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# Mediation as One Step in Adversarial Litigation: One Country Lawyer's Experience

*John R. Phillips\**

## I. INTRODUCTION

Practicing labor and employment law nationally for the past thirty years with a primary office in western Missouri has given me an unusual, if not a unique, opportunity to observe the evolution of the use of mediation in civil litigation. The United States District Court for the Western District of Missouri was an early convert to alternative dispute resolution (ADR) and mediation in particular as a result of its participation in the Civil Justice Reform Act<sup>1</sup> (CJRA) demonstration program. Beginning in 1992, the demonstration program required one-third - but eventually all - civil cases in the District (with minor exceptions) to undergo some form of alternative dispute resolution (ADR).<sup>2</sup> In contrast, the Missouri state court system embarked upon ADR more cautiously, adopting Missouri Supreme Court Rule 17.01<sup>3</sup> in 1989. Entitled "Voluntary Dispute Resolution," Rule 17 permitted, but did not require, judicial circuits within the state to adopt voluntary ADR programs.<sup>4</sup> Thus, I have had the opportunity to compare a mandatory ADR system with a voluntary system within the state as well as to a wide variety of other systems nationally that only recently have started to become mandatory. The experience with my clients, which is supported by empirical data derived from the Western District of Missouri federal court program, is that parties required to use mediation<sup>5</sup> were often surprised at the early settlement, reduced costs, and their own satisfaction with the process. By contrast, the experience in the voluntary Missouri state court

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1. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1994).

2. See *General Order of United States District Court for Western District of Missouri* (effective July 1, 1992).

3. Mo. Sup. Ct. R. 17.01 (repealed).

4. Mo. Sup. Ct. R. 17.01 was re-adopted in substantially changed form effective July 1, 1997, to permit individual judges to mandate mediation in specific cases.

5. Although the Western District of Missouri procedure is a multi-door procedure, ninety-eight percent of the participants elected to use mediation. Kent Snapp & Deborah Bell, *1997 Early Assessment Program Report* (Aug. 11, 1997).

program<sup>6</sup> demonstrates that in a voluntary program: (1) parties are often not offered a meaningful opportunity to mediate, (2) attorneys often fail to recognize when cases are appropriate for mediation, or (3) at least historically, attorneys have been reluctant to suggest mediation for fear of showing weakness in their case.

This experience stands in stark contrast to the thesis of Professor Deborah Hensler in her article, *Suppose It's Not True: Challenging Mediation Ideology*. Therein, Professor Hensler attempts to link social psychological research that she interprets as showing dissatisfaction with the use of mediation compared to adjudication, which, in turn, leads her to conclude that clients should prefer counsel who ordinarily can resolve cases successfully without the help of mediation.<sup>7</sup> The fallacy of Professor Hensler's argument is evident in several respects. For one, she relies far too heavily on her own intuition and previous empirical research of marginal relevance, and on research by social scientists that is either outdated or so confuses the terminology as to render such data meaningless in the study of ADR procedures under current practice and terminology. Further, Professor Hensler adds to the confusion in terminology by inappropriately juxtaposing "mediation" to "adversarial litigation and adjudication," thereby ignoring that in practice mediation most often occurs in the context of - not in lieu of - adversarial litigation. To suggest that the adversarial nature of litigation is lost or even diminished by mediation ignores the reality of how mediation is most often used, which is to bring adversarial litigation to a conclusion more quickly, cost effectively, and with the parties having greater control over the outcome, sometimes resulting in creative solutions not attainable through adjudication. The greatest fallacy of her thesis, however, is borne in the second paragraph of her article, when she asserts that empirical evidence to support the claim (that mediation would save courts and litigants time and money) "has failed to materialize," citing her own previous work as the only authority for her shaky conclusion.

## II. SUCCESS OF THE EARLY ASSESSMENT PROGRAM IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

As a result of the perception that civil litigation had gotten too expensive and prolonged, Congress provided five federal district courts with special funding under the CJRA to establish demonstration programs. In so doing, Congress directed three of the district courts, including the United States District Court for the Western District of Missouri, to consider ADR programs. As a result, the Western District of Missouri formed an Advisory Committee to study the docket and to recommend

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6. Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 Mo. L. Rev. \_\_ (forthcoming 2002).

7. Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. of Dis. Res. 81 (2002).

improvements through the use of ADR.<sup>8</sup> The Western District of Missouri had a fairly current docket at the time, with the average disposition rate being a little under a year. Further, the conventional wisdom in the Eighth Circuit - which includes the Western District of Missouri - was that most cases (actually ninety-eight percent) settled or were otherwise disposed of prior to trial.<sup>9</sup> The Advisory Committee, therefore, focused on lessening the burdensome expense of litigation and shortening even further the time to final disposition.

Working with the court, the Advisory Committee ultimately devised an Early Assessment Program (EAP) that resulted in the court hiring a full-time Early Assessment Program Administrator (Kent Snapp). The Administrator was required within thirty days of the filing of a responsive pleading to hold an early assessment meeting that gave the parties an opportunity to confront each other and gave the Administrator the opportunity to evaluate the case for present or future settlement possibilities. The program provided for information exchange and limited discovery to occur within ninety days following the first early assessment meeting and for an ADR procedure to be scheduled within that same ninety-day period. The parties were permitted to choose which ADR procedure to use or devise their own. They also were given the option of using the court EAP Administrator who had extensive litigation experience as the neutral or could select from a Court approved list of attorneys that had ADR training.

To judge the effectiveness of the program, one-third of all civil cases were randomly assigned to the assessment program, a second third of the cases were eligible to be invited into the program at the discretion of the Administrator and the parties ("opt-in" cases), and the final third were precluded from participating in the program in order to constitute a "control group" against which the program's success was measured. The results after five years of study showed that cases in the study settled significantly faster and at substantial cost savings compared to both the opt-in group and the control group of excluded cases and that the program was extremely well received by the litigants.

Although largely ignored at the time by a RAND Report<sup>10</sup> that purported to study the effectiveness of ADR usage in the federal court system, the results were reported to the court under whose auspices the program had been initiated<sup>11</sup> and to the Federal Judicial Center.<sup>12</sup> In his report to the court, Administrator Snapp reported that for the five years the EAP had been operating, fifty-three percent more of the control group (excluded) cases went to trial than those that went through the

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8. Interim Dean Ken Dean of the University of Missouri-Columbia School of Law was the original Reporter of the Advisory Committee.

9. Kent Snapp & Jerome T. Wolfe, *The Early Assessment Program: A Unique Opportunity to Avoid Cost and Delay*, 51 J. Mo. B. 111, 112 (Mar./Apr. 1995).

10. James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND 1996).

11. Snapp & Ball, *supra* n. 6.

12. Donna Stienstra, Molly Johnson & Patricia Lombard, *Report to the Judicial Conference Committee on Court Administration and Case Management: The Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* 215 (Jan. 24, 1997).

EAP, that median time from filing to disposition of the EAP cases was only 7.5 months whereas the average disposition time for the control group was over 10.5 months, and that - based on attorney survey responses - total report net savings exceeded \$17,000,000.<sup>13</sup> It was reported in the December 1997 issue of *Dispute Resolution* magazine that the project “provides strong statistical and practical support for the proposition: ADR has brought about case termination at a twenty-eight percent faster rate than traditional litigation . . . .” The opt-in group, which essentially constituted a “voluntary” group within the program, did not fare significantly better than the excluded control group with respect to cost savings or time to trial. That the comparison of groups within the program reflects favorably on mandated programs compared to voluntary programs may be due to the inability (or reluctance) of counsel to identify which cases were appropriate for the program early enough for there to be a significant benefit to their clients. But in any event, it is certainly reflective of this writer’s experience that in jurisdictions in which ADR is voluntary, lawyers must overcome inertia to get a case into mediation.

Importantly for purposes of determining whether clients as well as the lawyers advocating on their behalf felt satisfied with the process, sixty-nine percent of attorneys surveyed<sup>14</sup> indicated their clients were either very satisfied or somewhat satisfied, while only twelve percent indicated their clients were somewhat or very dissatisfied. The remainder indicated neutrality, “can’t say,” or no response.<sup>15</sup> Similarly, a majority reported their clients liked being involved in the EAP, an overwhelming ninety-four percent of the respondents reported they would volunteer an appropriate case for the EAP, and ninety-six percent reported that the EAP should be continued.<sup>16</sup> As a result of the success of the EAP program in reducing costs and delays and being well received by attorneys and clients alike, the District Court for the Western District of Missouri amended its General Order to eliminate the control and opt-in groups and to make the EAP mandatory in essentially all<sup>17</sup> civil cases in its jurisdiction.<sup>18</sup> Had it not been for the empirical data gathered during its demonstration project, the court, lawyers, and clients might not have fully appreciated the causal effect in requiring cases to go through the process, rather than leaving it up to the parties to determine whether and/or when a case should be referred. This experience in the federal court’s mandatory program differed

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13. Snapp & Ball, *supra* n. 6, at 1.

14. Of the 2,726 survey forms sent out, 1,970 were completed and returned.

15. Snapp & Ball, *supra* n. 6, at 14 (although the measurement was not of clients directly, it is reasonable to assume that counsel fairly and accurately reported the level of client satisfaction since counsel surveyed were acting as advocates for their clients, not as aspiring mediators as suggested by Professor Hensler in the preface of her article).

16. Stienstra et al., *supra* n. 13, at 217.

17. *Id.*

18. See *General Order of the United States District Court for the Western District of Missouri* (effective Jan. 1, 1998). *Missouri Court Rules - Federal Courts* vol. II, 359 (West Group 2002) (Initially, the program even as expanded applied only to the Western Division, although the Court expressly intended for it eventually to include the entire District. Also, certain types of cases such as multi-district, social security, and prisoner pro se cases have been and remain excluded from the program.).

significantly from the experience in the Missouri state court system's voluntary program.

### III. VOLUNTARY MEDIATION UNDER MISSOURI SUPREME COURT RULE 17

Voluntary mediation was encouraged by the adoption of Missouri Supreme Court Rule 17, entitled "Voluntary Dispute Resolution" for the stated purpose of "foster[ing] early, economical, fair and voluntary settlement of lawsuits without delaying or interfering with a party's right to resolve a lawsuit by trial."<sup>19</sup> The Rule allowed each of the forty-four state judicial circuits in Missouri to adopt local ADR rules; although in over a decade, only four circuits had done so for civil (non-domestic) cases. The circuits adopting ADR rules encompassed Kansas City, St. Louis City, St. Louis County, and St. Joseph, Missouri.<sup>20</sup> The programs in those few circuits in which implementing rules had been adopted were all voluntary in nature. In the Sixteenth Judicial Circuit of Jackson County, which encompasses most of Kansas City, the local rule specified that every petition was to be accompanied by a one-page notice announcing to the litigants the availability of ADR.<sup>21</sup> Still, ADR was infrequently accessed even in those circuits adopting implementation of ADR rules.<sup>22</sup>

Largely because of the infrequent use of the voluntary ADR program, the Missouri Supreme Court commissioned a committee to study the use and results under Rule 17,<sup>23</sup> and the Court substantially revised Rule 17 because the Court wanted it to achieve more widespread use.<sup>24</sup> The overall mail questionnaire response rate of fifty-four percent was unusually high, perhaps because it was accompanied by a letter from Missouri Supreme Court Chief Justice William Ray Price, Jr., personally asking attorneys to assist in gathering data to assess the effect of Rule 17 on their practice. The results were reported in a Supreme Court ADR Committee Report prepared by Bobbi McAdoo and Art Hinshaw entitled *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*. Approximately three-quarters of the statewide respondents reported using ADR processes in their cases in the two years

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19. Mo. Sup. Ct. R. 17.01 (repealed).

20. Rule 17 has since been revised, effective July 1, 1997, to permit individual judges the ability to initiate and to sustain an ADR referral absent a local ADR rule, although the rule remains voluntary in that it allows litigants the opportunity to opt out absent "compelling circumstances" that the court is required to set forth in an order referring the case to ADR. Mo. Sup. Ct. R. 17.03(a) - (b) (2001).

21. Mo. 16th Jud. Cir. R. 25.1 (2001).

22. Milton Garber & Kenneth R. Krueger, *A Talk With the Justices Covington and Holstein*, Missouri Lawyers Weekly (June 19, 1995) (quoting Judge Holstein that "We thought Rule 17.01 would be used more, particularly in urban areas. But, we haven't seen that").

23. Chaired by Sixteenth Judicial Circuit Judge Jay Daugherty (Kansas City, Missouri).

24. Cathie St. John-Ritzen, *Supreme Court Rule 17: Putting Some "Teeth" Into Alternative Dispute Resolution*, 54 J. Mo. B. 137 (May/June 1998); Stephanie Skinner, *Judges Given Power to Order Parties to ADR, Drafters Agree: "This rule has teeth"*, Missouri Lawyers Weekly (Nov. 4, 1996) (noting that revisions to Rule 17 were prompted largely by low circuit court participation under the old rule).

studied in the survey.<sup>25</sup> Interestingly, the Kansas City area, which is included in the geographical composition of the United States District Court for the Western District of Missouri, reported the highest use (ninety percent) of the voluntary state ADR program. One might reasonably infer that several years of exposure and favorable experience in the mandatory federal EAP in the Western District of Missouri might explain the higher voluntary use of ADR in the state court system in Kansas City compared to the rest of the state.

Of those respondents who had not used the ADR processes, a majority reported the reason they had not been involved in an ADR process was they had “not had a case [that they] thought was appropriate for ADR.”<sup>26</sup> Further, some of the respondent comments were illuminating such as: “when the Court does not order ADR, there is a perception that suggests it is a sign of weakness.” The latter comment comports with this writer’s own experience - that a decade ago and prior to attorneys becoming acclimated to ADR through the Western District of Missouri’s mandatory EAP, it was sometimes seen as a sign of weakness for one party to suggest mediation, especially early in the case whereas now most attorneys in the Western District of Missouri expect mediation to be proposed irrespective of whether the Court requires it - but now without any stigma attached to the proposing party. Furthermore, it is this writer’s experience that even if early mediation does not result in immediate settlement, it usually narrows the issues and reduces acrimony between the parties, which often leads to a later negotiated solution satisfactory to both parties.

Of those litigants taking advantage of voluntary ADR under Missouri Rule 17, almost ninety percent of the respondents reported ADR was at least “sometimes” a helpful civil litigation tool.<sup>27</sup> Almost one-third of the 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.<sup>28</sup> The impetus for using ADR in this voluntary program clearly did not come from clients because only four respondents (two percent) stated that their clients “usually” or “always” asked them to look at ADR options and more than two-thirds of the respondents reported their clients “never” or “rarely” asked them to investigate ADR options for their cases.<sup>29</sup> Yet, over a third of the users reported their cases “usually” or “always” settled faster when using ADR, and an additional forty-eight percent reported their cases “sometimes” settled faster using ADR,<sup>30</sup> and over a third reported their clients “usually” or “always” saved money when using ADR and forty-two percent more believed that they “sometimes” saved money using ADR. Again, the survey comports with this lawyer’s experience that until fairly recently even clients with knowledgeable in-house counsel often had little familiarity with ADR processes but

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25. McAdoo & Hinshaw, *supra* n. 7.

26. *Id.* at tbl. 8 (manuscript). Interestingly, the vast majority of respondents had no negotiation skills or ADR training before Rule 17 became effective.

27. *Id.* at tbl. 11 (manuscript).

28. *Id.* at tbls. 19 & 12 (manuscript).

29. *Id.* at tbls. 22 & 16 (manuscript).

30. *Id.* at tbls. 20 & 13 (manuscript).

once they experienced the benefits (often through a mandated procedure), they became advocates of the process. In fact, in-house counsel increasingly expect outside counsel to propose its usage even if not required by a court.

For purposes of this article, two conclusions may be drawn from the survey of voluntary ADR in the Missouri state court system. First, perhaps due to its voluntary nature, the infrequent use of Rule 17 as originally adopted was perhaps reflective of the significant number of attorneys not being trained in the ADR processes and believing they had no cases appropriate for submission. That experience is contrasted to the Western District of Missouri's EAP in which many cases settled earlier than the parties anticipated, some even at the first assessment meeting, when the parties were required to exchange information early in the process. The second conclusion to be drawn from the Missouri state court survey for these purposes is that, of the attorneys that voluntarily used ADR, the majority found that it saved time and money and that it was helpful litigation tool since the majority of ADR users indicated they would continue to use ADR as a tool even if Rule 17 providing judicial encouragement was repealed.<sup>31</sup>

Granted, the survey conclusions drawn from the Western District of Missouri's EAP experience as well as the Missouri state court program both focus more on outcome fairness and efficiencies than on procedural fairness, and the two are not always intertwined. Also, to the extent that some of the survey questions sought to measure client satisfaction with respect to procedural fairness, the results were filtered through the attorneys' perceptions of their clients' satisfaction rather than measuring client satisfaction directly. However, a study of participants in the Equal Employment Opportunity Commission Mediation Program did survey the parties directly and found even stronger satisfaction with the mediation process, regardless of their satisfaction with the outcome of the mediation (ninety-one percent of the charging parties and ninety-six percent of the respondents indicating they would be willing to participate in the mediation program again if they were a party to an EEOC charge).<sup>32</sup>

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31. *See id.*

32. Dr. E. Patrick McDermott et al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program 4* (September 20, 2001). In addition to the EEOC survey which was national in scope, a recent survey of over 1,709 complainants and respondents undertaken by the Kansas Human Rights Commission/Kansas Legal Services and reported to the Kansas Legislature on February 3, 2002, showed a similar high level of satisfaction on issues of procedural fairness such as whether the parties were satisfied with the services, whether the issues were adequately addressed, whether the mediator was fair to both parties, and whether the parties would recommend the mediation process to others with respondents' degree of satisfaction being in excess of eighty percent on such issues while complainants' satisfaction varied from sixty-two percent to seventy-six percent depending on the issue surveyed. *See also* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 Ohio St. J. on Dis. Res. \_\_ (forthcoming 2002) (ninety-five percent of the participants surveyed responded that the mediation process in that study was "very fair" or "somewhat fair" while ninety-nine percent of attorneys held the same view).



#### IV. IN APROPOS USE OF SOCIAL PSYCHOLOGICAL RESEARCH

Thus, Professor Hensler's assertion that empirical evidence to support the claim (that mandating mediation of lawsuits for money damages on the grounds that mediation would save courts and litigants time and money) "has failed to materialize" and that the process is not satisfying to the parties ignores the Missouri experience and the empirical evidence reporting on that experience.<sup>33</sup>

Professor Hensler's authority for the assertion is to cite her own writing in Joseph Sanders and V. Lee Hamilton's recently published *Handbook of Justice Research in Law*.<sup>34</sup> Further, Professor Hensler and the social science empiricists on whom she relies confuse ADR terminology to such an extent that it is impossible to compare and apply their empirical research to the reality of litigating in the new millennium. For example, Professor Hensler assumes "that courts order litigants to mediation when bilateral bargaining has failed."<sup>35</sup> That statement is certainly contrary to the Western District of Missouri EAP experience in which the assessment, usually through mediation, begins during the adversarial process but almost always prior to any bilateral bargaining and often prior to substantial discovery. Further, in footnote 9, Professor Hensler references studies of mediation compared to bargaining and then once again mistakenly juxtaposes the "consensual processes" (i.e., mediation) to "adversarial adjudication." In reality, however, mediation today has become an integral and valuable step or tool in adversarial litigation, not an alternative to it. In fact, the adversarial process of litigation culminates in a consensual resolution ninety-five percent of the time. This culmination can either be by direct negotiation or through some facilitated process such as mediation, leaving relatively few cases to be resolved by adjudication.

It may well be that Professor Hensler's reliance on her experiences in early RAND reports<sup>36</sup> may have colored her view of the viability of ADR. For example, the first RAND report cited by her and of which she was a co-author<sup>37</sup> was published over two decades ago and admittedly studied judicial arbitration - not mediation. Further, it was a study that may well have been flawed from its inception, in that it was studying the results of judicially mandated arbitration during the first year of a program in California state courts. The authors were admittedly concerned about this potential flaw causing the authors to point out that "some findings may well be

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33. In defense of Professor Hensler, the Supreme Court ADR Committee Report, *Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri* was not officially released until after Professor Hensler's article had been written. However, the Report to the Judicial Conference Committee on Court Administration and Case Management had been made to the federal judicial center January 24, 1997 and, although perhaps not intended by the authors, rebutted the RAND Report to the extent that it had curiously ignored the empirical evidence developed by the Western District of Missouri EAP experience.

34. Hensler, *supra* n. 8, at 81 n. 1.

35. *Id.* at 82 n. 3.

36. *Id.* at 83 n. 7, 80 n. 11.

37. Deborah Hensler, Albert Lipson, & Elizabeth Rolph, *Judicial Arbitration in California* 1 (RAND 1981).

artifacts of a difficult start-up period in which the courts were allowed to implement the program in a variety of different ways.”<sup>38</sup>

Unfortunately, the more recent RAND report in which Professor Hensler participated as a co-author is of only marginally greater relevance in that it investigated the attitudes and perceptions of individual plaintiffs and defendants in relatively small personal injury tort cases in three California state courts. The litigants were, by the authors’ own admission, “usually insured and represented by lawyers paid by their insurers and where plaintiffs’ legal costs may be ‘hidden’ within the favorable outcome.”<sup>39</sup> The study attempted to measure procedural fairness and satisfaction ratings of arbitration hearings, settlement conferences, and trials. One conclusion the study reached was that in such insured small tort claim cases, the litigant “wanted to exercise some control over the handling and ultimate outcome of their cases.” However, the study also concluded that the litigants in such cases also appeared to want a “dignified, careful and unbiased hearing of their cases,” and that “they were sensitive to variations in procedures.”<sup>40</sup>

None of those conclusions are inconsistent with the overwhelming majority of mediation experiences of this writer or with the proposition that litigants appreciate and usually prefer having a predetermined step in that long and costly path to the courthouse that affords them the opportunity to be heard by an unbiased neutral (not available through direct negotiation) and to craft a solution that might not be an option with judge or jury. Thus, the study appears to shed little light on whether civil litigants generally would prefer trial to a mediation that permits the adversarial process to take its course to the extent necessary but culminates in a settlement negotiated through a mediation in which they participate and over which they retain some control. Further that RAND report, along with most studies measuring either procedural or outcome fairness of mediation, fails to compare satisfaction with mediation to the largest and therefore most meaningful control group which is one comprised of disputes resolved by negotiated settlement between the lawyers in the absence of the parties. There is a dearth of research regarding procedural fairness of mediation generally and almost none comparing it to unfacilitated negotiation, which is surprising because by far the most likely disposition of a dispute, if mediation is not mandated, is settlement by direct negotiation rather than trial or adjudication.

The RAND study does present some common ground for agreement between Professor Hensler and this writer - namely that any forum should provide a dignified, careful and unbiased hearing for cases through standardized procedure. Not only does this writer agree with Professor Hensler’s conclusions in that regard, but suggests that even greater care should be taken in assuring dignified and fair procedures when ADR procedures are annexed to the courts as compared to those adjudicatory procedures taking place in the courtroom itself such as trial on the

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38. *Id.* at 2.

39. E. Allan Lind et al., *The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* 1 (RAND 1989).

40. *Id.* at 4.

merits. In short, process and decorum are important elements of justice and in the perception of the public whether in court or not.

Of equal concern is Professor Hensler's reliance on research of social science empiricists that use ADR terminology even more loosely. For example, reference is made to a study comparing preferences for a U.S.-style adversarial process to the inquisitorial trial process used in many European courts for deciding criminal cases.<sup>41</sup> Granted, no direct analogy was made, but this twenty-five-year old research can hardly be viewed as supportive of Professor Hensler's thesis. Further, the subsequent research of Thibaut and Walker, from which Professor Hensler seeks to analogize, is fraught with loose and perhaps outdated terminology: bilateral bargaining, mediation (interpreted by Professor Hensler to most resemble "non-binding arbitration"), the moot arbitration, and autocratic decision making.<sup>42</sup> Perhaps ADR practice terminology has evolved to such an extent in the quarter century since the more recent of the Thibaut and Walker studies cited by Professor Hensler that she should be excused and again, in Professor Hensler's defense, she did acknowledge "as is frequently true in conversations about dispute resolution procedures, the researchers did not (seemingly) pay a great deal of attention to the terminology they chose to describe the procedures."<sup>43</sup> However, Professor Hensler perpetuates the confusion again by drawing from Thibaut and Walker's research the comparison of mediation to trial as one of consensual processes to adversarialism,<sup>44</sup> when in this lawyer's experience, mediation is but one tool or step in an adversarial process that usually culminates in a negotiated settlement and less often results in the litigants proceeding to adjudication. Lack of definition appears to have led to foggy academic thinking and loose use of social psychological research.

Of even greater concern is the leap of academic speculation Professor Hensler takes in concluding - as she does - that in her perfect world of fully funded and fully functioning courts, "Dispute resolution programs would celebrate the lawyers who did not *need* mediation to achieve good outcomes for their clients, rather than the lawyers who [take] every case to mediation."<sup>45</sup> The author then extends her advice even further, suggesting that in such a perfect world, court ADR programs would offer adjudicative options and "would *not* include pure interest-based mediation . . . [or] transformative mediation . . ."<sup>46</sup> This conclusion, supported in only the loosest respect by the outdated and confused social psychological research cited, is contrary not only to this lawyer's personal experience in which mediation has become an effective advocacy tool, but is contrary to the empirical data suggested

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41. Hensler, *supra* n. 8, at 85 n. 14.

42. *Id.* at 86. Again, in Professor Hensler's defense, even the term "mediation" as it is used today is subject to tremendous variations to the point that one style of mediation may bear little resemblance to another style. The absence of clear definition makes meaningful statistical comparison difficult.

43. *Id.* at 86.

44. *Id.* at 87.

45. *Id.* at 97 (emphasis added).

46. *Id.* at 97.

by a comparison of the Western District of Missouri's EAP experience to that of the voluntary program under Missouri Supreme Court Rule 17.

It is also contrary to the experience of Senior Circuit Judge Dorothy Wright Nelson, the noted west coast jurist and member of the United States Court of Appeals for the Ninth Circuit, who began her distinguished career and education in dispute resolution studying under Dean Roscoe Pound in 1950. Judge Nelson, in a recently published article responding to detractors of ADR, notes multiple attributes of court-annexed ADR programs, including that, in addition to cost and time efficiencies, they can "contribute significantly to the quality of justice by providing better focus, more productive, and more efficient pre-trial case development"<sup>47</sup> and that "there are times when a sophisticated, knowledgeable neutral can be much better than a judge."<sup>48</sup>

## V. CONCLUSION

Professor Hensler has taken the courageous position of inquiring as to whether mediation is a panacea for the increasing costs and burdens of litigating by questioning the empirical support for the claimed efficiencies of mediation as well as whether litigants are truly satisfied by the process of mediation not only as to whether the outcome was just but with respect to procedural fairness as well. This inquiry as to procedural fairness should sensitize mediators to the need to guard against what appears to this writer to be a recent trend toward a reduced role for the litigants such as caucus-only mediation or the recent advent of mediation in the absence of the parties. Professor Hensler's inquiry may also serve as a wake-up call to those mediators and the occasional lawyer advocate who attempt to push toward settlement with single mindedness of purpose by presenting the parties with an unrealistically threatening picture of the litigation process or the trial itself or who otherwise try to bludgeon parties into a settlement. In guarding against those abuses, Professor Hensler is to be lauded for sounding the alarm that in using mediation, the integrity of the process and the perception of fairness is as important as the result and needs further study every bit as much as outcome fairness. Litigants not only want justice, they expect a careful, thorough and unbiased procedure over which they retain at least some control - they want someone to listen and understand.

But differing somewhat from Professor Hensler, it appears to this writer that in the last decade, ADR in general and mediation in particular has become an indispensable and highly effective tool for advocates in civil litigation. There is mounting evidence, including empirical, that requiring mediation often saves substantial time and money and produces results that are satisfying to the litigants - sometimes results that would not have been attainable in a trial. My hat is off to those law schools that have had the vision to incorporate ADR use and advocacy into their curriculum and to courts that encourage or require its use as a step in, not a

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47. Judge Dorothy Wright Nelson, *ADR in the Federal Courts - One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators and the Public*, 17 Ohio St. J. on Dis. Res. 1, 4 (2001).

48. *Id.* at 4.

substitute for, the adversarial process. Jurisdictions that encourage or require mediation with neutrals and advocates well-trained in ADR techniques may not have fewer cases filed, but should have more current dockets, fewer trials and at less time and expense to clients, and with greater client satisfaction than those reluctant to promote its use, but then I could be wrong . . . it's just one country lawyer's experiences and opinion.