

# All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation

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## I. INTRODUCTION

Imagine this scenario: You are the chief justice for your state court system, and the state bar association president has requested a meeting to talk about “justice” concerns raised by members of the (civil) bar. You agree to meet and are presented with the following issues:

- Referrals to alternative dispute resolution (ADR) are unnecessary; they add time and cost to the pursuit of justice, especially if clients are required to attend.
- Some mediators coerce parties into late night, last minute settlement agreements.
- Lawyers are increasingly dismayed about the frequency with which judges order ADR when their clients want a trial or a ruling on a motion, or when the lawyers can negotiate settlements without ADR if given the chance.

You leave the meeting somewhat confused. You think there has been a substantial amount of empirical work that proves ADR, especially mediation, “works” and clients are “satisfied” with it. You ask your clerk to do some research for you in anticipation of the need to meet again soon with the bar association president with your proposals for needed programmatic changes in court-connected ADR. Your clerk comes back with the following summary:

- A recent issue of *Conflict Resolution Quarterly* reviews existing evaluation data on ADR. A well-respected scholar, Roselle Wissler, authored the article *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, but it seems that her article mostly confirms that we know very little for sure.<sup>1</sup>
- There is a body of literature suggesting that parties are “satisfied” with the mediation process, although much of the data come from community and family cases, and comparisons of mediation versus

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<sup>1</sup> Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 67–70 (2004) [hereinafter *Effectiveness Data*]. Professor Wissler’s excellent article highlights the difficulty of sorting out what ADR is supposed to achieve, whether it has been “successful,” and also the difficulty of generalizing from ADR research when the context of individual ADR programs or processes is so variable. It is hard to reach prescriptive conclusions.

negotiation without mediation, especially in general civil cases, are sparse.<sup>2</sup>

- Program design and implementation differ greatly from state to state (and within states as well); therefore, it is difficult to know for sure what “works” or what provides lawyer or client “satisfaction.”<sup>3</sup>

Professor Nancy Welsh and I recently authored an article<sup>4</sup> that looks at the institutionalization of general civil mediation in the courts and compares

<sup>2</sup> *Id.* at 66 (finding that although participants and attorneys give high marks to mediation, the subset of studies “that compared participants’ assessments in mediation and nonmediation cases produced mixed findings”). See also Craig A. McEwen & Roselle L. Wissler, *Finding Out if it is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131, 142 (2002) (“[T]o address adequately important policy questions about the value and utility of mandated mediation in civil cases, we need significantly more research that focuses on the crucial comparison between unassisted lawyer-driven negotiation and settlement efforts aided by mediation delivered in variously structured mediation programs.”); see generally Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998) (discussing the factors that promote party satisfaction in mediation).

<sup>3</sup> Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, (Donna Stienstra & Susan M. Yates eds., 2004) [hereinafter ADR HANDBOOK] (detailing models of practice for court-connected mediation programs). See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 847 (2004).

To appreciate the true value of ADR in operation, one cannot depend exclusively or even primarily on statistical data, however rich. Ultimately, we need to “go . . . beyond large-scale research to small-bore case studies” qualitatively illuminating the evolution of ADR within various contexts and the experiences of those who play a part in it.

*Id.*; see also Bobbi McAdoo et al., *Institutionalization: What do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG., Winter 2003, at 8–10 (articulating empirically proven design features for court programs to increase the use of mediation, increase the likelihood of settlement and ensure litigant perceptions of procedural justice); Roselle L. Wissler, *The Role of Antecedent and Procedural Characteristics in Mediation: A Review of the Research*, in THE BLACKWELL HANDBOOK OF MEDIATION 129, 138–42 (Margaret S. Herrman ed., 2006) [hereinafter BLACKWELL HANDBOOK] (discussing mixed research results and methodological problems with much of the research).

<sup>4</sup> Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2005) [hereinafter *Lessons*].

the results of this institutionalization with what we think was intended by the thinkers at the 1976 Pound Conference.<sup>5</sup> Specifically, we articulated the goals for ADR emerging from the Pound Conference under categories of substantive, procedural, and efficient justice.<sup>6</sup> Using empirical data from studies of judges, lawyers, and parties, we raised important issues about whether ADR has fulfilled these Pound Conference goals and preserved the “justice” ADR should support.<sup>7</sup>

This Article will concentrate exclusively on data from a survey of Minnesota’s trial court judges. I believe that ADR, especially mediation, as implemented in our court system, is at a critical point in its evolution. It may have so adapted to the court system “soil”<sup>8</sup> that there is little hope it can

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<sup>5</sup> The Pound Conference was convened by Chief Justice Burger in 1976 to consider problems of justice in the courts, particularly the cost and delay problems that were so rampant. The modern ADR movement is generally considered to have emerged from the Pound Conference, specifically from Professor Frank Sander’s articulation of a “multi-door courthouse.” See *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE* 84 (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>6</sup> For example, under substantive justice, one of the goals we suggest was articulated at the Pound Conference is “outcomes that are consistent with the rule of law”; under procedural justice, a goal from the Pound Conference is “an opportunity for parties to express their views (‘voice’)”; under efficient justice, we include “savings in time and costs for parties and courts” as one of the Pound conference goals. *Lessons, supra* note 4, at 404–05.

<sup>7</sup> *Lessons, supra* note 4, at nn. 65–103, 110–12, 119, 122–27, 133–35, 148–50 and accompanying text (raising concern about the effect of mandatory mediation on substantive rights, whether mediation promotes settlements that involve something other than money, whether procedural justice is served by mediation, whether rates of trial decrease or settlement rates increase with the use of mediation, whether parties exercise self-determination in mediation sessions, and the effect of some mediator interventions in the process).

<sup>8</sup> See Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 *CARDOZO J. CONFLICT RESOL.* 117, 138–39 (2004) [hereinafter *The Place of Mediation*] (“[C]ourt-connected mediation has evolved from a process that focused on enhancing individual citizens’ voice, control and assurance of accountability into a mechanism that resolves cases by reconciling these citizens to the institutional reality (or at least mediators’ and attorneys’ perception of the reality) of the courts and litigation.”); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *HARV. NEGOT. L. REV.* 1, 3 (2001) [hereinafter *The Thinning Vision*] (discussing the change to the meaning of self-determination as mediation adapts to its home in the courthouse); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 *CARDOZO J. CONFLICT RESOL.* 57, 59 (2004) (asking whether “court-

further grow and develop as a different paradigm that is both “value-added” and more cost-effective for our system of justice.<sup>9</sup> It is important to acknowledge upfront, however, that given the lack of data and the conflicting results of much of the existing data, it is difficult to know with certainty whether this different paradigm, which still exists in the rhetoric, *ever* lived in practice.<sup>10</sup>

Some data from the judges do support a view that ADR and mediation add value to traditional dispute resolution.<sup>11</sup> Ironically, however, this view

connected mediation [has] lost its way on the road to justice” by becoming “so intertwined with litigation and adjudication as to be indistinguishable from judicial settlement processes or traditional bilateral negotiations”); Robert A. Baruch Bush & Lisa Blomgren Bingham, *The Knowledge Gaps Study: Unfinished Work, Open Questions*, 23 CONFLICT RESOL. Q. 99, 109–11 (2005) (articulating research gaps regarding institutionalization and cooptation of mediation principles, especially focusing on this issue in the court system).

<sup>9</sup> Robert Baruch Bush’s influential 1996 article articulated the “value-added” of mediation over the bilateral negotiation process: increased party participation, party self-determination, improved quality of communication, the possibility for parties to find more positive ways of regarding each other, and the decrease of party mutual demonization. Robert A. Baruch Bush, “*What Do We Need a Mediator For?*”: *Mediation’s “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 28 (1996). Too often these non-settlement values don’t find empirical support with lawyers and judges. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 45 (1982) (stating that the “Lawyer’s Standard Philosophical Map” assumes that “adversariness and amenability to solution by a general rule imposed by a third party” are “germane” to nearly every situation encountered by a lawyer.); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyers’ Philosophical Map?*, 18 HAMLIN J. PUB. L. & POL’Y 376, 388 (1997) (discussing the need for lawyers to get off their philosophical map to recognize that clients value things other than just money in a settlement.). *But see Lessons*, *supra* note 4, at 426 n.154 (suggesting the possibility of “giving up” on some of the original non-settlement goals for court connected mediation).

<sup>10</sup> In November 2005, I attended a conference on Court ADR Research hosted by the Federal Judicial Center and The Ohio State University Moritz College of Law. This conference grew out of recommendations regarding research gaps reported on by Bush and Bingham, *supra* note 8, at 110. The overwhelming need for additional ADR research was clear: what works, what does not, and what effect has ADR had on the justice system were all questions posed by a group of judges, court administrators, and academics. There was particular note made of the fact that little is known about what judges think about ADR. See also *Effectiveness Data*, *supra* note 1, at 81 (“Our ability to draw clear conclusions about the relative effectiveness and efficiency of court-connected mediation, neutral evaluation, and traditional litigation is limited by the small number of studies with reliable comparative data based on the random assignment of cases to dispute resolution processes and the use of statistical significance tests.”).

<sup>11</sup> See *infra* notes 71–91 and accompanying text.

based on the *perceptions* of Minnesota's judges has little other empirical support to back it up.<sup>12</sup> For example, although judges perceive better and more durable settlements, we know so little about settlements, with or without ADR, that the validity of this result is questionable.<sup>13</sup> Moreover, judges like mediation because of the potential for increased client involvement, yet they want mediators to have the substantive expertise that suggests an evaluative, lawyer-centered settlement process.<sup>14</sup>

Importantly, the data that *confront and question* the added value of mediation do find support elsewhere.<sup>15</sup> For example, there is overwhelming mediation rhetoric that notes the value-added potential of mediation to support continuing relationships.<sup>16</sup> A limited number of judges, however, consider "relationship" factors to be very important in the decision to order parties to use ADR.<sup>17</sup> This is consistent with other research that questions whether, in court-connected civil mediation, relationship issues figure strongly.<sup>18</sup> Some judges note that they do not send cases to ADR because it may increase costs and time, a concern that has been noted for some time despite the rhetoric to the contrary.<sup>19</sup> Finally, even if some of the judges'

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<sup>12</sup> See *infra* notes 73, 88, and 92 and accompanying text.

<sup>13</sup> See BLACKWELL HANDBOOK, *supra* note 3, at 138 (finding that compliance only related to litigant's ability to pay and the nature of the agreement); see generally *Effectiveness Data*, *supra* note 1, at 65 (finding mixed research results on whether there are more settlements with mediation).

<sup>14</sup> See *infra* notes 87 and 93 and accompanying text.

<sup>15</sup> See *infra* notes 94–96 and accompanying text. The increase in litigation about mediation is an unwelcome development for a process that was to be an "alternative" to disputing through litigation. See James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

<sup>16</sup> Lon Fuller first articulated the "central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship . . ." Lon Fuller, *Mediation—Its Form and Functions*, 44 S. CAL. L. REV. 305, 325 (1971); see also Dwight Golann, *Is Legal Mediation a Process of Repair — or Separation? An Empirical Study and its Implications*, 7 HARV. NEGOT. L. REV. 301, 331, nn. 1–4 and accompanying text (2002).

<sup>17</sup> See *infra* notes 87 and 95 and accompanying text.

<sup>18</sup> See *Effectiveness Data*, *supra* note 1, at 67.

<sup>19</sup> *Effectiveness Data*, *supra* note 1, at 67–68; see Deborah R. Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15–16; see Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81 (2002); see also Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 877 (1998).

concerns do not have other empirical support, they are still of sufficient concern that they need to be taken seriously in the implementation of ADR programs. Given that these are concerns about “justice,” it may be necessary to err on the side of “ADR restraint.”

Ultimately, I suggest that the ADR field may need to reexamine its goals, training agendas, and implementation strategies if it hopes to find a helpful and permanent place supporting the “justice” mission of the court system.<sup>20</sup> This is not an impossible task;<sup>21</sup> however, it requires a commitment of energy, as well as funding resources, commensurate to its importance.

After reviewing the background for the Minnesota judicial study and some basic data confirming the use of ADR in Minnesota,<sup>22</sup> this Article turns in section IV to the views expressed by judges on when and why ADR is, or is not, ordered.<sup>23</sup> Then, section V reviews data about judicial action when summary judgment motions are filed during an ADR process, as well as enforcement and complaint issues.<sup>24</sup> Section VI reviews data on three important mediation issues: the timing of mediation vis-à-vis discovery, client attendance at mediations, and mediator qualifications.<sup>25</sup> Finally, the Article concludes with a brief summary of the questions raised by the data

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<sup>20</sup> This is not meant to imply that no existing court-connected ADR programs are supporting the “justice” mission of the courts. Those with staff to monitor and evaluate what happens in ADR are more likely to have meaningful data on their programs and neutrals, and the ability to change course if problems arise. Staff for ADR programs, however, is often a luxury the courts cannot afford. ADR HANDBOOK, *supra* note 3, at 8.

<sup>21</sup> See *infra* notes 256–73 and accompanying text for concrete suggestions.

<sup>22</sup> The data are included to provide the *context* for Minnesota’s ADR program. This context is important especially because much of the empirical work in ADR suffers from insufficient attention to the details of program context. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 701–02 (2002).

Many of the questions regarding mediation in general jurisdiction civil cases lack clear answers because they have been examined in only a small number of studies, different studies find different patterns of effects, or the studies suffer from methodological weaknesses. . . . [R]esearch will need to examine not only the mediation process but also aspects of the “traditional” litigation process within which it takes place.

*Id.*; see also BLACKWELL HANDBOOK, *supra* note 3, at 139.

<sup>23</sup> See *infra* notes 67–185 and accompanying text.

<sup>24</sup> See *infra* notes 187–223 and accompanying text.

<sup>25</sup> See *infra* notes 238–255 and accompanying text.

and makes modest proposals to better ensure that the implementation of ADR is consistent with the “justice” goals it was intended to fulfill.<sup>26</sup>

## II. BACKGROUND TO THE JUDICIAL STUDY<sup>27</sup>

Minnesota has had a comprehensive court ADR rule, Rule 114 of the Minnesota General Rules of Practice, since July 1994.<sup>28</sup> The rule was the culmination of more than two decades of legislation, experimentation, pilot studies, several Supreme Court task forces, and public hearings.<sup>29</sup> By the time it took effect, a considerable amount of ADR had already occurred in metropolitan Hennepin and Ramsey Counties, although much less had occurred in “outstate” Minnesota.<sup>30</sup> Rule 114 is a “consideration” rule,<sup>31</sup> and therefore, its implementation did not require a substantial new ADR infrastructure in the state court system.<sup>32</sup> Rather, the educational efforts of the dispute resolution community and individual judicial willingness to order parties into ADR resulted in a successful ADR program throughout Minnesota.<sup>33</sup>

In 1996, in response to a directive to the ADR Review Board from the Minnesota Supreme Court, I undertook an evaluation project to gather data

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<sup>26</sup> See *infra* notes 256–73 and accompanying text. Although the proposals have obvious relevance for Minnesota (because the data in this article is from Minnesota), they also are relevant for other court systems.

<sup>27</sup> This article borrows from a 2004 report to the Minnesota Supreme Court and the Minnesota ADR Review Board. BOBBI MCADOO, *THE JUDICIAL PERSPECTIVE ON RULE 114 IN MINNESOTA* (2004) (on file with author).

<sup>28</sup> MINN. GEN. R. PRAC. 114.01 (2006).

<sup>29</sup> Early history of Minnesota’s ADR journey can be found in Barbara McAdoo, *The Minnesota Experience: Exploration to Institutionalization*, 12 *HAMLIN J. PUB. L. & POL’Y* 65 (1991).

<sup>30</sup> Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 *HAMLIN L. REV.* 401, 409 nn. 28–35 (2002) [hereinafter *McAdoo Report*].

<sup>31</sup> MINN. GEN. R. PRAC. 114.03 (2006). Under Rule 114, attorneys consider the use of ADR with their clients and opposing counsel and report to the court whether they will use an ADR process. If the parties choose not to use ADR and the court disagrees with this choice, the court may order the parties into a non-binding ADR process.

<sup>32</sup> An appointed volunteer ADR Review Board provides oversight and advice to the Minnesota Supreme Court on Rule 114. The author served on the original ADR Review Board from 1994–1998.

<sup>33</sup> Leadership from key judges is often cited as an ingredient for success in court ADR. ADR HANDBOOK, *supra* note 3, at 3 n.13.



on the lawyers' perspectives on ADR under Rule 114.<sup>34</sup> The subsequent report confirmed the growing use of ADR, especially mediation, as well as the positive settlement results lawyers perceived were happening in mediation.<sup>35</sup> Although the report made several specific recommendations which were approved by the ADR Review Board,<sup>36</sup> there were no "smoking gun" issues needing immediate corrective action from the lawyers' point of view.<sup>37</sup>

In 2001, the ADR Review Board appointed a data and analysis subcommittee to consider and to suggest new efforts to assess the current operation of Rule 114 in Minnesota.<sup>38</sup> The subcommittee spent considerable time reviewing the statewide data collection system (TCIS) to provide basic ADR program management data.<sup>39</sup> In addition, under Justice James H. Gilbert's encouragement, the idea for a statewide judicial survey was approved to solicit the Minnesota judges' perspectives on Rule 114. As an ad hoc member of the Data and Analysis subcommittee, I offered to develop the survey form and analyze the collected data for this statewide judicial survey.<sup>40</sup>

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<sup>34</sup> The evaluation resulted in a 1997 report to the court which, with some additions, was published in 2002. *McAdoo Report*, *supra* note 30.

<sup>35</sup> The lawyer research, like the judge research herein, reveals what lawyers and judges *perceive* as happening; no additional data gathering was authorized, for example, to corroborate settlement numbers, or to ascertain whether ADR could be credited with increased settlements.

<sup>36</sup> See *McAdoo Report*, *supra* note 30, at 442–49.

<sup>37</sup> In fact, Rule 114 functioned well in Minnesota's legal landscape for many years and was expanded to include consideration of ADR for family cases. MINN. GEN. R. PRAC. 114.01 (2006). Additionally, a code of ethics and ethics complaint system were developed and implemented. MINN. GEN. R. PRAC. 114 app. Code of Ethics (2006).

<sup>38</sup> The author was no longer a member of the ADR Review Board but was asked to serve on this committee.

<sup>39</sup> The need to collect routine ADR data was one of the recommendations in the 1997 Report. See *McAdoo Report*, *supra* note 30, at 448. Anecdotally, this is a common problem in many jurisdictions.

<sup>40</sup> I received generous help from ADR colleagues Donna Stienstra, Nancy Welsh, Roselle Wissler, Julie MacFarlane, and John Lande in the development of the survey questions. Judges on the ADR Review Board pre-tested the survey instrument and appropriate changes were made before being approved by the ADR Review Board. The surveys were returned to the Supreme Court for data entry and the data were forwarded to me for analysis. Craig Hagensick, research analyst from the Court Services Division in SCAO, provided invaluable help to my law students, Jeff Cooper and Megan Hanson Kraby, on the operation of the SPSS statistical package used for analysis.

The survey instrument was mailed in January 2003 to all 287 of the Minnesota state district court judges with a cover letter from Justice Gilbert asking them to return the survey to the court.<sup>41</sup> The response rate was 71% (203 district court judges returned the survey). Of these, thirty-one (15%) indicated they did not regularly get assigned to Rule 114 cases and, as instructed in the survey, answered only a few questions at the end.<sup>42</sup>

Data collected and analyzed from this survey of Minnesota's trial court judges confirm the institutionalization of ADR in the Minnesota State Court system. Judges perceive extensive use of ADR, especially mediation, and many believe that trial court caseloads have been reduced as a result. The judges note the potential for mediation to allow the direct participation of clients in settlement negotiations and the potential to produce better and more durable outcomes. Judges generally approve of the way ADR is working.<sup>43</sup>

Minnesota judges also raise worrisome issues that need discussion within the larger Minnesota legal community. Most of these issues are relevant as well to the national ADR and judicial communities. They include: the appropriateness of mandatory ADR, the question of whether ADR really adds anything to traditional bilateral negotiations, the need to clarify process distinctions, the need to develop rules for mediation programs that encourage early use of mediation, the need to address the unique issues raised when unrepresented parties are ordered to mediation or other ADR processes, and the need for further research to track the effects of ADR referrals on the overall system of justice.<sup>44</sup>

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<sup>41</sup> The survey instrument is at Appendix A.

<sup>42</sup> An initial "gatekeeper" question served to ensure that only judges who had experience with general civil cases and ADR filled out the whole survey. Since thirty-one judges answered that they did not regularly handle civil cases eligible for ADR, the entire survey was filled out by 172 judges. Since many questions were not filled out by all 172 judges, I have indicated exact numbers and percentages for individual questions throughout this article.

<sup>43</sup> Survey questions included questions on ADR generally as well as questions specific to mediation, the ADR process of choice for most parties in Minnesota.

<sup>44</sup> Judges did not raise each of these questions directly, although they are inferred from survey answers generally.

III. ADR IS DEFINITELY INSTITUTIONALIZED IN MINNESOTA<sup>45</sup>

Although Minnesota does not have the technological capability to track how often ADR is used, answers to several survey questions illustrate the extensive use of ADR in Minnesota. There is nothing “alternative” about ADR in Minnesota; it is a routinely expected step for most civil litigation.<sup>46</sup> The requirements of Rule 114 have been institutionalized.<sup>47</sup> Moreover, this institutionalization is primarily dependent on lawyers and parties simply “considering” the use of ADR at an early point in a case and reporting their choices to the court.<sup>48</sup> Given this program design, the buildup of an extensive court infrastructure to manage ADR programs has not occurred.<sup>49</sup> As expected, differences in the institutionalization of ADR in the Twin Cities (Hennepin and Ramsey Counties)<sup>50</sup> compared to the rest of the state are clearly evidenced in the data. The data also showed some significant differences between courts on a master calendar system and those on the

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<sup>45</sup> Institutionalization implies “the mechanics for ensuring that knowledge, as well as availability, of ADR processes are in place, ADR processes are used routinely and frequently to resolve cases, and judges treat the processes as an integral part of civil litigation.” ADR HANDBOOK, *supra* note 3, at 3 n.13.

<sup>46</sup> In general ADR is routinely “considered” for almost all civil litigation. MINN. STAT. § 484.76 subdiv. 1 (2002) and MINN. GEN. R. PRAC 114.01 (2006). The statute indicates those few areas (such as guardianship, juvenile proceedings, probate) in which ADR does not have to be “considered” and may not be ordered by judges. MINN. STAT. § 484.76 subdiv. 2 (2002). This research project does not report on any pre-filing ADR which anecdotally is reported to be a large part of the litigation process in Minnesota.

<sup>47</sup> *Lessons*, *supra* note 4, at 407–08; *McAdoo Report*, *supra* note 30, at 405 n.11, 416.

<sup>48</sup> *Id.*

<sup>49</sup> *See infra* Part III.C.

<sup>50</sup> The data was examined to explore whether there were any real differences between metropolitan and rural county judges in several ways: seven-county metro judges versus all others; five-county metro judges versus all others; and Hennepin and Ramsey County judges versus all others. The Hennepin and Ramsey judicial responses versus all others comparison yielded by far the most differences, probably because these two larger counties have a longer history of significant ADR use. In this report, therefore, statistically significant differences in responses from the Hennepin and Ramsey judges compared to those of all other judges in the state will be noted. Statistically significant differences between responses from courts using a master calendar and those using the block system also will be noted.

block system (the latter being when a judge is assigned a case at its beginning and often has multiple interactions with the parties to the case).<sup>51</sup>

### A. Percentage of Caseloads Using ADR

Just over one-half (55%) of judges statewide estimate that 76%–100% of their caseloads use ADR; 23% of the judges statewide indicate that 51%–75% of their caseloads use an ADR process. Significantly, 83% of the Hennepin and Ramsey judges estimate that ADR is used in 76%–100% of their caseloads; only 48% of the “outstate” judges give this answer.<sup>52</sup> (See Table 1 below.)

**Table 1: Percentage of Rule 114 Caseload that Uses ADR**

	Percentage of judges selecting response (N=171)
0–25%	9% (16)
26–50%	11% (18)
51–75%	22% (37)
76–100%	51% (87)
Unknown	8% (13)

### B. Party Request for ADR

Data suggest that parties often initiate the request for ADR in their cases. Over three-quarters of the Hennepin and Ramsey judges note that ADR is usually (or always) initially requested by the parties; about two-thirds of all other judges reply that ADR is usually (or always) initially requested by the parties.<sup>53</sup>

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<sup>51</sup> It has been suggested that judges on a master calendar system do not have the opportunity to influence (i.e., order) parties to use ADR at the appropriate time.

<sup>52</sup> As noted earlier, these numbers do not count pre-filing ADR, which could be occurring at a greater rate in “outstate” Minnesota.

<sup>53</sup> This was not a statistically significant difference, but was expected because of the greater amount of ADR that has occurred in Hennepin and Ramsey counties.

### C. Use of Rule 111 Statement and Scheduling Orders

Rule 111 of the Minnesota General Rule of Practice requires parties to submit information for case management to the court within sixty days of filing an action.<sup>54</sup> Therefore, when Rule 114 was developed, adding ADR information to what was already required on the Rule 111.02 form was assumed to be an efficient way to minimize the amount of additional work (and paperwork) it might take to institutionalize ADR. Indeed, earlier research<sup>55</sup> confirmed that when parties file the required Rule 111 Informational Statement, they are far more likely to request ADR than when they do not.<sup>56</sup> The data in this study show that most judges (149 of 171 or 87%) require the completion of the ADR portion of the Rule 111 Informational Statement. Furthermore, most judges use initial scheduling orders (166 of 172 or 97%) and include ADR requirements in them (157 of 166 or 95%). (See Tables 2, 3, and 4 below.)

**Table 2: Requirement that ADR Portion of Rule 114 Statement be Completed**

	Percentage of judges selecting response (N=171)
Always	87% (149)
In Selected Cases	6% (10)
Rarely or Never	7% (12)

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<sup>54</sup> MINN. GEN. R. PRAC. 111.02 (2006). Form 111.02 requires information such as a description of the case, whether a jury trial is requested or waived, discovery contemplated and estimated completion date, estimated trial time, and proposals for adding additional parties.

<sup>55</sup> *McAdoo Report*, *supra* note 30, at 403 n.4.

<sup>56</sup> *Id.* at 405 n.11.

**Table 3: Use of Scheduling Orders**

	<b>Percentage of judges selecting response (N= 172)</b>
Yes	97% (166)
No	3% (6)

**Table 4: ADR Requirements in Scheduling Orders**

	<b>Percentage of judges selecting response (N= 166)</b>
Yes	95% (157)
No	5% (9)

As Table 5 (below) shows, the information contained in scheduling orders varies from judge to judge. The most common requirement is the *Date by which ADR will be completed*, a basic case management item. The *Type of ADR ordered* and the *Date by which the type of ADR must be selected* also ranked highly.<sup>57</sup> The small number of judges who included “report the name” of the neutral to the court suggests that judges do not feel a need to “micromanage” what is happening in ADR.<sup>58</sup>

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<sup>57</sup> Uniform scheduling orders would assist Minnesota (and other states) in ADR data collection and monitoring efforts.

<sup>58</sup> Four judges commented, however, that they include a provision that if the parties cannot agree on a neutral, the judge will appoint one or conference with the parties to discuss the matter. This is consistent with what is required under Rule 114. MINN. GEN. R. PRAC. 114.05(a) (2006).

**Table 5: Which ADR Requirements are in Scheduling Orders?**

	<b>Percentage of judges selecting response (N=159)</b>
Date by which ADR will be completed	86% (137)
Type of ADR ordered	69% (109)
Date by which type of ADR will be selected	63% (100)
Date by which neutral will be picked	52% (82)
Date by which to report name of neutral to court	32% (51)
Name of neutral	15% (24)
Other <sup>59</sup>	11% (17)

*D. Coordination of ADR and Trial*

Although forty-four judges (26%) always or usually require completion of ADR before setting a date for trial, most (116 out of 171 judges or 68%) report that they “set trial dates earlier” but “ADR must be completed before parties can proceed to trial.” (See Table 6 below.) Four judges indicated that they set both dates at pre-trial, including when each will be completed. Another four indicated that parties are informed that judges will leave all ADR decisions up to them.

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<sup>59</sup> There were sixteen comments from judges who add other ADR items in their scheduling orders, including: the manner in which the court will be involved in neutral selection if necessary (four judges); the actual requirements of Rule 114 such as confidentiality, person with settlement authority to attend the mediation, and sanctions for noncompliance (two judges); cost and payment instructions (two judges); and a variety of items mentioned by only one judge (the date by which ADR will begin; the date by which to report the results of ADR to the court; and the “opportunity for a party to decline ADR and proceed in court.”). Survey Response from Judge 136 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author). One judge includes, “Plaintiff is to report results of ADR to court,” but adds that “in practice, this rarely happens.” Survey Response from Judge 23 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

**Table 6: Do Judges Require Completion of ADR Efforts Before Date for Trial is Set?**

	Percentage of judges selecting response (N=171)
Always	9% (15)
Usually	17% (29)
Trial dates set earlier, but ADR completed before parties proceed to trial.	68% (116)
Other	6% (11)

### E. Program Support Issues

Because most judges use scheduling orders to spell out their ADR requirements, ADR occurs in Minnesota without much additional court involvement. When asked whether there was satisfactory program support for referring cases to ADR (e.g., access to qualified neutrals, someone to manage the paperwork, etc.), 100% of the Hennepin and Ramsey judges said support was “satisfactory.” It is statistically significant that 80% of all other judges agreed.<sup>60</sup>

There were twenty-three comments from judges other than Hennepin and Ramsey judges explaining what is not satisfactory. Nineteen of these comments state in some way that there *is* no program or program support except the maintenance of the neutral list; that it is up to the lawyers to implement ADR unless they disagree on neutral selection and ask the court for help, implying that ADR does not *need* much additional program support to operate. For example:

- The parties access the neutrals, the court is rarely involved. We generate little paperwork other than [the] order.<sup>61</sup>

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<sup>60</sup> Regarding the master and block calendar comparison, 92% of block judges and 76% of master judges say program support is satisfactory. The difference is statistically significant.

<sup>61</sup> Survey Response from Judge 129 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).



- That is generally left to the attorneys to schedule in non-family cases. I order it and then they go and make the necessary arrangements.<sup>62</sup>
- Have list of neutrals, no other support.<sup>63</sup>
- No one really checks. We do not block so my clerk has no time or reason to check.<sup>64</sup>

Two comments about program support refer to an “inadequate supply of neutrals,” and indeed, a crucial issue for ADR program success is access to qualified neutrals. As expected in the Twin Cities, 100% of the judges indicate there are plenty of qualified neutrals; 62% of judges elsewhere agree. The difference is statistically significant. For judges outside the Twin Cities, 34% indicate that access to qualified neutrals is “adequate, but quite limited.”<sup>65</sup>

Rule 114 was developed in such a way as to leave most of the work of choosing ADR processes and neutrals to parties and lawyers.<sup>66</sup> If parties and lawyers do not choose to use ADR, Rule 114 allows judges to order parties into nonbinding ADR processes. Therefore, we turn to an examination of the criteria used by judges when they take this step.

#### IV. WHY ORDER ADR?

In the early days of ADR, mandatory ADR was not widely accepted. In fact, the voluntary nature of ADR was one of its heralded assets.<sup>67</sup> Since

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<sup>62</sup> Survey Response from Judge 25 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>63</sup> Survey Response from Judge 126 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>64</sup> Survey Response from Master Calendar Judge 195 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>65</sup> Regarding the master and block comparison, 84% of block judges and 59% of master judges believe there are plenty of qualified neutrals. The difference is statistically significant. In four non-metropolitan districts, one or two judges indicated there are not enough qualified neutrals.

<sup>66</sup> Neutrals are selected from a roster maintained by the Supreme Court. Roster quality is not promised, however, since membership is achieved simply by the completion of the training hours required in Rule 114. MINN. GEN. R. PRAC. 114.12(a) (2006).

<sup>67</sup> Voluntary mediation was deemed essential to self-determination in mediation. See *The Thinning Vision*, *supra* note 8, at 3; see also Timothy Hedeem, *Coercion and Self-*

voluntary programs were not used much, however, courts began to experiment with the implementation of mandatory nonbinding ADR programs.<sup>68</sup> After limited empirical work established the principle that mandatory ADR does not result in a decrease of procedural justice for parties, rather widespread acceptance of mandatory ADR resulted.<sup>69</sup> Now that mandatory ADR is in place in many court systems, it is difficult to imagine reversing this trend or especially *undoing* it, although many question the wisdom of ordering parties to ADR.<sup>70</sup> This makes it especially important to understand when and why judges order ADR.

### A. Settlement

The survey shows the key reason judges order parties to ADR is undoubtedly their belief that ADR offers assistance in getting cases settled and off their dockets.<sup>71</sup> Two-thirds of all judges indicated that Rule 114 has indeed changed their judicial workload. (See Table 7 below.)

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*Determination: All Mediations are Voluntary, but some are More Voluntary than Others*, 26 JUST. SYS. J. 273, 274 (2005).

<sup>68</sup> Jacqueline Nolan Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 59 (1996); ADR HANDBOOK, *supra* note 3, at 10.

<sup>69</sup> Wissler, *supra* note 22, at 690.

<sup>70</sup> *Lessons*, *supra* note 4, at 400. See also Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262–263 (1995) (stating that as ADR is more court-compelled, the voluntary nature of ADR which leads to self-determination is weakened).

<sup>71</sup> Docket clearing per se was not a Pound conference goal. Rather, as articulated by Frank Sander, the emphasis was on the need to save the courts for what needed their “unique capabilities.” THE POUND CONFERENCE, *supra* note 5, at 85. It was assumed that finding “alternatives” for some cases would help with the overall cost and delay problems plaguing the courts. Ensuring that party procedural and substantive rights would be protected, however, was still immensely important. At the Pound Conference, The Honorable A. Leon Higginbotham, Jr. said it this way: “[O]ur goal cannot be merely a ‘reform’ that seeks to ease the courts’ caseloads. . . . What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice?” *Id.* at 90–91. And Chief Justice Burger in his keynote address to the conference attendees noted that “[e]fficiency—like the trial itself—is not an end in itself. It has as its objective the very purpose of the whole system—to do justice.” *Id.* at 32. See also Owen Fiss, *ADR: Second-Class Justice?*, CONN. L. TRIB., March 17, 1986, at 9–10 (stating that justice is ignored when the focus is on resolving the dispute at the expense of ensuring that resolution terms are just).

**Table 7: Has Rule 114 Changed the Judicial Workload?**

	<b>Percentage of judges selecting response (N=169)</b>
Yes	67% (113)
Experience with ADR too limited to answer	20% (33)
No Change	14% (23)

Judges who chose “yes” to the *Changed the Judicial Workload* question (see Table 7 above) were asked to “describe” the changes. In qualitative comments from all 113 of those judges, 97 judges (86%) indicated some version of “reduces number of trials,” “gets cases settled,” and settlements are “earlier.” A few comments acknowledged the benefits of ADR even when cases do not settle (e.g., parties get better prepared).

To illustrate, the following is a range of the 113 qualitative responses by judges to the specific question of how Rule 114 changed their judicial workload:<sup>72</sup>

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<sup>72</sup> I have included a large number of qualitative responses throughout to highlight judicial perspectives and to add the richness of this data to the article.

### General Settlement Comments<sup>73</sup>

- It has decreased the number of civil and family cases actually going to trial.<sup>74</sup>
- It seems that more cases go to ADR before being filed so there may be fewer cases coming into the system.<sup>75</sup>
- Fewer trials. Without ADR the back load of trials would be much larger. Most settle in ADR.<sup>76</sup>
- Some complex cases have been settled either directly or indirectly as a result of mediation. At least two cases in the past three years would have required jury trials in excess of two weeks.<sup>77</sup>
- Civil personal injury case trials have diminished substantially. Commercial litigation remains at the same level as before ADR.<sup>78</sup>
- More cases settle prior to holding, or even scheduling, a settlement conference with the court, reducing the time needed for settlement efforts and trials.<sup>79</sup>

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<sup>73</sup> Comparing Minnesota court data from 1994 to that of the year July 2002 through July 2003, considerably fewer trials occurred even while caseloads continued to grow (data supplied by ADR Review Board member Bill Funari). There is no way to know whether there were fewer trials because of ADR, however, although ADR could be a contributing factor. It is beyond the scope of this article to examine the discourse about the “vanishing trial,” but the need for accurate settlement data to inform this conversation (e.g., pre- and post-ADR) is clearly apparent. Several excellent articles in the Summer 2004 *Dispute Resolution Magazine* were focused on this issue. See Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What they may Mean*, DISP. RESOL. MAG., Summer 2004, at 3, 3. Professor Galanter tells us that settlements are actually a smaller proportion of the cases now leaving the court system without trial, while non-trial adjudications, like summary judgments, have greatly increased. *Id.* Exactly how ADR affects the number or rate of trials is unknown. His nuanced view of the data on why trials are down includes demographics, diversion (ADR), and cost arguments, as well as an increase in the active encouragement and involvement of judges in settlement activities. *Id.* at 4–5; see generally, Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005).

<sup>74</sup> Survey Response from Judge 3 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>75</sup> Survey Response from Judge 60 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>76</sup> Survey Response from Judge 62 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>77</sup> Survey Response from Judge 112 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>78</sup> Survey Response from Judge 115 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

- Dramatic decrease in workload.<sup>80</sup>
- One benefit is all cases will go to trial within 12 months of filing. Without ADR I estimate the waiting period would be at least 24 months.<sup>81</sup>
- Obviously each case that settles is one less case to try but because I require ADR completion before the pre-trial the attorneys are better prepared if the case does not settle and I spend less time on pre-trials.<sup>82</sup>
- I conduct far fewer settlement conferences myself.<sup>83</sup>
- My civil caseload would crash without ADR.<sup>84</sup>

One judge offered another view about the effect of ADR on the workload:

I think ADR does settle some cases that might otherwise reach trial. But to be frank, in our courts in which we handle on a regular basis all types of cases, only a small percentage of which ADR even applies to, the impact of ADR on the workload is almost imperceptible.<sup>85</sup>

### *B. Specific Factors Supporting an Order to Mediation*

Because mediation is a confidential process, judges have little opportunity to know what goes on behind its closed doors. When a judge orders parties into mediation, presumably it is in accordance with some set of guiding principles—i.e., that particular judge’s perspective on the role of mediation in the court system.

<sup>79</sup> Survey Response from Judge 17 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>80</sup> Survey Response from Judge 78 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>81</sup> Survey Response from Judge 97 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>82</sup> Survey Response from Judge 45 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>83</sup> Survey Response from Judge 166 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>84</sup> Survey Response from Judge 150 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>85</sup> Survey Response from Judge 198 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

A survey question asked, “If you order a case to mediation when the attorneys or *pro se* parties have not made the choice themselves, how important are each of the following factors in warranting your order?” There were ten choices for answers<sup>86</sup> and a follow-up question for open-ended comments.

**Table 8: Very Important Factors in Ordering Parties into Mediation<sup>87</sup>**

	Percentage of judges selecting response
Mediation can provide better, more durable outcome for parties <sup>88</sup> (n=153)	56% (86)
Gets clients directly involved in discussions (n=149)	50% (75)
The case needs a neutral with specific expertise (n=151)	42% (64)
It is local court policy to send as many cases as possible to ADR/mediation <sup>89</sup> (n=149)	36% (54)
Case will take too much court time (n=153)	31% (47)
Mediation will cost the parties less (n=147)	31% (46)
Continuing relationship to preserve (n=149)	28% (41)
Relief is outside the court’s jurisdiction (n=144)	13% (18)

As seen in Table 8, the top two “very important” reasons to order parties into a mediation process were to provide a “better, more durable outcome for

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<sup>86</sup> Each choice was answered as “very important,” “somewhat important,” or “not at all important.”

<sup>87</sup> Each “n” represents the number of judges that answered that portion of the survey.

<sup>88</sup> “Better” was not defined in the question, so judicial perspectives on what is “better” have to be inferred from the answers to the survey as a whole. Many judges commented in several ways that having parties reach their own decisions is better than when the court makes a decision for them. This could be a “vote” for a negotiated settlement as well, however, not necessarily a “vote” for mediation.

<sup>89</sup> There was a significant difference between Hennepin and Ramsey judges’ choice of this factor, with 53% of these Twin Cities judges citing local court policy and only 33% of all other judges citing local court policy as a reason to order ADR. This is consistent with the longer history of court experience with ADR in Hennepin and Ramsey counties.

parties” and to get clients “directly involved in discussions.” Presumably, these items reflect values that the judges think are important and are being served by an order to mediate. Mediation advocates will certainly have much to celebrate if better and more durable outcomes can be claimed for mediated resolutions. Moreover, directly involving clients in settlement discussions supports the enhanced “voice” for clients desired by procedural justice advocates.<sup>90</sup> Indeed, these reasons for mediation resonate with the idea of mediation as “value-added” compared to traditional dispute settlement.<sup>91</sup> Therefore, it is particularly ironic that there is no data in Minnesota to support either of these effects in mediation compared to agreements reached through bilateral negotiations.<sup>92</sup>

The third “very important” reason to order mediation (see Table 8 above) is “the case needs a neutral with specific expertise.” It is interesting to ponder why judges think this expertise is helpful to mediation: are there more or better informed settlements because of “neutral expertise” in the mediator? It certainly could be argued that neutral expertise is requisite for a neutral evaluation process, but too much neutral expertise in mediation might silence the direct client involvement thought “very important” by the judges.<sup>93</sup>

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<sup>90</sup> Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 820 (detailing the social psychological research on the characteristics of a procedurally just process including, in part, the opportunity for parties to express their views (“voice”) and the opportunity for parties’ views to be heard and considered by someone involved in decisionmaking).

<sup>91</sup> These also support the notion that mediation is the process to support self-determination of the parties. See Bush, *supra* note 9, at 13; see also Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 940 (1997).

<sup>92</sup> To be fair, there is no direct evidence from Minnesota to defeat them either. Still, one wonders: (1) if the sell job on mediation was so good in Minnesota that Minnesota judges know what mediation is supposed to achieve, or (2) if mediation really is achieving these things? It is worrisome that these key ingredients to the judges’ orders to mediate have no proof they are being achieved. Wissler’s research concludes generally that increased durability in mediation has not been proven, although general assessment of mediation by participants—including that they had sufficient time to present their case, had input in determining outcomes and were not pressured to settle—is favorable. The favorable assessment data, however, is not “in comparison to” (i.e. more favorable than) unassisted negotiation. *Effectiveness Data*, *supra* note 1, at 65–68.

<sup>93</sup> Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 877 (1998) (stating if lawyers are the key actors in mediation, parties are not meaningfully participating.). With settlement pressures in court-connected mediation, a neutral with expertise is likely to utilize a highly directive style of mediation, perhaps bordering on “coercion.” Hedeem, *supra* note 67, at 281.

The factors for choosing mediation *not* cited as “very important” by even one-third of the responding judges all have ties to the early rhetoric of the field: mediation will save time and money,<sup>94</sup> will preserve relationships,<sup>95</sup> and can provide remedies that the court cannot.<sup>96</sup> The fact that more judges did not choose them as “very important” suggests some disconnect between this rhetoric and practice, or the possibility that the judges don’t buy this rhetoric as compelling.

A follow-up question allowed judges another opportunity to articulate their reasons to order mediation; there were twenty-six qualitative responses and almost twenty-six different responses.<sup>97</sup>

- Mediation is helpful where one party is being very unrealistic as to the value and strength of their case.<sup>98</sup>
- In cases where the amount in dispute is low or the matter can be tried to the court without a jury in a couple of hours, I don’t order if they don’t want it.<sup>99</sup>
- Settled matters, generally, provide greater sense of satisfaction to litigants.<sup>100</sup>

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<sup>94</sup> In fact, some judges perceive that ADR adds unnecessary costs for litigants. *See infra* Part IV.D. Once again, the need for accurate data is apparent.

<sup>95</sup> The factor of preserving “continuing relationships,” so important to the rhetoric of mediation advocates, continues to fare badly in empirical work on ADR in the court annexed setting. *See McAadoo Report, supra* note 30, at 445; *see also* Golann, *supra* note 16, at 331.

<sup>96</sup> “Mediators try to get parties out of an adversarial contest and into the exercise of creating a better future. Custom-tailored outcomes, developed to maximize benefits for all sides, can create more value for parties than the standardized remedies provided in adjudicative forums.” CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 270* (2005) (emphasis added). *See also* Fuller, *supra* note 16, at 308. (“[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.”).

<sup>97</sup> Although each of these was only noted by one judge, if these had been “choices” in the original survey question, any one of them might have been selected by many judges.

<sup>98</sup> Survey Response from Judge 31 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>99</sup> Survey Response from Judge 62 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>100</sup> Survey Response from Judge 9 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).



- I always try to convince the parties to agree to binding arbitration, for finality to minimize expense.<sup>101</sup>
- If case needs expert[ise]—special representation in some area—like construction.<sup>102</sup>
- I order ADR in all cases unless the attorneys convince me it would be futile.<sup>103</sup>
- Need for parties to feel as if they have been “heard” in order to get them to resolve issues.<sup>104</sup>
- True mediation is not what commonly occurs. A hybrid neutral evaluation/nonbinding arbitration is what is really taking place in a lot of cases.<sup>105</sup>
- Attorneys discourage ADR because it cuts into their fees.<sup>106</sup>
- I encourage mediation. It will not be successful if one or both parties oppose it. Parties need to have willingness to negotiate, compromise.<sup>107</sup>

There also were twenty-two qualitative comments about the consideration of attorney or client factors in the decision to order mediation. These comments enforce the complexity of all that is happening with multiple actors when a judge decides whether to order parties to use ADR:

- Some attorneys are genetically incapable of resolving cases short of trial.<sup>108</sup>
- There are certain attorneys you hope will settle their cases short of trial—those who are obnoxious, obsequious, poor trial attorneys, bombastic, and etc.<sup>109</sup>

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<sup>101</sup> Survey Response from Judge 71 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>102</sup> *Id.*

<sup>103</sup> Survey Response from Judge 25 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>104</sup> Survey Response from Judge 72 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>105</sup> Survey Response from Judge 154 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>106</sup> Survey Response from Judge 36 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>107</sup> Survey Response from Judge 51 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>108</sup> Survey Response from Judge 122 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

- The willingness of the attorneys and clients to involve the ADR process in a meaningful manner.<sup>110</sup>
- Some attorneys refuse to come to ADR with the right frame of mind and fail to adequately advise their clients.<sup>111</sup>
- If one attorney is unrealistic or too inexperienced to read the issues in the case.<sup>112</sup>
- I don't waive ADR unless I'm satisfied it will not work. I give some weight to the attorney's opinion on that issue but it depends on the credibility of the attorney in terms of their experience (not their honesty).<sup>113</sup>
- Experienced attorneys are often able to resolve cases without ADR.<sup>114</sup>

Often parties and lawyers make their own early decision to use ADR, and judges are not faced with the question of whether to order parties into an ADR process.<sup>115</sup> Still, as the above data illustrate, judges have developed reasons to order ADR. As will be seen in the next section, this includes ordering unrepresented (*pro se*) parties to use ADR.

### C. Proactive or Reactive Role

A question asked judges to assume that represented parties or *pro se* litigants had filed a case and did not choose to use ADR. Judges were asked *how often* they would:

- Mention ADR to the attorneys or *pro se* parties;
- Request attorneys or parties to consider the use of ADR; and

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<sup>109</sup> Survey Response from Judge 17 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>110</sup> Survey Response from Judge 182 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>111</sup> Survey Response from Judge 55 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>112</sup> Survey Response from Judge 96 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>113</sup> Survey Response from Judge 131 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>114</sup> Survey Response from Judge 138 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>115</sup> See *supra* Part III.B.

- Order ADR when attorneys or parties had not chosen to pursue it.<sup>116</sup>

These choices represent a continuum of judicial action relative to the use of ADR, and in large part the data support judicial proclivity to order even *pro se* parties to use ADR.<sup>117</sup> The following table summarizes, by percentage, what judges indicated they would *usually* or *always* do when represented parties or *pro se* litigants did *not* choose ADR on their filed Rule 111 Informational Statement:

**Table 9: ADR “Prompting” by Judges**

Percentages represent the combined number of judges who selected “usually” or “always”			
Choice	Statewide	Hennepin/Ramsey	Other
<i>Mention ADR</i>			
Represented (n=142)	85% (120)	91%	84%
<i>Pro Se</i> (n=141)	70% (99)	78%	68%
<i>Request use of ADR be considered</i>			
Represented (n=149)	82% (122)	87%	81%
<i>Pro Se</i> (n=147)	67% (98)	70%	65%
<i>Order ADR when it has not been chosen</i>			
Represented <sup>118</sup> (n=165)	49% (81)	77%	42%
<i>Pro Se</i> <sup>119</sup> (n=160)	43% (68)	64%	37%

<sup>116</sup> Answer choices for each part of the question were: never, rarely, occasionally, usually, or always.

<sup>117</sup> The numbers of judges who answered the individual parts of this question differed enough that it suggests that the instruction for judges to answer *each* part may not have been clear.

<sup>118</sup> The differences between the Hennepin and Ramsey judicial responses and the rest of the state were statistically significant for this response.

<sup>119</sup> The large numbers of judges who report they would usually or always order *pro se* parties to use ADR has enormous policy implications unless courts are more able to ensure that procedural and substantive rights of litigants are protected. The concern, in part, is that ADR advocates believe the achievement of procedural justice to be “enough,” or maybe even more important than protecting substantive rights. Clearly, not all *pro se* litigants are minorities; however, Professors Isabelle Gunning and Ellen Waldman have both written persuasively about concerns regarding substantive rights in mediation for minorities that could be equally raised for *pro se* parties. See, e.g., Isabelle Gunning, *Know Justice, Know Peace: Further Reflections on Justice Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 89 (2004) (discussing concerns about the status quo in court mediation practice if it

To routinely require unrepresented parties to use ADR as their only means of access to our system of justice was not contemplated at the Pound Conference.<sup>120</sup> Indeed, some of the dialogue on the need to ensure that court reforms preserved access to justice might be read to prohibit such a development.<sup>121</sup> The data from the Rule 114 survey nevertheless suggest that many judges are inclined to order ADR, even with *pro se* parties. It is important then to examine whether there are circumstances under which judges overcome what almost amounts to a presumption that ADR will be ordered.

#### D. *When Judges Do Not Order ADR*

Although institutionalization of ADR in Minnesota is widespread, 146 judges provided qualitative responses to an open-ended question about their reasons *not* to order parties to ADR. Some representative comments follow.<sup>122</sup>

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means “that white people get both a sense of dignity and self-determination along with the deserved financial resources that support a meaningful and actual self-determination, while Black and Brown people just get a sense of dignity and self-determination.”); Ellen Waldman, *Substituting Needs for Rights in Mediation Therapeutic or Disabling?*, 5 PSYCHOL. PUB. POL’Y & L. 1103, 1116 (1999) (“[A]lthough disputants may emerge content, such a process [one in which self-determination is more valued than monetary gain] violates the justice principle that like cases be treated alike and thwarts societal goals of racial equality.”).

<sup>120</sup> In his keynote address at the Pound Conference, Chief Justice Burger acknowledged that some might believe that the conference was about reducing access to the courts. In refuting this, Justice Burger stated, “[O]f course, that [reducing access] is not the objective, for what we seek is the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the people in resolving disputes.” THE POUND CONFERENCE, *supra* note 5, at 32.

<sup>121</sup> When Professor Sander spoke about saving the courts for what needed their “unique capabilities,” surely he did not assume that unrepresented parties were not to be afforded the opportunity to go to court. Moreover, Justice Higginbotham cautioned at the Pound Conference that “while there is an essential place for non-judicial forums in resolving disputes, the cutting edge of the move to remedy the results of this dehumanization [sanctioned for too long by the bench, bar associations, law schools, and the legal profession as a whole] must have a sharp judicial component.” THE POUND CONFERENCE, *supra* note 5, at 98.

<sup>122</sup> I have organized these representative comments to help with an understanding of their range, although many of them, especially in the first two categories, could be placed in more than one area.

**Parties are responsible for their cases; cases settle without ADR (53 responses)**

- Parties are adamant it will not be worth the time and expense.<sup>123</sup>
- When they tell me they've tried to settle and cannot.<sup>124</sup>
- Parties and attorneys know their cases better than I do; factors in dispute which are not part of the court file (personalities, relationships) can thwart or support ADR and the judge does not have this type of information at hand.<sup>125</sup>
- Parties do not take it seriously and do not intend to participate in good faith.<sup>126</sup>
- Happens only when both sides strongly indicate it will be hopeless.<sup>127</sup>
- If parties or attorneys feel they can negotiate a settlement, why have ADR?<sup>128</sup>
- If the amount in dispute is small and the attorneys are experienced it will usually settle without ADR.<sup>129</sup>
- Experienced attorneys usually can settle cases without mediation. If either attorney believes it is useful, I will order it.<sup>130</sup>
- I believe the parties, after my discussion with them, understand the risks they take in the litigation process versus verdicts, and understand settlements are best when entered into, not forced into.<sup>131</sup>

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<sup>123</sup> Survey Response from Judge 54 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>124</sup> Survey Response from Judge 56 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>125</sup> Survey Response from Judge 58 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>126</sup> Survey Response from Judge 77 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>127</sup> Survey Response from Judge 148 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>128</sup> Survey Response from Judge 91 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>129</sup> Survey Response from Judge 112 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>130</sup> Survey Response from Judge 161 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>131</sup> Survey Response from Judge 1 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

**Judge perceives no chance of mediation settlement; case needs a trial; parties too far apart (28 responses)**

- [P]arties too far apart.<sup>132</sup>
- If all parties perceive that a trial is needed and I agree.<sup>133</sup>
- I will consider withdrawing a case from ADR only if it is a case with no chance of settlement and they need a trial, i.e., medical and legal malpractice mostly.<sup>134</sup>
- Legal issue appears dispositive.<sup>135</sup>
- Only if case is important, precedent setting, and the parties need a court decision.<sup>136</sup>
- Insurance defense positions of “no liability.”<sup>137</sup>
- A stark factual dispute regarding liability which requires a jury trial (e.g., one party is adamant light was red and the other party is adamant light was green).<sup>138</sup>
- [N]o prospects of settlement.<sup>139</sup>
- If they want to stay in court, I am reluctant to order them out.<sup>140</sup>
- I do not believe ADR should be mandatory in every single case. I have found it to be useful in construction cases and family cases. To require [attorneys who can settle their own cases] to spend additional

<sup>132</sup> Survey Response from Judge 147 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>133</sup> Survey Response from Judge 151 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>134</sup> Survey Response from Judge 15 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>135</sup> Survey Response from Judge 51 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>136</sup> Survey Response from Judge 97 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>137</sup> Survey Response from Judge 72 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>138</sup> Survey Response from Judge 108 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>139</sup> Survey Response from Judge 169 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>140</sup> Survey Response from Judge 136 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

time and money on mediation when they have already used their best efforts to settle the case is a waste of both the time and expense.<sup>141</sup>

**Domestic abuse; severe power imbalance; volatile conflict (24 responses)**

- The parties are antagonistic to the point of violence.<sup>142</sup>
- Severe power imbalance—domestic abuse . . . .<sup>143</sup>
- If prohibited by abusive relationship . . . .<sup>144</sup>
- Serious domestic violence cases or others where there is a serious imbalance of power which even a trained mediator can't ameliorate.<sup>145</sup>

**Cost<sup>146</sup>(23 responses)**

- Cost and time spent isn't justified by value of case or amount in controversy.<sup>147</sup>
- Parties with limited resources.<sup>148</sup>
- Cost is too great . . . .<sup>149</sup>
- Too expensive in relation to controversy.<sup>150</sup>

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<sup>141</sup> Survey Response from Judge 34 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>142</sup> Survey Response from Judge 4 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>143</sup> Survey Response from Judge 3 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>144</sup> Survey Response from Judge 74 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>145</sup> Survey Response from Judge 108 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>146</sup> Since ADR held out the hope for greater efficiencies in time and cost, this "answer" makes clear the tremendous need for more research to unpack when and under what circumstances ADR adds too much cost.

<sup>147</sup> Survey Response from Judge 57 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>148</sup> Survey Response from Judge 66 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>149</sup> Survey Response from Judge 35 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>150</sup> Survey Response from Judge 100 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

**Court trial short, usually with small amount at issue (15 responses)**

- Very small amount in dispute . . . court trial expected to last less than a half-day.<sup>151</sup>
- Very poor people who promise a very short trial.<sup>152</sup>
- If the dispute is small and there is no jury requested.<sup>153</sup>

**Statutory restriction (e.g., medical malpractice cases) (12 responses)**

- Medical malpractice cases where they won't agree to it.<sup>154</sup>
- Medical malpractice because not allowed to—I try to push them there anyways.<sup>155</sup>

With this range of judicial comments in mind, we turn to the similar reasons lawyers give to judges when they do not want to use ADR.

*E. When Attorneys Do Not Want to Use ADR*<sup>156</sup>

Judges were asked how often attorneys give particular reasons when the attorneys do not want to use ADR. (See Table 10 below.)

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<sup>151</sup> Survey Response from Judge 7 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>152</sup> Survey Response from Judge 75 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>153</sup> Survey Response from Judge 131 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>154</sup> Survey Response from Judge 17 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>155</sup> Survey Response from Judge 78 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>156</sup> It would be interesting to obtain comparable data from Minnesota lawyers to all the questions in the survey, especially this one reporting on what judges say that lawyers say to them.



**Table 10: Why Don't Attorneys Want to Use ADR?**

	Usually	Occasionally	Percentage of judges who selected response
Adds cost to the case (n=161)	62 judges	63 judges	78% of judges
Settlement already attempted pre-filing (n=161)	37	86	76%
Other side not interested in settlement (n=166)	43	80	74%
My client is not interested in ADR (n=162)	37	81	73%
Pending or planned dispositive motion (n=160)	21	91	70%
Not enough discovery has been done (n=157)	18	68	55%

Fourteen judges added “other” comments on the reasons attorneys give when they do *not* want to use ADR on a given case: the case will settle without ADR (five judges),<sup>157</sup> the case won't settle or a jury is needed (seven judges),<sup>158</sup> adds too much cost (two judges), and there is a statutory or

<sup>157</sup> In qualitative comments on the question about changed judicial workload, a few judges noted the fact that cases settle without ADR. *See supra* Part IV.A. For example: “Most of my civil cases do settle prior to trial whether through mediation or by negotiation without mediation. I am rarely told why or how a case resolved and cannot determine whether cases would have settled through negotiation if mediation was not available.” Survey Response from Judge 82 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author). An additional example: “Given the high number of cases that settle before trial I am assuming that ADR has a significant impact. However, it is difficult to know how many of these same cases would settle even without ADR.” Survey Response from Judge 25 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>158</sup> Of course the question of which cases do not settle, and why, is itself another research project; yet the results of this survey suggest that there might be some common understandings among judges. At every point, however, there is a need for additional data.

constitutional right to go to trial (four judges). One judge sums up the lawyer viewpoint this way: "My side is not interested in settlement. Too costly. We can do it ourselves."<sup>159</sup> Another judge sums up the lawyer viewpoint this way: "Parties agree ADR wouldn't assist; the case is either going to settle or try regardless of ADR."<sup>160</sup>

### *F. Cases or Parties Inappropriate for Mediation*

The survey also asked whether there are cases or parties that judges believe are not appropriate for mediation, and for those judges who replied in the affirmative, the survey asked for further description of those cases or parties. With 161 judges responding, 106 (66%) answered "yes," and 100 judges provided an additional qualitative response. Most of these responses fit under categories similar to those raised by the judges' reasons not to order ADR, or the reasons lawyers give judges when they do not want to use ADR. Importantly, it could be argued that together they provide a concrete judicial rationale for why mandatory ADR might be unwise.

The judicial comments on what is not appropriate for mediation fit into several broad, now familiar categories:

#### **Domestic issues, violence, power issues (49 responses)<sup>161</sup>**

- Domestic violence between parties.<sup>162</sup>
- Unequal bargaining.<sup>163</sup>
- [H]ighly emotionally charged parties.<sup>164</sup>
- [P]ower differential too great.<sup>165</sup>

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<sup>159</sup> Survey Response from Judge 101 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>160</sup> Survey Response from Judge 198 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>161</sup> Of the forty-nine responses, thirty-one cited domestic abuse or violence. This suggests that some judges had family cases in mind, although the survey called for answers with reference to general civil cases.

<sup>162</sup> Survey Response from Judge 42 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>163</sup> Survey Response from Judge 65 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>164</sup> Survey Response from Judge 154 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>165</sup> Survey Response from Judge 153 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

- Where a party is in a position of authority over another.<sup>166</sup>

**Dollar amount small, trial likely to be short (23 responses)**

- [I]f relief sought is small in relationship to cost of ADR.<sup>167</sup>
- Little short trials that are easier to try than to mediate.<sup>168</sup>
- Small amount of money at issue; clients who can't afford to hire mediator and pay their attorney.<sup>169</sup>
- Small amount of money—jury waived.<sup>170</sup>
- [M]oney amount too small to warrant additional proceeding.<sup>171</sup>

**Case unlikely to settle, especially because parties are adamant in positions (20 responses)**

- Intransigent positions.<sup>172</sup>
- Where one or both are insistent in positions and unwilling to compromise.<sup>173</sup>
- If party has a history of no interest in settlement.<sup>174</sup>
- Those so entrenched in their positions that mediation would only cause delay.<sup>175</sup>

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<sup>166</sup> Survey Response from Judge 7 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>167</sup> Survey Response from Judge 74 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>168</sup> Survey Response from Judge 179 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>169</sup> Survey Response from Judge 57 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>170</sup> Survey Response from Judge 71 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>171</sup> Survey Response from Judge 150 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>172</sup> Survey Response from Judge 1 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>173</sup> Survey Response from Judge 51 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>174</sup> Survey Response from Judge 102 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>175</sup> Survey Response from Judge 123 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

**Responsibility of attorneys and parties to decide and advise court (18 responses)**

- If parties or attorneys want to fight it out in court, that's what courts are for.<sup>176</sup>
- Some parties want to go to court so they can tell their story.<sup>177</sup>
- When well-seasoned attorneys tell me there is no reason for an order.<sup>178</sup>
- I trust attorneys to evaluate the situation and accurately advise the court on whether it makes sense in the case [to order ADR].<sup>179</sup>
- Sometimes if I know both attorneys are good settlers, I won't order.<sup>180</sup>

**Legal issues only (7 responses)**

- Where there are purely legal issues precluding resolution through mediation.<sup>181</sup>
- If case can be resolved by summary judgment.<sup>182</sup>
- Insurance defense position of "no liability."<sup>183</sup>
- Case where only dispute is a matter of law.<sup>184</sup>

**Not allowed to order (4 responses)<sup>185</sup>**

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<sup>176</sup> Survey Response from Judge 91 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>177</sup> Survey Response from Judge 122 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>178</sup> Survey Response from Judge 128 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>179</sup> Survey Response from Judge 198 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>180</sup> Survey Response from Judge 101 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>181</sup> Survey Response from Judge 82 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>182</sup> Survey Response from Judge 191 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>183</sup> Survey Response from Judge 72 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>184</sup> Survey Response from Judge 4 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

V. SPECIAL ISSUES FOR JUDGES

A. Summary Judgment

A survey question probed for common practice when judges are faced with a motion for summary judgment while parties are engaged in a mediation process. The question stated: “If the parties are using a mediation process and one of them files a motion for summary judgment, what is your usual practice?”<sup>186</sup> Statewide, the answers broke down as follows:

**Table 11: Summary Judgment and Mediation**

	Percentage of judges selecting response (N=169)
Rule on summary judgment first	56% (94)
Wait for the result of the mediation	15% (26)
Other	29% (49)

The large number of “other” responses to this question, half of which represented Hennepin or Ramsey judges, broke into the following categories:

- Rule on summary judgment first: 15 judges<sup>187</sup>
- Depends on the case: 15 judges
- Ask the attorneys or parties: 9 judges<sup>188</sup>
- No experience with this situation: 8 judges
- Mediate first: 3 judges

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<sup>185</sup> Minnesota has a statute requiring unanimous agreement from all parties in a medical malpractice lawsuit before alternative dispute resolution may proceed. MINN. STAT. § 604.11 (2005).

<sup>186</sup> Bobbi McAdoo, *Judicial Evaluation of Rule 114*, at 7 (Jan. 2003) (Appendix A).

<sup>187</sup> This includes two judges who rule when required without regard to ongoing ADR. For example: “My scheduling order requires parties to schedule ADR and is a separate issue from my dispositive motion court date.” Survey Response from Judge 168 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author). The large number of comments referring to the need to rule first on summary judgment motions suggests that the percentage of judges who actually perceive the need to “rule first” is undercounted by at least 8%. See Table 11 above.

<sup>188</sup> The answers “ask the attorneys or parties” and “depends on the case” suggest thoughtful individual responses by judges, perhaps with attorney and party choice taken into consideration.

In a separate question, judges were asked to give reasons for the approach taken to summary judgment motions. There were 117 qualitative responses.<sup>189</sup>

### **“Rule first” (79 judges)**

#### **Party has a right to rulings on motions (34 responses)**

- I believe parties have a right to try cases—they shouldn’t have to settle.<sup>190</sup>
- Mediated settlement should be based on the application of law to facts, not on fear of the unknown.<sup>191</sup>
- If a party is entitled to dismissal then they shouldn’t be coerced to settle.<sup>192</sup>
- The summary judgment motion may dispose of the case, or at least, reduce the issues.<sup>193</sup>
- Some motions involve legal issues dispositive of the case even if the facts are in dispute. This isn’t appropriate to delay for mediation. It’s an unnecessary cost.<sup>194</sup>

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<sup>189</sup> I have organized the qualitative responses under “rule first” and “mediate first.” There also were eighteen qualitative responses that fit into the following categories: up to the parties or attorneys (9); depends on the case (7); and little or no experience with this topic (2).

<sup>190</sup> Survey Response from Judge 101 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>191</sup> Survey Response from Judge 129 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>192</sup> Survey Response from Judge 143 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>193</sup> Survey Response from Judge 111 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>194</sup> Survey Response from Judge 12 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

**Mediation is not effective with outstanding motion before the court<sup>195</sup> (35 responses)**

- Parties want to know whether there is a risk of going to trial before they will effectively participate in mediation.<sup>196</sup>
- If there is an unanswered question of law, the parties cannot effectively mediate.<sup>197</sup>
- They need the answer to the legal question (liability) before they can negotiate damage.<sup>198</sup>
- Cost. Expedited resolution earlier. Party filing motion won't cooperate with ADR, for whatever reason.<sup>199</sup>
- Mediation is fruitless where one party is confident of having issues dismissed in whole or in part.<sup>200</sup>

**Formal or informal court rules require prompt rulings (9 responses)**

- To keep the case proceeding.<sup>201</sup>
- I am on a timeline to rule—I rule. Most parties will not spend the money until a dispositive motion has been ruled upon.<sup>202</sup>
- A dispositive motion should be dealt with promptly.<sup>203</sup>

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<sup>195</sup> In the Eastern District of Missouri, cases referred to mediation were twice as likely to settle if no summary judgment motion was pending at the time the case was referred. Results of ADR Dispositive Motions Treatment Group—1995–1996 Cases, 2 (Feb. 3, 2004) (on file with author).

<sup>196</sup> Survey Response from Judge 115 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>197</sup> Survey Response from Judge 20 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>198</sup> Survey Response from Judge 62 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>199</sup> Survey Response from Judge 73 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>200</sup> Survey Response from Judge 72 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>201</sup> Survey Response from Judge 151 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>202</sup> Survey Response from Judge 71 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>203</sup> Survey Response from Judge 46 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

**“Mediate first” (22 judges)**

**Save court resources (8 responses)**

- Why should the court decide something which may be resolved by mediation?<sup>204</sup>
- Avoids unnecessary rulings . . . .<sup>205</sup>
- Let mediation run its course.<sup>206</sup>
- It is a needless expenditure of limited court time to rule on summary judgment when the case may settle.<sup>207</sup>
- Don’t bother the court until you have exhausted efforts.<sup>208</sup>

**Party decisions are better than court orders (6 responses)**

- Let the parties reach their own settlement. They are more “vested” in the outcome.<sup>209</sup>
- I want to give the parties every opportunity to resolve the case before formal court appearances.<sup>210</sup>
- I believe mediation usually reaches the most appropriate resolution for the parties.<sup>211</sup>

**More mediation success with uncertainty**

- Uncertainty breeds resolution.<sup>212</sup>

<sup>204</sup> Survey Response from Judge 94 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>205</sup> Survey Response from Judge 97 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>206</sup> Survey Response from Judge 118 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>207</sup> Survey Response from Judge 4 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>208</sup> Survey Response from Judge 120 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>209</sup> Survey Response from Judge 188 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>210</sup> Survey Response from Judge 47 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>211</sup> Survey Response from Judge 55 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).



- I tell each side to go to mediation assuming the summary judgment motion will be granted in favor of the opponent.<sup>213</sup>
- Keep things on equal playing field while they try to settle.<sup>214</sup>

The data tell us that most judges rule on summary judgment motions in a timely fashion; it is clear, however, that sometimes parties who ask for judicial action are denied the rights-based decision to which they are entitled.

### *B. Enforcement Issues*

Judges do not perceive a lot of disputes about the implementation or enforcement of mediated settlements agreements. Although 29% of the judges (46 out of 165) answered “yes” to a question about whether there are disputes, most indicated that these disputes are very rare. Forty judges provided comments and twenty-three of these noted that disputes are rare. Seventeen judges referred to a substantive issue with the enforcement of settlements; their comments reinforced the need for mediators to ensure clarity and finality in mediation settlements.<sup>215</sup>

#### **Representative enforcement issue comments (40 responses)**

- Rarely one side will try to back out of a settlement.<sup>216</sup>
- Each person thinks the agreement means something else. I look at [the] agreement, if [it is] not ambiguous, I enforce [it].<sup>217</sup>

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<sup>212</sup> Survey Response from Judge 102 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>213</sup> Survey Response from Judge 97 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>214</sup> Survey Response from Judge 137 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>215</sup> My colleagues at Hamline, Professors Jim Coben and Peter Thompson, have completed a study of litigation cases about mediation over a five year period. The enforcement of settlements comprises almost 50% of the 1,223 cases. Coben & Thompson, *supra* note 15, at 73. This study alone should compel the mediation field to examine itself carefully. It is hard to imagine that litigation about mediation furthers any justice goals articulated at the Pound Conference.

<sup>216</sup> Survey Response from Judge 34 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>217</sup> Survey Response from Judge 27 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

- This situation occurs in 5%–8% of mediation settlements. I call the parties and mediator together and work it out. If necessary, I will interpret the mediation result and proceed according to the agreement as I perceive it.<sup>218</sup>
- Usually one side gets buyer's remorse.<sup>219</sup>
- [D]isagreement regarding who pays costs.<sup>220</sup>
- [I]ssue not addressed by mediator that arises when parties drafting settlement document.<sup>221</sup>

### C. Complaints from Parties About ADR

Judges were asked whether they have heard complaints about the use of ADR under Rule 114. Fifty-five judges answered in the affirmative, referring mostly to themes already covered in the answers to earlier questions.<sup>222</sup> Forty-eight judges gave qualitative comments: issues of cost and time, together and separately, were noted by forty-six judges; six judges referred to problems with arbitration;<sup>223</sup> and nineteen judges raised an issue that arguably could be considered a justice concern, some of which are quoted below.

#### Representative Complaints (55 responses)

- Mediated agreement doesn't provide sense of fair process or fair result—but rather, just a cheaper result they will live with.<sup>224</sup>
- [P]arties are discouraged from using court system.<sup>225</sup>

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<sup>218</sup> Survey Response from Judge 94 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>219</sup> Survey Response from Judge 163 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>220</sup> Survey Response from Judge 174 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>221</sup> *Id.*

<sup>222</sup> This question was located towards the end of the survey and asked of all judges, even those who had not filled out the rest of the survey because their specific experience with ADR was limited. For this question, there were 194 responses; fifty-five represents 28% of respondents.

<sup>223</sup> The comments on arbitration pertained to the lack of expertise of the arbitrators or specific dissatisfaction with the Minneapolis Hennepin County non-binding arbitration program.

<sup>224</sup> Survey Response from Judge 172 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

## COURT-CONNECTED MEDIATION

- [N]ot legally appropriate for court to order ADR, against their will.<sup>226</sup>
- Courts select mediator and charge for it and it's on all cases.<sup>227</sup>
- Most frequent complaint in personal injury cases is that the process inherently works to the advantage of insurers who are better positioned to resist prompting to settle outside of desired range.<sup>228</sup>
- Mediator's notes or others' writings don't accurately reflect agreement, unequal bargaining positions resulting in unfair agreements, bias of mediator.<sup>229</sup>
- Adds layer of time, complexity and cost. <sup>230</sup>
- Cost, delay.<sup>231</sup>
- Too expensive for the type of case.<sup>232</sup>
- Medical malpractice cases not likely to resolve through ADR.<sup>233</sup>
- [L]itigants hate each other and therefore it's futile.<sup>234</sup>
- [I]nsurance companies that don't believe anything should delay getting to a jury.<sup>235</sup>
- Raises cost of process. Insurance industry fails to negotiate in good faith.<sup>236</sup>

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<sup>225</sup> Survey Response from Judge 191 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>226</sup> Survey Response from Judge 114 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>227</sup> Survey Response from Judge 2 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>228</sup> Survey Response from Judge 72 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>229</sup> Survey Response from Judge 12 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>230</sup> Survey Response from Judge 169 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>231</sup> Survey Response from Judge 1 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>232</sup> Survey Response from Judge 60 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>233</sup> Survey Response from Judge 192 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>234</sup> Survey Response from Judge 5 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>235</sup> Survey Response from Judge 75 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

- Complaints are rare and most have regarded the timing of ADR not being appropriate for the particular case.<sup>237</sup>

## VI. ADDITIONAL PERSPECTIVES ON MEDIATION

Data confirm that the ADR process of choice is mediation.<sup>238</sup> Specific questions about mediation were framed to explore the judicial perspective on what occurs during mediation in Minnesota.<sup>239</sup>

### A. *Mediation Timing vis-à-vis Discovery*

If mediation only replaces bilateral attorney negotiations on the courthouse steps, or even the judicial settlement conference, the potential for significant cost savings to parties seems to be limited. Earlier research suggested that most mediation occurred after almost all discovery on a case is completed.<sup>240</sup> In the survey, the judges were asked two questions about mediation practice vis-à-vis discovery practice: (1) At what point does the mediation process usually occur; and (2) When do judges think mediation *should* occur in a case?

A majority of the judges (57%) believe that mediation occurs after all or almost all discovery is completed. Only 43% of the judges, however, think that mediation should occur at this late point. Instead they think mediation should occur “after limited targeted discovery.” (See Table 12 below.)

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<sup>236</sup> Survey Response from Judge 110 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>237</sup> Survey Response from Judge 81 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>238</sup> Seventy-nine percent of the judges replied that mediation is used more than 75% of the time; 85% replied that arbitration is used less than 40% of the time. This is consistent with earlier research in Minnesota as well as anecdotal information from colleagues in many states. See *McAdoo Report, supra* note 30, at 418.

<sup>239</sup> See *supra* Parts IV.B, IV.F, V.A for other mediation responses.

<sup>240</sup> *McAdoo Report, supra* note 30, at 432. This is generally consistent with national data on this issue. See *Effectiveness Data, supra* note 1, at 68.

**Table 12: Timing of Discovery**

	<b>After all or almost all discovery</b>	<b>After limited target discovery</b>	<b>Before much discovery has been done</b>	<b>Other</b>
When does mediation usually occur? (n=167)	57% (96)	31% (50)	3% (5)	10% (16) <sup>241</sup>
When <i>should</i> mediation occur? (n=169)	43% (72)	41% (70)	5% (9)	11% (18) <sup>242</sup>

**B. Client Attendance**

Much has been written in ADR literature about the importance of procedural justice, including its contribution to party perceptions that substantive outcomes are fair and that decisionmaking institutions are legitimate.<sup>243</sup> Research also says that party perceptions of process fairness likely suffer if programs do not permit or require parties to attend mediation sessions.<sup>244</sup> A survey question asked: “Do you think it is important that clients (real parties in interest, the actual decisionmakers) be present at the mediation sessions?”<sup>245</sup> Although 70% of responding judges (119) affirmed that clients should be at mediation sessions “in all cases,” 29% replied “in most cases.”<sup>246</sup> Clearly, early mediation proponents envisioned the process

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<sup>241</sup> Half of the judges who noted “other” indicated that it depends on the case. Survey Responses from Judges 8, 42, 51, 56, 85, 88, 117, and 190 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author).

<sup>242</sup> Again, more than half (thirteen) of the judges who noted “other” indicated that it “depends on the case.” Two other comments were: the “sooner the better” and whenever there are “enough facts for settlement.” See Survey Response from Judge 82 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author); Survey Response from Judge 190 to Minn. Sup. Ct. (Jan. 31, 2003) (on file with author)..

<sup>243</sup> See *The Thinning Vision*, *supra* note 8, at 7–8.

<sup>244</sup> Welsh, *supra* note 90, at 838–39.

<sup>245</sup> McAdoo, *supra* note 186, at 7.

<sup>246</sup> The choices were: “in all cases,” “in most cases,” “in some cases,” “in the rare case,” and “no opinion.” One judge answered “no opinion;” no judges answered “in some

of mediation as one that operates with clients present; more research is needed to determine under what circumstances this is not happening, e.g., only in the insurance representative setting, or whether this practice is more widespread. Furthermore, more discussion is undoubtedly needed on the policy issues presented by the question of client attendance.

### C. Mediator Qualifications

Choosing mediators is typically done by attorneys and clients in Minnesota. In fact, 73% of the judges indicated that parties select mediators 90% or more of the time. Still, judges were asked what they consider to be important mediator qualifications when they do choose mediators by rating eleven alphabetized items as “not at all important,” “somewhat important,” or “very important.” The table below represents responses for “very important” mediator qualifications.

**Table 13: “Very important” Mediator Qualifications**

	Percentage of judges selecting response
Creative problem solver (n=134)	79% (106)
Legal experience (n=138)	70% (96)
Substantive knowledge in area of case being litigated (n=138)	70% (96)
Litigation experience (n=138)	66% (88)
Good Listener (n=133)	64% (88)
Training as mediator completed <sup>247</sup> (n=136)	59% (68)
Past mediation settlement rate (n=134)	45% (60)
Recommended by other judges or lawyers (n=135)	41% (56)
Skill at identifying nonlegal interests (n=133)	42% (56)
Experience as a judge (n=134)	9% (12)
Experience in a “helping” profession (n=130)	2% (2)

cases” or “in the rare case.” Those judges who replied only “in most cases” could be thinking about PI cases that often have an insurance company representative at the table. Whether this is an acceptable explanation or not requires more thought and discussion; however, there was no follow-up question that could confirm this interpretation.

<sup>247</sup> Significantly, the Hennepin and Ramsey judges (26% on this factor) found training to be less important than judges from the rest of the state (56% thought training was important).

“Creative problem solving” as the highest mediator qualification resonates with the early rhetoric of mediation practice, although as stated earlier, available empirical work does not support the conclusion that settlements are more creative or numerous with mediation.<sup>248</sup> The next three choices are less clearly aligned to the possibility of mediation emerging as a different paradigm of dispute resolution, not bound strictly by legal norms.<sup>249</sup> These choices, however, are supported by the data on criteria lawyers use when they select mediators.<sup>250</sup> It is worth noting that on the question of mediator training, although 59% of judges statewide noted this factor as very important, it is statistically significant that only 26% of the Hennepin and Ramsey judges (against 56% of other state judges) found training to be very important.<sup>251</sup> Once again, a disconnect is apparent: judges and lawyers view training as relatively unimportant<sup>252</sup> and training is not related to settlement in the available research;<sup>253</sup> however, training requirements<sup>254</sup> and mediation training programs continue to proliferate.<sup>255</sup>

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<sup>248</sup> See *supra* note 13 and accompanying text (noting it is unclear whether settlements are more numerous with mediation). Research in North Carolina found that mediated settlement outcomes were neither different nor more numerous than bilaterally negotiated settlements. See Stevens H. Clarke & Elizabeth Gordon, *Public Sponsorship of Private Setting: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 321 (1997).

<sup>249</sup> For example, a “different norm” mindset might have chosen “skill at identifying non-legal interests,” or even “experience in a ‘helping’ profession” as very important for mediator qualifications.

<sup>250</sup> *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota* found that the mediator qualification lawyers found most important was that the mediator have substantive experience in the field of law related to the case (84% of responding lawyers). *McAdoo Report, supra* note 30, at 434. A similar study in Missouri found that lawyers believed the most important mediator qualifications were “mediator knows how to value a case” (87% of respondents) and “mediator should be a litigator” (83% of respondents). That the “mediator knows how to find creative solutions” only garnered 35% of the lawyers’ “votes.” Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 590 (2002). Interestingly, Wissler concludes that the mediator’s familiarity with the substantive issues of a case was not related to the likelihood of settlement. See BLACKWELL HANDBOOK, *supra* note 3, at 134.

<sup>251</sup> In the studies of lawyer perceptions, mediator training was important to 43% of respondents in Minnesota and 49% of respondents in Missouri. *McAdoo Report, supra* note 30, at 434; McAdoo & Hinshaw, *supra* note 250, at 590.

<sup>252</sup> McAdoo & Hinshaw, *supra* note 250, at 590.

<sup>253</sup> *Effectiveness Data, supra* note 1, at 69. Training also was not related to assessments of the fairness of mediation. *Id.*

## VII. SUGGESTIONS FOR CHANGE: GOALS, TRAINING AND IMPLEMENTATION STRATEGIES

The issues touched upon by the data in the Rule 114 survey are important and relevant to national discussion within the ADR and judicial communities. The judicial responses raise important questions that go to the heart of what is done, and why, in the ADR field. Importantly, the data support a conclusion that there *probably* is a gulf between the early goals (and rhetoric) of the field and the realities of current program implementation in the courts. *Probably* is the operative word, however, given the lack of sufficient research and evaluation to conclude with conviction. There is an obvious need to have more thoughtful and thorough monitoring and evaluation of individual ADR programs. Without this, we will not ever know if ADR has been institutionalized in a manner to ensure that an experience of justice is available for those citizens who call upon the power of the courts.<sup>256</sup>

The judicial data from the Minnesota Rule 114 survey paint a complicated picture. There is no question that many judges *perceive* mediation as a dispute resolution process in which clients are given the opportunity to be active participants in negotiated solutions, and that these solutions may be better and more durable than those reached in the litigation

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<sup>254</sup> Even while finishing this article, the author was asked to review a twenty-eight page document, *Chapter 2: Training Standards and Procedures*, developed by the Georgia Commission on Dispute Resolution. The proposed standards include such details as “[a]n approved primary trainer must be present at least sixty percent (60%) of the training schedule each day . . .” GA. COMM’N ON DISPUTE RESOLUTION, CHAPTER 2: TRAINING STANDARDS AND PROCEDURES (on file with author).

<sup>255</sup> To add to the disconnect, most of these training programs probably teach the facilitative approach to mediation, while more mediation practice in the courts follows an evaluative approach. See, e.g., Joseph P. Folger, “*Mediation Goes Mainstream*”—*Taking the Conference Theme Challenge*, 3 PEPP. DISP. RESOL. L.J. 1, 4 (2002) (noting the mediation taking place in the court system is highly directive and evaluative).

<sup>256</sup> Many states (e.g., Maryland, Florida, and Michigan) are monitoring their court ADR programs and some have engaged in extensive evaluation activities. For example, a 2004 report published by the Judicial Council of California has promising data about five early mediation pilot projects in five of California’s Superior Courts. JUDICIAL COUNCIL OF CAL., EVALUATION OF THE EARLY MEDIATION PILOT PROJECTS, 29–77, 81–132, 143–204, 217–68, 279–323, 329–65 (2004) *available at* <http://www.courtinfo.ca.gov/reference/documents/emppt.pdf>. These projects need careful examination to understand the contexts in which they operate. Hopefully the research can be duplicated to determine whether the positive results can be replicated.



process without mediation.<sup>257</sup> Yet the data also suggest that mediation is not a significantly different paradigm of dispute resolution than the traditional adversarial litigation system in which lawyers are the primary actors.

Other concerns also are raised by the data. To the judges, settlement is critical in mediation, but it is not known if more settlements have occurred because of mediation,<sup>258</sup> whether the content of these settlements in mediation is different, or if any other significant value is created in these settlements, justifying judicial encouragement or mandate to use mediation. We do not know enough about the added costs of mediation, and we certainly do not know much at all about the effect on *pro se* parties when they are ordered to use mediation. Without this knowledge, it is increasingly worrisome that mediation as implemented in the court system, often in mandatory fashion, falls short of a different paradigm, based on party choice and self-determination, that early advocates hoped for and expected.<sup>259</sup>

Realistically, it is unlikely that a considerable amount of new funding will materialize to support the added research and evaluation efforts that are needed. Given this, however, it is important to err on the side of program requirements that we most expect will ensure an experience of justice for those who use our court system.

With the foregoing in mind, the following is offered for deliberation in the ongoing discussions about goals, training, and implementation strategies for ADR—especially mediation—in the courts.

1. The emphasis on party choice, i.e., self-determination in mediation, should be reaffirmed and honored in all details of program implementation.<sup>260</sup>

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<sup>257</sup> See *supra* notes 87 and 88 and accompanying text. Whether judges had in mind as their comparison jury trials, traditional lawyer bilateral negotiations, or some version of a judicial decision-making process (e.g., summary judgment or trial) is not clear.

<sup>258</sup> See Galanter, *supra* note 73, at 4–5.

<sup>259</sup> My colleague at the Federal Judicial Center, Donna Stienstra, rightfully reminds me that we need to know more about what litigants (and lawyers) expect from court mediation. Academics and practitioners in the field praise self-determination, but available data do not confirm that this is what is expected or desired by those already in the court. Perhaps they have different expectations about what is proper for a court to do and are not quite as concerned about self-determination.

<sup>260</sup> Without any data to “prove,” for example, that mediation is being practiced as a highly participatory and empowering client-centered process, and that mediated agreements are better and more durable than bilateral negotiated agreements, it is imperative to allow clients and attorneys to choose whether to engage in mediation or not.

- A. Statutes or court rules should always have appropriate opt-out provisions, even if the basic scheme for the program is to make it as mandatory as possible.<sup>261</sup>
  - B. Unless the parties request otherwise, motions should be ruled on in a timely fashion and not delayed for the completion of a mediation process.<sup>262</sup>
2. Those in the field of ADR have a professional obligation to articulate the differences between ADR processes so that they can be understood by consumers. This is especially important with respect to mediation and neutral evaluation.
    - A. Distinguishing characteristics of mediation include its ability to empower parties to have a voice in all discussions about their dispute; to empower them to make their own decisions about the “right” resolution without undue emphasis on a legally rights-based determination; and to encourage parties to understand others’ perspectives, even while disagreeing with them. Settlement is highly valued in mediation, but should not be sufficient by itself to justify a mediation program.<sup>263</sup>

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<sup>261</sup> There are many different ways that legislatures have crafted opt-out procedures. ADR HANDBOOK, *supra* note 3, at 16–17. The research discussed in this article (*see* Parts IV.D, E, and F) suggests that courts should be particularly sensitive to party request for trial when legal issues are at the heart of the case or when legal precedent is desired; when parties express no interest in settlement or there is very high hostility; and when the potential cost of ADR outweighs the value of the case. Courts also should encourage attorney and party responsibility to settle cases without ADR when this is possible.

<sup>262</sup> Ruling on motions is certainly consistent with the courts’ “unique capabilities.” *See supra* note 71 and accompanying text (discussing the emphasis on saving the courts for what needed their “unique capabilities”).

<sup>263</sup> This does not mean that settlement can not be one of the goals in mediation. Clearly settlement is important. Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 672 (2004) (noting disputants want procedural justice and resolution). Wissler has found that those who settle in mediation are more likely to feel that they had “voice” than those who did not settle in mediation. BLACKWELL HANDBOOK, *supra* note 3, at 137. Given the small number of cases presently going to trial in our court system, however, until there is sufficient data to conclude that mediation *compared to unassisted negotiation* results in more and better settlements, settlement goals alone are suspect. *See* Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 47 (2005) (suggesting ways for mediators to “evaluate” in a manner “most constructive to party self-determination, which is the first principle of mediation.”).

- B. Limits to the evaluative role for mediators must be addressed, e.g., no prediction of court results, no recommendation of specific settlements, and no coercion to get settlements.<sup>264</sup>
- C. Clients should attend mediation sessions unless excused by the mediator.<sup>265</sup>
- D. The content of mediation training needs to be congruent with the process articulation being urged.<sup>266</sup> Moreover, courts need to evaluate the “return on investment” from training (e.g., type of training program, trainers, and trainees; whether any of these affect whether clients report more “voice” or respect, more settlements, different kinds of settlements; etc.).<sup>267</sup>

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<sup>264</sup> Although many parties expect mediators to apply pressure to reach settlement, this begs the question of knowing when that pressure crosses the line and impinges on party self-determination. Hedeem, *supra* note 67, at 281. “Given the highly contextual nature of mediation and the correspondingly broad range of contingent behaviors, the field lacks a clear line delineating when a mediator has become too directive and has engaged in settlement coercion. This is especially problematic when the clear judicial philosophy is one of promoting settlement.” *Id.* See also Peter Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 561 (2004) (stating that “over-aggressive” mediators use pressure to “extract” settlements). Although research has suggested that parties like more active mediators, data also support the notion that settlement is more likely if disputants actively participate in a cooperative manner and engage in joint problem solving. BLACKWELL HANDBOOK, *supra* note 3, at 135, 138, and 136. See also Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13 (noting the need for the core mediation concepts of self-determination, impartiality, and justice to have commonly agreed upon definitions in training and practice).

<sup>265</sup> This assumes adequate training for mediators to assess the unusual case where clients would not attend and to master techniques for meaningful client (not just lawyer) participation in mediation.

<sup>266</sup> The employment REDRESS mediation program developed and implemented by the United States Postal Service provides a model program in which goals, training (of mediators and stakeholders), and implementation strategies were congruent. See Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in The USPS (TM) Redress Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 426 (2001).

<sup>267</sup> Research results thus far have not found training related to settlement at all, and its relationship to fairness assessments is mixed. BLACKWELL HANDBOOK, *supra* note 3, at 134, 138. Like most areas of research in the mediation field, the differences in mediation program training philosophy; who the trainees and mediators are (e.g., in-

3. It is essential that the quality of ADR program operations is monitored and evaluated by court staff.<sup>268</sup>
  - A. Effective monitoring and evaluation should allow the court to judge whether the processes being implemented meet the goals that have been articulated.<sup>269</sup> At a minimum, data should be routinely collected to allow the court to analyze:<sup>270</sup> How many cases are going to ADR? How did they get there? What was the result? Which neutral was involved? When in the litigation process did the ADR event occur?<sup>271</sup> What happens to cases that do, or do not, settle in ADR?

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house or private); who the trainers are and how they are paid, etc., make this research extremely difficult.

<sup>268</sup> When there is a higher degree of party choice, the courts' responsibility may be less than in a mandatory program. Nevertheless, "[i]n court-connected dispute resolution programs, the courts are responsible for the quality of justice . . ." SOC'Y OF PROF'LS IN DISPUTE RESOLUTION: QUALIFYING DISPUTE RESOLUTION PRACTITIONERS: GUIDELINES FOR COURT-CONNECTED PROGRAMS 5 (1995).

<sup>269</sup> Of course this assumes that court ADR programs have carefully thought out their goals. See ADR HANDBOOK, *supra* note 3, at 2–3.

<sup>270</sup> An ABA Task Force headed by Professor Lisa Bingham developed a list of data fields the courts can use to determine what ADR data to capture. The hope is that with more similar data collection across court systems, there will be more ability to discern the impact of ADR on the justice system as a whole. Memorandum from the A.B.A. Section of Dispute Resolution Research and Statistics Task Force to A.B.A. (Apr. 2005) (on file with author); see also ADR HANDBOOK, *supra* note 3, at 39–41 (providing ideas for collecting quantitative and qualitative data on court programs).

<sup>271</sup> There is some research that bears on the timing of the ADR event. Donna Stienstra and Julie MacFarlane have both noted that when the design of a mediation program requires early mediation, settlements occur earlier. DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997); JULIE MACFARLANE, LEARNING FROM EXPERIENCE: AN EVALUATION OF THE SASKATCHEWAN QUEEN'S BENCH MANDATORY MEDIATION PROGRAM (2003), available at <http://www.saskjustice.gov.sk.ca/DisputeResolution/pubs/QBCivilEvaluation.pdf>.

Moreover, Wissler and Dauber suggest that if courts are hoping for *earlier* settlements, rather than just more ADR, courts should consider "an early pretrial conference to discuss settlement and ADR, as well as the scheduling of case events and a discovery management plan." Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 270 (2005). Effective case management can assist parties to plan the limited discovery needed before serious settlement discussions can take place.

- B. Judges value an interesting mix of neutral characteristics, e.g., creativity in problem solving, as well as legal knowledge and experience. A particular monitoring and evaluation effort should be undertaken to derive attorney *and client* feedback about mediators on a regular basis. Training and mentoring should be informed by this feedback. Particular attention should be paid to evaluating whether certain neutral characteristics are producing more settlements, are appreciated for encouragement of client voice, and/or are considered to be too heavy-handed or even coercive in mediation sessions.
- C. A specific evaluation effort is needed to determine what is happening with unrepresented parties in mediation. There is a significant potential for mediator coercion with unrepresented parties who are mandated to use mediation in the general civil context. Specific questions include: how many of these cases are being mediated and with what results; do mediators need additional training to be effective for these cases; what alternatives exist for meaningful mediation representation for unrepresented parties; etc.<sup>272</sup>

Ongoing dialogue between the ADR community, attorneys, and judges needs to be encouraged to ensure that ADR program implementation is on track with the “justice” system it should compliment. Questions such as when ADR adds cost to litigation, what kinds of cases need a trial, and what kinds of outcomes are being achieved in ADR should be routinely

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<sup>272</sup> At Hamline University School of Law, for example, a student clinic, under attorney direction, provides limited representation for plaintiffs in their mediation sessions. If the case does not settle in mediation, plaintiffs need to find other representation to proceed in court. Without representation in mediation, the concern is that the importance of procedural justice will be over-emphasized and questionable substantive justice will result. See Gunning, *supra* note 119, at 89; Waldman, *supra* note 119, at 1116. Professor Hyman has also raised important questions about mediator responsibility to facilitate discussions on the fairness of case outcomes in mediation with the parties. Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 43 (2004). Hyman notes, “it seems odd to flatly discard any concern for substantive fairness and justice when we substitute mediation for adjudication as our method to resolve disputes.” *Id.*

reexamined, and research, including data from clients, should be welcomed.<sup>273</sup>

### VIII. CONCLUSION

ADR in Minnesota was premised on the belief that it offered promise for earlier, less costly, and more satisfactory disposition for many civil cases. This is the reason ADR was implemented in many jurisdictions in the U.S. In short, both substantive *and* procedural justice should be achieved in the implementation of ADR. In this era of severe budget constraint encompassing the fiscal environment in state and federal government, great creativity will be needed to generate effective systems to monitor and evaluate ADR programs. To ignore the need to monitor program quality, however, invites process abuse and the loss of institutional legitimacy for court ADR programs. Ultimately this borders on a breach of the public's continued trust in the fairness of the judicial system.

Magistrate Judge Wayne Brazil has been a most prolific writer and speaker on the importance of alternative dispute resolution in the courts. In an address entitled *Court ADR 25 Years After Pound: Have We Found a Better Way?* Brazil eloquently reviewed the progress since the Pound Conference.<sup>274</sup> He acknowledged the potential for mistakes and disappointments in the evolution of ADR, and the fact that many people would not be "animated by values or interests that we respect and whose conduct will not change regardless of the process setting."<sup>275</sup> Nevertheless, he concluded this way:

There are many more people, however, who will understand and appreciate the spirit that drives our service and who will find real value in what we do. It is for that reason that adding substantial ADR services to the pretrial process—and thereby reaching out to litigants, encouraging them to decide which interests are most important to them, permitting them to choose or fashion a procedure that is tailored to pursue those interests and that offers them an opportunity to reclaim power over and responsibility for

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<sup>273</sup> Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 78 (2000) (suggesting the need for renewed vigor "to test our assumptions about what ADR is, and about what it can do, about whom it benefits, about its public and private costs, and about its contributions to the fair resolution of civil disputes."); *see generally* Bush & Bingham, *supra* note 8, at 99–122 (discussing the research gaps regarding the institutionalization of mediation, especially in the court system).

<sup>274</sup> *See generally* Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002).

<sup>275</sup> *Id.* at 148.

how their dispute is resolved—might just be the greatest single reform in the history of this country’s judicial institutions.<sup>276</sup>

We don’t know if ADR is really the “greatest single reform in the history of this country’s judicial institutions,”<sup>277</sup> but we must be committed to figuring this out. Moreover, we also must be committed to making the changes that are necessary to ensure that ADR promotes not injustice, but justice for those who use our courts in the twenty-first century.

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<sup>276</sup> *Id.* at 148–49.

<sup>277</sup> *Id.*

APPENDIX: Statewide Survey

**Judicial Evaluation of Rule 114  
Alternative Dispute Resolution**

**The Minnesota Supreme Court** is gathering data from judges statewide to understand how Rule 114 is being implemented throughout the state and to determine whether any changes to the Rule are needed at this time.

It is extremely important that you take the time to fill out the enclosed questionnaire and return it by **January 31, 2003**. Feel free to write in the margins or at the end of the questionnaire to provide clarification or further information. This survey should take approximately 15-20 minutes to complete based on pretesting by several state court judges. **Your responses will remain anonymous and be kept confidential.**

**Definition of Alternative Dispute Resolution (ADR):** For the purposes of this questionnaire, please define ADR as those processes under Rule 114 that assist parties and attorneys to resolve or settle their disputes without going through the traditional litigation process, i.e. trial. Please do not include your judicial settlement efforts as part of Rule 114 ADR.

Relevant parts of Rules 111, 114, 310, and Minn. Stat. § 484.76 are included as Appendix A at the end of the questionnaire for your reference.

Please direct any questions you have about this questionnaire to:

Professor Bobbi McAdoo  
Hamline University School of Law  
(651) 523-2340  
bmcadoo@gw.hamline.edu

Bridget Gernander  
Staff Attorney,  
ADR Review Board  
(651) 284-0248  
bridget.gernander@  
courts.state.mn.us



**Judicial Questionnaire: General Civil ADR – January 2003**

**GENERAL ADR QUESTIONS**

Q1. Do you now, or did you within the last 3 years, regularly get assigned general civil (non-family) cases subject to Rule 114? (Rule 114 exclusions are included as Appendix A at the end of this document for your reference).

Q1a.  Yes, more than 10 cases in a year (please continue at question 2)

Q1b.  Yes, but 10 or less cases in a year (please continue at question 2)

Q1c.  No (please continue at question 26 on page 9 of the questionnaire)

Q2. Do you require the completion of the ADR portion of the Rule 111 Information Statement?

Q2a.  Always

Q2b.  In selected cases (please specify case type):

Q2c.  Rarely or never

Q3. In your caseload, how often is ADR initially requested by the parties?

Q3a.  Always

Q3b.  Usually

Q3c.  Occasionally

Q3d.  Rarely

Q3e.  Never

Q4. Do you use an initial scheduling order?

Q4a.  No (please continue at question 7)

Q4b.  Yes

Q5. Do you include ADR requirements in your scheduling order?

Q5a.  No (please continue at question 7)

Q5b.  Yes

Q6. Which ADR requirements are in your scheduling order (please check **all** that apply):

Q6a.  Type of ADR ordered

Q6b.  Date by which type of ADR will be selected

Q6c.  Name of neutral

Q6d.  Date by which neutral will be picked

Q6e.  Date by which to report name of neutral to court

- Q6f.  Date by which ADR will be completed
- Q6g.  Other (please specify):

Q7. Do you have satisfactory program support for referring cases to ADR e.g., access to qualified neutrals, someone to manage the paperwork, etc.?

- Q7a.  Satisfactory
- Q7b.  Not satisfactory (please specify):

Q8. Assume a Rule 111 Informational Statement has been filed in your court (or some similar communication has come to you about a case) and the attorneys or pro se litigants have NOT chosen to use ADR. When presented with the facts in this scenario, how often do you: (check the appropriate box)

**For Represented Parties**

	Never	Rarely	Occasionally	Usually	Always
Q8a. <b>Mention</b> ADR to the attorneys	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q8b. <b>Request</b> attorneys to consider the use of ADR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q8c. <b>Order</b> ADR when attorneys have not chosen to pursue it	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**For Pro Se Parties**

	Never	Rarely	Occasionally	Usually	Always
Q8d. <b>Mention</b> ADR to the pro se party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q8e. <b>Request</b> pro se parties to consider the use of ADR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q8f. <b>Order</b> ADR when the pro se parties have not chosen to pursue it	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**COURT-CONNECTED MEDIATION**

9. When **attorneys** don't want to use ADR, how often do they give one or more of the following reasons (check the appropriate box):

	Never	Rarely	Occasionally	Usually	Always
Q9a. Would add cost to the case	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9b. No qualified neutrals available	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9c. The other side is not interested in settlement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9d. My client is not interested in ADR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9e. Settlement was already attempted pre-filing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9f. The clients are too hostile to each other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9g. Not enough discovery has been done	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9h. There is a pending or planned dispositive motion in the case	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9i. The case implicates the federal or state constitution	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9j. Domestic violence is alleged to have occurred between the parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q9k. Other (please specify):	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q10. Do you require completion of ADR efforts before you set a date for trial?

Q10a.  Always

Q10b.  Usually

Q10c.  No, I set trial dates earlier, but ADR must be completed before parties can proceed to trial.

Q10d.  Other (please specify):

Q11. Minnesota does not yet have the technological capability to track how often ADR is used in Rule 114 cases. Please estimate, if you can, the percentage of your Rule 114 caseload that uses an ADR process (cases not subject to Rule 114 are included in Appendix A).

Q11a.  0 – 25%

Q11b.  26 – 50%

Q11c.  51 – 75 %

Q11d.  75% - 100%

Q11e.  Unknown

Q12. Thinking about those cases from question 11 that go to ADR, please estimate what percentage use:

Q12a. \_\_\_\_\_% use mediation

Q12b. \_\_\_\_\_% use arbitration

Q12c. \_\_\_\_\_% use other (please specify type):

Q12d.  Unknown

Q13. Are there enough qualified neutrals in your area?

Q13a.  Yes, plenty

Q13b.  Adequate, but quite limited

Q13c.  No, there are not enough

Q14. Has Rule 114 changed your judicial workload in any way?

Q14a.  Experience with ADR too limited to answer

Q14b.  No change

Q14c.  Yes (please describe):

**MEDIATION QUESTIONS**

Q15. If you order a case to mediation when the attorneys or pro se parties have not made the choice themselves, how important are each of the following factors in warranting your order (check the appropriate box):

	Not At All Important	Somewhat Important	Very Important
Q15a. The parties (clients) in the case have a continuing relationship to preserve	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15b. The case will take too much court time	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15c. The case needs a neutral with specific expertise	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15d. Gets clients directly involved in discussions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15e. Relief is outside the court's jurisdiction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15f. Mediation can provide better, more durable outcome for parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15g. It is local court policy to send as many cases as possible to ADR/mediation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15h. Mediation will cost the parties less	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15i. I never order a case to mediation unless the parties request it	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q15j. Specific attorney/client characteristics (please specify):	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q16. Are there factors important to you in ordering ADR that are not listed above in Question 15? If so, please specify:

Q17. Are there cases or parties you believe are not appropriate for mediation?

Q17a.  No (please continue at question 18)

Q17b.  Yes (please describe the cases or parties that you believe are not appropriate for mediation):

Q18. If the parties are using a mediation process and one of them files a motion for summary judgment, what is your usual practice?

Q18a.  Rule on the summary judgment motion first

Q18b.  Wait for the result of the mediation (and then rule on the motion for summary judgment if necessary)

Q18c.  Other (please specify):

Q19. Please explain any reason(s) for the approach you have adopted for summary judgment motions (from question 18):

Q20. Do you think it is important that clients (real parties in interest, the actual decision makers) be present at the mediation sessions?

Q20a.  In all cases

Q20b.  In most cases

Q20c.  In some cases

Q20d.  In the rare case

Q20e.  No opinion

Q21. At what point does the mediation process usually occur in your cases?

Q21a.  Before much discovery has been done

Q21b.  After limited targeted discovery has been done

Q21c.  After all or almost all of the discovery has been done

Q21d.  Other (please specify)

Q22. When do you think mediation should occur in a case?

Q22a.  Before much discovery has been done

Q22b.  After limited targeted discovery has been done

Q22c.  After all or most all of the discovery has been done

Q22d.  Other (please specify)

**COURT-CONNECTED MEDIATION**

Q23. In your experience, who chooses the mediator (please enter a number in the space below):

Q23a. \_\_\_\_\_% of the time, the attorneys or clients select the mediator

Q23b. \_\_\_\_\_% of the time, I select the mediator

Q23c. \_\_\_\_\_ % of the time someone else selects the mediator (please specify, e.g., court clerk, etc.):

Q24. When you choose the mediator, what qualifications are important to you (check the appropriate box). If you never choose the mediator, please continue at Question 25.

	Not At All Important	Somewhat Important	Very Important
Q24a. Creative problem solver	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24b. Experience as a judge	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24c. Experience in a "helping" (non legal) profession	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24d. Good listener	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24e. Legal experience	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24f. Litigation experience	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24g. Past mediation settlement rate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24h. Skill at identifying non-legal interests	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24i. Recommended by other judges or lawyers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24j. Substantive knowledge in area of case being litigated	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24k. Training as a mediator completed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Q24l. Other (please specify):	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q25. Have you handled any cases involving disputes about the implementation/ enforcement of mediated settlement agreements?

Q25a.  No (please continue at question 26)

Q25b.  Yes (please explain your experience, including how often such problems arise):

**ADDITIONAL QUESTIONS**

Q26. Have you heard complaints about the use of ADR under Rule 114?

Q26a.  No (please continue at question 27)

Q26b.  Yes (please explain what type of complaints you have received and how often this occurs):

Q27. When you do not order parties to ADR, please explain generally why not:

Q28. Do you have any suggestions for the Supreme Court regarding Rule 114 or ADR generally?

Q29. Please indicate your judicial district:

1st  2d  3d  4th  5th

6th  7th  8th  9th  10th

Q30. In which county(ies) do you regularly hear cases:

Q31. How many years have you been a judge? \_\_\_\_\_ years

Q32. Does your county operate on the:

Q32a.  Block system

Q32b.  Master calendar

Q32c.  Other (please specify):

**Thank you for completing this questionnaire. Your opinions on Rule 114 are very important and will be used as we address the challenge of the legislative session and consider whether any changes to Rule 114 are needed.**

**Please return the questionnaire in the self-addressed, stamped envelope by January 31, 2003 to:**

**The Honorable James H. Gilbert  
25 Rev. Dr. Martine Luther King Jr. Blvd.  
St. Paul, Minnesota 55155-1500**



**Applicability of Rule 114: Rule and Statute Excerpts**

**General Rule of Practice for District Court Rule 114.01. Applicability**

All civil cases are subject to Alternative Dispute Resolution (ADR) processes, except for those actions enumerated in Minn. Stat. § 484.76 and Rules 111.01 and 310.01 of these rules.

**Minn. Stat. § 484.76, Subd. 2. Scope**

Alternative dispute resolution methods provided for under the rules must include arbitration, private trials, neutral expert fact-finding, mediation, minitrials, consensual special magistrates including retired judges and qualified attorneys to serve as special magistrates for binding proceedings with a right of appeal, and any other methods developed by the supreme court. The methods provided must be nonbinding unless otherwise agreed to in a valid agreement between the parties. Alternative dispute resolution may not be required in guardianship, conservatorship, or civil commitment matters; proceedings in the juvenile court under chapter 260; or in matters arising under section 144.651 [Rights of Patients and Residents of Health Care Facilities], 144.652 [Corrective Orders to Enforce Rights of Patients and Residents of Health Care Facilities], 518B.01 [Domestic Abuse] or 626.557 [Maltreatment of Vulnerable Adults].

**General Rule of Practice for District Court Rule 111.01. Scope**

The purpose of this rule is to provide a uniform system for scheduling matters for disposition and trial in civil cases, excluding only the following:

- (a) Conciliation court actions and conciliation court appeals where no jury trial is demanded;
- (b) Family court matters governed by Minn. Gen. R. Prac. 301 through 379;
- (c) Public assistance appeals under Minn. Stat. § 256.045, subd. 7;
- (d) Unlawful detainer actions pursuant to Minn. Stat. §§ 504B.281, et seq.;
- (e) Implied consent proceedings pursuant to Minn. Stat. § 169.123;
- (f) Juvenile court proceedings;
- (g) Civil commitment proceedings subject to the Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment Act of 1982;
- (h) Probate court proceedings;
- (i) Periodic trust accountings pursuant to Minn. Gen. R. Prac. 417;
- (j) Proceedings under Minn. Stat. § 609.748 relating to harassment

- restraining orders;
- (k) Proceedings for registration of land titles pursuant to Minn. Stat. Ch. 508;
- (l) Election contests pursuant to Minn. Stat. Ch. 209;
- (m) Applications to compel or stay arbitration under Minn.Stat. Ch. 572.

The court may invoke the procedures of this rule in any action where not otherwise required.