# Coerced Cooperation in ADR: The Sixth Circuit Disallows Compulsory Summary Jury Trials

## I. INTRODUCTION

The evolutionary development of alternative dispute resolution (ADR) in the United States has come to a crossroads. Courts and legislatures are struggling to define the proper contexts in which ADR may be utilized and the proper scope of its use within a given field. In so doing, courts and legislatures have been forced to re-evaluate the purposes which justify the employment of ADR by the public sector. An examination of courts and legislatures in the 1990s reveals a significant shift in the original formulation of ADR as a system of voluntary, extrajudicial alternatives to a formulation in which it is viewed as a system of cost-efficient and time-efficient mechanisms which a court may utilize, at its own discretion, to compel party participation in extrajudicial dispute resolution processes.[1] In the 1990s, one finds voluntarism, an ingredient traditionally viewed as integral to the potential success of ADR, as a dispensable, historical artifact.

Many proponents of compulsory ADR mechanisms claim that ADR is capable of achieving cost-efficient and time-efficient resolutions to complex disputes absent the parties' consent.[2] Entitlement to one's "day in court" may now be conditioned upon the parties' submission to ADR procedures and its consequent expense and delay.[3] The proposition that a public forum may mandate the private resolution of disputes between unwilling parties does not contemplate an evolutionary refinement of ADR, but rather, promises a significant transformation of ADR in the coming century.

This Note offers a comprehensive examination of the current need to identify the proper limitations to be placed upon the use of ADR. The identification of the inherent, conceptual limitations of ADR, coupled with the recognition of a need to balance the individual autonomy of a litigant against the practical imperatives which have been placed upon the judiciary to expedite the disposition of cases, is necessary to determine how best to preserve the value and integrity of ADR into the next century.

This Note will first give a brief historical background of the ongoing

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[1] *See* Civil Justice Reform Act of 1990, 28 U.S.C. § 475 (1990); UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET PURSUANT TO CIVIL JUSTICE REFORM ACT OF 1990 (January 29, 1993) [hereinafter ANNUAL ASSESSMENT]; OHIO REV. CODE ANN. Ch. 2711 (Anderson 1992).

[2] Interview with C. Eileen Pruett, Coordinator of Dispute Resolution Programs for the Supreme Court of Ohio, in Columbus, OH (Jan. 27, 1994).

[3] Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

evolution of ADR to better articulate the concerns of those demanding that limitations be placed upon the use of mandated ADR. Once a historical foundation has been laid, this Note will then compare and contrast competing policy concerns and explanations for the use or non-use of mandated ADR procedures.

The recent decision of the Sixth Circuit in *In re NLO, Inc.*[4] broke with precedent and the majority of federal circuit courts by recognizing limits upon the power of federal district courts to compel participation in summary jury trials. Accordingly, this Note will examine similar attempts to place limitations upon the use of ADR as well as comprehensively explore the implications and effectiveness of judicially and legislatively-mandated ADR. The Ohio Revised Code § 3109.052 Shared Parenting provision,[5] the Annual Assessment of Civil and Criminal Docket for the United States District Court for the Northern District of Ohio,[6] and the Pilot Arbitration Project for the Boone County Circuit Court of Kentucky will be examined. The examination will provide an analysis of compulsory ADR on the federal, state, and county levels.

The inherent power of the federal judiciary to compel the use of ADR upon unwilling litigants is based upon a claim deriving from the inherent powers granted to them under Rule 16 of the Federal Rules of Civil Procedure (Rule 16) to manage pretrial party activity.[7] The scope of authority granted by Rule 16 has been a source of controversy among federal courts.[8]

In 1987, the Court of Appeals for the Seventh Circuit distinguished itself from all other federal circuit courts when it forbade the imposition of compulsory summary jury trials by a federal court.[9] On September 17, 1993, in *In re NLO, Inc.*, the Sixth Circuit broke from the majority and joined the Seventh Circuit in its interpretation of Rule 16.[10] The Sixth Circuit held that Rule 16 did not empower federal district court judges to impose ADR upon unwilling litigants. The court found "[t]he district court's order compelling participation in a summary jury trial under threat

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[4] 5 F.3d 154 (6th Cir. 1993).

[5] *See generally* OHIO REV. CODE ANN. §§ 3109.04, 3109.041, 3109.052 (Anderson Supp. 1993).

[6] ANNUAL ASSESSMENT, *supra* note 1.

[7] Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U. L. REV. 290, 293-94 (1989).

[8] Day v. NLO, Inc., 147 F.R.D. 148, 151 (S.D. Ohio 1993).

[9] Robert W. Bradford, Jr., *The Mini-Trial and Summary Jury Trial*, 52 ALA. L. REV. 150, 153 (1991).

[10] 5 F.3d 154 (6th Cir. 1993).

of sanctions to be clearly erroneous as a matter of law."[11] The decision rendered by the Sixth Circuit will be examined to: 1) identify the policy motivations behind the decision; 2) define the breadth of the decision in comparison to the Seventh Circuit's 1987 decision in *Strandell v. Jackson County*[12]; and 3) compare and contrast the competing arguments both for and against the implementation of mandatory ADR procedures by the courts.

The Ohio General Assembly has instituted provisions either favoring or mandating the use of ADR in Chapters 2711 and 2712 of the Ohio Revised Code.[13] In 1990, the legislature passed a provision in the domestic relations sphere by which a court may order parties to mediate their differences over a shared parenting agreement, and though not bound by the mediation report, the state court may use it as a basis for its shared parenting declaration.[14] This Note will examine the nature of the balance struck by the Ohio legislature in enacting legislatively-mandated ADR.

The U.S. District Court for the Northern District of Ohio released its annual assessment of the civil and criminal docket for 1992 in accordance with the mandates of Civil Justice Reform Act of 1990.[15] The contents of the report will be examined and the activities of the Northern District Court will be articulated in this Note.

The Boone County Circuit Court began an aggressive arbitration program in the early 1990s in an effort to alleviate the immense caseload of the one-judge court. An analysis of the program and recommendations for modifications to the program will be analyzed.

Ultimately, the United States continues to appreciate the benefits of an adversarial legal justice system. Incorporating the values of cooperation, conciliation, and compromise—that are found within ADR—into a justice system premised upon adversarial confrontation has perplexed courts and legislatures. Legislatures and the courts are now faced with the arduous task of striking a delicate balance between the rights of litigants and the value of innovative judicial officers utilizing ADR to expedite the disposition of ever-increasing caseloads.[16] The 1990s find courts and legislatures at crossroads where reconciliation must be achieved. This Note examines the current struggle for reconciliation.

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[11] *In re NLO*, 5 F.3d at 156.

[12] 838 F.2d 884 (7th Cir. 1987).

[13] OHIO REV. CODE ANN. Ch. 2711 and 2712 (Anderson 1992).

[14] OHIO REV. CODE ANN. § 3109.052 (Anderson Supp. 1993).

[15] ANNUAL ASSESSMENT, *supra* note 1.

[16] *Strandell*, 838 F.2d at 886.

## II. HISTORICAL BACKGROUND

According to Professor Judith Resnik of the University of California, a renowned authority in the field of ADR, the 1990s represent an era of transformation in which the rights-based adversarial system of the United States is seeking to resolve conflict by agreement or "dealmaking."[17] In the 1980s, the informal ADR mechanism of arbitration became equated in value with formal adjudication. Both methods of dispute resolution consequently became fused so that the former weaknesses of arbitration are now recognized as its strengths.[18] Accompanying this re-evaluation of arbitration has been the onslaught of judicial enthusiasm for fostering settlement. It is an era in which judges find themselves either descending to the role of a litigant or practicing a new brand of "managerial judging."[19] The recent efforts of state legislatures and the executive branch of the federal government may force the judiciary to redefine its role to reflect what it actually does in practice. The Civil Justice Reform Act of 1990 and the Administrative Dispute Resolution Act of 1990, along with orders from the executive branch of the federal government strongly encouraging the use of ADR,[20] have arguably transformed judges into advocates for settlement. These efforts at redefining the role of the judiciary and delegating fact-finding duties to non-Article III judges has received the endorsement of such notable jurists as Judge Posner, Judge Bork, and Justice Scalia, and according to Resnik, promises to affect a "real transformation of the civil process."[21]

Resnick does, however, concede that a successful settlement requires the production or discovery of all relevant information and party volition. Resnick identifies volition as "the key"[22] to successful settlements because it serves to validate the outcomes. This Note endorses the proposition that the loss of voluntarism from the ADR equation as it is integrated into a bifurcated state and federal adversarial system threatens to transform ADR into a mere variation of conventional adjudication.

### *A. Original Development and Growth*

Voluntary ADR began as a grass roots movement during the late 1960s.

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17 Judith Resnik, Speech at The Ohio State University College of Law, "ADR's Ideolgical Hostility to Adjudication," (Mar. 7, 1994).

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Resnick, *supra* note 17.

Local groups and neighborhood organizations favored the use of ADR in the context of local neighborhood centers.[23] Emphasis on cooperation and compromise preserved the integrity of the community while providing a vehicle by which divisive conflict could be avoided. Such local centers provided less formal, expensive, and hostile alternatives for feuding neighbors.

The use of ADR expanded beyond the neighborhood and into particular issue areas during the 1970s. The 1970s witnessed a recognition by the medical community of the value of ADR.[24] Concern over medical malpractice litigation spawned a search for cost-efficient solutions designed to accommodate competing interests as opposed to requiring one party's win at the expense of another's total defeat. Doctors and patients forced into an adversarial relationship proved to be inappropriate in many contexts. ADR provided an appealing alternative. ADR enabled litigants to preserve the integrity and privacy of the doctor-patient relationship while addressing the competing interests of each party in the resolution of a medical malpractice claim.

### *B. Rapid Growth of ADR Spurred by the Litigation Crisis of the 1980s*

The "litigation crisis" of the 1980s necessitated the rapid expansion of ADR across a broad range of areas.[25] The prolific amount of complicated litigation facing the courts and attorneys in the 1980s fostered a demand for alternatives. ADR provided a cost-effective solution to an overburdened judiciary and a simple, malleable solution for legislatures. The privatization of dispute resolution also provided an attractive solution for the business community.[26]

ADR was utilized as a cost-effective means by which court dockets could be efficiently managed or, at least, brought under control. Legislatures faced with mounting costs and vexing delays responded by legislating ADR as a mandatory procedure built into the legislative framework. What was previously an alternative now became an imperative.

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[23] Lucy Katz, *Compulsory Alternative Dispute Resolution And Voluntarism: Two-Headed Monster or Two Sides of A Coin?*, 1993 J. DISP. RESOL. 1, 3 (1993).

[24] *Id.* at 3.

[25] Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 893 (1993).

[26] Kim A. Lambert, *Fundamentals of Alternative Dispute Resolution*, 11 SPG FRANCHISE L.J. 99, 99 (1992).

### C. ADR at a Crossroads

However, the expansion of ADR into a variety of contexts proceeded without a clear definition of its limitations. The enthusiasm with which courts and legislatures have come to embrace ADR has motivated them to stretch the boundaries of its use. In search of satisfying results with less public expenditure of time, effort, and moneys, courts and legislatures have instituted measures designed to compel or induce parties to the ADR bargaining table. The legislatures and courts theorize that once parties are there, by whatever means, the chance for effective resolution remains unchanged.[27] The burdens are deemed incidental in comparison to the potential benefits.

But many litigants are petitioning the courts to recognize limits upon attempts by legislatures and courts to compel or induce the private resolution of disputes.[28] They assert that such compulsion violates their rights to due process, trial by jury, and the work product privilege, and impermissibly extends the limits of discovery.[29] The 1990s has found legislatures and the judiciary struggling to define those limits.

### D. The Summary Jury Trial

In the late 1970s, Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio pioneered the development of the summary jury trial (SJT) as a means by which complex litigation may be simplified or settled prior to trial.[30] Judge Lambros contended that the federal district courts have the authority to order parties to participate in SJT proceedings under Rule 16.[31] As formulated by Judge Lambros, and as it is currently implemented in a majority of jurisdictions, an SJT possesses the following characteristics:

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[27] Interview with C. Eileen Pruett, *supra* note 2. Pruett expressed the belief of many, stating that once the initial barrier of bringing both parties to the bargaining table is overcome, the success rate of such ADR mechanisms remains high.

[28] *See generally* Strandell v. Jackson County, 838 F.2d 884, 885 (7th Cir. 1987); Day v. NLO, Inc., 147 F.R.D. 148, 152 (S.D. Ohio 1993); *In re* NLO, Inc., 5 F.3d 154, 155 (6th Cir. 1993); Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 904 (6th Cir. 1988).

[29] *See* New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 714 (E.D. Pa. 1983); *Strandell*, 838 F.2d at 885; *Day*, 147 F.R.D. at 152. *See also* Katz, *supra* note 23, at 9.

[30] Bradford, *supra* note 9, at 151.

[31] FED. R. CIV. P. 16.

1. SJT is ordered by the court, as opposed to the mini-trial, which is strictly the product of voluntary choice and cooperation among parties.[32]

2. SJT is normally conducted by a judge or magistrate, as opposed to a mediator or an arbitrator.[33]

3. Before the commencement of an SJT, parties exchange information which defines the permissible scope of their trial presentation.[34]

4. Each attorney is generally accorded two strikes from the available jury pool.[35]

5. Attorneys then present an abbreviated version of their case to a jury panel, normally composed of six jurors selected from the available jury pool.[36]

6. Each attorney is permitted to make an opening and closing statement to the jury panel.[37]

7. The judge gives abbreviated jury instructions and frequently may choose to submit a series of interrogatories for response by the jury.[38]

8. The SJT typically lasts no longer than two days, after which time the jury renders a nonbinding verdict.[39]

9. The SJT does not abolish any substantive rights of the parties. Both parties remain entitled to a binding trial on the merits.[40]

10. Parties are then better able to assess their respective strengths and weaknesses. The awareness of the realistic merits of their case, it is

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[32] Bradford, *supra* note 9, at 153.

[33] *Id.*

[34] Day v. NLO, Inc., 147 F.R.D. 148, 150 (S.D. Ohio 1993).

[35] Bradford, *supra* note 9, at 153.

[36] Cincinnati Gas & Electric Co v. General Elec. Co., 854 F.2d 900, 904 (6th Cir. 1988).

[37] *Day*, 147 F.R.D. at 150.

[38] *Id.*

[39] Bradford, *supra* note 9, at 153.

[40] Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

theorized, facilitates settlement between parties.[41]

The federal circuits are split as to whether a federal district court possesses the authority under Rule 16 to mandate the use of an SJT upon unwilling litigants. The Seventh Circuit split the circuits in 1987 when it held "the parameters of Rule 16 do not permit courts to compel parties to participate in summary jury trials."[42]

The Sixth Circuit has historically sanctioned the use of district court orders requiring party participation in an SJT.[43] This position was in accord with the majority view which maintained that district courts have the power to compel parties to participate in SJTs under the auspices of Rule 16. Rule 16 authorizes the federal courts to take action designed to insure effective caseload management.[44] The majority of federal courts have endorsed compulsory SJTs as an innovative technique which places parties in a more realistic frame of mind when assessing their chances of success and their risk of liability.[45] SJTs represent "[b]y far the most prominent ADR innovation in the federal court system . . . ."[46] As such, this Note will examine the effect the current search for the proper limitations to be placed on ADR had upon the use of mandatory SJTs by the federal courts.

## III. COMPULSORY ADR IN THE 1990S

### *A. The Authority of Federal District Courts to Require Litigants to Participate in a Nonbinding Summary Jury Trial*

#### *1. The Majority Rule*

Rule 16 of the Federal Rules of Civil Procedure authorizes a federal court, at its own discretion, to compel party attendance at a pretrial conference to expedite the disposition of the action and to discuss "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."[47] It is clear that both federal and state legislatures view ADR as an effective means by which overly burdensome caseloads may be efficiently managed.[48] As recently as January 20, 1993, the Southern District of Ohio,

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[41] Arabian American Oil Co., 119 F.R.D. at 449.

[42] Standell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1987).

[43] *Cincinnati Gas & Electric Co.*, 854 F.2d at 901.

[44] Day v. NLO, Inc., 147 F.R.D. 148, 153 (S.D. Ohio 1993).

[45] Bradford, *supra* note 9, at 153.

[46] Katz, *supra* note 23, at 13.

[47] *In re* NLO, Inc., 5 F.3d 154, 157 (6th Cir. 1993).

[48] *See* Civil Justice Reform Act of 1990, 28 U.S.C. § 475 (1990); ANNUAL

a Sixth Circuit District Court, endorsed the prevalent view found within the federal court system: Judges possess the power to compel participation in an SJT.[49]

However, on September 17, 1993, the United States Court of Appeals for the Sixth Circuit found a district court order "compelling participation in a summary jury trial under threat of sanctions to be clearly erroneous as a matter of law."[50] The decision in *In re NLO, Inc.* represented a significant departure from the general rule which vests broad discretionary powers in district courts, under the dictates of Rule 16, to make every effort to settle litigation before coming to trial.

The Seventh Circuit was the first federal circuit to deny district courts the authority to compel participation in SJT proceedings.[51] It represented the only circuit to take such a restrictive view of the extent of the broad discretionary powers granted district courts by Rule 16. The Sixth Circuit is the first circuit to join the Seventh Circuit in its interpretation of Rule 16.[52]

The SJT is traditionally viewed as an effective settlement device enabling parties to get a realistic grasp of a case's probable outcome. The court in *In re NLO, Inc.* viewed the compulsory SJT as an impermissibly coercive tool as opposed to a means by which settlement can be facilitated when it stated: "We do not question the proposition that summary jury trials may be valuable tools in expediting cases. However, the voluntary cooperation of the parties is required to maximize the effectiveness of such proceedings."[53]

### *B. The Sixth Circuit and Summary Jury Trials*

#### *1.* Day v. NLO, Inc.[54]

In the year *In re NLO, Inc.* was decided, the District Court for the Southern District Court of Ohio followed the majority of circuit courts when it stated in *Day v. NLO, Inc.*: "[T]he Defendants state in their Motion to Reconsider that they will not actively participate in the summary jury trial if it is open to the public. If the Defendants choose this course of action, the Defendants and their counsel may be sanctioned accordingly."[55]

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ASSESSMENT, *supra* note 2.

[49] *Day*, 147 F.R.D. at 148 n.1.

[50] *In re NLO*, 5 F.3d at 156.

[51] *Strandell*, 838 F.2d at 888.

[52] Bradford, *supra* note 9, at 154; *In re NLO*, 5 F.3d at 157-58.

[53] *In re NLO*, 5 F.3d at 158.

[54] Day v. NLO, Inc., 147 F.R.D. 148 (S.D. Ohio 1993).

[55] *Id.* at 154.

The court premised its power to impose sanctions upon Rule 16(f). Rule 16(f) authorizes the court to impose sanctions upon any party failing to conform with a scheduling or pretrial order. Sanctions may be imposed for a complete failure to attend or perform as directed, but they may also be levied against parties inadequately prepared to participate or against parties participating in bad faith at a pretrial conference. Sanctions are imposed at the court's discretion.[56]

*In re Fernald* involved a suit brought by residents of Fernald, Ohio against a nuclear weapons manufacturer in their community.[57] The plaintiffs alleged that the manufacturer, National Lead of Ohio (NLO), had exposed them to radiation and other hazardous materials. The plaintiffs claimed damages for emotional distress, personal injury, and property damage. NLO consistently refused to consider settlement discussions.[58]

A trial on the merits would have been long and would have involved complex issues of fact. Accordingly, the district court chose to order a summary jury proceeding in an effort to promote settlement. The district court decided that the SJT was to be an open proceeding since it was an action affecting the interests of the community as a whole. NLO strongly objected to opening the SJT to the public. The district court rejected the request and opened the SJT to the public. Following the SJT, the parties settled for $78 million.[59]

The following year, those workers and individuals who were in frequent contact with the NLO facility, along with their families, brought a class action against NLO claiming they sustained three types of harm as a result of their exposure to hazardous materials at the facility. This harm included an increased risk of disease, emotional distress as a result of the awareness of an increased risk of disease, and actual disease.[60]

The SJT, in this case, was ordered open to the public by the district court at the final pretrial conference for the summary jury trial. NLO petitioned the court for reconsideration of the order for an open SJT proceeding.[61] The district court declined to close the SJT. The court cited precedent establishing the Sixth Circuit's willingness to permit federal district courts the discretion to close SJT proceedings to the public.[62] The court reasoned that if a federal district court possesses the power to close an SJT, despite First Amendment implications, then federal courts surely

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[56] FED. R. CIV. P. 16(f).

[57] *In re* Fernald, No. C-1-85-149, 1989 U.S. Dist. LEXIS 17761 (S.D. Ohio 1993).

[58] *Id.*

[59] *Day*, 147 F.R.D. at 150.

[60] *Id.*

[61] *Id.*

[62] Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 900 (6th Cir. 1988).

possess the ability to exercise the less constitutionally offensive power to order an SJT open to the public. Any concern that NLO might have regarding a polluted jury trial could be addressed through such procedural safeguards as a change of venue. The court held that it was impractical to close a class action proceeding which involved a large number of plaintiffs. Enforcement of a gag order upon all members of the class who were concededly entitled to be present at the SJT would be not only impractical, but also impossible. The court reasoned that a closed proceeding, given the facts of this case, would do little to realistically shield NLO from disclosure to the press.[63]

This case involved the public interest. NLO was indemnified by the United States, and, as a result, taxpayers would be forced to pay any judgment rendered against NLO. The court adamantly asserted that the determination as to whether an SJT proceeding would be open or closed was within the court's "managerial discretion."[64] Additionally, the court was able to call Judge Lambros, who pioneered the development of the SJT in the federal court system, to its support. Judge Lambros conducts open SJTs in his court and has stated that the decision to close such a proceeding is properly left to the discretion of the court.[65]

*Day v. NLO, Inc.* was consistent with standing precedent both within the Sixth Circuit and all the other federal circuits. The Seventh Circuit represented the only circuit which did not recognize the power of a federal district court to order an SJT, compel attendance and active participation, and sanction those parties failing to comply. [66]

In its decision, the court in *Day* cited *Cincinnati Gas & Electric Co. v. General Electric Co.*[67] as precedent for the recognition of the authority of a district court to open or close SJT proceedings based upon a discretionary evaluation of the particular facts of the case. Such an evaluation should be premised upon at least insuring the utility of an SJT proceeding as an effective settlement device. The court upheld the power of a district court to order a compulsory SJT.

The court in *Cincinnati Gas* held that the First Amendment right of access does not attach to an SJT proceeding.[68] A court may close the proceedings and bar public access. The court recognized that the SJT is a settlement device deriving its value from its ability to foster settlement. It is not a trial on the merits. Open SJT proceedings threaten to deter settlement.

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[63] *Day*, 147 F.R.D. at 152.

[64] *Id.* at 151.

[65] *Id.* at 152.

[66] *See* Katz, *supra* note 23, at 6.

[67] 854 F.2d 900 (6th Cir. 1988).

[68] *Id.* at 903.

If an open SJT proceeding defeats the very purpose for which it was devised, the trial court has the discretion to close it.[69] SJTs were historically closed proceedings out of recognition of this fact. The court thus held the SJT proceeding was to be closed to the public.[70]

### *C. The Summary Jury Trial in the Majority of Federal Circuits*

The court in *Day*, after interpreting *Cincinnati Gas*, found that substantial discretionary powers properly reside in the district court. The ability of a district court to close an SJT proceeding, despite the existence of competing First Amendment imperatives, was expressly authorized by the *Cincinnati Gas* decision.[71] The court in *Day* reasoned that the exercise of the lesser power to compel open SJT proceedings in the face of party dissent was vested within the discretion of the district court.[72]

The district court's decision in *Day* reflected the general consensus among federal courts that Rule 16 vested the courts with substantial discretion in their efforts to expedite litigation. For example, the Eastern District of Pennsylvania upheld a compulsory arbitration program for civil claims of fifty thousand dollars ($50,000) or less falling within enumerated classifications.[73] Under that district court's compulsory arbitration program, the arbitrator's award became final and binding upon the parties if neither party demanded a trial de novo within twenty days of the filing of the award.[74] The court held that the failure of a party to appear or attempt to appear at a compulsory arbitration hearing precluded its ability to later demand a trial de novo.[75] Thus, a party is unable to let the arbitrator render an ex parte hearing and then demand a trial de novo to re-establish its original intent to pursue resolution through the courts.

The parties were, in effect, required to expend time and energy upon a procedure they felt inadequate to address their needs. Failure to actively participate in the arbitration hearing transformed it from a means by which the alternatives for resolution were expanded into a tool by which the alternatives available to a litigant were limited. The court recognized that a mandatory arbitration hearing in which one party fails to cooperate renders

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[69] *Cincinnati Gas*, 854 F.2d. at 904.

[70] *Id.* at 903.

[71] *Day*, 147 F.R.D. at 151.

[72] *Id.*

[73] New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 712 (E.D. Pa. 1983).

[74] *Id.* at 714.

[75] *Id.* at 715.

the proceeding an unnecessary delay to the final disposition of the case.[76] However, the court chose to hold the dissenting party culpable for the failure of the proceeding, even though it was imposed upon the party against its will.[77]

The SJT has been an ADR mechanism enthusiastically accepted by the federal courts for promoting settlement and effectively managing burdensome caseloads. In *Federal Reserve Banks of Minneapolis v. Carey-Canada, Inc.*,[78] the Eighth Circuit addressed a case in which all parties formally objected to the imposition of an SJT proceeding by a U.S. Magistrate. The parties were required to participate despite their requests to be excused from participating.[79] The District Court of Minnesota overruled the parties' objections stating: "[t]his court believes that, in a case such as this, it is reasonable to require the parties to engage in settlement efforts with some degree of intensity."[80] The court was willing to extend its compulsory powers beyond mere attendance and participation and demand that parties make satisfactory efforts in the estimations of the district court judge.

In *Carey-Canada,* the plaintiff alleged the defendant's fireproofing of the Federal Reserve Bank with products containing asbestos resulted in substantial damage to the health of its employees as well as substantial property damage.[81] Both parties objected to the SJT, asserting that the SJT would not provide an accurate synopsis of a jury trial since a number of major evidentiary rulings would not be made until weeks after the scheduled SJT.[82]

The court rejected the contention that voluntary participation by the parties was integral to the success of an alternative dispute resolution mechanism such as a SJT. The court cited practical policy considerations as controlling: "The need to compel parties to address settlement, is an integral aspect of the docket management function of the court in this era of complex, protracted litigation. . . . The SJT provides a means by which to eliminate these barriers to settlement."[83] The docket management function of the district court superseded the rights of litigants to autonomously choose the manner in which to vindicate their rights. The *Carey-Canada*

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[76] *New England,* 556 F. Supp. at 715.

[77] *Id.*

[78] Federal Reserve Bank of Minneapolis v. Carey-Canada Inc., 123 F.R.D. 603, 604-05 (D. Minn. 1988).

[79] *Id.* at 603.

[80] *Id.* at 607.

[81] *Carey-Canada,* 123 F.R.D. at 603.

[82] *Id.* at 604.

[83] *Id.* at 604-05.

court joined several other district courts when it authorized federal courts to mandate summary jury trials.

The Middle District of Florida has the worst record nationally for delays and backlogs in the disposition of its cases.[84] In 1985, the Eleventh Circuit began using the SJT as an effective tool against the litigation crisis which then plagued the courts in that circuit.[85] When the Eleventh Circuit was forced to decide whether courts possessed the power to compel mandatory summary jury trials, it forthrightly stated: "[l]itigants are entitled to their day in court, but not, somebody else's day."[86] The court pointed to what they termed "the obvious purpose" of Rule 16 which was "to allow courts the discretion and processes necessary for intelligent and effective case management and disposition."[87] The Eleventh Circuit expressly found the *Strandell* precedent of the Seventh Circuit as neither binding or persuasive.[88]

*4.* In re NLO

NLO, Inc. sought a writ of mandamus to vacate the ruling in *Day* which required NLO to participate in an SJT open to the public. The United States Court of Appeals for the Sixth Circuit granted the petition and issued a writ of mandamus on September 17, 1993. The court vacated the order of the district court which required NLO to participate in an SJT proceeding.[89] The court broke from established precedent within the circuit and throughout the federal circuits, with the lone exception of the Seventh Circuit which had held similarly six years earlier.[90] The court held an order compelling participation in an SJT clearly erroneous as a matter of law.[91]

The Sixth Circuit recognized broad discretionary powers were vested in the district courts to manage their dockets efficiently and effectively.[92] However, the court also recognized necessary limitations upon the exercise of this power. The Sixth Circuit looked to the Advisory Committee notes to Rule 16(c)(7) for guidance in its interpretation of the authority granted to courts under the rule.[93] The court found the notes revealed that the rule was

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[84] Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 448-49 (M.D. Fla. 1980).

[85] *Id.* at 449.

[86] *Id.*

[87] *Id.* at 448-49.

[88] *Scarfone*, 119 F.R.D. at 448.

[89] *In re* NLO, Inc., 5 F.3d at 155.

[90] Day v. NLO, Inc., 147 F.R.D. 148, 157 (S.D. Ohio 1993).

[91] *In re NLO*, 5 F.3d at 155.

[92] *Id.* at 156 (construing *Cincinnati Gas*, 854 F.2d at 903 n.4.)

[93] *In re NLO*, 5 F.3d at 157.

meant to authorize judicial encouragement of ADR, but not the coercion of parties to reach a settlement. The court held a compulsory SJT represented an "unwarranted extension of [the] judicial power."[94] Any attempt made by the courts to derail litigants from the conventional track of litigation breached the limits of their authority.

The Sixth Circuit considered the practical implications of a compulsory SJT unsatisfactory. The court believed that once SJT became the product of compulsion its utility as a settlement mechanism would be defeated. Voluntary cooperation by the parties was necessary to maximize the potential benefit of the proceeding. The court asserted that the American justice system continues to be predicated upon an adversarial relationship between the parties.[95] This cannot be ignored when implementing an SJT within the adversarial system. This led the court to conclude: "Compelling an unwilling litigant to undergo this [SJT] process improperly interposes the tribunal into the normal adversarial course of litigation."[96] Additionally, the court found the time and expense extracted from litigants by virtue of an order of compulsory participation lacked adequate justification. No matter how short in duration or minimal in cost, the harm of a compulsory SJT was "unnecessary and irremediable."[97]

The decision in *In re NLO, Inc.* is not a radical departure from Sixth Circuit precedent if one examines the decision rendered in *Cincinnati Gas* more closely. There the court was confronted with opposition to the decision to close an SJT proceeding. Opponents to the court's decision to close the proceeding invoked the First Amendment in their defense. Conversely, in *In re NLO, Inc.*, the court was faced with opposition to the decision to open an SJT to the public. In its opinion, the Sixth Circuit emphasized that the SJT has historically been a closed proceeding.[98]

In *Cincinnati Gas,* the SJT was undertaken with the voluntary cooperation of both the parties once the court had insured the proceeding would be closed to the public. The SJT in *In re NLO, Inc.* was undertaken without the cooperation of NLO, and failed to accommodate the parties' need for confidentiality as had the court in *Cincinnati Gas*. The court in *Cincinnati Gas* recognized that the proper aim of the district court should be to act so as to facilitate the voluntary cooperation of the parties in conducting an SJT.[99]

Most importantly, the court stated that, where a party is found to have

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[94] *In re NLO*, 5 F.3d at 157.

[95] *Id.* at 158.

[96] *Id.*

[97] *Id.* at 159.

[98] *Cincinnati Gas*, 854 F.2d at 903-04.

[99] *Id.* at 904.

a legitimate interest in confidentiality, and public access would be detrimental to the effectiveness of the SJT as a settlement mechanism, deference should be afforded to protect the litigant's privacy interest.[100] The court equated the litigant's interest in privacy with the government's interest in providing an effective settlement device. Both interests were promoted through closure of the SJT. The court concluded, "[t]hus, public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device."[101] *In re NLO, Inc.* merely served to extend this rationale when that court held compulsory party attendance and participation at summary jury trials over the parties' objections has significant adverse effects on the utility of the procedure as a settlement device.[102] *In re NLO, Inc.* did not represent a departure from precedent so much as it represented a logical conclusion to its final end.

The 1990s present the federal courts with the arduous task of defining limits to the breadth and depth of ADR once it has been transposed upon the American adversarial system. The Sixth Circuit has come to the crossroads and has chosen to take the path less traveled. In denying the district courts the authority to compel attendance and participation at a summary jury trial, the Sixth Circuit has remained faithful to the underlying values which motivated the development of ADR in the United States, and has promoted the achievement of the purposes for which it was originally conceived.

At its inception, ADR represented an attempt to escape the rigid formalities of the conventional adversarial system. It emphasized the values of cooperation and compromise. It recognized that adherence to mechanized procedure sometimes fail to adequately address the needs of litigants or offer adequate solutions to complex problems. The resolution to some disputes necessitated individualized attention as opposed to attention to the needs of an inanimate legal system. ADR privatized the resolution of disputes while retaining the tempering influence of an objective third party. As a result, courts and legislatures enthusiastically welcomed the benefits of ADR.[103]

However, the utilization of ADR cannot be accomplished through the use of tools taken from the adversarial toolbox. ADR requires litigants to engage in a process of reconciliation and conciliation. But more importantly, it requires parties to approach the process in the proper state of mind. This cannot be judicially mandated.

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[100] *Cincinnati Gas*, 854 F.2d at 904.

[101] *Id.*

[102] *In re NLO*, 5 F.3d at 157-58.

[103] ANNUAL ASSESSMENT, *supra* note 1; The Civil Justice Reform Act of 1990; and the Administrative Dispute Resolution Act of 1990.

The grass roots movement of the 1980s endorsed the use of ADR because it nurtured a state of mind which valued the preservation of relationships. ADR abandoned adversarial concepts in favor of a long-term perspective favoring cooperation and compromise. The authorization of sanctions by the courts for the failure of parties to actively participate in ADR procedures, which they have involuntarily been forced to utilize, signifies a fundamental misunderstanding of the basic premises of ADR.

### *B. Federal Legislation Authorizing Compulsory ADR Mechanisms*

The court in *In re NLO, Inc.* noted that Congress has repeatedly considered specific grants of compulsory authority to the courts in the past and, on each occasion, declined to vote them into law.[104] The United States House of Representatives recently passed a bill which authorizes federal judges to assign a number of their smaller cases to a court-appointed arbitrator.[105] Litigants retain the right to proceed through the formal legal system if no resolution can be reached through arbitration. Courts would be empowered to design arbitration programs for claims involving $150,000 or less. The programs could be voluntary or mandatory.[106]

Since 1988, ten federal district courts have experimented with mandatory arbitration programs.[107] The ten pilot districts have also instituted voluntary arbitration programs. The reviews of the pilot programs have been mixed. The Judicial Conference withdrew its support from the portion of the bill which authorizes mandatory arbitration.[108] According to the Judicial Conference, the mandatory arbitration provision served only to add another layer to the litigation which an unwilling party must confront. Proponents of the bill include the American Bar Association and the Federal Judicial Center.[109]

The courts and Congress are at a crossroads. Senate passage of the bill would mark the course by which ADR is to travel into the next century. The possibility that voluntarism may be discarded will transform the fundamental nature and scope of ADR mechanisms in the twenty-first century.

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[104] *In re NLO*, 5 F.3d at 158.

[105] Richard B. Schmitt, *Bill Aims to Speed Cases in U.S. Courts*, WALL ST. J., Nov. 10, 1993, at B10.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

### *C. State Legislation Authorizing Compelled ADR Mechanisms*

Ohio has legislated ADR mechanisms into its statutory framework. Similar to efforts on the federal level, state efforts involve both voluntary and involuntary procedures. ADR legislation covers a broad range of areas. Section 2711 of the Ohio Revised Code[110] covers a substantial number of the arbitration provisions under Ohio law. ADR has been utilized in areas ranging from divorce to mental health board proceedings.[111] In response to the business community's affinity for the private resolution of disputes, the Ohio legislature has instituted measures designed to insure that contractual provisions mandating the use of ADR will be upheld by the courts.[112]

#### *1. The Civil Justice Reform Act of 1990 (CJRA) and The United States District Court for the Northern District of Ohio*

For the year 1992, the United States District Court for the Northern District of Ohio completed an Annual Assessment of the Civil and Criminal Dockets pursuant to the Civil Justice Reform Act of 1990 (CJRA). The CJRA requires that each U.S. District Court annually assess its docket in order to formulate provisions which better insure the cost-efficient and time-efficient management of each court's caseload.[113]

The district court for the Northern District of Ohio instituted several new programs during 1992. All have enjoyed favorable results. One of the new programs provides for a comprehensive tracking program. Cases are assigned to one of five processing tracks following review by a judicial officer to insure differentiated case management techniques.[114] Another new program, termed the "Docket Equalization Process" (DCM), insures that new cases are dispersed among judges proportionally according to their pending docket caseload.[115] The first year results indicated new case filings were resolved at a "significantly quicker pace under DCM."[116] The district court also has been designated a Pilot District for voluntary arbitration.[117]

The United States District Court for the Northern District of Ohio is on the forefront of change in the field of ADR. The district has actively undertaken measures designed to better define the use of ADR, provide for

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110 OHIO REV. CODE ANN. § 2711 (Anderson 1992).

111 *See generally* OHIO REV. CODE ANN. § 2711.21 (Anderson 1992).

112 OHIO REV. CODE ANN. § 2711.01 (Anderson 1992).

113 ANNUAL ASSESSMENT, *supra* note 1.

114 *Id.*

115 *Id.* at 4.

116 *Id.* at 10.

117 *Id.* at 3-4.

its use, and limit its application. The court has instituted a settlement week and published guidelines for court-annexed summary jury trials.[118] In so doing, it has attempted to prevent the formulation of a haphazard patchwork quilt of ADR use within the district and has instead chosen to provide an informed, cohesive framework in which ADR may operate.

*2. Ohio Revised Code §§ 3109.052 & 3109.041*

The area of domestic relations has been an arena in which the use of ADR has been favored by the legislature. ADR is typically praised for its ability to address the context in which these conflicts occur. Long-term conflictive relationships and their accompanying complexities may be taken into account while attempting to arrive at a tenable solution which will enable parties to preserve a working relationship.

In 1990, the Ohio legislature passed R.C. § 3109.052 into law.[119] The statute authorizes the state court to order parties to mediate their differences concerning a shared parenting decree in a divorce, dissolution, legal separation, or annulment proceeding.

Ohio Revised Code § 3109.041 outlines the mediation procedure to be followed by the court. Parties are required to jointly file a mediation report with the court.

The mediation report must indicate whether an agreement has been reached and the content and details of any such agreement. Inclusion of background information or any information discussed or revealed during the mediation is forbidden. The mediation report may serve as a basis of consideration for the judge in determining the proper allocation of responsibilities under the shared parenting agreement. However, the court is not bound by the mediation report. The best interests of the children or child is of paramount importance in the formulation of the shared parenting decree. Judicial discretion is afforded great latitude.[120]

Limitations upon the power of a state court to compel arbitration are integrated into the statute. The statute also allows for flexibility in procedure according to local rule and judicial discretion.[121]

Two important limitations are placed upon the discretion of the trial judge. First, the judge must make an initial determination that mediation is in the best interests of the parties.[122] The judge is free to consider the totality of circumstances surrounding the dispute in determining whether

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[118] ANNUAL ASSESSMENT, *supra* note 1, at 16.

[119] OHIO REV. CODE ANN. § 3109.052 (Anderson Supp. 1993).

[120] *Id.*

[121] *Id.* § 3109.041.

[122] *Id.* § 3109.052.

mediation is appropriate. The statute identifies circumstances under which mediation should be subjected to stricter judicial scrutiny. A record of previous offenses or abusive acts against a family member is a legislatively-mandated factor for heightened scrutiny.[123] Second, if one parent holds such a record or falls within an express classification outlined in the statute, the trial judge must not only make an initial determination that mediation is in the best interests of the parties, but must also make specific, written findings of fact justifying the order to mediate.[124]

The authority given the trial court judge includes the ability to order submission of the mediation report within a specified time period in order to facilitate a timely disposition of the matter.[125] The court may also order either party or both parties to pay costs. Parties are free to request waiver of the required payment and may be excused from payment for good cause.[126]

The statute serves to preserve the integrity of the mediation process by precluding the possibility that a mediator may be made a party or forced to testify at a later proceeding. The statute expressly forbids any attempt to make a mediator party to any consequent civil action or testify at such a proceeding.[127]

The Ohio statute represents a piece of legislation which attempts to balance the competing interests. The statute defines limits yet remains flexible. However, considerable discretion is left with the trial court judge. Just as substantial discretion is left to the mediator in conducting a mediation hearing, legislatures are forced to assign similar levels of discretion to judges. This seems an inevitable by-product when integrating ADR into an adversarial system. The judge comes to represent the neutral third party who helps facilitate settlement.

### *3. Boone County Circuit Court: Pilot Arbitration Project*

The Northern Kentucky Bar Association appointed a committee in 1989 to investigate ways to remedy the backlog of cases clogging the Boone County Circuit Court of Kentucky. The court was the fastest growing county in all of Kentucky, yet had only one judge to staff the circuit court. The judge who served the Boone County Circuit Court was also required to devote time to serve the Gallatin County Court.[128]

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123 OHIO REV. CODE ANN. § 3109.052 (Anderson Supp. 1993).

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 Christopher J. Mahling & Donald Stephner, *Court-Annexed Arbitration–The Northern Kentucky Expereince*, 81 KY. L.J. 1155 (1993).

The committee appointed by the Kentucky Bar Association began to develop a proposal for court-annexed arbitration in the Boone Circuit Court in late 1989 and early 1990.[129] The primary purposes of the proposal were to lower both the cost of litigation and the burdensome caseload the court was being forced to carry. The proposal was formulated to foster a feeling in participating litigants that they had been given "their day in court."[130] Cases eligible for participation in the program are limited to those which involve $25,000 or less.[131] All those cases which involve claims in excess of $25,000 require the consent of all parties to arbitration.[132] The arbitrators have been deemed to possess no equity powers so all equity cases are unilaterally excluded. As a result, cases in the area of domestic or family law may not utilize the program.[133]

While committee members realized the importance of party cooperation and satisfaction, they placed equal, if not greater, value on brevity, uniformity, and most importantly, finality. Committee members believed the program must be able to impose resolution on parties who remain unable to agree. The committee concluded that arbitration was the vehicle best equipped to help them achieve these goals.[134]

The arbitration program of Hamilton County, Ohio was chosen as the model after which the Boone County Circuit Court arbitration program would be fashioned. The Boone County arbitration program requires parties to submit their filing fees within thirty (30) days of being referred to the program. Once such fees are paid, the Kentucky Bar Association appoints a panel of three arbitrators to preside at the hearing. The parties enjoy the right to opt for one arbitrator, rather than three, to conduct the hearing. Additionally, recognition of the need for party volition is further evidenced by the right of each party to block the referral by filing a written objection to the arbitration proceeding within ten (10) days of the referral order.[135]

The Kentucky Rules of Evidence are relaxed and modified for the arbitration proceeding. For example, expert testimony may be admitted via a written statement. The time spent and cost incurred by the hearing are thereby reduced. Fourteen days before the hearing, parties submit and exchange documents which they intend to use at the arbitration hearing. Documents not exchanged at this time may not later be used at the hearing.

It is important to note that the Boone County Circuit Court program

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[129] Mahling & Stephner, *supra* note 128, at 1155.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Mahling & Stephner, *supra* note 128, at 1155.

[135] *Id.*

undertook affirmative efforts to publicize and educate the local legal community out of recognition of this need. Quite similarly, C. Eileen Pruett of the Dispute Resolution Program for the Supreme Court of Ohio had emphasized the concurrent need to educate both attorneys and judges about the processes and substance of alternative dispute resolution mechanisms when implementing ADR into a formal adversarial system. The Kentucky Bar Association newsletter publicized the Arbitration Program and steps were taken to encourage members to volunteer their time to participate in the program. ADR educational programs were permitted by the Kentucky Bar Association to be taken for CLE credit. Similarly, the Ohio Supreme Court is currently attempting to make CLE credit available for those wishing to attend programs and seminars on ADR.[136]

The initial results of the Boone County program have been positive. No party has yet to opt out. The average time from the referral order to the final resolution of a case is four months. The costs incurred by the parties have been dramatically reduced and the court's docket has been made more manageable.[137]

However, it is important to note that some advocates of the program have begun to recommend that a strict cost-benefit analysis be utilized to maximize the value of the program. As a direct result, recommendations designed to excise what little remains of voluntarism and consent within the arbitration program have been made. Advocates suggest that by raising the jurisdictional amount from $25,000 to $50,000, more cases could be caught in the net of arbitration and thereby be resolved more efficiently. It has also been suggested that the right of parties to opt out of the arbitration program be denied. Advocates of the elimination of the opt out provision claim that parties retain the right to demand a trial de novo, and this provides them with adequate protection.[138] These advocates apparently assign no value to the needless time, energy, and moneys expended on a futile resolution mechanism.

The Kentucky program appears to be at the same crossroads at which many other similar programs across the nation have found themselves. Court-annexed ADR appears to be a slippery slope which courts and legislatures must carefully demarcate and monitor. The aforementioned elimination of the opt out provision and increased jurisdictional amount threaten to proceed without recognition of the fact that some disputes may require formal discovery, the rules of evidence, and a well-defined

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[136] Pruett, *supra* note 2. Pruett outlined efforts by the Supreme Court of Ohio Committee on Dispute Resolution to institute mandatory ADR educational requirements for Ohio judges and attorneys.

[137] *Id.*

[138] Mahling & Stephner, *supra* note 128, at 1163.

procedural process. Some disputes may be too costly to be resolved informally or privately. They require public adjudication. The Kentucky arbitration seems to recognize this in its original formulation. However, recent suggestions made for the modification of the program reflect an ardent desire for the most cost-efficient and time-efficient ends to the resolution of every dispute absent any recognition of the fact that part of the original value assigned to ADR lay in its ability to utilize the "means" by which it pursued resolution to validate its "end." ADR is not a methodology which unilaterally endorses the proposition that the ends always justifies the means.

*4. Court-Annexed ADR: A Dissent*

The Honorable Rodney S. Webb, Chief Judge of the United States District Court for the District of North Dakota, emphasizes the need for many proponents of ADR to remain conscious of the fact that ADR is not only procedurally distinguishable from formal adjudication, but also is substantively different as well.[139] The Seventh Amendment to the United States Constitution guarantees the right to trial by jury, not the right to the "resolution" of a dispute by qualified experts from the legal field or other similar professions. As such, Judge Webb considers the civil jury trial properly termed "traditional dispute resolution."[140]

Some critics of the unguided expansion of ADR, contend that ADR cannot be equivocated in value and function with the traditional civil jury trial. They are entirely different in form, substance, meaning, and function. Instead, critics like Judge Webb, advocate the expansion and improvement of the traditional justice system to enable it to provide greater efficiency while retaining the important values inherent in formal adjudication. The answer lies not in abandoning adjudication and replacing it with ADR, but rather the proper solution is to work to improve adjudication so that it may meet the needs of a changing society. Minor changes are wise; wholesale exchange of one system for another wages an assault on the constitutional foundations of the nation.[141]

Such minor changes would include affirmative action on the part of legislators to prudently consider the effects of any further "federalization" of law, expansion of the magistrate judge support system, and the completion of a comprehensive computerization of the federal justice system.[142] In sum, it may be argued that ADR is not an alternative

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[139] Rodney S. Webb, *Annexed ADR--A Dissent*, 70 N. DAK. L. REV. 229 (1994).

[140] *Id.* at 230.

[141] *Id.* at 232.

[142] *Id.*

resolution so much as it is a *different* resolution to any given dispute.

The fundamental differences between the two resolution processes are exemplified in those cases in which there is a power imbalance between the parties.[143] ADR fails to provide mechanisms comparable to available adjudicative mechanisms which serve to level the playing field upon which litigants must play. Although ADR might often foster a perception of equality, the implicit power imbalances work to produce unjust result or to compromise an already compromised resolution process. As such, courts provide the best vehicle for the vindication of the individual right for the oppressed minority classes or persons: the very purpose for which this nation was founded. The value of this service is timeless and priceless. It is a service for which the federal courts were created and uniquely equipped to provide. Those wishing to draw lines of limitation upon the expansion of ADR argue that alternative dispute resolution processes are properly made available to litigants by the private sphere according to their own volition. They charge that those wishing to foster the illusion that ADR provides one with "one's day in court" pervert the original value of ADR. For "one's day in court," there can be no substitute.

### *5. The Quandary of the Judiciary and the Problem of Misguided Legislative Zeal*

Courts and legislatures must recognize the inherent limitations of ADR in an adversarial legal system and the paradox limitations of simultaneously requiring a judge to serve as both mediator and adjudicator. Additionally, courts and legislatures must be willing to recognize that attorneys and legislators must become better educated about ADR and its potential uses and abuses before implementing it into practice.[144] The value of the recognition of these facts is limited. In the 1990s, courts and legislatures must be forced to face the inadequacies of an adversarial system serving as a foundation for the imposition of a system of ADR mechanisms. Not only must limits be placed on the sanctioned means and ends of ADR, but courts and legislatures must also recognize that ADR in an adversarial context is inherently limited, if not flawed.

A judge can never serve as the functional equivalent to a mediator or negotiator. This is due to the simple fact that judges are not, in fact, neutral third parties. The aforementioned pieces of legislation represent legislative recognition of the fact that the duty and function of the judiciary is a product of the law which it seeks to enforce. Once the expedition of cases through alternative dispute resolution mechanisms is legislatively mandated,

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[143] Webb, *supra* note 139, at 232.

[144] Pruett, *supra* note 2.

the judiciary can approach the adjudicative forum armed with imperatives of its own. Judges and courts share an interest independent of the litigants. Every attorney and judge serves as an officer of the court. They are bound by oaths. They have a duty to preserve the integrity and promote the values of the American justice system.

Allegiance to the values of the American justice system in the 1990s requires judges to promote the time-efficient and cost-efficient disposition of cases in the face of a litigation crisis which threatens to compromise the integrity of the system as a whole. Legislatures share the same goal which aims at the systemic preservation of the adversarial system. Legislatures are actively trying to fashion resolutions that will alleviate the burden. In doing so, they have placed judges in a role which they cannot competently perform. Judges are not neutral third parties. They represent the rule of law and the interests of the whole. The interests of the whole in systemic efficiency and expediency may often conflict with the individual interests of litigants. The potential danger of ADR extending beyond a mere compromise between two parties into a three-way compromise with a judiciary searching for the most time-efficient and cost-efficient results must be addressed.

Legislatures have approached ADR enthusiastically, but superficially. Lines must be drawn and limitations realized. Vesting substantial amounts of discretion in a non-neutral third party must be re-evaluated. The question which faces courts and legislatures in the 1990s is whether their approach to the implementation of ADR must be modified to conform to the underlying theoretical underpinnings of ADR as a voluntary process of cooperation and conciliation or whether ADR must redefine itself to conform to compelling public policy mandates. The Sixth Circuit has chosen to answer affirmatively to the former proposition. The Sixth Circuit requires that ADR mechanisms, utilized to facilitate settlement, conform to the original, theoretical underpinnings of ADR.[145]

## IV. CONCLUSION

On the federal, state, and county levels, the use of ADR is increasing and expanding. With its expansion must come an awareness and definition of its limits. No uniform definition of its limits has been recognized. Courts and legislatures have been left to fashion a haphazard patchwork quilt of the permissible contexts in which ADR may be used and cooperation compelled. Compulsory ADR is a development that must be addressed quickly and competently. The potential influence of this development upon the evolution of ADR in the twenty-first century is readily apparent.

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[145] *In re* NLO, Inc., 5 F.3d 154, 156-57 (6th Cir. 1993).

The debate surrounding the use of compulsory participation in ADR mechanisms is a one over the proper public policy agenda. It is a debate which may change the perception of litigants from one in which ADR mechanisms are viewed as a potential remedy to one in which they are viewed as a potential sanction.

The strengths and weaknesses on each side of the debate have been identified. Those favoring ADR rely upon Rule 16 as authority for the practical recognition of the fact that courts must be vested with "the discretion and processes necessary for intelligent and effective case management and policies."[146] Proponents assert that without the use of such compulsory measures, the system will be compromised to the detriment of the majority of litigants and the system as a whole. An extraordinary backlog of cases delays resolution, and justice delayed is justice denied for many. Proponents argue that judges and legislatures are in a far better position to identify and effectively serve the needs of the parties and the system. They contend that parties often operate under a set of unrealistic expectations and perceptions of the formal justice system. The ideology and idealism of parties corrupts and distorts the system.

Critics of compulsory ADR mechanisms recognize the need of the judiciary to insure efficient caseload management, but claim that this need must be balanced against the fundamental rights of individual litigants. Compulsory SJTs represent the systemic needs of an overburdened formal justice system taking precedence over the autonomy of litigants. Through the introduction of compulsory ADR mechanisms, a new adversary has been introduced into the adversarial context. The federal judiciary, as representative for an overburdened formal justice system, has been charged by Congress to pursue its own agenda in the management of cases which comes before it. Critics charge that a compulsory SJT proceeding impermissibly and unnecessarily infringes on the rights of litigants to fully utilize the adversarial process if they so choose. Compulsory SJT proceedings seriously affect the nature and parameters of the well-established rights of litigants and their attorneys to work product privilege and restrictions on the scope of pretrial discovery. Opponents to compulsory SJT proceedings claim that any delay or additional cost imposed upon unwilling litigants improperly interposes judicial discretion where individual discretion properly resides. Such delays are not only unnecessary, but are irremediable as well. Critics claim that a compelled SJT proceeding represents an "unwarranted extension of judicial power."[147]

Compulsory ADR mechanisms are being implemented by courts and legislatures which are not adequately educated in the methodology and

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[146] FED. R. CIV. P. 16.

[147] *In re NLO*, 5 F.3d at 157-58.

ideology inherent in ADR. Attorneys and legislatures must become better schooled in ADR techniques before attempting to implement and interpose them in a variety of areas within the context of an adversarial system. Out of recognition of this need, the Supreme Court of Ohio Committee on Dispute Resolution has made formal recommendations to the Court that it mandate continuing legal education in dispute resolution concepts for judges in Ohio and a one-time mandatory continuing legal education requirement in dispute resolution concepts for attorneys within the state.[148]

The Sixth Circuit has come to the crossroads at which contrasting perspectives meet and draw lines of limitation. The Sixth Circuit has recognized a substantial difference between the encouragement and proper facilitation of early settlement and attempts to coerce settlement. Encouragement of out-of-court settlements is the proper goal of the courts and legislatures in their approach to the use of ADR by the formal justice system. Courts and legislatures, acting as agents of coercion in order to expedite the disposition of cases which overcrowd the judicial dockets, is not. Once voluntarism is discarded, many ADR mechanisms can be transformed into adversarial tools wielded by adjudicators pursuing settlement.

Courts and legislatures must decide whether ADR is to serve as a vehicle by which "community" can be preserved and individual needs may be more competently addressed through accommodation and voluntary cooperation, or whether individual litigants must learn to accommodate the pressing, communal need for efficiency and economy in the legal justice system of a modern nation-state. A balance must be struck and lines must be drawn. Can ADR mechanisms afford to respect individual autonomy in the face of systemic crisis? The Sixth Circuit has answered this question in the affirmative.[149] Courts and legislatures across this nation must address this fundamental question and, in so doing, chart the course of ADR into the next century.

*Kelli E. Tyrrell*

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[148] Preliminary Report of the Committee to the Supreme Court of Ohio, Recommendations Four & Five, pp. 18-21; The Supreme Court of Ohio Committee on Dispute Resolution, Columbus, Ohio (Sept. 1991).

[149] Report, *supra* note 148, at 18-21.