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COMMENT

Public Health and Safety Hazards Versus Confidentiality:

Expanding the Mediation Door of the Multi-Door Courthouse

*Arlin R. Thrush*¹

I. INTRODUCTION

A. The Growth of Alternative Forms of Dispute Resolution

The public's interest in and use of alternative forms of dispute resolution has been in existence for hundreds of years.² However, today's rejuvenated interest in alternative forms of dispute resolution can be traced to the late sixties.³ Since that time, alternative forms of dispute resolution have been labeled the wave of the future. The growth of alternative forms of dispute resolution can be seen in the tremendous increase in programs offering dispute resolution services. In 1980, there were approximately one hundred dispute resolution programs located

1. The author is currently a third year law student at the Cumberland School of Law at Samford University in Birmingham, Alabama. He is a Certified Public Accountant licensed with the State of Maryland, an active member of the American Institute of Certified Public Accountants and the Maryland Association of Certified Public Accountants, and he spent five years working as a Certified Public Accountant in the Washington, D.C. area before entering law school at the Cumberland School of Law. This project originated from work conducted during a summer position with the American Bar Association's Section on Dispute Resolution. Special thanks go to Larry Ray, Director of the Section on Dispute Resolution, Prue Kestner, Assistant Director to the Section on Dispute Resolution, and Professor Henry Strickland of the Cumberland School of Law for their help and assistance in this project and their comments on early drafts of this project.

2. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 3 (1985). Arbitration has been used in the resolution of commercial disputes for hundreds of years, and mediation can be traced to the religious communities of colonial New England. *Id.* at 3.

3. *Id.* at 3.

throughout the United States.⁴ Today, there are over four hundred dispute resolution programs available to settle disputes.⁵

B. Overview of Why Parties Have Turned to ADR Mechanisms

Why have parties to legal disputes turned to alternative forms of dispute resolution? There are at least six chief motivational aspects to this phenomenon. First, concerns about chronic delay in the judicial system have forced parties to disputes to locate other forums for settling their disputes.⁶ Second, concerns about the rising costs associated with litigating a dispute have also encouraged parties to seek other forums for settling their disputes.⁷ The third motivational aspect is that courts are ill-equipped to handle certain types of disputes.⁸ The fourth motivational aspect is that alternative dispute resolution programs have proven to be a successful substitute for the dispute settlement roles that extended families, neighborhoods, churches and communities provided in the past.⁹ The fifth motivational aspect is that alternative dispute resolution programs are better equipped to deal with a whole conflict rather than a particular legal infraction that

4. AMERICAN BAR ASSOCIATION, THE SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, DISPUTE RESOLUTION PROGRAM DIRECTORY (1993).

5. *Id.*

6. See Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future. . . Today*, 1 OHIO ST. J. ON DISP. RESOL. 7, 12 (1985). "Since 1960, federal case filings have increased 900 percent in the courts of appeals and 250 percent in the district courts." Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (Dec.-Jan. 1993). "Gridlock is particularly acute in metropolitan jurisdictions, where federal judges are having to delay civil trials for months, and even years, to accommodate criminal trial schedules in accordance with the Speedy Trial Act." *Id.* at 185. See also 18 U.S.C. 3161-74 (1988); see generally REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS, Vol. I, 27-30 (1990); Haig, *Judicial Vacancies and Procedural Reform*, N.Y. LAW J., June 15, 1992, at 2. State courts have also experienced this problem. The nation's largest court district, the Los Angeles Superior Court, has seen the median time to trial rise from an average of six months in 1920 to over forty months in 1981. THE INSTITUTE FOR CIVIL JUSTICE, ANNUAL REPORT, DOMESTIC RESEARCH DIVISION OF RAND 28-29 (April 1, 1992 - March 31, 1993). By the late 1980's, the time from filing to trial in Los Angeles Superior Court lengthened to fifty-nine months. *Id.* at 29.

7. Ray & Clare, *supra* note 6, at 88. In 1985, the total cost of tort lawsuits in state and federal courts of general jurisdiction totaled an estimated twenty-nine to thirty-six billion dollars. THE INSTITUTE FOR CIVIL JUSTICE, *supra* note 6, at 22. Approximately sixteen to nineteen billion dollars of this went to transaction costs resulting in net compensation to plaintiffs of fourteen to sixteen billion dollars. *Id.* at 22.

8. Ray & Clare, *supra* note 6, at 12-13. In addition, "Society's misperception of the role of the courts has contributed to a dissatisfaction with the legal system, and consequently, to the growth of alternative dispute resolution programs." *Id.* at 13. "Most large city prosecutors in the nation are confronted with scores of citizens each day who register what the citizens believe are criminal charges." *Id.* "In Philadelphia, about forty people bring complaints to the district attorney each day." *Id.* "On the average, only four leave with a filed charge." *Id.* This is attributed to the fact that most agencies do not view their role as comprehensive complaint handlers. *Id.*

9. *Id.* at 13. For example, "a mother might have intervened in a dispute involving siblings, or a priest might have aided communication between parish members." *Id.* at 14.

may be symptomatic of a much larger problem.¹⁰ Finally the sixth, and perhaps the most important motivational aspect, as it applies to the concerns addressed in this Article, is that the confidentiality granted is attractive to the parties to a dispute.

Despite the tremendous growth in society's interest in alternative forms of dispute resolution and the subsequent explosion in the number of programs offering dispute resolution services, accessibility to these programs remains a problem. Judge Earl Johnson of the California Court of Appeals addressed the problem of accessibility at the National Conference on Minor Dispute Resolution, which was held in New York City in May of 1977.¹¹ Judge Johnson stated:

At present, it is almost accidental if community members find their way to an appropriate forum other than the regular courts. Since these forums are operated by a hodgepodge of local government agencies, neighborhood organizations and trade associations, citizens must be very knowledgeable about community resources to locate the right forum for their particular dispute.¹²

C. The Birth of the Multi-Door Courthouse

In response to the problem of accessibility, Professor Frank Sander of Harvard Law School developed the "Multi-Door Courthouse Dispute Resolution Center."¹³ The ideal model proposed by Professor Sander included a center offering sophisticated and sensitive intake services along with an array of dispute resolution services under one roof.¹⁴ A screening unit at the center would "diagnose" citizen disputes, then refer the disputants to the appropriate "door" for handling the case.¹⁵

In 1985, the American Bar Association's Standing Committee on Dispute Resolution transformed this idea into practice with the development of three experimental centers.¹⁶ The centers were located in Washington, D.C., Tulsa, Oklahoma and Houston, Texas.¹⁷ In February 1989, the experimental center in Washington, D.C. was declared a success and designated as a full operating

10. *Id.* at 13.

11. *Id.* at 8. Professor Johnson was a member of the Special Committee on Resolution of Minor Disputes from 1976-1981. He was subsequently appointed Associate Justice on the State of California Court of Appeals, Second Appellate District, Division Seven, in Los Angeles. He has also been an advisor to the Special Committee on Dispute Resolution. *Id.* at 8-9 n.7.

12. *Id.* at 8.

13. *Id.* at 9.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 17.

Division of the Court by Chief Judge Fred B. Ugast, of the District of Columbia Superior Court.¹⁸

D. Overview of the D.C. Multi-Door Courthouse Concept

The Multi-Door Courthouse involves direct hands-on service to assist in determining the most appropriate dispute resolution mechanism available to resolve a citizen's problem or dispute.¹⁹ As stated earlier, the ideal Multi-Door Courthouse model would include a center offering sophisticated and sensitive intake services along with an array of dispute resolution services under one roof.²⁰ The chart on the following page visualizes the Multi-Door Courthouse concept.²¹

The Dispute-Complaint Diagnosis Center is at the center of the Multi-Door Courthouse. It is here that the Multi-Door Courthouse in the District of Columbia matches disputes with the appropriate ADR mechanism. This is accomplished by employing the "Case Classification System." The Case Classification System requires each party, upon case filing, to receive a Case Classification Form (see Appendix A). Each party must complete and submit the form to the Multi-Door Division of the Superior Court. The Division collects the responses and, for each case, submits an ADR recommendation to the responsible Judge for use at the case scheduling conference. At the scheduling conference the Judge informs the parties of the ADR recommendation.

The Case Classification Form produces an ADR recommendation by employing one of two techniques. The first is a categorical assessment (by virtue of case type some cases will not be referred to ADR, or will always be referred to a specific ADR mechanism). Part B of the Case Classification Form solicits the necessary information to fashion a categorical assessment while Part A solicits general information concerning the dispute. For example, all automobile cases (Question A in Part B) will automatically be referred to arbitration. If a case does not fit into one of the Part B categories, the questions in Parts C and D are used to produce an ADR recommendation based on salient characteristics of the case (Part C) and each party's stated goals in the processing of the case (Part D). The final scores are compared, and the mechanism with the highest score is recommended to the Judge.²²

18. THE SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, ABA, MULTI-DOOR RESOLUTION DIVISION SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ALTERNATIVE DISPUTE RESOLUTION PROGRAMS 1 (1993).

19. THE STANDING COMMITTEE ON DISPUTE RESOLUTION, ABA, CHRONOLOGICAL OVERVIEW DEVELOPMENT OF HOUSTON'S MULTI-DOOR KNOWN AS THE DISPUTE RESOLUTION CENTER, THE MULTI-DOOR EXPERIENCE: DISPUTE RESOLUTION AND THE COURTHOUSE OF THE FUTURE II-53 (1988).

20. Ray & Clare, *supra* note 6, at 9.

21. *Id.* at 10.

22. For a brief description of the ADR recommendation process based on salient characteristics of the case and each party's stated goals in the processing of the case see Appendix B.

Police Prosecutors Public Defenders Courts, Magistrates & Clerks
Bar Associations Consumer Agencies City & County Officials
Community Groups & Citizens Social Service Agencies

REFERRALS FROM

DISPUTE-COMPLAINT DIAGNOSIS CENTER

(Screening, Intake and Referrals)

REFERRALS TO

Social Services Mediation Conciliation Arbitration
Administrative Hearings Ombudsperson Fact Finding Adjudication

Further Court Processing

or

Ongoing Social Services

E. *Emerging Problems Within the Multi-Door Courthouse*

However, as the Multi-Door Courthouse develops and matures into a reputable institution, potential problems emerge.²³ Perhaps, one of the most critical is the conflict between public health and safety concerns, and the confidentiality afforded parties to a dispute. This Article will address the problems associated with mediating disputes within the Multi-Door Courthouse that involve public health or safety hazards. The Article will begin by discussing the increased use of sealed settlement agreements and sealed records in the judicial system and then present the more common problems associated with granting confidentiality in cases involving public health or safety hazards. The Article will then present a growing trend in the courts to challenge the sealing of settlement agreements and protective orders that are contradictory to public health and safety concerns and a trend to open up discovery proceedings and discovery materials to nonparties to a suit. The Article will then focus on the effects these trends may have on the Multi-Door Courthouse and will conclude with a proposed modification to the mediation door of the Multi-Door Courthouse in order to protect the public's interest in safety while protecting the integrity of the Multi-Door Courthouse.²⁴

II. CONFIDENTIALITY AND THE SETTLEMENT OF LAWSUITS

A. *Protective Orders, Sealing Orders and Settlement Agreements*

Parties to a dispute have utilized a variety of methods to shield information from public disclosure while taking advantage of the courts to resolve disputes.²⁵ The three principle methods currently used are: (1) protective orders for pre-trial discovery materials under Rule 26(c) of the Federal Rules of Civil Procedure; (2) judicial sealing orders that apply to the entire record of a case;²⁶ and (3)

23. Although this article will be limited to addressing potential problems associated with the mediation door of the Multi-Door Courthouse, these problems are by no means limited to the mediation door, nor are they limited to the Multi-Door Courthouse. These problems have emerged throughout the entire field of dispute resolution.

24. The author of this Article recognizes there are many types of disputes that may reach the Multi-Door Courthouse involving a public health or safety hazard. However, this Article is limited to a discussion of disputes involving products liability or medical malpractice disputes. For example, a defectively designed product that has the potential of injuring a large segment of the public or a medical malpractice suit questioning a medical professionals' competency.

25. Brian T. FitzGerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381 (Winter, 1990).

26. *Id.* at 381. "Total sealing orders remove from public view the identity of the parties, all pre-trial discovery material, the contents of the pleadings, trial testimony, trial exhibits and the ultimate resolution of the case." *Id.* "The courts merely enter the sealed cases on their docket sheets as *Sealed v. Sealed.*" *Id.*

confidential settlements that the parties negotiate, often with minimal involvement by the court.²⁷

The sealing of court records and the enforcement of covenants of silence are becoming increasingly common practices in the settlement of civil lawsuits.²⁸ Defendants typically request confidentiality to avoid disclosure of sensitive or potentially damaging information, while plaintiffs' attorneys may agree to confidentiality in an effort to obtain larger settlements for their clients.²⁹ The reduction of transaction costs associated with settling a dispute as opposed to litigating a dispute is yet another reason attorneys may agree to a cloak of secrecy. In Dallas County, Texas, over two hundred sealing orders were entered in non-child-related cases between 1980 and 1987, some of which involved allegations of fatally defective products, environmental contamination or professional incompetence.³⁰

B. Problems Created by Granting Confidentiality

Although the terms of a settlement have traditionally been considered a private matter between the parties,³¹ different concerns surface when the judicial system participates in the secrecy by sealing the file and ordering the parties not to discuss the case except among themselves.³² This form of confidentiality is sometimes viewed as being antithetic to the very foundation of our legal system.³³

Our legal system is founded on the premise that secret justice is inherently suspect.³⁴ When cases presented for resolution in the public forum are surrounded with secrecy there is a natural tendency to question whether justice is

27. *Id.* at 381.

28. Anne-Therese Bechamps, *Sealed Out-Of-Court Settlements: When Does The Public Have A Right To Know?*, 66 NOTRE DAME L. REV. 117, 117 (1990). See also FitzGerald, *supra* note 25, at 381; Russ Herman, *No More Dirty Secrets in the Courts*, ATLA ADVOCATE, Oct. 1989, at 4. But see John F. Rooney, *Issue of Sealed Files, Secrecy in the Courts Won't Be Swept Under the Rug*, 1 CHI. DAILY L. BULL., Apr. 20 1991, at 1 (reporting that judges feel that comparatively few sealing orders are issued).

29. Bechamps, *supra* note 28, at 117.

30. Lloyd Doggett & Michael J. Mucchetti, *Public Access To Public Courts: Discouraging Secrecy In The Public Interest*, 69 TEX. L. REV. 643, 644 (February, 1991). See also McGonigle, *Judge Says Privacy Can Help Settle Suits*, DALLAS MORNING NEWS, Nov. 22, 1987, at A24, col. 1.

31. Bechamps, *supra* note 28, at 117. See also *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981); *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).

32. Bechamps, *supra* note 28, at 117.

33. See, e.g., *Mary R. v. B. & R. Corp.*, 149 Cal. App. 3d 308, 316, 196 Cal. Rptr. 871, 876 (1983) (holding that a stipulated order of confidentiality is contrary to public policy, contrary to the ideal that full and impartial justice shall be secured in every matter); *Ex parte Drawbaugh*, 2 App. D.C. 404, 407-08 (1894) (stating that any attempt to maintain secret court records is inconsistent with the common understanding of what belongs to a public court of record to which all persons have the right of access).

34. Charles J. Reed, *Confidentiality and the Courts: Secrecy's Threat to Public Safety*, 76 JUDICATURE 308 (Apr-May 1993).

being equitably administered.³⁵ In other words, our legal system places a premium on public accountability when it comes to resolving disputes between members of our own society. The problems created by granting confidentiality were summarized by Judge H. Lee Sarokin in his article entitled *Justice Rushed Is Justice Ruined*. Judge Sarokin wrote: "Judicial decisions serve two main functions. They resolve the immediate dispute between the parties and they often provide guidelines for future conduct. A settlement denies that opportunity."³⁶ Judge Sarokin went on to say that some settlements are consummated for the very purpose of precluding the establishment of requirements for future conduct or for precluding the establishment of precedent that might affect other cases.³⁷ Some examples of Judge Sarokin's concerns include the payment in a single case to: (1) conceal discriminatory practices in a large company; (2) conceal the existence of a dangerous product used by many others; (3) conceal a patent's invalidity, which if known would promote competition; or (4) conceal the existence of corrupt or fraudulent practices in business or government.³⁸ In other words, in many instances the public's interests are disserved by settlement.³⁹ This is especially true in cases involving life-threatening dangers known to a product manufacturer but kept secret from the public through a confidentiality agreement.⁴⁰

Confidentiality agreements, whether entered into upon a court order or voluntarily, have also prevented law enforcement and regulatory agencies, as well as the public, from acquiring critical information.⁴¹ As New York Attorney General Robert Abrams stated, "Sealed settlements make it very difficult for government officials to determine links between environmental exposure to toxic chemicals and health effects It is important that, in the future, when judges are asked to approve secret settlements, they not seal records and data that may have an impact on the public health and welfare."⁴²

35. Bechamps, *supra* note 28, at 156.

36. Judge H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431, 433 (Spring 1986).

37. *Id.* at 433.

38. *Id.*

39. *Id.* See also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (May 1984); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25 (Vol. 1).

40. Reed, *supra*, note 34, at 308. See also Weiser, *Forging a 'Covenant of Silence'*, THE WASHINGTON POST, March 13, 1989, at A1, col. 1.

41. Doggett & Mucchetti, *supra* note 30, at 649.

42. *Id.* at 649. See also Freeman & Jenner, *Just Say No: Resisting Protective Orders*, TRIAL, Mar. 1990, at 66, 70.

C. *The Legislative Response to These Problems*

Since the late 1980's, there has been a national movement to limit the availability of protective orders covering documents and information produced during discovery, particularly in products liability actions.⁴³ This translates into an ever-expanding movement to require the disclosure of settlements dealing with public health and safety hazards.⁴⁴ To that end, more and more states are passing new laws requiring disclosure of settlements, or revising their rules of procedure to modify common practices involving confidentiality of discovery, protective orders and sealing of litigation records.⁴⁵

For example, in 1990, the Texas Supreme Court adopted Rule 76(a) of the Texas Rules of Civil Procedure.⁴⁶ Rule 76(a) recognizes that all court records are entitled to the presumption of openness, which can be overcome only by a showing of specific, serious and substantial interest in sealing such records that would outweigh any adverse effect on health and safety.⁴⁷ Under the Texas rule, court records include all documents filed in court as well as unfiled discovery material and settlement agreements.⁴⁸

Florida passed a statute similar to the Texas rule. Florida's statute is known as the "Sunshine in Litigation Act."⁴⁹ The Act forbids courts from entering an order that would conceal a "public hazard," defined as a "device, instrument, person, procedure, product or a condition of a device, instrument, person, procedure or product that has caused and is likely to cause injury."⁵⁰ The Act also makes any agreement to conceal a public hazard unenforceable and grants standing to the public and news media to contest court orders or agreements that would conceal public hazards.⁵¹

North Carolina and Virginia have also passed laws toughening the rules allowing the sealing of court documents.⁵² Additionally, for every state that has passed a "secrecy" statute there is a handful with such a measure now pending in the legislature.⁵³ The number of state legislatures addressing the secrecy issue

43. Richard A. Rosen et. al., *New Developments In State Protective Order Legislation And Procedural Rules*, ALI-ABA COURSE OF STUDY 301, 303 (May 20, 1993).

44. Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 ALTERNATIVES TO THE HIGH COST OF LITIGATION 85 (June 1993).

45. *Id.* at 85.

46. *Id.* at 86. TEX. R. CIV. P. 76(a).

47. Reed, *supra* note 34, at 310.

48. *Id.*

49. *Id.* See also FLA. STAT. ch. 69.081 (1990).

50. Reed, *supra* note 34, at 310.

51. *Id.*

52. *Open Secrets: Courts Rejecting Routine Sealings of Civil Cases*, 9 ALTERNATIVES TO THE HIGH COST OF LITIGATION 66 (May 1991). However, the North Carolina law only prohibits the State from participating in sealed settlements. *Id.*

53. *Id.* In California lawmakers are considering a bill to curb sealing of papers in cases involving public hazards. *Id.* Bills have or will be introduced as well in Hawaii, New Jersey, Rhode Island, Washington and Wisconsin. *Id.*

is a signal to the judiciary that the public policy supporting confidentiality must give way to the public's "right to know" in cases which signal danger to those not privy to the lawsuit.⁵⁴

D. The Judicial Response to These Problems

There is a lengthening line of cases granting greater access to discovery materials to the public, the press and parties in other cases.⁵⁵ These discovery-access cases span the gamut of issues, ranging from a civil RICO suit implicating the Iran-Contra affair,⁵⁶ to the landmark Agent Orange case,⁵⁷ to some tobacco product-liability litigation.⁵⁸ In light of these trends, it appears that mediation will become even more attractive to parties concerned with maintaining confidentiality.

III. THE NATIONAL MOVEMENT AND THE MULTI-DOOR COURTHOUSE

The Multi-Door Courthouse and mediation are especially susceptible to the tension created from the clash of confidentiality and public accountability. Using the Multi-Door Courthouse as a vehicle to conceal information when its release would avert danger to the public's health and safety, will sacrifice the public's interest in accountability and jeopardize confidence in the integrity of the Multi-

54. *No Sealing?*, 8 ALTERNATIVES TO THE HIGH COST OF LITIGATION 160 (October 1990).

55. See *Stone v. University of Md. Medical Sys. Corp.*, 855 F.2d 178, 182 (4th Cir. 1988) (holding that the public's right of access to judicial records and documents may be abrogated only in unusual circumstances); *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983) (holding that a presumption of access must be indulged to the fullest extent not incompatible with the reasons for closure); *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945, 949 (2d Cir. 1980) (holding that the existence of the common law right to inspect and copy judicial records is beyond dispute); *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 506 (D. Colo. 1902) (rejecting an agreement between the parties to remove testimony and exhibits on file in the clerk's office and noting that the inspecting and taking copies of public records is as old in the law as the records are old); *Pantos v. City & County of San Francisco*, 151 Cal. App. 3d 258, 263, 198 Cal. Rptr. 489, 492 (1984) (holding that judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons); *C.L. v. Edson*, 140 Wis. 2d 168, 182, 409 N.W.2d 417, 422 (Wis. Ct. App. 1987) (finding a compelling public interest in disclosing sealed documents although private individuals were involved and stressing that public records and court documents are subject to a strong presumption in favor of disclosure).

56. In that suit U.S. District Judge Joyce Hens Green of Washington, D.C. refused to issue a protective order barring the press from attending the deposition of a witness. *Avirgan v. Hull*, 118 F.R.D. 252 (D.D.C. 1987).

57. The massive amount of discovery in the Agent Orange class action was kept sealed throughout the protracted case. Afterwards, when some class members wanted to unseal the documents for dissemination to the press and public the Second Circuit largely allowed it. *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145 (2nd Cir., 1987) *cert. denied*, *Dow Chemical Co. v. Ryan*, 484 U.S. 953 (1987).

58. In a New Jersey federal court, the Third Circuit allowed plaintiffs to distribute discovery documents with some restrictions. *Liggett Group Inc. v. Cipollone*, 484 U.S. 976 (1987).

Door Courthouse. The wisdom of Justice Brandeis wisdom still rings true today: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁵⁹ As stated earlier, confidentiality is one of the main reasons parties to a dispute turn to alternative forms of dispute resolution, which includes mediation.

There are many arguments in support of maintaining confidentiality within the mediation context. However, the more common arguments are as follows:

1. Granting confidentiality encourages the use of mediation and encourages openness and frankness within mediation sessions.⁶⁰ Without a guarantee of confidentiality it would be difficult to develop an atmosphere of openness necessary to encourage disputants to reveal the underlying cause of the dispute.⁶¹ This openness and frankness is what stimulates settlement.⁶²
2. Without confidentiality, cooperation would be limited by a party's fears that any statement made or information provided in the mediation session would be used to that party's disadvantage in subsequent civil or criminal proceedings.⁶³
3. Mediators who testify or convey information to investigative agencies might be viewed by potential mediation participants as biased and thereby rendered ineffective.⁶⁴ Part of the success of a mediation program is based on the credibility and neutrality of both the program and the individual mediators.⁶⁵ The mediator must be neutral in order

59. Doggett & Mucchetti, *supra* note 30, at 644. See L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92, (1914).

60. NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION/LAW/POLICY/PRACTICE 99 (1989). See also United States v. Gullo, 672 F. Supp. 99 (W.D.N.Y. 1987).

61. Lawrence Freedman, Christopher Haile & Howard Bookstaff, *Confidentiality in Mediation: A Practitioner's Guide*, ABA PUB. SERVICES DIV. OF SPECIAL COMM. ON DISPUTE RESOLUTION 80 (1986).

62. ROGERS & MCEWEN, *supra* note 60, at 99. In *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2nd Cir. 1979), the Court of Appeals for the Second Circuit commented:

If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high stakes game than adversaries. attempting to arrive at a just solution of a civil dispute.

Id. at 99.

63. Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181, 197 (1981).

64. ROGERS & MCEWEN, *supra* note 60, at 99. See also *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985); *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980).

65. Friedman, *supra* note 63, at 198.

to make constructive suggestions concerning behavior and attitudes of the parties based on their responses and expressions in the session.⁶⁶

4. Mediators, especially volunteers, might be deterred from mediating if there is the possibility of subsequent subpoenas to testify.⁶⁷
5. In some instances, confidentiality is desired to protect against the dissemination of proprietary or competitive information. This is a danger present in a wide range of litigation matters, including trade secret and patent disputes, restrictive covenant litigation and customer-supplier disagreements.⁶⁸

A. Authorities Granting Confidentiality In Mediation

There are several authoritative sources granting confidentiality in the mediation context. They include: (1) the common law; (2) the Federal Rules of Evidence; and (3) various state statutory provisions. A review of these authorities will help shed light on the underlying policy that helped create them in the first place - the encouragement of openness and frankness within the negotiating context. The earliest authority behind the granting of confidentiality in settlement negotiations was the common law. However, at common law, only the actual offer of settlement was excluded from evidence in a trial.⁶⁹ "Statements of fact" were admissible unless they were stated hypothetically, expressly made "without prejudice" or so intertwined with an offer or acceptance that it could not have been understood without reading the two together.⁷⁰

However, this traditional doctrine of not excluding statements of facts discouraged the freedom of communication in attempting to compromise.⁷¹ As a result, the common law rule of excluding only the actual offer of settlement was expanded by the Federal Rules of Evidence.⁷² Federal Rule of Evidence 408 (Rule 408) provides that an offer of compromise shall be inadmissible to show liability or invalidity of a claim.⁷³ Rule 408 extended the exclusionary protection

66. *Id.* at 198.

67. Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DIS. RES. 37, 38 (1986).

68. James J. Restivo, Jr. & Debra A. Mangus, *Special Supplement - Confidentiality in Alternative Dispute Resolution*, 2 ALTERNATIVES TO THE HIGH COST OF LITIGATION 5 (May, 1984).

69. Kent L. Brown, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307, 312.

70. JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE, section 266, at 466 (4th ed. 1992).

71. *Id.*

72. Brown, *supra* note 69, at 312.

73. Federal Rule of Evidence 408 states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or

to include all statements made in compromise negotiations.⁷⁴ Compromise negotiations have been held to include settlement agreements, whether made during a mini-trial, mediation or elsewhere.⁷⁵

While affording substantially more confidentiality than the common law, Rule 408 is far from a guarantee of complete confidentiality of the information presented in a mediation session.⁷⁶ For example, courts have ruled that statements can be outside the scope of Rule 408 because they were sufficiently unrelated to settlement;⁷⁷ the rule's scope is limited to compromise discussions about a claim that is in dispute as to validity or amount;⁷⁸ Rule 408 excludes from protection materials "otherwise discoverable;"⁷⁹ and finally, a major gap in the protection against admissibility under Rule 408 is that the evidence is inadmissible only if used to prove "liability for or invalidity of the claim or its amount."⁸⁰ In addition to the evidentiary loopholes referred to above, Rule 408 fails to bar public disclosure of the substance of the proceedings by those present at the mediation session.⁸¹

Federal Rule of Evidence 501 (Rule 501) is another authority supporting confidentiality in certain situations. Rule 501 gives the courts the power to grant a common law privilege to the mediation context.⁸² However, no court has extended this privilege to the mediation context without statutory support.⁸³

statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

74. STRONG, ET. AL., *supra* note 70, at 466.

75. ROGERS & MCEWEN, *supra* note 60, at 100-101.

76. Brown, *supra* note 69, at 313.

77. ROGERS & MCEWEN, *supra* note 60, at 105.

78. *Id.* at 106.

79. *Id.* at 107. In other words, this permits a party to use information obtainable through the discovery process even though the same information was revealed during settlement. *Id.*

80. *Id.*

81. Brown, *supra* note 69, at 314. Federal Rule of Criminal Procedure 11(e)(6) is the criminal counterpart to Rule 408. However, Rule 11 only bars evidence of offers to plead guilty.

82. *Id.* at 315. Federal Rule of Evidence 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

83. Brown, *supra* note 69 at 316-317.

In response to the limitations of the Federal Rules of Evidence in guaranteeing complete confidentiality, numerous states have passed statutes granting confidentiality to the mediation context.⁸⁴ These statutes enable the side-stepping of most of the potential pitfalls concerning confidentiality. These state confidentiality statutes appear to be the most effective and viable means available to protect the exchange of information during mediation.⁸⁵

A contract entered into between the parties which stipulates that information disclosed in a mediation session is to remain confidential is yet another means of avoiding some of the potential pitfalls concerning confidentiality. Although the effectiveness of confidentiality agreements is uncertain, these contract situations appear to be increasing in number.⁸⁶

In short, the Federal Rules of Evidence have attempted to assure more confidentiality in settlement negotiations, including the mediation context, than afforded by common law. However, the limited effectiveness of the Federal Rules of Evidence, as previously stated, has led numerous states to adopt statutes granting confidentiality to the mediation context. Parties to a dispute have also attempted to limit the shortcomings of the Federal Rules of Evidence by entering into contractual agreements forbidding disclosure of information discussed in the mediation context.

B. Confidentiality And The Public's Health And Safety

The ill-effects of confidentiality are readily visible by reviewing a recent case brought before a jury in early 1993. In that case, Shannon Mosely, a 17-year-old boy, was driving a 1985 General Motors (GM) pickup truck near Atlanta, Georgia. As he passed through an intersection, he was struck broadside by another vehicle. The impact of the collision caused his truck to burst into flames, burning him to death. An autopsy revealed there were no other serious injuries sustained in the collision.

84. *Id.* at 317. The following fourteen states have confidentiality statutes or court rules concerning confidentiality: Arkansas; California; Colorado; Connecticut; Iowa; Florida; Michigan; Montana; New Hampshire; New York; New Jersey; North Carolina; Oklahoma; and Oregon.

85. *Id.*

86. *Id.* at 320. See also *Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1 (Minn. Ct. App. 1985) (finding a compelling need to protect the confidentiality of labor mediations between police officers and the city); *Illinois Education Labor Relations Board v. Homer Community School District No. 208*, 132 Ill. 2d 29, 547 N.E.2d 182 (Ill. 1989) (finding the existence of a strong public policy protecting the confidentiality of labor negotiating strategy sessions); *People v. Snyder*, 129 Misc. 2d 137, 492 N.Y.S.2d 890 (N.Y. Sup. Ct. 1985) (holding that the public policy of the state was to insure a mediation atmosphere free from restraint and intimidation by guaranteeing absolute confidentiality); *Byrd v. State*, 186 Ga. App. 446, 367 S.E. 2d 300 (Ga. App. 1988) (concluding that confidentiality was essential to the integrity of the mediation process); *Minnesota Education Association v. Bennett*, 321 N.W.2d 395 (Minn. 1982) (holding that a statute authorizing confidential mediation sessions permitted a private caucus between a school board and an employee of the school district notwithstanding the open meetings law).

Shannon's pickup was one of nine million similar vehicles made by GM between 1973 and 1987. The fuel system of Shannon's truck was designed so that the two gas tanks were placed on each side of the truck outside the frame rails. According to testimony during a trial brought by Shannon's family, GM had been aware of hundreds of fuel-fed fires in its trucks since the late 1970s. The plaintiffs alleged at trial that the fires were caused by GM placing the tanks outside the frame of the trucks. The plaintiffs further alleged that the tanks were susceptible to crushing and rupturing in a side impact. There were internal crash test reports introduced during the trial revealing that GM trucks using the side-saddle fuel tank design were three to four times more likely to burst into flames than trucks where the tanks were located inside the frame. Even though GM had settled numerous cases involving death caused by this design, the reports and crash test results revealing this extraordinary safety hazard were kept secret from the public until this case was brought to trial. Court-sanctioned confidentiality agreements and protective orders had prevented access to this critical information. On February 5, 1993, an Atlanta jury returned a \$101 million verdict against GM. The verdict was intended to deter and punish GM for what the jury found to be an intentional concealment of a safety hazard.⁸⁷

A research project conducted by the Institute for Civil Justice has concluded that the number of complex, high-stakes cases typified by product liability suits, such as the GM case, and medical malpractice suits, are increasing dramatically.⁸⁸ The incidence of secrecy in complex, high-stakes litigation has increased dramatically as well.⁸⁹ The incidence of secrecy has increased to the point where stipulated protective orders have become an accepted part of the complex litigation landscape.⁹⁰ The practice of insisting on secrecy is the universal rule among defense lawyers representing manufacturers.⁹¹ "A Defendant's Primer," published by the Defense Research Institute,⁹² instructs counsel representing manufacturers to "routinely seek a protective order limiting dissemination of documents, even though defense counsel can make no special claim of confidentiality."⁹³ However, in this highly complex society, where technological advances in product development blur the consumer's comprehension, it is vital that safety information

87. See *Moseley v. General Motors*, 447 S.E.2d 302 (Ga. 1994). See also *Reed*, *supra* note 34, at 308.

88. THE INSTITUTE FOR CIVIL JUSTICE, *supra* note 6, at 18-20. The research project involved examining cases in two large urban jurisdictions from 1960-1984. *Id.* at 18. The initial database included Cook County, Illinois and San Francisco, California. *Id.* The database was then extended to the rest of California. *Id.*

89. FitzGerald, *supra* note 25, at 381.

90. Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 1 (1983). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981) (stating protective orders have been used so frequently that a degree of standardization is appearing).

91. *Reed*, *supra* note 34, at 308.

92. *Id.* at 308. See Kearney & Benson, *Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer*, 1987 CURRENT ISSUES IN L. & MED. 36, 37.

93. Kearney & Benson, *supra* note 92, at 40.

known to a manufacturer also be available to the public.⁹⁴ Unfortunately, the struggle for competitive advantage has induced manufacturers to sweep product deficiencies under the rug to the consumer's serious detriment.⁹⁵

C. Some Support the Piercing of Confidentiality in the Mediation Context

In response to the dilemma of providing the public with appropriate safety information, some commentators have suggested piercing confidentiality in mediation cases involving public health or safety concerns.⁹⁶ Courts, however, have come down on different sides of this issue for a variety of reasons.⁹⁷ As a result, the current grounds for protecting confidentiality in mediation are uncertain.⁹⁸

Some commentators argue that there are many more cases where confidentiality should be broken.⁹⁹ The Code of the Society of Professionals in Dispute Resolution (SPIDR) states:

Maintaining confidentiality is critical to the dispute resolution process. There may be some types of cases, however, in which confidentiality should not be protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process.¹⁰⁰

However, this standard does not provide a criterion for recognizing which cases fall into the "some types of cases" category. In other words, there does not appear to be a principled way of identifying the types of cases the drafters of the Code envisioned falling into this category.¹⁰¹ It is also unclear when the mediator is under a duty to withdraw from mediation and when the mediator is under a duty

94. Reed, *supra* note 34, at 310. Reed argues that the courts exist to allow our society to function effectively for the well being of its citizens. Therefore, judges who have firsthand knowledge of a danger to the public have a duty to safeguard the public when possible. *Id.* Reed further argues that secrecy violates the policy behind Rule 1 of the Federal Rules of Civil Procedure, which requires that the rules be interpreted to "secure the just, speedy, and inexpensive determination of every action." *Id.*

95. *Id.*

96. Freedman & Prigoff, *supra* note 67, at 39.

97. *Id.*

98. *Id.*

99. Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 25.

100. *Id.* at 29.

101. *Id.*

to report information.¹⁰² This ambiguity allowing a mediator to breach confidentiality in "some types of cases" tends to undermine the mediators neutrality and damage the mediator's integrity. Furthermore, the decision to breach confidentiality depends on the discretion of the mediator handling a particular case. In turn, this leads to inconsistent standards in determining which cases confidentiality should be broken.

As the interest in the Multi-Door Courthouse combine with an increased interest in locating a forum granting confidentiality, it is extremely important that the Multi-Door Courthouse be prepared to effectively and efficiently handle cases involving public health or safety hazards. In order to accomplish this goal, the mediation door of the Multi-Door Courthouse must be expanded. The goal of such an expansion needs to address the public's concern for accountability as well as safeguarding the legitimacy and effectiveness of the Multi-Door Courthouse.

IV. EXPANDING THE MULTI-DOOR COURTHOUSE

Modifications to the Multi-Door Courthouse should begin at the Dispute-Complaint Diagnosis Center, which is located at the center of the Multi-Door Courthouse. The proposed modifications would include: (1) the identification of disputes that may affect the public's health or safety; (2) the determination of whether it is feasible to mediate such a dispute; and (3) the formalization of the mediation process.

A. Identifying Disputes Involving Public Health Or Safety Hazards

The initial step in expanding the mediation door of the Multi-Door Courthouse would require identifying disputes that involve public health or safety hazards. This identification process could be accomplished by modifying the "Case Classification System" currently utilized by the Multi-Door Dispute Resolution Division of the Superior Court of the District of Columbia. Modification would entail expanding Part B of the Case Classification Form (see Appendix A) to include questions as to whether the case involves: (1) a claim for personal injuries or property damages possibly caused by a defectively designed or manufactured product; and (2) an action alleging professional incompetence or medical malpractice. A check in either of these two boxes would categorically refer the case to mediation.

B. Determining The Feasibility Of Mediating The Dispute

After the identification of a dispute involving a public health or safety issue has been achieved, the mediator assigned to the dispute by the courthouse would need to determine the feasibility of mediating the dispute. This would entail a

102. *Id.*

more active role on the part of the mediator in the mediation process as compared to a mediator's traditional role.

The initial step in determining the feasibility of mediating the dispute would require identifying who, if anyone, could adequately represent the public's interest in maintaining consumer safety and protecting the public from incompetent professionals. Some possibilities might include allowing a representative from a consumer interest group or a representative of a federal regulatory agency to be present at the mediation table to ensure that the public's safety is not being jeopardized. The responsibility of determining who should represent the public's concerns needs to be handled by the mediator because parties directly involved in a dispute rarely consider the interests of unrepresented interests voluntarily.

However, identifying a public representative creates the problem of determining which consumer interest group or federal regulatory agency should represent the public's interests. One possible solution to this problem might entail composing guidelines for the mediator to follow in public sector disputes, such as: (1) guidelines for defining the various stakeholding interests in dispute resolution and methods of identifying their legitimate spokespersons; (2) guidelines listing the objectives and standards of conduct to be followed by the mediator; (3) guidelines outlining the prescriptions about the terms of final agreement and the monitoring and implementation of such agreements; (4) guidelines regarding ethical standards to be followed by the mediator; and (5) perhaps requiring lawyer-mediators or mediators trained in the substantive law concerning these issues to preside over the proceedings.

The approach of allowing the mediator to take a more active role in the mediation process is similar to the mediation techniques utilized internationally. In international mediation, the mediator maintains overt control over the proceedings and plays a much more active part in the development of the settlement.

The mediator's more active role should also include the exploration of potential obstacles to the mediation context.¹⁰³ Such obstacles include: exploring issues of fundamental values that cannot be compromised; determining the unwillingness of a party to participate knowing someone other than the parties to the dispute may be present at the mediation table; determining if the dispute involves disagreements over factual information; and determining if there are issues too numerous or too complex to mediate.¹⁰⁴ If any of these obstacles arise during the feasibility analysis, the mediator should determine whether it is possible to structure the mediation sessions so as to minimize these obstacles.¹⁰⁵

It would also be important that the parties acquire some understanding of the implications of the term "consensus" before agreeing to participate.¹⁰⁶ The

103. OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK 100 (January 1990).

104. *Id.*

105. *Id.*

106. *Id.* at 99.

definition of the term "consensus" is key to the success of the negotiations.¹⁰⁷ Generally, in a practical sense, consensus has meant that no interest represented opposes the decision on the item under consideration.¹⁰⁸ Achieving consensus does not necessarily require a formal yes or no vote, nor is it necessary that each interest represented affirmatively like the decision, merely what is necessary is that a party does not, or will not, oppose the decision if implemented.¹⁰⁹ The parties should be offered the chance to define consensus in their own way and to decide on how consensus will be recognized by the mediator.¹¹⁰ The feasibility analysis should also include a discussion between the parties of a set of tentative ground rules for the negotiations.

After the mediator gathers the preceding information, the results of the findings would need to be summarized and a determination made as to the feasibility of mediating the dispute. The steps required in the Case Classification System would now entail: (1) each party, upon case filing, to receive a Case Classification Form (see Appendix A); (2) each party completing the form and submitting it to the Multi-Door Division of the Superior Court; (3) upon submission of the form, the Multi-Door Division of the Superior Court assigning a mediator to the case; (4) the mediator determining the feasibility of mediating the dispute as outlined above; and (5) upon completion of the feasibility analysis, the mediator submitting an ADR recommendation to the responsible Judge, who would use the recommendation at the case scheduling conference.

If one of the obstacles referred to above or the public's interest in obtaining information about a potential health or safety hazard can not be adequately protected, the mediator should recommend that the dispute proceed to trial rather than attempt to mediate the dispute. However, if the mediator determines mediation is a feasible option and submits a mediation recommendation, the Judge at the scheduling conference should obtain a formal commitment from the parties to participate in the negotiations (assuming the Judge agrees with the mediators findings). Finally, the parties must also be willing to negotiate in good faith.

V. CONCLUSION

At first glance, the modifications referred to in this Article appear to deviate substantially from traditional mediation processes. However, there are numerous examples of programs where the traditional mediation process has not been followed. These programs have proven just as successful in encouraging settlement between the parties as the more traditional models. For example, in Columbus, Ohio, many mediation sessions involving domestic violence require the

107. *Id.* at 178.

108. *Id.*

109. *Id.*

110. *Id.*

attendance of a local representative from the Battered Women's Center.¹¹¹ In Marin County, California, mediators employ neutral third-party investigators to obtain background facts and information concerning a dispute.¹¹² The mediators then consult with the investigators for their perspective of the situation before hearing the parties accusations.¹¹³

The institutionalization of mediating public disputes is not a new phenomenon. In 1985, Hawaii's Chief Justice Herman Lum founded a four year experimental program called the Center for Alternative Dispute Resolution (the Center).¹¹⁴ In 1989, the Hawaii State Legislature created the Center through the passage of legislation which had a two year sunset provision.¹¹⁵ During the 1992 legislative session, the sunset provision was removed and the Center became a permanent part of the Judiciary.¹¹⁶ The purpose of the Center is to mediate complex litigations or disputes that affect the public interest or that involve state and local government.¹¹⁷

Although the programs referred to above, including the Multi-Door Courthouse, have proven to be successful, any new approach or modification to an existing dispute resolution mechanism must be carefully designed and implemented in order to safeguard it's legitimacy and effectiveness. This Article encourages others to think about the problems and ramifications of mediating disputes within the Multi-Door Courthouse that involve public health and safety hazards as well as stimulate the creation of a mechanism that accommodates both interests of successful mediation and the need for public information.

111. Interview with Larry Ray, Director of the Dispute Resolution Section of the American Bar Association, in Washington, D.C. (July 22, 1993).

112. *Id.*

113. *Id.*

114. Telephone interview with Peter Adler, Director of the Judiciary Program on ADR, Honolulu, Hawaii (July 8, 1993).

115. *Id.*

116. *Id.*

117. *Id.*

Superior Court of the District of Columbia
Multi-Door Dispute Resolution Division

**Alternative Dispute Resolution
Case Classification Form**

This form is confidential. It will not go in the case file. You are required to submit it to the Multi-Door Division 20 days prior to your Scheduling Conference. Sending instructions are in Section E.

A. Please fill in the information below:

Civil Action No.: _____ Calendar No.: _____

Case Name: _____

Your Name: _____

Telephone (including area code): _____

Approximate amount of the claim in this case: \$ _____

Date of Scheduling Conference: _____

You are: Plaintiff of Plaintiff's Attorney
 Defendant or Defendant's Attorney

B. Is this case (check all that apply)

- [A] a claim for personal injuries or property damages arising out of a motor vehicle accident?
- [1] one involving Constitutional claims?
- [2] a request for a declaratory judgment?
- [3] an action for libel of information?
- [4] an asbestos injury claim?
- [5] a request for injunctive relief?
- [6] an action for subrogation of a debt?

If you checked any of the items in Section B, skip to Section E below. Otherwise, complete sections C, D and E.

FORM CONTINUES ON REVERSE SIDE

C. Check all that apply in this case:

- [1] There are multiple plaintiffs or defendants.
- [2] I will be representing myself at trial without a lawyer.
- [3] The case involves more than monetary issues.
- [4] There is a continuing business or personal relationship between the parties.
- [5] There are highly technical or scientific questions in the case.
- [6] There is more than one issue involved.
- [7] An insurance company will be responsible for all or part of the claim.
- [8] This is a contract case.
- [9] This is a tort case and liability is in question.
- [10] This is a tort case and liability is **not** in question.

D. Of the following, select up to **three** important goals for you in this case. Place a 1 by the most important, 2 by the second-most important and 3 by the third-most important. You may also select one, two or no goals.

- [11] _____ Settling the case as quickly as possible, if the outcome is fair.
- [12] _____ Keeping the outcome of the case private.
- [13] _____ Receiving an expert's non-binding opinion about the case.
- [14] _____ Limiting the amount of pre-trial discovery required.
- [15] _____ Having a say in the outcome of the case.
- [16] _____ Reserving some relationship with the other party.
- [17] _____ Receiving a binding opinion that settles the case.
- [18] _____ Avoiding having to negotiate with the other side.
- [19] _____ Having someone decide who was right and who was wrong.
- [20] _____ Other (please specify): _____
- [21] _____ None of these goals are important to me.

E. Please mail this completed form to:

Case Analysis Specialist
 Multi-Door Dispute Resolution Division
 500 Indiana Avenue, N.W. Room 4242
 Washington, DC 20001
 Or, FAX the form (both sides) to 202-879-4619

If you have questions about how to fill out this form properly, or about other matters relating to alternative dispute resolution and your case, you may call the Case Analysis Specialist at 879-7869. Thank you.

The following example represents the mechanics of producing an ADR recommendation based on salient characteristics of the case and each party's stated goals in the processing of the case.

Litigants are given a brief list of statements (Part C) and asked to check all that apply in their case. Each of the objective factors have been chosen because it has been judged to make one ADR mechanism more attractive over another, all other things being equal. These relationships have been codified in the following table, in which each ADR mechanism receives a base weight of 1.00 for each question.

No.	Question	Weights		
		MED	ARB	CEC
1	Multiple plaintiffs or defendants	2.00	1.00	1.00
2	Party is pro se	2.00	1.00	1.00
3	Case involves more than monetary issues	3.00	1.00	1.00
4	Continuing relationship between parties	4.00	1.00	1.00
5	Highly technical or scientific questions	1.00	2.00	2.00
6	More than one issue involved	2.00	1.00	1.00
7	Insurance company liable in full or part	1.00	2.00	2.50
8	Contract case	2.00	1.00	1.00
9	Tort case, liability in question	1.00	2.00	2.00
10	Tort case, liability not in question	1.00	3.00	2.00

Each weight other than 1.00 indicates the increased relative attractiveness enjoyed by an ADR mechanism when the particular objective factor is present. An initial score for each ADR mechanism is derived by simply adding the individual weights for each question that is checked. Each of the three scores is then multiplied by up to three subjective factors calculated from the responses to Part D of the form. Litigants are asked to select, in order of importance, three important goals in the processing of their case. As with the objective factors each ADR mechanism is given a relative weight for each goal.

No.	Question	Weights		
		MED	ARB	CEC
11	Speed of resolution	1.00	1.25	1.00
12	Keeping outcome private	1.50	1.00	1.50
13	Receiving expert non-binding opinion	1.00	1.00	2.00
14	Minimizing pre-trial discovery	1.00	1.25	1.00
15	Having a say in outcome of case	1.25	1.00	1.00
16	Preserving relationship w/ other party	1.50	1.00	1.00
17	Receiving binding opinion	1.00	2.00	1.00
18	Avoiding negotiations w/ the other side	1.00	1.50	1.25
19	Having someone decide right and wrong	1.00	1.25	1.25

However, these weights are not used "as is," since the litigants have selected three goals in order of preference. Each weight is first multiplied by a "priority multiplier" according to whether the goal in question was ranked first, second or third in importance. These priority multipliers are:

Priority	Multiplier
1	1.50
2	1.25
3	1.10

For example, if a litigant's first priority was avoiding negotiations with the other side (question 18), the weights for mediation (MED), arbitration (ARB) and case evaluation (CEC) would each be multiplied by 1.50, producing respective final weights of 1.50, 2.25 and 1.87. The three weights of the litigant's second priority would be multiplied by 1.25, and so on. In this way each ADR mechanism is given a final weight for each of three goals.

In the final step, the initial objective score for each ADR mechanism is multiplied by each of the three subjective goal weights. In schematic form the process for each ADR mechanism is as follows:

$$\text{Objective Score} \times (\text{Goal \#1}) \times (\text{Goal \#2}) \times (\text{Goal \#3}) = \text{Final Score.}$$

Each litigant thus produces three numeric scores, one for each ADR mechanism. The scores from all litigants in each case are combined and the ADR mechanism with the highest total score becomes the recommended ADR route. Therefore, a hypothetical case might produce the following results:

Plaintiff	9.20	11.45	8.86
Defendant #1	10.30	6.44	7.72
Defendant #2	10.30	7.52	7.35
Totals	29.80	25.41	23.93

In this hypothetical case, mediation, by virtue of its higher total score, would be the recommended ADR mechanism. It should be noted that ties are resolved first in favor of mediation and second in favor of case evaluation (i.e., most-consensual over least-consensual).