Alternatives to Litigation: Do They Have a Place in the Federal District Courts?

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Contents

Acknowledgments iii

Introduction 1

Definitions and Context 3

Summary of the Arguments, Responses, and Points of Agreement 9

The Arguments and Responses 13

1. A core function of the courts as public institutions is to serve the needs of individual litigants and thereby to maintain public confidence in society's capacity for peaceful dispute resolution. 13
2. Courts have a responsibility to use ADR when it can help save litigant and public resources while preserving fair procedures and outcomes. 27
3. To provide all litigants with access to alternative procedures and to guarantee the procedural protections litigants rightfully expect from courts, ADR should be available through publicly funded court-based programs. 43
4. Alternative dispute resolution procedures should be presumptively mandatory in appropriate cases, but the right to trial must be preserved in all cases. Courts should establish procedures to assist parties in selecting the appropriate procedure for managing and resolving their case. 51

Endnote 61

Appendix 63

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Introduction

Is there a proper place in the federal courts for alternative methods of dispute resolution? Is it appropriate to compel litigants to participate in such procedures as arbitration and mediation? What is the proper role of courts in resolving disputes? And what is their proper role in society?

In this paper we examine the place of court-based, presumptively mandatory, nonbinding alternative dispute resolution (ADR) in the federal district courts. By its nature, the inquiry involves—indeed, in this paper the inquiry begins with—a debate about the role of the courts in society. We then examine whether ADR procedures enhance or undermine that role and whether these alternatives provide any benefits to individual parties, to courts, or to society.

Although the current rapid implementation of ADR in the federal courts may seem to make these issues moot, that very implementation is prompting policy makers—whether at the level of the individual court, the Judicial Conference, or Congress—to take note of the phenomenon, to ask basic questions about its value and effects, and to distinguish between the different kinds of ADR with their different procedures and objectives.

We address the questions about the role of the courts and ADR's value and effects through a series of arguments in support of and in opposition to court-based ADR programs. The purpose of the paper is not to come to a conclusion on the value of court-based ADR, but to inform the reader and policy maker through a fair summary of the points that can be made on each side of the issue.

This paper is one of a series of papers prepared by the Federal Judicial Center to assist the judiciary in considering questions that are critical to its future.[1] The Center has prepared these papers as

1. Previous papers in the series are Gordon Bermant et al., Imposing a Moratorium on the Number of Federal Judges (1993), William W Schwarzer and Russell R. Wheeler, On the Federalization of the Administration of Civil and Criminal Justice (1994), and Wheeler and Bermant, Federal Court Governance: Why Congress Should—and Why Congress Should Not—Create a Full-Time Executive Judge,

part of its statutory mandate to "conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other[s] . . . and to provide . . . planning assistance . . . ."[2] This paper, like the others in the series, does not take sides or state a Center position. Its purpose is to encourage and inform discussion about the role of the courts and the appropriate place of ADR in fulfillment of that role.

The arguments for and against providing alternative dispute resolution methods in the federal courts are the heart of the paper. Before turning to those arguments, we first define the object of our discussion—court-based alternative dispute resolution—and describe the context in which the ADR debate is taking place today.

Abolish the Judicial Conference, and Remove Circuit Judges from District Court Governance (1994).

2. 28 U.S.C. § 620(b)(1), (4).

Definitions and Context

Although the debate about the proper role of ADR has recently intensified, the idea of alternatives to litigation is neither novel nor especially recent in the federal courts. The first formal recognition of ADR's role was stated in the 1983 amendments to Federal Rule of Civil Procedure 16, which provided for the use of "extrajudicial procedures to resolve the dispute."[3] Adoption of this language followed by several years the federal courts' initial experimentation with court-based ADR, in the form of mediation and nonbinding mandatory arbitration programs. Since then a number of other forms of ADR have been established as court-based programs. It is this segment of ADR—the court-based programs—that we argue for and against in this paper.

Although ADR's vocabulary is not yet fixed, basically "court-based alternative dispute resolution procedures" are (1) administered by the court and (2) different from the traditional litigation process.[4] While ADR methods are often thought of as alternatives to trial, the very small percentage of cases that are tried indicates that ADR procedures serve primarily as alternatives to traditional forms of pretrial dispute resolution and not as alternatives to trial. (Thus, this paper does not treat the judge-hosted settlement conference, a long-standing component of the traditional adjudication process, as a form of alternative dispute resolution.) In administering a court-based ADR program, a court generally provides a roster of neutrals who conduct the sessions, establishes criteria for inclusion on the roster, and adopts rules regarding such matters as case selection, methods for assigning neutrals to cases, confidentiality guarantees, and guidelines for conducting the ADR session.[5] As

3. Fed. R. Civ. P. 16(b)(7).

4. We make this distinction recognizing that categorization is problematic in the field of ADR, where neither "ADR" nor "traditional adjudication" have firm definitions.

5. Throughout the paper we use the term "neutral" to denote the person who is appointed to a court roster and provides the ADR services. Depending on the type of ADR program under discussion, the neutral may be an arbitrator, a mediator, or an early neutral evaluator. The neutral is usually an attorney, al-

suggested in the definitions of ADR programs in the Appendix, at this point in their development, court-based alternatives involve a fairly limited number of ADR methods: arbitration, mediation, early neutral evaluation, and summary jury trial.[6]

Some court-based programs automatically refer certain types of cases to the ADR process—a so-called "mandatory" referral ("presumptively mandatory" is more precise, since parties can request that their cases be removed from the program). In other programs, cases enter the ADR process only after referral by a judge or through voluntary participation by the parties. In all federal court ADR programs, the outcome is nonbinding—that is, the parties are not bound by it unless they agree to be—and thus "mandatory" and "voluntary" describe only *how* cases enter an ADR program, not what happens during the ADR process or the type of outcome reached.

Federal district court experimentation with court-based ADR began in the late 1970s. Three district courts implemented presumptively mandatory arbitration programs in 1978, requiring parties in cases that met certain criteria to participate in arbitration unless they could show why it would be inappropriate. In 1988, Congress authorized ten courts to implement presumptively mandatory arbitration programs and an additional ten to offer, but not require, arbitration.[7] During the late 1970s and the 1980s, a number of courts also developed mediation programs, Judge Thomas Lambros in the Northern District of Ohio invented the

though some rosters also include other professionals, such as engineers, psychologists, and accountants.

6. Some courts that do not provide ADR services through a court-based program nonetheless make it available by authorizing individual judges to refer cases to ADR providers outside the court.

7. 28 U.S.C. §§ 651–658. The arbitration courts are often referred to as "pilot" courts. Their status is temporary, and current authorization will expire at the end of 1997 unless Congress acts before then to extend it (see the Federal Courts Improvements Act of 1994, Pub. L. No. 103-420). The Judicial Conference has voted to support continued authorization for the current twenty programs and extending to all courts the authority to adopt voluntary, but not mandatory, arbitration programs (Report of the Proceedings of the Judicial Conference of the United States, Sept. 1993, at 45; and Report of the Proceedings of the Judicial Conference of the United States, March 1993, at 12 [hereinafter JCUS Report, with month, year, and page]).

summary jury trial, and the Northern District of California created the first early neutral evaluation program.[8]

In 1990, the Report of the Federal Courts Study Committee urged Congress to make clear the authority of district courts to establish ADR programs, including presumptively mandatory procedures.[9] Two years later, a survey of all federal district judges showed that many supported, at least in principle, the use of ADR procedures in the federal courts: 66% disagreed with the proposition that courts should resolve litigation through traditional procedures only; 86% disagreed with the proposition that ADR should never be used in the federal courts; and 56% said that ADR should be used in the federal courts because in some cases it produces a fairer outcome than traditional litigation.[10] However, the Judicial Conference has refused to endorse mandatory use of ADR—at least in the form of arbitration—by voting not to endorse legislation that would extend mandatory arbitration beyond the ten pilot courts authorized in 1988 and limiting its support to voluntary arbitration.[11]

Passage of the Civil Justice Reform Act of 1990 (CJRA) undoubtedly quickened the pace of federal district court ADR development.[12] The CJRA, as part of its effort to reduce civil litigation cost and delay, requires thirteen district courts to implement alternative dispute resolution procedures—ten "pilot" districts and three "demonstration" districts—and instructs all other district courts to "consider" adopting ADR procedures. At least two-thirds of the district courts now authorize use of one or more forms of

8. *See, e.g.*, Karl Tegland, Mediation in the Western District of Washington (Federal Judicial Center 1984); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution—A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. (1984); and Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. Chi. Legal F. 303, 331–34 (discussion of the development of the early neutral evaluation program in the Northern District of California).

9. Report of the Federal Courts Study Committee, April 1990, at 83.

10. Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges (Federal Judicial Center 1994), at 43.

11. JCUS Report, March 1993, at 12, and Sept. 1993, at 45.

12. 28 U.S.C. §§ 471–482 (1995).

ADR, and perhaps as many as a third of the courts have in place or intend to establish court-based programs.[13]

The context in which the federal courts are now debating ADR's merits has also been changed by growing receptivity to ADR outside the federal courts. Consider, for example, the following developments:

- Programs are proliferating in state courts, and a number of states are moving beyond general authorization to comprehensive state-wide programs that provide litigants with a range of ADR options.[14]
- The 1990 Administrative Dispute Resolution Act requires each federal agency to consider ADR for resolving disputes, and a 1991 executive order directs agencies to consider ADR as one of a number of methods for improving civil justice.[15] A number of agencies, many with the assistance of the Administrative Conference of the United States, have developed ADR programs for internal as well as external disputes.
- In 1984, the Legal Program of the Center for Public Resources (now known as the CPR Institute for Dispute Resolution), a nonprofit organization established to publicize ADR, initiated a program to seek corporate pledges to use ADR. By 1994, almost 700 of the nation's largest companies and more than 2,000 of their subsidiaries had signed the pledge. A similar program begun in 1991 to seek law firm pledges to counsel clients about ADR had garnered 1,500 signatories by the end of 1993.
- In 1993, the American Bar Association Standing Committee on Dispute Resolution became a full-fledged ABA section—

13. This information was compiled at the Federal Judicial Center and is based on review of the CJRA cost and delay reduction plans and on an ADR survey sent to the courts in 1993. The information will be more fully reported in a district-by-district ADR Sourcebook to be published by the Center in 1995.

14. See, for example, Minnesota General Rules of Practice, Rule 114: Alternative Dispute Resolution, which requires litigants in eligible cases to select one of nine ADR options.

15. Administrative Dispute Resolution Act, 5 U.S.C. §§ 581–593 (1990); Exec. Order No. 12,778, 55 Fed. Reg. 55,195 (1991).

the Dispute Resolution Section—established to promote responsible use of ADR methods.

These developments have been driven by a variety of goals and circumstances, among them a search for lower costs and quicker dispositions in civil cases, the changing economics of legal practice, the demands imposed on judge time—particularly trial time—by a rising criminal caseload, and a conviction that ADR can, in some cases, provide a better process and a better outcome.[16]

This substantial incorporation of ADR into the dispute resolution process, both inside and outside the courts, presents the federal court system with many questions, such as

- Should ADR have a role at all in the federal courts?
- What should that role be?
- How can ADR fulfill that role most effectively?
- What weight should be given to the preferences of the public and the bar?
- How will adoption of ADR change the role of the courts?
- How will it change the role of the judge?

Embedded in these questions is a far more basic one: What is a court and what values does it serve? This paper will not answer these questions, but it will, we hope, provide arguments and information that will inform the debate.

16. For a discussion of some of the reasons given for adopting ADR, see Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 Fla. St. U. L. Rev. 1, 6–13 (1991).

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Summary of the Arguments, Responses, and Points of Agreement

The arguments and responses presented in the next section are the heart of this paper. Here we offer a short guide to what lies ahead: (1) the proposition that is the subject of this paper's debate; (2) a summary of the arguments and the responses to those arguments; and (3) a listing of points of agreement.

The arguments and responses in this paper debate the merits of the following proposition:

> *To fulfill their mission while using both litigant and court resources wisely, each federal district court should at an early point in each civil case help litigants identify the procedure most appropriate for managing and resolving the case. The procedures available to litigants should include, in addition to traditional litigation procedures, an array of court-based, publicly funded nonbinding processes, such as mediation, arbitration, and early neutral evaluation. There should be a presumption that parties in appropriate cases will use one of these processes, but the right to trial must be preserved in every case.*

More specifically, we consider the following questions:

1. Given that a core function of the courts as public institutions is to serve individual litigants and thus maintain public confidence in society's capacity for peaceful dispute resolution, does ADR
   - enhance that function by meeting litigant needs through a wider variety of dispute resolution methods, or frustrate it by diverting resources from the declaration and application of the law to programs designed solely to aid parties in settling their disputes?
   - enhance that function by providing litigants with greater opportunities to tell their story to a neutral, or compromise the courts' role and resources by substituting court-based programs for functions properly carried out by litigants' own counsel?

2. In respect to the courts' responsibility to use their own and litigants' resources wisely,
   - should courts use ADR to provide additional forums for pretrial preparation and settlement explorations, or should such activities be limited to judges under Federal Rule of Civil Procedure 16?
   - does ADR have the potential to save litigants, or courts themselves, time, money, or both, or are such savings illusory and achievable only at the expense of the trial by jury?
3. Should ADR be available through publicly funded, court-based programs as a means of providing all litigants with access to these procedures and of guaranteeing the procedural protections litigants rightfully expect from courts, or would ADR develop better through private-sector experimentation with flexible rules and practices?
4. Should federal courts have the authority to mandate that litigants in appropriate cases participate in ADR, or do mandatory programs distort the benefits of ADR?

In the course of debating the proper role of ADR in the federal courts, we identified several points of agreement:

- Although there is considerable evidence about user perceptions of ADR, research findings are currently insufficient on the cost and time consequences of ADR and cannot fully inform that part of the debate that revolves around cost and time. Research should not in any case displace other sources of guidance, such as logical analyses, individual and social values, and intuitions, but where the debate about the proper role of ADR can be informed by empirical analyses, that research should be undertaken promptly.[17]
- ADR provides substantial benefits to litigants by satisfying their need to tell their story to a neutral. Courts should be responsive to the importance litigants place on a meaning-

17. The lack of data is reflected in the small number of empirical studies we cite and their concentration on arbitration.

ful and fair forum, whether they provide that forum through ADR or in some other way.

- Efficiency should not be the overriding principle when a court considers whether to implement an ADR program.
- Fair procedures and case outcomes as well as litigant and public satisfaction with the courts require that any court-based ADR programs provide high-quality service. Essential to that quality is the effective training and performance of the attorneys who serve as mediators, arbitrators, and early neutral evaluators. Ensuring such quality requires resources.
- The use of multiple ADR procedures in a single case can be duplicative and unnecessarily costly and should not generally be imposed on parties.
- There appears to be value in an early screening process to determine case needs and party preferences and to educate attorneys and litigants about their case processing and dispute resolution options.
- The outcomes of court-based ADR procedures, particularly mandatory procedures, must be nonbinding and must preserve access to trial without penalty, unless the parties voluntarily agree to a binding outcome.

One additional point of agreement—that district judges should not serve as neutrals in court-based ADR programs—deserves slightly more discussion because many will disagree with our position. A district judge's involvement as the ADR neutral poses a serious risk—or at least an appearance of risk—to that judge's independence and neutrality by exposing the judge to the parties' private pretrial assessments of their case and to their negotiating postures.[18] This is particularly true in cases that, if tried, will be tried by

18. A judge's participation as the ADR neutral is rare in any event. Data from the Federal Judicial Center's 1987–1989 District Court Time Study indicate that Article III judges spent 0.14% of their case-related time on matters that were clearly connected with ADR. Approximately half of that time was spent on arbitration matters, including deciding the eligibility of cases for arbitration. In comparison, judges devoted 2.33% of their time to settlement conferences. Magistrate judges spent 0.48% of their time on ADR and 9.17% on settlement conferences. *See* Table 1 in the Appendix.

the judge (this risk arises also when judges participate in settlement conferences in cases they, rather than a jury, will decide[19]). Can a judge who places a value on a case as a neutral evaluator, or a judge who learns the details of each party's situation and concerns as a mediator, serve as the impartial decision maker at trial—or perhaps even when deciding other matters in the case? Although judges may insist that they can remain neutral, parties may justifiably be worried that they cannot. As a consequence, litigants may be reluctant to participate fully in the ADR process. These concerns can be set aside, of course, if a judge serves as the mediator or evaluator in another judge's cases, but is such an approach a wise use of the justice system's scarcest resource? We believe the answer is no.

19. D. Marie Provine, Settlement Strategies for Federal District Judges 28–30 (Federal Judicial Center 1986).

The Arguments and Responses

We proceed now to the arguments in support of and responses in opposition to the proposition presented above. We believe that some of the arguments offered below, both pro and con, are stronger than others. We lay them out in this format to provide the judiciary, the bar, and others involved in federal court policy making with an opportunity to assess the many conflicting points of view.

1. A core function of the courts as public institutions is to serve the needs of individual litigants and thereby to maintain public confidence in society's capacity for peaceful dispute resolution.

a. To serve litigant needs and preserve public confidence in the justice system, courts must provide dispute resolution procedures that fit the variety of disputes and needs brought to them.

The argument

Federal courts provide a forum for the peaceful resolution of disputes and thus serve the core governmental responsibility of ensuring society's safety and stability. Federal courts also preserve the rule of law and develop and refine legal norms through public adjudication, conducted according to written rules and resulting in recorded decisions that preserve individual rights, sustain public values, and provide a written law to guide future behavior. Courts cannot, however, fulfill their dual functions of peace maker and law giver if they are not available to disputants or do not have the confidence of the public.[20] To be available, courts must be affordable and must provide the assistance of a neutral decision maker or facilitator in a timely fashion. To generate public confidence, courts must provide both a process and an outcome that are seen as fair by litigants and the public.

20. Both of these functions of courts are stated in the first sentence of the Long-Range Planning Committee's Draft Mission Statement for the Federal Courts: "The mission of the federal courts is to preserve and enhance the rule of law by providing to society a just, efficient, and inexpensive mechanism for resolving disputes . . . ."

For many cases over many years, the traditional adjudicatory process has provided the means for peaceful and fair resolution of disputes. The courts' procedural rules and public proceedings have afforded individual parties due process, and their written decisions have established and reinforced public values.

In adhering solely to traditional dispute resolution methods, however, courts impose on all cases a stringent process whose purpose is preparation for trial. Yet most cases do not proceed to trial—some because the court cannot provide a timely trial date, but many more because the parties cannot or do not want to try the case. For some, the traditional adversarial framework, although providing a resolution, does not provide the conciliation they seek. For others, the procedural rules make the process too costly to pursue. Even for those who intend to proceed to trial—to seek, for example, a new precedent or to resolve an important public policy issue—the traditional process may impede or prolong case resolution, rather than promote it. When courts cannot meet litigants' needs, they risk becoming an esoteric and distant institution in citizens' lives. To retain the confidence of the public and to preserve their role as peace maker and law giver, the courts must change as the needs of those they serve change.

For many litigants, alternative procedures provide benefits or opportunities not available to them through traditional adjudication. Instead of adjudication's exclusive focus on legal and factual contentions, mediation—to take one form of ADR as an example—helps parties clarify and address the interests driving (and sometimes stalling) the litigation. Instead of adjudication's "winner take all" outcome, appropriate in some but not all cases, mediation permits parties to fashion more creative and mutually satisfactory outcomes. Where adjudication is rigid, mediation is flexible. And where adjudication reserves control for the judicial decision maker, mediation provides parties with greater control over the dispute resolution process and outcome.[21]

21. Many other benefits are asserted for ADR, including confidentiality of the outcome, preservation of relationships among the parties, and resolution of psychological issues as well as legal issues. *See generally* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 (1984).

"Common sense" alone, Professor Maurice Rosenberg has said, "suggests that meeting the standards of the ideal system will require deploying a whole battery of dispute resolving mechanisms . . . ."[22] The constraints of traditional adjudication and the need for greater flexibility are illustrated by a case described by Judge Joseph Weis:

> Two parties [in a state court case] had a dispute over whether they had an agreement to share the proceeds of a winning lottery ticket. The amount involved was in the millions of dollars. Because the parties had no writings, the decision whether there was a contract depended solely on their testimony. After deliberating for some hours, the jurors sent a note to the judge asking if they could award less than half to the plaintiff. The judge advised them that under the law the plaintiff got either half or nothing. The judge was correct, but I could not help wondering whether it would have been better if the law had given the jury the freedom to award a compromise.[23]

The rising call for alternative procedures from the bar, judges, Congress, the public, and litigants presents a fundamental question: What is the role of courts and how can it best be fulfilled? Even if a court's most important role is to declare and preserve the law, this function can be carried out only through real cases and real litigants who bring disputes to court. And it is the litigants' perceptions of their case's outcome and process that form the basis for much of the public's faith in the courts. In the individual case lies the legitimacy of the courts and the preservation of a just and ordered society.

Some litigants are best served by the traditional adjudicatory process. Others need a less elaborate, less costly, or less adversarial procedure. These needs have probably always been present, but are augmented today by a greater diversity of case types in federal courts compared with twenty years ago and a greater diversity of litigants. Many litigants, for example, are in prison; many come from countries where dispute resolution is not adversarial.[24] When substantial numbers of litigants in federal courts cannot satisfactorily

22. Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 Creighton L. Rev. 801, 809 (1988).

23. Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 Notre Dame L. Rev. 1385, 1396 (1992).

24. *See, e.g.*, [California Supreme Court Chief Justice] Malcolm M. Lucas, *The 1992 Frank E. A. Sander Lecture at the American Bar Association Annual Meeting*, NIDR Forum 3, 7 (Summer/Fall 1993).

resolve their disputes—or when the public believes this is true—the courts have failed in their most fundamental functions.

Some will argue that if courts shift their focus to meeting the needs of individual litigants, they will retard development of the law by removing law-making cases from judicial decision making. Even in the absence of alternative procedures, however, less than 5% of cases go to trial, the traditional forum for law declaring in the district courts (see Figure 2 in the Appendix). An additional unknown, but undoubtedly small, percentage of pretrial dispositions, such as summary judgment motions, also establish law. Furthermore, in the traditional adjudicatory system, as in alternative procedures, potentially lawmaking cases settle because the parties choose to do so. No judge would force the parties in such cases to trial because a new legal principle might be set.

Moreover, legal rules alone do not ensure societal well-being. Unwritten norms, too, are powerful guides for behavior, and courts, like other institutions, help establish and maintain important norms. In doing their work, for example, courts present to citizens a model for how to resolve disputes. The adjudication model, while teaching much that is good, emphasizes conflict rather than cooperation, secrecy rather than openness, and dependence on authorities rather than oneself for resolution of problems.

It is possible to conceive of a different kind of federal court, one in which mediation would be required in most civil cases, one in which those in disagreement would be directly involved in the resolution of their case.[25] One purpose of such a court, indeed a central purpose, would be to promote self-determination and a consideration for others, to "produce moral individuals and to find the common good."[26] Mediation would serve not only the needs of the individual litigant but critical public values as well, and the courts would serve as models for an alternative way to deal with problems, substituting cooperative problem solving and party-generated solutions for adversarial interactions and judge-imposed outcomes.

25. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, J. of Cont. Legal Issues 1, 3 (Fall 1989/Spring 1990).

26. *Id.* at 14.

The response

Federal district courts should not divert resources from their primary public mission—to declare and apply the law—to secondary, alternative programs designed solely to aid parties in settling their disputes.

Declaring and applying the law is the primary function of federal courts. The claim that the courts must provide an array of dispute resolution services raises the core issue in this debate: What are courts for? or, more specifically, What are federal courts for? Proponents of court-based ADR would have federal courts become whatever today's litigants want them to become. Their call for the courts to expand their public service role boils down to calling for the courts to provide whatever it takes to resolve pending disputes between private parties.

Courts exist first and foremost to establish, interpret, and apply the law, not simply to resolve private disputes. When a court resolves a dispute publicly, either through a jury verdict or findings of fact and conclusions of law, or through a ruling on a motion, the court not only serves litigants' private interests but also serves the public interest by creating a visible precedent or, in the case of a jury verdict, a visible case evaluation. When a court or its representative in an alternative proceeding evaluates a case privately and facilitates a confidential settlement, the court primarily serves individual, short-term interests of the litigants.

The methods courts use in declaring the law give the public confidence in the law. Such procedural traditions as carefully attending to factual development in depositions and trials, articulating reasons in public decisions, and relying on juries for fact-finding and law applying enhance public acceptance of case outcomes and legal rulings.[27] Yet these traditions are the very targets of ADR proponents, who view trials as too expensive, discovery and evidence rules as too complicated and formal, juries as too uneducated to understand complex cases, and impartial umpiring as too constricting a role for judges.

27. *See generally* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357 (1985) (discussing evidentiary and procedural aspects of judge and jury fact-finding that are likely to affect public acceptability of verdicts and compliance with them).

By declaring the law, courts resolve disputes and serve a higher purpose by ruling publicly in concrete cases. Reasoned decisions give meaning and context to abstract rules of law, empowering individuals in later instances to apply the law to their own situation and to avoid disputes or settle them privately, often applying a settled rule in the shadow of a scheduled trial. Even jury verdicts, while not formally declaring the law, serve as visible, public guides that others can use to predict how future juries will apply the law. Jury verdicts may also have the effect of opening the door for precedent-setting appellate rulings[28] and of precluding relitigation of the same issue by a losing party.

Alternative processes thwart the formal dispute resolution and law-declaring processes by siphoning disputes away from them. When court-based ADR rules establish alternative treatment for large blocks of cases, such as contracts and torts claiming less than $150,000, the effect may be, as observers of private ADR put it, to remove "whole categories of cases . . . from public scrutiny," raising the question of "how appropriate changes in the common law and in statutory interpretation might be accomplished."[29] By no means should or could all cases filed in court lead to trials and precedent-setting judicial opinions. In most cases, parties settle their claims with little or no formality. Referring such cases to ADR, however, removes them from the careful pretrial processes that allow the parties and the court to assess their importance to the development of the law.

In 1986, Judge Harry Edwards wrote that "we must determine whether ADR will result in an abandonment of our constitutional system in which the 'rule of law' is created and principally enforced by legitimate branches of government . . . ."[30] Some ADR advocates have acknowledged the tension between law-declaring and dispute-

28. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1974) (affirming the first jury verdict for a plaintiff in asbestos litigation, ruling that the jury was properly instructed on the legal standards and could have found that asbestos products are unreasonably dangerous and that manufacturers' warnings were inadequate).

29. Erik Moller et al., Private Dispute Resolution in the Banking Industry 29 (Rand Institute for Civil Justice 1993).

30. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*?, 99 Harv. L. Rev. 668, 671 (1986).

resolving functions, but they have not developed precise guides to assist courts in identifying cases of precedential value.[31] The eligibility requirements of the typical court-based ADR program sweep into such programs cases involving legal principles along with cases involving pecuniary interests.[32] By forcing parties to expend resources preparing for and participating in ADR, courts diminish resources that these parties might prefer to devote to advancing the law.

b. To serve the needs of litigants and preserve public confidence in the justice system, courts should provide litigants with an opportunity to tell their story to a neutral third person. This opportunity is of great importance to litigants but is available to only a small number when the traditional settlement conference or trial is the only forum offered by the court. ADR programs increase the availability of this opportunity.

The argument

In the traditional adjudicatory process, the litigants themselves seldom participate in the two most common forms of dispute resolution, attorney-negotiated settlements and judge-facilitated settlements. Only the few litigants whose cases proceed to trial will enter the courthouse or see the judge. Most will receive a settlement ne-

31. *See, e.g.*, Susan Keilitz, *Court-Annexed Arbitration*, *in* National Symposium on Court Connected Dispute Resolution Research 35, 46 (National Center for State Courts 1994) ("Most of the research has found no differences in the success of arbitration in handling torts and contract disputes, or relatively low value ($15,000 and under) and higher stakes cases ($150,000 or more in Hawaii and several federal district courts)."); Barbara Meierhoefer, Court-Annexed Arbitration in Ten District Courts 43–48 (Federal Judicial Center 1990) (Practices vary widely among the ten pilot courts; the probability that a case would be exempted from mandatory assignment to arbitration was as dependent on the practices of the court as it was on the type of dispute.).

32. For example, the ten original pilot federal court-based arbitration programs "limit eligibility to [contract and tort] cases where the claim is either for money damages only or for money damages plus non-monetary claims determined by the court to be insubstantial." Meierhoefer, *supra* note 31, at 32. Many of the courts set presumptive eligibility criteria and fail to account for cases in which one or more parties seek to establish precedent, leaving it to the parties to move for exemption from the program. *Id.* at 33–34.

gotiated by their attorneys through meetings the litigants themselves do not attend.

Most litigants express little satisfaction with either of the two most common forms of dispute resolution—particularly judicial settlement conferences, which they rank as the least fair method for resolving cases.[33] Research has consistently shown, however, that litigants are highly satisfied with and give high ratings to the fairness of traditional trials and ADR procedures.[34] Litigants value trial, arbitration, and mediation because these procedures permit them to tell their stories, assure them that they and their dispute have been taken seriously by the court, and help them maintain control over the process through involvement in it. And the effect appears to be the same whether or not the opportunity is actually exercised. Many parties who are referred to arbitration, for example, settle their dispute before the arbitration hearing is held, yet they and their attorneys—as well as those who actually have a hearing—express high satisfaction with this ADR method.[35] Furthermore, those who express such satisfaction include litigants who

33. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Soc'y Rev. 953, 965 (1990) (Litigants whose cases were resolved by trial or arbitration gave their procedures higher ratings for fairness than did litigants whose cases were resolved by attorney negotiations. Litigants whose cases were resolved through judge-hosted settlement conferences gave these procedures the lowest ratings for fairness.).

34. *See* Lind et al., *supra* note 33; Keilitz, *supra* note 31, at 48–49 (Review of the research literature on arbitration shows that "[l]itigants and attorneys are generally very satisfied with arbitration . . . . Perhaps the most salient aspect . . . is its potential to provide a third party review to cases that otherwise would settle with no intervention."); Meierhoefer, *supra* note 31, at 6 (also finding high litigant and attorney ratings for fairness, which for parties meant a hearing that provides "an opportunity to tell their side of the story and bring out all of the important facts to prepared arbitrators at a reasonable expenditure of time and money." Half the litigants and a plurality of the attorneys selected arbitration as their preferred method when asked to compare it with a decision by a judge or jury.); Susan Keilitz, *Civil Dispute Resolution Processes*, *in* National Symposium on Court Connected Dispute Resolution Research 5, 11 (National Center for State Courts 1994) (mediation was rated higher than the traditional trial process, and litigants in mediation had a greater sense they were heard).

35. In the ten federal mandatory arbitration programs, for example, between a quarter and a third of the cases eligible for arbitration closed after referral but before the hearing. Meierhoefer, *supra* note 31, at 49.

have a basis for comparing ADR with court experience—for example, half of those who had cases in the federal mandatory arbitration programs had observed or participated in a trial[36]—and lawyers with sufficient experience to permit comparison, such as those in the federal court arbitration study, who found the process as a whole satisfactory and the hearings themselves fair.

Attorney-negotiated settlement, in contrast, suggests to litigants that their case was not important enough to receive the court's attention. Perhaps even more important, because settlement generally focuses on only money, litigants may believe that critical issues of right and wrong have been trivialized.[37] This problem can be even more severe in judge-hosted settlement conferences, where judicial intervention is generally focused more on making litigants aware of the costs and uncertainties of litigation than on providing them with an opportunity to tell their story.[38]

This litigant dissatisfaction with traditional pretrial procedures renders largely irrelevant the claims that ADR is unnecessary because most cases settle anyway or at least settle once a firm trial date is set. The point is that settlement by traditional procedures is not what litigants want. What litigants want—and what ADR provides—is a forum they would not otherwise have.

Why not, then, provide more opportunities for trial? More trials are not a realistic possibility for many courts, where a limited number of trial slots are available for civil cases. Nor are trials a realistic possibility for many litigants, as Magistrate Judge Wayne Brazil has argued in the context of a discussion of arbitration:

> The *choice in the real world* for [cases of modest economic value is] *not between jury trial and arbitration, but between arbitration and no hearing of any kind* . . . . When assessing the value and role of arbitration programs, it is essential to keep sharply in focus what the real alternative to them is for most small and moderate-sized civil cases. The way most such cases are resolved is not by trial or any other formal or

36. Meierhoefer, *supra* note 31, at 65.

37. Lind et al., *supra* note 33, at 965.

38. *See* Provine, *supra* note 19, at 15–16. There are a number of reasons why judges may not encourage litigants to tell their stories, not the least of which is the amount of time such conferences would take.

> semi-formal adjudicative process, but through informal, *secret settlement negotiations* between two lawyers.[39]

Less than 5% of cases filed in federal courts are tried, and that percentage has been declining steadily (see Figure 2 in the Appendix). Whatever the cause of this decline—the high cost of litigation, too few judges, the rise in criminal filings and their priority in the trial queue—the reality is that many cases do not receive the attention of a judge. Alternative dispute resolution can provide a satisfactory—indeed, superior—option for many of these cases by providing more, not less, process. The benefits can be seen in a simple measure like the relatively high percentage of arbitration cases that go to a hearing compared with the percentage in traditional litigation that go to trial.[40] In other words, litigants in arbitration make use of—and are *able* to make use of—the forum provided for them.

Given the critical importance to litigants of an opportunity to be heard and given the extent to which this opportunity shapes litigants' perceptions of judicial system fairness, traditional procedures alone cannot fulfill the courts' obligations to individual litigants and the public. Because they cannot—even if in only a portion of the cases—the courts must provide alternatives.

The response

Parties' desire for an opportunity to tell their story is an undiscriminating standard because parties also appear to be satisfied when they do not take advantage of that opportunity. Moreover, parties voluntarily settle the vast majority of cases without ADR. Programs motivated by litigant dissatisfaction with lawyers' settlement practices draw the courts into addressing problems beyond their roles and resources.

Party satisfaction is an undiscriminating measure. It is impossible to structure effective civil dispute resolution procedures based on

39. *Statement Regarding Court-Annexed Arbitration* presented to the Subcomm. on Courts and the Administrative Process of the Senate Comm. on the Judiciary, 103rd Cong., 1st Sess., at 3–4 (1993) (statement of Wayne D. Brazil) (emphasis in original).

40. *See, e.g.*, Meierhoefer, *supra* note 31, at 49 (across ten courts, 12%–42% of cases referred to arbitration had an arbitration hearing; less than 5% of cases in traditional litigation go to trial).

party satisfaction with ADR programs. Parties' evaluations of the pilot federal arbitration programs, for example, showed similar rates of approval[41] across the ten courts despite significant differences in program characteristics, such as the types of cases eligible for referral, the standards for exemption from arbitration, the number of hearings, and the rates of requests for trial de novo.[42] Evaluations of the early neutral evaluation program in the Northern District of California also showed similar rates of satisfaction with the traditional and alternative approaches.[43] Such undiscriminating approval provides no basis for distinguishing effective programs from ineffective ones and leads one to suspect that traditional settlements might receive similar approval.

Party satisfaction is an undiscriminating measure in another sense. If party satisfaction is the primary standard and if parties are more satisfied with alternatives than with traditional trials or court-sponsored settlement conferences, does this mean that policy makers should abolish the less satisfying traditional approaches? Abolishing traditional approaches seems to be the logical outcome of taking overall litigant satisfaction as the primary measure of what the mission of the courts should be. The minority who want to pursue traditional trials could simply be considered outvoted.

Litigants are satisfied with traditional processes. Before adopting widespread use of a new procedural system to let litigants tell their

41. In ten federal court programs, approximately four out of five respondents thought the arbitration hearings were fair, and there were no statistically significant differences in respondents' appraisals of the programs in the ten courts. Meierhoefer, *supra* note 31, at 64–65.

42. *Id.* at 29–50. For example, the percentage of cases that settled before an arbitration hearing ranged from 58% to 87%. *Id.* at 49. The demand for trial de novo ranged from 46% to 74% in arbitrated cases. Yet these differences did not affect the litigants' ratings of the programs. *Id.* at 65.

43. "When asked how satisfied they were with the way their case was handled in the Northern District and with the final result in their case, attorneys' responses showed no significant differences between the ENE and the non-ENE groups." Joshua Rosenberg et al., Report to the Task Force on Alternative Dispute Resolution, Regarding the Early Neutral Evaluation Program of the United States District Court for the Northern District of California, December 1, 1992, at 22. *See also* Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 Stanford L. Rev. 1487 (1994) (published report of the authors' study of the ENE program in the Northern District of California).

story, there should be no doubt that the current system is wanting. In fact, over the years, parties have settled the vast majority of civil cases, presumably because they saw the certainty of a settlement as superior to the uncertainties and costs of a trial. By definition, these voluntary settlements produce outcomes that both sides see as advantageous. Voluntary settlements appear to reflect satisfaction with court procedures that leave the parties in control. The high rate of voluntary settlement shifts to those who would change the current system the burden of showing dissatisfaction with it.

Like the alternatives, traditional settlement processes afford litigants an opportunity to tell their story and to control the process. In the ten pilot arbitration programs, for example, only a minority of participants had an arbitration hearing,[44] yet four out of five participants were satisfied that the arbitration procedures were fair. Their responses imply that litigants are satisfied with traditional settlement negotiations.

Having an opportunity to tell one's story to a lawyer affords litigants an acceptable level of satisfaction with both the outcome and procedural fairness of the process. An exploratory study in state courts, for example, found marginal differences in litigant satisfaction with the outcomes of traditional settlement procedures as compared with the outcomes of trials, arbitration hearings, and judicial settlement conferences.[45] Furthermore, most litigants in the pilot arbitration programs expressed satisfaction when their cases settled informally, presumably through attorney negotiations before referral to the arbitration program. Perhaps party control of the process through representation by counsel is an overriding litigant value that has a major impact on satisfaction.

The observation that parties settle cases without ADR underscores a limitation on what is known about party satisfaction with ADR. How does the level of litigant and lawyer satisfaction in cases that settle with help from court-based ADR compare with lawyer

44. Meierhoefer, *supra* note 31, at 48, 49 (Table 9). "In all districts, the majority of cases closed prior to an arbitration hearing . . . . " In half of the participating districts, fewer than one in four assigned cases went to a hearing. At least one-fourth of the cases in the ten districts settled before referral to the program; in four districts, more than half of the cases settled before referral.

45. The data are from Lind, *supra* note 33, at 966 (Table 1).

and litigant satisfaction in cases that settle without court-based ADR? We know very little about this issue.[46] Yet ADR proponents would conclude that litigants and lawyers view the alternatives as a superior route to litigant satisfaction.

Furthermore, ADR may be more expensive to litigants than traditional settlements, which are likely to have lower transaction costs than participation in ADR would have. ADR studies have generally not approached the issue from this perspective, and there is insufficient evidence to determine whether, in effect, litigants would be satisfied if they knew they would have to pay more in terms of their time or lawyers' fees to have an opportunity to tell their story to someone other than their lawyer.

Preliminary reports of lack of success with voluntary federal arbitration programs suggest that litigant support for ADR programs is weak. Voluntary arbitration programs in federal courts—especially those that call for parties to "opt in"—have had little success.[47] When parties have been informed that they can take affirmative steps to opt in to an arbitration program, they have declined to do so. This suggests that reported satisfaction rates from mandatory arbitration programs are due to differences between the mandatory arbitration courts and the lawyers who practice in them and other federal dis-

46. The data available are from studies of programs in various state courts. Proponents cite Keilitz, *Civil Dispute Resolution Processes*, *supra* note 34, at 8–10, for the proposition that litigants are more satisfied with mediation than with traditional settlement negotiations. Keilitz looked at mediation programs in three state courts and found that both "litigants and attorneys find mediation to be fair and satisfactory." This is not a finding that mediation is superior to unassisted negotiation. In one jurisdiction, litigants found mediation to be superior to unassisted negotiation, but attorneys found the traditional process to be superior. In another jurisdiction, Keilitz found that mediation was rated superior in the cases that did not settle. In a third jurisdiction, no comparison was done, but satisfaction with mediation varied with the mediator and was greater in cases that concluded more quickly. *See also* Lind, *supra* note 33, at 966, discussed *supra* at note 45.

47. David Rauma & Carol Krafka, Voluntary Arbitration in Eight Federal District Courts: An Evaluation (Federal Judicial Center 1994). For example, "opt-in" programs in four courts generated twelve arbitration cases during a period when 13,239 civil cases were filed in those courts. *Id.* at 17–19 (Table 4). In "opt-out" programs in four federal district courts (Arizona, Georgia Middle, Ohio Northern, and Pennsylvania Western), in many cases (34%–55%) one or more of the parties took affirmative steps to remove the case from the arbitration process.

trict courts and their lawyers.[48] Policy makers should not presume that there is a great demand for ADR based on the results from ten districts that were committed to ADR before implementing mandatory arbitration pilot programs. We do not know whether either the voluntary courts or the mandatory courts are typical of other districts, and we should not presume that litigants in other districts, who may be steeped in a different litigation culture, will be as satisfied as those in the mandatory courts.

The ADR solution is not designed to resolve the problem of lawyer–client relations. ADR proponents assume that traditional litigants often have not had an opportunity to tell their story and, citing Magistrate Judge Wayne Brazil, that a primary cause of this lack of opportunity is the secrecy of settlement negotiations between the lawyers. If courts are to alleviate this problem, judges will have to intervene early and directly. Simply referring cases to ADR will not work because, as we have seen,[49] lawyers can and often do engage in settlement negotiations before the ADR procedures start. Policing all settlements would require substantial district or magistrate judge time and would draw judges away from their primary roles of preparing cases for trial and trying them. Moreover, it appears that litigants may not view judicial intervention in the settlement process as improving the situation or providing a fair opportunity for them to tell their story.[50]

48. The ten pilot arbitration districts studied by Meierhoefer appear to be atypical of other districts because they volunteered to participate in the program. Data from their programs should not be generalized to districts with different local legal cultures. Only eighteen of ninety-four federal district courts applied to participate in the mandatory court-annexed arbitration program created and funded by Congress. Two dropped out and ten were selected by the Administrative Office. Meierhoefer, *supra* note 31, at 20–21. Two "important" considerations used to select the districts were "evidence of bar acceptance and the enthusiasm demonstrated by judges and clerks." *Id.* at 21. Meierhoefer found that courts applying for the pilot programs either had experience with local forms of ADR or were familiar with successful national pilots in Northern California and Eastern Pennsylvania. *Id.* at 30. Lawyers and litigants in those jurisdictions may well have been predisposed to be satisfied with mandatory ADR programs because they were familiar with similar programs.

49. *See* discussion at notes 40–42, and 44–45.

50. According to Lind, "[j]udicial settlement conferences were more likely to leave litigants feeling uncomfortable about the process than were bilateral set-

If parties want to have an opportunity to tell their stories in an informal way, they can arrange their own procedure, using private firms that provide arbitration, mediation, mini-trials, and the like. Public agencies, such as consumer protection programs and neighborhood justice centers, have been designed to give people unable to afford private programs access to a forum for telling their stories and for obtaining meaningful relief without engaging the formal judicial apparatus. Perhaps these agencies should be expanded.

2. Courts have a responsibility to use ADR when it can help save litigant and public resources while preserving fair procedures and outcomes.

a. Alternative dispute resolution procedures can save litigants time and money and ensure fair treatment.

The argument

ADR programs can be an important tool in courts' efforts to help litigants resolve their disputes more quickly and less expensively. Courts should use ADR programs that can serve this goal, taking care to ensure that they are well designed and managed so they are fair and do not increase litigation cost and time.

Three federal court programs provide evidence of ADR's savings for litigants and of the fairness of the procedures. The first is the early neutral evaluation (ENE) program in the Northern District of California, which brings parties and a volunteer neutral together early in the litigation to discuss and plan the case and in doing so addresses one of the major sources of litigation costs—discovery.[51] In an evaluation of the ENE program, one-third of the

tlements." Lind et al., *supra* note 33, at 967. The authors speculate that the discomfort may relate to a lack of attention from the court or from a reduction of a dispute to monetary terms. *Id.* at 981.

51. In place since 1985, the ENE program provides parties in cases with substantial stakes (over $150,000) an early evaluation of their case, as seen through the eyes of a neutral evaluator with expertise in the case's subject matter. At a conference held within 150 days of case filing, each side presents its case to the evaluator, who then identifies the issues in dispute, assesses the strengths and weaknesses of each side, places a value on the case, assists in settlement discussions if the parties request it, and helps plan a discovery schedule if necessary. Northern District of California General Order 26.

attorneys in cases in the program reported decreased costs, and another third reported either no impact on costs or no knowledge of an impact.[52] Although the remaining third reported increased costs, on average the net savings estimated by those who reported savings were ten times as high as the net costs estimated by those who reported increased costs. The median savings reported by attorneys was $10,000, by parties $20,000.

As to savings in time, about half the participants in the ENE program said the process shortened the time to disposition and reduced the time they personally spent on the case. Actual case-tracking data also show reduced disposition time: ENE cases closed more quickly at all stages of the litigation. Although ENE, in providing an explicit assessment of the case's value to each party in the presence of the other parties, is a significant departure from traditional pretrial procedure, it also receives high approval for fairness. Two-thirds of the attorneys who participated in the procedure said it was fair, whereas only half of the attorneys who participated in the court's regular case management procedure said that procedure was fair.[53]

Mediation, when it occurs early in a case, can have the same effects as early neutral evaluation and can provide substantial savings in cost and time. The primary evidence on this point comes from the Early Assessment Program (EAP) in the Western District of Missouri, where cases in the program have a median disposition time of 7.7 months, and similar cases not in the program have a median disposition time of 10 months.[54] The termination rate also supports the conclusion that the EAP disposes of cases more quickly than

52. Rosenberg et al., *supra* note 43. Cost and time data are reported at pages 26–39.

53. *Id.* at 21.

54. Because the court established the program as an experiment, cases subject to the program can be compared with cases not subject to it. Established in 1992 by the court's CJRA plan, the program requires, within thirty days of the filing of an answer, a conference between the attorneys, clients, and the EAP administrator (an experienced litigator on the court's staff), at which the parties must select one of the court's ADR options. Most choose to mediate the case with the EAP administrator at the initial meeting. Data cited in this paper are from the court's most recent internal report, dated November 30, 1994.

the court's regular procedures: 60% of the EAP cases and 52% of the control-group cases terminated during the same time period.

The program has also been effective in reducing litigation costs: Nearly half the attorneys in cases in the program said it was "very helpful" in reducing costs, and 22% said it was "somewhat helpful" (10% said it was "detrimental"). A subset of 216 attorneys who were asked to estimate the impact of the program on litigation costs reported a total of $4,890,750 in cost savings and $39,050 in cost increases. Altogether, 84% of the attorneys who have participated in the early assessment meetings have found them fair.

Decisions reached through arbitration can also provide litigants with both savings and a sense of fair treatment. A majority of attorneys in each of the ten mandatory arbitration pilot courts reported that arbitration saved money for their clients. Although cost savings were less likely when there was a request for trial de novo, a dispute over legal issues, or party selection of the arbitrators rather than court selection, the majority of litigants in all cases reported that the overall cost of litigating their case was reasonable.[55] And in the one district in which arbitration cases could be compared with a control group of nonarbitration cases and in which attorneys were asked to provide actual cost estimates, there was a 20% reduction in litigation costs.[56]

Seventy percent of the litigants also thought the time to disposition in their case was reasonable. Even when there was a de novo demand, a majority of the litigants thought the time was reasonable and 70% of the attorneys said the de novo demand did not delay the case.[57] Although arbitration provides a procedure significantly

55. Meierhoefer, *supra* note 31, ch. 7.

56. E. Allan Lind, Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court 39–41 (RAND Institute for Civil Justice 1990).

57. Meierhoefer, *supra* note 31, ch. 8. Some have pointed to arbitration courts with above average median times from issue to trial to argue that arbitration delays trials and thus amounts to little more than another hurdle on the way to trial. Another plausible explanation, however, is that these courts' shorter and easier cases have settled through the arbitration process, leaving only the most difficult cases, those with the heaviest and longest pretrial demands, for trial.

different from traditional procedures, litigants and attorneys give it high ratings for fairness.[58]

To use ADR effectively, however, courts must be aware of the variations among programs and the interplay between the type of ADR proceeding, the type of case, specific ADR program characteristics, and the characteristics of the district, such as the caseload mix, the volume of civil and criminal filings, and the degree of collegiality of the bar. Some program features may substantially enhance the effectiveness of programs, whereas others may reduce it. In the early neutral evaluation program in the Northern District of California, for example, the identity of the evaluator has proven to be one of the most important factors in parties' assessments of program effectiveness. In the Western District of Missouri, the cost of the ADR service is very likely a factor, as nearly all parties choose the free mediation assistance of the program administrator rather than the for-fee service of non-court mediators or evaluators. And in the mandatory arbitration programs, experience has shown that arbitration is more likely to reduce litigation time when referrals occur early in the litigation, when the court controls and monitors scheduling, and when the hearing date is linked to discovery completion. Conversely, arbitration may increase cost and time when parties proceed to trial, underscoring the importance of selecting appropriate cases for these proceedings.

In addition to these factors, one other is very important for litigant evaluations of ADR's effectiveness, and that is the fairness of the procedure. For litigants, fairness is realized through a procedure that is dignified and attentive to their need to tell their story.[59] Even when litigation cost or time is saved, procedures that give too little attention to the litigant's need to be heard will not be seen as fair or effective. But when cost and time are reduced and fairness is not compromised—as in the federal court ADR programs described above—courts should use these dispute resolution tools.

58. Meierhoefer, *supra* note 31, ch. 6.
59. Lind et al., *supra* note 33, at 984.

The response

ADR programs are ill-suited to prevent excessive costs and delays; for litigants seeking a trial, ADR increases costs and delays trial scheduling.

Although there may be some marginal evidence of cost savings in some ADR programs, the aggregate figures are deceptive. Typical analyses do not consider whether injecting alternative dispute resolution procedures into traditional pretrial processes increases the cost of getting a disposition. Requests for trial de novo were made in more than 60% of the cases, for example, in six of the ten pilot mandatory arbitration courts. Almost two-thirds of the attorneys requesting trial de novo reported that referral to arbitration caused them to spend more time on the case than they otherwise would have.[60] Examination of caseload statistics showed little time savings from filing to disposition. Nor did the attorneys believe arbitration prompted earlier settlements.

Common sense alone tells us that adding new procedures is likely to add costs.[61] ADR procedures do not usually apply formal rules of evidence or otherwise focus on evidence that will be useful at trial.[62] For example, time spent in listening to lawyers' summaries of witnesses' expected testimony, as may be the case in arbitration, may have little relevance to trial[63] and therefore may increase the cost of getting through pretrial barriers with little commensurate benefit. If the ADR process does not lead to resolution and the case is tried, the ADR products (e.g., an arbitration award, settlement offers) do not fit into the trial process. Settlement discussions and offers are specifically excluded from evidence under Federal Rule

60. Meierhoefer, *supra* note 31, at 48–49, 88.

61. *See* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. Pa. L. Rev. 2169, 2215 (1993) ("CAA [court-annexed arbitration] programs that do not have strong disincentives to requesting a trial do not reduce either the potential litigation costs or the amount of delay the parties can threaten to inflict on each other, and may well increase such costs, especially when a trial is demanded.").

62. *Id*. at 2181 ("One district bans live testimony altogether."); *see also* Kathy L. Shuart, The Wayne County Mediation Program in the Eastern District of Michigan 6–7 (Federal Judicial Center 1984).

63. ENE is the exception in this regard in that it focuses on narrowing the issues, evaluating their merit, and preparing the case for trial.

of Evidence 408. The resulting duplication impedes the traditional law-declaring role of the courts by placing a costly barrier in front of litigants who want to have a public trial before a district judge. Wealthy litigants can hurdle these barriers; those with fewer resources cannot.

Even when the statistical approach most favorable to ADR is used—comparing ADR cases with cases that include trials—the results have been mixed.[64] Sometimes ADR proponents compare cost and delay data from ADR with data from traditional settlements and trials combined.[65] The result is that trials, which are beyond a doubt more expensive and time-consuming than ADR proceedings, skew the statistics. Studying costs and delays in this way ignores the unique role of trials in our common-law system and defines the issues in a way that is likely to find ADR to be less costly and time-consuming. In examining cost and delay data, it is more appropriate to compare the cost and time of ADR with the cost and time of traditional pretrial settlement. This, after all, is the comparison contemplated by the argument that secret settlement negotiations represent the evil to be addressed by ADR.[66]

64. In seven of the pilot mandatory arbitration courts, there was "very little difference overall in the speed with which" comparable cases terminated before and after the arbitration program was instituted. Meierhoefer, *supra* note 31, at 97. In the controlled experiment in the Middle District of North Carolina, data indicated that "the arbitration program . . . is encouraging the pursuit of some cases that otherwise might have been dropped." *Id.* at 96.

65. Data from the mediation program in the Western District of Missouri, *supra* note 54, illustrate the point. In that study, 4% of the cases in the control group went to trial, compared with 2% of the cases in the experimental group and 2% of the cases in a voluntary mediation group. In the calculation of the times from filing to disposition, the trial cases are included, inflating the median times by an unknown amount.

66. *See* discussion at notes 38–40. Cases that continue to trial after ADR should be compared with cases that proceed to trial without ADR.

b. Alternative dispute resolution procedures can reduce pretrial demands on judges and can help them allocate trial time more effectively.

The argument

The question of ADR's potential for conserving court resources has become caught up in a larger debate over whether the federal district courts face a caseload crisis and the nature of any such crisis.[67] Although this is not the forum in which to resolve that debate, it is important to note several related facts before assessing ADR's ability to assist the courts.

First, in the aggregate, federal civil caseloads have been decreasing in recent years,[68] even though some districts are feeling the consequences of extended judgeship vacancies and the rigorous prosecution of complex multidefendant criminal cases. Nevertheless, with current information it is not possible to measure in a very sophisticated way the demand of a case on a court or on a judge's time because demand is dependent on so many more factors than the simple caseload numbers used in arguments about the issue. While the demand of different case types, for example, is to some extent measured by the federal courts' case-weighting scheme, factors such as the contentiousness of discovery within a district are not easily measured.

Second, the civil trial rate in the federal courts is already very low and has been steadily declining for the past decade in nearly all federal courts, those with ADR and those without ADR alike. Between 1970 and 1993, the number of authorized judgeships increased and the number of civil filings decreased, but the percentage of civil cases terminated after a jury or bench trial decreased

67. *See, e.g.*, Robert A. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. Rev. 1905 (1993). A response is in G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. Rev. 1935 (1993).

68. Civil filings per authorized judgeship declined from 411 in 1987 to 354 in 1993. Weighted civil and criminal filings, which take into account the relative burdens that different types of cases impose on the courts, also declined during the same time period. Administrative Office of the U.S. Courts, Federal Court Management Statistics 167 (1993). These data are aggregates; some courts had increases in civil filings per authorized judgeship during that period.

substantially. In 1970, more than 7% of all civil cases were terminated after a trial; in 1993, less than 4% of all civil cases were terminated after a trial.[69] This drop represents a steady annual decrease over this time period in the percentage of civil cases with trials. Comparable data for jury trials show a similar downward trend, from less than 3% of all civil cases terminated in 1970 to about 1.5% of all civil cases terminated in 1993 (see Figure 2 in the Appendix).

Third, because the trial rate is so low, it is difficult to detect ADR's effects, if any, on the trial rate. The most effective method for determining an impact from ADR—random assignment of cases to alternative and traditional dispute resolution procedures—is infrequently used or used for too short a period of time because courts have been either unable or unwilling to create the long-term experimental programs necessary for testing the effect of ADR. Also, so many factors affect trial rates—for example, the nature of the caseload, relationships among members of the bar, the number of judges—that it is difficult to sort out the effect of any single one.

Beyond these facts, however, is the more important point that by and large the purpose of ADR is not and should not be to reduce trial rates. Neither individual cases needing trial nor the development of law is served by a preoccupation with lowering the number of trials. Rather, the essential goal, after ensuring that litigants have a fair process and outcome, should be to ensure that trial time is available for cases that need a trial or that will contribute to the development of law. A growing proportion of trial time is now demanded by criminal cases, as shown in Figure 1 in the Appendix. Because courts can do little to reduce this demand and because a sizable expansion of the judiciary is neither likely nor preferred as a matter of Judicial Conference policy, courts and individual judges must try to expand judges' trial time. They can do so by reducing judge time spent in other activities and by identifying cases that can be resolved before trial. Alternative dispute resolution procedures can help courts do both.

69. *See* Figure 2 in the Appendix. The percentages refer only to cases that were terminated after the completion of a trial before a district judge, magistrate judge, or jury.

Most ADR procedures expand the time available for trials by reducing pretrial demands on judges. Early neutral evaluation, for example, reduces this demand by helping parties narrow issues and plan discovery. Mediation programs can be particularly effective in reducing pretrial demands by removing from judges the burden of the often lengthy participation required for settlement discussions. And arbitration programs reduce judges' pretrial responsibilities in a number of ways. In some districts, for example, local rules permit the clerk of court to schedule pretrial events in cases referred to arbitration. In other districts, the demands of motions, particularly dispositive motions, are reduced because judges are permitted to set them aside until after the arbitration hearing. Across the ten federal arbitration courts, 96% of the judges agreed that their court's arbitration program had reduced their caseload burden, and 58% of them agreed strongly.[70]

Alternative dispute resolution procedures can also expand the time available for trials by helping courts screen out cases that can be resolved without trial. Rather than providing trials only to cases that can hold out until a trial slot is available, courts should actively assist parties in determining whether trial is the only method or the best method by which their case can be resolved. Not only will some cases be better and less expensively resolved if decided without trial, but also court time will be better used when applied only to cases that can be disposed of in no other way. Furthermore, by identifying cases that need trial and screening out those that do not, ADR helps produce trial calendars that are "real" and can be relied on, permitting judges to allocate their time more effectively. ADR can, in sum, help courts provide more trial time by using trial time better.

The response

Instead of reducing burdens, ADR creates additional burdens on courts. Moreover, any ADR-induced reduction in overall de-

70. Meierhoefer, *supra* note 31, at 34–35. Judges were asked for their perceptions of arbitration's impact on their burden. Judges whose programs diverted the greatest percentage of cases to arbitration and judges whose programs decreased judicial involvement in the pretrial process were the most likely to agree that the program had reduced their burden.

mands on court resources is likely to reduce the already declining rate of federal jury trials.

Conserving judicial resources by reducing the number of civil trials threatens to displace the role of civil trials in the federal system. The decline in trial rates cited earlier is a cause for serious concern. This decline cannot and should not be attributed solely to ADR. (Some of the decline is due to growing criminal caseloads and strict Speedy Trial Act deadlines, as well as to changes in the mix of civil cases that may result in more cases that are likely to settle.) It is clear, however, that ADR does not contribute to reversing or stopping the decline in trials. Some ADR programs were designed, in fact, specifically to relieve caseload pressures by reducing the number of trials.[71] The convergence of the ADR movement, the rising criminal caseload, increasing complexity of some civil cases, and judicial vacancies could lead to the gradual disappearance of civil trials from the federal courts unless priorities are rearranged to protect this tradition.

ADR may, in fact, facilitate and encourage increases in civil caseloads by resolving cases, thus reducing the judge's role in their termination and making it appear that the courts can handle more cases. The result may be a decline in the trial rate and apparent accommodation of all cases. The long-term effect may be to reduce or displace the role of trials in our legal system.

ADR programs demand additional resources. The best evidence indicates that arbitration cases impose burdens on court resources that are comparable to those imposed by ordinary case management procedures. The estimated costs, including judge time, in the only experiment that compared arbitration cases with a control group of nonreferred cases, were $1,209 for the average arbitration case and $1,240 for the average nonarbitration case. The trial rate was higher for the traditional group, but savings from fewer trials in the arbitration cases were offset by higher costs of responding to motions and conducting pretrial conferences in those cases. Finally, the arbitrators' fees of approximately $7,500 per year were paid by the court and the court's contractual costs for the administration of the program were $14,500 per year. Clerical support and judge

71. Meierhoefer, *supra* note 31, at 16–18.

involvement in the creation and administration of the program are not included in those cost figures.[72]

The same experiment showed that during the first nine months after filing, fewer cases terminated in the arbitration group than in the traditional group. Overall, the time from filing to termination was the same, but the data suggest the arbitration option may have induced some parties to keep alive cases they might otherwise have settled. We do not know whether this was good for the parties. We can surmise, however, that delays in terminating cases imposed additional demands on court resources.

No researcher has been able to detect, either through case studies or quasi-experiments, any effects of an arbitration program on the caseload.[73] Testimonials from judges based on personal experience[74] and surveys suggesting that almost all judges in the arbitration pilot courts believed that their court's programs assist with their caseload burdens should be interpreted cautiously. Such assertions may be no more than self-fulfilling beliefs. The judges who attest to savings from arbitration established the programs in question because they believed the programs would help with the caseload. Furthermore, most judges have little information about the baseline rate of terminations. They do not see the many cases that settle or are otherwise terminated without judicial action.

The findings from early mediation and early neutral evaluation programs suggest that those programs have reduced the time from filing to disposition when compared with cases handled by traditional methods. These results, however, should not be overstated. They do not show a lower demand on court resources, and they may only reflect the effects of a concentrated effort to force the parties to confront their cases at an early stage and a shift from using judicial resources to using nonjudicial resources. Costs to the courts may have been shifted to the front end of the process and to nonjudicial personnel.

72. *See* Lind, *supra* note 56, at 39–43.

73. *See* Meierhoefer, *supra* note 31; Lind, *supra* note 56, at 39–43.

74. A number of judges who have designed ADR programs or used ADR have written of its benefits for the courts. *See, e.g.*, Lambros, *supra* note 8; McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 49 (E.D. Ky. 1988); Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 62 Judicature 218 (1989).

ADR programs divert resources away from traditional programs. The judiciary is in a period of sustained resource shortfalls. From 1987 to 1994 the court system received noticeably smaller proportions of its budget requests.[75] The judiciary's budget for fiscal 1994 was funded at 87% of the requested level. (In 1995, the trend was at least temporarily reversed with funding at 97% of the requested level.[76]) In 1990, the judiciary requested 96 new judgeships to meet increases in cases filed. Congress created only 74 new judgeships.[77] In fiscal 1993, the initial appropriations to pay civil jurors ran out months before the end of the fiscal year.[78]

At a time when federal courts are understaffed in terms of both judges and staff, and when money to pay the modest fees of civil jurors is in jeopardy, it misplaces priorities to spend public money on ancillary programs designed primarily to satisfy private litigants. Long-term analyses of federal courts' caseloads show that the courts have been able by and large to accommodate the demands of an increasing workload.[79] Their ability to do so can be explained in

75. William W Schwarzer & Russell R. Wheeler, On the Federalization of the Administration of Civil and Criminal Justice 3, 53 (Federal Judicial Center 1994).

76. *President Signs FY 94 Appropriation Bill for Judiciary,* 25 The Third Branch 1–3 (November 1993); *FY 95 Judiciary Budget Bill Signed,* 26 The Third Branch 1–2 (September 1994).

77. *Bill Creates 85 Judgeships for Bush to Fill,* 1990 CQ Almanac 520–23. Congress created eighty-five judgeships, but eleven were for districts that were not included in the judiciary's request.

78. *See Funds for Civil Jurors Run Short,* 25 The Third Branch 1 (April 1993) (reporting that funds to pay jurors in civil cases "will run out on May 12, 1993").

79. During the period 1971–1986, years that included claims of a "litigation explosion," annual filings of private civil cases in the federal courts experienced almost a fourfold increase. Terence Dungworth & Nicholas Pace, Statistical Overview of Litigation in the Federal Courts 8–9 (RAND Institute for Civil Justice 1990). During the 1980s, however, "the number of cases terminated in any given year was roughly equal to the number filed in the previous year. As a consequence, the pending caseload has grown in most years by about the same amount as annual filings have increased over the previous year." *Id.* at 17. During the period 1971–1986, the median time from filing to disposition rarely strayed from the level of nine months, the same time that applied in four of the six years from 1988 to 1993. In 1993 the time from filing to disposition was eight months. *Id.* at 19–21. *See also* Administrative Office of the U.S. Courts, 1992 Federal Court Management Statistics 167 (1992). In 1991, the median time from filing to disposition was ten months.

part by increases in the number of judges and the size of chambers and court staff as well as by changes in the statutory and rule-based authority given judges to manage their caseloads. Resources claimed for ADR could better be used to support judges in their traditional role, either by creating new judgeships or by creating staff positions to assist judges in pretrial management. Assigning magistrate judges to preside at ADR programs, as some courts do, renders them less available to assist with pretrial litigation matters or with consent trials. Using members of the jury pool for summary jury trials undermines the argument for full funding of civil jury trials. Dollars used to support dispute resolution administrators are dollars that will not be available to fund pretrial case management or trials.

c. To expedite litigation from the outset, courts should provide assistance in early case evaluation and early settlement discussions.

The argument

Clarification of issues and facts will always be an important part of a case at its outset. The earlier and more effectively this is done, the more efficiently litigation will proceed. Innovative procedures adopted in two federal district courts challenge the conventional view that alternative dispute resolution is an event that should occur late in a case after discovery has been taken or the case has ripened. Early neutral evaluation seeks to expedite litigation through an early evaluation of the strengths, weaknesses, and value of the case.[80] Early assessment tries to compel parties to examine their case early and to select an ADR procedure appropriate for the case.[81]

In both the Northern District of California and the Western District of Missouri, these early evaluation programs have resulted in significant litigation efficiencies and high participant satisfaction. In California Northern, for example, although the conferences occur early in the case, they have led to settlement of one or more issues in a substantial number of cases and have prompted many

80. See program description at *supra* note 51.
81. See program description at *supra* note 54.

attorneys to change their expectations of the appropriate settlement amount for their case.[82] At every stage of litigation, cases subject to ENE close more quickly than cases handled through the court's regular procedures. Overall, attorneys rank the procedure as more useful than Rule 16 conferences.[83]

ENE is effective because it helps attorneys arrive at a more realistic assessment of their case's value, and it does so at the outset of the case. Without this understanding, as the attorneys themselves report, costs and fees can be unnecessarily high. And cases can go on much longer than they ought to. Indeed, when attorneys fail to evaluate their cases early and realistically, settlements may occur much later than they should and, in some cases, trials that need not have taken place do.[84]

Contrary to the conventional wisdom that settlement cannot occur until discovery has been completed, over a third of the cases in Missouri Western's Early Assessment Program have settled at the initial assessment conference, held within thirty days after answer is filed, or at a second meeting held a short time later. Another 17% settle within a month of the first or second meeting.[85] The program's value lies partly in the simple step of bringing parties together with a neutral who will discuss the strengths and weaknesses of the case and partly in the compelled presence of clients, who not only are encouraged to participate but also can see for themselves the opposing party's view of the case.[86] Of the attorneys whose cases

82. *See supra* note 43. Nineteen percent of the attorneys surveyed reported settlement of one or more issues because of the ENE conference. A third reported changed expectations regarding the value of their case. These and other data cited in this section are from pp. 19–26 of this report.

83. *Id.* When asked to rank procedures they believed would be helpful, more attorneys placed ENE in first or second place than placed a Rule 16 conference with a judge in first or second place (183 versus 145).

84. For a discussion of some of the consequences of postponed case evaluation, see, e.g., Wayne D. Brazil, Effective Approaches to Settlement: A Handbook for Judges and Lawyers 8–9 (1988).

85. *See supra* note 54.

86. *Id.* In the 88% of the cases in which parties did attend, 67% of the attorneys reported that the party's presence helped resolve the case (only 1% said it hindered resolution).

were placed in the early assessment program, 93% believe the program should be continued.

The success of these ADR procedures reveals the substantial information and case evaluation hurdles attorneys must get over before a case can move forward. The Rule 16 conference, which might be suggested as a solution, is not an adequate means for helping attorneys over these initial hurdles. Even the most committed judge is handicapped in three significant ways. First, many do not consider it appropriate for judges to give an assessment of the case's value, which is a major reason these programs are useful to attorneys and parties. Second, many cases may benefit from the assessment of someone with expertise in the subject matter of the case, but judges cannot be experts in every subject that comes before them. And third, many judges cannot give each civil case on their docket the two to four hours given by the non-judge neutral evaluators in the ENE and EAP programs.

Because an early understanding of the case is critical, courts should provide at the outset a mechanism to help all parties evaluate their case and seriously discuss settlement. Because judges cannot and should not be involved in such discussions, courts should establish programs that provide this early assistance.

The response

If early case evaluation is conducted, it should be conducted by judges as part of their responsibilities under Federal Rule of Civil Procedure 16.

To avoid pretrial confusion, the trial judge should perform the valuable functions of narrowing the issues and ruling on pretrial matters. When non-judge neutrals do so with the court's blessing, they can become in effect a private judge. If the case does not settle and the non-judge expert's views differ from those of the trial judge, the parties may be enticed to rely on the neutral's opinions rather than the judge's, which will result in either the parties being misled or the judge being left with the task of redefining the issues for trial. Pretrial preparation could easily end up on two conflicting tracks, one set by the neutral and the other set by the judge.

Except for intensive case evaluation, judges can and do perform the same functions in Rule 16 conferences that evaluators perform

in ENE.[87] Attorneys are as satisfied with traditional pretrial processes as they are with ENE.[88] Marginal, if any, gains from an elaborate new program can hardly justify transferring case management from judges to non-judge evaluators. Moreover, the data presented do not directly support the conclusion that ENE helps parties understand their cases better and earlier.[89] Besides, finding volunteer lawyers to help parties understand their cases seems an odd role for courts to play. Understanding the case, after all, is what parties pay lawyers to do. If the parties want or need a second, neutral opinion, they should pay for it. Private litigants should not expect courts to recruit or pay for non-judge neutrals to evaluate their cases. To the extent that evaluations by neutrals are free to litigants, one should not be surprised to find satisfied litigants. The parties gain a second opinion without paying the expert for the advice. A true test of litigant satisfaction would be to ask whether the litigants are willing to volunteer for the program and pay for it.

Proponents of ENE do not discuss program costs, such as program administration or neutrals' fees for work done after the initial consultation. Neutrals volunteer for four hours per case.[90] To what alternative uses, such as appointment of counsel in civil cases, might these pro bono efforts be put?

87. Rosenberg et al., *supra* note 43, at 20. In the attorneys' ratings of the helpfulness of the procedures, 275 indicated that ENE would be helpful, and 268 indicated that Rule 16 procedures would be helpful.

88. *Id.* at 22.

89. Rosenberg's data indicate that ENE helps the parties understand their cases, but those data do not compare ENE participants' understanding with the control group's understanding. The fact that ENE cases settled earlier than the control cases does not necessarily indicate better understanding of the case, but could result from ENE's forcing the parties to prepare their cases sooner because of the timing of the ENE sessions. Presumably the later settlements were also a result of improved understanding of the case, albeit at a later time.

90. *See* Northern District of California General Order 26.

3. To provide all litigants with access to alternative procedures and to guarantee the procedural protections litigants rightfully expect from courts, ADR should be available through publicly funded court-based programs.

a. Courts have an obligation as public institutions to provide ADR services.

The argument

Private dispute resolution options are numerous and growing. Courts should support the development of these options and citizens' use of them instead of or before filing cases in court.

Courts should also, however, establish alternatives that are located in and monitored by the courts themselves. They should do so for three reasons—equal access, fair process, and maintenance of a broad-based public-sector justice system.

First, the courts' public function is, in significant part, to help citizens resolve disputes. In doing so, the courts should provide all citizens with access to whatever process is appropriate to the case, be it a trial, an early ruling on a legal issue, or an early neutral evaluation of the case's merits. Whatever the appropriate method, citizen–litigants would rightfully be shocked if this public institution told them to turn to the private market for assistance. This is particularly true for litigants who cannot afford either the alternative procedures offered by the private market or the lengthy and costly process of traditional litigation. The courts owe these litigants in particular the opportunity and protections of a court-based alternative procedure. To ensure this opportunity, the procedure should be publicly funded.

Second, the courts have a responsibility to guarantee a fair process and just outcome to litigants. As Judge Alfred P. Murrah, the Federal Judicial Center's second director, told new judges in the Center's orientation seminars, "Until a case is filed, it's the parties' business. Once it's filed, it's the public's business." When a court's dispute resolution methods include referral to alternatives, such as mediation or arbitration, the court must guarantee the quality of those methods and can best do so by establishing them as part of its own system of case resolution. For example, the court can specify how cases are to be selected for ADR and whether certain types of

cases are to be exempt because they are inappropriate for ADR. It can spell out the procedures for assigning neutrals to cases and establish training and certification requirements for these neutrals. It can specify as well how the ADR sessions are to be conducted and can protect the confidentiality of information exchanged at these sessions.[91]

In establishing these and other procedures and safeguards, the courts provide the same kind of protections to litigants that they provide through traditional pretrial rules. In both contexts the purpose is to ensure that both the stronger and the weaker parties in a case have equal access to information and equal power to negotiate a resolution. The courts can protect parties from pressure to settle and protect one party from another's refusal to negotiate in good faith. The courts' involvement, in turn, is likely to bolster the parties' faith in the process, motivate the neutral to provide superior service, and allow ongoing evaluation by which the court can track whether certain types of cases fare better than others in ADR, whether ADR affects parties' costs, and whether ADR time limits are honored. Furthermore, should the day come that attorneys are no longer willing to serve as neutrals for free or for token honoraria, it is important to have public funding in place for maintaining the programs.

Some will object that administration of ADR is too intrusive a role for courts, that it attempts to regulate the interactions between attorneys and clients. Once parties have chosen to file a case in federal court, however, and once the court has determined that alternative dispute resolution procedures are appropriate, the court has an obligation to provide parties with the same protections afforded by traditional procedures. These protections do not neces-

91. *See, e.g.*, Northern District of California General Order 26 and General Order 34. Civil Justice Reform Act Plan, Western District of Missouri; Civil Justice Reform Act Plan, Northern District of Ohio. *See also* the local rules for the twenty courts authorized to use arbitration. Guidelines for developing rules and procedures can be found in Center for Dispute Resolution, The Institute of Judicial Administration, National Standards for Court-Connected Mediation Program (Washington, D.C., 1993).

sarily exist in the private market, which may be one of the reasons litigants choose to come to court.[92]

The third reason courts should provide ADR services is to fulfill their role as public institutions established to resolve citizens' disputes and to declare and apply the law. To suggest that citizens should take their disputes elsewhere, or that they can come to federal court but are unlikely to have a chance to present their cases to neutrals, can only prompt public doubt in the justice system. And to close the courthouse door on many cases that, if screened through a court program, might be identified as important for the development of the law is to undermine the courts' law-making function as well. Confining ADR to the private sector would result in creation of a private justice system, whose effect would be to undermine courts' peace-keeping and law-making functions far more drastically than court-based ADR possibly could.

The response

Bringing ADR into the courts and expanding procedural protections for litigants threatens to impede ADR's development; leaving it in the private sector encourages experimentation with flexible rules and practices.

Court-supervised and publicly funded ADR programs pose three closely related dangers: (1) they will create a public bureaucracy without the creativity and flexibility of the private market;[93] (2) they will preempt private citizens' efforts to manage their own affairs; and (3) they will be a drain on public resources.

First, court-annexed and publicly supported ADR systems would create a public bureaucracy. Private ADR is flexible and nonbureaucratic, unrestricted by formal due process in making and

92. Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes 422 (1992).

93. See also the assessment of one commentator:

> Private ADR tribunals have a number of features that parties consider important, but which cannot be fully replicated in mandatory, non-binding CAA [court-annexed arbitration] programs. These features include secrecy, informality, speed, finality, the right to select a trier of fact with specialized knowledge or expertise, and, in some trade industry arbitration, the ability to specify the rule or decision that will be used to resolve the dispute as well as the avoidance of litigation costs.

Bernstein, *supra* note 61, at 2239.

changing its rules.[94] In contrast, when courts establish court-based ADR programs, they commit themselves to selecting, training, and assigning neutrals, guaranteeing their impartiality and expertise, directing the conduct of ADR proceedings, protecting parties from pressures to settle, policing a party's refusal to negotiate in good faith, controlling the conduct of attorneys presiding over the sessions, and conducting ongoing program evaluation. While the breadth of the proposed protections far exceeds that of any protections currently in place, the proposed protections are a logical outgrowth of court annexation and public funding and accountability. Courts can be expected to take their own institutional needs into account, which may shift their focus from litigant savings to reduction of court expenditures. Courts may also be vulnerable to charges that court programs bring pressure on parties to waive their Seventh Amendment rights, whereas private ADR providers clearly have no power to do so.[95]

To illustrate some of these concerns, consider the selection of neutrals. When courts select individuals for the court's roster of neutrals, these individuals come to be seen as representatives of the courts, and thus courts must screen them; must impose high, but sometimes artificial, standards for selection;[96] and must certify their credentials, all at considerable expense to the public. Private organizations also screen applicants at the outset, but then can use

94. *See generally* Jerold S. Auerbach, Justice Without Law? (1983). The private sector can even create a system of precedent that will govern continuing relationships. For example, in labor–management arbitration, the parties define their own "statutory" standards in a collective bargaining agreement and hire specialized arbitrators to interpret and apply that agreement and issue reasoned decisions. The hundreds of volumes of "Labor Arbitration" reported decisions attest to the ability of the private sector to meet its own needs for fair, economical, and reasoned decisions. Influenced by lawyers, commercial arbitration developed in a relatively formalistic manner in the United States during the early twentieth century. *Id.* at 95–114.

95. *See generally* Eisele, *supra* note 67.

96. *See, e.g.*, James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?,* 19 Fla. St. U. L. Rev. 47, 56–59 (1991) (discussing a state court rule limiting mediators to experienced lawyers and retired judges).

market forces to control who stays on the list.[97] Private providers have a continuing economic interest in presenting high-quality services to the public. If they fail to do so, they will not be selected by parties or by attorneys. Courts may also find it important to assign the neutral in a particular case so as to spread activity evenly among those on the court's roster.[98] In addition, courts as public bodies face due process limits on their decisions about listing or not listing a neutral, limits the private sector does not face. Notice, reasons, and a hearing may have to be provided before removing attorneys from a roster.

Likewise, court control over confidentiality may differ from private control. The right of public access to ADR proceedings takes on a different cast when the parties agree privately to use their own funds to hire a neutral or to conduct a mock trial using paid volunteers. When a court invokes its power to order closed proceedings, that order must pass First Amendment muster.[99] When a court decides to use court resources for a program, that decision must have statutory authority.[100]

The second reason to prefer private provision of ADR services over public provision is that court provision of such services undermines society's fundamental assumption that adults are capable of managing their own affairs and threatens to displace the traditional means of gaining access to the justice system—through lawyers. If secret settlements are disfavored and courts control access to informal dispute resolution, cases that might otherwise be resolved amicably will be drawn into court for referral to court-based dispute resolution or perhaps even for appointment of coun-

97. For a discussion of the competitive forces involved in recruiting and training private mediators, see Karen Donovan, *Searching for ADR Stars,* Nat'l L.J., March 14, 1994, at A1.

98. Court control of the assignment also keeps down the costs to the parties. Meierhoefer, *supra* note 31, at 88–89. But the monetary savings come at the expense of giving the parties an opportunity to assess the qualifications of arbitrators.

99. Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d 900 (6th Cir. 1988) (summary jury trial may be ordered closed to the public).

100. *See, e.g.*, Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990) (federal courts have no authority to summon citizens to serve as jurors in summary jury trials).

sel.[101] A central assumption of ADR programs, or in some instances, an explicit rationale, is that the judiciary has a duty to provide citizens with an opportunity for a better form of consensual dispute resolution than secret settlements negotiated by lawyers. That assumption posits that federal courts are responsible for policing agreements between competent adults who are represented by counsel.

Third, turning the courts into full-service dispute resolution centers will be expensive.[102] These budget items come on the heels of a shortage in funds to pay for jurors in civil cases.[103] The choice facing policy makers is stark: Should current resources be used to pay for ADR services or juror services? Public funding of alternative dispute resolution programs serves as a public subsidy of a primarily private benefit. As discussed earlier, private resolution of a dispute without a public, reasoned opinion primarily serves the interests of the parties in that dispute. One commentator has raised questions about public subsidies for litigation by calling them "public welfare benefits."[104] Traditional litigation at least presents the possibility of producing a public verdict or a published opinion. ADR procedures produce no such public benefit to justify the subsidy.

101. Public programs for delivery of legal services have addressed the need to expand access to those with limited means, and the current administration has proposed expansion of that program. Addressing the need for legal services at the personal and community level makes more sense than adding a new regulatory duty to the federal courts' already full agenda.

102. In the early days of the ADR movement, Professor A. Leo Levin, then director of the Federal Judicial Center, pointed out that a "program of court-annexed arbitration requires that substantial costs be paid from the public fisc." A. Leo Levin, *Court-Annexed Arbitration*, 16 J. L. Reform, 537, 545 (1983). Some of the costs include fees of arbitrators and administrative personnel, and judicial time in drafting rules and monitoring program operation. *Id.*

103. *See* discussion at notes 75–79.

104. Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 Cath. U. L. Rev. 267, 269 (1985). The author, a former Solicitor General of the United States, raised the question this way: "Why, for example, should the public subsidize a lawsuit between Greyhound and IBM, or between Litton Industries and AT&T? Surely others are more in need of public welfare benefits."

The novelty of alternative programs threatens to attract resources that might otherwise be available for traditional court programs, such as jury and bench trials. The judiciary needs to clarify that its primary civil justice mission is to declare the law and then to obtain funding to do so before seeking and spending funds on secondary programs like ADR. Without a clear statement from the judiciary, Congress and the public will most likely continue to divert new funding to alternative programs.

b. It is impractical for courts to rely on magistrate judges or private ADR services instead of publicly funded, court-based ADR programs.

The argument

Some have proposed that the costs of ADR programs could be avoided if magistrate judges performed the role of mediator or evaluator. Magistrate judges, however, have many other duties, duties that cannot be performed by neutrals and should not be performed by judges. To give magistrate judges ADR responsibilities as well would require either shifting their current duties to judges, and thus appointing more judges, or appointing additional magistrate judges. Either would be more costly than hiring one or two staff members to administer an ADR program that relies on attorneys and other professionals to conduct the ADR sessions, or appointing an experienced mediator to the court staff, as in Missouri Western.

Others have proposed that courts refer parties to programs administered by entities outside the court. Aside from the fact that dispute resolution is a public obligation, referral to private entities raises difficult questions about quality, ethics, and appearances. To make referrals to high-quality providers, for example, judges would have to know something about the providers. This would be difficult without ongoing monitoring by the court or personal acquaintance between the judge and the providers, both of which compromise the appearance, if not the reality, of independence. To ensure quality, judges may find that they prefer certain providers over others, but routine referral to such providers will give the appearance of channeling money-making work to selected profit-making organizations. These problems underscore the wisdom of providing

ADR services—for cases that are filed in court—through the auspices of the court itself.[105]

The response

Private alternatives to publicly funded programs are available and can be used by litigants without formal referrals from the courts.

One can agree that it is impractical for courts to use magistrate judges or other existing court personnel to staff alternative procedures without agreeing that court-based programs are the only way to give parties access to ADR. It does seem to misallocate the talents of most magistrate judges to divert them from pretrial case management to staffing ADR programs. The fundamental question, however, is whether the courts have a role in administering such programs at all.

As we have noted, private ADR programs are flourishing. The success of private ADR programs seems in no way dependent on receiving referrals from the courts. A practical alternative for the courts is to allow litigants to find and use private ADR programs as they see fit. Litigants and their lawyers are generally quite capable of deciding how and when to use private ADR programs without relying on the courts for referrals. Courts need not agonize over establishing impartial referral programs to provide information that parties can readily obtain from private sources, including a number of national newsletters,[106] several academic publications,[107] and a myriad of local sources. If necessary, a court could serve as a clearinghouse for information about dispute resolution options without making referrals or endorsements.

105. If, during the court process, litigants want to seek the assistance of an outside neutral, the court should not stand in their way, but the court should retain oversight of the case. For example, to prevent delay in a case in which litigants have sought assistance from an outside mediator, the court should set a date by which the private ADR process must conclude.

106. *See, e.g.*, *Alternatives to the High Costs of Litigation* (published by the Center for Public Resources), *World Arbitration and Mediation Reports* (published by the Bureau of National Affairs), and *Dispute Resolution Alternatives* (published by the ABA Section on Dispute Resolution).

107. *See, e.g.*, the *Journal of Dispute Resolution* (published by the University of Missouri at Kansas City) and the *Ohio State Journal on Dispute Resolution*.

4. Alternative dispute resolution procedures should be presumptively mandatory in appropriate cases, but the right to trial must be preserved in all cases. Courts should establish procedures to assist parties in selecting the appropriate procedure for managing and resolving their case.

The argument

Despite the demonstrated benefits of ADR and litigants' satisfaction with it, parties who have filed their cases in federal court seldom volunteer to use alternative procedures, even when these procedures are readily available through the court.[108] Why, if litigants find alternative methods so satisfactory, do they not use them voluntarily?

Opponents of mandatory ADR suggest that parties come to court for a trial, and recognizing that an alternative form of resolution will deprive them of their right to a trial, they reject any such alternative. This explanation simply cannot be reconciled with the well-documented litigant and attorney satisfaction with each of the three principal forms of ADR—arbitration, mediation, and early neutral evaluation. Parties and their attorneys do not experience a deprivation of rights when ADR is imposed on them. The Center's analysis of the pilot arbitration districts, for example, found no "evidence that litigants in cases mandatorily referred to arbitration see themselves as receiving second-class justice. Eighty percent of all parties in cases mandatorily referred to arbitration agreed that the procedures used to handle their cases were fair. Among parties who had prior trial experience, 84% agreed that the procedures were fair." Litigants in state court programs report similar experiences.[109]

108. Recent experience in seven federal district courts authorized in 1988 to adopt voluntary arbitration programs shows that the number of cases using the programs varies with the degree of voluntariness. In courts in which parties are simply informed of the existence of the arbitration program and their right to use it, almost no cases have used arbitration. Use is highest in courts in which cases are automatically referred to arbitration and then permitted to opt out for any reason and with no explanation. Even then, use is lower than in the mandatory arbitration courts. Rauma & Krafka, *supra* note 47, at 9.

109. Meierhoefer, *supra* note 31, at 119–20. Keilitz, *supra* note 31, at 42.

Why, then, do parties not volunteer? Because, as Magistrate Judge Wayne Brazil has said, "there are a great many barriers to doing much of anything on a purely voluntary basis once a case is in litigation."[110] He cites nine factors that may prevent attorneys from volunteering to use an alternative form of dispute resolution, among them the following:

- Attorneys and clients may suspect an ulterior motive if ADR is suggested by the opponent and thus refuse the suggestion. Since voluntary programs require agreement by all parties, refusal by one ends the possibility.
- Attorneys or clients may not be familiar with ADR or know how to use it.
- Attorneys and clients are accustomed to the familiar and resist the new.
- Attorneys fear that they will appear weak in suggesting ADR to their clients or to opposing counsel.
- Attorneys fear that in suggesting something new to their clients, they may become subject to criticism, second-guessing, or even a malpractice claim by the client.
- Many attorneys are unlikely to act against their perceived economic self-interest.[111]

Because of the resistance to cooperation that is instilled in attorneys by the adversarial nature of litigation, attorneys' instincts are against voluntary use of alternatives to traditional litigation. To realize the benefits these alternatives clearly can provide to litigants, courts should establish a presumption that ADR will be used and should create procedures that break down the barriers to participation.[112] Perhaps such a presumption is needed only tem-

110. Brazil, *supra* note 39, at 13.

111. *Id.* at 13–15.

112. This point was also made recently by two seasoned litigators:

> One of the greatest impediments to the commencement of meaningful settlement discussions in many cases has always been the concern that the party initiating the discussion will be perceived as weak, uncertain about the outcome, or lacking in resources or commitment to try the case. As a result, the parties in many cases engage in an elaborate game of posturing when they really should be confronting the issue of settlement. Any reforms which compel parties to talk about settlement sooner and more frequently should improve the current situation.

porarily—that is, only until there is sufficient cultural change to permit voluntary participation without risk.[113] But clearly some mechanism is needed at this stage to prompt greater use of viable alternatives for dispute resolution.

Court-based ADR programs already in place provide models for such a mechanism. The Early Assessment Program in Missouri Western, for example, requires the parties—clients as well as attorneys—to attend an early meeting at the court to discuss their case, to select one of the court's ADR options, and, if possible, to attempt resolution of the dispute.[114] A new experimental program in California Northern, the Multi-Option Pilot Program, requires parties who haven't selected an ADR process to discuss their case and the court's ADR options with the court's ADR administrators and then to select an appropriate ADR method. When the parties do not or cannot select an option and the assigned judge believes ADR is appropriate, the judge may order the parties to use ADR.[115] In both the Missouri Western and California Northern programs, early discussion of each case's needs permits a reasoned decision about the suitability of ADR for that case. And in both programs, when ADR is determined not to be appropriate, the case proceeds through the traditional pretrial and trial process.[116]

Robert Haig & Warren Stone, *Does All This Litigation Reform Really Benefit the Client?*, 8 Inside Litigation 20, 24 (1994).

113. Such cultural change may occur more rapidly than many might expect. The most recent report on Missouri Western's Early Assessment Program, for example, shows that over the three years the program has been in effect, the percentage of cases not assigned to the program but whose parties are asking to be included has climbed to nearly 30%. *See* Missouri Western report, *supra* note 54.

114. *See* Argument 2a in this paper for a discussion of this program and early indications of substantial benefits to litigants, as measured by disposition time, litigation costs, and fairness of process and outcome.

115. Northern District of California General Order 36. Five judges are participating in the experimental program.

116. These programs resemble in purpose the "multidoor" courthouse first conceptualized by Professor Frank Sander in 1976 in an address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference) (Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976)). The multidoor concept is based on the premise that the needs of each individual case should determine the procedure used to resolve it. A number of state courts of general jurisdiction have become multidoor court-

It is clear from these programs, as it is from the mandatory arbitration programs, that mandatory ADR does not undermine the right to a jury trial.[117] All federal court programs are only presumptively mandatory and permit parties to seek removal from them. Likewise, all mandatory programs preserve the right to trial de novo.

Opponents argue that this right to a trial is a right in theory only because with the exercise of this right comes the risk of monetary penalties (in arbitration) and the certainty of additional litigation costs. In fact, the risk of monetary penalties has no effect on the rate of requests for trial de novo in the mandatory arbitration programs, indicating that these penalties do not burden that right.[118] This should not be surprising, given that the penalties are very low, both in absolute dollars and relative to the cost of trial.[119] Regarding litigation costs, when opponents claim that ADR increases costs, they do not acknowledge the research findings that show cost savings. Although the issue is not completely settled, as we stated in Argument 2a, there is evidence of substantial savings to litigants from a variety of mandatory ADR methods.

Finally, not only do litigants and attorneys find mandatory participation acceptable and beneficial, there are no legal barriers to mandatory participation in arbitration, mediation, and early neutral evaluation. At their inception, mandatory arbitration programs were challenged on several constitutional grounds, including right to a jury trial and due process. The challenges were not successful, primarily because the programs preserved the right to trial de novo.[120]

houses, including those in the District of Columbia and Minnesota. In Minnesota, new rules that went into effect July 1, 1994, require all civil litigants to consider using ADR and permit judges, where parties do not choose ADR and the judge believes it would be appropriate, to order parties to use court-based or private ADR (Minnesota General Rules of Practice, Rule 114).

117. *See, e.g.*, Eisele, *supra* note 67.

118. Meierhoefer, *supra* note 31, at 116–17.

119. These penalties appear to be neither necessary nor useful. Given their insignificant effect and the appearance they give of barring access to trial, they should be eliminated as a matter of policy.

120. *See* Riggs v. Scrivener, Inc., 927 F.2d 1146, 1147–48 (10th Cir.), *cert. denied*, 112 S. Ct. 196 (1991) (upholding local rule mandating participation in ar-

Even so, programs requiring mandatory participation in ADR should be adopted with care. When designed and administered thoughtfully, programs that presume participation can help parties over the hurdle of appearing weak or uncommitted. And by offering litigants a choice among dispute resolution methods and a means for bypassing ADR when it is inappropriate, a presumptively mandatory ADR program can meet important needs while protecting essential rights.

The response

Mandatory programs distort the benefits of ADR by defining it negatively and bypassing the opportunity to create a voluntary, binding system that would require participants in each case to select either an ADR track or a trial track at an early stage in the case.

Proponents of mandatory ADR say that voluntary programs will not work. They argue that lawyers will not volunteer cases for a host of reasons. However, in "opt-out" programs in four federal district courts (Arizona, Georgia Middle, Ohio Northern, and Pennsylvania Western), many of the reasons listed by Judge Brazil do not apply because the courts automatically refer cases to the program, and in many cases (34%–55%) one or more of the parties or their attor-

bitration and providing for de novo trial by jury); Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268–69 (6th Cir. 1985) (upholding mandatory case evaluation by a panel of lawyers, in an arbitration-like procedure known as "Michigan mediation"); Davison v. Sinai Hospital of Baltimore, Inc., 462 F. Supp. 778 (D. Md. 1978), *affirmed*, 617 F.2d 361 (4th Cir. 1980) (upholding mandatory submission of medical malpractice claims to an arbitration panel before filing in court and holding that making the arbitration findings presumptively valid in a trial de novo did not deprive plaintiff of the Seventh Amendment right to a trial by jury); Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979) (upholding mandatory arbitration program in one of ten pilot courts and rejecting Seventh Amendment challenge).

The summary jury trial has not fared as well as mandatory arbitration when subjected to legal challenge. The only courts of appeals to address the issue squarely have held that district courts do not have authority to order lawyers or litigants to participate in a summary jury trial. *In re* NLO, 5 F.3d 154 (6th Cir. 1993); Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987). Several district judges in other circuits have come to contrary conclusions. *See, e.g.,* Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); Home Owners Funding Corp. of America v. Century Bank, 695 F. Supp. 1343 (D. Mass. 1988).

neys take affirmative steps to remove the case from the program.[121] To avail themselves of ADR in these courts, attorneys do not have to step forward, take personal responsibility, or otherwise show weakness or scrutinize their opponents' motivations. While some opponents of mandatory ADR would also object to opt-out programs, a right to opt out seems to answer the primary objection to mandatory programs—that they impose an unnecessary financial burden on exercising the right to a jury trial.

The experiences of the voluntary arbitration programs suggest that a large percentage of lawyers and litigants in cases eligible for arbitration see no need for it, regardless of the form in which it is packaged. But these experiences suggest more: Acceptance of the presumptive assignment to arbitration by 45% to 66% of the litigants indicates that arbitration need not be mandated. The hearing rate is unknown, but if half of those who accepted the presumptive assignment had an arbitration hearing, the hearing rate in the voluntary programs would be comparable to the hearing rate in the mandatory programs. Moreover, one should not infer that the limits of voluntary arbitration programs would also apply to mediation or early neutral evaluation programs. Evidence from the Western District of Missouri suggests that many litigants opt in to that program.[122]

A comment by an attorney on the difference between voluntary and mandatory programs sums up the argument for voluntary programs:

> I think down here [mediation has] been distorted a little because it's mandatory. . . . I think people, a lot of times, just go through the motions whereas if you have the choice to mediate, you're there because you want to be and because you think it will help.[123]

Mandatory ADR erects financial barriers to exercising the right to a jury trial and threatens its viability. In contrast to voluntary programs, mandatory referral to ADR has the purpose and effect of coercing many parties to forgo their right to trial by jury. It gives any party the option of stringing out proceedings beyond their normal

121. Rauma & Krafka, *supra* note 47, at 17–19.

122. Missouri Western report, *supra* note 54, at 9 (nearly 30% of cases eligible for voluntary mediation opted in to the program).

123. Alfini, *supra* note 96, at 62.

course and forcing their opponents to expend resources that might otherwise be used to participate in a trial. It is not the modest sanctions courts might impose—for example, in arbitration—that impede access to jury trials. It is, rather, the mandatory expenditure of party resources, including the cost of counsel, that imposes a barrier to financing the expense of a jury trial.

Mandatory ADR arose out of concern for rising civil caseloads and the concurrent increase in demands for criminal trials.[124] Although many ADR programs have shifted away from an initial tendency to focus exclusively on cases that seek a modest amount of money damages (say, less than $150,000), one might expect that such damages cases still generate a great deal of attention from ADR administrators. Often judges see cases with modest monetary damages as routine, whereas the parties or their insurers may see them as having potential for high jury awards.

Mandatory ADR amounts to tort reform under the guise of court reform and has the subtle effect of diminishing opportunities for jury trials for most litigants by reallocating court resources to alternatives. ADR proceedings become accessible; jury trials, remote. Many litigants, especially plaintiffs bringing cases for damages of $150,000 or less, do not have the resources to survive a gauntlet of procedures to reach the jury trial guaranteed by the Seventh Amendment.

Mandating ADR procedures can add cost to the proceedings at at least two different points. The first point is when the case is referred to ADR. A party may object and seek to opt out, but the objection itself is subject to dispute and requires a ruling from the court. And the court may dismiss the objection and require that the objecting party participate in good faith, adding further cost.[125]

The second point at which additional costs may be incurred is in the parties' preparation for and attendance at a mandatory ADR

124. The concerns were generally stated as "[decreasing] the time and expense required to dispose of civil litigation." E. Alan Lind & John E. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts xii (Federal Judicial Center rev. ed. 1983); *see also* Meierhoefer, *supra* note 31, at 16–18. From a court's perspective, the major burden of civil litigation involves preparing for and conducting trials.

125. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. Rev. 2079 (1993).

proceeding, which may contribute little or nothing to a later trial. Informal procedures that rely on inadmissible evidence or on lawyers' off-the-record declarations about the evidence are not usable at trial. The informal proceedings may even be misleading. Lawyers can assert claims that they cannot back up at trial, knowing that they will not be held accountable because the ADR proceedings are not admissible into evidence.

Not only does mandatory ADR press litigants to forgo a jury trial, if only because their resources have been exhausted, it does so in an uneven fashion by delaying a trial date, putting the burden of duplicative expenditures on the plaintiff, and permitting the defendant to reserve its resources for the trial. The lack of a clear trial date creates pressure to settle when the plaintiff has a pressing need for prompt compensation. As we have shown, if either party files for a trial de novo, that act by itself is likely to inflate the cost of going to trial.[126]

Mandating ADR suggests that it is distasteful and, in mandating ADR, the courts miss an opportunity to attract parties to voluntary, binding ADR programs. Although some ADR programs may be attractive to litigants because they promise a quick and inexpensive resolution of the dispute, in reality, forcing litigants to pursue a nonbinding forum carries the risk of adding to the costs and delays of the litigation. The implicit message is that ADR is distasteful medicine that parties, if given the choice, would avoid. That message may have some basis in reality: All too often the opposing party learns the outcome of the alternative procedure and demands a trial de novo. The danger of the multidoor courtroom is that some litigants will want to try all the doors.

Private ADR users who are motivated to avoid the costs and delays of litigation address the potential multiplicity of proceedings by agreeing at the outset that the alternative they choose will be final and binding.[127] Making that choice at an early stage prevents par-

126. Meierhoefer, *supra* note 31, at 89–90.

127. *See generally* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?,* 1993 J. Disp. Resol. 1, 3–20; for an example of such a choice, see Frank W. Morgan, *ADR: Pitfalls and Promises,* 4 Inside Litigation 15 (July 1990) (Lawyers for both sides in a case choose a binding ADR procedure because "it would not be in the best interests of our

ties from using the bias of hindsight to frustrate the goals of reducing delays and costs. Forcing the choice of a binding procedure also reduces the opportunities for a wealthy party to manipulate the process to the disadvantage of a less wealthy party.

Following this approach to a logical application, the only mandatory ADR procedure should be one that is designed to lead directly to a binding outcome. For example, the court could, by local rule or pretrial order, direct the parties to meet and confer early in a case to seek agreement on a form of ADR. If both parties agree, they can select an adjudicatory procedure, such as arbitration or summary jury trial, and agree to be bound by it. If both sides agree, they can also choose a nonadjudicatory procedure, such as mediation or ENE, to help them pick an adjudicatory procedure or to settle the case entirely. And they can continue in this mode as long as both sides are agreeable. If either party objects to further proceedings or insists on a jury trial, the case can be placed on a trial track. In this way, a court could give a mandatory start to the process, give incentives to the parties to pursue voluntary, binding activity, and give each party the power to avoid manipulation by the other.

In sum, authorizing courts to impose mandatory forms of ADR continues the wasteful, manipulative practices that have accompanied mandatory arbitration (such as de novo hearing demands after ADR awards) and that could be expected to accompany other forms of ADR (such as parties using mediation to learn about the other side's case). Courts should be encouraged to highlight the positive features of ADR and assist the litigants in choosing a single, binding option. Courts can do so by confronting the jury trial issue early and not allowing the parties to use the slight prospect of a jury trial to delay proceedings and waste resources.

clients to devote potentially significant resources to undertaking a non-binding activity.").

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Endnote

Not for many years has even a sizable minority of cases filed in the federal courts been tried, yet the essence of a court is, in most citizens' minds, the trial. And all the procedures attached to courts are built around that central image. Now, however, a growing number of voices, some of them powerful ones, are questioning the value of the adjudicatory process.

The debate about the role of ADR in the federal courts is, in essence, a debate about the values and assumptions that guide the public justice system. In this debate, assumptions about the benefits of the adversary process collide with assumptions about what litigants really want. But this debate is about more than process. It is at its heart a debate about what courts—and judges—are for, about the value of adjudication and the value of its opposite, settlement. When should one value be observed and when should the other be? And who should make these decisions?

These questions have many subsidiary questions that seem at first glance to be more practical and pedestrian, but at a closer look they, too, raise important questions of policy and values. Should users of court-based ADR programs, for example, pay for that service? Who, then, will have access to these programs and who will be denied? Should rules of procedure be written to protect the rights of those who use court-based ADR programs? Or will regulation of the process re-create the inflexibility and burdensomeness thought to afflict traditional adjudication? How can a sufficient number of pro bono neutrals be recruited and monitored? Will their ADR role be a barrier to future client relationships? Will it garner them inappropriate benefits from the court?

As the federal courts, individually and collectively, plan for their future, the advent of ADR presents a challenge. How will the courts, the litigation process, and the law be changed by the movement toward ADR?

At this time, only a few conclusions seem tenable. We have stated these in the introduction as points of agreement. Most other issues remain open to debate.

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Appendix

Definitions of Principal Types of Court-Based ADR Programs

Table 1. District Judge and Magistrate Judge Time Reported for ADR and Settlement Activities, FJC District Court Time Study

Figure 1. Civil and Criminal Trials Completed as a Percentage of All Trials Completed: Statistical Year 1980 to Statistical Year 1993

Figure 2. Civil Trials Completed as a Percentage of All Civil Terminations: Statistical Year 1970 to Statistical Year 1993

Definitions of Principal Types of Court-Based ADR Programs[128]

Arbitration

In court-based arbitration, one or more arbitrators listen to presentations by each party to the litigation, then issue a nonbinding judgment on the merits. The arbitrator's decision addresses the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and request a trial de novo in the district court.

Early neutral evaluation

Early neutral evaluation brings all parties and their counsel together early in the pretrial period to present summaries of their case and receive a nonbinding assessment of the case from an experienced neutral with expertise in the subject matter of the case. The neutral also provides case planning guidance and, if requested by the parties, settlement assistance.

Mediation

Mediation is a flexible, nonbinding dispute resolution process in which a neutral third party—the mediator—facilitates negotiations among the parties to help them reach settlement. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy.

Summary jury trial

The summary jury trial is a flexible, nonbinding process designed to promote settlement in trial-ready cases headed for protracted jury trials. The process provides litigants and their counsel with an advisory verdict after a short hearing in which counsel present the evidence to a jury in summary form, and no witnesses appear. The jury's nonbinding verdict is used as a basis for subsequent settlement negotiations.

128. Definitions are derived from the Judges' Deskbook on Court ADR, ed. Elizabeth Plapinger et al. (CPR Institute for Dispute Resolution 1993). This publication was prepared for the National ADR Institute for Federal Judges, held November 12–13, 1993. Judges and court personnel may request copies of the Deskbook from the Federal Judicial Center. Others may contact CPR.

Table 1

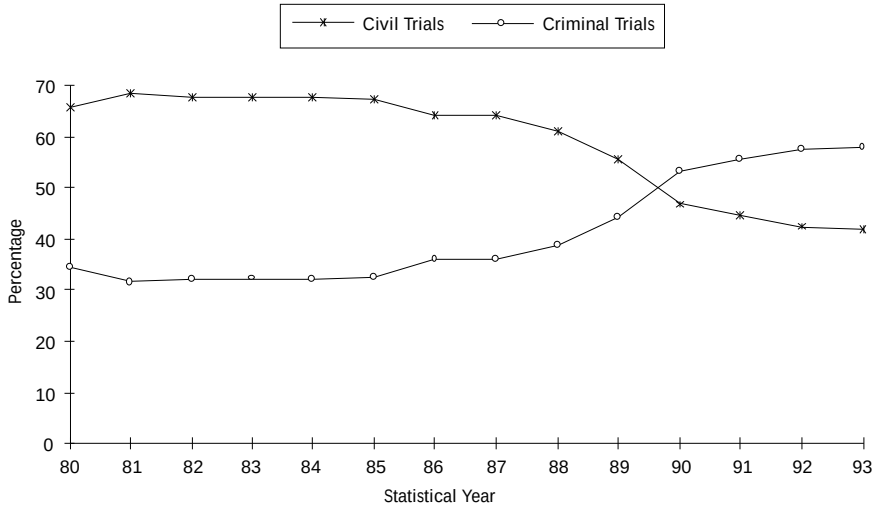
District Judge and Magistrate Judge Time Reported for ADR and Settlement Activities, FJC District Court Time Study
(*N* = 8,805 cases)

Type of Judge	Type of ADR & Settlement Activity	Number of Hours Spent	% of All Case-Related Hours Spent on ADR and Settlement
District judges	ADR	27.5	0.14
	Arbitration	11.8	0.06
	Early neutral evaluation (ENE)	0.5	0.002
	Mediation	5.4	0.03
	Mini-trial	4.5	0.02
	Summary jury trial	5.3	0.03
	Settlement	566.1	2.80
	Settlement (approval, etc.)	93.8	0.46
	Settlement conference	472.4	2.33
	All ADR and settlement	593.6	2.93
Magistrate judges	ADR	39.2	0.48
	Arbitration	2.6	0.03
	Early neutral evaluation (ENE)	18.0	0.22
	Mediation	1.9	0.02
	Summary jury trial	16.8	0.20
	Settlement	769.7	9.37
	Settlement (approval, etc.)	16.3	0.20
	Settlement conference	753.4	9.17
	All ADR and settlement	808.9	9.85

Source: Federal Judicial Center District Court Time Study. During the time study, all district and magistrate judges recorded the time they spent on a sample of cases, which were tracked from filing to disposition. The sample was selected from cases filed between November 1987 and January 1990. The numbers reported in the table reflect all reported district and magistrate judge time spent on ADR and settlement in 8,805 civil cases.

Figure 1

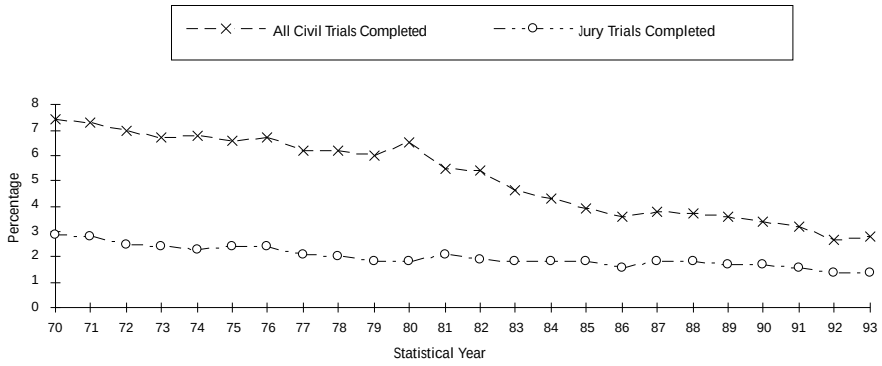
Civil and Criminal Trials Completed as a Percentage of All Trials Completed: Statistical Year 1980 to Statistical Year 1993



Source: Unpublished data tapes of civil and criminal trials maintained by the Administrative Office of the U.S. Courts.

Figure 2

Civil Trials Completed as a Percentage of All Civil Terminations: Statistical Year 1970 to Statistical Year 1993



Source: The Federal Judicial Center's Integrated Database, a standardized database of all terminated civil cases, SY 1970–SY 1993, based on information provided by the courts to the Administrative Office of the U.S. Courts.