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COMMENT

JUST, SPEEDY, AND INEXPENSIVE OR JUST SPEEDY AND INEXPENSIVE? MANDATORY ALTERNATIVE DISPUTE RESOLUTION IN THE WESTERN DISTRICT OF MISSOURI¹

I. INTRODUCTION

"More judicial bang for the judicial buck."² That's what Congress is seeking with its enactment of the Judicial Improvements Act of 1990.³ Title I⁴ of the Act may be a harbinger of the largest change in federal practice since the promulgation of the Federal Rules of Civil Procedure over fifty years ago.⁵ The Act authorizes alternative dispute resolution (ADR) in the federal district courts in addition to providing other reforms.⁶ One district court, designated as one of three ADR "demonstration districts" by the Act, seized upon this mandate and launched an

1. "[The Federal Rules of Civil Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

2. S. REP. NO. 101-416, 101st Cong., 2d Sess. 3, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6802, 6805 (quoting *Hearings on S. 2648 Before the Senate Judiciary Comm.*, 101st Cong., 2d Sess. 11 (1990) (statement of Senator Thurmond)).

3. S. REP. NO. 101-416, *supra* note 2, at 6805; Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (Title I to be codified at 28 U.S.C. §§ 471-82).

4. Title I of the Act is also known as the Civil Justice Reform Act of 1990. S. REP. NO. 101-416, *supra* note 2, at 6803.

5. See, e.g., S. REP. NO. 101-416, *supra* note 2, at 6804 (describing reforms as "comprehensive").

6. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5092. Title I of the Act sets forth a six-point plan for the courts to follow. *Id.* at 5091. The plan includes ADR and is outlined more fully below. See *infra* note 9. Title II of the Act increases the size of the federal judiciary by 77 circuit and district court judges. *Id.* § 202, 104 Stat. at 5098.

ADR program that is inclusive of almost all filings in that district and provides mandatory ADR for a significant number of cases filed in the district.⁷

Congress enacted Title I of the Judicial Improvements Act of 1990 to address the problems of cost and delay in civil litigation.⁸ Title I of the Act sets forth a six point plan designed to help achieve these goals.⁹ This Comment focuses on one of the six points of the plan, "expanding and enhancing the use of alternative dispute resolution,"¹⁰ and on the Western District of Missouri's ADR program designed in response to the Act.¹¹ The importance of the Western District's program is that it may have an effect on ADR programs in other federal district courts throughout the country because the Judicial Conference of the United States may develop a model plan for all district courts based on the Western District of Missouri's program.¹² The workability and legal viability of the Western District's program will be watched closely as the federal courts look to chart a course between overcrowded courthouses and infringement on constitutional and legal policy traditions.

This Comment will address five questions which may arise as challenges to the Western District of Missouri's implementation of its ADR program. First, is the experimental program designed by the court likely to be predictive? That is, will the program be able to tell us whether cost and delay are being reduced by the ADR program? Second, is the program as implemented likely to reduce cost and delay? Third, does the Western District of Missouri have authority to impose mandatory ADR on litigants? Fourth, is the provision for mandatory ADR constitutionally sound? And fifth, assuming affirmative answers to these questions, does the General Order of the Western District of Missouri promote policy concerns?

7. See generally General Order of the United States District Court for the Western District of Missouri, Early Assessment Program (October 31, 1991) [hereinafter EAP Order] (on file in the University of Missouri School of Law library and also available on request to the Western District of Missouri). The two other demonstration districts are the Northern District of California and the Northern District of West Virginia. Judicial Improvements Act of 1990, § 104, 104 Stat. at 5097.

8. S. REP. NO. 101-416, *supra* note 2, at 6803.

9. Judicial Improvements Act of 1990, § 102, 104 Stat. at 5089. The six components of the plan are:

- (1) building reform from the "bottom up";
- (2) promulgating a national, statutory policy in support of judicial case management;
- (3) imposing greater controls on the discovery process;
- (4) establishing differentiated case management systems;
- (5) improving motions practice and reducing undue delays associated with decisions on motions; and
- (6) expanding and enhancing the use of alternative dispute resolution.

S. REP. NO. 101-416, *supra* note 2, at 6817.

10. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5092.

11. EAP Order, *supra* note 7 (setting forth the Western District of Missouri Program).

12. See Judicial Improvements Act of 1990, § 103, 104 Stat. at 5094 (judicial conference will prepare manual for litigation and cost and delay reduction to be developed after the demonstration programs are evaluated).

A brief overview of Rule 16 of the Federal Rules of Civil Procedure is necessary because it authorizes judges to hold settlement conferences¹³ and, some believe, to impose on the parties ADR procedures such as arbitration, mediation, early neutral evaluation, magistrate settlement, mini-trials and summary jury trials.¹⁴ A discussion of the 1988 Arbitration Act¹⁵ which represents Congress' first foray into ADR programs in the Article III courts follows the overview of Rule 16.¹⁶ An analysis of both Title I of the 1990 Act and the General Order of the Western District of Missouri which establishes an ADR experiment in that court completes the necessary background.

II. FEDERAL ALTERNATIVE DISPUTE RESOLUTION

A. *Federal Rule of Civil Procedure 16*

Rule 16 of the Federal Rules of Civil Procedure, as originally adopted in 1937, made no express reference to settlement of cases.¹⁷ The omission of reference to settlement reflected a view that settlement was not at the heart of the pretrial conference, but that instead the focus of the conference should be on narrowing issues for trial and expediting proof.¹⁸ The practical result of this omission¹⁹ was to vest trial judges with broad discretion to deal with the topic of settlement during pretrial.²⁰

Rule 16 was first amended in 1983. During the period prior to the Rule's 1983 amendment, many judges began defining their roles more in terms of case management and less in terms of neutral adjudication.²¹ Judges began to look to ADR in the interest of settling cases before trial as dockets became more

13. FED. R. CIV. P. 16(c)(7). "The participants at any conference under this rule may consider and take action with respect to the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." *Id.*

14. *See, e.g.,* Federal Reserve Bank v. Carey-Canada, 123 F.R.D. 603, 605 (D. Minn. 1988).

15. 28 U.S.C. §§ 651-58 (1988).

16. Congress has enacted legislation concerning ADR which affects the state courts, the administrative courts and administrative rule making processes. *See* Dispute Resolution Promotion Act of 1979, 28 U.S.C. app. §§ 1-10 (Supp. IV 1981); Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990); Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990).

17. Fed. R. Civ. P. 16, 28 U.S.C. (1982) (as originally adopted in 1937).

18. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rule Making*, 137 U. PA. L. REV. 1969, 1980-81 n.40 (1989).

19. The omission, in the words of one member of the advisory committee, was "no mere chance." Clark, *To An Understanding Use of Pretrial*, 29 F.R.D. 454, 455 (1962). It reflected Advisory Committee concerns about suggestive or coercive use of settlement by the trial judge. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 169 (1956).

20. Shapiro, *supra* note 18, at 1983 n.46.

21. *Id.*

crowded.²² Rule 16 was amended in 1983 to reflect this shift in focus on the judicial role.²³

The 1983 amendment recognized the trend toward judicial case management by encouraging settlement. Indeed, the Advisory Committee notes suggest that this was an important purpose behind the decision to amend the rule.²⁴ The changed title of the rule, from "Pre-Trial Procedure—Formulating Issues" to "Pre-Trial Conferences: Scheduling; Management," itself indicates the scope of the changes.²⁵

Under the 1983 amendment, one of the subjects which may be considered at the pretrial conference is "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."²⁶ The rule thus codified the managerial trend without revoking the trial judge's broad discretion to determine which approach should be taken concerning settlement discussions in the pre-trial conference.²⁷

The 1988 Arbitration Act provided additional guidance to the district courts concerning Congress' view of the necessity for the increased use of ADR methods.²⁸ The 1990 Judicial Improvements Act likewise encourages the use of ADR,²⁹ practically expanding the role which ADR formerly held under Rule 16.

B. The 1988 Arbitration Act

In 1988, Congress enacted legislation establishing a court-annexed arbitration experiment in the federal district courts.³⁰ The experiment, as set forth in the 1988 Arbitration Act (Arbitration Act), is designed so that it will expire on November 19, 1993.³¹ Congress drafted the Arbitration Act so that it will not affect out-of-court arbitration recognized by the United States Arbitration Act.³²

Under Title II of the Arbitration Act certain federal district courts may refer qualified civil actions, including adversary proceedings in bankruptcy, to arbitration.³³ Title II authorizes twenty district courts to participate in this

22. *Id.* at 1984. The delay in civil litigation probably results in part from the enactment of the Speedy Trial Act of 1974 which required the setting of an expeditious trial date in criminal cases. *See* 18 U.S.C. §§ 3152-74 (1985).

23. FED. R. CIV. P. 16. The rule was amended again in 1987 for gender neutrality. *Id.*

24. *Id.* advisory committee's note.

25. Shapiro, *supra* note 18, at 1985 n.62.

26. FED. R. CIV. P. 16(c)(7).

27. Shapiro, *supra* note 18, at 1985.

28. Congress' first attempt to provide a mechanism for ADR was targeted at the state, not federal courts. *See* Dispute Resolution Promotion Act of 1979, 28 U.S.C. app. §§ 1-10. The Act expired in 1983. *Id.*

29. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5092-93.

30. 1988 Arbitration Act, 28 U.S.C. §§ 651-58.

31. Arbitration Act of 1988, Pub. L. No. 100-702, § 906, 102 Stat. 4659, 4664 (1988).

32. 28 U.S.C.A. § 651 practice commentary (1988); *see* United States Arbitration Act, 9 U.S.C. §§ 1-15 (1992 Supp.).

33. 28 U.S.C. § 651. Local rules are required to enact this procedure. Practice commentary, *supra* note 32.

experimental program.³⁴ For purposes of the experiment, the twenty districts are divided into two groups of ten courts each.³⁵

At the inception of the Arbitration Act ten district courts had already implemented arbitration by local rule.³⁶ These ten courts may, in their discretion, refer any civil action to arbitration if the parties consent³⁷ to arbitration.³⁸ Additionally, these ten courts may compel arbitration of pending civil actions if the relief sought consists solely of monetary damages in an amount under \$100,000.³⁹

The compulsory referral is subject to the requirement that a case arise neither under the Constitution of the United States nor under a statutory civil rights claim.⁴⁰ Each court maintains discretion to exempt a case from arbitration on a party's or its own motion where "the case involves complex or novel legal issues," "legal issues predominate over factual issues," or where there exists "other good cause."⁴¹

In the second group of district courts, there is no compulsory arbitration provision. Submission of a case to arbitration may only be done with the consent of the parties.⁴² The Senate would not allow compulsory arbitration in any of those district courts which had not already established compulsory arbitration by local rule.⁴³

District courts authorized to participate in either phase of the experiment establish their own standards for certification of arbitrators.⁴⁴ Arbitrators have the powers to "conduct arbitration hearings," "administer oaths and affirmations" and "make awards."⁴⁵ However, arbitrators are not authorized by the Arbitration Act to hold parties in contempt.⁴⁶

34. Arbitration Act of 1988, 28 U.S.C. § 568. The Act contains a sunset provision allowing the experiment a five year run. Pub. L. No. 100-702, § 906, 102 Stat. at 4664.

35. 28 U.S.C. § 658(1)-(2).

36. *Id.* § 658(1). These courts are the Northern District of California, Middle District of Florida, Western District of Michigan, Western District of Missouri, District of New Jersey, Eastern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and the Western District of Texas. *Id.*

37. *Id.* § 652(d)(1)-(2) (defining consent).

38. *Id.* § 652(a)(1)(A).

39. *Id.* § 652(a)(1)(B). The courts which had established a lower amount-in-controversy maximum were not required to raise the maximum to \$100,000. *Id.* The attorney for the party seeking damages in excess of the \$100,000 limit must certify that the damages requested exceed that amount. *Id.* § 652(a)(2).

40. *Id.* § 652(b)(1)-(2).

41. *Id.* § 652(c)(1)-(3).

42. *See id.* § 652(a)(1)(B).

43. 28 U.S.C.A. § 652 practice commentary (1988).

44. 28 U.S.C. § 656(a).

45. *Id.* § 653(a)(1)-(3).

46. 28 U.S.C.A. § 653 practice commentary (1988).

A party dissatisfied with an arbitration award is entitled to a trial de novo upon request.⁴⁷ The judge who presides over the trial will not have knowledge of the result of the arbitration.⁴⁸ After the arbitrator enters the award, and after the time lapses for a request for a trial de novo, the arbitration award has the same force and effect as a judgment of a court in a civil action except that it is not subject to review.⁴⁹

The response of the legal community to court-annexed arbitration is mostly positive.⁵⁰ However, to date, few hard statistics are available from which to measure the relative success of ADR programs.⁵¹

III. THE WESTERN DISTRICT OF MISSOURI PROGRAM

A. *Judicial Improvements Act of 1990*

The Judicial Improvements Act of 1990 began as Senate Bill S. 2027, the Civil Justice Reform Act of 1990, on January 25, 1990, when the bill was introduced by Senator Biden, Chair of the Senate Committee on the Judiciary, and Senators Thurmond, Metzenbaum, Heflin, Kohl, Simon, and Specter.⁵² Chairs Brooks and Fish of the House Judiciary Committee and Chair Kastenmeier and Representative Moorhead of the House Subcommittee on Courts, Intellectual Property and Administration of Justice introduced the House of Representatives' companion bill, H.R. 3898.⁵³

On March 6, 1990, the Senate held a hearing on S. 2027.⁵⁴ The proposed legislation received strong criticism from members of the judiciary and was thereafter revised to its present form.⁵⁵ In its present form, the legislation has the wide approval of the federal bench.⁵⁶

Many of the ideas engendered in Title I of the Act were derived from the report of a Brookings Institute Task Force convened at Chairman Biden's request.⁵⁷ Title I of the 1990 Judicial Improvements Act requires all federal district courts (exempting the bankruptcy courts) to establish a "civil justice

47. *Id.*

48. *Id.*

49. 28 U.S.C. § 655.

50. *See, e.g., Broderick, Court Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 223 (1989).

51. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 15 (1985).

52. S. REP. NO. 101-416, *supra* note 2, at 6805.

53. *Id.*

54. *Id.*

55. *Id.* at 6808.

56. *Id.*

57. *Id.* at 6816.

expense and delay reduction plan."⁵⁸ The stated purposes of the plans to be implemented by the courts are: "to facilitate adjudication of civil cases on the merits, monitor discovery, improve litigation management and to ensure just, speedy, and inexpensive resolutions of civil disputes."⁵⁹

Each federal district court, working with its advisory group, is required to consider all parts, and authorized to implement any or all parts of a six-point plan.⁶⁰ The Act requires that the advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in the court.⁶¹ The Act also requires that the United States District Attorneys for the districts be permanent members of the advisory groups.⁶² Other members of the groups may serve terms of no longer than four years.⁶³ The Act makes no express provision for the role of judges in the advisory groups. However, the Federal Judicial Center has recommended that judicial officers serve in the groups as non-voting members.⁶⁴

Title I of the Act focuses on the pretrial stage of proceedings and is designed to work within the discretion allowed by amended Rule 16. It proposes means by which to put a handle on cost and delay, including referral of certain types of cases to ADR programs that "have been designated for use in a district court; or that the court may make available."⁶⁵

While the Act requires all courts to consider implementing ADR, it also mandates that three courts conduct a mandatory experiment using ADR.⁶⁶ These three courts are: the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri.⁶⁷

The 1990 Judicial Improvements Act and its legislative history suggest several ADR devices that may be used by the district courts in their ADR programs: the summary jury trial, early neutral evaluation, mini-trial, mediation,

58. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5090. Title I does not specifically exclude bankruptcy courts from the program. However, the legislative history implies that the Act is not intended to apply to cases pending in these courts. See generally S. REP. NO. 101-416, *supra* note 2.

59. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5092.

60. *Id.* at 5091. The chief judge of each district court is required to appoint an advisory group to develop recommendations for the development and implementation of the civil expense and delay reduction plan. *Id.* at 5094. The advisory group for each court will be composed of attorneys, persons "representative of major categories of litigants" in the court and other persons as determined by the chief judge of the court. *Id.*

61. *Id.* at 5094.

62. *Id.*

63. *Id.*

64. FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT 5 (1991).

65. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5092.

66. *Id.* at 5092-93.

67. *Id.* at 5096.

the multi-door courthouse approach, and so-called "settlement weeks."⁶⁸ The list is not intended to be exhaustive.⁶⁹

At least as interesting as what Title I of the 1990 Judicial Improvements Act says is what it does not say. Like the Arbitration Act, Title I of the 1990 Judicial Improvements Act does not provide for the imposition of sanctions. Additionally, the 1990 Act does not say who shall preside over the authorized ADR proceedings. While the 1990 Act's legislative history identifies some specific ADR methods which may be employed, neither the 1990 Act nor its legislative history shed light on whether the procedures may be made mandatory. There is also no provision for the assessment of fees.

B. The Western District of Missouri's Early Assessment Program

Recently, the Federal District Court for the Western District of Missouri approved an experimental program called the "Early Assessment Program" [the Program], which is to begin on January 1, 1992 and end on December 31, 1994.⁷⁰ The Program does not replace the Joint Trial Calendar, a limited master calendar under which all available judges agree to accept cases which are ready for trial.⁷¹ The new Program is substantially different from the Calendar in that it focuses on the early pre-trial, rather than the trial phase of the proceedings.⁷²

The Program provides mandatory court-annexed ADR for roughly one-third of all civil cases filed in the Western District of Missouri and encourages voluntary court-annexed ADR for another third of filed cases.⁷³ Referral to the Program will be based on random assignment.⁷⁴ All cases in the following categories are explicitly exempt from the program: 1) multi-district cases, 2) social security appeals, 3) bankruptcy appeals, 4) habeas corpus actions, 5) prisoner pro se cases, 6) other pro se cases in which a motion for appointment of counsel is pending, and 7) class actions.⁷⁵

68. *Id.* at 5097; S. REP. NO. 101-416, *supra* note 2, 6830-33; *see infra* Appendix A (listing programs described in the Order of the Western District of Missouri).

69. Judicial Improvements Act of 1990, § 103, 104 Stat. at 5092.

70. EAP Order, *supra* note 7, at 1.

71. Interview with Kent Snapp, Plan Administrator for the EAP, phone conversation (March, 1992).

72. *See generally* EAP Order, *supra* note 7.

73. *Id.* at 1-2.

74. *Id.* at 1. The assignment of cases into the three groups is made by computer. Interview with Kenneth D. Dean, Assistant Dean of the University of Missouri-Columbia School of Law, Reporter for the EAP, Columbia, Missouri (March, 1992). The computer program anticipates the number of cases to be filed in a month, and then assigns cases randomly to each of the three groups in equal numbers based on projected monthly filings. *Id.* It is possible, though unlikely, that a party could increase its chances of being in one group by having information about the number of cases anticipated to be filed and those assignments that have already been given out. *Id.* This method would require luck as well as information and will not pose much of a practical threat to the random nature of the assignment. *Id.*

75. EAP Order, *supra* note 7, at 1-2.

The Program is designed to allow statistical comparison between cases which are referred through a court-annexed ADR process and cases which are not referred through the process.⁷⁶ A control group of 33.3% of non-exempt cases will not be referred to the Program in either its mandatory or voluntary application and will therefore be exempted from any participation in court-annexed ADR processes.⁷⁷ However, parties designated to be in the control group may request inclusion in the Program and are not forbidden to pursue other, non-court-annexed, ADR programs on their own initiatives.⁷⁸

Parties who request to "opt in" the Program, as well as those who request to "opt out" will have their requests reviewed by the Plan Administrator (the Administrator) who is authorized to reassign such a party for "good cause."⁷⁹ The Order establishing the Program cautions that the diversion of a significant number of cases may render statistical comparison difficult.⁸⁰

A case assigned through the Program to participate in ADR is scheduled for an Early Assessment Meeting (EAM) within 30 days after response to pleadings.⁸¹ At the EAM the Administrator will advise the parties of ADR options, such as arbitration and mediation.⁸² If additional discovery is warranted, or if the parties choose to pursue early neutral evaluation, the Administrator will design a plan by which to proceed.⁸³ The Administrator may turn the EAM into a mediation session, in which the Administrator will act as mediator if such action is "appropriate" and "agreeable to the parties."⁸⁴

If the parties cannot agree on an ADR option at the EAM, the Administrator may schedule a second meeting within 90 days.⁸⁵ At either the EAM or the second meeting, the parties must select an ADR option by which to proceed.⁸⁶ If the parties cannot agree on an ADR option, an ADR option will be chosen for them by the Administrator.⁸⁷

Attendance of the parties is required at the EAM.⁸⁸ Parties other than natural persons must be represented by a person with "reasonable settlement authority, and with sufficient stature in the organization to have direct access to those who make the ultimate decision about settlement."⁸⁹ Additionally, counsel

76. *Id.*; see Appendix A (describing the District's description of available ADR processes).

77. EAP Order, *supra* note 7, at 2.

78. *Id.*

79. *Id.* at 3.

80. *Id.*

81. *Id.* at 2.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 3. This is true unless the Administrator determines that a later date is necessary. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 5.

89. *Id.* (the representative may not be outside or local counsel).

primarily responsible for the case are required to attend the EAM.⁹⁰ The Order establishing the program provides that the court may impose "appropriate sanctions" for failure to participate in the program "in accordance . . . with the spirit of [the] Order."⁹¹

Within 120 days after completion of the responsive pleadings, the parties or the Administrator will decide which ADR option to pursue.⁹² The Program does not give any additional time guidelines. A backlog of cases may develop as the court adjusts its resources to meet the needs of court-annexed ADR. The Program does not make clear whether the court will set a trial date for ADR cases before or after the ADR process is complete.⁹³

The court *en banc* will select the Administrator who may be either an employee of the court or a general contractor.⁹⁴ The Administrator maintains authority over the Program and has the responsibility to report regularly to the Advisory Group on the status of the Program.⁹⁵ Specifically, the Administrator will: (1) administer the program and coordinate activities with the clerk of the court, (2) coordinate the selection of cases for the Assessment, (3) conduct the Assessment, (4) assist in monitoring evaluation of the program, (5) preside over the "opt in" and "opt out" processes, (6) recommend to the court modifications of the program, and (7) collect files from neutrals.⁹⁶ The Order establishing the Program provides no express qualifications for the Administrator, no term of office, and no definition of tenure.⁹⁷ The Order also does not indicate what salary or compensation the Administrator will receive.

As is the norm with ADR proceedings, most communications between the parties which take place during the course of the Program are confidential.⁹⁸ Rule 408 of the Federal Rules of Evidence, which governs introduction of evidence from settlement talks, will apply to these proceedings in the Western District of Missouri.⁹⁹ There are several exceptions to confidentiality of information exchanged during the course of the Program: (1) information which

90. *Id.*

91. *Id.* at 14.

92. *See id.* at 2-3 (this time frame consists of 30 days for assessment and 90 days for selection of form of alternative dispute resolution).

93. The Program will probably not affect trial scheduling as a practical matter. Interview with Kenneth D. Dean, *supra* note 74.

94. *See* EAP Order, *supra* note 7, at 4. The current Administrator is an employee of the court. Interview with Kent Snapp, *supra* note 71.

95. EAP Order, *supra* note 7, at 4.

96. *Id.*

97. The current Plan Administrator was hired for a three-year term, a term which coincides with the duration of the Act. Interview with Kent Snapp, *supra* note 71.

98. EAP Order, *supra* note 7, at 5.

99. *Id.* There is some question whether ADR proceedings in the Western District of Missouri will be deemed by other federal courts to be "settlement discussions" within the meaning of Federal Rule of Civil Procedure 408 and whether such proceedings will be deemed confidential under state law. Interview with Kenneth D. Dean, *supra* note 74. The issue of confidentiality of ADR procedures in other courts has not yet been litigated.

is independently discoverable is not immune from discovery by virtue of its disclosure during the proceedings; (2) the Administrator may disclose the non-compliance of a party to the judge assigned the case or to the court *en banc*; (3) special provisions apply to a request for trial de novo following arbitration; and finally, (4) the Administrator may use information regarding the case in his evaluation reports.¹⁰⁰

Each ADR option requires a neutral party to preside over the proceedings.¹⁰¹ The Order establishing the Program sets up guidelines for the qualifications and compensation of neutral parties.¹⁰² The court will not compensate the neutral parties, instead, the cost of the neutral party will be borne equally by the litigants unless the litigants agree to a different allocation of the cost.¹⁰³ If litigants can demonstrate to the Administrator an inability to pay, they may request the services of a neutral party who has agreed to serve pro bono.¹⁰⁴ Otherwise, the neutral party's fees will be set by the neutral party himself.¹⁰⁵ Local attorneys will act as neutral parties in the Program.¹⁰⁶ The court provides a questionnaire to local attorneys which requests information concerning areas of expertise and required fees.¹⁰⁷

IV. COMMENT

A. *Will the Experiment Yield the Results it is Designed to Achieve?*

Is the Program designed so as to produce results which can, with an acceptable measure of certainty, tell us whether or not it is reducing cost and delay? Without a well designed experiment which contains acceptable controls, the results of the experiment cannot tell us whether ADR is working.

The Western District's Program is important to the future of ADR because the results of the experiment are likely to be predictive. Currently there are few sophisticated data concerning the time and cost of ADR relative to traditional litigation processes.¹⁰⁸

In areas such as ADR "where data are fragmentary and the available analytical tools are crude, there is considerable potential for both inconsistent

100. EAP Order, *supra* note 7, at 4-5.

101. *Id.* at 6.

102. *Id.* at 12-13. A person may be a neutral if he or she is a former state judge who presided over a court of general jurisdiction or is a retired federal judicial officer or is a member of the Missouri bar who has been a member of a state bar for eight years or longer, and completes required training courses and is approved by the court or its designee. *Id.*

103. *Id.* at 13-14; *see id.* at 16-17 (attachment B, Neutral's Application Form).

104. *Id.* at 13-14.

105. *See id.* at 16-17 (attachment B, Neutral's Application Form).

106. *Id.*

107. *Id.*

108. Sander, *supra* note 51, at 15.

results and disagreements interpretation."¹⁰⁹ Many experiments are conducted on an ad hoc basis, others, such as the 1988 Arbitration Act do not provide an adequate control group.¹¹⁰ Thus, the "incredible" 99% settlement rates reported by some courts may not be as incredible as they seem.¹¹¹ It is well known, for example, that a "full-blown" trial is an unusual event; that trial occurs in "appreciably less than ten percent of cases."¹¹² Whether "success rates" truly reflect a significant increase in the number of cases being settled before trial will require a true experiment, with appropriate numbers of cases available for comparison and adequate controls.¹¹³

The ideal experiment would randomly assign cases through the ADR program to allow statistical comparison with similar cases which are not referred through ADR.¹¹⁴ The Missouri program satisfies this criteria by providing for a random assignment of approximately 33.3% of civil cases through the program.¹¹⁵ The random assignment does not hinge on case filing numbers or on a system which the litigants would be able to anticipate, and perhaps avoid.¹¹⁶

Exempting certain types of cases from ADR will not affect the verifiability of results of the experiment. However, the experiment will not be predictive of ADR results for those types of cases which are exempted. The "opt in" and "opt out" provisions in the Western District program are more problematic. These provisions will affect the randomness of the study.¹¹⁷ We can assume that a party applying to opt-in or opt-out is motivated to do so because the party has decided that either inclusion or exclusion would be to its benefit.¹¹⁸ As the

109. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROBS. 55, 55-56 (1988). For a discussion of statistical studies of procedural devices see Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

110. Statistics on results of the 1988 Arbitration Act appear to be significant to show that ADR is working in those courts which have implemented the program. See, e.g., Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 20 n.133 (1990) (in the Northern District of California 99% of eligible cases terminated short of trial).

111. See Sander, *supra* note 51, at 15.

112. *Id.* at 31. "It is no secret that the overwhelming majority of legal disputes are settled without trial." J. TANFORD, *THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS* 88 (1983). Judge S. Arthur Spiegel of the United States District Court for the Southern District of Ohio estimates that over 95% of civil cases are resolved before trial. Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 832 (1986).

113. Posner, *The Summary Jury Trial and Other Methods of Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986).

114. *Id.* at 374. (concerning random assignment of cases: "[a]nd by random, I mean random; I mean by use of a table of random numbers.")

115. EAP Order, *supra* note 7, at 1-2.

116. See *supra* note 74.

117. See Posner, *supra* note 113, at 375. On the topic of whether opt-in or opt-out presents a practical problem, see *infra* note 119.

118. Posner, *supra* note 113, at 375.

Order establishing the Program notes, the granting of options for a significant number of litigants will damage the predictive nature of the study.¹¹⁹

The Program is designed to be functional as well as predictive, however, and if the Administrator feels that a case would benefit through the exercise of the opt provision, it would be counter-productive not to allow a party to opt. Opt cases should be factored separately from the regularly routed cases in order to retain the predictive nature of the experiment. If substantial numbers of one type of case are regularly allowed to opt-in or opt-out, the court should amend the Order establishing the Program to provide for the regular inclusion or exemption of that type of case.¹²⁰

The Western District of Missouri Program allows parties to chose between different ADR options such as mediation and arbitration.¹²¹ The choice is intended to benefit the litigants by allowing them to choose the option which they feel will help them reach the best resolution of their cases.¹²² The choice presents a problem for the predictive nature of the experiment because it reduces the number of cases that can be used for strict comparison. The Administrator can keep separate records of the success rate of the ADR options but the number of cases which the Administrator can then use to compile statistics on each alternative might be so small as to make meaningful comparison impossible.¹²³ If comparison is impossible, determining which ADR option, for example mediation or arbitration, is working best to achieve settlement is likewise impossible. Of course, the Administrator will be able to keep records of the overall success rate of the program.

A similar record-keeping problem arises in determining whether ADR works for different types of cases. For example, if one-third of contracts cases participate in mandatory ADR, and one-fifth of that one-third choose arbitration over other ADR options, our numbers for comparison have become very small indeed. This problem is intensified with case types having low filings in the district.¹²⁴

119. EAP Order, *supra* note 7, at 3. However, to deny parties the opportunity to opt-in or opt-out raises its own problems. To exclude cases from a program which is designed to benefit litigants seems patently unfair to those excluded who therefore cannot benefit from court-annexed ADR.

120. In fact the Order does provide for modification of the Program by the Administrator. EAP Order, *supra* note 7, at 4.

121. *Id.* at 18-21 (attachment C, Notice to parties when case has been selected for EAP so that parties can commence preparation).

122. *Id.*

123. The number of cases assigned to the mandatory ADR track in the first quarter of 1992 was 56. Letter from Davis Loupe to April Fredlund (April 1, 1992) (these are the tentative first quarter statistics). Nine EAM's have been held, two follow up meetings, and one magistrate settlement conference. *Id.* (these are also tentative statistics).

124. For example, it would be difficult for the Administrator to amass meaningful statistics on the success rate of arbitration in antitrust cases if in 1992 only five antitrust cases are filed in the district, only two of these cases are chosen to participate in the Program, and only one of these proceeds through arbitration.

B. Will the Program be Effective in Reducing Cost and Delay?

Some commentators believe that filings may actually increase as more cases are settled without trial.¹²⁵ The number of cases filed may increase as more cases are settled and fewer reach publication.¹²⁶ This reduces the information available to prospective litigants about the probable resolution of their cases.¹²⁷ Because of the dearth of adverse precedents, some litigants will file who would not have filed if published adverse precedents existed.¹²⁸

Additionally, some commentators believe that litigation delay serves to keep down the number of cases filed by reducing the present value of potential judgments and therefore reducing plaintiffs' incentives to bring low-dollar cases.¹²⁹ Arguably, if delay is reduced, more litigants may be encouraged to file as the present value of their cases increases. However, increased filings will not frustrate the purpose of ADR. Instead, increased filings may show that the federal court system is becoming more accessible.¹³⁰

If the Western District of Missouri Program is to work in substantial measure, it should be targeted at those types of cases which represent the heaviest burden on the court. An analysis of the cases filed in the Western District of Missouri may give some indication of whether the Program is targeted at those types of cases which are filed often and those types of cases which take the greatest amount of judge-time to be resolved.

The Western District of Missouri has six judgeships.¹³¹ In 1990, 2395 cases were filed in the district, showing a decrease from the previous year's filings of 2846 cases, but reflecting an increase in filings as a general trend over the last nine years.¹³²

Of the 2395 cases filed in the Western District of Missouri in 1990, the top five types of civil cases by number filed were: prisoner cases at 968, contracts cases at 280, civil rights cases at 237, "all other" cases¹³³ at 216, and personal

125. Posner, *supra* note 113, at 388.

126. *Id.*; Kaufman, *supra* note 110, at 30.

127. Posner, *supra* note 113, at 388.

128. *Id.*

129. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U.L. REV. 527, 534 (1989); see Posner, *supra* note 113, at 388.

130. Cf. Posner, *supra* note 113, at 388-89.

131. The 1990 Judicial Improvements Act did not increase the number of judgeships in the Western District of Missouri.

132. FEDERAL JUDICIAL CENTER & THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, GUIDANCE TO ADVISING GROUPS APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990: PREPARED FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI 8 & 12 (1991).

133. "All other" cases includes all cases besides those involving: asbestos, bankruptcy matters, banks and banking, civil rights, commerce (ICC rates, etc.), contract, copyright, patent, trademark, ERISA, forfeiture and penalty (excluding drug forfeitures), fraud, truth in lending, labor, land condemnation and foreclosure, personal injury, prisoner, RICO, securities and commodities, social security, student and veteran loans, and tax. See *id.* at 12.

injury cases at 178.¹³⁴ The top five types of civil cases by "weight"¹³⁵ were: civil rights, prisoner, contracts, "other," and personal injury.¹³⁶ In 1990, civil trials accounted for a little less than 70% of total trials, or about 140 trials.¹³⁷ The "life expectancy" of the average civil case filed in the Western District of Missouri in 1990 was about 14 months.¹³⁸

If the Program of the Western District of Missouri works to reduce delay we may expect to see a reduction in the percentage of civil cases brought to trial, over the course of a few years.¹³⁹ Additionally, we can expect to see a corresponding decrease in the life expectancy of new cases. As noted above, an increase in filings will not be a signal that the Program is not reducing cost and delay for individual cases. However, the practical result of an increase in filings may result in delay in the system in general.

The Western District of Missouri's Program includes almost all types of cases in its ADR system. Although prisoner cases account for the greatest percentage of the court's caseload, these cases come to the court primarily under its appellate jurisdiction and are therefore inappropriate to the application of ADR. Overall, the Program is targeted to reach the greatest number of cases practicable.

C. Does the Western District of Missouri Have Authority to Implement the Program?

The authority of a district court to implement non-mandatory ADR remains largely unquestioned. In *Link v. Wabash Railroad*,¹⁴⁰ the Supreme Court recognized "the control necessarily vested in [district] courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases."¹⁴¹

Most cases resolved through the use of ADR are resolved through voluntary ADR and therefore are not the subjects of litigation.¹⁴² Whether the control vested in courts to manage their cases is sufficient to allow for the use of mandatory ADR has been the focus of litigation challenging the legality of such mandatory provisions. A majority of district courts considering the question of the

134. *Id.*

135. Weight is a measurement which is reflective of work time by the courts. *Id.* at 13. This ordering is based on an analysis of cases filed from 1988-1990. *See id.*

136. *Id.*

137. *Id.* at 14.

138. *Id.* at 15. "Life expectancy is a familiar way of answering the question 'how long is a newborn likely to live.'" *Id.* at 14.

139. *Cf. id.* at 14. "[D]ata for a single year or two may not . . . provide a reliable predictor of the time that will be required for new cases to move from filing to termination." *Id.*

140. 370 U.S. 626 (1962).

141. *Id.* at 630-31; *see also* *Brockton Sav. Bank v. Pete, Marwick, Mitchell & Co.*, 771 F.2d 5, 11 (1st Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) (concerning the idea that district courts exercise procedural authority outside the explicit language of the rules of civil procedure).

142. D.M. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT COURT JUDGES 7 (Federal Judicial Center, 1986).

courts' authority to conduct mandatory ADR processes have found that the courts do have authority to implement such procedures.¹⁴³

Defenders of mandatory ADR find authorization for its use in Rule 16 of the Federal Rules of Civil Procedure and in the nebulous doctrine of inherent judicial power.¹⁴⁴ However, in *Strandell v. Jackson County*,¹⁴⁵ the Seventh Circuit Court of Appeals rejected this argument, stating that a district court may not "impose settlement on unwilling litigants" although the courts may encourage settlement talks.¹⁴⁶ District courts in at least three circuits have expressly rejected *Strandell*.¹⁴⁷

The Judicial Improvements Act of 1990 does not indicate whether mandatory ADR procedures may be used by the district courts which will participate in the "demonstration district" program. The legislative history of the Act, however, suggests that Congress intended to vest the district courts with authority to implement mandatory programs.¹⁴⁸ The Act does specifically authorize the courts to require attendance of the parties at each pretrial conference and to require representatives with authority to bind the parties to be present at settlement discussions, at least by phone.¹⁴⁹

The Act does not expressly authorize the imposition of sanctions or the assessment of fees, but the Order of the Western District of Missouri provides for both.¹⁵⁰ While Congress remains silent on the issue, several circuit courts have held that sanctions may be imposed for failure to cooperate in pretrial proceedings.¹⁵¹ Overall, it appears that the Western District of Missouri Program will survive an authorization challenge.

D. Is the Program Constitutionally Sound?

The seventh amendment provides the basis for most constitutional challenges to ADR programs.¹⁵² The question presented under seventh amendment jurisprudence is whether the use of compulsory ADR in the pre-trial process

143. See, e.g., *Carey-Canada*, 123 F.R.D. at 606; *McKay v. Ashland Oil Co.*, 120 F.R.D. 43, 48-49 (E.D. Ky. 1988) (emphasizing that local rule authorizing ADR makes the court's authority particularly clear); *Arabian Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

144. See *Carey-Canada*, 123 F.R.D. at 606; *McKay*, 120 F.R.D. at 48-49; *Arabian Oil Co.*, 119 F.R.D. at 449.

145. 838 F.2d 884 (7th Cir. 1988).

146. *Id.* at 887.

147. See *Carey-Canada*, 123 F.R.D. at 606; *McKay*, 120 F.R.D. at 48-49; *Arabian Oil Co.*, 119 F.R.D. at 449.

148. See S. REP. NO. 101-416, *supra* note 2, at 6832 (noting that "[c]lients are required to attend" summary jury trials and that "[i]n some state jurisdictions, parties are required to attempt mediation before they can proceed to trial").

149. Judicial Improvements Act of 1990, § 130, 104 Stat. at 5092-93.

150. EAP Order, *supra* note 7, at 11 & 14.

151. See, e.g., *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990); *G. Heilman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 656 (7th Cir. 1989).

152. Kaufman, *supra* note 110, at 27.

violates the seventh amendment right to a jury trial.¹⁵³ However, all ADR programs, while diverting cases through ADR, do provide the litigants with a right to jury trial at some stage in the proceedings.¹⁵⁴ More narrowly framed, the seventh amendment question is: at what stage in a case must a jury trial be granted if requested by the parties? The seventh amendment does not indicate at which stage of a case a jury trial must be held when demanded.¹⁵⁵ It is clear, at least, that the amendment does not require that a jury trial be held in the earliest stages of a case.¹⁵⁶

*Capital Traction Co. v. Hof*¹⁵⁷ is the leading case on the permissibility of diversion through alternate systems. In *Capital Traction*, the Supreme Court considered whether the requirement that a party try a case before a justice of the peace impermissibly interfered with the seventh amendment right to a jury trial.¹⁵⁸ The Supreme Court held that Congress had "considerable discretion" to require a preliminary step "within reasonable bounds" so long as the right to trial by jury was not "unreasonably obstructed."¹⁵⁹

Generally, courts find that pretrial compulsory ADR processes do not unreasonably obstruct the right to a jury trial.¹⁶⁰ For example, in *Rhea v. Massey-Ferguson*,¹⁶¹ the Sixth Circuit Court of Appeals found that local-rule compulsory mediation did not violate the seventh amendment right to jury trial where the local rule provided the parties with resort to a trial de novo.¹⁶² The court held that the seventh amendment right to jury trial "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details."¹⁶³ The court based its decision in part on previous federal cases upholding mandatory arbitration procedures.¹⁶⁴

The Judicial Improvement Act of 1990 affords no insight into whether mandatory ADR in the federal courts will fail the *Capital Traction* test. Unlike the 1988 Arbitration Act, the Judicial Improvements Act of 1990 does not establish an across-the-board prohibition on fees or set a time limit for the

153. The seventh amendment provides, in pertinent part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

154. Kaufman, *supra* note 110, at 27.

155. *Id.* at 26.

156. *Id.*

157. 174 U.S. 1 (1899).

158. *Id.* at 22. The parties retained the right to a trial de novo in front of a jury and the process also required the party seeking review to post an appeals bond. *Id.* at 23.

159. *Id.* at 44-45.

160. *Cf. Strandell*, 838 F.2d at 886-88.

161. 767 F.2d 266 (6th Cir. 1985).

162. *Id.* at 269.

163. *Id.* at 268 (quoting *Galloway v. United States*, 319 U.S. 372, 392 (1943)).

164. *Id.*; see *Davison v. Sinai Hosp.*, 462 F. Supp. 778, 780 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980). Note that *Davison*, unlike *Rhea*, involved a state statute that declined jurisdiction for certain cases if they were not first arbitrated. *Id.* at 779.

institution of pre-trial ADR.¹⁶⁵ Future litigants in the Western District of Missouri will have to rely on a violation of the *Capital Traction* "reasonableness" requirement in challenging the constitutionality of ADR on seventh amendment grounds.¹⁶⁶ Thus far, no federal program has failed the test.¹⁶⁷ In practice, for a program to fail, it must either provide a significant financial barrier to the parties or a delay in adjudication long enough to be viewed by a court as unreasonable.¹⁶⁸ Of course, as programs expand in scope, delay in the programs may increase and with the increased delay, programs may fail the *Capital Traction* test.¹⁶⁹

The Western District of Missouri Program will probably survive a *Capital Traction* challenge. The Program requires that pretrial ADR procedures be conducted within 120 days of case filing.¹⁷⁰ The additional expense of the Program to the litigants is limited to increased attorneys' fees¹⁷¹ for the ADR procedure and the neutral's fee.¹⁷² In light of the court's purpose to reduce cost and delay, these additional burdens on the parties will probably be deemed reasonable by a reviewing court.

The right of access to the federal courts is an issue which is related to, but distinct from, seventh amendment jurisprudence. Professor Lawrence Tribe believes that there is a fundamental right of access to the courts which is based in the equal protection clause of the fifth amendment and the due process clause of the fourteenth amendment.¹⁷³ If access to the courts is a fundamental right, it will trigger strict scrutiny.¹⁷⁴ However, the Supreme Court has been willing to find that access to the courts is a fundamental right only when the underlying action itself involves a fundamental right.¹⁷⁵

165. See 28 U.S.C. § 653(b).

166. *Capital Traction*, 174 U.S. at 45.

167. At least one state court program has stated that an ADR program violated the right to jury trial in practice. See *Mattos v. Thompson*, 491 Pa. 385, 396, 421 A.2d 190, 195 (1980) (in practice compulsory arbitration forced great delays-over four years-thus making the state right to jury trial practically unavailable).

168. See *id.* at 396, 421 A.2d at 195.

169. Coulson, *The Coming Evolution in Court Administered Arbitration*, 69 JUDICATURE 276, 276-77 (1986).

170. EAP Order, *supra* note 7, at 2-3.

171. See generally *id.*

172. *Id.* at 13-14.

173. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1462-63 (2d ed. 1988).

174. *Id.* A fundamental right is a right which is "explicitly or implicitly guaranteed in the Constitution." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972). Under strict scrutiny, the government has the burden of showing that a challenged program is narrowly tailored to meet its objectives. *Id.* at 16-17.

175. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (fundamental right to marry). If a right is not deemed fundamental a program need only be rationally related to a legitimate state purpose to be upheld. *San Antonio*, 411 U.S. at 17; *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973) (per curium); *United States v. Kras*, 409 U.S. 434, 449-50 (1973).

The Western District of Missouri Program will almost assuredly pass a rational basis test if reviewing court looks at whether the requirement of ADR is rationally related to reducing cost and delay in civil litigation.¹⁷⁶ If the underlying cause of action presents a fundamental right, it is less clear whether a court will find that the Program is sufficiently "narrowly tailored" to meet the objective of reduced cost and delay. However, if a court takes into account the need for experimentation with ADR in the federal courts, as well as the objective of the experiment, the Program would probably pass a strict scrutiny test.

A fifth amendment/fourteenth amendment due process/equal protection attack on the constitutionality of ADR focuses on the inequality in access to the courts between those districts which have ADR and those which do not. A majority of courts considering this issue have held that mandatory ADR does not violate the due process clause. In *Kimbrough v. Holiday Inn*,¹⁷⁷ the Eastern District of Pennsylvania held that the court's compulsory arbitration program did not violate due process.¹⁷⁸ In *Kimbrough*, plaintiffs claimed that the arbitration provision violated equal protection in three ways: first, litigants in the Eastern District of Pennsylvania were treated differently from litigants in other courts; second, plaintiffs and defendants were treated differently on request for a trial de novo; and third, parties with claims which totalled over \$50,000 were treated differently from parties with claims which totalled under \$50,000 (the program only provided for mandatory arbitration of claims totalling under \$50,000).¹⁷⁹ Because the court analyzed the case under seventh amendment jurisprudence, the court used a rational basis test in examining the classifications.¹⁸⁰

The court upheld the mandatory arbitration provision finding that the compulsory requirement of arbitration was rationally related to the governmental goal of conserving judicial resources and was not an undue burden on the parties.¹⁸¹

However, equal protection and due process challenges have yet to be resolved and remain a possible and viable challenge to the Western District of Missouri's program. The variable treatment of litigants within the district seems to provide an equal protection challenge to some litigants. The courts will likely weight

176. In applying the traditional rational basis test the Supreme Court has usually upheld classifications based upon "a state of facts that can be construed to constitute a distinction or difference in state policy." *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959).

177. 478 F. Supp. 566 (E.D. Pa. 1979).

178. *Kimbrough*, 478 F. Supp. at 574.

179. *Id.*

180. *Id.*

181. *Id.* at 577. The use of court-annexed arbitration has also passed constitutional challenges in the state courts. *See, e.g., Firelock Inc. v. Dist. Ct.*, 776 P.2d 1090 (Colo. 1989) (mandatory arbitration provision did not violate equal protection clause of the Fourteenth Amendment). *But see Grace v. Howlett*, 51 Ill. 2d 478, 491, 283 N.E. 474, 481 (1972) (striking down a statute requiring arbitration for some automobile accident cases); *Grayley v. Satayatham*, 343 N.E.2d 832, 836 (Ohio Ct. App. 1976) (finding that a distinction between medical malpractice tort claimants, who were required to pursue ADR, and other tort claimants, who were not, violated the fourteenth amendment).

heavily the importance of the experiment for gathering data and will allow the Program to proceed as designed.

E. Will the Program Further Public Policy Objectives?

The policy objectives behind promoting ADR as a pre-trial settlement tool find solace in the assumption that ADR is useful in reducing cost and delay. This section examines whether the results of ADR will be "just" in a broad sense of that word.

Removing a significant number of cases from publication presents two issues which should be considered in determining whether ADR is meeting policy concerns. The first is whether ADR runs afoul of the first amendment when it excludes the press from its proceedings. The right of the press to access ADR proceedings is best argued in regard to cases which are assigned to arbitration, summary jury trial or mini-trial.¹⁸² These processes are most like a trial, which the press has traditionally been able to access, and least like settlement conferences, which the press has traditionally not been able to access.¹⁸³

*Cincinnati Gas and Electric v. General Electric Co.*¹⁸⁴ is the leading case concerning public access to ADR proceedings. In *Cincinnati Gas and Electric*, the Sixth Circuit Court of Appeals considered whether first amendment rights mandate press access to summary jury trials.¹⁸⁵ The court relied on the two prong test found in *Press Enterprise Co. v. Superior Court*¹⁸⁶ to hold that no such first amendment right exists.¹⁸⁷ The *Cincinnati Gas* court first considered whether the proceeding was one for which there has been a "tradition of accessibility."¹⁸⁸ Next, the court considered whether public access to the proceedings played a "significant positive role in the functioning of the particular process in question."¹⁸⁹

Using the two part test, the Sixth Circuit Court of Appeals found that there was no tradition of access in summary jury trial proceedings because: (1) the "tradition" is a process less than a decade old;¹⁹⁰ (2) the court found that access to the press played no significant positive role in the functioning of ADR; (3) ADR serves a substantial government interest in relieving the case burden of the

182. Kaufman, *supra* note 110, at 36.

183. *Id.*

184. 854 F.2d 900 (6th Cir. 1988), *cert. denied sub. nom.*, *Cincinnati Post v. General Elec. Co.*, 489 U.S. 1033 (1989).

185. *Id.* at 900.

186. 478 U.S. 1, 8 (1985).

187. *Cincinnati Gas*, 854 F.2d at 903.

188. *Id.*; see *Press Enterprise Co.*, 478 U.S. at 8 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982)).

189. *Cincinnati Gas*, 854 F.2d at 903; see *Press Enterprise Co.*, 478 U.S. at 8 (citing *Globe Newspaper*, 457 U.S. at 606).

190. *Cincinnati Gas*, 854 F.2d at 903.

federal courts; and (4) allowing access to the press would frustrate the utility of ADR as a settlement device.¹⁹¹

Notwithstanding the question of whether a first amendment right attaches to access of the press to settlement proceedings, a second question remains: should the results of court mandated settlement or pretrial procedures be available to the public as a practical matter? If the Western District of Missouri Program is successful in removing many cases from litigation and resulting in more settlements, it does run the risk of appearing unduly inaccessible to the public. Unlike the 1988 Arbitration Act, the Order of the Western District of Missouri does not exempt constitutional or statutory civil rights claims from ADR processes.¹⁹² As a result, these disputes will be removed from public scrutiny, should they settle before trial.¹⁹³

Part of the impetus of civil rights plaintiffs for bringing suit is to expose to society unfair or discriminatory practices.¹⁹⁴ While ADR vindicates the personal right asserted, it keeps the case from the public eye and thus frustrates one of the plaintiff's purposes behind bringing the case.¹⁹⁵ For example, if a plaintiff receives a satisfactory ruling in arbitration or in a summary jury trial, or in any other ADR forum in which a decision, not just guidance, is given by a neutral, there will be less incentive for that plaintiff to pursue a trial de novo. To do so would be to run the risk of an adverse ruling. Therefore the winning result for the plaintiff may be less than a total victory.

Meanwhile, the losing defendant is unlikely to pursue a trial de novo, for even if he were to win at trial, he would run the risk of notoriety, at least until the case came to resolution. Through ADR, the defendant thus avoids the gaze of the public eye. This could be more of a financial benefit to him than actually winning a civil rights claim in court.¹⁹⁶

Perhaps the most disturbing aspect of ADR in civil rights cases is the limitations placed on the neutral party who fashions the remedy. In civil rights cases, broad injunctive relief may be sought. The neutral party in an ADR proceeding will most likely be reticent or unable to order such relief. Even if the neutral could offer such relief, he will likely feel more bound by precedent in applying that relief than would a court.

The use of "hidden arbitrators" deciding private judgments concerning minority needs runs the risk of disservice, both to the society as a whole—which has a compelling interest in knowing of the treatment of its dispossessed—and to the individual litigant who should be entitled to consideration of her case in a

191. *Id.* at 904.

192. See EAP Order, *supra* note 7, at 1.

193. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 360 (1990). Of course this will only become an issue in cases that would not have settled before trial but for participating in mandatory ADR.

194. See *id.* at 360.

195. Again, this assumes a "but for" relationship regarding settlement and ADR.

196. Yamamoto, *supra* note 193, at 360-61.

forum which is accountable, both to itself and its precedents, and capable of applying legal principals to reflect legal and social concerns.¹⁹⁷

While ADR may be conducive to a speedy resolution of civil rights and constitutional law disputes, it has not yet shown that it can procedurally produce a just result. The focus on satisfying the needs of an individual at the expense of vindicating rights within the view of society serves to reinforce, and possibly accentuate, existing power imbalances.¹⁹⁸ As the defendant's cost of litigation decreases, including negative publicity as a cost to the defendant, the civil rights defendant is put in a better position with respect to the civil rights plaintiff.¹⁹⁹ Moreover, if claims of civil rights violations impose a lower economic cost to the defendant, there is a danger that he and others like him will not conform as readily to the standard of behavior society has previously found to be proper.

Of course, the fairness argument applies to the ADR process in general. Some commentators argue that settlement negotiations leads to more just results which are available to the parties earlier and at less cost.²⁰⁰ Others contend that settlement can exacerbate existing inequities.²⁰¹

The argument in favor of ADR suggests that a reduction in delay may accrue to the benefit of the weaker party. The weaker party may be coerced into settlement by delay.²⁰² To the extent that ADR eliminates delay-coerced settlements, it serves to eliminate inequality.²⁰³ Judicially sanctioned intervention in the settlement process may serve to eliminate coercion in another way as well: where settlement is conducted in the presence of a neutral party, it is less likely that the stronger party will prevail through sheer coercion.²⁰⁴ Additionally, if we can assume that ADR provides the parties with better information concerning a decision to settle, it benefits both parties. To test the validity of this assumption we need to compare ADR awards to awards given in the same case at trial to see if the results converge. Some data indicate that convergence of results is not a common occurrence.²⁰⁵ Of course, we can only measure convergence in those cases in which a party requests a trial de novo. These are likely to be the "hard cases" in which different judges might reach different results. In these cases, perhaps a recommendation of a neutral will not really aid the parties in determining the settlement value of a case. The 1988

197. *Id.*

198. Trubek, *The Handmaiden's Revenge: On Reading and Using the New Sociology of Civil Procedure in Alternative Dispute Resolution*, 51 LAW & CONTEMP. PROBS. 111, 131 (1988).

199. See Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391-1404.

200. See, e.g., Flanders, *Case Management in the Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147, 150 (1978).

201. See, e.g., Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

202. Alschuler, *Mediation With a Mugging: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1822-24 (1986).

203. Kaufman, *supra* note 110, at 29 n.193.

204. *Id.* at 29.

205. *Id.* at n.192.

Arbitration Act avoids this problem by exempting from arbitration those cases in which questions of law predominate.²⁰⁶ The Western District of Missouri Program does not make distinctions between cases which primarily concern issues of law and cases which primarily concern questions of fact. Therefore, the Western District of Missouri Program may be of little predictive value to parties who present claims centered primarily on issues of law and may serve to exacerbate existing inequities between litigants.

V. CONCLUSION

The federal district courts have found license to practice mandatory ADR. Mandatory ADR provisions have time and again passed constitutional and authorization muster. It is time to find out if such provisions pass a practical test. It is time to find out whether ADR works or not. The only way to determine the viability of ADR in the federal system is to experiment. The federal district courts are the only laboratories which can conduct such an experiment.

The Western District of Missouri Program is well designed for workability. It is also as well-designed an experiment as can be expected in a system which must balance important rights against the need to see if ADR works. Whether the Western District's Program will indeed reduce cost and delay for litigants is impossible to say at this point. In fact, it will probably be several years before we will be able to say whether the Program has made any inroads into reducing cost and delay. However, whatever the Program tells us about the ability of ADR to reduce cost and delay, so long as the results of the Program tell us something, the experiment will have accomplished its purpose.

The Western District of Missouri Program steers a narrow course between the Scylla of increasing caseloads and the Charybdis of constitutional rights and substantive social policies. A better course would exempt civil rights and constitutional law cases from participation in the experiment, even though the experiment might not reduce as much court congestion, and even though to do so may aggravate concerns that those cases routed through ADR are receiving "second class justice." I propose this compromise because we do not yet know if ADR will reduce cost and delay and produce just results—that is what the experiment is designed to find out. In the meantime, the court should recognize a compelling interest on the part of litigants to air their civil rights and constitutional law claims, and a compelling interest on the part of the entire society to know of the resolution of these disputes. The court should not run the risk of sacrificing justice on the altar of efficiency.

APRIL A. FREDLUND

206. 28 U.S.C. § 652(c)(2).

APPENDIX²⁰⁷**Mediation**

Mediation is a process in which a neutral third party assists the parties in developing and exploring their underlying interests (in addition to their legal positions), promotes the development of options and assists the parties toward settling the case through negotiations.

The mediator is a lawyer, certified by the Court in accordance with this order, who possesses the unique skills required to facilitate the mediation process including the ability to help the parties develop alternatives, analyze issues, question perceptions, use logic, conduct private caucuses, stimulate negotiations between opposing sides and keep order.

The mediation does not normally contemplate presentations by witnesses. The mediator does not review or rule upon questions of fact or law, or render any final decision in the case.

Non-Binding Arbitration

Non-binding Arbitration is a procedure in which the parties choose a neutral person to hear their dispute and render a decision. An arbitration is typically less formal than a trial, is usually shorter, and is conducted in a neutral setting. An arbitrator may be selected by the parties on the basis of his or her expertise, or on the basis of the mutual respect of the parties for the arbitrator. The decision can become final and a judgment of the Court after 30 days unless a party does not agree to the decision. In that event, the case proceeds as scheduled to trial.

Early Neutral Evaluation (ENE)

Early neutral evaluation is a process in which parties obtain from an experienced neutral (an Evaluator) a non-binding, reasoned evaluation of their case on its merits. After essential information and position statements are exchanged, the Evaluator convenes a session which typically lasts about two hours. At the meeting, each side briefly presents the factual and legal basis of its position. The Evaluator may ask questions and help the parties identify the parties' underlying interests, the main issues in dispute as well as areas of agreement. He or she may also help the parties explore options for settlement. If settlement does not occur, the Evaluator then offers his or her opinion as to the settlement value of the case, including the likelihood of liability and the likely range of damages. With the benefit of this assessment, the parties are again encouraged to discuss settlement, with or without the Evaluator's assistance. They may also explore ways of

207. EAP Order, *supra* note 7, at 19-21 (Attachment C (notice to parties to be given when case has been selected for participation in early neutral evaluation)).

narrowing the issues, exchanging information about the case or otherwise preparing efficiently for trial.

The Evaluator has no power to impose a settlement or to dictate any agreement regarding the pretrial management of the case.

Magistrate Settlement Conference

The purpose of the settlement conference is to permit an informal discussion between the lawyers, parties and the magistrate of every aspect of the lawsuit, thus permitting the magistrate privately to express his or her views concerning the actual dollar settlement value or other reasonable disposition of this [sic] case.

The settlement conference statement (oral) of each party shall be presented to the magistrate, setting forth the positions of the parties concerning factual issues, issues of law, damage or relief requested. Pertinent evidence to be offered at trial, documents or otherwise, should be brought to the settlement conference for presentation to the magistrate if thought particularly relevant.

The magistrate may with the agreement of the parties converse with any or all sides of the dispute outside the hearing of the other.

The failure to attend a settlement conference or the refusal to cooperate fully may result in the imposition of sanctions by the magistrate. The magistrate may issue such other and additional requirements of the parties or persons having an interest in the outcome as he or she shall deem proper in order to expedite the amicable resolution of the case. The magistrate shall not discuss the merits of the case with the assigned Judge but may discuss the status of motions and other procedural matters with him or her.

Other Alternative Dispute Resolution Mechanisms

The Administrator and the parties may decide that some other form of alternative dispute resolution might be useful. Such other forms could include mini-trials, summary jury trials, binding arbitration or some other form of ADR developed by the parties in consultation with the Administrator.

