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Wisconsin's Court-Ordered ADR Law: Potential for Resolving Libel Disputes

Michael E. Weinzierl¹

I. INTRODUCTION

As the cost of libel litigation continues to soar² and the damages awarded in these suits rise,³ Alternative Dispute Resolution (ADR) offers an alternative to Wisconsin media organizations and to claimants to fairly resolve their differences outside of court. Research into why people sue the media for libel indicates that plaintiffs primarily file suits against the news media hoping to be vindicated and have their reputations restored. But instead, plaintiffs become frustrated as they proceed through the litigation process learning that the law is not structured to address their principal concerns. Along the way, the news organization, or its insurer, spends tens or hundreds of thousands of dollars on litigation and defense costs. Each year, ADR procedures could help libel litigants fairly, quickly and cost-effectively resolve their disputes short of court. Yet despite considerable evidence supporting the advantages, to both the plaintiff and news organization, of using ADR, parties to libel suits have been reluctant to employ it.

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The author would like to thank University of Wisconsin-Milwaukee Professor David Pritchard for his assistance with this article. Also, the author's gratitude is extended to Ryan Hamilton and Barry White for their support.

2. RANDALL P. BEZANSON & JOHN SOLOSKI, REFORMING LIBEL LAW 287 (1992).

3. Junda Woo, *Juries' Libel Awards Are Soaring, With Several Topping \$10 Million*, WALL ST. J., Aug. 26, 1992, at B3 (the first two years of the decade saw several significant libel verdicts). See also Sara Marley, *Huge Libel Awards No Longer The Rule, But Big Risks Remain*, BUS. INSURANCE, May 30, 1994, at 3. These libel verdicts include a \$58 million verdict awarded against Belo Broadcasting, and a \$34 million verdict awarded against the *Philadelphia Inquirer*. Although jury awards in libel cases declined slightly in 1993 and 1994, a 1993 survey, six-figure verdicts are "commonplace" today in mid-size towns, and seven-figure verdicts are not out of the ordinary in larger cities such as Philadelphia.

This Article argues that the Wisconsin Judicial Council's court-ordered ADR plan, which was adopted by the Wisconsin Supreme Court in December of 1993,⁴ will benefit libel litigants by giving them an alternative to the courtroom battle. The Article discusses the interests of the plaintiff and defendant in libel litigation and how ADR will benefit each, as well as critiques the structure of current libel law. The Article also analyzes other proposed alternatives to libel litigation and evaluates their effectiveness. The Article examines the efficiency and effectiveness of Florida's dispute resolution program, which provides settlement options similar to those found in the new Wisconsin law. And finally, the Article suggests how the settlement procedures provided in the Wisconsin court-ordered ADR law will be applied to resolve libel disputes.

II. THE LITIGANTS' INTERESTS IN LIBEL SUITS

A. *The Defendant's Interests*

Nationally in the 1980s, the Libel Defense Resource Center reported that juries awarded an average of 15.8 libel judgments per year totaling \$231.9 million for the decade, including four awards greater than ten million dollars.⁵ The early 1990s have already seen an increase over these figures. In the first two years of the decade, juries were averaging 10.5 libel judgments annually, totaling \$190.4 million. The median libel punitive damage award in these same years increased twelve times from that in the 1980s to \$2.5 million.⁶ Verdicts like these, although most always overturned on appeal,⁷ may chill the constitutionally protected freedom of the press by encouraging self-censorship.⁸

On the other hand, an increase in successful libel verdicts may prompt journalists to be more careful when assembling stories, and increase the public's faith in the media as news organizations become more accountable.⁹ But journalists still worry that too many excessive verdicts may cause reporters to engage in self-censorship.

Although the news organization always risks losing a verdict and having damages awarded against it when it defends a libel charge in court, when it elects to pursue ADR, it almost always remains in control of whether or not to settle, as well as what the eventual settlement will be.¹⁰ Therefore, substantial damages

4. *Supreme Court Of Wisconsin*, MILWAUKEE SENTINEL, Dec. 16, 1993, at 10D.

5. Woo, *supra* note 3, at B3.

6. *Id.*

7. *Id.*; see also Milo Geyelin, *Libel Defendants Fare Well On Appeal*, WALL ST. J., May 31, 1994, at B11.

8. Woo, *supra* note 3, at B3.

9. *Id.*; see also Marley, *supra* note 3, at 26.

10. If the news organization and plaintiff attorney elect to employ binding arbitration as the settlement procedure, they then contractually authorize a third-party neutral, such as a former judge or an arbitration panel, to render a decision. The parties must abide by the arbitrator's finding. The award, if any, becomes binding upon the parties, and it is extremely difficult to appeal. In Wisconsin,

can be avoided, and First Amendment battles during the appeals process are circumvented. Instead of leaving the outcome of the dispute in the hands of an emotional jury that may or may not understand libel law, the news organization's and plaintiff's attorneys can privately negotiate settlement arrangements (with input from the parties) acceptable to both parties.

In addition to the risk of losing suits and potentially paying out damages, the cost of defending libel suits is another reason news organizations should consider resolving the case early in or even prior to the litigation process. Bezanson and Soloski reported that the news media spend roughly \$150,000 to defend the typical libel suit.¹¹ Even so called "nuisance" suits, which often end in a summary judgment in favor of the news organization, may cost the news organization tens of thousands of dollars.¹² Clearly, it is to the media's advantage to settle these disputes prior to going to the jury, or for that matter, into litigation.

B. The Plaintiff's Interests

Plaintiffs also have an interest in settling their disputes early. Should their dispute come to trial, standards that the "public official"¹³ and the "private plaintiff"¹⁴ must meet to prove libel are difficult. Given these difficulties, plaintiffs may achieve better satisfaction resolving their disputes in a private forum where their real concerns may be addressed, and the legal maneuvering is not as difficult.

Research indicates that many plaintiffs' primary objective in entering libel litigation is not to recover monetary damages, but simply to clear their name and restore their reputation.¹⁵ Some plaintiffs may not even intend to take the lawsuit through its full course, but rather view filing suit as evidence of the falsity of the media's report.¹⁶ By officially and publicly challenging the news organization, the plaintiff is legitimizing the complaint to her or his community through the judicial process.¹⁷ In other cases, plaintiffs sue simply as a reaction to the media's indifference to their complaints.¹⁸ As the researchers in the Iowa Libel

for instance, all arbitration procedures are subject to review. WIS. STAT. §§ 788.10 and 788.11.

However, if the parties select one of the many non-binding procedures, at no point in the settlement conference will any party be compelled to accept a proposed resolution of the matter, leaving the participants in complete control over the settlement process. All parties must agree to any proposed settlement in order for the case to be resolved.

11. BEZANSON AND SOLOSKI, *supra* note 2, at 287.

12. *Id.*

13. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

14. *Id.*; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

15. RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS, MYTH AND REALITY*, 80-81, 172 (1987).

16. *Id.* at 78.

17. *Id.*

18. *Id.* at 79, 80-81; see also Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 792 (1986).

Research Project found, monetary concerns are not at the forefront of the plaintiffs' motivation behind filing libel suits against the news media.¹⁹

C. Critique of Libel Law

Unfortunately for the plaintiff as well as for the news organization (considering what is at stake), current libel law is not structured to address the claimant's actual concerns.²⁰ After the United States Supreme Court decided the cases of *New York Times v. Sullivan*²¹ and *Gertz v. Welch*,²² plaintiffs in lawsuits against media defendants were required to prove not only that the libel was false and damaging to their reputation, but that it was negligently published; the publisher was at fault. Public officials had to demonstrate that the information was published with reckless disregard of the truth or with knowledge of its falsity (states could require private-figure plaintiffs to prove only negligence on the part of the media defendant).²³ But in practice, plaintiffs who demonstrate that the news organization published false material which harmed their reputation may not be able to prove that the news organization acted negligently or with actual malice.

In a libel suit, more weight is given to the journalist's state of mind when she or he composed the story than to the ultimate accuracy of the report.²⁴ Although in *Herbert v. Lando*,²⁵ the U.S. Supreme Court opened the journalist's state of mind and thus the entire news gathering, reporting and editorial processes to the rules of discovery, the news media are still well insulated from libel judgments.

In *Denny v. Mertz and McGraw-Hill, Inc.*,²⁶ the Wisconsin Supreme Court distinguished differences between private and public figures, as well as determined what constitutional protection the news media are entitled in defamation cases brought by private individuals. As the Wisconsin Supreme Court noted, in *Gertz* the U.S. Supreme Court invited states to set their own standards for libel suits brought by private individuals against the news media "so long as liability without fault was not imposed."²⁷

The Wisconsin Supreme Court decided plaintiff Denny was not a "public figure" under the criteria established in *Gertz*.²⁸ It then decided that in Wisconsin, private figures only had to prove that the news organization was negligent in publishing or broadcasting the libel to recover actual damages.²⁹ However, consistent with *Gertz*, private figures still must prove that the news

19. BEZANSON ET AL., *supra* note 15, at 79, 80-81; *see also* Bezanson, *supra* note 18, at 791.

20. BEZANSON AND SOLOSKI, *supra* note 2, at 287-89.

21. 376 U.S. 254 (1964).

22. 418 U.S. 323 (1974).

23. *New York Times Co.*, at 279-280.

24. *Gertz*, at 349.

25. 441 U.S. 153 (1979).

26. 106 Wis.2d 636, 318 N.W.2d 141 (1982).

27. *Id.* at 148.

28. *Id.*

29. *Id.* at 150.

organization acted with actual malice in order to recover punitive damages.³⁰ This retention of the actual malice standard makes it exceedingly difficult for the private plaintiff to win punitive damages in libel suits against Wisconsin news organizations.

Although plaintiffs may have a difficult time winning libel disputes against the news media in Wisconsin, the Wisconsin Supreme Court has not afforded non-media defendants in defamation cases the same protection.³¹ In *Denny*, the Wisconsin Supreme Court reaffirmed its decision in *Calero v. Del Chemical Corporation*³² in which it concluded that the "constitutional restrictions on the common law of defamation set forth in *Gertz* and its predecessors did not apply to a purely private communication between individuals."³³ As a result of this ruling, private plaintiffs could sue non-media defendants for providing false and defamatory information to a news organization. Although the plaintiff still would have a difficult time winning the libel case against the news organization, she or he could recover damages against the source for providing the libelous information under Wisconsin's common law of defamation.³⁴

Public officials have even a more difficult time winning libel suits than private citizens because of the burden of proving the news organization acted with actual malice when it published the libel.³⁵ The U.S. Supreme Court's decision in *Curtis Publishing Co. v. Butts*³⁶ extended the *Times* criteria for recovering damages to "public figures" as well.³⁷ News organizations being sued for libel by "public figures" or "public officials" are afforded much more protection than when they are sued by private plaintiffs. In Wisconsin, if the news organization cannot demonstrate that the report was true, which is an absolute defense of a libel charge,³⁸ it still will not be found liable for libel if a public-figure plaintiff cannot prove that the report was published with actual malice.³⁹

Resolving libel cases through ADR offers plaintiffs the opportunity to achieve what they are really after, restoration of their reputation and vindication.⁴⁰ And unlike in litigation, where a libel suit may take years to resolve due to the appeals process, the suit may be disposed of quickly and privately, ensuring that the plaintiff's and the news organization's reputations are not further damaged in the public spotlight. By turning to ADR, libel defendants, who on their own admission acknowledge they have some degree of culpability in nearly half of the

30. *Id.* at 152.

31. *Id.* at 153.

32. 68 Wis.2d 487, 228 N.W.2d 737 (1975).

33. *Denny*, 106 Wis.2d at 660-61, 318 N.W.2d at 153.

34. *Id.*

35. *New York Times Co.*, at 279-80.

36. 388 U.S. 130 (1967).

37. *Id.*

38. WIS. STAT. §§ 895.05(1) (1993).

39. *New York Times Co.*, at 279-80.

40. BEZANSON ET AL., *supra* note 15, at 79, 80-81.

libel suits filed,⁴¹ would eliminate the possibility of large damage awards and reduce their defense costs. The Wisconsin court-ordered ADR program provides several settlement procedures that meet the needs of libel plaintiffs and defendants. And unlike other voluntary settlement mechanisms already in place, the Wisconsin program has the force of law behind it.

III. THE NEW WISCONSIN ADR LAW

Nationally, ADR is increasingly becoming accepted as a fair, viable and cost-effective alternative to the litigation process. The Wisconsin Judicial Council's⁴² petition, adopted by the Supreme Court,⁴³ establishes a policy of encouraging ADR procedures as an alternative to litigation. This law also empowers judges to order ADR procedures at any time during litigation and to compel the plaintiff and defendant to participate personally in those proceedings along with their attorneys.⁴⁴ Under the court-ordered ADR statute, parties are able to select from a number of non-binding and binding procedures.

Binding arbitration.⁴⁵ In binding arbitration, litigants contractually authorize a third-party neutral (often a former judge) to hear their dispute and render a binding decision subject to judicial review. The rules of evidence are relaxed, and the participating parties mutually tailor procedures and rules to meet their requirements.

Non-binding arbitration.⁴⁶ This procedure is identical to binding arbitration except the parties are not compelled to accept the arbitrator's decision.

Direct negotiation.⁴⁷ Direct negotiation does not involve the intervention of a third party. Rather, the litigants directly attempt settlement by exchanging offers and counter-offers, or by discussing the strengths and weaknesses of the merits of their position.⁴⁸

Early neutral evaluation.⁴⁹ In early neutral evaluation, the third-party neutral evaluates the litigants' cases early in the litigation process and provides an "appraisal of the merits of the case with suggestions for conducting discovery and obtaining legal rulings to resolve the case as efficiently as possible."⁵⁰

41. Bezanson, *supra* note 18, at 792.

42. WIS. STAT. § 758.13(2a) (1958). The Judicial Council is authorized to advise the Wisconsin Supreme Court as to "changes which will, in the council's opinion, simplify procedure and promote a speedy determination of litigation upon its merits." *Id.*

43. WIS. STAT. § 751.12 (1968).

44. James L. Fullin, Jr., *Supreme Court Orders*, WISCONSIN LAWYER, Aug. 1993, at 46-48.

45. *Id.* at 46.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 46-47.

50. *Id.* at 47.

Focus group.⁵¹ Similar to mock jury trials, the focus group settlement option enables litigants to make an abbreviated presentation of their cases to a panel of citizens who in turn render an "advisory"⁵² opinion about how the dispute should be resolved. This opinion is intended to guide the parties as they ponder future settlement discussions or continue through the litigation process. It may give them an idea of what kind of verdict and award, if any, to expect from a jury, as well as other settlement options.

Mediation.⁵³ In mediation, a third-party neutral works between or among the parties in an effort to reach a mutually acceptable settlement to the dispute. The mediator is not authorized to interject her or his personal opinions regarding the value of the case or impose a decision. The settlement becomes binding only after all parties agree to it, releases are signed and the lawsuit dismissed.

Mini-trial.⁵⁴ The mini-trial is similar to a focus group. It allows the parties to present their case to a panel of citizens who then attempt to negotiate a settlement to the matter.

Moderated settlement conference.⁵⁵ In this procedure, "settlement conferences are conducted by one or more neutral third parties who receive brief presentations by the parties or their representatives in order to facilitate settlement negotiations."⁵⁶

Summary jury trial.⁵⁷ In a summary jury trial, attorneys for the litigants make presentations to a "jury" selected from the regular jury pool. A judge presides over the panel, which renders an "advisory" verdict. As with the outcome of the focus group procedure, this verdict gives the parties something to consider as they prepare for their actual trial date.

The Wisconsin program outlined above is similar to the American Bar Association's Multi-Door Courthouse model as well as the State of Florida's program which matches litigants with appropriate settlement procedures.⁵⁸ These programs offer several viable alternatives for settling media disputes. Before examining which of these settlement procedures are most suitable for resolution of libel disputes, it is important to explore other proposed remedies and evaluate their effectiveness in resolving libel cases.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Larry Ray and Prue Kestner, *The Multi-Door Experience; Dispute Resolution and the Courthouse of the Future*, THE STANDING COMMITTEE ON DISPUTE RESOLUTION OF THE AMERICAN BAR ASSOCIATION (1988); JENNIFER L. MASON & SHARON B. PRESS, *FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM* (Florida Dispute Resolution Center, July 1991).

IV. VOLUNTARY ADR PROGRAMS

A. *The Libel Dispute Resolution Program*

In 1987, the Libel Dispute Resolution Program was developed by the Iowa Libel Research Project in conjunction with the American Arbitration Association.⁵⁹ The program was designed to provide a voluntary settlement alternative to the courtroom battle. Research in the Iowa Libel Research Project study revealed that, "The disjunction between the goals of libel law and real interests of the parties, their dissatisfaction with the litigation process, and the expense and delay of litigation suggested that a more efficient method for resolving libel disputes was needed."⁶⁰ In developing the Libel Dispute Resolution Program, the researchers considered the plaintiff's desire for a timely determination of the truth or falsity of the alleged libelous statements and the news media's interest in avoiding large damage awards and considerable defense and litigation expenses.⁶¹ Through this program, litigants could voluntarily agree to employ ADR procedures to attempt, or in the case of binding arbitration, to achieve settlement. Third-party neutrals would be provided by the American Arbitration Association.⁶²

From 1987 through 1990, the Libel Dispute Resolution Program contacted attorneys involved in 128 libel disputes throughout the United States.⁶³ Project coordinators learned about these disputes through press accounts and with the cooperation of a major libel insurer.⁶⁴ Libel Dispute Resolution Program representatives explained their program and asked the attorneys if they would be willing to consider an ADR procedure to resolve the dispute outside of court.

According to the results of the three-year experiment, there was little interest in the libel settlement program. The researchers determined this lack of interest was largely due to the resistance of counsel for both sides. Of the 128 libel disputes that came to the attention of the project coordinators, parties in only five cases agreed to use the program.⁶⁵ Members of the project frequently found that attorneys did not discuss the option with their clients, were concerned primarily with their own interests, and may not have accurately explained the ADR option to their clients.⁶⁶ The researchers speculated that an attorney's financial stake in the outcome of the dispute may have been an additional factor in this

59. Roselle Wissler et al., *Resolving Libel Cases out of Court: How Attorneys View the Libel Dispute Resolution Program*, JUDICATURE, April-May 1992, 329-33.

60. *Id.* at 329.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 329-30.

65. *Id.* at 330.

66. *Id.* at 330, 332; see also Don DeBenedictis, *Little Interest in Libel ADR; Iowa Project Found Only Five Cases Willing to Bypass Court, Money Damages*, 78 ABA JOURNAL 22 (1992).

resistance.⁶⁷ Plaintiff attorneys, who generally receive one-third of the award or settlement as compensation, may have believed their clients had a better chance of winning a more substantial award in court than in arbitration or by settling out of court with the news organization. These attorneys were concerned that an ADR procedure may result in the neutral "split[ting] the baby,"⁶⁸ and thus their client may not receive the award she or he was entitled. Defense attorneys, who are typically paid an hourly fee, also stood to benefit from a protracted dispute.

In addition to financial concerns, many attorneys may have shied away from the ADR option due to their unfamiliarity with the process.⁶⁹ The researchers found that those attorneys who had used ADR more frequently or had a favorable prior experience with it were more likely to be receptive to using an ADR procedure to resolve a libel dispute, while those who had not used ADR frequently or who had a previous unfavorable experience with it were not as likely to recommend it.⁷⁰

Other attorneys who were not open to the ADR option indicated they thought that by agreeing to mediation or some other form of ADR, they were displaying a weakness.⁷¹ The attorneys were concerned that if they agreed to ADR, they were in effect telling the opposing side that their case was not as strong as their adversary's.

The attorneys and their clients who did agree to use the Libel Dispute Resolution Project were satisfied with the advantages this program offered over traditional litigation. They agreed that the Libel Dispute Resolution Project was fair, as well as faster and more cost effective than going to court.⁷² This finding is consistent with the results of a 1993 study which examined ADR use, in all types of civil suits, by general counsel and law firm attorneys for *Fortune* 1,000 companies. The study revealed most parties use ADR to reduce litigation costs and save time.⁷³ It also suggests that the parties were generally satisfied with the effectiveness of ADR and were very positive regarding the potential for resolving many different types of disputes through ADR procedures.⁷⁴ Further, after engaging in non-binding settlement procedures, nearly half of the respondents said they never pursued further litigation in those cases, meaning their disputes were resolved.⁷⁵

Interestingly, the study suggested that the primary reason attorneys did not engage in ADR was a lack of understanding of the process and the fear of

67. DeBenedictis, *supra* note 66, at 22.

68. Wissler et al., *supra* note 59, at 332.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 331.

73. *1993 Survey of General and Outside Counsels*, DELOITTE & TOUCHE LITIGATION SERVICES, at 8, 14 (1993) (Chicago, Ill.).

74. *Id.* at 10.

75. *Id.* at 14.

displaying a weakness.⁷⁶ Many attorneys refused to use ADR simply because the other side suggested it. This experience is similar to that of the coordinators of the Libel Dispute Resolution Project, who frequently met with resistance from counsel who did not understand the alternative or who were unwilling to explore the option.⁷⁷

Wisconsin's court-ordered ADR law will help alleviate some of these problems. Dissimilar to the Libel Dispute Resolution Project, attorneys ordered to engage in ADR will not only be compelled to explain ADR to their clients, but may be required to produce them at the settlement conference as well.⁷⁸ A 1992 study commissioned by the National Institute for Dispute Resolution indicated that when ADR is explained to potential plaintiffs and defendants, an overwhelming majority of them are not only receptive to using it, but would choose mediation or arbitration over litigation the next time they are involved in a dispute.⁷⁹ Therefore, had those attorneys who did not bother to explain the Libel Dispute Resolution Program to their clients in their respective libel suits⁸⁰ chosen to do so, it is likely that more parties would have participated in the project.

B. The Chandler Proposal

In 1989, Robert W. Chandler proposed an alternative dispute resolution system to libel litigation.⁸¹ In response to research from the Iowa Libel Project, the proposed system would replace the libel litigation process with a more responsive alternative that addressed the claimant's real concerns.⁸² This system would provide a timely and final determination of the truth or falsity of the alleged libel and cost the disputants little if anything to employ.⁸³ Of course, this system would be voluntary.⁸⁴

The settlement process would begin when the claimant contacts the news organization and voices her or his displeasure with the report.⁸⁵ The news organization puts the claimant in contact with its representative who is authorized to make decisions on behalf of the news organization.⁸⁶ The media representative

76. *Id.* at 8.

77. Wissler et al., *supra* note 59, at 330, 332.

78. Fullin, *supra* note 44, at 46-48.

79. *National Survey Findings On: Public Opinion Towards Dispute Resolution*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION (1992) (National Institute for Dispute Resolution, 1726 M Street, N.W., Suite 500, Washington, D.C.).

80. Wissler et al., *supra* note 59, at 330, 332.

81. ROBERT W. CHANDLER, *CONTROLLING CONFLICT: A WORKING PROPOSAL FOR SETTLING DISPUTES BETWEEN NEWSPAPERS AND THOSE WHO FEEL HARMED BY THEM 3* (Gannett Center for Media Studies, 1989).

82. *Id.* at 9-10.

83. *Id.*

84. *Id.* at 10.

85. *Id.*

86. *Id.*

arranges a meeting with the claimant to discuss the issue in person and to demonstrate the news organization's commitment to good faith as well as to protect its reputation in the community.⁸⁷

At the meeting, the news organization's representative must be prepared to do one of several things: (1) acknowledge her or his organization's mistake, at which time a statement of correction or clarification would be drafted with the claimant's input and published soon thereafter; (2) offer the claimant an interview in which the claimant can respond to the article (in this scenario, the news organization admits no wrongdoing); (3) offer the complainant an opportunity to directly respond to the article in a letter to the editor or an opinion piece; or (4) deny that the news organization did anything wrong.⁸⁸

If the representative decides at the meeting that the news organization did nothing wrong, she or he may take up to five business days to discuss the situation with the reporter who composed the story and other members of the news staff.⁸⁹ They collectively will determine whether the news organization's story was inaccurate or misleading, or whether to stand by its report. At this point, the news organization either publishes a correction, clarification or retraction (if it agrees with the complainant's assertions), or it finds the complaint groundless and notifies the claimant, within five days, of its decision in writing.⁹⁰

Once the claimant receives the news organization's reply, she or he decides whether or not to proceed in the settlement process. The next stage is binding arbitration.⁹¹ If the claimant elects to proceed, each agrees in writing to be bound by the arbitrator's decision and not to proceed into the litigation process.⁹² The arbitrator is authorized only to determine the truth or falsity of the alleged libel, and may not make any monetary awards or order the news organization to publish the finding on any particular page or in any particular style.⁹³

At this point, the parties may elect to employ one arbitrator to hear the dispute, or each selects an arbitrator who in turn appoint the chair to a three-member arbitration panel.⁹⁴ The arbitrator(s) reviews statements of position from the parties and schedules a joint hearing, for the morning, in which the news organization and claimant state their cases.⁹⁵ Upon conclusion of the hearing, the arbitrator(s) may take the afternoon to deliberate, but the entire process should last

87. *Id.*

88. *Id.* at 10-11.

89. *Id.* at 11.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 11-12. In some limited cases, the arbitrator may order that the prevailing side's legal costs be paid by the loser. This would occur only if the claimant elected to have representation at the hearing. It was anticipated by Chandler that the majority of disputes would not reach the arbitration stage, and if they did, the claimant would not likely hire an attorney.

94. *Id.* at 11.

95. *Id.*

no longer than one day.⁹⁶ If the decision is in favor of the news organization, the process ends. If the arbitrator(s) finds in favor of the claimant, the news organization must publish or broadcast the arbitrator's decision.⁹⁷

Chandler's system certainly addresses the plaintiff's primary objectives as determined in the Libel Research Project.⁹⁸ The plaintiff not only has an opportunity to persuade the news organization that it was wrong, but to receive vindication when the news organization retracts or corrects its error. If the news organization stands by its report, it may still elect to allow the claimant to respond directly through a letter to the editor or opinion piece, or through an interview. And finally, if the news organization denies culpability, the claimant may compel the news organization to arbitrate the matter, at which time the claimant again has the opportunity to win public vindication.

The news organization also benefits under this plan because it avoids costly litigation, resolves the matter in a timely fashion, and avoids potential damages. Even if the news organization loses the arbitration, its decision to publish the arbitrator's finding was a voluntary one due to its agreement to do so beforehand as part of its libel resolution policy.⁹⁹

Since Chandler proposed this system in 1989, a number of newspapers, including the *Seattle Times*, have adopted it as their libel dispute resolution policies.¹⁰⁰ As sound and reasonable of a proposal as Chandler's system seems to be, the overwhelming majority of newspapers, magazines and television stations, however, have not adopted the proposal. Therefore, the claimant with a complaint against such a news organization may quickly become a plaintiff, as research in the Iowa Libel Project suggests.

C. Press Councils

In addition to court-related or voluntary mediation and arbitration settlement procedures, press and/or news councils have been frequently suggested as alternatives to libel litigation. The oldest, and arguably most effective, news councils in existence today in the United States are the Minnesota News Council and the Honolulu Community-Media Council.

The Minnesota News Council was founded in 1970.¹⁰¹ The body is composed of twelve citizens and twelve members of the media and is jointly funded by media organizations, corporations, foundations, professional associations

96. *Id.*

97. *Id.* at 11-12.

98. BEZANSON ET AL., *supra* note 15, at 79-81, 172.

99. CHANDLER, *supra* note 81, at 10.

100. William L. Winter, *How Publishers Can Calm Angry Readers*, PRESSTIME, May 1990, at 14.

101. *To the Common Man, it Seems That Journalists, at Will, Can Make Heroes or Scoundrels Out of Us All*, (unpublished brochure, Minnesota News Council, 822 Marquette Avenue, Suite 200, Minneapolis, Minnesota 55402-2820).

and private donations.¹⁰² Citizens may file complaints with the council against the Minnesota news media, and in some limited instances news media outside of the state, for a number of alleged harms including libel. The complainant must sign a waiver agreeing not to file suit against the media.¹⁰³ If the council agrees to consider the complaint, it contacts the media outlet and attempts to set a hearing before its members. However, as was the case with the Libel Dispute Resolution Project, the Minnesota News Council cannot compel the media organization to comply with its request or cooperate in any manner. Further, it has no legal authority over the news media. The council simply hears complaints and publishes its findings in its newsletter *Newsworthy*. The media are not obliged to publish or broadcast their findings. In 1992, the Minnesota News Council heard five complaints against the news media, sustaining the grievances in all of the cases.¹⁰⁴

Although the Minnesota News Council has no legal authority in libel and other disputes against the news media, one study suggests its existence has reduced the number of libel cases pursued in Minnesota. Hale and Scott found that the Minnesota News Council apparently reduced the number of news media libel cases filed in Minnesota after its creation. The researchers examined all libel and defamation appeals in Minnesota and its four border states during the thirty-nine year period from 1950 through 1988. They found that libel appeals in Minnesota declined as a percentage of all defamation appeals after the creation of the news council.¹⁰⁵ Further, they found that media defamation appeals significantly dropped as a percentage of all defamation cases, from fifty percent to twenty-one percent after creation of the news council.¹⁰⁶ Finally, they observed that the "per capita incidence of media defamation appeals only increased fifty-five percent in Minnesota after a news council was created; this compared to a 149% increase in the four [border] states without news councils."¹⁰⁷

The Honolulu Community-Media Council, founded in 1970,¹⁰⁸ is composed of forty-five volunteers, including journalists, academics, private citizens, businesspeople, labor representatives, clergymen, attorneys and

102. *Id.*

103. *Id.*

104. *Complaints heard in 1992*, NEWSWORTHY, Summer 1993, at 18-19 (unpublished newsletter, Minnesota News Council, 822 Marquette Avenue, Suite 200, Minneapolis, Minnesota 55402-2820).

105. F. Dennis Hale and Robert O. Scott, *Impact of the Minnesota News Council on Libel*, 11 (March 2, 1991). Paper presented to the Law Division of the Association for Education in Journalism and Mass Communication, Southeast Colloquium, Orlando, Florida, March 2, 1991. The researchers found that prior to the creation of the Minnesota News Council, libel cases constituted sixty-four percent of all Minnesota defamation cases. In the seventeen year period after the news council's founding, the percentage dropped to fifty-six percent. During that time frame, the researchers also found that the Minnesota libel appeal rate increased 288% (increasing libel cases was a national trend in that time period as well), compared to a 439% increase in slander cases.

106. *Id.* at 12.

107. *Id.* at 13.

108. Fletcher Knebel, *Basic Speech for Media Council Members 1* (April 1992). (speech prepared for Honolulu Community-Media Council, Box 22415; Honolulu, Hawaii 96823-2415).

government workers.¹⁰⁹ But unlike the Minnesota News Council, which solely handles media disputes, the Honolulu Community-Media Council engages in a number of other activities including: First Amendment activism; establishing ethical and reporting codes; sponsoring seminars on media-related topics; and evaluating the overall performance of the Hawaiian news media.¹¹⁰

Its primary function is, however, resolving complaints by citizens against the news media, although it does occasionally field grievances from journalists and media organizations against public officials.¹¹¹ Most of the disputes that come to the council's attention are resolved through mediation procedures.¹¹² Once the complaint is received, the council contacts the opposing party and attempts to arrange a meeting to resolve the dispute. The council organizes a face-to-face meeting between the news organization and the citizen. The dispute is mediated on the spot with a representative of the council acting as mediator. A substantial majority of the disputes are resolved during this meeting.

In most instances, the news organization is receptive to mediation, but many times the citizen is not.¹¹³ In these cases, the council (with approval of the parties) investigates the complaint and sends its report to the parties. It then invites the parties to testify at its next meeting.¹¹⁴ Upon conclusion of the testimony, the council votes, and sends its decision to the parties and the media.¹¹⁵ The Honolulu Community-Media Council has no legal authority over the disputants. Rather, it relies on its prominence within the community to lend credibility to its findings.¹¹⁶

In 1981, Wisconsin investigated the possibility of establishing its own news council modeled after the Minnesota News Council and the then-existing National News Council (since disbanded).¹¹⁷ A task force, consisting of eight media representatives and seven citizen members, was appointed and funded by Milwaukee industrialist Bill Brady, who also served as one of the task force's citizen members.¹¹⁸ The task force was formed to determine if there should be a formal body to investigate complaints against the news media and publish its findings.¹¹⁹ As with the Minnesota and other existing U.S. news councils, the proposed Wisconsin press council would have had no legal or disciplinary powers.

In addition to debating the merits of establishing a press council, the task

109. *Id.* at 6.

110. *Id.* at 1-3.

111. *Id.* at 1.

112. *Id.* at 4.

113. *Id.* at 4-5.

114. *Id.* at 5.

115. *Id.*

116. *Id.*

117. Eugene C. Harrington, *Mediation Panel Urged for Media*, THE MILWAUKEE J., Aug. 18, 1981, at 1.

118. Collected notes of William B. Blankenburg, Professor, University of Wisconsin-Madison School of Journalism and Mass Communication (Aug. 11, 1993).

119. Harrington, *supra* note 117, at 1.

force considered several other proposals to improve relations between the public and the news media including: sabbaticals for journalists; staff seminars; continuing education; internal and external critical analysis of the press; prompt correction of errors; meetings with concerned citizens groups; community advisory councils; and outside auditors, all of which were embraced by the body.¹²⁰

The news media panel members were largely opposed to establishing a press council citing First Amendment and ethical concerns.¹²¹ Many journalists feared the creation of a Wisconsin council could lead to self-censorship or even outright censorship sanctioned by state government. Out of this uneasiness, a mediation council was proposed.¹²² The mediation council would have been composed of citizens who would have mediated disputes between the news media and individuals, and issued a report on the outcome.¹²³ This council would not have, however, made any judgments. Rather, it would have functioned in the traditional role of the mediator, facilitating a compromise or resolution to a dispute without interjecting personal opinion or biases. Over the objections of most of the media representatives, this proposal was approved.¹²⁴ However, the task force soundly rejected the formation of a formal news council.¹²⁵

Despite the task force's approval of the mediation council, Brady did not pursue formally implementing this recommendation,¹²⁶ and Wisconsin's effort to establish a press council proceeded no further.

Although research into the impact of the Minnesota News Council suggests that it may have lessened the pace at which libel cases escalated in Minnesota,¹²⁷ the council has no effect on those libel disputes that did make their way through the court system. However, the principle of the Minnesota and Honolulu news councils' settlement procedure, namely the independent investigation of the dispute and the issuance of a subsequent report, clearly offers a viable resolution avenue for disputants who do not want to engage in full-blown litigation but find themselves immersed in the process nevertheless. The problem still remains for those plaintiffs whose grievances are supported by the press council, but which no news organization agrees to publish or broadcast the council's finding. In the case of the Honolulu Community-Media Council however, mediation may resolve the dispute before a hearing is even needed.

120. Blankenburg, *supra* note 118; Harrington, *supra* note 117, at 1.

121. Blankenburg, *supra* note 118.

122. *Id.*

123. *Id.*

124. Harrington, *supra* note 117, at 1.

125. *Id.*

126. Blankenburg, *supra* note 118.

127. Hale and Scott, *supra* note 105; see also Ronald Farrar, *News Councils and Libel Actions*, 63 JOURNALISM QUARTERLY 509-16 (1986).

V. HOW THE WISCONSIN ADR LAW WILL BENEFIT LIBEL LITIGANTS

Although the parties who voluntarily agreed to use ADR in the Libel Dispute Resolution Project met with success and/or were satisfied with the process,¹²⁸ an overwhelming majority of the libel disputes that could have potentially been resolved were not even attempted.¹²⁹ The Honolulu Community-Media Council reports that most of the media disputes brought to its attention are resolved through mediation procedures.¹³⁰ Similar results were reported in the Chandler program.¹³¹ Independent research suggests that an overwhelming majority of attorneys who have used ADR to resolve civil disputes were satisfied with the process and believed their clients saved time and money by using mediation or arbitration.¹³² And when ADR is explained to ordinary citizens, over eighty percent said they would employ some type of ADR procedure over traditional litigation should they be party to a lawsuit in the future.¹³³ Yet despite a myriad of evidence supporting the benefits of using ADR, parties to libel disputes and their attorneys have not embraced it. The Wisconsin Judicial Council's plan, although certainly not developed for the sole purpose of resolving libel disputes, will be the catalyst needed to effectively assimilate ADR into libel settlement procedures.

Simply stated, ADR has not succeeded in resolving great numbers of libel disputes because it has not been given a chance. Under Wisconsin law, judges have the authority to order parties to libel suits (and all litigants for that matter) to attempt settlement through ADR before venturing deeper into the litigation process.¹³⁴ And there is no reason to believe that once attorneys and their clients are exposed to ADR, they too will not be satisfied with its benefits.¹³⁵ When examining these benefits, it is puzzling why they would not consider using some form of ADR as an alternative to litigation.

The defendant's interest in resolving a libel dispute is two-fold. The news organization is primarily concerned with protecting its First Amendment rights, but cost considerations are increasingly becoming an issue as well.¹³⁶ Libel suits certainly have the potential to cost the litigants a great deal. One libel dispute that might have been resolved through the Libel Dispute Resolution Project proceeded

128. Wissler et al., *supra* note 59, at 331.

129. *Id.* at 329.

130. Knebel, *supra* note 108, at 4.

131. Winter, *supra* note 100, at 15.

132. *1993 Survey of General and Outside Counsels*, *supra* note 73, at 8, 10, 14.

133. *National Survey Findings on: Public Opinion Towards Dispute Resolution*, *supra* note 79.

134. *Supreme Court of Wisconsin*, *supra* note 4, at 10D.

135. *1993 Survey of General and Outside Counsels*, *supra* note 73, at 12. This study suggested that attorneys who were compelled to participate in ADR procedures by a judge were at the very least moderately satisfied with ADR. For many, their level of satisfaction with the process was even higher.

136. BEZANSON AND SOLOSKI, *supra* note 2, at 287.

through the traditional protracted litigation process and ultimately cost six million dollars in litigation expenses.¹³⁷

ADR, when used effectively, alleviates both of these concerns. Unlike in litigation, settlements in nearly all ADR procedures are voluntary and private. Rather than having decisions imposed upon them, news organizations actively participate in the settlement process, and the outcome is structured to preserve the news organization's interests. In this regard, ADR may offer greater First Amendment protection than risking a court battle. ADR enables news organizations to privately and cost-effectively settle libel disputes without risking tremendous damage awards and without violating their First Amendment rights.

Attorneys for news organizations admit that their clients have some degree of culpability in nearly half of the libel suits filed nationally.¹³⁸ Although there may be some degree of exposure on its part, the news organization will likely win most of these libel disputes on appeal. In order to do so, the news organization may have to spend large sums money in the process. In addition, there is still always the chance, however slight, that it may lose. A borderline or questionable libel case may be disposed of in ADR for a nominal private settlement at a fraction of the cost of litigation. A dispute in which the news organization likely committed libel can be resolved just as efficiently. In both scenarios, the news organization avoids any precedent-setting decision, as well as damages.

The news organization, which relies heavily on its standing within the community it serves for its legitimacy, would also do well to resolve a libel dispute quickly and privately. Each day the suit lingers is another day that the news organization's credibility may be questioned by its readers or viewers. And although approximately seventy-five percent of all libel awards are reduced or thrown out on appeal,¹³⁹ news consumers are more likely to remember the million-dollar headlines. By no means is the author suggesting that news organizations "roll over" and settle every libel suit filed against them no matter how frivolous. When a libel suit clearly has no merit or when First Amendment rights are explicitly threatened, the media have no choice but to see the suit through its entirety. ADR procedures, however, certainly should be considered by news organizations as an alternative to litigation in those cases where clearly there is a chance they are censurable. The new Wisconsin court-ordered ADR law will ensure that that consideration is given.

Plaintiffs in libel suits may also benefit from attempting ADR rather than pursuing litigation. Research into plaintiffs' motives for suing the media for libel

137. Wissler et al., *supra* note 59, at 332.

138. Bezanson, *supra* note 18, at 792.

139. Woo, *supra* note 3, at B3; see also Milo Geyelin, *Libel Defendants Fare Well On Appeal, Research Finds*, WALL ST. J., May 31, 1994, at B11. According to a 1994 study, only 28.3% of the verdicts and damage awards against the media in libel cases are not altered in some fashion during the appeals process. The study revealed that 41.3% of the verdicts were reversed completely, while 14.1% of the verdicts were partially reversed, with new trials being ordered. In the remaining 16.3% of the cases, according to the study, the juries' verdicts were upheld, but damages were reduced, or thrown out. *Id.* at B11.

suggests that monetary recovery of damages is not a priority.¹⁴⁰ Most are primarily interested in clearing their name and repairing their damaged reputations.¹⁴¹ But because of the structure of libel law, the truth or falsity of the news organization's report is not really given as much weight in court as the journalist's state of mind when the story was composed. For this reason, the majority of libel awards are thrown out or reduced on appeal. The plaintiff faces a tremendously difficult task in proving libel, even if the information published was false. ADR, however, affords an opportunity for the parties to focus on what is really important to the plaintiff rather than on the journalist's state of mind.

Before a plaintiff can sue a news organization for libel in Wisconsin, the news organization must be given a reasonable amount of time to correct the alleged libel.¹⁴² An ADR procedure could be used to determine the truth or falsity of the plaintiff's charge. If it appears the news organization might be culpable to some degree, the ADR session may produce a result in which the news organization agrees to print a clarification, correction or retraction, and the plaintiff agrees to dismiss or not file the suit. In this win-win situation, the plaintiff got what she or he was seeking, vindication,¹⁴³ without the expense, anguish and uncertainty of trial.

In some libel cases, the news organization clearly may have some exposure. In this scenario, the parties may negotiate a monetary settlement acceptable to both parties. Unlike in litigation where the plaintiff must worry about any award she or he received being thrown out or reduced on appeal, the settlement produced in an ADR session is final. The appeals process is eliminated. When engaged in settlement negotiations, the litigants will understand they are dealing in real dollars. If they agree to a monetary settlement, that settlement will stand. This aspect of ADR should be attractive to both sides.

The plaintiff also benefits from the efficiency ADR offers. While it may take months or years to see a libel dispute through its course, an ADR session can be arranged and a settlement produced in a matter of days. The plaintiff can settle the dispute in a timely fashion, avoiding the bad headlines and negative media coverage bound to appear whenever the status of the suit is updated.

VI. THE FLORIDA MODEL

When considering how Wisconsin's ADR law will affect civil litigation in the state, it is important to examine the success of court-ordered ADR in other states. Of all the court-mandated ADR procedures and programs nationally, Florida's is arguably the most successful. The results achieved in Florida suggest that the Wisconsin ADR law was well thought out and will likely be effective, not

140. BEZANSON ET AL., *supra* note 15, at 79, 80-81.

141. *Id.*

142. WIS. STAT. § 895.05(2) (1994).

143. BEZANSON ET AL., *supra* note 15, at 80-81.

only in settling libel disputes, but other types of civil litigation and family disputes as well.

Florida designed its court-annexed program after the American Bar Association's Multi-Door Model. Each county oversees its own ADR program. As a result of a 1985-86 study by the Legislative Study Commission, Florida statutes were amended in 1987 to grant judges the authority to order ADR procedures in civil cases already in litigation, as well as family and community disputes.¹⁴⁴ Under Florida's guidelines for civil disputes over \$15,000, litigants ordered to ADR can choose between the court-operated program, if available, or a private procedure.¹⁴⁵ However, each county's program is different, with some counties supplying the parties with voluntary mediators for which there is no charge, while in other counties, the court refers the parties to private mediators who charge an hourly fee which is split between or among the parties.¹⁴⁶ The parties also select which type of ADR procedure to use in an attempt to settle. This way, the disputants are matched with the settlement option most likely to produce a settlement.

Mediation is often the selected ADR procedure. Florida's circuit court-referred mediation programs have been very effective in settling non-family civil disputes of \$15,000 and greater throughout the state, regardless if the court was providing the mediators or if the parties were selecting private ADR practitioners. For instance, in 1990, Duval County's circuit court mediation program successfully resolved 632 civil cases out of 988 or sixty-four percent.¹⁴⁷ In Palm Beach County, 1,384 civil cases settled out of the 3,014 referred to mediation by the circuit court, or forty-six percent.¹⁴⁸ In Lee County, seventy-nine percent of the civil disputes referred to mediation by the circuit court were resolved.¹⁴⁹ Dade County saw the most circuit court referrals with 2,380 resolutions reached out of 3,500 civil mediations, or sixty-eight percent.¹⁵⁰ Without the Florida circuit court-ordered ADR system, however, 6,190 civil cases that were settled through mediation would have likely proceeded through the costly litigation process.¹⁵¹ No figures are available on the number of settlements reached in private, voluntary ADR during this time period, but it is safe to say that well over 6,200 total non-family civil disputes over \$15,000 were resolved between court-ordered and voluntary ADR procedures. Thousands of additional civil disputes of lesser

144. MASON AND PRESS, *supra* note 58 at v; see also Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 5; Robert A. Baruch Bush, *Efficiency and Protection, or Employment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 266-73 (1989).

145. MASON AND PRESS, *supra* note 58, at v.

146. *Id.* at 5-1, 5-2.

147. *Id.* at 5-5.

148. *Id.* at 5-8.

149. *Id.*

150. *Id.*

151. *Id.*

values, as well as family and citizen disputes were also resolved by mediation procedures through other Florida programs.

The success of Florida's court-referred mediation program continued in 1991. The Broward County circuit court referred 5,329 civil cases to mediation that year, 3,192 (sixty percent) of which were mediated, with forty-nine percent of those being resolved at the mediation.¹⁵² In Dade County, 6,500 cases were referred to mediation.¹⁵³ Four thousand of those referrals were actually mediated, and 2,400 (sixty percent) settled.¹⁵⁴ In Duval County, 1,088 of the 1,345 cases that were mediated, or eighty-one percent, were settled.¹⁵⁵ The Palm Beach circuit court ordered 5,500 cases to mediation, of which 4,112 were actually mediated.¹⁵⁶ Of those Palm Beach County cases that were mediated, 2,400, or fifty-eight percent, settled.¹⁵⁷ And in Pinellas County, 1,033 disputes of 1,599 (sixty-five percent) settled as a result of court-ordered mediation.¹⁵⁸

In 1991, Florida's circuit court-ordered mediation program produced approximately 10,391 settlements out of 16,960 actual mediation sessions, or sixty-one percent.¹⁵⁹ Again, these numbers do not include all of the cases that were resolved through voluntary mediation prior to reaching the court-ordered program.

Since its inception, the scope and usage of Florida's court-ordered ADR program has grown each year, and continues to flourish. (See chart at page 21). As the success of the program became increasingly evident, attorneys began employing ADR voluntarily. Today, private mediators, local ADR firms and national ADR providers offer their mediation services throughout the state.¹⁶⁰ As Wisconsin attorneys are increasingly exposed to ADR procedures, they will likely elect to voluntarily use mediation and arbitration for dispute resolution as well. As it stands now, research indicates that attorneys anticipate they will increasingly employ ADR to resolve their disputes in the future.¹⁶¹

152. JENNIFER L. MASON & SHARON B. PRESS, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM, at 5-5 (July 1992).

153. *Id.* at 5-8.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

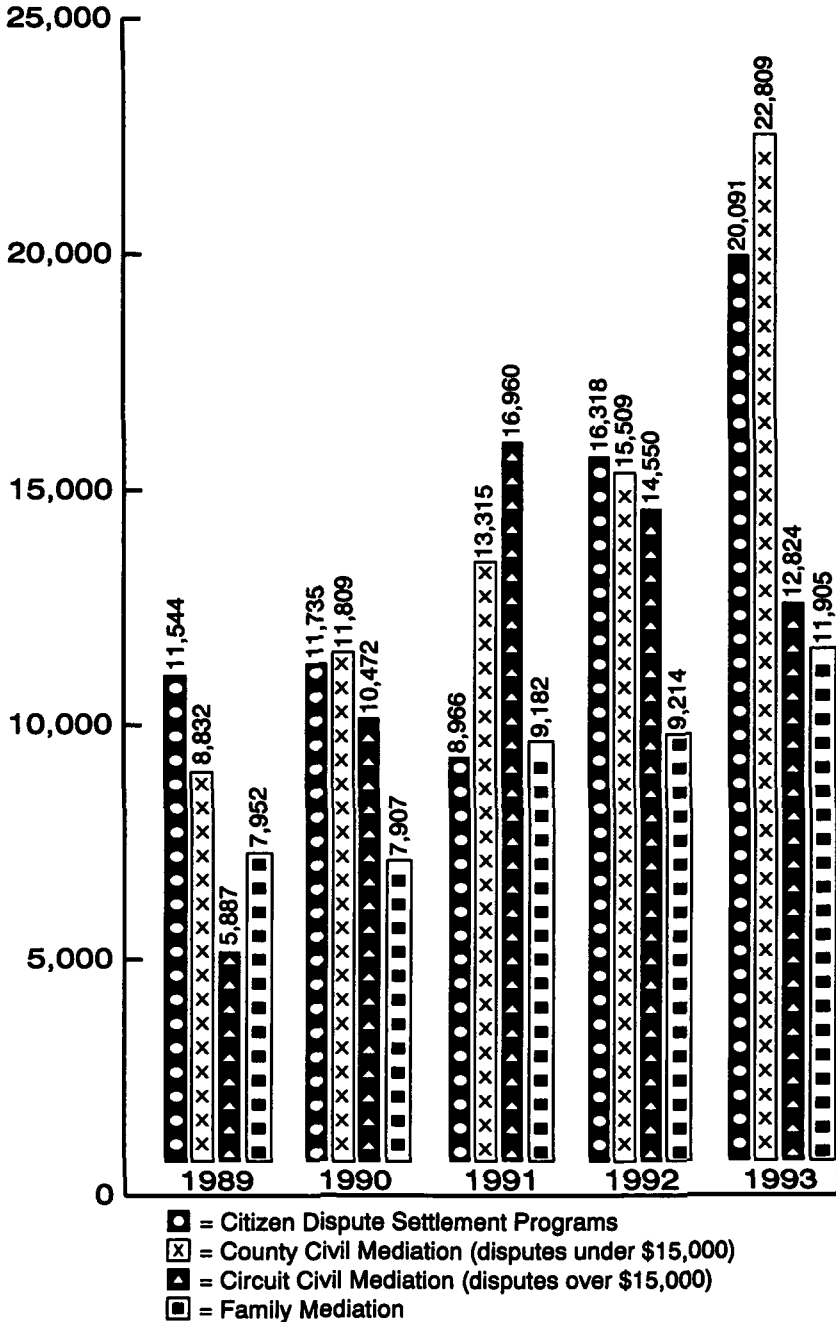
159. *Id.*

160. MASON AND PRESS, *supra* note 58, at v.

161. 1993 Survey of General and Outside Counsels, *supra* note 73, at 16.

Figure 1

Total Florida Court-Ordered Mediation Sessions



Source: Florida Dispute Resolution Center, 1994

VII. THE WISCONSIN ADR LAW AND LIBEL DISPUTE RESOLUTION

Several settlement procedures in Wisconsin's ADR law provide viable resolution alternatives to libel litigants. The focus group,¹⁶² when applied to libel cases, could function in a similar manner to that of a news council. A panel composed of citizens and journalists would hear the parties' abbreviated presentation of their case and offer an advisory opinion about how the dispute should be resolved.¹⁶³ For example, the panel could recommend that the news organization run a retraction or give the plaintiff time or space to respond to the article. Such an outcome may be satisfactory to the plaintiff, who is most likely primarily concerned with restoring her or his reputation. The news organization may also be pleased with the outcome given it has protected its First Amendment rights, avoided potential damages, and curbed its legal costs. On the other hand, after hearing the presentations the panel may determine that the news organization did nothing wrong. The neutral panel may be able to more easily persuade the plaintiff that her or his charge is without merit than could the news organization or its counselor. The mini-trial¹⁶⁴ option would function in much the same manner.

The parties may opt for mediation if they prefer input from a knowledgeable neutral, such as a former judge, a law or mass communications professor, or an attorney with a thorough understanding of libel law. In such a procedure, the mediator would discuss the merits of the case, the applications of libel law and cost considerations. Monetary and/or non-monetary settlements could be reached privately at a fraction of the cost of protracted litigation. The same procedure could be adopted in a moderated settlement conference.¹⁶⁵

In limited cases, where finality may be a consideration, the litigants might select binding arbitration before a respected, qualified neutral party (i.e. an eminent former judge or attorney) or arbitration panel to settle the case. This option may be especially attractive to the news organization that could argue its case before a legal expert not likely to be influenced by the emotional aspects of a libel case to which juries often succumb.¹⁶⁶ If for some reason the news organization lost, a dangerous precedent that might have been set through traditional litigation was avoided. Further, the lengthy and costly appeals process is almost always eliminated.

The findings in a non-binding arbitration hearing may impact upon one or both party's decisions to continue the litigation process. The hearing may provide each party with insight into its own case as well as its adversary's. If the non-

162. Fullin, *supra* note 44, at 47.

163. *Id.*

164. *Id.*

165. *Id.*

166. Marley, *supra* note 3, at 26.

binding arbitration produces a resolution to the matter, then certainly both the plaintiff and news organization benefitted.

Unlike the Florida court-annexed program, the Wisconsin law will not result in a court-run settlement program.¹⁶⁷ When a judge orders the parties to pursue ADR, the litigants will select one of the settlement procedures as outlined in the ADR law, and must agree upon an ADR provider.¹⁶⁸ The litigants equally share the provider's cost. If the parties cannot voluntarily agree upon a procedure or a provider, then the court will make the selections for them and direct payment of that provider's fees and expenses.¹⁶⁹ The Wisconsin law, however, does not require any public financing.

It is critical to note that although the court can order the parties to ADR, it cannot compel them to settle the dispute. The goal of the program certainly is to "promote the speedy determination of litigation upon its merits" as outlined in state statutes governing the role of the Wisconsin Judicial Council.¹⁷⁰ However, the implementation of the law will not result in the infringement of the First Amendment rights of the news media. The court may only compel the parties to attempt settlement, but it has no authority to impose a settlement upon the parties. If a settlement is not reached during the ADR process, the parties may then continue on toward trial.

VIII. CONCLUSION

Clearly, libel law as it stands does not address the real concerns of plaintiffs who feel they were victimized by the news media. As a result, plaintiffs must engage in a costly, time-consuming litigation process in an effort to repair their reputations and clear their names. Likewise, the news media find themselves engaged in a costly, protracted litigation process where they not only risk the potential of paying tremendous damages to the plaintiff, but will likely spend large sums of money in a winning or losing effort.

ADR offers libel litigants a chance to resolve their differences in a fair, timely and cost-effective manner. The disputants can select an ADR procedure that best meets their individual needs. The dispute is resolved privately out of the public spotlight, and potential further damage to each party's reputation is minimized.

Social science research suggests the advantages of ADR that its proponents argue are indeed real and appreciated.¹⁷¹ The Wisconsin court-ordered system will introduce ADR procedures to libel litigants. It will give them a viable alternative to the status quo. And in the future, the Wisconsin court-ordered

167. Fullin, *supra* note 44, at 46-47.

168. *Id.* at 47.

169. *Id.* at 47-48.

170. WIS. STAT. § 758.13(2a) (1977).

171. 1993 *Survey of General and Outside Counsels*, *supra* note 73, at 8, 10, 14; *see also National Survey Findings On: Public Opinion Towards Dispute Resolution*, *supra* note 79.

system will likely serve as a catalyst for potential libel litigants to voluntarily attempt settlement of their disputes before suit is even filed.