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COMPULSORY ALTERNATIVE DISPUTE RESOLUTION AND VOLUNTARISM: TWO-HEADED MONSTER OR TWO SIDES OF THE COIN?

Lucy V. Katz¹

I. INTRODUCTION

During the 1980s, alternative dispute resolution (ADR) was transformed; instead of a set of voluntary, extrajudicial alternatives to traditional litigation, the term now includes a number of compulsory intrajudicial processes designed to augment and to improve the legal system from within. No longer an alternative, ADR is now an integral part of the very systems it sought to replace. Techniques and methods developed largely in the private sector have been incorporated into public institutions as courts make extensive use of alternatives such as arbitration, mediation, expert fact-finding, summary jury trials, early neutral evaluation, and mini-trials.²

With the growth of ADR has come a strong element of compulsion and coercion. The voluntary nature of alternatives has been eroded, and individuals and institutions find themselves mandated or pressured into participating in what were once considered purely optional activities. Large numbers of litigants are channeled into arbitration or other non-traditional procedures before gaining access to formal adjudication. Some ADR procedures are mandatory; others are

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2. See *infra* notes 25-149 and accompanying text; see also Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 488-94 (1989); 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, 13-14 (1991).

imposed through persuasive arguments of judges or others who promise escape from the real or perceived disadvantages of traditional litigation.

This Article broadly defines compulsory ADR³ to include any process in which the parties experience a lack of free choice about their participation, other than a civil or criminal trial with full due process protections. Thus, it includes not only court-ordered ADR⁴ (or alternatives mandated by statute), but also judicial mediation, settlement conferences, non-mandatory summary jury trials, and other techniques⁵ in which there is pressure on litigants to forgo trials, at least temporarily, and to utilize alternatives to bring about settlement.⁶

Now is a good time to survey the extent of compulsory ADR. Litigation over alternative procedures has worked its way through the appellate courts, affording a glimpse into the actual workings of the new procedures and also highlighting some important legal and policy issues. Major changes in the Federal Rules of Civil Procedure have been proposed,⁷ some of them impacting on the growth of compulsory ADR. It is therefore now possible, and useful, to answer some questions about this phenomenon and to identify those questions that must, for now, remain unanswered.

3. In this Article, the term compulsory ADR is used because it precisely connotes the lack of individual choice that characterizes the procedures studied. The term "mandatory ADR" is sometimes used by others to describe many of the same procedures. See, e.g., G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34, 35 (1991); Golann, *supra* note 2, at 494; see also Steven Lubet, *Some Early Observations on an Experiment with Mandatory Mediation*, 4 OHIO ST. J. ON DISP. RESOL. 235 (1989). Some refer to "nonconsensual" ADR. See John R. Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISP. RESOL. 1. Others refer to the "institutionalization" of ADR. See Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134, 135 (1984). However, "mandatory" is too narrow a term. It usually refers to methods such as arbitration or summary jury trials that by court rule or statute are required as a prerequisite to further relief in the judicial or regulatory system. "Institutionalization," on the other hand, is too broad, encompassing programs that are truly voluntary for the participants, yet are found within institutional structures, such as district attorneys' offices or consumer affairs departments. "Nonconsensual" comes closest to a description of what this Article is about. Nevertheless, "compulsory ADR" best describes all forms of ADR in which the element of choice, or voluntariness, is diminished, with the official imprimatur of the legal system.

4. See *infra* notes 31-50, 62-66 and accompanying text.

5. See *infra* notes 73-116 and accompanying text.

6. This Article does not cover contract clauses that arguably come within the definition of compulsory ADR because courts enforce them regardless of the actual consent of the parties. These include labor arbitration agreements and form contracts in which ADR is imposed on a party without adequate bargaining power to reject it. See, e.g., *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-86 (1989) (securities brokerage agreements); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-27 (1987); *Mendes v. Automobile Ins. Co. of Hartford*, 563 A.2d 695, 695 (Conn. 1989) (uninsured motorist policy). Nor does it include legislation imposing arbitration in public collective bargaining disputes. See ILL. REV. STAT. ch. 24, para. 10-3-8 to -11 (1991); see also MICH. COMP. LAWS ANN. §§ 423.231-.243, .271-.278 (West 1978 & Supp. 1992). Nevertheless, it is important to note that in these areas compulsory ADR has long been a part of the legal landscape.

7. See *infra* notes 127-29 and accompanying text.

This Article will begin with a brief overview of the history of contemporary ADR, followed by a survey of the extent of compulsory ADR in the courts. Next, it will discuss the constitutional and statutory issues that have arisen as ADR has become more prevalent. The next part will discuss the policy questions that necessarily accompany such a change in systems and the empirical and theoretical research that seeks to shed light on some of these questions. In conclusion, this Article will argue that, where possible, voluntarism should be restored as an overriding principle for public-sector ADR, minimizing the element of compulsion.

II. ADR THEMES AND A HISTORICAL OVERVIEW

Compulsory ADR is part of a movement over the last three decades to develop alternatives to traditional litigation for the resolution of legal disputes.⁸ During that process, three distinct phases can be identified. The first, in the late-1960s, consisted of the growth of neighborhood justice centers and a general interest in consensual, community-based alternatives.⁹ The second, in the mid- to late-1970s, came with the so-called medical malpractice crisis of that time; it included the creation of screening panels and arbitration of medical malpractice claims in an effort to eliminate weak claims or defenses and generally to lower the cost of malpractice insurance.¹⁰ The third phase, in the mid- to late-1980s, included the broad incorporation of alternatives over a wide spectrum of disputes. The latter phase was a response to another perceived "crisis" infecting all litigation, which allegedly had become too expensive and time-consuming and placed intolerable burdens on the American economy.¹¹ At the same time, there was an increase in very large, complex lawsuits (such as those involving toxic

8. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 3-5 (1985); see Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 424-26 (1986).

9. See, e.g., Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 3 (1973); Raymond Shonholtz, *How Neighborhood Justice Systems Work: Structure and Overriding Principles*, 5 MEDIATION Q. 3, 16-30 (1984).

10. See *Bernier v. Burris*, 497 N.E.2d 763, 768-72 (Ill. 1986); *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736, 739 (Ill. 1976); *Paro v. Longwood Hosp.*, 369 N.E.2d 985, 989 (Mass. 1977).

11. The Council on Competitiveness, for example, led by former Vice-President Dan Quayle, urged that litigation be made less "burdensome" in order to promote U.S. business interests. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1992); see also Warren E. Burger, *Agenda for 2000 A.D. — A Need For Systematic Anticipation*, 70 F.R.D. 83, 84 (1976); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 768 (1977). Others claim that reports of a litigation explosion destructive of business interests are unfounded. See Marc Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 922-23; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5-11 (1983); Marc Galanter & Joel Rogers, *A Transformation of American Business Disputing? Some Preliminary Observations* (1990) (Institute for Legal Studies, University of Wisconsin, Disputes Processing Research Program Working Paper 1990).

torts, mass disasters, and major antitrust actions) that were settled through extensive judicial mediation or other ADR methods because they were perceived as simply too large for traditional litigation.¹²

Many factors have generated the growth in ADR, but arguments for alternatives can be divided roughly into those concerned with the quality of justice and those concerned with efficiency.¹³ Early proponents argued that a growing number of litigants did not believe that the courts could provide a just and fair solution to their problems.¹⁴ Rule-oriented and procedurally complex court systems were perceived as overly formalistic, cumbersome, destructive of relationships, alienating, humiliating, slow, and expensive.¹⁵ This critique led to the formation of neighborhood justice centers, and content-specific alternatives such as mediation of family and divorce issues and landlord-tenant disputes.¹⁶ ADR was to provide an opportunity to escape the formal procedural aspects of traditional trial and appeal, and replace it with a consensual, individualized alternative that would allow participants to express their underlying interests and tailor both process and outcome to their individual needs.¹⁷ Other critics focused more on the expense and delay inherent in litigation; they sought ways to settle

12. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), *cert. denied sub nom. Hoffman v. Merrill Dow Pharmaceuticals, Inc.*, 109 S. Ct. 788 (1989) (bendectin); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986); *Rocco v. Johns-Manville Corp.*, 754 F.2d 110 (3d Cir. 1985) (asbestos); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984) (Dalkon Shield); *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164 (Mich. 1984), *cert. denied sub nom. E.R. Squibb & Sons v. Abel*, 469 U.S. 833 (1984) (DES); see also Lucy V. Katz, *The L'Ambiance Plaza Mediation: A Case Study in Judicial Settlement of Mass Torts*, 5 OHIO ST. J. ON DISP. RESOL. 277, 278-79 (1990).

13. See Menkel-Meadow, *supra* note 2, at 6. The author provides an excellent analysis of the two justifications for ADR, which she terms "quantitative-efficiency claims" and "qualitative-justice claims." *Id.*

14. See Thomas J. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465-66 (1984); see also ADR PRACTICE BOOK 3-4 (John H. Wilkinson ed., 1990).

15. Lieberman & Henry, *supra* note 8, at 427-31; National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy*, in SOURCEBOOK: FEDERAL AGENCY USES OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 5, 15 (Marguerite S. Milhauser & Charles Pou eds., 1987); Frank E.A. Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 111, 118-26 (1976).

16. CHRISTINE B. HARRINGTON, *SHADOW JUSTICE* 30-31 (1985); *THE MULTIDOOR EXPERIENCE: DISPUTE RESOLUTION AND THE COURTHOUSE OF THE FUTURE* at II-1 (Larry Ray & Prue Kestner eds., 1988) [hereinafter *THE MULTIDOOR EXPERIENCE*]; see also Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 6 (1985).

17. ADR advocates argue that consensual methods allow for integrative bargaining and 'win-win' solutions instead of the zero sum outcomes characteristic of litigation. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 10-14 (1983); LAWRENCE SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 85 (1987); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795 (1984).

disputes faster, thus realizing savings in transaction and opportunity costs.¹⁸ Businesses, particularly insurance companies, were attracted to ADR for this reason as litigation costs escalated and a surge in hostility to the legal system in the business community encouraged private and public uses of ADR.¹⁹ Public costs were also an issue for ADR proponents: not only litigants but the judicial system itself (hence the public treasury) allegedly gain when disputes are diverted into nonjudicial, settlement-oriented systems.²⁰ Efficiency arguments have dominated the more recent phases of the ADR movement. Overall, however, the growth of ADR has resulted from a convergence of interests among disparate groups: public officials, public interest advocates, and businesses.

ADR is not without its critics. There is growing concern that some parties in civil litigation are harmed and receive less justice the more ADR becomes incorporated in the judicial system.²¹ Speed can destroy opportunities for developing evidence, especially when ADR is used to cut short discovery.²² Moreover, the growth in compulsory ADR may have destroyed part of its original value as an informal, consensual alternative. As ADR is institutionalized, it tends to become more formal, more hedged with rules and requirements, taking on aspects of the very system it was meant to displace. One judge argues that ADR

18. ADR PRACTICE BOOK, *supra* note 14, at 12-14; Nancy F. Reynolds, *Why We Should Abolish Penalty Provisions for Compulsory Nonbinding Alternative Dispute Resolution*, 7 OHIO ST. J. ON DISP. RESOL. 173, 173 (1991); William E. Craco, Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 484 (1988).

19. Symptomatic of this hostility are the remarks at an Illinois conference on the legal system in the 21st century by Edward A. Butts, vice president and general counsel of Illinois Bell Telephone Co., suggesting that "we look ahead 20 years and come up with ways to get rid of courts — do away with what they do." Randall Samborn, *Court-Future Forum Airs Current Peeves*, NAT'L L.J., April 20, 1992, at 3, 47. Courts, he argued, "have a capacity today, and they have exercised it, to put businesses out of business." *Id.*

20. Raymond J. Broderick, 75 JUDICATURE 41, 41 (1991); Burger, *supra* note 11, at 96.

21. While these groups often articulate the same goals, commentators increasingly point out that not all ADR, particularly in the public sector, serves all its advocates. Thus, there is a growing concern that plaintiffs in civil litigation, and civil rights plaintiffs in particular, are being harmed and receive less justice from the system the more ADR methods become compulsory and the more settlement and case disposition *per se* are emphasized over justice concerns. See Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindication of Civil Rights*, 137 U. PA. L. REV. 2179, 2181-84, 2191-95 (1989); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 128-29 (1991); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1913 (1989); see also Judith Resnick, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2222 (1989) (arguing that different federal rules express the values of different political groups); Jeffrey L. Dawson, Note, *The Constitutionality of Mandatory Farmer-Lender Mediation: The Minnesota Plan*, 1988 J. DISP. RESOL. 237, 244 (noting that lenders expressed the view that they were "much worse off" due to the requirement of mediation before farm foreclosures and that farmers felt themselves "much better off"). Critics also express concern that certain types of plaintiffs are denied the opportunity to establish binding principles of great public importance. See generally Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Eisele, *supra* note 3.

22. See Charles F. Webber, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 U. CHI. L. REV. 1495, 1518-19 (1989).

destroys the value the American system traditionally placed on the right to vindication of one's position through an orderly procedure and rational decision subject to appellate review.²³ Others question whether compulsory ADR really fulfills its promise of cost savings to the judicial system.²⁴ These issues will be discussed further, after an overview of ADR in the courts today.

III. ADR METHODS

Compulsory ADR methods can be grouped into decision-oriented processes and consensual processes, and, within these categories, into mandatory and non-mandatory programs. In decision-oriented methods, such as arbitration²⁵ and fact-finding,²⁶ the outcome is primarily a decision by a neutral third party resolving the particular dispute.²⁷ In consensual ADR methods, by contrast, a third party assists the disputants in reaching their own agreement regarding how to resolve their dispute. Such methods include mediation, summary jury trials, minitrials, early neutral evaluation, and a host of negotiation techniques including judicial settlement conferences.

Yet even consensual ADR in the public sector is, to a degree, decision-oriented: the neutral's advisory opinion often becomes an aid to negotiation. Private ADR mediators are more likely to focus on identifying interests, providing a neutral yet sympathetic forum, and helping the parties fashion integrative solutions tailored to their needs.²⁸ Public ADR's decisional emphasis may reflect the fact that compulsory ADR usually takes place after a lawsuit is filed. The parties believe that they have exhausted all possibility of bilateral discussion. For many, a quick decision is imperative; a battered wife needs a restraining order against her husband, not a protracted series of discussions.²⁹ For others, it is important to have someone make a decision to break a deadlock or to end the arguing: "You like the blue drapes; I'd go for the green. Let's let Aunt Agnes choose." The chance to present the facts before an impartial, knowledgeable

23. See generally Eisele, *supra* note 3.

24. See generally *id.*; Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

25. See Federal Arbitration Act, 9 U.S.C. § 4 (1988); ROBERT COULSON, BUSINESS ARBITRATION: WHAT YOU NEED TO KNOW 6, 14-29 (1982).

26. Coulson, *supra* note 25, at 17-22; see also *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460, 461 (E.D.N.Y. 1985).

27. See *AMF Inc.*, 621 F. Supp. at 460-62.

28. For discussions of very different models of mediation, see *DIVORCE MEDIATION, THEORY AND PRACTICE* (Jay Folberg ed., 1988); Thomas Colosi, *Negotiation in the Public and Private Sectors*, 27 AM. BEHAV. SCI. 229, 242 (1983); Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 SO. CAL. L. REV. 305 (1970). In general, private mediators function primarily to identify interests, to provide a neutral but sympathetic forum, and to help the parties fashion integrative solutions tailored to their needs.

29. See Edwards, *supra* note 21, at 679; see also *Woman Slain in Courthouse While Seeking Protection*, ALBUQUERQUE J., March 19, 1992, at A3 (woman stabbed to death by husband in Milwaukee County Courthouse while waiting for hearing on request for permanent restraining order).

person and to obtain a quick decision as to who is right (after which the parties can go back to business as usual) can be more important than actually winning. The difference posited here is one of degree only. Nevertheless, it provides a useful context in which to view the specific kinds of public, compulsory ADR incorporated into the legal system.³⁰

A. Decision-oriented Procedures

Mandatory arbitration. Mandatory, or court-annexed, arbitration refers to arbitration that is required, either by statute or court rule, in some or all disputes before the parties can proceed with litigation. Selection can be at the discretion of a judge or by legislation or court rule,³¹ and arbitrators may be judges, attorney fact-finders or lay experts.³² Various state and federal courts have set up court-annexed arbitration programs, usually for disputes on certain subjects or disputes involving less than a certain dollar amount.

In most, but not all, mandatory systems, participation in the arbitration hearing is required but, to avoid constitutional problems,³³ the result is not binding. Either party may accept the arbitral award or reject it and request a trial *de novo* of all issues.³⁴ However, a penalty is imposed on litigants who request trial and fail to better their positions; penalties may include payment of either the arbitrator's fee, court costs, or even the opponent's attorney fees.³⁵ A variation

30. It is very difficult, perhaps impossible, to identify all alternatives to traditional litigation, even alternatives that are compulsory rather than voluntary. See Michele S.G. Hermann, *Anatomy of Mediation, Mediate Don't Litigate*, 1990 J. DISP. RESOL. 201, 202 (reviewing SAM KAGEL & KATHY KELLY, *ANATOMY OF MEDIATION: WHAT MAKES IT WORK* (1989) and PETER LOVENHEIM, *MEDIATE, DON'T LITIGATE: HOW TO RESOLVE DISPUTES QUICKLY, PRIVATELY AND INEXPENSIVELY WITHOUT GOING TO COURT* (1989)) (noting omissions of several public mediation groups and private dispute resolution providers in New Mexico from book purporting to include complete list of ADR programs).

31. See, e.g., John P. McIver & Susan Keilitz, *Court-Annexed Arbitration: An Introduction*, 14 JUST. SYS. J. 123, 123-24 (1991); Sharon A. Jennings, Comment, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or 'Second Class' Justice?*, 6 OHIO ST. J. ON DISP. RESOL. 313, 315-16 (1991).

32. See, e.g., CONN. GEN. STAT. §§ 52-549n to -549t (1991).

33. See generally *Firelock Inc. v. District Court*, 776 P.2d 1090 (Colo. 1989); *In re Smith*, 112 A.2d 625 (Pa. 1955), *appeal dismissed sub nom. Smith v. Wissler*, 350 U.S. 858 (1955).

34. The constitutional requirement of a trial *de novo* does not apply to administrative arbitration of purely statutory rights. See *infra* note 169 and accompanying text.

35. See, e.g., D.C. CT. APP. MAND. ARB. R. XIII(c) (arbitrator compensation, trial and arbitration costs, expert trial witness and arbitration witness costs, and interest on arbitration award); ILL. SUP. CT. R. 93(a) (flat penalty); MICH. COMP. LAWS ANN. § 600.4969 (West 1987) (trial court costs); N.C. ARB. R. 5(b) (arbitrator's fee); N.J. STAT. ANN. § 2A:23A-27 (West Supp. 1992) (arbitrator's fee); *id.* § 2A:23A-29 (West Supp. 1992) (costs, attorney fees, opponent's investigation costs and expert witness expenses and fees); 42 PA. CONS. STAT. ANN. § 7361(d) (Supp. 1991) (costs and opponent's attorney fees); R.I. SUP. CT. ARB. R. 5(b) (flat penalty); WASH. REV. CODE ANN. § 7.06.060 (1992) (costs and opponent's attorney fees); WASH. SUP. CT. MAND. ARB. R. 7.3 (trial court costs); see also Reynolds, *supra* note 18, at 177-78.

on mandatory arbitration is arbitration at the request of one party, such as a consumer, to a dispute.³⁶ At least 21 states have statutes or rules authorizing referral of some classes of cases to arbitration.³⁷ Many states require arbitration of claims involving a specific subject matter, such as torts,³⁸ domestic relations,³⁹ housing,⁴⁰ or agricultural activities.⁴¹ The federal courts began experimenting with court-annexed arbitration in 1978. By statute, federal courts may impose mandatory arbitration in cases up to \$100,000, or arbitration can be voluntary.⁴² Disputes involving constitutional or civil rights issues may not be subject to mandatory arbitration.⁴³ Courts may otherwise set their own parameters.

Medical malpractice legislation in the 1970s and early-1980s often required that malpractice disputes be submitted to special expert panels as a prerequisite either to filing a complaint or proceeding to trial. Some states refer to this

36. See *infra* notes 48-50 and accompanying text (new car warranty disputes).

37. See, e.g., ALASKA STAT. § 09.43.190 (1991) (redemption after foreclosure of a lien); ARIZ. REV. STAT. ANN. § 12-133 (1992) (all cases for less than \$50,000 must be arbitrated unless all parties waive and court finds good cause for waiver); CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1993) (all cases under \$50,000); CONN. GEN. STAT. § 52-549n; CONN. SUPER. CT. R. 46N (discretionary referral of cases under \$15,000); DEL. SUP. CT. R. 16.1 (cases under \$50,000); D.C. CT. APP. MAND. ARB. R. 111; FLA. STAT. ANN. §§ 44.101-.108 (West Supp. 1991); HAW. REV. STAT. § 601-20(b) (Supp. 1992) (tort cases up to \$150,000); MASS. GEN. LAWS ANN. ch. 211B, § 19 (Supp. 1993) (authorized program for trial court referrals of civil cases); MICH. COMP. LAWS ANN. §§ 600.4951-.4969 (West 1987) (nonmedical malpractice tort claims of over \$10,000); MINN. STAT. ANN. § 65B.525 (West 1986) (motor vehicle claims up to \$5,000); NEV. REV. STAT. § 38.250 (1991) (all claims up to \$25,000); N.Y. CIV. PRAC. L. & R. 3405 (McKinney Supp. 1992); N.C. GEN. STAT. § 7-37 (1991); N.Y. ARB. R. 1 (cases up to \$15,000); OR. REV. STAT. § 36.405 (1991) (up to \$25,000); 42 PA. STAT. ANN. §§ 7301-7362 (1982); R.I. SUP. CT. R. 1; TEX. CIV. PRAC. & REM. § 154.001 (Supp. 1992); WASH. REV. CODE § 7.06.020 (1982) (up to \$15,000 or \$35,000 if two-thirds superior court judges approve).

38. See, e.g., HAW. REV. STAT. § 601.20(b) (torts); MINN. STAT. ANN. § 65B.525; N.J. STAT. ANN. § 39:6A-25 (West 1990) (automobile negligence).

39. See, e.g., CAL. CIV. CODE § 4800.9 (West Supp. 1993) (community property division up to \$50,000); OR. REV. STAT. § 36.405 (property issues); WASH. REV. CODE § 7.06.020(2) (child support); W. VA. CODE § 49-5A-1 (1982) (juvenile matters).

40. See, e.g., FLA. STAT. ANN. § 723.038 (West Supp. 1993) (mobile home owner rental disputes); HAW. STAT. ANN. § 519-2 (b) (Supp. 1992) (lease renegotiation); N.J. STAT. ANN. § 46:3B-7 (1989) (home owner claims against builders).

41. See, e.g., IDAHO CODE § 22-436 (Supp. 1992) (seed performance); *id.* § 25-2104 (1990) (taking up hogs); *id.* § 36-1108(c)(3) (Supp. 1992) (claims against Fish and Game Department for damage to crops caused by antelope, elk, deer, and moose); *id.* § 36-1109 (Supp. 1991) (claims against Fish and Game Department for damage caused by black deer or mountain lions); ME. REV. STAT. ANN. tit. 13, § 1958-B (Supp. 1992) (agricultural handlers and qualified associations); W. VA. CODE §§ 19-9-30, 19-17-8 to -9 (1991) (appraisal values of infected animals and disputes over partition fences); WIS. STAT. ANN. § 93.50 (West 1990) (farm debts); WYO. STAT. § 11-19-106(b) (1991) (slaughter of diseased animals).

42. See 28 U.S.C. § 652(a)(1) (Supp. 1991). The statute provides for mandatory arbitration in cases valued up to \$100,000, but courts that had a program in place for cases up to \$150,000 could maintain the higher limit. See Pub. L. 100-702, § 901, 102 Stat. 4569, 4663 (1988).

43. 28 U.S.C. § 652(b) (Supp. 1991).

procedure as arbitration;⁴⁴ others direct their panels to screen,⁴⁵ or to review,⁴⁶ medical malpractice claims, or to provide some form of mediation.⁴⁷ Screening is supposed to eliminate litigation of weak claims or defenses by changing perceptions of the chances of prevailing at trial and by creating disincentives to continuing with litigation. Since all panels must reach a decision or give an opinion on the merits of the complaint, they fit the arbitration model.

Another large group of arbitration statutes and rules are those for new car consumer complaints. Special procedures for such complaints have been set up in almost every state under a federal program supervised by the Federal Trade Commission (FTC). Under the Magnuson-Moss Warranty Act,⁴⁸ the FTC has adopted standards for informal settlement of new car warranty disputes.⁴⁹ Many states also have enacted so-called Lemon Laws that require car owners to submit disputes to arbitration or mediation, either in a manufacturer's program that meets FTC standards or in a state-run or Better Business Bureau program.⁵⁰

Voluntary arbitration. Some courts have instituted voluntary arbitration programs in which one or both parties can choose whether or not to take advantage of an arbitration service before trial.⁵¹ Some such programs are

44. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2A-04 to -05 (1989); MASS. GEN. LAWS ANN. ch. 231, § 60B (1985); N.Y. CIV. PRAC. L. & R. 7550-7565 (McKinney 1991); OHIO REV. CODE ANN. § 2711.21 (Anderson 1991); 40 PA. CONS. STAT. ANN. §§ 1301.103, .308 (1992).

45. See ME. REV. STAT. ANN. tit. 24, § 2851 (West 1991).

46. See ARIZ. UNIF. RULES OF PROC. FOR MEDICAL LIAB. REV. PANELS IN THE SUPER. COURT, R. 1-6; DEL. CODE ANN. tit. 18, § 6802 (1989); LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1992); MONT. CODE ANN. § 27-6-105 (1991); NEB. REV. STAT. § 44-2840 (1988).

47. See MICH. COMP. LAWS ANN. § 600.4901-.4923 (West 1987); UTAH CODE ANN. § 78-14-12 (1992); WIS. STAT. ANN. § 655.42 (West Supp. 1992). See generally Shirley Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417 (1986).

48. 15 U.S.C. §§ 2301-2312 (1988).

49. See 16 C.F.R. §§ 700.1, 701.1-703.8 (1992).

50. See, e.g., ALASKA STAT. § 45.45.355 (1986); ARIZ. REV. STAT. ANN. § 44-1265 (West Supp. 1992); CAL. CIV. CODE § 1793 (West Supp. 1993); CONN. GEN. STAT. § 42-181 (West 1992); DEL. CODE ANN. tit. 6, § 5007 (Supp. 1992); D.C. CODE ANN. § 40-1303 (1990); FLA. STAT. ANN. § 681.108 (West Supp. 1993); HAW. REV. STAT. § 481I-4 (Supp. 1992); ILL. REV. STAT. ch. 121-1/2, para. 1204 (Supp. 1992); IND. CODE ANN. § 24-5-13-19 (Burns 1991); KAN. STAT. ANN. § 50-645(c) (Supp. 1992); KY. REV. STAT. ANN. §§ 367.865, .867 (1987); LA. REV. STAT. ANN. § 51:1944 (1987); ME. REV. STAT. ANN. tit. 10, § 1165 (West Supp. 1992); MINN. STAT. ANN. § 325F.6656 (West Supp. 1993); MISS. CODE ANN. § 63-17-163 (1989); MONT. CODE ANN. §§ 61-4-511 to -520 (1991); NEV. REV. STAT. § 598.761 (1991); N.H. REV. STAT. ANN. § 357-D:4 to :5 (Supp. 1992); N.M. STAT. ANN. § 57-16A-6 (1987); N.Y. GEN. BUS. LAW § 198-a (McKinney 1988 & Supp. 1992); N.C. GEN. STAT. § 20-351.7 (1989); N.D. CENT. CODE § 51-07-18.3 (1989); OHIO REV. CODE ANN. § 1345.77 (Anderson Supp. 1992); OKLA. STAT. ANN. tit. 15, § 901.F (West Supp. 1993); OR. REV. STAT. §§ 646.355, .357 (1991); 73 PA. CONS. STAT. ANN. § 1959 (Purdon Supp. 1992); R.I. GEN. LAWS § 42-42-5.1 (1988); UTAH CODE ANN. § 13-20-7 (1992); VT. STAT. ANN. tit. 9, §§ 4173-4174 (Supp. 1992); VA. CODE ANN. § 59.1-207.15 (1992); WASH. REV. CODE ANN. §§ 19.118.080-.110, .150 (West Supp. 1993); W. VA. CODE § 46A-6A-8 (1992); WIS. STAT. ANN. § 218.015(3)-(4) (West Supp. 1991); WYO. STAT. § 40-17-101(f) (Supp. 1991).

51. See, e.g., MD. R. SPECIAL PROC. E3; OHIO REV. CODE ANN. § 2701.10(B)(1) (Anderson 1992).

confined to specific types of disputes.⁵² Voluntary programs often include elements of compulsion. Florida, for example, provides for voluntary, binding arbitration of medical malpractice claims.⁵³ However, a party who opts for litigation faces significant penalties, including payment of the winner's attorney fees, limits on noneconomic damages,⁵⁴ and prejudgment interest.⁵⁵ In the Middle District of Florida, for example, parties with claims that do not qualify for mandatory referral can still choose to participate in the program.⁵⁶

B. Consensual Procedures

There is enormous variety among consensual ADR methods in the courts, making them hard to categorize and to classify. Mediation may be required in most civil actions, or in specific categories.⁵⁷ Summary jury trials may be mandatory or voluntary. Recent statutes and court rules tend to lump together different consensual processes and to authorize referral to several alternatives at the discretion of the court. The Civil Justice Reform Act of 1990⁵⁸ is a federal statute authorizing certain judicial districts to enact rules for referral of appropriate cases to "alternative dispute resolution programs that . . . the court may make available, including mediation, minitrial and summary jury trial."⁵⁹ The Texas Alternate Methods of Dispute Resolution Act⁶⁰ authorizes courts to refer any dispute for alternative dispute resolution procedures⁶¹ such as mediation,⁶² minitrials,⁶³ moderated settlement conferences,⁶⁴ summary jury

52. See FLA. STAT. ANN. §§ 718.112(L), .1255 (West Supp. 1993) (condominium governance and disputes with governing body); HAW. REV. STAT. §§ 514A-121 to -127 (1985 & Supp. 1992) (disputes between tenants and apartment owners or associations of apartment owners); N.Y. EXEC. LAW § 297.4(a)(ii) (McKinney 1993) (voluntary arbitration of disputes alleging unlawful discrimination).

53. FLA. STAT. ANN. § 766.207 (West Supp. 1992).

54. *Id.* § 766.209(4).

55. *Id.* § 766.209.

56. M.D. FLA. R. CIV. P. 8.02(3)(a); see also E.D. PA. R. CIV. P. 8.3.B; CAL. CIV. PROC. CODE § 1141.12 (West Supp. 1993).

57. See COLO. REV. STAT. § 13-22-305 (Supp. 1992); FLA. STAT. ANN. § 44.102(2)(b) (Supp. 1991) (disputes over custody, visitation or other parental responsibilities issues in circuits where mediation program established); MICH. COMP. LAWS ANN. § 600.4951 (tort actions, excluding malpractice, where claimed damages exceed \$10,000); MINN. STAT. ANN. § 484.74 subd. 1 (West 1990) (judge has discretion to order mediation if amount exceeds \$50,000).

58. 28 U.S.C. §§ 471-482 (Supp. 1992).

59. *Id.* § 473(a)(6); see also S.D. ILL. R. 34 (authorizing judges to order any alternative method of dispute resolution in any case).

60. TEX. CIV. PRAC. & REM. CODE ANN. §§ 151.001-155.006 (West Supp. 1993).

61. *Id.* § 154.021.

62. *Id.* § 154.023.

63. *Id.* § 154.024.

64. *Id.* § 154.025.

trials,⁶⁵ or arbitration.⁶⁶ The U.S. Claims Court has instituted settlement judges and minitrials as a means of reducing litigation costs and delay.⁶⁷

Mandatory mediation. By far the most extensive use of court-ordered mediation is in family relations disputes; 20 states mandate mediation in these cases, mainly when issues such as custody, visitation, or child support are in dispute.⁶⁸ A few states have established special conciliation courts in which either spouse may file for the purpose of preserving the marriage or amicably settling the divorce issues.⁶⁹ Several states have instituted mandatory mediation of agricultural debt foreclosures, generally at the option of the debtor,⁷⁰ in an effort to help distressed farmers. Certain federal district courts authorize referrals of all kinds of matters to mandatory mediation at the discretion of the trial judge.⁷¹ And the District of Columbia Circuit's Appellate Mediation Program provides for court-ordered mediation, which counsel or others with authority to settle must attend, with parties encouraged though not required to attend.⁷²

Voluntary mediation. Court-annexed voluntary mediation is generally found in courts with access to some external organization willing to provide mediation

65. *Id.* § 154.026.

66. *See id.* § 154.027; *see also* FLA. STAT. ANN. §§ 44.1011, .102 (Supp. 1992); IND. R. ALTERNATIVE DISP. RESOL. 1.3; MINN. STAT. ANN. § 484.74 subd. 1 (referrals to private trials, neutral expert fact-finding, mediation, minitrials and other procedures); OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 1993).

67. *See* U.S. Cl. Ct. Gen. Order No. 13, 28 U.S.C.A. 46 (West Supp. 1992). Both procedures are voluntary. *See id.*

68. *See* ALASKA STAT. § 25.20.080 (1991) (custody); ARIZ. REV. STAT. ANN. §§ 25.381.01-.24 (1991); CAL. CIV. CODE § 4607 (West 1983 & Supp. 1992) (custody and visitation); COLO. REV. STAT. ANN. § 14-10-129.5 (West Supp. 1991) (custody and visitation); CONN. GEN. STAT. ANN. §§ 42-182, 46b-59a (West Supp. 1992); FLA. STAT. ANN. § 61.183 (Supp. 1993) (custody, visitation or disposition of primary residence); ILL. REV. STAT. ch. 40, para. 602.1, 607.1 (Supp. 1992) (joint custody and visitation); IOWA CODE § 598.16 (1987); KAN. STAT. ANN. § 23.602, .701 (1988); LA. REV. STAT. ANN. §§ 9.351-.356 (West Supp. 1992) (custody and visitation); ME. REV. STAT. ANN. tit. 19, §§ 214.4, 581.4, 636, 665 (West 1991); MINN. STAT. ANN. § 518.619 (West 1990 & Supp. 1993) (custody); N.M. STAT. ANN. §§ 40-12-1 to -6 (1987); N.Y. JUD. LAW § 924 (McKinney 1983); N.C. GEN. STAT. § 7A-494 (1989); N.D. CENT. CODE § 14-09.1-02 (1991); OHIO REV. CODE ANN. § 3105.091 (Anderson 1989 & Supp. 1992); OR. REV. STAT. § 107.765(1) (1991); UTAH CODE ANN. § 30-3-16.4 (1989); WIS. STAT. ANN. § 767.11 (West Supp. 1992).

69. *See, e.g.*, MONT. CODE ANN. § 40-3-121 (1991); NEB. REV. STAT. §§ 42-808 to -828 (1988 & Supp. 1992); UTAH CODE ANN. § 30-3-16.2 (1989).

70. IND. CODE ANN. §§ 15-7-6-10 to -12 (Burns 1990); IOWA CODE § 654A.6 (1987); MINN. STAT. ANN. §§ 583.20-.32 (West Supp. 1992); MONT. CODE ANN. §§ 80-13-201 to -214 (1991); WIS. STAT. § 93.50 (1990); WYO. STAT. §§ 11-41-101 to -110 (1987); *see Laue v. Production Credit Ass'n*, 390 N.W.2d 823, 827 (Minn. Ct. App. 1986); Dawson, *supra* note 21, at 237; *see also* Donna L. Malter, Comment, *Avoiding Farm Foreclosure Through Mediation of Agricultural Loan Disputes: An Overview of State and Federal Legislation*, 1991 J. DISP. RESOL. 335, 339-44.

71. *See, e.g.*, M.D. FLA. R. 9.03; N.D. IND. R. 32 (court may order any case to non-binding alternative dispute resolution including summary jury trial); S.D. IND. R. 53.2; E.D. MICH. R. 32; W.D. MICH. R. 42; E.D. PA. R. 15 (pilot program for assigning odd-numbered cases in certain categories to mandatory mediation); E.D. WASH. R. 39.1; W.D. WASH. R. 39.1.

72. Order Establishing Appellate Mediation Program, U.S. CT. APP. D.C. CIR. RULES, app. VII, 28 U.S.C.A. (filed May 1, 1992).

and other services. The Neighborhood Justice Centers (NJC), which grew out of the first wave of compulsory ADR in the late-1960s, often serve this purpose. NJCs were set up to provide mediation and other alternatives in disputes among neighbors, families, landlords and tenants, consumer problems, and even misdemeanors, all of which were thought to be amenable to informal intervention.⁷³ These centers still exist, and some courts regularly refer people to them.⁷⁴ Most are non-profit organizations; they work in conjunction with the courts but also service people who come independently of the legal system.⁷⁵ In the late-1980s, many expanded their scope and changed their name to Justice Centers or Dispute Resolution Centers.⁷⁶ Some were incorporated into later experiments with the multi-door courthouse.⁷⁷ As court interest in alternatives grew, more courts took advantage of nonprofit dispute resolution centers as referral sources.⁷⁸

Judicial mediation. Several complex, multi-party cases, such as mass torts, have been resolved through elaborate judicial mediation efforts.⁷⁹ Litigation over the toxic effects of the chemical Agent Orange was settled by a massive mediation effort in the District Court for the Eastern District of New York, involving three special masters appointed by the court to facilitate settlement.⁸⁰ Professor Francis E. McGovern has used computer programs for settlement of disputes in the Eastern District of Michigan⁸¹ and the Northern District of Ohio.⁸² In Connecticut, Judge Robert Zampano has experimented successfully

73. Daniel McGillis, *Minor Dispute Processing: A Review of Recent Developments*, in ROMAN TOMASIC & MALCOLM H. FEELEG, *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 60, 64 (1982).

74. See HARRINGTON, *supra* note 16, at 76.

75. *Id.*

76. See *Introduction to AMERICAN BAR ASS'N STANDING COMM. ON DISPUTE RESOLUTION, DISPUTE RESOLUTION PROGRAM DIRECTORY* (1990).

77. THE MULTIDOOR EXPERIENCE, *supra* note 16, at II-3; Larry Ray & Anne L. Clare, *The Multidoor Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. ON DISP. RESOL. 7, 11 (1985).

78. THE MULTIDOOR EXPERIENCE, *supra* note 16, at III-1 to -5 (describing a program in Philadelphia); *id.* at III-77 to -87 (describing a program in Burlington County, New Jersey); see also N.Y. CRIM. CODE §§ 849a-849g (McKinney 1992).

79. "Judicial mediation" refers to the range of informal, judicially assisted settlement efforts, although the term settlement facilitation, or judicially assisted settlement, better differentiates judicially directed efforts from more traditional, facilitative mediation. See D. MARIE PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 50-51 (1986); see also Eugene F. Lynch & Lawrence C. Levine, *The Settlement of Federal District Court Cases: A Judicial Perspective*, 67 OR. L. REV. 239 (1988).

80. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 341-45 (1986).

81. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 461-65 (1986); Clifford J. Zatz, *Summary Jury Trial in Groundwater Case*, 1 TOXIC TORTS L. REP. 929, 935 (1987).

82. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394, 400 (1986); McGovern, *supra* note 75, at 480.

with mediation conducted jointly by federal and state judges in complex disputes in which parties assert jurisdiction in both court systems.⁸³ The Federal Judicial Center Manual for Complex Litigation urges judges to become involved in the settlement process particularly in complex cases where the parties' risks and expenses are abnormally high.⁸⁴

While voluntary, the pressure to participate in mediation of complex cases can be intense. Commentators have expressed concern about whether participation in such proceedings is truly voluntary when, as often happens, parties are drawn into settlement discussion by a judge willing to exert considerable pressure to bring parties into the process.⁸⁵

Summary jury trials. By far the most prominent ADR innovation in the federal court system has been the summary jury trial (SJT). In an SJT, attorneys present an abbreviated version of the case to a "mock" panel chosen from the regular jury pool; this "jury" renders a non-binding verdict.⁸⁶ Introduced by Judge Lambros of the Northern District of Ohio in 1978, the SJT has become a popular way to induce settlement by giving the parties a sense of the likely outcome of a trial.⁸⁷ Some federal districts permit mandatory summary jury trials, regardless of parties' consent,⁸⁸ or include summary jury trials with other ADR methods that may be ordered by the court.⁸⁹ In other districts, judges often suggest summary jury trials and, if the parties agree, empanel the jury and preside at the "trial."⁹⁰ State courts also use summary jury trials, most often through enabling legislation⁹¹ or through an individual judge's initiative.

Early neutral evaluation. A variant of arbitration and summary jury trials, early neutral evaluation is a method in which lawsuits are screened and evaluated by neutral third parties, either experienced private attorneys or judges specially assigned to the program.⁹² The evaluators present an opinion as to the probable

83. See generally Katz, *supra* note 12.

84. MANUAL FOR COMPLEX LITIGATION § 1.21 (5th ed. 1982).

85. See Katz, *supra* note 12, at 329-31; Schuck, *supra* note 80, at 350-59.

86. Lambros, *supra* note 14, at 468-71 (1984); see also Charles W. Hatfield, Note, *The Summary Jury Trial: Who Will Speak for the Jurors?*, 1991 J. DISP. RESOL. 151, 152-56.

87. Lambros, *supra* note 14, at 474-76; see Gerald L. Maatman, *The Future of Summary Jury Trials in Federal Court*, 21 J. MARSHALL L. REV. 455, 457 (1988); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1090-95 (1990).

88. S.D. ILL. R. 34; E.D. KY. R. 23; W.D. KY. R. 23; W.D. MICH. R. 44; M.D. PA. R. 513. There is disagreement in the courts about a judge's authority to order participation in mandatory jury trials, and this issue will be discussed later in this Article. See discussion *infra* Part IV.

89. See N.D. IND. R. 32; S.D. IND. R. 53.2; E.D. KY. R. 23; W.D. KY. R. 23; D. NEV. R. 185; N.D. OHIO R. 7:1.1; S.D. OHIO R. 53.1; N.D. OKLA. R. 17.1(B); W.D. OKLA. R. 17(1).

90. James J. Alfani, *Summary Jury Trial in State and Federal Courts*, 4 OHIO ST. J. ON DISP. RESOL. 213, 215-16 (1989); Bobby M. Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 TEMPLE L. REV. 799, 812-13 (1990).

91. See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 154.021-.073.

92. See N.D. Cal. Gen. Order No. 26 (1988); David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RESOL. 1, 2.

outcome of the case, including the amount of any damages.⁹³ The opinions are then presumably used to stimulate settlement discussion. The process is somewhat like a one-person summary jury trial, though it bears aspects of arbitration or fact-finding as well.

Settlement conferences. Probably the oldest and most pervasive court-annexed ADR technique is the settlement conference, in which a judge invites the lawyers into chambers to facilitate settlement.⁹⁴ Recently, however, the settlement conference in many jurisdictions has been formalized, institutionalized, and transformed into a major weapon in the fight to reduce court congestion, expense, and delay.

Rule 16 of the Federal Rules of Civil Procedure⁹⁵ was amended in 1983 to increase the trial judge's involvement in settlement.⁹⁶ The 1983 amendments were intended to improve case management, to expedite the disposition of cases, and to handle cases more efficiently.⁹⁷ Judges may require attorneys and unrepresented parties to attend pretrial conferences explicitly for "facilitating the settlement of the case."⁹⁸ Among topics to be discussed at the conference are "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute,"⁹⁹ and each party must be represented by at least one attorney with authority to settle.¹⁰⁰ Judges are mandated, in appropriate cases, to enter elaborate scheduling orders with time limits on all aspects of the pretrial process within 120 days of the filing of the complaint.¹⁰¹ Sanctions are permitted for failure to obey a scheduling order or to appear at a pretrial conference, and sanctions could be used against those who appear unprepared or fail to participate

93. See Levine, *supra* note 92, at 2.

94. See Wayne D. Brazil, *Effective Lawyering in Judicially Hosted Settlement Conferences*, 1988 J. DISP. RESOL. 1, 2; James A. Wall et al., *Judicial Participation in Settlement*, 1984 MO. J. DISP. RESOL. 25, 27-32; Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977).

95. FED. R. CIV. P. 16.

96. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1985 (1989); see also Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 602-03 (1989).

97. See FED. R. CIV. P. 16(a); see also FED. R. CIV. P. 16 (Notes of Advisory Comm. on Rules — 1983 Amendment).

98. FED. R. CIV. P. 16(a)(5).

99. FED. R. CIV. P. 16(c)(7). Other subjects can include "the need for adopting special procedures for managing potentially difficult or protracted actions . . . and such other matters as may aid in the disposition of the action." FED. R. CIV. P. 16(c)(10)-(11).

100. FED. R. CIV. P. 16(c).

101. FED. R. CIV. P. 16(b).

in good faith.¹⁰² Rule 16 has also been cited as the source of authority to order mediation, summary jury trials, and minitrials.¹⁰³

Some local district court rules have turned Rule 16 conferences and scheduling orders into elaborate devices designed, at least partially, to force the parties into meaningful settlement discussions. In the Northern District of Oklahoma, for example, local rules set out elaborate procedures for requiring attendance at a settlement conference by persons with "full settlement authority,"¹⁰⁴ and judges may require any case to proceed to summary jury trial, mediation, arbitration or other ADR method.¹⁰⁵ The rule even instructs judges in specific mediation techniques.¹⁰⁶ In several districts, attorneys are required to meet without a judge prior to trial and then to prepare and to file reports on what took place; these meetings must include settlement, the report must state details of settlement offers, and counsel must certify that all offers have been communicated to the parties.¹⁰⁷

State courts have also expanded the use of settlement conferences, though less formally and with less power to mandate attendance. Settlement weeks have been instituted in many courts, in which one or two weeks are set aside, no trials or hearings are scheduled, and cases are assigned to settlement conferences. These programs are a direct response to overcrowded dockets.

102. FED. R. CIV. P. 16(f). There is also a federal statute which provides a source of sanctions for unreasonably or vexatiously multiplying judicial proceedings. See 28 U.S.C. § 1927 (1988).

103. See *infra* notes 240-46 and accompanying text. Other federal rules that create pressure for settlement include Rule 11 (imposing sanctions for filing or pursuing frivolous claims), and Rule 68 (permitting awards of attorney fees and costs for rejecting an offer of judgment and failing to improve on the offer at trial). See FED. R. CIV. P. 11, 68.

104. N.D. OKLA. R. 17.1(A), (C) (providing sanctions for failure to appear or participate in good faith in a settlement conference or other ADR process); see also S.D. CAL. R. 37.1; D. CONN. R. 11.

105. N.D. OKLA. R. 17.1(B).

106. See N.D. OKLA. R. 17.1(A). This rule reads, in part, as follows:

The settlement Judge or Magistrate also has the right to meet jointly or individually with the parties and/or corporate representatives without the presence of counsel, and may elect to have the parties and/or corporate representatives meet alone without the presence of the settlement Judge or Magistrate or counsel with the specific understanding that any conversation relative to settlement will not constitute an admission

Id.

107. See, e.g., E.D. ARK. R. 21 (parties must file Information sheet that includes "[p]rospects for settlement"); W.D. ARK. R. 21 (same); C.D. CAL. R. 9.4-9.4.11 (parties are to meet within 40 days of trial and "[t]he parties shall exhaust all possibilities of settlement"); D. DEL. R. 5.4 (parties must file "certification that two-way communication has occurred between persons having authority in a good faith effort to explore the resolution of the controversy by settlement"); S.D. FLA. R. 14(C) (ten days prior to a pretrial conference parties "shall meet and discuss settlement"); N.D. GA. R. 235 (within 30 days after issue joined, lead counsel are required to "confer in a good faith effort to settle the case" and must inform all parties promptly of offers of settlement; parties must file statement certifying that conference was held and offers communicated, and indicating specific problems hindering settlement); D. HAW. R. 235(6)(a) (parties must meet and engage in good faith attempt to settle).

Like judicial mediation, the judicial settlement conference is consensual, and parties retain the right to refuse any proposed settlement. However, there is evidence that judicial pressure for resolution in these proceedings can be intense, particularly in large, complex cases.¹⁰⁸ An extensive survey of judges and lawyers showed that at least some lawyers and judges observed some or all of the following settlement techniques used by judges: setting tight schedules for trial or delaying trial dates; telling attorneys not to use sham arguments; convincing lawyers they have distorted views of cases; downgrading the stronger case and overvaluing the weaker; delaying rulings to press for settlement; coercing lawyers to settle; threatening dismissal or mistrial when lawyers fail to settle; discussing attorney recalcitrance with a senior member of the attorney's law firm (or threatening to do so); speaking personally with clients; and suggesting settlement figures to clients.¹⁰⁹ While much of what judges do in settlement was perceived as ethical, some behaviors, such as delaying rulings, threatening penalties for not settling, speaking directly to clients, penalizing clients for attorney actions, giving favorable rulings to the weaker side, ordering defendants to pay the settlement figure to charity and not to the plaintiff, transferring the case to another district on the day of trial, and threatening to discuss the attorney with a senior member of his or her firm, were perceived as unethical by at least 40 percent of the respondents.¹¹⁰

The Multidoor courthouse. Pulling together all of these court-related ADR programs is the purpose of the multidoor courthouse, a single intake facility where parties can choose the best forum for their dispute among all available alternatives.¹¹¹ Some disputes are resolved at the intake point; others proceed to some ADR method such as arbitration or mediation and then, if necessary, back to court.¹¹² Three experimental programs were set up by the American Bar Association in 1984: Tulsa, Oklahoma, Washington, D.C., and Houston, Texas.¹¹³ Others have been instituted by state or local courts.¹¹⁴ Some incorporate existing Neighborhood Justice Centers; others used such facilities as a referral source.¹¹⁵ While acceptance of a referral is usually voluntary, participation in the multidoor intake process is not.¹¹⁶

General ADR legislation. Legislative efforts to encourage ADR proliferated as the 1980s ended and the 1990s began. Several comprehensive state statutes

108. See Katz, *supra* note 12, at 333; Schuck, *supra* note 80, at 359-62.

109. Wall et al., *supra* note 94, at 28-29; see also NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY AND PRACTICE* 79 (1989); Leroy J. Tornquist, *The Activist Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 751 (1989).

110. Wall et al., *supra* note 94, at 37-38.

111. THE MULTIDOOR EXPERIENCE, *supra* note 16, at II-1 to -2.

112. *Id.* at II-2 to -3.

113. See *id.* at II-9 to -16, -53 to -61; Ray & Clare, *supra* note 77, at 17-23.

114. THE MULTIDOOR EXPERIENCE, *supra* note 16, at III-i, -79.

115. *Id.* at II-2 to -3, -53.

116. *Id.* at II-3 to -4; see also HARRINGTON, *supra* note 16, at 122-23 (discussing coercion in referrals to Neighborhood Justice Centers).

exhort courts and public agencies to use alternative dispute resolution, or to consider its use, over a broad spectrum of cases.¹¹⁷ On the federal side, there has been a flurry of ADR activity since 1988, culminating in the Judicial Reform Act of 1990,¹¹⁸ a statute likely to revolutionize federal court procedure. The 1990 Act is mainly concerned with strengthening litigation management by federal judges, but it includes a mandate for extensive use of ADR.¹¹⁹ The Act authorizes the development of "Civil Justice Expense and Delay Reduction Plans" in 10 pilot districts and mandates demonstration programs in five additional courts; three of the 10 plans must focus on ADR methods.¹²⁰ All the pilot plans must include the six "principles and guidelines of litigation management and cost and delay reduction" identified in § 473(a),¹²¹ three of the guidelines refer directly to settlement and ADR.¹²² Plans must include provisions for monitoring complex cases through conferences with a judicial officer, who "explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation"¹²³ and who has "authorization to refer appropriate cases to alternative dispute resolution programs," including mediation, minitrials, summary jury trials, and other programs already in use.¹²⁴ Optional components of the plans include a neutral evaluation program for discussion of issues at a "nonbinding conference conducted early in the litigation"¹²⁵ and authority to

117. Alternative Methods of Dispute Resolution Act, TEX. CIV. PRAC. & REM. CODE §§ 154.001-.073; *see also* New Jersey Alternative Procedures for Dispute Resolution Act, N.J. REV. STAT. ANN. §§ 2A:23A-1 to -19 (West 1987) (provides option of informal judge or umpire for binding decision if parties agree); Ohio Commission on Dispute Resolution and Conflict Management Act of 1989, OHIO REV. CODE ANN. §§ 179.01-.04 (Anderson 1990) (dispute resolution and conflict management commission established); OKLA. STAT. ANN. tit. 12, §§ 1801-1813; OR. REV. STAT. §§ 36.100-.210 (1991) (mandatory mediation; dispute resolution commission established to set rules and guidelines for dispute resolution programs).

118. 28 U.S.C. §§ 471-482. The framework for this statute came mainly from a report by the Federal Courts Study Committee, mandated by the 1988 Court Reform and Access to Justice Act, 28 U.S.C. § 651 (Supp. 1991), and from a 1989 report prepared for the Federal Judicial Center by the Brookings Institute. *See* BROOKINGS INSTITUTE, JUSTICE FOR ALL, REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989).

119. *See* 28 U.S.C. § 473.

120. *Id.*; *see* Civil Justice Reform Act of 1990, Pub. L. 101-650, § 104(b)(2), 104 Stat. 5090, 5097 (1991). These districts are the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri. Other districts may adopt expense and delay reduction plans voluntarily, and as of January, 1992, 34 had done so. All districts must develop plans by December 1, 1993. All these programs will be evaluated by the Administrative Office of the United States Courts and the House and Senate, to determine whether the programs should be extended. *See id.* § 105(c), 104 Stat. at 5098.

121. *See id.* § 104(b)(1), 104 Stat. at 5097; *see also* 28 U.S.C. § 473(a).

122. 28 U.S.C. § 473(a)(2), (3), (6).

123. *Id.* § 473(a)(3)(A).

124. *Id.* § 473(a)(6). The guidelines also include: systematic, differential treatment of cases (sometimes referred to as "tracking"); early pretrial control including the setting of firm dates for motions, discovery, and trial dates and control over discovery; voluntary exchange of information and cooperative discovery; and limits on discovery motions. *Id.* § 473(a)(1)-(2), (4)-(5).

125. *Id.* § 473(b)(4).

require representatives of parties with authority to settle to be present or available by telephone at settlement conferences.¹²⁶ The plans are to form the basis for changes in the Federal Rules of Civil Procedure, so one result of the Act is likely to be the institutionalization of ADR throughout the federal system.

Paralleling developments under the Civil Justice Reform Act¹²⁷ is a proposal for major change in the Federal Rules, changes that will also encourage compulsory ADR. Proposed amendments to Rule 16 would allow a court to require represented parties or their insurers to attend settlement conferences and participate in "special procedures to assist in resolving the dispute."¹²⁸ This language is meant to "enhance the court's powers in utilizing a variety of procedures to facilitate settlement, such as through mini-trials, mediation, and nonbinding arbitration."¹²⁹

A different group of statutes, regulations, and even an executive order encourage greater use of ADR in administrative proceedings as a way to cut down on what is seen as excessive government litigation.¹³⁰ The Administrative Dispute Resolution Act of 1990¹³¹ encourages the use of ADR throughout the administrative agencies.¹³² Every federal agency must "adopt a policy that addresses the use of alternative means of dispute resolution and case management" and "examine alternative means of resolving disputes in connection with adjudication, rulemaking, enforcement, issuing of licenses or permits, contract administration, litigation involving the agency, and "other agency matters."¹³³

126. *Id.* § 473(b)(5).

127. 28 U.S.C. §§ 471-482.

128. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 112 S. Ct. 259, 289-90 (Aug. 1991) [hereinafter Proposed Amendments].

129. *Id.* at 293 (committee notes).

130. "Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes," private sector ADR has "yielded decisions that are faster, less expensive, and less contentious," and ADR can lead "to more creative, efficient, and sensible outcomes." Administrative Dispute Resolution Act, Pub. L. 101-552, § 2, 104 Stat. 2736, 2736 (1990). See generally Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1.

131. Pub. L. 101-552, 104 Stat. 2736 (1990) (codified as amended in scattered sections of 5 U.S.C., 9 U.S.C., 28 U.S.C., 29 U.S.C., 31 U.S.C., and 41 U.S.C.); see Grassley & Pou, *supra* note 130, at 15-17.

132. See Grassley & Pou, *supra* note 130, at 15. Administrative hearing officers are instructed to hold conferences for the settlement of disputes, and they must inform parties as to available ADR methods and encourage their use. 5 U.S.C. § 556(c)(7) (Supp. 1991).

133. Alternative Dispute Resolution Act § 3, 104 Stat. at 2736-37 (1990). Because of the special function of the federal agencies, Congress cautioned that ADR should not be used under certain conditions, primarily where the public policy role of the agency would be compromised. Alternative Dispute Resolution Act, 5 U.S.C. § 582(b)(2), (3) (Supp. 1991). ADR is to remain a voluntary procedure to "supplement rather than limit other available agency dispute resolution techniques." *Id.* § 582(c).

Agencies must appoint a senior official as ADR specialist to promote ADR.¹³⁴ Government contracts are to be reviewed to determine whether they should include provisions encouraging ADR.¹³⁵ Arbitration is authorized by consent of all parties in administrative proceedings,¹³⁶ though to protect essential government functions and policy, agency heads are given discretion to terminate arbitration proceedings or vacate awards with no judicial review but only before the award becomes final.¹³⁷ Another statute, the Negotiated RuleMaking Act of 1990,¹³⁸ set up procedures for negotiated rule-making by committees of interested parties.¹³⁹

Recent statutes, such as the Americans with Disabilities Act,¹⁴⁰ include boilerplate language encouraging the use of ADR.¹⁴¹ The Civil Rights Act of 1991¹⁴² requires consideration of alternative dispute resolution in all civil rights disputes.¹⁴³ In addition, the Federal Credit Unions are to establish ADR procedures for resolution of claims by clients,¹⁴⁴ as is the Federal Deposit Insurance Corporation.¹⁴⁵ These statutes are in addition to older laws which incorporate mandatory arbitration for determining statutory rights into particular regulatory proceedings.¹⁴⁶ In some states, special education statutes and other regulatory measures incorporate mediation as an alternative to administrative hearings.¹⁴⁷ To encourage ADR in government litigation, President Bush issued

134. Alternative Dispute Resolution Act § 3(b), 104 Stat. at 2737.

135. *Id.* § 3(d), 104 Stat. at 2737.

136. Alternative Dispute Resolution Act, 5 U.S.C. § 585 (Supp. 1991).

137. *Id.* §§ 590(c), (d), 591(b)(2) (Supp. 1991).

138. Negotiated Rule Making Act, 5 U.S.C. §§ 581-590 (Supp. 1991); see Grassley & Pou, *supra* note 130, at 14-15.

139. See Grassley & Pou, *supra* note 130, at 14-15; see also Leonard F. Charla, *ADR Used More Often in Waste Site Disputes*, NAT'L L.J., Feb. 10, 1992, at 30 (giving examples of negotiated rulemaking prior to the enactment of this statute); Matthew L. Wald, *U.S. Agencies Use Negotiations To Pre-empt Lawsuits Over Rules*, N.Y. TIMES, Sept. 23, 1991, at 1.

140. 42 U.S.C. §§ 12101-12213 (Supp. 1991).

141. 42 U.S.C. § 12212 (Supp. 1991) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.").

142. Pub. L. 102-166, 105 Stat. 1072 (1991) (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

143. *Id.* § 118, 105 Stat. at 1081.

144. 12 U.S.C. § 1787(b)(7)(B)(iii)-(iv) (1988).

145. See 12 U.S.C. § 1821(d)(7)(B)(i)-(iv) (Supp. 1991).

146. See, e.g., 7 U.S.C. §§ 7a(11) (1988), 136a(c)(1)(F)(ii) (Supp. 1991), 136a(c)(2)(B)(iii) (1988); 29 U.S.C. § 1401(a) (1988).

147. Steven S. Goldberg, *The Failure of Legalization in Education: Alternative Dispute Resolution and the Education for All Handicapped Children Act of 1975*, 18 J.L. & EDUC. 441, 450 n.46 (1989) (reporting that thirty-six states have or are developing some sort of mediation policy sponsored by the state education agency).

an executive order in 1991.¹⁴⁸ The Order requires government counsel to attempt settlement before litigation begins, and to suggest the use of an appropriate ADR technique to the private parties in a dispute.¹⁴⁹ As a result of these changes, the current legal environment is replete with procedures external to traditional methods for resolving legal disputes. Disputing parties are likely to find themselves involved in compulsory arbitration, mediation, summary jury trials, minitrials, computer simulations, or simply protracted and complex settlement negotiations, with or without an official presiding, before, during and even after litigation. The image of a lawsuit as beginning with a complaint, followed by discovery, motion practice and settlement discussion among counsel, trial, and appeal, no longer accurately reflects America's legal system.

IV. DISPUTING OVER DISPUTE RESOLUTION: JUDICIAL RESPONSES

The widespread use of compulsory ADR has spawned its own body of law as courts have grappled with constitutional and statutory challenges to alternative procedures. In addition to clarifying legal rules, the resulting opinions, reviewed in the following section, give insight into how ADR is working in the courts, as well as to how litigants are responding to different methods.

Any discussion of judicial responses to ADR must take account of two significant changes in judicial attitude over the last half-century. The first is the shift from hostility to enthusiasm for arbitration. The second is the change from a rejection of consensual methods as not appropriate for judicial intervention to a far more sophisticated understanding of the dynamics of negotiation and a willingness to use judicial power to facilitate it. The Federal Arbitration Act,¹⁵⁰ enacted in 1925, introduced a federal policy favoring private arbitration agreements.¹⁵¹ By 1991, the U.S. Supreme Court had held in several opinions that a contract to arbitrate would be enforced even as to public rights governed by important regulatory statutes.¹⁵² These opinions were significant in that they

148. See Exec. Order No. 12,778, 3 C.F.R. 359 (1992), reprinted in 28 U.S.C. § 547 (Supp. 1991) (hereinafter using C.F.R. page numbers for pinpoint cites). In its preamble the executive order states that civil litigation has imposed burdens on the courts and high costs on Americans, American business, and American government at all levels. *Id.* at 359.

149. *Id.* § 1(c)(1)-(3), 3 C.F.R. at 360-61. To preserve government prerogatives, counsel are cautioned not to agree to binding arbitration or its equivalent. *Id.* § 1(c)(3), 3 C.F.R. at 361. The Order also encourages cooperative discovery and fee shifting agreements. *Id.* § 1(d), (h), 3 C.F.R. at 361, 362-63. It also requires that proposed legislation and regulations be reviewed to minimize potential for litigation. *Id.* § 2, 3 C.F.R. at 363-65.

150. 9 U.S.C. §§ 1-15 (1988 & Supp. 1991).

151. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

152. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1652 (1991) (Age Discrimination in Employment Act); *Rodriguez de Quijas*, 490 U.S. at 481-83 (securities claims); *McMahon*, 482 U.S. at 226-27 (RICO and securities claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 626-27 (1985) (antitrust and securities claims).

indicated the Court's acknowledgment that arbitration could provide a hearing in which important substantive rights were protected. The traditional courtroom was, therefore, no longer the sole appropriate venue for the enforcement of legal rights.¹⁵³ Without this new regard for arbitration as a process, some of the compulsory arbitration programs introduced over the past two decades might not have withstood constitutional challenge.

The second attitude shift, toward an understanding and appreciation of consensual ADR methods, is in some ways even more remarkable. Traditionally, courts refused to enforce agreements to mediate or to negotiate on the grounds that equity would not issue "vain orders" or require litigants to do something that would be ineffective or futile.¹⁵⁴ If a party were determined not to settle, forcing it to negotiate or to mediate was thought to be futile, since the dispute would only end in court anyway. Moreover, since consensual ADR depends on cooperation, ordering participation would violate the equitable maxim that courts should not grant specific performance of a contract requiring cooperation between the parties, such as a personal service contract.¹⁵⁵ Either party could jeopardize the process and make performance worthless. The only exception was for enforcement of the obligation to negotiate in good faith under collective bargaining agreements.¹⁵⁶

Today most courts enthusiastically enforce statutes, rules, and even agreements for consensual ADR.¹⁵⁷ Such opinions, moreover, indicate a new understanding of how such processes work. Judges perceive, for example, that summary jury trials often result in settlement, even when attorneys are initially opposed to participation.¹⁵⁸ Judicial opinions declare that the SJT works

153. See, e.g., *Mitsubishi Motors*, 473 U.S. at 628.

154. See, e.g., *AMF Inc.*, 621 F. Supp. at 462-63; see also RESTATEMENT (SECOND) OF CONTRACTS §§ 357-359 (1981); HAROLD G. HANBURY & RONALD H. MAUDSLEY, *MODERN EQUITY* 661 (12th ed. 1985); Lucy V. Katz, *Enforcing an ADR Clause — Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 583, 590-95 (1988).

155. *Copylease Corp. of Am. v. Memorex Corp.*, 408 F. Supp. 758, 759 (S.D.N.Y. 1976); *Felch v. Findlay College*, 200 N.E.2d 353, 355 (Ohio Ct. App. 1963).

156. See 29 U.S.C. § 158(d) (1988); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02, 404 (1952). See generally Jay M. Dade, Note, *Negotiating in Good Faith: Management's Obligation to Maintain the Status Quo During Collective Bargaining Under the Railroad Labor Act*, 1992 J. DISP. RESOL. 395.

157. See, e.g., *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 44 (E.D. Ky. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988); *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 604-05 (D. Minn. 1988); *AMF Inc.*, 621 F. Supp. at 461-62; see also *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275, 277 (W.D. Wis. 1985), *rev'd*, 871 F.2d 650 (7th Cir. 1989).

158. See *McKay*, 120 F.R.D. at 49. In *McKay*, the court states:

In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred. I know also that the attorney who objected to the first summary jury trial he

because it allows parties to vent emotions and it satisfies litigants' need for a day in court, in addition to providing input on the probability of success at trial.¹⁵⁹ Such judicial articulation of the dynamics of settlement has, perhaps more than any other single factor, encouraged the expansion of judicial power to compel participation in consensual ADR.

A. Constitutional Issues

Most constitutional challenges to ADR involve mandatory arbitration and the medical malpractice review panels put in place during the second phase of ADR development, in the mid- to late- 1970s. Objections to these ADR methods have been based on the following constitutional arguments: the Seventh Amendment right to jury trial in civil cases; the Due Process Clause, as found in the Fifth and Fourteenth amendments; the Equal Protection Clause; Article III on judicial powers; and the First Amendment. State court challenges have been based on analogous provisions in state constitutions, particularly those guaranteeing due process, access to courts, and equal protection. Few of these challenges have been successful. Generally, the U.S. Supreme Court is hospitable to alterations of traditional legal processes, approving such procedures as the appointment of auditors to assist judges in decision-making,¹⁶⁰ the elimination of common law causes of action,¹⁶¹ the six-person jury,¹⁶² and "nonadversarial" administrative procedures dealing with important rights.¹⁶³ In *McNary v. Haitian Refugee Center, Inc.*,¹⁶⁴ the Court even upheld a plan for ruling on deportation orders at interviews conducted by Immigration and Naturalization Service workers, with no judicial review absent initiation of a deportation proceeding.¹⁶⁵

The right to jury trial. The Seventh Amendment right to a jury trial is limited to suits that were triable to a jury at common law. Even in such matters, the amendment has been held to require only that a trial on the merits be available at some point before final determination of the parties' rights.¹⁶⁶ Whether any

was required to participate in is now the biggest local fan of the procedure.

Id.

159. *Id.* at 50.

160. *See Ex Parte Peterson*, 253 U.S. 300, 309-10 (1920).

161. *See Crowell v. Benson*, 285 U.S. 22, 40 n.4 (1932); *Mountain Timber Co. v. Wisconsin*, 243 U.S. 219, 236 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188, 199-200 (1917).

162. *Colgrove v. Battin*, 413 U.S. 149, 156-57 (1973).

163. *See, e.g., United States Dept. of Labor v. Triplett*, 494 U.S. 715, 721 (1990); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985).

164. 111 S. Ct. 888 (1991).

165. *Id.* at 896.

166. *Peterson*, 253 U.S. at 310 ("The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury not be interfered with."); *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 149 (5th Cir. 1981). New causes of action that are analogous to common law claims also carry the jury trial guarantee. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990); *Tull v. United States*, 481 U.S. 412, 417 (1987); *Pernell v. Southall Realty Corp.*, 416

given procedure violates the Seventh Amendment depends essentially on a reasonableness test: If the procedure is reasonable and does not unduly burden the jury trial right, it is valid.¹⁶⁷ Under this analysis, most departures from traditional litigation have been tolerated by the Supreme Court, as long as the parties have some chance eventually to present their claims to a jury. Even the total elimination of the jury trial, in workers' compensation matters for example, has been upheld as long as the loss of the jury trial right is offset by a substantial benefit.¹⁶⁸

Compulsory arbitration in civil cases, and other mandatory forms of ADR, does not, therefore, violate the Seventh Amendment so long as a jury trial is available *de novo* at some point.¹⁶⁹ Penalties imposed for insisting on trial *de novo* do not, if reasonable, violate the jury trial right.¹⁷⁰ Generally, the benefits of arbitration, such as speed and the elimination of frivolous suits, outweigh the burdens, such as delay in obtaining a jury trial, and so the procedure is deemed reasonable.¹⁷¹ In some cases, state courts have upheld mandatory arbitration but with reservations about its use in all instances. The Pennsylvania Supreme Court, for example, in upholding the nation's first mandatory arbitration program, cautioned that penalties for trial *de novo* that were too high in proportion to the arbitral award might be unconstitutional in specific cases.¹⁷²

U.S. 363, 374-75 (1974); *see also* *Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 550 (1990). Common law claims that arise in equitable proceedings can be determined without a jury and then barred by collateral estoppel from being raised in a later jury trial. *Langenkamp v. Culp*, 111 S. Ct. 330, 331-32 (1990); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334-35 (1979); *Katchen v. Landy*, 382 U.S. 323, 339 (1966); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

167. *See* *Galloway v. United States*, 319 U.S. 372, 389 (1943) (directed verdict); *Fidelity Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902) (summary judgment); *Capital Traction Co. v. Hof*, 174 U.S. 1, 38-39 (1899) (hearing before justice of the peace).

168. *Hof*, 174 U.S. at 23. In *Hof*, the Supreme Court stated:

[Y]et it is to be remembered that . . . it is not "trial by jury" but "the right to trial by jury" which the amendment declares "shall be preserved." It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right.

Id.; *see also* *Mountain Timber Co.*, 243 U.S. at 235; *White*, 243 U.S. at 201-02.

169. *Riggs v. Scrivner*, 927 F.2d 1146, 1147-48 (10th Cir.), *cert. denied*, 112 S. Ct. 196 (1991) (upholding W.D. OKLA. R. 43, which mandates arbitration as applied to claims for damages under 42 U.S.C. § 1981); *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 268-69 (6th Cir. 1985) (upholding E.D. MICH. R. 32, on mandatory mediation that effectively operates as arbitration); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 570-71 (E.D. Pa. 1979); *Davison v. Sinai Hosp.*, 462 F. Supp. 778, 781 (D. Md. 1978); *Firelock Inc.*, 776 P.2d at 1097; *Davis v. Gaona*, 396 S.E.2d 218, 220-21 (Ga. 1990); *see also* *Anderson v. Elliott*, 555 A.2d 1042, 1049 (Me. 1989) (mandatory arbitration of attorney-client fee dispute does not violate state constitutional right to jury trial); *Pittsburgh Corning Corp. v. Bradley*, 453 A.2d 314, 316-17 (Pa. 1982) (special program for nonjury trials of asbestos claims does not unduly burden right to jury trial).

170. *Rhea*, 767 F.2d at 268-69. *But see* *Firelock Inc.*, 776 P.2d at 1096; *Smith*, 112 A.2d at 629-30.

171. *Kimbrough*, 478 F. Supp. at 571.

172. *Smith*, 112 A.2d at 630. At the same time the court recognized that such costs are specifically designed to discourage appeals. *Id.*

Some state courts have struck down medical malpractice review panels or other arbitration programs as violative of the right to jury trial¹⁷³ while others have upheld similar statutes.¹⁷⁴ A few opinions have invalidated medical review panels as applied in specific circumstances in which delays or other procedural roadblocks have been deemed so onerous as to go beyond the limits of reasonableness.¹⁷⁵ Georgia's Supreme Court has upheld a local program for arbitration of claims up to \$25,000.¹⁷⁶

Due process of law. Due process challenges to ADR involve two types of claims: (1) that a procedure deprives a claimant of a due process hearing on the merits; and (2) that particular procedures, such as penalty assessments or sanctions, are administered without adequate due process protections. Like Seventh Amendment claims, due process arguments are rarely successful in the federal courts. The Supreme Court has stuck firmly to its pronouncement in *Mathews v. Eldridge*¹⁷⁷ that due process is a flexible concept, that its requirements vary depending on a number of factors,¹⁷⁸ and that a full due process hearing with notice and the right to representation is not required in all cases.¹⁷⁹ Administrative proceedings are valid substitutes for trial as long as

173. See, e.g., *Wright*, 347 N.E.2d at 741; *Grace v. Howlett*, 283 N.E.2d 474, 481 (Ill. 1972) (mandatory arbitration of automobile accident claims not over \$3,000). But see *De Luna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1145-46 (Ill. 1992) (upholding requirement that party alleging medical malpractice attach to complaint attorney affidavit that prior to suit there was consultation with a professional who agreed that the claim had merit). The Seventh Amendment does not apply to the states, but all states except Colorado and Louisiana provide analogous guarantees of the right to jury trial. Golann, *supra* note 2, at 503.

174. See, e.g., *Eastin v. Broomfield*, 570 P.2d 744, 748-79 (Ariz. 1977); *Paro*, 369 N.E.2d at 991; *Parker v. Children's Hosp.*, 394 A.2d 932, 939 (Pa. 1978); *Strykowski v. Wilkie*, 261 N.W.2d 434, 449 (Wis. 1978).

175. *Mattos v. Thompson*, 421 A.2d 190, 196 (Pa. 1980) (lengthy delays in medical malpractice arbitration place impermissible burden on right to jury trial; delays mean act does not accomplish its purpose to provide prompt determination of claims); see also *Aldana v. Holub*, 381 So. 2d 231, 236-37 (Fla. 1980) (rule that jurisdiction of courts lapses if medical mediation not concluded within ten months of filing complaint, resulting in arbitrary loss of right to trial, denies due process of law); *Jiron v. Mahlab*, 659 P.2d 311, 313-14 (N.M. 1983) (requirement that plaintiff apply to medical review panel before filing suit denies constitutional right of access to courts in case in which, due to delay thus imposed, plaintiff would lose jurisdiction over defendant).

176. See *Gaona*, 396 S.E.2d at 220.

177. *Id.* 424 U.S. 319 (1976).

178. *Id.* at 335. "What process is due" depends on: (1) the private interest that will be affected by the determination; (2) the risk of erroneous deprivation of that interest in the mandated procedure, and the probable value of addition or substitute procedural safeguards; and (3) the government's interest in the procedure, including the government function involved and the fiscal or administrative burdens that additional or substitute procedures would entail." *Id.*; see also *Walters*, 473 U.S. at 320; *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

179. *Mathews*, 424 U.S. at 340; see also *Walters*, 473 U.S. at 305-06 (Congress has strong interest in nonadversarial, informal procedure); *Goldberg*, 397 U.S. at 269.

there is an opportunity for judicial review of constitutional issues.¹⁸⁰ Under the Due Process Clause, mandatory arbitration is invalid only if the arbitral result is final and binding and parties are deprived of any subsequent judicial hearing.¹⁸¹

Legislatures may create totally new procedures for dispute resolution without violating due process rights,¹⁸² and they may alter existing procedures,¹⁸³ as long as there is no denial of the essentials of due process under *Mathews*. Such innovations are valid if they are reasonable and serve a legitimate interest.¹⁸⁴ This includes mandatory arbitration or mediation.¹⁸⁵

ADR procedures that are so burdensome as to prevent any access to courts do deprive claimants of a hearing in violation of the due process clause, but such instances usually involve technical restrictions that, through no fault of the claimant, foreclose a trial or hearing. This was the case in *Logan v. Zimmerman Brush Co.*,¹⁸⁶ in which failure by the state to comply with a technicality meant that the plaintiff had forfeited any right to a hearing.¹⁸⁷ Similarly, medical malpractice review procedures were invalidated as applied on due process grounds in *Jiron v. Mahlab*,¹⁸⁸ and *Aldana v. Holub*.¹⁸⁹ Fees, bonds, or penalties for unsuccessful appeals of arbitral awards do not violate due process rights as long

180. See *Schweiker v. McClure*, 456 U.S. 188, 197 (1982) (government may delegate to private insurance carriers power to hold hearings and to impose final decision in Medicare claims disputes); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Weinberger v. Salfi*, 422 U.S. 749, 763 (1975); *Crowell*, 285 U.S. at 45; *Mountain Timber*, 243 U.S. at 235.

181. See *Healy v. Onstott*, 237 Cal. Rptr. 540, 542 (Ct. App. 1987); *American Universal Ins. Co. v. DelGreco*, 530 A.2d 171, 177 (Conn. 1987) ("compulsory arbitration statutes that effectively close the courts to the litigants by compelling them to resort to arbitrators for a final and binding determination are void as against public policy and are unconstitutional"); *Mount St. Mary's Hosp. v. Catherwood*, 260 N.E.2d 508, 518 (N.Y. 1970); *Smith*, 112 A.2d at 629.

182. See *Crowell*, 285 U.S. at 45; *Montgomery v. Daniels*, 340 N.E.2d 444, 453 (N.Y. 1975); *Strykowski*, 261 N.W.2d at 442.

183. See *Colton v. Riccobono*, 496 N.E.2d 670, 673 (N.Y. 1986) (upholding medical malpractice panel procedure against claim that delay denied due process).

184. See *id.*; see also *Lindsey v. Normet*, 405 U.S. 56, 78 (1971).

185. See *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. Ct. App. 1992) (mediation order does not violate due process or access to courts); Charles J. McPheeters, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 J. DISP. RESOL. 337 (discussing the *Decker* decision); see also *Seal Audio, Inc. v. Bozak Inc.*, 508 A.2d 415, 423 (Conn. 1986) (referral to attorney referees for fact-finding and recommendation of legal decision, with ultimate review and approval by judge, does not violate state or federal due process clause); *Laue*, 390 N.W.2d at 830 (statute does not violate substantive due process by requiring notice of right to mandatory mediation before pursuing a common law claim on a debt). But see *Knoke v. Michelin Chem. Corp.*, 470 N.W.2d 420, 422 (Mich. Ct. App. 1991) (mediation determination that appeal was frivolous must be subject to *de novo* judicial review or process would violate "fundamental notions of due process").

186. 455 U.S. 422.

187. *Id.* at 433.

188. 659 P.2d 311, 313.

189. 381 So. 2d 231, 238; see also *Cardinal Glennon Memorial Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 109 (Mo. 1979) (striking down a medical malpractice screening program for violation of right of access to courts). But see *Colton*, 496 N.E.2d at 673.

as a judge can modify harsh requirements to permit meritorious appeals.¹⁹⁰ As in the jury trial cases, if the fee is not an absolute bar to a full due process hearing, it is valid.

Particular procedures may violate due process if they fail to provide adequate notice. This is especially relevant in sanctions cases, in which penalties are imposed for failure to attend or to participate in a pretrial settlement conference.¹⁹¹ Some courts have held that penalties for failure to comply with pretrial orders, including orders to settle by a certain date or to go to trial, are really in the nature of civil or criminal contempt proceedings, and may not be imposed without full due process notice and hearing.¹⁹²

Rules on use at a later trial of testimony or information gained at an ADR proceeding sometimes raise due process concerns. Statutes allowing an arbitrator or mediator opinion to be introduced into evidence at a later trial have been upheld if there is an opportunity to cross examine the opinions' author.¹⁹³ However, disclosure and cross examination conflict with the strong policy of confidentiality in ADR, particularly in procedures such as mediation or summary jury trials, and in some circumstances court rules bar examination of mediators. Disclosure of a result in such a case without opportunity for cross examination would arguably be a denial of due process.¹⁹⁴

Equal protection of the law. Some suits have raised equal protection arguments against ADR procedures that are applied only to certain classes of lawsuits, such as medical malpractice claims, or claims for under a certain dollar limit. Such classifications have been upheld by several courts,¹⁹⁵ usually under the rational-basis test applied by the Supreme Court to social and economic legislation.¹⁹⁶ The states' goals of affording speedier trials, eliminating docket congestion, and alleviating the medical malpractice "crisis" all have been held legitimate, and efforts to channel some cases into speedier procedures, to eliminate frivolous claims early in litigation, or to encourage settlements have

190. See *Paro*, 369 N.E.2d at 990; *Knoke*, 470 N.W.2d at 422.

191. See *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962); see also *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (due process clause imposes limits on state power to dismiss suits for failure to comply with pretrial orders).

192. See, e.g., *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (9th Cir. 1990) (civil contempt); *Hess v. New Jersey Transit Rail Operations*, 846 F.2d 114, 116 (2d Cir. 1988) (criminal contempt).

193. See *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 349 (Alaska 1988); *Eastin*, 570 P.2d at 748-49; *McLean v. Hunter*, 486 So. 2d 816, 819 (La. Ct. App. 1986).

194. See *McLaughlin v. Superior Court*, 189 Cal. Rptr. 479, 485-87 (Ct. App. 1983) (mandatory mediation imposed in custody and visitation disputes; parties could not cross examine mediator, whose recommendation was given to court); see also *Simon v. St. Elizabeth Medical Ctr.*, 355 N.E.2d 903, 908 (Ohio Ct. App. 1976); *Weber v. Lynch*, 375 A.2d 1278, 1281-82 (Pa. 1977).

195. See, e.g., *Firelock Inc.*, 776 P.2d at 1098; *Gaona*, 396 S.E.2d at 221; *Bernier*, 497 N.E.2d at 767-68; *Paro*, 369 N.E.2d at 988; *Strykowski*, 261 N.W.2d at 443.

196. See, e.g., *United States v. Kras*, 409 U.S. 434, 447 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The states generally apply a similar analysis. See, e.g., *Montgomery v. Daniels*, 340 N.E.2d 444, 451 (N.Y. 1975); *Smith*, 112 A.2d at 631.

been deemed rationally related to those goals.¹⁹⁷ Moreover, experimental ADR programs, which may be necessarily underinclusive, do not for that reason constitute an equal protection violation.¹⁹⁸

On the other hand, certain state courts have upheld equal protection claims, particularly in medical malpractice cases.¹⁹⁹ The Supreme Court of Rhode Island held that a medical malpractice screening provision failed even minimum scrutiny under the Equal Protection Clause because, the court found, no malpractice crisis existed when the legislation was enacted and so there was no basis at all to justify the restrictive classification.²⁰⁰ The Louisiana Supreme Court held that a malpractice damage limit of \$500,000, not including medical expenses, constituted discrimination based on physical condition, which is prohibited by the state constitution.²⁰¹ Presumably the same would be true of a medical malpractice arbitration panel.

A potentially more serious set of equal protection problems arises when ADR procedures are applied differently to plaintiffs and defendants in the same law suit. In *Lindsey v. Normet*,²⁰² the Supreme Court struck down as arbitrary and irrational an Oregon requirement that tenants, not landlords, who appeal from an eviction proceeding must post bond for double the rent expected to accrue during the appeal.²⁰³ The Connecticut Supreme Court struck down that state's automobile lemon law because it allowed only consumers, and not manufacturers, to reject an unfavorable arbitration award and to demand a trial *de novo*.²⁰⁴ Manufacturers were relegated to limited judicial review under the standards applicable to private, voluntary arbitration awards;²⁰⁵ the court held that the disparity violated the Connecticut constitutional guarantee of a remedy "by due course of law," the equivalent of a due process guarantee.²⁰⁶ However,

197. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81 (1988) (upheld fifteen percent penalty on unsuccessful appellants in certain cases); *Normet*, 405 U.S. at 72 (special procedures to encourage "rapid and peaceful settlement" of landlord-tenant disputes, including provision for trial within six days of complaint, with counterclaims tried later, do not deny equal protection); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 430-31 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979).

198. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955); see also *New England Merchants Bank v. Hughes*, 556 F. Supp. 712, 714 (E.D. Pa. 1983); *Kimbrough*, 478 F.Supp. at 575 ("The local arbitration rule is a first step to develop a fast, efficient, and inexpensive system of dispute-resolution on a national scale.").

199. See, e.g., *Carson v. Maurer*, 424 A.2d 825, 836 (N.H. 1980).

200. *Boucher v. Sayeed*, 459 A.2d 87, 91-93 (R.I. 1983).

201. *Sibley v. Board of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1108 (La. 1985). The court remanded for determination of whether the state could maintain its burden of demonstrating that the classification was not arbitrary, capricious, or unreasonable. *Id.* at 1110.

202. 405 U.S. 56.

203. *Id.* at 77-79.

204. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. O'Neill*, 561 A.2d 917, 923 (Conn. 1989).

205. *Id.* at 922.

206. *Id.* at 925.

the basis for the decision was the unequal opportunity for trial *de novo* afforded to plaintiffs and defendants.²⁰⁷ Other procedures that give one-sided access to arbitration or mediation, such as the farmer-lender mediation statutes providing for mediation at the option of the farmer,²⁰⁸ may be vulnerable to equal protection challenges.

Separation of powers. When ADR procedures vest decision-making power in non-judges, questions arise regarding the separation of powers or, generally, the right of access to courts. Many procedures do this: arbitrators are often practicing lawyers; medical malpractice panels may include physicians and community representatives; and mediation is frequently done by lay persons or mental health professionals. Such features arguably violate Article III of the U.S. Constitution, which vests the judicial power in judges appointed by the President and confirmed by the Senate, who serve for life terms on good behavior.²⁰⁹ Non-Article III judges may not decide disputes within the power of Article III courts.²¹⁰ Such disputes include common law and analogous claims.²¹¹ While Congress may delegate jurisdiction over public rights to other bodies such as administrative tribunals, it may not do the same with common law rights.²¹² The Court has also held that Article III is violated when an alternative forum

207. *Id.* The court held that "such disparate treatment violates the plaintiffs' constitutional right to a reasonable opportunity to have a remedy, 'by due course of law,' in our courts." *Id.* Note that the court rejected an equal protection challenge to a provision of the same statute requiring defendants to pay a \$250 filing fee to defend themselves in the arbitration. *See id.* The fee could be waived, and so did not foreclose poor defendants from the process, and it was held to be rationally related to the state's legitimate interest in funding arbitration. *Id.* Other cases have struck down uninsured motorist arbitration clauses that favor defendants over plaintiffs. *See, e.g.,* Field v. Liberty Mut. Ins. Co., 769 F. Supp. 1135, 1139-40 (D. Haw. 1991); *Mendes*, 563 A.2d at 699; *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 874 (Minn. 1988). *But see* *Cohen v. Allstate Ins. Co.*, 555 A.2d 21, 23 (N.J. Super. Ct. App. Div. 1989); *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988). *See generally* Steven R. Leppard, Note, *Arbitration? Sure, But Only on Our Terms: Escape Clauses in Uninsured Motorist Policies*, 1993 J. DISP. RESOL. 193. Such clauses are found in private contracts, and have been struck down on unconscionability grounds, but they are imposed pursuant to state regulation, raising potential constitutional issues.

208. *See supra* note 70 and accompanying text.

209. U.S. CONST. art. III, § 1. This section reads: "The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* Courts must be staffed by judges with lifetime tenure during good behavior and whose salaries may not be diminished during their tenure. *Id.*

210. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 72-73 (1982).

211. *Id.* at 74.

212. *Schweiker*, 456 U.S. at 197-98; *Crowell*, 285 U.S. at 47; *see also* *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449 (1977) (Congress may create new statutory obligations and assign the factfinding function and initial adjudication to an administrative forum).

threatens the judiciary's independence through undue political domination of the courts.²¹³

The mere postponement of judicial consideration does not rise to an Article III violation.²¹⁴ Therefore the trial *de novo* provisions that forestall Seventh Amendment violations in court-annexed arbitration also prevent Article III problems.²¹⁵ State courts have upheld mandatory ADR provisions against similar claims.²¹⁶ Particularly in nonbinding procedures, courts appear reluctant to invalidate the use of people other than judges to aid in ADR or in decision-making generally, as long as the lay persons do not make binding decisions free of judicial oversight.²¹⁷ However, the Illinois Supreme Court has twice held its malpractice legislation invalid because review panels consisting of a judge, a lawyer, and a health care professional held adversary hearings and decided legal and factual issues.²¹⁸ The court held that the process violated constitutional language vesting "exclusive and entire judicial power in the courts."²¹⁹

First Amendment claims. The need for confidentiality in mediation and other consensual procedures has generated First Amendment challenges in a few cases. The Sixth Circuit Court of Appeals held that the press has no right to attend a summary jury trial in an opinion that strongly reflects judicial appreciation of the dynamics of consensual procedures.²²⁰ Reporters sought access to the SJT on the grounds that the dispute, between two public utilities, involved matters of public interest;²²¹ the court, however, found that the summary jury trial was a

213. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1985); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582 (1985). Such issues are more likely to arise in the context of regulatory statutes that include arbitration or other nonjudicial procedures for determining statutory rights.

214. *Peterson*, 253 U.S. at 310. This case probably precludes challenges to the use of special masters and experts who make advisory rulings on fact or law issues. See Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2142 (1989).

215. See *Gianfinanciera v. Nordberg*, 492 U.S. 33, 53-55 (1989), for a discussion of the relationship between Article III and the Seventh Amendment. In an analogous situation the Supreme Court upheld the appointment of magistrates to rule on certain questions in criminal cases, subject to review by an Article III judge. See *United States v. Raddatz*, 447 U.S. 667, 680 (1980); *Crowell*, 285 U.S. at 51-52; see also Silberman, *supra* note 214, at 2141-73 (explaining the use of special masters).

216. See *Eastin*, 570 P.2d at 749 (panel virtually identical to that in *Wright* did not encroach on judicial power in violation of Arizona constitution); *Firelock Inc.*, 776 P.2d at 1095.

217. See, e.g., *DiBerardino v. DiBerardino*, 568 A.2d 431, 437 (Conn. 1990) (family court magistrates are not judges and their recommendation of support awards subject to judicial oversight does not unconstitutionally intrude on power of judiciary); *Seal Audio*, 508 A.2d at 421-22 (attorney referee fact-finders are not "judges" and so need not be appointed in manner mandated by constitution for judicial appointments); *Carafano v. City of Bridgeport*, 495 A.2d 1011, 1016 (Conn. 1985) (upholding binding arbitration of municipal labor disputes).

218. See *Bernier*, 497 N.E.2d at 769; *Wright*, 347 N.E.2d at 740.

219. *Wright*, 347 N.E.2d at 739.

220. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903 (6th Cir. 1988); see also *Carey-Canada*, 123 F.R.D. at 607.

221. *Cincinnati Gas & Elec.*, 854 F.2d at 904.

settlement procedure, which is traditionally closed, and was not analogous to a trial, which must remain open.²²² The court stressed that public access would be detrimental to the purpose of the SJT whenever the parties were concerned with confidentiality.²²³

Preemption. A final set of constitutional questions has to do with conflicts between state and federal ADR policies. The issue is whether state-mandated ADR must be employed in federal court diversity actions. Under *Erie v. Tompkins*,²²⁴ most courts have applied state ADR requirements in diversity actions, as long as the state practices are in harmony with the Federal Rules of Civil Procedure. The Seventh Circuit Court of Appeals has held that a state requirement of arbitration before filing suit should apply in a diversity case.²²⁵ The requirement, the court held, was an integral part of the rights and obligations established by state law, and, furthermore, arbitration did not interfere with the federal distribution of functions between judge and jury.²²⁶ In Hawaii, a district court imposed a state-mandated penalty in a diversity case, including \$5,000 in attorney fees and \$4,811.83 in costs, when the plaintiff failed to improve on a prior arbitration award by at least 15 percent.²²⁷

A different result was reached in a New York district court. In *Seck v. Hamrang*,²²⁸ the court refused to convene a malpractice screening panel prior to trial, as required by state law.²²⁹ The court reasoned that the state panel proceeding conflicted with the underlying spirit of the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure, which granted courts broad discretion and flexibility in pretrial management.²³⁰ Unlike the New York statute, the federal Rule presumably provided judges a choice among a variety of settlement procedures, including mediation, arbitration, and summary jury trial.²³¹ The proposed changes in the Federal Rules of Civil Procedure,²³² and the extensive enactment of new local federal rules, many of which enlarge authority for a

222. *Id.* at 903-04.

223. *Id.* at 903. Generally, parties are prohibited from any disclosure of information about a summary jury trial, though such rules are sometimes disregarded. See *Russell v. PPG Indus., Inc.*, 953 F.2d 326, 333-34 (7th Cir. 1992); *News Press Publishing Co. v. Lee County*, 570 So. 2d 1325, 1326-27 (Fla. Dist. Ct. App. 1990).

224. 304 U.S. 64 (1938).

225. *Hines*, 603 F.2d at 647.

226. *Id.* at 648.

227. *Towey v. Catling*, 743 F. Supp. 738, 741 (D. Haw. 1990); accord *Feinstein v. Massachusetts Gen. Hosp.*, 643 F.2d 880, 885-88 (1st Cir. 1981); *DiAntonio v. Northampton-Acomack Memorial Hosp.*, 628 F.2d 287, 290 (4th Cir. 1980); *Davison v. Sinai Hosp. of Baltimore, Inc.*, 617 F.2d 361, 362 (4th Cir. 1980); *Edelson v. Soricelli*, 610 F.2d 131, 135 (3d Cir. 1979); *Hines*, 603 F.2d at 647; *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1168 (5th Cir. 1979).

228. 657 F. Supp. 1074 (S.D.N.Y. 1987).

229. *Id.* at 1074; see also *Wheeler v. Shoemaker*, 78 F.R.D. 218, 222-23 (D.R.I. 1978).

230. *Seck*, 657 F. Supp. at 1076-77.

231. *Id.* at 1075-76.

232. See *supra* notes 127-29 and accompanying text.

variety of ADR procedures,²³³ make *Seck* a significant decision. The more extensive federal ADR becomes, the more likely it is that courts will find that the federal rules occupy the field to the exclusion of contradictory state law.²³⁴

B. Statutory Authority

Statutory authority for federal courts to order ADR is found mainly in Rule 16 of the Federal Rules of Civil Procedure,²³⁵ with occasional reliance on Rules 1 and 83.²³⁶ Courts also rely on the doctrine of inherent powers, under which the federal courts possess inherent authority to issue any orders necessary for the exercise of their explicit powers.²³⁷ Inherent powers are broad but must be exercised without violating specific statutes, rules, or constitutional provisions.²³⁸

Compelled summary jury trial. The prevailing view is that judges have the authority to compel participation in summary jury trials,²³⁹ and that nothing in the Federal Rules prohibits mandatory arbitration or mediation.²⁴⁰ Several courts have found authority to order participation in summary jury trials in Rule 16(c)(7), which instructs judges to conduct pretrial conferences at which they are to take action regarding "settlement or the use of extrajudicial procedures to

233. See *supra* notes 104-07 and accompanying text.

234. See *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 7 (1987). In this case, the Court held that FED. R. APP. P. 38, which grants circuit courts discretion to assess penalties for frivolous appeals, "occupied the field," invalidating an Alabama law automatically adding a 10% penalty to any money judgment it affirmed. *Id.* But see *Automobile Importers of Am., Inc. v. Minnesota*, 681 F. Supp. 1374, 1377-80 (D. Minn. 1988) (state lemon law not preempted by Magnuson-Moss Warranty Act).

235. See *supra* notes 97-103 and accompanying text.

236. Rule 1 provides that the Federal Rules of Civil Procedure shall be construed "to secure the just, speedy, and inexpensive determination of every action," FED. R. CIV. P. 1, and this rule is often cited to justify cost-cutting and delay reducing innovation. Rule 83 permits local court rules that are "not inconsistent with these rules or those of the district in which they act," FED. R. CIV. P. 83, and it is often relied on to uphold local introduction of techniques such as the summary jury trial.

237. See, e.g., *Bank of Nova Scotia v. Kilpatrick*, 487 U.S. 250, 254 (1988); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link*, 370 U.S. at 630-31 (inherent power stems from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); *Peterson*, 253 U.S. at 312 (courts have inherent power "to provide themselves with appropriate instruments required for the performance of their duties"); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 560-64 (3d Cir. 1985).

238. *Bank of Nova Scotia*, 487 U.S. at 254; *Roadway Express*, 447 U.S. at 764.

239. See *Carey-Canada*, 123 F.R.D. at 604-07; *McKay*, 120 F.R.D. at 46; *Arabian Am. Oil Co.*, 119 F.R.D. at 449; see also Note, *supra* note 87, at 1087-90. *Contra Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987); *Webber*, *supra* note 22, at 1500-02; see also *Hume v. M & C Management*, 129 F.R.D. 506, 507 (N.D. Ohio 1990); *United States v. Exum*, 744 F. Supp. 803, 804-05 (N.D. Ohio 1990).

240. See *Tiedel v. Northwestern Michigan College*, 865 F.2d 88, 91-92 (6th Cir. 1988); *Rhea*, 767 F.2d at 268-69; *Kimbrough*, 478 F. Supp. at 573-74.

resolve the dispute."²⁴¹ As the court stated in *McKay v. Ashland Oil, Inc.*,²⁴² if courts can order decision-oriented procedures such as arbitration, they ought to be able to compel less intrusive, consensual methods such as the SJT: "Plainly Rule 16 would authorize the trial judge to hold a final pretrial conference in the form of a condensed trial. In a summary jury trial, the court just has laymen sit in and give their reactions."²⁴³

McKay and opinions like it manifest a faith in the ability of the SJT to bring even the most recalcitrant parties to settlement. As the court said in *Federal Reserve Bank v. Carey-Canada, Inc.*,²⁴⁴ parties do not settle when they feel deprived of their day in court and they are unable to assess accurately the strengths and weaknesses of their case.²⁴⁵ A summary jury trial provides both. It is thus a powerful settlement tool, and trial judges appear to favor it.

This view is not, however, unanimous. In *Strandell v. Jackson County*,²⁴⁶ the Seventh Circuit Court of Appeals held that a district court may not compel a party to participate in a summary jury trial.²⁴⁷ The plaintiff argued that SJT participation would force him to reveal evidence he considered privileged work product and as to which his opponent had previously lost a motion to compel.²⁴⁸ Plaintiff's counsel was found guilty of criminal contempt and fined \$500 for refusing to attend the SJT.²⁴⁹ The Seventh Circuit, reversing the contempt conviction, held that nothing in the Federal Rules provides explicit or implicit authority for an SJT and that so extensive an innovation in procedure would upset the "delicate balance" struck by the Supreme Court and Congress between individual rights and the need for expeditious dispute resolution.²⁵⁰ The court refused to accept the idea of the SJT as merely a settlement conference; it held that the language of Rule 16(c)(7) regarding "extrajudicial procedures to resolve the dispute" refers only to procedures to which the parties consent.²⁵¹ To compel an SJT, the court said, was improperly to compel negotiations and to

241. *McKay*, 120 F.R.D. at 44,48 (referring to Local Rule 23 of the Joint Local Rules for the Eastern and Western Districts of Kentucky).

242. 120 F.R.D. 43.

243. *Id.* at 48; see also *Arabian Am. Oil Co.*, 119 F.R.D. at 448. In *Arabian American Oil Co.*, a Florida district court stated: "Rule 16 calls these procedures conferences, but what is in a name. [sic] The obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition." *Arabian Am. Oil Co.*, 119 F.R.D. at 448.

244. 123 F.R.D. 603.

245. *Id.* at 604.

246. 838 F.2d 884.

247. *Id.* at 887.

248. *Id.* at 885.

249. *Id.*

250. *Id.* at 886-88. The Federal Rules are promulgated by the Supreme Court under the Rules Enabling Act, 28 U.S.C. § 2072 (1988). Under 28 U.S.C. § 2071 and Federal Rule 83, local rules may be enacted consistent with the Federal Rules and federal statutes. See 28 U.S.C. § 2071 (1988); FED. R. CIV. P. 83.

251. *Strandell*, 838 F.2d at 887 (quoting FED. R. CIV. P. 16(c)(7)).

"require that an unwilling litigant be sidetracked from the normal course of litigation."²⁵²

At least one district judge feels strongly that the *Strandell* court was correct and has gone even further in condemning all SJTs, voluntary or not.²⁵³ The court, in *Hume v. M & C Management*,²⁵⁴ denied the parties' joint motion for a summary jury trial, holding that courts lack authority to force members of the jury pool to serve as summary jurors.²⁵⁵ The only valid purpose for summoning jurors, the court argued, is for service on grand or petit juries, or for advisory juries in equity.²⁵⁶ This opinion, based upon the judge's more extensive experience with the SJT than the others cited, raises some major concerns. The court is skeptical of the whole SJT process because it is too easily manipulated: "For instance, the non-binding nature of Summary Jury Trials presents great temptation to strategically withhold crucial evidence and argument. Furthermore, when forced, a party might view it as an unacceptable burden or bludgeon."²⁵⁷ In addition, the court was concerned that the use of summary jurors would infect the regular jury pool adversely;²⁵⁸ the court cited Judge Posner, who had argued previously that if jurors learn that some cases they hear are fake, they may take all cases less seriously.²⁵⁹

Currently a proposed amendment to Rule 16 is designed to allow mandatory SJTs and other procedures.²⁶⁰ The Judicial Conference of the United States has endorsed the experimental use of SJTs for promoting settlements.²⁶¹ Finally, the Expense and Delay Reduction Plans under the Civil Justice Reform Act of 1990²⁶² are to include authority to order SJTs and other forms of ADR,²⁶³ and such experiments are sanctioned by the proposed Amendments to Rule 83.²⁶⁴

252. *Id.*

253. *Hume*, 129 F.R.D. at 510. See generally Hatfield, *supra* note 86 (discussing the *Hume* case).

254. 129 F.R.D. 506.

255. *Id.* at 509.

256. *Id.*; see also 28 U.S.C. § 1861 (1988); FED. R. CIV. P. 39(c).

257. *Hume*, 129 F.R.D. at 508.

258. See *id.*

259. *Id.*; Posner, *supra* note 24, at 386-87.

260. See Proposed Amendments, *supra* note 128, at 288-93 (proposed amendments to FED. R. CIV. P. 16). Amended Rule 16(c)(9) would allow the use of "special procedures to assist in resolving the dispute." *Id.* at 290. Courts may order parties to participate in a conference to consider the possibilities of settlement and to participate in proceedings ordered under paragraph (9). *Id.* at 293 (committee notes). The change is to enhance the court's power to use procedures such as "mini-trials, mediation, and nonbinding arbitration." *Id.*

261. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM 88 (Sept. 19-20, 1984).

262. 28 U.S.C. §§ 471-482.

263. See *supra* notes 118-26 and accompanying text.

264. See Proposed Amendments, *supra* note 128, at 358-61 (proposed amendments to FED. R. CIV. P. 83). The proposal reads as follows:

(b) Experimental Rules. With the approval of the Judicial Conference of the United States, a district court may adopt an experimental local rule inconsistent with these

The dispute over authority is therefore more interesting for what it reveals about experience under mandatory SJTs and the need for some standards to protect abuse of judicial power. All of these opinions indicate some need to spell out when parties can legitimately opt out of a mandatory SJT, or what standards judges should use to excuse participation. *Strandell* may have been overly concerned with the particular disclosure problems asserted by the plaintiff. Other courts have noted that with extensive discovery practice now commonplace, it is highly unlikely that an SJT will force parties to give away information they might otherwise keep secret until trial.²⁶⁵ But some protection against unduly forced disclosure, commensurate with the need to protect against parties that hold back, or simply go through the motions of an SJT and then reject the result, may be necessary. *Hume* points out the need for reforms to protect the orderly functioning of the jury system.²⁶⁶

Compelled attendance at settlement conferences. Most courts considering the issue have ruled that a judge has the power to force a party who is represented by counsel to attend a pretrial settlement conference.²⁶⁷ Rule 16(a) states that "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . . (5) facilitating the settlement of the case."²⁶⁸ Since the Rule refers only to unrepresented parties, some judges argue that there is no authority to order represented parties to appear.²⁶⁹ Nevertheless, many judges seem to believe such authority is necessary if they are to bring about settlement.²⁷⁰ The issue is complicated by the difficulty of determining who has

rules if it is consistent with the provisions of Title 28 of the United States Code and is limited in its period of effectiveness to five years or less.

Id. at 359. The amendment is meant to conform to the Civil Justice Reform Act of 1990, *see id.* at 360 (committee notes), which requires that district courts find new methods to reduce the expense and delay of litigation. *See* 28 U.S.C. § 471. Presumably the result will be a need for new local rules that may differ from the Federal Rules.

265. *See, e.g., Carey-Canada*, 123 F.R.D. at 606; *McKay*, 120 F.R.D. at 48. The *Carey-Canada* court stated: "If the Seventh Circuit implication is that a SJT prevents the litigant from saving some surprise for the trial, the Federal Rules of Civil Procedure are designed to avoid that eventuality. Trial by ambush is no longer an accepted method of practice." *Carey-Canada*, 123 F.R.D. at 606.

266. *See supra* notes 253-59 and accompanying text.

267. *See, e.g., In re Novak*, 932 F.2d 1397, 1398 (11th Cir. 1991); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652-53 (7th Cir. 1989); *Dvorak v. Shibata*, 123 F.R.D. 608, 610 (D. Neb. 1988); *Lockhart v. Patel*, 115 F.R.D. 44, 46 (E.D. Ky. 1987). In *Lockhart*, the court assumed that "[t]he authority of a federal court to order attendance of attorneys, parties, and insurers at settlement conferences and to impose sanctions for disregard of the court's orders is so well established as to be beyond doubt." *Lockhart*, 115 F.R.D. at 46.

268. FED. R. CIV. P. 16(a)(5).

269. *See infra* text accompanying notes 278-84.

270. Wayne D. Brazil, *What Lawyers Want From Judges in the Settlement Arena*, 106 F.R.D. 85, 91 (1985) (55 percent of lawyers questioned believed the conference was more likely to be productive if clients attended); Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 528 (1991); Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. Inc. v. Joseph Oat Corp.*, 69

power to speak for an institutional party. When a corporation, a consumer group, or a government agency is a party, there is sometimes no single person with authority to settle without consulting others.

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,²⁷¹ the Seventh Circuit Court of Appeals held that a district judge could order a represented corporate defendant to send a corporate representative with authority to settle to a pretrial conference²⁷² and approved sanctions in the amount of the opposing party's costs and attorneys fees for refusal to attend.²⁷³ Two lower courts have reached the same result.²⁷⁴

The *Heileman* court reasoned that the list of persons in Rule 16(a), including attorneys and unrepresented parties, is not meant to be exclusive.²⁷⁵ A court retains inherent power to create procedural innovations, as long as these are consistent with the underlying purpose of the Rules;²⁷⁶ orders to represented parties to participate at pretrial, it held, are consistent with the broad remedial purpose of Rule 16 to aid judges in managing their cases.²⁷⁷

There were vigorous dissents in *Heileman* as to the interpretation of Rule 16 and the underlying ethical issues involved in forcing a represented party into direct contact with a judge or its opponents.²⁷⁸ Direct negotiations with the client are a powerful settlement tool.²⁷⁹ Skilled judges are able to win parties' trust and to rely upon their own expertise to persuade the parties that settlement is in their best interests. These are all good mediation skills; when used by a judge with represented parties, however, their use raises some serious questions of fairness and respect for the right to counsel.

Extreme pressure exists for both the client and the attorney when a judge deals directly with the client. At a minimum, the danger exists that the party may make an admission prejudicial to the case.²⁸⁰ Judges who demand direct contact with a party, moreover, often believe either that the attorney will not convey settlement options fully to the clients or that the judges believe that they will be able to convince the client to settle when the attorney cannot or when the attorney believes that settlement is inadequate.²⁸¹ In any case, the judge is deliberately interfering with the attorney-client relationship and stripping away the protections

WASH. U. L.Q. 1059, 1114-16 (1991).

271. 871 F.2d 648.

272. *Id.* at 656-57.

273. *Id.* at 656.

274. *See Dvorak*, 123 F.R.D. at 611; *Lockhard*, 115 F.R.D. at 47.

275. *Heileman*, 871 F.2d at 651-52.

276. *Id.* at 652-53.

277. *Id.*

278. *See id.* at 658-63 (Coffey, J., dissenting); *id.* at 666-71 (Manion, J., dissenting).

279. *See supra* note 94 and accompanying text.

280. *Heileman*, 871 F.2d at 662 (Coffey, J., dissenting) ("I am convinced that if the attorney does not wish to have the litigant personally appear before the court at the pretrial conference, he is not bound to do so . . .").

281. *Id.* at 657 (Posner, J., dissenting).

that most clients want when they hire an attorney. An attendance order may also force parties to spend considerable time and money when, in their judgment, their local attorney can and should represent their interests.²⁸² One *Heileman* dissenter was concerned that judicial impartiality will be compromised in the eyes of parties who are subjected to settlement pressure by a trial judge.²⁸³ Judge Coffey argued that a client subjected to intense pressure to settle will not trust that judge, or perhaps any judge, to accord it a fair trial or make fair rulings if the litigation continues.²⁸⁴

Judges who believe in mediation, even when parties initially refuse to consider settlement, are most apt to order attendance by represented parties at pretrial. But many judges have other, simpler, motives: they want to speed disposition by having someone on the spot who can agree to a settlement without having to check back with someone else with higher authority, usually an insurer or corporate CEO. These judges deliberately seek to deprive the parties of a popular bargaining strategy. The Eleventh Circuit in *In re Novak*²⁸⁵ dealt with such a case. The district court had ordered a nonparty insurer to send a senior claims analyst with full settlement authority to a pretrial conference;²⁸⁶ the insurer sent only its attorney, and the district court held the analyst in contempt.²⁸⁷ The court of appeals agreed in principal with the majority in *Heileman* and determined that courts may compel attendance by represented parties.²⁸⁸ The *Novak* court based its determination on the courts' inherent authority "to direct parties to produce individuals with full settlement authority at pretrial settlement conferences."²⁸⁹ Inherent power, however, does not extend to orders directly against a nonparty insurer;²⁹⁰ to get around this problem, the court said, any order should be directed to the party, who will then turn to its insurer, who, to protect its interest, will have to send an appropriate person with settlement authority.²⁹¹

In spite of the lack of explicit reference in Rule 16 to represented parties, the *Novak* court said that the power to compel the appearance of represented parties is "not inconsistent with" Rule 16 and is, in fact, in keeping with the

282. *See id.* at 654. The defendant in *Heileman* had argued that it was unreasonable for its president to attend the pretrial conference because the president would have had to travel from New Jersey to Madison, Wisconsin, to take part in settlement discussions when there was no intention to settle. *Id.*

283. *Id.* at 662 (Coffey, J., dissenting).

284. *Id.*

285. 932 F.2d 1397.

286. *Id.* at 1399.

287. *Id.*

288. *Id.* at 1407.

289. *Id.* The court held that the order directly to a nonparty insurer was invalid under both Rule 16 and the inherent powers theory, but that the insurer's employee was properly convicted of criminal contempt for failure to obey the order. *Id.* at 1409. Since the court's order was neither transparently invalid nor patently frivolous, the proper remedy was to obey and then to appeal. *Id.* at 1408.

290. *Id.*

291. *Id.*

rule's overall goals.²⁹² Therefore, the court would "not hold, without specific language to the contrary, that Congress intended to frustrate the very rule it enacted by limiting the power of the district courts in this manner."²⁹³ The court also reasoned that a party who refuses to give his attorney settlement authority is "his own attorney for settlement purposes" and can be compelled to attend under the explicit language of the Rule.²⁹⁴

The *Novak* court clearly wanted to empower district judges with a broad range of authority to do whatever they believe will facilitate settlement. The opinion, along with *Heileman*, makes obvious the shift from viewing orders to participate in ADR as futile to the position that even the most reluctant participants can be brought to agreement, or at least can benefit from the process. Opinions such as *Novak* and *Heileman* reflect the view that, to foster settlement, parties may and should be compelled to appear and be ready to "explore fully settlement options and to agree at that time to any settlement terms acceptable to [them]."²⁹⁵ The lower court opinion in *Heileman* expressed the enormous value trial judges place on compelled conferences:

It is no argument that it would have been futile for Joseph Oat or National Union Fire to appear by representatives with full authority to settle, simply because these corporations had decided that they would not settle on any terms other than full dismissal of the claims against Joseph Oat. *It is always possible that exposure of the decisionmakers to the realities of a case will bring about a reevaluation of settlement posture on the part of those persons.*²⁹⁶

The court in *Lockhart v. Patel*²⁹⁷ agreed. In ordering an insurer to send a representative to a settlement conference with authority to settle, the court noted that even when parties believe discussions to be useless, exposure to the judges' and other parties' views of the case may change their perception of the value of settlement and resolve the case.²⁹⁸

C. Sanctions for Failure to Participate

Courts' authority to order summary jury trials and arbitration and their explicit authority to hold pretrial conferences to explore settlement under Rule 16

292. *Id.* at 1407 n.19.

293. *Id.*; see *Heileman*, 871 F.2d at 652.

294. *Novak*, 932 F.2d at 1407 n.19. The court characterized this as a "colorable argument that Rule 16, on its face, empowers the court to order such a party to attend a pretrial settlement conference; the party is an unrepresented party with respect to settlement, and, thus, his attendance is crucial." *Id.*

295. *Id.* at 1406 n.18.

296. *Heileman*, 107 F.R.D. at 277 (emphasis added).

297. 115 F.R.D. 44.

298. *Id.* at 47.

will mean little gain in efficiency if attorneys and their clients do not obey these orders in good faith. The courts' authority to compel ADR procedures is actualized through the use of sanctions, including the payment of an opponent's costs, which may or may not include attorney fees, fines, striking of pleadings, dismissal with prejudice, and punishment for civil or criminal contempt.

Arbitration. The most frequent use of sanctions and penalties is in conjunction with mandatory arbitration. In federal programs, parties who reject an arbitration award and demand a trial *de novo* and then fail to better the award at trial may have to pay the arbitrator's fee but not attorney fees or other costs.²⁹⁹ However, costs and even attorney fee awards are allowed under several state arbitration programs.³⁰⁰ Moreover, one court has held that, although federal law prohibits assessing attorney fees as sanctions, a federal court exercising diversity jurisdiction should apply a state law allowing taxation of fees and costs for failure to improve on an arbitration award by at least 15 percent at trial *de novo*.³⁰¹

When parties refuse to participate in arbitration at all, sanctions can be more drastic. Outright and intentional disdain for the process can result in an award of all costs and fees incurred in the arbitration and related proceedings,³⁰² even in loss of the right to trial *de novo*.³⁰³ In *Gilling v. Eastern Airlines, Inc.*,³⁰⁴ the defendant sent a representative to arbitration who called no witnesses and stated to the arbitrator that she did not care what he did, since the client would refuse to pay any damages awarded.³⁰⁵ The arbitrator found that the defendant merely "went through the motions" and had clearly acted so as to justify sanctions, including denial of trial *de novo*, for failure to "participate in the arbitration process in a meaningful manner" ³⁰⁶ The court refused, however, to deny a trial *de novo*.³⁰⁷ Such a penalty would have been valid, but

299. 28 U.S.C. § 655(d) (Supp. 1992). The statute provides for permission to proceed in *forma pauperis*, *id.* § 655(d)(1)(B), and exempts cases in which the court finds that the demand for trial *de novo* was for good cause. *Id.* § 655(d)(2)(B). No other penalties may be assessed for demanding a trial *de novo*. *Id.* § 655(d)(4). Local rules can impose arbitrators' fees when a party fails to better the award by a certain minimum, such as ten percent. *See id.* § 655(e)(1). When arbitration is voluntary, by consent of all parties, if a party fails to obtain a judgment "substantially more favorable" than the award and the court finds a trial was sought in bad faith, the court may award costs and attorney fees in addition to arbitrator's fees. *Id.* § 655(e)(1); *see Rhea*, 767 F.2d at 268-69; *see also Tiedel*, 865 F.2d at 93 (attorney fees may not be taxed as costs for failure to improve on award at trial *de novo*).

300. *See, e.g.*, E.D. PA. R. 7(E) (arbitrator's fees); CAL. CIV. PROC. CODE § 1141.21(a) (West Supp. 1991) (arbitrator's fees and costs); DEL. SUP. CT. R. 16.1(h)(4); N.C. CT. ORD. ARB. R. 5(b) (arbitrator's fees); WASH. REV. CODE § 7.06.060.

301. *Towey*, 743 F. Supp. at 740-41.

302. *Gilling v. Eastern Airlines, Inc.*, 680 F. Supp. 169, 171-72 (D.N.J. 1988).

303. *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715 (E.D. Pa. 1983).

304. 680 F. Supp. 169.

305. *Id.* at 170.

306. *Id.*; *see* D.N.J. R. 47(E)(3).

307. *Gilling*, 680 F. Supp. at 172.

the court found the more limited sanction of costs and fees more appropriate.³⁰⁸ One problem for the court was the failure of the applicable local rule to define "meaningful" participation,³⁰⁹ a problem that pervades most of compulsory ADR. Other courts have been willing to deny trial, particularly when a party refuses even to attend the arbitration hearing.³¹⁰

State courts have also grappled with perfunctory participation in arbitration. These courts also appear to prefer monetary sanctions to outright dismissal of the action. A California Supreme Court opinion held that the superior court could not dismiss an action for failure to participate and to present evidence in a mandatory arbitration hearing.³¹¹ However, sanctions, including an award of reasonable expenses and attorney fees were held valid in cases of bad faith or frivolous or delaying tactics.³¹² A New York court applied a different approach in a case in which it perceived a pattern on the part of a particular law firm to appear at arbitration hearings, to present no evidence or witnesses, and then to move for trial *de novo*.³¹³ The court ruled that the plaintiff could proceed to trial but would be barred from presenting any evidence not previously produced at arbitration.³¹⁴ The plaintiff was, however, permitted to choose instead to go through another arbitration hearing.³¹⁵ Effectively, the court precluded the plaintiff from introducing any evidence at the trial but refused to deny the plaintiff any recourse at all. However, another New York court reacted differently to similar behavior, refusing to sanction a defendant for nonparticipation in an arbitration hearing.³¹⁶ The court noted that a defendant, in contrast to a plaintiff, has no obligation in the first place to present evidence;³¹⁷ if counsel appears and cross-examines plaintiff's witnesses, that is enough participation to preserve the right to trial.³¹⁸

Settlement conferences. Many disputes have arisen over sanctions for failure to attend a Rule 16 settlement conference. The Rule provides for sanctions, including costs and attorney fees, for various omissions, including failing to attend

308. *Id.*

309. *Id.* at 171. *But see Hughes*, 556 F. Supp. at 715 (denying trial *de novo* after refusal to attend arbitration hearing).

310. *See, e.g., Hughes*, 556 F.2d at 715; *Petermann v. Arundel Diesel Equip. Co.*, Civ. A. No. 88-9070, 1991 WL 13984, at *1 (E.D. Pa. Feb. 6, 1991) (unreported decision) (trial *de novo* denied with costs imposed on party failing to attend, but new arbitration hearing ordered instead of dismissal).

311. *Lyons v. Wickhorst*, 727 P.2d 1019, 1023 (Cal. 1986); *see also Weisenburn v. Smith*, 573 N.E.2d 240, 243 (Ill. App. Ct. 1991); *Schulz v. Nienhuis*, 448 N.W.2d 655, 659 (Wis. 1989) (court could not dismiss for failure to participate in mediation).

312. *Lyons*, 727 P.2d at 1020.

313. *See Honeywell Protection Servs. v. Tandem Telecommunications, Inc.*, 495 N.Y.S.2d 130, 131 (Civ. Ct. 1985).

314. *Id.*

315. *Id.*

316. *See Valot v. Allcity Ins. Co.*, 501 N.Y.S.2d 597, 598-98 (Civ. Ct. 1986).

317. *Id.* at 598.

318. *Id.* The court noted the strong need to preserve the right to a jury trial in mandatory arbitration. *Id.*

a conference, attending unprepared, or failing "to participate in good faith."³¹⁹ In addition, a federal statute authorizes sanctions against litigants who "unreasonably and vexatiously multiply or delay the proceedings."³²⁰ Rule 41 allows dismissal of an action for failure to prosecute or to comply with court orders.³²¹ Rule 11 authorizes sanctions for bad faith pleading,³²² and Rule 26 covers sanctions for abuse of discovery proceedings.³²³ Sanctions, including attorneys' fees and costs, are frequently awarded for disobeying orders to compel attendance by a person with settlement authority.³²⁴

Sanctions orders are not without limits, however, and may not be used to coerce settlement.³²⁵ When a statute or rule enumerates available sanctions, moreover, a court may impose additional penalties only in exceptional cases, even under its inherent authority to control its docket. Thus in *Eash v. Riggins Trucking Inc.*,³²⁶ the court held that, under 28 U.S.C. § 1927,³²⁷ it could not penalize a party in the amount of the government's cost for one day's jury service without notice and a hearing.³²⁸ Attorney fees are the least-favored sanction and are not permitted except when explicitly mentioned, as in Rule 37, or for bad faith.³²⁹

Contempt. Like other court orders, Rule 16 pretrial orders are enforceable through the contempt power. Certain courts have found that fines to punish

319. FED. R. CIV. P. 16(f). Rule 16(f) provides:

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Id.

320. 28 U.S.C. § 1927 (1988).

321. FED. R. CIV. P. 41; *see also* *Anderson v. United Parcel Serv.*, 915 F.2d 313, 315 (7th Cir. 1990); *Thomas v. Housing Auth.*, 782 F.2d 829, 832 (9th Cir. 1986).

322. FED. R. CIV. P. 11.

323. FED. R. CIV. P. 26.

324. *See Heileman*, 871 F.2d at 653; *Dvorak*, 123 F.R.D. at 610; *Lockhart*, 115 F.R.D. at 46.

325. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *see also* *National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees*, 844 F.2d 216, 222-23 (5th Cir. 1988).

326. 757 F.2d 557.

327. 28 U.S.C. § 1927.

328. *Eash*, 757 F.2d at 570. In *Eash*, the court noted that numerous district court rules require payment of jury costs when settlement occurs immediately before trial. *Id.*; *see also* *Martinez v. Thrifty Drug & Discount Co.*, 593 F.2d 992, 993 (10th Cir. 1979).

329. *See Roadway Express*, 447 U.S. at 766 (finding that 28 U.S.C. § 1927 does not allow taxation of attorney fees as costs; fees taxable under inherent powers but only for bad faith); *Tiedel*, 865 F.2d at 93-94.

noncompliance with a pretrial order are in the nature of civil or criminal contempt penalties.³³⁰ The main impact of such decisions is to require adequate notice and hearing before the penalty is imposed in order to meet due process requirements.³³¹

D. Settlement Pressures and Compelled Negotiation

Compulsory ADR can evolve quickly into intense pressure to settle — or at least to negotiate. Yet both of these phenomena are highly questionable in terms of judicial ethics and basic litigant rights. Compulsory ADR, therefore, raises important questions as to the authority of judges to pressure parties to settle and their authority to compel good faith settlement negotiations.

It is clear that judges are not permitted to force settlement on unwilling litigants.³³² The Second Circuit has stated that Rule 16 of the Federal Rules of Civil Procedure "was not designed as a means for clubbing the parties — or one of them — into an involuntary compromise."³³³ Moreover, "there is no duty . . . to settle cases, or to reduce one's claims."³³⁴ "Unless his claim is frivolous, a party is entitled to assert it, and to whatever judicial time is required to try it."³³⁵ "There is no basis for the general duty to settle"³³⁶ Yet the line between clubbing and effective judicial management is hardly clear. In the give-and-take of settlement conferences, formal and informal, some judges overstep the bounds of their authority, and litigants do feel pressured to compromise.

The only clear rules against settlement pressure come out of cases in which trial judges state explicitly that they are penalizing a party's refusal to settle; more subtle pressures generally go uncorrected. An order imposing sanctions was recently reversed based on the judge's statement that "the defendants lost the opportunity to settle this case in advance of trial for a relatively small amount of money."³³⁷ In *Kothe v. Smith*,³³⁸ sanctions were reversed because of the judge's remark that he was "determined to get the attention of the carrier" and

330. See *supra* note 192 and accompanying text.

331. See *supra* notes 191-92 and accompanying text; see also *Novak*, 932 F.2d at 1400; *In re LaMarre*, 494 F.2d 753, 758 (6th Cir. 1974).

332. *Kothe*, 771 F.2d at 669; *Del Rio v. Northern Blower Co.*, 574 F.2d 23, 26 (1st Cir. 1978); *Wolff v. Laverne, Inc.*, 233 N.Y.S.2d 555, 557 (App. Div. 1962).

333. *Kothe*, 771 F.2d at 669; see also *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 175 (7th Cir. 1982).

334. *Del Rio*, 574 F.2d at 26.

335. *Id.*

336. *Id.*; *Insurance Benefit Adm'rs, Inc. v. Martin*, 871 F.2d 1354, 1360 (7th Cir. 1989) (finding that 28 U.S.C. § 1927 "does not command settlement as a requirement in the proper course of litigation, nor does any other statute or rule authorizing sanctions").

337. *Martin*, 871 F.2d at 1360-61.

338. 771 F.2d 667.

that "the carriers are going to have to wake up when a judge tells them that they want [sic] to settle a case and they don't want to settle it."³³⁹

A Ninth Circuit Court of Appeals opinion demonstrates the difficulty inherent in separating legitimate and illegitimate settlement tactics. The court held that a trial judge had the power to set a definite date by which the parties must settle, and then to impose costs under Rule 16 on a party which settles after that date,³⁴⁰ as long as the order's purpose was to control the docket by eliminating unnecessary trial schedules and jury selection.³⁴¹ However, the appeals court held that it was an abuse of discretion for the court in the case at bar to impose a penalty for failure to obey its order when the purpose was to induce settlement in this and future cases.³⁴² The litigation involved hundreds of asbestos personal injury cases; the trial court commented that it had penalized Celotex, a defendant in most of the cases, to "compel a relaxation of the purse strings and induce settlement."³⁴³ The court of appeals found that this constituted impermissible pressure to alter the defendants' settlement tactics.³⁴⁴ The court also commented that there was nothing wrong with settling after a day of trial, noting that parties and their lawyers frequently change their opinions on the value of settlement after hearing witnesses before a real jury.³⁴⁵

Negotiation in good faith. While it is clear that there is no legal obligation on any litigant to settle a case, there is genuine dispute on the extent to which a court may force parties to negotiate, and that dispute goes directly to the validity of mandatory consensual ADR. In labor negotiations there is a statutory obligation to negotiate in good faith, which is regularly enforced by the courts.³⁴⁶ In ordinary litigation, there is no such obligation. However, it is not at all clear whether Rule 16 orders to participate in settlement conferences in fact require good faith negotiations.

The *Heileman* court³⁴⁷ distinguished between orders to attend a conference and orders to participate in negotiations.³⁴⁸ An order to come to court to make

339. *Id.* at 669.

340. *Newton*, 918 F.2d at 1125; *see also National Ass'n of Gov't Employees*, 844 F.2d at 223 ("Failure to compromise a case, however, even pursuant to terms suggested by the court, does not constitute grounds for imposing sanctions . . .").

341. *Newton*, 918 F.2d at 1126. The court held that these penalties were in fact a finding of contempt without due process. *Id.*

342. *Id.* at 1127.

343. *Id.* at 1128.

344. *Id.*

345. *Id.* at 1128-29.

346. *See NLRB v. Wooster Div.*, 356 U.S. 342, 349 (1958). *See generally Dade, supra* note 156.

347. 871 F.2d 648.

348. *Id.* at 653. The court quoted the Advisory Committee Notes to Rule 16 and stated: Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing [settlement] might foster it These notes clearly draw a distinction between being required to attend a settlement conference and being required to participate in settlement negotiations.

an offer to pay a judgment would clearly have been improper, the court said, because it would have been tantamount to an order to negotiate in good faith for settlement.³⁴⁹ Nevertheless, a party may be compelled to attend and, at the least, state its position not to settle.³⁵⁰ The Eleventh Circuit made a similar distinction in *In re Novak*.³⁵¹ Rule 16, it held, allows courts to require parties to attend settlement conferences and to come prepared.³⁵² This means, the court said, that participants

must evaluate discovered facts and intelligently analyze legal issues before the . . . conferences. Furthermore, parties and their attorneys must discuss settlement options thoroughly prior to these conferences to ensure that settlement discussions are meaningful . . . in other words, participants in pretrial settlement conferences must be prepared and authorized to negotiate and commit to settlement terms at that time.³⁵³

In a footnote, however, the *Novak* court denied any intent to force parties to settle: "We do not mean, of course, that parties and their attorneys must be willing to settle a case."³⁵⁴ In support of this statement it reiterated the Rules Advisory Committee comments that Rule 16 is not meant "to impose settlement negotiations on unwilling litigants."³⁵⁵

Dissenting in *Heileman*, Judge Posner rejected the distinction relied on by the majority, recognizing that, in reality, an order to attend a conference with full settlement authority is an order to negotiate in good faith, which is forbidden under federal law.³⁵⁶ It is significant that the Seventh Circuit had held the year before in *Strandell* that a federal judge has no authority to order participation in a summary jury trial.³⁵⁷ The majority apparently felt that a summary jury trial was, at least in part, an invalid attempt to insist that parties participate in negotiations.³⁵⁸ In *Heileman*, the court apparently differentiated between

Id.

349. *Id.*

350. *Id.* at 652.

351. 932 F.2d 1397.

352. *Id.* at 1405.

353. *Id.* The court appears to assume that this level of preparedness is required for any pretrial conference, regardless of explicit orders to be ready to consider settlement. Sanctions are authorized for failure to come thus prepared. *Id.*; see also *Flaherty v. Dayton Elec. Mfg. Co.*, 109 F.R.D. 617, 618-19 (D. Mass. 1986) (imposing costs and attorney fees as sanctions under Rule 16(f) on attorney for coming to scheduling conference so ignorant of facts of case that he could not "explore the possibilities of settlement").

354. *Novak*, 932 F.2d at 1405 n.15.

355. *Id.*

356. *Heileman*, 871 F.2d at 658 (Posner, J., dissenting).

357. See *Strandell*, 838 F.2d at 887.

358. *Id.*; see *supra* notes 246-52 and accompanying text (discussing *Strandell*).

extrajudicial techniques such as the SJT, which under Rule 16(c)(7) it viewed as permissive, and pretrial or settlement conferences, which it agreed are mandatory, at least until used to force good faith negotiations.

There is authority for a very different view: in some circumstances judges may indeed penalize parties for failure to settle. The U.S. Supreme Court has indicated that when a defendant offers a settlement that includes all relief a plaintiff could potentially win at trial, the court may effectively force settlement by entering an order in accordance with the defendant's offer.³⁵⁹ In the Second Circuit, a refusal to settle resulted in sanctions in *Kline v. Wolf*.³⁶⁰ In that case, the court stated that rejection of settlement and insistence on trial can be grounds for an award of costs, expenses and attorney fees under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings when the claims for relief greater than the settlement are "so lacking in merit that they have but a slender chance of success at trial."³⁶¹ Anything short of complete relief, however, can be rejected by the plaintiff, and a court may not impose settlement by incorporating such an offer into a judgment.³⁶²

Still another district court appeared to assume its authority to compel negotiations in *In re Air Crash Disaster at Stapleton International Airport*.³⁶³ The judge in that multidistrict litigation ordered corporate officers with authority to settle to attend, also with counsel, settlement conferences outside the presence of a judge and directed the parties "to meet to discuss settlement of each of the 20 remaining cases."³⁶⁴ The purpose of the conference was to negotiate: "Immediate decision making is critical to the process of exchange involved in true negotiation."³⁶⁵ The court recognized only two limits on its power to compel participation in pretrial procedures: (1) a court may not attempt to force a particular solution on the parties;³⁶⁶ and (2) it may not require a procedure that requires parties to disclose strategies or evidence that would prejudice them at trial.³⁶⁷ These are narrow limitations and allow for orders that in effect compel negotiation.³⁶⁸

In the states, there is little uniformity over the issue of compelled negotiations. In Texas, a state with one of the most modern ADR statutes,³⁶⁹ an appellate court has agreed with the federal view, holding that while a judge

359. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980).

360. 702 F.2d 400, 405 (2d Cir. 1983).

361. *Id.*; see also 28 U.S.C. § 1927; *Marovic v. Elgin, Joliet & E. Ry.*, Case No. 85 C 5980, 1988 WL 139295, at *1 (N.D. Ill. Dec. 13, 1988) (unreported decision) (criticizing plaintiff's counsel for, among other reasons, refusing "to enter into good faith settlement negotiations").

362. See *Kline*, 702 F.2d at 405.

363. 720 F. Supp. 1433 (D. Colo. 1988).

364. *Id.* at 1435.

365. *Id.* at 1438.

366. *Id.* at 1437.

367. *Id.*

368. See *Marovic*, 1988 WL 139295, at *1.

369. See TEX. CIV. PRAC. & REM. CODE §§ 151.001-155.006.

may validly refer unwilling parties to mediation, he or she may not "compel the parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so. Any inconsistencies in [the statute] can be resolved to give effect to a dominant legislative intent to compel referral, but not resolution."³⁷⁰ A mediator to whom a case is referred "may not compel the parties to mediate (negotiate) or coerce the parties to enter into a settlement agreement."³⁷¹ The Georgia Supreme Court has also held that its laws allow referral to mediation, but not compulsion actually to mediate, by which the court appears to mean good-faith negotiation with the aid of a mediator.³⁷² In Maine, however, there can be no hearing in a divorce case after referral to mediation until the court is satisfied that "the parties made a good faith effort to mediate the issue."³⁷³

If one can be compelled to attend an ADR procedure, then the distinction between negotiation and attendance is so blurred as to be meaningless. Rather than risk sanctions, attorneys are likely at least to go through the motions of settlement discussions, even if that means merely explaining their opposition to settlement. The litigated cases discussed thus far, however, indicate that at least some counsel and parties perceive that they are being unduly pressured into settlement negotiations when they have no desire to settle. Such pressure often takes the form of sanctions, including assessments of costs, fees, and even outright dismissal.

While these cases demonstrate some discomfort among parties with mandatory processes, they also show the desires of trial judges for more power to "manage" cases and to punish parties who refuse, unreasonably, to settle their claims. They bring to the forefront the tensions between the benefits of ADR to bring about early settlement and the rights of parties to a full due process hearing and a judicial decision subject to review. In the end, the problem is one of drawing lines. If the Supreme Court were to rule that there is an obligation of good-faith settlement negotiation or meaningful participation, the result would probably be continuous litigation over what those terms meant. Inevitably, such words and phrases call for subjective evaluations.

V. COMPULSORY ADR: DOES IT WORK?

With increasing dockets creating pressure for even greater judicial authority to compel alternative methods, it is useful to review what knowledge we have gained so far about the operation of these methods. In addition to litigation, judges' writings and some empirical studies of ADR programs are helpful in evaluating ADR. These sources provide mixed responses to the question, does compulsory ADR work? Judges who have spoken out on the topic are generally

370. *Decker*, 824 S.W.2d at 251. See generally McPheeters, *supra* note 185 (discussing the *Decker* decision).

371. *Decker*, 824 S.W.2d at 251.

372. *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265, 267 (Ga. 1989).

373. *Bennett v. Bennett*, 587 A.2d 463, 464 (Me. 1991).

positive, though there are some thoughtful and notable exceptions.³⁷⁴ Empirical studies indicate considerable participant satisfaction with compulsory ADR. However, data on cost and time savings are more problematic.³⁷⁵ It is not yet at all clear that mandatory ADR significantly reduces the expense and time involved in litigation.

Justice and efficiency encompass the two goals of compulsory ADR,³⁷⁶ with efficiency assuming more importance in recent years.³⁷⁷ Yet there is little strong data supporting the theory that ADR saves significant time and money for participants or the system. Adequate control groups are hard to obtain since most programs are simply introduced for all disputes in a given classification. In addition, studies that do exist tend to measure single programs, and therefore fail to provide a source of easily comparable data.³⁷⁸

No doubt procedures such as mandatory arbitration divert large numbers of cases from the courts.³⁷⁹ However, given the historically high rate of settlement generally, it is very hard to determine how many of those disputes would have settled anyway, without ADR or any other type of intervention. Moreover, requiring an additional procedure, such as arbitration or a summary jury trial, in large numbers of cases adds a new layer of administrative expense for courts and another layer of transaction costs for litigants. While arbitration or a summary jury trial may be less expensive than trial, both may be more costly than ordinary settlement negotiations.³⁸⁰ Early studies of judicial settlement conferences indicated no savings in settlement rates and a reduction in court efficiency.³⁸¹ For the large majority of disputes that can be expected to settle without trial anyway, even a modest outlay of additional attorney hours may be a significant and unwanted expense.³⁸²

374. See Posner, *supra* note 24, at 392-93; Eisele, *supra* note 3, at 40.

375. See *infra* notes 383-402 and accompanying text.

376. Others posit more refined criteria for evaluating ADR methods. See, e.g., Keith O. Boyum, *Afterword: Does Court-Annexed Arbitration 'Work'?*, 14 JUST. SYS. J. 244, 246-47 (1991); Menkel-Meadow, *supra* note 2, at 4-5; Posner, *supra* note 24, at 369-89; Tornquist, *supra* note 104, at 752-68.

377. See *supra* notes 18-20 and accompanying text. As federal court Expense and Delay Reduction Plans are implemented and assessed, efficiency concerns are likely to predominate even more.

378. Menkel-Meadow, *supra* note 2, at 9.

379. See McKay, 120 F.R.D. at 49.

380. Webber, *supra* note 22, at 1520-21.

381. See MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 118 (1964).

382. See *Arabian Am. Oil Co.*, 119 F.R.D. 448. In this case, the parties objected to a summary jury trial order because the defendant, with limited financial resources, lived and worked in Greece, did not believe the SJT would lead to settlement, and did not want to incur the time and money involved in what it expected to be a useless procedure. *Id.* at 448. The idea that ADR can increase costs has been echoed by others, who note that ADR imposes an additional procedure on parties, triggering higher attorney fees. Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 235 (1991).

In one study of early neutral evaluation, a majority of litigants responded that the process had saved them over \$5,000 in litigation and discovery costs.³⁸³ However, one-fourth thought it had increased their costs.³⁸⁴ A small majority believed the early evaluation program had contributed to settlement.³⁸⁵ However, there was not overwhelming agreement on this issue. Not surprisingly, the neutrals believed far more strongly than attorneys or parties that the system had contributed to prospects of settlement.³⁸⁶ Only 37 percent of the cases settled at, or as a direct result of, the evaluation conference, and there was no information as to how many of these cases would have settled anyway.³⁸⁷ Thus, this study indicated few dramatic gains in efficiency from early neutral evaluation, even though the program was probably very effective at clarifying issues and revising parties' perceptions of their claims.³⁸⁸

A series of studies of mandatory arbitration published in 1991 also indicates that ADR does not necessarily result in more efficiency in the courts.³⁸⁹ In two of the five programs studied, arbitration displaced settlements and not trials.³⁹⁰ A New Jersey study was the most pessimistic. In an automobile negligence arbitration program covering all disputes with damages of up to \$15,000, arbitration was found to increase the time required to dispose of cases, with no significant reduction in the trial rate; there was, however, a decrease in the number of unassisted settlements.³⁹¹ In general, these studies showed mixed results as to efficiency, and when gains resulted, they were moderate, not dramatic.³⁹² It is likely that in mandatory programs, litigants tend to wait until the ADR process is either about to begin or is finished before they begin serious settlement discussions. This would mean a longer processing time for such cases than for others that settle without any ADR. A Pennsylvania study suggests

383. Levine, *supra* note 92, at 29.

384. *Id.* at 41.

385. *Id.* at 42.

386. *Id.* at 9. Only 59 percent of all attorneys and 66 percent of parties agreed that the Early Neutral Evaluation had improved prospects for settlement. *Id.* In contrast, 90 percent of the evaluators agreed with this statement. *Id.*; see also Lloyd Burton et al., *Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program*, 14 JUST. SYS. J. 183, 197 (1991) (81 percent of arbitrators satisfied with system in Colorado, compared to 70 percent of attorneys and 56 percent of litigants).

387. Levine, *supra* note 92, at 15.

388. Levine, *supra* note 92, at 47-48.

389. See John Barkai & Gene Kassebaum, *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133, 136 (1991); Boyum, *supra* note 370, at 245-48; Burton et al., *supra* note 380, at 188-89; Steven H. Clarke et al., *Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction*, 14 JUST. SYS. J. 154, 159 (1991); Roger A. Hanson & Susan Keilitz, *Arbitration and Case Processing Time: Lessons from Fulton County*, 14 JUST. SYS. J. 203, 216 (1991); MacCoun, *supra* note 382, at 239.

390. See Clarke et al., *supra* note 389, at 162; MacCoun, *supra* note 382, at 238.

391. MacCoun, *supra* note 382, at 239.

392. See Boyum, *supra* note 376, at 245-47.

another reason why such programs may prolong termination times.³⁹³ In a mandatory arbitration program, the authors found that there was a high rate of plaintiffs' awards, and a very high (25 percent) appeal rate.³⁹⁴ The reason was that defendants tended to improve their position at trial *de novo*, even when the plaintiff continued to prevail.³⁹⁵ Therefore, defendants nearly always rejected the awards and requested trial, which prolonged ultimate disposition rates.

Consensual processes, including summary jury trial, mediation or early neutral evaluation, are much harder to evaluate, since there is a much smaller universe of cases, and informal procedures rarely result in an accumulation of data. Judge Posner, in an admittedly crude study of SJTs in Ohio district courts between 1980 and 1985, found no change in the disposition time of cases and in the number of trials before and after SJTs were introduced.³⁹⁶ In fact, his statistics showed that disposition times were greater and termination rates lower in the Northern District, where Judge Lambros first introduced the summary jury trial, than in the other districts where it was used less.³⁹⁷ Lambros himself found strong indications of success in the program: Of 49 SJTs held through 1985, he claimed, 92 percent settled.³⁹⁸ Of the 88 cases in which an SJT was scheduled, 44.3 percent settled before it could be held.³⁹⁹ Lambros also calculated substantial savings in the cost of actual jury trials from the SJT program.⁴⁰⁰ These conclusions also suggest that ADR substitutes for ordinary settlements more than it decreases the number of trials. It may also confirm the theory that parties tend to wait to settle until the alternative process — be it arbitration or an SJT — takes place instead of settling on their own, perhaps more quickly. For many judges, the most effective way to settle a case is to set a firm trial date.⁴⁰¹ Setting an ADR date may serve the same function.

Participant satisfaction is another measure of ADR effectiveness. Most studies report high satisfaction rates with arbitration and even other ADR methods.⁴⁰² Interestingly, however, the aspects of ADR with which litigants are

393. See Dennis L. Metrick, *The Benefits of Research for Management: The Case of a Civil Arbitration Program*, 9 JUST. SYS. J. 111, 114 (1984).

394. *Id.* at 113.

395. *Id.* at 114.

396. Posner, *supra* note 24, at 378-81.

397. *Id.*

398. Lambros, *supra* note 14, at 473.

399. *Id.* at 472-73.

400. *Id.* at 473-74.

401. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313 (1986); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 258 n.13 (1985).

402. See Barkai & Kassebaum, *supra* note 389, at 141-42 (overall lawyer satisfaction with program high, but defense lawyers much less satisfied (46 percent) than plaintiffs' lawyers (91 percent)); Burton et al., *supra* note 386, at 196 (70 percent of attorneys and 56 percent of litigants satisfied); Clarke et al., *supra* note 389, at 166, 181 (litigants satisfied with program; attorneys approved program but did not rate higher than standard litigation); Levine, *supra* note 92, at 5-6, 15

most satisfied tend not to be cost and speed but qualitative features such as fairness and the need to be heard.

A study of summary jury trials in state and federal courts in Florida showed a relatively high trial rate (nine percent state; 14 percent federal), approximately the same as what might have been expected without intervention.⁴⁰³ This study found a much higher rate of satisfaction with SJTs in a voluntary state court program⁴⁰⁴ than in the federal mandatory program.⁴⁰⁵ Lawyers in the federal program were generally more suspicious of "gamesmanship" opportunities and their exploitation in SJTs, and they believed that jurors in SJTs tended to minimize the evidential summaries and to exaggerate the impact of lawyers' personalities.⁴⁰⁶ Attorneys in another study also expressed dissatisfaction with the way the lack of control over SJT presentations led to emotional responses from juries rather than fact-based, rational conclusions.⁴⁰⁷ A further study noted that parties experience great pressure to settle based on the SJT verdict, even when they suspect it is distorted by abuse or the simple lack of live witness testimony.⁴⁰⁸

The Florida findings suggest that voluntary programs will be more satisfactory to participants and be perceived as fairer than mandatory methods. Fairness can also be defined as a function of the actual settlement: Was it a good approximation of a jury verdict, or was it artificially high or low? The Florida research sheds interesting light on this question. In the voluntary state program, 64 percent estimated that the SJT verdict accurately predicted an expected jury verdict.⁴⁰⁹ In the federal program, 53 percent thought the SJT verdict was accurate.⁴¹⁰ Moreover, the amount of the SJT verdict was the single most influential factor in inducing settlement in both programs, reinforcing the view that consensual procedures are most effective when they change parties' perceptions of the value of settlement.⁴¹¹ Scheduling and settling deadlines were also critical to settlement, according to attorneys in both systems.⁴¹² This confirms the view that litigants tend to wait for the ADR proceeding before they engage in serious settlement efforts.

(attorneys, parties and evaluators satisfied with early neutral evaluation project).

403. Alfini, *supra* note 90, at 222.

404. *Id.* at 216.

405. *Id.* at 219. The author is careful to point out, however, that there are other factors that may contribute to this difference, among them the high threshold for federal cases and the large number of personal injury cases in the state program. *See id.* at 229.

406. *Id.* at 220.

407. Clifford J. Zatz, *Summary Jury Trial: The Settlement of a Toxic Tort Case*, 2 TOXIC TORTS L. REP. 929, 933-34 (1988).

408. Webber, *supra* note 22, at 1517.

409. Alfini, *supra* note 90, at 228 (three percent thought the verdict too high; 33 percent, too low).

410. *Id.* (twenty-eight percent thought it too low; 19 percent, too high).

411. *Id.* at 224.

412. *Id.* at 222.

Theoretical studies also question whether greater efficiency results from these programs. Judge Posner suggests that summary jury trials had not proven to be efficient: If they produce more settlements, there may be more suits filed in the hopes of an early resolution; if SJTs raise settlement costs, by reducing unassisted settlement, overall costs will rise.⁴¹³ He suggests that real reductions in caseloads can come only with changes that limit demand, i.e., that limit access to the courts.⁴¹⁴

Others question whether fairness and justice really do result from compulsory ADR, even with overall reports of participant satisfaction. They argue that ADR may reduce the quality of justice by creating arbitrary results due to power imbalance, judicial overreaching, and lack of resources.⁴¹⁵ Another major criticism of ADR is that it reduces opportunities for judicial rule-making, in which a public figure explicates and actualizes public values as expressed in the law subject to appellate review.⁴¹⁶ Others warn that ADR, by exacerbating power imbalances, works against women and minorities who are less able to exploit informal procedures.⁴¹⁷ Anecdotal studies of settlements in complex litigation, while reporting client satisfaction, also indicate either participant resentment of judicial overreaching or concern over the sacrifice of rule-making to settlement.⁴¹⁸

Judges themselves are generally positive about ADR.⁴¹⁹ They tend to value all methods that might induce settlement and therefore clear their dockets; many accept the idea that alternatives reduce court congestion. They appear to believe that consensual and mandatory ADR works to settle difficult cases.⁴²⁰ However, there are also judicial critics of ADR; Judge Posner presents the most thorough critique of ADR efficiency.⁴²¹ Judge Brazil, generally positive about judicial management and ADR, has criticized some alternatives as too costly or inefficient.⁴²²

413. Posner, *supra* note 24, at 373.

414. *Id.* at 388-89. Judge Posner suggests that ADR advocates "are like highway engineers, for whom the natural solution to highway congestion is to build more and wider highways." *Id.*

415. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984); *see also* Goldberg, *supra* note 147, at 450 (mediation in special education fails to compensate for unequal bargaining power, does not provide true neutral third parties, and eliminates judicially created clear rules for implementation of statute); Judith P. Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 439-40 (1982).

416. *See* Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 527 (1987); Fiss, *supra* note 415, at 1085.

417. *See* Edwards, *supra* note 21, at 679; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1545 (1991); *see also* Menkel-Meadow, *supra* note 2, at 41.

418. *See generally*, Schuck, *supra* note 80.

419. Broderick, *supra* note 20, at 41-43; Lambros, *supra* note 14, at 474-76; Ritchie, *supra* note 96, at 599.

420. *See supra* 244-45, 295-98 and accompanying text.

421. *See supra* notes 412-13 and accompanying text.

422. *See* Brazil, *supra* note 82, at 420.

Posner also has theorized that summary jury trials may not be a lawful use of jurors and in fact may affect the entire jury system negatively: By creating the impression that jury service is not real, SJTs may discourage serious and careful jury decision-making.⁴²³ Judge Eisele has argued strongly against mandatory arbitration which, he claims, deprives too many litigants of the opportunity for a full due process trial where truth is determined and rights are vindicated.⁴²⁴ Arbitration, moreover, discriminates against the non-wealthy, non-corporate client because it is generally confined to smaller cases.⁴²⁵ Judge Edwards, while advocating ADR for private disputes, argues for limits on alternatives in disputes over constitutional rights or public law.⁴²⁶ The distinction, however, is not always obvious. Strict product liability is, to Edwards, a public law issue that requires judicial rule-making.⁴²⁷ For such disputes he would make ADR an adjunct to the court system, with no diminution in the opportunity for trial on the merits.⁴²⁸ Yet torts, including product liability, are a category of cases frequently diverted to ADR.

VI. SUMMARY, CONCLUSIONS, AND THE QUESTION OF VOLUNTARISM

This survey of compulsory ADR yields several conclusions and raises important policy issues. First, compulsory ADR permeates federal and state judicial and regulatory systems. However, different types of ADR predominate in different types of disputes. ADR tends to be concentrated at opposite points in the system: It is used for relatively small claims, although today this can include suits for up to \$150,000, and in very large, complex cases. Decision-oriented processes such as mandatory arbitration tend to be imposed more on more routine, smaller claims. At the other end of the spectrum, large, complex disputes tend to be processed through more informal judicial management techniques that emphasize timetables, discovery controls, and judicial mediation, and may include summary jury trials and expert fact-finding.

Second, litigation over ADR indicates general acceptance of the concept by appellate courts. However, there may be more grounds for constitutional challenges if widespread use of ADR results in unreasonable delays in obtaining a full due process trial. Increased use may also result in increased tension

423. Posner, *supra* note 24, at 386; see also Exum, 744 F. Supp. 803.

424. Eisele, *supra* note 3, at 35.

425. See *id.* at 36. "Where 'big money' is involved, you are entitled to your traditional day in court unencumbered by this costly arbitration diversion. But if you have a relatively small claim, no." *Id.* Others condemn what is termed the "anti-access" movement, which includes not only ADR but proposals for discovery limits, greater sanctions under Rule 11, and limits on federal diversity jurisdiction, as motivated by a small number of wealthy, mainly corporate "repeat players" who want to limit litigation costs and judgments. See generally Resnick, *supra* note 21; Weinstein, *supra* note 21.

426. See Edwards, *supra* note 21, at 671.

427. *Id.*

428. *Id.* at 671-72.

between federal and state systems and more litigation over preemption issues. Equal protection problems may occur concerning procedures that favor either plaintiffs or defendants. Otherwise, there are few constitutional issues that might invalidate large numbers of ADR programs.

Third, there is likely to be greater concern, and more litigation, over issues of judicial overbearing and statutory authority. In particular, the issue of compelled good-faith negotiation needs to be resolved by appellate courts on both the state and federal levels. With increased emphasis on judicial management, there is a need to clarify generally the proper role of judges in all forms of compulsory ADR. There is also a need to define meaningful participation in ADR procedures. If there is no obligation to participate in a process, what is the point of giving judges authority to order participation? This question is pertinent as well to local rules such as those that require parties to meet and discuss settlement and then file a written report to the court certifying that the meeting took place, as well as to arbitration, mediation, and settlement conferences.

Fourth, some of the early enthusiasm for compulsory ADR is waning. Today there is more emphasis on judicial management techniques such as discovery control and assertive use of deadlines to achieve efficiency in litigation. This trend is reflected in the Civil Justice Reform Act of 1990⁴²⁹ and the experiments in local rulemaking it has mandated. Indications are that ADR has had too little impact on overcrowded dockets and litigation expenses. Studies show that ADR does not necessarily reduce caseloads. It may be a fairer, more just settlement technique, but it generally replaces ordinary settlement negotiation more than it substitutes for trials. Nevertheless, ADR remains popular with litigants and judges. A more balanced perspective is developing on compulsory ADR. It is a useful tool, but only one tool, for increasing efficiency and justice in legal disputes. Informal justice, however, carries with it the potential for abuse, and compulsory ADR is not an exception.

The overriding policy issue concerning compulsory ADR is whether it should exist at all. As the federal courts move into experimentation with significant changes in judicial management, and as ADR takes its place as one among many management tools, it is important for policy makers to have some guidelines as to whether ADR should be made more, or less, compulsory.

One recent study by the Society of Professionals in Dispute Resolution recommends caution in adopting mandatory ADR.⁴³⁰ The report recommends that programs pay greater attention to such issues as concern for historically disadvantaged groups, results that serve the parties' needs, interests of non-parties, and the importance of precedent.⁴³¹ It warns against coercion to settle

429. 28 U.S.C. §§ 471-482.

430. SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 1 (1991).

431. *Id.* at 11.

and recommends that mediation programs be kept free of coercive factors such as financial disincentives to trial and *ad hoc* pressure by trial judges.⁴³²

Many of the problems evidenced by ADR litigation would be removed if all participation were voluntary. There would be no disputes over sanctions for not attending a summary jury trial if attendance could not be compelled. There might remain some complaints of judicial overbearing, since judges would always be free to use the power of office to convince litigants to try alternatives. Some litigation over bad-faith failure to settle might persist. But the more troubling questions of good faith and meaningful participation would appear irrelevant if parties could simply refuse to take part in the procedure in question.

Empirical data on efficiency, moreover, indicate that making alternatives voluntary would not greatly increase system costs. The evidence indicates that ADR does not significantly reduce such costs, though the data is far from conclusive.⁴³³ There is a need for more and better designed studies of the precise impacts of different forms of compulsory ADR. One persistent difficulty is that of comparing settlements resulting from ADR with settlement rates without ADR given the generally high rate of settlements in civil cases.⁴³⁴ At this point, the evidence points toward caution and skepticism as to claims of efficiency, but not necessarily toward rejection of alternatives.

Qualitative assessments are also inconclusive. Participants seem to experience value from compulsory ADR.⁴³⁵ Yet highly visible compulsory processes, such as court-annexed arbitration and its attendant penalties for seeking trial *de novo*, are bound to make some litigants question whether they are being treated fairly or whether they are subjected to undue pressure to forgo the right to a trial.⁴³⁶ Some commentators have pointed out that mandatory summary jury trials can be abused by attorneys temporarily freed from the constraints of cross examination and the rules of evidence.⁴³⁷ One suspects that the same type of abuse can occur in settlement conferences or mediation, where lawyers or parties tell their stories free of evidentiary constraints.

Mandatory decision-oriented procedures such as court-annexed arbitration appear to be well-entrenched in many court systems. More study is needed to determine whether the courts or litigants are really obtaining value as a result of these procedures, and in which types of cases. Since one goal of ADR is increased litigant control of the process, it seems valid to suggest that parties at least be presented with some options, as in multidoor courthouse plans, as to the alternative they want to pursue.

432. *Id.* at 16.

433. *See supra* notes 375-88 and accompanying text; *see also* Webber, *supra* note 22, at 1520-21.

434. Eisele, *supra* note 3, at 37; Posner, *supra* note 24, at 379.

435. *See supra* note 402 and accompanying text.

436. Reynolds, *supra* note 18, at 177.

437. Webber, *supra* note 22, at 1516-18, 1522.

According to the theory behind ADR, alternatives work best when litigants display a cooperative attitude.⁴³⁸ Studies of compulsory ADR tend to confirm this theory. There is little evidence that compulsory summary jury trials are efficient.⁴³⁹ The comparison of Florida state and federal SJTs strongly suggests that voluntary procedures result in greater diversion of cases and litigant satisfaction.⁴⁴⁰ If ADR works because parties feel less alienated, and are more willing to accept settlements over which they have some control, then voluntary consensual procedures should result in better outcomes than compulsory methods.

One piece of empirical information that would help resolve this debate is totally absent from ADR studies: the extent of participation that would occur voluntarily, without compulsion, if alternatives were simply made available to litigants. There is a need for studies of participation in voluntary arbitration, mediation, and other ADR programs that are readily available through the courts or agencies but not compulsory. If voluntary rates of participation are high, which they should be, given the persuasive power of most judges, then compulsory procedures may be unnecessary. Few litigants or their attorneys are likely to refuse to cooperate with a judge's strong suggestion that an alternative be tried. Experience with complex litigation indicates that parties respond readily to innovation and alternatives when judges take control and urge participation.⁴⁴¹ If participation would result without compulsion, there may be no need to force unwanted proceedings on the intransigent few who resist.

On balance, then, the argument for voluntariness appears strong. First, there is little evidence that compulsion produces greater efficiency or greater justice. Second, there is at least some evidence that some participants feel undue pressure and believe their right to a fair trial is violated by compulsory procedures. Third, voluntary procedures would eliminate a great deal of potential litigation over issues of compulsion, and particularly over the troublesome question of the duty to participate in good faith. Fourth, voluntariness is consistent with the underlying philosophy of ADR.

It is probably not possible to eliminate all compulsion from public ADR. Current emphasis on judicial management means there will always be judicial pressure to discuss and even to accept settlements and to participate in ADR. Yet as a general principle, it seems reasonable to opt for voluntary procedures when there is some choice. This is so at least until there is better data on the benefits of compulsory procedures. It is likely, moreover, that now that ADR has been eclipsed by case management techniques as the method of choice for alleviating crowded courts and expensive procedures, there will be much less pressure from courts and others for mandatory ADR.

Like all such studies this one has ended with a plea for more study: more data, larger samples, better control groups. In the end, though, compulsory

438. Alfini, *supra* note 90, at 216.

439. See Webber, *supra* note 22, at 1520-22.

440. See Alfini, *supra* note 90, at 215-16.

441. Maatman, *supra* note 87, at 455.

ADR, or some forms, will probably continue to evolve on their own, regardless of how precise or imprecise our knowledge. Like the Panda's thumb,⁴⁴² or perhaps more like the human appendix, they will evolve to a higher state or wither away in response to broad political needs. As Martha Minow writes: "Reforms go in cycles, especially in America, which has a longstanding tradition of the new. Particularly familiar cycles move between centralization and decentralization, abstraction and contextualization, and uniformity and diversity. Perhaps these mark inevitable points in the journeys of American public and private institutions."⁴⁴³

Perhaps, then, the only value in such an endeavor such as this is to allow us to see more clearly where we are on the evolutionary scale — where we stand in the cycle — in order to glimpse where we are going.

442. See Elliot, *supra* note 401, at 307.

443. Martha Minow, *Realism About Realism*, 137 U. PA. L. REV. 2249, 2256 (1989).

