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

Lucy V. Katz

I. INTRODUCTION

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

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

1. Associate Professor of Business Law, School of Business, Fairfield University; J.D., New York University School of Law.

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

This Article broadly defines compulsory ADR\(^3\) to include any process in which the parties experience a lack of free choice about their participation, other than a civil or criminal trial with full due process protections. Thus, it includes not only court-ordered ADR\(^4\) (or alternatives mandated by statute), but also judicial mediation, settlement conferences, non-mandatory summary jury trials, and other techniques\(^5\) in which there is pressure on litigants to forgo trials, at least temporarily, and to utilize alternatives to bring about settlement.\(^6\)

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

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

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

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

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

7. See infra notes 127-29 and accompanying text.
This Article will begin with a brief overview of the history of contemporary ADR, followed by a survey of the extent of compulsory ADR in the courts. Next, it will discuss the constitutional and statutory issues that have arisen as ADR has become more prevalent. The next part will discuss the policy questions that necessarily accompany such a change in systems and the empirical and theoretical research that seeks to shed light on some of these questions. In conclusion, this Article will argue that, where possible, voluntarism should be restored as an overriding principle for public-sector ADR, minimizing the element of compulsion.

II. ADR THEMES AND A HISTORICAL OVERVIEW

Compulsory ADR is part of a movement over the last three decades to develop alternatives to traditional litigation for the resolution of legal disputes. During that process, three distinct phases can be identified. The first, in the late-1960s, consisted of the growth of neighborhood justice centers and a general interest in consensual, community-based alternatives. The second, in the mid-to late-1970s, came with the so-called medical malpractice crisis of that time; it included the creation of screening panels and arbitration of medical malpractice claims in an effort to eliminate weak claims or defenses and generally to lower the cost of malpractice insurance. The third phase, in the mid- to late-1980s, included the broad incorporation of alternatives over a wide spectrum of disputes. The latter phase was a response to another perceived "crisis" infecting all litigation, which allegedly had become too expensive and time-consuming and placed intolerable burdens on the American economy. At the same time, there was an increase in very large, complex lawsuits (such as those involving toxic...
torts, mass disasters, and major antitrust actions) that were settled through extensive judicial mediation or other ADR methods because they were perceived as simply too large for traditional litigation.12

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


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


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

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


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


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

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

III. ADR METHODS

Compulsory ADR methods can be grouped into decision-oriented processes and consensual processes, and, within these categories, into mandatory and non-mandatory programs. In decision-oriented methods, such as arbitration 25 and fact-finding, 26 the outcome is primarily a decision by a neutral third party resolving the particular dispute. 27 In consensual ADR methods, by contrast, a third party assists the disputants in reaching their own agreement regarding how to resolve their dispute. Such methods include mediation, summary jury trials, minitrials, early neutral evaluation, and a host of negotiation techniques including judicial settlement conferences.

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

23. See generally Eisele, supra note 3.
28. For discussions of very different models of mediation, see DIVORCE MEDIATION, THEORY AND PRACTICE (Jay Foilberg ed., 1988); Thomas Colosi, Negotiation in the Public and Private Sectors, 27 AM. BEHAV. SCI. 229, 242 (1983); Lon L. Fuller, Mediation — Its Forms and Functions, 44 SO. CAL. L. REV. 305 (1970). In general, private mediators function primarily to identify interests, to provide a neutral but sympathetic forum, and to help the parties fashion integrative solutions tailored to their needs.
29. See Edwards, supra note 21, at 679; see also Woman Slain in Courthouse While Seeking Protection, ALBUQUERQUE J., March 19, 1992, at A3 (woman stabbed to death by husband in Milwaukee County Courthouse while waiting for hearing on request for permanent restraining order).
person and to obtain a quick decision as to who is right (after which the parties can go back to business as usual) can be more important than actually winning. The difference posited here is one of degree only. Nevertheless, it provides a useful context in which to view the specific kinds of public, compulsory ADR incorporated into the legal system.30

A. Decision-oriented Procedures

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

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

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


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

35. See, e.g., D.C. Ct. APP. MAND. ARB. R. XIII(c) (arbitrator compensation, trial and arbitration costs, expert trial witness and arbitration witness costs, and interest on arbitration award); ILL. SUP. CT. R. 93(a) (flat penalty); MICH. COMP. LAWS ANN. § 600.4969 (West 1987) (trial court costs); N.C. ARB. R. 5(b) (arbitrator's fee); N.J. STAT. ANN. § 2A:23A-27 (West Supp. 1992) (arbitrator's fee); id. § 2A:23A-29 (West Supp. 1992) (costs, attorney fees, opponent's investigation costs and expert witness expenses and fees); 42 PA. CONS. STAT. ANN. § 7361(d) (Supp. 1991) (costs and opponent's attorney fees); R.I. SUP. CT. ARB. R. 5(b) (flat penalty); WASH. REV. CODE ANN. § 7.06.060 (1992) (costs and opponent's attorney fees); WASH. SUP. CT. MAND. ARB. R. 7.3 (trial court costs); see also Reynolds, supra note 18, at 177-78.
on mandatory arbitration is arbitration at the request of one party, such as a consumer, to a dispute. At least 21 states have statutes or rules authorizing referral of some classes of cases to arbitration. Many states require arbitration of claims involving a specific subject matter, such as torts, domestic relations, housing, or agricultural activities. The federal courts began experimenting with court-annexed arbitration in 1978. By statute, federal courts may impose mandatory arbitration in cases up to $100,000, or arbitration can be voluntary. Disputes involving constitutional or civil rights issues may not be subject to mandatory arbitration. Courts may otherwise set their own parameters.

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

36. See infra notes 48-50 and accompanying text (new car warranty disputes).
37. See, e.g., ALASKA STAT. § 09.43.190 (1991) (redemption after foreclosure of a lien); ARIZ. REV. STAT. ANNOT. § 12-133 (1992) (all cases for less than $50,000 must be arbitrated unless all parties waive and court finds good cause for waiver); CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1993) (all cases under $50,000); CONN. GEN. STAT. § 52-549n; CONN. SUPER. CT. R. 46N (discretionary referral of cases under $15,000); DEL. SUP. CT. R. 16.1 (cases under $50,000); D.C. CT. APP. MAND. ARB. R. 111; FLA. STAT. ANN. §§ 44.101-.108 (West Supp. 1991); HAW. REV. STAT. § 601-20(b) (Supp. 1992) (tort cases up to $150,000); MASS. GEN. LAWS ANN. ch. 211B, § 19 (Supp. 1993) (authorized program for trial court referrals of civil cases); MICH. COMP. LAWS ANN. §§ 600.4951-.4969 (West 1987) (nonmedical malpractice tort claims of over $10,000); MINN. STAT. ANN. § 65B.525 (West 1986) (motor vehicle claims up to $5,000); NEV. REV. STAT. § 38.250 (1991) (all claims up to $25,000); N.Y. CIV. PRAC. L. & R. 3405 (McKinney Supp. 1992); N.J. STAT. ANN. § 7-37 (1991); N.J. ARB. R. 1 (cases up to $15,000); OR. REV. STAT. § 36.405 (1991) (up to $25,000); 42 PA. STAT. ANN. §§ 7301-7362 (1982); R.I. SUP. CT. R. 1; TEX. CIV. PRAC. & REM. § 154.001 (Supp. 1992); WASH. REV. CODE § 7.06.020 (1982) (up to $15,000 or $35,000 if two-thirds superior court judges approve).
39. See, e.g., CAL. CIV. CODE § 4800.9 (West Supp. 1993) (community property division up to $50,000); OR. REV. STAT. § 36.405 (property issues); WASH. REV. CODE § 7.06.020(2) (child support); W. VA. CODE § 49-5A-1 (1982) (juvenile matters).
41. See, e.g., IDAHO CODE § 22-436 (Supp. 1992) (seed performance); id. § 25-2104 (1990) (taking up hogs); id. § 36-1108(c)(3) (Supp. 1992) (claims against Fish and Game Department for damage to crops caused by antelope, elk, deer, and moose); id. § 36-1109 (Supp. 1991) (claims against Fish and Game Department for damage caused by black deer or mountain lions); ME. REV. STAT. ANN. tit. 13, § 1958-B (Supp. 1992) (agricultural handlers and qualified associations); W. VA. CODE §§ 19-9-30, 19-17-8 to -9 (1991) (appraisal values of infected animals and disputes over partition fences); WIS. STAT. ANN. § 93.50 (West 1990) (farm debts); WYO. STAT. § 11-19-106(b) (1991) (slaughter of diseased animals).
42. See 28 U.S.C. § 652(a)(1) (Supp. 1991). The statute provides for mandatory arbitration in cases valued up to $100,000, but courts that had a program in place for cases up to $150,000 could maintain the higher limit. See Pub. L. 100-702, § 901, 102 Stat. 4569, 4663 (1988).
procedure as arbitration,\textsuperscript{44} others direct their panels to screen,\textsuperscript{45} or to review,\textsuperscript{46} medical malpractice claims, or to provide some form of mediation.\textsuperscript{47} Screening is supposed to eliminate litigation of weak claims or defenses by changing perceptions of the chances of prevailing at trial and by creating disincentives to continuing with litigation. Since all panels must reach a decision or give an opinion on the merits of the complaint, they fit the arbitration model.

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

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

\begin{itemize}
\item 45. See ME. REV. STAT. ANN. tit. 24, § 2851 (West 1991).
\item 47. See MICH. COMP. LAWS ANN. § 600.4901-.4923 (West 1987); UTAH CODE ANN. § 78-14-12 (1992); WIS. STAT. ANN. § 655.42 (West Supp. 1992). See generally Shirley Qual, A Survey of Medical Malpractice Tort Reform, 12 WM. MITCHELL L. REV. 417 (1986).
\item 51. See, e.g., MD. R. SPECIAL PROC. E3; OHIO REV. CODE ANN. § 2701.10(B)(1) (Anderson 1992).
\end{itemize}
confined to specific types of disputes. Voluntary programs often include elements of compulsion. Florida, for example, provides for voluntary, binding arbitration of medical malpractice claims. However, a party who opts for litigation faces significant penalties, including payment of the winner’s attorney fees, limits on noneconomic damages, and prejudgment interest. In the Middle District of Florida, for example, parties with claims that do not qualify for mandatory referral can still choose to participate in the program.

B. Consensual Procedures

There is enormous variety among consensual ADR methods in the courts, making them hard to categorize and to classify. Mediation may be required in most civil actions, or in specific categories. Summary jury trials may be mandatory or voluntary. Recent statutes and court rules tend to lump together different consensual processes and to authorize referral to several alternatives at the discretion of the court. The Civil Justice Reform Act of 1990 is a federal statute authorizing certain judicial districts to enact rules for referral of appropriate cases to "alternative dispute resolution programs that . . . the court may make available, including mediation, minitrial and summary jury trial." The Texas Alternate Methods of Dispute Resolution Act authorizes courts to refer any dispute for alternative dispute resolution procedures such as mediation, minitrials, moderated settlement conferences, summary jury


54. Id. § 766.209(4).
55. Id. § 766.209.


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

61. Id. § 154.021.
62. Id. § 154.023.
63. Id. § 154.024.
64. Id. § 154.025.
trials,\textsuperscript{65} or arbitration.\textsuperscript{66} The U.S. Claims Court has instituted settlement judges and minitrials as a means of reducing litigation costs and delay.\textsuperscript{67}

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

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

**Judicial mediation.** Several complex, multi-party cases, such as mass torts, have been resolved through elaborate judicial mediation efforts. Litigation over the toxic effects of the chemical Agent Orange was settled by a massive mediation effort in the District Court for the Eastern District of New York, involving three special masters appointed by the court to facilitate settlement. Professor Francis E. McGovern has used computer programs for settlement of disputes in the Eastern District of Michigan and the Northern District of Ohio. In Connecticut, Judge Robert Zampano has experimented successfully...
with mediation conducted jointly by federal and state judges in complex disputes in which parties assert jurisdiction in both court systems. The Federal Judicial Center Manual for Complex Litigation urges judges to become involved in the settlement process particularly in complex cases where the parties' risks and expenses are abnormally high.

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

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

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

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83. See generally Katz, supra note 12.
84. MANUAL FOR COMPLEX LITIGATION § 1.21 (5th ed. 1982).
85. See Katz, supra note 12, at 329-31; Schuck, supra note 80, at 350-59.
88. S.D. ILL. R. 34; E.D. KY. R. 23; W.D. KY. R. 23; W.D. MICH. R. 44; M.D. PA. R. 513. There is disagreement in the courts about a judge's authority to order participation in mandatory jury trials, and this issue will be discussed later in this Article. See discussion infra Part IV.
89. See N.D. IND. R. 32; S.D. IND. R. 53.2; E.D. KY. R. 23; W.D. KY. R. 23; D. NEV. R. 185; N.D. OHIO R. 7.1.1; S.D. OHIO R. 53.1; N.D. OKLA. R. 17.1(B); W.D. OKLA. R. 17(1).
91. See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 154.021-.073.
outcome of the case, including the amount of any damages. The opinions are then presumably used to stimulate settlement discussion. The process is somewhat like a one-person summary jury trial, though it bears aspects of arbitration or fact-finding as well.

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

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

93. See Levine, supra note 92, at 2.
95. FED. R. CIV. P. 16.
97. See FED. R. CIV. P. 16(a); see also FED. R. CIV. P. 16 (Notes of Advisory Comm. on Rules — 1983 Amendment).
98. FED. R. CIV. P. 16(a)(5).
99. FED. R. CIV. P. 16(c)(7). Other subjects can include "the need for adopting special procedures for managing potentially difficult or protracted actions . . . and such other matters as may aid in the disposition of the action." FED. R. CIV. P. 16(c)(10)-(11).
100. FED. R. CIV. P. 16(c).
101. FED. R. CIV. P. 16(b).
in good faith. Rule 16 has also been cited as the source of authority to order mediation, summary jury trials, and minitrials.

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

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

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

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

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

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

106. See N.D. OKLA. R. 17.1(A). This rule reads, in part, as follows:
The settlement Judge or Magistrate also has the right to meet jointly or individually with the parties and/or corporate representatives without the presence of counsel, and may elect to have the parties and/or corporate representatives meet alone without the presence of the settlement Judge or Magistrate or counsel with the specific understanding that any conversation relative to settlement will not constitute an admission . . .

Id.

107. See, e.g., E.D. ARK. R. 21 (parties must file Information sheet that includes "[p]rospects for settlement"); W.D. ARK. R. 21 (same); C.D. CAL. R. 9.4-9.4.11 (parties are to meet within 40 days of trial and "[t]he parties shall exhaust all possibilities of settlement"); D. DEL. R. 5.4 (parties must file "certification that two-way communication has occurred between persons having authority in a good faith effort to explore the resolution of the controversy by settlement"); S.D. FLA. R. 14(C) (ten days prior to a pretrial conference parties "shall meet and discuss settlement"); N.D. GA. R. 235 (within 30 days after issue joined, lead counsel are required to "confer in a good faith effort to settle the case" and must inform all parties promptly of offers of settlement; parties must file statement certifying that conference was held and offers communicated, and indicating specific problems hindering settlement); D. HAW. R. 235(6)(a) (parties must meet and engage in good faith attempt to settle).
Like judicial mediation, the judicial settlement conference is consensual, and parties retain the right to refuse any proposed settlement. However, there is evidence that judicial pressure for resolution in these proceedings can be intense, particularly in large, complex cases. An extensive survey of judges and lawyers showed that at least some lawyers and judges observed some or all of the following settlement techniques used by judges: setting tight schedules for trial or delaying trial dates; telling attorneys not to use sham arguments; convincing lawyers they have distorted views of cases; downgrading the stronger case and overvaluing the weaker; delaying rulings to press for settlement; coercing lawyers to settle; threatening dismissal or mistrial when lawyers fail to settle; discussing attorney recalcitrance with a senior member of the attorney’s law firm (or threatening to do so); speaking personally with clients; and suggesting settlement figures to clients.

While much of what judges do in settlement was perceived as ethical, some behaviors, such as delaying rulings, threatening penalties for not settling, speaking directly to clients, penalizing clients for attorney actions, giving favorable rulings to the weaker side, ordering defendants to pay the settlement figure to charity and not to the plaintiff, transferring the case to another district on the day of trial, and threatening to discuss the attorney with a senior member of his or her firm, were perceived as unethical by at least 40 percent of the respondents.

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

General ADR legislation. Legislative efforts to encourage ADR proliferated as the 1980s ended and the 1990s began. Several comprehensive state statutes...
exhort courts and public agencies to use alternative dispute resolution, or to consider its use, over a broad spectrum of cases.\textsuperscript{117} On the federal side, there has been a flurry of ADR activity since 1988, culminating in the Judicial Reform Act of 1990,\textsuperscript{118} a statute likely to revolutionize federal court procedure. The 1990 Act is mainly concerned with strengthening litigation management by federal judges, but it includes a mandate for extensive use of ADR.\textsuperscript{119} The Act authorizes the development of "Civil Justice Expense and Delay Reduction Plans" in 10 pilot districts and mandates demonstration programs in five additional courts; three of the 10 plans must focus on ADR methods.\textsuperscript{120} All the pilot plans must include the six "principles and guidelines of litigation management and cost and delay reduction" identified in § 473(a),\textsuperscript{121} three of the guidelines refer directly to settlement and ADR.\textsuperscript{122} Plans must include provisions for monitoring complex cases through conferences with a judicial officer, who "explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation,"\textsuperscript{123} and who has "authorization to refer appropriate cases to alternative dispute resolution programs," including mediation, minitrials, summary jury trials, and other programs already in use.\textsuperscript{124} Optional components of the plans include a neutral evaluation program for discussion of issues at a "nonbinding conference conducted early in the litigation"\textsuperscript{125} and authority to

\begin{itemize}
  \item \textsuperscript{119} See 28 U.S.C. § 473.
  \item \textsuperscript{120} Id.; see Civil Justice Reform Act of 1990, Pub. L. 101-650, § 104(b)(2), 104 Stat. 5090, 5097 (1991). These districts are the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri. Other districts may adopt expense and delay reduction plans voluntarily, and as of January, 1992, 34 had done so. All districts must develop plans by December 1, 1993. All these programs will be evaluated by the Administrative Office of the United States Courts and the House and Senate, to determine whether the programs should be extended. See id. § 105(c), 104 Stat. at 5098.
  \item \textsuperscript{121} See id. § 104(b)(1), 104 Stat. at 5097; see also 28 U.S.C. § 473(a).
  \item \textsuperscript{122} 28 U.S.C. § 473(a)(2), (3), (6).
  \item \textsuperscript{123} Id. § 473(a)(3)(A).
  \item \textsuperscript{124} Id. § 473(a)(6). The guidelines also include: systematic, differential treatment of cases (sometimes referred to as "tracking"); early pretrial control including the setting of firm dates for motions, discovery, and trial dates and control over discovery; voluntary exchange of information and cooperative discovery; and limits on discovery motions. Id. § 473(a)(1)-(2), (4)-(5).
  \item \textsuperscript{125} Id. § 473(b)(4).
\end{itemize}
require representatives of parties with authority to settle to be present or available by telephone at settlement conferences. The plans are to form the basis for changes in the Federal Rules of Civil Procedure, so one result of the Act is likely to be the institutionalization of ADR throughout the federal system.

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

A different group of statutes, regulations, and even an executive order encourage greater use of ADR in administrative proceedings as a way to cut down on what is seen as excessive government litigation. The Administrative Dispute Resolution Act of 1990 encourages the use of ADR throughout the administrative agencies. Every federal agency must "adopt a policy that addresses the use of alternative means of dispute resolution and case management" and "examine alternative means of resolving disputes in connection with adjudication, rulemaking, enforcement, issuing of licenses or permits, contract administration, litigation involving the agency, and "other agency matters."

126. Id. § 473(b)(5).
129. Id. at 293 (committee notes).
130. "Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes," private sector ADR has "yielded decisions that are faster, less expensive, and less contentious," and ADR can lead "to more creative, efficient, and sensible outcomes." Administrative Dispute Resolution Act, Pub. L. 101-552, § 2, 104 Stat. 2736, 2736 (1990). See generally Charles E. Grassley & Charles Pou, Jr., Congress, the Executive Branch and the Dispute Resolution Process, 1992 J. Disp. Resol. 1.
132. See Grassley & Pou, supra note 130, at 15. Administrative hearing officers are instructed to hold conferences for the settlement of disputes, and they must inform parties as to available ADR methods and encourage their use. 5 U.S.C. § 556(c)(7) (Supp. 1991).
133. Alternative Dispute Resolution Act § 3, 104 Stat. at 2736-37 (1990). Because of the special function of the federal agencies, Congress cautioned that ADR should not be used under certain conditions, primarily where the public policy role of the agency would be compromised. Alternative Dispute Resolution Act, 5 U.S.C. § 582(b)(2), (3) (Supp. 1991). ADR is to remain a voluntary procedure to "supplement rather than limit other available agency dispute resolution techniques." Id. § 582(c).
Agencies must appoint a senior official as ADR specialist to promote ADR.\textsuperscript{134} Government contracts are to be reviewed to determine whether they should include provisions encouraging ADR.\textsuperscript{135} Arbitration is authorized by consent of all parties in administrative proceedings,\textsuperscript{136} though to protect essential government functions and policy, agency heads are given discretion to terminate arbitration proceedings or vacate awards with no judicial review but only before the award becomes final.\textsuperscript{137} Another statute, the Negotiated RuleMaking Act of 1990,\textsuperscript{138} set up procedures for negotiated rule-making by committees of interested parties.\textsuperscript{139}

Recent statutes, such as the Americans with Disabilities Act,\textsuperscript{140} include boilerplate language encouraging the use of ADR.\textsuperscript{141} The Civil Rights Act of 1991\textsuperscript{142} requires consideration of alternative dispute resolution in all civil rights disputes.\textsuperscript{143} In addition, the Federal Credit Unions are to establish ADR procedures for resolution of claims by clients,\textsuperscript{144} as is the Federal Deposit Insurance Corporation.\textsuperscript{145} These statutes are in addition to older laws which incorporate mandatory arbitration for determining statutory rights into particular regulatory proceedings.\textsuperscript{146} In some states, special education statutes and other regulatory measures incorporate mediation as an alternative to administrative hearings.\textsuperscript{147} To encourage ADR in government litigation, President Bush issued
an executive order in 1991. \(^\text{148}\) The Order requires government counsel to attempt settlement before litigation begins, and to suggest the use of an appropriate ADR technique to the private parties in a dispute. \(^\text{149}\) As a result of these changes, the current legal environment is replete with procedures external to traditional methods for resolving legal disputes. Disputing parties are likely to find themselves involved in compulsory arbitration, mediation, summary jury trials, minitrials, computer simulations, or simply protracted and complex settlement negotiations, with or without an official presiding, before, during and even after litigation. The image of a lawsuit as beginning with a complaint, followed by discovery, motion practice and settlement discussion among counsel, trial, and appeal, no longer accurately reflects America's legal system.

IV. DISPUTING OVER DISPUTE RESOLUTION: JUDICIAL RESPONSES

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

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

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

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


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

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

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

153. See, e.g., Mitsubishi Motors, 473 U.S. at 628.
158. See McKay, 120 F.R.D. at 49. In McKay, the court states:

In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred. I know also that the attorney who objected to the first summary jury trial he
because it allows parties to vent emotions and it satisfies litigants’ need for a day in court, in addition to providing input on the probability of success at trial. Such judicial articulation of the dynamics of settlement has, perhaps more than any other single factor, encouraged the expansion of judicial power to compel participation in consensual ADR.

A. Constitutional Issues

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

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

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Id. at 50.

159. *Id.* at 50.


165. *Id.* at 896.

166. *Peterson*, 253 U.S. at 310 ("The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury not be interfered with."); Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 149 (5th Cir. 1981). New causes of action that are analogous to common law claims also carry the jury trial guarantee. Chaffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564-65 (1990); Tull v. United States, 481 U.S. 412, 417 (1987); Pernell v. Southall Realty Corp., 416
given procedure violates the Seventh Amendment depends essentially on a reasonableness test: If the procedure is reasonable and does not unduly burden the jury trial right, it is valid. 167 Under this analysis, most departures from traditional litigation have been tolerated by the Supreme Court, as long as the parties have some chance eventually to present their claims to a jury. Even the total elimination of the jury trial, in workers' compensation matters for example, has been upheld as long as the loss of the jury trial right is offset by a substantial benefit. 168

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

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

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

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


172. Smith, 112 A.2d at 630. At the same time the court recognized that such costs are specifically designed to discourage appeals. Id.
Some state courts have struck down medical malpractice review panels or other arbitration programs as violative of the right to jury trial while others have upheld similar statutes. A few opinions have invalidated medical review panels as applied in specific circumstances in which delays or other procedural roadblocks have been deemed so onerous as to go beyond the limits of reasonableness. Georgia's Supreme Court has upheld a local program for arbitration of claims up to $25,000.

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

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


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

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


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

179. Mathews, 424 U.S. at 340; see also Walters, 473 U.S. at 305-06 (Congress has strong interest in nonadversarial, informal procedure); Goldberg, 397 U.S. at 269.
there is an opportunity for judicial review of constitutional issues.\(^\text{180}\) Under the Due Process Clause, mandatory arbitration is invalid only if the arbitral result is final and binding and parties are deprived of any subsequent judicial hearing.\(^\text{181}\)

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

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

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

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

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

\(^{184}\) See id.; see also Lindsey v. Normet, 405 U.S. 56, 78 (1971).

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

\(^{186}\) 455 U.S. 422.

\(^{187}\) Id. at 433.

\(^{188}\) 659 P.2d 311, 313.

\(^{189}\) 381 So. 2d 231, 238; see also Cardinal Glennon Memorial Hosp. for Children v. Gaertner, 583 S.W.2d 107, 109 (Mo. 1979) (striking down a medical malpractice screening program for violation of right of access to courts). But see Colton, 496 N.E.2d at 673.
as a judge can modify harsh requirements to permit meritorious appeals. As in the jury trial cases, if the fee is not an absolute bar to a full due process hearing, it is valid.

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

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

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

190. See Paro, 369 N.E.2d at 990; Knoke, 470 N.W.2d at 422.
195. See, e.g., Firelock Inc., 776 P.2d at 1098; Gaona, 396 S.E.2d at 221; Bernier, 497 N.E.2d at 767-68; Paro, 369 N.E.2d at 988; Strykowski, 261 N.W.2d at 443.
been deemed rationally related to those goals. Moreover, experimental ADR programs, which may be necessarily underinclusive, do not for that reason constitute an equal protection violation. On the other hand, certain state courts have upheld equal protection claims, particularly in medical malpractice cases. The Supreme Court of Rhode Island held that a medical malpractice screening provision failed even minimum scrutiny under the Equal Protection Clause because, the court found, no malpractice crisis existed when the legislation was enacted and so there was no basis at all to justify the restrictive classification. The Louisiana Supreme Court held that a malpractice damage limit of $500,000, not including medical expenses, constituted discrimination based on physical condition, which is prohibited by the state constitution. Presumably the same would be true of a medical malpractice arbitration panel.

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

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


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


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

202. 405 U.S. 56.

203. Id. at 77-79.


205. Id. at 922.

206. Id. at 925.
the basis for the decision was the unequal opportunity for trial \textit{de novo} afforded to plaintiffs and defendants.\textsuperscript{207} Other procedures that give one-sided access to arbitration or mediation, such as the farmer-lender mediation statutes providing for mediation at the option of the farmer,\textsuperscript{208} may be vulnerable to equal protection challenges.

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

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

\textsuperscript{208} \textit{See supra} note 70 and accompanying text.

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


\textsuperscript{211} \textit{Id.} at 74.

\textsuperscript{212} Schweiker, 456 U.S. at 197-98; Crowell, 285 U.S. at 47; \textit{see also} Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 449 (1977) (Congress may create new statutory obligations and assign the factfinding function and initial adjudication to an administrative forum).
threatens the judiciary's independence through undue political domination of the courts.\textsuperscript{213}

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

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

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

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

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

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

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

\textsuperscript{218} See Bernier, 497 N.E.2d at 769; \textit{Wright}, 347 N.E.2d at 740.

\textsuperscript{219} Wright, 347 N.E.2d at 739.

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

\textsuperscript{221} Cincinnati Gas & Elec., 854 F.2d at 904.
settlement procedure, which is traditionally closed, and was not analogous to a trial, which must remain open. The court stressed that public access would be detrimental to the purpose of the SJT whenever the parties were concerned with confidentiality.

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

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

222. Id. at 903-04.
223. Id. at 903. Generally, parties are prohibited from any disclosure of information about a summary jury trial, though such rules are sometimes disregarded. See Russell v. PPG Indus., Inc., 953 F.2d 326, 333-34 (7th Cir. 1992); News Press Publishing Co. v. Lee County, 570 So. 2d 1325, 1326-27 (Fla. Dist. Ct. App. 1990).
224. 304 U.S. 64 (1938).
225. Hines, 603 F.2d at 647.
226. Id. at 648.
229. Id. at 1074; see also Wheeler v. Shoemaker, 78 F.R.D. 218, 222-23 (D.R.I. 1978).
231. Id. at 1075-76.
232. See supra notes 127-29 and accompanying text.
variety of ADR procedures,233 make Seck a significant decision. The more extensive federal ADR becomes, the more likely it is that courts will find that the federal rules occupy the field to the exclusion of contradictory state law.234

B. Statutory Authority

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

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

233. See supra notes 104-07 and accompanying text.
234. See Burlington Northern R.R. v. Woods, 480 U.S. 1, 7 (1987). In this case, the Court held that FED. R. APPEL. P. 38, which grants circuit courts discretion to assess penalties for frivolous appeals, "occupied the field," invalidating an Alabama law automatically adding a 10% penalty to any money judgment it affirmed. Id. But see Automobile Importers of Am., Inc. v. Minnesota, 681 F. Supp. 1374, 1377-80 (D. Minn. 1988) (state lemon law not preempted by Magnuson-Moss Warranty Act).
235. See supra notes 97-103 and accompanying text.
236. Rule 1 provides that the Federal Rules of Civil Procedure shall be construed "to secure the just, speedy, and inexpensive determination of every action," FED. R. CIV. P. 1, and this rule is often cited to justify cost-cutting and delay reducing innovation. Rule 83 permits local court rules that are "not inconsistent with these rules or those of the district in which they act," FED. R. CIV. P. 83, and it is often relied on to uphold local introduction of techniques such as the summary jury trial.
237. See, e.g., Bank of Nova Scotia v. Kilpatrick, 487 U.S. 250, 254 (1988); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Link, 370 U.S. at 630-31 (inherent power stems from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); Peterson, 253 U.S. at 312 (courts have inherent power "to provide themselves with appropriate instruments required for the performance of their duties"); Eash v. Riggins Trucking Inc., 757 F.2d 557, 560-64 (3d Cir. 1985).
resolve the dispute."\textsuperscript{241} As the court stated in \textit{McKay v. Ashland Oil, Inc.},\textsuperscript{242} if courts can order decision-oriented procedures such as arbitration, they ought to be able to compel less intrusive, consensual methods such as the SJT: "Plainly Rule 16 would authorize the trial judge to hold a final pretrial conference in the form of a condensed trial. In a summary jury trial, the court just has laymen sit in and give their reactions."\textsuperscript{243}

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

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

\begin{itemize}
  \item \textsuperscript{241} McKay, 120 F.R.D. at 44,48 (referring to Local Rule 23 of the Joint Local Rules for the Eastern and Western Districts of Kentucky).
  \item \textsuperscript{242} 120 F.R.D. 43.
  \item \textsuperscript{243} Id. at 48; see also Arabian Am. Oil Co., 119 F.R.D. at 448. In Arabian American Oil Co., a Florida district court stated: "Rule 16 calls these procedures conferences, but what is in a name. [sic] The obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition." Arabian Am. Oil Co., 119 F.R.D. at 448.
  \item \textsuperscript{244} 123 F.R.D. 603.
  \item \textsuperscript{245} Id. at 604.
  \item \textsuperscript{246} 838 F.2d 884.
  \item \textsuperscript{247} Id. at 887.
  \item \textsuperscript{248} Id. at 885.
  \item \textsuperscript{249} Id.
  \item \textsuperscript{251} Strandell, 838 F.2d at 887 (quoting \textit{Fed. R. Civ. P.} 16(c)(7)).
\end{itemize}
"require that an unwilling litigant be sidetracked from the normal course of litigation."

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

Currently a proposed amendment to Rule 16 is designed to allow mandatory SJTs and other procedures. The Judicial Conference of the United States has endorsed the experimental use of SJTs for promoting settlements. Finally, the Expense and Delay Reduction Plans under the Civil Justice Reform Act of 1990 are to include authority to order SJTs and other forms of ADR, and such experiments are sanctioned by the proposed Amendments to Rule 83.

252. Id.
254. 129 F.R.D. 506.
255. Id. at 509.
258. See id.
259. Id.; Posner, supra note 24, at 386-87.
260. See Proposed Amendments, supra note 128, at 288-93 (proposed amendments to Fed. R. Civ. P. 16). Amended Rule 16(c)(9) would allow the use of "special procedures to assist in resolving the dispute." Id. at 290. Courts may order parties to participate in a conference to consider the possibilities of settlement and to participate in proceedings ordered under paragraph (9). Id. at 293 (committee notes). The change is to enhance the court's power to use procedures such as "mini-trials, mediation, and nonbinding arbitration." Id.
263. See supra notes 118-26 and accompanying text.
264. See Proposed Amendments, supra note 128, at 358-61 (proposed amendments to Fed. R. Civ. P. 83). The proposal reads as follows:

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

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

The issue is complicated by the difficulty of determining who has rules if it is consistent with the provisions of Title 28 of the United States Code and is limited in its period of effectiveness to five years or less. Id. at 359. The amendment is meant to conform to the Civil Justice Reform Act of 1990, see id. at 360 (committee notes), which requires that district courts find new methods to reduce the expense and delay of litigation. See 28 U.S.C. § 471. Presumably the result will be a need for new local rules that may differ from the Federal Rules.

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

See supra notes 253-59 and accompanying text.

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

FED. R. Civ. P. 16(a)(5).

See infra text accompanying notes 278-84.


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

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

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

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

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

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271. 871 F.2d 648.
272. Id. at 656-57.
273. Id. at 656.
274. See Dvorak, 123 F.R.D. at 611; Lockhard, 115 F.R.D. at 47.
276. Id. at 652-53.
277. Id.
278. See id. at 658-63 (Coffey, J., dissenting); id. at 666-71 (Manion, J., dissenting).
279. See supra note 94 and accompanying text.
280. *Heileman*, 871 F.2d at 662 (Coffey, J., dissenting) ("I am convinced that if the attorney does not wish to have the litigant personally appear before the court at the pretrial conference, he is not bound to do so. . . .").
281. Id. at 657 (Posner, J., dissenting).
that most clients want when they hire an attorney. An attendance order may also force parties to spend considerable time and money when, in their judgment, their local attorney can and should represent their interests.\textsuperscript{282} One \textit{Heileman} dissenter was concerned that judicial impartiality will be compromised in the eyes of parties who are subjected to settlement pressure by a trial judge.\textsuperscript{283} Judge Coffey argued that a client subjected to intense pressure to settle will not trust that judge, or perhaps any judge, to accord it a fair trial or make fair rulings if the litigation continues.\textsuperscript{284}

Judges who believe in mediation, even when parties initially refuse to consider settlement, are most apt to order attendance by represented parties at pretrial. But many judges have other, simpler, motives: they want to speed disposition by having someone on the spot who can agree to a settlement without having to check back with someone else with higher authority, usually an insurer or corporate CEO. These judges deliberately seek to deprive the parties of a popular bargaining strategy. The Eleventh Circuit in \textit{In re Novak}\textsuperscript{285} dealt with such a case. The district court had ordered a nonparty insurer to send a senior claims analyst with full settlement authority to a pretrial conference;\textsuperscript{286} the insurer sent only its attorney, and the district court held the analyst in contempt.\textsuperscript{287} The court of appeals agreed in principal with the majority in \textit{Heileman} and determined that courts may compel attendance by represented parties.\textsuperscript{288} The \textit{Novak} court based its determination on the courts' inherent authority "to direct parties to produce individuals with full settlement authority at pretrial settlement conferences."\textsuperscript{289} Inherent power, however, does not extend to orders directly against a nonparty insurer;\textsuperscript{280} to get around this problem, the court said, any order should be directed to the party, who will then turn to its insurer, who, to protect its interest, will have to send an appropriate person with settlement authority.\textsuperscript{281}

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

\begin{thebibliography}{99}
  \bibitem{282} See \textit{id.} at 654. The defendant in \textit{Heileman} had argued that it was unreasonable for its president to attend the pretrial conference because the president would have had to travel from New Jersey to Madison, Wisconsin, to take part in settlement discussions when there was no intention to settle. \textit{id.}
  \bibitem{283} \textit{id.} at 662 (Coffey, J., dissenting).
  \bibitem{284} \textit{id.}
  \bibitem{285} 932 F.2d 1397.
  \bibitem{286} \textit{id.} at 1399.
  \bibitem{287} \textit{id.}
  \bibitem{288} \textit{id.} at 1407.
  \bibitem{289} \textit{id.}. The court held that the order directly to a nonparty insurer was invalid under both Rule 16 and the inherent powers theory, but that the insurer's employee was properly convicted of criminal contempt for failure to obey the order. \textit{id.} at 1409. Since the court's order was neither transparently invalid nor patently frivolous, the proper remedy was to obey and then to appeal. \textit{id.} at 1408.
  \bibitem{290} \textit{id.}
  \bibitem{291} \textit{id.}
\end{thebibliography}
rule's overall goals. Therefore, the court would "not hold, without specific language to the contrary, that Congress intended to frustrate the very rule it enacted by limiting the power of the district courts in this manner." The court also reasoned that a party who refuses to give his attorney settlement authority is "his own attorney for settlement purposes" and can be compelled to attend under the explicit language of the Rule.

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

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

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

C. Sanctions for Failure to Participate

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

292. Id. at 1407 n.19.
293. Id.; see Heileman, 871 F.2d at 652.
294. Novak, 932 F.2d at 1407 n.19. The court characterized this as a "colorable argument that Rule 16, on its face, empowers the court to order such a party to attend a pretrial settlement conference; the party is an unrepresented party with respect to settlement, and, thus, his attendance is crucial." Id.
295. Id. at 1406 n.18.
297. 115 F.R.D. 44.
298. Id. at 47.
will mean little gain in efficiency if attorneys and their clients do not obey these orders in good faith. The courts’ authority to compel ADR procedures is actualized through the use of sanctions, including the payment of an opponent’s costs, which may or may not include attorney fees, fines, striking of pleadings, dismissal with prejudice, and punishment for civil or criminal contempt.

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

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

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

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

\(^{301.}\) Towey, 743 F. Supp. at 740-41.


\(^{304.}\) 680 F. Supp. 169.

\(^{305.}\) Id. at 170.

\(^{306.}\) Id.; see D.N.J. R. 47(E)(3).

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

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

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

\textsuperscript{308} Id.
\textsuperscript{309} Id. at 171. \textit{But see} Hughes, 556 F. Supp. at 715 (denying trial \textit{de novo} after refusal to attend arbitration hearing).
\textsuperscript{312} Lyons, 727 P.2d at 1020.
\textsuperscript{314} Id.
\textsuperscript{315} Id.
\textsuperscript{317} Id. at 598.
\textsuperscript{318} Id. The court noted the strong need to preserve the right to a jury trial in mandatory arbitration. Id.
a conference, attending unprepared, or failing "to participate in good faith." Rule 41 allows dismissal of an action for failure to prosecute or to comply with court orders. Rule 11 authorizes sanctions for bad faith pleading, and Rule 26 covers sanctions for abuse of discovery proceedings. Sanctions, including attorneys' fees and costs, are frequently awarded for disobeying orders to compel attendance by a person with settlement authority.

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

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

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

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

Id.


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

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


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


326. 757 F.2d 557.


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

329. See Roadway Express, 447 U.S. at 766 (finding that 28 U.S.C. § 1927 does not allow taxation of attorney fees as costs; fees taxable under inherent powers but only for bad faith); Tiedel, 865 F.2d at 93-94.
noncompliance with a pretrial order are in the nature of civil or criminal contempt penalties.\textsuperscript{330} The main impact of such decisions is to require adequate notice and hearing before the penalty is imposed in order to meet due process requirements.\textsuperscript{331}

**D. Settlement Pressures and Compelled Negotiation**

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

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

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

\textsuperscript{330} See supra note 192 and accompanying text.
\textsuperscript{331} See supra notes 191-92 and accompanying text; see also Novak, 932 F.2d at 1400; In re LaMarre, 494 F.2d 753, 758 (6th Cir. 1974).
\textsuperscript{333} Kothe, 771 F.2d at 669; see also Curtiss-Wright Corp. v. Helfand, 687 F.2d 171, 175 (7th Cir. 1982).
\textsuperscript{334} Del Rio, 574 F.2d at 26.
\textsuperscript{335} Id.
\textsuperscript{336} Id.; Insurance Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354, 1360 (7th Cir. 1989) (finding that 28 U.S.C. § 1927 "does not command settlement as a requirement in the proper course of litigation, nor does any other statute or rule authorizing sanctions").
\textsuperscript{337} Martin, 871 F.2d at 1360-61.
\textsuperscript{338} 771 F.2d 667.
that "the carriers are going to have to wake up when a judge tells them that they want [sic] to settle a case and they don't want to settle it." 339

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

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

The *Heileman* court 347 distinguished between orders to attend a conference and orders to participate in negotiations. 348 An order to come to court to make

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339. *Id.* at 669.
340. *Newton*, 918 F.2d at 1125; see also *National Ass'n of Gov't Employees*, 844 F.2d at 223 ("Failure to compromise a case, however, even pursuant to terms suggested by the court, does not constitute grounds for imposing sanctions . . . .").
341. *Newton*, 918 F.2d at 1126. The court held that these penalties were in fact a finding of contempt without due process. *Id.*
342. *Id.* at 1127.
343. *Id.* at 1128.
344. *Id.*
345. *Id.* at 1128-29.
347. 871 F.2d 648.
348. *Id.* at 653. The court quoted the Advisory Committee Notes to Rule 16 and stated: Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing [settlement] might foster it . . . . These notes clearly draw a distinction between being required to attend a settlement conference and being required to participate in settlement negotiations.
an offer to pay a judgment would clearly have been improper, the court said, because it would have been tantamount to an order to negotiate in good faith for settlement. Nevertheless, a party may be compelled to attend and, at the least, state its position not to settle. The Eleventh Circuit made a similar distinction in In re Novak. Rule 16, it held, allows courts to require parties to attend settlement conferences and to come prepared. This means, the court said, that participants

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

In a footnote, however, the Novak court denied any intent to force parties to settle: "We do not mean, of course, that parties and their attorneys must be willing to settle a case." In support of this statement it reiterated the Rules Advisory Committee comments that Rule 16 is not meant "to impose settlement negotiations on unwilling litigants." Dissenting in Heileman, Judge Posner rejected the distinction relied on by the majority, recognizing that, in reality, an order to attend a conference with full settlement authority is an order to negotiate in good faith, which is forbidden under federal law. It is significant that the Seventh Circuit had held the year before in Strandell that a federal judge has no authority to order participation in a summary jury trial. The majority apparently felt that a summary jury trial was, at least in part, an invalid attempt to insist that parties participate in negotiations. In Heileman, the court apparently differentiated between

Id.

349. Id.
350. Id. at 652.
351. 932 F.2d 1397.
352. Id. at 1405.
353. Id. The court appears to assume that this level of preparedness is required for any pretrial conference, regardless of explicit orders to be ready to consider settlement. Sanctions are authorized for failure to come thus prepared. Id.; see also Flaherty v. Dayton Elec. Mfg. Co., 109 F.R.D. 617, 618-19 (D. Mass. 1986) (imposing costs and attorney fees as sanctions under Rule 16(f) on attorney for coming to scheduling conference so ignorant of facts of case that he could not "explore the possibilities of settlement").
354. Novak, 932 F.2d at 1405 n.15.
355. Id.
357. See Strandell, 838 F.2d at 887.
358. Id.; see supra notes 246-52 and accompanying text (discussing Strandell).
extrajudicial techniques such as the SJT, which under Rule 16(c)(7) it viewed as permissive, and pretrial or settlement conferences, which it agreed are mandatory, at least until used to force good faith negotiations.

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

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

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

360. 702 F.2d 400, 405 (2d Cir. 1983).
362. See Kline, 702 F.2d at 405.
364. Id. at 1435.
365. Id. at 1438.
366. Id. at 1437.
367. Id.
368. See Marovic, 1988 WL 139295, at *1.
369. See TEX. CIV. PRAC. & REM. CODE §§ 151.001-155.006.
may validly refer unwilling parties to mediation, he or she may not "compel the parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so. Any inconsistencies in [the statute] can be resolved to give effect to a dominant legislative intent to compel referral, but not resolution."370 A mediator to whom a case is referred "may not compel the parties to mediate (negotiate) or coerce the parties to enter into a settlement agreement." 371 The Georgia Supreme Court has also held that its laws allow referral to mediation, but not compulsion actually to mediate, by which the court appears to mean good-faith negotiation with the aid of a mediator.372 In Maine, however, there can be no hearing in a divorce case after referral to mediation until the court is satisfied that "the parties made a good faith effort to mediate the issue."373

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

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

V. COMPULSORY ADR: DOES IT WORK?

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

370. Decker, 824 S.W.2d at 251. See generally McPheeters, supra note 185 (discussing the Decker decision).
371. Decker, 824 S.W.2d at 251.
positive, though there are some thoughtful and notable exceptions. Empirical studies indicate considerable participant satisfaction with compulsory ADR. However, data on cost and time savings are more problematic. It is not yet at all clear that mandatory ADR significantly reduces the expense and time involved in litigation.

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

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

374. See Posner, supra note 24, at 392-93; Eisele, supra note 3, at 40.
375. See infra notes 383-402 and accompanying text.
376. Others posit more refined criteria for evaluating ADR methods. See, e.g., Keith O. Boyum, Afterword: Does Court-Annexed Arbitration 'Work'?., 14 JUST. SYS. J. 244, 246-47 (1991); Menkel-Meadow, supra note 2, at 4-5; Posner, supra note 24, at 369-89; Tornquist, supra note 104, at 752-68.
377. See supra notes 18-20 and accompanying text. As federal court Expense and Delay Reduction Plans are implemented and assessed, efficiency concerns are likely to predominate even more.
379. See McKay, 120 F.R.D. at 49.
380. Webber, supra note 22, at 1520-21.
382. See Arabian Am. Oil Co., 119 F.R.D. 448. In this case, the parties objected to a summary jury trial order because the defendant, with limited financial resources, lived and worked in Greece, did not believe the SJT would lead to settlement, and did not want to incur the time and money involved in what it expected to be a useless procedure. Id. at 448. The idea that ADR can increase costs has been echoed by others, who note that ADR imposes an additional procedure on parties, triggering higher attorney fees. Robert J. MacCoun, Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey, 14 JUST. SYS. J. 229, 235 (1991).
In one study of early neutral evaluation, a majority of litigants responded that the process had saved them over $5,000 in litigation and discovery costs. However, one-fourth thought it had increased their costs. A small majority believed the early evaluation program had contributed to settlement. However, there was not overwhelming agreement on this issue. Not surprisingly, the neutrals believed far more strongly than attorneys or parties that the system had contributed to prospects of settlement. Only 37 percent of the cases settled at, or as a direct result of, the evaluation conference, and there was no information as to how many of these cases would have settled anyway. Thus, this study indicated few dramatic gains in efficiency from early neutral evaluation, even though the program was probably very effective at clarifying issues and revising parties' perceptions of their claims.

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

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383. Levine, supra note 92, at 29.
384. Id. at 41.
385. Id. at 42.
386. Id. at 9. Only 59 percent of all attorneys and 66 percent of parties agreed that the Early Neutral Evaluation had improved prospects for settlement. Id. In contrast, 90 percent of the evaluators agreed with this statement. Id.; see also Lloyd Burton et al., Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program, 14 JUST. SYS. J. 183, 197 (1991) (81 percent of arbitrators satisfied with system in Colorado, compared to 70 percent of attorneys and 56 percent of litigants).
387. Levine, supra note 92, at 15.
388. Levine, supra note 92, at 47-48.
390. See Clarke et al., supra note 389, at 162; MacCoun, supra note 382, at 238.
391. MacCoun, supra note 382, at 239.
392. See Boyum, supra note 376, at 245-47.
another reason why such programs may prolong termination times. In a mandatory arbitration program, the authors found that there was a high rate of plaintiffs' awards, and a very high (25 percent) appeal rate. The reason was that defendants tended to improve their position at trial de novo, even when the plaintiff continued to prevail. Therefore, defendants nearly always rejected the awards and requested trial, which prolonged ultimate disposition rates.

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

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

394. Id. at 113.
395. Id. at 114.
397. Id.
398. Lambros, supra note 14, at 473.
399. Id. at 472-73.
400. Id. at 473-74.
402. See Barkai & Kassebaum, supra note 389, at 141-42 (overall lawyer satisfaction with program high, but defense lawyers much less satisfied (46 percent) than plaintiffs' lawyers (91 percent)); Burton et al., supra note 386, at 196 (70 percent of attorneys and 56 percent of litigants satisfied); Clarke et al., supra note 389, at 166, 181 (litigants satisfied with program; attorneys approved program but did not rate higher than standard litigation); Levine, supra note 92, at 5-6, 15.
most satisfied tend not to be cost and speed but qualitative features such as fairness and the need to be heard.

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

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

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

403. Alfini, supra note 90, at 222.

404. Id. at 216.

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

406. Id. at 220.


408. Webber, supra note 22, at 1517.

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

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

411. Id. at 224.

412. Id. at 222.
Theoretical studies also question whether greater efficiency results from these programs. Judge Posner suggests that summary jury trials had not proven to be efficient: If they produce more settlements, there may be more suits filed in the hopes of an early resolution; if SJTs raise settlement costs, by reducing unassisted settlement, overall costs will rise. He suggests that real reductions in caseloads can come only with changes that limit demand, i.e., that limit access to the courts.

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

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

413. Posner, supra note 24, at 373.
414. Id. at 388-89. Judge Posner suggests that ADR advocates "are like highway engineers, for whom the natural solution to highway congestion is to build more and wider highways." Id.
415. Owen M. Fiss, Comment, Against Settlement, 93 YALE L.J. 1073, 1076 (1984); see also Goldberg, supra note 147, at 450 (mediation in special education fails to compensate for unequal bargaining power, does not provide true neutral third parties, and eliminates judicially created clear rules for implementation of statute); Judith P. Resnick, Managerial Judges, 96 HARV. L. REV. 374, 439-40 (1982).
417. See Edwards, supra note 21, at 679; Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1545 (1991); see also Menkel-Meadow, supra note 2, at 41.
418. See generally, Schuck, supra note 80.
419. Broderick, supra note 20, at 41-43; Lambros, supra note 14, at 474-76; Ritchie, supra note 96, at 599.
420. See supra 244-45, 295-98 and accompanying text.
421. See supra notes 412-13 and accompanying text.
422. See Brazil, supra note 82, at 420.
Posner also has theorized that summary jury trials may not be a lawful use of jurors and in fact may affect the entire jury system negatively: By creating the impression that jury service is not real, SJTs may discourage serious and careful jury decision-making. Judge Eisele has argued strongly against mandatory arbitration which, he claims, deprives too many litigants of the opportunity for a full due process trial where truth is determined and rights are vindicated. Judge Edwards, while advocating ADR for private disputes, argues for limits on alternatives in disputes over constitutional rights or public law. The distinction, however, is not always obvious. Strict product liability is, to Edwards, a public law issue that requires judicial rule-making. For such disputes he would make ADR an adjunct to the court system, with no diminution in the opportunity for trial on the merits. Yet torts, including product liability, are a category of cases frequently diverted to ADR.

VI. SUMMARY, CONCLUSIONS, AND THE QUESTION OF VOLUNTARISM

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

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

423. Posner, supra note 24, at 386; see also Exum, 744 F. Supp. 803.
424. Eisele, supra note 3, at 35.
425. See id. at 36. "Where 'big money' is involved, you are entitled to your traditional day in court unencumbered by this costly arbitration diversion. But if you have a relatively small claim, no." Id. Others condemn what is termed the "anti-access" movement, which includes not only ADR but proposals for discovery limits, greater sanctions under Rule 11, and limits on federal diversity jurisdiction, as motivated by a small number of wealthy, mainly corporate "repeat players" who want to limit litigation costs and judgments. See generally Resnick, supra note 21; Weinstein, supra note 21.
426. See Edwards, supra note 21, at 671.
427. Id.
428. Id. at 671-72.
between federal and state systems and more litigation over preemption issues. Equal protection problems may occur concerning procedures that favor either plaintiffs or defendants. Otherwise, there are few constitutional issues that might invalidate large numbers of ADR programs.

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

Fourth, some of the early enthusiasm for compulsory ADR is waning. Today there is more emphasis on judicial management techniques such as discovery control and assertive use of deadlines to achieve efficiency in litigation. This trend is reflected in the Civil Justice Reform Act of 1990 and the experiments in local rulemaking it has mandated. Indications are that ADR has had too little impact on overcrowded dockets and litigation expenses. Studies show that ADR does not necessarily reduce caseloads. It may be a fairer, more just settlement technique, but it generally replaces ordinary settlement negotiation more than it substitutes for trials. Nevertheless, ADR remains popular with litigants and judges. A more balanced perspective is developing on compulsory ADR. It is a useful tool, but only one tool, for increasing efficiency and justice in legal disputes. Informal justice, however, carries with it the potential for abuse, and compulsory ADR is not an exception.

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

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

431. Id. at 11.
and recommends that mediation programs be kept free of coercive factors such as financial disincentives to trial and ad hoc pressure by trial judges.432

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

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

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

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

432. Id. at 16.
433. See supra notes 375-88 and accompanying text; see also Webber, supra note 22, at 1520-21.
434. Eisele, supra note 3, at 37; Posner, supra note 24, at 379.
435. See supra note 402 and accompanying text.
436. Reynolds, supra note 18, at 177.
437. Webber, supra note 22, at 1516-18, 1522.
According to the theory behind ADR, alternatives work best when litigants display a cooperative attitude.\textsuperscript{438} Studies of compulsory ADR tend to confirm this theory. There is little evidence that compulsory summary jury trials are efficient.\textsuperscript{439} The comparison of Florida state and federal SJTs strongly suggests that voluntary procedures result in greater diversion of cases and litigant satisfaction.\textsuperscript{440} If ADR works because parties feel less alienated, and are more willing to accept settlements over which they have some control, then voluntary consensual procedures should result in better outcomes than compulsory methods.

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

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

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

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

\textsuperscript{438} Alfini, supra note 90, at 216.
\textsuperscript{439} See Webber, supra note 22, at 1520-22.
\textsuperscript{440} See Alfini, supra note 90, at 215-16.
\textsuperscript{441} Maatman, supra note 87, at 455.
ADR, or some forms, will probably continue to evolve on their own, regardless of how precise or imprecise our knowledge. Like the Panda's thumb,442 or perhaps more like the human appendix, they will evolve to a higher state or wither away in response to broad political needs. As Martha Minow writes: "Reforms go in cycles, especially in America, which has a longstanding tradition of the new. Particularly familiar cycles move between centralization and decentralization, abstraction and contextualization, and uniformity and diversity. Perhaps these mark inevitable points in the journeys of American public and private institutions."443

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