished.

The perceived need to maximize the value of the company, the pain associated with being in bankruptcy, and the threat of declining assets were weakened. Management seemed convinced that they would continue to retain their exclusive period for filing a plan of reorganization even though they were under judicial pressure to file. In particular, management was convinced that the total value of all the Dalkon Shield related claims against the company was manageable, except for punitive damages. If it were possible to eliminate the threat of punitive damages, they felt the company itself could provide more than sufficient funds. A fund of \$800 million could be created by using company assets as collateral and would be adequate for liquidating all the claims. Yet Robins insisted upon a closed-ended fund--a single lump payment or a payment of a single amount over time--without any further recourse to the company. It was concerned that the extreme rancor pervading the Dalkon Shield litigation would

follow Robins if it were still liable for an unlimited amount of damages. Jurors would find a way to award punitive damages under the guise of compensatory damages.

The claimants' committee was unsympathetic. The Bankruptcy Code provided that claimants must be paid in full before any money could be allocated to equity. At historic settlement rates, the claimants' committee argued that there would be multiple billions of dollars in claims against a company that had a much smaller estimated value. They argued for a sale of the company, or at least for an open-ended fund to pay all Dalkon Shield claims, with the remainder, if any, to go to equity. Why, they argued, should the claimants bear the risk of an inadequate fund once the shareholders had received payment for their stock in the company? In addition, the claimants' committee had the right under the Bankruptcy Code to move for the appointment of a trustee or for the termination of the debtor's exclusive period for filing a reorganization plan.

No one was optimistic about the chances for an early settlement. If the debtor tried to push through a reorganization plan without the blessings of the claimants' committee and lost a vote of 50% of the claimants who constituted two-thirds of the value of the claims, a practical termination of the exclusive period could result and the creditors could proceed with virtually any plan they desired. On the other hand, if the debtor were successful in a vote among the claimants, the claimants' committee would have functionally diluted their role in the development of a reorganization plan.

There were two ways to view the negotiations--either the parties could look to the total value of the company and divide the pie, or they could decide the total value of the claims against the company and set aside a fund for payment. Uncertainty can often be productive in fostering a settlement; the respective aversions to risk by the parties can create an opportunity for agreement. Here the uncertainty was crippling. There was a several billion dollar difference in opinion concerning the value of the Dalkon Shield claims and at least a one billion dollar difference in estimates of the total value of the company.

There was also ill will among the parties. Not only had the Dalkon Shield litigation created animosities in its 15 year history, but there was a cultural chasm between the bankruptcy and tort lawyers. The company had fired its initial bankruptcy lawyers, the judge had fired the claimants' committee, and the plaintiffs' lawyers had attempted to disqualify the judge. Indeed, these parties and the court had at least one lawyer develop coronary or other health problems during the pendency of the case.

If the Manville and UNR bankruptcies were models, one would anticipate an extremely long decision-making process. In the asbestos cases there was arguably an endless stream of liability, both for personal injuries and for property damages. Yet it had taken over four years in Manville to reach a consensual plan. In Robins, where there appeared to be sufficient funds to satisfy the claims, the process could have been even longer.

## PRESCRIPTION

Judge Merhige took a two pronged approach. In August, 1986, he appointed an examiner, former U.S. Bankruptcy Judge Ralph R. Mabey, who attempted to facilitate negotiations by increasing the size of the pie based upon the total value of the company. In March, 1986, Judge Merhige also named a court appointed expert, the author of this article, to devise a system for estimating the total value of the Dalkon Shield related claims. If the examiner could narrow the uncertainty concerning the value of the company by increasing the company's total worth in the marketplace, and the court appointed expert could narrow the range of value of the Dalkon Shield claims, it might be possible to generate a consensual plan. The theory was to create artificial negotiation deadlines in the form of a hearing to estimate the value of the claims or in the form of an establishment of the market value of the company.. These would act as surrogates for the normally successful prompting mechanism of a trial date.

The negotiations sponsored by the examiner were almost successful in February of 1987. A potential purchaser offered to establish a \$1.75 billion fund in cash for the claimants, pay \$100 million to the trade creditors, and pay \$550 million in stock for the equity. This offer was accepted by the claimants' committee after they had negotiated the fund up from \$1.5 billion to \$1.75 billion. The negotiations with the company fell apart and the purchaser withdrew.

Then the debtor developed a reorganization plan that would not necessitate the sale of the company but would give trade



creditors \$100 million and claimants a \$1.75 billion letter of credit to be paid over time. The claimants opposed the proposed plan because payment was not to be made in cash at consummation and because the company retained a reversionary interest in the fund. Yet another suitor offered to purchase the company with a \$1.75 billion fund for claimants to be paid over time, \$100 million for trade creditors, and stock with a stated worth of approximately \$720 million for equity. The claimants opposed this plan as well because they contended it was inferior to the proposal made in February, 1987.

On July 27, 1987, the Judge scheduled a hearing to estimate the total value of the Dalkon Shield related claims in accordance with Section 502(c) of the Bankruptcy Code. His goal remained a consensual plan in order to expedite the payment of monies to claimants and to obtain "global peace" for the debtor.

1. Parties. There were six major players: the company, the trade creditors, equity, claimants, future claimants, and the company's insurer. The Robins family acted through counsel for the debtor and had their own separate bankruptcy counsel. The equity committee represented the non-Robins family shareholders; their interests were purely financial--maximizing the stock value. At times these interests conflicted with management's desire to keep the company independent. The trade creditors were interested mainly in speed. The sooner they received their funds, the more they would have.

The situation concerning the claimants and future claimants was more complex. The U.S. Trustee had originally appointed a

claimants' committee of 38 plaintiffs' attorneys with Dalkon Shield experience. Although approved by the court, the judge expressed some reservations concerning the large size of the committee. The conflict within the committee among the tort and bankruptcy lawyers became so acute that communications sometimes ground to a standstill. Although they shared an interest in expanding the size of the claimants' pot, they differed radically in their tactics and strategy. That committee--affectionately known as the "Gang of 38" - was disbanded by Judge Merhige and replaced by a committee that eventually consisted of three claimants and one attorney. The legal representative for the future claimants worked closely with the claimants' committee, but his interests diverged when the respective rights of present and future claimants were in conflict.

Finally there was Robins' insurer, the Aetna Life and Casualty Company. Although the insurer-insured relationship between Robins and Aetna had been terminated in 1977 and settled in 1984, Aetna remained a major trade creditor because it had advanced payment of certain Dalkon Shield related damage awards and settlements. In addition, Aetna had been sued by plaintiffs who alleged that it was a joint tortfeasor with Robins in the failure to remedy problems associated with the use of the Dalkon Shield and Judge Merhige had consolidated all of those cases in his court. Aetna's interests were in a final consolidation and resolution of all Dalkon Shield claims through the bankruptcy case.

2. Issues. The first issue confronting the court concerned its powers under Section 502(c) of the Bankruptcy Code. It is not uncommon for courts to estimate the value of claims for voting purposes. Nor is it unusual to find the estimation of a single claim for purposes of providing full information in a disclosure statement. Here, Robins was asking the court to estimate the total value of 200,000 still viable individual claims that had been filed plus an unknown number of future claims and to use that estimation number to set a legal cap on all monies owed by Robins to the Dalkon Shield claimants.

In theory the estimation hearing was intended to provide sufficient information to the parties so that they could negotiate a consensual plan. In fact, the impending release of raw and unanalyzed data for the estimation generated substantial negotiation effort. If negotiations were unsuccessful, the court could rule, at least for purposes of a disclosure statement, on the total value of the claims. If the parties still could not reach a settlement, the court would be in a position to place, as a matter of law, a limit on the liability of Robins for personal injuries associated with the use of the Dalkon Shield.

There were two issues facing the court in its estimation process: (1) What was the appropriate amount of money for the fund? and (2) How would it be distributed? There had never been a 502(c) estimation conducted in a mass tort action since the provision had been passed in 1978, so there was little precedent in law or in practice.

Just as important as the amount to be placed in the fund was the method of distributing the fund; until the parties had a good perspective on the general rules for payment, it would be impossible to estimate the value of the claims. Judge Merhige asked his court appointed expert, with the concurrence of the examiner, to work with the parties in devising a claims resolution facility. The assignment was to mediate any differences the parties might have and to make recommendations to the court if necessary.

The claims resolution facility eventually included in Robins' proposed disclosure statement contained four options for claimants: (1) a relatively small flat payment upon an affirmation of Dalkon Shield use and injury; (2) a schedule of benefits for specific injuries for claimants who could provide documentary evidence of Dalkon Shield use and the injury alleged; (3) a deferral option for those who decided to make a later claim; and (4) a procedure for those who rejected the other options to proceed through a series of offers and demands culminating in settlement, binding arbitration or trial. The applicable law and venue was as if the cases had never been in bankruptcy, with the exception of the elimination of punitive damages.

The theory behind the claims resolution facility was that there is no single "best" remedy for the claimants; instead, there are numerous approaches that are appropriate depending upon the preferences of each individual. For those who have only minor damages or are unable to muster proof of a Dalkon Shield

related injury, an option 1 flat payment might be ideal. Other plaintiffs who have more substantial proof or injuries may prefer a hassle-free scheduled payment in option 2 rather than the more intense process required in option 3. Those who feel they deserve higher awards and the most individualized treatment will choose the more traditional litigation process under option 3. The more compensation sought by a claimant, the more information required by the fund. The greater the amount of money paid to a claimant, the greater the confidence that she is receiving the appropriate value.

The claimants would be encouraged to make this selection themselves because they are in the best position to do so. At the same time, the fund would not be required to spend more money eliminating false positives than paying legitimate claimants; there would be no need to do a full and complete investigation in every case regardless of its worth. The design of the claims resolution facility is analogous to a manufacturer's attempt to capture the consumer surplus through price discrimination. The fund is "selling" its "product", the resolution of Dalkon Shield cases, and is attempting to have the "purchasers" self-select the optimal combination of price and transaction costs.

3. Information. The answer to the billion dollar question lay in the specifics of the 200,000 pending claims. The expert appointed by the court decided to utilize an analytic approach he had developed with Professor Eric D. Green in the Ohio Asbestos Litigation of Judge Thomas D. Lambros to probe those specifics. Data on the key variables that drove the outcomes and values of

trials and settlements of Dalkon Shield claims could be collected from the 9,500 previously resolved cases. Data on the same variables could also be collected from the 200,000 pending cases. It would be possible then to use historical experience to project the total value of the pending claims based upon the previous case values.

The first issue in May, 1986, was who would collect the data. Because of the highly controversial nature of the estimation process and because the court had not at that time mandated a Section 502(c) estimation, each party was allowed to have its own experts who would work with a team of court appointed neutrals and subcontractors to collect the data. The entire process would thus be consensual--experts from all of the parties would collaborate with court experts to develop a common data base. If all parties agreed on the data base, then each side could use its own methodology to analyze the data and make its own estimation.

If the alternative approach of having the court's neutrals establish the data and make an estimate had been followed, there was a significant chance that the court would have arrived at an estimate but there would have been no agreement among the parties and no consensual plan. If, on the other hand, the data were gathered consensually with the threat that the court's expert might also testify concerning an estimate, the quest for agreement on the total value of pending claims might be achieved.

Could these parties, who were by this time accustomed to acrimonious discourse, possibly agree on each step in this long

and tortuous social science survey? Through excruciating and virtually endless negotiations, the experts agreed on all aspects of the data collection. It was a remarkable display of collaboration among some fifteen statisticians, physicians, attorneys, economists, and other social scientists. During the estimation hearing not a single complaint was raised regarding the data base; during the entire process only three issues were raised before Judge Merhige.

First the experts agreed upon two data collection instruments--one for previously resolved cases and one for pending claims. They narrowed down the domain of relevant variables to approximately 150 questions. The previously resolved case questionnaire was relatively uncontroversial. The statisticians decided that a random sample of 1,600 of the 9,500 cases and a stratified sample of the 100 highest and 100 lowest cases would suffice. Neutrals hired specifically for this purpose gathered complaints, interrogatories, depositions and medical records from the files of Robins and its attorneys, its insurance carrier, and plaintiffs' attorneys. Once the files were re-created, neutral medical record coders completed the previously resolved case questionnaire and translated the medical information into an international format for the coding of diseases, treatments, and tests--the ICD-9. Neutral data entry personnel then put the information onto computer tapes so that it could be analyzed.

The task of reaching consensus on a corresponding questionnaire for the pending cases was far more difficult. Fewer than

one-fourth of the claimants were represented by attorneys so the format had to be comprehensible to all potential lay plaintiffs. At the same time, there was a need for a significant amount of information in order to verify the details of each claim. It was decided to send a 50-page claim form to 6,000 claimants. Once the claim form was drafted and approved, it was pretested on claimants from a variety of socio-economic groups to determine if they could understand the questions and respond completely and accurately.

The claim form was designed to accomplish two goals: (1) gather information on certain specifics of a claimant's personal history and (2) jog the claimant's memory to enable her to identify the essential facts of her OB/GYN medical history so that it would be possible to obtain medical records. The claim form was divided into eleven sections: background information; use of Dalkon Shield; medical history; pregnancies; contraception; medical problems, illnesses or injury claims from the Dalkon Shield; other medical information; claim of future medical problems; financial losses; certification; and optional additional comments. It was an imperfect product of intense negotiations. As an example of these, Robins favored open-ended questions concerning a claimants' allegations of Dalkon Shield related harm because it was concerned that any list of potential harms would prompt answers that were not true. The claimants' committee favored a checklist that claimants could readily mark. The compromise was a checklist in the section on medical history



that would arguably remind women of potential problems they had experienced and then, separated by two different sections, open-ended questions regarding medical problems, illnesses or injury claims from the Dalkon Shield.

Once the claimant had completed and returned the claim form, she would then be responsible for having medical record facilities send her medical records showing use of the Dalkon Shield and her alleged Dalkon Shield related injury. Once the claim form was received, neutrals hired by the court would obtain all other relevant medical records.

A toll free telephone line was established to assist the sampled claimants. Because of concerns on the part of the parties that no interviewer bias be interjected into the process, all responses made by the 800 number operators were limited to scripts approved by all the parties.

As the claim form and the requested medical records were returned, the neutrals hired by the court logged them on a sophisticated data tracking system and entered the data directly into computers using state of the art data entry programs designed specifically for that purpose. As had been done with the previously resolved cases, the medical records were coded into ICD-9 and entered onto computer tape.

The final tapes were sent to the parties in July, 1987. Over 75 million pieces of information had been collected and the entire process had taken fourteen months. The materials prepared for the parties had two components: a tape of the raw data

organized to facilitate analysis and a hard copy created by one of the court neutrals through the use of a special computer program which translated the raw data from the master tape into a relatively easily readable printout of a case summary for each sampled claimant. The case summaries were organized to approximate the type of summaries that had traditionally been prepared by paralegals in the underlying Dalkon Shield litigation. Thus the parties had two formats for analyzing the data--the tape for computer manipulation of the information as a whole, and case summaries that could be reviewed individually by attorneys, physicians, nurses or paralegals.

#### RESULTS

The estimation hearing was conducted by Judge Merhige on November 5 through November 11, 1987. Fifteen witnesses testified; 212 exhibits were offered into evidence. The range of estimates of the total value of pending claims among the five experts was from \$1.0 billion to \$7.3 billion with the second highest estimate at \$2.5 billion. They used at least three distinct analytic techniques--regression analysis, decision tree analysis, and an expert system.

Although the absolute estimates deviated greatly, all the experts agreed on the data base and the differences among the estimates was generally the result of disagreements on five basic assumptions: (1) the effect of statutes of limitations; (2) the level of proof required to demonstrate Dalkon Shield use and

injury; (3) the effect of alternative causes of injury; (4) the value of the previously resolved cases; and (5) the number of claimants who would pursue the various claims resolution facility options.

If they had agreed on that series of assumptions, their estimates could have been within 20% of each other. For example, experts for the company assumed that a relatively small number of claimants would receive historic settlement values because only a few of them had returned a completed claim form, had sent in a medical record that confirmed Dalkon Shield use and also that confirmed one of a list of Dalkon Shield related injuries, and had a complete history of medical records which showed no obvious alternative cause for the alleged Dalkon Shield related injury. Experts for Aetna assumed a larger number of claimants would receive historic values because they focused on evidence of the number of claimants who sent in the claim form and alleged Dalkon Shield use and injury and presented at least some, if not complete, medical records. Experts for the claimants took a different approach. They assumed that all claimants would receive historic values, inflated to present value, unless their claim form or medical records showed that their claim was not Dalkon Shield related.

These basic differences among the parties became evident as the hearing proceeded and the court focused on them as the critical issues. At one point, Judge Merhige requested several of the parties to change certain assumptions and recalculate

their estimates. By the conclusion of the hearing it was reasonably clear that the issues remaining for judicial resolution were well within the expertise of the court.

Notwithstanding efforts by the court, the examiner and the parties, settlement negotiations held subsequent to the hearing were not fruitful. On December 11, 1987, Judge Merhige announced that he intended to rule that the total value of the Dalkon Shield related claims was \$2.475 billion to be paid over a reasonable length of time.

Within two weeks two new offers to purchase the company were made. There were then three outstanding offers as well as a proposed stand-alone plan from the company. Because the \$2.475 billion could not be financed solely by Robins, a sale was inevitable. The company preferred the sale of 58% of the stock for a stated value of \$600 million with a \$2.475 billion letter of credit to be paid over five years and \$100 million to trade creditors. The claimants' committee and the equity committee preferred an offer of \$700 million for all of equity, \$2.38 billion cash payment at consummation for claimants, and \$100 million to trade creditors. The latter offer also included \$100 million from Aetna for the trusts, with \$25 million returned as an insurance premium on an insurance policy in return for releases from claimants when they settle their cases against the trust fund and settle a mandatory class action against Aetna for independent tort claims.

After extensive negotiations among the court, the examiner, and the parties, a consensual plan was announced on March \_\_\_, 1988, accepting the latter offer. The final plan also included provisions that relaxed the bar date originally requested by Robins. Future claimants will be allowed to receive compensation if their medical problems were not manifested until after the bar date or if they had no knowledge of the bar date. Late filed claims are subordinated to the timely claims but may be paid if there are sufficient funds.

1. Economy. The estimation process was the largest and most expensive social science survey ever conducted under the auspices of a court. The cost of the data collection itself was approximately \$5 million. In addition, there were considerable expenses by the parties to monitor the process and to present evidence at the estimation hearing. The court's involvement was not substantial except for the three issues that were presented for resolution and the hearing itself. Needless to say, this expense could not be warranted in a small case. The study cost represented .2% of the \$2.475 billion in dispute, .7% of the change in the value of the claimants' fund from \$1.75 to \$2.475 billion, and approximately \_\_\_\_% of the total expenses associated with the bankruptcy proceedings. The fourteen months duration of the study, particularly in light of its consensual nature, was a remarkably short period of time. The estimation hearing served effectively as a trial for the parties--once the estimate was announced and the approximate market value of the

company was determined, the eventual consensual plan was approved within three months.

The cost of the study could probably be justified on two grounds independent of the estimation--for the benefit of the trustees of the claims resolution facility in designing their processes and for scientists studying the medical phenomena associated with IUD use. In addition, there would be a substantial reduction in cost if the model of this process were used on another occasion in any future litigation. If it had been done solely by the court's experts rather than in a consensual manner, the total expense of the data collection could have been reduced by up to half.

The opportunity costs, however, may have been substantial. Although it is impossible to determine, it could be argued that the case might have settled much earlier and at lower cost had there been no estimation process, but this is doubtful because of the respective positions of the parties in the early stages of the case. Had the parties known that they would never have any additional information concerning the value of the pending claims, they might have become reconciled to a high level of uncertainty and the resulting risk aversion might have prompted an earlier resolution. Most of the parties believed, however, that some sort of estimation based upon gross data was a prerequisite to the eventual resolution of the case; it did not seem feasible to have extensive formal discovery in 200,000 cases prior to a resolution of the bankruptcy. The estimation might

have been much less sophisticated and expensive and could have relied on more hypothesis than data, but it was necessary.

The most troublesome costs related to potential errors. Only time will tell the accuracy of the estimation, although numbers such as these oftentimes become a self-fulfilling prophecy. Excruciating and costly checks were made on the underlying data and the experts agreed that the data base was exceptionally accurate for this type of study. Yet a comparison to the level of information gathered after an exhaustion of discovery under the Federal Rules of Civil Procedure in a typical Dalkon Shield case would leave the study a second best. In addition, the nature of the evidence--purely statistical--may have its own problems. There is bona fide doubt on the part of some decision-makers that it is possible to make a ruling based on anything other than detailed and individualized facts. That is one reason why the parties received both raw data tapes and the individualized case summaries.

The court appointed expert decided not to testify at the hearing because there was a consensus concerning the general accuracy and usefulness of the data. The ultimate decision by the court did not address the statistical manipulations but was based on the choice of assumptions to apply to the data, a judgment well within the court's expertise.

2. Fairness. The fairness criteria present both the greatest strengths and greatest weaknesses of the process. On the one hand there was a genuine equality of opportunity and

strategy among the parties, but the exigencies of the project did not allow for a high level of predictability concerning the rules of the study. The development of the study was closely akin to designing an airplane while flying it across the country. There was also continuous doubt whether the project would be completed and, if so, how it would be used by the court.

The transparent nature of the process and the continuous consultation with experts and attorneys explain why the data base was accepted by the parties. The court appointed expert spent many hours explaining each step of the process to the lawyers and their experts. No decision was made without a full and fair opportunity for input from all sides.

Views of the rationality of the study varied but the close agreement among the experts suggested an independent check verifying the reliability of the data base. There was extreme reliance on the court to make a final decision, but the judge's decision was based almost completely upon legal and policy, rather than statistical, principles. Even though there was no official ruling or opinion, the fact that the parties agreed to the final number suggests their approval of its rationality.

3. Other Values. The reaction to these less tangible values varied among attorneys and their clients. The attorneys had a strong sense of participation, full information, and significant control. They were less concerned about dignity and autonomy.



The claimants' level of participation was extraordinary. 66% of the 300,000 claimants returned the court's two-page questionnaire. 66% of the sampled survey claimants from the 300,000 claims returned at least one document indicating a desire to pursue their claims. 65% of the sampled survey claimants from the group of 200,000 viable claims returned the 50-page claim form. Indeed, claimants seemed to relish the opportunity to tell their own stories, in the privacy of their own homes, without the indignities often suffered in the formal litigation discovery process. They were, however, generally frustrated by the minimal assistance from the 800 telephone number for legal and medical advice and by their own inability to locate doctors and hospitals and find their medical records.

There was no public exposure of the data base except in the experts' presentations at the estimation hearing. This was driven in large part by a desire to protect the privacy of each claimant's file. The court neutrals went so far as to insure that all communications with claimants were enclosed in envelopes to prevent opportunities for even casual revelations to third parties.

The degree to which the process furthered the underlying values of the substantive tort and bankruptcy law is problematic. If \$2.475 billion is the "true value" of the eventually liquidated claims, then the results would be superb. If not, at least one of the parties will have been shortchanged. Yet there appeared to be little alternative and the estimate offered by the court was accepted by the parties.

## RESOLVING MATURE MASS TORTS

It is generally accepted that the consolidation of relatively small numbers of cases--two to ten--is an extremely effective tool in resolving disputes. When confronted by more cases, judges have generally been reluctant to consolidate. As illustrated by the two case studies, consolidation of large numbers of mature mass tort cases into a single forum can be a successful procedure for resolving disputes. This consolidation can be effective for deciding common issues such as liability, general causation, and punitive damages and even for deciding the more individualized issues of specific causation and compensatory damages in an aggregate amount. Not that these two cases reach perfection, but as in dynamic modeling, these experiments provide us with the opportunity to benefit from feedback loops so that dispute resolution can be improved.

Once past the hurdle of practicality, the question then becomes whether mature mass tort cases should be consolidated and, if so, how it should be done. By definition, these cases are a subset of tort litigation and thereby call for a subset of tort-oriented goals. Unlike most torts where less than all the individuals harmed seek redress, the mature mass torts generate so much publicity that there is an overabundance of plaintiffs, many legitimate and many not. The defendants, who by this time will have withdrawn their products or corrected deficiencies, are then faced with internalizing the costs of compensatory damages

and punitive damages and defense transaction costs. In addition, the lesson to be learned from their experience has long been well known to their peers. There is the potential for deterrence to become overdeterrence and for retribution to become crippling. At least in the two cases studied here, there is also concern that there may not be sufficient funds from the defendants for equitable compensation for all plaintiffs. This type of situation seems to invite a different approach.

One view is that the current system is "not broken" and that there is no need for revision. A second position is that slowing down the resolution of these mature mass tort cases is a positive development. Causing the plaintiffs' attorneys to recognize that their cases will not come to trial for an extended period of time will make them more eager to enter settlements at discounted values to reflect the costs to them of the anticipated delay. A third position is that the entire tort compensation system is broken and the time has come to channel what are now considered as torts into an administrative process where compensation is made under new, and more readily managed, criteria.

It is suggested here that none of these three approaches is currently satisfactory in the context of mature mass torts for at least three reasons. First, the transaction and opportunity costs associated with current methods of resolving mature mass torts are increasingly viewed as too great. The oft-quoted figures are 60¢ on the dollar going to attorneys and administrators and 40¢ going to injured persons. Contingency fees of 30%-

-40% in cases where there is no contingency on liability seem excessive to many observers. If there is exposure to a specific defendant's product and resulting harm, the only question in an asbestos case is usually how much money is to be awarded, not whether it will be awarded. The defense costs are equally high.

Second, the adage of "justice delayed is justice denied" still has vitality. If the perceived problem with the current resolution process for mass torts is an unfairness in outcomes because of the substantive law of liability and damages, then the solution is to change that substantive law. A solution based upon holding large numbers of mass tort plaintiffs--and, indeed, all the plaintiffs and defendants in the court system--hostage in a litigation gridlock is not generally viewed as appropriate.

Third, the mass tort phenomenon is a new one. The surprising fact to this author is that there are so few varieties of mass torts to date. Just as the tort litigation process adapted to the "mass tort" of automobile litigation and the "mass tort" of product liability litigation, there is a good chance that, over time, the processing of these torts will become routinized. Until there has been ample opportunity to experiment and to propose methods for coping with these types of cases, there will be substantial resistance to wholesale change. If, however, the courts, attorneys and parties are unable to adapt the current system successfully, then the administrative law approaches become more likely.

It is not the purpose of this article to argue the merits or demerits of various proposed injury compensation schemes. The

concept is to interject some suggested measures short of wholesale reform into the thoroughfare of discourse on this subject. The notion presented here is that current processes can be altered without substantial modification so as to mediate some of the problems that have been identified. There is the potential to create a hybrid process that provides a roadmap for dealing with the trade-offs among the multiple, and sometimes conflicting, values being promoted by tort law. It is a system designed to reduce transaction costs without sacrificing the individualized treatment and intangible values associated with existing civil procedure in four steps: (1) consolidation of all cases in a single mature mass tort into one forum; (2) resolution of all common issues in that forum; (3) collection of information concerning all injuries; and (4) development of a systematic process for resolving all remaining issues.

#### CONSOLIDATE

There is already ample opportunity in mass torts to consolidate cases for discovery purposes through multi-district litigation or under the Federal Rules of Civil Procedure. Once a mass tort has become "mature" because there is little or no new evidence or law to be added to the decision-making process, and trials and settlements have exhibited a full and fair opportunity for attorneys to play out a complete cycle of strategies in the litigation dance, there is arguably little benefit to be derived from full-fledged individual trials, at least on the common issues.

Yet the current techniques for a consolidation on the merits for individual mass torts in multiple states are limited. Aside from bankruptcy proceedings, there are substantial impediments to the use of existing procedures because of variations in the applicable substantive law, the ability of parties to avoid consolidation by opting out of class actions or by pursuing state court actions, and the jurisdictional limitations of the courts. Numerous proposals have been made to rectify this situation--creating federal common law, national consensus law or federal choice of law; expanding federal or state class action rules; adding to federal jurisdiction; modifying offensive and defensive collateral estoppel; and amending the Anti-Injunction Statute. Without one or more of these changes, it simply is not effective to have a de facto or de jure consolidation for a trial of the common issues. Although not fungible, these proposals would generally achieve the same goal; they all have strengths and weaknesses. The most promising proposal appears to be an addition to federal jurisdiction for mass torts in a trade for a limitation of federal diversity jurisdiction for cases with smaller amounts of money in controversy.

A second series of problematic issues relates to the scope of consolidation. Potential plaintiffs include those who have filed a lawsuit, those whose causes of action have accrued but who have not filed an action, and those whose causes of action have not accrued. Potential parties include the defendants alleged to be tortfeasors by any of the plaintiffs, third party

defendants, insurers, re-insurers, and excess carriers. The issue of the scope of appropriate parties is oftentimes so case specific that it may be dangerous to create generalizations that provide anything but flexibility. These are issues that may best be resolved by an eventually centralized decision-maker.

It should also be noted that there are circumstances where consolidation may be counterproductive when viewed through the lenses of the same values that are used to promote consolidation. If the aggregation of cases may sire a creature too unruly to manage, then common sense would dictate a less global strategy. This issue, too, may best be resolved at the detail level by the entity assigned the task of making consolidation decisions.

#### RESOLVE COMMON ISSUES

There are multiple issues that cut across the lawsuits of large numbers of plaintiffs and large numbers of defendants. Notwithstanding complexities and resultant practical difficulties, if a common set of legal principles were applied to all relevant cases, there could be a substantial savings in transaction, opportunity and error costs and an increase in equality of treatment among plaintiffs. The question then becomes which issues should be consolidated. Certainly general liability and punitive damages would be likely candidates. If there is a common defense such as the government contractor's defense, it could be tried once for all the parties. If insurance coverage issues are involved, they could be susceptible to common

treatment. In the case of prescription drugs, the general causation issue can be tried in common. For other mass torts the variations in dose and exposure may create insurmountable problems for a single trial of all parties on general or specific causation. Likewise, the potential differences in compensatory damages would probably preclude a single trial except for one to establish an aggregate amount of damages. Again, it is the centralized decision-maker who would be in the best position to resolve these questions.

#### GATHER DATA ON ALL CASES

By determining the variables that drive case outcomes and by collecting data on all previously resolved and pending cases, it is possible to reduce the uncertainty associated with the nature and the value of the total claims. Opportunities can be created thereby (1) enhancing the chances for settlement, (2) insuring that there is optimal allocation of moneys among plaintiffs, and (3) reducing transaction costs.

Settlement opportunities can be created by the disclosure of relevant data from previously resolved cases concerning the variables that drive case outcomes and the settlement values. Unless there is only one defendant, there may be no single entity that is aware of the total value of previous settlements. Typically there is no stated consensus concerning the outcome determinative facts in any single or group of cases. By revealing this data there is a reduction in uncertainty concerning case



worth. Not only will data collection identify the case dispositive issues in the previously resolved cases but it will also focus the attention of the parties on those same issues for pending or future cases. This is particularly true if the parties are active participants and have confidence in the data collection process. Data from the Ohio Asbestos Litigation suggests that by a presentation of full information to the parties concerning previously resolved and pending cases the chances that pending cases will settle and settle sooner are improved. Once attorneys recognize that there is a relatively narrow legitimate range of values for any given case, there is an incentive to settle the case earlier, particularly if the potential savings in transaction costs exceed the difference between plaintiff and defendant demands and offers. In addition, there is a possibility the entire range of cases might settle at one time, as in A. H. Robins.

The comprehensive data on case variables and values will enable any claims resolution facility to operate more effectively on the basis of full information. The benchmark values of mature mass torts have, by definition, attained a sufficient equilibrium to be used to establish current values, as long as similar cases in similar jurisdictions are compared. The facility will be able to gauge the adequacy of available funds, appreciate settlement strategies that have been effective in various parts of the country, and be more confident in devising case resolution processes. A by-product of this type of comparison is that like

cases can be treated alike, one of the goals of a predictable litigation system. An indication that trial lawyers find this predictability a positive value is the increasing use of high-low settlements. Attorneys agree in advance of a trial that regardless of how high or low a jury award may go, they would respect their own limits, thereby reducing the variance in trial outcomes. There is another by-product available in the scientific value of the data. By completing what amounts to an epidemiological study, there will be a substantial increase in the understanding of the underlying health problems presented by the litigation.

Finally, the attorneys can see that information does not have infinite value and that there are non-adversarial mechanisms available to gather information more cheaply than in the normal litigation process. An analysis of the East Texas and Dalkon Shield data shows that the parties generally agreed on a majority of the information available and that they also agreed that there were an extremely small number of critical variables which were outcome determinative. There simply was little need for, and a low pay-off in, overly extensive discovery. A centralized decision maker could, with appropriate assistance, maximize the benefits of this type of data collection.

#### SYSTEMATIZE RESOLUTION OF INDIVIDUAL ISSUES

There are four potential outcomes if the mature mass tort cases were consolidated, common issues decided, and data on previously resolved and pending cases gathered. There could be a

global settlement accompanied by a method for the distribution of funds. If the case were in bankruptcy or if there were legislation passed to expand existing powers, there could be a determination of a single amount of money for all the claims and the creation of a claims resolution facility to distribute the money. Third, the consolidated cases could be disaggregated and sent back to their original courts for resolution of their individual issues. Or, and this has not been done but probably has the most potential of all the possibilities, the court could design a claims resolution facility not unlike the one described in the Dalkon Shield case to process the cases.

This last suggestion is worthy of further consideration. By routinizing the processing of cases in a systematic and humane manner in a hybrid litigation-administrative format, the court could easily reduce the defense costs. The court could also mandate a substantial reduction in plaintiffs' attorneys fees. In addition, there might be an incentive for plaintiffs not to hire attorneys at all, thereby further reducing transaction costs.

The reaction of the bar to this fourth potential outcome might not be as negative as one would expect, particularly if the attorneys can participate in the creation of a claims resolution facility and there is a recourse to trial by jury as a last step as has been done in some bankruptcy claim resolution facilities. The value of having the attorneys work with each other and with the court in designing the claims resolution process is noteworthy. They would be much more inclined to accept abbreviated

and less costly measures if they are opted into the deliberations and develop confidence in the ability of this alternative to serve the interests of their clients.

If one looks at the existing mature mass torts, once the paradigmatic plaintiff's case become crystalized, a relatively small number of plaintiff and defendant "mass tort" firms tend to dominate the litigation. They routinize case processing themselves and could easily afford a lower margin of profit on their larger volume. Because this proposal is made solely in the context of mature mass torts, there would still remain substantial opportunity for innovative plaintiffs' attorneys to locate new mass torts that justify the imposition of damages on offending defendants. Indeed, they would have sufficient incentive to be the first in line to try mass tort cases before punitive damages and attorney's fees were eliminated or reduced.

The incentives for the parties to accept a claims resolution facility approach would be largely financial. Arguably there could be as much as a 40% net savings to society. The defendants would benefit substantially, at least in the short run and potentially longer if settlement payments were made over time. The downside for them would be the requirement for a larger immediate payment. Given the time value of money and the alternative of a much slower velocity in claims settlement, some defendants will not find this an attractive alternative. Yet there are substantial opportunities in the bargaining process to overcome this hurdle. Lower transaction costs, payments over

time to correspond to the claims resolution facility disposition rate, and potential structuring of individual settlements are all possibilities. The plaintiffs, if they could retain comparable values and at least satisfactory individual treatment, would benefit. Net payments to plaintiffs with attorneys can sometimes be comparable to net payments to plaintiffs without attorneys or with less highly paid attorneys. The benefits envisioned under a claims resolution facility would be a cost to the attorneys for both plaintiffs and defendants.

There are problems with this scenario of having the court and parties devise a new mass tort specific dispute resolution procedure. There is some doubt that courts currently have sufficient authority to mandate alternative dispute resolution techniques on unwilling parties. There would probably need to be some change in existing judicial powers. There is also the problem of a magnification of effects when such a large number of cases are consolidated in any one court. If an error is made, it will be visited on a larger number of parties and with greater impact than in the ordinary type of case management process. There is also a more subtle problem. Once large numbers of cases are consolidated and the prospects of a huge fund of money become apparent, the prism of financial gain tends to focus the attention and aggression of the key players. It may also accentuate the yearning for power of those who would otherwise be neutral in a more customary underlying action. Finally, economies of scale may not develop if a mass tort is either too

large or too small. It may be possible, however, to determine optimal size levels and a cottage industry involving the creation and operation of claims resolution facilities may result.

The allure of a resolution of large numbers of mass tort lawsuits at a substantial savings in transaction costs by the use of a claims resolution facility is impressive. There seems to be some incentive on the part of the parties to seek this type of outcome, even at the cost of some of the traditional values associated with normal tort litigation. In mature mass torts where liability is foreordained and the only genuine issues that remain involve individualized compensatory damages, a routinized cost-effective claims resolution facility tailored to the needs of a specific tort could be close to an ideal compromise for solving existing perceived problems.

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SMALL CASE/MINOR DISPUTE MEDIATION

- McGillis, Daniel, "Community Dispute Resolution Programs and Public Policy," Issues and Practices in Criminal Justice, U.S. Department of Justice, National Institute of Justice (December 1986).
- McEwen, Craig, and Richard Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," 33 Maine Law Review 237-268 (1981).
- DISPUTE RESOLUTION AND THE COURTS — Case Study: Community Justice Mediation (a half-hour videotape produced by the National Institute for Dispute Resolution).



U.S. Department of Justice  
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*Office of Communication and Research Utilization*

# **Community Dispute Resolution Programs and Public Policy**

by

**Daniel McGillis**

**December 1986**

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*Issues and Practices in Criminal Justice* is a publication series of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion in the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

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## ONE

# Community Dispute Resolution: An Overview

The basic concern underlying the development of community dispute resolution mechanisms is very simple: there must be a better way than routine court processing for handling many disputes among citizens. The simplicity of the field ends there. The types of dispute resolution mechanisms that have evolved vary greatly.<sup>1</sup> The motives for establishing them are similarly diverse, and the debates regarding the potential value or harm of such programs have been lively and complex.<sup>2</sup> This chapter seeks to explain how such an ostensibly simple notion could generate such complexity and result in substantial variations in theory and practice. The basic terrain of the field is summarized here, and subsequent chapters assess what we know, what we do not know, and what we need most to know in the future.

### **Community Dispute Resolution Programs: What Are They?**

The boundaries of any innovative field are often difficult to define. As one researcher noted, efforts at definition serve as the "Bermuda Triangle" of many conferences. The discussion disappears into the abyss and never resurfaces to deal with substantive issues. The discussion of definitional matter will be kept brief here in an effort to avoid that fate. For the purposes of this report, "community dispute resolution programs" will be considered to include all those programs that:

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- process a range of "minor" civil and criminal matters,
  - through nonjudicial techniques (including primarily mediation and arbitration), and
  - thereby provide an alternative to routine court processing.

The disputes handled by such programs tend to include civil matters within the local courts' "small claims" case range (e.g., often under \$1,500) and misdemeanor criminal cases. Cases frequently involve everyday disputes between consumers and merchants, neighbors, spouses, landlords and tenants, and the like. The use of the term "minor" to describe the disputes is not intended, in any way, to disparage their importance to the disputants; such conflicts can clearly be major events in the daily lives of disputants. However, the term does distinguish the cases from major civil litigation and from felonies.

Community dispute resolution programs have a wide variety of local titles, including, "citizen dispute settlement center," "community mediation center," "night prosecutor program," "community board program," "urban court project," and others. Such programs are perhaps the most numerous single type of alternative dispute resolution program in the United States. The American Bar Association's 1985 Dispute Resolution Program Directory provides profiles of 182 such programs nationwide. Numerous additional specialized dispute resolution programs focus upon narrow classes of disputes, including consumer, family, housing, and other matters. Such programs are excluded here from the definition of "community dispute resolutions program," but the issues discussed in this report have considerable relevance for them.

Many of the "community dispute resolution programs" began with a primary emphasis upon criminal cases and then later added civil matters from the local small claims court and other sources. Some still receive their major referrals from the criminal justice system, but inevitably deal with the "civil" component of such offenses (such as assault) for the purposes of their dispute resolution hearings. In a sense they convert the criminal matters to civil ones by treating the cases as matters for discussion between the individual disputants and not for processing between the state and the defendant.

The definition of "community dispute resolution programs" intentionally does not restrict the programs to specific forms of sponsorship, types of dispute resolution processes, types of hearing officers, referral sources, or even aims. All of these vary considerably across programs.

#### 4 COMMUNITY DISPUTE RESOLUTION

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## **Why Have Programs Been Developed?**

The earliest community dispute resolution programs appear to have been developed by prosecutors and the courts in response to clear needs for improvements in the processing of minor criminal matters. The Philadelphia Municipal Court Arbitration Tribunal has perhaps the longest lineage of any of the programs, having evolved from a project established in 1969 through the joint efforts of the American Arbitration Association, the Philadelphia District Attorney, and the Municipal Court. The project provides disputants with the option of binding arbitration for minor criminal matters.

At about the same time, the Columbus, Ohio City Prosecutor recognized the severe problems the local justice system had with minor disputes. Minor dispute cases clogged the court, and adjudication did not seem to work well for them. Complainants very often withdrew their complaints as trial neared because their opponent was a neighbor, relative, or acquaintance. The complainants were not seeking incarceration for the adversary or a fine (paid to the state); they wanted changed behavior, an apology, or money paid to them as restitution for the harm done. The Columbus project uses mediation rather than arbitration. It began with two local law professors serving as mediators and expanded to its present caseload of over 10,000 cases per year. Participation in the mediation sessions is voluntary for disputants, and the mediators are trained to help the parties to negotiate a mutually agreed upon resolution to their controversy.

Both the Philadelphia and Columbus programs stimulated the development of similar projects in other cities. Other major projects developed in the early 1970s include the Institute for Mediation and Conflict Resolution's Dispute Center in Manhattan, the San Francisco Community Board Program, the Rochester Community Dispute Services project, and the Boston Urban Court Program. Recently developed projects often tend to be eclectic and borrow features from a number of the established programs.

The reasons for the nationwide development of programs have been numerous and complex. Some programs have been developed by policymakers who were seeking ways to remedy the courts' chronic problems with delays, high costs, assembly-line procedures, and citizen dissatisfaction with the quality of justice rendered by the courts. The Philadelphia and Columbus experiences seem to fall into this pattern. Some other programs have been developed by individuals and groups outside the justice system who were convinced that mediation and arbitration offer far more humane and sensible means of settling citizens' disputes. These groups are motivated by the notion that they can offer a superior dispute resolution process to disputants.

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They place less emphasis upon any efficiency advantages to the court. Others have been motivated to increase access to justice and feel that the convenience of dispute resolution programs can attain this goal.

The question of why such programs have emerged at this point in our history is a difficult one. The courts have had well-documented problems for many years (e.g., see the Wickersham Commission report, 1923). The processes of mediation and arbitration are not exotic, high-tech innovations; such processes have been around since early civilizations. Indeed, some nations base their justice systems upon the use of mediation or similar processes. For example, the People's Republic of China reports that it has over 600,000 People's Mediation Committees in operation, and these committees handle the overwhelming majority of disputes in the nation.<sup>3</sup> In the United States, labor and commercial arbitration have extensive histories predating experimentation with community dispute resolution programs.

Several of the factors contributing to the timing of the current "dispute resolution movement" in the United States include: (1) the problems of the courts were perhaps most persuasively documented in the 1960s with the work of the President's Commission on Law Enforcement and the Administration of Justice and other such groups. Such work may have laid the foundation for a consensus on the need for reform and experimentation. (2) Federal funding from the now-closed Law Enforcement Assistance Administration had a powerful effect on stimulating program development nationwide. This effect was sufficiently potent in the late 1970s that commentators of the time viewed the programs as a "fad" product of federal funding and argued that such programs would not outlast their federal sponsorship. (3) Significant leadership has been exercised by many national groups in encouraging program experimentation. Major leaders included the American Bar Association, the American Arbitration Association, the Institute for Mediation and Conflict Resolution, the Ford Foundation, and the U.S. Department of Justice. And, (4) some program directors have been extremely effective advocates for their programs and have encouraged other jurisdictions to replicate their efforts.

In addition, many commentators have suggested that the community dispute resolution programs have evolved to fill a void left in society by the diminished role of the extended family, the church, and other similar indigenous institutions in dispute resolution. The extent to which this analysis is sound is difficult to determine.

The current experimentation with alternatives to adjudication for minor disputes appears to be part of a larger effort at "delegalization" in many areas of the American legal system. Major examples include efforts to simplify

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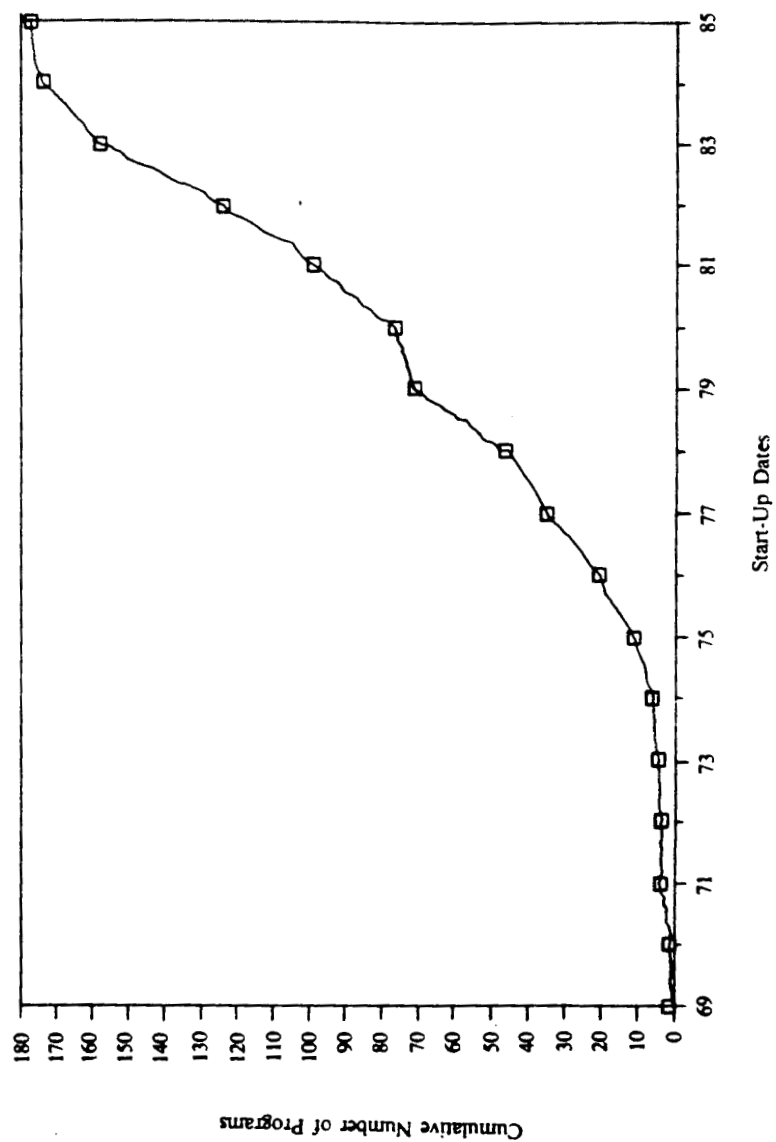
legal procedures (no-fault divorce, no-fault automobile insurance laws;<sup>4</sup> efforts to decriminalize certain offenses, and deinstitutionalize selected convicted offenders;<sup>5</sup> and attempts to apply non-judicial dispute processing techniques such as mediation to major as well as minor disputes (e.g., civil case appellate mediation conferences in California;<sup>6</sup> large scale environmental mediation;<sup>7</sup> and related applications;<sup>8</sup> A Task Force Report of the National Center for State Courts clearly summarized the current trend in American legal procedures in stating that, "In any event, we appear to be moving inevitably in the direction of a drastically revised system of dispute resolution — a justice system more than a judicial system — and one in which non-judicial forums will occupy an important place."<sup>9</sup>

### **The Growth of Community Dispute Resolution Programs**

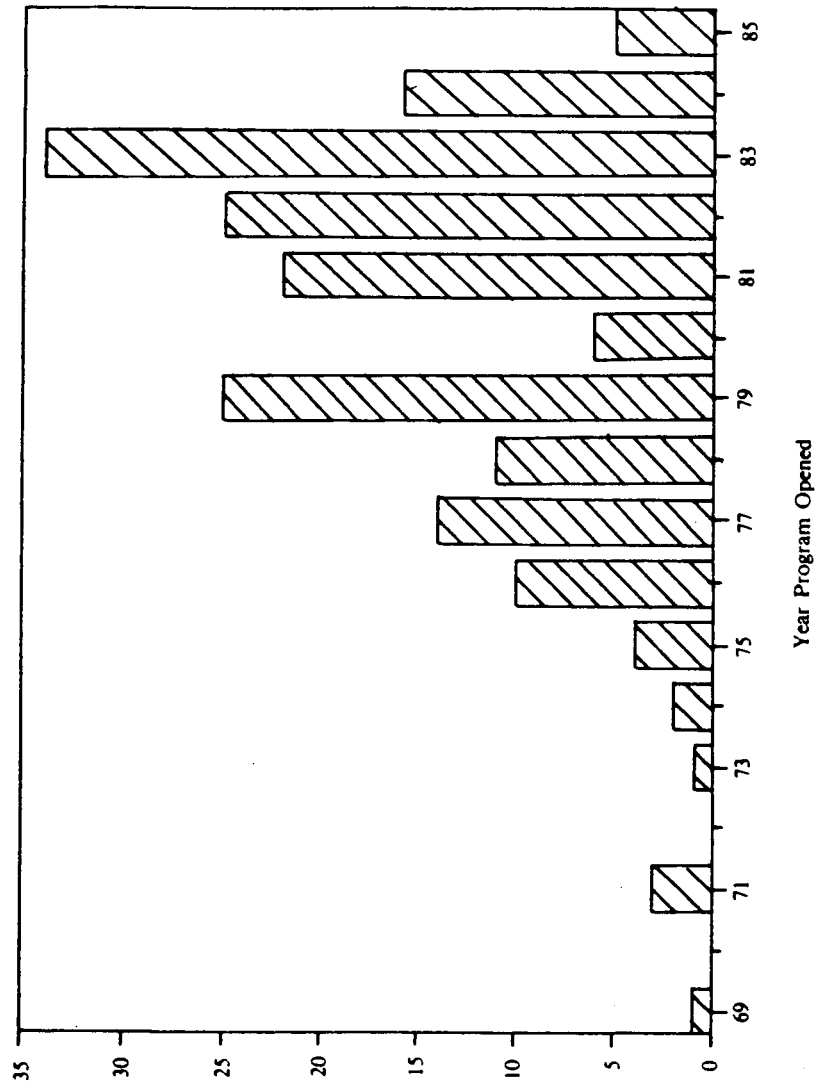
The number of community dispute resolution programs has grown remarkably since the establishment of the Philadelphia and Columbus programs. In 1975 less than one dozen such efforts were in operation. Their number nearly doubled from 1975-76 to a total of 21, and doubled again in the next two years to a total of 46. According to information from the American Bar Association's 1985 Dispute Resolution Directory (in press) a total of 182 community dispute resolution programs are currently in operation in the United States. Exhibit 1.1 graphically depicts the cumulative growth of the centers. Nineteen eighty-three was the peak year for the growth of new programs, and 34 community dispute resolution centers were established that year.

Exhibit 1.2 presents a summary of the annual development of community dispute resolution programs from 1969-1985. With the exception of 1980, the graph indicates a relatively steady increase in the number of programs developed per year through 1983 and a subsequent diminishing in the number of new programs being established in 1984 and 1985. The reasons for the establishment of only six programs in 1980 compared to 25 in 1979 and 22 in 1981 is difficult to interpret. The Dispute Resolution Act, which was designed to provide federal funding for experimental programs, was signed into law in February 1980 by President Carter, but then never received an appropriation. It is possible that this development had some impact on program development, although it would seem likely to account for only a fraction of the differences among years. The reduced number of program start-ups in 1984-85 may signify a trend in program development due to the possible saturation of major cities with programs or a reduced interest or support for the field, or this drop may represent a brief hiatus comparable to the pattern in 1980.

Exhibit 1.1  
Community Dispute Resolution Programs  
Growth in Numbers of Programs



**Exhibit 1.2**  
**Community Dispute Resolution Programs**  
**Number of Programs Begun Per Year since 1969**





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As was noted earlier, specialized dispute resolution programs handling such matters as family, consumer, housing, and juvenile cases have also grown rapidly across the nation. The ABA 1985 Directory provides profiles of major programs of these various types. The extent of growth of differing types of dispute resolution mechanisms was recently highlighted by the development of experimental "multi-door dispute resolution centers." The aim of such programs is to screen incoming disputes and refer them to an appropriate forum for their resolution. They can serve as a clearinghouse for the assignment of cases to the courts or alternative dispute resolution forums in a jurisdiction. As envisioned by Professor Frank Sander of Harvard Law school, such multi-door centers would provide centralized screening facilities that could refer citizens to appropriate processes or sequences of processes for the resolution of their disputes. The concept has been endorsed by Chief Justice Warren Burger and other judicial leaders, and the American Bar Association has established such experimental programs in Washington, D.C., Houston, Texas, and Tulsa, Oklahoma. The efforts are being evaluated by the Institute for Social Analysis under a grant from the National Institute of Justice.

### **Institutionalization of Dispute Resolution Programs**

As was mentioned earlier, many of the interpersonal dispute resolution programs were initially funded by the federal government primarily with Law Enforcement Assistance Administration seed money. With the demise of that agency, widespread predictions of the end of the "dispute resolution movement" were voiced. The typical picture that was painted of the future of the field resembled the final scene of Hamlet; the carnage of dead programs would soon litter the landscape. The programs had survived on the artificial respiration of federal largesse, it was argued, and Congress had now pulled the plug. However, with a very few notable exceptions, the patient confounded the predictions: programs have not died off, but rather proliferated.

A number of factors fueled the massive die-off theory. The closure of a few formerly very visible projects (such as the Kansas City Neighborhood Justice Center), the lack of general exposure to programs and their growth due to their relatively low profile in the media, and the assumption that federally funded experiments routinely collapse all encouraged the vision that we would soon have another extinct social program species. Such a prediction did not seem very far fetched in 1980.<sup>10</sup> But a review of the primary funding sources of programs in the most recent A.B.A. directory indicates that in a great many jurisdictions, local and state governments have stepped

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in to fill the vacated role of the federal government. The data in the directory are not extremely detailed but indicate that approximately one-half of the programs handling minor civil and criminal matters now receive significant support from local government. An additional one-third of programs are funded by state government, with other major sources being foundations and miscellaneous other agencies. Funding sources listed for the 182 community dispute resolution programs profiled in 1985 were as follows:

	Number of Programs Indicating Funding
Local Government (including city, county, and prosecutorial budgets)	95
State Government	60
Federal Government	4
Foundations	40
Fees	16
Interest on Lawyers Trust Funds	2
Churches	7

As can be seen from the listing, local and state funding sources make up the overwhelming majority of sources of support for programs. In contrast, the 1981 A.B.A. directory of programs indicated that less than one-third of programs were supported by local governments. Many projects are supported by multiple sources. The Chapel Hill, North Carolina Dispute Settlement Center is an example of a program having multiple sources of support. That program has received funds from the North Carolina General Assembly, the Town of Chapel Hill, the Town of Carrboro, the Town of Hillsborough, the Orange County Commissioners, the United Fund of Chapel Hill-Carrboro, the United Way of Orange County, and the Z. Smith Reynolds and Mary Babcock Reynolds foundations.

The decreasing proportion of federally supported programs is particularly striking. The 1981 A.B.A. directory reported that 28 percent of the existing programs at the time (45 programs) were primarily funded by federal monies; the 1983 directory reports that only 2 percent (2 programs) receive such funding, and only four of the 182 programs listed in the 1985 directory report receiving any federal funding.

The institutionalization of dispute resolution programs is demonstrated by a number of states which are developing novel sources of funding for

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programs. For example, the Texas legislature has passed an act which enables dispute mediation centers to be funded by small additional charges to civil court filing fees. Similarly, Florida has passed a statute to enable programs to receive support for their operating expenses from court filing fees, a form of funding similar to the approach used in a number of jurisdictions to fund their county law libraries. The Texas act will enable programs in large counties to be fully funded from the filing fee source. The Florida bill was structured to provide sufficient funds for only partial support of a program's operating budget.

In short, program funding sources are quite diverse. A major evolution has occurred in recent years away from federal funding and toward state and local funding. Yet, the number of projects has continued to grow. A number of states have passed legislation to support experimental dispute processing programs (including Connecticut and New York), and the New York Community Dispute Resolution Center's Program has a budget of over one and one-half million dollars per year. Apparently, while no one was watching, city councils, county commissioners, and other funding bodies have been deciding to fund mediation efforts in their communities.

### **Differing Perspectives Regarding Dispute Resolution Programs**

Any effort at categorizing disparate viewpoints carries with it the inevitable risk of oversimplification. Many subtle shades of difference of opinion exist in the dispute resolution field. But three major schools of thought regarding dispute resolution programs have emerged, and they serve as anchors around which the variations in opinion are arrayed. The "boosters" have a relatively simple approach: simply stated, they feel that programs are clearly useful, and that one should fund virtually all of them by whatever means available (local and state general revenues, court filing fees, foundation support, individual user fees, and so forth). Many policymakers are in this group. They argue that our best strategy is "to let a thousand flowers bloom" (to quote another major proponent of mediation) and let the free market in social services sort out the winners from the losers. Programs providing low quality services or violating the interests of their clients will fade from the scene due to market forces according to this perspective, and the faith is that the vast majority of programs will indeed provide very high quality services.

The "critics," on the other hand, have typically favored the Hamlet solution (of widespread closure of programs) noted earlier, and have been disappointed that the drama did not play itself out in the mediation field in the fashion experienced by that hapless Prince of Denmark. Such critics also have a simple answer to the question of program development: "don't do it." They argue that mediation programs are ill-conceived, faddish, and the product of the overly optimistic minds of misguided reformers. Such programs are said to duplicate (and expensively so) the informal processes already

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provided by our friendly neighborhood court clerk and judiciary. In their darker moments they sense a plot by the capitalist ruling elites to relegate the disadvantaged of our society to a second-class form of justice. Mediation is a toothless process designed to disenfranchise and coopt the underprivileged by this line of reasoning. Recent legal reforms such as the growth of consumer protection legislation are being cleverly defanged by the growth of mediation programs around the nation, it is argued. Furthermore, some of the critics assert that mediation programs cannot work anyway in America, and they provide anthropological and historical evidence that the preconditions required for effective mediation simply do not exist in our industrialized, mobile, heterogeneous society.

The third school of thought regarding dispute resolution programs can be labeled the "Yes, but . . ." approach (for the lack of a better label). This group argues that we should experiment with mediation programs, but cautiously, and that we should very carefully measure the outcomes of programs. Persons in this school accept the "boosters" assertions that programs may be very useful, and they respect the "critics" concerns. The literature of the "Yes, but . . ." variety is distinguished from the other two schools of thought in that it is typically empirical in nature. Both the "booster" and "critic" literatures have a very casual approach to detailed empirical information. The "boosters" are in a hurry to get on with the task of reforming the justice system and are satisfied (perhaps prematurely) that mediation is a promising way to start. The "critics" have an affinity for macro level analysis, and sometimes one gets the impression that they feel the use of empirical data immediately moves one from the macro to the mere micro level.

### **Assessing Program Achievements**

The survival and growth in numbers of dispute resolution programs suggests that they must be doing something right, especially given the routine demise of many other 1970s social programs. The question of what in particular they do "right" is an interesting one, and Chapters 5, 6, and 7 provide a detailed discussion of relevant data.

While they have been successful in many respects, the programs have certainly failed to fulfill many of the early optimistic goals laid out for them. They were expected to reduce court caseloads in their jurisdictions, freeing up resources for the remaining cases on the docket. No demonstrable evidence exists that programs have remotely succeeded in this task. A corollary to that goal was an anticipated reduction in justice system costs (because mediation would be very cheap compared to adjudication). The courts have not been reported to be mailing checks of unexpended funds back to governmental

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treasuries, however. In fact, some mediation programs are quite expensive on a per-case basis. Programs have also typically failed to develop large caseloads (in comparison to comparable court caseloads). Some programs sponsored by the courts and prosecutors' offices are exceptions to this pattern, and a few process over 10,000 cases per year. But we can probably say with some confidence after approximately ten years experience with such programs that the American people are not eagerly beating a path to the programs' doors, although this may be due more to Americans' focus on court dispute settlement (as idealized on Perry Mason) than due to anything fundamentally wrong with dispute resolution programs.

So what are the mediation programs doing right to justify the investment of scarce local and state governmental resources? The most likely achievement of the programs is that they provide a superior process for many of the types of cases that they handle. Research studies support the casual impression that people like to have their cases mediated. They typically view the process as more fair and more understandable, and they like the agreements that are achieved.<sup>11</sup> Agreements are reached in approximately 80 percent of mediation sessions. Disputants consistently report that they are satisfied with the mediation process and view outcomes as fair (see Chapter 5). Research on the mediation of minor civil cases in the Maine District Courts indicates that defendants in mediated cases are far more likely to pay their settlement in full than defendants in comparable court cases (70% vs. 34%, respectively). Interestingly, when interviewed, 73 percent of such mediation case defendants indicate that they feel some or a strong legal obligation to pay compared to only 12 percent of court defendants. However, improved compliance with agreements for minor criminal rather than such minor civil cases has not been clearly demonstrated by research. The Maine cases dealt with minor civil matters which could be settled with a single act, payment of money, rather than by complex behavioral changes among disputants. The payment of money is a simple task compared to stopping the criminal harassment of a relative or neighbor, and is likely to be an easier obligation to fulfill.

In short, policymakers appear to be drawn to funding community dispute resolution programs because they suspect that their process is better for particular types of cases. Mediation programs clearly have a very mixed record of achievement when assessed against the goals originally stated for them in the early and mid-1970s. They have failed quite flagrantly to reduce court caseloads and court costs, though many recent observers have suggested that such goals were very unrealistic at the outset and argue, for that matter, that the programs have also failed to increase voter registration, decrease hunger, improve SAT scores, and achieve countless other improbable goals.

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Programs have also been underwhelming when it comes to receiving large, self-referred, walk-in caseloads. Apparently, program successes in providing a potentially better process for the types of cases they handle have counterbalanced their other shortcomings. Chapters Five, Six, and Seven present discussions regarding the quality of justice of these programs, their efficiency and costs, and possible impacts on access to justice.

### **Dispute Resolution: Reform and Counterreform**

The proliferation of community dispute resolution programs in the late 1970s led many observers to begin to describe the growth as the "dispute resolution movement." More recent developments in the early 1980s have reinforced this image, if one defines a movement as a relatively widespread emergence of a given activity or innovation. Furthermore, the movement towards nonjudicial dispute processing programs appears to be gaining interest in a number of other nations as well. Both Australia and Canada have developed mediation centers modeled after the American programs. The Australian programs in Sydney and Woollongong have recently been very favorably evaluated by the Law Foundation of New South Wales.<sup>12</sup> The Canadian programs exist in nine cities, according to the A.B.A. directory. Both Canada and Australia have justice systems that are similar in many respects to the American justice system.

In contrast, it should be noted that many other societies traditionally mediate a high proportion of civil and criminal matters. In some of these countries, the justice systems are experiencing increasing legalization, rather than delegalization, as is the case in the United States. The Chinese government, for example, has promulgated new civil and criminal codes and increased the role of lawyers (from earlier virtual banishment during the Cultural Revolution) to a more central role in the administration of justice in China. This pattern suggests that legal reforms occur cyclically. Dean Roscoe Pound (1922) noted that there is a "continual movement in legal history back and forth between justice without law, as it were, and justice according to law." In this light, it may be that the present "dispute resolution movement" is only one upward (or downward, depending on one's perspective) thrust on an ongoing sine wave of reform and counterreform in society's dispute resolution machinery.

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### Footnotes

1. Green, E. "The Complete Courthouse," in Levin, et al. (eds.) *Dispute Resolution Devices in a Democratic Society*. (The Final Report of the 1985 Chief Justice Earl Warren Conference on Advocacy in the United States). Washington, D.C.: The Roscoe Pound—American Trial Lawyers Foundation, 1985.
2. See Rosenberg, M. "Query Regarding Alternate Dispute Resolution," 69 *Judicature* 254 (1986) and Levin, L. "A Fresh Way to Deliver Justice," in Levin, et al. (eds.) *Dispute Resolution Devices in a Democratic Society*. (The Final Report of the 1985 Chief Justice Earl Warren Conference on Advocacy in the United States). Washington, D.C.: The Roscoe Pound—American Trial Lawyers Foundation, 1985.
3. Chen Zhucheng. "China's Criminal Law and Law of Criminal Procedure," 23 *Beijing Review* 17 (1980). Interest in mediation is strong in many Asian nations, and an Asia-Pacific Organization for Mediation has been established. Information regarding the organization is available from the APOM Secretariat, Victoria I Building, 1672 Quezon Avenue, Quezon City, Metro Manila, Philippines.
4. Johnson, E., Kantor, V., and Schwartz, E. *Outside the Courts: A Survey of Diversion Alternatives to Civil Cases*. Denver: National Center for State Courts, 1977.
5. Abel, R. *Delegalization: A Critical Review of Its Ideology, Manifestation and Social Consequences* (unpublished manuscript, University of California, Los Angeles, 1978).
6. See Green, E. "Getting Out of Court—Private Resolution of Civil Disputes," 28 *Boston Bar Journal*, 11 (1984).
7. Carnduff, S.B., and Russell, J.R. *Alternative Environmental Mediation Structures within the Federal Government—Final Report*. Washington, D.C.: U.S. Executive Office of the President Council on Environmental Quality, 1980; and Susskind, L. and Ozawa, C. "Mediating Public Disputes: Obstacles and Possibilities," 41 *Journal of Social Issues* (1985).
8. Bush, R.A. "Dispute Resolution Alternatives and Achieving the Goals of Civil Justice: Jurisdictional Principles for Process Choice," 1984 *Wisconsin Law Review* 893 (1984); and Hensler, D. "What We Know and Don't Know About Court-Administered Arbitration," 69 *Judicature* 270 (1986).

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9. Johnson, E. "Courts and the Community," in Fetter, T. (Ed.) *State Courts: A Blueprint for the Future*. Williamsburg, VA: National Center for State Courts, 1978.
  10. Galanter, M. *Justice in Many Rooms*. Working Paper 1979, Dispute Processing Research Program, University of Wisconsin School of Law.
  11. Chapter 5 presents a detailed discussion of these findings. As is the case with all social programs, assessing the accomplishments and shortcomings of community dispute resolution efforts is no easy task. Selecting criteria for program "success" is challenging, and Merry has reviewed the complex issues in this area (see Merry, S., "Defining 'Success' in the Neighborhood Justice Movement." In Tomasic, R. and Feeley, M. (Eds.). *Neighborhood Justice: Assessment of an Emerging Idea*. New York: Longman, 1982).

Programs can have unintended negative consequences or fail to reach stated goals, and a number of papers have considered such problems (e.g., see Nader, L. (Ed.), *No Access to Law: Alternatives to the American Judicial System*. New York: Academic Press, 1980; Auerbach, J., *Justice Without Law?* New York: Oxford University Press, 1983; Abel, R., "The Contradictions of Informal Justice," in Abel, R. (Ed.), *The Politics of Informal Justice*. New York: Academic Press, 1982; and Merry, S., and Silbey, S. *Mediator Ideology and Settlement Strategies: Authority and Manipulation in Alternative Dispute Resolution*. Presented at the American Sociological Association Annual Meetings, 1984). The potential problems associated with alternative dispute resolution require careful attention. Eight major critiques that have appeared recurrently in the literature on dispute resolution are summarized and assessed in McGillis, D., *Consumer Dispute Resolution*. Washington, D.C.: National Institute for Dispute Resolution, in press.

As was noted earlier in Chapter 1, a tendency occurs in the existing literature to present either strong praise or strong criticism of the dispute resolution field. A number of papers have sought to assess the critiques of the field and acknowledge that, in the absence of more conclusive data, both extreme boosterism and extreme criticism are misplaced (e.g., see Johnson, E. "Review of the Politics of Informal Justice." 21 *Journal of Legal Education* (1984); Singer, L. "Non-Judicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor," 13 *Clearinghouse Review*, 569 (1979); Roehl, J., and Cook, R. "Issues in Mediation." 41 *Journal of Social Issues* 161 (1985); McGillis, D. "Minor Dispute Processing: A Review of Recent Developments." In



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Tomasic, R., and Feeley, M. (Eds.). *Neighborhood Justice: Assessment of an Emerging Idea*. New York: Longman, 1982; McEwen, C. and Maiman, R. "Mediation in Small Claims Court: Achieving Compliance through Consent," 18 *Law and Society Review*, 11 (1984); and "Review of Justice without Law?" 97 *Harvard Law Review* 607 (1983). Continuing research on alternative dispute resolution will help to sort out the achievements and problems of community dispute resolution mechanisms and their implications for the delivery of justice in the United States.

12. Schwartzkoff, R., and Morgan, T. *Final Report of the Evaluation of Three Experimental Community Justice Centres*. Sydney: Law Foundation of New South Wales, 1982.

# MEDIATION IN SMALL CLAIMS COURT: ACHIEVING COMPLIANCE THROUGH CONSENT

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RICHARD J. MAIMAN

In Maine defendants in small claims court are nearly twice as likely to comply fully with mediated outcomes as with judgments imposed by the court after adjudication. Some of the explanation can be attributed to specific features that are more common to mediated and negotiated settlements than to adjudicated outcomes. In addition, consensual processes lead to social psychological pressures for compliance that are not associated with authoritative judgments. Our findings point to the value of consent—the most central difference between mediation and adjudication—as an adjunct to command in promoting compliance with rules and orders.

## I. INTRODUCTION

This article began as an effort to make sense of a striking finding from our research in Maine small claims courts (McEwen and Maiman, 1981). In a detailed comparison of small claims mediation and adjudication, we discovered a significant association between forum type and the likelihood that defendants would pay what they owed. The likelihood that mediation defendants would live up to the terms of their agreements was almost twice the likelihood that adjudication defendants would fully meet the obligations imposed upon them by the court.

How can one account for this difference in compliance rates? It cannot, as we shall show, be explained away by differences in defendant or case characteristics. The literature on mediation, access to justice, alternatives to courts, and the like, despite its richness, provided us with no consistent guidance (see, e.g., Witty, 1980; Cappelletti and Garth, 1978; Wahrhaftig, 1982; McGillis and Mullen, 1977; Abel, 1982b).

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Indeed, this body of work denies, ignores, or de-emphasizes what we have come to believe is the most significant difference between mediation and adjudication: the distinction between consent and command. Our conclusion that this is the crucial distinction has, in turn, led us to a broader examination of the institutional context in which mediation occurs and of the interplay between consent and command.

## II. MEDIATION AS A CONSENSUAL PROCESS

The feature that distinguishes mediation from other forms of dispute settlement is the presence of a third party who encourages the contending parties to settle their dispute. The third party's role is, in essence, to facilitate a negotiation process (Gulliver, 1979: 3-7), for mediation like negotiation requires the consent of the parties. In contrast, adjudication (like arbitration) involves a third party who imposes a "solution" upon the disputants. It does not require consent but rests instead upon the command of an authority. This distinction between mediation and negotiation as ideal types and adjudication as an ideal type applies not just to final solutions but also to procedural matters and interim decisions about substance. In adjudication, "all these kinds of decisions, minor or more substantial, are made by the adjudicator. . . . In negotiation, each procedural and substantive issue must be resolved by the joint agreement of the parties through their interaction" (Gulliver, 1979: 7). Thus, mediation can be distinguished from adjudication by the degree to which the disputants can shape the settlement process and the need for them to consent to outcomes of the dispute.<sup>1</sup>

Not everyone emphasizes or even accepts the idea that the essence of mediation lies in third party facilitation of joint, consensual decision-making. The vision of mediation that has

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<sup>1</sup> This definition of mediation and negotiation provides a measuring stick (actually two) against which various empirical processes may be judged. Although in the remainder of the paper we shall treat participation and consent as if they were discrete variables, either present or absent, they are in fact continuous variables. For example, it appears to us that the frequent or exclusive use of "shuttle diplomacy" reported in some mediation programs reduces participation by parties by limiting the flow of information back and forth between them, just as rules of evidence help limit the information flow, and thus party participation in trials. Lon Fuller (1978) argues that the distinguishing feature of adjudication is the participation of the parties in presenting proofs and arguments. Thus, adjudication too involves participation and by implication perhaps a limited sense of responsibility for the adjudicator's or arbitrator's decision. Nevertheless, when consent to the settlement is required, as in mediation, the parties' participation differs not just in degree but also in kind from that which occurs when the decision is imposed by a third party.

guided many of its proponents and critics draws most of its imagery from studies of dispute processing in small-scale societies. As a consequence, models of mediation have often incorporated conceptions of community; continuing relationships and interdependence among parties; neutrality of the mediator; accommodative as opposed to binary decisions; and informal, presumably noncoercive controls rather than formal coercion. Witty, for example, treats such features as defining characteristics of mediation (1980: 10-20). Other scholars have assumed such models in arguing over the viability of mediation in urban areas where the strength of community and informal control is in doubt (Felstiner, 1974; Danzig and Lowy, 1975). And some have attempted to refine the model in light of modern anthropology and bring it into closer accord with the reality of mediation as an instrument of political power and inequality in small-scale societies (Merry, 1982; Gulliver, 1979).

Our focus on small claims court, however, has led us to believe that features other than consent/command, even if they are more commonly associated with mediation than with adjudication, do not distinguish clearly between these forms of dispute processing. Neither the small claims court nor small claims mediation is rooted in a cohesive, self-identified community, and few of the parties to small claims disputes are locked together in continuing multiplex relationships. Perhaps for these reasons it is rare for either small claims adjudication or mediation to probe below the surface dispute in an effort to discover and resolve "underlying causes." Furthermore, small claims adjudication is typically informal and commonly accommodative, making it difficult to distinguish from mediation on these grounds. What remains is the distinction between consent and command, between joint decision-making by disputants and the imposition of a decision by a judge.

But how clear is the distinction between command and consent? Critics of informal justice and neighborhood justice mediation argue that informality merely disguises coercion (Abel, 1982a; Harrington, 1980). We need not reject this contention to maintain the distinction. Consent may be an element of decisions that are in some respects highly constrained. While there is a point at which constraints are so great that it makes no sense to speak of consent, there is room for considerable constraint before that point is reached.

The claim that mediation leaves responsibility for decisions to the parties does not, therefore, imply the naive view often

attributed to proponents of mediation that disputants face no pressure to reach an agreement. In mediation and negotiation, moral pressures and situational contingencies as well as power and resource differentials may affect the decisions of the parties. Mediators can and do at times represent their own interests or those of powerful people, and they invoke norms of fairness and urge them on one or both parties. Disputants consider their options, including the risk of loss in adjudication and the greater expenditure of time and resources it entails, before agreeing grudgingly to a settlement. In addition, weaker parties may simply give in to stronger ones.<sup>2</sup> Even in the extreme but probably not uncommon case where a weak party gives in to an "unfair" settlement under pressure generated in the mediation process, the party still bears some responsibility for that agreement. The distinguishing feature of consensual decision-making remains: one or both parties might have refused to agree to a settlement, and if they did agree, they did so with the knowledge that they could have said "no," however difficult that might have been.

The extent to which consent is in fact meaningfully involved in reaching an agreement can best be measured by the willingness of parties to reject tentative agreements. Operationally, that is, a forum in which parties do reject tentative agreements is one where consent is meaningfully available.

Mediation and negotiation appear similar in that in both the parties are able to shape agreements and must consent to them. This, our research suggests, is fundamental. Mediation and negotiation differ in that the former involves a third party whereas the latter does not. The presence of the third party makes it likely that the consensual process in mediation will differ in some respects from that in negotiation. A mediator, in order to understand the dispute, needs to have the disputants review and clarify their perceptions of facts, events, commitments, obligations, demands, and disagreements. In bilateral negotiations such a detailed review is neither as

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<sup>2</sup> It is not necessarily the case that the same resources that advantage parties in court will also advantage them in mediation or negotiation, and, thus, definitions of strength and weakness must rest on the special requirements of these distinctive processes. For example, in small claims cases a stubborn party with few legal resources but available time may do well in negotiation or mediation against parties with considerable legal resources. It is cheaper for the "stronger" party to settle weak claims than to pursue them. This "advantage" in mediation or negotiation is produced in large part, however, by legal rules and procedures which equalize the parties enough to put in doubt the value of an adjudicated outcome.

necessary nor as likely. During the review and clarification process, a mediator often highlights points of agreement as well as issues in dispute, thus providing a kind of "reality-testing" that may be unavailable in negotiation. By proposing possible settlements, a mediator may also remove from the parties some of the psychological burden of initiating concessions. In addition, a mediator can encourage parties to think about the relative costs and advantages of choosing one or another course of action. Finally, the presence of a mediator makes a consensual commitment semi-public in character. The mediator witnesses the commitment, and he or she may formalize or ritualize interim and final agreements through devices such as the signing of a document or a handshake. Of course, the presence of a mediator does not ensure that these things will occur, nor does a mediator's absence preclude them.<sup>3</sup>

The conceptual distinction between mediation and adjudication does not preclude mediators from judging nor judges from mediating. Observations of courts and mediation sessions by ourselves and others demonstrate as much (e.g., Silbey and Merry, 1983). However such occasions blur the roles of judge and mediator, they do not obliterate the conceptual distinction between the processes. We can appreciate this only if we keep clear the distinction between institutions, such as courts, and the processes employed in them. The presence of judge-like actors in court-like surroundings has led some scholars to write as if adjudication—the imposition of judgment on contending parties—typically occurs in these settings. For example, Swartz (1966) describes consensual dispute processes in Benaland as "adjudication." However, it is the process and not the institution which is ultimately defining (e.g., Nader, 1969). Institutions like courts may accommodate various processes for dealing with disputes. The tasks faced by the

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<sup>3</sup> In a general sense, skilled and experienced negotiators can do for themselves what a mediator helps less skilled and experienced negotiators do. Yet even skillful negotiators may find it difficult to agree, either because they are personally involved or because they feel they must posture as advocates for clients while working to find a reasonable settlement with the other side. Under these circumstances, too, a mediator can facilitate the negotiation process.

A more thorough description of negotiation and of the relationship between negotiation and mediation would separate negotiations conducted between the immediate parties and negotiations conducted through agents. Since our primary concern is with mediation, we shall not pursue the matter. While it appears that the distinctions between mediation and negotiation that we have identified are not ultimately crucial to compliance, the differences between the two processes deserve further examination, for negotiation is the most common way of settling formal legal disputes.

student of a particular dispute settlement institution are to identify and explain the various processes that are in use, the ways they may be combined, the behaviors they entail, and the consequences that follow.

One crucial question is whether anything substantial turns on the fact that consensual processes like mediation and negotiation, rather than authoritative processes like adjudication and arbitration, are used to deal with a dispute. We believe that the procedural choice is an important one, with implications for the extent of compliance with judgments or settlements and for the degree of legitimacy accorded legal institutions.

These conclusions follow, however, not from a theory of mediation and adjudication but from more general ideas concerning command and consent. Both are methods of defining a standard of appropriate conduct. But command and consent differ fundamentally—or appear to—as procedures for identifying such standards. In what follows, we use data from the small claims courts we studied to examine differences between consent and command in the degree to which parties act as if they are bound by decisions arrived at. In addition, we explore the reasons why disputants invoke consensual processes when adjudication is available and conclude with a general discussion of the relationship between consent and compliance.

### III. COMMAND, CONSENT, AND COMPLIANCE IN SMALL CLAIMS COURT

#### *Small Claims Mediation in Maine*

A mediation program which began in the fall of 1977 in several small claims courts in Maine provides an opportunity to examine in depth the nature and consequences of consensual dispute resolution, especially as it compares to adjudication. The program grew out of an experiment in which a group of academic humanists who had received training in the rudiments of dispute resolution offered their services as mediators in the state's busiest small claims court. Subsequently, the program was expanded to include small claims cases in a number of less busy courts as well. Since 1979, the mediation service has been funded through the state's judicial budget.

At the time of our study, the small claims court in Maine had jurisdiction over civil disputes where the amount in

controversy was \$800 or less.<sup>4</sup> The district court hears the cases, using a "simple, speedy and informal court procedure" (ME. REV. STAT., 1980). As in most small claims courts, a majority of cases end in default or dismissal. Some cases, however, are contested, and in these cases either mediation or adjudication is typically employed to achieve a settlement. In a small number of these cases, a settlement is negotiated by the parties outside the courtroom before the case is heard by a third party. Such negotiations are frequently initiated by the judge, who asks parties "to see if they can't work something out." In our sample of cases, negotiated settlements, like mediated ones, were officially entered as the judgment of the court.<sup>5</sup>

In those small claims courts where mediation services are regularly available, the judge usually explains briefly to the assembled litigants that mediators are present to help the parties resolve their dispute without a trial. Most judges emphasize that mediation is voluntary, but some judges routinely assign cases to mediation without first obtaining the assent of the parties. Litigants usually are advised that they will lose nothing by trying mediation and that unsuccessfully mediated cases will be given priority that day in the order of trials. This does not always prove to be the case, however; when time is short, such cases may be postponed until the next small claims court date.

Once their case has been assigned to a mediator, litigants are escorted to a room designated for mediation sessions. Attorneys (who represented 11 percent of the plaintiffs and 10 percent of the defendants) typically are allowed to join their clients in mediation. Most mediation sessions last between twenty and forty minutes and involve a substantial amount of give-and-take between parties. Only rarely do mediators caucus privately with parties, a strategy common to labor mediation and to many of the community mediation programs developed in recent years (e.g., Cook *et al.*, 1980; Felstiner and Williams, 1980). Small claims mediation in Maine is typically a face-to-face proceeding from start to finish.

If the parties agree on a resolution of their dispute, the mediator will write out the terms of settlement and have it

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<sup>4</sup> Since our study was completed, that statutory limit has been raised to \$1000.

<sup>5</sup> In 27% (103 cases) of our sample of cases the judge asked or told disputants to go out and try to settle the case on their own. A settlement was achieved in 21% (22 cases) of these cases. In another 11 cases a settlement was arrived at spontaneously by the parties without the judge's prodding.



signed by the parties. The written agreement is then reviewed by the judge. Once approved, as almost all agreements are, the settlement becomes the judgment of the court. However, in about 35 percent of the cases, mediation does not end with an agreement between the parties. Some mediators decide quickly that a case needs to be tried by a judge; others are more persistent in attempting to effect a resolution. When mediation does not resolve a dispute, that case is returned to the court for trial.

### *Research Design and Methods*

In the spring of 1979, we undertook an intensive study of small claims mediation in Maine. Our major goal was to compare the processes of mediation and adjudication and assess their impact on litigants. Ideally, from a research point of view, cases would have been randomly assigned to one process or the other as they arrived at court. Differences in outcome or impact would then have been uncontaminated by factors that might channel one set of litigants to mediation and another to adjudication. Innovations within the legal system like the mediation program, however, are rarely designed for the convenience of researchers. The courts we studied did not use a random number table to assign cases, so we must treat the complex issue of equivalence in our analysis.

We chose six district courts of varying sizes and caseloads from which to collect cases. Once these sites were chosen, we proceeded with four major data collection techniques: interviews with litigants, observations of court and mediation sessions, analysis of docket book information, and analysis of state court mediation reports. In August of 1979, we began interviewing litigants involved in contested small claims cases roughly four to eight weeks after their cases had been tried or mediated. Two, and at times three, full-time interviewers continued this work until September 1, 1980. When the interviewing load grew heavy, we selected mediated and non-mediated cases randomly.<sup>6</sup> In total we drew 403 cases in our

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<sup>6</sup> The one exception to random selection was the exclusion from our sample of cases in which we had interviewed one of the parties once or twice before. This resulted in underrepresentation of banks and utilities as plaintiffs in our samples of both mediated and adjudicated cases and thus eliminated from our sample a number of cases where the focus of mediation and adjudication was on setting a workable payment schedule rather than on resolving a substantive dispute. Our original sample was slightly larger, but we dropped five cases when we learned that they had not actually been heard in court. In three of these cases we completed one or both interviews, but we have not included them in the analysis. The sample constitutes roughly 70% of the cases that, according to the docket book entries, were contested in the six

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SUMMARY JURY TRIAL

- Lambros, Thomas D., "Summary Jury Trial," 37 Federation of Insurance & Corporate Counsel Quarterly 139-148 (Winter 1987).
- Maatman, Gerald L., Jr., "The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County," 21 The John Marshall Law Review 455 (1988).
- DISPUTE RESOLUTION AND THE COURTS — Case Study: Summary Jury Trial (a half-hour videotape produced by the National Institute for Dispute Resolution).

# Summary Jury Trial

THOMAS D. LAMBROS

## I. OVERVIEW

This article is intended to assist judges, lawyers, and litigants in implementing the summary jury trial procedure.

Summary jury trial is a simple, flexible, and inexpensive settlement alternative. It involves the summarized presentation of a civil case to an advisory jury for the purpose of showing the parties how a jury reacts to their dispute. The process is intended to aid and assist the parties in gaining a realistic perspective of the fair settlement value of their case. Summary jury trial is designed to slash legal costs and to encourage out-of-court settlements. Summary jury trial is non-binding and thus does not impair the constitutional right to proceed to jury trial. However, a full jury trial after a summary jury trial is often unnecessary because the parties are able to settle their dispute.

The evidentiary and procedural rules governing summary jury trial (SJT) are few and flexible. Nevertheless, to achieve the goal of facilitating settlement, the SJT is conducted in open court with appropriate formalities and clients and other key decision makers with settlement authority are expected to attend. The lawyers are to have their case in a state of trial readiness and to present to the summary jury the best possible summation of their claims. The SJT is normally concluded in a half day and rarely lasts longer than a full day.

Most cases result in settlement during the conventional pretrial events or procedures. SJT is intended for those durable or hard core cases that are not settled through conventional pretrial negotiations. When SJT is determined to be an appropriate alternative, it is used as a final pretrial settlement procedure. The selective use of SJT is calculated to avoid the high cost usually associated with final trial preparations, such as the judge blocking out time for trial, lawyers preparing witnesses, and lay and expert witnesses as well as jurors setting aside weeks of their busy schedules to sit through an extended trial. This additional judicial event, when used selectively, does not place significant additional burdens upon the judicial system or its participants. Indeed, there are potential savings to be derived from the process either in the form of settlements or, for those cases that do not settle, shorter and better prepared trials.



*Thomas D. Lambros has served as United States District Judge for the Northern District of Ohio in Cleveland since 1967. Among his many achievements is his invention and development of the summary jury trial, a procedure which has received widespread acceptance in both federal and state courts throughout the country.*

## II.

### HOW TO SELECT A CASE FOR SUMMARY JURY TRIAL

Summary jury trial is not encumbered with a list of imperatives. The basic question or rule in selecting a case for SJT is "Will It Help?" SJT is used in cases where settlement cannot be achieved because the parties have differing perceptions on how a jury will evaluate the evidence.

The decision to use SJT rarely turns on the substantive legal aspects of a case but rather depends upon the dynamics of the controversy. SJT has been used in a wide range of cases from relatively simple negligence and contract actions to complex mass tort and anti-trust cases. Experience has shown that the selection process must look beyond the question of whether a case would formally be classified as simple or complex. A wide variety of variables must be injected into the selection equation. The anticipated length of a full jury trial is obviously relevant. If a case is only expected to require a single day to try, there may be little advantage in conducting a summary jury trial. SJT may be particularly attractive in cases that are anticipated to require several weeks or months to present through the traditional jury trial process. The longer the trial, the greater the potential savings. Another factor to be considered in the selection process is the psychological effect of courtroom combat on the litigants. Any trial, however long or short, exacts some sacrifice or penalty from the litigants in the form of financial costs and emotional stress. Some litigants have the ability to handle it, others do not. Sometimes there are benefits which outweigh simple economics. The process may provide the parties with the necessary psychological satisfaction of telling one's story and may thus remove emotional barriers to settlement.

Each case is unique and presents a special balance of factors that must be weighed collectively by the judge so that he or she can rationally decide whether the settlement prospects of the case will be substantially advanced through the use of SJT.

Effective conferencing is the best method for determining the suitability of a case for SJT. The give and take between the parties at such a conference provides the judge with the soundest basis for assessing whether SJT is in order. Ideally, after discussing the possibility of a SJT during the pretrial conference, the parties will decide that use of SJT is in their best interest. Such acceptance is desirable because it heightens the chances that the parties will accept the result of the SJT and settle their case. Ultimately, the judge must make the final decision. Often times, however, lawyers are too wrapped up in their controversy to recognize the benefits of agreeing to SJT. Experience indicates that SJT works well in cases consumed by acrimony and intense disagreement. In such an atmosphere, only the judge retains the objective viewpoint necessary to make an informed decision to go to SJT.

If one or both of the parties is unwilling to consent, the trial judge should have authority to order the parties to proceed to summary jury trial. It must be remembered that SJT is a settlement alternative and thus is one component of the pretrial segment of the litigation process. Under Federal Rule of Civil Procedure 16(b)(5), a district judge may order the parties to proceed to SJT if the judge is so empowered by a local district court rule. In the Northern District of Ohio, Local Civil Rule 17.02 provides: "The judge may, in his or her discretion, set any appropriate civil case for summary jury trial or other alternative method of dispute resolution, as he or she may choose." The objective perspective of the judge enables the judge to recognize when use of SJT may assist in breaking a settlement impasse. Consistent with the letter and spirit of the Federal Rules of Civil Procedure, a trial judge should be granted discretionary authority to order the parties to participate in SJT when it is believed that use of the process may foster settlement.

### III.

#### THE FINAL PRETRIAL CONFERENCE BEFORE THE SUMMARY JURY TRIAL EVENT

The decision on whether a case should be sent to summary jury trial is normally made at the final pretrial conference scheduled before trial. After the assignment decision is made, the judge determines whether the housekeeping details attendant to a SJT can be disposed of during that pretrial conference or whether the case

requires one additional pretrial conference so that it may be placed in a state of complete readiness for SJT.

Certain matters must be addressed at the conference preceding the SJT. The judge should determine that discovery has been substantially completed. All motions relating to the merits of the case should be resolved. The court should also hear objections to the use of certain evidence and also consider any motions *in limine*. In general, the conference should be used by the judge to elicit problem areas concerning the materials that may be presented or opinions that may be expressed. The judge should not hesitate to make rulings on these motions and to inform counsel as to what lines of summarization will be permitted and what areas will be excluded. As a result of such conferencing, the actual presentations or counsel during the SJT are likely to flow without interruptions of the narrative presentations.

Additionally, the court and counsel should engage in a dialogue on SJT techniques. For those attorneys who are new to the procedure, it is worthwhile for the court to explain the process in some detail and to review examples of techniques that attorneys have previously used effectively. It may be useful to distribute a brief written explanation of the process as a means of introducing the attorneys and their clients to the process.

The conference before the SJT also provides an opportunity for intensive settlement negotiations. The imminence of SJT brings to bear on the parties the same type of concerns experienced just prior to civil jury trial. Counsel and the parties must be aware that their case will be inalterably affected by the advisory jury's verdict. The demands of the parties will always be contrasted to the advisory jury's evaluation and demands that appeared reasonable before the SJT may then appear to be out of line.

#### IV.

#### THE DAY OF THE SUMMARY JURY TRIAL ARRIVES — WHAT HAPPENS?

##### A. *Final Preparations for the SJT.*

The day of the summary jury trial begins with the arrival of prospective jurors at the jury commissioner's office. Twelve jurors are normally summoned. However, if another judge is commencing a jury trial on the same day, the jurors who are called for that proceeding but not actually empanelled may be used in the SJT. To expedite selection of the summary jury, the jury commissioner provides the prospective jurors with a questionnaire, also known as a juror profile form, which normally elicits the following information:

1. Juror's name and occupation;

2. Juror's marital status;
3. Juror's spouse's name and occupation;
4. Names and ages of juror's children;
5. Juror's prior knowledge of the parties, counsel, or facts of the case;
6. Any prejudicial attitudes of the jurors.

After the juror profile forms have been completed, copies are made and distributed to the presiding judicial officer and counsel. The responses of the prospective jurors give the court and counsel a bird's eye view of the panel and prepare them to proceed quickly with their strikes for cause and peremptory challenges.

While the potential jurors are completing their questionnaires, the presiding judicial officer meets with counsel. This meeting gives the court and the parties an opportunity to review the case in an environment which is very similar to that existing just prior to a regular civil jury trial. It is at this conference that many cases settle because the imminence of the SJT has served to motivate both sides to give the case virtually the same top priority that is given to a case which is scheduled for a regular civil jury trial. When this point is reached prior to the SJT rather than the regular civil jury trial, there is a considerable savings of litigation costs.

In order for this meeting to be of full benefit, it is essential for counsel to have their case in a state of complete trial readiness. The parties should be required to have filed trial memorandum, proposed voir dire questions, and proposed jury instructions. If an extensive presentation is anticipated the court may also require the parties to submit exhibit lists and lists of witnesses whose testimony will be summarized during the proceeding. During this meeting, counsel are required to present all procedural and evidentiary questions which foreseeably will arise during the course of the summary jury trial. Resolution of these questions during this meeting minimizes the need for objections during the actual SJT and thus contributes to the flowing character of the proceeding.

#### *B. The Format of the Actual SJT.*

The format of a summary jury trial is very similar to a traditional civil jury trial. A judge or magistrate presides over the court which is formally brought to order. Attendance of the parties and/or principals with complete settlement authority is necessary and requisite. In fact, the very essence of SJT contemplates the participation of the litigants. This pretrial exercise is first and foremost for the benefit of the



parties. It may enable them to observe the strengths and weaknesses of their respective positions, to observe the courtroom styles of their attorneys, and to detach themselves from the emotionalism that so often prevails so that they may engage in realistic settlement negotiations.

The judge opens the SJT with a few introductory remarks in which he or she introduces the trial participants and explains in a nutshell what the case is about. The SJT procedure is then explained to the jury. The judge normally states that the lawyers have reviewed all of the relevant materials and interviewed all of the witnesses and now have been asked to condense all of the evidence and present it to the jury in a narrative form. They are also told that the attorneys will be permitted to summarize both the evidence and legal arguments in support of their respective positions. The prospective jurors are advised that at the conclusion of the case they will be instructed on the applicable law and the use of the verdict form. They are further advised that it is expected that they will consider the case just as seriously as they would if the case were presented to them in the conventional manner and that their verdict must be a true verdict based on what they believe the evidence has shown to be the most persuasive position. They are further told that the proceeding they are considering will be completed in a single day and that their verdict will aid and assist the parties in resolving their dispute. Nothing more is said about the nonbinding nature of the SJT. Nothing more need be said.

Following the judge's introduction of the case to the prospective jurors, the judge conducts a brief voir dire generally posing questions to the jury collectively. This process is expedited through the use of the completed juror profile forms. The judge may make additional inquiries of the jury based on voir dire questions proposed by the attorneys. Counsel are normally permitted to exercise challenges for cause as well as peremptory challenges — in a two party action each side is permitted two peremptory challenges with adjustment in case of multiple plaintiffs or defendants. The first six jurors seated after the challenges constitute the panel, alternates usually being unnecessary because the case is completed in a single day. In a more complex case that it is anticipated to last more than a single day alternate jurors may be empanelled.

Jury selection is followed by the presentations of counsel. Although the goal of expeditious presentation is always kept in mind, the length and format of the proceeding may be adjusted to accommodate the particular needs of the case. Counsel are usually given one hour each for their presentations. This period is usually broken down so that plaintiff devotes approximately 45 minutes to its case in chief,

followed by the defense being given a similar period of its main presentation. A fifteen minute period may then be given to the parties for their respective rebuttal and surrebuttal. The total time of the proceedings may be extended if the case involves particularly complex issues and/or more than two parties. As with all other aspects of the SJT process, form should not be allowed to overcome substance. Each party should be given sufficient time so that it feels that it has had a reasonable opportunity to make an exhaustive presentation of its case. One common departure from the standard format entails allowing each party to make a five minute opening statement so that the defendant has an opportunity at the outset to state its position to the jury.

In making their presentations to the jury, counsel are limited to representations based on evidence that would be admissible at trial. Although counsel are permitted to mingle representations of fact with legal arguments, considerations of responsibility and restraint must be observed. Counsel may only make factual representations supportable by reference to discovery materials. These materials include depositions, stipulations, signed statements of witnesses, and answers to interrogatories or requests for admissions. Additionally, an attorney may make representations based on his or her assurance that he or she has personally spoken with the witness and is repeating what that witness stated. Discovery materials may be read aloud but not at undue length. Counsel may submit these materials in full to the jury for their consideration during deliberations. Each juror is provided a note pad and pen and is permitted to take notes.

Physical evidence, including documents, may be exhibited during a presentation and submitted for the jury's examination during deliberations. Such exhibits may be marked for identification but are returned to the appropriate party at the end of the proceeding.

By virtue of the nature of SJT, objections during the proceeding are not encouraged. However, in the event counsel overstep the bounds of propriety as to a material aspect of the case, an objection will be received and, if well-taken, it will be sustained and the jury instructed appropriately.

At the conclusion of the SJT presentations, the jury is given an abbreviated charge and retires for its deliberations. The jury is normally given a verdict form containing specific interrogatories, a general inquiry as to liability, and an inquiry as to plaintiff's damages. The jurors are encouraged to return a unanimous verdict and given ample time to reach such a consensus. However, they are given six verdict forms and instructed that if, after diligent efforts, they are unable to return a unanimous verdict, they should individually complete verdict forms.

Once the jury has been excused to deliberate, the court may engage the parties in settlement negotiations. These negotiations have a special sense of urgency in that they are conducted in the shadow of an imminent advisory verdict. These negotiations are informed by the perspective gained through observation of the SJT.

After the jurors complete their deliberations, the Court receives their unanimous verdict or individual verdicts. At this time the court, counsel, the parties, and the jurors engage in a dialogue unique to SJT. The court may ask the jurors a broad range of questions ranging from the general reasons for their decision to their perceptions toward specific aspects of either party's presentation. Counsel may also inquire of the jurors both as to their perspective on the merits of the case and their responses to the style of the attorneys' presentations. This dialogue affords an opportunity to gain an in-depth understanding of the strengths and weaknesses of the parties respective positions. This dialogue may serve as a springboard to meaningful settlement negotiations.

### *C. The Flexible Character of SJT.*

Summary jury trial is designed to accommodate the needs and styles of its various users. Judges and lawyers should not hesitate to modify the procedure so that it will operate in a manner that suits their preferences. To date, witnesses have not been called during SJT proceedings. As with all other facets of the process, this approach should not be regarded as being fixed in stone. If the parties can agree on a reasonable means of limiting the scope of testimony, such as having witnesses read sworn narrative summaries of their anticipated testimony, use of witnesses may provide a valuable means of exploring the credibility of each party's position.

If a jury demand is not made in a case, the summary jury trial is adaptable to a non-jury trial or the so-called "bench trial" with a judicial officer, such as a judge, magistrate, referee, special master or other qualified neutral serving as a trier of fact and rendering an advisory opinion without jury intervention.

Another possible variation is for the parties to agree to conduct a summary jury trial at a very early stage of the proceedings. Such a proceeding may occur a brief period of expedited discovery and may assist the parties to avoid the inconvenience and expense of protracted litigation.

Video tape presentations may provide another means of effectively utilizing the SJT procedure. In a case before Judge Lee R. West of the United States District Court for the Western District of Oklahoma, an attorney prepared a videotape for viewing by a summary jury in lieu a live presentation. The film provided an overview of all aspects of the

plaintiff's case in a personal injury action. It included an animated reconstruction of the accident scene, pictures showing the plaintiff's injuries and their effect on his every day life, and pictures of each of the plaintiff's lay and expert witnesses with summarizations of their probable testimony dubbed in by the announcer.

#### V.

#### WHAT HAPPENS IF THE CASE DOES NOT SETTLE DURING THE SJT — THE POST SJT CONFERENCE

In some cases settlement is achieved during or immediately after the SJT. Usually, however, it takes several weeks for the parties to assess and evaluate the SJT verdict. In such cases a post-SJT conference should be scheduled several weeks after the SJT. Whether the SJT was conducted before a judge or magistrate, the post-SJT conference should be held before the judge upon whose docket the case is pending. Again, attendance of the principals is mandatory. During the conference the court and the parties review the SJT and engage in exhaustive settlement discussions.

During the interim between the SJT and the post-SJT conference the parties have had an opportunity to reflect upon the advisory verdict and the proceeding in general. In personal injury and business cases, the advisory verdict has been communicated to the decision makers at the home office who now assume a more central role in settlement discussions. The SJT result now provides an objective basis for settlement discussions that did not exist at the time of impasse preceding the SJT. At the post-SJT conference, the subjective case evaluations of the attorneys are no longer the primary focus of the discussions. Rather the parties must now wrestle with the reality of the SJT verdict and the likelihood that another jury will render a similar, yet binding, verdict if the case is not settled. As a result of the SJT new insights into the merits of the controversy have been obtained and there now exists the objectivity which is essential to productive settlement negotiations. All in all the parties now approach their dispute more realistically. This new outlook, based upon the now tangible advisory verdict, is a strong catalyst to settlement.

If a settlement is not achieved during the post-SJT conference, the case is programmed for a *de novo* civil jury trial. The jury trial is normally scheduled to occur approximately one month after the SJT but may be continued if meaningful settlement negotiations are occurring.

## VI. CONCLUSION

Summary jury trial is intended to foster settlements by providing litigants with a forecast of civil jury trial verdicts. The use of SJT is consistent with the traditional objective of the American adversary system of providing individuals with a fair, equitable, and inexpensive means of resolving their disputes. Summary jury trial may even provide a tool for advancing our traditional system by relieving it of the unnecessary costs and burdens involved in using civil jury trials to resolve controversies that can be settled justly through far less expensive and time-consuming procedures. This new approach was supported by the Judicial Conference of the United States in 1984 when it resolved:

The Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases.

Chief Justice Warren E. Burger echoed this viewpoint in his 1984 *Year-End Report of the Judiciary*, when he stated:

Summary jury trials . . . are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals. In the summary jury trial, attorneys present abbreviated arguments to jurors who render an informal verdict that guides settlement of the cases. Judge Thomas Lambros (N.D. Ohio), who developed a workable summary jury trial procedure, reports that virtually all of more than 100 suits handled through this method have been concluded without the need of a full trial. The Judicial Conference in 1984 endorsed the experimental use of summary jury trials "as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases." . . . These judicial pioneers should be commended for their innovative programs. We need more of them to deal with the future.

This article is intended to assist judges, lawyers, and litigants in implementing the summary jury trial procedure. It is hoped that summary jury trial will assist in resolving disputes and in some measure reduce the burdens on the adversary system.

## ARTICLES

### THE FUTURE OF SUMMARY JURY TRIALS IN FEDERAL COURTS: *STRANDELL v. JACKSON COUNTY*

GERALD L. MAATMAN, JR.\*

#### INTRODUCTION

Alternative Dispute Resolution (ADR) is a mechanism to which lawyers and litigants are turning with increasing frequency to save time and money attendant traditional civil litigation in federal courts. The search for litigation alternatives stems from dissatisfaction with congested court dockets, long delays, and the high cost of litigating. The ADR movement enjoys broad support.<sup>1</sup> Indeed, the subject has its own specialized journals and an ABA Standing Committee.<sup>2</sup> Law schools and legal casebooks are now endeavoring to

\* Associate, Baker & McKenzie, Chicago, Illinois. B.A., Washington & Lee University; J.D., Northwestern University. The author represented the plaintiffs in *Strandell v. Jackson County*, and argued the case before the United States Court of Appeals for the Seventh Circuit. The author wishes to acknowledge the contribution to the preparation and writing of this article by Ms. Lucy Nale, B.A., Loyola University of Chicago; J.D. Candidate, Loyola University of Chicago.

1. J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESS IN EVOLUTION 7, 26-38 (1984). ADR, however, is not without detractors. Proponents of the Critical Legal Studies movement object to ADR as favoring the state, the wealthy, and capital. See Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L J. SOC. & LAW 245 (1981). Other commentators have argued that ADR fosters racial and ethical prejudice, on the premise that people who hold prejudicial attitudes are more apt to act on those attitudes in informal settings. See Delgado, *Fairness and Formality: Minimizing The Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359. Another criticism is that as the ADR process is not restrained by the equality parties enjoy in formal legal proceedings, ADR works to the detriment of the disadvantaged to the extent that they benefit most from the public policies underlying formal legal processes. See Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-80 (1984).

2. *Alternatives to the High Cost of Litigation* is a monthly publication available from the Center for Public Resources, and covers the latest developments in ADR, dispute prevention, and judicial ADR. The *Alternative Dispute Resolution Report*, published monthly by the Bureau of National Affairs, reports on public and private ADR. The ABA's House of Delegates conferred standing-committee status on

train lawyers in alternative dispute resolution techniques.<sup>3</sup> ADR is also big business. Private entrepreneurial ADR firms are nationwide in scope, prompting concerns of a "brain drain" from public courts as judges retire to earn higher pay at private dispute resolution companies.<sup>4</sup>

The Federal Rules of Civil Procedure also recognize ADR as a legitimate option to traditional civil litigation. Rule 16(c)(7) provides that "the participants at any pre-trial conference . . . may consider and take action with respect to . . . the use of extrajudicial procedures to resolve the dispute."<sup>5</sup> Many federal judges enthusiastically embrace alternative methods of dispute resolution; others counsel caution.<sup>6</sup> The result is a wide divergence in federal pre-trial practice. Settlement may be fostered by traditional judicial approaches of tight docket control, rigid litigation timetables, or the court's active participation in pre-trial settlement negotiations.<sup>7</sup> In contrast, some federal judges are increasingly viewing ADR options under Rule 16 as a method to clear their dockets and dispose of a large percentage of cases without a trial on the merits.<sup>8</sup> Utilization

of ADR mechanisms which federal courts name of settlement

One such popular Jury Trial (SJT), United States District though Judge Lambros the use of the device have been held in courts.<sup>10</sup> In 1984, States endorsed the fair and equitable cases."<sup>11</sup> Judges decept,<sup>12</sup> law schools a summary jury trial the prospects of the summary jury trial practice in m

What is a summary system that retains traditional manner. The

the Dispute Resolution Committee in August of 1986. See 4 ALTERNATIVES 11 (Dec. 1986).

3. See S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION (1985); L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION (1986); Sanders, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229 (1984).

4. Oliver, *Rent-a-Judge: A Shortcut Through the Legal Muck*, L.A. Times, Feb. 18, 1988, § I, at 1, col. 1 (retired judges hired by litigants to settle civil disputes through arbitration, mediation, conciliation, or mini-trials earning \$250 to \$300 per hour). The American Bar Association's Commission on Court Costs and Delay estimated in 1985 that nearly 400 private companies are marketing private judges for civil disputes. *Id.* One of the first companies to enter the market was EnDispute, Inc., which now has offices nationwide. See Koenig, *More Firms Turn to Private Courts To Avoid Long, Costly Legal Fights*, Wall St. J., Jan. 4, 1984, at 1, col. 1.

5. FED. R. CIV. P. 16(c)(7).

6. Compare Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1984), with Posner, *The Summary Jury Trial And Other Methods Of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

7. See Schuck, *The Role of Judges in Settling Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986); Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977); Barrett, *Rocket Docket: Federal Courts In Virginia Dispense Speedy Justice*, Wall St. J., Dec. 3, 1987, at 33, col. 4 (elapsed time between filing complaint and case disposition is five months in the Eastern District of Virginia due to "a combination of unforgiving rules and fierce pride in efficiency").

8. Lambros, *The Summary Jury Trial*, 13 LIT. MAG. 52 (1986); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986). In fact, since 1980, Judge Lambros has not had a civil jury trial in his courtroom, and has tried only criminal cases and non-jury cases, a result he has attributed to the summary jury trial. See *Developments in Alternative Dispute Resolution*, 115 F.R.D. 349, 369 (1986); see also *Strandell v. Jackson County*, 115 F.R.D. 333, 336 (S.D. Ill. 1987) (without the availability of mandatory summary jury trials, a court cannot clear its docket).

9. Lambros (1980).

10. Marcotte, *Sur also Angiolillo & Tell*, 1987, at 48. Judge Lambros has also districts at the request *many Jury Trials Gain* summary trial in the North February of 1985, in an summary jury trial. *Id.* Most recently, summary courts in a pilot program ALTERNATIVE DISPUTE RES.

11. REPORT OF THE CEEDINGS OF THE JUDICIAL. The original draft of the with the voluntary conference COMMITTEE ON mittee reported that "[t]hrough the procedure, matter of law and equities' consent." *Id.* at 3. the language regarding

12. See Posner, *et al.* the Judiciary, he noted judges across the country judicial pioneers should of them in the future."

13. See GOLDBERG

of ADR mechanisms raises the additional question of the extent to which federal courts may impose such devices upon litigants in the name of settlement.

One such popular yet controversial ADR option is the Summary Jury Trial (SJT), the brainchild of Judge Thomas Lambros of the United States District Court for the Northern District of Ohio.<sup>9</sup> Although Judge Lambros originated the concept only eight years ago, the use of the device has grown dramatically. Summary jury trials have been held in an estimated sixty-five different federal district courts.<sup>10</sup> In 1984, the Federal Judicial Conference of the United States endorsed the SJT device as an "effective means of promoting fair and equitable settlement of potentially lengthy civil jury cases."<sup>11</sup> Judges describe themselves as being fascinated by the concept,<sup>12</sup> law schools teach courses to their students on how to conduct a summary jury trial,<sup>13</sup> and lawyers and litigants increasingly face the prospects of participating in the procedure. As a consequence, the summary jury trial has become an important component of pre-trial practice in many federal courts.

What is a summary jury trial? In essence, it is an ADR mechanism that retains the traditional jury system, albeit in a nontraditional manner. The summary jury trial is designed to facilitate set-

9. Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 44 (1980).

10. Marcotte, *Summary Jury Trials Touted*, A.B.A. J., April 1, 1987, at 27; see also Angiolillo & Tell, *From Jury Selection to Verdict—In Hours*, BUS. WK., Sept. 7, 1987, at 48. Judge Lambros himself has set over 150 cases for summary jury trial. *Id.* Judge Lambros has also conducted summary jury trial proceedings in other federal districts at the request of other judges. See Ranii, *New Spurs to Settlement: Summary Jury Trials Gain Favor*, NAT'L L.J., June 10, 1985, at 1, col. 4. The first summary trial in the Northern District of Illinois was conducted by Judge Lambros in February of 1985, in an antitrust case; the plaintiff won a verdict of \$27 million in the summary jury trial. *Id.* Many state court systems have also embraced the concept. Most recently, summary jury trials have also been introduced in North Carolina state courts in a pilot program based on the model developed in federal courts. See 1 ALTERNATIVE DISPUTE RESOLUTION REP. 181-83 (1987).

11. REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 88 (Sept. 17, 1984). The original draft of the resolution endorsed the use of the summary jury trial "only with the voluntary consent of the parties." SUMMARY REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM 2 (Sept. 1984). The committee reported that "[a]lthough Judge Lambros is willing to require litigants to go through the procedure, it is your committee's view that it is necessary, both as a matter of law and equity, that summary jury trials be conducted only with the parties' consent." *Id.* at 3. Without explanation, the final draft of the resolution omitted the language regarding voluntary consent.

12. See Posner, *supra* note 6, at 366. In Chief Justice Burger's 1984 Report to the Judiciary, he noted that "summary jury trials are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals . . . . These judicial pioneers should be commended for their innovative programs. We need more of them in the future." BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY 15-16.

13. See GOLDBERG, *supra* note 3, at 282.



tlement by providing what is hoped to be a reasonably accurate forecast of trial outcomes. The procedure consists of counsel's presentations to an advisory jury of the expected evidence in each party's case. The jury is then given an abbreviated charge, and asked to render a verdict as to liability and damages. The summary jury trial lasts up to one day and its apparent evidentiary and procedural rules are few and flexible. The verdict of the jury is intended to give the parties a preview of the likely result of a full trial. Since the jury's determination is advisory only and nonbinding unless the parties agree otherwise, the litigants can obtain the opinions of a jury and preserve their seventh amendment rights to a jury trial without the expense and time concomitant to a full trial.

The goal of the summary jury trial is to refine the settlement calculus of the parties. The procedure is designed to improve the accuracy of a litigant's expectation about trial outcomes at a lower cost than continuing to litigate. Proponents of the summary jury trial claim that the procedure makes settlement significantly more likely, and avoids full trials in over ninety percent of cases.<sup>14</sup> However, no empirical study has substantiated the results of SJT utilization or compared its proclaimed efficiency to other settlement devices.<sup>15</sup>

As conceived by Judge Lambros, the summary jury trial is not confined to any particular type of civil case. Proponents have found it particularly effective in negligence actions, but the procedure has been used successfully to resolve contract, defamation, securities, toxic tort, employment discrimination, and even class-action asbestos and antitrust lawsuits.<sup>16</sup> Yet, even Judge Lambros concedes that

14. Lambros, *The Summary Jury Trial And Other Alternative Methods Of Dispute Resolution*, 103 F.R.D. 461, 472 (1984); see also Angiolillo & Tell, *supra* note 10, at 48. A study of settlements in federal courts observes that SJT inevitably serves two functions that promotes settlement: it provides "a forum for sounding out and evaluating the case, and at the same time [it] force[s] litigants to a level of self-examination and preparation that encourages private settlement discussions." PROVINCE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 16 (Federal Judicial Center 1986).

15. See Posner, *supra* note 6, at 382. Judge Richard Posner of the Seventh Circuit has suggested that a cursory review of case disposition statistics leads to the conclusion that the summary jury trial does not increase judicial efficiency. *Id.* As Judge Posner points out, "The judicial time taken up in summary jury trials might be spent equally well or even better on some other method of encouraging settlements especially when one considers how lavish the summary jury trial is with the judge's time: he spends a whole day trying to settle one case." *Id.*

16. See Lambros, *supra* note 14, at 472-77; see also PROVINCE, *supra* note 14, at 69 (summary jury trial applied to consolidated asbestos case involving over 100 plaintiffs); *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1372 (D. Minn. 1985) (seven day summary jury trial in antitrust class action). Judge Lambros has suggested that certain cases are not amenable to summary jury trial. He believes a case should not be assigned to summary jury trial if the case is likely to set precedent (rather than simply require the application of existing law), a government office or agency is a

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The author has been assumed that the Seventh Circuit's recent en banc decision does not preclude a summary jury trial in a summary jury trial district judge has determined that "to foster settlement was not intended from the normal

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PROVING, *supra* note 17. See Lambros, *supra* note 18. Rule 83 are not inconsistent with Rule 17.02 provide for a civil case for a trial, as he or she local rules setting the District of Illinois extensive. It provides that witnesses are allowed. See C.D. Ill., *Strandell* that a Rules of Civil Procedure. See *Farmer v. As* provides limited with the federal

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the summary jury trial is not a panacea in every case where settlement is not achieved in a pre-trial conference.<sup>17</sup> Most federal courts implement summary jury trial procedures by local rules which vest district judges with discretion to decide when and in what cases to schedule a summary jury trial.<sup>18</sup> Summary jury trial proceedings have been convened, however, without reference to a local rule, but simply upon general orders stemming from pre-trials.<sup>19</sup>

The authority of federal courts to order summary jury trials had been assumed and never questioned or considered until the Seventh Circuit's recent decision in *Strandell v. Jackson County*.<sup>20</sup> The Seventh Circuit held in *Strandell* that the Federal Rules of Civil Procedure do not authorize a district court to order a litigant to participate in a summary jury trial. In construing the powers accorded district judges under the federal rules, the court in *Strandell* determined that "while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."<sup>21</sup> Indeed, the decision implies

party in the case, or the credibility of a witness is a critical issue in the case. JACUBOVITCH & MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO 3 (Federal Judicial Center 1982). Judge Richard Enslin of the United States District Court for the Western District of Michigan, another advocate of summary jury trial, has identified three criteria for selecting cases for the procedure: where the attorneys on both sides are similarly competent; there is a genuine dispute about the monetary value of the case; and a day in court might be cathartic for the parties. See Zatz, *Summary Jury Trial: The Settlement Of A Toxic Torts Case*, 2 TOXICS L. RPT. 929, 930 (1988). Other judges select cases for a summary jury trial based on the number of days it would take to try the lawsuit; some courts have suggested that summary jury trial should be reserved for cases that would take 20 hours or more to try. See PROVINE, *supra* note 14, at 15 n.20.

17. See Lambros, *supra* note 6, at 1376.

18. Rule 83 of the Federal Rules of Civil Procedure authorizes local rules that are not inconsistent with the federal rules. In the Northern District of Ohio, Local Rule 17.02 provides that "[t]he Judge may, in his or her discretion, set any appropriate civil case for Summary Jury Trial or other alternative methods of dispute resolution, as he or she may choose." N.D. OHIO Loc. R. 17.02. Other jurisdictions also have local rules setting procedures for summary jury trials. For example, in the Central District of Illinois, Standing Order 7 governs any summary jury trial. The order is extensive. It provides that the procedure is not to last in excess of five hours, no witnesses are allowed, and the court may order the summary jury trial *sua sponte*. See C.D. ILL., STANDING ORDER 7, ¶¶ 1, 3, 15. To the extent the Seventh Circuit held in *Strandell* that a mandatory summary jury trial is not authorized by the Federal Rules of Civil Procedure, any local rules providing for such procedures are invalid. See *Farmer v. Arabian American Oil Co.*, 285 F.2d 720, 722 (2d Cir. 1960) (Rule 83 provides limited power as local rules are allowed only to the extent not inconsistent with the federal rules).

19. See *infra* note 58. Some courts have suggested in written opinions that the parties consider summary jury trial procedures. See, e.g., *King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 11 n.14 (D.D.C. 1987). It is apparent that some courts will not employ the procedures absent the consent of the parties. See *Ranii*, *supra* note 10, at 1, 30.

20. 838 F.2d 884 (7th Cir. 1988).

21. *Id.* at 887.

that any other interpretation of Rule 16 would have signaled that a quiet revolution had occurred in federal pre-trial practice. The Seventh Circuit asserted that a mandatory summary jury trial would be possible only upon radical surgery of the Federal Rules of Civil Procedure.<sup>22</sup> *Strandell* thus represents a refusal to endorse the summary jury trial as conceived and implemented by Judge Lambros.

This article examines the summary jury trial and its legality under federal law. Because the Seventh Circuit did not address the question of the manner in which a summary jury trial may be used with the consent of the parties, part I of this article discusses summary jury trial procedures, both in general and in the context of a recent complex toxic tort case resolved after a summary jury trial. Next, part II analyzes the *Strandell* decision. Particular attention is focused upon the inherent power of federal courts to control and manage their dockets, and the balance to be struck between the rights of individual litigants and judicial innovation with ADR mechanisms. Finally, part III of this article examines the future of the summary jury trial. The legal basis of consensual summary jury trials is analyzed, and the benefits and potential adverse consequences of participation in a summary jury trial are discussed from the practitioner's viewpoint.

## I. SUMMARY JURY TRIAL PROCEDURES

### A. The Summary Jury Trial In Theory

Judge Lambros developed the summary jury trial as a result of his perception that there is a certain class of cases in which the only bar to settlement is the difference in opinion among the parties as to how a jury will react to the evidence adduced at trial.<sup>23</sup> The summary jury trial is an attempt to narrow the gap between the parties' opinions as to potential trial outcomes.

In devising the procedure, Judge Lambros relied upon Rules 1, 16, and 39 of the Federal Rules of Civil Procedure, as well as the inherent power of a court to manage its docket.<sup>24</sup> Rule 1's mandate is that federal judges apply the federal rules to secure the just, speedy, and inexpensive determination of every case.<sup>25</sup> The summary jury trial is an obvious effort to resolve disputes with a savings of time and expense. The result is just if it is assumed the summary jury trial replicates a full trial, and the parties behave rationally and

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22. *Id.* at 888.

23. See Lambros & Shunk, *supra* note 9, at 44-45.

24. See Lambros, *supra* note 14, at 469-70, 484-86.

25. FED. R. Civ. P. 1. See *Real v. Hogan*, 828 F.2d 58, 63 (1st Cir. 1987) ("the Federal Rules must be construed to secure not only the 'just' but the 'speedy' determination of every action").

settle their differences based upon a preview of the likely outcome at trial. Furthermore, Rule 39(c), it is argued, authorizes federal judges to convene an advisory jury in any case not triable of right by a jury.<sup>26</sup> The rule codifies long-standing equity and maritime practice where a judge could convene a jury to advise the court on questions of fact.<sup>27</sup> The summary jury trial is analogous to an advisory jury under Rule 39(c), it is argued, to the extent the parties utilize the jury's perceptions of the facts in helping the court resolve the dispute.

The linchpin underlying the legality of the summary jury trial, however, is Rule 16. The declared purpose of the rule is to facilitate settlement. Rule 16(c)(7) provides that the "participants at any pre-trial conference . . . may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."<sup>28</sup> ADR mechanisms are therefore appropriate, and a distinct option under Rule 16(c)(7).

The inherent power of a federal judge to manage and control his or her docket is the final basis for the summary jury trial. The summary jury trial, in part, can be seen as a response to the myriad of problems caused by ever-expanding court dockets.<sup>29</sup> Judicial innovation in developing alternative methods of dispute resolution is one method to aid the court's efficient disposition of its business. The conclusion of Judge Lambros is that as federal judges have sufficient power and resources to manage their dockets, a federal court therefore has inherent authority to convene a summary jury trial.

Judge Lambros has analogized a federal judge's role in a summary jury trial to that of a weather forecaster.<sup>30</sup> The role of the court in fostering settlement is to predict for the disputants how a jury will decide the pending action; while there is a recognized margin of error in predicting the weather, let alone a jury verdict, the

26. FED. R. CIV. P. 39(c) provides that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury . . . ." The historical function of the advisory jury was "to inform the conscience of the court." *Parsons v. Bedford*, 3 Pet. 433, 466, 7 L.Ed. 732, 737 (1830).

27. See 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURES: CIVIL* § 2335 (1971 & Supp. 1987); see also *Hargrove v. American Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942).

28. FED. R. CIV. P. 16. The rule at subsection (a)(5) provides that a court may, in its discretion, direct the parties to appear before it for conferences for the purpose of "facilitating the settlement of the case." At subsection (c)(10), a court is authorized to use "special procedures for managing potentially difficult or protracted actions . . ." *Id.*

29. See Lambros, *supra* note 6, at 1368. The average case load for federal district judges doubled from 1940 to 1981, going from 190 to 350 cases. See Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). In 1986, over 255,000 new cases were filed in federal courts, and 5,222 civil jury trials were held, of which 355 lasted more than two weeks. See Angiolillo & Tell, *supra* note 10, at 48.

30. See Lambros, *supra* note 6, at 1371.

goal of the court is to reduce that margin of error. That is the premise of the summary jury trial: to give a realistic preview of a jury's verdict to the litigants so that they may have a reliable basis upon which to forge a settlement.

Assuming a case does not settle at a pre-trial conference,<sup>31</sup> a summary jury trial is set. Discovery should be completed. The parties may be guided by local rules setting forth summary jury trial procedures, or given materials by the court explaining the summary jury trial process.<sup>32</sup> Preparation for the proceeding is not inconsequential. To the extent counsel must present their version of the evidence in a summary jury trial, the parties must organize and prepare their cases for presentation to the jury. The parties or their principals are required to be present at the entire summary jury trial. Counsel are required to submit trial briefs. Abbreviated jury instructions are also submitted, consisting of instructions on the issues, burden of proof, and damages.

On the day of the summary jury trial, a jury venire is called and six jurors are chosen. The parties have two peremptory challenges. The jurors are informed only that the parties have decided to streamline the case and to dispense with usual court procedures. Typically, the process of *voir dire*, jury selection, and the court's preliminary remarks are completed in fifteen minutes.<sup>33</sup>

The actual "trial" consists solely of counsels' presentations. Procedural rules are few, and the form of the proceeding is flexible. Counsel may employ argument with summarization of evidence<sup>34</sup>

31. A pre-trial conference is not automatic in theory. See Fed. R. Civ. P. 16. A district court has discretion to set cases for pre-trial conferences. Most courts set pre-trials with scheduling orders under Rule 16(a) at the inception of the lawsuit. A district court has authority to compel parties and their principals to attend. See, e.g., *Lockhart v. Patel*, 115 F.R.D. 44, 46 (E.D. Ky. 1987). The pre-trial conference is a forum for discussion; the court cannot force a settlement on terms deemed objectionable to a litigant. See *Huertas v. East River Housing Corp.*, 813 F.2d 580 (2d Cir. 1987). A court-compelled settlement raises due process concerns. *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974) ("it is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial terms which one or both parties find completely unacceptable"). The Second Circuit recently held that a litigant cannot be sanctioned for the failure to settle before trial at a figure a trial court determined to be reasonable at a pre-trial conference, even when the eventual settlement was for the very figure the trial court had proposed. *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985). The Second Circuit reasoned that although the law favors the voluntary settlement of civil suits, "Rule 16 . . . was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise." *Id.* at 669.

32. See *Lambros*, *supra* note 14, at 461-88.

33. See *Lambros*, *supra* note 6, at 1377. While the usual summary jury trial involves six jurors, some federal judges have convened summary jury trials with only three jurors. See *PROVINE*, *supra* note 14, at 73 n.184.

34. Regarding summarization of evidence, commentators note:

In making statements to the jury, counsel are limited to presenting representations as to evidence which would be admissible at trial. While counsel are permitted to mingle representations of fact with argument, considerations of

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and are free to present exhibits to the jury. Objections by counsel are disfavored and not provided for in summary jury trial procedures; tactical maneuvering is to be kept to a minimum.<sup>35</sup> Time limits are imposed on each side, with the attorneys normally given an hour to present their cases. The hour of the plaintiff may be portioned to allow for a short rebuttal. Though testimony of witnesses is not characteristic of the prototype summary jury trial, a court may allow it if the parties agree to present limited live testimony in abbreviated form.

At the conclusion of the counsel's presentations, the court delivers the jury instructions.<sup>36</sup> The jury has not been informed that its role is advisory in nature. On the other hand, if the parties have agreed to be bound by the verdict, the jury will be so informed. It is not uncommon for the court to submit special interrogatories to the jury. The jurors are sometimes given a time limit on deliberations. Alternatively, the court may re-instruct the jury after one to two hours to return a consensus verdict, individual verdicts, or simply each juror's perception of liability and damages.<sup>37</sup>

Since the summary jury trial is intended as a learning process for the litigants, attorneys are given the opportunity to question the jurors after a verdict is rendered. By this process, the parties will gain a better appreciation of the jury's reaction to the evidence at issue. It is hoped that the verdict of the summary jury trial will

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responsibility and restraint must be observed. Counsel may only present factual representations supportable by reference to discovery materials, including depositions, stipulations, signed statements of witnesses, or other documents or by a professional representation that counsel personally spoke with the witness and is repeating what the witness stated.

JACOUBOVITICH & MOORE, *supra* note 16, at 39.

35. *Id.* However, should counsel overstep the bounds of propriety as to a material aspect of the case, the procedure as envisioned by Judge Lambros would allow for an objection to be received, and for the jury to be admonished. *Id.*

36. *Id.* In the District of Massachusetts, Judge McNaught has employed the summary jury trial in a novel respect, insofar as the judge's law clerk presides over the trial. Judge McNaught uses five jurors for a summary jury trial, while the judge himself sits as the sixth (and silent) juror. See Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 38-39 (1985). Judge McNaught has held in excess of 50 summary jury trials. See Ranii, *supra* note 10, at 30.

37. Several views have emerged regarding the desirability of unanimous verdicts. See PROVINZ, *supra* note 14, at 74. Judge Lambros does not require or stress unanimity, though he instructs the jury to attempt to reach a consensus. *Id.* Judge Lambros has estimated that split verdicts have occurred in about 10% of the summary jury trial proceedings he has conducted. See Ranii, *supra* note 10, at 30. This encourages settlement, according to Judge Lambros, because in "a split verdict . . . both sides can see the risk" of going to trial. *Id.* Judge Enslin, on the other hand, requires unanimity on the question of liability, which is separated from the issue of damages. In addition, Judge Enslin asks for votes from all present at the summary jury trial, including the bailiff, the judge's law clerk, and the court reporter. See PROVINZ, *supra* note 14, at 74.

prompt settlement discussions; this is the rationale for requiring the parties to be present. Judge Lambros claims that over ninety percent of the cases he has set for summary jury trial have settled; other judges utilizing the procedure have claimed a similar success rate.<sup>38</sup>

### B. The Summary Jury Trial In Operation and Practice

The flexibility inherent in the summary jury trial is manifest in the disparities characterizing summary jury trial proceedings held in different federal courthouses or in different types of cases resolved by summary jury trial proceedings in the same courtroom. Some summary jury trials last in excess of one day or incorporate live testimony to a greater degree than that originally envisioned by Judge Lambros.<sup>39</sup> A case study of the flexibility of the summary jury trial is illustrated by its recent use in *Stites v. Sundstrand Heat Transfer, Inc.*,<sup>40</sup> a large toxic tort case pending before Judge Enslin of the United States District Court for the Western District of Michigan.

The *Stites* case involved claims by twenty-nine plaintiffs alleging neurological damage and physical injury due to exposure to trichloroethylene, a toxic chemical that leaked from defendant's plant.<sup>41</sup> It was one of the nation's major groundwater pollution cases. The litigation centered around multiple experts expressing competing medical and toxicological opinions. The defendants had retained over sixty experts, while the plaintiffs had employed twenty. Negotiations during pre-trial conferences had shown the parties to be millions of dollars apart in their evaluation of the settlement value of the case. The defendants had spent three million

38. See Lambros, *supra* note 6, at 1377. No empirical study has assessed the efficiency of the summary jury trial, or compared it to other settlement techniques. See Posner, *supra* note 6, at 381-83. However, in the Western District of Oklahoma, the combined use of the special settlement conferences and the summary jury trial is claimed to have increased settlement rates from 84% to 96%. See THE SUMMARY JURY TRIAL, THE JUDICIAL CONFERENCE OF THE SIXTH CIRCUIT OF THE UNITED STATES 2-5 (May 16, 1985) (speech of Hon. Lee West).

39. See, e.g., *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1372 (D. Minn. 1985) (seven day summary jury trial with live testimony). In *Cincinnati Gas & Electric Co. v. GTE*, 117 F.R.D. 597, 601 (S.D. Ohio 1987), a proposed summary jury trial was scheduled for seven days, but when held it lasted two weeks. See 6 ALTERNATIVES 1 (Feb. 1988).

40. No. K84-299 (W.D. Mich.). Judge Enslin is also a leading proponent of the summary jury trial. He has utilized the procedure on over fifty occasions. See Angiolillo & Tell, *supra* note 10, at 48.

41. See Zatz, *supra* note 16, at 930. The case arose in 1983 when trichloroethylene and related organic solvents were discovered in several residential wells near the defendant's facility in Dowagiac, Michigan. The plaintiffs claimed that they had sustained chronic systemic chemical poisoning, with resulting personal injury to virtually every organ in their human bodies. *Id.* Plaintiffs also alleged that they had suffered an increased risk of cancer due to chemical exposure and suppression of their immune systems. *Id.*

dollars on discovery, and millions of dollars, with the case proceeding to trial. The parties requested a summary jury trial.

Judge Enslin's summary jury trial format was a departure from the traditional scope and too narrow. The court expanded the trial to a six hour day. The parties were also given the opportunity to present a video monologue. The qualifications of the experts were a myriad of scientific disciplines. The jury removed the issues from the courtroom and were given one day to decide about the origin of the storage and discharge of the time of the parties selected. The jury was a representative group that was given the issue in the law. The jury, both to the plaintiff and the defendant, might ultimately dismiss the case.

With the summary jury trial, approximately six weeks before trial, the counsel later consisted of preparing the parties during the week prior to the summary jury trial. The summary jury trial was a versatile experience and build important counsel revealed. The trial lasted 120 hours of testimony and tape presentation.

After selection of the jury in the *Stites* case, the "background" testimony. Plaintiff's testimony. Plaintiff's testimony.

42. See 6 ALTERNATIVES 1.

43. See Zatz, *supra* note 16, at 930. The case would be binding on the summary jury trial.

44. See Zatz, *supra* note 16, at 930.



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dollars on discovery costs and attorney's fees, the plaintiffs one million dollars, with the prospect of both sides spending more as the case proceeded toward trial.<sup>42</sup> In these circumstances, both parties requested a summary jury trial.

Judge Enslin instituted several modifications to the summary jury trial format in *Stites*. Because the case was simply too broad in scope and too complex to be realistically presented in one day, the court expanded the summary jury trial to three days. Each party had a six hour time limit on their respective presentations. The parties were also permitted to present expert testimony in the form of video monologues, because the jury would be asked to assess the qualifications and credibility of dozens of experts and to resolve a myriad of scientific and medical controversies. Moreover, the court removed the issue of liability from the case. Instead, the parties were given one-half hour each to present background information about the origins of the groundwater contamination, the defendant's storage and disposal practices, and the state of the art prevailing at the time of the contamination. As a focus on damages, the court and parties selected one family consisting of four plaintiffs as a representative group that would present virtually every medical condition at issue in the lawsuit. Finally, Judge Enslin decided to utilize a second jury, both to produce a range of values within which the parties might ultimately settle, and to avoid an attempt by either party to dismiss the advisory verdict as a fluke.<sup>43</sup>

With discovery and motions complete, the parties had approximately six weeks to prepare for the summary jury trial. Defense counsel later revealed that the majority of their preparation consisted of preparing video monologues of expert testimony. Because the parties did not exchange videotapes of their experts until one week prior to trial and as cross-examination plays no part in a summary jury trial, the attorneys had to anticipate the testimony of adversarial experts, tape potentially responsive testimony in advance, and build impeachment theories into their presentations. Defense counsel revealed that they selected appropriate pieces from nearly 120 hours of videotape for inclusion in their ultimate three hour tape presentation.<sup>44</sup>

After selection of twelve jurors, the summary jury trial opened in the *Stites* case with each side allowed to make a thirty minute "background" presentation that replaced any discussion of liability testimony. Plaintiffs' "background" presentation consisted of a

42. See 6 ALTERNATIVES 19-20 (Feb. 1988).

43. See Zatz, *supra* note 16, at 930. The parties did not agree that the verdicts would be binding. *Id.* Judge Lambros has also utilized multiple jury panels in an asbestos summary jury trial. See PROVINCE, *supra* note 14, at 70 n.174.

44. See Zatz, *supra* note 16, at 930-31.



videotape complete with a narrator, shots of neighborhood children at play, and an interview with the representative plaintiff family in their home. Plaintiffs stressed that trichloroethylene is a poison, which the defendant had dumped and buried despite knowledge of its hazards. Defendants' "background" presentation consisted of an oral presentation by counsel to the effect that engineering and environmental experts had found that defendant's storage facilities were state of the art, leakage was small and accidental, and the surrounding ecosystem was healthy.<sup>45</sup>

The next phase of the summary jury trial involved medical claims. Intertwining their four and one-half hour presentation with argument and videotapes of their experts, plaintiffs' medical case posited claims that the chemical exposure had caused neurological injury, immune dysfunction, and increased risk of cancer. In essence, plaintiffs had one full day of argument, uninterrupted by objection or cross-examination, before the defendant could respond. Plaintiffs requested \$2.5 to 3 million in damages for past injuries, and \$10,000 annually for each of the four plaintiffs for future injuries. Defendants' presentation consumed the second and part of the third day of the summary jury trial. Defendant's presentation centered upon videotape testimony of a multi-disciplinary team of physicians, toxicologists, and carcinogenesisists. Defendant argued that none of the medical conditions of the plaintiffs could be linked causally to chemical exposures and that exposures even at thousands of times the levels to which the plaintiffs had been exposed could not produce neurological damage. Thereafter, plaintiffs were given one hour to present rebuttal arguments.<sup>46</sup>

Judge Enslin divided the jurors into two groups, and directed the juries to reach a verdict in three hours. The court informed the juries that the parties had insisted on two separate jury verdicts, and that a procedure had been developed for dealing with any varying verdicts. The first jury returned a \$2.8 million verdict for plaintiffs in less than the allotted time. After requesting additional time to deliberate, the second jury returned a defense verdict. The court then requested the second jury to deliberate further and decide upon a damage figure that assumed they had found in favor of plaintiffs; the second jury returned with a total figure of \$300,000. Counsel were then allowed to question the jurors. Some jurors complained that they were unable to keep track of the testimony and weigh competing concerns about the toxicity of trichloroethylene.

45. *Id.* at 931. Unlike most summary jury trials (and indeed actual trials in federal courts), Judge Enslin allowed extensive voir dire lasting four hours. See 6 *ALTERNATIVES* 20 (Feb. 1988); see also Enslin, *Alternative Dispute Resolution: Summary Jury Trial In A Toxic Tort Case*, 2 *TOXICS L. RPT.* 1015, 1016 (1988).

46. See Zatz, *supra* note 16, at 932.

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The parties negotiations, which consisted of all twenty to determine disclaimed the sum stated to both sides the merits, yet all the verdicts in the of what the attorney nine to fourteen dollars.<sup>46</sup>

## II. Strandell v

Local rules authorize orders trial; other federal jury trial entered in Rule 16

47. *Id.* at 931. questionnaire University. Stites summary jury Toxic Tort Cases. 2 note 45, at 1017-18.

48. See Enslin, would not have settled 935. Defendants estimated they v Enslin, *supra* note 4 enormous resources, toxic tort cases. See

49. Some federal See, e.g., C.D. ILL. STANDING ORDER 6A: eral courts have ordered Cincinnati Gas & El Parties subject to court out local rules author up the rules as they study of settlement

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Indeed, some of the jurors commented that the editing of the testimony on the videotapes left them suspicious as to whether they heard everything the witnesses had to say.

The parties proceeded immediately into marathon settlement negotiations, which resulted the next day in a \$3.5 million settlement of all twenty-nine claims, with the plaintiffs retaining the right to determine distribution.<sup>47</sup> Judge Enslin and the attorneys proclaimed the summary jury trial a success. The proceeding demonstrated to both sides that they might win the case at a full trial on the merits, yet also risk a defeat as shown by the inconsistency of the verdicts in the summary jury trial. The case was settled in lieu of what the attorneys and court had estimated would have been a nine to fourteen month trial costing in excess of several million dollars.<sup>48</sup>

## II. *Strandell v. Jackson County*: THE LEGALITY OF MANDATORY SUMMARY JURY TRIALS

Local rules in the courtrooms of Judges Lambros and Enslin authorize orders directing litigants to participate in a summary jury trial; other federal courts compel participation in mandatory summary jury trial proceedings by local rule or pursuant to orders entered in Rule 16 pre-trials.<sup>49</sup> This practice remained unchallenged

47. *Id.* at 931-32. Following the summary jury trial, an extensive survey and questionnaire was administered to the jurors by Professor Marie Provine of Syracuse University. The results of the study are summarized in Judge Enslin's report of the *Stites* summary jury trial. See Enslin, *Summary Jury Trials Can Help Settlement in Toxic Tort Cases*, 2 ALTERNATE DISPUTE RESOLUTION REP. 46 (1988); Enslin, *supra* note 45, at 1017-18.

48. See Enslin, *supra* note 47, at 48. Defense counsel believed that the case would not have settled without the summary jury trial. See Zatz, *supra* note 16, at 935. Defendants estimate trial costs would have approximated \$3 million, while plaintiffs conceded they would have expended nearly \$500,000 to prepare for trial. See Enslin, *supra* note 47, at 48. Judge Enslin believed the summary jury trial "saved enormous resources," and has indicated his intention to use the device with other toxic tort cases. See Enslin, note 45, at 1017.

49. Some federal courts direct participation of litigants based upon local rules. See, e.g., C.D. ILL. STANDING ORDER 7, ¶ 15; W.D. MICH. LOC. R. 44(a),(b); D. MONT. STANDING ORDER 6A; N.D. OHIO LOC. R. 17.02; W.D. OKLA. LOC. R. 17 (I). Other federal courts have ordered SJT proceedings without reference to a local rule. See, e.g., *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987). Parties subject to coerced participation in a summary jury trial in jurisdictions without local rules authorizing summary jury trials are apt to perceive that judges "make up the rules as they go along" to mandate such a settlement procedure. However, a study of settlement strategies in federal courts has concluded:

The decision on the part of many judges to forego a detailed presentation of the summary jury option in either court rules or standing orders should not, however, be taken to mean that procedures are typically developed on an ad hoc or case-by-case basis. The judges and magistrates who have spoken out on the process have developed their own standard procedures for summary jury trial, which they follow in all, or nearly all, cases.

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for seven years until plaintiffs' counsel in *Strandell v. Jackson County* questioned the authority of federal courts to coerce participation in mandatory summary jury trials.

#### A. Background to *Strandell*

To describe the case briefly, in March 1985, the plaintiffs in *Strandell* filed their action under 42 U.S.C. section 1983 in the United States District Court for the Southern District of Illinois. Plaintiffs alleged that the defendant law enforcement officials and their county employer had violated the constitutional rights of the plaintiffs' decedent because of the purported unconstitutional arrest, strip search, beating, and death of the plaintiffs' decedent while in the custodial care of the defendants at their county jail.<sup>50</sup> Plaintiffs successfully opposed and defeated defendants' successive motions to dismiss and for summary judgment.<sup>51</sup> In addition to serving and obtaining extensive written discovery, plaintiffs' counsel deposed the six party defendants, thirteen witnesses and the defendants' two experts; defense counsel, in contrast, deposed no witnesses.<sup>52</sup> Plaintiffs' counsel also secured statements from twenty-one witnesses. Defense counsel filed a motion to compel production of these witness statements, which the court denied for reasons of privilege.<sup>53</sup> As the litigation progressed, plaintiffs made a settlement demand for the insurance policy limits of defendants, and defendants made no counter-offer; in addition, the defendants' insurance carriers filed their own declaratory judgment action seeking to escape defense and indemnity responsibility under their policies.<sup>54</sup>

At an initial pre-trial conference, when faced with these positions on settlement, the court suggested the possibility of resolving the case with a summary jury trial. The court directed the parties to the procedures established by Judge Lambros because no local rule

PROVINE, *supra* note 14, at 72.

50. See Plaintiffs' Amended Complaint at ¶¶ 1-87, *Strandell v. Jackson County*, No. 85-4159 (S.D. Ill. Mar. 15, 1985).

51. The *Strandell* case has generated multiple opinions. The ruling denying defendants' first motion to dismiss is reported at 634 F. Supp. 824 (S.D. Ill. 1986). The opinion denying defendants' second motion to dismiss and for summary judgment is reported at 648 F. Supp. 126 (S.D. Ill. 1986). The ruling denying defendants' motion to compel production of witness statements is reported at 7 Fed. R. Serv. 3d 715 (S.D. Ill. 1986). The opinion holding plaintiffs' counsel in criminal contempt is reported at 115 F.R.D. 333 (S.D. Ill. 1987).

52. See Plaintiffs' Status Report at 3-4, *Strandell v. Jackson County*, No. 85-4159 (S.D. Ill. Aug. 28, 1986).

53. 7 Fed. R. Serv. 3d 715 (S.D. Ill. 1986).

54. See Plaintiffs' Status Report at 6, *Strandell v. Jackson County*, No. 85-4159 (S.D. Ill. Aug. 28, 1986). The declaratory judgment action was filed in state court and ultimately removed to federal court. See *Imperial Casualty & Indemnity Co. v. USF&G, et al.*, No. 86-4137 (S.D. Ill.).

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existed to establish its utilization.<sup>55</sup> P trial, and instead the court granted filed a joint pre-tr

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existed to establish a summary jury trial or to outline procedures for its utilization.<sup>55</sup> Plaintiffs expressed no interest in a summary jury trial, and instead filed a motion to advance the case for trial, which the court granted.<sup>56</sup> The parties finished discovery of experts, and filed a joint pre-trial order.

At the final pre-trial conference on the eve of trial, the court again raised the possibility of resolving the dispute through a summary jury trial. Plaintiffs' counsel declined this suggestion a second time, and answered ready for an immediate trial. At this juncture, the court ordered the participation of the parties in a mandatory summary jury trial. Plaintiffs' counsel objected to the order on the grounds that federal judges have no authority under the Federal Rules of Civil Procedure to convene a mandatory summary jury trial, and because plaintiffs would be unfairly prejudiced during the procedure by having to reveal their trial strategy as well as the multitude of witness statements already held privileged by the court in its earlier denial of defendants' motion to compel.<sup>57</sup> The court overruled these objections, and ordered the parties to select a jury for the summary jury trial. When plaintiffs' counsel declined to do so, the court held plaintiffs' counsel in criminal contempt.<sup>58</sup>

### B. The Seventh Circuit's Decision

On appeal, United States Court of Appeals for the Seventh Circuit reversed summarily at oral argument,<sup>59</sup> and issued its full opinion four months later.<sup>60</sup> The Seventh Circuit premised its ruling with a recognition that while courts have substantial inherent power to manage their dockets,<sup>61</sup> judicial experiments such as the summary

55. The procedures prepared by Judge Lambros are readily available. See Lambros, *supra* note 14, at 482-88.

56. Strandell v. Jackson County, No. 85-4159, slip op. at 1 (S.D. Ill. Sept. 3, 1986).

57. See Plaintiffs' Motion Objecting To Mandatory SJT at ¶¶ 1-5, Strandell v. Jackson County, No. 85-4159 (S.D. Ill. Mar. 31, 1987).

58. Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill. 1987). Perhaps one reason for the lack of any legal challenge to orders mandating a summary jury trial is the difficulty in appealing discovery orders. A party might attempt to file a mandamus action or interlocutory appeal, but such attempts are usually unsuccessful in the context of discovery orders. A litigant may challenge a discovery order by way of criminal contempt. If the underlying order is invalidated, the criminal contempt judgment will be vacated; however, the party must be willing to pay the price of being punished if the validity of the order he has disobeyed is upheld. See Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150, 1157 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985). For this reason, review of a discovery order by way of criminal contempt has been described as a "crude but serviceable method" of securing appellate jurisdiction. *Id.*

59. Strandell v. Jackson County, 830 F.2d 195 (7th Cir. 1987).

60. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988).

61. *Id.* at 886 (citing Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962)); J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1323 (7th

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In construing plain language of at subsection (c), alternative dispute achieve settlement the behest of the ferres with a party exceeds the scope court-ordered sum cept underlying th to allow a party interests. The Sev mentary on the power does not in compromise.<sup>70</sup>

In so construing the district court's ruling, the court says the rule is a narrowly tailored, legitimate interest.

68. *Id.*

69. See *supra* note 68.  
70. Strandell, 82.

(Cir. 1985)). The Seventh Circuit, in contrast to other parts of the majority, was as noncoercive with respect to the drafters' comment sentence provides: "A conference before trial admissions regarding a rule should be discussed." *Id.* (quoting the drafters' comment). The court insists upon the ability of the drafters to insist upon the ability of the rule should not be into stipulations or to the Fed. R. Civ. P. 16 adopted in *Edwards Const. Co. v. Edwards Const. Co.* (1976), and *Identiseal Corp. v. Identiseal Corp.* (1977), to further bolster the *J.F. Edwards Const. Co. v. Edwards Const. Co.* Rule 16 to compel parties to stipulate. In *Identiseal Corp.*, the district courts lacked the authority of *J.F. Edwards Const. Co. v. Edwards Const. Co.* Ninth Circuit in *Stratton v. Stratton*. Advisory Committee on the Rules of the rule coercive." *Id.*; see also (the 1983 amendment to the Rules of the "beast").

The participants at any conference under this rule may consider and take action with respect to. . . .

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . . .

(11) such other matters as may aid in the disposition of the action.

FED. R. CIV. P. 16(c)(7), (11).

66. *Strandell*, 838 F.2d at 888. Judge Lambros has written, in a related context, that “the judicial process is not . . . coercive [and] . . . courts do not nullify the free will of litigants.” Lambros, *supra* note 6, at 1367.

67. *Strandell*, 838 F.2d at 888.

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tended to foster settlement, its purpose was never to achieve that result by allowing a federal court to require an unwilling litigant to be "sidetracked from the normal course of litigation."<sup>68</sup>

In construing Rule 16, the Seventh Circuit looked both to the plain language of the rule and its advisory committee note. The rule, at subsection (c), simply refers to the possible use of extrajudicial or alternative dispute resolution devices as a potential means to achieve settlement.<sup>69</sup> The rule does not require a litigant to do so at the behest of the district court. To the extent a federal judge interferes with a party's determination of settlement techniques, a court exceeds the scope of its case management powers under Rule 16. A court-ordered summary jury trial thus would be contrary to the concept underlying the American system of jurisprudence that purports to allow a party to present its case as it deems to be in its best interests. The Seventh Circuit also observed that the drafters' commentary on the rule makes plain that a district court's pre-trial power does not include "clubbing the parties" into "an involuntary compromise."<sup>70</sup>

In so construing Rule 16, the Seventh Circuit made clear that a district court's authority to impose settlement devices under the rule is a narrowly circumscribed area of power. While courts have a legitimate interest in clearing up congested trial calendars, the need

68. *Id.*

69. See *supra* note 65.

70. *Strandell*, 838 F.2d at 887 (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)). The Seventh Circuit also stated that the drafters' commentary with respect to other parts of Rule 16 further reinforced the court's interpretation of Rule 16 as noncoercive with respect to settlement procedures. *Id.* at 887. The court cited to the drafters' comments to the last sentence of Rule 16(c), added in 1983. *Id.* This sentence provides: "At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed." *Id.* (quoting Fed. R. Civ. P. 16(c)). The Seventh Circuit observed that the drafters' comments made plain that reference to "authority" was not intended to insist upon the ability to settle the litigation. *Id.* The comments further made clear that the rule should not be construed to permit a judge to compel attorneys to enter into stipulations or to make admissions considered to be unreasonable. *Id.* (citing Fed. R. Civ. P. 16 advisory committee's notes). The Seventh Circuit also cited *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir. 1976), and *Identiseal Corp. v. Positive Identification Sys.*, 560 F.2d 298 (7th Cir. 1977), to further bolster its interpretation of Rule 16 as noncoercive. *Id.* at 887-88. In *J.F. Edwards Const.*, the Seventh Circuit had held that a district court could not use Rule 16 to compel parties to stipulate facts to which they could not voluntarily agree. In *Identiseal Corp.*, the Seventh Circuit found Rule 16 was noncoercive, holding that district courts lacked power to order a party to undertake further discovery. While *J.F. Edwards Const.* and *Identiseal* antedate the amendments to Rule 16, the Seventh Circuit in *Strandell* pointed out that "nothing in the amended rule or in the Advisory Committee Notes suggests that the amendments were intended to make the rule coercive." *Id.*; see also *Salahaddin v. Harris*, 782 F.2d 1127, 1133 (2d Cir. 1986) (the 1983 amendments to Rule 16 "did not [set] loose a strange and capricious new beast").

for convenience and expedience cannot exceed statutory and inherent limitations. Indeed, legal and prudential constraints on judicial power underlie the Seventh Circuit's reading of Rule 16 as non-coercive in nature.

To that end, the pre-trial conference under Rule 16 was intended to be "informational and factual" rather than coercive.<sup>71</sup> Compelling obedience to court orders with respect to the pre-trial process is limited to situations involving, for example, a party's failure to prosecute its case, prepare a pre-trial order, or appear at a pre-trial conference.<sup>72</sup> Rule 16 cannot be invoked as authority to impose a summary jury trial in the guise of settlement negotiations. At most, the court can only require the parties to consider settlement by discussion—or possible participation in a summary jury trial—as a means of disposition of the case. Therefore, the purpose of Rule 16 is to achieve *voluntary* agreement for expediting trial.<sup>73</sup>

The second basis of the Seventh Circuit's decision rested on the notion that a mandatory summary jury trial would seriously affect the core concepts of disclosure in pre-trial discovery and the delicate framework of the work-product privilege.<sup>74</sup> The Seventh Circuit stated that the rules concerning discovery and work-product privilege reflect a "carefully crafted balance between the needs for pre-trial disclosure and party confidentiality."<sup>75</sup> The court opined that a mandatory summary jury trial could upset that balance, for a party should not be required to undergo a summary jury trial if it would force the litigant to divulge privileged information prior to a full trial on the merits.<sup>76</sup> Such information, if obtainable at all by an adversary, should be obtained through the normal discovery process and not as a result of a summary jury trial.<sup>77</sup>

Indeed, the Seventh Circuit indicated that any other interpreta-

71. See *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1323 (7th Cir. 1976).

72. *Id.* at 1323-25.

73. This premise is well founded in the Seventh Circuit. For example, under Rule 16, the Seventh Circuit has determined that a district court does not have the power to compel a litigant to stipulate to facts. See *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir. 1976). A district court also has no authority to require a party to initiate discovery that counsel believes would not serve the interests of their clients. See *Identiseal Corp. of Wisconsin v. Positive Identification Sys.*, 560 F.2d 298, 301 (7th Cir. 1977). In addition, the Seventh Circuit has found that Rule 16 does not permit a district court to force a party to consent to a referral of the trial of their case to a magistrate. See *Adams v. Hecker*, 794 F.2d 303, 307 (7th Cir. 1986); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041 (7th Cir. 1984).

74. *Strandell*, 838 F.2d at 888 (citing Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947)).

75. *Id.*

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tion of Rule 16 with regard to pre-trial settlement practice would constitute a "radical alteration of the considered judgments contained in Rule 26 and the case law."<sup>78</sup> For this reason, the *Strandell* court justified its holding that Rule 16 could not be used coercively by observing that the rule-making process of the Supreme Court and Congress,<sup>79</sup> in providing for trial practice procedures, could hardly have undertaken such a radical alteration of either discovery concepts or the framework for the work-product privilege. The Seventh Circuit reasoned that if such radical surgery of the federal rules is to be undertaken, Congress and the Supreme Court would have to amend the Federal Rules of Civil Procedure to explicitly provide for mandatory summary jury trials.<sup>80</sup> Hence, the Seventh Circuit concluded that Rule 16 does not permit district courts to compel parties to participate in summary jury trials.<sup>81</sup>

Underlying the second basis of the Seventh Circuit's decision lies the notion that the substantive rights of individual litigants should not be sacrificed in the guise of regulating procedure. This concept is embodied in section 2072 of the Rules Enabling Act.<sup>82</sup> In enacting section 2072, Congress delegated authority to the Supreme Court to prescribe rules of procedure for federal courts.<sup>83</sup> This delegation rests upon the necessity for uniformity on procedural matters in federal courts.<sup>84</sup> However, the Rules Enabling Act also mandates the preservation of the substantive rights of litigants. To this end,

78. *Id.*

79. *Id.* (citing the Rules Enabling Act, 28 U.S.C. § 2072 (1982)). The Rules Enabling Act provides in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

28 U.S.C. § 2072 (1982).

80. *Strandell*, 838 F.2d at 884.

81. *Id.* A local rule providing for a mandatory summary jury trial would be invalid in light of the Seventh Circuit's ruling. It is of no legal significance that local district court rules, in accordance with Rule 83, have been furnished to the Judicial Council of the relevant circuit and the Administrative Office of the United States Courts. This is because district courts act in an administrative rule-making capacity when promulgating local rules and not in the same manner as when courts decide questions of law. See *Mississippi Publishing Co. v. Murphree*, 326 U.S. 438, 444 (1946) ("the fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency").

82. See *supra* note 79.

83. *Id.*

84. See generally *Hanna v. Plumer*, 380 U.S. 460 (1965).



the Rules Enabling Act contains a limitation prohibiting rules that "abridge, enlarge or modify substantive rights."<sup>85</sup>

The distinction between substance and procedure is often unclear. Rules that may be classified as procedural may also bear directly on the substantive rights of litigants.<sup>86</sup> Therefore, while the Rules Enabling Act delegates power to the Supreme Court to govern practice and procedure, this power inevitably includes matters falling in the uncertain area between substance and procedure.<sup>87</sup> However, in prescribing rules in this uncertain area, the Supreme Court cannot avoid the congressional limit on affecting substantive rights. Thus, the Federal Rules of Civil Procedure intentionally reflect a balance between the often competing concerns of procedural matters, such as the need for judicial efficiency or for pre-trial disclosure, and substantive matters, such as the need for party confidentiality or the preservation of other individual litigant rights.

Once rules have been prescribed according to the process set forth in the Rules Enabling Act, Congress and the Supreme Court have acted to determine the appropriate balance between such competing concerns. After the appropriate balance has been prescribed, the rights of litigants cannot be altered or compromised in the guise of regulating procedure. To alter the core of any such rules, the appropriate process of the Rules Enabling Act must be followed.

*Strandell*, in this context, is a recognition that the rights of individual litigants are not to be subordinated to judicial authority to impose requirements to settle cases. The federal rules reflect a well-reasoned balance between the need for judicial efficiency and the rights of individual litigants that trial lawyers rely upon in preparing their cases. *Strandell* signifies that an exercise of a district court's power to promote judicial efficiency cannot sacrifice litigant rights or upset the balance embodied in the Federal Rules of Civil Procedure. Alterations of the federal rules are within the province of Congress and the Supreme Court, and not within the guise of a court's inherent power.<sup>88</sup> An innovation of the magnitude of the summary jury

trial cannot be carefully designed.

As the Seventh Circuit has held, the summary jury trial is a privilege. Therefore, the parameters of a district court's discretion to preserve the integrity of such practice are limited to the case itself.

In *Strandell*, the summary jury trial placed the parties in a position of strategy where the counsel would have to weigh the arguments of the risk of irreparable harm caused by revealing the facts in a summary jury trial. The discovery with respect to the summary jury trial that the parties would have to make in the trial of different jury trials to prove their case in the circumstances. More importantly, the motion raises the question of whether the litigants to adopt a summary jury trial or other sanction.

85. See *supra* note 79.

86. See *supra* note 84.

87. *Id.*

88. This notion is further underscored by the fact that legislation has been introduced in the last two sessions of Congress to amend the Federal Rules of Civil Procedure and Title 28 of the U.S. Code to grant authority to district courts to convene summary jury trials. See H.R. 473, 100th Cong., 1st Sess., 133 CONG. REC. H. 157 (1987) ("Alternative Dispute Resolution Promotion Act of 1987"); S. 2038, 99th Cong., 2d Sess., 132 CONG. REC. S. 848 (1986) ("Alternative Dispute Resolution Promotion Act of 1986"). The proposed legislation would require attorneys to advise their clients of ADR mechanisms, and to file notice with the court certifying that the attorney has complied. The proposed statutes also provide that if the parties consent to ADR mechanisms, the court may enter an order governing such proceedings. Available ADR mechanisms expressly include summary jury trial proceedings. *Id.*

89. *Hickman v. Totten*, 407 U.S. 194, 204 (1962). It is familiar to the federal rules. See, e.g., *Prejudice*; *Miranda v. Arizona*, 384 U.S. 439, 444 (1966) (sanctions on attorneys for failure to advise clients of their rights). In the context of summary jury trials, the Code of Professional Responsibility provides that "if a party in good faith . . . asserts a position . . . tactics delay the inequity of the motions of a summary jury trial. Absent a rule on summary jury trials, the well desire to impose summary jury trials upon a party for its failure to participate in mediation. *Merchants Nat'l Bank v. Wickhorst*, 1987 WL 10000 (S.D. Cal. 1987).

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trial cannot be undertaken by a single judge in derogation of the carefully designed procedure for judicial rule-making.

As the Seventh Circuit recognized in *Strandell*, a mandatory summary jury trial has the potential of disrupting the work-product privilege. Therefore, the Seventh Circuit's interpretation of the parameters of a district court's pre-trial authority was necessary in order to preserve the framework of *Hickman v. Taylor*.<sup>89</sup> The necessity of such parameters can best be exemplified by the *Strandell* case itself.

In *Strandell*, an order compelling participation in the summary jury trial placed plaintiffs' counsel in a position of adopting one line of strategy different from that of a full trial on the merits. Plaintiffs' counsel would have had to confine their presentation to conclusory arguments of the defendants' alleged liability in order to avoid the risk of irreparable harm and injury to their case, which would be caused by revealing the privileged witness statements in the summary jury trial. Since defense counsel had failed to undertake any discovery with respect to witnesses, defense counsel therefore would become the recipient of the specifics of testimony in the summary jury trial that they had not bothered to investigate. Forcing adoption of different trial strategies undermines the goal of summary jury trials to promote settlement. In addition, the procedure in these circumstances merely results in unnecessary increased costs and delays. More interestingly, however, the potential for sham participation raises the question of whether a district court could order litigants to adopt a more meaningful strategy, with contempt of court or other sanctions as a consequence of the failure to do so.<sup>90</sup>

89. *Hickman v. Taylor*, 329 U.S. 495 (1947).

90. It is familiar law that district courts may enter sanctions for violations of the federal rules. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626 (1962) (dismissal with prejudice); *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983) (monetary sanctions on attorneys for failure to comply with pre-trial conference requirements). In the context of pre-trials, Rule 16(f) authorizes district courts to impose sanctions "if a party or party's attorney fails to participate [in a pretrial conference] in good faith . . ." Fed. R. Civ. P. 16(f); see also American Bar Association Model Code of Professional Responsibility, Disciplinary Rule 7-102(A) ("a lawyer shall not . . . assert a position, conduct a defense, delay a trial, or take other action" when such tactics delay the inevitable outcome of the litigation). The question would become whether a court could impose sanctions for a party doing no more than going through the motions of a summary jury trial, well knowing that they will not settle the case. Absent a rule on summary jury trials covering imposition of sanctions, the court may well desire to impose sanctions for lack of good faith participation. Compare *Tiedel v. Beech Aircraft Corp.*, 118 F.R.D. 54, 58 (W.D. Mich. 1987) (attorney's fees imposed upon party for its failure to better a mediation award at the time of trial where party rejected mediation award and elected to proceed to trial) and *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715 (E.D. Pa. 1983) (defendant failed to participate in court-ordered arbitration program, and court notes that motion to strike defendant's request for a jury trial *de novo* would be appropriate), with *Lyons v. Wickhorst*, 42 Cal. 3d 911, 231 Cal. Rptr. 738, 727 P.2d 1019 (1986) (trial

In *Strandell*, a strategy more meaningful than sham participation would have necessitated the divulgement of privileged information and witness statements.<sup>91</sup> Indeed, compelled participation in the summary jury trial would have resulted in a complete reversal of the district court's earlier ruling denying the defendant's motion to compel production of the privileged materials.<sup>92</sup> In addition, court-ordered participation effectively compels counsel to adopt a particular strategy over one at trial that would better promote their client's interests.

Under such circumstances, mandatory application of an experimental device would effect a drastic altering of the core of *Hickman v. Taylor*. The district court's initial scheduling order in *Strandell* set only a discovery cutoff date, a pre-trial, and trial date. The possibility of a summary jury trial was not mentioned, nor did the local rules provide for a possible summary jury trial.<sup>93</sup> The plaintiffs relied on the scheduling order in preparing their case, as well as on the specific rules laid down by the Federal Rules of Civil Procedure. The plaintiffs prepared their case and obtained a myriad of privileged witness statements.<sup>94</sup> The order compelling a mandatory "summary jury trial" would destroy any semblance of protection accorded plaintiff's discovery and investigatory efforts.

Moreover, a non-consensual summary jury trial, in effect, converts pre-trial practice into another discovery mechanism, thereby allowing one litigant to make unfair use of his opponent's diligent preparation for trial. Pre-trial, in the guise of a summary jury trial, should not have the effect of forcing a party to divulge privileged information to an opponent after the close of discovery. Pre-trial is neither the time nor place for discovery of the specifics of expected testimony of a witness.

Indeed, preparation for trial traditionally rests in a party's own efforts aided by the tools of discovery. Hence, a mandatory summary jury trial necessarily destroys the basis upon which the work product doctrine rests, as it would be inconsistent with the doctrine's role of promoting the adversary system by safeguarding the fruits of

court exceeded its authority in dismissing plaintiff's action on account of plaintiff's willful failure to present evidence in a court-ordered arbitration, since arbitration rules had no guidelines covering sanctions or dismissal). However, elucidation of the powers of district judges to interfere with trial counsel's presentation of the lawsuit has received scant appellate attention, especially in the context of pretrial requirements. See *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) (local rule requiring submission of extensive pretrial order is invalid because it goes far beyond the role of pretrial as envisioned in Rule 16).

91. See *supra* notes 49-58 and accompanying text.

92. *Id.*

93. See Scheduling Order at 1-3, *Strandell v. Jackson County*, No. 85-4159 (S.D. Ill. April 8, 1985).

94. See 7 Fed. R. Serv. 3d 715 (S.D. Ill. 1987).

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an attorney's trial preparation from their opponent.<sup>95</sup> As the Seventh Circuit in *Strandell* recognized, fairness and equity dictate that experimental use of a mandatory, non-consensual summary jury trial is inappropriate where a litigant's privileged discovery materials may be subject to disclosure.

### III. FUTURE OF SUMMARY JURY TRIALS

#### A. The Legality of Consensual Summary Jury Trials

The court in *Strandell* observed that the only issue before it concerned whether federal courts have the power to require a litigant to participate in a summary jury trial.<sup>96</sup> The Seventh Circuit expressly noted that it was not required to decide the manner in which summary jury trials may be used with the consent of the parties.<sup>97</sup> Moreover, the court left open the question of the legality of consensual summary jury trials altogether, although it intimated that the Federal Rules of Civil Procedure permit summary jury trial by consent.

In leaving the question of the legality of consensual summary jury trials unanswered, the Seventh Circuit did not pass upon the question of whether district courts have the authority to empanel citizens selected from the district's master jury wheel to sit for purposes of the summary jury trial.<sup>98</sup> In trials in federal district court, jurors are selected pursuant to the procedures established by the Jury Selection and Service Act of 1968.<sup>99</sup> This statute has no provision for the use of jurors to sit for purposes of summary jury trials or to act as mediators to render advice to litigants in the form of an advisory verdict.<sup>100</sup>

95. Case law authority recognizes that a party is certainly entitled to make legitimate use of any tactical advantage gained on an opponent. See *Hickman v. Taylor*, 329 U.S. 495, 516 (1949) ("discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary"); *Pantry Queen Foods v. Lifschultz Fast Freight*, 809 F.2d 451, 456 (7th Cir. 1987) ("Our legal system is adversarial, not inquisitorial, and parties are entitled to the strategic advantage of information to which the other side has not sought access"); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (work product doctrine's role is to promote "the adversary system by safeguarding the fruits of an attorney's trial preparation from . . . the opponent").

96. *Strandell v. Jackson County*, 838 F.2d 824, 886 (7th Cir. 1988).

97. *Id.* The court also noted that it was not expressing any view on the effectiveness of summary jury trials in settlement negotiations. *Id.*

98. The issue of whether federal courts have the authority to empanel jurors for a summary jury trial was raised by plaintiffs' counsel in his briefs in *Strandell*, but the Seventh Circuit did not address the issue. See Brief of Contemner-Appellant at 34-37, *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988).

99. 28 U.S.C. §§ 1861-77.

100. *Id.*; see also Posner, *supra* note 6, at 385-86. It has been observed that "the authority under which courts divert jurors from 'real' trials nevertheless remains problematic." PROVINCE, *supra* note 14, at 72 n.180. Judge Lambros has avoided the

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Courts have power with precise reach.<sup>107</sup> The court power to regulate sanctions upon appellate courts is inherent power to in

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A summary jury trial is hardly an extrajudicial proceeding. Indeed, a summary jury trial is conducted inside the courtroom of a federal courthouse, before an Article III judge, and with jurors selected from the court's master jury wheel who are paid from congressionally apportioned funds. Moreover, nothing in Rule 16(c)(7) or in the advisory committee notes mentions, envisions, or authorizes the use of a summary jury trial. All that the subsection and advisory committee note appear to envision is the discussion of employing adjudicatory techniques outside the courthouse. Although express authorization from the federal rules is not always necessary, a lack of clear authority is cause for hesitation when experiments are to be undertaken.<sup>108</sup>

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101. FED. R. CIV. P. 39(c).

103. See *supra* notes 24-27, and accompanying text; see also Lambros, *supra* note 14, at 461-65.

104. See Amendments To The Federal Rules of Civil Procedure, 97 F.R.D. 165, 211 (1983); see also Posner, *supra* note 6, at 366-75.

105. See Posner *supra* note 6; see also *Henson v. East Lincoln Township*, 814 F.2d 410, 414 (7th Cir. 1987) ("the ease and speed with which the Federal Rules of Civil Procedure can be amended by those whom Congress entrusted with the responsibility for doing so should make federal judges hesitate to create new forms of judicial proceedings in the teeth of existing rules"); *Taylor v. Oxford*, 575 F.2d 152, 154 (7th Cir. 1978) ("innovative experiments may be admirable, and considering the heavy case loads in the district courts, understandable, but experiments must stay

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Legislative proposals have been introduced in the last two sessions of Congress to amend the Federal Rules of Civil Procedure and Title 28 of the United States Code in order to grant authority to district courts to convene and order summary jury trial proceedings on a consensual basis.<sup>106</sup> The fact that such legislation has been offered intimates that statutory authority under Rule 16 is lacking.

However, the absence of statutory authority does not mean that courts do not have inherent authority to convene consensual summary jury trials. The Seventh Circuit in *Strandell* held only that inherent authority is nonexistent in regards to ordering non-consensual participation. The opinion can be read narrowly to suggest that a court's inherent authority is not so limited in the context of a consensual summary jury trial. Indeed, the key word and distinction may be consent. With consent present, both the balance between judicial efficiency and individual litigants' rights and between pre-trial disclosure and party confidentiality are preserved. Parties are able to choose the strategy in their best interests and determine if the price of revealing the fruits of their discovery is worth their participation in a summary jury trial. When consent is present, such devices may prove to be useful in facilitating settlement.

Courts have neither defined the concept of inherent judicial power with precision nor developed a clear analysis for measuring its reach.<sup>107</sup> The courts have invoked the doctrine of inherent judicial power to regulate the conduct of members of the bar and to provide sanctions upon those who abuse the judicial process.<sup>108</sup> However, no appellate court has yet endorsed the view that a judge possesses inherent power to impose requirements designed to settle cases.

Only one federal court to date has discussed the issue of inherent authority to convene a consensual summary jury trial. In *Cincinnati Gas & Electric Co. v. General Electric Co.*,<sup>109</sup> a post-*Strandell* decision, the court stated in dicta that a consensual summary jury

within the limitations of the statute"). However, some courts more readily employ innovative procedural devices when both parties stipulate to their use. *See, e.g., Mobil Oil Corp. v. Altech Corp.*, 117 F.R.D. 650 (C.D. Cal. 1987) (although there was no precedent on the issue, court determined a special master could preside over a jury trial pursuant to stipulation of the parties).

106. *See supra* note 88.

107. *See Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561-62 (3d Cir. 1985) (doctrine of inherent judicial power is "nebulous," and its bounds are "shadowy"). For a discussion of inherent judicial power in the settlement context, see Comment, *Judicial Authority in the Settlement of Civil Cases*, 42 WASH. & LEE L. REV. 145, 179 (1985).

108. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (power to impose attorney's fees for bad faith litigation); *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (power to dismiss for failure to prosecute); *Levin v. U.S.*, 362 U.S. 610 (1960) (contempt power rooted principally in inherent powers of judiciary).

109. 117 F.R.D. 597, 599 (S.D. Ohio 1987). The court also suggested it had authority to order the procedure pursuant to Rule 16 (a)(5), (c)(7), and (c)(10).

trial may be convened as a "matter of the Court's inherent power to manage its own cases."<sup>110</sup> This conclusion, however, was unnecessary to the question being decided, because no challenge was posited concerning the power to convene the summary jury trials. Rather, the court examined whether newspapers could intervene in the action for the limited purpose of challenging the closure of the summary jury trials to the press, and whether the first amendment right of access to judicial proceedings extends to summary jury trials. The court resolved this equally novel issue by determining that courts may restrict public access to summary jury trials.<sup>111</sup>

The ambiguity and inexactitude of the limits on inherent judicial power has not prevented courts from convening consensual summary jury trials. The practice is now the norm in many courtrooms, notwithstanding the notion that inherent powers should be exercised with restraint and caution. In light of the fact that a legal challenge to a consensual summary jury trial is most unlikely, legal authority will remain sparse on the issue of inherent power to convene summary jury trials. Therefore, absent legislative direction, federal courts will continue to convene consensual summary judgment trials based on the notion of inherent authority.

#### B. *The Pros and Cons of Consensual Summary Jury Trials*

While it is clear from *Strandell* that compelled participation in summary jury trials is not permitted at least in the Seventh Circuit, the consensual summary jury trial, though legally questionable, appears to be permitted; proponents will argue that *Strandell* does not preclude voluntary summary jury trials. Indeed, it is the norm in most federal courts. Therefore, the summary jury trial device will

110. *Id.* at 599; see also *supra* note 28. Judge Spiegel, the author of the opinion, is also a proponent of the summary jury trial. See Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

111. The court decided that the press and public have no first amendment right to attend a summary jury trial because it is a pretrial proceeding and settlement technique. Guided by the recent decision in *Press-Enterprise v. Superior Court of Cal.*, 106 S. Ct. 2735 (1986), the court applied a two-part criteria in determining whether the right of access attached to the summary jury trial: whether there had been a "tradition of access" to such proceedings, and whether such access plays a significant role in the functioning of the process. The court opined that neither criteria had been satisfied. There was no historical right of access, because the summary jury trial is less than a decade old; moreover, settlement negotiations traditionally have been closed proceedings. *Id.* at 599. The court also concluded that a summary jury trial, as a settlement device, has no effect on the merits should the case go to trial, and therefore public access is not critical to ensure that the proceedings be conducted fairly. *Id.* at 600. Although the parties settled their case following the summary jury trial, see 6 ALTERNATIVES 1 (Feb. 1988), the newspapers have taken an appeal of the closure order. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987), appeal filed, Nos. 87-3950 and 87-4045 (6th Cir. Oct. 13, 1987 & Nov. 23, 1987).

continue to represent a topic of discussion in courts. Litigators must confront the question of whether to consent to participate in summary jury trials. Cons must be cons

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112. See *supra*.

113. See *Enslin*.

114. See *Zatz*.

115. *Id.*



continue to represent a viable alternative to trial and a possible topic of discussion at every pre-trial conference convened in federal courts. Litigators in federal court will undoubtedly and increasingly confront the question of whether they ought to counsel a client to consent to participation in a summary jury trial. Various pros and cons must be considered in deciding that question.

The most obvious benefit of a summary jury trial is the potential avoidance of litigation costs that usually accompany a full trial on the merits. The length of the procedure is designed to be much shorter in nature, thereby generally limiting the extent of the evidence counsel may present. Thus, in theory, a summary jury trial should be a fraction of the cost of a full trial.

However, theoretical designs do not always reflect practical realities. A summary jury trial has its own hidden costs. The very nature of a summary jury trial calls for strategy far different than litigators may employ at a full trial on the merits. Therefore, preparation for a summary jury trial differs fundamentally from trial preparation. For a newcomer to the device, the preparation may indeed prove to be burdensome and time-consuming.

The counsel that participated in *Stites*,<sup>112</sup> a large scale toxic tort case, estimated that resolution of the case through a summary jury trial saved an estimated three million dollars in trial costs and further discovery, and avoided roughly anywhere from nine to fourteen months that it would have taken to conduct the trial.<sup>113</sup> However, counsel that participated in *Stites* also indicated that preparation for the summary jury trial was as rigorous as preparation for any other trial because discovery had to be just as thorough, and counsel's familiarity with expected testimony was even more important.<sup>114</sup>

Indeed, in *Stites*, presentation of witness testimony by videotape required seven-day work weeks for counsel and legal assistants. The plaintiffs' expert testimony had to be anticipated and responded to for impeachment purposes all within the defendant's presentation of their case. Counsel in *Stites* even had to engage in learning about film production in order to produce an understandable presentation for the jury in the summary jury trial. After the videotapes of the opposing parties were exchanged, the process repeated itself, once again requiring enormous time and effort to complete the final product.<sup>115</sup> In any complex case centering upon competing and multiple expert opinions, counsel can expect a similar

112. See *supra* notes 40-48 and accompanying text.

113. See Enslin, *supra* note 47, at 48.

114. See Zatz, *supra* note 16, at 930-31.

115. *Id.*



investment of time and expenditure of money.

As the *Stites* case indicates, the severe time limits in presenting a party's evidence in a summary jury trial, and the uniqueness of the proceeding may well necessitate a considerable amount of time to prepare an understandable case. Therefore, the amount of attorney fees that may end up attributable to preparation for participation in a summary jury trial are by no means insubstantial. Indeed, the parties may incur costs comparable to preparation for a full trial, even in circumstances where settlement is achieved. In circumstances where the proceeding serves no utility as a settlement device, or the parties have reached an impasse regarding settlement, the expenses and costs incurred may be unnecessary or doubly exorbitant.

Regardless of whether a case ultimately settles through a summary jury trial, counsel considering participation should weigh the device's role in bringing parties together. Often a major stumbling block to settlement will be a party's unyielding attitude in terms of potential liability and exposure. In theory, the advisory verdict in a summary jury trial provides a barometer or prediction of a potential jury's reaction to the evidence in each party's case. Its utility as a settlement device stems from the confidence parties have that the verdict will be duplicated at trial. With this confidence, a defendant's attention to potential exposure is heightened while a plaintiff's demands become more realistic in terms of the dollar values of the claims at issue. In addition, both the parties are given an emotional release in the sense that they feel they have had their day in court, while at the same time reinforcing the realities of the case.

One must remember, however, that the summary jury trial's utility as a settlement device depends upon the reliability of the jury verdict.<sup>116</sup> Not all cases are amenable to resolution through a summary jury trial proceeding. For an advisory verdict to be reliable, the jury in such a proceeding should be able to view and evaluate the evidence as a jury would in a full trial, only in a much more

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116. The summary jury trial before Judge Enslin in the *Stites* case, discussed *supra* notes 40-48, 106-109 and accompanying text, was conducted before a panel of twelve jurors, later reduced to ten, and then divided into two panels of five for deliberation. Each panel returned a different verdict, one for the defendant and one for the plaintiff. Counsel in *Stites* questioned the jurors, and discovered that both panels expressed overall confusion of the mass of evidence presented in such a short time. Counsel in *Stites* also noted that the panel ultimately for the plaintiff approached the evidence from an emotional perspective, whereas the panel that found for the defendant examined the evidence from a more logical perspective. The differing verdicts in *Stites* cast doubt on the summary jury trial's ability to accurately predict a verdict at a full trial on the merits. However, in *Stites*, the inconsistency of the verdicts seemed to have actually promoted the settlement. For further discussion concerning the reliability of a summary jury trial verdict and its overall role to facilitate settlement, see JACOBOWITZ & MOORE, *supra* note 16, at 9-33; Ranii, *supra* note 10, at 30.

117. See Zatz. *Stites* commented th left the jurors suspic had prevented them credibility determin. In a study of the S that jurors felt that lar trial would have of witnesses. Some examination left de

118. See Zatz.

119. *Id.* at 9: have several hours rupted by cross-exa

abbreviated form. Therefore, in cases where determinations as to truthfulness and credibility are of paramount importance, the absence of the jury's observation of parties, witnesses, or expert witnesses and the opportunity for cross-examination prevents the jury from accurately performing that very important function. At the summary jury trial, counsel presents the context of such testimony, thus preventing the jury from being able to reach an accurate and just assessment of credibility.<sup>117</sup> In such cases, the advisory verdict may be a poor predictor of the outcome of a full trial, and hence its utility as a settlement device may be dubious.

For similar reasons, very complex cases may not be amenable to a summary jury trial. Because the procedure is very abbreviated, presentations by counsel must be compressed into a few hours. With such time limits, not all of the arguments and evidence will be adequately presented. The price of a quick and efficient summary jury trial may result in the incomplete development of pertinent facts. On the other hand, counsel may also run the risk that the complexity of the case will result in a massive overload of information to the jurors. Mass amounts of compressed information can mislead and confuse the jury.<sup>118</sup> In addition, defense counsel must recognize that the summary jury trial's procedure will often place plaintiffs at an advantage because momentum is not interrupted, as it is in a real trial, by cross-examination and objections.<sup>119</sup> Consequently, the advisory verdict may prove to be of no more insight into potential liability and exposure than what counsel had anticipated before the proceeding.

The fact that not all cases may be amenable to summary jury trial resolution, however, should not automatically preclude counsel from considering participation in the proceeding. The summary jury trial offers the fringe benefit of obtaining a preview into an opponent's case, and an opportunity to have lay jurors analyze the issues. Such insights can prove invaluable if the case goes on to trial. Moreover, counsel on both sides will have a better idea of what to expect

117. See Zatz, *supra* note 16, at 932-33. Jurors in the summary jury trial in *Stites* commented that the substitution of live witnesses with videotape presentations left the jurors suspicious of the entire process. Many wondered if the editing of tapes had prevented them from hearing what all the witnesses had to say, thereby affecting credibility determinations. *Id.*; see also JACOBOWITZ & MOORE, *supra* note 16, at 22. In a study of the SJT in the Northern District of Ohio, juror questionnaires revealed that jurors felt that the SJT left too much to the juror's imagination, whereas a regular trial would have provided them with a clearer picture through actual observation of witnesses. Some jurors also commented that the absence of witnesses and cross-examination left determinations of credibility upon the lawyers. *Id.* at 22-23.

118. See Zatz, *supra* note 16, at 933-34.

119. *Id.* at 934. In a lengthy summary jury trial such as *Stites*, plaintiffs will have several hours of what is in essence tantamount to a closing argument uninterrupted by cross-examination or objection. *Id.*

in terms of the evidence, and of their adversary's performance by way of strategy at the subsequent full trial on the merits.

Situations will inevitably arise where parties will want to avoid a summary jury trial in order to prevent their opponent any preview into their case. As illustrated by the *Strandell* case, a summary jury trial may harm a client's interests. For a summary jury trial to be effective as a settlement device, reliability in the verdict is crucial. To procure such reliability, presentation should be vehement and designed to "win" the verdict. Therefore, participation in a summary jury trial will require disclosure of important information, even perhaps disclosure of information which an opponent may otherwise have had no idea or to which they had no access. In *Strandell*, the plaintiffs procured a myriad of witness statements and other confidential work-product information that was privileged. With discovery closed, the defendants taking no depositions of witnesses, and the district court's denial of the motion to compel production of the multiple witness statements, the plaintiffs obtained a distinct tactical advantage over the defendants. With settlement at an impasse, a summary jury trial offered no benefit to the plaintiffs that would be worth sacrificing their tactical advantage. Indeed, a summary jury trial would only benefit defense counsel by allowing them to witness a rehearsal of the plaintiffs' trial strategy and learn what defendants had failed to discover when left to their own devices during discovery.<sup>120</sup>

Such circumstances bring into light the potential danger that a summary jury trial, even in cases where the interests of a party are not at risk of harm, may be used purely by ill-prepared counsel as a manipulative means of gaining tactical advantage at trial.<sup>121</sup> This is because a summary jury trial has the obvious benefit of offering a preview into the opponent's case and an opportunity to hear lay jurors analyze it. Parties not truly interested in settling, knowing this benefit of a summary jury trial, may implore its use from such pure tactical considerations rather than as means of pursuing resolution of the case. It is not difficult to conceive that in such circumstances counsel would be compelled to adopt one line of trial strategy over

120. See *supra* notes 50-58 and accompanying text. Some commentators have argued that settlement is achieved when parties are uncertain as to the evidence or theories possessed by their adversaries. "[T]he most important factor in the making of settlements is the fear of unknown evidence in possession of one's opponent . . . . [T]he mutual fear of unknown factors creates a greater desire to settle than is present if each party already knows exactly what the other side's evidence will be and has had an opportunity to prepare his case accordingly." Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480, 489-90 (1967).

121. See *supra* notes 90-93 and accompanying text. On the other hand, Judges Lambros and Enslin have reported that the SJT procedure does not work well when the lawyers "are inexperienced or unprepared . . . ." See PROVINE, *supra* note 14, at 70.

another for purpose to be utilized during

In addition to the nature of the summary trial, the role of the judge will be presiding over the real trial if one expressed the general result from bias a judge during a summary trial. Concerning the judges are charged with the case. Nonetheless, selling clients on wh

Another factor in a summary jury trial will be the concern that in telling the jury at trial will not be binding. It is more seriously a summary jury trial, the reliability of the verdict will be told of

122. See Zatz, *supra* note 10, at 1, 30; see also *summary jury trial to a magistrate*, NATIVES 1, 14 (Jan. 1988), concerned antitrust price discrimination. Judge because of the court's decision in the event the case was reversed.

123. See Zatz, *supra* note 10, at 1, 30. Official participation in a summary jury trial may prejudice a litigant to an ADR proceeding may be. *Judges In Settlement* (1982).

124. See Posner, *supra* note 10, at 1, 30. Which reviews the summary trial and accompanying text. The nature asking the jury to make a non-binding nature of the verdict. They felt it was appropriate only one juror responsible for the verdict was known the verdict was

125. *Id.* One juror dictum will be non-binding. NATIVES 22 (Feb. 1988). This did not deter the jury

another for purposes of a summary jury trial as opposed to strategy to be utilized during a full trial on the merits.

In addition to the concerns expressed thus far, the overall nature of the summary jury trial poses potential problems regarding the role of the judge and of the advisory jury. Often the judge that will be presiding over the summary jury trial will also preside over the real trial if one becomes necessary.<sup>122</sup> Counsel in the *Stites* case expressed the general concern that fundamental unfairness could result from bias a judge might develop about the merits of the case during a summary jury trial.<sup>123</sup> However, judges often develop opinions concerning the merits at several proceedings of a case, and judges are charged, as a theoretical matter, to impartially conduct the case. Nonetheless, this does present a factor to consider in counseling clients on whether or not to consent to a summary jury trial.

Another factor to consider is what and when the jury in a summary jury trial will be told regarding its role. Judges have expressed the concern that the reliability of the verdict may be affected by telling the jury at the outset of the proceeding that their decision will not be binding.<sup>124</sup> The jury might become apt to take the procedure less seriously, thereby rendering nugatory the very basis of a summary jury trial.<sup>125</sup> Considering this consequence of impairing the reliability of the advisory verdict, most summary jury trial jurors will be told of their role, if at all, at the end of the procedure. In-

122. See Zatz, *supra* note 16, at 934. Summary jury trials have been conducted also by magistrates. See JACOBOWITZ & MOORE, *supra* note 16, at 5; Rani, *supra* note 10, at 1, 30; see also PROVINZ, *supra* note 14, at 85. One judge assigned a summary jury trial to a magistrate expressly due to concerns of impartiality. See 5 ALTERNATIVES 1, 14 (Jan. 1987). The case, pending in the Eastern District of North Carolina, concerned antitrust allegations of predatory pricing, tying arrangements, and price discrimination. Judge Fox had a magistrate preside over the summary jury trial because of the court's concern that it maintain an ability to view the evidence freshly in the event the case failed to settle and went on to a full trial on the merits. *Id.* at 14.

123. See Zatz, *supra* note 16, at 934. Commentators have also noted that judicial participation in alternative dispute resolution mechanisms has the potential to prejudice a litigant to the extent a judge's perception of the case gained during the ADR proceeding may influence the court's ruling after a full trial. See Oesterle, *Trial Judges In Settlement Discussions: Mediators Or Hagglers*, 9 CORNELL L. FORUM 7, 10 (1982).

124. See Posner, *supra* note 6, at 386. But see 6 ALTERNATIVES 19 (Feb. 1988), which reviews the summary jury trial in the *Stites* case, discussed *supra* notes 40-48 and accompanying text. In the *Stites* case, the jurors were administered a questionnaire asking the jurors to respond to how they felt regarding not being told of the non-binding nature of the verdict. *Id.* at 20. The jurors unanimously responded that they felt it was appropriate not to have been told. *Id.* Indeed, in a related question, only one juror responded that he might have decided the case differently had he known the verdict would be non-binding. *Id.*

125. *Id.* One judge has followed the practice of advising the jury that their verdict will be non-binding prior to the start of the summary jury trial. See 6 ALTERNATIVES 22 (Feb. 1988). The attorneys involved in this case believed that these remarks did not deter the jury from following the SJT closely. *Id.*

deed, current guidelines for summary jury trial procedures, as established by Judge Lambros, do not provide for telling the jurors in advance of the nonbinding nature of their decisions, thereby preserving, in theory, the reliability of the advisory verdict.<sup>126</sup>

Judges have also expressed the more general concern that the advisory nature of the summary jury trials could undermine the overall jury system.<sup>127</sup> It is argued that the very act of rendering a binding verdict is an exercise of governmental power by jurors, and thus provides jurors with the incentive to responsibly exercise their role. Indeed, at present, some courts have created separate jury pools, with those jurors who have sat on a summary jury trials being disqualified from regular jury service.<sup>128</sup> Therefore, the potential is real that when jurors discover they have been misled regarding the nature of their verdict, the incentive to perform well will be lost and could result in a decline in juror conscientiousness, and in the utility of the summary jury trial procedure itself.<sup>129</sup>

#### IV. CONCLUSION

In sum, while the summary jury trial is not an all-purpose panacea to reduce the congestion of federal district court dockets, its proponents argue that a near decade worth of experience with the procedure suggests that its discriminate use can assist counsel to procure justice for their clients in an expeditious and cost-efficient manner. However, its utility as a settlement device depends substantially upon the motives of the counsel and parties who participate. Parties who endeavor seriously to resolve the case with a favorable settlement should engage in the procedure with the goal of convincing their opponent of the superiority of their case or that continued litigation might not prove to be cost-effective. Imploremment of the device by ill-prepared counsel motivated by a desire to gain a strategical advantage at the subsequent full trial on the merits will only reduce the reliability of the advisory verdict and destroy the procedure's perceived theoretical efficacy to promote settlement.

Also fundamental to the summary jury trial's utility as a settlement device is that its use be discriminately applied to cases amenable to such resolution. The Seventh Circuit's decision in *Strandell* underscores the notion that the summary jury trial is not the answer in every case, especially when pre-trial settlement negotiations reach

an impasse. Case jury trial due to credibility deterioration could work to u

While *Strandell* participate in a open its utilization as to the legitimacy the necessity for Rules of Civil Procedure jury trial, counsel their client in the fits and adverse

126. See Lambros, *supra* note 8.

127. See Posner, *supra* note 6, at 386-87.

128. *Id.* Judge Becker of the Third Circuit also has criticized SJT procedure for taking jurors from the "regular venue to participate in what is essentially a mock trial . . . ." 5 ALTERNATIVES 199 (Dec. 1987).

129. See Posner, *supra* note 6, at 386-87.

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an impasse. Cases may not be amenable to resolution in a summary jury trial due either to the complexity of the case or to the import of credibility determinations. In other cases, a summary jury trial could work to undermine the interests of a client.

While *Strandell* provides that a party cannot be compelled to participate in a summary jury trial, the Seventh Circuit has left open its utilization on a voluntary basis. Questions persist, however, as to the legality of a consensual summary jury trial, thereby raising the necessity for amendatory legislation to Title 28 or the Federal Rules of Civil Procedure. With the increasing use of the summary jury trial, counsel can ill afford to volunteer the participation of their client in the procedure without considering the potential benefits and adverse consequences to the interests of their client.

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Tab N

INTEGRATION

- Conference Case Study: The Integration of Dispute Resolution
- (To be inserted) Slides from Plenary Session: Developing Integrated State Dispute Resolution Programs, Margaret L. Shaw
- "Statewide Offices of Mediation," Dispute Resolution Forum (National Institute for Dispute Resolution 1988).



Developing Integrated  
State Dispute Resolution Programs

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Thursday Afternoon  
November 17

# **DEVELOPING INTEGRATED STATE DISPUTE RESOLUTION PROGRAMS**

## **INTERIM REPORT OF THE TASK FORCE ON COMPLEMENTARY DISPUTE RESOLUTION PROGRAMS NEW HOPE, 1988**

### **INTRODUCTION.**

There exists in New Hope a wide array of dispute resolution mechanisms and forums, both private and court-annexed. The question arises what relationship, if any, there should be between government and private initiatives and those innovations which operate as part of the courts. To begin to answer the question, the Governor of New Hope created this task force to sort out, assess, and propose ways to broaden and organize the range of available dispute resolution settings in the state. It includes representatives from the legislature, the judiciary, the legal profession, the growing ADR profession, the academic community, and public interest organizations. This report summarizes the preliminary findings of the task force.

The task force is continuing its work to develop alternatives for action by New Hope's executive branch, the judiciary, and private entities. Options currently under consideration include the creation of a statewide office of dispute resolution, experimentation with a comprehensive judicial system such as a "multi-door" courthouse, and the development of private procedures for facilitating specific types of disputes.

For example, New Hope may want to follow the lead of the handful of states that have created statewide offices of dispute resolution which operate under the executive branch. Such offices serve to stimulate awareness of and interest in alternative dispute resolution (ADR) services, both among government officials -- executive and judicial -- and the public. They achieve this through a variety of activities, including the successful resolution of notable disputes, the

sponsoring of training courses, and through serving as a hub of a network of prospective participants in ADR. One important task for a New Hope office would be to develop procedures whereby disputes could be channeled toward an appropriate resolution mechanism, whether private or court-connected. Another would be to promote mediation in complex disputes involving the public interest, both locally and statewide.

Another possibility is the establishment in New Hope of a comprehensive dispute resolution system to function under the supervision of the judiciary. Such a system, often referred to by the popular term "multi-door" courthouse, can serve to coordinate access to dispute resolution mechanisms through a referral system. As part of a comprehensive system, court-annexed mechanisms designed to fill existing gaps in the dispute resolution services currently offered can be developed.

Private entities also must play a role in any coherent integration program. A variety of private organizations already exist to aid in resolution of certain classes of cases, often small claims and family disputes. However, private procedures can be developed to facilitate settlement of toxic tort and other similar cases as well.

Options such as those above will serve as a menu of possibilities from which one or more can be selected; they are not intended to be exclusive of each other. The final report of this task force will include a detailed discussion of all options.

## **FINDINGS.**

- 1. New Hope's present system offers a structured formal public dispute resolution system which is complemented by a network of other, more informal, options.**

New Hope currently has a hodgepodge of public and private dispute resolution systems. For example, specialized trial courts such as the Housing Court have developed complementary mediation programs. Some general jurisdiction trial courts mandate mediation for specific types of cases; others offer mediation on an informal *ad hoc* basis. There are state agency programs for mediation. In addition, various private organizations offer mediation services, either general or specialized.

- 2. The public dispute resolution system includes not only the courts but a variety of mechanisms which function apart from the courts.**

The legislative and executive branches of New Hope's state and local governments have created alternative forums in response to public decisions that some kinds of disputes are better handled outside of the courts. For example, statutorily-mandated state administrative forums hear workers' compensation and medical malpractice cases. A branch of the state Attorney General's office offers a variety of consumer protection programs, including a "lemon law" program. Other types of disputes are handled through administrative law proceedings.

- 3. There is no statewide means for promoting innovative dispute resolution techniques.**

Although various alternative forums have been created by statute in New Hope to resolve certain classes of cases, there has been little experimentation with alternative dispute resolution techniques. ADR is infrequently used by government agencies even though use by other states demonstrates that alternative techniques can be an invaluable supplement to other decisionmaking processes. Most techniques remain unfamiliar in New Hope; further, government officials tend to be suspicious of their use. The suspicion apparently results from the unfamiliarity as officials fear that using ADR means losing control of the process and the outcome.

**4. Private dispute resolution services often are underused.**

Private practitioners offer a wide range of dispute resolution services. Further, private providers offer the potential for removing some of the burden from the court system. However, government officials and the general public often are unaware of the private option or of how it fits into a coherent dispute resolution system. The resulting lack of a steady flow of cases and funding forces many private practitioners out of the market. There is a need to create an awareness that private services exist and to educate potential users on how to obtain the services.

**5. Court and non-court forums offer services which often overlap; there is no mechanism to assure the funneling of disputant and dispute to the most appropriate system.**

It is ill-understood how New Hope's dispute resolution mechanisms all work together. Further, it is difficult for those involved in a dispute to know where to turn. Whether faced with a warranty conflict or an issue of property damage or a personal injury claim, most are not knowledgeable enough to locate the most appropriate forum for a particular dispute or to know where to go for help. The result is that disputants -- and their attorneys -- often turn first to the courts, even though the dispute could be better handled by another mechanism.

**6. A few New Hope counties, at the behest of an activist official or judge, have created a coherent and coordinated dispute resolution scheme. However, in most jurisdictions, there exists a need to consolidate and organize what in many respects has been a grass roots movement.**

There is a need to create a framework for the use of alternatives. Lack of such a framework is creating difficulties and wasting energies -- the justice system is costly, confusing, and less successful than it otherwise could be. Fragmented, *ad hoc* series of initiatives, often instituted in response to pressure from users of the system, need to be converted into a coherent, uniform, but flexible approach that will build a structural capacity for negotiations and consensual decisionmaking into the system. New Hope must assure its citizens access to justice through the most effective, least costly, and most appropriate processes by providing a tie-in between demand (court filings) and supply (alternatives to adjudication).

7. **Early programs tend to spread to and be adopted by other jurisdictions without adequate study whether they are truly appropriate.**

Problems of limited initiative must be addressed. There is a need to encourage more experimentation -- for example, what is appropriate for large urban county such as Belgravia may or may not be suitable for a rural county such as Levy with its lower case volume and reduced pool of professionals from which to draw neutrals. The challenge is to foster local action while at the same time imposing a greater measure of order.

8. **Dispute resolution programs appear to operate most effectively if certain elements are consistent statewide; other elements must be adaptable to individual local programs.**

Local initiative is necessary in order to achieve and maintain a diversity of appropriate programs. However, a balance must be struck to take advantage of the benefits of centralization. Centralization is useful to the extent that it prevents re-invention of existing programs and provides an accessible pool of expertise, information, and advice. Statewide guidance is necessary on critical legal issues such as due process and right of access; guidelines should be promulgated to the extent necessary to protect litigants' rights and the public interest. Criteria for evaluating the usefulness of alternative programs should be uniform so that programs can be compared to each other, and provision should be made for systematic evaluation of programs. It would be useful to have a statewide vehicle for sharing and disseminating information on local programs. Additional state tasks can be to provide technical assistance, provide for the training of mediators, and provide funding.

9. **Any successful approach to dispute resolution must include a public relations element. No program can be effective if not widely known and used.**

There is a vital need for an organized forum for communication and advocacy. Only a few programs currently incorporate any provision for dissemination of information regarding the existence and operation of the program. For instance, the Belgravia court published a brochure listing its services and giving a contact person for specific questions.

**10. One of the most important needs continues to be evaluation of existing programs.**

It is difficult to develop viable options or make rational policy decisions without good and credible information. Selected New Hope programs, particularly some of the court-annexed programs such as mandatory arbitration and programs offered through community dispute resolution centers, are well documented and have benefitted from periodic evaluations. However, information about others is less comprehensive and often is substantially anecdotal. This need for evaluation will extend to the operation of a program for integrating private and court-annexed initiatives in the area of dispute resolution, if such a program is adopted.

December 1987

DISPUTE RESOLUTION  
*forum*  
Published by NATIONAL INSTITUTE FOR DISPUTE RESOLUTION

**Statewide Offices of Mediation:  
Experiments in Public Policy**

An examination of offices in Hawaii,  
Massachusetts, Minnesota and New Jersey



# PUBLIC POLICY AND STATEWIDE OFFICES OF MEDIATION

Big, factious, often controversial disputes involving many people and driven by strong emotions often set the stage for forging public policy. Every political leader who has faced angry constituents knows that. The challenge for government officials is to see that large, complex disputes are settled in ways that result in equitable, efficient and workable public policy; that the heat generated from disputes doesn't ultimately distort the public interest.

The goal of the public policy program at the National Institute for Dispute Resolution is to help build the institutions, the infrastructure, and the methodologies for settling large-scale conflicts involving the public interest. The program includes support for public policy dispute resolution experiments within state and federal government and for the continued use and refinement of public interest mediation in disputes across the country. A central part of the Institute's program is testing and supporting devel-

opment of statewide offices of mediation as institutions within government that promote mediation in public policy disputes.

As Lawrence Susskind notes in his lead article, the Institute has provided matching grants to several states willing to experiment with statewide offices. A preliminary examination of how those offices have fared is the subject of this issue of *Dispute Resolution FORUM*. An independent evaluation of the offices is underway. In the coming year, the Institute will assess the evaluation results and provide policy recommendations for states considering such offices.

Susskind's article provides an overview of the uses and development of statewide offices. To get a close-up of each state, we interviewed the directors of offices in Hawaii, Massachusetts, Minnesota, and New Jersey. We also talked with Sanford M. Jaffe, director of the Center for Negotiation and Conflict Resolution at Rutgers University,

and Christine Carlson, program officer at the Kettering Foundation. Both have been advisers to the Institute and keen observers of the growth of statewide offices.

Complementing our coverage are four case studies reporting how statewide offices have contributed to the resolution of major disputes. These disputes involve such frequently controversial matters as herbicide spraying, emergency medical services, public housing, and water resources. Rounding out the issue is a page of excerpts from a new handbook for governors on dispute resolution. To be published next year by the National Governors Association, *Governors and the Resolution of Public Policy Disputes* was written by Howard S. Bellman, a former state cabinet officer and a mediator, and William R. Drake, vice president of the Institute.

Robert M. Jones  
Editor  
Dispute Resolution FORUM

## Dispute Resolution FORUM

The National Institute for Dispute Resolution publishes *Dispute Resolution, FORUM* several times a year as a medium for discussion and debate of the principal questions in the field. Each edition focuses on a single subject and, in addition, includes a brief summary of new information about dispute resolution under the heading, "In The Process" and announcements of Institute programs and activities in a section titled "NIDR Notes." Readers wishing to submit letters, provide information for "In The Process," or be placed on the *FORUM*'s mailing list should write *Dispute Resolution, FORUM*, 1901 L St., N.W., Washington, D.C. 20036. Single copies of the *FORUM* are available without cost; bulk copies are available at a nominal price.

Robert M. Jones, Editor

## Letters

As a vehicle for debate, *Dispute Resolution FORUM* welcomes letters commenting on the issues and opinions discussed in its pages. Because of space limitations, however, letters selected for publication are subject to abridgment.

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# EXPERIMENTS IN STATEWIDE OFFICES OF MEDIATION

LAWRENCE SUSSKIND

For years, the possibility of creating state offices to promote mediation in public policy disputes has been intriguing but generally untested. The statewide office approach has involved using mediation and allied tools of dispute resolution to settle disputes in matters as diverse as environmental quality, land development, budget allocation, and rulemaking.

In 1984, the National Institute for Dispute Resolution decided to test the concept. It has provided multiyear matching grants ranging from \$10,000 to \$50,000 to five experimental state offices of mediation in New Jersey, Massachusetts, Minnesota, Hawaii, and Wisconsin. While a full-fledged assessment of these offices is only beginning, regular meetings convened by the Institute of the state office directors and advisors have provided an opportunity to review their activities and to assess the work in progress.

The Institute began with several objectives. First, there was a desire to demonstrate that dispute resolution techniques could help state governments deal more effectively with public disputes that clog their courts and bog down administrative and legislative efforts. Until the Institute announced its program of state incentive grants, there had been surprisingly few attempts at the state level to use mediation, arbitration, and other alternatives as a means of resolving public disputes in the regulatory, permitting, rate setting, budgeting, municipal annexation, facility siting, and other areas. A few successful experiments (such as the Negotiated Investment Strategy projects sponsored by the Kettering Foundation and the State of Virginia's annexation mediation program) attracted a great deal of attention, but they did not lead to additional demonstrations.

Second, the Institute sought to seed an array of efforts to institutionalize dispute resolution along lines that made

sense in each state. Finally, it hoped to help create a market for the services of private dispute resolution practitioners. A great many practitioners have had problems establishing a regular flow of cases and overcoming financial obstacles generated by the unequal ability of the disputing parties to pay for the services of a neutral.

## Five Different Models

Each state office began with a different administrative structure, and each has focused on different projects and activities. In New Jersey, the Center for Public Dispute Resolution, developed and directed by James McGuire and currently under the direction of John Gleeson, is located in the Department of Public Advocate's Division of Citizen Complaints and Dispute Settlement. A 17-member advisory board provides guidance to the program and staff of two mediators and an attorney/mediator. The center has served as a special master appointed by the state court and has helped to settle several complex public disputes, including a ten-year legal battle over the establishment of a regional sewage treatment facility. The staff has also helped initiate a policy dialogue (involving public officials, citizen action groups, and industry leaders) on siting solid waste disposal facilities and has facilitated an agreement on policies governing ambulance services within the state, avoiding a potential loss of \$20 million in federal funds. (See the case study on p12)

The Massachusetts Mediation Service is under the jurisdiction of the Executive Office for Administration and Finance and directed by David O'Connor. A 12-member board provides advice to a two-member staff. The service has mediated statewide disputes concerning hazardous waste disposal, the clean-up of a Superfund site, and long-term health care insurance regulation. The state's appellate court appointed the service as the coordinating agency for implementation of a long-delayed and often-litigated jail construction project in Boston. The service has also been invited to mediate several

local disputes, including a recall battle involving a local board of selectmen, a controversy over siting a mobil home park and a public housing contract dispute (see the case study on p8). Finally, the service has devoted a substantial portion of its energies to behind-the-scenes consultations with state agencies interested in, but still wary of, its dispute resolution efforts.

The Minnesota State Planning Agency serves as the administrative home for the state's Office of Dispute Resolution. An *ad hoc* advisory board oversees the efforts of Director Roger Williams and a small support staff. The office has helped develop and implement the nation's first farmer-lender mediation program within the Department of Agriculture Extension Program. In its first year, the program has received over 5,000 requests for mediation from farmers and lenders which have resulted in over 1,500 mediated settlements. The office has played a key role in brokering the use of mediation in a state-wide herbicide spraying dispute (see the case description on p10) and has mediated a sewage treatment dispute between two small cities. It is also facilitating a process to determine the future role of regional treatment centers for the developmentally disabled and those with mental health disorders. The Minnesota office has helped to train state officials who want additional mediation skills and organized the first statewide dispute resolution week in November, 1987.

The Hawaii Program on Alternative Dispute Resolution is located in the Office of the Administrative Director of the Courts, directly under Chief Justice Herman Lum, and is directed by Peter Adler. The Hawaii program has helped to implement a court-ordered arbitration plan in the civil courts and launched a major effort to divert complex civil litigation concerned with public policy into court-sponsored mediation. The program also played a key role in facilitating a legislative effort to redraft Hawaii's politically sensitive water code (see the case description on p6).

Lawrence Susskind is director of the MIT-Harvard Public Disputes Program. This article is an updated and expanded version of a column that appeared in the October, 1986 issue of *Negotiation Journal*.

*continued on page 13*

# NEW NEGOTIATING TOOLS FOR GOVERNORS

*How can governors use the tools of dispute resolution? Howard S. Bellman and William R. Drake address that question in **Governors and the Resolution of Public Policy Disputes** which the National Governors Association will publish next year. Bellman, a former cabinet officer in Wisconsin state government, is a veteran mediator. Drake is vice president of the National Institute for Dispute Resolution. Following are excerpts from the publication.*

Policy conflicts are the business of political life. They involve the essence of political judgement and the best aspects of being involved in politics. Governors always have used negotiations to resolve conflicts and balance competing interests, both to achieve their initiatives as well as to respond to initiatives undertaken by others. But now the increasing pressure to be actively, even personally, involved in many policy disputes calls for a broader repertoire of innovative problem-solving and dispute resolution alternatives.

## Mediation and Conflict

Mediation and consensus-building tools are proven procedures to help governors manage and resolve conflicts. Of course, they are not intended to replace traditional legislative, regulatory, administrative or judicial mechanisms. Instead, governors should view them as useful adjuncts to these institutionalized decision-making mechanisms that should not be applied indiscriminately.

## Making Decisions

Mediation and other dispute resolution approaches can be used to enhance the decision-making process and help state executives broaden and strengthen their leadership roles. Using mediation as a problem-solving tool does not mean relinquishing the authority or power granted to a leader by state constitutions and statutes. Recent trends suggest that mediation can be used in addition to traditional decision-making processes, and that the use of this alternative is often politically advantageous.

## Mediated Negotiation

Mediation, as discussed in this issue on statewide offices, is a voluntary, structured process of negotiation in which key stakeholders—those parties affected by a problem or decision—seek to resolve their differences consensually in ways that are mutually beneficial. Key to this “mediated negotiation” approach is a collective effort to set aside certain behaviors common to traditional bargaining and negotiation and address the underlying interests of the parties.

## Settling the Snoqualmie Dispute

The Snoqualmie River flood control dispute in 1973 probably was the first time mediated negotiations were used by a governor to resolve a dispute other than labor conflict. Negotiations were proposed by Daniel J. Evans, then governor of Washington, when several environmental groups opposed the building of a flood-control dam on the river. At Evans' request, two mediators helped the parties negotiate a solution. By December 1974, an agreement was signed which included formal recommendations for the project and the creation of a coordinating council which guides the project and monitored its progress for its first 10 years.

## Resolving Hundreds of Conflicts

Since 1973, mediators have helped states resolve hundreds of conflicts involving almost every policy and decision-making area—aligning highways, siting waste facilities, establishing environmental standards, allocating social service funds, and drafting rules and regulations. During the 1980s, the use of mediation has increased dramatically. The four states discussed in this issue have created offices to provide mediators. Other states have passed legislation to “trigger” the use of mediation and negotiation during policy development and implementation.

Examples of the use of mediation

multiply. Ten states have used mediation in farmer-lender disputes. Virginia authorizes mediation to resolve annexation disputes among local jurisdictions. Pennsylvania sanctions mediation in local land use conflicts. States as different as Connecticut and Mississippi use negotiated investment strategies to allocate federal social service block grant funds. Massachusetts, Rhode Island, Texas, Virginia and Wisconsin have statutes that permit mediation for settling disputes over siting hazardous waste dumps.

## The Governor as Mediator

Sometimes a governor may personally serve as a mediator. Although specialists may call that role a “mediator with power,” such power does not mean that the mediator cannot be neutral in helping participants reach an agreement. Indeed, the governor's power and stature may be a healthy catalyst for convening key parties and enabling opposed groups to negotiate. Governors can use mediation to enhance their leadership roles in three ways: as consensus builders, problem solvers, and institution builders. Depending upon the circumstances, governors may fill any of these roles personally or use their authority and influence to help others act in such capacities.

## The Governor as Consensus Builder

Governors often act as consensus builders, an appropriate strategy for resolving complex issues. This role can be greatly enhanced, in selected situations, by using a mediated or facilitated approach to negotiations. Consensus building through mediation involves more than compromise. It recognizes areas of agreement which are mutually acceptable to all interested parties. A neutral mediator or facilitator can help structure a multiparty negotiation in ways that increase the chances all parties will agree on some, if not all, of the key issues.

For example, former Colorado Governor Richard Lamm once convened a 31-

## STATEWIDE OFFICES— THE DIRECTORS SPEAK

party negotiation over water policies and asked a team of professional facilitators to assist him. The parties ranged from the Denver Mayor's office and suburban governments and water districts to the League of Women Voters and neighborhood groups. Eventually the Denver metropolitan water roundtable successfully negotiated a needed set of policies and guidelines.

### The Governor as Problem Solver

Governors use the problem-solving approach to address a specific situation and to settle urgent problems rather than to resolve issues related to the gradual development of broad policy. As with consensus building, the governor may personally intervene to help structure negotiations or may arrange for assistance by a third party.

For example, Governor William A. O'Neill of Connecticut assumed the role of problem solver to reallocate social services block grant funds by convening a Negotiated Investment Strategy, a form of mediated negotiation. The federal government had forced states to accept sharply reduced social service funds in a lump sum and to distribute the money among competing programs. The Charles F. Kettering Foundation provided two mediators to guide the negotiations. O'Neill assigned a personal representative and committed himself to accept a consensus agreement. This personal commitment was an essential element in creating an environment for competing parties to enter and successfully conclude the negotiations.

### The Governor as Institution Builder

Governors can support and promote a state framework that sanctions and provides incentives for the use of mediation in public policy and enforcement disputes. The statewide offices of mediation discussed in this issue are the best current examples.

*Statewide offices of mediation have taken on several different forms. To learn how four states have developed their offices, the FORUM interviewed their directors: Peter Adler, director of Hawaii's Program on Alternative Dispute Resolution; John W. Gleeson,*

*director of New Jersey's Center for Public Dispute Resolution; David O'Connor, director of the Massachusetts Mediation Service; and Roger Williams, director of Minnesota's Office of Dispute Resolution.*

## Q. What is the mission of your office? What services do you provide? To whom?

**Adler:** We have two missions, one broad, one narrow. The broad one is to be a catalyst for dispute resolution development and experimentation throughout the state, notably in the judiciary but in other branches of government and outside the government as well. In other words, to develop and broaden the field of dispute resolution in Hawaii. This office is a proving ground, a place that could get good evaluative tests of dispute resolution up and running.

The narrower mission is to pay particular attention to the continued testing of dispute resolution alternatives for public controversies of various sorts, both those in litigation and those outside of the courts that involve policy matters.

Our office provides several different services. Our largest initiative has been designing and getting a statewide court-annexed arbitration program going in all circuits. In the public disputes area, last year we started a program working with judges and litigants to identify appropriate cases and match mediators to those cases. We provide ongoing mediation services for public disputes, ongoing arbitration services for tort cases, and other services in research and planning.

**Gleeson:** Our basic mission is to develop and promote effective methods of resolving major public interest disputes through mediation and other third-party neutral services. Our goal is to resolve the disputes faster, at less cost, and with greater satisfaction to the disputing parties than more adversarial methods. Center services are broad, involving a variety of neutral third party techniques

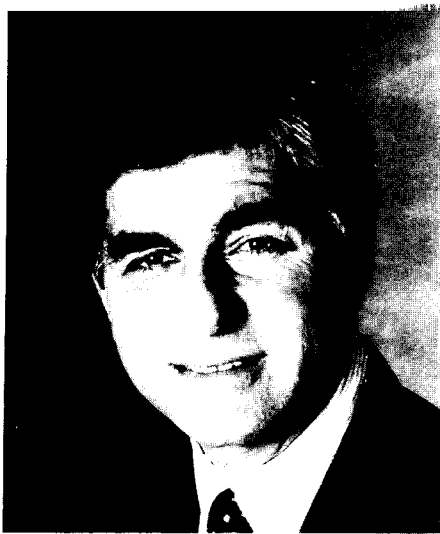
but principally mediation by staff and nonstaff consulting mediators. This year we facilitated a major case that used collaborative problem solving over issues surrounding the state's emergency medical services system. To date, state agencies, municipal officials, private parties, and their lawyers have been involved in, and the beneficiaries of, the mediations. State courts send us a significant number of our cases.

A major center service is training in dispute resolution techniques. Over the years we have trained public managers, law clerks, probation officers, community mediation volunteers and public interest lawyers, among other groups.

**O'Connor:** The mission of the Mediation Service is to resolve major public policy disputes of statewide significance. We provide a range of services which we group in four categories.

The first is direct mediation of major disputes involving a public agency in some capacity, if not as a direct party, then as a concerned indirect party. These situations also include private parties such as advocacy groups, corporations and business interests. Our expertise here is to assist in negotiations that cross the boundary between public and private interests. We identify and appoint mediators acceptable to the parties and arrange for their funding. Occasionally I serve as a co-mediator.

A second area is to help public officials develop better administrative procedures for processing disputes. This is less glamorous but can have a substantial impact over time. It can be accom-



*"We have known for some time that mediation works in the field of labor relations and I am convinced that it can be used in other areas of public policy."*

Governor Michael S. Dukakis,  
Massachusetts

plished with more opportunities for settlement and fact-finding.

A third area is education and training in dispute resolution for public officials. We meet with and explain dispute resolution to state and other officials and periodically sponsor training programs for them and their staffs.

A final area is service to the court system. We help the judiciary understand and implement dispute resolution programs. We help insure the quality of services and work on the development of case selection and referral procedures.

**Williams:** The mission of the office is to help public agencies become more adept at settling disputes and helping

them actually settle public disputes. We do that in several ways. We provide training courses in negotiation and mediation to state employees and managers. We work with agencies to determine the dispute resolution procedure best suited to a particular dispute. We provide mediation services or suggest non-profit or for-profit service providers which would be appropriate, given the nature of the dispute. And the office maintains and disseminates up-to-date information about the use of dispute resolution techniques in settling public-sector disputes. Our principal clientele are state agencies, although we will assist any public agency that requests our help.

## MEDIATING HAWAII'S WATER CODE

### The Dispute

For nearly half a century, lawmakers in Hawaii have wrestled with complex policy issues related to the management of the state's surface and ground water resources. In 1978, the Hawaii state constitutional convention passed, and the electorate approved, a specific provision mandating the Hawaii legislature to protect, control, and manage Hawaii's water. Various versions of a State "water code" were introduced and heatedly argued. For nearly a decade, these discussions pitted developers against environmentalists, large landowners against small ones, and the counties against the state. Inevitably, each legislative water code battle ended in stalemate.

In the summer of 1986, the Judiciary's Program on Alternative Dispute Resolution, Hawaii's office of mediation, was approached by JoAnn Yukimura, a legislator from the county of Kauai. Yukimura, on behalf of lawmakers from several counties, requested that the program organize an informal and voluntary policy dialogue centering on some of the issues involved in the water code impasse. The Program on Alternative Dispute Resolution agreed to assist and assembled a team of mediators.

### The Process

To initiate discussions, the mediators first set in motion a process that identified major "sectors" that stood to be affected by any new water law. These included, among others, federal, state, and county agencies involved in water administration; large and small farmers; county legislators and planning departments; environmental and conservation groups; private developers and large landowners; and native Hawaiian groups.

Next, the mediators drafted a brief concept paper called "Towards A Water Code Roundtable". Focusing largely on procedural matters, the paper suggested the creation of a neutral, ad hoc forum that would promote information exchange, issue clarification, and, if feasible, joint problem solving and negotiation. The mediators recommended that a "safe haven" of discussion be created for people who normally took opposing positions with each other before the legislative on water issues. The document, stamped "draft", was circulated to the individuals who had been identified as prospective participants along with an invitation to a first meeting.

The Water Code Roundtable's initial meeting, held in the Supreme Court

building in July, 1986, produced an agreement to proceed with substantive, mediated discussions. All decision-making within the roundtable would be by consensus and the process would continue only so long as all individuals were willing to meet. Additional prospective roundtable participants were identified and ground rules for participation adopted. Of particular importance was a provision that allowed roundtable members to speak in their personal capacities rather than as official representatives of their constituencies. The effect was to permit everyone at the table to enter into "no-risk" discussions.

Moving from procedure to substance, the roundtable next concentrated on identifying and improving the definition of various water code issues. The roundtable's first breakthrough came when all parties acknowledged that, regardless of who owned Hawaii's water, water in general should be regulated. Discussions continued on questions dealing with the types of water code and water permits the state should have and on how authority for regulating Hawaii's water should be divided between the state and counties. Between July and December of 1986 the Water Code Roundtable held more than 25 large and

## Q. What has been the most important accomplishment of the office?

**Adler:** The most visible accomplishment has been the start-up of the court annexed arbitration program and the public disputes project. People can see cases being arbitrated and mediated.

The quieter accomplishment has been to help create a climate of receptivity for dispute resolution experimentation. By this I mean basic missionary work with judges, court administrators, legislators, and executive branch officials that arouses their curiosity about dispute resolution and interests them in trying it.

small group working sessions. As the start of the 1987 legislature drew closer, the group's efforts intensified.

### The Result

In January the roundtable was able to draw up an arrangement-in-principle covering many of the major water code issues that had been sticking points in prior legislative sessions. The agreement was forwarded to key committee chairs and to other public and private groups. Among its features, the agreement called for an independent state water authority, a statewide water permitting system, the development of individual county water plans, and the creation of an administrative dispute resolution system for dealing with various water matters.

Between January and April, 1987, the roundtable's water code proposals were discussed and debated in various public hearings. Further compromises and modifications occurred. Then, in the final hours of the legislative session, a water code embracing many of the roundtable's key consensus proposals passed both the Senate and House of Representatives. On May 30, 1987, after more than 10 years of debate, Governor John Waihee signed Hawaii's new water code into law.

**Gleeson:** That we are functioning, active, moving ahead. In terms of case-work, the single most important accomplishment was the settlement of a ten year litigation over the Camden County regional sewage and waste treatment system. The dispute involved 37 municipalities including Camden, New Jersey's single most economically depressed city. The settlement included reducing the costs of the system by about \$50 million; lowering system costs to individual homes in the county from \$1000 to about \$350. The settlement was instrumental in a decision by the Campbell Soup Company, Camden's single largest employer, to remain in the city. That was very uncertain before the settlement. Campbell now is in the process of constructing a \$40 million international headquarters and investing another \$37 million in modernizing the Campbell plant in Camden. So the settlement really played a direct role in stabilizing the employment and tax base situation in Camden.

**O'Connor:** Developing a solid track record of using mediation in a wide variety of important public policy disputes. Our recent annual report describes the role of the office in 26 major public policy issues or problems during the last year covering everything from health care and environmental issues to construction and transportation issues and insurance and rate-setting problems.



*"The New Jersey Public Advocate's Center for Public Dispute Resolution is an exciting experiment in the use of alternative methods of resolving society's conflicts."*  
Governor Thomas Kean, New Jersey

We have been able to show to public officials the wide applicability and flexibility of mediation and other dispute resolution procedures.

**Williams:** Acceptance of the office as a legitimate endeavor by the local dispute resolution community. In shaping the office, we worked closely with the dispute resolution community to determine the need for a state office and the role it might play. This open process allowed the office to be accepted as an important addition to the community. Being a small office, we must utilize non-profit and for-profit resources in serving our clientele. Today, we are able to draw on the dispute resolution community's resources in responding to the dispute resolution and training service needs of our clients.

## Q. What has been its most difficult challenge?

**Adler:** The most difficult challenge involves the opportunistic nature of this work. It is very difficult to do a strategic plan for the use of dispute resolution methods. That's the most frustrating aspect for me. I've been trying to figure out how we assess in the widest possible way the potential uses of dispute resolution in Hawaii in various settings and establish some priorities in the effort. We have not succeeded in putting together a coherent plan that cuts

across different sectors, across the different institutions and branches of government, and across the substantive areas of the field, such as family mediation, civil and criminal matters, and environmental and community mediation.

**Gleeson:** Creating an awareness among potential users of dispute resolution services, ours and others, of the usefulness of the services in meeting their immediate needs. Everybody



*"The Minnesota State Office is helping state officials to understand that a broad range of disputes—over farm credit, state policy or personnel issues—can be resolved most effectively through a collaborative rather than adversarial process."*

Governor Rudolph S. Perpich, Minnesota

agrees that mediating disputes without going to court is a wonderful idea. The difficulty is making decision makers in government and elsewhere aware that dispute resolution methods exist and that there are places where these services can be obtained. That's a difficult job. For example, city managers are constantly faced with what seem to be intractable problems such as siting a homeless shelter or halfway house. Mediation can be an effective way to resolve these problems. The tough part is to get their attention that mediation is a tool to help them to resolve community problems.

The center has tried to raise awareness of dispute resolution around the state through training and conferences such as one we co-sponsored in 1986 with the League of Women Voters and a major symposium in December, 1987

on critical issues in dispute resolution. A broad, targeted and educational effort is necessary and is not a one-shot effort with us.

**O'Connor:** Consciousness raising. How to get the word out to let public officials know this option is available to them, and help them understand when and how they can use it. We began the office in 1985 from ground zero. Nothing of the kind predated it. It took considerable effort to develop momentum and increase awareness of the office's existence. Even now, we constantly remind and alert public officials that there is assistance in alternative dispute resolution available to them in state government.

**Williams:** To convince state agency officials that there is something other than

## ENDING BOSTON'S PUBLIC HOUSING STALEMATE

### The Dispute

Gentrification and a rising standard of living have resulted in what Mayor Ray Flynn has called "a crisis of affordability" in Boston's rental housing market. The Boston Housing Authority (BHA) has almost 15,000 people on its waiting list for public housing. In this context, the authority's Franklin Field Public Housing Project, with 19 low-rise buildings, has provided affordable housing for low income families every year since 1959. In the mid-1970s the authority recognized the project's dilapidated condition and decided to rehabilitate the buildings rather than construct new ones. When it contracted with Shah/Wexler Construction Company in 1982 to rehabilitate the buildings at Franklin Field, the contract called for almost \$26 million of renovations to the 346 units. The last ones were to be ready to inhabit by June, 1984.

Reliance Insurance Company posted a bond for the Shah/Wexler joint venture at the start of the project. Along the way, construction work was delayed due to many complications and hundreds of change orders. Three years after the contracted date of completion, Wexler

Construction had gone bankrupt leaving Shah Construction alone to finish the work; all \$26 million had been paid out; the last buildings had not been touched; and work had come to a standstill. The insurance company claimed to have paid out \$35.5 million and demanded reimbursement of \$9.5 million. The BHA and Shah threatened each other with litigation over responsibility for the delays, the amount owed, and the cost for rehabilitating the last building. BHA argued that many of the cost increases were not its responsibility.

### The Process

The parties made numerous attempts at bilateral negotiation, but all failed. The case was scheduled to enter the administrative appeals process of the Executive Office of Communities and Development (EOCD), the state agency that provided the BHA with funds for the project. This move would have been the first round in a long, costly series of hearings and court cases leaving the fate of the project and those who live in it in limbo for many years.

At the urging of its general counsel, the agency recommended that the parties

use a mediation process and they agreed. EOCD asked another state agency, the Massachusetts Mediation Service (MMS), the statewide office of mediation, to arrange and oversee the process. Mediators David O'Connor and Stanley Shuman were assigned to the case. O'Connor, MMS executive director, was available at no cost to the parties through funding from the National Institute for Dispute Resolution and the state. Shuman, an experienced arbitrator and construction company executive, would be paid by the parties. Negotiations involved three major issues: reaching agreement on a delay claim, completion of the final 24 units to be rehabilitated, and future liability issues. The parties held many caucuses and occasional joint sessions to determine the facts in dispute and the basis on which each side might make a settlement. Distrust was high between negotiation teams and internal differences among members of the teams threatened to end the process.

### The Result

After months of difficult negotiations, the parties agreed to settle the delay



going to court. It is politically safe for public managers and officials in any state to turn disputes over to the attorney general for resolution. Generally, the court can be blamed for an undesirable decision. When an official agrees to a negotiated settlement, however, there is a perception that they are open to criticism on the terms of the settlement. Someone can say, "you gave away the store, you gave in too soon, could have done better in court, look how much more someone else got in a similar case, etc." The continuing challenge is to convince public officials that they have much more control over process and outcome in a negotiated settlement process and, that they do not waive their right to a court settlement if these attempts fail.

claim on the basis of 414 days of delay, with the housing authority and EOCD each paying Reliance \$1.7 million. Shah agreed to complete the last building within eight months for a total of \$1.83 million. Shah insisted that this amount was less than the actual cost for renovation, but recognized the agreement enabled Reliance and the construction company to avoid years of legal suits and provided a prompt payment on the delay claim. EOCD released Reliance from liability for routine warranty work in exchange for Reliance's agreement to continue to carry liability for undiscovered defects throughout the entire project.

A lengthy settlement agreement and other documents were signed on August 3, 1987. Work soon began on the last building. With the completion of the last apartments, families would finally enjoy the satisfaction of clean, modern, handsome rehabilitated housing at Franklin Field. The 322 other families already living there would see the end of the construction work at the site and the agencies could turn their attention to other critically needed public housing projects.

## Q. How do you view the office's prospects to survive and to flourish?

**Adler:** Prospects for survival are very good. I am confident the programs that have been created—court annexed arbitration, public disputes mediation, family court mediation and so on—will survive and grow.

The office itself will survive, but it will continue to be a small office with a catalytic role. We have demonstrated the utility of having a single state office not only thinking about dispute resolution but designing and carrying out experimental uses in various settings and functioning as an incubator. As we develop programs and put them in place, they will find homes other than in this office. For example, at the moment in the court-ordered arbitration area, I have three people working. Over time I think those numbers will diminish since the organizational home for the program won't remain in this office but in the appropriate court. My goal is to try and build these programs, find the right homes for them, and spin them out and integrate them within the appropriate institutions.

Flourishing for me means continued enthusiasm and receptivity across the state for adaptations of dispute resolution in various settings. Flourishing in the public disputes program for me would mean having an active and accepted mediation service that is used by negotiators from the government, business and community sectors.

**Gleeson:** The prospects for survival are excellent. The function of dispute settlement within the Department of the Public Advocate existed prior to the creation of the Center for Public Dispute Resolution and has been recognized by the legislature by statute and through the appropriations process for 11 years. Since the center's creation the dispute settlement function has become a line item in the state budget. This bodes well for its future survival. Al Slocum, the current public advocate, as well as Governor Kean, give very strong support for the center. To flourish, the center needs the continued recognition and support of these same public officials—



*"The Hawaii State Judiciary's efforts in the field of ADR honors a long-standing island tradition of settling differences of opinion informally. Mediation and arbitration are modern-day counterparts of ho'oponopono, the ancient Hawaiian way of 'setting things right.'"*

Chief Justice Herman Lum,  
Supreme Court of Hawaii

by the legislature, by the Governor, by the Public Advocate—as well as through the input from its advisory board. In addition, we'll work to generate a much wider general knowledge of the potential of dispute resolution among the public and among government officials.

**O'Connor:** The prospects for survival are excellent. We've been getting tremendous support from Governor Dukakis and the legislature as we grow into a mature agency. Our track record is probably the best indication of our prospects for survival because performance is what public officials are looking for.

The question of flourishing is more difficult to answer. Like any public entity, we are subject to constraints and pressure reflecting what the citizens of our state are most concerned about. Massachusetts has had 5-6 years of unprecedented economic success. So there hasn't been an urgency about cost cutting and reduction in services across the government. In an era of frugality we would have a tougher time in expanding or even sustaining our levels of activity because the services we provide are not highly visible to voters and do not directly provide jobs or other essential services.

An innovative and conscientious ad-



ministration like the one we now work under sees great benefit in mediation services. Our challenge is to broaden and deepen that constituency. Performance is the way to do it.

**Williams:** I'm not concerned about the long-term future of the office. As long

as we meet the needs of our clientele, we will continue to exist. The small size of the office will, however, be a limiting factor in our ability to meet future needs. As agencies become familiar with out-of-court settlement procedures, I predict they will develop procedures for automatically attempting settlement

through negotiations at various levels in the organizational structure. As these procedures are incorporated into the day-to-day operations of agencies, there could be a declining role for the office over time.

## RESOLVING MINNESOTA'S FORESTRY DISPUTE

### The Dispute

In the fall of 1985, environmentalists challenged the Minnesota Division of Forestry's use of aerial herbicides that clear away old forest growth and make room for new stands of conifer trees such as pines and firs. They prepared a petition that claimed the aerial spraying could harm human health, wildlife, forest ecosystems, and the quality of ground water. The Sierra Club, People Against Chemical Contamination, and about 50 individuals filed the petition with the Minnesota Environmental Quality Board. The petition called for the Department of Natural Resources to prepare an environmental assessment worksheet on the aerial application of herbicides.

The department responded with its worksheet in December, 1985, but the petitioners found several flaws in the department's documents. According to the petitioners, the documents failed to provide accurate and complete documentation of the need for the aerial program; to furnish the information necessary for a cost-benefit analysis of the program; and to analyze the risks associated with herbicide use in forest management. The petitioners claimed the documents misstated the effectiveness of the department's administrative processes in safeguarding against adverse environmental effects.

Nonetheless, the department's staff said that its review process produced no new information requiring preparation of a more detailed environmental impact statement. But the staff did believe that legitimate questions existed that could best be resolved through a dispute resolution process.

### The Process

In May, 1986 staff members began discussing the use of mediation with the director of the Minnesota Office of Dispute Resolution, the statewide office of mediation. He explained the process of mediation and identified several mediators with environmental mediation experience. After many discussions between department staff and the environmentalists, both sides agreed in February 1987 to use mediation as a means of settling their disputes.

As part of the agreement, the Sierra Club and others set aside the possibility of suing the department to stop the aerial application of herbicides on state forest lands while the mediation proceeded. The department, in turn, deferred its formal decision on the necessity of preparing an environmental impact statement. Next, the parties retained the services of Leah Patton of the Seattle-based Mediation Institute. Finally, representatives of the forest products, chemical manufacturing, and agriculture industries jointly indicated an interest in becoming a party to the mediation and the two original parties decided to allow industry participation.

Each of the parties—the Department of Natural Resources, the environmental coalition, and the industry group—formed a work group consisting of members representing their respective interests and constituents. Each work group designated contact persons to represent the group during the course of the mediation and to coordinate communications during and between mediation sessions. Strict ground rules addressing attendance, confidentiality, media relations and cost-sharing were adopted to

guide the mediation process. The rules also defined the issue and focused discussion on particular aspects of chemical usage. The Office of Dispute Resolution was responsible for logistical arrangements.

From Feb. 5 through June 5, 1987, the parties held eight full-day sessions, concluding negotiations at a June 4-5 retreat at which they developed and signed an agreement.

### The Result

The wide-ranging agreement includes provisions that call on the department to protect public health, wildlife, and water and fisheries and to redirect its aerial herbicide spraying through changes in management activities. The agreement makes the director of the Minnesota Office of Dispute Resolution the chair of a Forest Herbicide Committee that is to evaluate compliance with the agreement through 1993. All the parties agreed to make their best efforts to reach by 1993 important targets such as reducing by 50 percent the number of acres treated with aerial herbicides.

In addition, the environmentalists agreed to redefine their petition to conform with the agreement regarding the herbicide application program for growing new conifers during the 1986-93 period. In turn, the department issued a record of decision that the 1986-1993 program does not have the potential for significant environmental effects, provided the agreed-upon targets are met and other provisions of the agreement are accomplished.

## STATEWIDE OFFICES—THE EXPERTS' VIEWS

*The development of statewide offices of mediation has benefitted from constructive advice and continuing encouragement from many quarters. Among the*

*leading observers and proponents of statewide offices are **Sanford M. Jaffe**, director of the Center for Negotiation and Conflict Resolution, and **Christine***

***Carlson**, a Kettering Foundation program officer. Their views were expressed in a recent interview with the FORUM.*

### **Q.** What has been the significance of the role of the courts in the statewide offices of mediation?

**Carlson:** It has varied from state to state. Obviously one of the factors is where the office is located within the structure of state government. Hawaii's office is located in the judiciary and the program has been shaped by that. The other three offices are not located in the courts, but they inevitably developed relationships with the courts. In New Jersey, the courts turned to the office as a source of training and as a special master in some complex cases. In Massachusetts, the courts turned to the office as a consultant in how to set up a program in the courts. Inevitably, because the offices are becoming centers of information and experience with dispute resolution, they are going to be positioned to assist the courts as courts be-

come more interested in using dispute resolution.

**Jaffe:** If you look at what has happened in dispute resolution over the 5-6 years, a great deal of dispute resolution activity has been in the courts. It is not surprising that the state offices would begin to develop connections with the court system as part of their general evolution. As courts have become more anxious to use the range of dispute resolution processes, they need resources to deal with the complex cases they want dispute resolution processes such as mediation to play a role in. The state offices can play a very important role in being that kind of resource.

By working with the state court sys-

tems, the state offices garner an additional degree of legitimacy and credibility. This is particularly important in the beginning stages of any social experiment and change. This legitimacy helps the offices in dealing with other constituencies within the state, the executive and legislative branches and the broader community.

The next stage will be to look at dispute resolution not just in the courts, but as an overall system for resolving conflict and solving problems within each state. The relationship between the state offices and the courts in that context becomes an integral part of a system-wide approach to resolving disputes.

### **Q.** What are the chances of other states replicating the models developed by the statewide offices of mediation offices supported by the Institute?

**Carlson:** Overall, I think the chances are very good that states in one way or another will take up this idea of providing some state leadership and assistance for resolving disputes involving government. Part of that is because the interesting conflict resolution is so high. The approaches will be tailored to the particular state.

Two of the most important considerations are where the offices are located in the state government structure and the skills of the people initiating the activity. Some offices are better positioned in terms of being able to interact with the various agencies of state government and the various branches. Part of that is related to the role the agency plays, that is, whether it is seen as an initiator and innovator; whether it is a line agency or agency reporting directly to the governor.

**Jaffe:** I believe that state offices are worth replicating and will be replicated in other states in the coming years. They appear to me to offer a good product that is replicable. The challenge will be informing the public of the product and lending technical assistance to help replicate the offices in new states.

You need a good model that is replicable. I believe that the state offices are a good product. We'll be in a better position to test my intuitive judgment on this point when the assessment that institute is conducting is completed. The evaluation will not provide absolute measures of success or failure, but it should help identify common elements in the state offices that can be replicated, even while recognizing that each state will be different. The four NIDR offices are in some ways quite different. I do think there are common elements.

One is that each state office has as its fundamental operational goal the provision of dispute resolution services to the state and the public. Another is the educational role each office has undertaken to get people to understand the role of these processes. Both of these are important elements and replicable while preserving state-by-state diversity.

You need to inform the public of the product and provide technical assistance to help replicate these offices. The step from having knowledge and a need to actually structuring a project that addresses the needs is a difficult one. Assistance from persons familiar with these operations can help.

## **Q. What role has private funding played in creating and maintaining these offices? Is it a necessary element of these models in the future?**

**Carlson:** Private funding has provided opportunities for both acquainting and involving a broader spectrum of non-government as well as government agencies in experimenting with these approaches to solving problems. I am particularly impressed with the development of the Public Mediation Fund created by the Boston Community Foundation in conjunction with the Massachusetts Mediation Service as a model other states and foundations should look to. The field of dispute resolution as applied to public policy issues is very new and there is much to be learned. Private funds are needed to allow for innovation.

When a field is new, it is very important and useful to have support from both government and non-government sectors. Such funding and support indicates that it isn't just government that is

interested in these new approaches, but that there is broader interest in using these processes for resolving public policy problems. It helps make the idea of dispute resolution both legitimate and credible.

Is public funding necessary for these models? It is important to think about the kind of funding to get an office started and the funding that is needed to sustain it over time. Some issues these state offices will be addressing will be primarily related to the way government functions and are appropriately supported by public funds. My sense is that in the foreseeable future, the expansion of the field will involve trying to establish some mediating function between government and the public and between government and the private sector. Shared funding and support of new approaches makes them more legitimate.

Private funds should continue to support innovation and permit people who would not otherwise be able to use these approaches to participate. Private funds are needed to support innovation. Private support is most likely to be available for extending dispute resolution into new issue areas or making possible participation by those who cannot otherwise.

**Jaffe:** Private funding played a key role in helping start the state offices. Without private funds it is unlikely that any of these offices would have gotten started. Private funds were important to help make the case with public officials that these were experiments that should be tried.

In the future private funders will continue to play a key role in getting offices started. It may not, and probably

## **MEDIATING NEW JERSEY'S EMERGENCY SERVICES**

### **The Problem**

In 1986, the federal government, upset about New Jersey's divided system of emergency medical services, said it would no longer reimburse the state for emergency transport bills it pays through Medicare and Medicaid programs. At stake was about \$20 million a year. The federal government objected to the tradition-bound fragmentation of effort between volunteer ambulance crews and professional paramedics in handling emergency medical services.

When volunteer ambulance crews respond to distress calls, they are restricted to providing basic life support such as administering CPR and oxygen, bandaging wounds, and splinting fractures. In turn, hospital-based paramedics are limited to providing advanced life support such as administering intravenous lines, drug therapy and specialized techniques. The volunteer crews are allowed to transport patients to hospital. Paramedics ride with patients in the volunteers' ambulances.

In the past conflict and competition among volunteer ambulance services, hospital-based paramedics, state and local agencies, health care institutions and consumer organizations have prevented New Jersey from implementing a comprehensive, coordinated, statewide emergency medical services system. But the federal threat to end its \$20 million in reimbursement prompted change.

In September, 1986, Gov. Thomas H. Kean created the Governor's Council on Emergency Medical Services to recommend overall policy and a state plan that would meet the state's needs and federal guidelines. In November, the council asked the New Jersey Center for public Dispute Resolution (CPDR), a part of the state's Department of the Public Advocate, to provide dispute resolution services in helping it develop these recommendations. After an initial assessment, the center, which is the state's office of mediation, agreed.

### **The Process**

The center staff and the council's leadership first evaluated the various dispute settlement processes that could be useful in forging recommendations. With the council kept informed, the center retained mediation consultants, Interaction Associates, Inc., of Cambridge, Massachusetts, to assist in developing the most useful process. The consultants and the center's staff devised a collaborative problem-solving process as a form of mediated negotiation whereby all policy recommendations would be adopted by consensus of the council.

Subcommittees were created to develop recommendations on a range of important matters such as training, staff response time, data, reporting and quality assurance, communications, and the structure and design of the state's emergency medical services system. Initially, Interaction Associates led monthly negotiations, a job now filled by center staff which all along has guided subcommittee meetings.

should not require the same amount of resources as in the first four offices. But it may require a small amount to provide the glue to get things started. Experimental and innovative projects state offices may want to undertake may still need some private support. Those efforts remain difficult to fund completely from public sources. Finally, and perhaps most important, private funding helps to preserve the neutrality and credibility of these offices. Complete dependence on state funds may present problems. The experience to date shows that the state is often a key party in the kinds of public policy disputes these offices have handled. I think it's important for these offices to rely on a balanced mix of public and private support. ◀▶

## The Results

In April, 1987, the council gave Gov. Kean an interim report, reached through consensus, that recommended that all emergency medical services personnel must meet certain basic training standards. Those personnel include dispatchers, police, firemen, ambulance drivers, and rescue workers. The council agreed that all volunteers in the system should be trained to qualify as emergency medical technicians. Only some do now.

Other council recommendations call for uniform standards for equipment on ambulances, minimum response times by ambulance squads, and a coordinated system to review all levels of emergency medical service.

The council now is in the midst of the second phase of negotiations with more changes expected that could help provide greater coordination and efficiency to the emergency medical system. The center is helping the council in developing a process to obtain increased public comment on all proposed

Wisconsin's approach differed from the other states with Institute-funded pilot projects. There, rather than create a separate office or hire new staff, Howard Bellman, the state's Secretary of Labor, Industry and Human Relations, chaired an informal screening panel composed of two other members of the governor's cabinet to determine whether dispute resolution techniques might usefully be applied in certain controversies. In 1985, through Bellman's intervention, two major statewide disputes between the Department of Natural Resources and Indian tribes over fish and game regulations were mediated. When the governor's office changed hands in 1987, though, and Bellman was replaced, the Wisconsin dispute resolution effort dissipated. The Wisconsin approach indicates the difficulties of im-

changes. Meanwhile, the federal government and the state are discussing the threatened withdrawal of reimbursements in light of changed regulations recently issued by the U. S. Department of Health and Human Services.

For the Bergen *Record*, one of New Jersey's leading newspapers, mediation in this public policy case played a vital role. It said, "Over the past year, the Governor's Council on Emergency Services has been meeting to find a solution that would satisfy Washington and still provide an active role for volunteer ambulance corps. These discussions could have bogged down in petty rivalries and competition. Instead, cooperation has prevailed." Affected parties "wisely called in a third party—the Center for Dispute Resolution in the Office of the Public Advocate—to act as intermediary. The mediator, Thomas Fee, helped bridge the gap in communication and guide the council toward a consensus. This is how government works when it works well."

plementing a state-wide dispute resolution through the personal efforts of one individual, no matter how highly placed that person might be.

## Achievements and Lessons Learned

In choosing among the applications submitted by interested states, the Institute sought guarantees of official support (especially matching funds), indications of a readiness to move quickly, and a multi-issue focus. From what four of the states have accomplished thus far, it appears that the Institute chose wisely. It is no small accomplishment to win political support for such experimental efforts, gain approval for matching allocations, select senior staff, develop constructive relationships with the courts and various administrative agencies, and achieve actual case results in two or three years. Moreover, it appears that the state offices in Massachusetts, New Jersey, Minnesota and Hawaii have succeeded in winning long-term state funding commitments.

The volume of case work has been surprisingly high. For example, during the past year in Massachusetts, 26 public disputes involving a wide range of subject matter were handled by the state office. The positive impacts of the settled cases have also been considerable. For example, in New Jersey the settlement of a complex case involving a regional sewage and waste treatment system with 37 municipalities directly led to a saving of \$50 million in construction costs and indirectly to a decision by Campbell Soup Company to remain in New Jersey's most economically depressed city, Camden, and invest more than \$75 million to build new headquarters and upgrade its Camden plant.

The success of several of the state offices has been in part due to the realization that mediation and other forms of dispute resolution are best institutionalized through an almost invisible, behind-the-scenes, set of interactions among policymakers, state officials and various disputants. When public officials are able to announce a constructive solution to a difficult controversy, they are more inclined to try mediation a second time. The state office directors have all opted for this behind-the-scenes approach, and have spent a great deal of

time consulting with state officials who want advice on how best to handle difficult disputes. This approach has helped to build good working relationships which, in turn, have enhanced the reputation of the mediation offices within state government. While the public in each of the states may as yet have almost no inkling of what has been accomplished thus far, the prospects for institutionalization have been boosted by this strategy.

The interest in the offices shown by the state judiciaries has surprised some and helped legitimize the work of the offices. The state offices were initially aimed at dealing with disputes under the auspices of the executive branch, particularly administrative agencies. The state courts, though, have shown enormous initiative in identifying and adopting alternative dispute resolution techniques and strategies. New Jersey, Hawaii, and Massachusetts have keyed portions of their state office functions to cases and activities suggested by the judiciary.

Most recently, the state offices have begun to build public awareness and acceptance of dispute resolution through training sessions and conferences. In Minnesota, Governor Rudy Perprich recently announced a statewide "dispute resolution week" that was suggested and coordinated by the state office. While these activities require much work by office staff, they can be important in raising consciousness and may pay off in referrals and requests for assistance. Each of the state offices has made a commitment to continue its training activities and other forms of public education.

As other states contemplate creating their own state offices, the challenges encountered by the first five states should be given careful consideration.

### **Resistance from Agencies**

A vexing but not surprising problem has been resistance to the idea of state offices of mediation from inside the executive branch, particularly from administrative agencies concerned about their authority. A number of key officials in each state have been antagonistic to the idea of "turning over" highly visible policy, siting, or other kinds of disputes to "outsiders." Some believe it is their responsibility to resolve disputes using

traditional means and view the entry of a mediator as an admission of failure on their part.

Of course, some state officials mistakenly assume that mediation is the same as binding arbitration, and that the disputants, including the chief executive, will be forced to "give up control" if dispute resolution procedures are employed. Only with great care and persistence have the heads of the state offices (and their advisory boards) been able to convince the doomsayers that the use of informal dispute resolution mechanisms involves neither admission of failure nor a loss of statutory authority.

### **Mediation Services**

Another function of these offices involves the identification of acceptable neutrals to serve as mediators or facilitators. The notion of prescreening in-state professionals for the purpose of creating a roster of dispute resolvers has proven very difficult. While none of the state offices has wanted to take responsibility for any kind of de facto certification, each office has put together informal lists of experienced public dispute mediators. The office directors agree that they must be ready with appropriate suggestions when the court asks for special master nominees or regulatory agencies seek a nominee. In Hawaii, the state office held special training sessions for carefully selected public dispute mediators and developed an expedited case entry system which is now being tested.

An important premise so far guiding each of the state offices is that the offices themselves will not normally serve as mediators in most of the cases referred to them. Instead, they have tried to match disputants with appropriate dispute resolvers private practice. Ultimately, the parties themselves must feel completely comfortable with the neutral they select; the state offices, while prepared to make suggestions, have tried to avoid any implied certification or the appearance that they are forcing particular practitioners on anyone.

### **Funding and Payment for Services**

Funding persists as a central concern for these offices, even as several state governments have moved to pick up their annual operating costs. Each state office has created a pool of funds that can be

used to cover the costs associated with specific mediation efforts. One breakthrough came when the Massachusetts Mediation Service received a grant from a Boston-area foundation to put funds aside to create such a resource pool. The fund's primary focus is support in public policy disputes of importance to lower-income residents in the city of Boston, but it can be expanded by contributions from other sources to serve other groups or issues. This may lead other funders to create targeted resource pools.

Several of the state offices have just reached the point of charging at least a nominal amount for some of the services they provide. This is tricky. The offices do not want to impose costs of those least able to pay, and sliding fee schedules are hard to construct. Moreover, agencies of government are not in the habit of charging for their services and state and federal labor mediation offices have historically not charged for mediation services. On the other hand, as in-state groups and other agencies seek additional training and advice from the state offices, they have indicated a willingness to pay at least a modest amount for such services.

Finally, the rate at which professional mediators should be paid has been an issue each office has grappled with. The offices in general have sought to use the highest quality mediators with experience in public disputes. While one state has tried to set a standard fee range from \$350 to \$500 a day, another state handles this on a case-by-case basis. Establishing a going rate can be a difficult task in the public disputes area work. Some believe setting a standard fee might eliminate from the mediator pool some of the most experienced professionals whose per diem rates can be much higher.

### **The Future**

One forecast in 1985 was that the state office "fad" would die out as soon as the initial round of Institute grants was spent. Others suggested that the offices quickly would take hold in the initial states and many other states soon would follow suit. The experience to date suggests both of these predictions were wrong. Instead, the offices have moved at a deliberate pace in experimenting

with various roles, building momentum through successful case work, and institutionalizing their functions. They have done so with quiet but savvy political and institution-building strategies.

It is possible over the next few years that as many as ten more states will adopt dispute resolution programs—whether by statute or informally. California, for instance, is once again considering legislation that would create an office to advise local governments on how to proceed with mediation when disputes arise. This bill passed both houses during the last legislative session, but the governor vetoed it. The bill has been reintroduced, and its backers have made a special effort to explain the merits of the idea to the governor. The governor of Ohio has expressed interest in creating a state office of mediation. Key agency heads in Maine, Vermont, Florida, Oregon, Washington and Virginia have indicated continuing interest in the state offices concept.

As the Institute begins its formal assessment of the first round of state offices and as the state offices examine their own successes and failures more systematically, further evidence should become available that will make it easier to assist interested states and forecast the future of state offices of mediation.

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## NIDR NOTES

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### Regulatory Negotiation at the State Level

The Institute soon will invite proposals from dispute resolution practitioners and government officials who seek to test the uses of regulatory negotiation at the state level.

Regulatory negotiation is a relatively new adaptation of dispute resolution methods to government agency rulemaking. In a regulatory negotiation, all parties affected by a rule are called to a bargaining table where a facilitator or mediator helps them to seek agreement on the terms of a rule *before* an agency issues it. The purpose is to avoid the delay, litigation, and acrimony sometimes associated with the current rule-making process.

In recent years several federal agencies, including the Environmental Protection Agency and the Federal Aviation Administration, have used regulatory negotiations successfully in controversial rulemaking cases. To help examine and promote this developing process, the Institute has subsidized costs in several federal negotiations where some parties could not pay for shared expenses.

Now the Institute wants to expand to the state level its public policy program of testing, demonstrating and documenting a limited number of regulatory negotiation demonstration projects. So far, few states have experimented with regulatory negotiation, or negotiated rule-making as it sometimes is called. One state that will is New Mexico.

### New Mexico Storage Tanks

The Institute recently awarded \$5,000 to help develop rules governing the state's 11,000 underground petroleum storage tanks. It is estimated that as many as 30 percent of New Mexico's underground storage tanks leak, a serious health threat in a state that relies heavily on groundwater for personal use.

"Besides wanting to help New Mexico deal with the storage tank problem, our purpose in awarding the funds is to test how government, industry, environmentalists and citizen groups can work at the state level in fashioning regulations controlling vital parts of their lives," according to Madeleine Crohn, the Institute's president.

The Institute's grant goes to Western Network, a Santa Fe-based mediation firm. The funds will be used to increase public participation in producing the new storage tank regulations.

Western Network will assist representatives from environmental, citizen, government and industry groups and the state's Environmental Improvement Division (EID) in negotiating the regulations that will apply to the storage tanks. The regulations that emerge from this process will be adopted by the state's Environmental Improvement Board along lines mandated by the New Mexico legislature during its most recent session.

The Institute also has funded Western Network to assist in a regulatory negotiation involving groundwater standards in Arizona.

In 1988, the Institute will issue an announcement with guidelines on support for state-level regulatory negotiation projects. For further information and copies of the announcement, please write the Institute.

### Recent Institute Grants

Conflict Clinic, Inc., George Mason University, Fairfax, Virginia: a \$25,000 grant to provide third-year support for intervention in conflicts of public interest and for study of the processes used through a "teaching hospital" method.

The Institute for Environmental Negotiation, Charlottesville, Virginia: a \$5,000 grant to support a mediation process for resolution of a conflict over historic preservation in Atlanta.

University of Florida Dispute Resolution Center, Gainesville, Florida: a \$10,110 grant to cosponsor with the Florida Supreme Court a national workshop on mediation standards for court-authorized dispute resolution programs.

Mediation Network of North Carolina, Durham, North Carolina: A \$6,400 grant to support creation of a regional resource center for community mediation programs.

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## IN THE PROCESS: Resources for the Field

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### PUBLICATIONS

*Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, by Lawrence Susskind and Jeffrey Cruikshank of the MIT-Harvard Public Disputes Program (Basic Books, Inc., New York, 1987, pp. 276, \$19.95) posits that conventional ways of handling public disputes no longer work. According to the authors, political compromise, litigation, elections, referendums and administrative processes have been unable to break the impasse in growing numbers of public disputes. The book draws on various cases over the past 15 years in which negotiated approaches were used to resolve politically charged public disputes. It presents a set of consensus-building strategies aimed at producing agreements that are less costly and more satisfying to those involved.

The New York University Press, (17 Washington Sq. South, New York, NY 10012) has recently published *The Politics of Environmental Mediation*, by Douglas Amy (1987, 255 pp.), and *Conflict Management and Problem Solving: Interpersonal to International Applications*, edited by Dennis Sandole (1987, 320 pp.) . . .

*Alternative Dispute Resolution: An ADR Primer* by Beth Paulson and Frank E.A. Sander (ABA Standing Committee on Dispute Resolution 1800 M St., N.W. Suite 200-S, Washington D.C. 20036, 1987, 36 pp. \$2.50) is a pamphlet designed to answer some basic questions posed by lawyers and judges about ADR . . .

*Neighborhood Justice in Capitalist Society: The Expansion of the Informal State* by Richard Hofrichter (Greenwood Press Inc., 88 Post Road West, Box 50007, Westport CT 06881, 1987) argues from a Marxist perspective that community dispute resolution should be viewed not simply as an alternative to the courts, but more fundamentally as an unstable alternative to politics and community organization in general . . .

*Labor Arbitration: The Strategy of Persuasion*, by Norman A. Brand (Practising Law Institute, 810 Seventh Ave., New York, NY 10019, 1987, 499 pp. \$75.00) is a guide for advocates on how to prepare and present cases in labor arbitration . . .

*Commercial Dispute Resolution: A Resource Guide* features an annotated cata-

logue of publications and media products available through the American Arbitration Association. For information, contact the AAA, 140 West 51st St., New York, NY 10020-1203 . . .

## NEWSLETTERS, JOURNALS AND ARTICLES

*Resolve*, the Conservation Foundation's newsletter, will be back in publication in early 1988. The focus in the upcoming issue will be on the Institute's statewide offices of mediation and on institutionalizing state level support for mediating public disputes. For more information, write The Program on Environmental Dispute Resolution, The Conservation Foundation, 1250 24th St. N.W., Washington D.C. 20037 . . .

The October, 1987 issue of the *COPRED Peace Chronicle*, a bimonthly newsletter for members of the Consortium on Peace Research, Education and Development, focuses on the various dispute resolution programs now housed at George Mason University, including COPRED, the National Conference on Peacemaking and Conflict Resolution, the Conflict Clinic and the Center for the Analysis and Resolution of Conflict. For more information, contact COPRED/CARC, George Mason University, 4400 University Dr., Fairfax, VA 22030 . . .

*The Fourth R* is the newsletter of the National Association for Mediation in Education, which promotes the teaching of conflict resolution skills in schools.

Its Fall, 1987 issue features a report of NAME's 3rd conference. NAME also makes available the *Annotated Bibliography for Teaching Conflict Resolution in Schools* with over 120 entries. For information write, NAME, % Mediation Project, 139 Whitmore, UMass, Amherst, MA 01003 . . .

*Update*, the newsletter of the Program on Conflict Resolution of the University of Hawaii, reports on the projects the program is undertaking. For information, write, PCR, University of Hawaii at Manoa, 2424 Maile Way, Porteus 107, Honolulu, HI 96822 . . .

*The Natural Resources Journal* recently published a special issue titled "Environmental Dispute Resolution" with articles on mediation of water disputes, toxic cleanup disputes and others. For information, write to the UNM School of Law, 1117 Stanford NE, Albuquerque, NM 87131 . . .

## MEDIA

*Resolving Disputes Without Going Into Court*, is a series of six 30-minute color videos intended for classroom use featuring interviews with prominent labor arbitrators such as Ralph Seward, Arthur Stark, Eric Schmertz, Walter Gelhorn and George Nicolau. For more information, write Dr. Clara Friedman, 200 Central Park South, New York, N.Y. 10019.

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IMPLEMENTATION

- Conference Case Study: The Implementation of Dispute Resolution
- Edelman, Peter B., "Institutionalizing Dispute Resolution Alternatives," 9 The Justice System Journal 134-150 (1984).
- "Are Additional Resources Needed?" State Court Journal (Fall 1985).

Implementing  
Court-Annexed ADR Procedures

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Friday Morning  
November 18

**Judicial Task Force  
Committee on Implementation of Court-Annexed  
Alternative Dispute Resolution Procedures**

100 Hope Avenue  
Ventureville, New Hope 00045

November 1, 1988

Dear Colleagues:

As members of Chief Justice Martin's Task Force Committee on Implementation of Court-Annexed Alternative Dispute Resolution Procedures, we have begun thinking about our meeting later this month to discuss key issues to be considered before and during the implementation of court-annexed alternative dispute resolution procedures. Since our actual meeting time will be short and since there will be much to cover during that limited time, we have taken the liberty of creating a draft outline of possible issues to serve as a starting point for discussion.

We would be glad to hear from any of you regarding suggestions or criticisms of the outline during the few weeks remaining until the conference. Otherwise, we look forward to discussing these issues with you then.

Warm regards,

Joan Hallworth

## **Implementing Court-Annexed ADR Procedures**

### ***Premise.***

The success of any given program, including the extent of its support throughout the community, depends on program implementation.

### ***Issues.***

- **How can the need for a program be assessed?**
  - √ Gathering of statistical data.
  - √ Practical analysis of operation of current system.
  - √ Interviews with judges, court personnel, legal professionals, lay persons.
  - √ Consideration of policy issues.
  - √ Evaluation by judicial task force.
- **What are the objectives of a program?**
  - √ Reduce backlog.
  - √ Save the court and the litigants time and money.
  - √ Reduce number of litigated cases.
  - √ Provide most appropriate mechanism for resolution of particular case or class of cases.
  - √ Improve quality of justice.
  - √ Increase satisfaction and compliance with result.
  - √ Improve, restore, or maintain relationships between and among parties.
- **How can support for a program be garnered?**
  - √ Build on a previously established voluntary base.
  - √ Incorporate orientation process into program through use of seminars, printed materials, videotaping.
  - √ Include education component to publicize court services.
  - √ Solicit involvement from local bar, community interest groups.
  - √ Take advantage of and organize any dissatisfaction with present court operation.

- **How can a program be authorized?**
  - ✓ Statute.
  - ✓ Court rule.
    - Statewide.
    - Local.
  - ✓ Inherent authority of judge.
- **How can various programs be sequenced?**
  - ✓ Progression of case through established stages with limited overlap.
  - ✓ Party option.
  - ✓ *Ad hoc* judicial control through individual calendaring.
- **How can a program be managed?**
  - ✓ By court personnel, either specially assigned or in course of regular duties.
  - ✓ By individual judges.
  - ✓ By those neutrals assigned to the program.
  - ✓ By an outside organization under contract with the court.
- **How can the integrity of the process be preserved?**
  - ✓ Address concern that alternative programs will be inadequately supervised by the court.
    - Especially critical where outcome can be binding.
  - ✓ Ensure that parties have method of recourse to correct injustice during alternative process.
- **What resources are required?**
  - ✓ Facilities.
  - ✓ Staff.
  - ✓ Money.

- **What are the costs/benefits to the court?**
  - ✓ Decrease of backlog.
  - ✓ Shortened median time to disposition.
  - ✓ Some programs may increase the burden on existing personnel and facilities and/or create the need for additional personnel and facilities. Other programs may decrease the burden on existing personnel and facilities.
  - ✓ More diverse management burden.
- **How can a program be funded?**
  - ✓ State or local government.
  - ✓ State or local bar association.
  - ✓ Grant programs.
  - ✓ Court's regular operating budget.
  - ✓ User funding through filing fees, appeal bonds.
- **Is a pilot program desirable?**
  - ✓ Forces assessment of a program's effectiveness before deciding whether to expand the program or to discontinue it.
  - ✓ Difficulty of achieving same positive results when program with demonstrated success in one jurisdiction is expanded to jurisdiction with differing characteristics and legal resources.
  - ✓ Postponement of action to reduce delay and costs.
- **Should a program be *ad hoc* or systemic?**
  - ✓ Opportunity for local or individual innovation.
  - ✓ No centralized administration or support.
- **How can caseload be monitored?**
  - ✓ Adaptation of existing forms.
    - Difficult to integrate alternative programs into standard case management systems.
  - ✓ Development of specialized forms and new types of data.
  - ✓ Segregation of dispute resolution programs onto separate tracks.
  - ✓ Approach varies with calendaring system, staff capacity and other resources.

- **How can success be defined?**

- √ User satisfaction.
- √ Decrease in backlog.
- √ Cost savings.
- √ Reduction in trial rate.

- **How can success be measured?**

- √ Use of a randomly assigned control group.
- √ Empirical comparison of the pace of cases before and after implementation of the program.
- √ Qualitative evaluations in the form of questionnaires, follow-up letters, etc.

- **How can eligible cases be selected?**

- √ Amount of money in dispute.
- √ Subject matter of dispute.
- √ Nature of issues in dispute.
- √ Nature of relationship of disputants.
- √ Individualized selection by judge or court personnel.
- √ Party stipulation.
- √ Automatic selection based on timing.

- **How can otherwise eligible cases be screened?**

- √ Individualized screening by judge or court personnel.
- √ Party motion or stipulation that case inappropriate.
- √ Statutory or rule-based guidelines.

- **When can a case be assigned?**

- √ Trial court.
  - At time case is filed.
  - After pretrial conference.
  - After completion of some discovery.
  - After completion of all discovery.
  - After trial date is set.
  - On day of trial.

- √ Appellate court.
  - At time notice of appeal is filed.
  - After record is submitted.
  - After briefs are filed.
  - After date of argument is set.
  - On date of argument.

- **What qualifications should a neutral have?**

- √ Legal experience.
- √ Counseling experience.
- √ Special training.
- √ Subject matter expertise.

- **Who determines whether a neutral is qualified?**

- √ Court or judge.
- √ Parties.
- √ Bar association.
- √ Private organization.
- √ Specially appointed administrator.

- **What training can be required of a neutral?**

- √ Standardized statewide training programs.
- √ Court-sponsored training sessions.
- √ Training offered by private organizations.
- √ Handbook or manual.

- **Should neutrals be certified?**

- √ Consistent standards statewide.
- √ Additional bureaucracy.



- **What can be the role of a neutral?**
  - √ Define issues.
  - √ Review progress of case.
    - Prior settlement overtures.
    - Likely time to and cost of trial.
  - √ Facilitate communications.
  - √ Evaluate strengths and weaknesses.
  - √ Predict outcome.
  - √ Channel substantive discussions.
  - √ Recommend settlement value.
  - √ Decide outcome.
- **What can be the nature of the outcome?**
  - √ Award.
    - Binding.
    - Non-binding.
  - √ Opinion.
  - √ Recommendation.
  - √ Evaluation.
  - √ Narrowing of issues.
- **How can decisions relating to settlement be made?**
  - √ Evaluation of outcome.
  - √ Evaluation of neutral's input.
  - √ Review of integrity of process.
  - √ Privacy/confidentiality considerations.

- **How can a program be enforced?**

- √ Sanctions.
  - For non-participation.
  - For obstruction of process.
  - For non-compliance with settlement agreement.
- √ Incentives for settlement.
- √ Disincentives for trial.
  - Assessment of costs.
  - Appeal bonds.
  - Admissibility into evidence.
- √ Entry of court order.
- √ Follow-up sessions.
- √ Imposition of realistic deadlines.

## INSTITUTIONALIZING DISPUTE RESOLUTION ALTERNATIVES\*

PETER B. EDELMAN\*\*

*Alternative dispute resolution programs are prevalent enough now so that it is appropriate to examine problems of and strategies for the development of the next stage. Some "first-stage models" are now institutionalized within their own jurisdictional settings, and the field is ready for "second-stage models." More accelerated diffusion is unlikely because of gaps in what we know concerning current efforts, changing political and economic conditions, and a number of identifiable dangers associated with larger-scale initiatives. Second-stage models are initiatives which contain the seeds of further development in a qualitative way that previous initiatives have not. They include state funding, state offices, the multi-door courthouse, and the compulsory use of mediation techniques in specialized circumstances. Also important to enhance development are efforts to increase public visibility of the field, expand and improve our knowledge, and encourage formal interest in a variety of relevant settings, including law schools. Tactically, the development of second-stage models must include attention to leadership issues, alliances and funding options. A new effort to gain federal support and a new role for national foundations are timely.*

### Introduction

This article addresses issues associated with "institutionalization" of dispute resolution alternatives. It is written from the perspective of participation in and observation of efforts at institutional change in other areas. It applies the author's experience with the politics of institutional change in the public and non-profit sector to information about informal dispute resolution mechanisms, focusing more on mediation than arbitration, and more on court-related and public policy mediation than on neighborhood or community-based mediation.<sup>1</sup>

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1. The author was involved in significant efforts at change and development at the University of Massachusetts, where he was staff director of the President's Committee on the Future University of Massachusetts and principal author of its report. As Vice-President for University Policy, thereafter, he worked on the implementation of many of its proposals. He was Director of the New York State Division for Youth, in which capacity he directed an extensive effort at agency reform (cf. Edelman, 1977). He was involved in many questions of institutional strategy during his time as legislative assistant to Senator Robert Kennedy. He has written about strategies for political and institutional change as well (Edelman, 1973).

The premise of this article is that the recent wave of initiatives in the area of alternative dispute resolution has not been institutionalized. Alternatives to formal judicial processes, of course, are not at all new. Arbitration, quasi-judicial functions of administrative agencies, small claims courts, and family or domestic relations courts are but a few examples of longstanding activities that were established because it was felt they would be more effective than traditional court operations. Many of these by-now traditional alternatives are institutionalized, according to any definition of the word, and have been for decades.

In recent years, however, there has been a new wave of concern about court congestion and cost, and a new set of alternatives to courts has appeared in response. It is this new group of initiatives that is still in a formative period and is the subject of this essay.

"Institutionalization" is a relative term. What is institutionalized from one perspective may still be unproven from another. For example, a local dispute resolution center that began with a foundation or federal grant may now be institutionalized in some ways and yet not in others. It may now have ongoing funding as part of a court budget, a prosecutor's budget or from a continuing private source like the United Way, or a combination thereof. It may now receive systematic referrals of certain categories of cases from the court clerk's office or other points in the court system. On the other hand, it may have potential application to other categories of cases. It may be a voluntary program that would operate at an entirely different order of magnitude if it were made compulsory. It may have the potential for being applied systematically in a larger unit of government; if it is now operating at the county level, it could perhaps be adopted on a statewide basis.

The foregoing introduces at least five dimensions of institutionalization: extent of permanent financing, comprehensiveness of role within the substantive area covered, breadth of substantive areas covered, degree of compulsory participation, and geographic scale. As to any of these, a particular initiative could well be regarded simultaneously as institutionalized from some perspectives and not from others.

#### **The "State of the Art"**

The "state of the art" vis a vis the "new wave" of alternative dispute resolution is in fact roughly like what has just been described. There are now hundreds of examples of what might be called "first-stage models" which are now themselves stable and recognized in their own jurisdictional setting.

Ten years ago the situation was quite different. Handfuls of innovative practitioners and scholars were pointing to a problem, conceptualizing models and establishing demonstration programs (see, e.g., McGillis and Mullen, 1977). No one worried particularly about what would happen next. The question was a toehold, not a foothold.

Now a toehold has been established. There are some 160 minor dispute mediation centers in about forty states which mainly handle disputes between non-strangers, generally on referral from police, prosecutor, court clerk, or the court itself (Marks *et al.*, 1984). There are many different kinds of specialized mediation, including some 300 divorce mediation providers (Pearson, 1982) and mediation of consumer, landlord-tenant, and juvenile delinquency disputes. In addition to models which relate to individualized disputes that were at least theoretically susceptible of judicial resolution, there are also a number of public policy mediation models, especially in the environmental area, including such issues as the siting of toxic waste dumps.<sup>2</sup>

Some of these activities have received support at the state level. For example, New York now provides some funding for minor dispute resolution centers. California requires child custody dispute mediation, and Massachusetts and Wisconsin require mediation of hazardous waste dump siting issues.

At least four other observations emerge as further generalizations about the state of the art. First, the more specialized a form of mediation is in terms of its issue focus, the more likely it is that it will have been applied statewide, although that is a tentative statement because statewide applications are still limited in number. Second, more broadly focused models—essentially the minor dispute resolution centers—have spread laterally more than vertically, that is, more from one city or county to the next than from local jurisdiction to statewide application. Third, voluntary models spread more rapidly than compulsory models, although, as indi-

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2. Compare McGillis (1981). Nor is the list in text anything like an exhaustive list of variations. Marks, Johnson and Szanton (1984) list an array of dispute resolution "families." One category, court reform, includes management improvements, procedural limitations, diversion, preprocessing and incourt settlement facilitation. Another group, some items from which are the primary focus here, is described as "entirely separate forums and procedures," and includes labor-management mediation, grievance and arbitration procedures, commercial arbitration, other private dispute resolution and counseling services, client-generated innovations, community dispute resolution, media-sponsored complaint efforts, individual firm and industry-operated complaint programs, internal institutional grievance programs, environmental mediation, and policy-related consensus building programs. Finally, the authors include delegatization, regulatory innovation and low-cost access under a grouping called "attempts at systemic changes." It is clear from this list that the items considered in this article reflect only a part of what is going on and the generalizations offered must be tempered accordingly.

cated, there are some statewide models of required mediation in highly specialized areas and there are eight states which have compulsory arbitration of certain civil disputes in some or all counties (Marks *et al.*, 1984). Fourth, as implied above, widespread statewide application of any of the new wave of alternative dispute resolution mechanisms is yet to come.

If the state of the art is that many programs originally established as demonstrations, or as replications of demonstrations but on a similar scale, have achieved stability and a reasonable sense of permanence, the general questions to be asked are: Is the field ready to move to a new stage? If so, what is the next stage? How is it to be achieved? What barriers confront the process of moving to a second stage?

### **The Case for Second-Stage Models as the Next Step**

It is my proposition that the field is not ready for a great leap forward, but rather for what we might call second-stage models—initiatives that would expand on the first-stage models in some of the ways listed earlier, but still be demonstrations from a state-wide or even a national perspective. I offer this idea for three sets of reasons: the limited evaluation data on current efforts; changing political and economic conditions; and a number of identifiable problems associated with larger-scale initiatives, some unique to this field, and others more generally associated with larger-scale operation.

*The State of Our Knowledge.* We do not yet know enough to be able to say that all court systems should be changed to include mediation alternatives, even if they are voluntary. But what is known certainly does not tell us to go no further. One recent examination of evaluation studies (Pearson, 1982) reveals that individuals who have used court-annexed mediation report satisfaction with the process and see it as fair and more personal, humane and pleasant than court processes, and that compliance with decisional outcomes reached through mediation seems satisfactory. On the other hand, voluntary mediation does not attract sizable numbers of disputants and is, perhaps as a consequence, more expensive per case. Another stocktaking effort indicates that mediation alternatives resolve a large percent of matters brought to them but reports similar issues regarding costs, volume and effects on the justice system (Garofolo and Connelly, 1980).

Although this information is by no means discouraging, it does suggest that there is not sufficient knowledge to indicate what would happen if large-scale expansion and replication were to occur (see also Singer, 1979). There are certainly evaluators who call for major expansion (e.g., Cook *et*

*al.*, 1980), but there are also critics who suspect that dispute resolution centers, even in their relatively nascent state, have an effect of denying access to the courts to the detriment of poor and powerless disputants (e.g., Hofrichter, 1977; Tomasic, 1982).

The foregoing refers to evaluation data regarding minor dispute resolution centers, and does not take account of evaluations and discussions of more specialized initiatives relating to various family law issues, consumer complaints, or landlord-tenant disputes. Here, as with the more generalized dispute resolution approaches, there are not only supportive observations (e.g., Goodman *et al.*, 1983; Henry, 1983), but also skeptics. In the family law area, observers worry about how the spouse with a weaker resource base will fare in mediation, and warn against tendencies to be coercive in pressing its utilization (Mnookin and Kornhauser, 1979). Consumer advocates warn that mediation and other devices may well favor the dealer or industry, both because those interests may have had undue influence on the design of the process, and because they understand better how to use the process advantageously due to the fact that they are involved in it on a regular basis (Galanter, 1974; Nader, 1979).

From the perspective of someone in a position to recommend, enact or promulgate next steps, the picture has to be unclear. Putting aside the unanswered questions about the existing models at their current scale, let alone the lack of assurance as to what new issues would arise at a qualitatively different level of operation, the appropriate relationship and balance among the various kinds of approaches when all are envisioned as operating systemically present questions that are difficult even to discuss intelligently.

If, for example, mediation and conciliation were suddenly to be annexed on a large scale to every court in a state, that would presumably mean that these alternatives were now available for civil disputes generally, many criminal issues, marital and child custody disputes, certain juvenile matters, consumer problems, landlord-tenant arguments, and perhaps others. A long list of questions immediately raises itself. Is this generalized approach, which sounds like the "multi-door courthouse" that is being promoted in a few places now, intended to supplant all the issue-specialized approaches which may now exist or could have been imagined? Do we know that handling, say, child custody disputes within a generalized framework is more appropriate than specialized mediation focused only on child custody? Are we sure that a major investment in court-annexed mediation of, say, consumer disputes is cost-effective in comparison to privately financed consumer complaint resolution programs? Can a

large-scale generalized approach exist side by side with specialized interventions? Perhaps separate investment in a series of specialized mediation options would make more sense, because each could be tailored to the issue with which it deals in terms of such matters as the level of compulsion associated with it, the degree of its connection to the court and the training of its mediators. On the other hand, perhaps the latter direction would result in uneven and haphazard operation that would be avoided by a more generalized approach.

I raise all of these questions not because I have an answer to offer, but rather because my reading of the literature suggests that there is as yet no answer, a state of affairs that supports the cautionary hypothesis I am advocating.

*Political and Economic Conditions.* Even if I am reading the literature too pessimistically or too skeptically, the political and fiscal climate at the present time supports an incremental, or second-stage, approach. The major reason for this is obvious. Unlike the 1930s or the 1960s, this is not a time when there is interest in large new domestic social initiatives if they require either substantial spending or governmental intervention in other ways. Spending and intervention are out of fashion, in state capitals and locally as well as in Washington. Incrementalism represents the art of the possible at the present time.

If the latter observation is perhaps more cyclical than structural, there is also a more systemic force behind a politics of incrementalism. When alternative dispute resolution mechanisms were instituted in the past—one thinks of the rise of commercial arbitration in the 1880s, the creation of small claims courts in the 1910s and the creation of juvenile, domestic relations, and, thereafter, family courts—they were institutionalized very quickly. There were at least two reasons for this. They were responses to egregious circumstances, and the entire sociopolitical scene was much more elitist and dominated by relatively few people than is the case today. If a few leading citizens in a city decided something had to be done differently, even quite differently, they could make it happen (see, e.g., Harrington, 1982). After so many decades of reform and so many waves of activism, we are not only much less sure of our solutions, but we also require agreement among many more people and interests to implement them in more than a token way. So our politics is more incremental on that account, and, indeed, that is a kind of conservatism of process that may help to avoid making some serious errors.

There is yet another aspect of the current political climate that suggests the wisdom of incrementalism. Among the major enthusiasts of dispute



resolution alternatives are people in the judicial system who have opposed the efforts of some of the more powerless elements in our society to gain judicial redress for their grievances. While these observers talk about the litigation explosion in broad terms, some of the dispute resolution ideas they endorse would affect those whose access to the courts is already marginal. Despite the fact that the advocates of these alternatives also include people who clearly believe they would increase access to fair resolution, a more incremental approach would avoid negative consequences potentially flowing from reduced access of the powerless to the courts.

*Problems of Scale.* There are inevitably problems in moving to operation at a substantially larger scale, the full impact of which cannot be foreseen or avoided. One key issue is determining the institutional values that will be reflected in larger-scale operations. Small-scale demonstrations tend to be non-profit entities headed by an energetic, creative director, staffed by a cadre of capable, dedicated mediators and conciliators, and watched over by an active, committed board. Their demonstrably quantifiable success often cannot be separated from the nonquantifiable characteristics of their leadership, staffing, and sponsorship.

Qualitatively larger scale strongly implies bureaucratization, mass production, and changes, de facto if not de jure, in control and "ownership." Alternatives which handle court-referred matters will tend to become public agencies, which from the point of view of public legitimacy is probably good. But as public agencies they will tend to be led by managers rather than innovators and, more important, will most likely be underfunded in relation to their case burden and will feel pressures to justify requests for funding by quantifying the volume of cases handled rather than pointing to harder-to-measure dimensions of quality. Even if the operations remain non-profit in form, larger scale still tends to bring bureaucratization and pressures for mass production and quantification from referral and funding sources.

If critics are already concerned about negative implications for access and fairness in some of the current alternatives, the concerns will only intensify as expansion occurs. If it does turn out that mediation is cheaper than court resolution when a large enough scale is reached, there will be serious pressures to push people toward mediation. If the concerns about fairness have not been resolved by that time, the consequences may be unfortunate.

These questions exist regardless of whether the large-scale replication being discussed is of a generalized dispute resolution center model or one

targeted at a particular type of dispute, and they exist with modes that have no particular need to be connected to the courts. They are simply problems of scale. In the latter two areas, however, the problems of scale do seem less intense, although only relatively. Specialized programs will by definition never be as large even when they are in full effect throughout a jurisdiction and their specialization militates somewhat against bureaucratization and mass production pressures. Non-court-related programs are less likely to be funded with public money and would be correspondingly somewhat less subject to mass production pressures.

Further problems with large scale are the need for a large infusion of additional staff and the related issue of quality which, in turn, raises issues of training, certification, accreditation, licensing and regulation. Consideration would have to be given to establishing new post-secondary or other curricula and either new oversight agencies or professional self-regulatory processes. Moving too fast will only assure that these matters will present problems.

Nor is this the end of the list of potential problems of scale. Wide availability of mediation-type alternatives may have the effect of "widening the net" and processing or even causing disputes that would have been better left alone. Finally, it is possible that moving too fast can stimulate a legitimate demand for service that overloads the system.

#### **A Typology of Second-Stage Models**

The notion of incrementalism is broader than the notion of second-stage models. In my lexicon, every time a program that has operated successfully in one location is replicated at about the same scale in another location, that is incremental development, not second-stage model building. However, in terms of advancing the development of the field there is absolutely nothing wrong with "cookie-cutter" replication. For example, "Johnny Appleseeds" in the form of former law student mediators in the Columbus, Ohio Night Prosecutor Program have successfully sown similar programs in many other communities. Similarly, an evangelical initial director of the Miami dispute settlement program convinced many other communities in Florida to adopt the model.<sup>3</sup>

My definition of second-stage model building, expanding on what I said earlier, is an initiative which contains the seeds of further development in a qualitative way that previous initiatives have not. An obvious second-stage model is created when a state provides funds to encourage more rapid

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3. These examples are drawn from an interview with Larry Ray of the American Bar Association Special Committee on Dispute Resolution.

replication of existing local programs. In New York, for example, the state legislature, lobbied by representatives of a few existing programs, put up money for new initiatives (and gave support to the existing programs as well). In fact, a next phase occurred. The first stage appropriation caused a state office to be created to administer the funds, and the enterprising state program director who appeared on the scene consequently succeeded in gaining funds to the point where there are about thirty state-supported mediation programs around the state.

Another kind of second-stage effort is exemplified by the activities under way in New Jersey and Massachusetts to create offices of mediation in the governor's office and the attorney general's office, respectively, to serve as catalysts for more mediation endeavors of different kinds around the state. These approaches add up to both less and more than the New York type of approach. The latter is more heavily funded but focused mainly on the more generalized type of minor dispute resolution center. The type of state office envisioned in New Jersey might well end up with only the funds to hire one or two staff members but its mission would be a broader one of encouraging a variety of mediation applications. One day it might be encouraging local courts to organize or cooperate with a dispute resolution center or a specialized mediation project, and the next day it might be pressing the business community to work on consumer disputes. It might also try to work on public policy disputes, whether to create organized dispute resolution mechanisms or on an ad hoc basis to bring the parties to the table in seemingly intractable disputes over such things as location of a landfill or a mass transit route, the proposed filling in of some wetlands, proposed school closings in a shrinking school district, or a regulation on the tolerable levels of a hazardous chemical in the workplace.

Quite a different second-stage model is represented by the "multi-door courthouses," building on existing, more limited dispute resolution mechanisms that are starting or on the drawing boards in Houston, Tulsa, and Washington, D.C. These are quintessential examples of my "second-stage model" notion because they are simultaneously partial institutionalization of what has gone before and a demonstration on a broader scale. In the District of Columbia, for example, there will be expanded arbitration and mediation capability in the small claims area, mediation *pendente lite* in domestic relations cases, mediation for juvenile status offenses and relatively minor juvenile delinquency cases, and possibly some misdemeanor mediation on the criminal side. If offering mediation in these various ways takes hold, and is not only effective in the cases it handles but is the disputants' choice of modality in significant numbers

of cases, lateral replication to other jurisdictions would constitute a significant reform movement.

All of these are examples of what might be called "legislating the supply"—steps that make mediation or other dispute resolution alternatives more available without requiring their use. Making the supply more available can happen in many different ways. For example, a steady supply of students who serve as mediators can enhance the supply of mediation. The Columbus Night Prosecutor Program owes its sustained life in part to successive generations of students who predominantly make up its staff (National Institute of Law Enforcement and Criminal Justice, 1974). Similarly, law students have for some time been staffing a mediation unit attached to the small claims court in Boston.

"Legislating the demand"<sup>4</sup> can be another way to approach second-stage model building. By this I mean requiring the use of mediation or another technique, as has been done with child custody disputes in California and the siting of hazardous waste treatment facilities in Massachusetts and Wisconsin. This is problematic for generalized mediation because compulsion is controversial in that area. There are, however, specialized applications of legislated demand that seem appropriate, and the very fact of introducing compulsion would make them second-stage models in my view.

For example, one thinks of status offenses in the juvenile courts—the category of judicial intervention when young people have been habitual truants, chronic runaways, or otherwise beyond parental control. Although many believe this form of state intervention should be abolished altogether, it is certainly possible that mediation between and among the youth, his or her family, school authorities and whoever else has an interest could be inserted as a required step before a court would even consider adjudication. Or, compulsory mediation could conceivably replace adjudication as the sole form of state-supported involvement in such cases.

The juvenile justice area is one which supports the idea of pursuing both generalized and specialized models as the field develops. The issues and problems presented by status-offender cases are unique, and it is difficult to envision generalized mediators being well enough attuned to succeed if they are involved only sporadically. The design of a compulsory mediation component for status-offender cases, let alone a step which involves mediation totally replacing the power to adjudicate, will require complex negotiations among elected officials, judges, police, school officials, probation

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4. I am indebted to Professor Lawrence Susskind who offered the notions of "legislating the supply" and "legislating the demand."

staff, the social service community, the defense bar, and perhaps others. Moreover, given the sorry history of documentation and evaluation in the juvenile justice field, any insertion of compulsory mediation into status-offender cases should be accompanied by a simultaneous longitudinal evaluation. All of this is to suggest not only that legislating the demand is an identifiable area for second-stage model building, but also that specialized mediation approaches are suited to such efforts.

### **Enhancing the Framework**

Before turning to some of the tactical issues and variables in second-stage model building, it is important to stress that there is a considerable list of allied activities which should be going on simultaneously to improve the climate for development. Perhaps the most important is the need for greater public visibility. Public statements about the excess of lawyers in our society and the unduly adversarial way in which we approach disputes are certainly visible enough (see, e.g., Bok, 1983; Lasker, 1976; Manning, 1977), but intelligent discussion of different approaches is lacking in the mass media. Even as a scholarly matter, the field of alternative dispute resolution appears to be comprised of a limited number of people who talk mainly to each other. Major institutionalization certainly cannot occur without support or at least lack of opposition from the organized bar as well as from judges and other significant actors in the justice system. Those with a professional stake in the system will be far more open to change if there is broader familiarity within the population in general.

Strategies to make the issues visible are certainly being pursued, but they need to be intensified. Activists need to promote more television coverage in news or documentary form, more newspaper and popular magazine articles by journalists or leading citizens, more hearings in Congress and other legislative bodies, and more speeches by public figures that might get attention.

At the same time, it does appear that the grist for the public mill is not sufficiently developed. The first-stage models seem, on the whole, marginal enough to the justice system as not to constitute compelling evidence for a leap to new dimensions of activity. The evaluation data are mixed, as I said earlier, and not very extensive at that. This has become, for better or worse, an era in which social science evaluation data do play a role in governmental decisions. Sometimes a fallacy of false precision with regard to such evaluation plagues advocates who fervently believe in their cause, but it is also clear that, in this time of fiscal constraint, evaluation and research data have protected programs like Head Start and saved others,

like Title I of the Elementary and Secondary Education Act and a number of categorical health and nutrition programs, from deeper cutbacks. It does appear, therefore, that an increased and intensified effort to develop new research and evaluation information that happens to be politically relevant would be extremely worthwhile.

There is a symbiotic relationship between the extent of political interest and the quality of the supportive evidence. Strengthening either will tend to strengthen the other. Hence there is a role for activists in working simultaneously to strengthen both. That, I take it, is one way to describe the mission, or a mission, of entities like the National Institute for Dispute Resolution. One might add to that a mission to increase the number of activists—people in many different institutional settings who adopt the idea of alternative dispute resolution as their cause. I add to the latter observation a caveat which probably does not need to be articulated, namely, that no one should be interested in stimulating activism which is not justified by objective evidence or at least coherent theory. So, there is really a three-way symbiosis among the official actions, the research data and the existence of activist individuals situated strategically in courts, legislatures, public executive offices, positions of bar leadership, universities and elsewhere.

The framework would be further enhanced by efforts to seed and nurture institutional sprouts in the bodies and entities that are relevant to this discussion. Much of this has been done, of course. Bar association committees, special legislative committees or inquiries, appropriately sponsored conferences to promote interest in the subject, and governors' offices of mediation are all examples of this.

I would like to add a particular word about law schools in this context. Although it is probably true that there is more interest in alternative dispute resolution in law schools than in the bar generally, and while there is emerging in the literature a discussion of how to deal with dispute resolution in the law school curriculum (e.g., Sander, 1984), it is also the case that relatively little has occurred to divert the educational process away from its traditional proclivity to instill an adversarial mindset. On the other hand, the institutional sprouts that have appeared in many law schools may be the best that can be expected given the state of the field. Nevertheless, it is fair to say that in the symbiotic process described above, law school faculty should be among the most intellectually curious and the most ready to play a role at the cutting edge. It is hard to characterize the current situation in that way.

### **The Tactics of Second-Stage Model Building**

The prescriptions herein are necessarily of limited value. There are many kinds of alternative dispute resolution mechanisms with differing potential constituencies and adversaries, differing financing implications, and differing prospects on the merits. Even as to a given type of mechanism, the possibilities will differ from state to state and community to community depending on the cast of characters, both positive and negative.

One key variable is who takes the initiative and who the rest of the players are. The initiator (or the person stimulated to be the initiator) can be almost anyone in a position of leverage in the community or state: mayor, county executive or governor; key appointed official; key legislator or committee; key judge; senior foundation officer; bar leader; issue-oriented advocate; editorial writer; or senior corporate executive. Most of these have staff members who might be more accessible than the individual with greater seniority and authority, and, possibly, more effectively influential. Any of those mentioned thus far could be an initiator himself or herself, or the recipient of an initiating step from someone else, or the instigator of an initiating step by someone else or in combination. There is a kaleidoscope of possibilities. Because we are talking about second-stage models, those involved in the existing first steps are logical instigators or at least logical participants in the instigation.

It is easy to follow most of the basic scenarios implied by the foregoing paragraph and therefore probably pedantic to spell out any of them. Most of the scenarios will, obviously, quickly involve combinations and coalitions among a number of those I have listed, individually and institutionally. Which scenario an activist or instigator chooses will clearly depend on which individuals are perceived to be sympathetic and have the power to make things happen. Some scenarios will be legislature-driven, some court-driven, some foundation-driven, and so on, although nearly all will need to involve assent and participation in some combination among these institutions.

One scenario which I think is especially important and promising insofar as the mechanism being pursued has any court-related implications is the involvement of a key judge. Two examples will illustrate this.

One involves the implementation of the Adoption Assistance and Child Welfare Act of 1980. That law provided, among other things, for more intensive scrutiny by family court judges before a child could be removed from home for parental neglect, in order to assure that adequate efforts to prevent the need for removal had been made; the law also provided for

periodic reviews of such placements by the court. It was agreed by individuals involved that successful implementation of the law depended in part on reaching family court judges to acquaint them with their new responsibilities and obtain their cooperation.

In Missouri some of the individuals concerned reached a member of that state's highest court who was a former family court judge himself. He in turn took the lead in convening all the relevant judges and other key court and social services personnel to convey the appropriate message. Even more relevant to an essay on alternative dispute resolution mechanisms, he was supportive of steps by individual family courts in the state to install a volunteer court-appointed advocate program, wherein lay advocates would be appointed to assist the court in handling and following individual cases. Indeed, the latter initiative has been adopted in a number of states (Missouri was not one of the first), and judges were key initiators in many cases.

The second example involves the District of Columbia multi-door courthouse mentioned earlier. The original instigator in that instance was not a judge but, not surprisingly, the founder and director of the Citizens Complaint Center, which is the first-stage model that is one of the programmatic building blocks for the multi-door courthouse. The point is that she brought the idea to the Presiding Judge of the Family Division of the Superior Court, because she saw that getting a key judge involved was important and thought perhaps installation of the multi-door courthouse notion in the domestic relations context was the way to go. However, the Family Division Presiding Judge saw the possibility of a more multi-faceted initiative and took it to the Chief Judge of the Superior Court. The Chief Judge in turn convened the D.C. Corporation Counsel, bar leaders, business leaders and representatives of the City Council and the U.S. Attorney's Office, so that most of the major actors in the system had a stake in the idea from the outset. As the plan has developed, it has components in each of the major divisions of the Superior Court, and this has been helpful, in turn, in stimulating the interest of most of the judges.

Some other aspects of what has occurred so far are illustrative of generalizations made earlier. There was an able, interested, creative staff person at the court—the Director of the Division of Research, Evaluation and Special Projects—who was interested and did the drafting of the necessary proposals that a busy judge might well not have had the time to do. The executive director of the District of Columbia Bar was especially enthusiastic because it happened she had been a mediator at the Citizens Complaint Center—an unanticipated but, nonetheless, important side



effect of the existence of the Center as a building block. She has done much of the necessary work in seeking foundation funding, which has been even more important because the District government, hard pressed financially, is unable to provide support for the project.

If determining who the key players need to be is one variable, financing is another, although not a wholly independent one. One thing is reasonably clear here. Given current economic constraints, widespread expansion is unlikely, apart from other considerations. Moreover, it is very likely that funding for the type of second-stage model that involves a significant expansion of services concentrated within a particular court system, as in one city or county, will have to involve a packaging of public and private resources, rather than be drawn entirely from one source.

There are essentially three sets of resources available, and the combination will vary somewhat depending on the type of disputes involved. One resource is public funding. An interesting point here is the variety of patterns that public funding has in fact taken in various places. Depending in part on who the chief instigators or allies are, the partial institutionalization of some of the first-stage projects has been funded from prosecutors' budgets, court budgets and general county or city budgets. For more specialized forms, the interested public agency may be successful in getting money added to its budget. And specificity of function invites dedicated funds: for example, a fund derived from fines paid by polluters has been suggested. Another source of dedicated funds, not especially limited to one type of mediation or another, would be court filing fee surcharges.

A second source is private funding. Here the local foundations are critical for any second-stage effort that offers something new and if, like the multi-door courthouse, it is a demonstration with national implications, the national foundations should be interested as well. Once the service seems in the community to stay, the United Way, even though it is pressed in many directions these days, is a logical source of partial funding. Also, the business community may be willing to give to endeavors in which it has an interest. For example, some have suggested a corporation financed-revolving fund for environmental disputes. The problem, of course, is to make sure the funding does not affect the process, if what we have is corporations funding resolution of disputes in which they have an interest.

Third, the individuals who use the services could pay. User fees may be feasible in a number of areas, although obviously care must be taken to assure that user fees do not limit access.

There are two related, more general points to be made in discussing the

tactics of second-stage model building. One, it is time to resuscitate the effort to get federal support for the field. If I am correct that the field is ready for a next phase of more sophisticated demonstrations, a new federal initiative would be helpful, not only in helping to fund the models but also the evaluation, research and dissemination that need to occur at the same time. Such an initiative would need only modest funding to be of value, and is, therefore, achievable.

Second, national foundations and corporate givers could take a greater interest than they have, especially in teaming up with local and community foundations to make up the kind of packaged funding I mentioned above. A national foundation matching a local philanthropic source might well be the attraction that convinces a public chief executive or powerful legislator to press forward with the kind of initiative discussed in the essay.

#### Conclusion: Targets of Opportunity

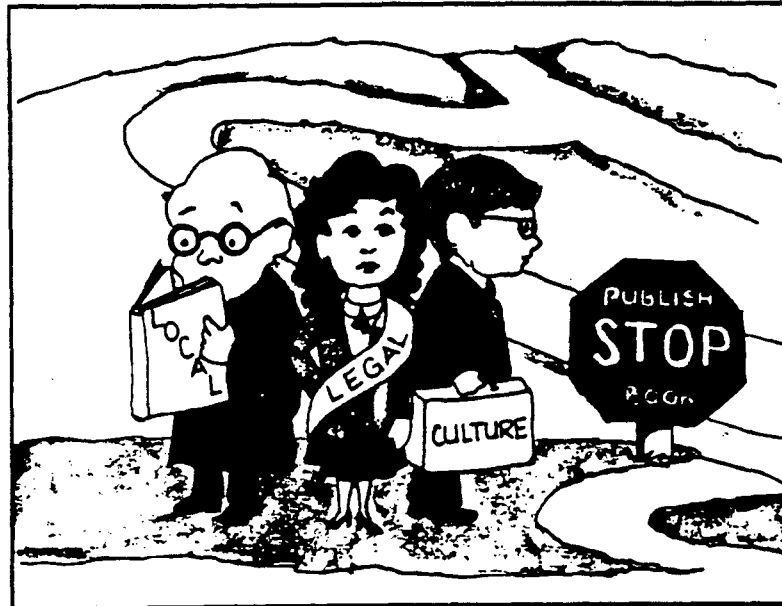
The aim underlying alternative dispute resolution proposals, of course, is instrumental. Proponents believe a fairer and more effective system of justice will eventuate. One's perspective, therefore, must be appropriately broad. Perhaps more disputes can be resolved cheaply by raising the jurisdictional limits of the small claims court than by making ten mediators available, or perhaps the two are equally effective but the former is the one that is politically acceptable. Perhaps more can be accomplished toward the desired end if sitting judges begin mediating more often and adjudicating less; if that is true, it is an aim that should be pursued. Thus, in the final analysis, if there is one reminder to be added to an essay on the institutionalization of alternative forms of dispute resolution, it is that the field concerns means and not ends, and that the proposed means must be constantly weighed not only in terms of their intrinsic merit but also in comparison to other strategies which might have more promise of improving the quality of justice.

#### REFERENCES

- BOK, Derek (1983) "Annual Address by the President of Harvard University to the Board of Overseers," Boston: Harvard University.
- COOK, Royer F., Janice A. ROEHL, and David I. SHEPPHARD (1980) "Neighborhood Justice Centers Field Test: Final Evaluation Report," Washington, D.C.: Government Printing Office.
- EDELMAN, Peter B. (1973) "The Massachusetts Task Force Reports: Advocacy for Children," 43 *Harvard Educational Review* 639.
- (1977) "Overview of the New York State Division for Youth," in *Children: In Pursuit of Justice*. New York: Rockefeller Foundation.
- GALANTER, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change," 9 *Law and Society Review* 95.

- GAROFALO, James and Kevin J. CONNELLY (1980) "Dispute Resolution Centers Part II: Outcomes, Issues and Future Directions," 12 *Criminal Justice Abstracts* 576.
- GOODMAN, John A., Kathleen BRADY and Melisande LEE (1983) "Cost Benefit Argument in Aggressive Corporate-Based Dispute Resolution Mechanisms," in Larry Ray (ed.) *Consumer Dispute Resolution: Exploring the Alternatives*. Washington, D.C.: American Bar Association.
- HARRINGTON, Christine B. (1982) "Delegalization Reform Movements: A Historical Analysis," in Richard L. Abel (ed.) *The Politics of Informal Justice*, Vol. I: *The American Experience*. New York: Academic Press.
- HENRY, James F. (1983) "The Work of the CPR Legal Program in Developing Alternatives to the High Cost of Consumer and Other Disputes," in Larry Ray (ed.) *Consumer Dispute Resolution: Exploring the Alternatives*. Washington, D.C.: American Bar Association.
- HOFRICHTER, Richard (1977) "Justice Centers Raise Basic Questions," 2 *New Directions in Legal Services* 168.
- LASKER, Morris E. (1976) "Court Crunch: The View From the Bench," 70 *Federal Rules Decisions* 245.
- MANNING, Bayless (1977) "Hyperlexis: Our National Disease," 71 *Northwestern Law Review* 767.
- MARKS, Jonathan B., Earl JOHNSON, Jr. and Peter L. SZANTON (1984) *Dispute Resolution in America: Processes in Evolution*. Washington, D.C.: National Institute for Dispute Resolution.
- McGILLIS, Daniel (1981) *Neighborhood Justice: An Emerging National Movement*. Washington, D.C.: U.S. Department of Justice, National Institute of Justice.
- McGILLIS, Daniel and Joan MULLEN (1977) *Neighborhood Justice Centers: An Analysis of Potential Models*. Washington, D.C.: U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice.
- MNOOKIN, Robert and Lewis KORNHAUSER (1979) "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950.
- NADER, Laura (1979) "Disputing Without the Force of Law," 88 *Yale Law Journal* 998.
- NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE (1974) *Citizen Dispute Settlement: The Night Prosecutor Program of Columbus, Ohio*. Washington, D.C.: Government Printing Office.
- PEARSON, Jessica (1982) "An Evaluation of Alternatives to Court Adjudication," 7 *Justice System Journal* 420.
- SANDER, Frank E. A. (1984) "Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles," 34 *Journal of Legal Education* 229.
- SINGER, Linda R. (1979) "Nonjudicial Dispute Resolution: The Effects on Justice for the Poor," 13 *Clearinghouse Review* 569.
- TOMASIC, Roman (1982) "Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement," in Roman Tomasic and Malcolm M. Feeley (eds.) *Neighborhood Justice: Assessment of an Emerging Idea*. New York: Longman.

# Are additional resources needed?



One of the ongoing debates about delay-reduction efforts involves the need for additional resources. In order to implement effective programs, do courts need additional judges and staff (either permanent or temporary), or can the job be done through better use of existing resources? How does the emergence of alternative dispute resolution programs affect the equation? Members of this panel presented a range of sometimes conflicting perspectives on these issues.

**E**rnest Friesen, dean of the California Western School of Law and a long-time proponent of caseload management in courts, took the position that additional judges and courtrooms are not needed for delay reduction. Instead, resources can be "added" by using judges' and staff time more efficiently. In fourteen cities where his research teams have worked, court delay has been reduced by 25 percent or more in each court without adding judges.

What is necessary in most courts, Dean Friesen said, is a revamping of staff structure and re-training of both judges and staff to focus more effectively on management of cases. Most courts do not have either an effective structure for making

policy or a staff structure that supports policy formulation and the implementation of policy decisions. Policy decisions, even when presented in the form of rules, are not self-executing. For example, many courts could benefit from having a staff member with explicit responsibility for case scheduling — an "expediter" who would telephone attorneys, monitor case status, and work with judges to ensure that caseload management goals and time standards are met.

Accurate information, Dean Friesen noted, is a critical component of effective resource utilization. He quoted Will Rogers: "It ain't what you don't know that'll hurt you; it's what you know that ain't true." Accurate information is essential both for the operation of an effective delay reduction program and for an honest assessment of whether additional judges are needed, even on a temporary basis. In this connection, he criticized the value and utility of the weighted caseload systems that are employed in some states, asserting that they "mix apples and oranges" and have been used to support questionable claims of need for more judges.

Betty Weinberg Ellerin, formerly administrative judge for New York City courts and now an appellate judge in New York,

disagreed with Dean Friesen on the question of need for additional judges. While recognizing the necessity for making better use of existing resources, she argued that additional judges can have a positive effect on reducing backlogs and delay.

Judge Ellerin described the way existing judicial resources had been reallocated in New York State, to address problems of trial-court backlog and delay in New York City. No additional judgeships were established, but judges from all parts of the state were assigned to serve on a temporary short-term basis in New York City's general jurisdiction civil and criminal trial courts.

## SPEAKERS & PANELISTS

**Ernest C. Friesen**, Dean, California Western School of Law, San Diego, California

**Alexander B. Atkman**, Senior Staff Attorney, Western Regional Office, National Center for State Courts

**William Drake**, Deputy Director, National Institute for Dispute Resolution

**Betty Weinberg Ellerin**, Associate Justice, Appellate Division — First Department, New York, New York

The program was developed by New York State's former Chief Judge Lawrence H. Cooke, who was appalled by the number of cases pending longer (sometimes much longer) than called for by the state's standards and goals. Judge Ellerin's role in the reassignment of judges included working with the upstate judges (most of whom were initially reluctant to participate in the program) and with litigating attorneys to focus on reduction of the backlog. After two years, significant results had been achieved. On the civil side, the backlog had been markedly reduced and systems had been put in place to deal efficiently with new cases and prevent a reemergence of a backlog problem. On the criminal side, there was also remarkable progress. In the Bronx, for example, the backlog was reduced by 37 percent and case processing times were cut by a third. Without the additional resources made available by the temporary reassignment of judges from courts facing less caseload pressure, these results could not have been achieved.

Judge Ellerin concluded by observing that efforts to make more effective use of existing resources should be "people-oriented." "To make effective use of judges and nonjudicial staff," she said, "it is important for court system leaders to make a sound assessment of the strengths and weaknesses of judicial personnel and develop systems that use their strengths most effectively."

Alexander B. Aikman, a senior staff attorney with the National Center for State Courts, focused on two main issues: (1) how to determine when additional resources are needed; and (2) how to use lawyers as supplemental resources to help address problems of backlog and delay.

Aikman noted that a national task force, made up of representatives from seven national court and governmental organizations, had concluded that no single method was most appropriate for determining judicial resource needs.\* The task force did, however, suggest a three-pronged general approach for any court:

(1) measure the demand for court services (i.e., how much the court is being asked to do);

(2) compare the court's level of demand to its available resources;

(3) evaluate the court's use of existing resources, through an on-site review of

what the court has been doing to cope with demands.

In a state with a weighted caseload system, that system can be used to measure the level of demand for the court's services; otherwise, case filings can be used. Few states now have standards for measuring need for judicial resources; but where they exist, a court exceeding the statewide standard by a designated percentage would have a *prima facie* showing of need for additional judicial resources. This need could then be confirmed in a visit to the court. Only a court that already has exhausted other options, such as improved calendar management or the use of alternative dispute resolution mechanisms, will have demonstrated a conclusive need for additional judicial resources.

One possible source of additional resources is the bar. A number of states use practicing lawyers as supplemental judicial resources. Aikman noted that a recent National Center study, conducted with the aid of an advisory board of court leaders, documented some of the ways in which members of the bar are used as "judicial adjuncts," on either a paid or volunteer basis, in jurisdictions across the country.\*\* The advisory board endorsed the use of lawyers as supplemental resources (especially when there was a need for short-term aid); there were, however, some important caveats. In particular, practicing lawyers should not be used in judicial capacities in lieu of the establishment of new permanent judgeships that are clearly needed.

The final speaker was William Drake, deputy director of the National Institute for Dispute Resolution. Drake took the position that developing alternative dispute resolution mechanisms is a way of adding resources to help address problems of delay. Recognizing that some current research has concluded that alternative dispute resolution mechanisms will not affect the great bulk of court business in the foreseeable future, he argued that such mechanisms can and ultimately will have a significant positive effect on problems of delay. Moreover, in addition to being less complex than formal court procedures, alternative methods can enhance access to justice, lower costs, promote consensual dispute resolution, and enhance public respect for courts and lawyers.

Drake envisioned a time when the following would exist:

- The judicial system would screen all cases for suitability to be resolved by alternate methods.

- Caseflow management systems would have "tracks" for differential case treatment according to case types.

- There would be an array of court-annexed services, provided by the public but also supported by fees.

- There would be a nonprofit dispute resolution sector, within and outside the courts, for disputes not now easily handled by formal court procedures.

- There would be a for-profit sector offering dispute resolution services.

- There would be a larger universe of such commercial or arbitration organizations as the American Arbitration Association.

- Large public and private organizations would use dispute assessment and dispute management methods.

- A court goal would be to help parties reach consensual resolution of disputes to the greatest extent possible, before turning to formal adjudication methods.

If this vision came to pass, Drake said, alternative dispute resolution methods would indeed be an effective long-term aid to court delay reduction. While this vision may not be realized in the immediate future, there are trends suggesting that it is not unrealistic. Several hundred programs have been established in the past decade, and now collectively handle more than 100,000 disputes per year. In addressing questions of resource needs, the development of alternative dispute resolution mechanisms — and this linkage to courts and to problems of court delay — should be considered. SCJ

\* The preliminary draft, *Assessing the Need for Judicial Resources: Guidelines for a New Process*, was adopted by the task force as its final report in December 1984. Copies are available from the Publications Coordinator at the National Center headquarters.

\*\* See Dodge, Douglas C., "Lawyers to the Rescue: The Use of Judicial Adjuncts," 8 *State Court Journal* 2 (1984), pp. 10-13.

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**SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION**  
**COMMISSION ON QUALIFICATIONS**

**SUMMARY OF ISSUES AND PRELIMINARY PRINCIPLES**

**October 1988**

The role of the SPIDR Commission on Qualifications is to examine the question of qualifications of mediators and arbitrators. Established by the Board of the Society of Professionals in Dispute Resolution, the Commission is composed of individuals representing a broad variety of backgrounds and experience. The Commission's recommendations will be subject to approval by the SPIDR Board. While the recommendations may have general applicability, the primary focus of the Commission's inquiry will be on those areas of alternative dispute resolution in which legislatures and other public bodies are now seeking to establish criteria that define who can serve as a mediator or arbitrator.

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns also have been raised, particularly about mandatory standards or certification, including: 1) creating inappropriate barriers to entry into the field, thus, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society. Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies. As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies could draw.

There are no obvious answers to what constitutes a qualified neutral or which of the policy options described is appropriate to ensure that those who practice are qualified to do so. During its deliberations to date, however, the Commission has found three central principles useful in shaping its discussions:

- A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;
- B. that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and

- C. that qualification criteria should be based on performance, rather than paper credentials.

### PRELIMINARY PRINCIPLES

1. Where criteria for determining minimum competence in different contexts are warranted, they should be established by a variety of agencies working in those contexts. No single entity should be relied on to certify general dispute resolution competence.
2. Public and private entities making judgments about appropriate qualifications should be guided by groups that include representatives of consumers of the services and individuals with expertise in alternative dispute resolution processes, as well as representatives of the sponsoring body.
3. The extent to which qualifications for neutrals should be mandated should vary by the degree of choice the parties have over the dispute resolution process, the program offering dispute resolution services, and the neutral. The greater the degree of choice, the less mandatory should be the requirements.
4. No standards or qualifications should be required that would prevent any person from providing dispute resolution services, when parties have free choice of the process, program, and individual neutral, provided that the parties are given access to the following information about the neutral:
  - a. prior training and experience relevant to the dispute resolution services to be provided;
  - b. personal and/or previous business relationships with the parties;
  - c. all financial interests that may have any bearing on the case;



- d. any code of ethics to which the neutral adheres; and
  - e. other relevant information such as personal bias, which, if known, may affect the parties' choice.
- 5. Where courts, public agencies, or private organizations operate programs that do not offer the parties a choice of the dispute resolution process, program, or neutral to which the parties must go to engage in that process, standards or qualifications for such programs and neutrals should be set by an appropriate public entity. Information about such standards or qualifications should be made available to the parties.
- 6. It is the responsibility of public and private programs offering dispute resolution services to define clearly the services they provide, to establish clear criteria for selecting intervenors and evaluating intervenor performance, to conduct periodic performance evaluations, and to offer the following information about the program and the neutral(s) to parties:
  - a. the criteria used for selecting and evaluating neutrals;
  - b. fees charged, if any;
  - c. rules governing confidentiality;
  - d. the neutral's prior training and experience relevant to the dispute resolution services to be provided;
  - e. any personal or previous business relationships the neutral may have had with the parties;
  - f. any financial interest of the neutral that may have a bearing on the case;
  - g. any code of ethics to which the neutral adheres; and

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2. ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision making;
3. ability to use clear, neutral language in speaking and (if written opinions are required) in writing;
4. sensitivity to strongly felt values of the disputants, including gender, ethnic, and cultural differences;
5. ability to deal with complex factual materials;
6. presence, i.e., an overt commitment to honesty, dignified behavior, and an ability to create and maintain control of a diverse group of disputants; and
7. ability to identify and to separate personal values from issues under consideration.
8. for mediation:
  - i. ability to convert parties' positions into needs and interests,
  - ii. ability to screen out non-mediabile issues,
  - iii. ability to help parties to invent creative options,
  - iv. ability to help the parties identify principles and criteria that will guide their decision making,
  - v. ability to help parties assess their non-settlement alternatives, and
  - vi. ability to help the parties make informed choices.
9. for arbitration:
  - i. ability to make decisions,
  - ii. ability to run a hearing, and

- iii. ability to write reasoned opinions.
  - b. Knowledge of the particular dispute resolution process being used:
    - 1. familiarity with existing standards of practice covering the dispute resolution process; and
    - 2. familiarity with commonly encountered ethical dilemmas.
  - c. Knowledge of the range of available dispute resolution processes, so that inappropriate cases can be referred to a more suitable process;
  - d. Knowledge of the institutional context in which the dispute arose and will be settled;
  - e. In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;
  - f. Where parties' legal rights and remedies are involved, knowledge of the legal standards that would be applicable if the case were taken to a court or other legal forum; and
  - g. Adherence to ethical standards.
- 11. Practice as an advocate should not, on its own, disqualify any individual from qualification to practice as a neutral. However, individuals practicing as advocates have a duty to disclose that fact to the parties.
- 12. To maintain their qualifications, neutrals have an obligation to continue to improve their competence through additional training, study and practice.

13. Programs or services offering training for neutral practitioners should establish clearly articulated qualifications for their trainers. Such qualifications should include the following factors:
  - a. the qualifications required to practice as a neutral in the area for which the training is offered;
  - b. the ability to communicate clearly; and
  - c. the ability to evaluate the performance of others working in simulated situations.
14. Where training is required as a condition of practice, trainers have an obligation to evaluate the performance ability of each individual trained and to communicate their evaluation to both the trainee and the staff of the program or service for which the training program is conducted.

**SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION**  
**COMMISSION ON QUALIFICATIONS**

**ISSUES PAPER**

**Draft\***

**October 1988**

**I. INTRODUCTION**

At the annual conference in New York in October 1987, SPIDR President George Nicolau proposed the formation of a Commission on Qualifications. The SPIDR Board of Directors charged the Commission with examining the question of qualifications of mediators and arbitrators and approved the following mission statement:

The Commission's role is to examine the question of qualifications of mediators and arbitrators. Established by the Board of the Society of Professionals in Dispute Resolution, the Commission is composed of individuals representing a broad variety of backgrounds and experience.

In that examination, the Commission intends to solicit the broadest cross-section of views on this subject, including those of SPIDR's membership, other organizations involved with or interested in dispute resolution and the users of dispute resolution services.

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\* This draft has been prepared by the Commission on Qualifications for purposes of discussion only and does not represent the final position of the Commission or of the SPIDR Board of Directors. Minor editorial changes were made after SPIDR's annual meeting in October. The Commission will review the contents of this paper in light of the comments received by January 1989 prior to making its recommendations to the SPIDR Board of Directors.

The members of the Commission wish to thank the National Institute for Dispute Resolution for its generous support, which made the work of the Commission possible, and the many members of SPIDR and representatives of other organizations for contributing their ideas in writing, through discussions at chapter and other meetings, and through direct communication with Commission members.

The Commission's recommendations will be subject to approval by the SPIDR Board. While the recommendations may have general applicability, the primary focus of the Commission's inquiry will be on those areas of alternative dispute resolution in which legislatures and other public bodies are now seeking to establish criteria that define who can serve as a mediator or arbitrator.

Linda R. Singer, Executive Director of the Center for Dispute Settlement, serves as Chair of the Commission. The members of the Commission are: Gail Bingham, Vice-President, Program on Environmental Dispute Resolution, The Conservation Foundation; Daniel P. Dozier III, Legal Counsel, Federal Mediation and Conciliation Service; William Hartgering, Vice-President, Endispute Inc.; Patrick Phear, President, Family Mediation Associates; Frank E. A. Sander, Professor, Harvard Law School; Margaret L. Shaw, Director, Institute of Judicial Administration, Inc.; Lamont E. Stallworth, Labor Arbitrator and Professor, Institute of Industrial Relations, Loyola University of Chicago; and Paul Wahrhaftig, President, Conflict Resolution Center, Inc. Michael K. Lewis, Senior Advisor to the National Institute for Dispute Resolution, and George Nicolau, President of SPIDR, serve as *ex officio* members of the Commission.

This report summarizes information about current public policy developments shaping the dispute resolution field and presents for purposes of discussion a preliminary set of principles that SPIDR might use to educate policy makers about these developments. The Commission will revise these principles based on the comments it receives and will make recommendations to the SPIDR Board of Directors on such issues as:

- o the purpose(s), and pros and cons, of establishing qualifications;
- o if qualifications ought to be established, who should set them;
- o what options exist for achieving the purpose(s) recommended;
- o whether distinctions should be made among mediators of different types of disputes, between mediators and arbitrators, or by other circumstances (e.g., the extent to which legal rights are involved);
- o what types of qualifications might be most relevant; and
- o what role, if any, SPIDR should play in the establishment of qualifications.

## II. RATIONALE

The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Many policy makers and professionals in the field are concerned about individuals with little information about or skill in dispute resolution simply "hanging out a shingle" and offering to mediate or arbitrate anyone's dispute. Further, concerns are being raised about poorly trained and inexperienced neutrals offering training to others. The risks are several -- the interests of parties may be harmed by incompetent practice and the public's understanding of what it means to request specific dispute resolution services may become confused, leading to public dissatisfaction with the field and claims that mediation and arbitration are merely a form of second class justice.

Proposals to establish qualifications for neutrals also raise considerable controversy, however. Some of the reaction appears to be anxiety among members of a profession newly faced with regulation. Many substantive concerns also have been raised, particularly about mandatory standards or certification, including: 1) creating inappropriate barriers to entry into the field, thus, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peacemaking skills in society. Even many of those who are persuaded that there is a need for some mandatory standards are concerned that it may not be possible yet to define and measure competence.

Perhaps the most pragmatic reason for SPIDR to address the issue of qualifications is that minimum requirements for neutral practice already are being set by legislative, judicial, and administrative bodies.<sup>1</sup> As a leading professional association of neutrals in all fields, SPIDR has a substantial degree of expertise on which these bodies could draw.

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<sup>1</sup> All but 15 states and the District of Columbia have adopted some type of statutory authority for mediation. At least nine states have adopted comprehensive statutes to define and to encourage the development of "alternative" dispute resolution methods. At least 21 states provide for mediation of labor disputes, usually by state boards of mediation. At least ten states have statutes specifically addressing mediation of family disputes, including issues of divorce, separation, child custody, and visitation rights. Individual states authorize or require the use of mediation in other specific types of dispute -- for example, foreclosure by lenders against farm property.

Among the states that have legislated, by statute or court rule, qualifications for practice as a neutral are California, Florida, Iowa, Michigan, Minnesota, New York, Oklahoma, Texas, and Wisconsin.



Although current developments in legislating qualifications most frequently apply to disputes referred by courts, these developments are likely to shape the practice of dispute resolution in all sectors. With so many statutory or court-ordered requirements in place, avoidance of the issue is no longer an option. Rather, the question is what are the most appropriate and useful ways to achieve the objectives of policy makers who are concerned about ensuring qualified practice, without the negative consequences of limiting the field.

### III. POLICY OPTIONS

There is no single way to promote quality in any professional practice. Among the options are:

1. free market
2. disclosure requirements
3. public/consumer education
4. "after the fact" controls, such as malpractice lawsuits
5. rosters
6. voluntary standards
7. codes of professional ethics
8. mandatory standards (certification) for neutrals
9. mandatory standards (certification) for programs
10. improvements in training for neutrals, including apprenticeship programs

#### 1. Free market.

Classically, in the "free market" consumers of a service select any provider they wish, with no regulation on consumer or provider. This situation can be found in much labor arbitration practice and in the mediation of some family, commercial, and environmental disputes. Based on this experience, some assert that the free market is

sufficient to ensure quality of practice because the parties will continue to select only those who have provided competent service.

## 2. Disclosure requirements.

A concern raised about the "free market" approach is that many parties, particularly those who do not use dispute resolution services on a regular basis, do not have access to complete information about practicing neutrals. Thus, these parties cannot make the *informed* choice on which the advantages of the free market depend. Consequently, some suggest that disclosure requirements would make a significant contribution to consumer protection. Decisions about what information should be disclosed, however, unavoidably depend on one's views about what attributes are relevant to competent practice.

An example of mandatory disclosure is Minnesota's Civil Mediation Act, which provides that any person performing mediation services pursuant to the act must provide potential parties with a written statement of qualifications, education, and training before commencing mediation. Failure to do so is a petty misdemeanor.

## 3. Public/consumer education.

Reliance on informed choice also assumes that parties will consider what characteristics of a neutral will serve their best interests. Although some parties are experienced in how dispute resolution processes and neutrals function, others are not. Some public and private agencies consider it their responsibility to conduct educational programs for potential parties or to raise questions to help them think through the implications of a variety of options. For example, the Massachusetts Council on Family Mediation provides potential clients with a list of useful questions and a range of possible answers.

## 4. "After the fact" controls, e.g. malpractice lawsuits.

The threat of malpractice lawsuits is another method of increasing the likelihood that individuals in any profession will practice in a competent manner. Few malpractice cases have been filed against neutrals to date and few professional standards exist against which to judge whether a particular individual has been guilty of malpractice in a given situation. The increasing tendency to formulate standards of practice may have growing implications for malpractice actions.

### 5. Rosters.

An increasingly common means for encouraging the use of dispute resolution services is to establish "rosters" through which parties can obtain the services of a neutral. A roster differs from a dispute resolution program in that the neutrals listed on a roster provide services independently of the organization maintaining the roster. Although organizations that compile rosters vary in the amount of screening that they do, most stand behind the competence of the individuals included on their rosters. Examples of rosters are the lists maintained by the Federal Mediation and Conciliation Service and the American Arbitration Association.

Typically, the parties are given some choice in the selection of names from a roster. The initial choice to use a roster to obtain a neutral also is usually voluntary. Some suggest that a roster approach can make it easier for parties to find qualified neutrals by drawing on the expertise of the organization that compiled the roster.

Whether consciously or not, organizations putting together rosters use a set of criteria to screen who is qualified, because someone must decide (and therefore limit) who gets on the roster in the first place. Obviously, some rosters apply less restrictive criteria than others; but usually the less restrictive the roster the longer the list; and the longer the list the more likely that the effective screening in any particular case will be done by an administrator who selects from the roster a panel of names from which the parties actually choose. An exception is that the FMCS asks the parties in each case for *their* screening choices from a set of standard criteria, then uses a computerized system with a random number generator to select the panel of names from those who meet the parties' criteria.

### 6. Voluntary standards.

Various professional organizations, such as the National Academy of Arbitrators, have adopted their own form of standards through their membership criteria. Another example is the Academy of Family Mediators, which has established detailed membership requirements and criteria to accredit mediators and trainers. Neutrals participate in these organizations voluntarily; if they choose not to do so they are not barred from practice. If the standards of the organization are explicit, well publicized, and seen as desirable by consumers, however, the consumers' preference for neutrals possessing the "credential" of membership in that organization may serve to increase the use of neutrals with those qualifications.

### 7. Codes of professional ethics.

One form of voluntary standards is a code of ethics, such as the code developed by the Society of Professionals in Dispute Resolution. Parties have the opportunity to know more about, and possibly value the qualities of, neutrals subscribing to a code of ethics.

### 8. Mandatory standards for neutrals.

Some suggest that specific standards should be set for who should be allowed to practice as a neutral, in part because parties often do *not* have a free choice of the neutral providing a dispute resolution service. Among those who hold this view there are differences about what criteria are good measures of competent practice. The most common pattern to date is for states to require degrees earned in other professions, such as law, social work or counseling. The specific degrees required vary. Recent regulations promulgated by the Florida Supreme Court, for example, limit court-referred family mediators to those with one of the following credentials: a master's degree in social work, mental health, behavioral or social sciences; psychiatrists; attorneys; and certified public accountants.

Some states include training requirements; one incorporates experience. In some states, such as Florida, a minimum number of hours of court-approved dispute resolution training is combined with academic degree requirements. In other states, such as Texas, dispute resolution training is the only requirement, but the training program must be certified by the court. The Texas statute explicitly rules out occupational status or degrees as requirements. Oklahoma combines training requirements with observation by an experienced mediator, independent case experience, and continuing education.<sup>2</sup>

### 9. Mandatory standards for programs.

Arguably, many public and private dispute resolution programs have *de facto* standards of practice. Mediation agencies such as the Federal Mediation and Conciliation Service, state mediation agencies, court-run dispute resolution programs, and private mediation programs such as the Better Business Bureau all set standards for people they hire or use as volunteers.

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<sup>2</sup> A statutory scheme recently adopted in New South Wales relies on a similar competence-based scheme for certifying mediators and programs.

A few state statutes establish mandatory standards for programs. Under New York's Community Dispute Resolution Centers program, for example, a Chief Administrator of the Courts provides supervision of approved centers. To be eligible, a center must follow prescribed guidelines, which include providing services at nominal or no cost, not accepting specified criminal disputes for resolution, and providing mediators who have received at least 25 hours of training in conflict resolution techniques.

Some dispute resolution programs maintain a working relationship with a list of neutrals not in their direct employ. When parties come to such a program for dispute resolution services, the program provides the services through a neutral on its list. These services may be offered on either a paid or volunteer basis. These programs have either explicit or *de facto* standards for the neutrals with whom they work.

Some suggest that setting criteria for *programs* offering dispute resolution services, rather than criteria for individual neutrals, might be an effective way to ensure quality of dispute resolution services without limiting the entry of individual neutrals into the field. Rule 703 under the Magnusen Moss Consumer Product Warranty Act, for example, regulates the scope of issues that a program can decide, the timetable of decisions, the training of neutrals, funding of services, and recordkeeping.

#### 10. Improvements in training for neutrals.

Regardless of whether any limitations on entry are established, a strong case can be made for requiring continuing training and evaluation of dispute resolution skills. One good way of achieving that objective is to apprentice new practitioners to more experienced ones. Both court-based and community mediation services use such schemes routinely.

### IV. PRELIMINARY PRINCIPLES

There are no obvious answers to what constitutes a qualified neutral or which of the policy options described is appropriate to ensure that those who practice are qualified to do so. During its deliberations to date, however, the Commission has found three central principles useful in shaping its discussions:

- A. that no single entity (rather, a variety of organizations) should establish qualifications for neutrals;

- B. that the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory should be the qualification requirements; and
- C. that qualification criteria should be based on performance, rather than paper credentials.

**A. No single entity.**

Clearly, the dispute resolution field is a diverse one. Even though there are some skills that are basic, the knowledge and techniques required to practice competently may vary by context, by process, by issue, or by institutional setting. Different criteria also may be relevant to binding arbitration, non-binding arbitration, and mediation (where neutrals do not give opinions.)

Skills may need to differ in situations with differing dynamics. Some disputes are between individuals; others are between organizations. Some disputes involve two parties; others involve many. Some disputes may be more polarized than others; in some cases there may be the threat of violence. In some disputes the parties have never met before and are not likely to meet again; in others the parties have an ongoing relationship. Some disputes involve parties who are knowledgeable, experienced negotiators; others do not; still others involve amateurs negotiating with professional advocates. Some disputes are private matters; others must be resolved in the limelight of politics or litigation.

It may be important to avoid policies that would allow any one public or private body to establish uniform criteria for all neutrals, even for a single sector. Such uniformity could restrict the development of different dispute resolution approaches and, if misused, could close the ranks of the profession to particular social or ethnic groups.

Thus, the Commission recommends the following principles as starting points for discussion among SPIDR members:

1. Where criteria for determining minimum competence in different contexts are warranted, they should be established by a variety of agencies working in those contexts. No single entity should be relied on to certify general dispute resolution competence.

2. **Public and private entities making judgments about appropriate qualifications should be guided by groups that include representatives of consumers of the services and individuals with expertise in alternative dispute resolution processes, as well as representatives of the sponsoring body.**

**B. Degree of choice.**

In some cases parties voluntarily agree on a dispute resolution process and a mutually acceptable neutral. Although the Commission would encourage public and private dispute resolution programs to provide parties with the greatest possible choice of both process and neutral, the actual degree of choice afforded in different circumstances varies considerably. The Commission has identified three categories of relative choice by the parties:

- a. independent neutrals offering services to the public through a free market, or public or private institutions in which parties have *full choice* of process, program and neutral;
- b. public or private institutions in which parties have a choice of *some*, but not all, of the following: process, program and neutral; and
- c. public or private institutions in which parties have *no choice* of process, program or neutral.

If one of the purposes of efforts to ensure competent practice is to protect the consumer, different approaches may be appropriate depending on the degree of freedom or ability that the parties have to choose and thus to protect themselves. Thus, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

3. **The extent to which qualifications for neutrals should be mandated should vary by the degree of choice the parties have over the dispute resolution process, the program offering dispute resolution services, and the neutral. The greater the degree of choice, the less mandatory should be the requirements.**

Based on this general principle, the Commission suggests three basic strategies corresponding to the degree of choice by the parties. First, the Commission suggests that, despite its limitations, a free market should be relied on where parties have the opportunity to choose the process and neutrals themselves, so long as they are provided with complete and accurate information. Thus, for situations in which parties have free choice, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

4. **No standards or qualifications should be required that would prevent any person from providing dispute resolution services, when parties have free choice of the process, program, and individual neutral, provided that the parties are given access to the following information about the neutral:**
  - a. **prior training and experience relevant to the dispute resolution services to be provided;**
  - b. **personal and/or previous business relationships with the parties;**
  - c. **all financial interests that may have any bearing on the case;**
  - d. **any code of ethics to which the neutral adheres; and**
  - e. **other relevant information such as personal bias, which, if known, may affect the parties' choice.**

In practice, we recognize that the parties have varying degrees of freedom to choose among dispute resolution processes, programs, and neutrals. Numerous circumstances exist in which parties are required to participate in mediation or arbitration. Even where the parties come to a particular program, such as a neighborhood justice center, voluntarily, they may be assigned a particular mediator or arbitrator. Without intending to imply that such assignment necessarily leads to more poorly qualified neutrals, the Commission believes that lack of choice by the parties creates a greater reason for concern about consumer protection and, therefore, a greater need for public scrutiny of the criteria used to select these neutrals.



Where parties have no choice of process, program or neutral, they have more difficulty protecting themselves against incompetent neutrals, particularly in arbitration proceedings with binding effect. This situation exists in many court-mandated programs, and in programs established under statutes (such as some consumer warranty programs under Rule 703 of the Magnusen Moss Consumer Product Warranty Act), regulations, or standard agreements (such as the Security and Exchange Commission's arbitration procedure for fee disputes between brokers and clients, which is included as part of virtually every brokerage firm's form contract). These are the circumstances in which state legislatures already have taken the most active role to mandate specific qualifications. Consequently, when the parties have no choice of process, program or neutral, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

5. Where courts, public agencies, or private organizations operate programs that do not offer the parties a choice of the dispute resolution process, program, or neutral to which the parties must go to engage in that process, standards or qualifications for such programs and neutrals should be set by an appropriate public entity. Information about such standards or qualifications should be made available to the parties.

Finally, where the parties have a choice of some -- but not all -- of the elements of process, program, or neutral, the elucidation of a general standard to govern qualifications is the most difficult and remains under active development by the Commission. One possible approach is to require programs offering dispute resolution services to *disclose* their selection criteria but not to tell them what criteria they should use. Thus, when the parties have some, but not complete, choice of process, program, or neutral, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

6. It is the responsibility of public and private programs offering dispute resolution services to define clearly the services they provide, to establish clear criteria for selecting intervenors and evaluating intervenor performance, to conduct periodic performance evaluations, and to offer the following information about the program and the neutral(s) to parties:
  - a. the criteria used for selecting and evaluating neutrals;

- b. fees charged, if any;
- c. rules governing confidentiality;
- d. the neutral's prior training and experience relevant to the dispute resolution services to be provided;
- e. any personal or previous business relationships the neutral may have had with the parties;
- f. any financial interest of the neutral that may have a bearing on the case;
- g. any code of ethics to which the neutral adheres; and
- h. other relevant information about the neutral such as personal or programmatic bias, which, if known, may affect the parties' choice.

### C. Performance-based qualifications.

The question of what criteria should be used for measuring competence is relevant, whether the approach to ensuring competence is disclosure of relevant information by the neutral, disclosure by programs of their criteria for selecting and evaluating neutrals, or mandated public standards regulating dispute resolution practice.

The most common requirement that has been imposed by state legislatures to date is the possession of an advanced degree from some other profession or discipline, such as law or mental health. The Commission knows of no evidence that formal degrees are necessary to competent performance as a neutral. Indeed, there is impressive evidence that some individuals who do not possess these credentials make excellent dispute resolvers. Furthermore, the requirement of a graduate degree in any discipline clearly creates a significant barrier to the entry of many competent individuals into the profession. Thus, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

7. **We recognize that knowledge acquired in obtaining various degrees can be useful in the practice of dispute resolution. At this time and for the foreseeable future, however, no such degree in itself ensures competence as a neutral. Furthermore, requiring a degree would foreclose alternative avenues of demonstrating dispute resolution competence. Consequently, no degree should be considered a prerequisite for service as a neutral.**

The Commission concluded that performance criteria (such as neutrality, demonstrated knowledge of relevant practices and procedures, ability to listen and understand, and ability to write a considered opinion for arbitrators) are more useful and appropriate in setting qualifications to practice than is the manner in which one achieves those criteria (such as formal degrees, training, or experience). Thus, the Commission recommends the following principles as starting points for discussion among SPIDR members:

8. **Any requirements concerning who can practice as a neutral should be based on performance. In establishing requirements, any certifying bodies or agencies maintaining rosters or lists of "acceptable" neutrals, should emphasize the knowledge and skills necessary for competent practice, not the education or other method by which an individual acquired the knowledge or skills.**
9. **One goal of establishing standards should be to encourage and increase the diversity of practicing mediators and arbitrators. Consequently, standards should be scrutinized carefully to avoid the disproportionate exclusion of groups based on race, sex, age, handicap, nationality, religion, or sexual preference.**

Clearly, if performance criteria are preferred to educational degrees, it is important to identify and measure the characteristics and capabilities that determine competence. While recognizing the difficulty of the task, the Commission believes that it is possible to test for competence and well worth the effort it entails. If performance can be measured, the way in which an individual achieves the necessary level of performance need not be a barrier to practice.

Performance-based testing is relatively new to dispute resolution but not to other skills (athletes and pilots, for example). To do it well can be time consuming and expensive. Thus, it may not currently be feasible to expect all organizations or programs to rely on actual performance measures. As an alternative, experience can be a useful screening tool to identify those who can mediate or arbitrate and those who would benefit from further training. Factors such as the amount and diversity of prior dispute resolution experience, the complexity of previous cases handled, and the amount and diversity of experience as a negotiator in similar cases all may be useful. Well designed training and apprenticeship programs, with significant personal observation and feedback, also may be able to provide an equivalent of competency testing.

In determining what the elements of competent performance might include, the Commission recommends the following principles as starting points for discussion among SPIDR members:

10. Policy makers setting standards for those who may practice as a neutral, programs developing their own criteria for the neutrals they employ or include on rosters, and bodies determining relevant information to disclose to parties should consider the following performance criteria:
  - a. Skills necessary for competent performance as a neutral:
    1. ability to listen actively;
    2. ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision making;
    3. ability to use clear, neutral language in speaking and (if written opinions are required) in writing;
    4. sensitivity to strongly felt values of the disputants, including gender, ethnic, and cultural differences;
    5. ability to deal with complex factual materials;

6. presence, i.e., an overt commitment to honesty, dignified behavior, and an ability to create and maintain control of a diverse group of disputants; and
7. ability to identify and to separate personal values from issues under consideration.
8. for mediation:
  - i. ability to convert parties' positions into needs and interests,
  - ii. ability to screen out non-mediabile issues,
  - iii. ability to help parties to invent creative options,
  - iv. ability to help the parties identify principles and criteria that will guide their decision making,
  - v. ability to help parties assess their non-settlement alternatives, and
  - vi. ability to help the parties make informed choices.
9. for arbitration:
  - i. ability to make decisions,
  - ii. ability to run a hearing, and
  - iii. ability to write reasoned opinions.
- b. Knowledge of the particular dispute resolution process being used:
  1. familiarity with existing standards of practice covering the dispute resolution process; and
  2. familiarity with commonly encountered ethical dilemmas.

- c. Knowledge of the range of available dispute resolution processes, so that inappropriate cases can be referred to a more suitable process;
- d. Knowledge of the institutional context in which the dispute arose and will be settled;
- e. In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;
- f. Where parties' legal rights and remedies are involved, knowledge of the legal standards that would be applicable if the case were taken to a court or other legal forum; and
- g. Adherence to ethical standards.

The Commission does not believe that practice as an advocate necessarily disqualifies an individual from serving as a neutral. Indeed, such experience can be a useful way of acquiring some of the skills identified above. Consequently, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

- 11. Practice as an advocate should not, on its own, disqualify any individual from qualification to practice as a neutral. However, individuals practicing as advocates have a duty to disclose that fact to the parties.

Reliance on performance-based criteria for establishing competence (whether that be done through disclosure, voluntary memberships in certifying associations, mandatory standards, or other methods) implies that, once qualified, an individual does not necessarily remain competent forever. Also, qualification criteria may change over time as the knowledge in this new field grows, thus creating a need for additional training. Thus, the Commission recommends the following principle as a starting point for discussion among SPIDR members:

12. To maintain their qualifications, neutrals have an obligation to continue to improve their competence through additional training, study and practice.

To the extent that training is relied on for establishing or measuring competence, the trainers themselves must be qualified. Thus, the Commission recommends the following principles as starting points for discussion among SPIDR members:

13. Programs or services offering training for neutral practitioners should establish clearly articulated qualifications for their trainers. Such qualifications should include the following factors:
  - a. the qualifications required to practice as a neutral in the area for which the training is offered;
  - b. the ability to communicate clearly; and
  - c. the ability to evaluate the performance of others working in simulated situations.
14. Where training is required as a condition of practice, trainers have an obligation to evaluate the performance ability of each individual trained and to communicate their evaluation to both the trainee and the staff of the program or service for which the training program is conducted.

#### **V. FURTHER QUESTIONS**

The Commission recognizes, if SPIDR were to adopt standards modeled on the principles presented for discussion, that other questions would remain to be resolved. Among them are the following:

1. SPIDR's role in serving as a national source of information on qualifications, in promulgating and enforcing standards, or otherwise;
2. Enforcement in general;

3.   **Adaptation to the needs of different sectors; and**
4.   **Implementation.**



# REFERENCES

Fallows, The Case Against Credentialism, Atlantic Monthly (Dec. 1985).

Goldberg, Green and Sander, Dispute Resolution, pp. 517-21 (1985).

Honeyman, Five Elements of Mediation, 4 Neg. J. 149 (1988).

Koopman, The Education and Training of Mediators, Divorce and Family Mediation, 118, 130.

R. Kraybill, Rough Draft of the Mennonite Conciliation Service Philosophy of Training and Certification (1986).

Note, The Dilemma of Regulating Mediation, 22 Hous. L. Rev. 841 (1985).

Note, The Sultans of Swap: Defining the Duties and Liabilities of American Mediators, 99 Harv. L. Rev. 1876 (1986).

M. Shaw, Mediator Qualifications: Report of a Symposium on Critical Issues in Alternate Dispute Resolution Sponsored by New Jersey Center for Public Dispute Resolution (1988).

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## SUGGESTED BIBLIOGRAPHY ON DISPUTE RESOLUTION <sup>1</sup>

Abraham, Kenneth S., "Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform," 73 Virginia Law Review 845-910 (August 1987).

Analyzes the dilemma encountered by those searching for solutions to mass tort problems and discusses the use of non-adjudicatory systems for compensating victims.

Abrahams, Steven, "Mediation: The New Move Toward Justice," 65 Judicature 493-496 (May 1982).

Discusses the history and spread of mediation and neighborhood justice centers.

Adams, Charles W., "Final Offer Arbitration: Time for Serious Consideration by the Courts," 66 Nebraska Law Review 213-248 (1987).

Assesses the use of final offer arbitration to improve the negotiation process and promote settlement. Recommends its use in connection with court-annexed arbitration programs.

Adler, Jane W., Deborah R. Hensler, and Charles Nelson, Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program, Rand Institute for Civil Justice, R-3071-ICJ (1983).

Describes and analyzes mandatory arbitration program in the Allegheny County Court of Common Pleas.

Adler, Jane W., William F. Felstiner, Deborah R. Hensler, and Mark A. Peterson, The Pace of Litigation -- Conference Proceedings, Rand Institute for Civil Justice, R-2922-ICJ (1982).

Discusses expense and delay of civil court litigation.

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<sup>1</sup> Prepared for the National Conference on Dispute Resolution and the State Courts by the National Institute for Dispute Resolution, 1901 "L" Street, N.W., Suite 600, Washington, D.C., 20036, 202-466-4764 (November 1988).

Adler, Peter S., "Is ADR a Social Movement?" Negotiation Journal 59-71 (January 1987).

Examines whether interest in ADR can accurately be called a "movement" and, if so, what kind of movement.

ADR and the Courts: A Manual for Judges and Lawyers, CPR Legal Program, Erika S. Fine, Editor (Center for Public Resources, New York 1987).

Presents compilation of articles addressing various case management and dispute resolution techniques.

ADR Trends and Abstracts, Hawaii State Judiciary Program on Alternative Dispute Resolution, Ali' iolani Hale, Post Office Box 2560, Honolulu, Hawaii, 96804, 808-548-3080.

Advancing Justice: May We Approach the Bench," Alliance of American Insurers, Monograph (1987).

Presents comprehensive look at alternatives to litigation and discusses current problems with civil justice system.

Agricultural Credit Act of 1987, Congressional Record, Volume 133, Number 202.

Legislation deals with farmer/creditor mediation.

Aikman, Alexander B., Mary E. Elsner, and Frederick G. Miller, " Friends of the Court — Lawyers as Supplemental Judicial Resources (National Center for State Courts 1987).

Assesses the use of volunteer lawyers as judicial adjuncts and reports the results of an evaluation of six such programs.

Albany Law Review, Symposium on Alternatives to Litigation, Volume 48, Number 3 (Spring 1984).

Alfini, James J., "Alternative Dispute Resolution and the Courts: An Introduction," 69 Judicature 252-253, 314 (February-March 1986).

Describes court-annexed dispute resolution mechanisms.

Alfini, James J., and Richard W. Moore, "Court-Annexed Arbitration: A Review of the Institute for Civil Justice Publications," 12 The Justice System Journal 260-268 (1987).

Reviews four ICJ publications: (1) Judicial Arbitration in California: The First Year (Hensler, et al., 1981); (2) Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program (Adler, et al., 1983); (3) Introducing Court-Annexed Arbitration: A Policymaker's Guide (Rolph, 1984); and (4) Court-Annexed Arbitration: The National Picture (Ebener and Betancourt, 1985).

"Alternative Dispute Resolution: An ADR Primer," ABA Standing Committee on Dispute Resolution (1987).

Poses questions and offers answers to questions generally asked about alternative dispute resolution.

Alternative Dispute Resolution: A Handbook for Judges, Monograph Series, American Bar Association Standing Committee on Dispute Resolution (1987).

Alternative Dispute Resolution In High Volume Third Party Insurance Disputes, CPR Legal Program to Develop Alternatives to Litigation (Center for Public Resources 1987).

Examines benefits and features of alternative dispute resolution programs; suggests ways to institutionalize ADR within a company.

Alternative Dispute Resolution and Risk Management: Controlling Conflict and Its Costs, Practising Law Institute, Litigation and Administrative Practice Series, Number 338.

"Alternative Justice: The Potential for Local Mediation Centers in the State of Washington," Summary Report (Washington State Institute for Public Policy, Olympia, Washington, September 1984).

Alternative Means of Family Dispute Resolution (American Bar Association, Special Committee on Dispute Resolution, Washington, D.C. 1982).

Alternative Methods of Dispute Settlement: A Selected Bibliography (American Bar Association, Special Committee on Resolution of Minor Disputes, Washington, D.C. 1979).

"An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations," Comment, 29 Villanova Law Review 1505-1539 (November 1984).

Examines the development and viability of negotiated rulemaking as a form of administrative action.

Alternatives to the High Cost of Litigation, Special Issue on Judicial ADR, Center for Public Resources (1985).

Provides comprehensive overview of court-annexed alternative dispute resolution procedures.

American Arbitration Association, Model Procedures, 140 West 51st Street, New York, 10020, 212-484-4011.

American Bar Association, Publications Catalogue, Order Fulfillment, 750 North Lake Shore Drive, Chicago, Illinois, 60611, 312-988-5555.

"Analysis of a First Amendment Challenge to Rent-A-Judge Proceedings," 14 Pepperdine Law Review 989-1005 (1987).

Analyzes what, if any, first amendment rights the public has to access civil court proceedings and discusses such rights in conjunction with private reference proceedings.

Anderson, Douglas E., "The Self-Executing Pretrial Conference: An Exceptional Tool for Handling Small Lawsuits," 71 Judicature 55 (June-July 1987).

Examines a Colorado court's provision of a pretrial discussion forum for parties to reach settlement or shorten trial of small cases.

"Arbitrate — Don't Litigate," Public Affairs Newsletter, Kemper Group, Volume 12, Number 2 (December 1984).

Describes both private and court-annexed arbitration, as well as several of the private forums available.

Arbitration and the Law: AAA General Counsel's Annual Report (American Arbitration Association, New York, 1981-present).

Discusses recent developments, including case law and statutes. The reports also contain updates of AAA's rules regarding dispute resolution methods.

"Arbitration: Can It Rein in Excessive Litigation?" Journal of American Insurance 20-24 (1984).

Deals with ways insurers can cope with lawsuits by using alternative dispute resolution mechanisms.

The Arbitration Journal, Volume 40, Number 3 (September 1985).

Presents an overview of the agencies and programs that provide an alternative to the courts.

Aspen, Marvin E., "Intensive ad hoc Mediation," ADR and the Courts: A Manual for Judges and Lawyers, pages 225-232 (Center for Public Resources, New York 1987).

Association of American Law Schools, "Alternative Dispute Resolution in the Law Curriculum," 34 Journal of Legal Education 229 (June 1984).

Presents a compilation of articles on the role of various forms of ADR techniques in legal education.

Attacking Litigation Costs and Delay, American Bar Association, Action Commission to Reduce Court Costs and Delay, Final Report and Supporting Volume (1984).

Reviews selected trial court projects.

"The 'Attorney Mediator': Protection Through Representation," Comment, 92 Dickinson Law Review 811-838 (Summer 1988).

Assesses the role and obligations of lawyers who act as mediators and proposes a theory of liability.

Atwood, Barbara Ann, "Issues in Federal-State Relations Under the Federal Arbitration Act," 37 University of Florida Law Review 61-103 (Winter 1985).

Discusses history and current status of federal and state legislation and relevant court decisions.

Auerbach, Jerold S., Justice Without Law? Resolving Disputes Without Lawyers (Oxford University Press, New York 1983).

Reviews history of ongoing struggle between the legal system and alternate forms of dispute resolution.

Ayre, J. Randolph, "Corporate Law Departments: Strategies for the 1980s," Practising Law Institute (1984).

Bacow, Lawrence S., and Michael Wheeler, Environmental Dispute Resolution (Plenum Press 1984).

Proposes framework for negotiating resolutions to environmental controversies.

Barkai, J., and G. Kassebaum, "The Impact of Discovery Limitations on Cost, Satisfaction, and Pace in Court-Annexed Arbitration," Paper presented at the Law and Society Association Annual Meeting (June 1988).

Barrett, William L.D., "Arbitration of a Complex Commercial Case: Practical Guidelines for Arbitrators and Counsel," 41 The Arbitration Journal 15-23 (December 1986).

Goes step-by-step through the phases of complex arbitration, offering practical suggestions to speed the process and make it more productive.



Bedikian, Mary, "Medical Malpractice Arbitration Act: Michigan's Experience with Arbitration," 10 American Journal of Law and Medicine 287-306.

Discusses use of arbitration to resolve medical malpractice disputes and examines the Michigan statute, including constitutional challenges.

Bedlin, Howard, and Paul Nejelski, "Unsettling Issues About Settling Civil Litigation: Examining 'Doomsday Machines,' 'Quick Looks,' and Other Modest Proposals," 68 Judicature 9-29 (June-July 1984).

Examines positive and negative aspects of settlement techniques, both court-annexed and private.

Benchbook for Arbitrators, North Carolina Pilot Program of Court-Ordered Arbitration, Subcommittee, North Carolina Bar Association Dispute Resolution Committee (January 1987).

"Bergen County Pilot Rules Re: Differentiated Civil Case Management," New Jersey Law Journal (January 23, 1986).

Bertelsman, William, "Pretrial and Settlement Conferences, Part I," Kentucky Bench and Bar 21-22 (April 1984) and ". . . , Part II," Kentucky Bench and Bar 43-44 (July 1984).

Discusses the use by federal judges of pretrial and settlement conferences.

Bethel, Charles A., and Linda R. Singer, "Mediation: A New Remedy for Cases of Domestic Violence," 7 Vermont Law Review 15-32 (1982).

Assesses the effectiveness of mediation in domestic violence situations, based on the record of the District of Columbia Mediation Service.

BNA's Alternative Dispute Resolution Report, Bureau of National Affairs, Washington, D.C., 20037, 202-452-4200.

Bi-weekly report covering developments in private and public dispute resolution, including dispute resolution legislation and court decisions.

Botter, Theodore I., "The Court-Appointed Expert," Using Experts in Civil Cases (Practising Law Institute 1982).

Boveri, Mark D., "Surveying the Law of Fee Awards Under the Attorney's Fee Awards Act of 1976," 59 Notre Dame Law Review 1293-1314 (1984).

Discusses when attorney's fees may be recovered and who may be liable for the fees.

Brazil, Wayne D., Effective Approaches to Settlement: A Handbook for Lawyers and Judges (Prentice Hall Law and Business 1988).

Brazil, Wayne D., Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges (American Bar Association 1985). See also, Brazil, "Settling Civil Cases: What Lawyers Want From Judges" and related articles, The Judges' Journal, Volume 23, Number 3 (Summer 1984).

Reports results of survey which asked litigators whether they favored active judicial participation in settlement discussions.

Brazil, Wayne D., "Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?" 53 University of Chicago Law Review 394-423 (1986).

Discusses benefits and risks associated with the use of special masters; describes possible roles.

Brazil, Wayne D., Geoffrey C. Hazard, and Paul R. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (American Bar Foundation 1983). See also, Brazil, "Special Masters in the Pretrial Development of Big Cases: Potential and Problems," American Bar Foundation Research Journal 287-374, and, Hazard and Rice, "Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers," American Bar Foundation Research Journal 375-418 (1982).

Articles examine the use of special masters to expedite the case development process and to control the pretrial phase of complex disputes; suggest ways to avoid problems caused by delegating judicial responsibilities.

"Breaking the Legal Logjam: Alternatives to the Courthouse," 4 CPU Public Affairs Forum 1-9 (Society of Chartered Property and Casualty Underwriters).

Describes dispute resolution methods other than adjudication.

Bremer, Celeste F., and W. Scott Simmer, "One Day in Court: Suggestions for Implementing Summary Jury Trials in Iowa," 36 Drake Law Review 297-315 (Spring 1987).

Overviews methods of dispute resolution, including mediation, private and court-annexed arbitration, special masters, minitrials, and private judging, but with particular emphasis on the summary jury trial.

Brenneman, Hugh W., Jr., and Edward Wesoloski, "Blueprint for a Summary Jury Trial," Court Review 6-11 (Summer 1987).

Examines the standard steps of a summary jury trial and possible modifications.

"Bringing the Dispute Resolution Community Together," SPIDR Conference Proceedings (October 1985).

Broderick, Raymond J., "Compulsory Arbitration," Paper presented on Court-Annexed Arbitration (Federal Judicial Center, March 15, 1985).

Brody, Michael, "When Products Turn Into Liabilities," Fortune 20-24 (March 3, 1986).

Discusses manufacturer responses to increased numbers of product-related claims, including the development of dispute management and dispute resolution programs.

Brown, John Prather, "Alternatives to the Present System of Litigation for Personal Injury," The Effects of Litigation on Health Care Costs, pages 69-79, The Brookings Institution (Washington, D.C. 1985).

Discusses issues raised by personal injury litigation and shortcomings in the present system for resolving such litigation; describes alternatives to present system, including no-fault, a uniform federal statute, marketability of claims, and public funding of compensation.

Brunet, Edward, "Questioning the Quality of Alternate Dispute Resolution," 62 Tulane Law Review 1-56 (November 1987).

Analyzes dispute resolution methods, including the relationship between alternative procedures and conventional litigation. Focuses on the quality of justice as measured by deference to substantive legal principles, outcome accuracy, speed of resolution, and availability of objective and informed representation.

Bush, Robert A. Baruch, "Dispute Resolution Alternatives and Achieving the Goals of Civil Justice: Jurisdictional Principles for Process Choice," 1984 Wisconsin Law Review 893-1034 (1984).

Addresses debate over institutional reform in civil justice system, including dispute resolution alternatives outside the courts.

Bush, Robert A. Baruch, Defining Quality in Dispute Resolution Taxonomies and Anti-Taxonomies of Processes, Contexts, Interest, and Standards, University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Project Working Paper 8-7, 78 pages (1987).

Assesses the myriad definitions of "quality" as applied to dispute resolution programs.

"The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts," Note, 94 Harvard Law Review 1592-1615 (1981).

Discusses federal and state use of private reference statutes; examines the advantages and disadvantages, concluding that institutional costs and constitutional concerns outweigh any advantages.

"California's Pilot Project in Economical Litigation," Note, 53 Southern California Law Review 1497-1525 (July 1980).

Examines pilot project rules and compares them with other procedural rules.

Cavanagh, Ralph, and Austin Sarat, "Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence," 14 Law & Society Review 371-420 (Winter 1980).

Reviews arguments about limitations on judicial competence or capacity and suggests reforms should be directed at wide range of social goals rather than solely at the courts.

Center for Public Resources, Model Procedures and Practice Guides, 366 Madison Avenue, New York, 10017, 212-949-6490.

Cerino, Angela M., and Sebastian M. Rainone, "The New Wave: Speedy Arbitration Hearings — But Are They Fair?" 29 Villanova Law Review 1495-1503 (1983-1984).

Evaluates compulsory arbitration program in Philadelphia County Court of Common Pleas.

Christensen, Barlow F., "Private Justice: California's General Reference Procedure," American Bar Foundation Research Journal 79-110 (Winter 1982).

Explains the "rent-a-judge" procedure and examines issues associated with its use.

Church, Thomas, Jr., Alan M. Carlson, Jo-Lynn R. Lee, and Teresa Tan, Justice Delayed: The Pace of Litigation in Urban Trial Courts (National Center for State Courts, Williamsburg, Virginia 1978). See also, Church, "Civil Case Delay in State Trial Courts," 4 Justice System Journal 166-196 (Winter 1978).

Examines strategies for delay reduction.

Cifelli, Gus, and David Szymanski, "Mediating Small Claims Promotes Amicable Settlements," 7 State Court Journal 18-20 (Fall 1983).

Discusses the mediation system for small claims of a Michigan court.

"Civil Case Management and Procedures Report: Report of the Supreme Court Committee," New Jersey Law Journal (March 28, 1985).

Civil Litigation Research Project: Final Report, Volumes I-IV (University of Wisconsin-Madison Law School, Civil Litigation Research Project 1983).

Clark, Lincoln, and Jane Orbeton, "Mandatory Mediation of Divorce: Maine's Experience," Maine Lawyer's Review 25 (September 1985). See also, 69 Judicature 310-312 (February-March 1986).

Reports successes and failures of Maine's mediation program for domestic relations cases.

Clearinghouse Bibliography, Center for Public Resources Information Packages, 680 Fifth Avenue, New York, New York, 10019, 212-541-9830 (1986-1987).

Clune, William H., III, and Patrick Hyde, Final Offer Interest Arbitration in Wisconsin: Legislative History, Participant Attitudes, Future Trends, University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Project Reprint Series #7.

Colorado Supreme Court Committee on Delay Reduction, "Colorado Standards for Case Management: Trial Courts" (1987).

Comeaux, Elizabeth A., "A Guide to Implementing Divorce Mediation in the Public Sector," 21 Conciliation Courts Review 1-25 (1983).

Discusses the variety of mediation services in the public sector and defines issues which should be considered when implementing such services.

"Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes," Note, 29 Hastings Law Journal 475-518 (1978).

Defines and examines the effectiveness of court-annexed arbitration.

Connecticut Superior Court, "The Mediation Program," informational brochure.

Connolly, Paul, "Why We Do Need Managerial Judges," The Judges' Journal 34-36, 40-44 (Fall 1984).

Rebuts Professor Resnick's criticisms of judicial case management and discusses the proper conduct of scheduling and settlement conferences.

Connolly, Paul, and Sandra Smith, "Description of Major Characteristics of the Rules for Selected Court-Annexed Mediation/Arbitration Programs," American Bar Association Action Commission to Reduce Court Costs and Delay (June 1982).

"The Constitutional and Contractual Challenges to Michigan's Medical Malpractice Arbitration Act," 59 Journal of Urban Law 319 (1982).

Reviews legislative provisions regarding agreements to arbitrate issues arising from health care or treatment.

"Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated," 19 Valparaiso University Law Review 493-520 (1985).

Discusses constitutional issues raised by Indiana's medical malpractice act, including increased delay as a result of the review panel process and admissibility of the panel's decision in court.

Consumer Dispute Resolution: Exploring the Alternatives (American Bar Association, Washington, D.C. 1983).

Cook, Royer F., Janice A. Roehl, and David I. Sheppard, "Neighborhood Justice Centers Field Test — Final Evaluation Report" (American Bar Association, Washington, D.C. 1980).

Evaluates the Neighborhood Justice Centers in Atlanta, Los Angeles, and Kansas City.

Cooley, John W., "Arbitration vs. Mediation — Explaining the Differences," 69 Judicature 263-269 (February-March 1986).

Describes both procedures and charts the distinctions between them.

Cooley, John W., "Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?" 68 Judicature 59-60, 88-89 (August-September 1984).

Examines the use of special masters to mediate disputes.

Corporate Dispute Management 1982: A Manual of Innovative Corporate Strategies for the Avoidance and Resolution of Legal Disputes (Center for Public Resources, Matthew Bender 1982).

Presents overview of techniques which have been used successfully to prevent, manage, or resolve corporate disputes.

Cortez, Miles C., Jr., "The 'Private Judge' Alternative to Traditional or Mandatory Arbitration," 17 Colorado Lawyer 831-834 (May 1988).

Describes the use of private lawyer and non-lawyer "judges" to resolve disputes in Colorado, including recent examples.

Coulson, Robert, "Business Arbitration — What You Need to Know" (American Arbitration Association, New York 1986).

Describes commercial arbitration and its role in the construction, textile and apparel, and insurance industries.

Coulson, Robert, "Business Mediation — What You Need to Know" (American Arbitration Association, New York 1987).

Describes in detail the mediation process and the role of the mediator in the context of resolving business disputes; includes bibliography.

Coulson, Robert, How to Stay Out of Court (American Arbitration Association, New York 1984).

Discusses negotiation and other dispute resolution techniques, including arbitration and mediation.



Coulson, Robert, "Private Settlement for the Public Good," 66 Judicature 7-10 (June-July 1982).

Examines "rent-a-judge" procedure as a form of private arbitration.

"Court-Annexed Arbitration," Report of the Subcommittee on Alternative Means of Dispute Resolution, Committee on Corporate Counsel, Section of Litigation, American Bar Association (May 1984).

"Court-Annexed Arbitration in Federal District Courts: Status of Implementation and Evaluation as of February 1987," Memorandum prepared by the Federal Judicial Center's Research Division.

"Court-Annexed Arbitration in Hawaii," ADR Trends & Abstracts, Special Report (January/February/March 1988).

Presents information regarding all aspects of Hawaii's court-annexed arbitration program (CAP).

"Court-Annexed Arbitration in Lane, Linn-Benton, and Multnomah Counties," Report to the Commission on the Judicial Branch, Willamette University Center for Dispute Resolution, Prepared by Christopher Simoni and Michael B. Wise (January 1987).

Crittenden, Thomas D., "Intra-Insurance Industry Litigation: The Bad Faith Syndrome and Other Issues," 38 The Arbitration Journal 7-11 (September 1983).

Examines legal issues raised by insurance-related litigation as classified into (1) insured/insurer disputes; (2) primary insurer/primary insurer disputes; (3) excess insurer/primary insurer disputes; and (4) primary, excess, or reinsurer/reinsurer disputes; and suggests the need for more arbitration of such disputes to curb the rise in litigation.

Crittenden, Thomas D., "Is Arbitration a Viable Alternative to Legislation? What May or Must Be Arbitrated? A Reinsurance Perspective," 13 The Forum 223-236 (Fall 1977).

Describes reinsurance and the use of arbitration in reinsurance agreements to reduce litigation.

Cross, Laura L., "Re-Examination of the Liability Insurer's Duty to Settle," 38 Federation of Insurance & Corporate Counsel Quarterly 185-206 (Winter 1988).

Examines possible conflicts inherent in the typical liability policy defense provision. Considers evolution of insurer's duty to settle and standards by which the extent of the duty is measured, the impact of insurance statutes on the duty to settle, the conflicts of interest underlying the duty to settle, and alternative solutions including strict liability.

Cullen, Kathleen M., "ADR: Shaking Hands Instead of Shackling Them," Risk Management 28-32 (June 1987).

Discusses the use of alternative dispute resolution methods to facilitate earlier settlements in those cases which would settle anyway and to resolve disputes without the necessity for filing in court.

Cullen, Kathleen M., "ADR: The 'Travelers' Experience," Alternative Dispute Resolution and Risk Management, Practising Law Institute, Litigation and Administrative Practice Series, Number 338, pages 181-196 (New York 1987).

Discusses historical use of arbitration to resolve insurance claims and evolution of modern ADR movement; describes the ADR program used at The Travelers as part of liability litigation management.

Cunningham, J.R., "Arbitration of Marine Insurance Disputes," 38 Federation of Insurance & Corporate Counsel Quarterly 209-214 (Spring 1988).

Describes advantages of arbitration, particularly in the context of marine insurance disputes.

Current Developments in Judicial Administration, Panel II, "Let the Tribunal Fit the Case — Establishing Criteria for Channeling Matters into Dispute Resolution Mechanisms," 80 Federal Rules Decisions 166-190 (December 1977).

Discusses the rationales for development of alternative forums.

"Current Issues: Civil Justice," Alliance of American Insurers, Second Edition (1986).

Examines reform issues, including those presented by alternative dispute resolution procedures. A brief discussion of each issue is followed by relevant exhibits and a bibliography.

Danzon, Patricia M., New Evidence on the Frequency and Severity of Medical Malpractice Claims, Rand Institute for Civil Justice, R-3410-ICJ (1986). See also, 49 Law and Contemporary Problems 57-84 (Spring 1986).

Reports, among other things, findings relating to the use of screening panels and binding arbitration.

Danzon, Patricia M., and Lee A. Lillard, "The Resolution of Medical Malpractice Claims: Research Results and Policy Implications," Rand Publications Series, R-2793-ICJ (1982).

Reports results of research into operation of malpractice system, including comparison of settlement outcomes to litigated outcomes and the effects of tort law changes on the system.

Darling-Hammond, Linda, and Thomas J. Kriesner, "The Law and Economics of Workers' Compensation," Rand Institute for Civil Justice, R-2716-ICJ (1980).

Reviews history and issues raised by workers' compensation system.

Davis, Albie M., "Community Mediation in Massachusetts: Lessons from a Decade of Development," 69 Judicature 307-309 (February-March 1986).

Dawes, Paul H., and Richard A. Lapping, "Certain Settlement Problems," Paper prepared for American Bar Association Section of Litigation (1986).

Discusses certain privileges relevant to settlement, the ramifications of settlement on bankruptcy, settlement as it relates to litigation with the government, and settlement of derivative actions against a corporation.

Defeating Delay: Developing and Implementing a Court Delay Reduction Program, Lawyers Conference Task Force on Reduction of Litigation Costs and Delay, American Bar Association (1986).

Describes how to organize, design, and implement a delay reduction program.

Deis, Michelle, "California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes," 1 Ohio State Journal on Dispute Resolution 149-181 (Fall 1985). See also, "Mediation in California," CEB Forum, page 14.

Discusses successes and problems of California's mandatory mediation laws.

DeJong, William, Gail A. Goolkasian, and Daniel McGillis, "The Use of Mediation and Arbitration in Small Claims Disputes" (National Institute of Justice, June 1983).

Delaware, Report on the Child Support Mediation Program of the Family Court (July 31, 1985). See also, "The Family Court of the State of Delaware, Annual Report."

"Department Policy Regarding Special Masters," Memorandum from Edwin Meese, III, to all Assistant Attorneys General and all United States Attorneys (March 13, 1986).

"Developments in 'Alternative' Dispute Resolution: An Overview," [Judicial Conference—Second Circuit, 115 Federal Rules Decisions 361-374 (September 1986)].

Provides overview of dispute resolution procedures, including the summary jury trial, court-annexed arbitration, minitrials, mediation, and the use of special masters in complex litigation. Also discusses briefly some criticisms of the ADR movement.

Dewey, Joel A., "Traps in Multitortfeasor Settlements," 13 Litigation 41-44 (Summer 1987).

Discusses opportunities and pitfalls for all parties when a plaintiff settles with one of several joint defendants, including tortfeasor releases and joint tortfeasor credits.

Dispute Resolution, American Bar Association Standing Committee on Dispute Resolution, Quarterly Information Update, 202-331-2258.

"Dispute Resolution Alternatives in North Carolina," North Carolina Bar Association. See also, "Dispute Resolution," A Task Force Report by the North Carolina Bar Foundation (June 1985).

"Dispute Resolution Contract Clauses," 2 Alternatives to the High Cost of Litigation (August 1984).

Dispute Resolution Devices in a Democratic Society, Final Report of the 1985 Chief Justice Earl Warren Conference on Advocacy in the United States, American Trial Lawyers Foundation (1985).

Presents selected articles on dispute resolution, including among others "The Complete Courthouse" by Eric D. Green, "Mending Fences: Mediation in the Community" by Jack Etheridge, and "For and Against Settlement: For What Purpose the Mandatory Settlement Conference?" by Carrie Menkel-Meadow.

Dispute Resolution Forum (National Institute for Dispute Resolution, Washington, D.C. 1985).

Quarterly publication which focuses on one subject in each issue.

"Dispute Resolution Handbook for State and Local Bar Associations," Monograph Series, Number 3, American Bar Association, Special Committee on Dispute Resolution (Washington, D.C. 1986).

"Dispute Resolution in Massachusetts," Final Report of the Governor's Alternative Dispute Resolution Working Group (November 1986).

Dispute Resolution Program Directory 1986-1987, American Bar Association, Special Committee on Dispute Resolution (Washington, D.C. 1986).

District of Columbia Bar, "Arbitration Report," Prepared by Division Four (January 1986).

Presents recommendations of Committee to District of Columbia Superior Court regarding mandatory arbitration by court rule.

Divorce Mediation: Readings, Edited by Leonard L. Riskin (American Bar Association 1985).

"Do You Believe That Mediation, Arbitration, and Similar Methods of Dispute Resolution Promise to Reduce Litigation and Other Uses of the Courts to Settle Disputes?" Dispute Resolution Forum (National Institute for Dispute Resolution, December 1983).

Doty, Ethan Allen, "Philadelphia's Compulsory Arbitration Program," 29 Villanova Law Review 1449-1461 (1983-1984).

Describes the history and current use of mandatory arbitration in Philadelphia.

Dougherty, Judy Kurth, "Family Mediation — What Does It Mean for Lawyers?" 51 Texas Bar Journal 28-31 (January 1988).

Discusses domestic relations mediation and the role of the lawyer during the mediation process in the context of the 1987 Texas Alternative Dispute Resolution Procedures Act.

"The DPRP Library Acquisitions List," University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Project SPR-4.

Drake, William R., and Thomas A. Fee, "Court-Ordered Arbitration," A Report on the First National Conference on Court-Ordered Arbitration, Dispute Resolution Forum (National Institute for Dispute Resolution, August 1985).

Presents comprehensive overview of court-ordered arbitration.

Dunlop, John T., "The Negotiations Alternative in Dispute Resolution," 29 Villanova Law Review 1421-1448 (1983-1984).

Discusses the expansion of negotiations and offers a framework for understanding both direct negotiations and mediation.

Dynia, Therese, "Illinois' Medical Malpractice Review Panel Provision: A Constitutional Analysis," 17 Loyola University of Chicago Law Journal 275-301 (1986).

Discusses history of Illinois medical malpractice legislation, including constitutional challenges, focusing on provisions for a review panel.

Ebener, Patricia, et al., Court Efforts to Reduce Pretrial Delay: A National Inventory, Rand Institute for Civil Justice, R-2732-ICJ (1981).

Describes both diversion techniques and management techniques used by courts to combat pretrial delay.

Ebener, Patricia, and Donna Betancourt, Court-Annexed Arbitration: The National Picture, Rand Institute for Civil Justice, N-2257-ICJ (1985).

Edelman, Peter B., "Institutionalizing Dispute Resolution Alternatives," 9 The Justice System Journal 134-150 (1984).

Discusses the degree to which alternative dispute resolution mechanisms have been institutionalized and the issues raised by institutionalization.

Edwards, Harry, "Alternative Dispute Resolution: Panacea or Anathema?" 99 Harvard Law Review 668-684 (1986).

Invites a reassessment of the problems alternative methods of dispute resolution seek to address and the goals the alternatives attempt to accomplish.

Edwards, Harry, "The Rising Work Load and Perceived 'Bureaucracy' of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies," 68 Iowa Law Review 871-936 (July 1983).

Examines the factors contributing to rising court work loads and evaluates major remedial strategies.

Elkouri, Frank, and Edna Asper Elkouri, How Arbitration Works (Bureau of National Affairs, Washington, D.C. 1985). [Supplement forthcoming.]

Treatise on arbitration.

Elliott, E. Donald, "Managerial Judging and the Evolution of Procedure," 53 University of Chicago Law Review 306-336 (1986).

Defines "managerial judging" and its evolution into a set of techniques for inducing settlement.

Emery, Robert E., and Melissa M. Wyer, "Divorce Mediation," 42 American Psychologist 472-480 (May 1987).

Enslin, Richard A., "Michigan Mediation," ADR in the Courts: A Manual for Judges and Lawyers (Center for Public Resources, New York 1987).

Enslin, Richard A., "Should Judges Manage Their Own Caseloads?" 70 Judicature 200-201 (December-January 1987).

Compares master calendar system to individual assignment system which allows judicial case management.

Environmental Conflict Resolution: A Selected Bibliography (The Conservation Foundation, Washington, D.C. 1983).

Epstein, Norman L., "Reducing Litigation Costs for Small Cases," 20 The Judges' Journal 8-15, 64-67 (Spring 1981).

Analyzes first three years of California's economical litigation pilot project.

Erlanger, Howard S., Elizabeth Chambliss, and Marygold S. Melli, "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context," 21 Law and Society Review 585-604 (1987).

Reports findings from study of divorce settlements and concludes that reforms are necessary before the informal process achieves its objectives.



Esser, John P., The State of the Art in ADR Evaluation: We Don't Know What We Think and We Don't Think What We Know, University of Wisconsin-Madison Law School, Disputes Processing Research Program Working Paper 8-10, 45 pages (August 1988).

Discusses existing evaluations of dispute processing programs.

Evaluation of Court-Annexed Arbitration in the Middle District of Florida, William Terrell Hodges, Chief Judge (November 1986).

"An Example for Reform: The Insurance Industry Arbitration Process," 47 University of Missouri Kansas City Law Review 444-463 (Spring 1979).

Analyzes the voluntary arbitration process, including its history, and discusses the current use of arbitration by the casualty insurance industry.

"Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law," Federal Judicial Center (1981).

Examines "program experiments" within the justice system and their success in improving the status quo.

Fairweather, Owen, Practice and Procedure in Labor Arbitration, Second Edition (Bureau of National Affairs, Washington, D.C. 1983).

Discusses the steps of the labor arbitration process.

"Family and Divorce Mediation," Dispute Resolution Forum (National Institute for Dispute Resolution, December 1984).

Family Law Quarterly, Volume 17, Number 4 (Winter 1984).

Includes special section on mediation with variety of articles pertaining to mediation of family cases, including child custody disputes; selected bibliography.

Farmers Home Administration Regulations, Federal Register, Volume 53, Number 178, page 35638 (September 14, 1988).

Deals with farmer/creditor mediation.

Farrug, Eugene J., and John I. McHugh, "What's New in Arbitration?" 34 Federation of Insurance & Corporate Counsel Quarterly 347-361 (Summer 1984).

Discusses voluntary and mandatory arbitration programs specially designed for insurance claims.

Feinberg, Kenneth R., "Avoiding Litigation Through Nonbinding Mediation," Alliance of American Insurers, Monograph (1987).

Describes in detail the mediation procedure and presents suggestions for evaluating case suitability.

Fieger, Geoffrey, "Medical Malpractice Tort Reform: An Analysis and Comparison of Existing Acts," Michigan Bar Journal 262-267 (March 1987).

Outlines constitutional challenges to various provisions of existing tort reform legislation, including mediation panels and procedures.

Final Report of the Connecticut ADR Project, Inc. (Summer 1988).  
[Copies are available from The Travelers, Hartford, Connecticut.]

Describes a pilot program designed to educate disputants in liability insurance claims in Connecticut to available dispute resolution methods and to achieve agreement to use such methods.

Fine, Erika S., "Special Masters and Court-Appointed Experts: A Dialogue," ADR and the Courts: A Manual for Judges and Lawyers, pages 209-219 (Center for Public Resources 1987).

Fineman, Martha, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking," 101 Harvard Law Review 727-774 (February 1988).

Examines the changes resulting from the shift toward mandatory mediation of custody and other post-divorce disputes.

Fisher, Roger, "Why Not Contingent Fee Mediation," 2 Negotiation Journal 11-13 (January 1986).

Proposes that mediators offer services on a contingent fee basis.

Fisher, Roger, and William Ury, Getting to YES: Negotiating Agreement Without Giving In (Penguin Books, New York 1983).

Presents negotiating strategy.

Fiss, Owen, "Against Settlement," 93 Yale Law Journal 1073-1090 (1984).

Criticizes institutionalization of settlement practices based on, among other things, imbalance of power, absence of authoritative consent, and lack of foundation for continuing judicial involvement.

Fiss, Owen, "The Bureaucratization of the Judiciary," 92 Yale Law Journal 1442-1468 (1983). See also, Comments, pages 1467-1486.

Proposes that the bureaucratization of the judiciary as a result of changes in American society challenges the legitimacy of the judicial branch of government; suggests that legitimacy is threatened because judicial participation in process of decisionmaking is threatened.

Flanders, Steven, "Case Management and Court Management in United States District Courts," Federal Judicial Center, FJC-R-77-6-1 (1977).

Flanders, Steven, "Blind Umpires — A Response to Professor Resnick," 35 Hastings Law Journal 505-522 (January 1984).

Attacks Professor Resnick's argument that the increase in managerial responsibilities of judges results in the abandonment of neutrality.

Fleming, Robben W., "Reflections on the ADR Movement," 34 Cleveland State Law Review 519-529 (1986).

Addresses relative merits of civil justice system and alternative methods of dispute resolution.

Florida Study Commission on Alternative Dispute Resolution, Final Report (February 1986).

Folberg, Jay, "A Mediation Overview: History and Dimensions of Practice," 1 Mediation Quarterly 3-15 (1983).

Folberg, Jay, and A. Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (Jossey-Bass, San Francisco 1984).

Establishes framework for considering conflict resolution and discusses the process and uses of mediation.

Folberg, Jay, "Mediation of Child Custody Disputes," 19 Columbia Journal of Law and Social Problems 413-449 (1985).

Explores the use of mediation to resolve child custody disputes and examines the legal issues raised by custody mediation.

Fortenberry, Joseph E., "Antitrust Litigation and the Court-Appointed Economic Expert: A Modest Proposal," 12 Antitrust Law and Economic Review 41-48 (1980).

Proposes use of neutral economic expert not to serve as witness during trial but to assist the court to frame the issues for trial and to structure the decision on those issues.

Freedman, Larry, et al., Confidentiality in Mediation: A Practitioners' Guide (American Bar Association, Special Committee on Dispute Resolution, Washington, D.C. 1985).

Discusses confidentiality issues and proposes possible solutions.

"From Jury Selection to Verdict — In Hours," Business Week, Legal Affairs Column, September 7, 1987.

Describes summary jury trial.

Fuller, Lon L., "Mediation — Its Forms and Functions," 44 Southern California Law Review 305-339 (1971).

Explores a methodology for understanding mediation.

Gage, Hilda, "How to Reduce the Docket: What One Judge Can Do When Extra Funding and Staff Aren't Available," 23 The Judges' Journal 12-17 (Winter 1984).

Discusses the use of pretrial conferences and mediation by an attorney panel to achieve settlement without judicial participation.

Galanter, Marc, "The Day After the Litigation Explosion," 46 Maryland Law Review 3-39 (1986). See also, Comments, pages 40-85.

Examines assumption that there exists in America a litigation "explosion" and assesses possible benefits of litigation.

Galanter, Marc, "The Emergence of the Judge as a Mediator in Civil Cases," 69 Judicature 256-262 (February-March 1986). See also, University of Wisconsin-Madison Law School, Disputes Processing Research Program, Working Paper 1984-5, and "A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States," 12 Journal of Law & Society 1-18 (Spring 1985).

Discusses the techniques used and the extent of use by judges to settle civil cases.

Galanter, Marc, "Justice in Many Rooms," Disputes Processing Research Program, Working Paper 1979-4, and "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," 19 Journal of Legal Pluralism 1-47 (1981).

Considers the many facets of the phrase "access to justice."

Galanter, Marc, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society," 31 University of California Los Angeles Law Review 4-71 (1983).

Assesses the "contention that American legal institutions are overwhelmed by an unprecedented flood of litigation" and suggests that the "litigation explosion" is an adaptation to changing conditions.

Galanter, Marc, Frank S. Palen, and John M. Thomas, "The Crusading Judge: Judicial Activism in Trial Courts," 52 Southern California Law Review 699-741 (March 1979).

Describes examples of activism by trial judges and proposes a framework for evaluating activism.

Gnaizda, Robert, "Secret Justice for the Privileged Few," 66 Judicature 6, 11-13 (June-July 1982).

Examines criticisms of the "rent-a-judge" procedure, including constitutional and ethical concerns.

Golann, Dwight, Making Alternative Dispute Resolution Mandatory: The Constitutional Issues (Draft -- To be published by the National Institute for Dispute Resolution).

Analyzes constitutional issues which arise when alternative dispute resolution is mandated in civil disputes, including right to jury trial, separation of powers, due process and right of access to the courts, equal protection, and federal-state relations.

Goldberg, Stephen B., "Meditations of a Mediator," 2 Negotiation Journal 345-350 (October 1986).

Discusses personal experiences as a judge-appointed mediator in complex cases.

Goldberg, Stephen B., Eric D. Green, and Frank E.A. Sander, Dispute Resolution (Little Brown and Company, 1985) and Supplement (1987).

Textbook in the field of alternative dispute resolution.

Goldman, Robert B., Roundtable Justice: Case Studies in Conflict Resolution (Westview Press, Boulder, Colorado 1980).

Green, Eric D., "Corporate Alternative Dispute Resolution," 1 Ohio State Journal on Dispute Resolution 203-299 (Spring 1986).

Discusses dispute resolution techniques available to corporate counsel and issues raised by corporate use of alternatives to the public justice system.

Groothuis, Richard B., "A.D.R.: Theory and Practice in the Business World," ACCA Docket 9-12 (Fall 1987).

Defines alternative dispute resolution, including how it can be used, and describes its use by Aetna Life and Casualty.

Grossman, Joel, Herbert Kritzer, Kristen Bumiller, and Stephen McDougal, "Measuring the Pace of Civil Litigation in the Federal and State Trial Courts," 65 Judicature 86-113 (August 1981).

Describes the pace of litigation for different kinds of cases and different courts; identifies the stages which contribute most to "delay."

Grossman, Joel, and Austin Sarat, "Access to Justice and the Limits of Law," 3 Law and Policy Quarterly 125-140 (April 1981).

Examines the strategies designed to increase access to justice and concludes that expanded access may in fact decrease the delivery of justice.

Guide to Patent Arbitration, Edited by Thomas L. Creel, New York Patent, Trademark & Copyright Law Association, Inc. (Bureau of National Affairs, Washington, D.C. 1987).

Offers practical guidelines for using arbitration to resolve patent disputes.

Guidelines for the Use of Lawyers to Supplement Judicial Resources  
(National Center for State Courts 1984).

Gwin, Robert Y., "Summary Jury Trial: An Explanation and Analysis," 52 Kentucky Bench & Bar 16-17, 57-58 (Winter 1988).

Describes summary jury trial procedure, statistical data regarding its success, and the advantages and disadvantages of the technique.

Hanson, Roger, Geoff Gallas, and Susan Keilitz, "The Role of Management in Court-Annexed Arbitration," 12 State Court Journal 14-19 (Spring 1988).

Discusses strengths and weaknesses of existing research in area of court-annexed arbitration and relationship of strong management to success of program.

Harrington, Christine B., "The Politics of Participation and Nonparticipation in Dispute Processes," 6 Law & Policy 203-230 (April 1984).

Proposes framework for exploring the relationship between legal participation and the organizational structure of dispute processing.

Harrington, Christine B., Shadow Justice (Greenwood Press, Westport, Connecticut 1985).

Hart, B.C., "Alternative Dispute Resolution: Negotiation, Mediation, and Minitrial," 37 Federation of Insurance and Corporate Counsel Quarterly 113-131 (Winter 1987). See also, Louis A. Lehr, Jr., "Some Additional Thoughts on ADR," pages 133-138.

Provides general overview of dispute resolution procedures with particular emphasis on negotiation, mediation, minitrials, and arbitration. Follow-on article provides brief discussion of minitrials, as well as court-annexed arbitration, the summary jury trial, early neutral evaluation by a special master, and summary judgment.



Harter, Phillip J., "Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship," 29 Villanova Law Review 1393-1419 (1983-1984).

Reviews the past and future of administrative law; discusses the administrative process in the context of dispute resolution.

Harvard Law School Program on Negotiation, Working Paper Series.

Healey, Thomas S., "Alternatives to Litigation," 47 Insurance Review 46-52 (June 1986).

Discusses alternative dispute resolution mechanisms.

Henderson, Thelton E., "Settlement Masters," ADR and the Courts: A Manual for Judges and Lawyers, pages 233-237 (Center for Public Resources, New York 1987).

Henry, James F., "ADR and Personal Injury Litigation: An Early Settlement Technique for Injury Cases," 23 Trial 73-76 (April 1987).

Describes a settlement procedure which provides the parties with a nonbinding neutral evaluation of the settlement value of the case.

Henry, James F., and Jethro K. Lieberman, The Manager's Guide to Resolving Legal Disputes: Better Results Without Litigation (Harper and Row, 1985).

Outlines alternative dispute resolution procedures and how they can be used by business managers.

Hensler, Deborah R., William L.F. Felstiner, Molly Selvin, and Patricia A. Ebener, "Asbestos in the Courts: The Challenge of Mass Toxic Torts," Rand Institute for Civil Justice, R-3324-ICJ (1985).

Describes how tort system handles mass tort cases, based on a study of asbestos case processing.

Hensler, Deborah, Jane Adler, and Gregory J. Rest, Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution, Rand Institute for Civil Justice, N-1965-ICJ (1983).

Reports results of study of arbitration in Allegheny County (Pittsburgh) Court of Common Pleas.

Hensler, Deborah, Court-Annexed Arbitration in the State Trial Court System, Rand Institute for Civil Justice, P-6963-ICJ (February 1984). See also, Hensler, "What We Know and Don't Know About Court-Administered Arbitration," 69 Judicature 270-278 (February-March 1986) and Hensler, Reforming the Civil Litigation Process: How Court Arbitration May Help (1984).

Hensler, Deborah, Albert Lipson, and Elizabeth Rolph, Judicial Arbitration in California: The First Year, Rand Institute for Civil Justice, R-2733-ICJ (1981). See also, Rolph and Hensler, "Court-Ordered Arbitration: The California Experience," Civil Justice Quarterly 163-174.

Hermann, Margaret, Patrick McHenry, and Ruth Weber, "Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement," 34 The Arbitration Journal 17-21 (1979).

Compares non-adversarial and adversarial dispute resolution methods.

Hill, Marvin F., Jr., and Anthony V. Sinicropi, Evidence in Arbitration, Second Edition (Bureau of National Affairs, Washington, D.C. 1987).

Analyzes the role and use of evidence in arbitration proceedings.

Hill, Marvin F., Jr., and Anthony V. Sinicropi, Remedies in Arbitration (Bureau of National Affairs, Washington, D.C. 1981).

Uses reported awards and cases as basis for discussion of possible remedies and approaches.

Hittner, David, "The Summary Jury Trial," 51 Texas Bar Journal 40-41 (January 1988).

Discusses use of summary jury to provide litigants with estimate of probable results of full trial.

Hobbs, Steven H., "Facilitative Ethics in Divorce Mediation: A Law and Process Approach," 22 University of Richmond Law Review 325-376 (1988).

Examines the use of mediation in the divorce process and proposes an ethical framework for mediation participants.

Hurst, James Willard, "The Functions of Courts in the United States, 1950-1980," Disputes Processing Research Program, Working Paper 1980-1 (1980).

Presents a broad view of the organization and functions of courts and judges over a thirty year period.

Illinois Judicial Conference, Report of the Study Commission on Dispute Resolution (January 1985).

The Improvement of the Administration of Justice, Judicial Administration Division, American Bar Association (Sixth Edition 1981).

Presents compilation of articles relating to all aspects of the justice system.

"Innovative Techniques for Resolving Complex Litigation," Judicial Conference — Second Circuit, 115 Federal Rules Decisions 374-394 (September 1986).

Presents panel discussion of the use of special masters by the courts, of private alternatives to adjudication such as the minitrial and mediation, and of class action and procedural devices.

"Institutionalization of Alternative Dispute Resolution by the State of California," 14 Pepperdine Law Review 943-987 (1987).

Examines public institutionalization of dispute resolution mechanisms, including public funding or other authorization of private procedures. Identifies methods of institutionalization used within California, with emphasis on codification but also including administrative hearings and regulations, state agency activities, court rules, and state-sponsored formal education.

Irving, Howard H., and Michael Benjamin, "Family Mediation Research: Critical Review and Future Directions," The Role of Mediation in Divorce Proceedings: A Comparative Perspective, page 234 (Vermont Law School Dispute Resolution Project 1987).

Jacks, Ronald A., "How Far Have We Come?" Best's Review 66-70 (October 1987).

Discusses problems which may arise during reinsurance arbitration, including choosing a panel, establishing the limits of its authority, and agreeing on procedural rules.

Jacobovitch, M.-Daniel, and Carl Moore, "Summary Jury Trials in the Northern District of Ohio," Federal Judicial Center, FJC-R-82-1 (May 1982).

Evaluates the use of summary jury trials in various civil cases.

Jaffe, Sanford, "Dispute Resolution: A Complementary Approach to Justice — Issues for the Future," Disputes Processing Research Program, Working Paper 1984-7 (1984).

Advances the theory that dispute resolution is a complementary, rather than an alternative, approach to the justice system.

Johnson, Earl, "Preliminary Analysis of Alternative Strategies for Processing Civil Disputes," National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice (Washington, D.C. 1978).

Johnson, Earl, Valerie Kantor, and Elizabeth Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases (National Center for State Courts, Denver, Colorado 1977).

Johnston, Bryan M., "Dispute Resolution in the Northwest," 14 Pepperdine Law Review 795-800(1987).

Offers "possible destination for the alternative dispute resolution movement" in Idaho, Washington, and Oregon. Also reviews status of movement as of 1987.

Jones, Glower W., "Awarding Punitive Damages by Arbitration," 17 The Construction Lawyer 1, 22-24 (August 1987).

Discusses the awarding of punitive damages in the context of contractual agreements to refer disputes to arbitration, including cases allowing claims which may give rise to punitive damages to be submitted to arbitration when the agreement to arbitrate is otherwise enforceable.

Journal of Legal Education, Volume 34 (1984).

Issue on Alternative Dispute Resolution in the Law Curriculum.

The Judges' Journal, Volume 23, Number 1 (Winter 1984).

Special Issue on Setting the Clock Right on Court Delay.

Judicature, Volume 69, Number 5, American Judicature Society (February-March 1986).

Special Issue on Alternative Dispute Resolution and the Courts. Judicial Benchbook for Arbitrators, Hennepin County District Court Arbitration Program, Minneapolis, Minnesota (July 1985).

"Judicial Council Adopts Case Disposition Time Standards," News Release of the Administrative Office of the Courts, San Francisco, California (June 4, 1987).

Judicial Council of California, "Report and Recommendation on Effectiveness of Judicial Arbitration," Superior Court Committee (November 1983).

"A Judicial Overview," The Arbitration Journal, Volume 42, Number 2 (June 1987), pages 55-61 and 64-65. Also, Volume 43, Number 3 (September 1987), pages 3-5.

Excerpts of speeches on dispute resolution given by judges at Arbitration Days across the country sponsored by the American Arbitration Association in 1986 and 1987.

Justice System Journal, Volume 4, Number 2 (Winter 1978).

Issue on Judicial Management and the Civil Docket.

Kagel, Sam, Anatomy of a Labor Arbitration, Second Edition (Bureau of National Affairs, Washington, D.C. 1986).

Practical guide to every stage of arbitration proceeding.

Kahn, Mark L., "The Outlook for Dispute Resolution in the United States," 14 Pepperdine Law Review 791-793 (1987).

Outlines future directions for dispute resolution as viewed by the Long Range Planning Committee of SPIDR (Society of Professionals in Dispute Resolution).

Kanowitz, Leo, Alternative Dispute Resolution: Cases and Materials (West Publishing Company, 1986).

\_\_\_\_\_ Casebook on alternative dispute resolution. \_\_\_\_\_

Kanowitz, Leo, "Alternative Dispute Resolution and the Public Interest: The Arbitration Experience," 38 The Hastings Law Journal 239-303 (January 1987).

Identifies and evaluates techniques used by courts to analyze fundamental questions regarding public and private interests raised by alternative dispute resolution mechanisms, in particular arbitration.

Katz, David M., "Taking the Liability Crisis Out of Court," National Underwriter 21-23 (June 6, 1986).

Discusses alternative dispute resolution in the fields of risk management and insurance.

Katz, Martin Z.N., "The Judicial Gold Rush," 8 California Lawyer 10 (January-February 1988).

Presents claim that private "rent-a-judge" and judicial arbitration programs are harming the public justice system by siphoning off its best judges.

Kaufman, Irving R., "The Judicial Crisis, Court Delay, and the Para Judge," 54 Judicature 145-148 (November 1970).

Examines "crises" in the court system.

Keilitz, Susan, Geoff Gallas, and Roger Hanson, "State Adoption of Alternative Dispute Resolution," 12 State Court Journal 4-11 (Spring 1988).

Reports results of state court administrative office survey of alternative dispute resolution programs in the fifty states and the District of Columbia.

Kelly, Helen I., and Larry Ray, "No Room To Dispute ADR's Promise," 14 Bar Leader 10-13 (September-October 1988).

Kelly, Patrick F., "Mediation: A Settlement Conference Format That Works" ADR and the Courts: A Manual for Judges and Lawyers (Center for Public Resources, New York 1987).

Kemper, James D., Myra C. Selby, and Bonnie K. Simmons, "Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later," 19 Indiana Law Review 1129-1150 (1986).

Discusses history and current status of medical malpractice legislation in Indiana, including the medical review panel and constitutional challenges.

King, Donald, "Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law," CEB Forum: Mediation in California 13.

Kleiman, Bonnie S., "A Step Forward: Tulsa's Precourt Hearing Program," 70 Judicature 170-171 (October-November 1986).

\_\_\_\_ Examines use of mediation in Tulsa's court system. \_\_\_\_\_

Kleinfeld, Andrew, "Alaska: Where the Loser Pays the Winner's Fees," 24 The Judges' Journal 4-7, 52-53 (Spring 1985). See also, Kleinfeld, "On Shifting Attorneys' Fees in Alaska: A Rebuttal," 24 The Judges' Journal 38-41 (Summer 1985).

Summarizes Alaska system of fee awards which follows the English rather than the American rule. \_\_\_\_\_

Koch, M.A.P., and C.P. Lowery, "Evaluation of Mediation as an Alternative to Divorce Litigation," 15 Professional Psychology: Research and Practice 109-120 (1984).

Koopman, Elizabeth J., and E. Joan Hunt, "Divorce Mediation: Issues in Defining, Educating, and Implementing a New and Needed Profession," 21 Conciliation Courts Review 25-37 (June 1983).

Examines some basic issues of divorce mediation, including the need for education and training of mediators. \_\_\_\_\_

Krash, Margaret, and Peter W. Salsich, Jr., "The Use of Mediation in the Resolution of Small Claims, Landlord/Tenant, and Neighborhood Disputes," 32 St. Louis Bar Journal 34-38 (Spring 1986).

Examines operation of Neighborhood Dispute Center of Metropolitan St. Louis. \_\_\_\_\_

Kraut, William D., "Domestic Relations Advocacy -- Is There a Better Alternative?" 29 Villanova Law Review 1379-1391 (1983-1984).

\_\_\_\_ Discusses dispute resolution in domestic relations cases, particularly the Chester County, Pennsylvania, conciliation program. \_\_\_\_\_



Kressel, Kenneth, "Research on Divorce Mediation: A Summary and Critique of the Literature," The Role of Mediation in Divorce Proceedings: A Comparative Perspective, page 222 (Vermont Law School Dispute Resolution Project 1987).

Kritzer, Herbert M., "Adjudication to settlement: shading in the gray," 70 Judicature 161-165 (October-November 1986).

Examines judge's role in settlement based on data from selected state and federal courts collected by the Civil Litigation Research Project.

Kritzer, Herbert M., "The Form of Negotiation in Ordinary Litigation," Institute for Legal Studies, DFRP Series 7-2, 48 pages.

Reviews literature on settlement and negotiations processes in civil disputes.

Kritzer, Herbert M., "The Judge's Role in Pretrial Case Processing: Current Practices and Implications of Possible Changes," University of Wisconsin-Madison Law School, Disputes Processing Research Program, Working Paper 1981-2. See also, 66 Judicature 28-38 (June-July 1982).

Kritzer, Herbert M., "Notifying Potential Claimants in Mass Tort Actions: the Dalkon Shield Case," University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Paper 8-5, 23 pages (September 1987).

Examines issues of notice in mass tort cases in the United States.

Kritzer, Herbert M., and Jill K. Anderson, "The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts," 8 Justice System Journal 6 (Spring 1983).

Compares state and federal court records from five federal judicial districts with AAA records from same five districts.

Lacey, Frederick B., "The Judge's Role in the Settlement of Civil Suits," Federal Judicial Center, FJC-ETC-77-7 (1977).

Lambros, Thomas D., "The Future of Alternative Dispute Resolution," 14 Pepperdine Law Review 801-804 (1987).

Briefly examines dispute resolution issues as they relate to both past and future.

Lambros, Thomas D., "The Judge's Role in Fostering Voluntary Settlements," 29 Villanova Law Review 1363-1378 (1983-1984).

Examines dispute resolution processes which are judicially managed, including neutral experts, special masters, and the summary jury trial.

Lambros, Thomas D., "The Summary Jury Trial," 37 Federation of Insurance & Corporate Counsel Quarterly 139-148 (Winter 1987). See also, Lambros, "The Summary Jury Trial and Other Alternative Methods of Dispute Resolution," A Report to the Judicial Conference of the United States (January 1984, revised October 1984); Lambros, "The Summary Jury Trial — An Alternative Method of Resolving Disputes," 69 Judicature 286-290 (February-March 1986); and, Lambros and Thomas H. Shunk, "The Summary Jury Trial," 29 Cleveland State Law Review 43-59 (1980).

Discusses the summary jury trial in detail, including how to select a case, the pretrial conference, the steps of the summary trial, and the posttrial conference.

Landsman, Stephan, The Adversary System: A Description and Defense (American Enterprise Institute for Public Policy Research 1984).

Defines the adversary system, including its long history, and reviews and answers criticisms of it.

Lapin, Jay F., "Facilitating Settlement Through Partial Summary Judgment," ADR and the Courts: A Manual for Judges and Lawyers (Center for Public Resources, New York 1987).

Law and Society Review, Volume 15, Number 3-4 (1980-1981).

Special Issue on Dispute Processing and Civil Litigation.

Legislation on Dispute Resolution, Standing Committee on Dispute Resolution, American Bar Association, Washington, D.C. (1984).

Lemmon, J.A., "Divorce Mediation: Optimal Scope and Practice Issues," 1 Mediation Quarterly 45-61 (1983).

Lerner, Jerome, "Court-Annexed Arbitration," Paper presented at Project JUSTICE — Illinois Arbitration Conference, December 5, 1984.

Describes and evaluates court-annexed arbitration programs in various jurisdictions, with primary emphasis on the programs in Philadelphia and Los Angeles.

Lerner, Richard E., "Alternative Dispute Resolution," 3 Texas Insurance Law Reporter 1-7 (June 1985).

Discusses the basics of commercial arbitration, mediation, and negotiation.

Levin, A. Leo, "Court-Annexed Arbitration," 16 University of Michigan Journal of Legal Reform 537-548 (Spring 1983).

Describes court-annexed arbitration, contrasting it with adjudication; summarizes the experience with court-annexed arbitration to date; proposes a model program.

Levin, A. Leo, and Denise D. Colliers, "Containing the Cost of Litigation," 37 Rutgers Law Review 219-252 (Winter 1985).

Examines factors contributing to costs of litigation and the use of alternative dispute resolution procedures, among other things, to contain those costs.

Levin, A. Leo, and Deirdre Golash, "Alternative Dispute Resolution in Federal District Courts," 37 University of Florida Law Review 29-59 (Winter 1985).

Discusses the variety of programs in federal district courts, including court-annexed arbitration, Michigan mediation/valuation, the summary jury trial, and the broad spectrum of mediation programs, and analyzes the legality and constitutionality of mandatory programs.

Levin, Edward, and Donald Grody, Witnesses in Arbitration: Selection, Preparation, and Presentation (Bureau of National Affairs, Washington, D.C. 1987).

Offers practical advice on how to choose and prepare witnesses for a case that is to be arbitrated.

Levine, David I., Reports on the California Early Neutral Evaluation Program, Hastings College of Law, University of California, 200 McAllister Street, San Francisco, California, 94102-4978, 415-565-4677. See also, Wayne Brazil, Michael A. Kahn, Jeffrey P. Newman, and Judith Z. Gold, "Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution," 69 Judicature 279 (February-March 1986).

Assesses the ENE program in operation in the Northern District of California whereby a panel of attorneys provide litigants with a neutral assessment of a dispute in an effort to encourage settlement.

Lieberman, Jethro K., and James F. Henry, "Lessons from the Alternative Dispute Resolution Movement," 53 University of Chicago Law Review 424-439 (1986).

Defines ADR and examines its social value; suggests practical applications within the court system and a typology for the future.

Lind, E. Allan, "Status Report to the Court: Current Findings of Research on the Program for Court-Annexed Arbitration in the Middle District of North Carolina" (October 1987).

Lind, E. Allan, et al., The Perception of Justice: Tort Litigants' Views of Trials, Court-Annexed Arbitration and Judicial Settlement Conferences, Rand Institute for Civil Justice (forthcoming).

Lind, E. Allan, and John E. Shapard, "Evaluation of Court-Annexed Arbitration in Three Federal District Courts," Federal Judicial Center, FJC-R-83-4 (revised edition 1983).

"Litigation and Settlement Under Imperfect Information," Rand Journal of Economics, Working Paper Number 15 (Stanford Law and Economics Program 1984).

Proposes model intended to facilitate settlement decisions where the parties have imperfect information on which to base such a decision.

Longworth, Jeanne E., "Private Judging: An Effective and Efficient Alternative to the Traditional Court System," 21 Valparaiso University Law Review 681-718 (Spring 1987).

Describes how the private judging procedure works under various state reference statutes; discusses constitutional concerns; compares private judging to arbitration and to small claims court; proposes model private judging statute.

Luban, David, The Quality of Justice, University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Project Working Paper 8-6, 60 pages.

Proposes criteria for assessing the quality of alternative dispute resolution programs.

Luneberg, William V., and Mark A. Nordengerg, "Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation," 67 Virginia Law Review 887-1007 (1981).

Describes alternatives to the use of traditional juries in complex federal civil cases.

MacAlister, James Kevin, and Alfred L. Scanlan, Jr., "Health Claims Arbitration in Maryland: The Experiment Has Failed," 14 University of Baltimore Law Review 481-521 (1985).

Examines strengths and weaknesses of present system; proposes ways to make the arbitration program more effective.

MacCoun, R.J., et al., Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program, Rand Institute for Civil Justice, R-3676-ICJ (1988).

Reports results of evaluation of the arbitration program in operation in New Jersey for the resolution of automobile claims.

Mahoney, Barry, et al., Caseflow Management and Delay Reduction in Urban Trial Courts (1987).

Mahoney, Barry, Larry Sipes, and Jeanne Ito, Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings from Current Research, Report prepared for the National Conference on Court Delay Reduction (National Center for State Courts 1985).

Marcotte, Paul, "Struck Down: Illinois Malpractice Law," 72 American Bar Association Journal 32 (August 1, 1986).

Marks, Jonathan, Earl Johnson, and Peter Szanton, Dispute Resolution in America: Processes in Evolution (National Institute for Dispute Resolution 1984).

Presents the answer to the question of "what is dispute resolution?" in guidebook form.

Martin, John H., "Eighth Circuit Court of Appeals Pre-Argument Conference Program," 69 Judicature 312-313 (February-March 1986).

Discusses use of settlement conference in appeals court.

Marvell, Thomas B., "Caseload Growth — Past and Future Trends," 71 Judicature 151-161 (October-November 1987).

Documents caseload trends in the 1980s.

Marziano, Frederic G., "Moving Cases Out of the Tort System," 2 The John Liner Review 20-24 (Spring 1988).

Analyzes the existing tort system, including its history and development, and proposes an alternate system for handling mass tort cases.

Mazadoorian, Harry N., "Alternative Dispute Resolution: Some Myths, Some Realities," Paper prepared for the Legal Section Meeting of the American Council of Life Insurance (November 16, 1987).

Mazadoorian, Harry N., "For-profits take firm hold on field," 14 Bar Leader 22-25 (September-October 1988).

Mazadoorian, Harry N., "On Implementing ADR: One Company's Experience Putting Theory into Practice," 4 The Compleat Lawyer 45-47 (Spring 1987).

Describes the experience of the CIGNA Corporation in implementing alternative dispute resolution procedures.

Mazadoorian, Harry N., "Alternative Dispute Resolution: The Unique Role of Inside Counsel," ACCA Docket 16-22 (Winter 1988).

Discusses opportunities for corporate counsel in developing alternative techniques to both resolve and prevent disputes when traditional methods are inadequate or inappropriate.

McEwen, Craig, and Richard Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent," 18 Law & Society Review 11-49 (1984).

Compares compliance with mediated outcomes to compliance with adjudicated outcomes.

McGovern, Francis E., "Towards a Functional Approach for Managing Complex Litigation," 53 University of Chicago Law Review 440-493 (1986).

Overviews judicial management and alternative dispute resolution techniques and analyzes three cases in which such techniques were used.

McGovern, Francis E., "Use of Master and Magistrates in Complex Litigation," pages 221-224, and "Court-Appointed Experts: An Overview," pages 245-250, ADR and the Courts: A Manual for Judges and Lawyers (Center for Public Resources, New York 1987).

McIsaac, H., "Confidentiality: An Exploration of Issues," 8 Mediation Quarterly 57-66 (1985).

McIsaac, Hugh, "Court-Connected Mediation," 21 Conciliation Courts Review 49-56 (December 1983).

Discusses court-annexed mediation of child custody and visitation disputes.

McKay, Robert, "Civil Litigation and the Public Interest," 31 University of Kansas Law Review 355-376 (Spring 1983).

Considers the concerns of cost, delay, and perceived lack of fairness.

McMillan, Richard, and David Siegel, "Creating a Fast-Track Alternative Under Federal Rules of Civil Procedure," 60 Notre Dame Law Review 431-455 (1985).

Examines the history of the alternative dispute resolution movement and suggests changes in the existing system which makes the goals of ADR capable of achievement by the courts.

Mediation: A Select Annotated Bibliography (American Bar Association, Special Committee on Dispute Resolution, Washington, D.C. 1984).

Mediation and the Law: Will Reason Prevail? (American Bar Association, Special Committee on Dispute Resolution, Washington, D.C. 1983).

Reports discussions by panel members of mediation issues, including confidentiality, mediator liability, due process, and enforceability of mediated agreements.



"Mediation in Maine: Five Years of Progress," A Report to the Chief Justice from the Court Mediation Service, Judicial Department, State of Maine (November 1982). See also, McEwen and Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," 33 Maine Law Review 237-268 (1981).

"Medical Malpractice: Can the Private Sector Find Relief?" 49 Law and Contemporary Problems (Spring 1986).

Symposium issue focusing on medical malpractice.

"Medical Malpractice: No Agreement on Problems or Solutions," General Accounting Office, GAO/HRD-86-50 (1986).

Meierhoefer, Barbara, and Carroll Seron, "Description of Court-Annexed Arbitration in Ten Pilot Federal District Courts: A Status Report," Federal Judicial Center (January 1986).

Melli, Marygold S., Howard S. Erlanger, and Elizabeth Chambliss, The Process of Negotiation: An Exploratory Investigation in the Divorce Context, University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Paper 7-1, 58 pages (December 1985).

Reports results from study of data relating to negotiation as a means of dispute resolution in divorce cases. [[Need to look up 40 Rutgers Law Review 1133-1172 (Summer 1988).]]

Merry, Sally, and S. Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," 9 Justice System Journal 151-178 (Summer 1984).

Miller, Robert A., Jr., "Crossing the Legislative Barrier: State Legislation and the Implementation of Alternative Methods of Dispute Resolution," Mediation: Contexts and Challenges, pages 95-122.

Surveys types of state mediation statutes, and discusses limitations of, and need for, legislation.

Miller, Samuel R., and Leigh Shields, "Contribution, Indemnity and Settlement in Multi-Defendant Cases," Paper prepared for American Bar Association Section of Litigation (1986).

Discusses issues of concern to a defendant attempting to reach a settlement with the plaintiff in a multi-defendant dispute.

Millhauser, Marguerite S., "Gladiators and Conciliators," 14 Bar Leader 20-21, 30 (September-October 1988).

Millhauser, Marguerite S., "The Unspoken Resistance to Alternative Dispute Resolution," 3 Negotiation Journal 29-35 (January 1987).

Identifies barriers to the use of alternative dispute resolution from the perspectives of the client and the lawyer.

Milne, Ann L., "Divorce Mediation: The State of the Art," 1 Mediation Quarterly 15-31 (September 1983).

"Minitrials: Opportunities for Compromise," 51 Texas Bar Journal 34-36 (January 1988).

Discusses private minitrial procedure and includes sample minitrial agreement.

Missouri Bar Special Committee on Dispute Resolution, "Memorandum Re: Alternative Dispute Resolution Proposals" (July 1987).

Missouri Journal of Dispute Resolution, publication of the Missouri Law Review in conjunction with the Center for the Study of Dispute Resolution, Tate Hall, University of Missouri-Columbia, Columbia, Missouri, 65211, 314-882-7055.

Mnookin, Robert H., and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 Yale Law Review 950-997 (1979).

Suggests that the role of the legal system in divorce is to provide a framework for negotiations and bargaining outside of court.

Moe, Karlen J., "The Montana Medical Malpractice Panel Act: Origin, Procedure, and Effect," 44 Montana Law Review 281-289 (1983).

Reviews the history of the legislation, including case law, and assesses the operation of the panel.

Moore, Christopher W., The Mediation Process (Jossey-Bass, San Francisco 1986).

Offers a thorough presentation of all aspects of the mediation process and the role of the mediator.

Moore, Christopher W., "Training Mediators for Family Dispute Resolution," 2 Mediation Quarterly 79-89 (1983).

Moore, Michael M., "Constitutional Standards of Review for Medical Malpractice Mediation Panels," 1 Ohio State Journal on Dispute Resolution 183-202 (Fall 1985).

Examines constitutional issues raised by arbitration and mediation review panels, including the right to jury trial and equal protection.

Morris, Marlene, "Parent-Child Mediation: An Alternative That Works" (Children's Aid Society's PINS Mediation Project 1983).

Murphy, Kathleen, "Voluntary Arbitration: An Alternative Means of Resolving Medical Malpractice Disputes," Medical Trial Technique Quarterly 409-429 (Summer 1987).

Discusses legal issues and effectiveness of binding arbitration.

Nader, Laura, "Disputing Without the Force of Law," 88 Yale Law Journal 998-1021 (1979).

Examines the shortcomings of those systems which have developed outside of the legal system to address consumer and citizen complaints.

Nader, Laura, No Access to Law: Alternatives to the American Judicial System (Academic Press, New York 1980).

Nagel, Stuart S., and Casimir Varczyk, "Can Computers Aid the Dispute Resolution Process?" 71 Judicature 253, 294-295 (February-March 1988). See also, Nagel and Miriam K. Mills, "Microcomputers, P/G's, and Dispute Resolution," 2 Ohio State Journal on Dispute Resolution 187-221 (Spring 1987).

Describes microcomputer program designed to help choose the best alternative for achieving a set of goals and its possible application in dispute resolution.

Nathan, Vincent M., "The Use of Masters in Institutional Reform Litigation," 10 Toledo Law Review 419-464 (1979).

Reviews sources of authority for appointment of a master; examines benefits and drawbacks of masters in the context of institutional reform litigation.

"National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," 70 Federal Rules Decisions 79-246 (April 1976).

Presents collection of articles, including Frank Sander's "Varieties of Dispute Processing" which examines the characteristics of dispute resolution mechanisms and considers criteria for allocating disputes to the various alternative processes.

National Symposium on Civil Justice Issues, Conference Report (1986).

Negotiation Journal, Program on Negotiation, Harvard Law School.

Neighborhood Justice: Assessment of an Emerging Idea, Edited by Roman Tomasic and Malcolm Feeley (Longman Press, New York 1982).

Nejelski, Paul, "Supplements to Trial: A Court Administrator's View," 29 Villanova Law Review 1339-1361 (1984).

Suggests that "alternatives" to courts actually exist with some degree of court involvement.

Nejelski, Paul, "With Justice Affordable for All," 19 The Judges' Journal 4-9, 46-48 (Summer 1980).

Reviews several methods — procedure, technology, case management, mediation, lawyer conduct — of reducing court costs and delay by improving court efficiency.

Nejelski, Paul, and Andrew S. Zeldin, "Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story," 42 Maryland Law Review 787-822 (1983).

Reviews history of court-annexed arbitration and examines in detail the program operating in the Eastern District of Pennsylvania.

Nelson, Leonard J., III, "Medical Malpractice and Alternative Dispute Resolution," 10 American Journal of Trial Advocacy 345-363 (1986).

Examines the use of negotiation/settlement, mediation, and arbitration to resolve medical malpractice disputes.

New Approaches to Conflict Resolution (Ford Foundation, New York 1978).

"New Jersey County Set to Begin First County-Wide ADR Program for Consumers in the U.S.," 2 Alternatives to the High Cost of Litigation (September 1984).

"New Jersey Enacts 'Umpire' Law; Similar U.S. Bill Pending," 5 Alternatives to the High Cost of Litigation (May 1987).  
New Jersey Supreme Court Committee on Complementary Dispute Resolution Programs, "Report #2" (July 1985). See also, "Family and Neighborhood Dispute Programs" (Draft Report 1987).

New Jersey Supreme Court Task Force on Dispute Resolution, 1988 Judicial Conference, (October 1988).

Materials: Volume I—Discussion Paper; Volume II—Subcommittee Reports on Court Programs; Volume III—Subcommittee Reports on Court Operations; Volume IV—Evaluation Reports on Court-Annexed Dispute Resolution Programs.

The New York Mediator Newsletter, Community Dispute Resolution Centers Program, Unified System of the State of New York, Agency Building 4, Tenth Floor, Empire State Plaza, Albany, New York, 12223, 518-473-4160.

Nicolau, George, "Community Mediation: Progress and Problems," Massachusetts District Court Mediation Project (August 1986).

"'No Frills' Justice: North Carolina Experiments with Court-Ordered Arbitration," Note, 66 North Carolina Law Review 395-420 (January 1988).

Reviews North Carolina's experimental court-ordered arbitration program in three judicial districts. Includes a discussion of various other state programs.

Nonna, John M., and Jonathan E. Strassberg, "Reinsurance Arbitration: Boon or Bust?" 22 Tort & Insurance Law Journal 586-612 (Summer 1987).

Analyzes legal issues which may block arbitration of reinsurance disputes, including the scope of an arbitration clause, multi-party disputes where not all parties have agreed to arbitration, and the availability of remedies.

O'Brien, Michael, and Kimberlee K. Kovach, "Moderated Settlement Conference," 51 Texas Law Journal 38-39 (January 1988).

Discusses procedure in use in Texas whereby litigants receive pretrial case evaluation by panel of experienced trial attorneys.

Ohio State Journal on Dispute Resolution, Symposium on Critical Issues in Mediation Legislation, Volume 2, Number 1 (1986). Also see other issues of Journal, 1659 North High Street, Columbus, Ohio, 43210-1306, 614-422-7170.

Olson, Lester, "Pick Your Own Judge: An Insider's Look at the California Rent-A-Judge System," 4 Compleat Lawyer 38-41, 54 (Winter 1987).

Describes private judging in California.

Ostermeyer, Melinda, "'Multi-Door' on threshold of success," 14 Bar Leader 14-16 (September-October 1988).

Parkinson, Lisa, Conciliation in Separation and Divorce: Finding Common Ground (Croom Helm, New Hampshire 1986).

Parks, Catherine, "The Comprehensive Medical Malpractice Reform Act," Florida Bar Journal 31-34 (July/August 1986).

Parrish, James, and H. Whiting, "The Alaska Rules Are A Success," 24 The Judges' Journal 8-1, 53-55 (Spring 1985).

Paths to Justice: Major Public Policy Issues of Dispute Resolution, "United States Department of Justice Report of the Ad Hoc Panel on Dispute Resolution and Public Policy (National Institute for Dispute Resolution, January 1984).

Examines dispute resolution options in terms of the questions raised and the problems created by their use.

Patterson, Roger J., "Dispute Resolution in a World of Alternatives," 37 Catholic University Law Review 591-604 (1988).

Provides guidance for choosing among available dispute resolution methods. Describes selected processes and examines possible uses for such processes.

Pearson, Jessica, "An Evaluation of Alternatives to Court Adjudication," 7 Justice System Journal 420-444 (1982). See also, Comments, pages 445-448.

Examines mandatory and voluntary mediation and arbitration programs and their success in achieving stated objectives.

Pearson, Jessica, "Child Custody: Why Not Let the Parents Decide?" 20 The Judges' Journal 4-12 (Winter 1981). See also, "How Child Custody Mediation Works in Practice," pages 11-12.

Pearson, Jessica, Maria L. Ring, and Ann Milne, "A Portrait of Divorce Mediation Services in the Public and Private Sectors, " 21 Conciliation Courts Review 1-24 (June 1983).

Defines and compares mediation services.

Pearson, Jessica, and Nancy Thoennes, "Divorce Mediation: An Overview of Research Results," 19 Columbia Journal of Law and Social Problems 451-484 (1985). See also, Pearson and Thoennes, "Will This Divorced Woman Receive Child Support?" 25 The Judges' Journal 40-46 (Winter 1986) and "Divorce Mediation: Strengths and Weaknesses Over Time," Center for Policy Research and the Divorce Mediation Research Project (1982).

Reports findings from two research projects involving domestic relations cases, the Denver Custody Mediation Project and the Divorce Mediation Research Project.

Pearson, Jessica, and Nancy Thoennes, Final Report of the Divorce Mediation Research Project (Available from the authors: 1720 Emerson Street, Denver, Colorado 1984).

Pearson, Jessica, Nancy Thoennes, Bernard Mayer, and Mary Margaret Golten, "Mediation of Child Welfare Cases," 20 Family Law Quarterly 303-322 (Winter 1987).

Reports findings garnered from the first year of the child protection mediation program of the Center for Dispute Resolution in Denver.

Peckham, Robert F., "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition," 69 California Law Review 770-805 (1981).

Defines and assesses pretrial case management.

Peckham, Robert F., "A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution," 37 Rutgers Law Review 253-277 (Winter 1985).

Discusses techniques of judicial case management and the incorporation of alternative dispute resolution mechanisms into the management process.



Peeples, Ralph A., "Dispute Resolution in North Carolina: An Overview," 35 North Carolina State Bar Quarterly 10-12 (Winter 1988).

Describes mediation-, arbitration-, and litigation-based techniques currently in use or being considered for use in North Carolina.

Pegalis, Steven, American Law of Medical Malpractice, Volume 3, Lawyers Co-operative Publishing Company, Rochester, Bancroft-Whitney Company, San Francisco.

Perritt, Henry H., Jr., "'And the Whole Earth Was of One Language' -- A Broad View of Dispute Resolution," 29 Villanova Law Review 1221-1338 (1983-1984).

Presents conceptual "umbrella" for understanding all forms of dispute resolution.

Perry, Jo Lia, "The 'Crisis' in the Courts: Critical Change in the Role of the Judge," Paper prepared for presentation at the Law & Society Association Meeting, May 29-June 1, 1986.

Petillon, Lee R., "Recent Developments in Alternative Dispute Resolution," 14 Pepperdine Law Review 929-942 (1987).

Examines growth of alternative dispute resolution at both national and state levels. Includes statistics for dispute resolution centers.

Philadelphia Municipal Court Dispute Resolution Programs, "Mediation" (April 1986). See also other court handouts and publications.

Phillips, Barbara Ashley, and Anthony C. Piazza, "Mediation: Putting Disputes into a Manageable Framework," CPCU Journal, Society of Chartered Property and Casualty Underwriters, pages 16-21 (March 1985).

Describes how the mediation process works and explores possible applications.

Pipkin, Ronald M., and Janet Rifkin, "The Social Organization in Alternative Dispute Resolution: Implications for the Professionalization of Mediation," 9 Justice System Journal 204-227 (1984).

Plapinger, Elizabeth S., "The Minitrial in the District of Massachusetts," ADR in the Courts: A Manual for Judges and Lawyers (Center for Public Resources, New York 1987).

The Politics of Informal Justice, Volume I: The American Experience and Volume II: Comparative Studies, Edited by Richard L. Abel (Academic Press, New York 1981).

Group of essays present objections to and criticisms of the concept and practice of nonjudicial dispute resolution.

Poppleton, Allen, "The Arbitrator's Role in Expediting the Large and Complex Case," 36 The Arbitration Journal 6-10 (December 1981).

Contrasts role of arbitrator and judge and suggests ways for arbitrators to increase their efficiency.

Posner, Richard, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," 53 University of Chicago Law Review 366-393 (1986).

Establishes criteria for evaluating alternatives to litigation and discusses the advantages and shortcomings of the summary jury trial as judged by those criteria.

Pound, Roscoe, "The Causes of Popular Dissatisfaction with the Administration of Justice," 8 Baylor Law Review 1-25 (1956).

Examines history of civil justice.

"A Practical Assessment of Arizona's Medical Malpractice Screening System," Comment, 1984 Arizona State Law Journal 335-367 (1984).

Reviews legal and procedural shortcomings of Arizona's pretrial screening panel system.

"Practice and Potential of the Advisory Jury," 100 Harvard Law Review 1363-1381 (April 1987).

Examines use of advisory jury, or summary jury trial, at discretion of trial judge.

Prado, Edward, "Court-Annexed Arbitration," 51 Texas Bar Journal 45 (January 1988).

Discusses court-annexed arbitration in the Western District of Texas.

Problem Solving Through Mediation, Edited by Thomas Christian and Maria Volpe (American Bar Association, Special Committee on Dispute Resolution 1984).

Presents plenary sessions of conference on alternative dispute resolution.

"Programming the Process: An Examination of the Use of Computers in Dispute Resolution," Dispute Resolution Forum (National Institute for Dispute Resolution, April 1988).

"Project Early Settlement: An Alternative to the Courts," American Bar Association, Special Committee on Dispute Resolution, Dispute Resolution Papers Series Number 4 (December 1984).

"Protecting Confidentiality in Mediation," 98 Harvard Law Review 441-459 (1984).

Discusses need for confidentiality in the context of mediation and examines protections provided by rules of privilege and by contract.

Provine, D. Marie, "Managing Negotiated Justice: Settlement Procedures in the Courts," 12 The Justice System Journal 91-112 (1987). Also, Maurice Rosenberg and Milton Heumann, "Comments on Managing Negotiated Justice," pages 113-118.

Describes judicial involvement in the settlement of civil cases, including an assessment of the status of empirical research in the area and public policy concerns raised by settlement. In their review of Provine's article, Rosenberg and Heumann suggest questions needing further research.

Provine, D. Marie, "Settlement Strategies for Federal District Judges," Federal Judicial Center, FJC-R-86-1 (1986).

Discusses issues raised by judicial settlement efforts, describes various judicial settlement techniques, and outlines other methods of dispute resolution.

Qual, Shirley, "A Survey of Medical Malpractice Tort Reform," 12 William Mitchell Law Review 418-457 (1986).

Reviews federal and state tort reform measures, including arbitration and pre-screening panels.

Ray, Larry, and Anne L. Clare, "The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today," 1 Ohio State Journal on Dispute Resolution 7-54 (Fall 1985).

Discusses the concept of offering a variety of dispute resolution services through the courts and three experimental implementation projects.

Ray, Larry, and Lawrence Freedman, "Alternative Dispute Resolution: New Tools for a Tough Task," 3 The Compleat Lawyer 28-32 (Fall 1986).

Traces history of ADR movement and discusses the use of alternative mechanisms, including the multi-door courthouse.

Readey, James A., "Alternative Dispute Resolution—A Trial Lawyer's Primer," Insurance Counsel Journal 300-313 (April 1986).

Offers a "working knowledge" of alternative dispute resolution methods, including arbitration and court-annexed arbitration, mediation, rent-a-judge, the minitrial, and the summary jury trial.

Report on the National Conference on Minor Disputes Resolution (American Bar Association, Chicago, Illinois 1977).

Resnick, Judith, "Failing Faith: Adjudicatory Procedure in Decline," 53 University of Chicago Law Review 494-560 (1986).

Discusses history and future of the Federal Rules of Civil Procedure.

Resnick, Judith, Managerial Judges, Rand Institute for Civil Justice, R-3002-ICJ (1982). See also, Resnik, "The Assumptions Remain," The Judges' Journal 37-40 (Fall 1984) and Resnick, "Managerial Judges and Court Delay: The Unproven Assumptions," 23 The Judges' Journal 8-11. 54-55 (Winter 1984).

Resolving Community Conflict: An Annotated Bibliography (Institute of Community and Areas Development, University of Georgia 1983).

"Resolving Disputes: The Responsibility of the Florida Lawyer," Comment, 17 Stetson Law Review 751-785 (1988).

Examines Florida and federal law governing alternative methods of dispute resolution. Includes appendix of primary methods of dispute resolution and appendix of Florida statutes relating to alternative dispute resolution.

"Resolving Disputes Without Litigation," Special Report (Bureau of National Affairs, Washington, D.C. 1985).

Presents information on all dispute resolution mechanisms and on particular applications, including environmental and family disputes.

Riesel, Daniel, "Negotiation and Mediation of Environmental Disputes," 1 Ohio State Journal on Dispute Resolution 99-111 (Fall 1985).

Examines special difficulties presented by environmental disputes and the limitations of alternative dispute resolution approaches.

Riskin, Leonard L., "The Special Place of Mediation in Alternative Dispute Processing," 37 University of Florida Law Review 19-27 (Winter 1985).

Classifies alternative methods of processing disputes under headings of adjudicative processes, consensual processes, and mixed processes, with special emphasis on mediation.

Riskin, Leonard L., "Toward New Standards for the Neutral Lawyer in Mediation," 26 Arizona Law Review 329-362 (1984).

Addresses the special problems and opportunities created when lawyers act as neutrals.

Rogers, Nancy H., and Richard A. Salem, A Student's Guide to Mediation and the Law (Matthew Bender 1987).

Provides comprehensive description of all aspects of mediation.

Rohbock, Donald, "The Utah Medical Malpractice Prelitigation Panel," 95 Utah Law Review 199-212 (1986).

The Role of Courts in American Society, Final Report of the Council on the Role of the Courts, Edited by Jethro K. Lieberman (West Publishing Company, St. Paul, Minnesota 1984).

Rolph, Elizabeth, Introducing Court-Ordered Arbitration: A Policymaker's Guide, Rand Institute for Civil Justice, R-3167-ICJ (1984).

Rosenberg, Maurice, "Can Court-Related Alternatives Improve Our Dispute Resolution System?" 69 Judicature 254-255 (February-March 1986).

Rosenbleeth, Richard M., "Neutral Discovery Managers: An Alternative for Discovery Dispute Resolution," ADR and the Courts: A Manual for Judges and Lawyers, pages 273-284 (Center for Public Resources, New York 1987).

Rowe, Thomas, D., Jr., "Predicting the Effects of Fee Shifting," 47 Law and Contemporary Problems 139 (Winter 1984). See also, Rowe, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," 1982 Duke Law Journal 651-680 (September 1982) and "State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?" pages 321-347.

Rules for Court-Ordered Arbitration in North Carolina, Revised January 30, 1987.

Rutgers Law Review, Volume 37, Number 2 (Winter 1985).

Symposium on Reducing the Costs of Civil Litigation,

Saichek, David, "A Summary of New Statutes Governing Medical Malpractice," Wisconsin Bar Bulletin 8-11, 65 (October 1986).

Salem, Richard, Community Dispute Resolution Through Outside Intervention (SPIDR 1982).

Sander, Frank E.A., "Alternative Methods of Dispute Resolution: An Overview," 37 University of Florida Law Review 1-18 (Winter 1985).

Defines "alternative dispute resolution mechanisms" and presents overview of programs and types of disputes.

Sands, John E., "ADR: A New Tool for Employment Relationships," Risk Management 22-30 (December 1987).

Discusses the use of alternative dispute resolution in employment relationships as an affirmative tool to prevent disputes and manage employers' risks of loss.

Saposnek, D.T., Mediating Child Custody Disputes (Jossey-Bass, San Francisco, California 1983).

Sayler, Robert, "Rule 56: Proposals for an Underused Rule," ADR and the Courts: A Manual for Judges and Lawyers, pages 325-326 (Center for Public Resources 1987).

Scalise, David G., and Jeffrey E. Engels, "Alternative Dispute Resolution: A Commercial Guide for Dispute Management," 9 Advocates' Quarterly 53-76 (February 1988).

Examines merits and limitations of alternative means of resolving problems, including arbitration, negotiation, mediation/conciliation, minitrial, and private judging.

Schepard, Andrew, Melissa D. Philbrick, and Dvora Wolff Rabino, "Ground Rules for Custody Mediation and Modification," 48 Albany Law Review 616-668 (Spring 1984).

Suggests ways to resolve conflicts faced by divorce mediators.

Schiller, Lawrence F., and James A. Wall, Jr., "Judicial Settlement Techniques," 5 American Journal of Trial Advocacy 39-61 (1981).

Discusses all aspects of judicial mediation and suggests lawyer responses.

Schuck, Peter H., "The Role of Judges in Settling Complex Cases: The Agent Orange Example," 53 University of Chicago Law Review 337-365 (1986).

Examines the judge's role in settling civil cases and the questions raised by such activity.

"The Scope of Modern Arbitral Awards," 62 Tulane Law Review 1113-1138 (1988).

Traces the development of arbitration law with regard to commercial, labor, and international disputes, with emphasis on state and federal policies concerning punitive damages.

Selvin, Molly, "An Historical Overview of Delay and Congestion in the Civil Justice System," Rand Institute for Civil Justice (1980).



"Settlement Week: An Analysis," Multi-Door Dispute Resolution Program, District of Columbia Superior Court, June 15, 1987.

Sherman, Edward F., "Reshaping the Lawyer's Skills for Court-Supervised ADR," 51 Texas Bar Journal 47-50 (January 1988).

Discusses the relationship of the traditional skills of lawyers used in litigation and those skills needed to be successful in various forms of alternative dispute resolution procedures.

Shmanske, Stephen, and Tina Stevens, "The Performance of Medical Malpractice Review Panels," 11 Journal of Health Politics, Policy and Law 525-535 (Fall 1986).

Presents results of empirical study of Arizona's medical malpractice review panels, concluding that the panels have contributed to the length and cost of claims resolution.

"Should Dispute Resolution Be Attached to the Courts," Interviews with Raymond Shonholtz and Thomas Christian, Dispute Resolution Forum (National Institute for Dispute Resolution, June 1984).

Presents pros and cons of court annexation of alternative methods of dispute resolution.

Shuart, Kathy L., Sandra Smith, and Michael D. Planet, "Settling Cases in Detroit: An Examination of Wayne County's 'Mediation' Program," 8 The Justice System Journal (1983).

Silberman, Linda, "Divorce Mediation: Progress and Prognosis," Family Litigation Section (American Bar Association 1983).

Silberman, Linda, "Professional Responsibility Problems of Divorce Mediation," 16 Family Law Quarterly 107-145 (1982).

Examines issues relating to the identity of the mediator.

Silbey, Susan S., "Case Processing: Consumer Protection in an Attorney General's Office," 15 Law and Society Review 849-910 (1980-1981).

Describes how an attorney general's office of consumer protection processes complaints and creates statistical records.

Silbey, Susan, and Austin Sarat, Dispute Processing in Legal Thought: From Institutional Critique to a Reconstruction of the Juridical Subject, University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Project Working Paper 8-9, 90 pages (1987).

Describes the politics and conflicts associated with dispute processing.

Simkin, William E., and Nicholas A. Fidandis, Mediation and the Dynamics of Collective Bargaining, Second Edition (Bureau of National Affairs 1986).

Discusses mediation principles and procedures, including mediator training, and explores the use of labor mediation techniques in non-labor disputes.

Simoni, Christopher, "Court-Annexed Arbitration in Oregon: One Step Forward and Two Steps Back," 22 Willamette Law Review 237-284 (Summer 1986).

Describes arbitration program in Oregon and explains how it can be used to reduce litigation delay.

Singer, Linda R., "Non-Judicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor," 13 Clearinghouse Review 569-583 (December 1979).

Identifies and defines objectives of alternative forums; discusses potential effects on users and on the provision of legal services.

Singer, Linda R., and Eleanor Nace, "Mediation in Special Education: Two States' Experiences," 1 Ohio State Journal on Dispute Resolution 55-98 (1985).

Examines the use of mediation by state education agencies to resolve disputes between individuals and the institutions.

Smith, David R., "Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws," 38 Oklahoma Law Review 195-231 (Summer 1985).

Discusses constitutional challenges to, among other things, screening panels and voluntary arbitration.

Sohn, David, "An Examination of Alternatives to Suit in Doctor-Patient Disputes," 48 Albany Law Review 669-692 (1984).

Assesses non-judicial resolution methods, including binding arbitration and screening panels.

Solomon, Julie, "To Cut Backlog, An Ohio Court Tries Mediation," The Wall Street Journal, May 19, 1986.

Describes week-long mediation project by the state trial court for Franklin County, Ohio.

Solomon, Maureen, Caseflow Management in the Trial Court (American Bar Association 1973).

Spece, Roy, Jr., "The Case Against (Arizona) Medical Malpractice Panels," 63 University of Detroit Law Review 7-88 (Fall 1985).

Reviews the operation of Arizona's panel system and discusses constitutional challenges.

State Court Journal, Volume 9, Number 4 (Fall 1985).

Special Issue on Court Delay Reduction.

Status Report of Judicial Arbitration Commission, State of Hawaii, and Summary Report of Court-Annexed Arbitration Program, December 31, 1986.

Steelman, David, "Options for Reducing Civil Volume and Delay: A Review and Analysis for the 1980s," 4 State Court Journal 9-11, 14-15, 28-33 (Fall 1980).

Examines ways to keep civil disputes out of court and ways to improve the court process.

Stier, Serena, and Nina Hamilton, "Teaching Divorce Mediation: Creating a Better Fit Between Family Systems and the Legal System," 48 Albany Law Review 693-718 (Spring 1984).

Examines problems with the adversary process in divorce cases and describes divorce mediation.

Stipanowich, Thomas J., "Recent Developments in Commercial Arbitration," 52 Kentucky Bench & Bar 15, 52-55 (Winter 1988).

Discusses, among other things, national and Kentucky-based arbitration services.

Stipanowich, Thomas J., "Rethinking American Arbitration," 63 Indiana Law Journal 425-487 (1988). See also, Stipanowich, "A Preliminary Analysis of Responses to the Questionnaire on Construction Industry Arbitration," 7 The Construction Lawyer 17-22 (August 1987).

Assesses pros and cons of consensual arbitration. Presents detailed analysis of American Bar Association arbitration survey results and, based on survey analysis, proposes procedural rules changes.

Study Commission on Alternative Dispute Resolution, Final Report to the Florida Legislature, March 1, 1985.

Summary of Alternative Dispute Resolution Program Characteristics (National Center for State Courts 1986).

"Summary Jury Trials," 1 Alternative Dispute Resolution Report 339-340 (Bureau of National Affairs, December 23, 1987).

Describes two non-binding jury verdicts which resulted in a \$3.5 million toxic tort settlement.

Superior Court of the State of Delaware, Arbitration Program Annual Report.

Survey of State-Based Alternative Dispute Resolution Programs, Prepared for Conference of State Court Administrators, National Center for State Courts (August 1987).

Susskind, Lawrence, "Court-Appointed Masters as Mediators," 1 Negotiation Journal 295-300 (October 1985).

Discusses the use of special masters to mediate complex cases and offers suggestions based on personal experience.

Susskind, Lawrence, and Denise Madigan, "New Approaches to Resolving Disputes in the Public Sector," 9 Justice System Journal 179-203 (1984).

Describes mediated negotiation and process innovations in public sector disputes.

Susskind, Lawrence, and Gerard McMahon, "The Theory and Practice of Negotiated Rulemaking," 3 Yale Journal of Regulation 133-165 (Fall 1985).

Explores EPA's experiments with negotiated rulemaking and suggests improvements.

Talbot, Allan, Settling Things: Six Case Studies in Environmental Mediation (The Conservation Foundation, Washington, D.C. 1983).

"Talk, Don't Sue," Changing Times 49-52 (August 1986).

Discusses use of mediation and other alternative dispute resolution methods by consumers.

Tannon, Elizabeth M., "Implementing a Successful Minitrial," 52 Kentucky Bench & Bar 12-13, 50-51 (Winter 1988).

Discusses suitability of procedure and how to initiate and implement its use.

"Tax Incentives for Using Alternative Dispute Resolution Methods," Note, 3 Ohio State Journal on Dispute Resolution 263-283 (1987).

Suggests employing tax incentives to encourage use of alternative dispute resolution methods and employing tax disincentives to discourage use or protraction of litigation. Examines the economics of litigation and alternative methods of dispute resolution.

Teglund, Karl B., Mediation in the Western District of Washington (Federal Judicial Center, Washington, D.C. 1984).

Describes the mediation program in the Western District as established under local court rule.

Temple Law Quarterly, Volume 34, Number 4 (Summer 1961).

Symposium on the Impartial Expert Medical Witness.

Terry, Nicholas P., "The Technical and Conceptual Flaws of Medical Malpractice Arbitration," 30 St. Louis Law Journal 571-631 (August 1986).

Analyzes the technical legal problems posed by arbitration systems as currently operated and examines malpractice-specific arbitration in the context of traditional voluntary arbitration, concluding that "malpractice arbitration as currently envisaged is a dangerously inappropriate solution to the real or perceived malpractice crisis."

Thompson, Mark, "Rented Justice," California Lawyer 42-46 (March 1988).

Discusses the private "rent-a-judge" procedure prevalent in California. Sidebar discusses the availability of a jury trial in at least one private court.

Tract, Harold M., "Arbitration: The Bloom is off the Rose," Best's Review 30-36, 100 (August 1987).

Discusses the advantages of litigation over arbitration in resolving reinsurance disputes, including the application of established procedural rules, court control of the proceeding, and the right to appeal.

"Travelers Set to Test Dispute Settling Project," Journal of Commerce, July 15, 1986.

Describes experimental alternative dispute resolution center set up by The Travelers Companies for automobile accident cases.

Trends in Tort Litigation: The Story Behind the Statistics, Rand Institute for Civil Justice, R-3583-ICJ (1987).

Trubeck, David, Herbert Kritzer, Karen Holst, and William Felstiner, Costs, Processes and Outcomes: Lawyers' Attitudes to Courts and Other Dispute Processing Options, University of Wisconsin-Madison Law School, Disputes Processing Research Project, Working Paper 1984-9.

Reports and analyzes data from survey of lawyers who had used both courts and other forums to achieve resolution of a dispute; lawyers choose forum believed would give favorable result quickly and at low cost.

Trubeck, David, Austin Sarat, William Felstiner, Herbert Kritzer, and Joel Grossman, "The Costs of Ordinary Litigation," 31 University of California Los Angeles Law Review 72-127 (1983).

Describes the central theme of the Civil Litigation Research Project — litigation as an investment — and presents some of the principal findings of the empirical investigation.

Tyler, June Smith, "Medical Malpractice Statutes: Special Protection for a Privileged Few?" 12 Northern Kentucky Law Review 295-346 (1985).

Tyler, Tom R., The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possibilities, University of Wisconsin-Madison Law School, Institute for Legal Studies, Disputes Processing Research Project Working Paper 8-8, 29 pages (1987).

Discusses issues encountered during attempts to measure the quality of dispute resolution systems.

University of California Los Angeles Law Review, Volume 31, Number 1 (October 1983).

Special issue on "Litigation in America."

University of Chicago Law Review, Volume 53, Number 2 (1986).

Symposium on Litigation Management.

University of Florida Law Review, Volume 37, Number 1 (Winter 1985).

Alternative Dispute Resolution Symposium.

Use of Mediation and Arbitration in Small Claims Disputes (National Institute of Justice, Office of Development, Testing and Dissemination 1983).

Reviews criticisms of small claims courts; discusses growing use of alternatives, including arbitration and mediation, to resolve small cases and evaluates the success of alternative programs.

Vause, W. Gary, "Impasse Resolution in the Public Sector—Observations of the First Decade of Law and Practice Under the Florida PERA," 37 University of Florida Law Review 105-188 (Winter 1985).

Surveys trends within states toward use of alternative dispute resolution procedures and examines in detail Florida's procedures for public sector collective bargaining.

Vermont Law School Dispute Resolution Project, The Role of Mediation in Divorce Proceedings: A Comparative Perspective (South Royalton, Vermont 1987).

Vermont Law School Dispute Resolution Project, A Study of Barriers to the Use of Alternative Methods of Dispute Resolution (South Royalton, Vermont 1984).

Vidmar, Neil, "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance," 21 Law & Society Review 155-163 (1987).

Discusses issues raised by the assessment of data relating to dispute resolution programs in the context of forum type and the case characteristic of admitted partial liability.

Vidmar, Neil, "The Small Claims Court: A Reconceptualization of Disputes and An Empirical Investigation," 18 Law & Society Review 515-550 (1984).

Describes characteristics of small claims cases and compares mediated results to adjudicated outcomes.



Villanova Law Review, Volume 29, Number 4 (November 1984).

Symposium on Alternative Dispute Resolution.

Wahrhaftig, Paul, "NonProfessional Conflict Resolution," 29 Villanova Law Review 1463-1476 (1984).

Examines development of community dispute resolution centers.

Wald, Michael H., and W. Richard Evarts, "Does Alternative Dispute Resolution Work?" 51 Texas Bar Journal 57-59 (January 1988).

Reports experiment testing usefulness of mediation and negotiation as dispute resolution mechanisms and emphasizes need for further research.

Wald, Patricia M., "Negotiation of Environmental Disputes: A New Role for the Courts?" 10 Columbia Journal of Environmental Law 1-33 (1985). See also, Philip J. Harter, "The Role of Courts in Regulatory Negotiation — A Response to Judge Wald," 11 Columbia Journal of Environmental Law 51-72 (1986).

Examines the use of alternative dispute resolution to resolve environmental disputes from the perspective of an appellate judge.

Walker, George K., "Court-Ordered Arbitration Comes to North Carolina and the Nation," 21 Wake Forest Law Review 901-956 (1986). See also, Walker, "Experimental Court-Annexed Arbitration Comes to North Carolina," The North Carolina State Bar Quarterly 10-19 (1986).

Describes North Carolina's mandatory arbitration program and compares it to other programs.

Wall, James A., Jr., Dale E. Rude, and Lawrence F. Schiller, "Judicial Involvement in Pretrial Settlement: A Judge is Not a Bump on a Log," 6 American Journal of Trial Advocacy 27-45 (Summer 1982).

Reports the results of a study regarding settlement techniques used by judges.

Wall, James A., Jr., Lawrence F. Schiller, and Ronald Ebert, "Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediator Techniques," 8 American Journal of Trial Advocacy 83-114 (Fall 1984).

Reports results of survey of views of lawyers and judges regarding the effectiveness of various judicial settlement techniques.

Weisberg, Lynn, "Pilot Program Seeks to Reduce Civil Case Delay in California," 71 Judicature 288-289 (February-March 1988).

Describes experimental delay reduction project in nine California counties.

Weller, Steven, John Ruhnka, and John Martin, "American Experiments for Reducing Civil Trial Costs and Delays," 1 Civil Justice Quarterly 151-174 (1982).

Evaluates the Rochester compulsory arbitration project and the California Economical Litigation Project.

Westin, Alan F., and Alfred G. Feliu, Resolving Employment Disputes Without Litigation (Bureau of National Affairs 1988).

Discusses the development and current use of internal complaint and appeal systems in the non-union workplace.

Weston, William I., "Divorce Mediation: Cheaper for Your Client, But Dangerous for You," 4 The Compleat Lawyer 40-43 (Spring 1987).

Discusses use of mediation in domestic relations disputes and the role of the lawyer as mediator.

"What We Now Know About Court-Ordered Arbitration Programs," Rand Institute for Civil Justice, Draft Report (American Bar Association, Special Committee on Dispute Resolution, 1988).

Reviews current court-ordered arbitration programs and summarizes the results of research studies to date.

"Where is Dispute Resolution Today? Where Will It Be in the Year 2000?"  
Dispute Resolution Forum (National Institute for Dispute Resolution,  
April 1985).

Who's In Charge of Mediation? (American Bar Association, Special  
Committee on Dispute Resolution 1982).

Presents discussion by panel members concerning the  
characteristics of mediation programs.

Wide World of Arbitration: An Anthology (American Arbitration  
Association 1982).

Discusses changes and developing issues in arbitration during the  
1970s.

Willamette Law Review, Volume 3 (Summer 1985).

Symposium on Dispute Resolution.

Will, Hubert L., Robert R. Merhige, Jr., and Alvin B. Rubin, "The Role  
of the Judge in the Settlement Process," Federal Judicial Center, FJC-  
ETS-77-13 (1977).

Williams, Gerald R., Effective Negotiation and Settlement (National  
Practice Institute 1984).

Willging, Thomas E., "Asbestos Case Management: Pretrial and Trial  
Procedures" (Federal Judicial Center, Washington, D.C. 1985).

Describes techniques applicable to the management of mass tort  
cases such as those relating to asbestos.

Willging, Thomas E., "Court-Appointed Experts," Federal Judicial  
Center, FJC-SP-86-1 (1986).

Wisconsin Legislative Council Staff, "An Introduction to Alternative  
Dispute Resolution," Staff Brief 85-2 (1985).

Describes alternative dispute resolution mechanisms and provides  
survey of state programs; identifies Wisconsin programs.

Wissler, Roselle L., Randall P. Bexanson, Gilbert Cranberg, and John Soloski, "Resolving Libel Cases Out of Court," 71 Judicature 197-201 (December-January 1988).

Describes Libel Dispute Resolution Program, developed in cooperation with the American Arbitration Association to resolve media libel disputes outside the courts.

Wittman, Donald, "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data," 17 Journal of Legal Studies 313-352 (June 1988).

Considers the relationship between the set of disputes ending in trial and the set of disputes settled out of court. Seeks to answer the question: "Do the characteristics of the dispute ending in trial reflect the characteristics of the disputes that are settled out of court, or are there biases one way or the other?"

Wolf, John, and Sander Lund, "Evaluation of Mediation as a Means of Resolving Employment Discrimination Disputes," Minnesota Center for Social Research (Minneapolis, Minnesota 1985).

Wolff, Helmut O., "Private Contractual Arbitration," 51 Texas Bar Journal 43-44 (January 1988).

Discusses advantages and suitability of arbitration by contract.

Wolff, Roberta, and Melinda Ostermeyer, "Dispute Resolution Centers: Citizen Access to Justice," 51 Texas Bar Journal 51-53 (January 1988).

Discusses concept and operation of multi-door courthouses such as the one in Houston.

Yale Law Journal, Volume 88, Number 5 (April 1979).

Issue on dispute resolution.

Zack, Arnold M., Public Sector Mediation (Bureau of National Affairs, Washington, D.C. 1985).

Details each step of mediation process, including scheduling meetings and choosing a mediator.

Zampano, Robert C., "Settlement Conferences with Experts," ADR and the Courts: A Manual for Judges and Lawyers, pages 251-255 (Center for Public Resources, New York 1987).

Zuckerman, Stephen, Christopher F. Koller, and Randall R. Bovbjerg, "Information on Malpractice: A Review of Empirical Research on Major Policy Issues," 49 Law and Contemporary Problems 85-111 (Spring 1986).

Reviews, among other things, arbitration of medical malpractice disputes as an alternative to traditional settlement and litigation.

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