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Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings

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NOTHING FOR SOMETHING? DENYING LEGAL ASSISTANCE TO THOSE COMPELLED TO PARTICIPATE IN ADR PROCEEDINGS

*Stephan Landsman**

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I. JUDICIAL TREATMENT OF UNREPRESENTED LITIGANTS

A. The Traditional Approach

The courts have been of two minds in their handling of unrepresented litigants. The traditional view has been that those who proceed pro se must look out for themselves. They will be expected to comply with all the rules regulating the litigation process and will not be given special dispensation because of their lack of knowledge or legal skill. The United States Supreme Court relied on this view in its 1975 ruling in *Faretta v. California*.¹ There, the Court held that a criminal defendant has a Sixth Amendment right to represent him or herself. The Court cautioned, however, that: “The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of proce-

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1. 422 U.S. 806 (1975).

dural and substantive law.”² This proposition has been reiterated regularly and amplified upon in both criminal and civil decisions since *Faretta*.

In conformity with this view, the Supreme Court has determined that a trial judge, generally, has no obligation to assist pro se litigants. As the Court bluntly put it, there is no “constitutional right to receive personal instruction from the trial judge on courtroom procedure.”³ One of the key justifications for this position is the fear that the trial judge who intervenes on behalf of an unrepresented party is likely to undermine his or her neutrality. Speaking for a five-member majority in *Pliler v. Ford*,⁴ Justice Thomas used the neutrality argument in rejecting a claim that a district judge was obliged to assist an unrepresented litigant with “details of federal habeas corpus procedure.”⁵ Justice Thomas asserted that such assistance “would undermine district judges’ role as impartial decision makers.”⁶

In the adversarial framework, the most sensible and effective approach when courts are faced with self-represented litigants who seem incapable of managing their cases may not be judicial intervention, but the provision of counsel.⁷ Courts have held that the Sixth Amendment to the Constitution requires the appointment of a lawyer for the unrepresented impecunious criminal defendant at public expense whenever there is a possibility of incarceration.⁸ On the civil side, by contrast, the courts have recognized no similar right. In *Lassiter v. Department of Social Services*, a case involving the termination of parental rights, the Supreme Court established a presumption *against* any right to the appointment of counsel in civil actions.⁹ While *Lassiter* did not literally rule out judicial recognition of such a right, it has been interpreted as having erected a virtually insurmountable barrier to any due process claim regarding civil legal assistance.¹⁰ Although courts have long recognized judicial discretion to appoint counsel in particularly

2. *Id.* at 834 n.46.

3. *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (noting that the potential difficulties arising from this rule were mitigated in criminal matters by the presence of “standby counsel,” assigned by the court to assist those accused who elected to proceed pro se).

4. 542 U.S. 225 (2004).

5. *Id.* at 231.

6. *Id.*

7. Counsel is at the heart of the adversarial framework. See generally STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988).

8. See *Argersinger v. Hamlin*, 407 U.S. 25, 28 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

9. 452 U.S. 18, 25 (1981).

10. See Kimberly A. Owens, *Right to Counsel—The Third Circuit Delivers Indigent Civil Litigants from “Exceptional Circumstances”*, 39 VILL. L. REV. 1163, 1163 & nn.1-2 (1994).

compelling circumstances,¹¹ that authority suffered a serious blow when the Supreme Court decided *Mallard v. United States District Court*.¹² The Court held that an unwilling attorney could not be required to accept an uncompensated court assignment to represent a pro se litigant pursuant to 28 U.S.C. § 1915(e)(1). The statute allows a court, in its discretion, to make such appointments. The Court thereby reduced the likelihood of the provision of counsel, even as a matter of judicial discretion.

B. An Opposing View

Were this all there was to say about representation and assistance, the picture would be bleak indeed. The story, however, is not so simple. Several years before the Court decided *Faretta*, it held, in *Haines v. Kerner*,¹³ that in reviewing pleadings filed by unrepresented parties, judges were to hold the submissions “to less stringent standards than formal pleadings drafted by lawyers.”¹⁴ Courts have extended this accommodating attitude toward the efforts of parties representing themselves to other areas of litigation including service of process, pursuit of discovery, responses to motions for dismissal or summary judgment, and compliance with the rules of evidence.¹⁵ The Ninth Circuit has been among the leading advocates of the liberal treatment of pro se efforts. In *Balistreri v. Pacifica Police Department*,¹⁶ the circuit court stated: “This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements.”¹⁷ Such sympathetic handling has made the litigation process somewhat more congenial to the self-represented and has involved judges in rendering some, albeit modest, assistance to them.

The organized bar and a significant number of courts have moved beyond tolerance of pro se efforts to encouragement of direct judicial assistance. The American Bar Association (“ABA”) heralded this shift in 2007, when, in a Comment to Rule 2.2 of the Model Code of Judicial Conduct, addressing impartiality and fairness, the rule drafters stated: “It is not a violation of this Rule for a judge to make reasonable accommodations to en-

11. See, e.g., John Rearden, Jr., *Appointed Attorneys for Indigent Civil Litigants in Federal Court: The Illinois Experience*, 94 ILL. B.J. 369, 370 (2006).

12. 490 U.S. 296 (1989).

13. 404 U.S. 519 (1972).

14. *Id.* at 520.

15. See generally John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15.

16. 901 F.2d 696 (9th Cir. 1990).

17. *Id.* at 699.

sure pro se litigants the opportunity to have their matters fairly heard.”¹⁸ The ABA went further, and in Rule 2.6, with pro se litigants in mind, declared that “a judge shall accord [to all] the right to be heard. . . .”¹⁹ These changes reflect a rejection of the narrow view of neutrality espoused in *Pli-ler* and a willingness to encourage judges to assist the unrepresented.

A number of courts, judicial administrators, and national organizations have, over the past decade, contributed to what one scholar has described as an accelerating trend “to accommodate unrepresented litigants and facilitate their efforts to present their cases.”²⁰ Steps along this road have included: the 1997 Final Report of the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges which called for alternative procedures to facilitate the presentation of pro se claims;²¹ the declaration in 2000 by the Conference of State Court Administrators that courts have an “obligation” to respond to the needs of the self represented;²² the American Judicature Society and State Justice Institute report of 2005 recognizing as a “best practice” judicial action to manage the presentation of proof so that the claims of the self-represented are addressed on the merits;²³ the 2006 Massachusetts Judicial Guidelines for Civil Hearings Involving the Self-Represented Litigant, which urge a series of steps to ensure that parties proceeding pro se understand court processes and have a meaningful opportunity to present their claims;²⁴ and the 2007 State Justice Institute and Judicial Council of California, Administrative Office of the Courts volume, *Handling Cases Involving Self-Represented Litigants*, which establishes a set of principles for the management of pro se cases.²⁵

The California principles capture the dramatic shift that has occurred as courts have begun to erect a partial but increasingly effective safety net to protect the unrepresented. Among the measures urged are that: (1) cases be resolved on the merits; (2) courts recognize a duty to prevent miscarriages of justice; (3) all court-provided instructions be comprehensible to lay people; and (4) rules requiring equal treatment do not “prevent trial judges from providing assistance to self-represented litigants to enable them to

18. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007).

19. *Id.* at R. 2.6.

20. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 372 (2008).

21. *Id.* at 372.

22. *Id.* at 373.

23. *Id.* at 376.

24. *Id.* at 377.

25. STATE JUSTICE INST. AND JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS (2007), available at <http://www.nlada.org/DMS/Documents/1176151729.08/CA%20pro%20se%20Benchbook.pdf>.

comply with the rules of evidence and procedure.”²⁶ These proposals may not amount to a right to judicial assistance, but they do signal that the unrepresented increasingly may expect to receive substantial help.

Similar developments have occurred with respect to the provision of counsel. The barriers erected by *Lassister*, *Mallard*, and the rest have not been dismantled, but there has been movement toward the recognition of a right to a lawyer in a number of settings, most particularly with respect to certain issues affecting the family, involuntary commitment, and medical treatment.²⁷ These steps come in addition to already existing statutes at both the federal²⁸ and state level²⁹ that grant courts discretion to appoint counsel in civil proceedings. While courts have generally been reluctant, especially in the aftermath of *Mallard*, to use this discretionary power except in “exceptional circumstances,”³⁰ there has been a growing sensitivity to the importance of appointing counsel where there is a real opportunity for success on the merits.³¹

Recent developments clearly have not yet established a guarantee of judicial or lawyer assistance to the unrepresented in civil litigation but have made courts significantly more sensitive to the needs involved. Judges are authorized to help pro se litigants. Some courts have gone so far as to declare that judges who place obstacles in the path of pro se parties should be criticized or even sanctioned.³² Courts are being urged, Justice Thomas notwithstanding, to provide assistance while codes of judicial conduct make specific allowance for such intervention. The appointment of counsel represents a genuine option in cases of particular need,³³ as well as the potential for expansion if developments continue on their present course.

26. *Id.* at 6.

27. See Laura Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 2006 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 245 (2006).

28. 28 U.S.C. § 1915(e)(1).

29. More than one-half the states have statutes empowering courts to appoint counsel in civil proceedings under a variety of circumstances. See Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.—C.L. L. REV. 557, 585-86 n.121 (1988).

30. See Owens, *supra* note 10, at 1174-78.

31. *Id.* at 1179-80.

32. See Kerry Hill, *Meeting the Challenge of Pro Se Litigation: An Update on Legal and Ethical Issues* (Aug. 2000), http://www.ajs.org/prose/pro_legal_ethical.asp, cited in Engler, *supra* note 20, at 373 nn.33-34 (describing incidents in California and Colorado where judges were censured or otherwise rebuked for mistreatment of pro se litigants).

33. See Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 844 (1997) (reporting the appointment of counsel for pro se litigants on a somewhat regular basis in the Northern District of California).

The remainder of this Article will explore the treatment of unrepresented litigants in ADR settings. Section II will examine the difficulties faced by pro se litigants in managing their own arbitrations and court-annexed mediations. It will contend that in these settings the unrepresented may be substantially more disadvantaged than in litigation. Section III will explore the special risks that arise in ADR proceedings when parties appear alone, including: reduced prospects of success, heightened decision maker bias, corrosive paternalism, and lawless adjudications. Sections IV and V will then explore ways in which these risks may be reduced, particularly through the provision of counsel.

II. THE UNREPRESENTED IN COMPULSORY ADR SETTINGS – THE UNAVAILABILITY OF ASSISTANCE

A. Arbitration

From the early 1980s on, the Supreme Court assiduously expanded the reach of compulsory arbitration clauses through its reinterpretation of the Federal Arbitration Act (FAA).³⁴ The process began in 1983 with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,³⁵ where the Court recognized a national policy strongly favoring arbitration. In 1984 and 1985, the Court enforced agreements to arbitrate incorporated in adhesion contracts, drafted for the purpose of setting up franchise arrangements.³⁶ Over the course of the next half dozen years, the Court permitted drafting parties in the financial industry to compel adherent customers and employees to arbitrate rather than litigate a range of statutory claims,³⁷ eventually even including claims of civil rights violations.³⁸ It then extended the compulsory arbitration regime to consumers of other sorts.³⁹ The reach of imposed arbitration was expanded to virtually all consumers when, in 2002, the Court decided *Doctor's Associates, Inc. v. Casarotto*,⁴⁰ barring states from imposing consumer-protective limitations on the man-

34. 9 U.S.C. §§ 1-14 (2000). For an extended discussion of the growth of compulsory arbitration see Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005).

35. 460 U.S. 1 (1983).

36. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 617-19 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 3-4 (1984).

37. See, e.g., *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987) (concerning RI-CO and Securities Exchange Act of 1934 claims).

38. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

39. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

40. 517 U.S. 681, 688 (1996).

ner in which arbitration clauses could be established. This meant that arbitration might be imposed without a signed agreement, by notice sent long after the original contract had been made, or even as a printed declaration on shrink wrap packaging, so long as a single state would permit such conduct and the drafting party was incorporated there.⁴¹ Virtually all major credit card companies insist on adhesive arbitration agreements,⁴² which are estimated to govern more than one-third of all consumer interactions with large corporations.⁴³ Moreover, because of the tendency of contract drafters in unregulated markets featuring adhesive conditions to expand self-protective requirements, it should be anticipated that the hegemony of arbitration clauses is likely to grow in the future.⁴⁴

The compulsory arbitration offered to customers, consumers, and employers has been aptly described as “quick and dirty.”⁴⁵ It is dominated by drafting party repeat players who impose it on an ill-informed and contractually powerless adhering population. It is used to control virtually all disputes between the “little guy” and the large scale provider or employer. It frequently offers a sort of second-class justice. That perception was, perhaps unwittingly, confirmed by the Congress in 1998 when it authorized mandatory Federal court ADR programs,⁴⁶ but exempted cases involving more than \$150,000 (along with a number of other sorts of cases) from compulsory arbitration.⁴⁷ As Judge William Schwarzer has pointed out, this sort of treatment may be viewed as a signal that mandatory arbitration is only useful for “unimportant” matters.⁴⁸

Drafting party corporations have a decided advantage in the processes they mandate. The arbitrators involved in handling compulsory proceedings often rely on repeat-player drafters for much of their business.⁴⁹ This

41. See Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 158 (2006).

42. *Id.*

43. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1639 (2005).

44. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997).

45. Bryant Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 932 (2002).

46. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2000).

47. *Id.*

48. See William W. Schwarzer, *ADR and the Federal Courts: Questions and Decisions for the Future*, 7 F.J.C. DIRECTIONS 2, 3 (1994), cited in Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1798 n.165 (2001).

49. See Landsman, *supra* note 34, at 1614-16.

creates a situation in which arbitrators are beholden to drafters for their livelihood and, consciously or unconsciously, have a motivation to decide cases in a manner congenial to those sending them business.⁵⁰ In most cases, moreover, the corporate drafter involved in the arbitration is an experienced player that has been through the process many times and has a significant tactical advantage over the one-shot consumer or employee participant.⁵¹ The arbitrator is likely to come from a tight-knit homogenous population, far less diverse than the consumers or employees who appear before him. When the GAO looked at arbitrators in the financial industry, it found that 89% were male, 97% were white, and their average age was sixty.⁵²

Unsophisticated and ill-prepared adhering parties are most often the ones being dragged into arbitration by corporate opponents seeking vindication of some contractual claim. The credit card company, First USA, in the initial two years of its mandatory arbitration program, brought 51,622 claims while facing four from its customers.⁵³ The individuals compelled to arbitrate are seldom represented by counsel. When the National Arbitration Forum (“NAF”), a large ADR service provider, reported to the State of California on cases it had handled between January 2003 and March 2007, it disclosed that 96.5% of its consumer lending arbitrations involved unrepresented consumers.⁵⁴ Just as counsel is only present on one side, arbitration results are one-sided as well. A *Christian Science Monitor* examination of consumer debt arbitrations found that creditors won 96% of the time.⁵⁵

Unlike courts, arbitrators have no authority to assist the litigants appearing before them or to secure counsel for them. Arbitrators are prohibited from providing help to the parties.⁵⁶ They are present to hear the parties’ submissions but not to inquire or intervene.⁵⁷ If help is going to come to

50. *Id.*

51. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97 (1974).

52. See Landsman, *supra* note 34, at 1596.

53. See Sternlight, *supra* note 43, at 1655.

54. Memorandum, California Consumer Arbitration Data, at 3 (Navigant Consulting, July 11, 2008).

55. See Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCI. MONITOR, July 16, 2007, at 13.

56. Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 12 (2006); see also MODEL RULES OF PROF’L CONDUCT R. 2.4 (1983) (emphasizing that a lawyer serving as a third-party neutral shall communicate that she is not representing either of the parties).

57. See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standard of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 101 (1997); see also Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Advisory Con-*

participants in arbitrations, it must come from their own counsel. Yet, in none of the standards set forth in the Uniform Arbitration Act (“UAA”)⁵⁸ or the rules promulgated by the American Bar Association,⁵⁹ is there any authorization whatsoever for the appointment of counsel. This is not to say that the importance of counsel has gone unrecognized. Both the American Arbitration Association and the UAA have declared that there is a right to be represented by counsel (at one’s own expense) in arbitration proceedings.⁶⁰ The UAA prohibits the waiver of that right if the waiver was secured “prior to the initiation of the arbitration proceeding.”⁶¹ In explaining this principle, the UAA Commentary notes the special importance of counsel “in the context of an arbitration agreement between parties of unequal bargaining power.”⁶² Despite recognizing the importance of counsel and the risks posed by unequal power, the uniform act authorizes no steps to assist parties in securing legal help. In other words, a party may be forced into arbitration through the exercise of adhesive power without any hope of obtaining assistance, notwithstanding the neutral arbitrator’s clear understanding that the parties are not fairly matched and the weaker is in desperate need of legal advice.⁶³

Thus, unrepresented parties are contractually compelled by their far stronger and richer opponents to forego court hearings where there is the prospect of judicial assistance and perhaps even some hope for the appointment of counsel. Instead, they are required to appear in a forum where the adjudicator is prohibited from assisting them, and counsel’s appointment is literally impossible. It may be argued that this deprivation of legal help is neither intentional nor the doing of the contract drafting party, but simply the nature of things in our society. Assuming no malicious intent on the drafter’s part (a point we will return to), this is still troubling. That the financially superior party may be able to impose such conditions on its opponents without in any way compensating for the deprivation it works seems inequitable. The Supreme Court in its arbitration decisions,

ception of Lawyers’ Responsibility, 38 S. TEX. L. REV. 407 (1997) (analyzing various guidelines for lawyers filling the role of neutral).

58. See UNIF. ARBITRATION ACT (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf>.

59. The ABA House of Delegates approved the Revised Uniform Arbitration Act in 2001.

60. See UNIF. ARBITRATION ACT, *supra* note 58 § 16.

61. See *id.* § 16, cmt. 3.

62. See *id.* § 4, cmt. (4)(c).

63. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 69 (1997); see also UNIF. ARBITRATION ACT, *supra* note 58 § 4, cmt. (4)(c) (recognizing that there may be power imbalances between the parties, but not allowing the neutral to assist).

while endorsing arbitration, has expressed the view that the forum substituted for the courts must be a fair replacement, comparable to that offered in a move from federal to state jurisdiction where there is concurrent jurisdiction.⁶⁴ When that equivalence is undermined, there is reason to question whether the court's rationale for approving compulsory arbitration has been satisfied.

So far it has been assumed that the powerful adhesion contract drafter has not intentionally worked to deprive the adhering party of access to representation. That is not the reality some adhering parties have encountered. Drafters have, in a number of instances, abused their power not just to deprive their employees or customers of representation but of any hearing at all. One of the most egregious cases of this sort involved the Hooters restaurant chain.⁶⁵ Hooters insisted that all employees arbitrate all claims, including those involving statutorily prohibited forms of discrimination.⁶⁶ Hooters reserved to itself the exclusive right to select all arbitrator candidates.⁶⁷ Employees, but not the restaurant, were required to give notice of their claims. Hooters alone could move for summary disposition, make a record of the proceedings, and sue in court to vacate an arbitral decision that exceeded the arbitrator's authority. The Fourth Circuit condemned this arrangement as "a sham system unworthy even of the name of arbitration."⁶⁸ The *Hooters* case stands for the proposition that when drafters seek to deprive their opponents of the means to pursue a hearing, their conduct is illegitimate and should be condemned.

Hooters displayed the lack of subtlety for which it is famous. It was caught, and its scheme was denounced as nothing more than an effort to rob employees of an opportunity to be heard and vindicated. While that scheme, on its face, had little to do with access to counsel, it illustrates an inclination on the part of some drafters to adopt whatever strategies seem viable to thwart adhering party success. Those more subtle than Hooters have launched a series of initiatives that may be construed as efforts to prevent access to counsel and thereby, diminish the prospect of the filing of a successful claim. They have, for example, sought to shorten the statute of limitations.⁶⁹ A prime objective here seems to be to curtail the time in which assistance can be sought and legal prospects appraised. Other draf-

64. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (comparing arbitration forum to "concurrent jurisdiction").

65. *Hooters of Am. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

66. *Id.* at 936.

67. *Id.* at 938-39.

68. *Id.* at 940.

69. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002).

ters have sought to limit or bar discovery.⁷⁰ Here, the goal seems to be to thwart counsel's ability to investigate and to prepare an effective case. Another ploy has been to narrow the sorts of relief available,⁷¹ thereby rendering cases financially unattractive to contingency fee attorneys. Finally, some have moved to cut off awards of statutorily-mandated attorney's fees,⁷² a step with no other purpose than to deprive adhering parties of access to a lawyer.

Some may object that most of these steps have little to do with access to counsel and were not motivated by a desire to keep lawyers out. A closer look suggests otherwise. Professor Jean Sternlight demonstrated the existence of such a desire in a recent *Stanford Law Review* article.⁷³ What is more, she pointed out that no less an advocate of arbitration than Samuel Estreicher,⁷⁴ had reached the same conclusion, recognizing that employers manipulate the availability of arbitration to reduce the prospect of an employee obtaining legal assistance.⁷⁵ That contract drafters are wielding their power to prevent access to counsel suggests the need to protect access, at least at a level commensurate with that available outside the arbitration world, otherwise arbitration becomes a tool to thwart legal claiming.

Activities that interfere with securing counsel have disturbed a number of courts and led to findings that some arbitration agreements are "unconscionable."⁷⁶ They are not, however, the most provocative examples of the attack on access. That label is most properly applied to adhesion contract drafters' efforts to thwart class actions. It has long been understood that there are a number of claims that are simply uneconomical to bring on the basis of a single victim's loss.⁷⁷ These are, most often, cases where a minor but systematic injury has been done to a large group of similarly situated individuals by a single perpetrator and individual recovery would never warrant the retention of counsel and the prosecution of a lawsuit. In such circumstances, what is needed is a lawyer who can aggregate a large number of claims and recover an award that makes the effort economically

70. See, e.g., *Armendariz v. Found. Health Psycare Servs., Inc.*, 6 P.3d 669, 684 (Cal. 2000).

71. See, e.g., *Adams*, 279 F.3d at 894.

72. See, e.g., *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 214-15 (3d Cir. 2003); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997).

73. Sternlight, *supra* note 43, at 1653.

74. See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

75. *Id.* at 567-68.

76. See *supra* notes 70-72 and accompanying text.

77. See Issacharoff & Delaney, *supra* note 41, at 168-69.

worthwhile.⁷⁸ Many adhesion contract drafters have sought to bar such action by claiming that arbitration clauses require individual hearings⁷⁹ or by expressly prohibiting class action claims.⁸⁰ The clear thrust of all these efforts is to destroy the legal and monetary basis for attracting counsel. Some courts have found this strategy, like other attacks on access and consumers' interests, an unconscionable deprivation of adhering party rights.⁸¹ Yet others have rejected such arguments,⁸² and a number of arbitration service providers, including the American Arbitration Association and NAF, refuse to provide class-based arbitration.⁸³

In the end, compulsory arbitration has been imposed on a vast body of customers, consumers, and employees. It has removed them from the courts, and the legal protections offered there. It has substituted what often amounts to second-class justice. In the arbitral forum, these parties have faced conditions that effectively curtail their access to legal assistance. Some of these conditions have been purposely imposed by contract drafters with the objective of cutting off counsel and thereby, stifling claims.

It should be noted that criticism of arbitration has grown over the last decade.⁸⁴ Concern about the high cost of arbitration⁸⁵ and the absence of appellate review have increased.⁸⁶ While these concerns have not been enough to deter South Dakota incorporated credit card companies from taking advantage of local sweetheart legislation to impose arbitration on their nationwide clientele,⁸⁷ corporate enthusiasm for arbitration with equals has weakened.⁸⁸

Even in compulsory settings there has been some retreat. The financial industry was, for many years, the leader in the use of compulsory arbitra-

78. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28-31 (2000).

79. See *Champ v. Siegel Trading Inc.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (reviewing holdings in several circuits rejecting class actions on the basis of an arbitration agreement). *But see Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (recognizing arbitrator authority to consider class action proceeding).

80. See Landsman, *supra* note 34, at 1610-11 (discussing a range of arbitration agreements prohibiting class proceedings).

81. See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171-74 (9th Cir. 2003).

82. See, e.g., *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. 2001).

83. See Landsman, *supra* note 34, at 1610-11.

84. See Garth, *supra* note 45, at 927-28.

85. See Sternlight, *supra* note 43, at 1651-52.

86. See Garth, *supra* note 45, at 935-36.

87. See Issacharoff & Delaney, *supra* note 41, at 158.

88. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007).

tion.⁸⁹ As considered above, the Supreme Court's decisions in a series of cases involving the brokerage business opened the way to the radical expansion of the FAA. In the middle 1990s, however, a shift occurred after a number of Wall Street firms were caught up in headline-making sexual discrimination cases.⁹⁰ The victims of harassment and discrimination fought to avoid imposed arbitration, claiming that the process was dominated by industry-insider elderly white males who could not credibly claim to be fair and neutral.⁹¹ The victims' attacks, the sympathetic press coverage they received, and the repeated disclosure of lurid financial firm misconduct eventually convinced the National Association of Securities Dealers ("NASD"), the industry's self-regulatory organization,⁹² to withdraw its insistence on mandatory arbitration in such cases. As the NASD coyly put it, "After consideration of all the views presented, and in light of the public perception that civil rights claims may present important legal issues better dealt with in a judicial setting, the NASD determined that the appropriate action was to remove the arbitration requirement for such claims."⁹³ The New York Stock Exchange followed suit shortly thereafter.⁹⁴ Concerns about imposed arbitration have been expressed elsewhere as well and have reduced arbitration's credibility and appeal.

B. Court-Annexed Mediation

While compelled arbitration's reputation has been brought into question, another form of compulsory ADR, court-annexed mediation, has expanded dramatically. Part of its appeal has been that, at least as a theoretical matter, it operates quite differently from arbitration and does not impose solutions on unwilling participants. Instead, it is supposed to provide "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."⁹⁵ Its preferred status may be glimpsed in the Alternative Dispute Resolution Act passed by Congress in 1998.⁹⁶ That act sharply restricts the binding effect of arbitration when used in the cases of federal court liti-

89. See Landsman, *supra* note 34, at 1594-96.

90. *Id.* at 1597-98.

91. *Id.*

92. *Id.* at 1594.

93. *Id.* at 1598 quoted in Paul Rose, *Developing a Market for Employment Discrimination Claims in the Securities Industry*, 48 UCLA L. REV. 399, 413 (2000).

94. See Landsman, *supra* note 34, at 1599.

95. AM. ARBITRATION ASS'N, AM. BAR ASS'N & ASSOC'N FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmb1. (2005) [hereinafter STANDARDS FOR MEDIATORS].

96. 28 U.S.C. § 652 (2000).

gants⁹⁷ but imposes no such constraints on the mediation option.⁹⁸ Forty states now provide for mandatory court-annexed mediation.⁹⁹

According to the mediation community, the ideal mediation is one governed by party self-determination. Mediation is claimed to be a process in which the parties “com[e] to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”¹⁰⁰ Compulsory court-annexed mediation often fails to meet this ideal. Parties have no choice whatsoever about whether to participate in mediation. They are mandated to do so by court order. The methods used to bring parties into court-annexed mediation are, to put it plainly, “coercive.”¹⁰¹ This is not the conclusion of an opponent of mediation but of one of its earliest and staunchest proponents, Frank Sander.¹⁰² Professor Sander has argued that so long as the coercion ends when parties arrive at the mediator’s door, the process remains consistent with the seminal principle of self-determination.¹⁰³

Whether coercion ends at the door to the mediation room is debatable. Those who established court-annexed mandatory mediation programs and those who run them appear to have a very clear agenda—to settle cases. Legislatures that have been persuaded to support such programs have viewed them as a cost-effective way of dealing with rising judicial caseloads.¹⁰⁴ The chief criterion for providing funds has been the number of settlements arranged.¹⁰⁵ Courts asked about their mandatory mediation programs have been equally emphatic. A survey of Minnesota trial judges, for example, indicated that the judges’ fundamental reason for sending cases to mediation was so that they would be cleared from the court’s docket and settled.¹⁰⁶ Similar judicial attitudes are common all over the country. Critics of this approach have variously described mediators’ attitudes toward

97. See Crowne, *supra* note 48, at 1794.

98. *Id.* at 1793-94.

99. See Garth, *supra* note 45, at 928 n.3.

100. STANDARDS FOR MEDIATORS, *supra* note 95, § 1.

101. See Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 276-79 (2005).

102. See generally Frank E. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3 (2000).

103. See *id.* at 8.

104. See Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 613 n.21 (2002).

105. *Id.*

106. See Bobbi McAdoo, *All Rise, the Court is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 394-97 (2007).

settlement as an “obsession”¹⁰⁷ and as creating a pervasive “bias towards settlement.”¹⁰⁸ When settlement is king, the idea of self-determination is likely to be undercut—the only determination that is acceptable is the one that ends the case. The single measure of success then becomes: how many cases can be permanently dispatched.¹⁰⁹

Using settlement as the key metric and objective has skewed the mediation process. The mediators are likely to be sent the cases that judges do not want to handle or want to see disappear from the docket.¹¹⁰ This means that cases viewed as having less monetary or social significance are the ones that will be consigned to mediation.¹¹¹ Because of the ardent hope that mediated cases will not return, there appears to be a judicial inclination to simply “hand them off” with little supervision or review.¹¹² Even when there is some desire for review, it is likely to be circumscribed by the strict rules of confidentiality imposed by many states to insulate mediation proceedings,¹¹³ on the theory that post-mediation secrecy is necessary to foster candid negotiations and energetic settlement efforts by the mediator.¹¹⁴

Given the strong desire for settlement, mediators in court-annexed programs have adopted a variety of strategies to push parties toward compromise. At their most benign, these strategies (which are used outside the court-annexed context as well as within it) involve the exertion of subtle pressure on the parties to see the wisdom of the mediator’s recommendations about agreements. After extensive observation of mediators, Susan Silby and Sally Merry were able to catalogue a number of these. They noted that mediators routinely assert authority based on their experience in arranging settlements, their close relations with the court, and their “superior knowledge” of the dangers faced by parties who choose to go to trial.¹¹⁵ Mediators augment their power by controlling the agenda of the

107. Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 265-66 (2006).

108. Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 560 (2004).

109. See James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 795 (1997).

110. See Garth, *supra* note 45, at 938.

111. See Crowne, *supra* note 48, at 1770.

112. See Thompson, *supra* note 108, at 513.

113. *Id.* at 564-65.

114. *Id.*

115. See Susan S. Silby & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 12-13 (1986).

mediation—deciding who is to speak, on what topics, and when.¹¹⁶ If a settlement seems to be within reach, the mediator takes center stage and drafts the agreement.¹¹⁷ All of this, according to Silby and Merry, heightens mediator control and ability to produce settlements.¹¹⁸

An additional and potentially critical source of mediator power is the opportunity to provide the parties with evaluative information concerning the strengths and weaknesses of each side's case. There is a substantial debate within the ADR community about the propriety of evaluation because of the pressure it can exert on the parties,¹¹⁹ and the risk that it will turn the mediator into a provider of legal assessments.¹²⁰ The trouble with both of these results is that they tend to undermine self-determination and foster reliance on the mediator's judgment.¹²¹ Even so, evaluation is a central attribute of court-annexed mediation.¹²² Roselle Wissler, who has done some of the best empirical work on such mediation, observed in one of her large-scale studies that mediators assisted with case evaluation in 89% of the cases observed, opined on the value of the case 66% of the time, listed a range of settlement figures in 69% of the cases, and endorsed a single settlement figure 38% of the time.¹²³ These data appear to be fairly representative of the general run of mediator activity.¹²⁴

Some mediators have gone well beyond evaluation in exerting pressure or influence to achieve settlement. These intermediaries have used a number of tools including manipulation of the duration of proceedings to push reluctant parties toward settlement. The ploy of having parties forego lunch is a common tactic¹²⁵ and some have gone much further—pushing mediation sessions to eight¹²⁶ or even twelve hours,¹²⁷ sometimes with parties in fragile mental¹²⁸ or physical¹²⁹ health. Other mediators have resorted to intimidation and threats. In *Allen v. Leal*,¹³⁰ a mediator repeatedly

116. *Id.* at 14.

117. *See id.* at 15.

118. *See id.* at 8.

119. *See* Thompson, *supra* note 108, at 532.

120. *See* Stark, *supra* note 109, at 784-86.

121. *See* Thompson, *supra* note 108, at 533.

122. *See* Stark, *supra* note 109, at 785-87.

123. *See* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 656 (2002).

124. *See* Thompson, *supra* note 108, at 564.

125. *See* Hedeem, *supra* note 101, at 280.

126. *See* Vitakos-Valchine v. Valchine, 793 So. 2d 1094, 1096 (Fla. Dist. Ct. App. 2001).

127. *See* Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1144 (N.D. Cal. 1999).

128. *See id.*

129. *See id.*

130. 27 F. Supp. 2d 945 (S.D. Tex. 1998).

threatened a party in a police shooting case, declaring that the party had “zero chance of success and this will destroy your family [if you do not settle].”¹³¹ After this behavior was disclosed, a widely respected Texas mediator (Texas was the state in which the case had been filed) declared: “[A] little bullying is really just part of how mediation works.”¹³² The judge in *Allen* felt the need to publicly disavow the mediator’s statement.¹³³

These and other pressure tactics¹³⁴ have raised serious questions among widely respected ADR advocates about the integrity of court-annexed mediation. Some have suggested that mediation has been “co-opted” into an unrelenting pursuit of the courts’ settlement obsession,¹³⁵ and that this has resulted in a system devoted to “reconciling . . . citizens to . . . institutional reality”¹³⁶ rather than fostering genuine self-determination. Such criticism may overstate the difficulties in court-annexed mediation. The process appears to work satisfactorily in many places, and users often report satisfaction.¹³⁷ Yet it may not be a process well designed for the unrepresented. They have no advisors to help them deal with the pressures mediators may exert. Interestingly, much of the research on party satisfaction with mediation has focused on parties with lawyers rather than those proceeding pro se.¹³⁸ It may be open to question whether the same level of satisfaction would be found among the unrepresented.

Observers have noted that the settlements achieved in court-annexed mediation are likely to be powerfully influenced by the law governing the underlying dispute.¹³⁹ Whenever a mediator evaluates the law of a case, he or she arguably proves a legal opinion.¹⁴⁰ Unrepresented parties will frequently be incapable of appraising the accuracy of such opinions.¹⁴¹ Having no other source of legal insight, there is every likelihood that pro se litigants will rely on what the mediator tells them.¹⁴² This makes the unrepresented particularly vulnerable to the manipulations of mediators

131. See Hedeem, *supra* note 101, at 282.

132. *Id.*

133. 27 F. Supp. 2d at 948 n.5.

134. See Hedeem, *supra* note 101, at 283 (“[C]oercion through reports and recommendations to the court.”).

135. See Garth, *supra* note 45, at 928.

136. Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 139 (2004).

137. See Wissler, *supra* note 123, at 690-95.

138. *Id.* Attorneys had a key part in the processes observed and analyzed by Wissler.

139. See Stark, *supra* note 109, at 779.

140. *Id.* at 785-86.

141. *Id.* at 792-93.

142. *Id.*

bent on achieving settlement.¹⁴³ This vulnerability is, as will be considered below, not the sort that mediators are required to remedy.¹⁴⁴ What results is a situation in which the pro se litigant is left to face the “(1)trashing, (2) bashing, and (3) hashing it out”¹⁴⁵ of court-annexed mediation without advice, protection, or assistance.

Are there a significant number of pro ses in court-annexed mediation programs? It is not easy to determine. Anecdotal reports indicate their presence and their difficulties in a wide range of settings from housing court¹⁴⁶ to divorce court.¹⁴⁷ Some federal courts bar the assignment of the unrepresented to mediation programs,¹⁴⁸ but others have taken the opposite view.¹⁴⁹ In the previously cited survey of Minnesota trial judges, it was reported that 43% would assign pro ses to mandatory mediation—that number was little different from the 49% of judges who would send those with counsel to mediation.¹⁵⁰ In a number of ADR settings, most particularly some states’ matrimonial cases, pro se status may be imposed and lawyers excluded because of the fear that they will “adversarialize” the process.¹⁵¹

Mediators, unlike judges, are generally not supposed to render “opinions” or provide “advice.”¹⁵² They are instructed to remain disengaged from the parties. Anything that would require intervention to protect one party is most often classified as a “quasi-judicial function” (a revealing choice of words) and is off limits to mediators.¹⁵³ Those who serve as mediators are directed not to assess or guarantee the fairness of agreements.¹⁵⁴ What mediators are supposed to do is urge parties to be vigilant on their own behalf and verify all important claims made in the mediation.¹⁵⁵ Minnesota has mandated a script for its mediators that requires them to inform

143. *Id.*

144. *See infra* notes 152-161 and accompanying text.

145. *See* James A. Alfani, *Trashing, Bashing and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 73 (1991).

146. *See generally* Eric L. Fox, Note, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85 (1996).

147. *See generally* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

148. *See* S.D.N.Y. Civ. R. 83.12(e).

149. *See* E.D.N.Y. Civ. R. 83.11(b)(1).

150. *See* McAdoo, *supra* note 106, at 403-04.

151. *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensure Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351-52 (1995).

152. *See* Stark, *supra* note 109, at 784-85.

153. *See* McEwen et al., *supra* note 151, at 1334.

154. *See* Thompson *supra* note 108, at 534.

155. *Id.*

the parties that the mediator “has no duty to protect [them].”¹⁵⁶ Mediators have been urged, most particularly, to avoid appraising legal questions.¹⁵⁷ When non-lawyer mediators attempt such appraisals, their efforts may be viewed as the unauthorized practice of law.¹⁵⁸ When lawyer mediators do it, they open themselves to criticism about improper advising.¹⁵⁹ Mediators have been directed to inform the parties that they should seek their own lawyers.¹⁶⁰ Twenty states insist that this sort of directive be provided.¹⁶¹

Whatever else one might say, it is clear that these requirements erect a series of barriers to mediators helping pro se litigants. Mediators are not authorized to get involved, and face sharp criticism if they do. Unfortunately, this presents a virtually insoluble problem for the unrepresented. They cannot obtain a lawyer, but have been instructed that they need one, and the mediator who tells them this is powerless to appoint counsel or assist them. While the mediation process does not directly undercut access, it sharply increases the need for counsel to counter mediator pressure. It then offers no help with the heightened need it has created.

Lawyers often improve the mediation process once they are significantly involved. The Uniform Mediation Act appears to agree. In defending its standard of allowing parties to have counsel, the Act’s drafters declared that “because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide [on the utilization of counsel].”¹⁶² Empirical data suggest that attorneys do a good job in mediation. In 2002, Roselle Wissler examined two Ohio mediation programs where counsel appeared to be present in virtually all cases.¹⁶³ She found that attorneys engaged in extensive pre-mediation client preparation in 57% of the cases studied and virtually all cases had some preparation.¹⁶⁴ Attorneys spoke more than their clients in 63% of the mediations and spoke about as much as their clients in another 31%.¹⁶⁵

156. *Id.* at 534 n.133.

157. *See Stark, supra* note 109, at 778 & n.24.

158. *Id.*

159. *Id.*

160. For lists of states requiring mediators to suggest that parties seek review by counsel, see McEwen et al., *supra* note 151, at 1401-02, 1409.

161. *Id.*

162. *See* UNIF. MEDIATION ACT OF 2003, § 10 cmt. (2003) available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

163. Counsel for plaintiffs and defendants were present in virtually all the cases analyzed by Wissler (99% for plaintiff attorneys in one study, 98% for defense attorneys in the other). *See* Wissler, *supra* note 123, at 657.

164. *Id.* at 654.

165. *Id.* at 658.

Clients felt less pressure¹⁶⁶ and felt that the process was fairer¹⁶⁷ because of these interventions. Assessment of an early neutral evaluation program in the Northern District of California came to similar conclusions. There, 42% of the lawyers undertook earlier case preparation, and 78% of attorneys said they were well prepared.¹⁶⁸

Recognizing the challenges mediation can pose, particularly for pro se litigants, some states have required additional procedural protections for those involved in mediation proceedings. Some have imposed a post-agreement “cooling off period” during which the settlement may be rescinded.¹⁶⁹ This requirement borrows directly from the consumer rights tool kit that protects purchasers from high pressure salesmen hawking such wares as aluminum siding and encyclopedias. Other states have insisted that before a settlement may be finalized certain “magic words” must be agreed to and no other formula will create a binding deal.¹⁷⁰ There is a demonstrable trend toward more formalized protections across the board—a trend at odds with the basic informality of mediation,¹⁷¹ and one that seems, at least partly, designed to make up for the absence of counsel.

III. THE RISKS OF LEAVING PRO SE LITIGANTS UNREPRESENTED IN ADR PROCEEDINGS

Leaving pro se litigants unrepresented in ADR proceedings opens them to a number of risks. The most obvious, of course, is of an unmerited adverse judgment. While there is little systematic evidence on the point, it would appear that pro ses fare badly in a number of ADR settings. One of the few areas scrutinized has been investment industry arbitrations. There, it has been reported that represented investors obtain far better results than the unrepresented.¹⁷² Other data indicate that consumers (who are, overwhelmingly, unrepresented) lose 96% of adhesion-contract-imposed arbitrations.¹⁷³ It is hard to believe that these results are warranted, particularly in light of the previously discussed case law regarding unconscionable behavior by drafting parties and their concerted efforts to stifle legitimate claims. Data regarding mediation are even harder to come by, but recent

166. *Id.* at 687.

167. *Id.*

168. See Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1512, 1521 (1994).

169. See Thompson, *supra* note 108, at 539.

170. *Id.* at 540.

171. *Id.* at 541.

172. See Sternlight, *supra* note 43, at 1659 n.140.

173. See Baribeau, *supra* note 55 and accompanying text.

emphasis on protective legislation and the required warning about the need for consultation with independent counsel suggest a general perception of participant vulnerability to unfair settlements.

Apart from loss on the merits, the most serious risk posed by the absence of counsel is of a loosening of constraints on bias. The informality of ADR is more likely than formal court proceedings to offer an opening to ADR-provider bias.¹⁷⁴ Courts have elaborate mechanisms to check prejudice and an ethos that emphasizes the importance of evenhanded treatment. It is possible that the effect of the absence of these structures is to open the door to various sorts of animus.¹⁷⁵ The absence of any significant opportunity for judges to review ADR proceedings exacerbates the prospect of biased behavior, since the processes have been classified as confidential¹⁷⁶ and placed beyond judicial scrutiny, at least with respect to most questions.¹⁷⁷ A number of ADR critics have forcefully argued that informal and unreviewable processes lead to discrimination against women.¹⁷⁸ Others have noted that the overwhelming majority of ADR providers are high status middle aged or older white males.¹⁷⁹ Some see this as increasing the prospect of decisions biased against minority-group participants.¹⁸⁰ Such discrimination has been observed in some ADR-focused empirical work.¹⁸¹ In the arguably analogous context of auto sale negotiations, Ian Ayres has found substantial evidence of such discrimination.¹⁸²

In the compulsory arbitration setting, bias of another sort is likely to arise—that resulting from market pressures on ADR providers to “sell” their services. As previously noted, adhesion contract drafters have the contractual power to designate ADR providers. Their choices will generate a flow of business that may be critical to provider prosperity.¹⁸³ Given this dependency, it should come as no surprise that, either consciously or not, providers may tilt toward those regularly sending them business. This does

174. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1385-89 (1985).

175. See *id.*

176. See Thompson, *supra* note 108, at 564-67.

177. *Id.*

178. See McEwen et al., *supra* note 151, at 1319 & n.2.

179. See Landsman, *supra* note 34, at 1626-27.

180. See Delgado et al., *supra* note 174, at 1375-91.

181. See generally Gary LaFree, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & POL'Y REV. 767 (1996).

182. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995).

183. See Garth, *supra* note 45, at 932-35; Landsman, *supra* note 34, at 1614-15.

not necessarily mean that arbitrators will decide every case in a contract drafter's favor, but rather that results, on the whole, will be satisfactory to such parties. Otherwise, they are likely to take their business elsewhere.¹⁸⁴ The risks that these business realities pose have led some states to require that arbitrators disclose all of their connections to the parties so that the adhering one-shot participant can raise a conflict of interest objection in appropriate cases.¹⁸⁵

The pressure on arbitration service providers to ingratiate themselves to corporate clients has led to another sort of bias as well—the adoption of arbitral rules congenial to big business interests. Providers who customize their services to satisfy business objectives are likely to be more popular.¹⁸⁶ This may be what has led several providers to ban class action arbitrations.¹⁸⁷ Some providers have gone so far in their efforts to curry business favor through procedural manipulation that courts have found them insufficiently neutral and unable to conduct fair arbitrations.¹⁸⁸ For example, a number of courts have found that NAF has unconscionably titled its procedures in favor of large corporate clients.¹⁸⁹

Recently the Supreme Court, in *Caperton v. A.T. Massey Coal Co., Inc.*,¹⁹⁰ considered a case in which one side in a legal dispute had effective control over the selection of the adjudicator. Because Massey's outsized judicial campaign contributions clearly raised the most serious questions about judicial neutrality, the Court held that due process required the recusal of the beneficiary of his largesse. The Court declared: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause."¹⁹¹ It seems clear that this sort of thing happens in compulsory arbitration, in all but the most formal sense. In light of *Caperton*, the due process issue would seem quite serious, indeed.

Yet a third source of bias has been identified in arbitration, one often referred to as "repeat player" bias. Marc Galanter, in a path-breaking 1974 article, argued that repeat players have a decided advantage in a variety of adjudicatory settings because of their experience-based knowledge of the

184. See Garth, *supra* note 45, at 932-35.

185. See *id.* at 935. This assumes a level of adhering party sophistication that is seldom realistic.

186. *Id.* at 934.

187. See Landsman, *supra* note 34, at 1615.

188. *Id.* at 1615-17.

189. *Id.* at 1615-16.

190. 129 S. Ct. 2252 (2009).

191. *Id.* at 2265.

process and their awareness of the predilections of decision makers.¹⁹² These repeat players know how to select the most sympathetic adjudicators and how to most effectively argue their positions. This gives them a powerful advantage, which has been observed in the arbitration setting¹⁹³ and has been identified as a matter of concern in mediation as well.¹⁹⁴

For mediation participants, the bias in favor of settlement poses particular problems. As already noted, this bias arises out of the pressures exerted by both legislatures and courts to see the maximum number of settlements arranged. Since there is little effective review, mediators can push for settlements in cases where the bargain may not be fair. Mediators may use a number of pressure tactics, including partial or inaccurate legal evaluations, extended negotiating sessions, and even intimidation. The result of these tactics is that agreements are skewed to the mediator's need for settlement rather than the parties' needs or wishes. The most vulnerable participants in such cases will be the pro se litigants who must deal with this heightened pressure unaided by counsel.

Much of involuntary ADR is infused with a paternalistic attitude akin to the other sorts of bias already discussed. ADR advocates have felt free to "coerce" parties "into" alternatives to the courtroom.¹⁹⁵ This sort of coercion undermines self-determination and sets an important precedent. If parties are too ignorant to understand what processes are good for them, so the thinking goes, then, perhaps, they are also incapable of recognizing an appropriate deal when it is offered. This kind of analysis provides a justification for all types of pressure. Paternalism is a mindset that deprives its subjects of freedom of choice and personal dignity.¹⁹⁶ It is also a rejection of the voice of the marketplace, suggesting that if consumers do not want your product or your solution, it must be the consumers' fault. Not only businesses, but entire social systems, like the Soviet Union, have failed by relying on this command-and-control approach.¹⁹⁷ It is a short step from paternalism to the adoption of an attitude that views disputants as sufferers from a social disease requiring involuntary treatment.¹⁹⁸ The dignity-

192. See Galanter, *supra* note 51.

193. See Sternlight, *supra* note 43, at 1650.

194. See Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, But Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003, 1036 (2007).

195. See Delgado et al., *supra* note 174, at 1396-97; Hedeem, *supra* note 101, at 277-78.

196. See Stephan Landsman, *The Growing Challenges of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 452-53 (2009).

197. See Inga Markovits, *Law and Order—Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513, 518 (1982).

198. See Delgado et al., *supra* note 174, at 1397.

destroying and self-serving character of this perspective has been noted by critics, especially in the matrimonial context where it has been frequently used to deprive women of power and respect.¹⁹⁹

The procedures used in compulsory ADR heighten another sort of risk, the adoption of an ill-fitted resolution in derogation of facts or law. First, ADR practitioners generally agree that sessions should be held before discovery is completed.²⁰⁰ This reduces the likelihood that all the salient facts will be known and considered in the ADR appraisal of the case. While cutting discovery short may be defensible when lawyers are available to the parties to appraise the risks, the tactic is decidedly more dangerous when the unrepresented are involved. Second, at the sessions held to resolve the dispute, no rules of evidence apply, and the introduction of information may be curtailed at any time.²⁰¹ This slights the ascertainment of facts in favor of attempts to get resolution. Again, it is the pro se litigant who is likely to be most vulnerable. Third, ADR providers are generally not obliged to provide findings of fact or conclusions of law.²⁰² There is no way to know if critical information has been considered or legal principles recognized. All these problems are compounded by strict confidentiality rules²⁰³ and the absence of appellate review.²⁰⁴ If a mistake is made, a risk that is higher with pro se participants, there is no reliable corrective mechanism.

The pressure to settle and the poor quality of proceedings in compulsory ADR make it less likely that unrepresented parties will get a real chance to voice their views. The limits imposed by arbitrators and mediators, in a hurry to resolve cases, make it difficult for parties to speak up.²⁰⁵ Proceedings tend to be fast with little time for dialogue.²⁰⁶ ADR providers working small cases are likely to be poorly compensated,²⁰⁷ if they are paid at all.²⁰⁸ They are unlikely to see it as their job to devote great time or effort to satisfying a party's desire to tell his or her story. All of this stacks the deck against providing what a number of social scientists call "voice"—the op-

199. See Grillo, *supra* note 147, at 1549-50.

200. See Garth, *supra* note 45, at 935.

201. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2181 (1993); Crowne, *supra* note 48, at 1773 n.24.

202. See Bernstein, *supra* note 201, at 2181.

203. See Hedeem, *supra* note 101, at 283-84.

204. See Garth, *supra* note 45, at 935.

205. See Landsman, *supra* note 34, at 1620.

206. *Id.*

207. See Garth, *supra* note 45, at 938-39.

208. *Id.*

portunity to express views, tell a story, and feel that one has been heard.²⁰⁹ Tom Tyler, one of the leading empirical analysts of this question has persuasively argued that the opportunity to speak one's mind and be listened to is critical to participant satisfaction.²¹⁰ If this is correct, what should we make of the data suggesting general participant satisfaction with certain forms of mandatory ADR?²¹¹ The key may be that in most of these forms, the parties involved were represented by counsel²¹² and had multiple opportunities for voice both with and through their lawyers.²¹³ Taking the lawyers out of the equation substantially heightens the risk of dissatisfaction.

IV. RESPONDING TO THE RISKS

The risks engendered by compulsory ADR have not gone unappreciated. They have led to a number of reform proposals and initiatives, the consequence of which has been heightened formality in the ADR process. Arbitrators must make pre-hearing conflict-of-interest disclosures so that more effective use may be made of recusal mechanisms. Scripted warnings must be supplied urging parties to seek independent appraisals of fairness. Interference with discovery, statutes of limitations, and remedies have all been curtailed as potentially unconscionable, at least in some jurisdictions. One particularly canny observer has pointed out that these and other changes have injected more law into ADR processes and made them ever more law like.²¹⁴

The efficacy of these reforms is open to question. They have begun to transform a set of processes that were intended to offer an alternative to law into legal proceedings. This has not been done to advance ADR's espoused principles, but to maintain the credibility of compulsory extrajudicial resolution mechanisms which have generated the sorts of pressures and biases likely to undermine legitimacy. Some leading ADR proponents have been appalled by these changes and have argued that they undermine the principles and practices that make ADR valuable.²¹⁵ Some have gone further and suggested that what is really needed to ensure fairness is not a set of internal constraints, but external judicial review of all compulsory ADR

209. See TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 88-89 (1997).

210. *Id.*

211. See Wissler, *supra* note 123, at 690-94.

212. *Id.* at 657-58, 685-86.

213. *Id.*

214. See Garth, *supra* note 45, at 950.

215. See, e.g., Alfini, *supra* note 145.

proceedings.²¹⁶ Such proposals appear wildly impractical. The sheer volume of such matters is likely to be overwhelming and any sort of robust review would be likely to undercut whatever efficiency advantages ADR delivers to the courts.²¹⁷ Such review is also likely to reduce the free-flow of settlements in the courts, thereby reducing the incentive to employ ADR techniques.²¹⁸

The introduction of counsel into compelled ADR proceedings involving pro se's may offer a better solution than formality or review. Neither of the latter two has worked very well. Formality is inconsistent with the organizing principles of ADR. Moreover, formality can only work if it is effectively policed, and the judges seem not to have had the time or motivation for that sort of effort. If fairness is to be achieved, a number of commentators have concluded, it is the interposition of counsel that will be needed.²¹⁹ The UAA recognized a particular utility of counsel in situations where a disparity of power exists.²²⁰ Lawyers can reduce the pressure felt by ADR participants²²¹ and provide a buffer against coercion and manipulation. They can supply professional knowledge and judgment,²²² thus helping to overcome the substantial information disadvantage faced by the unrepresented.²²³ ADR participants have appreciated counsels' assistance, where available, and found it valuable in helping to secure satisfactory resolutions.²²⁴

All that said, the introduction of counsel poses serious challenges. The first, of course, is the absence of resources to pay for counsel's help.²²⁵ Lawyers' time is expensive and effective assistance requires adequate preparation. Finding resources to pay attorneys poses a huge challenge—one that in the past has intimidated those seeking solutions to a range of problems posed by pro se litigants, both civil and criminal.²²⁶ Even assuming that resources can be found (a question to be addressed in the next section), there remains the risk that the very things that make counsel attrac-

216. See Crowne, *supra* note 48, at 1809-10.

217. See Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993 (1992).

218. See Thompson, *supra* note 108, at 513-14.

219. See McEwen et al., *supra* note 151, at 1347-48.

220. See *supra* notes 60-63 and accompanying text.

221. See Delgado et al., *supra* note 174, at 1403; McEwen et al., *supra* note 151, at 1361.

222. See McEwen et al., *supra* note 151, at 1379-85.

223. See Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 239-40 (2005).

224. See *supra* notes 162-68 and accompanying text.

225. See Stark, *supra* note 109, at 777 & n.21; see also Engler, *supra* note 20, at 395-96.

226. See Landsman, *supra* note 196, at 443-44.

tive—legal information and forensic skill—may be used by attorneys to manipulate clients into accepting inappropriate resolutions.²²⁷ This sort of difficulty has been encountered in the criminal process²²⁸ and may be likely to arise in the civil setting if significant time and money pressures are encountered. The answer to this challenge is far from clear but may be a topic particularly appropriate for consideration by the organized bar in its deliberations about rules of ethics.

V. FOCUSING ON COUNSEL AS A REMEDY

Compelling the unrepresented to participate in arbitrations or court-annexed mediations poses clear risks. It is critical to recognize that in both compulsory arbitration and mandated court-annexed mediation the forum being imposed on the unrepresented heightens the need for legal advice. At the same time, each setting is structured so as to prohibit assistance from the presiding official. If the imposing entity, either contract drafter or court, heightens the need for legal help by its unilateral choice of an ADR process and then offers a process where the only realistic opportunity for that help is undermined, its action is a serious diminution of the opportunity to contest or participate. Various sets of ADR principles decry any effort to bar the participation of counsel retained by a party.²²⁹ What happens with the pro se litigant is functionally equivalent—assistance is blocked. That result should not be permitted. It intensifies the existing power imbalance and increases the more powerful party's already substantial advantage.

In the arbitration process when adhesion contract drafters have seriously impaired the prospects of adherents through the manipulation of the process, some courts have found the adhesion contract's requirements unconscionable.²³⁰ A number of courts have reacted in this way to constraints on discovery, the shortening of statutes of limitations, and the revocation of remedies.²³¹ Some courts have embraced a similar rationale in voiding a prohibition of class actions.²³² Especially in the latter case, the underlying basis for decision has been the insight that what the ban does is deprive the adhering party of access to counsel.²³³ By a parity of reasoning, where the

227. See Thompson, *supra* note 108, at 533.

228. Joyce H. Vesper, *An Unforgettable Affair*, 25 AM. J. FORENSIC PSYCHOL. 31, 34-36 (2007).

229. See *supra* notes 60-63 and accompanying text.

230. See *supra* notes 68-69 and accompanying text.

231. See *supra* notes 69-71 and accompanying text.

232. See *supra* notes 79-82 and accompanying text.

233. See *supra* note 72 and accompanying text.

effect of an individual's pro se status and the restrictive advising requirements (imposed as a part of insistence on mandatory participation in ADR proceedings) work to confront the pro se participant with serious legal questions while offering no opportunity for advice from the presiding officer, or otherwise, the process should be deemed unconscionable or the party insisting on ADR should be required to provide the disadvantaged participant with appropriate legal assistance. Not only does fundamental fairness require such a response but it works as a needed deterrent to those who would be tempted to use ADR to deny their opponents an opportunity for voice and redress. It might be argued that such a requirement would end ADR as we know it. First, there is no substantial evidence that if ADR officers were required to act in the way judges do that ADR would be undermined. Second, in light of recent steps to embrace a form of "unbundling" that allows a lawyer to take on just one aspect of or procedural step in a case,²³⁴ such a requirement might prove to be reasonably economical and a remedy precisely tailored to the special challenge of compelled arbitration involving pro se litigants.

One other situation should be addressed. Arbitration clauses have, on occasion, sought to curtail statutory entitlements to attorney's fees.²³⁵ The clear objective of the statutes involved has been to help those claiming statutory rights find counsel to assist them in making their claims.²³⁶ Where such entitlements exist, the shift into arbitration should never be permitted to defeat the legislature's determination that the assistance of counsel is to be encouraged to ensure the vindication of meritorious claims. To allow the suspension of the attorneys' fees provisions is to invite the very sort of deprivation the legislature was at pains to overcome. Otherwise, access to a lawyer could be barred at the whim of any adhesion contract drafter.

Jean Sternlight has argued that compulsory arbitration requirements are, in many cases, the functional equivalent of a forced waiver of the Seventh Amendment right to jury trial.²³⁷ She has pointed out that, usually, waivers of constitutional rights are suspect unless they are knowing, voluntary, and

234. See generally Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563 (2007).

235. Martin M. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 796 (2003).

236. See DAVID MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* 255 (1976) ("It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation.")

237. See generally Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

intelligent.²³⁸ Of course, the waivers affected by adhesive arbitration requirements are none of these things. Despite the power of Professor Sternlight's analysis, this argument has not made much headway in the courts.²³⁹ On the basis of that experience, it is hard to say that a less specific right—one perhaps arising out of the due process clause to secure access to representation—is likely to gain court approval. Yet, the conscious effort of some in positions of unilateral power to deprive their opponents of all advice and assistance raises questions worthy of judicial consideration. When the motive of the powerful is to deny an opponent the opportunity for representation, intervention may be warranted. The federal district court in the recent KPMG tax fraud prosecution was faced with something like this sort of behavior when the government sought to exert pressure on KPMG to cut off the payment of legal fees to various of its accused executives.²⁴⁰ The court harshly criticized the government for its unfair tactics and protected access to counsel paid for by the corporate employer. The criminal setting and the involvement of the government make KPMG different from the present problem, but there is no doubting the court's belief that schemes to cut off access deserve the sharpest rebuke. The same sort of judicial attitude may be observed in a number of cases where pretextual claims of conflict of interest have been used in efforts to have counsel removed.²⁴¹ The consistent theme is judicial antipathy toward strategies that seek to deprive parties of counsel's assistance.

The situation in mediations is not nearly so clear cut. There is, generally, no animus on anyone's part to cut off access when mandatory mediation is imposed. Yet, the result of assigning a pro se litigant to mediation is often the same—consignment to a forum where advice is unavailable although there is a pressing need. Some courts, like the Southern District of New York, have concluded that placing the self-represented in this position is inappropriate and should be prohibited.²⁴² Others, however, have had no such scruple. In light of the risks involved, courts should follow the Southern District's lead or make provision for representation (perhaps “unbundled”) through such mechanisms as 28 U.S.C. § 1915(e). To do less is to join in the manipulative games of those who place settlement ahead of fair treatment. When courts impose burdens that seriously interfere with the success of impecunious litigants, they raise significant questions about un-

238. *Id.* at 678.

239. *Id.*

240. *See* United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

241. *See* Machecca Transport Co. v. Philadelphia Indemnity Co., 463 F.3d 827, 833 (8th Cir. 2006); *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983).

242. *See supra* note 148 and accompanying text.

equal treatment. At least on the criminal side, such burdens, be they connected to the purchase of a transcript²⁴³ or the testimony of an expert,²⁴⁴ have been rejected.

Two particular warning signs suggest the urgency of addressing the problem experienced by the unrepresented in compulsory ADR settings. The first is the incredibly low rate of success for pro ses in such settings. While the data are patchy, they suggest a lopsided win rate for adhesion contract drafters and a particular disadvantage for the unrepresented. These results may have other explanations, but the burden of defending them should be on those who have imposed processes in which they virtually never lose. While this is an argument specifically addressed to arbitration, the high level of settlements in many court-annexed mediation programs raises similar questions.

Recently, the Supreme Court in an ERISA case entitled *Metropolitan Life Insurance Co. v. Glenn*,²⁴⁵ analyzed the particular dangers that arise when a decision maker responsible for resolving disputes over benefits has a conflict of interest. Such conflicts arise, the Court said, when there is a “real or seeming incompatibility between one’s private interest and one’s public or fiduciary duties.”²⁴⁶ When such circumstances exist care must be taken to scrutinize outcomes and reject those that have the appearance of self-dealing even at the expense of increasing costs and inefficiency. In compulsory arbitration, the arbitrators who depend on repeat-player adhesion contract drafters for steady employment face such conflicts. Their work should be policed. Similar concerns have been voiced about the impact of settlement pressure on mediators. In both settings, the risk needs to be addressed either by busy courts or by reliance on the provision of counsel to the disadvantaged.

243. See generally *Griffin v. Illinois*, 351 U.S. 12 (1956).

244. See generally *Ake v. Oklahoma*, 470 U.S. 68 (1985).

245. 128 S. Ct. 2343 (2008).

246. *Id.* at 2348 (citing BLACK’S LAW DICTIONARY 319 (8th ed. 2004) (“conflict of interest”).