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The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri

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PREFACE

Most state courts now have Alternative Dispute Resolution ("ADR") programs in place to assist with the settlement of cases filed in court. The result is that ADR has become something of a routine part of the civil litigation process. Efforts to evaluate these programs have been limited, in part, because (1) the programs have little or no existing systemic data collection mechanisms, and (2) evaluations are methodologically challenging and, therefore, difficult to design and implement. Evaluation of these programs is vital, however. For ADR to play an important role in our judicial system, policy makers need to know what is happening in practice. Are ADR programs reaching their objectives? Are there any unanticipated consequences? Are legal communities accepting or rejecting ADR? One approach to evaluating ADR programs, taken by the Authors of this Report, is to look at the program through the eyes of practicing litigation attorneys. Why? Because the effects of an ADR program depend upon, among other things, the ways in which attorneys use ADR in the litigation process.

In 1997 the Missouri Supreme Court revised its civil (non-family) ADR rule, Rule 17, to give individual judges the power to order cases to ADR. One of the primary reasons for the revision was to increase the use of what was seen as a worthwhile but underutilized rule. In an effort to evaluate the revised rule and its effects, the Missouri Supreme Court commissioned the Authors to conduct an extensive attorney survey to assess when and why lawyers choose to use ADR, especially mediation; what ADR's effects are on discovery practices; what overall effects the choice of ADR has on the litigation process; and how and when judges get involved in choosing ADR. The following Report, published in May 2002 by the Missouri Supreme Court and reprinted here, details the answers Missouri lawyers gave to these important questions and provides important evaluative information for the emerging national picture of court-connected ADR.

Based on the survey data, the Authors conclude that attorneys find ADR to be helpful in saving time and money and that court rules promoting ADR have helped to move Missouri lawyers to (at the very least) a cautious acceptance of ADR in the litigation process. Less clear is whether judges and lawyers are knowledgeable enough about when and how to use ADR to maximize the revised rule's stated objectives—saving time and expenses for the litigants and the court (i.e., how ADR can help curtail the transactional costs associated with discovery). In addition, attorneys reported that judges are not using the rule to order cases to ADR as the drafters of the revised rule had hoped. The picture of specific mediation practices that emerges is one that incorporates a mix of facilitative and evaluative techniques, with attorneys having a clear preference for the evaluative aspects of mediation. As a result, they want mediators who are lawyers with substantive knowledge in the area being litigated so they know they can rely on the mediator's case evaluation skills.

MISSOURI SUPREME COURT ALTERNATIVE DISPUTE RESOLUTION COMMITTEE REPORT MAY 2002

I. INTRODUCTION

On November 30, 1989, the Missouri Supreme Court adopted Rule 17, entitled "Voluntary Dispute Resolution," to "foster early, economical, fair and voluntary settlement of lawsuits without delaying or interfering with a party's right to resolve a lawsuit by trial."[1] The primary vehicle for delivery of court referred ADR[2] services was to be local ADR rules adopted by each judicial circuit, but few of the judicial circuits adopted such rules.[3] Eight years later, the Supreme Court commissioned a committee to study and revise Rule 17 because the court wanted it to achieve more widespread use.[4] As a result of the Committee's work, the court adopted major revisions to the Rule in 1997.[5]

The primary difference between the two versions of Rule 17 is that the revised Rule 17 granted individual judges the ability to initiate and sustain an

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1. MO. SUP. CT. R. 17.01 (repealed 1997).

2. In this Report ADR refers to ADR processes available under Rule 17: arbitration (non-binding), early neutral evaluation, mediation, mini-trial, and summary jury trial. MO. SUP. CT. R. 17.01(b).

3. Milton Garber & Keith R. Krueger, *A Talk with Judges Covington and Holstein*, MO. LAW. WKLY., JUNE 19, 1995, *at* http://www.missourilaw.com (statement of Justice Holstein) ("We thought [pre-1997 revision] Rule 17.01 would be used more, particularly in urban areas. But, we haven't seen that."). *See* MO. SUP. CT. R. 17.01 (repealed 1997).

4. Cathie St. John-Ritzen, *Supreme Court Rule 17: Putting Some "Teeth" into Alternative Dispute Resolution*, 54 J. MO. BAR 137, 137 (May/June 1998); Stephanie Skinner, *Judges Given Power to Order Parties to ADR, Drafters Agree: 'This Rule Has Teeth'*, MO. LAW. WKLY., Nov. 4, 1996, *at* http.www.missourilaw.com (noting that revisions to Rule 17 were prompted, in part, by low circuit court participation under the old rule).

Purely voluntary ADR programs are notorious for attracting relatively few cases, even when offered at no or little cost. Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*; 33 WILLAMETTE L. REV. 565, 570 (1997) (citing several empirical studies); *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 981-83 (2000) (discussing surveys that show high institutional support for ADR, but low voluntary use).

5. The revised Rule became effective on July 1, 1997. A copy of revised Rule 17 in its entirety is attached as Appendix B.

ADR referral absent a local ADR rule.[6] The Rule specifically gives judges the power to order a case to non-binding arbitration, early neutral evaluation, mediation, mini-trial, or summary jury trial, but allows litigants the opportunity to opt out of such ADR process.[7] If a party decides to opt out of an ADR process, the case cannot subsequently be referred to ADR absent "compelling circumstances," which the court has to set out in an order referring the case to ADR.[8]

The revised Rule 17 also allowed the judicial circuits to continue to establish alternative dispute resolution programs through local rules.[9] At the time of the data collection for this Report, only four of Missouri's forty-four Circuit Courts had adopted local ADR rules for civil court (non-family) cases: the Fifth Circuit (Andrew and Buchanan Counties), the Sixteenth Circuit (Jackson County), the Twenty-First Circuit (St. Louis County), and the Twenty-Second Circuit (St. Louis City).[10]

The revisions to Rule 17 were adopted with little fanfare, but ADR supporters hoped the Rule would quickly become an integral part of Missouri's legal landscape.[11] Several judges and attorneys, however, believed that greater use of Rule 17 would come about slowly and only as a result of trial court orders or an attitude change in a significant number of attorneys in the local bar.[12] Some attorneys acknowledged that as more courts ordered ADR, and as law schools continued to emphasize ADR in the curriculum,

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6. Michael S. Geigerman, *In the Beginning: Rule 17*, 54 J. MO. B. 67, 67 (Mar./Apr. 1998) (calling judicial ability to initiate the ADR process the "most significant" revision to Rule 17). Most of the publicity surrounding the rule focused on this change, but there were other changes in the revised Rule. For example, the new Rule lists and defines five ADR processes available for use. MO. SUP. CT. R. 17.01(b)(1)-(5). It requires counsel to advise a client of ADR options and provides for the qualification of neutrals. MO. SUP. CT. R. 17.02(b) and 17.04. The revised Rule also requires notification to the court if ADR is successful and requires that a written settlement be executed after the termination of the ADR process. MO. SUP. CT. R. 17.05.

7. MO. SUP. CT. R. 17.03(a), (b).

8. MO. SUP. CT. R. 17.03(b).

9. MO. SUP. CT. R. 17.01(a).

10. *See* FIFTH JUD. CIR. R. 25; SIXTEENTH JUD. CIR. R. 25; TWENTY-FIRST JUD. CIR. R. 38; TWENTY-SECOND JUD. CIR. R. 38. Between the time of data collection and the time of finalizing this Report, the Twenty-Seventh Circuit (Bates, Henry, and St. Clair Counties) had adopted an ADR local rule (TWENTY-SEVENTH JUD. CIR. R. 38, effective Jan. 18, 2000). In that same time period the local ADR rule for St. Louis City (Twenty-Second Circuit) was revised to require mediation in all circuit court civil cases. *See* TWENTY-SECOND JUD. CIR. R. 38; *infra* note 178.

11. *See, e.g.*, Geigerman, *supra* note 6, at 69; Skinner, *supra* note 4.

12. St. John-Ritzen, *supra* note 4, at 138-39 (interviewing six judges and six attorneys); Skinner, *supra* note 4 (interviewing three attorneys who thought others might resist the Rule).

members of the bar would utilize ADR and find that it saved time and money compared to preparing for trial.[13]

Rule 17 does not require judges or clerks of courts to keep statistics related to its operation. Therefore, the only evidence of whether the Rule is being used or if it "is working" has been purely anecdotal. In the Fall of 1998, the Missouri Supreme Court ADR Committee[14] decided to collect data from the civil trial bar on the use and acceptance of Rule 17. Committee member Michael Geigerman, St. Louis lawyer and mediator, was asked to chair this effort. He asked Professor Bobbi McAdoo at the University of Missouri-Columbia School of Law to conduct a survey to obtain empirical data about the Rule and its effect on the practice of law in Missouri.[15]

II. GOALS AND METHODS OF THE STUDY

The primary purpose of this study was to gather data about the effect of Rule 17, as revised in 1997, on the practice of civil litigation (non-family) in Missouri.[16] A secondary purpose of the study was to make policy recommendations concerning ADR in the Missouri courts.

A. Survey Design

The questionnaire sent to Missouri attorneys[17] was based on a survey developed by Professor Bobbi McAdoo to study the effects of Minnesota's ADR rule on civil litigation practice in Minnesota.[18] The first portion of the survey determined who had or had not used ADR under Rule 17 from July 1,

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13. Skinner, *supra* note 4.

14. The Honorable Jay A. Daugherty, Circuit Judge is the Committee Chair. Justice William Ray Price, Jr. is the Supreme Court Representative on the Committee.

15. Professor McAdoo had surveyed Minnesota lawyers as a part of the Minnesota Supreme Court ADR Review Board evaluation of Minnesota Rule 114. *See* BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA (1997).

16. Child custody disputes are exempt from Rule 17 because Rules 88.02 to 88.08 govern mediation in those cases. MO. SUP. CT. R. 17.01(a) and 88.02-.08. Rule 17 may be utilized to resolve other family law issues. The Supreme Court, however, commissioned a different study to determine the propriety of ADR in family law issues. The results of that study are contained in COMMISSION ON ALTERNATIVE DISPUTE RESOLUTION SERVICES IN DOMESTIC RELATIONS CASES, FIRST ANNUAL REPORT TO THE SUPREME COURT (2000) [hereinafter "ADR DOMESTIC RELATIONS REPORT"]. This study does not examine the effect of Rule 17 and ADR in the marital dissolution/family law context.

17. *See* MISSOURI RULE 17—ADR QUESTIONNAIRE. A copy of the questionnaire is attached as Appendix D.

18. *See* MCADOO, *supra* note 15.

1997 to November 8, 1999.[19] Those who had not used ADR during this time period answered a final question explaining why, and were directed to return their completed questionnaire to the Missouri Supreme Court.

Respondents who had used ADR in Missouri state court were directed to answer general questions about how often they used different ADR processes and the effect ADR had on their civil (non-family) litigation practice. Expecting arbitration (non-binding) and mediation to be the most "popular" ADR choices, the survey asked follow-up questions about these processes. Attorneys who had not used either mediation or arbitration were directed to skip the questions relating to these processes.

B. Selection of Questionnaire Recipients and Rate of Return

To ensure that survey recipients were subject to Rule 17, attorneys identified as civil litigators in Missouri state courts were selected to receive the questionnaire. Because Missouri has no statewide record-keeping system for cases filed in its circuit courts, it was impossible to identify potential survey recipients in a consistent manner across the state. Therefore, the survey was sent to attorneys whose names were provided by the Circuit Clerks of Missouri's three highest-volume circuits and by two influential attorney organizations. In the state's three highest-volume circuits, Jackson County (Sixteenth Circuit), St. Louis County (Twenty-First Circuit), and St. Louis City (Twenty-Second Circuit),[20] attorneys were randomly chosen from lists provided by the respective Clerks of Court.[21] Attorneys selected to represent the remainder of the state (hereinafter "Outstate") were randomly chosen from membership lists provided by the Missouri Association of Trial Lawyers (MATA) and by the Missouri Organization of Defense Lawyers

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19. The survey was mailed on November 8, 1999. *See* Appendix C.

20. Of the 159,596 civil (non-family) cases filed in Missouri Circuit or Associate Circuit courts in fiscal year 1998, 22% (35,050 cases) were filed in St. Louis County, 20% (31,613 cases) were filed in Jackson County, and 14% (23,125 cases) were filed in St. Louis City. MISSOURI JUDICIAL REPORT SUPPLEMENT, FISCAL YEAR 1998, 11, 50, 60, 62. Greene County (31st Cir.) had the next highest number of civil (non-family) cases filed in fiscal year 1998, 4% of such cases filed in Missouri (6,369 cases). *Id.* at 80.

21. Each Circuit Clerk's office was asked to provide a complete list of attorneys of record on the circuit's civil litigation docket for cases tried in 1998. The respective Clerks of Court from Jackson County (16th Cir.) and St. Louis City (22d Cir.) provided lists of attorneys of record for jury-tried civil cases. The Clerk of Court from St. Louis County (21st Cir.) inadvertently provided a list of attorneys of record for jury-tried civil cases with some other cases that were tried to a final judgment. When that discrepancy was discovered, fifty-two responses from St. Louis County attorneys who had not been listed as an attorney of record in a jury-tried civil case in 1998 were disqualified in order to maintain the consistency of the data set.

(MODL).[22] In an attempt to capture the distribution of attorneys across the state while ensuring the survey sample size was large enough for reliable data, one hundred attorneys per list from each Circuit Clerk and seventy-five attorneys per list from MATA and MODL received the questionnaire.[23] Thus, a total of 450 attorneys were selected to receive the survey, and, after disqualification, 398 survey recipients remained.

The overall questionnaire response rate, 58% (232 responses), is high by social science survey research standards.[24] The Authors believe this high rate of response is a result of the survey's design methodology. The questionnaires were mailed with a letter from Chief Justice William Ray Price, Jr., that asked the attorneys to assist in gathering data assessing the effect of Rule 17 on their practice.[25] To help emphasize the Supreme Court's interest in the project, questionnaire responses were returned to the Supreme Court before being delivered to the University of Missouri-Columbia School of Law for data entry and analysis. While the questionnaires were uniquely

22. MATA and MODL members from Missouri's three urban circuits were eliminated from the lists before any selections were made. While the Authors did not cross reference the entirety of the MATA and MODL membership lists to determine if any attorneys were present on both lists, no attorney received more than one copy of the questionnaire.

23. Of the one hundred surveys sent to attorneys who primarily practiced law in St. Louis County, fifty-two responses were disqualified, leaving a total of forty-eight valid survey recipients in the St. Louis County data set. *See supra* note 21.

The Missouri Bar has no record of the number of attorneys who lived in different regions in the state for the year 1998. Letter from Wayne Greer, MIS Director of the Missouri Bar, to Art Hinshaw, University of Missouri-Columbia School of Law, Membership Records of the Missouri Bar (June 21, 2001) (on file with the Authors). Therefore, the Authors are unable to definitively determine if the group of responding attorneys is representative of the number of attorneys who practiced law in those regions of the state in 1998.

24. Typically, surveys by mail elicit extremely low response rates, even with short questionnaires. DON A. DILLMAN, MAIL AND TELEPHONE SURVEYS: THE TOTAL DESIGN METHOD 1 (1978). A high response rate to a relatively long questionnaire is rare. *Id.*; *see also* Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 37 (1999) (19.1% response rate for questionnaire sent to 850 state court judges); Patricia A. Simpson & Joseph J. Martocchio, *The Influence of Work History Factors on Arbitration Outcomes*, 50 INDUS. & LAB. REL. REV. 252, 257 (1997) (10.8% response rate on survey sent to members of the National Academy of Arbitrators and the Bureau of National Affairs Directory of U.S. Labor Arbitrators); Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67, 85 (1998) (observing that a response rate of around 20% is typical for a mailed survey).

25. A copy of Chief Justice Price's letter is contained in Appendix C.

coded for tracking purposes, the responses from the questionnaires were analyzed anonymously and individual responses were kept confidential. If a survey recipient failed to return a questionnaire by the allotted date, the tracking code allowed for a follow-up reminder to be sent to the non-respondent.

Because of a high response rate statewide, sufficient numbers of attorneys returned questionnaires to allow determinations to be made as to whether questionnaire responses from attorneys practicing in Missouri's primarily urban circuits are different than those from the state's more rural circuits.[26] Comparisons of those two data sets and other statistical subgroups of attorneys were tested for statistical significance using the t-test of group independence.[27] Tests of statistical significance indicate the likelihood of an observed difference in the data occurring by chance.[28] These tests allow analysts to make assessments as to whether an observed difference is meaningful.

The geographic breakdown of the 232 completed surveys is shown in Table 1.

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26. The Urban data set includes all responses from Jackson County, St. Louis City, St. Louis County, and those that identified Greene County (Springfield) as their primary practice areas. The responses from the remaining portions of the state constitute the Rural data set. Of the 232 respondents, 160 were part of the Urban data set and the remaining 58 were grouped into the Rural data set.

27. Five statistical subgroups were tested: (1) attorney age, (2) attorney gender, (3) attorney location (i.e., Urban or Rural), (4) practice types (litigation classified as "one time events" and "continuing relationships"), and (5) party represented (primarily plaintiffs or primarily defendants).

28. In the social sciences a commonly used level of statistical significance is 5% ("$p<.05$"). Thus, when the term "statistically significant" is used in this Report, it means that in at least ninety-five cases out of one hundred, the observed difference is not due to chance factors alone, but is due to a real difference in the two groups being compared. The term "marginally significant" describes when the level of statistical significance is between 5% and 10% ("$.05< p<.1$").

There were no statistically significant or marginally significant results based on attorney age or party represented (primarily plaintiffs or primarily defendants). The sample size for female attorneys (gender subgroup) and attorneys conducting "continuing relationship" type litigation (practice type subgroups) was too small to provide any reliable data about the effect of Rule 17 on their practice of law. There were only a few instances where there were statistically significant or marginally significant differences in the responses based on attorney location (urban and rural). Those differences are noted in this Report.

Table 1

Region	Number of surveys		Percentage of Statewide Sample of Returned Surveys
	sent	returned	
Jackson County	100	44 (44%)	19%
St. Louis City	100	59 (59%)	25.5%
St. Louis County	48	35 (73%)	15%
Outstate (MATA)	75	45 (60%)	19.5%
Outstate (MODL)	75	49 (65%)	21%
Statewide	398	232 (58%)	100%

C. Appropriate Conclusions from the Data

The data reported in this Report consists of the responses of Missouri civil (non-family) litigation attorneys to a questionnaire regarding the various ADR methods available under Rule 17.[29] In the questionnaire, attorneys were asked how they believed ADR affected their civil litigation (non-family) practice. As a result, the conclusions one can draw from the study are limited. For example, while nearly 70% of the surveyed attorneys who had represented a client in mediation over the last two years responded "mediation causes earlier settlement of cases," one can only justifiably conclude that attorneys *perceive* mediation causes earlier settlement. Such data do not support a conclusion that mediation does in fact cause earlier settlement. While the difference may seem subtle, it is of utmost importance. To obtain data to support a valid conclusion that mediation causes earlier settlement, one must perform a comparative study of mediated cases against non-mediated cases.[30] While such a study would be worthwhile, it is beyond the scope of this Report.

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29. Those methods are arbitration (non-binding), early neutral evaluation, mediation, mini-trial, and summary jury trial. MO. SUP. CT. R. 17.01(b).

30. *See, e.g.*, Thomas A. Kochan, Brenda A. Lautsch & Corrine Bendersky, *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 261-62 (2000) (documenting a reduction in disposition time due to mediation by comparing the time to resolution of cases that go through mediation with those that do not); 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, THE FEDERAL JUDICIAL CENTER, 215-16 (Jan. 24, 1997) [hereinafter "REPORT TO THE JUDICIAL CONFERENCE"]

III. THE ATTORNEYS RESPONDING TO THE QUESTIONNAIRE

A. Background of Attorneys

The overwhelming majority of questionnaire respondents in the statewide sample (88%) worked in law firms. Those respondents who did not work in law firms worked as in-house corporate attorneys (7%), in government or other public service jobs (2%), and other legal jobs (3%). None of the survey respondents worked for a legal aid project or non-profit organization. Table 2 shows the breakdown of the size of the respondents' law firms or their law departments (those not working in law firms).[31]

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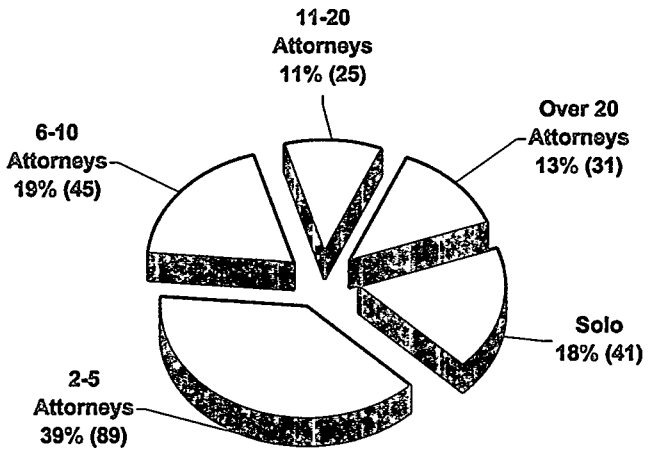
(documenting a reduction in disposition time due to ADR by comparing disposition time in cases that went through ADR and those that followed a traditional litigation pre-trial track).

31. The Missouri Bar has no records regarding the size of the law firms or the legal departments in which its members worked in 1998. Letter from Wayne Greer, *supra* note 23. As a result, the Authors are unable to confirm whether this is an accurate representation of the size of Missouri law firms or practice groups for attorneys who work in each type of organization.

Table 2 Size of Firm



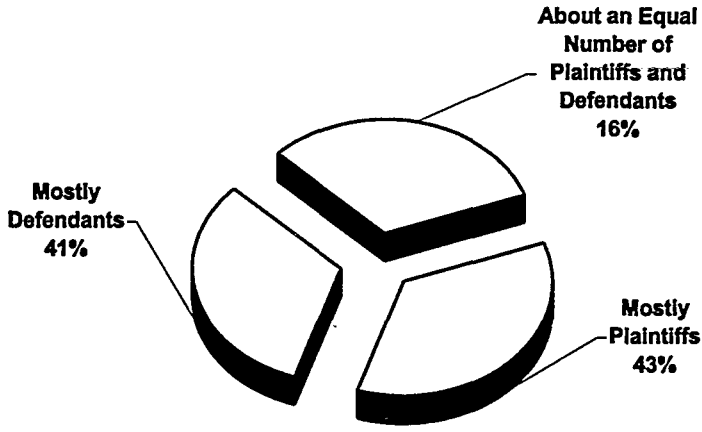
Number of responses in parenthesis

The responding attorneys represented a broad array of practice areas including, among others, contracts, malpractice, discrimination, and products liability. Just over 62% of respondents, however, indicated that vehicular injury cases represented either the highest or second-highest percentage of their case loads over the past two years.[32]

The overwhelming majority of respondents (88%) conducted more than half of their civil caseload in Missouri state court. Individuals formed the primary client base for nearly two-thirds of the survey respondents (63%), and business/commercial interests represented the primary client base for 29% of the statewide respondents. Only 2% of the respondents listed government or a public agency as their primary civil litigation clients. Table 3 shows that the respondents represented plaintiffs and defendants in fairly equal numbers.

32. For more detail regarding the survey respondents' practice areas, see the responses to Question 8 in Appendix E. The Missouri Bar has no records indicating the areas of practice of its members for the year 1998. Letter from Wayne Greer, *supra* note 23.

Table 3 **Composition of Clients**



B. Negotiation and ADR Training

Respondents were questioned about their formal negotiation skills/ADR training before and after revised Rule 17 became effective. More than 60% of the respondents reported no such training before Rule 17's revision. (*See* Table 4.)

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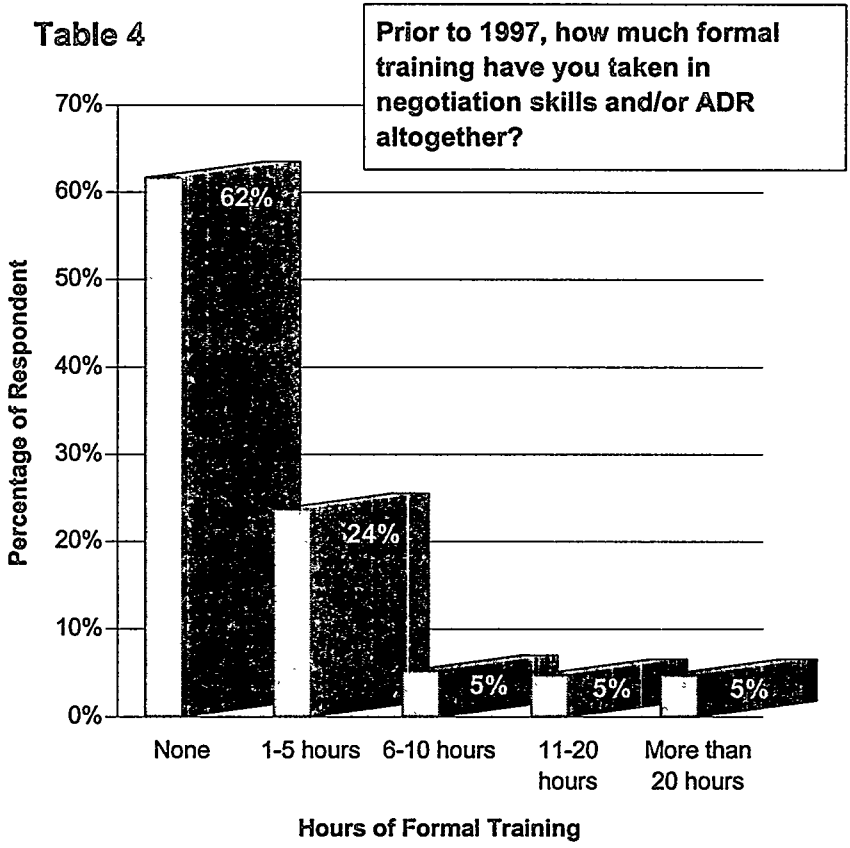
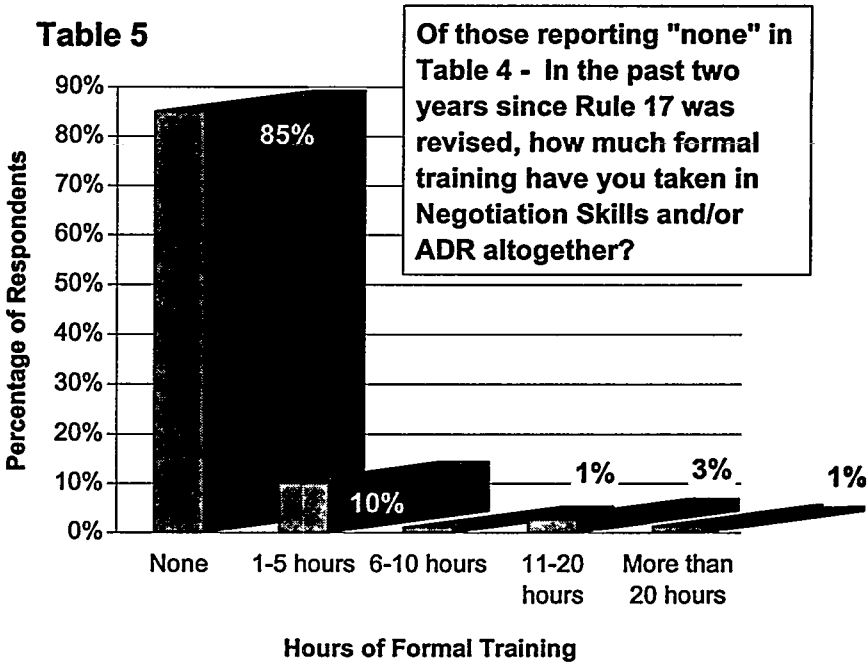


Of the 143 respondents who claimed to have no negotiation skills or ADR training before Rule 17 became effective, 85% (121 respondents) stated that they had no negotiation skills/ADR training after Rule 17 became effective.[33] (*See* Table 5.)

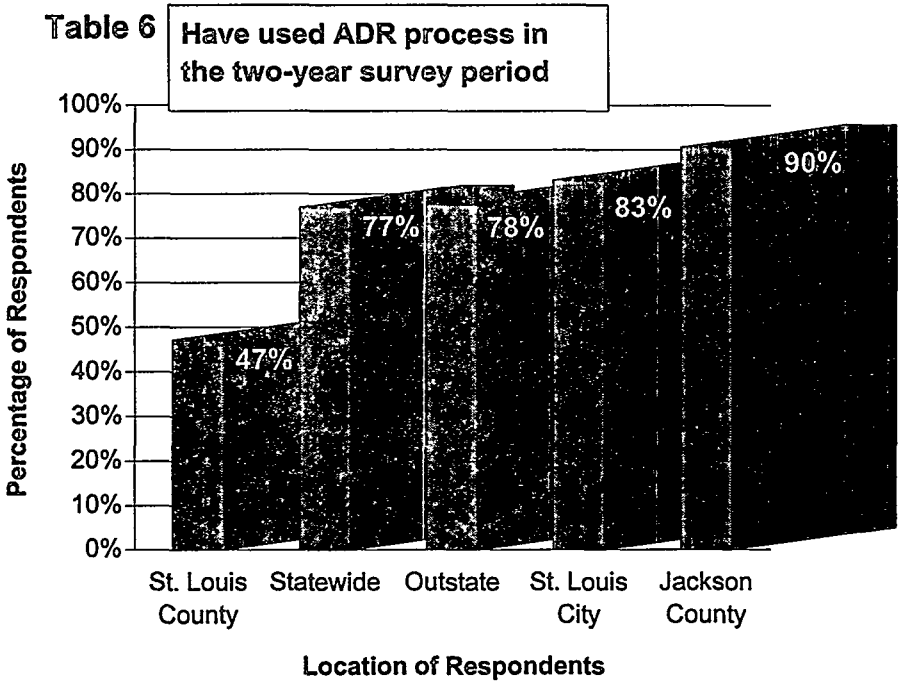
33. Only 14% of the Rural respondents reported taking any negotiation skills/ADR training since Rule 17 was revised; whereas, 28% of the Urban respondents reported having taken negotiation skills/ADR training since the Rule was revised. This difference is marginally significant (p = .0643).



IV. USE OF ADR PROCESSES

More than three-fourths of the statewide respondents reported using ADR processes in their cases over the last two years. It was expected that Jackson County, St. Louis City, and St. Louis County—all with local ADR rules—would have a higher use of ADR compared to the Outstate sample because only one other Circuit had a local civil (non-family) ADR rule.[34] The survey, however, showed that more Outstate respondents reported participation in an ADR process than St. Louis County respondents.

34. *See supra* note 10 and accompanying text.



The number of St. Louis County respondents who reported not using ADR is surprising because the St. Louis County Circuit Court had a local ADR rule,[35] and anecdotal evidence suggested St. Louis County judges had been making referrals to ADR under the local rule during the survey period. The St. Louis County data do not offer any insight into why ADR might be used less frequently than in other areas of the state. Because Jackson County has a strong ADR tradition,[36] it was expected that Jackson County might have

35. *See* TWENTY-FIRST JUD. CIR. R. 38.

36. Jackson County has a strong ADR tradition partly due to the fact that it implemented a local ADR rule under the auspices of the original version of Rule 17 and partly due to the fact that the United States District Court for the Western District of Missouri adopted a strong ADR program in the early 1990s, the Early Assessment Program. *See, e.g.*, SIXTEENTH JUD. CIR. R. 25; Milton B. Garber, *Savings in Costs, Time and Privacy Propel ADR*, MO. LAW. WKLY., April 19, 1993 *at* http://www.missourilaw.com; St. John-Ritzen, *supra* note 4, at 137.

the highest percentage of respondents using ADR processes over the two-year period, and the data supported that hypothesis.

A. Respondents Who Had Not Used ADR Processes

As reported in Table 7, over half of the fifty-six respondents who had not used ADR in their civil litigation cases in Missouri state court reported their cases were "not appropriate" for ADR; more than one-third said the courts do not actively order or encourage ADR. Relatively few stayed away from ADR to avoid exposing their litigation strategy (15%) or providing "free discovery" (9%).

Table 7

Please indicate why you have not been involved in an ADR process (circle all that apply)	
I have not had a case I thought was appropriate for ADR	57%
The court does not actively encourage/order ADR	34%
I prefer a judge or jury trial	30%
I settle my cases as well or better without the use of ADR	26%
It would impose an unnecessary expense	25%
I don't want to expose my litigation strategy	15%
I can get to trial easily if I need to	13%
My clients refuse to use ADR	11%
I don't want to provide "free discovery"	9%
I don't understand the different ADR processes	2%

These non-users of ADR were given the opportunity to list other reasons why they did not use ADR in their Missouri state court litigation during the survey period. The majority of responses fall into two groups—those focusing on judicial activity (or lack thereof) and those who are outright hostile to ADR. A representative sample of their responses include:[37]

- I do not feel it is effective without putting the force of the court behind it—without some binding effect I do not believe insurance carrier adjusters will take it seriously.

37. Responses on file with the Authors.

- It simply isn't encouraged/ordered. I have used it in federal court and believe in the process.
- It is not mandated like in federal court, so [there] is less interest in doing it in state court.
- When the court does not order ADR, there is a perception that suggests it is a sign of weakness.
- ADR is a defendant forum.
- I have been involved in ADR approximately six times [in other jurisdictions], and nothing was ever settled or concluded in that process.
- I did it once; the cost was outrageous and resolved nothing! I won't do it again!
- It's a waste of time.
- I believe juries are more inclined to be neutral than "neutral" evaluators.

B. Respondents Who Used ADR Processes[38]

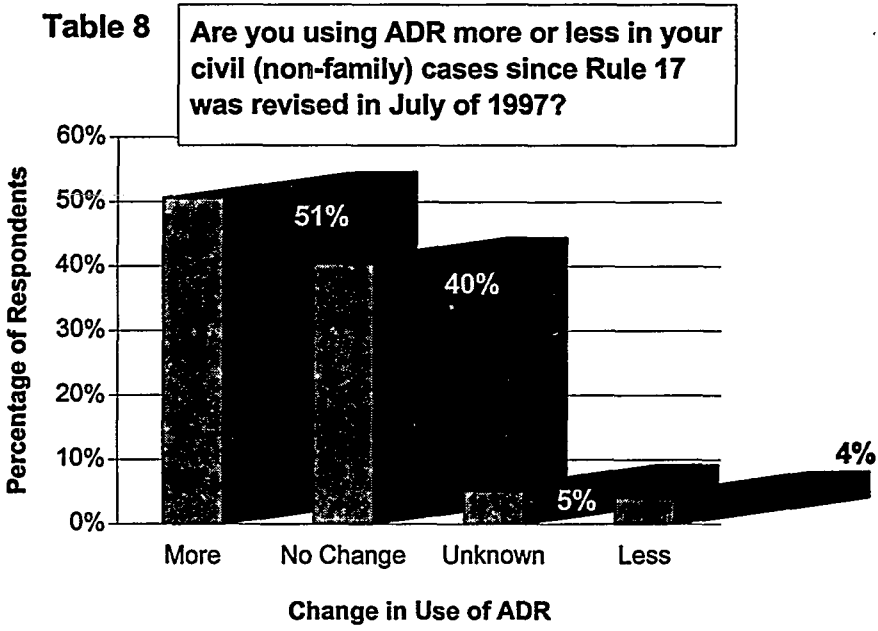
The 176 respondents (77% of all respondents) who used ADR during the survey period were asked follow-up questions about their ADR use and its effect on their practice of law.

1. Use of ADR under Rule 17

One of the main purposes of revised Rule 17 was to increase the use of ADR statewide because the prior version of the Rule was perceived to be underutilized.[39] To determine if the Rule was meeting this goal, the questionnaire asked respondents if their use of ADR increased after revised Rule 17 went into effect. Table 8 shows that a slight majority of respondents (51%) reported more use of ADR processes after Rule 17 was revised in 1997. More than one-third (40%) reported no change in their use of ADR.

38. The respondents who reported no use of an ADR process after Rule 17's revision did not participate in the remainder of the study. From this point forward, therefore, the term "respondents" refers to those who reported using ADR processes under Rule 17 during the survey period, unless otherwise indicated.

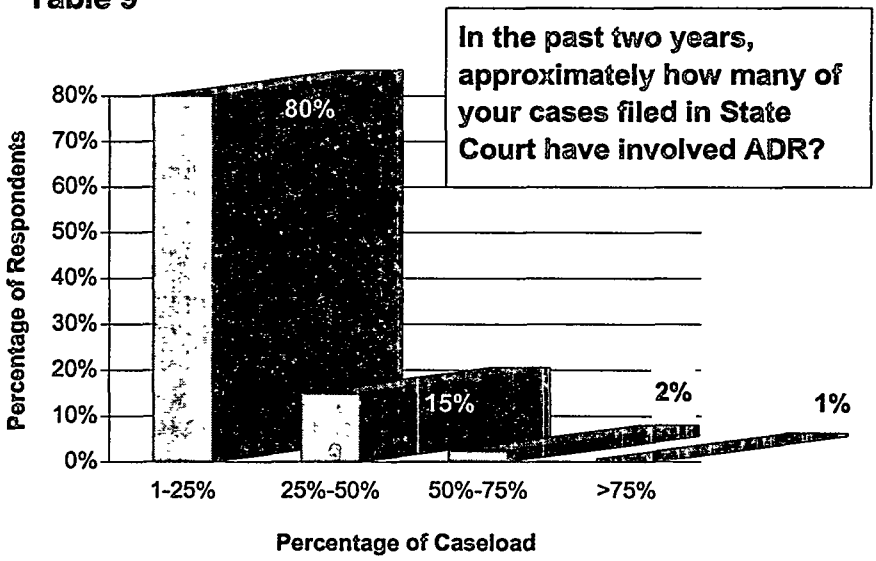
39. *See* St. John-Ritzen, *supra* note 4, at 137-38; Skinner, *supra* note 4.



While those numbers indicate that many attorneys have used ADR more frequently, 80% of the respondents reported using ADR in less than one-fourth of their civil cases. Only 3% of respondents reported using it in more than half of their civil cases. These data suggest that while more attorneys are using ADR processes under Rule 17, they may use it in only a select, few cases.[40]

40. Lawyers report more use of mediation than any other ADR process by far. *Compare infra* Part VI (reporting about mediation) *with infra* Part VIII (reporting about arbitration (non-binding)) and *infra* Part IX (reporting about early neutral evaluation, summary jury trial, and mini-trial). Yet nearly 40% of the respondents who had participated in mediation under Rule 17 reported representing a party in mediation one to three times over the last two years. *See infra* Table 24.

Table 9



Although ADR may be used in relatively few cases, many attorneys believe ADR is useful in their litigation strategy, as is shown in Tables 10 and 11. Slightly less than 90% of respondents reported that ADR is at least "sometimes" a helpful civil litigation tool.

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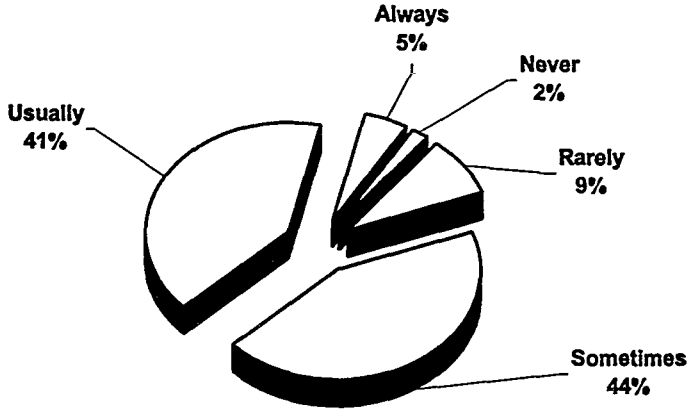
Table 10

In your experience, is ADR a helpful tool for your civil litigation cases?



Additionally, almost one-third of respondents found ADR helpful enough that they reported they would "usually" or "always" use ADR as a part of their litigation strategy even if Rule 17 were repealed. Moreover, another 55% of respondents would use ADR "sometimes" if the Rule were repealed. These results suggest ADR has been accepted by the civil trial bar. (*See* Table 11.)

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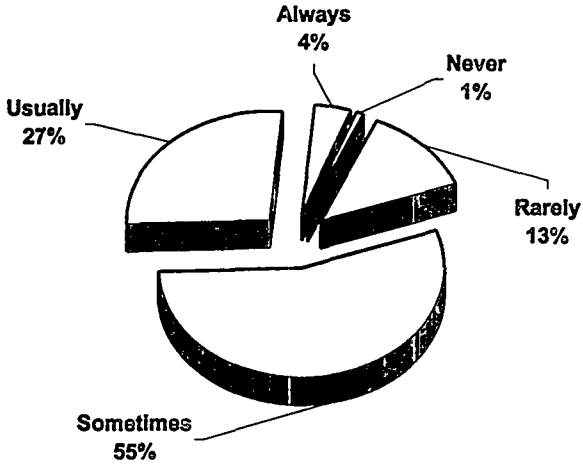
Table 11 **If Rule 17 were repealed would you choose to use ADR as a part of your litigation strategy?**

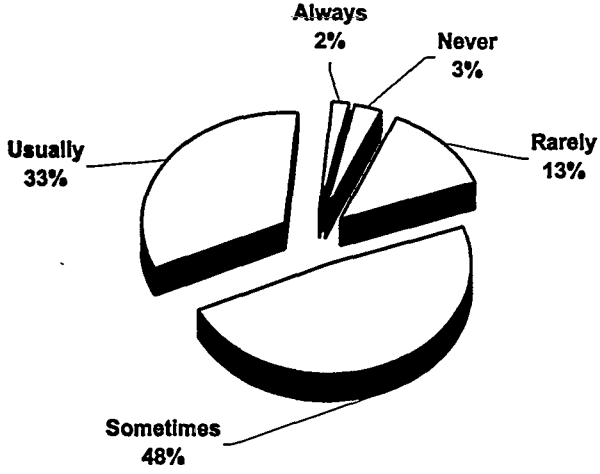


2. Saving Time and Money

One of Rule 17's primary goals is to save judicial and litigant time and money compared to the normal litigation process, including routine settlement.[41] The questionnaire asked respondents if their use of ADR caused cases to settle faster compared to traditional settlement negotiations. As Table 12 indicates, slightly more than one-third of ADR users (35%) replied that their cases "usually" or "always" settle faster when using ADR than when not using ADR, and an additional 48% reported that their cases "sometimes" settle faster using ADR.

41. MO. SUP. CT. R. 17.01(a). Judge Jay A. Daugherty, Chair of the Committee that drafted Rule 17, stated "The purpose of ADR is not to settle cases, but to settle them earlier." Keith R. Krueger, *Committee May Recommend New Supreme Court Rule on ADR*, MO. LAW. WKLY., Oct. 23, 1995, *at* http.www.missourilaw.com.

Table 12 **In your experience, do you settle cases faster with ADR than you would if you just negotiated with opposing counsel?**



To see if respondents believed the Rule was saving money, the questionnaire asked if ADR processes saved money for clients compared to traditional settlement negotiations. (*See* Table 13.) Again, more than 36% of ADR users reported their clients "usually" or "always" saved money when using ADR over traditional settlement negotiations; more than 45% believed they "sometimes" saved money using ADR.

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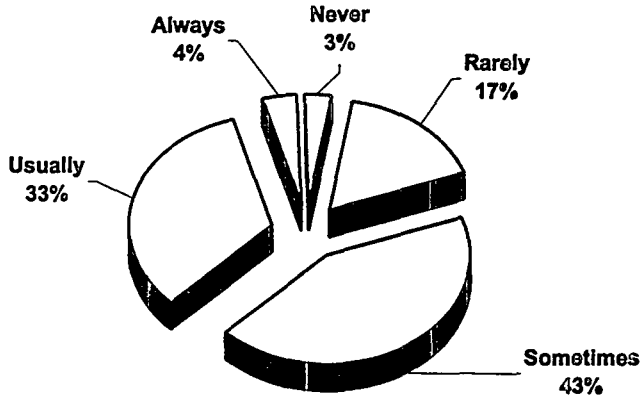
Table 13 In your experience, do your clients save more money over the life of a case when you use ADR than they would if you just negotiated with opposing counsel?



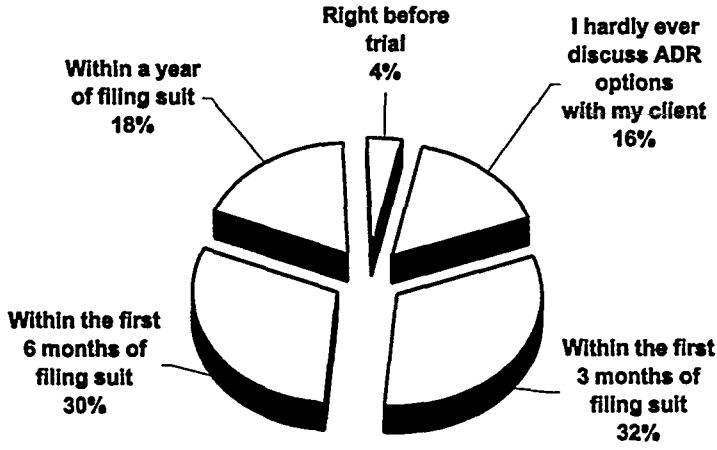
3. Discussing ADR Options with Clients

Rule 17 requires attorneys to "advise their clients of the availability" of the ADR options under the Rule in each civil action.[42] To find out when and if those discussions were taking place, attorneys were asked when they discussed ADR options with their clients.[43] Nearly two-thirds of the respondents stated that they discussed ADR options with their clients within the first six months of the filing of suit, with another 18% doing so within a year of the filing of suit. The remaining respondents reported either hardly ever discussing ADR options with their clients (16%) or waiting until right before trial to have such a conversation (4%). (*See* Table 14.)

42. MO. SUP. CT. R. 17.02(b).

43. Rule 17 does not dictate when such a discussion should take place. *See* MO. SUP. CT. R. 17.01-.07.

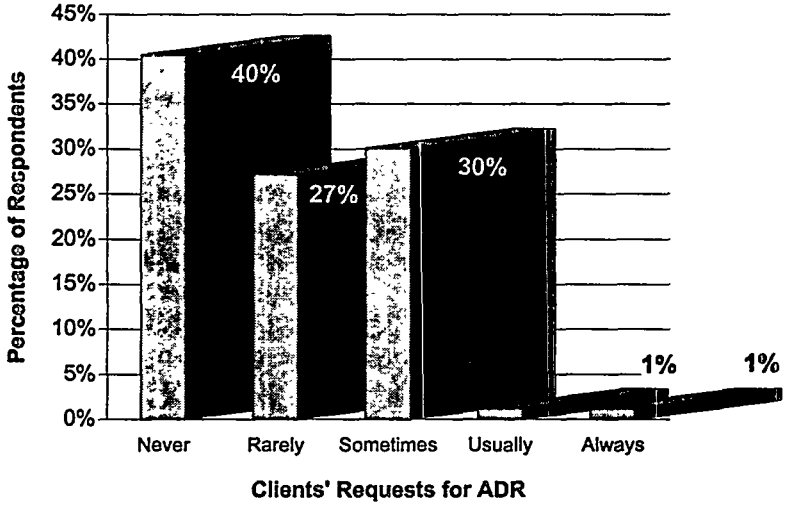
Table 14 **I generally discuss ADR options with my client...**



One hope in the ADR community is that as clients become aware of ADR's benefits, they will push attorneys to use ADR processes.[44] While the questionnaire did not test how familiar the respondents' clients were with ADR, it did ask respondents if their clients have asked them to investigate the use of ADR processes in their cases. Only four respondents (2%) stated that their clients "usually" or "always" asked them to look at ADR options, while more than two-thirds of the respondents reported their clients "never" or "rarely" asked them to investigate ADR options for their cases. (*See* Table 15.)

44. *See, e.g.*, MISSOURI BAR ASSOCIATION, DISPUTE RESOLUTION ALTERNATIVES: WHAT YOU NEED TO KNOW (1998) (educating the public about Rule 17's ADR methods).

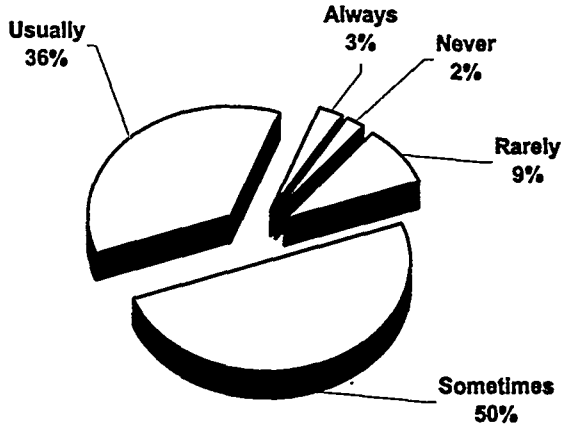
Table 15 **My clients request that I investigate the use of ADR processes for their case(s)**



It is also believed that insurance companies support the use of ADR due to their large volume of cases.[45] The questionnaire asked respondents whether insurance companies support the use of ADR processes. As Table 16 shows, a large minority of respondents, 39%, indicated that insurance companies "usually" or "always" support the use of ADR, and nearly half of respondents reported that insurance companies "sometimes" support the use of ADR.

45. *See, e.g.*, Judge Carl R. Gaertner, *Alternative Dispute Resolution: A Jurist's Perspective*, MO. LAW. WKLY., April 3, 1995, *at* http://www.missourilaw.com.

Table 16 In your experience, do insurance companies support the use of ADR processes?



4. Discussing ADR Options with Opposing Counsel

A corollary to the timing of attorney discussion of ADR options with clients is their discussion of ADR options with opposing counsel. As Table 17 indicates, slightly more than 50% of the respondents reported that they typically discuss ADR options with opposing counsel within six months of filing suit, and another 30% reported typically having such discussions within one year of filing suit.[46] Almost 15% of respondents reported they "hardly ever" discuss ADR options with opposing counsel unless opposing counsel or the judge raises the issue.

46. The length of time from filing a petition to case disposition in civil (non-family) cases varies depending on the court in which the case is filed. Of the civil cases disposed of in Circuit Court in fiscal year 1998, 79% had been filed within 18 months of disposition, and 87% had been filed within 24 months of disposition. MISSOURI JUDICIAL REPORT, FISCAL YEAR 1998, at 4. Of the civil cases disposed of in Associate Circuit Court in fiscal year 1998, 84% had been filed within 6 months of disposition, and 95% had been filed within 12 months of disposition. *Id.*

Table 17

I generally discuss ADR options with opposing counsel...	
Within the first 3 months of filing suit	17%
Within the first 6 months of filing suit	34%
Within a year of filing suit	30%
Right before trial	5%
I hardly ever discuss ADR options with opposing counsel unless opposing counsel or the judge raises the issue	15%

5. Court Use of Rule 17

Many believed the pre-1997 Rule 17 was not used much because the use of ADR was purely voluntary under that version of the Rule.[47] Hoping the courts would encourage more use of ADR,[48] Rule 17 was revised to give trial judges the power to order cases to ADR.[49] To gather information about the courts' use of that power, the questionnaire asked respondents (1) about judicial actions when one or both attorneys believed no ADR process to be appropriate (*see* Table 18) and (2) about judicial actions when attorneys did not agree on the particular ADR process to use. (*See* Table 19.) When the parties disagreed on which process was appropriate, nearly three-fourths of the respondents reported that courts did not become involved in the issue.[50] Likewise, when either one or both attorneys thought no ADR process was appropriate in the case, more than three-fourths of the respondents (77%) reported that courts did not become involved in the issue.[51] This suggests that attorneys believe that the judiciary, as a whole, does not take the initiative with Rule 17, instead deferring to attorney decisions regarding ADR.

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47. MO. SUP. CT. R. 17 (repealed 1997); *see also* Krueger, *supra* note 41. Such a belief is consistent with empirical data regarding the use of voluntary ADR programs. *See* Wissler, *supra* note 4, at 570; Reuben, *supra* note 4, at 981-83.

48. *See, e.g.*, St. John-Ritzen, *supra* note 4, at 137-38; Skinner, *supra* note 4.

49. MO. SUP. CT. R. 17. 03(a); *see also* Geigerman, *supra* note 6, at 67.

50. It is possible the judge was not aware of any outstanding ADR issue since the survey did not ask that question.

51. One explanation for this result may be the ability to override a judicial ADR referral through Rule 17's "opt-out" procedure. MO. SUP. CT. R. 17.03(b). After an opt-out is exercised, a judicial referral to ADR must be supported by "compelling circumstances." *Id.* The study did not ask respondents if they had exercised the opt-out provision.

Table 18

When you and/or opposing counsel were of the opinion that no ADR was appropriate, what action did the court take? (circle all that apply)	
Court scheduled a phone conference	**0%**
Court scheduled an in court conference	**11%**
Court selected an ADR process	**8%**
Court ordered the parties to find an ADR process	**5%**
Court did not become involved	**77%**
Other	**3%**

Table 19

When you disagreed with opposing counsel about which ADR option was appropriate, what action did the court take? (circle all that apply)	
Court scheduled a phone conference	**5%**
Court scheduled an in court conference	**7%**
Court selected an ADR process	**7%**
Court ordered the parties to find an ADR process	**7%**
Court did not become involved	**74%**
Other	**5%**

6. Settlement Rate

Even though Rule 17 may not have been primarily intended to increase the settlement rate of cases,[52] this hope is typically cited as one reason courts embrace the use of ADR. More than one-third (37%) of the respondents

52. *See* Krueger, *supra* note 41 ("The purpose of [Rule 17] is not to settle cases, but to settle them earlier.") (quoting Judge Daugherty).

reported increased settlement rates[53] following the 1997 revisions to Rule 17.[54] A majority of those reporting higher settlement rates attributed this increase to the fact that their clients have become more interested in staying out of court. (*See* Table 20.) A large minority (42%) identified an increased use of ADR as a reason for the increased settlement rate.

Table 20

If your settlement rate has increased over the last two years, what do you attribute the increase to? (circle all that apply)	
Clients more interested in settling and staying out of court	57%
Increased use of ADR	42%
Increased efforts on my part to reach settlement	22%
Other[55]	12%

V. CONCLUSIONS ABOUT THE EFFECT OF RULE 17 ON CIVIL LITIGATION IN MISSOURI

A. Favorable Conclusions Regarding the Use of ADR

1. A vast majority of litigation attorneys have used ADR under Rule 17 during the two-year survey period

In the statewide survey sample, just more than three-fourths of all respondents had used ADR processes in the two-year survey period.[56] While

53. Fifty percent of the Rural respondents reported a higher settlement rate during the survey period.

54. The percentage of respondents who reported higher settlement rates (37%) is similar both to those respondents who say their cases "usually" or "always" settle faster using ADR (35%) and to those who say their clients "usually" or "always" save money using ADR (37%). *See supra* Tables 12 and 13. Comparing the respondents' answers to these three questions, 13% of the respondents reported (1) saving time, (2) saving money, and (3) a higher settlement rate, all as a result of using ADR.

55. The majority of "Other" responses could be grouped under client desires to save time and money, for example, "increase in cost of litigation for both parties" and "costs and uncertainty of litigation." Data on file with the Authors.

56. *See supra* Table 6.

there has been some concern about the availability of ADR neutrals in outstate Missouri,[57] 72% of Rural respondents reported participation in ADR in the two-year survey period.[58]

2. Attorneys believe ADR is a helpful litigation tool

Of the respondents using ADR, 45% believed ADR "usually" or "always" was a helpful tool for their litigation cases, and another 44% believed it was, at the very least, "sometimes" helpful.[59] Additionally, 31% of the respondents using ADR said they would "usually" or "always" use ADR as part of their litigation strategy if Rule 17 were repealed.[60] Another 55% of ADR users stated they would "sometimes" use ADR as a part of their litigation strategy if Rule 17 were repealed.[61] This suggests that in only two years' time, the consideration of ADR has become a part of attorney practice for at least one-third to one-half of Missouri civil litigation attorneys. Furthermore, there is at least a hesitating acceptance of ADR by three-fourths of Missouri civil litigation attorneys.

3. Attorneys believe that ADR under Rule 17 saves time and money

Although the nationwide data about the savings of time and money through the use of ADR are mixed,[62] responding attorneys using ADR believe

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57. Garber & Krueger, *supra* note 3 ("One problem is that there are just not enough qualified mediators in some areas.") (quoting Supreme Court Justice Holstein); Skinner, *supra* note 4 (discussing the potential problem of finding neutrals in rural areas); *see also* ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 13, 22-23.

58. Data on file with the Authors. *See also supra* Table 6. While these numbers are encouraging, the Authors of this Report caution that there may not be enough qualified ADR neutrals in some parts of Missouri. *See* ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 13, 22-23.

59. *See supra* Table 10.

60. *See supra* Table 11.

61. *See supra Table 11.*

62. *Compare* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT, at xxvii, xxx (1996) (concluding that there was "no strong statistical evidence that time to disposition (or lawyer work hours) were significantly affected by mediation or neutral evaluation in any of the six programs studied") *with* STEVENS H. CLARKE ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS, at vi-vii, 45 (1995) (documenting a reduced disposition time due to mediation and suggesting that mediation produced a cost savings for litigants), *and* REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 215-16 (documenting a

ADR saves both time and money.[63] The data are unclear as to the source of these perceived savings. A large number of attorneys wait to speak about ADR with their clients and with opposing counsel until more than six months after suit is filed, if at all.[64] Additionally, a large number of attorneys reported no change in the timing and/or volume of discovery when they used mediation.[65]

4. Many attorneys report a higher settlement rate under Rule 17

More than one-third of the respondents (37%) reported an increased settlement rate during the survey period.[66] This is consistent with a North Carolina study reporting that attorneys thought mediation reduced the likelihood that a case would go to trial.[67]

B. Mixed Conclusions Regarding the Use of ADR

1. Attorneys view ADR favorably, but are still hesitant to make ADR a larger part of their litigation strategy

A common theory in ADR circles is that attorneys have an unspoken (maybe even subconscious) resistance to ADR, due in part to the amount of adversarial training attorneys receive.[68] The data from this Report support this unspoken bias theory. The use of ADR continues to grow in Missouri,[69]

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reduction in disposition time due to ADR and noting attorneys' beliefs that ADR produced savings of more than $15,000 per case).

63. *See supra* Tables 12 and 13.

64. *See supra* Tables 14 and 17.

65. *See infra* Tables 27 and 28.

66. *See supra* Part IV(B)(6). This study does not confirm or deny whether Rule 17 has an effect on the case settlement rate. *See supra* Part II(C).

67. CLARKE ET AL., *supra* note 62, at 69.

68. *See* Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri-Columbia*, 50 FLA. L. REV. 609, 648-54 (1998) (discussing the teaching of ADR as a "heresy" compared to the traditional adversarial dispute resolution process taught in law schools); John P. McCrory, *Mandated Meditation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RES. 813, 818-19 (1999) (enumerating many reasons for attorneys' resistance to ADR). *See generally* Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOT. J. 29 (1987).

69. *See supra* Part IV(B)(1) and Table 6 and *supra* notes 56-58 and accompanying text; *see also* Kathleen Bird, *Integrating ADR into the Practice of Law*, MO. LAW. WKLY., Nov. 22, 1999, *at* http://www.missourilaw.com; Michael S. Geigerman, *ADR Around the State*, MO. LAW. WKLY., May 24, 1999, *at*

and many respondents reported ADR to be a beneficial litigation tool.[70] Few Missouri attorneys, however, used ADR frequently.[71] Slightly more than half of the respondents are using ADR more now than before the revised Rule went into effect,[72] but most respondents reported using ADR in relatively few (1-25%) cases.[73] Furthermore, a large number of respondents, nearly 40%, reported representing parties in mediation only one to three times during the two-year survey period.[74]

Because ADR in Missouri state court is still in its infancy, attorneys are still learning about the processes, their benefits and how they work. Hesitancy to use ADR is not unexpected, and is consistent with results of a similar study in Ohio. In Ohio, most lawyers favored an expanded use of mediation but only one-tenth of those lawyers regularly recommended mediation to their clients and did not refer a "significant" portion of their clients to mediation.[75]

2. While a majority of attorneys discuss ADR with their clients and opposing counsel relatively soon after filing suit, many wait more than one year after suit is filed to do so, if at all

The timing of when attorneys discuss ADR options with their clients and with opposing counsel is an important issue related to the savings of time and money through ADR. One primary method of savings is to divert cases to ADR earlier in the litigation process,[76] which cannot occur if courts do not

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http://www.missourilaw.com; James R. Keller, *Alternative Dispute Resolution is Here to Stay*, MO. LAW. WKLY., May 24, 1999, *at* http://www.missourilaw.com.

70. *See supra* Tables 10 and 11.

71. *See supra* Tables 7 and 9.

72. *See supra* Table 8.

73. *See supra* Table 9.

74. *See infra* Table 24. However, nearly 45% of the respondents reported representing a party in mediation four to nine times in the 2-year survey period, and another 15% reported representing a party in mediation in more than 10 mediations during the survey period. *See infra* Table 24. Because of the way the survey question was worded ("How many times have you represented a party in a mediation over the last 2 years?"), it is not clear whether the respondents were referring to mediation sessions or number of cases that went to medation. Thus, in the best-case scenario, attorneys reported that they had four to nine cases go to mediation. In the worst-case scenario, however, the respondents had one case that went into mediation, but there were four to nine mediation sessions for that case.

75. Nancy H. Rogers & Craig McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RES. 831, 841 (1998).

76. *See, e.g.*, REPORT TO THE JUDICIAL CONFERENCE *supra* note 30, at 221-22; Rogers & McEwen, *supra* note 75, at 845.

order cases to ADR and/or attorneys do not discuss ADR with their clients and opposing counsel early in the litigation process.

More than 60% of the respondents discussed ADR options with their clients within six months of the filing of suit (62%), and more than half discussed ADR options with opposing counsel within six months of the filing of suit (51%).[77] However, 16% of the respondents reported they "hardly ever" discussed ADR options with their clients, and nearly 15% of them "hardly ever" discussed ADR options with opposing counsel unless opposing counsel or the judge raised the issue.[78]

C. Challenges to Further Institutionalization of ADR

1. Some judges may have a laissez-faire attitude toward ADR and Rule 17

One of the primary benefits of revised Rule 17 was that it gave judges the power to order cases to ADR if the judge thought ADR would be beneficial.[79] The data suggest that attorneys believe judges are not using that power. More than one-third of the non-ADR using respondents said they did not do so because courts do not actively encourage or order ADR.[80] In addition, when attorneys do not agree on which ADR process to use, 75% of respondents reported that the court took no action.[81]

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77. *See supra* Tables 14 and 17.

78. *See supra* Tables 14 and 17.

79. *See, e.g.*, St. John-Ritzen, *supra* note 4, at 137-38; Skinner, *supra* note 4; Krueger, *supra* note 41.

80. *See supra* Tables 7, 18, 19. This conclusion is consistent with judicial responses to an informal survey the ADR Committee of the Bar Association of Metropolitan St. Louis conducted in March 2000. The questionnaire was sent to sixty-one judges in the Eleventh Circuit (St. Charles County), the Twenty-First Circuit (St. Louis County), the Twenty-Second Circuit (St. Louis City), and the Twenty-Third Circuit (Jefferson County), and thirty-one responses were received. BAR ASSOCIATION OF METROPOLITAN ST. LOUIS—ADR COMMITTEE, QUESTIONNAIRE TO JUDGES IN THE ST. LOUIS METROPOLITAN AREA (2000) (unpublished survey, on file with the Authors) [hereinafter "BAMSL, QUESTIONNAIRE TO JUDGES"]. Of the thirty-one judges who responded, eighteen said that they had referred at least one case to ADR under Rule 17. *Id.* Of those eighteen, ten had referred more than fifteen cases to ADR under the Rule, and four had referred more than twenty-five cases to ADR under the Rule. *Id.* The survey did not ask about the time period over which these referrals were made. *See id.*

81. *See supra* Tables 15 and 16. This statistic could be somewhat misleading because the survey did not ask respondents if the judge was aware of any outstanding ADR issue, or whether Rule 17's "opt-out" provision had been used. *See supra* note

2. Many attorneys believe that ADR is not appropriate in certain types of cases

While some people believe that all cases are appropriate for ADR,[82] the perception that certain types of cases are not appropriate for ADR has a stronghold in Missouri.[83] A slight majority (57%) of respondents not using ADR during the survey period reported, "I have not had a case I thought was appropriate for ADR."[84] While this belief may be changing,[85] it is a part of Missouri's legal culture and may have slowed the use of ADR under Rule 17.[86]

3. ADR training for attorneys has been minimal

As stated earlier, Missouri's legal culture may have slowed the use of ADR under Rule 17. A study in Ohio found that one of the predictors for whether attorneys will encourage their clients to go to ADR is training in

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51 and accompanying text. This result is consistent, however, with the findings of Missouri's ADR Commission on Domestic Relations. The Commission found that judicial awareness and leadership were "factors that contribute to the interest, availability, and utilization of ADR services at the local court level." ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 16. Several respondents to the Commission's survey reported that ADR services in domestic cases were not available because courts do not order cases to ADR and do not encourage the use of ADR. ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 16.

82. *See, e.g.*, Kent Snapp, Director Early Assessment Program, United States District Court for the Western District of Missouri, Presentation at the University of Missouri-Columbia (February 7, 2000) (stating that ADR is appropriate for all cases).

83. The belief that ADR is not appropriate in all cases has been adopted by the United States District Court for the Eastern District of Missouri. Only those cases that the attorneys indicate to the court are "suitable for ADR" go through the court's ADR program. REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, at 3 (May 23, 1997) [hereinafter "REPORT-EASTERN DISTRICT"]. Based on the court's statistics, 459 cases were referred to ADR during fiscal year 1996 out of 2352 civil cases filed during fiscal year 1996 that were eligible for ADR. *Id.* at 2-4 (735 "prisoner cases" filed in fiscal year 1996 were not eligible for ADR). Of the cases referred to ADR, employment-related civil rights claims are considered most appropriate for ADR (46% of all cases referred to ADR in fiscal year 1995 and fiscal year 1996). *Id.* at 5. Tort and contract claims are considered the next two most appropriate types for ADR (16% and 13%, respectively, of all ADR referrals in both fiscal year 1995 and fiscal year 1996). *Id.*

84. *See supra* Table 7.

85. *See* Geigerman, *supra* note 69; Keller, *supra* note 69; St. John-Ritzen, *supra* note 4, at 138-39; Skinner, *supra* note 4.

86. *See* Bird, *supra* note 69.

dispute resolution.[87] Of the entire Missouri survey sample, nearly 52% of all respondents reported no negotiation skills training or ADR education during their careers.[88] The high number of Missouri attorneys with no ADR training may be related to the bar's hesitating acceptance of ADR.

4. The general public is largely unaware of ADR

While many repeat players (e.g., insurance companies and large corporations) are familiar with ADR,[89] the general public is much more familiar with the traditional trial model for resolving civil disputes.[90] Only four respondents stated that their clients "usually" or "always" asked them to look at ADR options for a case. Another two-thirds of the respondents said their clients "never" or "rarely" asked them to investigate ADR options for their cases.[91]

VI. MEDIATION

Missouri lawyers report more use of mediation than any other ADR process.[92] As shown in Table 21, 58% of the respondents reported that they

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87. ROSELLE L. WISSLER, OHIO ATTORNEYS' EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES, at 22-23 (1996) (discussing ADR training and previous participation in ADR processes as the strongest predictors of whether attorneys will suggest ADR to clients).

88. *See supra* Tables 4 and 5.

89. *See, e.g.*, Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 5 (1998) (comparing the dispute management styles of corporations that used ADR processes frequently to those that used ADR processes occassionally and those that never used ADR processes); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEG. L. REV. 1, 35-38 (1998) (expressing business executives' dissatisfaction with litigation and the litigation process); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 862 (1996) (discussing the Center for Public Resources Institute for Dispute Resolution's effort to get major corporations to pledge to employ ADR in disputes with other businesses). Almost 90% of respondents indicated that insurance companies at least "sometimes" support the use of ADR. *See supra* Table 16.

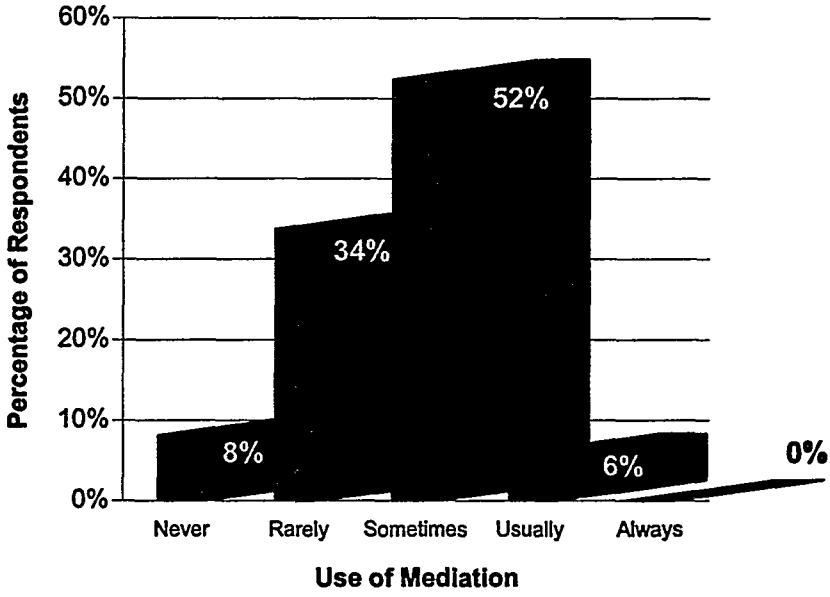
90. *See, e.g.*, Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 308, 314 (discussing the general public's lack of knowledge about mediation).

91. *See supra* Table 15.

92. Summary jury trial and mini-trial are used very rarely. Non-binding arbitration and early neutral evaluation are used more often than summary jury trial and mini-trial, but are also rarely used. *See infra* Parts VIII and IX.

participated in mediation at least "sometimes" even before the revision of Rule 17. After Rule 17's revision, 80% of the respondents reported at least "sometimes" participating in mediation. (*See* Table 22.)

Table 21 **BEFORE July 1997 (when Rule 17 was revised) how frequently did you use mediation in your civil litigation practice?**



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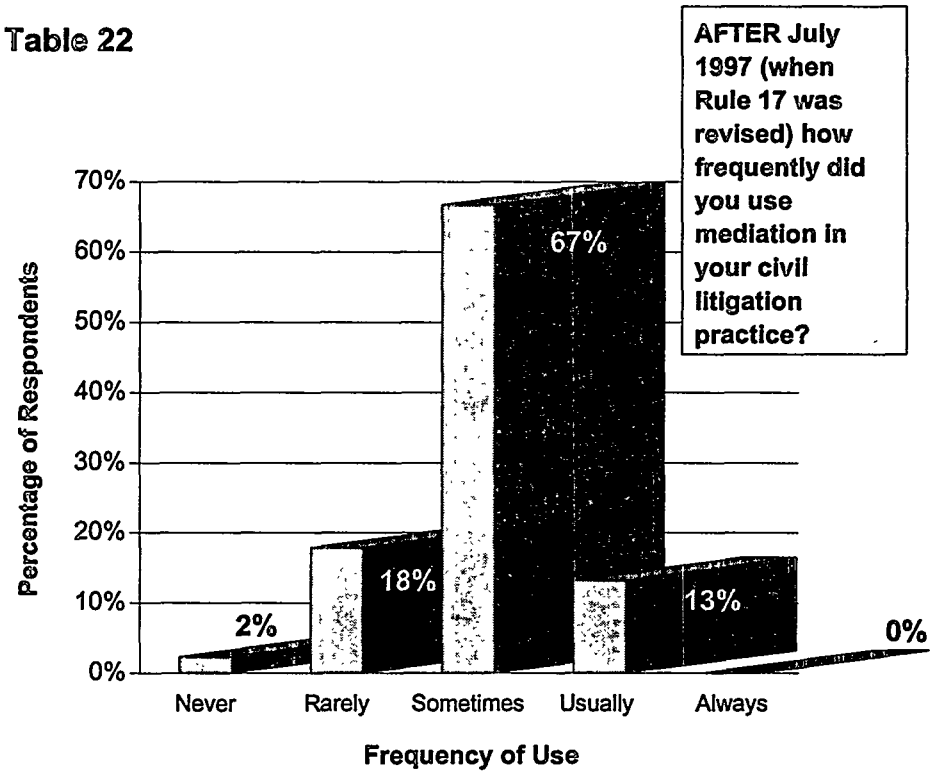

Two-thirds of respondents reported an increase in mediation participation during the survey period. (*See* Table 23.) However, Table 24 indicates that nearly 40% of respondents reported representing parties in mediation only one to three times, and less than 15% reported such representation ten or more times in the two year survey period.[93]

93. While 65% of the Urban respondents reported four or more mediations during the survey period, only 48% of the Rural respondents reported four or more mediations during the survey period. Data on file with the Authors. This difference is statistically significant (p = .0297).

Table 23

In the past two years, the number of mediations that you have participated in has...

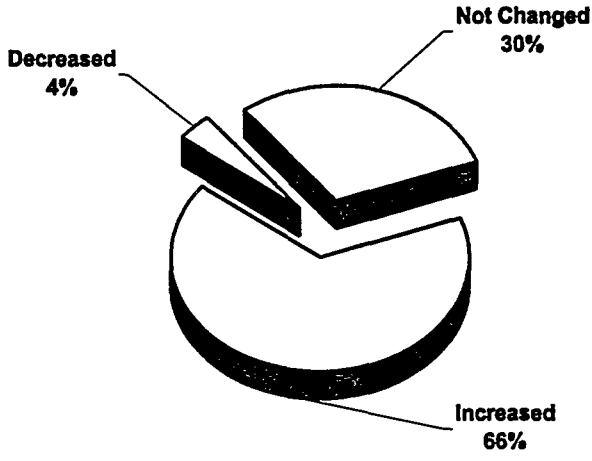

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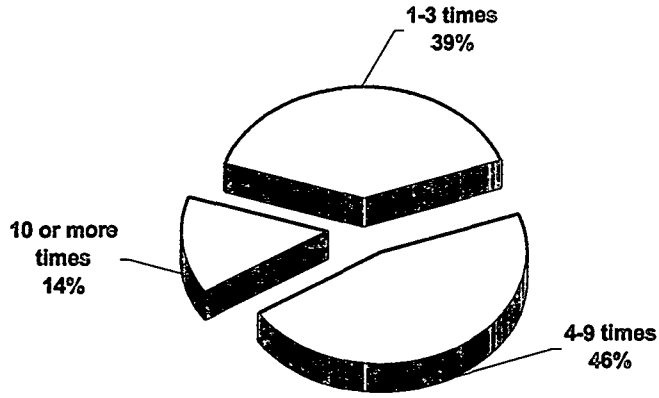
Table 24 How many times have you represented a party in mediation the last two years?



A. Choice Factors for Mediation

More than 50% of respondents reported their mediations were "usually" or "always" voluntary. Table 25 shows that respondents reported the primary reasons they chose mediation were to save money and to speed settlement. Other frequently selected reasons why respondents chose mediation included providing a reality check for the parties and opposing counsel and making settlement more likely. The least cited reasons for choosing mediation were preserving party relationships[94] and anticipating that the court would order the case to ADR.[95]

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94. Mediation advocates have long championed mediation as a method to preserve party relationships. *See, e.g.*, Reuben, *supra* note 4, at 968 (stating that mediation may be "particularly effective" in disputes when preserving the parties' relationship is important); Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 FLA. L. REV. 19, 26 (1985) (stating that voluntary mediation can improve party relationships); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 444 (1984) (noting that mediation gives the parties the opportunity to preserve ongoing relationships). In personal injury litigation, or other litigation arising from a "one time event," conventional wisdom has been that

Table 25

Which of the following factors motivated you to voluntarily choose mediation? (circle all that apply)	
Saves litigation expense	85%
Speeds settlement	76%
Provides needed reality check for opposing counsel or party	69%
Settlement more likely	69%
Helps everyone value the case	69%
Provides my client a needed reality check	67%
Clients like mediation	32%
Increases potential for creative solutions	23%
Preserves party relationships	8%
Anticipate court will order ADR	7%

The questionnaire also asked respondents to indicate their own reasons for taking a case to mediation. The majority of the write-in responses suggested that mediation provides an opportunity to learn more about the case, including an evaluation of the opponent's theory of the case. The following responses are representative of the "other" factors attorneys cited as reasons to mediate cases.[96]

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mediation is less useful because there is no relationship to preserve. *See, e.g.*, Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1597 (1995) (stating that ordinary tort litigation resembles a bureaucratic process to determine how to transfer modest sums of money); Scott H. Hughes, *Elizabeth's Story: Explaining Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 582 (1995) (noting that the relationship preservation benefits of mediation are inconsequential in personal injury cases because there is no relationship to save). Thus, the high number of personal injury lawyer respondents to this survey probably explains, in part, this low number for "preserving party relationships."

95. Based on the low response of those who anticipated a court would order a case to ADR (7%), the Authors presume judges order relatively few cases to mediation. This supports the Authors' concern about the lack of judicial initiative in ADR in Missouri. *See supra* notes 48-51, 80-81 and accompanying text; BAMSL, QUESTIONNAIRE TO JUDGES, *supra* note 80.

96. Responses on file with the Authors.

- There is no downside to the process; even if it fails what is learned there is useful.
- To hear the other side's presentation of the case.
- Learn more about the other attorney's thoughts on case.
- I want to talk directly to the opposing party—not opposing counsel.
- Valuable discovery and planning/strategy tool.
- It gets my client involved in the case.
- It gives my clients a sense that they've 'had their day in court' without the expense and stresses of trial. They have a neutral party hear their side of the case and how bad they were *really* hurt. (*emphasis in original*).

B. Mediation's Effect on the Civil Litigation Process

The questionnaire asked the respondents, in general terms, how mediation affected their litigation process. Overwhelmingly, the respondents reported earlier settlement and saving money. Less than one-third of the respondents identified greater client satisfaction or greater client control as effects of mediation.[97]

97. Again, mediation practitioners have consistently cited greater client satisfaction and greater client control as primary reasons to use mediation. *See, e.g.*, Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 921 (1997); 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, 18-20 (1996). Furthermore, what little empirical data exists about the mediation process supports its positive effect on client satisfaction and client control. *See, e.g.*, Lisa B. Bingham et al., *Mediating Employment Disputes at the United States Postal Service*, 20 REV. PUB. PERSONNEL ADMIN. 5, 13 (2000) (reporting high levels of participant satisfaction with the Postal Service's REDRESS Program, including satisfaction with the levels of participant control); Kochan et al., *supra* note 30, at 264 (documenting greater client satisfaction with the mediation process and the actual outcome of the process than in cases that did not go through mediation); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 887-90 and nn.7, 10, 11 (1998) (using preexisting empirical research to help explain the effects party expectations, party process control, and party outcome control have on party satisfaction in mediation).

Table 26

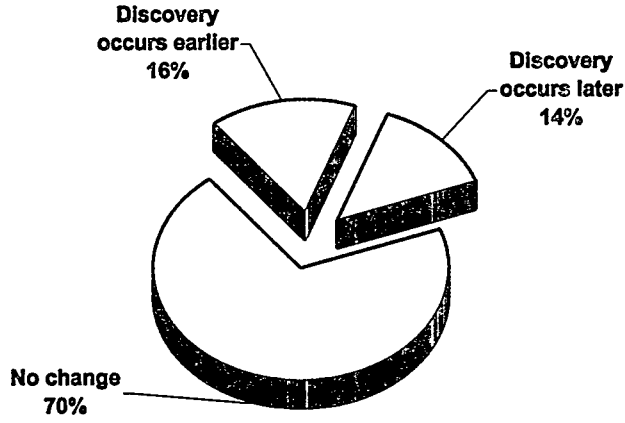
Based on your experience, compared to the normal civil litigation process, mediation has which of the following effects? (circle all that apply)	
Causes earlier settlement	70%
Decreases client expenses	65%
Saves my time	61%
Saves client's time	57%
Is less adversarial	51%
Provides client a greater sense of control	31%
Provides greater client satisfaction	30%
Settlement amounts are higher	16%
Provides me a greater sense of control	18%
Settlement amounts are lower	7%
Increases client expenses	6%

1. Mediation's Effect on the Discovery Process

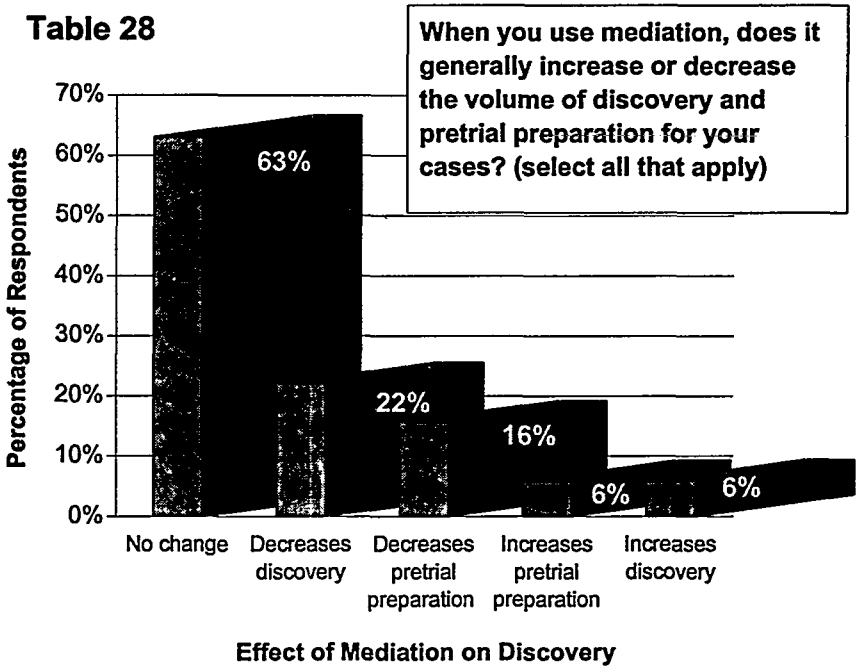
Many believe that ADR and mediation can save time and money by cutting down on the lengthy and expensive discovery process.[98] To determine if the discovery process was where attorneys were realizing the reported time and cost savings, the questionnaire asked several questions about mediation and the discovery process. As reported in Table 27, a large majority of respondents (70%) stated that there was no change in the timing of their discovery.

98. *See, e.g.*, McEwen, *supra* note 89, at 12 ("mediation would be better than litigation only if you eliminated discovery because that is where the costs are") (quoting an attorney).

Table 27 When you use mediation, does it change the timing of discovery for your case?



Furthermore, nearly two-thirds of respondents reported no change in the volume of their discovery or pretrial preparation. (*See* Table 28.) Almost one-fourth did report that mediation decreased their volume of discovery, and more than 15% reported that it decreased the amount of their pre-trial preparation. Further examination of the data revealed that a total of 30% of the respondents reported mediation (1) decreased discovery or (2) decreased pretrial preparation or (3) decreased both.



Respondents were also given the opportunity to list reasons why mediation was not reducing the volume of discovery. The primary theme running through these responses was that mediation occurs so close to trial that the attorneys still need to conduct full discovery in preparation for trial.[99] A related theme was that mediation could only reduce discovery when the mediation is successful. The following responses are representative of respondents' explanations why mediation was not reducing the volume of discovery.

- Usually mediation takes place closer to trial and the discovery is done.
- My job is to promptly prepare the case for trial.
- The case must be handled with the assumption that it will be tried.
- Only reduces discovery if it is successful.

99. Responses on file with the Authors.

- Depends on whether the mediation is successful at an early stage of the case.
- If I mediate, I want to know all the facts.
- Mediation is not a substitute for discovery.
- It is difficult to value the case without discovery.

2. Mediation's Effect on Settlement

The survey asked respondents to estimate settlement rates experienced "as a direct result"[100] of mediation, as well as the settlement rate of their cases before they started using mediation. The data do not provide support for the proposition that mediation adds to the number of settlements occurring.[101] More than 23% of respondents reported they were settling 90% or more of their cases directly through mediation, which is only a slight increase over the 21% of respondents who believed they had a 90% settlement rate before they started using mediation. (*Compare* Tables 29 and 30.)

However, the number of respondents who reported the settlement of 60% to 89% of their cases "as a direct result" of mediation was lower than the number of respondents who reported a "typical" settlement rate of 60% to 89% before they started using mediation.[102]

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100. The questionnaire did not define the term "direct result."

101. This result is not surprising. Over the years, there have been many reports of high settlement rates in civil litigation without ADR, and improving on those rates will be difficult if not impossible. *See, e.g.*, St. John-Ritzen, *supra* note 4, at 138 (stating that five Missouri trial court judges estimated that 95% of the civil cases on their dockets settle before trial); Stephen C. Yeazell, Essay, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633, 638 (1994) (citing U.S. Administrative Office numbers indicating that 4.3% of filed civil cases in 1990 resulted in trials); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 44 (1983) (citing U.S. Administrative Office numbers indicating that 6.5% of civil cases filed in 1980 resulted in trial).

102. These results are consistent with those reported in Table 17, *supra*, where approximately two-thirds of respondents reported that their settlement rate had not increased after Rule 17 became effective.

Table 29 What settlement rates are you experiencing as a direct result of the use of mediation?

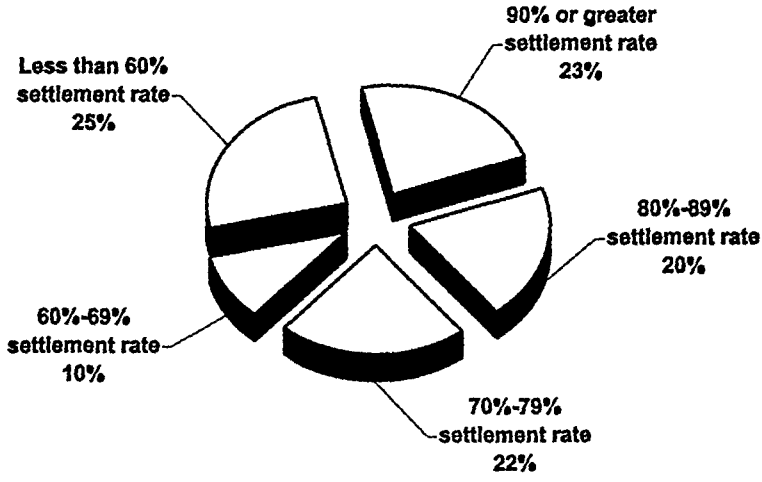

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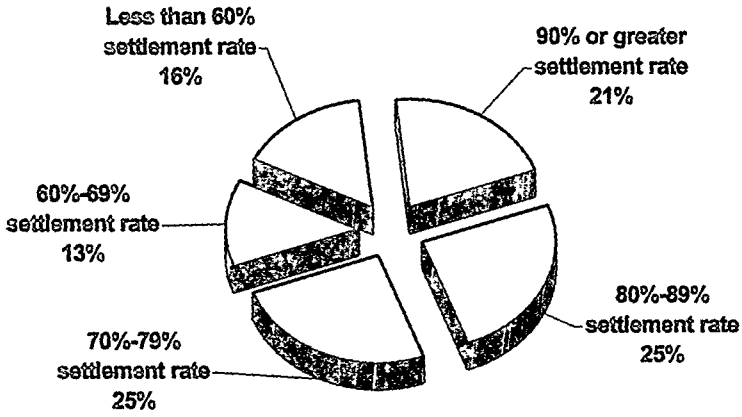
Table 30

What was your typical settlement rate before you started using mediation?



A purported benefit of mediation (compared to litigation) is to provide parties with the opportunity to come up with creative solutions to their dispute.[103] Table 31 indicates that approximately three-fourths of the respondents reported that the settlements they reach through mediation "never" or "rarely" include more non-monetary elements than settlements reached without mediation.[104] This may be because of the high number of

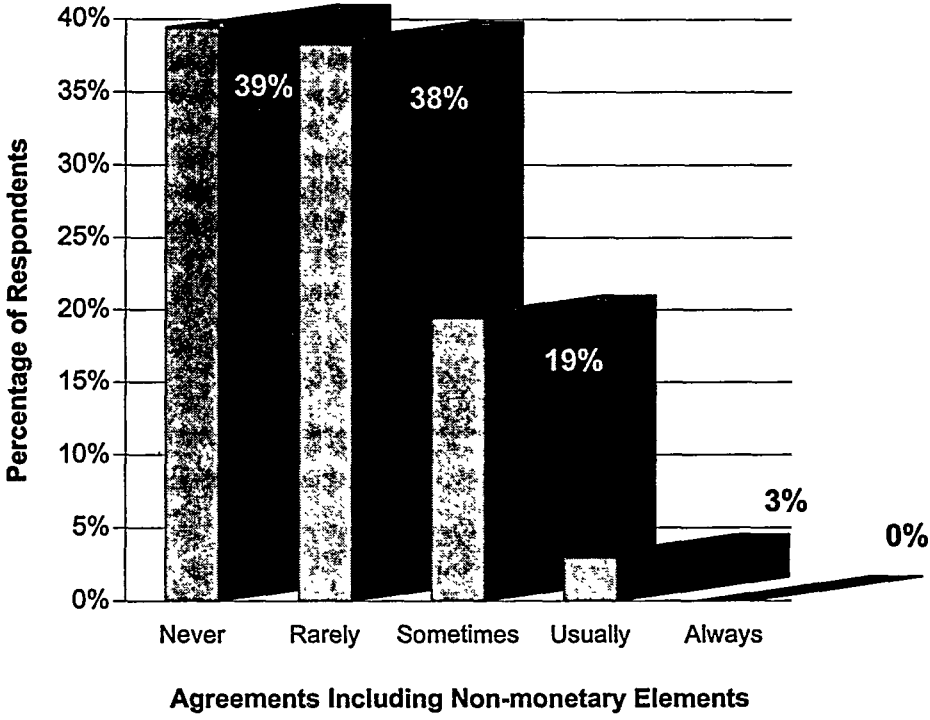
103. *See, e.g.*, Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 944-45 (1997) (arguing that evaluative mediators detract from creative problem-solving in mediation); BOBBI MCADOO, MEDIATION MANUAL (1999) (comparing mediation to arbitration).

104. This finding is consistent with attorney responses to another question where attorneys were asked what happens in mediation. Only 8% of the respondents said that creative solutions were suggested during mediation. *See infra* Table 32. Worth noting, however, is the fact that 33% of the Rural respondents reported that settlements reached through mediation "sometimes" or "usually" resulted in non-monetary elements while only 19% of the Urban respondents reported that settlements reached through mediation "sometimes" or "usually" included non-monetary

respondents involved in vehicular injury cases[105] in which the parties presumably have no relationship other than the accident leading to the lawsuit.

Table 31

Do your settlement agreements reached through mediation include more non-monetary elements (e.g. apology, change in practices, new job assignments) than settlements reached without mediation?



elements. This difference is marginally significant ($p = .0576$). Also worth noting is the fact that virtually the same percentage of Urban (58%) and Rural (55%) respondents listed "one time event" type litigation as their primary practice area. Data on file with the Authors.

105. *See supra* Part III(A).

C. What Happens During Mediation

Due to the confidential nature of mediation,[106] the only information about what actually happens in mediation in Missouri is anecdotal. Looking to Rule 17, mediation is described as a process where a third party neutral "facilitates communication" and does not "impose his or her own judgment" on the issues for the parties.[107] This suggests the Rule requires mediators to practice a primarily facilitative model of mediation, preserving the parties' right of self-determination.[108] The vast majority, if not all, of the mediator training in Missouri has followed the facilitative model.[109] Consistent with the facilitative philosophy, the data in Table 32 suggest Missouri's mediators may lean towards the facilitative mode: encouraging parties to assess their strengths and weaknesses, helping parties understand each other's perspectives, and involving clients in the process. Respondents reported, however, that mediators also use a number of more evaluative techniques: opining about the strengths and weaknesses of the case, and primarily speaking with the lawyers.[110]

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106. MO. SUP. CT. R. 17.06; MO. REV. STAT. § 435.014.2 (1994).

107. MO. SUP. CT. R. 17.01(b)(3).

108. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). In that article Professor Riskin describes a facilitative/evaluative continuum that represents mediators' mediation techniques. At the most facilitative end of the continuum is conduct intended simply to allow the parties to communicate with and understand each other. *Id.* at 24. At the most evaluative end of the continuum is conduct intended to direct some or all of the mediation's outcome. *Id.* at 23-24.

109. Leonard L. Riskin, Professor University of Missouri-Columbia School of Law, Comment During Author's Masters Thesis Presentation at the University of Missouri-Columbia School of Law (April 18, 2000); *see* MO. SUP. CT. R. 17.04 (requiring sixteen hours of formal mediation training before qualifying as a mediator under Rule 17).

110. With the emphasis on the facilitative/evaluative debate in scholarly literature, it is interesting to note Missouri mediators tend to avoid using: (1) two very evaluative mediation techniques—"predict court outcomes" and "propose a particular settlement" and (2) two very facilitative mediation techniques—"encourage addressing issues beyond the legal cause of action" and "suggest creative outcomes that would not be a likely court outcome." Respondents reported that these four techniques are "usually" or "always" used by mediators 30% or less of the time. *See infra* Table 32.

Table 32

Based on your experience in mediation, how often do you find that mediators	Usually	Always	Usually and Always Combined
Encourage the parties to assess the strengths and weaknesses of their case	58%	32%	90%
Ask each side to present an opening statement in joint session	38%	47%	85%
Help parties understand each other's perspective	63%	18%	81%
Opine about the strengths and weaknesses of the case	46%	29%	75%
Require the parties to sign a mediation agreement	30%	37%	67%
Use caucuses almost exclusively	45%	17%	62%
Ask clients to talk about their concerns and goals	45%	14%	59%
Primarily speak with or to the lawyers	45%	6%	51%
Encourage parties to execute a settlement agreement at the end of the mediation	28%	19%	47%
Press for settlement	39%	6%	45%
Encourage the clients to speak for themselves	34%	8%	42%
Predict court outcomes	30%	1%	31%
Propose a particular settlement	26%	1%	27%
Encourage addressing issues beyond the legal causes of action	21%	2%	23%
Push parties to accept a particular settlement	20%	2%	22%
Take responsibility for the fairness of the settlement	16%	3%	19%
Suggest creative outcomes that would not be a likely court outcome	7%	1%	8%
Use joint session almost exclusively (absent a compelling reason to caucus)	2%	1%	3%

D. Mediator Qualifications

The only qualification to be an ADR provider under Rule 17 is to have "appropriate training or equivalent experience" with the particular ADR process.[111] Mediators must have sixteen hours of formal training, while providers of other ADR services must have four hours of formal training.[112] The questionnaire asked respondents to identify important indicia of mediator qualifications.

The data from Table 33 shows that attorneys value the mediator's experience and knowledge in the particular area of law. This suggests that attorneys want mediators to provide evaluations of their cases, even though Rule 17 suggests mediators use a more facilitative mediation style. Respondents reported less important qualifications to include mediation training, experience as a mediator, and the ability to identify non-legal interests.

Table 33

What mediator qualifications are important to you? (circle all that apply)	
Mediator knows how to value a case	87%
Mediator should be a litigator	83%
Mediator should be a lawyer	77%
Mediator knows how to help parties clarify issues	74%
Mediator should have substantive experience in the field of law	69%
Mediator should have taken mediation training	49%
Mediator has substantial mediation experience	46%
Mediator knows how to find creative solutions	35%
Mediator is good at helping lawyers and clients identify their non-legal interests	31%
Mediator has a reputation for settling cases	28%
Mediator has experience as a judge	25%
Mediator is good at "knocking heads"	16%

111. MO. SUP. CT. R. 17.04. Non-lawyers may be ADR providers under Rule 17 as long as they have the appropriate training or experience. *See* MO. SUP. CT. R. 17.04.

112. MO. SUP. CT. R. 17.04.

The questionnaire also asked respondents to list any other qualities they wanted in their mediators. The responses centered around the following qualities: tactfulness, patience, listening skills, and impartiality.[113]

VII. CONCLUSIONS ABOUT MEDIATION IN MISSOURI

A. Favorable Conclusions About the Use of Mediation

1. Attorneys believe mediation saves time and money

Attorneys participating in mediation believe mediation saves money and speeds settlement.[114] This belief is consistent with survey results in North Carolina, Florida, and the United States District Court for the Western District of Missouri.[115] Furthermore, when specifically asked, only 6% of respondents thought mediation increased client expenses.[116]

2. Mediators are using facilitative techniques to involve clients as active participants in mediation and to help the parties understand each other's perspectives

Rule 17 requires mediators to "facilitate communication" between the parties and most mediator training in Missouri focuses on facilitative mediation techniques.[117] This includes getting the parties involved in the mediation and promoting the parties' communication skills to enable them to articulate what course of action is best.[118] Based on what attorneys report,

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113. Responses on file with the Authors.

114. *See supra* Table 23.

115. *See* CLARKE ET AL., *supra* note 62, at 45-46, 54 (North Carolina); KARL D. SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT, at viii (1990) (Florida); REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 215-17 (U.S. District Court for the Western District of Missouri).

116. *See supra* Table 23. One of the fears of attorneys when Rule 17 was passed was that it would increase the costs of litigation. *See* Skinner, *supra* note 4 (interviewing practicing attorneys).

117. MO. SUP. CT. R. 17.01(b)(3). *See also supra* notes 109 and 110 and accompanying text. *See generally* MU LAW SCHOOL CONTINUING LEGAL EDUCATION AND THE CENTER FOR THE STUDY OF DISPUTE RESOLUTION, A TRAINING WORKSHOP ON MEDIATING CIVIL CASES (1999) [hereinafter "MEDIATING CIVIL CASES"].

118. *See, e.g.*, MEDIATING CIVIL CASES, *supra* note 117, at 23-39; MCADOO, *supra* note 103, at 30; Riskin, *supra* note 108, at 24; Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role*

mediators are putting that training to work in their mediations.[119] In addition, attorneys reported that in less than one-third of all mediations do mediators "usually" or "always" use classic evaluative mediation techniques: predicting court outcomes, proposing settlement agreements, and pushing the parties to accept a particular settlement.[120]

3. Many attorneys choose mediation because it is less adversarial

Because a court resolution to the parties' dispute results in a win/loss ruling, lawyers tend to treat the traditional negotiation process as an early version of court adjudication.[121] Thus, lawyers often begin their negotiations demanding the relief they will seek from the court.[122] This practice creates an unnecessarily adversarial framework for the negotiation process.[123] Mediation, on the other hand, can promote a less adversarial approach to conflict resolution.[124] It encourages the parties to communicate directly, to identify their interests, and to generate options for a mutually acceptable settlement.[125] As attorneys continue to report dissatisfaction with the practice of law, in part due to its adversarial nature,[126] it was expected that a majority

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and Ethical Standards in Mediation, 41 FLA. L. REV. 253, 272 (1989) (urging a role for mediation that requires party participation).

119. *See supra* Table 30.

120. *See supra* Table 30. For a discussion of evaluative mediation techniques, *see* Riskin, *supra* note 108, at 24 (evaluative mediators assume the participants want and need the mediator "to provide some guidance as to the appropriate grounds for settlement"). *See also* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 80-81 (1998) (stating that a mediator is being evaluative when the mediator asserts an opinion or judgment as to the likely court outcome).

121. Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does not Tell Us*, 1985 J. DISP. RESOL. 25, 32-33.

122. *Id.* at 33.

123. *See id.*

124. *See, e.g.*, KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 14 (2000); *supra* Table 26.

125. KOVACH, *supra* note 124, at 14.

126. *See also* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1342-48 (1997) (discussing a decline in civility due, in part, to increased adversarial attitudes); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 43-44 (1982) (stating that the lawyer's standard philosophical map is based, in part, on adversariness). *See generally* DEBORAH L. ARRON, RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION 5 (1989) (stating that according to former practitioners, dissatisfaction with the adversarial process explains why lawyers leave the practice of law).

of attorneys who used ADR would report that they like mediation because it is less adversarial. Indeed slightly more than 50% of the respondents indicated that they liked mediation because it is less adversarial than traditional civil litigation.[127]

B. Mixed Results About the Use of Mediation

1. Mediators mix facilitative and evaluative mediation styles

Despite the fact that evaluation in mediation per se is not problematic,[128] too much evaluation may corrupt the mediation process. Once a mediator's evaluation favors one party, the mediator's neutrality may be compromised.[129] Once a mediator's neutrality is compromised, the "disfavored" party may see mediation as an unfair process often resulting in that party's de facto withdrawal from the mediation.[130] In Missouri, although respondents reported that mediators avoid the most evaluative mediation techniques,[131] they do some evaluating.[132] The Authors assume this is because attorneys want mediators to evaluate their cases.[133] Some mediators focus almost

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127. *See supra* Table 26 (reporting 51% of respondents like mediation because it is less adversarial).

128. *See, e.g.*, Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 263-69, 285-92 (arguing that "good" mediation practice occurs when mediators employ both facilitative and evaluative techniques); Kochan et al., *supra* note 30, at 274 (finding the probability of settlement is higher when mediators use both facilitative and evaluative mediation techniques); Birke, *supra* note 90, at 315-19 (arguing that all mediations are both facilitative and evaluative and all mediators are, therefore, both facilitative and evaluative).

129. Love, *supra* note 103, at 939, 945-46.

130. Joseph B. Stulberg, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators*, 14 OHIO ST. J. ON DISP. RESOL. 259, 267 (1998).

131. *See supra* note 110 and accompanying text; *supra* Table 30.

132. For instance, respondents reported that mediators "opine about the strengths and weaknesses of the case" nearly 75% of the time. *See supra* Table 32.

133. *See supra* Table 33; Kochan et al., *supra* note 30, at 271 (noting that lawyers in the studied mediations "indicated that they expected some directive and evaluative efforts by the mediators" and that lawyers viewed purely facilitative mediators as less credible and less effective); John Bickerman, *Evaluative Mediator Responds*, 14 ALT. TO THE HIGH COSTS OF LITIG. 70, 70 (1996) (suggesting that parties usually want mediator opinions as to strengths and weaknesses of their positions); Jonathan D. Marks, *Should Mediators Evaluate or Facilitate? A Review of the "Riskin" Approach*, MO. LAW. WKLY., Sept. 14, 1998 *at* http.www.missourilaw.com (arguing that parties routinely request and need mediators to evaluate their cases).

exclusively on the lawyers,[134] in part because mediators feel they need to keep attorneys happy to sustain a mediation practice.[135]

2. Attorneys believe mediation speeds settlement and saves money, but they report no decrease in the volume of discovery

Like many of their colleagues from other jurisdictions, Missouri attorneys believe mediation saves time and money.[136] Compared to trial, it probably does. Since most cases do not go to trial, however, increased savings from the mediation process will occur only if the discovery process can be somewhat curtailed.[137] Yet, the vast majority of respondents reported that the timing and volume of their discovery has not changed.[138] Without that change, the potential for mediation to result in significant savings over traditional settlement in the litigation context will be limited.[139]

3. Attorneys report participating in more mediations since Rule 17 went into effect, but attorneys are participating in relatively little mediation

One of the goals for revised Rule 17 was to get more attorneys to use the Rule's ADR procedures. Attorneys report that mediation is a good litigation tool and they have favorable attitudes towards mediation and ADR.[140] As expected, more attorneys have participated in more mediations since the Rule became effective.[141] But, it seems that they are participating in relatively few

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134. Respondents reported that mediators "primarily speak with or to lawyers" "usually" or "always" just over 50% of the time. *See supra* Table 32.

135. *See supra* Table 32; John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 881-86 (1997) (discussing the relationships between the principals, lawyers, and mediators in mediation including the deferential relationship many mediators have with the attorneys in the mediation).

136. *See supra* Tables 25 and 26; Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 379-80 (1997) (reporting that the Minnesota ADR Task Force's final report found that ADR had "substantial promise" for earlier and less costly disposition of civil cases).

137. *See* McEwen, *supra* note 89, at 12.

138. *See supra* Tables 25 and 28.

139. *See generally* McEwen, *supra* note 89 (studying several corporations' approaches to managing disputing and how they put mediation to use in that overall disputing strategy).

140. *See supra* Tables 10 and 11.

141. *See supra* Tables 21, 22, 23.

mediations. Nearly 40% of respondents reported representing parties in mediation only one to three times during the two-year survey period.[142] This finding confirms a general tendency for lawyers to hesitate in using mediation,[143] a trend also noted in Ohio, where lawyers favoring mediation did not refer a "significant" portion of clients to mediation.[144]

4. Attorneys want their mediators to be attorneys

When asked which qualities attorneys wanted in their mediators, a large majority responded that they wanted their mediators to be attorneys.[145] This comes as no surprise based on the fact that attorneys want mediators to be fluent in the substantive area of law, presumably so the lawyers will feel comfortable relying on the mediators' evaluation of their cases.[146] Yet, mediation is an interdisciplinary field.[147] Many non-lawyer mediators may be qualified to mediate certain disputes, and non-lawyers have made significant contributions to mediation's growth.[148] When lawyers lose the talents and perspectives of non-lawyer mediators, they risk weakening the mediator pool.[149] In addition, mediation's problem-solving paradigm may be swallowed into the more familiar adversarial paradigm.[150]

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142. *See supra* Table 24.

143. This hesitancy may arise out of a fear that suggesting mediation will be seen as a sign of weakness. *See, e.g.*, Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 95 (1996) (describing such a belief as an "enduring cliche"); Wissler, *supra* note 4, at 570-71.

144. Rogers & McEwen, *supra* note 75, at 841.

145. *See supra* Table 33.

146. *See supra* Table 33; *infra* notes 154-56 and accompanying text; Kochan et al., *supra* note 30, at 275 (noting that mediator credibility with lawyers rests on knowledge in the substantive area of law among other things); Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 61 (concluding that advocates force mediators to focus on narrow legal and factual issues).

147. KOVACH, *supra* note 124, at 41.

148. *See, e.g.*, DEBORAH M. KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS (1994) (profiling several non-lawyer mediators); Love, *supra* note 103, at 942; Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified-Lessons from the San Diego Experience*, 30 U.S.F. L. REV. 677, 693-97 (1996) (describing the critical role non-lawyers played in mediation's development).

149. Love, *supra* note 103, at 942.

150. Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALT. TO HIGH COSTS LITIG. 31, 31-32 (1996) (discussing ways attorney mediators can push mediation into an adversarial framework); *see also* James J. Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47, 47 (1991) (asserting that the Florida

C. Challenges to the Further Institutionalization of Mediation

1. Attorneys see mediation as a litigation tool instead of as a client oriented problem-solving process

Part of the growth in ADR and mediation over the last two decades has been its ability to provide a forum for more creative, flexible, and participatory problem solving compared to the traditional legal system.[151] Using mediation against the backdrop of the adversarial legal system, however, increases the focus on the legal issues of the dispute (instead of the underlying conflict), which results in a conclusion that legal solutions are the only possible outcomes.[152] This conclusion is evident in the survey results. More than 75% of respondents participating in mediation reported they "never" or "rarely" include more non-monetary aspects in settlements reached in mediation, while only 3% "usually" or "always" include these in mediation settlements.[153]

2. Attorneys want mediators to evaluate their cases

Because attorneys see mediation as a litigation tool instead of a different method of dispute resolution with a distinctly different philosophy, lawyers want their mediators to evaluate their cases.[154] This demand may result in

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requirement that mediators of certain cases be lawyers is "the end of good mediation"). *See generally* Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

151. *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 415-21 (1997) (discussing the history of ADR).

152. KOVACH, *supra* note 124, at 165. *See generally* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991) (arguing that the institutionalization of ADR and mediation has diluted their original goals).

153. *See supra* Table 31. This may also be due to the large number of personal injury cases in Missouri state court, however. *See supra* Part III(A). Of the small number of respondents (thirteen) who reported conducting primarily "continuing relationship" type litigation (*see supra* notes 27-28) and had participated in mediation during the survey period, nine (69%) said they at least "sometimes" included more non-monetary aspects in settlements reached in mediation. Data on file with the Authors.

154. *See supra* notes 151-153 and accompanying text; Nancy F. Atlas, *What Advocates and Clients Need to Know About the Mediation Process*, *in* WHAT EVERY LITIGATOR NEEDS TO KNOW ABOUT MEDIATION 24 (American Bar Association, 1994)

mediators trying to fulfill attorneys' expectations by providing overly evaluative mediation services.[155] Instead, attorneys would be well advised to look to other, more evaluative ADR processes, such as neutral evaluation,[156] when a third party evaluation is desired.

3. Mediation has not changed the discovery practices of the majority of attorneys

Attorneys feel the need to have as much information about a case as possible before advising clients how to proceed.[157] As a result, attorneys are resistant to suggestions to do less discovery.[158] Furthermore, conventional wisdom asserts that meaningful settlement discussions cannot occur until discovery is almost completed.[159] However, if ADR and mediation are to save more time and money, the discovery process is where these savings are most likely to be realized. In fact, many cases can resolve without extensive discovery. For instance, early ADR efforts are successful in the United States District Court for the Western District of Missouri, where early assessment meetings are held within thirty days after completion of responsive pleadings or as soon thereafter as practical.[160] In a survey of the Western District's ADR program, only 11% of the attorneys reported that the meetings occurred too early.[161]

(describing one of the mediator's tasks as "case analyst"); Marks, *supra* note 133 (arguing that parties routinely request and need mediators to evaluate their cases).

155. *See* Kochan et al., *supra* note 30, at 270 (noting that some of the observed mediators used evaluative techniques that traversed mediation and neutral evaluation); Lande, *supra* note 135, at 881-86 (discussing the relationships between the principals, lawyers, and mediators in mediation).

156. In neutral evaluation the parties present case summaries to an experienced neutral evaluator who provides a non-binding assessment of the case. *See* MO. SUP. CT. R. 17.01(b)(2) (defining early neutral evaluation).

157. McEwen, *supra* note 89, at 12 (noting that attorneys like to make decisions based on 100% of all available information).

158. *See, e.g., id.*; KOVACH *supra* note 124, at 80; Atlas, *supra* note 154, at 22-23.

159. *See* qualitative comments, *supra* Part VI(B)(1) (answering the question why mediation does not reduce the volume of discovery).

160. General Order, United States District Court for the Western District of Missouri (effective Jan. 1, 1999); REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 237; Kent Snapp, *Five Years of Early Testing Shows Early ADR Successful*, 3 DISP. RESOL. MAG. 16, 16 (Summer 1997).

161. REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 237.

4. Some mediators may "press" too hard for settlement, and/or "push" the parties to accept a particular settlement

Mediators play an important role in many different ways, and one of them is to help the parties generate and evaluate settlement proposals.[162] As a facilitative process, however, the parties are responsible for the content of settlement proposals and their acceptability.[163] If the mediator appears to favor one party by evaluating and pushing for a particular settlement, the "disfavored" party may question the mediator's neutrality. As a result, the mediator's evaluation may end meaningful negotiations between the parties to the dispute.[164] Also, the mediator may not know enough about the details of the case or of the relevant law and practice to give an informed opinion.[165]

Additionally, some argue that settlement per se is not the most important objective in mediation.[166] Many times when mediation does not end in a settlement, the parties have begun a constructive dialogue that may lead to a settlement,[167] or the parties just need time to process the information learned before negotiations continue.[168] Mediators pressing too hard for settlement may ignore these realities and lose potential benefits from mediation.

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162. *See, e.g.*, Riskin, *supra* note 108, at 29, 34; MEDIATING CIVIL CASES, *supra* note 117, at 40.

163. KOVACH, *supra* note 124, at 39.

164. Love, *supra* note 103, at 945 (stating that a party may get locked into an unacceptable claim or position); Riskin, *supra* note 108, at 28 n.67 (stating why facilitative mediators believe it is inappropriate for the mediator to give an opinion); Stulberg, *supra* note 130, at 267 (noting that the parties are less likely to see mediation as fair if the mediator recommends a particular settlement).

165. Riskin, *supra* note 108, at 28 n.67.

166. *See, e.g.*, Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 275 (1996) (noting that success in mediation is not solely defined in terms of the final agreement reached).

167. *See id.* (noting that increased communication and understanding in mediation may lead to a subsequent agreement after the mediation); St. John-Ritzen, *supra* note 4 (noting that "failed" ADR attempts benefit the parties).

168. KOVACH, *supra* note 124, at 267-70; *see also* MEDIATING CIVIL CASES, *supra* note 117, at 48 (instructing mediators to note the progress made in the mediation if the parties have not reached an agreement).

VIII. ARBITRATION (NON-BINDING)

Of the 176 survey respondents who participated in an ADR process during the survey period, 32 or 18% had participated in non-binding arbitration.[169] As Table 34 reports, respondents who voluntarily chose to take their cases to non-binding arbitration did so primarily to save time and money. Not surprisingly then, respondents also reported that non-binding arbitration saved time and money. (*See* Table 35.)

Table 34

Which of the following factors motivated you to voluntarily choose non-binding arbitration? (circle all that apply)	
Speeds settlement	71%
Provides needed reality check for my clients	71%
Saves litigation expenses	72%
Helps parties value the case	57%
Settlement more likely	57%
Provides needed reality check for opposing counsel or party	52%
Clients like arbitration	19%
Can select decision maker with special expertise	19%
Required by contract	10%
Anticipate court will order ADR	0%

169. Rule 17 defines arbitration as a procedure where the parties selected either one person or a panel of three people to hear both sides of a case "and decide the matter." MO. SUP. CT. R. 17.01(b)(1). The arbitration decision is not binding and simply serves to guide the parties in trying to settle the case. MO. SUP. CT. R. 17.01(b)(1).

Table 35

Based on your experiences, compared to normal civil litigation processes, non-binding arbitration has the following effect: (circle all that apply)	
Causes earlier settlement	76%
Saves client time	67%
Decreases client expenses	67%
Is less adversarial	67%
Saves attorney time	62%
Increases client expenses	24%
Provides greater client satisfaction	24%
Provides clients a greater sense of control	19%
Awards are higher	19%
Awards are lower	5%

While these statistics are informative, the low number of respondents who participated in non-binding arbitration precludes further reliable analysis of non-binding arbitration's effect on the litigation process.

IX. EARLY NEUTRAL EVALUATION, SUMMARY JURY TRIAL, AND MINI-TRIAL

The number of respondents who claim to have used early neutral evaluation, summary jury trial, and mini-trial was too low to provide any reliable data about the effect of those processes on civil litigation in Missouri.[170] We assume these processes have had no major effect on civil (non-family) litigation statewide. This would also be consistent with the results of a study of the Early Assessment Program of the United States District Court for the Western District of Missouri. In that study, more than 845 cases went through the Early Assessment Program. Given the choice to go to mediation, early neutral evaluation, summary jury trial, magistrate judge

170. Only twenty-eight survey respondents stated they participated in an early neutral evaluation, only six responded that they participated in a summary jury trial, and only eight responded that they participated in a mini-trial. *See* Appendix E, responses to Questions 19 (b), (d), and (e).

settlement conference, or non-binding arbitration, only twenty-nine chose an option other than mediation.[171]

X. RECOMMENDATIONS

Based on the data contained in this Report, the Supreme Court ADR Committee views the 1997 revisions to Rule 17 as a significant first step in making Missouri's civil litigators more aware of ADR in general and mediation in particular. At this moment the Committee will not be recommending any changes to the Rule based on the findings in this Report. The Committee believes, however, that continued growth of ADR is important to the civil litigation process, and the Committee has several recommendations to encourage and ensure this growth.

1. Consider Stronger Supreme Court Oversight of ADR in Civil Cases

The survey forming the basis of this Report focused only on lawyers' perceptions of Rule 17, and did not focus on the coordination or delivery of ADR services under the Rule. Before addressing those issues, the Committee suggests that the Supreme Court become more active in its supervision of ADR activities in an attempt to encourage continued growth of ADR under the Rule. The Committee has two suggestions in this regard.

a. Restructure the Supreme Court ADR Committee

With the expectation that this Committee will become more active in the future, the Committee suggests that it become an umbrella committee designed (1) to review all aspects of Rule 17 and (2) to coordinate the delivery of ADR services to litigants under the Rule. With this change in the Committee, the Committee's makeup should be revised to include more ADR stakeholders. For instance, the reshaped committee should include members from MATA and MODL, bar members from across the state, insurance companies, general counsels, and other representatives of consumers of legal services.

Of course, the reshaped committee would continue to maintain members of the judiciary, the academic community, and ADR professionals. In addition, the Committee believes that it would benefit from having a liaison with the Supreme Court's Domestic Relations ADR Committee.[172] The

171. REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 230.

172. One concern is that the Committee may become unwieldy with so many different constituencies represented on a restructured committee. Many of the Committee's current members overlap the recommended constituencies, however.

Committee believes that the input from a diverse pool of ADR stakeholders will help the Committee respond to various concerns that may arise as the Committee looks at Rule 17 in greater depth.

b. Provide the Committee with support personnel

The Committee plans to look at Rule 17 in greater depth with regard to issues such as ethics rules for ADR providers, initial and ongoing training requirements for mediators, ADR education for the bar and judiciary, the need to assist in the expansion of local ADR rules for the judicial circuits, ADR data collection and program evaluation, and ADR administration. Additionally, the Committee is interested in reviewing the possibility of beginning a grant program to fund local ADR coordinator positions[173] and investigating the best ways to provide ADR services in outlying areas of Missouri where there may be a lack of ADR professionals. To properly review these issues, the Committee believes it would be beneficial to have support personnel (possibly an ADR Coordinator) responsible for the coordination of these efforts.[174]

2. Encourage More Judicial Use of Rule 17

When Rule 17 was enacted, one of its key provisions was to give judges the power to order cases to ADR.[175] Because judicial awareness and leadership are factors contributing to the interest, availability, and utilization of ADR at the local level, the judiciary's attitudes towards and use of Rule 17 are important gauges for the Rule's effect on litigation in Missouri.[176] The data indicate that courts are not ordering cases to ADR, and many attorneys do not pursue ADR options because of this.[177]

The Committee does think it important that the court seek Committee members to represent the interests of the specific constituencies noted above.

173. The grant would fund the position for a number of years, and at the end of the grant, the Circuit would decide whether to keep the position and assume funding responsibility.

174. The Commission for ADR Services in Domestic Relations recommended that there be an ADR coordinator for domestic relations cases. ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 24. It may be possible to have one person in both roles.

175. Skinner, *supra* note 4; Krueger, *supra* note 41; St. John-Ritzen, *supra* note 4, at 137.

176. *See* ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 16.

177. *See supra* Tables 7, 18, 19; *supra* notes 80-81 and accompanying text.

To address this issue, the Committee suggests the need for judges to become more proactive in their use of Rule 17.[178] In addition to ordering cases to ADR, judges can encourage and/or explain ADR to attorneys and/or assist with the selection of ADR if the parties are unable to agree on the appropriate process.[179] To make this possible, the Committee recommends judicial education regarding (1) when and under what circumstances it is advisable for the court to take an active role in ordering parties to ADR and (2) how to make specific case assessments for sending a case to a specific form of ADR.

3. Provide ADR Education for the Bar and the Judiciary

Both the bar and judiciary will benefit from education regarding ADR and the dispute resolution processes contained in Rule 17,[180] and the Committee suggests further study of the feasibility of requiring ADR training for both.[181] ADR training for attorneys statewide is minimal,[182] which may be one explanation of why ADR receives a hesitating acceptance from the bar. While education in basic ADR concepts (such as the difference between

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178. For example, in St. Louis City the court now refers all civil cases filed in circuit court to mediation. *See* TWENTY-SECOND JUD. CIR. R. 38.4, 6.2.1; Letter from Nancy B. Stenn, Staff Attorney/Docket Coordinator for the Twenty-Second Judicial Circuit of Missouri, to Art Hinshaw, University of Missouri-Columbia School of Law, Overview of Twenty-Second Judicial Circuit ADR Program (June 8, 2001) (on file with the Authors). The Local Rule requires the mediation referral to take place within sixty days after the petition is filed, but, due to case management rules and time standards, the court is "backing" into the sixty-day referral date by referring older cases to mediation first. *See* TWENTY-SECOND JUD. CIR. R. 38.4; Letter from Nancy Stenn. Beginning in January 2001, the court referred cases filed in September and October of 1999 to mediation. *Id.* As of June 8, 2001, approximately 400 cases had been referred to mediation. *Id.*

179. *See generally* Wayne D. Brazil, *For Judges: Suggestions About What to Say About ADR at Case Management Conferences—and How to Respond to Concerns or Objections Raised by Counsel*, 16 OHIO ST. J. ON DISP. RESOL. 165 (2001); Nancy Welsh & Barbara McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, 37 JUDGES' J. 11 (1998).

180. *See* BAMSL, QUESTIONNAIRE TO JUDGES, *supra* note 80 (twenty-three of thirty-one judges responded that they had no formal ADR education, and twenty of thirty-one said that they would be interested in ADR training); *see also* Brazil, *For Judges*, *supra* note 179.

181. *See* Recommendation 1 (discussing Supreme Court oversight of ADR), *infra*.

182. *See supra* Tables 4 and 5 and accompanying text (indicating that 52% of all the respondents have had no ADR/negotiation skills training in their careers and 85% of the respondents who had no such training before Rule 17 was revised still have not had any ADR training).

interests and positions) is necessary,[183] the Committee also suggests education regarding the specific issues below.

a. Differences between mediation and neutral evaluation

Rule 17 defines mediation as a process where a neutral third party facilitates communication between the parties to promote settlement and does not impose his or her own judgment on the issues.[184] In contrast, Rule 17 defines early neutral evaluation as a process where the parties present case summaries to a neutral evaluator who then effectively and realistically assesses the relative strengths and weaknesses of their positions.[185] The survey data show that mediators incorporate a healthy mix of evaluative tactics during mediation and that attorneys believe having evaluative techniques and skills are important mediator qualifications.[186] This suggests that what many call "mediation" is a hybrid between mediation and neutral evaluation. Pragmatists may suggest the difference is immaterial as long as the cases settle,[187] but consumers of ADR services should know and understand which procedure they are entering and what its rules are.[188] Such concerns indicate a need for education about these two processes and when and why to use each.[189]

b. The timing and appropriateness of ADR

The perception that some cases are not appropriate for ADR has a stronghold in Missouri.[190] While research indicates this perception may be

183. *See generally* Brazil, *For Judges*, *supra* note 179; Welsh & McAdoo, *The ABCs of ADR*, *supra* note 179.

184. MO. SUP. CT. R. 17.01(b)(3).

185. MO. SUP. CT. R. 17.01(b)(2).

186. *See supra* Tables 32 and 33; *supra* notes 128-135 (discussing mediators' use of facilitative and evaluative mediation techniques) and 154-56 (discussing attorney desires for evaluation resulting in mediator evaluation).

187. *See* Snapp, *supra* note 82 (stating that it does not matter what the process is called as long as it helps the parties settle the case).

188. Wayne D. Brazil, *ADR and the Courts, Now and in the Future*, 189 F.R.D. 500, 507 (1999) (noting displeasure with reports about some procedures employed in the name of mediation); *see also* Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes*, 2000 J. DISP. RESOL. 295, 297-300 (arguing that the term "mediation plus neutral evaluation" would make ADR consumers more knowledgeable about the services they are receiving).

189. Additionally, if the bench and the bar were more aware of the benefits of the seldom-used processes, greater use of those processes may result.

190. *See* REPORT-EASTERN DISTRICT, *supra* note 83, at 3, 5; *supra* Table 7.

erroneous,[191] it is part of Missouri's legal culture and keeps Rule 17 from realizing its full potential. ADR education for attorneys and judges should address this issue. Only through education and experience will ADR become more acceptable in types of cases where it has been perceived as inappropriate.[192]

Additionally, many attorneys consider the use of ADR and mediation only after discovery is complete.[193] There is probably greater potential to save time and money, however, if there is more coordination of ADR and discovery activities.[194] For instance, ADR may help focus discovery, which, in turn, may lead to the earlier resolution of disputes. Judges and attorneys need opportunities to learn when it is appropriate to request, encourage, and order ADR before the discovery process is completed.[195]

4. Begin Ongoing Data Collection and Analysis

Presently, the Rule has no data collection requirements, which results in no reliable court-related ADR information. If the Missouri Supreme Court were to mandate record-keeping requirements, clerks of court could maintain information critical to future evaluations of Rule 17.[196] The data from this survey report on lawyers' perceptions about Rule 17 and its effects on the litigation process from July 1997 through November 1999. The data in this Report should be updated on a regular basis and supplemented by other means to ascertain whether the Rule is meeting its objectives of saving time and money without sacrificing the quality of justice. Additionally, individual

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191. *See, e.g.*, Snapp, *supra* note 82 (stating that ADR is appropriate for all cases regardless of what claims are made); Snapp, *Five Years of Testing*, *supra* note 160, at 16 (concluding that early ADR is successful regardless of case type); SCHULTZ, *supra* note 115, at viii (concluding that "[t]he type of case does not significantly affect the speed, cost, or participant satisfaction with mediation processing although respondents whose cases were not resolved were somewhat less satisfied than the majority").

192. *See* WISSLER, *supra* note 87, at 14-15.

193. *See supra* Tables 24-26.

194. *See, e.g.*, McEwen, *supra* note 89, at 11-13 (suggesting a reduction in the discovery process to save time and money and noting attorney negative responses to such suggestions); *see also supra* Tables 26-28; *supra* notes 157-61 and accompanying text.

195. For instance, early ADR efforts are successful in the United States District Court for the Western District of Missouri, where early assessment meetings are held within thirty days after completion of responsive pleadings or as soon thereafter as practical. REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 237; Snapp, *supra* note 160, at 16.

196. Such information may provide insight about necessary revisions to the Rule and may help judges and attorneys to determine the appropriate timing for ADR procedures and which ADR processes are better suited for particular cases.

courts should be studied to ascertain the number of ADR referrals, the types of cases being referred to mediation, the timing of referrals, data on those who opt out of ADR, and settlement rates.

5. Review the Availability of Neutrals in Outstate Areas

There is a concern that there are not enough qualified neutrals to provide ADR services in outstate Missouri.[197] If true, this is a legitimate concern that should be addressed before it becomes a stumbling block for further ADR initiatives.[198]

6. Maintain Seldom Used ADR Procedures

With regard to the ADR processes already in place under Rule 17, the survey data reveal that most of them are used infrequently.[199] There are no data, however, that would suggest the need to limit the ADR choices available under the Rule. Because early neutral evaluation, summary jury trial, mini-trial, mediation, and non-binding arbitration all offer a variety of unique benefits, litigants should have an opportunity to assess each process to pick the one that best meets the needs of their particular situation.[200]

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197. ADR DOMESTIC RELATIONS REPORT, *supra* note 16, at 13, 22-23. *See* Skinner, *supra* note 4; Garber & Krueger, *supra* note 3. Seventy-two perent of the Rural respondents, however, had participated in ADR during the survey period. *See supra* note 58 and accompanying text.

198. If the availability of neutrals for ADR processes is problematic in some geographic areas, processes such as "Settlement Week" may be viable. Settlement Week is a program in which a number of pending lawsuits are directed to mediation to take place at the courthouse during a one-week period when there is minimal courthouse activity. *See generally* James G. Woodward, *Settlement Week: Measuring the Promise*, 11 N. ILL. U. L. REV. 1 (1990); ROSELLE L. WISSLER, EVALUATION OF SETTLEMENT WEEK MEDIATION (1997) (unpublished manuscript). Settlement Week programs have been successful in Ohio and deserve further study to determine if they may be beneficial in Missouri. *See id.*; Rogers & McEwen, *supra* note 75, at 841-48

199. *See supra* Parts VIII and IX (describing arbitration (non-binding), early neutral evaluation, summary jury trial, and mini-trial).

200. *See* Brazil, *supra* note 188, at 508 (noting that one ADR process does not meet all ADR needs). *See generally* Frank E.A. Sander & Steven B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

7. Determine Why the Use of ADR in St. Louis County Was Considerably Less Than in the Rest of the State

Anecdotal information suggests the use of Rule 17 has grown in St. Louis County, in part because it has a local ADR Rule.[201] The data, however, lead to the conclusion that during the survey period ADR was used considerably less in St. Louis County than in the rest of the state.[202] The survey data do not provide any insight as to why. Further study may be helpful to answer that question.

8. Recommendations from Survey Respondents

The survey invited the respondents to identify any changes they would like to see in Rule 17. The responses represented a continuum of opinions on ADR in the court system:[203]

- Require ADR in all civil cases;
- Get judges to use Rule 17 more often;
- Keep ADR "suggestible" and not mandatory under the Rule; and
- Get rid of ADR in its entirety.

The range of these comments underscores the need for a systematic way to obtain and track ADR related data to provide more detailed insight about the use of Rule 17 and its effect on civil litigation in Missouri.

XI. CONCLUDING REMARKS

Use of ADR in Missouri's courts has increased since Rule 17's 1997 revision, and attorneys believe that the revised Rule is saving time and money. In these respects, Rule 17 has been a success. The substantive effect of the Rule on litigation practice in Missouri, such as its documented effect on the timing of settlement, is still unknown. Furthermore, a widespread and routine use of mediation in most civil litigation has not occurred. While it is acknowledged that the potential benefits of Rule 17 are yet to be fully realized, attorneys believe those benefits are being realized to some extent in earlier and less costly disposition of civil cases. Based on the short period in which the rule has been in effect and the favorable view attorneys have of

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201. *See* Geigerman, *supra* note 69 (stating that the use of ADR in St. Louis County is growing and that the bench and bar are discovering mediation to be an important settlement option).

202. *See supra* Table 6.

203. Responses on file with the Authors.

ADR, there is optimism that ADR and Rule 17 will continue to become more routine in civil litigation in Missouri.

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XII. APPENDICES

APPENDIX A

Other Published Studies of ADR in Missouri

In 1997,[204] the two Missouri districts of the United States District Court published reports regarding their respective ADR programs.[205] These reports also included data from attorneys' surveys. These studies help provide context for the study of ADR under Rule 17, since the Authors assume that these ADR programs helped create and mold Missouri attorneys' attitudes to ADR.

1. United States District Court—Eastern District of Missouri

Referrals to the ADR program for the United States District Court for the Eastern District of Missouri began in October 1994 and continue to the present.[206] Mediation and early neutral evaluation are the two ADR methods available, but nearly 92% of all referrals are to mediation.[207] Of the cases referred to ADR in 1995, 35% were concluded by agreement within thirty days of the end of the ADR referral.[208] Of the cases referred to ADR in 1996 that completed the ADR process by March 1997, 41% resolved as a direct result of ADR.[209]

In a survey, the Clerk of Court measured the opinions of the attorneys in the ADR process. While 88% of the survey respondents thought the ADR process was fair, 58% were either "satisfied" or "very satisfied" with the outcome of the case, and 41% were either "dissatisfied" or "very dissatisfied" with the outcome of the case.[210] Sixty-four percent of the respondents felt that the benefits of ADR outweighed the costs, and those who believed the

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204. The same year revised Rule 17 became effective.

205. *See* REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 215-54 (Western District); REPORT-EASTERN DISTRICT, *supra* note 83.

206. REPORT-EASTERN DISTRICT, *supra* note 83, at 3. The Eastern District's ADR program begins as a part of a scheduling conference in each civil case. *Id.* at 3-4. The judge, in consultation with the attorneys, determines whether the case will go through the ADR program. *Id.* at 4. If the case is selected for ADR, the judge makes an order referring the case to ADR. *Id.* The judge may enter the order immediately, or may defer it for a period of time to permit an initial exchange of discovery. *Id.* The order also sets an ADR completion deadline to prevent undue delay and to ensure trial date certainty. *Id.* At the time of the 1997 survey, 92% of all ADR referrals were to mediation. *Id.*

207. *Id.*

208. *Id* at 6.

209. *Id* at 6-7.

210. *Id* at 8-9.

benefits outweighed the costs primarily were those who were satisfied with the outcome of the case.[211]

The responding attorneys considered only three factors to be "very important" when influencing their decision to choose an ADR process: helping resolve the case quickly (62%), desiring someone to facilitate settlement discussions (57%), and reducing litigation costs (52%).[212] When asked if their clients' litigation costs would be higher had they not been assigned to ADR, 30% of respondents said that ADR decreased client costs, although 38% of respondents said ADR would increase client costs.[213]

2. United States District Court—Western District of Missouri

Effective January 1, 1992, the United States Court for the Western District of Missouri adopted an Early Assessment Program ("EAP") requiring ADR in one-third of the civil cases filed in the court.[214] The ADR options available include mediation with a neutral other than the administrator, early neutral evaluation, non-binding arbitration, and a settlement conference with a magistrate judge. The primary method of ADR is mediation.[215]

In a 1997 survey of attorneys who had participated in the EAP, a large percentage reported that the process helped move their cases to resolution: 59% reported that it was "very helpful" for that purpose, and an additional 25% reported that it was "somewhat helpful" for that purpose.[216] Cases that went through the EAP terminated approximately 1.7 months earlier than those

211. *Id.* at 9.

212. *Id.* at 11-12.

213. *Id.* at 12.

214. Under the court's General Order dated October 31, 1991, all civil cases filed in the Western District, except certain enumerated case types (e.g,. social security and prisoner cases), were required to be assigned randomly to one of three groups: (1) cases that were required to participate in the EAP; (2) cases that could voluntarily participate in the EAP; and (3) cases that could not participate in the EAP. REPORT TO THE JUDICIAL CONFERENCE, *supra* note 30, at 223. Within thirty days after the responsive pleadings are filed, cases in the EAP were required to attend an early assessment meeting among the program administrator, the parties, and the attorneys who were to be primarily responsible for handling the case. *Id.* At the meeting the administrator advises the parties of various available alternative dispute resolution options; helps the parties devise a discovery plan, if appropriate; and helps the parties identify areas of agreement and explore the possibility of settling the case through mediation. *Id.* If the parties agree, the mediation process may begin with the administrator serving as the mediator. *Id.*

215. *Id.* at 215-16.

216. *Id.* at 241. The survey's findings were based on a questionnaire sent by the EAP office to each attorney who participated in an EAP session. *Id.* at 237.

that did not go through the process (9.7 months vs. 11.4 months).[217] Of those cases that went through the EAP process and did settle, 57% settled either during the first EAP session or within a month of that session.[218]

The respondents were asked to assess the effect the EAP had on the client's total litigation costs, if any. More than two-thirds reported that the EAP reduced litigation costs and the average estimation of cost savings was $32,000 per case.[219] A great majority of those surveyed (84%) responded that the benefits of the program outweighed its costs.[220] Due to positive reaction to the program, participation in the EAP is now required of all civil filings in the Western District.[221]

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217. *Id.* at 243.
218. *Id.* at 245.
219. *Id.* at 247.
220. *Id.* at 252.
221. General Order, United States District Court for the Western District of Missouri (Effective Jan. 1, 1999).

APPENDIX B

RULE 17 ALTERNATIVE DISPUTE RESOLUTION

RULE 17.01 ALTERNATIVE DISPUTE RESOLUTION PROGRAM—ESTABLISHMENT—PURPOSE—DEFINITION

(a) Any judge by order or any judicial circuit by local court rule may establish an alternative dispute resolution program as provided in this Rule 17. It is the purpose of the Court through adoption and implementation of this Rule 17 to provide an alternative mechanism for the resolution of civil disputes, except those subject to Supreme Court Rules 88.02 to 88.08, by means of alternative dispute resolution procedures for disposition before trial of certain civil cases with resultant savings in time and expenses to the litigants and to the court without sacrificing the quality of justice to be rendered or the right of the litigants to jury trial in the event that a settlement satisfactory to the parties is not achieved through alternative dispute resolution.

(b) As used in this Rule 17, alternative dispute resolution programs include but are not limited to:

(1) "Arbitration," a procedure in which neutral persons, typically one person or a panel of three persons, hears both sides and decides the matter. The arbitrator's decision is not binding and simply serves to guide the parties in trying to settle their lawsuit. An arbitration is typically less formal than a trial, is usually shorter, and may be conducted in a private setting at a time mutually agreeable to the parties. The parties, by agreement, select the arbitrator or arbitrators and determine the rules under which the arbitration will be conducted;

(2) "Early neutral evaluation," a process designed to bring together parties to litigation and their counsel in the early pretrial period to present case summaries before and receive a non-binding assessment from an experienced neutral evaluator. The objective is to promote early and meaningful communication concerning disputes, enabling parties to plan their cases effectively and assess realistically the relative strengths and weaknesses of their positions. While this confidential environment provides an opportunity to negotiate a resolution, immediate settlement is not the primary purpose of this process;

(3) "Mediation," a process in which a neutral third party facilitates communication between the parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties;

(4) "Mini-Trial," a process in which each party and counsel present the case before a selected representative for each party and a neutral third party, to define the issues and develop a basis for realistic settlement negotiations. The neutral third party may issue an advisory opinion regarding the merits of the case.

(5) "Summary jury trial," is an informal settlement process in which jurors hear abbreviated case presentations. A judge presides over the hearing, but there are no witnesses, and the rules of evidence are relaxed. After the "trial", the jurors retire to deliberate and then deliver an advisory verdict. The verdict becomes the starting point for settlement negotiations among the parties.

(c) Each circuit is encouraged to develop other alternative dispute resolution programs that will meet the needs of the parties, the circuit and the community.

(d) All alternative dispute resolution processes shall be non-binding unless the parties enter into a written agreement as provided in Rule 17.06(c). A written agreement shall be binding to the extent not prohibited by law.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

RULE 17.02 NOTICE OF ALTERNATIVE DISPUTE RESOLUTION SERVICES

(a) In each civil action to which the alternative dispute resolution program applies, a notice of alternative dispute resolution services shall be furnished to all parties to the action. The notice shall be provided to the party initiating the action at the time the action is filed. All responding parties shall receive the notice with the summons and petition. The notice shall advise parties of the availability and purposes of alternative dispute resolution services. Other means of providing notice may be designated by local court rule.

(b) In addition to the provisions of Rule 17.02(a), counsel shall advise their clients of the availability of alternative dispute resolution programs.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

RULE 17.03 REFERRAL, NOTIFICATION AND APPOINTMENT

(a) A civil action shall be ordered to alternative dispute resolution upon stipulation of the parties. A civil action may be ordered to alternative dispute resolution upon the motion of any party or by the court. Absent the parties agreeing to an alternative dispute resolution process, the court shall determine the most appropriate process.

(b) If counsel for any party, after conferring with their respective clients, all other attorneys, and unrepresented parties, conclude that referral to alternative dispute resolution has no reasonable chance of being productive, they may opt out by so advising the court, in writing, within thirty days of the order of referral. The matter shall not thereafter be referred by the court to alternative dispute resolution absent compelling circumstances, which shall be set out by the court in any order referring the matter to alternative dispute resolution.

(c) If the parties agree to participate in the alternative dispute resolution program but cannot agree upon the neutral, then the court shall select a neutral from individuals or organizations qualified under Rule 17.04.

(d) Nothing contained in this Rule 17 shall preclude the parties from agreeing:

(1) To participate in any alternative dispute resolution program independent of this Rule 17;

(2) On different neutrals than that selected by the court either before or after the entry of an order entered pursuant to this Rule 17;

(3) On a neutral not otherwise identified on any court maintained list.

(e) Each circuit shall adopt necessary local court rules assuring the impartiality of the neutral, allowing for the removal or withdrawal of the neutral, and providing for the method of, but not the rate of, compensation of all neutrals.

(f) Each circuit shall adopt such local court rules as shall be appropriate for the scheduling of disputes referred to the program.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

RULE 17.04 QUALIFICATION OF INDIVIDUALS AND ORGANIZATIONS

Any individual providing alternative dispute resolution services independently or through an organization under this Rule 17 shall have appropriate training or equivalent experience in conducting the type of alternative dispute resolution service the individual or organization provides. Appropriate training for mediators shall include at least sixteen hours of formal training. Appropriate training for individuals providing other services shall include at least four hours of formal training. The Missouri Bar shall determine the number of hours of formal training of the individual.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

RULE 17.05 STATUS OF RESULTS

(a) Absent the written agreement provided in Rule 17.06(c), any award or evaluation shall be reported only to the parties and their lawyers and shall have no effect other than as a guide to the parties in resolving the lawsuit and shall be inadmissible in any court.

(b) The parties shall advise the court within ten days of the termination of the alternative dispute resolution process only that the parties were successful in resolving their dispute or that issues remain open and unresolved.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

RULE 17.06 CONFIDENTIALITY AND SETTLEMENT

(a) An alternative dispute resolution process undertaken pursuant to this Rule 17 shall be regarded as settlement negotiations. Any communication relating to the subject matter of such dispute made during the alternative dispute resolution process by a participant or any other person present at the process shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery, except that, no fact independently discoverable shall be immune from discovery by virtue of having been disclosed in such confidential communication.

(b) No individual or organization providing alternative dispute resolution services pursuant to this Rule 17 or any agent or employee of the individual or organization shall be subpoenaed or otherwise compelled to disclose any

matter disclosed in the process of setting up or conducting the alternative dispute resolution process.

(c) Settlement shall be by a written document setting out the essential terms of the agreement executed after the termination of the alternative dispute resolution process.

(d) An individual or organization providing alternative dispute resolution services pursuant to this Rule 17 or any agent or employee of the individual or organization may be called in an action to enforce the written settlement agreement reached following the conclusion of the alternative dispute resolution process for the limited purpose of describing events following the conclusion of the alternative dispute resolution process.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

RULE 17.07 DISCOVERY

In an action referred to an alternative dispute resolution program, discovery may proceed as in any other action, and all motions regarding discovery disputes shall be ruled upon by the court as in any other action. Discovery may take place both before and after an alternative dispute resolution process held pursuant to this Rule 17.

(Adopted Oct. 22, 1996, effective July 1, 1997.)

APPENDIX C

Supreme Court of Missouri
P. O. Box 150
Jefferson City, Mo. 65102

CHAMBERS OF
WILLIAM RAY PRICE, JR., CHIEF JUSTICE
(573) 751-4513
WPrice@osca.state.mo.us

November 8, 1999

I am asking for your help to gather data about the effect of Alternative Dispute Resolution (ADR) on your practice of law.

Professor Bobbi McAdoo, the director of the LL.M. in Dispute Resolution program at the University of Missouri, and Michael Geigerman, St. Louis mediator and member of the Supreme Court ADR Committee, developed the enclosed questionnaire. You have been selected to complete the questionnaire because you have litigated at least one civil case in the Missouri state court system.

Please take the time now to complete the questionnaire and return it in the enclosed envelope by November 19, 1999. The validity of the results depends on a high response rate. All individual responses will be confidential and analyzed only as part of the composite picture of the use of ADR in Missouri.

If you have any questions about this project, do no hesitate to call Norma Rahm in the Office of State Courts Administrator at (573) 751-4377.

Many thanks for your assistance.

Sincerely,

William Ray Price, Jr.
Chief Justice

Enclosure

APPENDIX D

MISSOURI RULE 17 - ADR QUESTIONNAIRE

As part of a state-wide evaluation, the Missouri Supreme Court ADR Committee is gathering data to determine how Missouri Supreme Court Rule 17 has been incorporated into your civil litigation practice. The Rule gives judges the authority to order parties into non-binding ADR (e.g., mediation, non-binding arbitration, etc.). Rule 17 became effective July 1, 1997.

Please take time to fill out the questionnaire and return it by **November 19, 1999**. Feel free to write in the margins or at the end of the questionnaire to provide clarification or further information. Although there is a number on your questionnaire for geographical coding purposes, your responses will remain anonymous and be kept **confidential**. We appreciate your help and cooperation.

DEFINITION: For purposes of this questionnaire, please consider the definition of **ADR (Alternative Dispute Resolution)** to be those processes which help parties and attorneys resolve/settle their disputes without going to trial. Five ADR processes are defined in Rule 17: Mediation; Non-Binding Arbitration; Early Neutral Evaluation; Summary Jury Trial; Mini-Trial.

I. LAWYER DATA SECTION

The questions in this section concern you and your practice.

1a. What year were you licensed to practice law in Missouri? *(Please fill in.)* 19____

1b. Sex *(Please circle one.)*
1. Male
2. Female

1c. Age *(Please fill in.)* _____

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2. Which setting best describes your legal experience in the past two years? *(Please circle one.)*
1. Law Firm
2. Legal Aid/Non-profit organization
3. Government/Public Service
4. Corporate/In-house
5. Other (*Please specify.*):_____

---

3. What is the size of your law firm/law department? *(Please circle one.)*
1. Solo
2. 2-5 Attorneys
3. 6-10 Attorneys
4. 11-20 Attorneys
5. Over 20 Attorneys

---

4. Please describe the majority of your civil litigation clients. *(Please circle one.)*
1. Individuals
2. Business/Commercial
3. Government/Public Agency
4. Other_____

---

5. In which Missouri Circuit have your lawsuits been predominantly venued during the past two years?

Circuit *(Please print one.)*:_____

6. To the best of your knowledge, what percentage of your civil caseload is conducted in:

a. Missouri State court? *(Please circle one)*
1. Over half
2. Less than half

b. Federal District Court? *(Please circle one)*
1. Over half
2. Less than half

7. Who do you usually represent in civil litigation cases? *(Please circle one.)*
1. Mostly Plaintiffs
2. Mostly Defendants
3. About Equal

8. From the list at the right, please select the two case types which reflect the highest percentage of your case load for the past two years. Write the corresponding letters in the blanks provided below.

8a. First Choice___ *(Highest %)*

8b. Second Choice___ *(2nd highest %)*

a. Vehicular Injury
b. Contracts
c. Real Estate
d. Malpractice (Medical/legal)
e. Property Damage
f. Environmental
g. Commercial/Business/ Securities
h. Construction
i. Discrimination
j. Premises Liability
k. Products Liability
l. Other (*Please specify.*):_____

9. Prior to 1997 how much formal training in Negotiation Skills and/or ADR had you taken altogether. *(Please circle one.)*	1. 2. 3. 4. 5.	None 1-5 hours 6-10 hours 11-20 hours More than 20 hours
10. In the past 2 years how much formal training have you taken in Negotiation Skills and/or ADR altogether? *(Please circle one.)*	1. 2. 3. 4. 5.	None 1-5 hours 6-10 hours 11-20 hours More than 20 hours
11. Have you ever served as a neutral in an ADR process? *(Please circle one.)*	1. 2.	Yes *(If yes, answer number 12)* No
12. If your answer to question 11 was yes, approximately how many times have you served as an ADR neutral in the past TWO years? *(Please fill in approximate number of times for each position.)*		_____ Mediator _____ Arbitrator _____ Early Neutral Evaluator _____ Other *(Please specify.):* _____
13. Have you used an ADR process with any of your civil cases in Missouri STATE court in the past TWO years? *(Please circle one.)*	1. 2.	Yes No

If you answered "Yes" to number 13 above, please skip to number 16.

If you answered "No" to number 13 above, please continue to number 14.

14. Please indicate why you have NOT been involved in an ADR process. *(Please circle all that apply.)*	a.	I don't want to expose my litigation strategy.
	b.	I prefer a judge or jury trial.
	c.	My clients refuse to use ADR.
	d.	I have not had a case that I thought was appropriate for ADR.
	e.	The court does not actively encourage/order ADR.
	f.	I settle my cases as well or better without the use of ADR.
	g.	I do not understand the different ADR processes.
	h.	I don't want to provide "free discovery."
	i.	I can get to trial easily if I need to.
	j.	It would impose an unnecessary expense.

15. Are there any other reasons you have not been involved in ADR? *(Please specify.)*

_____

_____

_____

If you have not been involved in an ADR process during the past TWO years STOP, you are finished with this questionnaire.

Thank you for completing this questionnaire. Please return the questionnaire by November 19, 1999.

Please continue if you have experience with ADR processes in state court.

II. ADR & RULE 17

The questions in this section concern your experience with ADR processes under Rule 17.

16.	Are you using ADR more or less in your civil (non-family) cases since Rule 17 became effective July, 1997? *(Please circle one.)*	1. 2. 3. 9.	More Less No Change Unknown
17.	In the past TWO years, approximately how many of your cases that have been filed with the court have involved an ADR process? *(Please circle one.)*	1. 2. 3. 4. 5.	None 1-25% 26-50% 51-75% >75%

18. BEFORE July, 1997 (when Rule 17 became effective) how frequently did you use the following ADR process in your civil (non-family) practice?

	Never	Rarely	Sometimes	Usually	Always
a. Mediation *(circle one.)*	1	2	3	4	5
b. Non-binding Arbitration *(circle one.)*	1	2	3	4	5
c. Early Neutral Evaluation *(circle one.)*	1	2	3	4	5
d. Summary Jury Trial *(circle one.)*	1	2	3	4	5
e. Mini-Trial *(circle one.)*	1	2	3	4	5
f. Binding Arbitration *(circle one.)*	1	2	3	4	5

19. AFTER July, 1997 (when Rule 17 became effective) how frequently have you used the following ADR processes in your civil (non-family) practice?

	Never	Rarely	Sometimes	Usually	Always
a. Mediation *(circle one.)*	1	2	3	4	5
b. Non-binding Arbitration *(circle one.)*	1	2	3	4	5
c. Early Neutral Evaluation *(circle one.)*	1	2	3	4	5
d. Summary Jury Trial *(circle one.)*	1	2	3	4	5
e. Mini-Trial *(circle one.)*	1	2	3	4	5
f. Binding Arbitration *(circle one.)*	1	2	3	4	5

20. In your experience, do insurance companies support the use of ADR processes? *(Please circle one.)*

1. Never
2. Rarely
3. Sometimes
4. Usually
5. Always

21. In your experience, is ADR generally a helpful tool for civil cases? *(Please circle one.)*

1. Never
2. Rarely
3. Sometimes
4. Usually
5. Always

22. In your experience, do you settle cases faster with ADR than you would if you just negotiated on your own with opposing counsel? *(Please circle one.)*

1. Never
2. Rarely
3. Sometimes
4. Usually
5. Always

23. In your experience, do your clients save more money over the life of a case when you use ADR than they would if you just negotiated on your own with opposing counsel? *(Please circle one.)*	1. 2. 3. 4. 5.	Never Rarely Sometimes Usually Always
24. If Rule 17 were repealed, would YOU choose to use an ADR process as part of your litigation strategy? *(Please circle one.)*	1. 2. 3. 4. 5.	Never Rarely Sometimes Usually Always

III. ADR CHOICES

*The questions in this section concern your experience with the selection of ADR processes in cases filed in state court under Rule 17 in the past **TWO** years.*

25. I generally discuss ADR options with my client: *(Please circle one.)*	1. 2. 3. 4. 5.	Within the first 3 months of filing suit. Within the first 6 months of filing suit. Within a year of filing suit. Right before trial. I hardly ever discuss ADR options with my client.
26. I generally discuss ADR options with opposing counsel: *(Please circle one.)*	1. 2. 3. 4. 5.	Within the first 3 months of filing suit. Within the first 6 months of filing suit. Within a year of filing suit. Right before trial. I hardly ever discuss ADR options with opposing counsel unless it is raised by opposing counsel or a judge.

27. My clients request that I investigate the use of an ADR process for their case(s). *(Please circle one.)*	1. 2. 3. 4. 5.	Never Rarely Sometimes Usually Always
28. Have you had a case or cases in which you and opposing counsel disagreed on <u>which</u> ADR process was appropriate? *(Please circle one.)*	1. 2.	Yes *(if yes, answer 29)* No *(if no, skip to 30)*
29. If yes, when you disagreed about which ADR process was appropriate, what action did the court take? *(Please circle <u>all</u> that apply.)*	a. b. c. d. e. f.	Court scheduled phone conference. Court scheduled in court conference. Court selected an ADR process. Court ordered parties to find an ADR process. Court did not become involved. Other *(Please specify)*: _____
30. Have you had a case or cases in which you and/or opposing counsel were of the opinion that no ADR process was appropriate? *(Please circle one.)*	1. 2.	Yes *(If yes, answer 31.)* No *(If no, skip to 32.)*

31. If yes, when you and/or opposing counsel were of the opinion that no ADR process was appropriate what action did the court take? *(Please circle all that apply.)*	a.	Court scheduled phone conference.
	b.	Court scheduled in court conference.
	c.	Court selected an ADR process.
	d.	Court ordered parties to find an ADR process.
	e.	Court did not become involved.
	f.	Other *(Please specify)*: _____

IV. SETTLEMENT

The questions in this section concern your experience with civil (non-family) settlement.

32. In your opinion, have civil settlement rates increased in your practice during the past TWO years? *(Please circle one.)*	1.	Yes (if yes answer 33)
	2.	No
33. If yes, to what would you attribute the increase in settlement rates in your practice? *(Please circle <u>all</u> that apply.)*	a.	Clients more interested in settling and staying out of court.
	b.	Increased use of ADR.
	c.	Increased efforts on my part to reach settlement.
	d.	Other (*Please specify*)_____

V. MEDIATION

The questions in this section concern your experience with the MEDIATION process only.

34.	In the past TWO years, the number of mediations you have participated in have: *(Please circle one.)*	1. Increased 2. Decreased 3. Not changed
35.	How many times have you represented a party in a MEDIATION process in the last TWO years? *(Please circle one.)*	1. None 2. 1-3 times 3. 4-9 times 4. 10 or more times

If you answered "None" to question 35 above, skip to question 49 on page 15, otherwise continue to question 36.

36.	How often did you VOLUNTARILY choose the mediation process? *(Please circle one.)*	1. Never 2. Rarely 3. Sometimes 4. Usually 5. Always
37.	Which of the following factors motivated you to VOLUNTARILY choose MEDIATION? *(Please circle all that apply.)*	a. Saves litigation expenses. b. Speeds settlement. c. Anticipate court will order ADR. d. Increases potential for creative solutions. e. Clients like mediation. f. Settlement more likely. g. Preserves parties' relationships. h. Provides needed reality check for my client. i. Provides needed reality check for opposing counsel or party. j. Helps everyone to value the case. k. I've never chosen mediation voluntarily.

38. What other factors not listed in question 37 above have motivated you to use MEDIATION in your practice? *(Please list.)*

_____

_____

_____

_____

39. When you use MEDIATION, does it generally change the TIMING of discovery for your case(s)? *(Please circle one.)*

1. Discovery occurs earlier
2. Discovery occurs later
3. No change

40. When you use MEDIATION, does it generally increase or decrease the VOLUME of discovery and pre-trial preparation for your case(s)? *(Please circle all that apply.)*

a. Increases discovery
b. Increases pre-trial preparation
c. Decreases discovery
d. Decreases pre-trial preparation
e. No change

41. If MEDIATION generally is NOT reducing the volume of DISCOVERY being done, why not? *(Please circle <u>all</u> that apply.)*

a. Doing less discovery violates professional standards or malpractice coverage standards.
b. Doing less discovery means less income to me.
c. Case circumstances usually require full discovery before the case is ready for mediation.
d. I think it does reduce the volume of discovery.
e. Other (*Please specify*):

_____

_____

42. Based on your experiences, compared to the normal civil litigation process, MEDIATION has the following effects: *(Please circle all that apply.)*	a. Saves my time. b. Saves my client's time. c. Causes me to make less money. d. Settlement amounts are higher. e Settlement amounts are lower. f. Increases client's expenses. g. Decreases client's expenses. h. Causes earlier settlement. i. Provides greater client satisfaction. j. Provides clients with a greater sense of control. k. Provides me with a greater sense of control. l. Is less adversarial.
43. What settlement rates are you experiencing as a direct result of the use of mediation? *(Please circle one.)*	1. 90% or greater 2. 80-89% 3. 70-79% 4. 60-69% 5. Less than 60%
44. What was your typical settlement rate before you started using mediation? *(Please circle one.)*	1. 90% or greater 2. 80-89% 3. 70-79% 4. 60-69% 5. Less than 60%
45. Civil cases are generally settled with a monetary agreement. Do you find that settlements reached through mediation include more non-monetary elements (e.g. apology, change in practices, new job assignments, etc.) than settlements reached without mediation? *(Please circle one.)*	1. Never 2. Rarely 3. Sometimes 4. Usually 5. Always

46. Based on your experiences in MEDIATION how often do you find that mediators:

	Never	Rarely	Sometimes	Usually	Always
a. Predict court outcomes. *(Circle one.)*	1	2	3	4	5
b. Propose a particular settlement. *(Circle one.)*	1	2	3	4	5
c. Give own opinion about the strengths and weaknesses of the case. *(Circle one.)*	1	2	3	4	5
d. Push parties to accept specific settlement. *(Circle one.)*	1	2	3	4	5
e. Take responsibility for the fairness of the settlement. *(Circle one.)*	1	2	3	4	5
f. Require parties to sign an agreement to mediate. *(Circle one.)*	1	2	3	4	5
g. Ask clients to talk about their concerns and goals. *(Circle one.)*	1	2	3	4	5
h. Encourage clients to speak for themselves. *(Circle one.).*	1	2	3	4	5
i. Primarily speak with/to the lawyers. *(Circle one.)*	1	2	3	4	5
j. Encourage addressing issues beyond the legal causes of action. *(Circle one.).*	1	2	3	4	5
k. Ask each side to present an opening statement in joint session. *(Circle one.)*	1	2	3	4	5
l. Use caucuses almost exclusively. *(Circle one.)*	1	2	3	4	5
m. Use joint sessions almost exclusively (absent compelling reason to caucus). *(Circle one.)*	1	2	3	4	5
n. Press for a settlement. *(Circle one.)*	1	2	3	4	5
o. Help parties to hear/understand each other's perspective. *(Circle one.)*	1	2	3	4	5
p. Encourage parties to assess the strengths and weaknesses of their case. *(Circle one.)*	1	2	3	4	5

q. Encourage parties to execute settlement agreement, at end of mediation. *(Circle one.)*	1	2	3	4	5
r. Suggest creative solutions that wouldn't be a likely court outcome. *(Circle one.)*	1	2	3	4	5

47. What MEDIATOR qualifications are important to you?
(Please circle <u>all</u> that apply.)

a. Mediator should be a lawyer.
b. Mediator should be a litigator.
c. Mediator should have substantive expertise in the field of law related to case.
d. Mediator should have taken mediation training.
e. Mediator has reputation for settling cases.
f. Mediator has substantial mediation experience.
g. Mediator has experience as a judge.
h. Mediator is good at helping lawyers and clients identify their non-legal interests.
i. Mediator is good at "knocking heads."
j. Mediator knows how to value a case.
k. Mediator knows how to find creative solutions.
l. Mediator knows how to help parties clarify issues.

48. Are there other mediator qualifications that are important to you?
(Please list.)

_____

_____

_____

_____

_____

VI. ARBITRATION

The questions in this section concern your experience with the ARBITRATION process only.

49.	How many times have you represented a party in an ARBITRATION process in the past TWO years? *(Please circle one.)*	1. 2. 3. 4.	None 1-3 times 4-9 times 10 or more times

If you answered "None" to 49 above, STOP, you are finished with this questionnaire.

Thank you for completing this questionnaire.
Please return the questionnaire in the self-addressed, stamped envelope by November 19, 1999.

Otherwise, please continue to question 50 below

50. How often did you VOLUNTARILY choose:	Never	Rarely	Sometimes	Usually	Always
a. BINDING arbitration? *(Please circle one.)*	1	2	3	4	5
b. NON-BINDING arbitration? *(Please circle one.)*	1	2	3	4	5

51. Which of the following factors motivated you to VOLUNTARILY choose NON-BINDING ARBITRATION? *(Please circle all that apply.)*

a. Saves litigation expenses.
b. Speeds settlement.
c. Anticipate court will order ADR.
d. Settlement more likely.
e. Clients like arbitration.
f. Provides needed reality check for my clients.
g. Provides needed reality check for opposing counsel or party.
h. Helps parties value the case.
i. Can select decision maker with special expertise.
j. Required by contract terms.
k. I've never chosen non-binding arbitration voluntarily.

52.	Based on your experiences, compared to the normal civil litigation process, NON-BINDING ARBITRATION has the following effect: *(Please circle all that apply.)*	a. Saves my time. b. Saves my client's time. c. Causes me to make less money. d. Awards are higher. e. Awards are lower. f. Increases client's expenses. g. Decreases client's expenses. h. Causes earlier settlement. i. Provides greater client satisfaction. j. Provides client with a greater sense of control. k. Provides me with a greater sense of control. l. Is less adversarial.
53.	Which of the following factors motivated you to VOLUNTARILY choose BINDING ARBITRATION? *(Please circle all that apply.)*	a. Saves litigation expenses. b. Speeds settlement. c. Anticipate court will order ADR. d. Clients like arbitration e. Can select decision maker with special expertise. f. Required by contract terms. g. Provides finality. h. Opportunity to limit remedies, such as excluding punitive damages. i. I've never chosen binding arbitration voluntarily.

54.	Based on your experiences, compared to the normal civil litigation process, BINDING ARBITRATION has the following effect:? *(Please circle all that apply.)*	a. Saves my time. b. Saves my client's time. c. Causes me to make less money. d. Awards are higher. e. Awards are lower. f. Increases client's expenses. g. Decreases client's expenses. h. Causes earlier settlement. i. Provides greater client satisfaction. j. Provides client with a greater sense of control. k. Provides me with a greater sense of control. l. Is less adversarial.

Please identify any changes you would like to see in Rule 17.

_____

_____

_____

_____

_____

Thank you for completing this questionnaire.
Your opinions on Rule 17 are very important to us and will be used to make policy recommendations concerning ADR in the courts.

Please return the questionnaire in the self-addressed, stamped envelope by November 19, 1999 to:

Missouri Supreme Court
Supreme Court Building
P.O. Box 150
Jefferson City, MO 65102
Attn: ADR Survey

Please direct any questions you have about the questionnaire to: Norma Rahm, Office of State Courts Administrator, (573) 751-4377.

APPENDIX E

DATA SET
Statewide

I. Lawyer Data Section

Question	Choice	Valid Responses	%
Q. 1. A. What year were you licensed to practice law in Missouri?	19_____	1979.86	
1B. Sex	1. Male 2. Female	203 28	88 12
1C. Age	_____	46.35	
Q. 2. Which setting best describes your legal experience in the past two years?	1. Law Firm 2. Legal Aid/Non Profit organization 3. Government/Public Service 4. Corporate/In-house 5. Other (please specify)	205 0 4 16 7	88 -- 2 7 3
Q. 3. What is the size of your law firm/law department?	6. Solo 7. 2-5 Attorneys 8. 6-10 Attorneys 9. 11-20 Attorneys 10. Over 20 Attorneys	41 89 45 25 31	18 39 19 11 13
Q. 4. Please describe the majority of your civil litigation clients.	1. Individuals 2. Business/Commercial 3. Government/Public Agency 4. Other_____	146 66 5 13	63 29 2 6

Question	Choice	Valid Responses	%
Q. 5. In which Missouri Circuit have your lawsuits been predominantly venued during the past two years?	Circuit *(please print one)*_____	1. 0	--
		2. 1	00.45
		3. 0	--
		4. 0	--
		5. 3	01.36
		6. 2	00.91
		7. 2	00.91
		8. 0	--
		9. 0	--
		10. 4	01.81
		11. 1	00.45
		12. 1	00.45
		13. 7	03.17
		14. 0	--
		15. 2	00.91
		16. 43	19.46
		17. 0	--
		18. 0	--
		19. 8	3.62
		20. 2	00.91
		21. 36	16.29
		22. 50	22.62
		23. 3	01.36
		24. 1	00.45
		25. 1	00.45
		26. 3	01.36
		27. 1	00.45
		28. 0	--
		29. 3	01.36
		30. 0	--
		31. 31	14.03
		32. 0	--
		33. 1	00.45
		34. 2	00.91
		35. 2	00.91
		36. 3	01.36
		37. 1	00.45
		38. 1	00.45
		39. 1	00.45
		40. 1	00.45
		41. 0	--
		42. 0	--
		43. 0	--
		44. 0	--

Question	Choice	Valid Responses	%
Q. 6. To the best of your knowledge, what percentage of your civil caseload is conducted in?	1. Over half 2. Less than half	205 27	88 12
a. Missouri State court?	1. Over half 2. Less than half	16 192	8 92
b. Federal District Court? (please circle one)			
Q. 7. Who do you usually represent in civil litigation cases? (please circle one)	3. Mostly Plaintiffs 4. Mostly defendants 5. About Equal	100 94 37	43 41 16
Q. 8. From the list at the right, please select the two case types which reflect the highest percentage of your case load for the past two years. <u>Write the corresponding letters in the blanks provided below.</u> **8a. First choice___** **8b. Second Choice___**	a. Vehicular Injury b. Contracts c. Real Estate d. Malpractice (Medical/legal) e. Property Damage f. Environmental g. Commercial/Business /Securities h. Construction i. Discrimination j. Premises Liability k. Products Liability l. Other (Please specify)_____	93 28 12 22 2 10 23 17 0 8 0 2 12 14 0 5 11 4 6 39 8 20 30 19	47 15 6 12 1 5 12 9 -- 4 -- 1 6 7 -- 3 6 2 3 21 4 11 15 10
Q. 9. Prior to 1997 how much formal training have you taken in Negotiation Skills and /or ADR altogether? (please circle	1. None 2. 1-5 hours 3. 6-10 hours 4. 11-20 hours 5. More than 20 hours	143 55 12 11 11	61 24 5 5 5

one)			
Q. 10. In the past two years how much formal training have you taken in Negotiation Skills and /or ADR altogether? (please circle one)	1. None 2. 1-5 hours 3. 6-10 hours 4. 11-20 hours 5. More than 20 hours	173 43 8 6 3	74 18 3 3 1

Question	Choice	Valid Responses	%
Q. 11. Have you ever served as a neutral in an ADR process?	1. Yes *(if yes, answer number 12)* 2. No	34 199	15 85
Q. 12. If your answer to question 11 was yes, approximately how many times have you served as an ADR neutral in the past TWO years? *(please fill in approximate number for each position)*	____Mediator ____Arbitrator ____Early Neutral Evaluator ____Other (please specify)		
Q. 13. Have you used an ADR process with any of your civil cases in Missouri STATE court in the past TWO years?	1. Yes 2. No	176 53	77 23

If you answered "Yes" to number 13 above, please skip to number 16.

If you answered "No" to number 13 above, please continue to number 14.

Question	Choice	Valid Responses	%
Q. 14. Please indicate why you have NOT been involved in an ADR process. (please circle all that apply)	a. I don't want to expose my litigation strategy	8	15
	b. I prefer a judge or jury trial	16	30
	c. My clients refuse to use ADR.	6	11
	d. I have not had a case that I thought was appropriate for ADR.	30	57
	e. The court does not actively encourage/order ADR.	18	34
	f. I settle my cases as well or better without the use of ADR.	14	26
	g. I do not understand the different ADR processes.	1	2
	h. I don't want to provide "free discovery."	5	9
	i. I can get to trial easily if I need to.	7	13
	j. It would impose an unnecessary expense.	13	25
Q. 15. Are there any other reasons you have not been involved in ADR? (please specify)	**Refer to handwritten responses.**		

If you have not been involved in an ADR process during the past TWO years STOP, you are finished with the questionnaire.

Thank you for completing this questionnaire.

Please continue if you have experience with ADR processes in <u>state</u> court.

II. ADR & Rule 17

The questions in this section concern your experience with ADR processes under Rule 17.

Question	Choice	Valid Responses	%
Q. 16. Are you using ADR more or less in your civil (non-family) cases since Rule 17 became effective July, 1997?	1. More 2. Less 3. No Change 4. Unknown	89 7 71 9	51 4 40 5
Q. 17. In the past TWO years, approximately how many of your cases that have been filed with the court have involved an ADR process?	1. None 2. 1-25% 3. 26-50% 4. 51-75% 5. >75%	4 140 26 4 1	2 80 15 2 1

Question	Choice	Valid Responses	%
Q. 18. BEFORE July 1997 (when Rule 17 became effective) how frequently did you use the following ADR process in your civil (non-family) practice?	18a. Mediation (circle one)		
	1. Never	14	8
	2. Rarely	58	34
	3. Sometimes	90	52
	4. Usually	10	6
	5. Always	0	--
	18b. Non-binding Arbitration		
	1. Never	127	80
	2. Rarely	24	15
	3. Sometimes	7	4
	4. Usually	--	--
	5. Always	--	--
	18c. Early Neutral Evaluation		
	1. Never	129	82
	2. Rarely	18	11
	3. Sometimes	10	6
	4. Usually	0	--
	5. Always	0	--
	18d. Summary Jury Trial		
	1. Never	149	94
	2. Rarely	8	5
	3. Sometimes	1	1
	4. Usually	1	1
	5. Always	0	--
	18e. Mini-Trial		
	1. Never	148	93
	2. Rarely	10	6
	3. Sometimes	2	1
	4. Usually	0	--
	5. Always	0	--
	18f. Binding Arbitration		
	1. Never	96	58
	2. Rarely	51	31
	3. Sometimes	16	10
	4. Usually	2	1
	5. Always	0	--

Question	Choice	Valid Responses	%
Q. 19. AFTER July 1997 (when Rule 17 became effective) how frequently have you used the following ADR processes in your civil (non-family) practice?	19a. Mediation		
	1. Never	4	2
	2. Rarely	31	18
	3. Sometimes	116	67
	4. Usually	23	13
	5. Always	0	--
	19b. Non-Binding Arbitration		
	1. Never	126	80
	2. Rarely	24	15
	3. Sometimes	7	4
	4. Usually	1	1
	5. Always	0	--
	19c. Early Neutral Evaluation		
	1. Never	131	82
	2. Rarely	17	11
	3. Sometimes	11	7
	4. Usually	0	--
	5. Always	0	--
	19d. Summary Jury Trial		
	1. Never	154	96
	2. Rarely	4	3
	3. Sometimes	1	1
	4. Usually	1	1
	5. Always	0	--
	19e. Mini-Trial		
	1. Never	152	95
	2. Rarely	6	4
	3. Sometimes	2	1
	4. Usually	0	--
	5. Always	0	--
	19f. Binding Arbitration		
	1. Never	100	61
	2. Rarely	44	27
	3. Sometimes	18	11
	4. Usually	3	2
	5. Always	0	--
Q. 20. In your experience, do insurance companies support the use of ADR processes?	6. Never	4	2
	7. Rarely	16	9
	8. Sometimes	87	50
	9. Usually	63	36
	10. Always	5	3

Question	Choice	Valid Responses	%
Q. 21. In your experience, is ADR generally a helpful tool for your civil cases?	1. Never 2. Rarely 3. Sometimes 4. Usually 5. Always	4 15 77 71 8	2 9 44 41 5
Q. 22. In your experience, do you settle cases faster with ADR than you would if you just negotiated on your own with opposing counsel?	6. Never 7. Rarely 8. Sometimes 9. Usually 10. Always	6 23 84 57 4	3 13 48 33 2
Q. 23. In your experience, do your clients save more money over the life of a case when you use ADR than they would if you just negotiated on your own with opposing counsel?	1. Never 2. Rarely 3. Sometimes 4. Usually 5. Always	6 30 75 57 7	3 17 43 33 4
Q. 24. If Rule 17 were repealed, would YOU choose to use an ADR process as part of your litigation strategy.	6. Never 7. Rarely 8. Sometimes 9. Usually 10. Always	2 22 97 48 7	1 13 55 27 4

III. ADR Choices

The questions in this section concern your experience with the selection of ADR processes in cases filed in state court under Rule 17 in the past two years.

Question	Choice	Valid Responses	%
Q. 25. I generally discuss ADR options with my client.	1. Within the first 3 months of filing suit.	55	32
	2. Within the first 6 months of filing suit.	51	30
	3. Within a year of filing suit.	31	18
	4. Right before trial.	7	4
	5. I hardly ever discuss ADR options with my client.	27	16
Q. 26. I generally discuss ADR options with opposing counsel.	1. Within the first 3 months of filing suit.	29	17
	2. Within the first 6 months of filing suit.	58	34
	3. Within a year of filing suit.	52	30
	4. Right before trial.	8	5
	5. I hardly ever discuss ADR options with opposing counsel unless it is raised by opposing counsel or a judge.	25	15
Q.27. My clients request that I investigate the use of an ADR process for their case(s).	1. Never	70	40
	2. Rarely	47	27
	3. Sometimes	52	30
	4. Usually	2	1
	5. Always	2	1
Q. 28. Have you had a case or cases in <u>which</u> you and opposing counsel disagreed on which ADR process was appropriate?	1. Yes (if yes answer 29)	41	24
	2. No (If no skip to 30)	132	76

Question	Choice	Valid Responses	%
Q. 29. If yes, when you disagreed about which ADR process was appropriate, what action did the court take? (please circle all that apply)	a. Court scheduled phone conference.	2	5
	b. Court scheduled in court conference.	3	7
	c. Court selected an ADR process.	3	7
	d. Court ordered parties to find an ADR process.	3	7
	e. Court did not become involved.	30	73
	f. Other_____	2	5
Q. 30. Have you had a case or cases in which you and /or opposing counsel were of the opinion that no ADR process was appropriate?	1. Yes (if yes, answer 31)	131	77
	2. No (if no, skip to 32)	39	23
Q. 31. If yes, when you and /or opposing counsel were of the opinion that no ADR process was appropriate what action did the court take? (Please circle all that apply)	a. Court scheduled phone conference.	0	--
	b. Court scheduled in court conference.	15	11
	c. Court selected an ADR process.	10	8
	d. Court ordered parties to find an ADR process.	6	5
	e. Court did not become involved.	101	77
	f. Other_____	4	3

IV. Settlement

The questions in this section concern your experience with civil (non-family) settlement.

Question	Choice	Valid Responses	%
Q. 32. In your opinion, have civil settlement rates increased in your practice during the past TWO years?	1. Yes (if yes answer 33) 2. No	65 109	37 63
Q. 33. If yes, to what would you attribute the increase in settlement rates in your practice? (Please circle all that apply)	a. Clients more interested in settling and staying out of court. b. Increased use of ADR. c. Increased efforts on my part to reach a settlement. d. Other_____	37 27 14 9	57 42 22 10

V. Mediation

The questions in this section concern your experience with the MEDIATION process only.

Q. 34. In the past two years, the number of mediations you have participated in have:	1. Increased 2. Decreased 3. Not Changed	115 7 52	66 4 30
Q. 35. How many times have you represented a party in a MEDIATION process in the last TWO years?	1. None 2. 1-3 times 3. 4-9 times 4. 10 or more times	1 68 80 25	1 39 46 14

If you answered "None" to question 35 above, skip to question 49 on page 15, otherwise continue to question 36.

Q. 36. How often did you VOLUNTARITY choose the mediation process?	1. Never 2. Rarely 3. Sometimes 4. Usually 5. Always	3 19 57 46 37	2 12 35 28 23

Question	Choice	Valid Responses	%
Q. 37. Which of the following factors motivated you to VOLUNTARILY choose MEDIATION? (please circle all that apply)	a. Saves litigation expenses.	135	85
	b. Speeds settlement	121	76
	c. Anticipate court will order ADR.	11	7
	d. Increases potential for creative solutions.	37	23
	e. Clients like mediation.	51	32
	f. Settlement more likely.	110	69
	g. Preserves parties' relationships.	13	8
	h. Provides needed reality check for my client.	107	67
	i. Provides needed reality check for opposing counsel or party.	110	69
	j. Helps everyone to value the case.	109	69
	k. I've never chosen mediation voluntarily.	0	--
Q. 38. What other factors not listed in question 37 above have motivated you to use MEDIATION in your practice?	**Refer to handwritten responses.**		
Q. 39. When you use MEDIATION, does it generally change the TIMING of discovery for your case(s)?	1. Discovery occurs earlier	28	16
	2. Discovery occurs later	24	14
	3. No change	120	70

Q. 40. When you use MEDIATION, does it generally increase or decrease the VOLUME of discovery and pre-trial preparation for your case(s)? (please circle all that apply)	a.	Increases discovery	10	6
	b.	Increases pre-trial preparation	10	6
	c.	Decreases discovery	38	22
	d.	Decreases pre-trial preparation	27	16
	e.	No change	109	63
Question		**Choice**	**Valid Responses**	**%**
Q. 41. If MEDIATION generally is NOT reducing the volume of DISCOVERY being done, why not? (please circle all that apply)	a.	Doing less discovery violates professional standards or malpractice coverage standards.	30	22
	b.	Doing less discovery means less income to me.	0	--
	c.	Case circumstances usually require full discovery before the case is ready for mediation.	95	71
	d.	I think it does reduce the volume of discovery.	22	16
	e.	Other_____	23	17
Q. 42. Based on your experiences, compared to the normal civil litigation process, MEDIATION has the following effects: (please circle all that apply)	a.	Saves my time.	105	61
	b.	Saves my client's time.	98	57
	c.	Causes me to make less money.	15	9
	d.	Settlement amounts are higher.	28	16
	e.	Settlement amounts are lower.	12	7
	f.	Increases clients expenses.	10	6
	g.	Decreases client's expenses.	112	65
	h.	Causes earlier settlement.	120	69
	i.	Provides greater client satisfaction.	52	30
	j.	Provides clients with a greater sense of control.	54	31
	k.	Provides me with a greater sense of control.	22	13
	l.	Is less adversarial.	88	51

Question	Choice	Valid Responses	%
Q. 43. What settlement rates are you experiencing as a direct result of the use of mediation?	1. 90% or greater 2. 80-89% 3. 70-79% 4. 60-69% 5. Less than 60%	39 34 37 17 42	23 20 22 10 25
Q. 44. What was your typical settlement rate before you started using mediation?	6. 90% or greater 7. 80-89% 8. 70-79% 9. 60-69% 10. Less than 60%	36 42 42 23 28	21 25 25 13 16
Q. 45. Civil cases are generally settled with a monetary agreement. Do you find that settlements reached through mediation include more non-monetary elements (e.g., apology, change in practices, new job assignments, etc.) than settlements reached without mediation?	11. Never 12. Rarely 13. Sometimes 14. Usually 15. Always	67 65 33 5 0	39 38 19 3 --

Question	Choice	Valid Responses	%
Q. 46. Based on your experiences in MEDIATION how often do you find mediators:	46a. Predict court outcomes.		
	1. Never	15	9
	2. Rarely	36	22
	3. Sometimes	64	39
	4. Usually	50	30
	5. Always	1	1
	46b. Propose a particular settlement.		
	1. Never	14	8
	2. Rarely	45	27
	3. Sometimes	63	38
	4. Usually	43	26
	5. Always	2	1
	46c. Give own opinion about the strengths and weaknesses of the case.		
	1. Never	2	1
	2. Rarely	13	8
	3. Sometimes	28	17
	4. Usually	77	46
	5. Always	48	29
	46d. Push parties to accept specific settlement.		
	1. Never	10	6
	2. Rarely	53	31
	3. Sometimes	69	41
	4. Usually	34	20
	5. Always	3	2
	46e. Take responsibility for the fairness of the settlement.		
	1. Never	42	25
	2. Rarely	57	34
	3. Sometimes	38	22
	4. Usually	27	16
	5. Always	5	3
	46f. Require parties to sign an agreement to mediate.		
	1. Never	10	6
	2. Rarely	23	13
	3. Sometimes	23	13
	4. Usually	51	30
	5. Always	64	37

	46g. Ask clients to talk about their concerns and goals.		
	1. Never	7	4
	2. Rarely	25	15
	3. Sometimes	38	22
	4. Usually	77	45
	5. Always	23	14
	46h. Encourage clients to speak for themselves.		
	1. Never	13	8
	2. Rarely	42	25
	3. Sometimes	45	26
	4. Usually	58	34
	5. Always	13	8
	46i. Primarily speak with/to the lawyers.		
	1. Never	3	2
	2. Rarely	32	3
	3. Sometimes	48	28
	4. Usually	77	45
	5. Always	10	6
	46j. Encourage addressing issues beyond the legal causes of action.		
	1. Never	16	10
	2. Rarely	55	33
	3. Sometimes	58	35
	4. Usually	35	21
	5. Always	4	2
	46k. Ask each side to present an opening statement in joint session.		
	1. Never	3	2
	2. Rarely	3	2
	3. Sometimes	20	12
	4. Usually	65	38
	5. Always	81	47
	46l. Use caucuses almost exclusively.		
	1. Never	11	7
	2. Rarely	15	9
	3. Sometimes	38	23
	4. Usually	75	45
	5. Always	28	17

	46m. Use joint sessions almost exclusively (absent compelling reason to caucus).		
	1. Never	43	26
	2. Rarely	91	55
	3. Sometimes	26	16
	4. Usually	3	2
	5. Always	2	1
	46n. Press for settlement.		
	1. Never	7	4
	2. Rarely	30	18
	3. Sometimes	57	33
	4. Usually	67	39
	5. Always	10	6
	46o. Help parties to hear/understand each other's perspective.		
	1. Never	0	–
	2. Rarely	5	3
	3. Sometimes	27	16
	4. Usually	108	63
	5. Always	31	18
	46p. Encourage parties to assess the strengths and weaknesses of their case.		
	1. Never	1	1
	2. Rarely	3	2
	3. Sometimes	14	8
	4. Usually	99	58
	5. Always	55	32
	46q. Encourage parties to execute settlement agreement, at end of mediation.		
	1. Never	17	10
	2. Rarely	31	18
	3. Sometimes	42	25
	4. Usually	47	28
	5. Always	33	19
	46r. Suggest creative solutions that wouldn't be a likely court outcome.		
	1. Never	23	14
	2. Rarely	77	46
	3. Sometimes	55	33
	4. Usually	12	7
	5. Always	2	1

Question	Choice	Valid Responses	%
Q. 47. What MEDIATOR qualifications are important to you? (please circle all that apply)	a. Mediator should be a lawyer.	134	77
	b. Mediator should be a litigator.	143	83
	c. Mediator should have substantive expertise in the field of law related to case.	119	69
	d. Mediator should have taken mediation training.	84	49
	e. Mediator has reputation for settling cases.	49	28
	f. Mediator has substantial mediation experience.	79	46
	g. Mediator has experience as a judge.	43	25
	h. Mediator is good at helping lawyers and clients identify their non legal interests.	54	31
	i. Mediator is good at "knocking heads."	28	16
	j. Mediator knows how to value a case.	151	87
	k. Mediator knows how to find creative solutions.	60	35
	l. Mediators knows how to help parties clarify issues.	128	74
Q. 48. Are there other mediator qualifications that are important to you?	**Refer to handwritten responses.**		

VI. Arbitration

The questions in this section concern your experience with the ARBITRATION process only.

Question	Choice	Valid Responses	%
Q. 49. How many times have you represented a party in an ARBITRATION process in the past TWO years?	1. None 2. 1-3 times 3. 4-9 times 4. 10 or more times	99 57 9 5	58 34 5 3

If you answered "None" to 49 above, STOP, you are finished with this questionnaire.

Q. 50. How often did you VOLUNTARILY choose:	50a. BINDING arbitration?		
	1. Never	26	38
	2. Rarely	16	24
	3. Sometimes	13	19
	4. Usually	4	6
	5. Always	9	13
	50b. NON-BINDING arbitration?		
	1. Never	42	67
	2. Rarely	10	16
	3. Sometimes	5	8
	4. Usually	3	5
	5. Always	3	5
Q. 51. Which of the following factors motivated you to VOLUNTARILY choose NON-BINDING ARBITRATION? (please circle all that apply)	a. Saves litigation expenses.	13	62
	b. Speeds settlement.	15	71
	c. Anticipate court will order ADR.	0	--
	d. Settlement more likely.	12	57
	e. Clients like arbitration.	4	19
	f. Provides needed reality check for my clients.	15	71
	g. Provides needed reality check for opposing counsel or party.	11	52
	h. Helps parties value the case.	12	57
	i. Can select decision maker with special expertise.	4	19

	j. Required by contract terms.	2	10
	k. I've never chosen non-binding arbitration voluntarily.	29	

Question	Choice	Valid Responses	%
Q. 52. Based on your experiences, compared to the normal civil litigation process, NON-BINDING ARBITRATION has the following effect: (circle all that apply)	a. Saves my time.	13	62
	b. Saves my client's time.	14	67
	c. Causes me to make less money.	2	10
	d. Awards are higher.	4	19
	e. Awards are lower.	1	5
	f. Increases client's expenses.	5	24
	g. Decreases client's expenses.	14	67
	h. Causes earlier settlement.	16	76
	i. Provides greater client satisfaction.	5	24
	j. Provides client with a greater sense of control.	4	19
	k. Provides me with a greater sense of control.	0	--
	l. Is less adversarial.	14	67
Q. 53. Which of the following factors motivated you to VOLUNTARILY choose BINDING ARBITRATION? (circle all that apply)	a. Saves litigation expenses.	27	64
	b. Speeds settlement.	20	48
	c. Anticipate court will order ADR.	1	2
	d. Clients like arbitration.	12	29
	e. Can select decision maker with special expertise.	14	33
	f. Required by contract terms.	13	31
	g. Provides finality.	25	60
	h. Opportunity to limit remedies, such as excluding punitive damages.	17	40
	i. I've never chosen binding arbitration voluntarily.	14	33

Question	Choice	Valid Responses	%
Q. 54. Based on your experiences, compared to the normal civil litigation process, BINDING ARBITRATION has the following effect: (please circle all that apply)	a. Saves my time.	27	64
	b. Saves my client' time.	32	76
	c. Causes me to make less money.	6	14
	d. Awards are higher.	9	21
	e. Awards are lower.	8	19
	f. Increases client's expenses.	2	5
	g. Decreases client's expenses.	37	88
	h. Causes earlier settlement.	27	64
	i. Provides greater client satisfaction.	6	14
	j. Provides client with greater sense of control.	5	12
	k. Provides me with a greater sense of control.	4	10
	l. Is less adversarial.	19	45
Please identify any changes you like to see in Rule 17.	**Refer to handwritten responses.**		

Thank you for completing this questionnaire. Your opinions on Rule 17 are very important to us and will be used to make policy recommendations concerning ADR in the courts.

Please return this questionnaire in the self-addressed, stamped envelope by November 19, 1999 to:

Missouri Supreme Court
Supreme Court Building
P.O. Box 150
Jefferson City, MO 65201
Attn: ADR Survey