Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts

Irving R. Kaufman

Recommended Citation
CONTENTS

ARTICLES

Reform for a System in Crisis:
Alternative Dispute Resolution in
the Federal Courts .......................Irving R. Kaufman 1

Following Dead Precedent: The
Supreme Court's Ill-Advised Rejection
of Anticipatory Overruling ..........C. Steven Bradford 39

NOTES

Interpreting the Direct Effects Clause of the
FSIA's Commercial Activity Exception .............. 91

Undue Hardship: Title I of the Americans
With Disabilities Act......................... 113

Will the CERCLA Be Unbroken? Repairing the
Damage After Fleet Factors .................... 135
ARTICLES

COMPLEX LITIGATION REFORM AND ARTICLE III JURISDICTION ............ Linda S. Mullenix 169

THE SUBSIDIARY: DOCTRINE WITHOUT A CAUSE? ................. Joseph H. Sommer 227

"ONE NATION INDIVISIBLE, WITH LIBERTY AND JUSTICE FOR ALL": LESSONS FROM THE AMERICAN EXPERIENCE FOR NEW DEMOCRACIES ... Patricia M. Wald 283
CONTENTS

ARTICLES

On Strategy ..................... Richard K. Neumann, Jr. 299
A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions ............. Rebecca White Berch 347

NOTES

Garcia Revisited: The Age Discrimination in Employment Act's Application to Appointed State Court Judges ......................... 403
“A Fresh Start With Someone Else’s Property”: Lien Avoidance, the Homestead Exemption and Divorce Property Divisions Under Section 522(f)(1) of the Bankruptcy Code ......................... 423
Cross-Examination of Defendant’s Character Witnesses: In Favor of the Prosecutor’s Inquiry Into the Charges at Bar ................. 453
ARTICLES

REMARKS DELIVERED ON THE OCCASION OF THE PRESENTATION OF THE FORDHAM-STEIN AWARD TO THE HONORABLE WILLIAM HUGHES MULLIGAN ..........John D. Feerick 479

EQUAL PROTECTION AND MORAL CIRCUMSTANCE: ACCOUNTING FOR CONSTITUTIONAL BASICS ...............Donald E. Lively 485

TWO FACES OF DISPARATE IMPACT DISCRIMINATION ................. Pamela L. Perry 523

JUDGING THE NINTH AMENDMENT ............Sol Wachtler 597

NOTES

PARTNER BANKRUPTCY AND PARTNERSHIP DISSOLUTION: PROTECTING THE TERMS OF THE CONTRACT AND ENSURING PREDICTABILITY .............. 619

REIMBURSEMENT OF INDENTURE TRUSTEES FOR SUBSTANTIAL CONTRIBUTION UNDER SECTION 503 OF THE BANKRUPTCY CODE .................. 647

APPELLATE JURISDICTION FOR CIVIL FORFEITURE: THE CASE FOR THE CONTINUATION OF JURISDICTION BEYOND THE RELEASE OF THE RES ............... 679

COPYRIGHT PROTECTION OF SSO: REPLETE WITH INTERNAL DEFICIENCIES AND PRACTICAL DANGERS ...... 699

CRIMINAL MALPRACTICE: PRIVILEGE OF THE INNOCENT PLAINTIFF? ..................... 719
ARTICLES

A Dedication to John Calamari .......... Joseph M. Perillo 735

Equal Protection and the
Procedural Bar Doctrine in
Federal Habeas Corpus ............ Laura Gaston Dooley 737

1990 Annual Antitrust Review ........ Michael Malina &
Richard M. Steuer 773

NOTES

Estimating Aggregate Damages in Class-Action
Litigation Under Rule 10b-5 for Purposes
of Settlement ......................... Jon Koslow 811

Attorney’s Fees in Common
Fund Actions ......................... Monique Lapointe 843
CONTENTS

SYMPOSIUM

FOREWORD: ... AND BACKWARD: DEATH AND TRANSFIGURATION AMONG THE SAVINGS ASSOCIATIONS .......... Michael P. Malloy S1

THE SAVINGS AND LOAN CRISIS ........ Carl Felsenfeld S7

THE S&L DEBACLE ...................... Lawrence J. White S57

THUMBS ON THE SCALE: THE ROLE THAT ACCOUNTING PRACTICES PLAYED IN THE SAVINGS AND LOAN CRISIS .......... Richard C. Breeden S71

DEREGULATION: INVITATION TO DISASTER IN THE S&L INDUSTRY ............ Fred E. Case S93

PRIVATE MARKET SOLUTIONS TO THE SAVINGS AND LOAN CRISIS: BANK HOLDING COMPANY ACQUISITIONS OF SAVINGS ASSOCIATIONS .......... Lissa Lamkin Broome S111

AFTER THE FALL: THE CRIMINAL LAW ENFORCEMENT RESPONSE TO THE S&L CRISIS .................. Bruce A. Green S155

JUDICIAL RESPONSES TO THE RECENT ENFORCEMENT ACTIVITIES OF THE FEDERAL BANKING REGULATORS ...... Lawrence G. Baxter S193

A STATE'S RESPONSE TO THE UNITED STATES TREASURY DEPARTMENT PROPOSALS TO MODERNIZE THE NATION'S BANKING SYSTEM .................. Jill M. Considine S243

NOTES

TOO MANY CONSONANTS AND NOT ENOUGH CONSONANCE: THE DEVELOPMENT OF THE S&L REGULATORY FRAMEWORK ................. S263

CAUSES OF THE SAVINGS AND LOAN DEBACLE ............... S301

PLAYING WITH FIRREA, NOT GETTING BURNED: STATUTORY OVERVIEW OF THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT OF 1989 ................. S323
THE RESOLUTION TRUST CORPORATION: WASTE
MANAGEMENT AND THE S&L CRISIS ..................... S339

THE OFFICE OF THRIFT SUPERVISION ..................... S363

THE FDIC'S ENHANCED POWERS OVER SAVINGS
ASSOCIATIONS: DOES FIRREA
MAKE IT "SAIF"?........................................... S381

A NOTE TO CONGRESS AND THE FDIC: AFTER
FIRREA, WHERE'S THE BIF? ............................. S411
REFORM FOR A SYSTEM IN CRISIS: ALTERNATIVE DISPUTE RESOLUTION IN THE FEDERAL COURTS

by

IRVING R. KAUFMAN*

INTRODUCTION

In its third century, the federal court system has entered a period of crisis. Faced with ever-burgeoning caseloads and essentially static resources, the nation's courts fall further and further behind the promise of the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive determination of every action." Long before Charles Dickens's scathing attacks on the legal system, the delay and cost of adjudication was a familiar target. For the last four decades, reform groups have searched for ways to reduce court congestion and we have been warned for at least ten years that relieving our overburdened court system is imperative.

Yet there is a new urgency abroad in the legal community, a recently emerging sense that the stability and legitimacy of the system are genuinely at risk. Many observers see the courts on the verge of buckling under the strain; one view from the trenches sees the problem of delay as "beyond the crisis stage." The problem is not merely one of harried judges. Litigants, people with grievances, are being denied meaningful access to the courts. Delay prevents the courts from doing their job—
resolving people's disputes at reasonable costs so that they may return to their normal lives.

After more than forty years on the federal bench, I am convinced that a decisive moment is at hand for the federal courts. The problem has grown beyond the reach of tinkering with the periphery of the judicial system. Flexibility, experimentation and a willingness to innovate are essential if the administration of justice is to keep up with the society we serve. What follows is a brief examination of proposed changes in judicial administration, stressing those that hold the greatest promise to reduce the major costs of justice—expense and delay.

I. Scope of the Problem and Some Causes

The Brookings Institution Task Force on Civil Justice Reform displayed great economy of expression in its 1989 report: "Civil litigation costs too much and takes too long." The expense of seeking judicial determination affects the litigants themselves most directly. Persons who seek redress in the courts, or who must defend themselves against legal action, often face staggering legal fees. The cost to our national economy is more insidious: every dollar American business spends on litigation and every hour United States executives spend in depositions are money and time diverted from developing or producing better products at lower prices.

As daunting as the cost of litigation may be, the monster of delay might be more imposing to litigants. In even our smaller urban jurisdictions, a delay of over two and a half years from filing of suit to trial has become routine. The median time from issue to civil trial in federal courts. See Berke, Surging Criminal Cases Jam Federal Court System, N.Y. Times, Sept. 26, 1989, at A24, col. 3.

8. An example of such an effort is the unprecedented step taken by ten federal district judges who moved to consolidate thousands of asbestos cases clogging their dockets. See N.Y. Times, Aug. 11, 1990, at A1, col. 5. Presumably, a single judgment awarded to similarly situated plaintiffs would lower transaction costs, allow for uniform damages and resolve many analogous cases in a timely manner. The judges' actions, however, have been subject to legal challenge from both plaintiffs' attorneys and defendant companies, and have suffered at least one adverse ruling by an appellate court. See Nat'l L.J., Sept. 3, 1990, at 3, col. 1.


10. Id. at 1.

11. See, e.g., Rosenberg, Rient & Rowe, Jr., Expenses: The Roadblock to Justice, 20 Judges' J. 16, 17 (1981) (because of the cost of litigation, "the bright promise held up by the American justice system is frequently a chimera"). But see Trubek, Sarat, Feltziner, Kriter, & Grossman, The Costs of Ordinary Litigation 31 UCLA L. Rev. 72, 123 (1983) (questioning whether most ordinary litigation is excessively costly to litigants and society).

12. Cf. Wermiel, Courting Disaster: The Costs of Lawsuits Growing Ever Larger Disrupt the Economy, Wall St. J., May 16, 1986, at 1, col. 6 (cost of litigation has become part of cost of production and is being passed on to consumers).

13. See Alschuler, Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808, 1822
district court is a year and a half, though the more difficult cases usually take far longer. Since 1986, the number of civil cases that have been on federal docket for more than three years has grown by a third, to 22,391.

This growth in backlog and delay is in part attributable to the absolute growth in federal caseloads—an increase of which I am painfully aware. In 1949, the year in which I was appointed to the Southern District of New York, 53,421 cases were brought in the district courts. By 1989, that number had grown to 233,293—an increase of over 430 percent. In 1961, the year President Kennedy elevated me to the Second Circuit, 4,204 cases were filed in the United States Courts of Appeals. This past year, 39,734 appeals were taken.

Of course, forty years has made for a faster, more complex and harder world in many respects, and the public might agree with David Copperfield that the courts might be improved if we judges "got up early in the morning, and took off our coats to the work." I am second to none in my admiration of hard work, but that particular ointment has already been liberally applied. In 1989, on average, federal district court judges were responsible for 485 filed cases, 407 of which were civil filings. In human terms, this is a crushing burden that translates into a need to dispose of more than a case a day or face an ever-growing backlog. When I began as a district judge, the workload was a third of its present prodigality.

(1986); see also T. Church, Jr., A. Carlson, J. Lee, & T. Tan, Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978) (describing findings of a national research project on inefficiency in the courts).


15. See 1989 Director's Report - Appendix 1, supra note 14, at 40; see also Labaton, supra note 6, at A1, col. 1 (combination of Speedy Trial Act and increase in drug-related indictments causing unprecedented delays for civil litigants).

16. See 1949 Director's Report, supra note 14, at 44.

17. See 1989 Director's Report - Appendix 1, supra note 14, at 22. This number represents a decline of over 6,000 cases from the previous year's filings.


19. See 1989 Director's Report - Appendix 1, supra note 14, at 3.

20. C. Dickens, David Copperfield 479 (1957).


22. See 1949 Director's Report, supra note 14, at 111. Of course, numbers provide only the sketchiest outline of a judge's labors. I am not alone in this view. Chief Judge
What accounts for this avalanche of cases and the resulting delay? The causes are almost as varied and distinct as each litigant, but some general explanations can be set forth and one specific culprit identified for the growing sense of crisis.

The general causes are rooted in changes in our society over the past forty years. These decades have continued the expansion of a complex industrial society with equally complex social patterns. Along with its blessings, corporate America's markets and advanced industries have created new, more widely dispersed risks: toxic chemicals, carcinogens of dizzying variety and nuclear power plants, to name only a few. Society has responded with a broadened concept of rights and accompanying remedies. These have spawned wholly new areas of law—vastly expanded consumer protection and products liability, and the creation seemingly from whole cloth of “environmental law.” To give substance to the civil rights that lie at the core of America's promise to itself, the judiciary and the Congress have revitalized the Civil War amendments and related statutes, opening the courts to those alleging racial or ethnic discrimination.

Much of the delay on the civil side of the docket is attributable to the vast expansion of federal criminal cases. Under the Speedy Trial Act, criminal defendants must be given a trial within ten weeks of indictment. Accordingly, this requires trial judges to put criminal prosecutions at the head of their calendars. The constitutionalization of many areas of criminal law and procedure makes the task of trial and appellate judges more demanding.

James L. Oakes of the Second Circuit, criticizing legislative efforts to monitor the pace of work of federal judges, declared that equating raw statistics with the true output of judicial work “reflects a lack of understanding of what we do.” N.Y.L.J., Sept. 7, 1990, at 1, col. 3.


"RICO") and Continuing Criminal Enterprise ("CCE") cases—typically involving sprawling conspiracies with numerous defendants—are popular tools in the prosecutors' hands, but they are voracious consumers of the courts' time. The Sentencing Guidelines have created a wholly new and time-consuming task for the appeals courts, the review of sentences—virtually unheard of before the Guidelines.

While all of these elements play a role in clogging courtrooms and squeezing out civil litigants, the greatest pressure on our court system—the culprit alluded to above—is the "war on drugs." Federal enforcement agencies have the lead role in the crackdown on drugs that began with the administration of President Ronald Reagan. From 1981 through 1989, the number of drug cases filed in federal district courts leaped 270%. These cases are clogging the appellate courts as well.

In some districts, this eruption of priority drug cases diverts judicial personnel and resources away from civil cases. To a frightening degree, the federal courts are "becoming drug courts." As a result, "[c]ivil
litigants are in effect discriminated against."

Even without the delays attributable to the drug crisis, civil litigation is slow and costly. Many lawyers apparently view their ability to drive up the opponents' costs as a powerful weapon. The American rule making each party responsible for its own legal fees encourages strategic misuse of discovery, as well as the filing of dilatory and burdensome motions and "nuisance suits." Both state and federal judges, as well as litigators of all types, are particularly critical of the discovery process, rating it the most important cause of both delay and excessive cost in civil litigation. Discovery has become a blunt bludgeon to beat the opposition into submission.

Whatever the reason, the bottom line is clear: "[T]here can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike." High transaction costs of delay and direct expense are the enemies of justice; when these costs become high enough, people who have been injured or had their rights violated may despair of vindication, choosing instead to "lump it." To the extent that delay and expense produce settlements, they can do so unfairly: some plaintiffs are "being coerced by the cost of justice into accepting far less than their due, while some defendants are yielding to opportunistic litigants who unabashedly wield the expenses of litigation as weapons to extort undeserved settlements."

In 1989, for the third time in the past four years, the number of civil cases in the district courts diminished. It appears that many potential plaintiffs, discouraged by court backlogs, have abandoned hope of judi-

---


37. As many as 92% of attorneys in large cases admitted that applying "economic pressure on another party" was a factor in discovery tactics. See Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787, 857 (1980).

38. Rosenberg & Shavell, A Model in Which Suits are Brought for Their Nuisance Value, 5 Int'l Rev. L. & Econ. 3, 3 (1985). For a discussion of the "strategic infliction of waste," see Alschuler, supra note 13, at 1830-31. Alschuler concludes that American procedure invites abuse by giving each party the power to drive up the other's unrecoverable costs. See id. at 1830; see also Schwarz, Mistakes Lawyers Make in Discovery, 15 Litigation 31, 31 (Winter 1989) ("For many lawyers, discovery is a Pavlovian reaction.").


41. See Alschuler, supra note 13, at 1813; Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 14 (1983).

cial disposition. When access to the courts becomes so impeded that the people begin to abandon the system, both the courts and the public are imperiled. If we are to give substance to the promise of "just, speedy, and inexpensive" adjudication, decisive steps must be taken.

The Federal Courts Study Committee, which Congress created to examine the challenges facing the federal judicial system, has concluded that without emergency action, "the courts soon will be unable to discharge their core functions." The perception that things have come to a critical pass is now widely shared. That common sense of urgency has led to a welter of ambitious proposals over the last year. Reformers are looking beyond the well-worn paths of adding judges and imposing stiffer sanctions to more innovative possibilities. The challenges of delay and expense demand more than "tinkering changes."

The Brookings Task Force proposed that each district court adopt "differentiated case management" so that cases of varying complexity are placed on different time tracks for discovery and trial. Each non-complex case would be assigned a firm trial date, with associated discovery cut-off dates and time limits for the disposition of motions. The Task

43. See Berke, supra note 7, at 24, col. 3 (statement of L. Ralph Mecham, Director, Administrative Office of the U.S. Courts). "Where we fail to fulfill the needs of the times our jurisdiction is sidetracked . . . and, in the long run, the strength of the law and of our society is weakened." Kaufman, supra note 23, at 216.
45. Coyle, supra note 24, at 1, col. 1 (quoting Committee conclusion).
46. See Labaton, supra note 6, at A1, col. 1. Adding judges has historically been the remedy for expanding demands on the federal courts, and some still advocate this straightforward response. See id. For my argument rejecting this as an unwise and inefficient response, see Kaufman, New Remedies For the Next Century of Judicial Reform: Time As the Greatest Innovator, 57 Fordham L. Rev. 253, 256-61 (1988). This should not be taken as an endorsement of the political branches' sloth in filling already authorized judgeships. Five percent of judges' chairs are constantly vacant, on average for 10 months but frequently far longer. See Federal Bar Council, Judicial Vacancies—The Processing of Judicial Candidates: Why It Takes So Long and How It Could be Shortened, 128 F.R.D. 143, 143 (1989).
48. See Justice for All, supra note 9, at 14-17. The aim is to give simple cases the quick scheduling they deserve by avoiding "Cadillac-style procedures" in "bicycle-size lawsuits." Id. at 14-15 (quoting Rosenberg, The Federal Civil Rules after Half a Century, 36 Me. L. Rev. 242, 247 (1984)).
49. See Justice for All, supra note 9, at 17-22. Only narrow exceptions for "good cause" would be permitted. The General Accounting Office has concluded that the enforcement of such time standards is the key to effective case management. Id. at 17 (citing Comptroller Gen., U.S. General Accounting Office, Better Management Can Ease Federal Civil Case Backlog (1981)).
Force also embraced the concept of "staged discovery." During the first phase, minimal discovery is conducted to develop a realistic assessment of the case in order to facilitate prompt resolution. Full-blown discovery will be permitted only if efforts to settle or otherwise dispose of the case fail.

While staged discovery may speed the disposition of cases, an approach that holds greater promise is, in Judge Henry Friendly's words, "averting the flood by lessening the flow"—that is, diverting some cases from trial in federal courts to other forms of fair and just determination.

The biggest diversion would be the abolition of diversity jurisdiction. Diversity actions—everything from automobile accidents to contract disputes—account for more than a quarter of federal cases. To date, Congress has resisted abolishing diversity jurisdiction. Although support is growing for such a major restructuring of the judicial landscape, stiff opposition from the organized bar and from state judges remains. De-

50. Id. at 20-21.
53. See id. at 640-41; Kaufman, supra note 46, at 267-68; Feinberg, Is Diversity Jurisdiction An Idea Whose Time Has Passed?, N.Y. St. B.J. (July 1989). As Friendly and others have suggested, we might also shift certain cases to administrative tribunals or new Article I courts. Proponents of the use of administrative courts to process misdemeanor crimes point to the use of this method in Britain. See Newsday, Feb. 20, 1990, at 3, col. 1.
54. See N.Y. Times, Jan. 8, 1990, at D2, col. 1. In the circuit courts, 16% of all civil appeals, some 4,287 cases, were diversity cases. See 1989 Director's Report - Appendix I, supra note 14, at 16. It has been estimated that diversity cases annually consume resources equivalent to 193 district judges and 22 courts of appeals judges. These cases go to trial more often than non-diversity cases. See 1990 Report, supra note 33, at 41.
56. For example, the Federal Courts Study Committee has embraced the idea. See 1990 Report, supra note 33, at 38-40. The Committee was established by the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642, 4644 (codified as amended in scattered sections of 28 U.S.C.).
57. The ABA has fought aggressively to preserve diversity jurisdiction. See N.Y. Times, Jan. 8, 1990, at D2, col. 1. State judges argue that its abolition would swamp their systems. See, e.g., Wachtler, Diversity Jurisdiction: Case for Retention, N.Y.L.J., Jan. 17, 1990, at 39, col. 1 (arguing that abolition of diversity jurisdiction will only reroute cases to overburdened state courts). The National Center for State Courts has calculated that on average each state judge of general jurisdiction would see his or her docket grow by only 11 cases. See Flango & Boresina, How Would Proposed Changes in Jurisdiction Affect State Courts? (National Center For State Courts 1989). Such a rough calculation does not convey a sense of the impact on individual states. New York, whose state court system groans under backlog, hears 10% of all diversity cases. See Wachtler, supra, at 51.
spite this resistance, the elimination of diversity jurisdiction seems the correct approach to alleviate an overloaded docket.

II. AVERTING THE FLOOD WITH ADR

Short of learning to live together with greater comity, we must find a way to settle disputes more efficiently. Reallocating judicial business by the varied methods of "alternative dispute resolution," or ADR, holds out great promise of accomplishing this goal. Because ADR has only recently developed all the trappings of a "movement," including an acronym, specialized journals and think tanks, we sometimes forget that there has been a long history of alternatives to formal adjudication. Most familiar are extrajudicial mechanisms such as voluntary, binding arbitration. Indeed, such arbitration has been practiced in North America since colonial times and its scope and legitimacy are expanding.

The popularity of private resolution has grown along with the delay and cost of court adjudication. Large corporations have increasingly turned to such devices to settle complex business disputes, and are increasingly willing to experiment and entrust high-stakes cases to ADR.

58. Whether American society is markedly more litigious than others is not the issue here. I note only that the empirical evidence is far from persuasive. Data from one study shows that only a small portion of disputes in the United States become lawsuits and that the number of actions is not excessive for the changing conditions of society. See Galanter, supra note 41, at 36-37, 39. The core issue has been well stated by Derek Bok: "The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of most of its citizens." N.Y. Times, Apr. 22, 1983, at B4, col. 1. The challenge is to restore meaningful access to justice through the reduction of cost and delay.

59. E.g., Ohio State Journal on Dispute Resolution; Alternative Dispute Resolution Report (BNA); Alternatives to the High Cost of Litigation (Center for Public Resources).

60. E.g., The National Institute for Dispute Resolution; Stanford Center on Conflict and Negotiation.

61. See generally F. Kellor, American Arbitration 4-8 (1948) (history of arbitration in the United States).


63. See, for example, the resolution through arbitration of a gargantuan dispute between International Business Machines and Fujitsu over Fujitsu's alleged misappropriation of IBM software. See Miller, IBM, Fujitsu End Dispute Over Software, Wall St. J., Sept. 16, 1987, at 2, col. 1. One of the two arbitrators, Stanford Law Professor Robert Mnookin, described a flexible process:

We were able to choose different dispute settlement techniques for different problems and issues. Broadly speaking, we acted as mediators in developing the framework for the resolution, and as arbitrators in implementing that framework. In addition, we presided over meetings of responsible executives of both parties using a mini-trial format. We also held independent fact-finding meetings with customers.

Other methods of private adjudication—including mediation, judges-for-hire and mini-trials—have also gained their advocates and critics.64

The focus of this article, however, is on what we generally describe as judicial ADR mechanisms, those used in connection with court proceedings. The nascent trend toward including ADR mechanisms within the judicial system might well develop into a major wave of judicial reform, one capable of restoring meaningful access to the courts.65 This assimilation has great potential, but it is not a panacea for all that ails the administration of justice. As we consider institutionalizing ADR within the federal courts, we must take care to embrace only those mechanisms that promise to reduce litigation's cost while increasing its pace. Above all, we must ensure that the programs implemented meet our standards of justice. The challenge for the federal courts is to reap the benefits of ADR while minimizing the risks.

A. ADR in the Courthouse: Some Examples

1. The Civil Appeals Management Plan

One of the first programs to institutionalize ADR processes in the federal courts was one I introduced in 1974, my first year as Chief Judge of the Second Circuit. This innovation, the Civil Appeals Management Plan ("CAMP"), injected court-sponsored mediation into appellate liti-


In essence, a mini-trial is a voluntary, confidential and non-binding procedure consisting of an informal, abbreviated presentation of each side's case before principals of the parties who have authority to settle. A neutral moderator can preside and give his evaluation. See Green, The Mini-Trial Approach to Complex Litigation, in Alternative Dispute Resolution: A Handbook for Judges 151-52 (P. Harter ed. 1987).

65. One commentator contends that the effect on the judicial landscape of court-annexed alternative dispute resolution will be comparable to the sea change introduced by Arthur Vanderbilt after the Second World War: the establishment of "unified" state court systems staffed by a professional judiciary. See Alfini, Alternative Dispute Resolution and the Courts: An Introduction, 69 Judicature 252, 252 n.7 (1986). The Chinese wall between "private alternative dispute resolution" and "judicial alternative dispute resolution" erected here oversimplifies to a degree. One commentator has noted that "dispute resolution is 'all of a piece,' all part of one system in which proximity to or distance from court is not the crucial defining factor." Bush, Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments, 66 Den. U.L. Rev. 335, 342-43 (1989). But from the standpoint of judicial administration, closeness to the court is all important.

Court-annexed alternative dispute resolution has been described as one of the "most promising" approaches to simplifying access to justice. See McKay, Rule 16 and Alternative Dispute Resolution, 63 Notre Dame L. Rev. 818, 822 (1988).
The primary aims of CAMP are to encourage the resolution of appeals short of full-blown appellate proceedings and to expedite the disposition of all civil appeals. Virtually all civil appeals taken in the Second Circuit are referred to CAMP. Within ten days of docketing an appeal, the appellant must submit a brief "Pre-Argument Statement." One of the circuit's two full-time "staff counsel" then issues a schedule including a date for a CAMP conference, deadlines for the filing of briefs and a date for oral argument of the appeal. Because parties are more likely to settle before they have invested large sums in preparing for the appeal, the first conference is scheduled well in advance of the deadline for filing briefs.

At this first conference, counsel discuss in depth the strengths and weaknesses of their cases. In addition, "[a]ttorneys should obtain advance authority from their clients to make such commitments as may reasonably be anticipated." At the conclusion of the conference, a staff attorney is expected to give counsel "the benefit of his [or her] views of the merits," and does not hesitate to point out weaknesses or to predict the outcome of the appeal. To promote honest discussion and to avoid any hint of judicial pressure, all participants are prohibited from advising the court of the detailed discussions at the conference. A party that breaches confidentiality is subject to censure.

In the words of former Chief Judge Feinberg, CAMP's success "has been outstanding." In 1989, the program disposed of 601 appeals without briefs or arguments—nearly twenty percent of the total appeals terminated. In more concrete terms, CAMP settles more cases than two judges would normally handle in a year at one-third the cost of two judicial chambers. Early settlement saves large sums for parties by sparing them the expense of briefs and oral argument.

In short, CAMP has achieved its goals. It "does result in the settlement or withdrawal of appeals that would otherwise have to be considered by three-judge panels." It "almost certainly results in faster

---

69. Id.
72. See id.
disposition" of cases that settle and "probably results in faster disposition of appeals that are argued." By a substantial margin, attorneys enjoyed participating in CAMP. Indeed, this pioneer effort at resolving appeals quickly and cheaply has surpassed its objective.

2. Early Neutral Evaluation

Some of the lessons of CAMP have been applied creatively to the district courts. Recognizing that the greatest potential savings to litigants must be reaped in the formative stages of cases, some districts have begun programs of early intervention to facilitate settlement. The Northern District of California has adopted a program of "early neutral evaluation" ("ENE"), a pre-trial case evaluation by an experienced neutral attorney who assesses the case and discusses it with all parties and counsel.

The central feature of ENE is an evaluation session somewhat similar to the CAMP conference. The innovation of the Northern District was to place top priority on holding the evaluation promptly. Similar programs in the past have called for intervention only after extensive discovery has been completed. The principal aim of ENE is to hold an evaluation before major discovery. The session is presided over by a neutral evaluator who has received a ten-page statement from each party. Absent undue hardship, the parties must be present with their counsel.

74. Id. This study urged that other courts of appeals follow the lead of CAMP, see id. at 11, and many have. See Kaufman, Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan, supra note 66, at 761-62.

75. See A. Patridge & A. Lind, supra note 73, at 61. Most lawyers practicing in the Second Circuit like CAMP "primarily because they believe (correctly) that it fosters the nonjudicial resolution of some appeals." Id. at 74.

76. The California program is one of the most well established. See General Order No. 26, U.S. District Court for the Northern District of California (1985); Brazil, Kahn, Newman & Gold, Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution, 69 Judicature 279, 279-81 (1986); Levine, Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution, 72 Judicature 235, 235-38 (1989). The D.C. court system has also been experimenting with ENE. See Kessler & Finkelstein, The Evolution of a Multi-door Courthouse, 37 Cath. U.L. Rev. 577, 590 (1988). The authority to establish the ENE program by local rule flows from Fed. R. Civ. P. 83 (authorizing the promulgation of local rules), Fed. R. Civ. P. 53 (concerning special masters), and the courts' inherent power to appoint masters. See Ex parte Peterson, 253 U.S. 300, 312-13 (1920). Peterson and its progeny establish the courts' authority to appoint a master over the objection of the parties and to require them to pay the master's fee (a component of some ENE programs). See Brazil, Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule, in W. Brazil, G. Hazard, Jr. & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters 305, 366-67 (1983).

77. See Brazil, Kahn, Newman & Gold, supra note 76, at 280 n.3.

78. See Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev. 394, 407-08 (1986). The stated goal in the Northern District of California was to hold its session within 100 days of filing of the complaint. To date, this goal has proved elusive. Sessions were held within 173 days for 25% of the cases; 193 days for 50%; 240 days for 75%; and 429 for 100%. See Levine, supra note 76, at 237.
After each side presents a summary of its argument, the evaluator frankly assesses the strengths and weaknesses of arguments and evidence, and offers a non-binding evaluation of the case.79

By forcing the parties to prepare for an early presentation, ENE encourages parties to do their basic homework sooner than they otherwise would. This self-evaluation leads to a more realistic assessment of a case's merit. In addition, the evaluator's figures can give parties or counsel a "reality check," deflating rosy expectations.80 The session also provides an opportunity for real communication between the parties, beyond the fog of notice pleadings, and increases client involvement in the early stages of the litigation.81

If the evaluator finds the parties willing to explore settlement after the assessment is given, she may facilitate negotiations by mediating or caucusing seriatim with the parties. If an early settlement does not materialize, the evaluator proposes a schedule of phased discovery under which the parties first obtain that evidence on which the key aspects of the case are most likely to turn.82 The evaluators, however, lack the power to enter binding orders.83

To date, ENE's performance has been impressive.84 Parties and attorneys have felt that the program provided them with useful information about their opponent's case, as well as their own. Most have agreed that ENE enabled them to obtain key information more quickly and at less expense while focusing the case on the central issues. In addition, parties and counsel have felt that the process increased the chance of settlement.85 While ENE has yet to be subjected to sufficient study to justify firm conclusions about its cost-effectiveness, most of those who have participated in the program rate it a success.86

3. Summary Jury Trial

A different approach to facilitating early disposition is the summary jury trial ("SJT").87 Developed by Judge Thomas D. Lambros of the

79. See Brazil, Kahn, Newman & Gold, supra note 76, at 280. The evaluators in the Western District of Washington, for example, become involved after the bulk of discovery has completed. See Volunteer Attorney Mediation Program, Western and Eastern Districts of Washington, Alternatives to the High Cost of Litigation, Special Issue 1985, at 11-12 (Center for Public Resources 1985). The valuation is usually expressed in a range of minimum and maximum.
80. See Brazil, Kahn, Newman & Gold, supra note 76, at 283.
81. See id.
82. See id. at 282.
83. As originally designed, the program's veil of confidentiality prevented the evaluator from reporting to the court his staged discovery plan. Some argue that this policy should be changed. See id.
84. See Levine, supra note 76, at 237-38.
85. See id. at 236.
86. Of those surveyed, 79.6% of attorneys and 73.8% of parties reported a high level of satisfaction. See id. at 236.
87. See Lambros, supra note 51, at 798; Lambros, The Summary Jury Trial and Other
Northern District of Ohio in 1980, summary jury trials are used when the “dynamics of the controversy” make settlement unlikely and an extensive trial probable. The intent is to foster settlement by forecasting civil jury verdicts, giving the parties a reliable preview of the outcome “upon which to build a mutually acceptable settlement.”

In essence, summary jury trial is an abbreviated presentation to an advisory jury whose decision serves as a “crystal ball” the parties can use to predict a real jury’s verdict. The procedure is not binding unless the parties stipulate otherwise. The process comes into play late in the pre-trial period when an impasse in settlement negotiations has been reached and a trial is the next step. Discovery should be complete, motions in limine disposed of, and trial briefs and proposed jury instructions submitted. In sum, the case should be fully prepared for trial.

A summary jury trial may be conducted by a judge or by a magistrate upon assignment from the court. A venire of sufficient size to provide a jury of six is called from the regular jury pool. Limited voir dire by the court follows; counsel are usually permitted a limited number of challenges. Jurors are instructed on the importance of rendering a true verdict and are further told that their decision will “aid and assist the parties in resolving their dispute.”

There are no live witnesses at summary jury trials, hence no direct or cross-examination. Counsel simply summarize the anticipated evidence


88. See An Alternative Method, supra note 87, at 286. Judge Lambros has noted that “[t]here is a certain class of cases in which the only bar to settlement among parties is the difference in opinion of how a jury will perceive evidence adduced at trial.” Appendix B: Handbook and Rules of the Court for Summary Jury Trial Proceedings, in Report to the Judicial Conference, supra note 87, at 482.


91. In a large district, it may be possible to coordinate the procedure with actual trials that are getting under way. Those disqualified from regular jury service could be called for summary jury service later in the day. See Report to the Judicial Conference, supra note 87, at 473-74.

92. Lambros, An Alternative Method, supra note 87, at 289. Jury instructions do not further emphasize the non-binding nature of the proceeding. The “Juror Profile Form” completed by venire members describes summary jury trial as “a summarized presentation of a case upon which you will be expected to decide the issues within one day.” Report to the Judicial Conference, supra note 87, at 490 (Appendix C: Juror Profile Form). The verdict forms are labeled “advisory.” See id. at 492 (Appendix D: Jurors’ Advisory Opinion).
in a combined opening statement and closing argument, presenting exhibits to the jury when necessary.\textsuperscript{93} Frequently, exhibit notebooks are distributed to the jury. The narrative approach permits counsel to quickly sketch an overview of the dispute sufficient to "give the jury a birdseye\textsuperscript{sic} view of what the case is all about."\textsuperscript{94} Typically, an hour is allotted to each side; rebuttal time may be reserved by the plaintiff.\textsuperscript{95}

Following counsels' presentations, the jury is charged and then retires to deliberate. While unanimous verdicts are encouraged, if the jurors cannot agree, they may return a special verdict, anonymously listing individual determinations of liability and damages. Although not as definitive as a unanimous decision, these special verdicts assist in the settlement process as well.\textsuperscript{96} The final phase of the trial proper is a post-verdict debriefing of the jurors by court and counsel. From the jurors' critique on the merits, the litigants learn more about the strengths and weaknesses of their case.

Part of the appeal of the summary jury trial is its flexibility. The allotted time can be expanded, the live testimony of a key witness might be given, video monologues might be played and, in big cases, two juries might be used to give a range of possible determinations.\textsuperscript{97}

Parties frequently reach a settlement immediately after the summary hearing, though several weeks are usually needed to evaluate the verdict.\textsuperscript{98} If agreement is not reached shortly after the advisory verdict, a pretrial conference is held to discuss settlement. If no disposition is reached, the case will be called for actual trial within thirty to sixty days of the summary hearing.\textsuperscript{99}

In addition to its value as a predictive tool, summary jury trial plays an important role as a "doomsday event." By imparting the same sort of psychological urgency as a trial, the process does not permit self-deception. The approach of a summary jury trial intensifies efforts to settle and, as in the familiar settlement "on the courthouse steps," the parties frequently reach agreement just before or even during the summary hear-

\textsuperscript{93} "Representations of facts must be supportable by reference to discovery materials, . . . or by a professional representation that counsel has spoken with the witness and is repeating that which the witness stated." \textit{Report to the Judicial Conference, supra} note 87, at 471. Excerpts of documents may be read. \textit{See id.} Objections are discouraged and it is hoped that motions in limine and the pre-trial conference will settle most evidentiary disputes.


\textsuperscript{95} "Sandbagging" the defendant by holding back on an important aspect of the case will lead to the defendant receiving response time. \textit{See Report to the Judicial Conference, supra} note 87, at 483-84 (Appendix B: Handbook and Rules of the Court for Summary Jury Trial Proceedings) [hereinafter \textit{Appendix B}].

\textsuperscript{96} "The special verdict has proved invaluable in affording counsel insights as to lay perceptions of the case and in suggesting an equitable basis for settlement." \textit{Id.} at 484.

\textsuperscript{97} \textit{See Maatman, supra} note 64, at 464-67; \textit{An Alternative Method, supra} note 87, at 289-90.

\textsuperscript{98} \textit{See An Alternative Method, supra} note 87, at 290.

\textsuperscript{99} \textit{See Appendix B, supra} note 95, at 484.
Summary jury trial also provides one other valuable function, arguably making the eventual settlement more palatable to some parties. Many who have participated in such trials report that the summary proceeding satisfied their psychological need for "a day in court"—something that cannot be said for the ordinary settlement.\(^{101}\)

Summary jury trials have been used in a wide spectrum of cases, from straightforward contract disputes to complex antitrust and class action tort suits. Judge Lambros has found that these trials foster more equitable settlements while easing the strain on his docket.\(^{102}\) While countrywide statistics are unavailable, some estimate that 100 federal and state judges have utilized the technique in over 1,000 disputes.\(^{103}\)

The intent of the summary jury trial is to preserve judicial resources for "hardcore" disputes by facilitating disposition short of a full-blown trial in those cases that have reached an impasse in negotiations. To date, it appears to have met these goals. Of the 150 cases Judge Lambros assigned to summary jury trials over a six-year period, only five went to a regular jury trial.\(^{104}\) This high settlement rate\(^{105}\) appears all the more remarkable when we recall that only those cases in which settlement is deemed unlikely are selected for summary jury trials. Other courts have reported similarly encouraging empirical findings.\(^{106}\) Moreover, a majority of participating attorneys believed that summary jury trial led to a more rapid resolution of cases.\(^{107}\)

The financial saving to the parties is evident. Perhaps equally impor-

---

100. See An Alternative Method, supra note 87, at 286-87; see also Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) ("The reality is that too many [lawyers] will not get ready until the day of a trial; a summary trial forces that day and that preparation"). In the Northern District of Ohio, roughly 44% of cases assigned for summary jury trial settled before the hearing. See Report to the Judicial Conference, supra note 87, at 472-73.


102. See Appendix B, supra note 95, at 486.

103. See Lambros, supra note 51, at 802. Over 65 federal judges had used the process as of 1988. See Maatman, supra note 64, at 457.

104. See Lambros, supra note 94, at 368.

105. Although one frequently hears that "90% of cases settle," this is merely a convenient shorthand. It signifies that upwards of 90% of federal civil cases are "terminated short of trial." Second Circuit Committee on the Pretrial Phase of Civil Litigation, Final Report, 115 F.R.D. 453, 457 (1986). This includes the roughly 30% that are disposed of by motion. In recent years, no more than 60% of all federal civil cases settled. See Flanders, Blind Umpires—A Response to Professor Resnik, 35 Hastings L.J. 505, 516 n.56 (1984).

106. For example, in 1980 the Western District of Oklahoma introduced summary jury trials for selected cases poised for lengthy trials. Compared to similar cases at the same stage of litigation, settlement rate increased from 84 to 96%. See B. Meierhoefer, Court-Annexed Arbitration in the Western District of Oklahoma 1 (Federal Judicial Center 1988).

107. Seventy-two percent of plaintiffs' attorneys believed it was "much more rapid," whereas 28% answered it was "somewhat more rapid." The figures for defense counsel
tant is the preservation of the courts' most precious resource—time. Because summary jury trials are targeted at complex disputes that would necessitate lengthy trials, their effect on the docket may well be disproportionate to the number of cases in which they have been used. Ideally, the result is that other litigants face shorter queues while those who participate in summary jury trials are afforded a speedy, just disposition of their case.

4. Court-Annexed Arbitration

Court-annexed arbitration ("CAA") is an additional innovative procedure that holds real promise for conserving judicial time, accelerating resolution of disputes and reducing costs to the parties. CAA differs fundamentally from private commercial arbitration. Most significantly, CAA is mandatory and non-binding, and deals with filed lawsuits referred to arbitration by the court—not potential lawsuits where the parties opt for arbitration.

There are a plethora of CAA variants currently in place at various state and federal courts. All provide for the involuntary assignment of eligible cases to a hearing by experienced local attorneys who serve as arbitrators. The arbitration hearing is conducted as an informal trial, usually within a few months of the time that the issue is joined.

Procedural rules are relaxed, though the Federal Rules of Evidence are generally used as "guides" to admissibility. The power of subpoena is available. A panel of three arbitrators hears the testimony of the parties. Other savings are significant. The money not spent on reporters, court personnel and jurors' fees rapidly accumulates. See Lambros, supra note 51, at 800-01. Congress has authorized mandatory CAA in ten district courts. See 28 U.S.C. § 658(1) (1988). Most courts use CAA only where the claimant seeks money damages. See P. Ebener & D. Betancourt, supra, at 7.

All programs cap monetary damages. Federal district courts, for example, may not refer cases where the relief sought exceeds $100,000. See 28 U.S.C. § 652(a)(1)(B) (1988). Particular types of cases are occasionally exempted. See infra notes 201-202 and accompanying text.

See, e.g., E.D.N.Y. Local Arbitration R. § 5(d) (allowing for use of subpoenas for attendance of witnesses and production of documents under Fed. R. Civ. P. 45); D. Conn. R. 28 (giving special masters power to force compliance with their orders).

Some programs use only one arbitrator per case. See, e.g., Barkai & Kassebaum,
parties and their witnesses and makes an "award" immediately after the trial. A party dissatisfied with the award may reject it by demanding a formal trial de novo within a certain period, usually thirty days. If such a demand is not filed, the arbitration award will be entered as the judgment of the court after expiration of the thirty days. The judgment then has the same force and effect as any civil judgment, except that it is not appealable. At any trial de novo, "the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding."

One of the crucial decisions in developing a CAA program is whether to include disincentives for demanding a formal trial. Most programs include such provisions. Normally, the party challenging the award must deposit with the clerk an amount equivalent to the cost of the arbitration. If he or she does not obtain a more favorable result, or if the court finds that the trial de novo was sought in bad faith, the deposit is forfeited. Some courts require that the party demanding a full trial must improve his or her position by at least a fixed percentage, while others make more significant sanctions a possibility. If the party demanding trial de novo falls short, the opposing party’s attorney's fees and costs may be shifted to the other side as a penalty. The specter of such substantial monetary sanctions would no doubt deter demands for trial de novo more effectively than the relatively modest costs of arbitration. But, for just that reason, the stiffer sanctions are much more problematic from both the policy and constitutional perspectives.

Another key choice in designing a court-annexed arbitration program concerns the "gate-keeping" function. Do we take the relief sought in the complaint at face value? Or do we invest court resources to deter-

---

Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation, 16 Pepperdine L. Rev. 543, 553-54 (1989) (discussing Hawaiian program). In the Western District of Oklahoma, “[m]ost hearings are to be conducted by a single arbitrator, but the parties may agree to and request . . . a panel of three.” B. Meierhofer, supra note 106, at 3. In the Eastern District of New York, the process is reversed: the parties may, but need not, agree to arbitrate before a single arbitrator. If they do not agree, the arbitration is held before a panel of three. See E.D.N.Y. Local Arbitration R. § 4(c).

115. The award is an unadorned judgment on the merits, such as “we find for the plaintiff in the amount of $______.”

116. E.D.N.Y. Local Arbitration R. § 7(c). Some courts permit trial witnesses to be impeached by testimony at the arbitration hearing. See D. Conn. R. 28, § 10.

117. See E.D.N.Y. Local Arbitration R. § 7(d). A common figure is $225 if conducted before a single arbitrator. See id. § 2.

118. See id. § 7(d). The final judgment, exclusive of costs and interest, must exceed the arbitration award if plaintiff demands de novo trial.

119. For example, the Western District of Oklahoma requires at least 10% improvement. See W.D. Okla. R. 43(P)(5).

120. See id.; P. Ebener & D. Betancourt, supra note 111, at 10. Under the Hawaii state program, if the arbitration award is not bettered by 15%, legal fees and costs up to $5,000 may be shifted. See Barkai & Kassebaum, supra note 114, at S54.

121. See infra text accompanying note 177.
mine the legitimacy of that valuation? Some courts require the judge to whom a case is assigned to assess its availability for court-annexed arbitration; frequently this is done by entertaining motions that no genuine claim exceeding the maximum for arbitration exists. Other courts have enacted a presumption that relief sought is within the monetary maximum, which can be overcome by certification that a valid claim exceeding the maximum exists; the clerk of the court has authority to schedule cases for arbitration at the time of filing. Courts that have chosen this latter approach have realized significant savings in time and expense.

Because of the ability to step out of the queue for sparse judges and courtrooms, litigants whose cases are referred to court-annexed arbitration obtain a hearing far faster than the time in which they would have received a trial. In Pittsburgh's program, for example, the median time to a CAA hearing is three months, while the wait for a trial is eighteen months. When properly designed, court-annexed arbitration does offer a "decidedly speedier alternative to trial."

As might be expected, the evidence indicates that court-annexed arbitration also disposes of cases faster than trial. In California, the time for completion of arbitrated cases is about half that required for cases on the regular trial track. Thus, court-annexed arbitration can clearly meet one of its goals—providing an alternative forum for the speedier resolution of disputes. The impact on the system is less clear, however, because

---

122. See, e.g., W.D. Okla. R. 43(B)(2)(e) (judge may decide, on motion by any party or sua sponte, that the action is subject to mandatory arbitration because claim does not exceed maximum).

123. See, e.g., E.D.N.Y. Local Arbitration R. §§ 3(A) (clerk has authority to schedule cases); 3(C) (presumption that relief is within the monetary maximum can be overcome by certification).

124. Empirical data from the RAND Institute for Civil Justice contrasted the programs in California and Pittsburgh. Among other significant administrative differences, California judges assessed eligibility while the Pittsburgh courts adopted a presumption of eligibility. California's program did little to increase the pace of disposition. Time to disposition varied from nine months to over three years. In Pittsburgh, the average time was three months. The cost of court-annexed arbitration in California was $123 for each case assigned, and $299 for each case actually arbitrated. The comparable figures for Pittsburgh were $76 and $175, respectively. See Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 Judicature 270, 273-74 (1986).

125. See Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 674 (1986); Institute for Civil Justice, An Overview of the First Five Program Years 36 (1983).


127. See D. Bryant, supra note 126, at 22 (table 6). It also appears that the de novo trials are expedited because the groundwork in the court-annexed arbitration hearing prepares the lawyers. See Broderick, supra note 126, at 52. Again, administrative design is critical; not all arbitration programs succeed in resolving cases more rapidly than traditional settlement and trial procedure. See Edwards, supra note 125, at 674.
most of the cases referred to arbitration would presumably have settled short of trial. Whether CAA slows or speeds settlement is as yet unknown. There is reason to believe, however, that cases in court-annexed arbitration settle earlier than those awaiting trial.

The arbitration hearing serves a role similar to that of the summary jury trial, a “doomsday” event whose approach forces counsel to give serious attention to the case. In this way, scheduling arbitration is similar to the scheduling of a trial date, causing the lawyers to face the realities of their case and, frequently, to begin discussing settlement. The difference, of course, is that arbitration occurs much earlier in the life of a case than trial, and therefore the effect of court-annexed arbitration may be to accelerate the settlement process.

But court-annexed arbitration does more than force counsel to pay attention to the case. Litigants present all the evidence and argue the merits before a highly regarded panel of arbitrators. The hearing provides an ideal opportunity to assess the strengths and pitfalls of the suit. If the process is perceived as fair and the award regarded as a reasonable estimate of a likely trial verdict, many parties—even those dissatisfied on the merits—will accept the outcome. In any event, the panel’s fact-finding and judgment create an external reality, similar to a verdict. Thus, the award may greatly aid settlement negotiations by providing a foundation for a mutually acceptable compromise.

Thus, it is expected that court-annexed arbitration would have three primary effects on disputes: (1) some will settle before the arbitration hearing, as opposed to months later on the eve of trial; (2) some will be decided by the arbitrators in an award accepted by the parties; and (3) some will settle after the hearing, with the award serving as an aid.

The numbers tell a story of success. Studies of court-annexed arbitration in federal courts concluded that upwards of ninety percent of disputes eligible for the program terminated without returning to the trial calendar—and ninety percent of cases in which trial de novo was demanded settled before trial. Comparisons with cases not placed on the

---

128. See supra note 105.
129. See supra text accompanying note 101; see also E. Lind & J. Shapard, supra note 110, at 9 ("[M]any settlements occur when, and only when, the attorneys in the case find it necessary to . . . prepare the evidence, and assess the case’s strengths, weaknesses, and net monetary value.").
130. See CAA Hearings, supra note 110, at 18 (testimony of Chief Judge Robert Peckham, relating experiences in the Northern District of California).
131. See Edwards, supra note 125, at 675.
132. See 1990 Report, supra note 33, at 83-84.
133. In the Northern District of California, 94% of eligible cases (not just those actually referred and arbitrated) terminated without returning to the trial calendar; 99% terminated short of trial. See B. Meierhoefer & C. Seron, Court-Annexed Arbitration in the Northern District of California 12 (Federal Judicial Center 1988). The analogous figures for the Eastern District of Pennsylvania are 90% and 97%. See B. Meierhoefer, Court-Annexed Arbitration in the Eastern District of Pennsylvania 14 (Federal Judicial Center 1988). For the Western District of Oklahoma, the statistics are 91% and 98%. See B.
court-annexed arbitration track are instructive. Over a 129-month period in the Eastern District of Pennsylvania, only two percent of cases placed in the program required trial de novo. During the same period, eight percent of the civil cases not placed in the arbitration program went to trial. Studies of other programs indicate that referring cases to arbitration cut the incidence of trial in half.

Numerous studies of court-annexed arbitration programs have found that those involved—litigants, lawyers, arbitrators and judges—overwhelmingly favor such arbitration. Virtually every federal judge who has experience with the program advocates the expansion of CAA in scope and to other courts; almost all believed CAA helped them manage their civil dockets. Participating lawyers overwhelmingly expressed satisfaction with the program and, perhaps most important, the parties themselves regard CAA as fair and satisfying.

Court-annexed arbitration, then, appears to be meeting its goals of re-


The key finding is the number of cases concluded short of trial. While some programs have high rates of demand for trial de novo, this “appears to be fueled by the desire of attorneys to keep their options open rather than by dissatisfaction with arbitration outcomes.” D. Bryant, supra note 126, at x. Many may wish to strengthen a position prior to settlement talks in which the arbitration award may well be crucial.

134. See Broderick, Court-Annexed Compulsory Arbitration: It Works, 72 Judicature 217, 222 (1989). That ratio has held constant over time. See Broderick, supra note 126, at 52; CAA Hearings, supra note 110, at 3.


137. In fact, all surveyed judges in the Northern District of California, the Eastern District of Pennsylvania and the Western District of Oklahoma had much enthusiasm for CAA. See B. Meierhoefer & C. Seron, supra note 133, at 18 (Northern District of California); B. Meierhoefer, supra note 133, at 15 (Eastern District of Pennsylvania); B. Meierhoefer, supra note 106, at 19 (Western District of Oklahoma).

138. For example, in the Northern District of California, over 80% of the attorneys either approved or strongly approved of court-annexed arbitration. See B. Meierhoefer & C. Seron, supra note 133, at 21. Over 60% felt their cases concluded more rapidly and less expensively than they otherwise might have. See id. Over 80% of counsel felt that the setting of an arbitration hearing date helped get settlement negotiations started. See id. at 30. Of those attorneys whose cases terminated as a result of the hearing, 84% felt at the outset that trial was somewhat or very likely. See id. at 30-31. Over 90% of participating attorneys felt that the procedures were fair and that there was adequate time for presentation of the case, and over 80% felt that there was sufficient time for discovery. See id. at 31. Even among those attorneys who demanded trial de novo, a majority felt that CAA saved them time and their clients money. See id. at 32.

139. In the Northern District of California, 85% of the litigants felt that the process was fair. All of those satisfied with the outcome thought so, as did half of those who were dissatisfied. Over 70% of all litigants felt that CAA helped to bring the sides together. See id. at 35-36. A study of state tort litigation concluded that “court-annexed arbitra-
ducing litigant and court costs, increasing the pace of litigation and maintaining the satisfaction of litigants. What has been said about CAA in the Eastern District of Pennsylvania appears true overall: "the program has seen an increase in pre-hearing settlements, a reduction in the incidence of trials, and an expedited hearing process for eligible cases—all of which have saved time and expense for the litigants."\(^{140}\)

While court-annexed arbitration is generally regarded as the most effective of the ADR mechanisms discussed here,\(^{141}\) these glowing reviews give an idea of the promise held out by court-annexed ADR. However, every silver lining does have a cloud. In this case, the very idea of courts initiating and mandating recourse to alternative mechanisms for resolving disputes is surrounded by controversy.

B. ADR in the Courthouse: Problems and Complaints

Criticism of court-initiated ADR focusses on three principal issues. First, some argue that such programs do not "work"—that they neither cut costs nor reduce congestion. Second, fundamental questions about the constitutionality of some of the procedures have been raised. Third, and more basically, the results produced by such programs have been criticized as lacking fairness and, in essence, creating a diminished quality of justice.

1. Do They Work?

In a complex area like the civil justice system, obtaining meaningful empirical data is difficult and basing policy conclusions on the available data remains risky.\(^{142}\) Still, to get a rough measure of court-annexed ADR’s effectiveness, we should look to its impact on the cost and pace of litigation, as well as to its acceptance by litigants. The firmest statistical information available indicates that participants favor ADR.\(^{143}\) They be-

---

140. Nejelski & Zeldin, Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story, 42 Md. L. Rev. 787, 818 (1983). Nationwide, empirical data indicates that CAA “can contribute significantly to reducing court congestion, costs and delay and to diminishing the financial and emotional costs of litigation for parties.” Hensler, supra note 124, at 273. Of course, the courts save money also, because arbitration is much less expensive than trial. See D. Bryant, supra note 126, at 27.

141. See, e.g., Nejelski & Zeldin, supra note 140, at 819 (“Court-annexed arbitration is the most effective of the current court-reform proposals.”).

142. “Particularly in topical areas where data are fragmentary and the available analytic tools are crude, there is considerable potential for both inconsistent results and disagreements over interpretation.” Hensler, Researching Civil Justice: Problems and Pitfalls, 51 Law & Contemp. Probs. 55, 55-56 (1988). There is “essentially no sophisticated data concerning the relative time and cost of alternative dispute settlement mechanisms such as arbitration and mediation.” Sander, Alternative Methods of Dispute Resolution: An Overview, 37 U. Fla. L. Rev. 1, 15 (1985).

143. See supra text accompanying notes 70-75 (CAMP), 84-86 (ENE), 101-108 (SJT), and 133-141 (CAA). Again, it is more likely that these processes would speed settle-
lieve that these procedures saved them time and money. A wide variety of studies have concluded that litigants, attorneys and judges like the ADR process, and that litigants favor ADR even when it does not resolve the case according to their expectations. Perhaps more revealing, parties seem to prefer the use of techniques like court-annexed arbitration over more traditional settlement conferences, regarding the former approach as fairer and more dignified.

Still, some commentators believe that these programs may lead to unanticipated consequences, undermining the contribution they make to speedy disposition. For example, one argument favoring these programs is that they give a neutral evaluation after a presentation of each side’s case. It has been argued, however, that in some cases this might reduce the chance of settlement. Some parties are impelled to settle due to fear of the unknown; they do not know the strength of their opponent’s case, and cannot hazard a guess about how the fact finder will decide. To the extent that a process like summary jury trial supplies this information, it could arguably diminish the odds of compromising a case.

A more basic point is that the likelihood of delay plays an important role in the dynamics of settlement and rate of civil filings. Some plaintiffs with potentially meritorious grievances are deterred from filing suit by the knowledge that it could be years before they secure any relief. Similarly, delay increases the likelihood of settlement, as parties despair of obtaining a speedy judicial determination. Thus, it is argued that as delay is reduced, more actions will be filed and fewer will be settled.

---

144. See supra notes 72 (CAMP), 84-86 (ENE), 108 (SJT), and 124 (CAA) and accompanying text. The enthusiasm of “repeat players” like counsel and judges is most encouraging. If a procedure is a waste of time, we would expect experienced judges to abandon it.


146. For example, one study concluded that “[s]ettlement conferences tended to provoke less favorable reactions than did trial and arbitration hearings. Perceptions of fairness were markedly lower for litigants whose cases were subject to settlement conferences . . . .” Perception of Justice, supra note 136, at 79.

147. See Maatman, supra note 64, at 484.


149. See Maatman, supra note 64, at 484. For the moment we will put aside the fairness of settlements based on ignorance.

150. In economic terms, “litigation delay, by reducing the present value of the potential judgment in a dispute, reduces the likelihood of litigation.” Priest, supra note 4, at 534.


152. Professor Priest terms his exposition of this possibility the “congestion equilibrium” hypothesis. Priest, supra note 4, at 535. “The equilibrium concept implies that the parties’ litigation decisions will serve to offset the effects of congestion reform. Indeed,
For this reason, Judge Richard Posner has argued that even if the use of alternatives like summary jury trials creates an atmosphere conducive to settlement, the procedures are unlikely to affect the rate of settlement. For each case terminated through ADR, another case will advance in the queue. Some of the cases that would have settled because of delay will now proceed to trial because the calendar is moving faster. "Whatever happens, there will be the same number of trials." Whether this would be true if court-annexed ADR were implemented on a large scale is unclear. Even if that proves to be so, the conclusion that all efforts to reduce delay and congestion are useless does not follow. Indeed, court-annexed ADR may quicken the disposition of litigation even if it does not substantially affect the backlog of cases, not an unattractive objective. Under this view, the key measure of a given reform's effectiveness would be the output of the court system—even if the influx of new cases returns the average delay to its equilibrium level, the volume of disposition will have increased. In any event, large numbers of litigants will have had their disputes fairly, quickly and inexpensively determined.

To date, experience with ADR demonstrates that participant satisfaction is high and that delay and cost have been decreased, or at least have not increased. The numerous studies of ADR in the courts have all been positive. Perhaps the strongest reply to the argument that these techniques have not been scientifically validated is the enthusiastic support voiced by participants familiar with one or another of the processes. In the words of Judge Bertelsman, "[i]f the procedure is ineffective and wastes time, we may expect it to be abandoned, since most federal trial judges are not profligate of their time." In sum, those most familiar with ADR's effect on civil dockets—the judges—clearly believe that when properly structured, these procedures work well.

2. Are They Constitutional?

If reference to court-related ADR was merely an optional service provided to litigants, it would raise no significant constitutional issues. Most
programs are mandatory, however, and include sanctions of varying degrees if the parties proceed to full-blown trials. While these provisions are necessary if the programs are to succeed, they do invite constitutional attack.

a. Access to the courts

There have been arguments for a broad-based constitutional right of access to the courts. Professor Lawrence Tribe believes there is a fundamental right of access, grounded in the constitutional guarantees of equal protection and due process. Thus, any program restricting access to the courts—by requiring the use of ADR mechanisms as a prerequisite—would trigger a heightened level of scrutiny. If access to the courts is defined as a fundamental right, the more stringent analysis would supplant the looser requirement of a "rational relationship" between these programs and their objectives, raising the question whether court-annexed ADR could pass constitutional muster.

To date, however, the Supreme Court has recognized a much more limited right of access. Access to the courts has been afforded special protection only when the right asserted in the underlying action is itself fundamental and when there is no alternative forum in which to enforce that right. For example, in *Boddie v. Connecticut* the Court held that Connecticut could not make the judicial system the only forum for obtaining a divorce—dissolving the fundamental relationship of marriage—and then inhibit court access by imposing mandatory filing fees. The effect of that combination was to exclude indigent plaintiffs "from the only forum effectively empowered to settle their disputes." When the underlying right asserted is not fundamental, a program that inhibits access to the courts will be upheld so long as there is a rational basis for

---

160. In our adversarial system, one side is frequently reluctant to agree to anything the other side proposes—despite the potential benefits to all concerned. See American Bar Association Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* 16 (1984) (when alternate procedure designed to speed case development is voluntary, the procedure is infrequently used). Official encouragement to participate can be important in overcoming hostility to the unfamiliar. In one case, an "attorney who objected to the first summary jury trial he was required to participate in is now the biggest local fan of the procedure." *McKay*, 120 F.R.D. at 49.


162. A right is "fundamental" in this sense if it is among those rights "explicitly or implicitly guaranteed by the Constitution." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). Under strict scrutiny, of course, the usual presumption of a government program's validity falls away. The government carries a "heavy burden of justification" to show that the challenged program is narrowly tailored and structured with "precision." *Id.* at 16-17 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)).

163. Where no fundamental right (or suspect class) is involved, a court need only "determine whether [the program] rationally furthers some legitimate, articulated state purpose." *Id.* at 17.


165. *Id.* at 376.
To many, the "rational basis" for court-related ADR is clear. In addition, the incidental hurdle to court access that these programs impose is hardly a "denial" of access: all retain the right to full-blown trials. Any added delay or costs imposed are minimal.

b. Right to Jury Trial

The primary constitutional argument against a provision mandating ADR for federal litigants is that it unconstitutionally burdens the right to trial by jury. The seventh amendment, however, protects "not 'trial by jury,' but 'the right of trial by jury.'" The amendment was "designed to preserve the basic institution of jury trial in only its most fundamental elements." At its heart, the seventh amendment strives to preserve the right to have a "jury ultimately determine the issues of fact if they cannot be settled by the parties or determined as a matter of law." The amendment has never been understood to mandate that a jury be impanelled at the earliest possible stage of a case.

The Supreme Court has long upheld procedures requiring litigants to appear before alternate fact finders prior to a jury trial. The seventh amendment does not place restrictions on what "conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it." The Court has sustained a statute authorizing trial of smaller disputes before non-article III justices of the peace, subject to trial de novo upon demand; upheld compulsory referral of a case to an "auditor" who would make preliminary findings of fact; and endorsed the inherent power of federal courts to appoint special masters over the parties' objection.

The Supreme Court has afforded Congress "considerable discretion"

---

166. See, e.g., Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973) (per curiam) (since less constitutional significance attaches to appellant's interest in welfare benefits than to divorce, state could set filing fee for appeal from adverse welfare decision); United States v. Kras, 409 U.S. 434, 449-50 (1973) (upholding mandatory filing fee prior to discharge in voluntary bankruptcy). Both Ortwein and Kras establish that reasonable fees may be set as a prerequisite to bringing an action, so long as a fundamental right is not asserted.

167. See 1990 Report, supra note 33, at 84.

168. Capital Traction Co. v. Hof, 174 U.S. 1 (1899). The seventh amendment reads, in part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . " U.S. Const. amend. VII.


171. The amendment "does not prescribe at what stage of an action a trial by jury must, if demanded, be had." Capital Traction, 174 U.S. at 23.

172. Id.


174. See Ex parte Peterson, 253 U.S. 300, 310 (1920).

175. See id. at 314; see also Brazil, Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule, in W.D. Brazil, G. Hazard, Jr. & P. Rice, Managing Complex Litigation 305 (1983) (discussing Peterson and its progeny).
to entrust cases to alternate forums in the first instance, whenever a "general increase in litigation" makes such reference necessary "to prevent unnecessary delay and unreasonable expense." Court-annexed ADR has precisely these objectives. The programs discussed here do not block ultimate access to jury trial.

The issue ultimately turns on the degree of burden created by the intervention. If the delay imposed—or the financial risk faced by a litigant who seeks a jury trial de novo—is large enough in practice, a particular program might arguably pose an intolerable impediment to the right to jury trial. To date, no federal program has failed such a test. As the programs expand in size, however, delay may well increase. On balance, then, the constitutional outlook for court-related ADR is favorable.

3. Are They Fair?

In itself, crafting processes that constitutionally dispose of cases more quickly and inexpensively is insufficient cause for rejoicing. We must not become entangled in the "mystique of disposition uber alles." The highest value in the justice system, after all, is justice. The ultimate issue on which the desirability of court-annexed ADR will turn is the fairness of the results it produces.

To determine that issue, we must touch upon the fairness of settlements in general. The ADR mechanisms discussed here are intended to foster settlement. There is a sense among some commentators that...
settlement leads to better justice than the "all or nothing, black or white end result of a trial," and that "a freely negotiated settlement is a higher quality of justice which is obtainable earlier and at less cost."\textsuperscript{183} Partially due to this attitude, but probably more because of the system's overcrowding, the settlement process has become the core of the judicial process. After decades of resistance, and in the face of some persistent opposition, the federal judiciary has unmistakably embraced an active role in promoting settlement.\textsuperscript{184} Yet fundamental criticism about settlement exists, criticism that calls into question its fairness to the parties, other litigants and society as a whole; many firmly believe that the court has no business encouraging settlements and should refrain from doing so.\textsuperscript{185}

Because settlement consists of a solution arrived at by negotiation rather than by a court's application of legal rules, some argue that it allows the stronger party to pressure the weaker into an unjust agreement. Distributional inequalities—the fact that some parties have ample resources available to finance lengthy litigation and others do not—mean the weaker party is frequently coerced into acquiescence.\textsuperscript{186} Any outcome that results from one party's brute bargaining power is neither acceptable nor just. To the extent that excess delay produces settlements, it does so unfairly. Yet this happens with some regularity.\textsuperscript{187}

The parameters of any settlement, like all private transactions, hinge on the relative strength of the parties. The legal system cannot eliminate the reality that some adversaries are more powerful than others. Until we can deliver judgments on demand, the stronger will attempt to lord it over the weaker.

Still, the system strives to extend its even hand beyond the courtroom to the pretrial phase. While disparities in power are important, negotiations do not occur in a Hobbesian state of nature,\textsuperscript{188} nor do they take place in a vacuum. The substantive law governing the dispute establishes the boundaries of agreement. The judgment that a court would impose

\textsuperscript{183} Flanders, Case Management in Federal Courts: Some Controversies and Some Results, 4 Just. Sys. J. 147, 150 (1978).

\textsuperscript{184} See generally Galanter, The Emergence of the Judge as a Mediator in Civil Cases, 69 Judicature 257, 261 (1986) (settlement is not merely convenient, but produces superior results). The ascendency of the judge's role in settlement was formally recognized in the 1983 amendments to Fed. R. Civ. P. 16. See supra note 174. For the most prominent critique of this interventionist role, see Resnik, Managerial Judges, 96 Harv. L. Rev. 374 (1982). For criticism of her critique, see Flanders, supra note 105.

\textsuperscript{185} See generally Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984) ("[S]ettlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.").

\textsuperscript{186} See id. at 1076. A minimal "take-it-or-leave-it" offer might well tempt the weaker party in such a situation.

\textsuperscript{187} Alschuler, supra note 13, at 1820.

\textsuperscript{188} See T. Hobbes, The Leviathan (1914).
after trial—or, more accurately, the parties' expectation of that outcome—defines the bargaining power of each side. The negotiating process thus unfolds in the shadow of the law.\textsuperscript{189} This does not guarantee fair settlements—parties will still differ in their abilities to bear cost and delay, negotiating skill and willingness to take risks\textsuperscript{190}—but it increases the likelihood of just results.

Another restraint on the unfairness of settlements has come with increasing judicial involvement in pretrial proceedings. Cases that formerly would have been settled without judicial involvement now require some judicial input: "We have moved from dyadic to mediated bargaining."\textsuperscript{191} Bringing ADR into the courthouse has continued this move. The buffer between the parties protects the weaker while giving both sides information needed to bargain intelligently. Whether an ADR-assisted settlement would resemble a trial verdict or unassisted settlement is uncertain.\textsuperscript{192} It would seem, though, that the involvement of a panel of neutral arbitrators or of a jury culled from the regular jury pool would more closely approximate justice than naked bargaining. With ADR, the shadow of the law looms much larger.\textsuperscript{193}

There is no body of statistics from which we can measure the fairness of court-related ADR. Again, the best indicator is the satisfaction of the participants.\textsuperscript{194} As we have seen, litigants like ADR and think it produces fair outcomes.\textsuperscript{195} The only direct comparison to "regular" settlements indicates that litigants prefer settlements achieved through court-

\begin{footnotes}
\footnote{189. See Mnookin & Kornhauser, \textit{Bargaining in the Shadow of the Law: The Case of Divorce}, 88 Yale L.J. 950, 968 (1979).}
\footnote{190. See Galanter, \textit{supra} note 41, at 33-34.}
\footnote{191. Galanter, \textit{supra} note 184, at 262; see Resnik, \textit{supra} note 184, at 378-79.}
\footnote{192. "Because settlement data are private, it is difficult to measure the effect of ADR on case outcomes. But several studies that have looked at this question have found no evidence of significant change." Hensler, \textit{Court-Annexed ADR}, in Donovan Leisure Newton & Irvine ADR Practice Book 351, 371 (J. Wilkinson ed. 1990); see also J. Adler, D. Hensler, C. Nelson, & G. Rest, \textit{Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program} 85, 90-92 (Institute for Civil Justice 1983) (most litigants interviewed believed that arbitration was an acceptable manner of resolving their disputes); E. Lind, \textit{Arbitrating High Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court} (Institute for Civil Justice 1990) (litigants felt that arbitration process was fair overall). The congruence between arbitration awards and decisions of trials de novo varies from program to program. For example, in Multnomah County, Oregon, the congruence was 41\%s, while the comparable figure in Philadelphia was 68\%. See Note, \textit{supra} note 133, at 608. Of course, these rough percentages are for the small number of cases taken to trial de novo. These figures tell us nothing about those verdicts that are accepted.}
\footnote{193. In addition, to the degree these programs reduce delay, they limit the impact of inequality.}
\footnote{194. See Levin & Golash, \textit{Alternative Dispute Resolution in Federal District Courts}, 37 U. Fla. L. Rev. 29, 35 (1985). Luban has argued that "[p]articipant satisfaction is not valued for its own sake, but for the sake of whatever it is the participants feel good about. For most likely what the participants feel good about is the justice of the procedure." Luban, \textit{The Quality of Justice}, 66 Den. U.L. Rev. 381, 407 (1989) (emphasis in original).}
\footnote{195. See \textit{supra} notes 137-138.}
\end{footnotes}
annexed arbitration.\textsuperscript{196}

Traditional settlements, of course, are the proper benchmark against which to assess ADR. It is not a question of court-annexed ADR versus trials, but rather of court-annexed ADR versus relatively unmediated bargaining. In that context, these dispute resolution mechanisms appear quite fair.

More fundamental attacks have been launched against settlement. In a sense, legal norms articulate the public morality of our society. Trials serve to enforce these norms while, to a degree, settlements evade them.\textsuperscript{197} This discrepancy manifests itself in two ways. First, parties to a private settlement can more easily pass losses and risks to third parties. For example, a dispute over a public nuisance, such as pollutants flowing onto plaintiff’s property, can be “resolved” by an agreement to shift the dumping onto a third party’s property. Such a private settlement would satisfy both disputants but is unlikely to resemble the result of public litigation.\textsuperscript{198} Courts are an important vehicle for striking the necessary balance between community and individual. A more private method of dispute resolution such as ADR runs the risk of neglecting that balance.\textsuperscript{199}

A wider danger in the evasion of conventional litigation may be the undermining of public values that underlie legal principles. Increasing resort to ADR could stunt the growth of legal precedent by enabling litigants to bypass the public judicial arena. Because there can be no evolving common law with private ADR, the results in similar cases may well vary considerably.\textsuperscript{200} The guidance that third parties gain from published judicial opinions might be undercut and the law’s progress retarded. The law cannot respond to changing times and new technologies if the disputes that these developments engender never pass through the courthouse doors. In sum, it is urged that ADR will hamper the evolution of public morality by removing disputes from the reach of judicial rulemaking. This risk is exacerbated in the spectrum of cases that serve remedial and social functions—cases involving civil rights, institutional reform, or environmental pollution.

Some of these criticisms seem exaggerated. Even the most optimistic predictions do not envision ADR diverting so many cases from trial that the common law will dry up. Still, these concerns are valid and we should heed them. Of greatest concern is the need to ensure that the adjudication of important public rights and duties remains public. This points to a unique strength of court-annexed ADR: so long as ADR

---

\textsuperscript{196} See Perception of Justice, supra note 136, at 79.

\textsuperscript{197} See Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 Tul. L. Rev. 1, 16 (1987); Fiss, supra note 185, at 1085; Luban, supra note 194 at 388.

\textsuperscript{198} See Luban, supra note 194, at 404-05.


\textsuperscript{200} See id. at 544-45.
mechanisms are adjuncts to courts, steps can be taken to ensure that is-
ques of great public concern are resolved in a public forum. Administer-
ing ADR in the courthouse allows for supervision by the judiciary,
minimizing any risks.

Further, Congress has established some guidelines. For example,
claims based on constitutional violations as well as all civil rights claims
have been exempted from compulsory arbitration in the ten districts in
which CAA has been authorized.201 Also, each of these courts must es-
tablish rules for a system that exempts cases from arbitration for good
cause, including cases that involve complex or novel legal issues or in
which legal issues predominate over factual ones.202

Such standards would ensure that the law continues to grow and that
judicial pronouncements will not be foreclosed on important issues of
public policy. For better or worse, we have invested the courts with an
almost ecclesiastical authority to interpret constitutional and community
values. In a properly designed program, court-annexed ADR will not
undermine or diminish that role.

We must continually bear in mind that we are discussing the impact of
ADR on a judicial system in which a full-blown trial is an unusual event.
Court-annexed ADR programs do result in more “adjudicated” cases—
those in which a neutral third party renders a judgment on the merits of
a case. It is difficult to believe that the results are less fair than those of a
system in which the only adjudicative method available, trial, will occur
in appreciably less than ten percent of cases. Indeed, to the extent that
delay and congestion are reduced and hardcore disputes brought to trial
sooner, court-annexed ADR enhances fairness for all—even those liti-
gants for whom participation in arbitration or summary jury trial re-
solves nothing.203

4. Other Questions

Significant questions about some of these programs remain.

a. What authority?

Congress has authorized mandatory arbitration in ten district
courts.204 It would appear that no additional district court could estab-
lish such a program without expanded legislative authorization.

No specific statutory authorization for SJT currently exists, and at
least one court has concluded that federal judges lack authority to com-

201. See 28 U.S.C. § 652(b) (1988). Currently, mandatory CAA is authorized only in
203. As my colleague Judge Jon O. Newman has observed, “we must include in our
assessment of fairness . . . fairness in the broader context for all who use and wish to use
the litigation process.” Newman, supra note 40, at 1647.
pel participation in SJTs. Defenders of the procedure, however, see the bases for that authority in Federal Rule of Civil Procedure 16 and in inherent judicial power.

Rule 16 empowers a court to order attorneys and unrepresented parties to appear at pretrial conferences designed to facilitate settlement of the case. The participants are authorized to "consider and take action with respect to . . . the use of extrajudicial procedures to resolve the dispute."

One commentator has argued that SJT is merely a pretrial meeting in another form and that "the provisions of Rule 16 should not be read to limit such pretrial meetings to those which are traditionally defined as conferences." In other words, SJT is merely a variant of pretrial conference. It is more plausible to consider summary trials the type of "extrajudicial procedures" the Rule allows to be considered at a pretrial conference.

But, as the Seventh Circuit has noted, while Rule 16 "was intended to foster settlement through the use of extrajudicial procedures," it alone cannot "be read as authorizing a mandatory summary jury trial." The Rule merely states that parties "may consider and take action with respect to" such extrajudicial procedures. Still, the Seventh Circuit's decision in Strandell v. Jackson County appears to go to the opposite extreme: not only does Rule 16 fail short of explicit authorization, but the Rule's parameters "do not permit" compulsory SJTs. This conclusion flowed from the court's equation of SJT with the imposition of settlement negotiations on an unwilling litigant or the equivalent of coercing the parties into an involuntary compromise. Aside from mischaracterizing the intent of summary jury trials (and all ADR), the opinion reflects a crabbed reading of a district court's authority.

---

205. See Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1987).
206. See supra note 76. This discussion applies with equal force to early neutral evaluation programs.
207. See Fed. R. Civ. P. 16(a). The explicit authorization to compel the attendance of pro se litigants should not be taken to preclude a court's authority to so order represented litigants. See G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 656 (7th Cir. 1989) (en banc).
208. Fed. R. Civ. P. 16(c). They may also take action with respect to "such other matters as may aid in the disposition of the action." Id.
210. See Fed. R. Civ. P. 16(c)(7); Lambros, supra note 51, at 802.
211. Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987) (emphasis in original).
212. Fed. R. Civ. P. 16(c) (emphasis added).
213. Strandell, 838 F.2d at 888.
214. See id. at 887. To similar effect, the Second Circuit has noted that Rule 16 "was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise." Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).
As the Supreme Court has noted, the Federal Rules of Civil Procedure are not the exclusive authority for procedural actions taken by the district courts. Instead, a court’s actions may properly be grounded in "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Indeed, as the Rules recognize and numerous courts have noted, "the mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition."

Of course, a district court cannot exercise its inherent power to manage its docket as it sees fit in a manner inconsistent with rule or statute. SJTs, however, are fully in keeping with the aims of Rule 16 and Rule 1. The Judicial Conference of the United States has apparently reached the same conclusion, formally endorsing the experimental use of SJTs in 1984.

A judge, however, does not have the power to impose settlement on parties who insist on their day in court. The Rules draw a clear distinction between being required to attend a settlement conference and being required to participate in settlement negotiations. The Strandell court apparently believed that a compulsory SJT was equivalent to the imposition of compulsory settlement negotiations, and therefore an improper abridgement of the right to trial.

That conclusion, however, rests on a misconception of this and other
forms of ADR. Like each court-annexed ADR mechanism discussed here, a summary jury trial is not binding. While it aims to encourage settlement negotiations (and to make them more fruitful by providing both sides with valuable information), it in no way compels them.\textsuperscript{222} Nor does an SJT in any way deny a party's right to trial.

Reflecting a more generous view of a court's inherent authority, district courts in three circuits have expressly rejected the Seventh Circuit's Strandell analysis.\textsuperscript{223} Of course, an amendment to Rule 16 explicitly authorizing SJTs would dispel all doubts on the issue. Nonetheless, even absent such an amendment or local rule, an individual judge possesses the authority to compel summary jury trials. It would, however, seem advisable for courts to adopt local rules clarifying the procedure for utilizing SJTs.

b. What about privileged information?

The Seventh Circuit's Strandell decision also expressed the view that a summary jury trial could not be imposed on recalcitrant parties when it might require disclosure of information privileged from discovery.\textsuperscript{224} Some have questioned whether compelled disclosure is even an issue, arguing that the decision to withhold privileged information is merely a matter of tactics and that counsel can structure their presentations as desired.\textsuperscript{225} That approach threatens to render SJTs a wasteful exercise in those cases where privileged information could affect the outcome at trial. Some lower courts have attacked the problem head on. Since modern federal courts require a comprehensive pretrial order—including the marking of all exhibits, the exchange of witness lists and summaries of expected testimony—"it is hard to see how anything would be disclosed by a summary jury trial that would not . . . already be contained in the pretrial order."\textsuperscript{226}

In the vast majority of cases, SJTs would serve their function even if the parties could hold back privileged information. In almost all cases, trial is based on facts uncovered through discovery. In those rare instances in which privileged information is crucial to a party's case and he

\textsuperscript{222} Circuit [in Strandell] reasoned that compelled participation would result in litigants' loss of their right to proceed to trial, and forced courthouse settlements.


\textsuperscript{224} See Strandell, 838 F.2d at 888. In Strandell, plaintiffs had obtained statements from 21 witnesses. After the close of discovery, the court denied defendants' motion to compel production of those statements because the defendants had failed to meet the "substantial need" and "undue hardship" requirements of Federal Rule of Civil Procedure 26(b)(3). See id. at 885. Plaintiffs' counsel then refused to participate in the SJT, arguing that it would require disclosure of the privileged statements. See id.

\textsuperscript{225} See Houck, supra note 217, at 390-91.

is determined not to reveal it until trial, SJT may not be useful and the court should probably not compel it.\textsuperscript{227} "That is a very different thing, however, from saying that the court lacked the power to require an SJT."\textsuperscript{228}

c. \textit{Will the press have access?}

A related question is whether the first amendment right of access will attach to court-annexed ADR. When the media has asserted a right to attend judicial proceedings, the Supreme Court has applied a two-pronged analysis. First, the proceeding must be one for which there has been a "tradition of accessibility."\textsuperscript{229} Second, public access must play a "significant positive role in the functioning of the particular process in question."\textsuperscript{230} It is far too early to speak of "traditions" for programs little more than a decade old. In any event, practice thus far weighs heavily against allowing access to the public.\textsuperscript{231} The ADR mechanisms that federal courts have adopted to date are "procedure[s] that might lead the parties to voluntarily terminate the litigation."\textsuperscript{232} In that respect, they most resemble settlement conferences. Such conferences have historically been closed to the public and the press.\textsuperscript{233}

In addressing whether access would play a "significant positive role" in the functioning of ADR,\textsuperscript{234} "it is necessary to consider whether the practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'"\textsuperscript{235}

The role that ADR can play in the heavily overburdened federal court system certainly establishes a "substantial government interest." Public access over one or more parties' objections would undoubtedly under-

\textsuperscript{227} See Houck, \textit{supra} note 217, at 391.

\textsuperscript{228} Id.; see also Marcus, \textit{supra} note 90, at 750 (privileged information arguments "not persuasive").

\textsuperscript{229} Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982)).

\textsuperscript{230} Id. (quoting \textit{Globe Newspaper}, 457 U.S. at 606). Even where present, the right of access has been termed a qualified one. See id. at 9.

\textsuperscript{231} The effect of publicity on settlements is currently at issue in medical malpractice suits. As of September 1990, federal law requires hospitals, medical boards and insurance companies to submit reports on disciplinary actions and settlements. The American Medical Association fears that such recording of adverse settlements in minor cases decreases the chances of privately settling burdensome "nuisance suits" and of any settlement under $30,000 being reported. See Hilts, \textit{Ideas and Trends: Oversight, Phase I: Keeping Records of Doctors with Records}, N.Y. Times, Sept. 9, 1990, at A26, col. 1.


\textsuperscript{233} See Palmieri v. New York, 779 F.2d 861, 865 (2d Cir. 1985).

\textsuperscript{234} Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986).

mine the utility of the procedure as a settlement device. Thus, as the Sixth Circuit concluded in a case involving SJTs, "allowing access would undermine the substantial governmental interest in promoting settlements, and would not play a 'significant positive role in the functioning of the particular process in question.'"236

There is something unsettling about barring the press from such proceedings.237 That ill-defined unease, which I have experienced, probably flows from the similarity of SJT and CAA to trial on the merits, a context in which press access has enjoyed substantial protection. But we must be mindful that there is no binding judicial determination that decides the litigation at these alternative procedures. They are "inextricably bound up with the settlement process."238 The media cannot compel disclosures about negotiations preceding a traditional settlement, even if such negotiations are conducted with the participation of the court. It would seem that the press lacks a right of access to these less traditional proceedings.

CONCLUSION

Seven hundred seventy-five years ago, King John, in the Magna Carta, promised "[T]o no one will we deny or delay right or justice."239 That promise has proven devilishly difficult to keep. It has yet to be completely fulfilled. Still, in light of all the pressures on the nation's courts, we can be justly proud of their performances and innovations. Given the startling growth of a federal judge's workload over the last forty years, I am heartened that the system has not already buckled. That the courts have survived testifies to a willingness to meet challenges through change. Judges today take a much more active role in case management than in years past, bolstered by increased power to sanction attorneys who wield discovery and delay as weapons.240 This ability to react has enabled the federal system to shoulder its vastly increased load while continuing to dispense quality justice. An even greater willingness to experiment is needed now. The sense of crisis gripping some in the legal community241 is all to the good if it spurs us to meaningful experimentation and reform.

The procedures discussed in this article bring the encouraging news


237. See Marcus, supra note 90, at 780-81.

238. Lambros, supra note 51, at 802.

239. Quoted in J.C. Holt, Magna Carta 327 (1965) (J.C. Holt trans.).

240. See generally Galanter, supra note 184, at 261-62 (surveying emergence of the judge as mediator in civil cases); Peckham, supra note 51, at 254 (discussing the role of the judge as case manager); Flanders, supra note 105, at 505, 516 (defending modern judicial management of civil cases).

241. See, e.g., Coyle, supra note 24, at 1, col. 1 (noting "ominous signs that federal courts soon won't be able to function as intended").
that there are judicial innovators willing to take courageous steps.\textsuperscript{242} These ADR programs began as isolated experiments. As with any experiment, questions arise just as some problems are solved. But given the dire situation in which our courts find themselves and the encouraging results that these procedural innovations achieved, I feel confident in urging an expansion in court-annexed ADR.\textsuperscript{243}

I caution that ADR is not a magic potion. It is not a panacea for all the problems facing the federal courts. The problems of caseloads, delays and costs are simply too great. But all the evidence to date indicates that ADR can make a valuable contribution to easing access to the courts.

To take advantage of that potential, Congress should act:

1. to authorize mandatory arbitration in all federal district courts;\textsuperscript{244}
2. to make explicit the authority of all federal courts to refer cases to mandatory non-binding ADR, including early neutral evaluation, court-annexed arbitration, and summary jury trials.\textsuperscript{245}

This enabling legislation should be general enough to allow continued local diversity. These reforms will take root only if district courts can adapt them to particular local needs. In addition, participation by the local bar in the drafting of court rules will give them greater acceptability. Exploring alternative procedures will furnish us with experience and knowledge. Using the district courts as laboratories will help us learn what works best.

Is it premature to expand? I believe that the current conditions do not permit delay. The overloading of the system has become dangerous and relief for courts and litigants is imperative. After forty years on the bench, I am convinced that concerted and immediate action is necessary to preserve the precious resource that the Founding Fathers created: Article III courts. Mounting delays compel the system to react if its role—to provide a forum for solving important controversies when all other methods fail—is to be fulfilled.

For the federal courts to function efficiently, an essential reform that must be pursued is perfecting our ability to remove from the calendar, early in the litigation process, those cases that are destined to settle after

\footnotesize{\begin{enumerate}
\item As former Chief Justice Burger has commented, judges willing to act as "judicial pioneers should be commended for their innovative programs. We need more of them in the future." D. Provine, Settlement Strategies for Federal District Judges 69 n.171 (Federal Judicial Center 1986).
\item The Federal Courts Study Committee shares this confidence: "The movement to infuse [ADR] techniques into the federal courts no longer need be limited to local experiments. But the variations in local conditions make equally inappropriate the imposition of uniform national ADR rules . . . ." 1990 Report, supra note 33, at 83.
\item The Federal Judicial Center advocates authorizing CAA in all courts, which could then determine in their discretion whether it would be mandatory or voluntary. See B. Meierhoefer, Court-Annexed Arbitration in Ten Federal District Courts [Draft] 2 (Federal Judicial Center, forthcoming).
\item The Federal Courts Study Committee has made a similar proposal. 1990 Report, supra note 33, at 83.
\end{enumerate}}
clogging a court’s docket for years. Many cases are frivolous, brought out of a notion that litigation should be a first resort and not a last recourse. Indeed, some are brought to extort settlement. It is important to weed out these cases, the sooner the better, through motion or settlement. They pollute the whole process of meting out justice and thus deny access to other litigants. Even in meritorious cases, however, we must consider whether parties, if given the assistance of the courts, might not arrive at a mutually agreeable solution relatively quickly and inexpensively. It is wise to remember that litigation is an irritant. Judge Learned Hand expressed his view: “I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.”

Court-annexed ADR promises to make such early settlement more likely, relieving pressure on an overburdened judiciary and mitigating delay for all concerned. By bringing ADR into the courthouse, we can increase efficiency and still maintain fairness. Without the speedy, inexpensive disposition of cases, justice is denied. Over a decade ago, the Pound Conference Report put the point well:

The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all.

247. Pound Conference, supra note 5, at 300.