

2000

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### Recommended Citation

Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 J. Disp. Resol. (2000)

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Brazil: Brazil: Continuing the Conversation

# Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts\*

*Wayne D. Brazil\*\**

It is an honor to be asked to participate in a dialogue about ADR that Professor Frank Sander initiates. Professor Sander is, of course, the Dean in this arena--the commentator and leader with the deepest experience, the broadest vision, the richest knowledge, and the most balanced counsel. The essay with which he begins the dialogue that we continue in these pages includes an instructive and insightful overview of the current status of ADR in both the private and the public sectors. It also identifies problems that must be addressed and developments that might retard or jeopardize realization of ADR's full potential in the future.

In this essay I would like to complement the picture that Professor Sander has presented by adding information about and commentary from the perspective of the courts. After offering some general observations about the current status of ADR in the courts, I will describe what I think the near-term future looks like. Then I will articulate values that we need to take special care to preserve in court-sponsored ADR programs. I also will identify dangers that we, as courts, must try to avoid on the road ahead. Along the way, I will respond specifically to three of the concerns that Professor Sander raises: (1) the still relatively widespread lack of accurate knowledge in clients and lawyers about various aspects of ADR, (2) the absence of readily available public dispute resolution centers, and (3) the pressure from legislators and other makers of public policy to demonstrate through "adequate cost-benefit studies" that publicly supported ADR programs deliver sufficient value to justify the public funding they receive.

## I. CURRENT STATUS OF ADR IN THE COURTS: IMPRESSIONS<sup>1</sup>

Like Professor Sander, I am not sure whether the ADR glass in the courts is half-full or half-empty. The only thing I can report with complete confidence is that

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\* This essay is based in substantial part on a presentation by the author at the Connecticut Bar Foundation's Second Annual John A. Speziale Alternative Dispute Resolution Symposium, Oct. 29, 1999 (videotape on file with the Connecticut Bar Foundation).

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1. As will become clear, I know appreciably more about ADR in federal courts than in state courts--but even my knowledge about ADR programs in federal courts is far from comprehensive. So the generalizations I offer are not the product of systematic study or survey--and thus may omit or misstate significant facts, especially about ADR in state courts.

the glass is nowhere near full--even though there has been a great deal of innovation and activity in court programs over the past twenty years, especially in some state courts. Over that period, courts have expanded the kinds of cases served by ADR programs<sup>2</sup> and the kinds of ADR processes parties may use.<sup>3</sup> They have developed a wide array of systems for delivering ADR services.<sup>4</sup> They have formed partnerships in ADR activities with several different kinds of institutions.<sup>5</sup> And they have generated sometimes sophisticated practical guidelines and ethical rules for parties, their counsel, and the people who serve as neutrals.<sup>6</sup> Despite these significant achievements, my guess is that well over half of the civil cases filed in state or federal courts receive no court-sponsored ADR services at all.<sup>7</sup>

I am forced to guess about this because no one has produced a comprehensive picture or assessment of the state of ADR in the courts. Nor is it likely that such an assessment could be reliably completed at this juncture. This follows from three fundamental features of the current state of court-connected ADR: the constancy of change, the sometimes large gaps between appearances (of programs and processes) and reality, and the enormous variety and variability of ADR offerings. A few words about each of these features of the current situation are in order.

No static photograph of ADR in the courts could do the national situation justice. The only constant in this arena is change itself--which even in individual courts can be substantial, but which reaches overwhelming dimensions when we expand our vision to include all of the ADR related activity in all of the thousands of courts in this country. The target is always on the move<sup>8</sup>--as new programs are

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2. In many jurisdictions, the earliest ADR programs were limited to some kinds of family law matters and/or to disputes that would be assigned to small claims courts or to petty offense criminal dockets (neighborhood justice centers, sometimes at least loosely affiliated with local courts, provided ADR processes for addressing some of these kinds of matters).

3. State courts in Philadelphia began offering a specific type of non-binding arbitration to some classes of cases in the early 1950's. Since then, courts have sponsored a wide range of ADR processes, including various forms of mediation and early neutral evaluation, summary jury and bench trials, mini-trials, settlement weeks, and tailored special master assignments, as well as hybrid procedures.

4. See, e.g., ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR LAWYERS AND JUDGES* (1996); see also Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999).

5. Examples of the kinds of institutions with which courts have joined in providing ADR opportunities to litigants include state or local bar organizations, neighborhood justice centers, community based family counseling service centers, and the American Arbitration Association.

6. See FLA. R. CERTIFIED & CT. APPOINTED MEDIATORS 10.100-10.300; GA. R. ADR 1-8; GA. R. ADR app. A (UNIFORM RULES FOR DISPUTE RESOLUTION PROGRAMS 1-11); GA. R. ADR app. B (REQUIREMENTS FOR QUALIFICATION & TRAINING OF NEUTRALS 1-5); GA. R. ADR app. C (ETHICAL STANDARDS FOR NEUTRALS 1-5); MINN. GEN. R. PRAC. 114.01-114.14; MINN. GEN. R. PRAC. 114 app. I-VII.

7. Some modest evidence in support of this generalization is found in the study of ADR in selected federal district courts that was conducted by RAND's Institute for Civil Justice pursuant to the Civil Justice Reform Act. In most of the courts that the RAND group studied less than 15% of the civil cases were even referred to an ADR process. See JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 14-15* (1996) [hereinafter RAND].

8. One significant example of how the mobility of the target of study can frustrate even sophisticated attempts at empirical analysis can be found in RAND's effort to assess the neutral evaluation program in the Eastern District of New York. During RAND's study period the focus of the program shifted from

added, as different categories of cases are reached, as established programs are modified or turn stale, sometimes abandoned altogether, as rules and procedures are adjusted or refined, as key personnel are added or move on, or as energy, resources, interest, and commitment wax, wane, or disappear.

We also must acknowledge, as an unpleasant fact of current ADR life, that sometimes there may be sizeable gaps between court-sponsored ADR programs as they appear on paper and those same programs as they operate in the real world. I am not sure how pervasive this problem is, but I fear that it is more widespread than we have admitted in the past. This problem has two dimensions.

First, some courts have ADR programs that look substantial on paper, *e.g.*, in local rules and program descriptions, but that deliver service to appreciably fewer cases than one would expect. While there likely are many reasons for this kind of disparity, two may be most significant. One surfaces in programs that provide ADR services only when all (or at least most of) the litigants in a case take the initiative to volunteer their participation. On paper, such courts might have elaborate rules and large panels of neutrals offering an array of ADR process options, but underutilization has generally been the experience in programs that are truly voluntary<sup>9</sup>--*i.e.*, programs in which neither judges nor administrators take active steps to encourage litigants to give real consideration to the possible benefits of an ADR process.

Dependence on referral initiatives by individual judges is a second factor that can account for a substantial disparity between the apparent and actual magnitude of court ADR programs. Because there are wide ranges of attitudes toward and knowledge about ADR among district and magistrate judges, as well as wide ranges of attitudes toward the propriety of active judicial involvement in case management generally, an ADR program that depends on referrals from its judges is vulnerable to both uneven and under- utilization.

There is a second dimension of the gap between appearances and reality in court ADR programs. It consists of space between process theory and process practice, or, stated differently, space between rule-described ADR process protocols, on the one hand, and, on the other, how the neutrals actually conduct the ADR sessions. While I do not know how substantial this problem is, I know it exists. It has happened more than once in our program that a neutral we have selected has proceeded with an understanding of the basic structure of a particular ADR process (*e.g.*, a mediation, an early neutral evaluation ("ENE"), or an arbitration) that differs quite dramatically from the process our rules and teaching materials prescribe. We also know that occasionally a neutral decides not to follow a well-understood process format--perhaps because he or she believes that some ad hoc variation on the procedural theme will better respond to the specific situation the case presents. And as Professor Sander points out, even among "professional" mediators there rages a

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"later" neutral evaluation to "early" neutral evaluation--a fact so fundamental that it compelled the authors to conclude that "it is not clear how to interpret any observed effects." See RAND, *supra* note 7, at 22.

9. See, *e.g.*, RAND, *supra* note 7, at 15; see also DAVID RAUMA & CAROL KRAFKA, VOLUNTARY ARBITRATION IN EIGHT FEDERAL DISTRICT COURTS: AN EVALUATION 17 (1994) (non-binding "opt-in" arbitration programs attract appreciably fewer cases than presumptively mandatory or opt-out programs).

sometimes unflattering debate about what the “true” nature of mediation is. That debate, by itself, triggers concern that neutrals within any one court program could be using a wide and uncharted range of procedures--all in the name of “mediation.” That possibility raises serious quality control issues--some of which I address later in this essay.

The third prominent feature of the national picture that frustrates our efforts to make reliable generalizations is the staggering dimension of the variety we see in court-connected ADR programs. Viewed from one perspective, this variety reflects great richness in experimentation. It is a product, in part, of grass-roots creativity in a wide range of settings as well-intentioned people around the country have sought to develop processes and to design systems that are tailored to locally identified goals and needs--while working within locally specific boundaries fixed by resource constraints, attitude configurations, and administrative environments. The fecundity of the past twenty years has produced a host of different ideas about processes and program design--leaving us with potentially fertile fields for study and analysis.

Ironically, however, that same variety that appears to promise such analytical dividends also stands as a formidable barrier to reliable generalization. The number of variables by which different court programs can be distinguished is huge--especially when our vision reaches both state and federal courts and both the trial and the appellate levels. Some sense of this variability is suggested in the high-visibility study completed under the Civil Justice Reform Act by RAND’s Institute for Civil Justice. That study reached programs in only six (of ninety-four) federal district courts. Nonetheless, the authors found that the “six study programs var[ied] greatly in the types of cases eligible for referral, the point and timing in the litigation of the referral and the ADR session, the length and timing of the sessions, the type of provider and cost to the parties, and the purpose of the program.”<sup>10</sup> And these were all federal trial courts--courts of limited and fundamentally similar jurisdiction. The range of variability increases dramatically in state courts--which have broader jurisdictional reach and much more complex internal subject matter divisions.

Over the years, state courts have offered ADR services to disputes involving family law, probate, misdemeanor and petty offense criminal charges, general business cases, civil rights and employment cases, and unusually complex civil litigation. Few such programs are identical from court to court, or even between divisions of the same court. And among the many variables that differentiate the many different court ADR programs, one of the most important is the character or nature of the specific ADR processes themselves. Those processes range from purely facilitative, client-oriented mediation through virtually trial like arbitrations--proceedings that are exclusively evaluative.

One arena of variability in court ADR programs that has not yet been the subject of extensive description is in the federal courts of appeals.<sup>11</sup> While I am not aware of ADR making inroads at the Supreme Court, there has been a great deal of ADR

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10. RAND, *supra* note 7, at 18, 29-30.

11. I focus here on federal courts of appeals because I have more information about them--but it is important to acknowledge that there also are state courts of appeals that have experimented with or implemented ADR programs.

activity at the circuit court level. The Court of Appeals for the Second Circuit launched the first such program in the late 1970's. Then in the early 1980's the Sixth Circuit followed suit. Later that decade a program began in the Ninth Circuit. By the late 1990's, there was a program directed toward facilitating settlement in every circuit court of appeals save the Federal Circuit.

The reach and character of these programs varies considerably, however, among the circuits. Some programs are very small--served by a sole staff attorney, reaching only a small percentage of the civil cases on the appellate court's docket. Other programs are appreciably more ambitious, employing up to eight full-time staff neutrals and reaching well over a thousand cases a year (in the Ninth Circuit).<sup>12</sup> In most of the programs the services of the neutral are provided by professionals who are full time employees of the court--but that is not the only model used. In the Court of Appeals for the District of Columbia, for example, some of the mediation services are provided by staff professionals, but in most cases the mediators are private lawyers who have been selected and trained by the court. Each such lawyer-neutral serves in only a few cases a year, largely on a pro bono basis, while maintaining a full-time law practice.

The roles the neutrals play, and the kinds of processes they host, also can vary significantly among the ADR programs in the federal courts of appeals. While all such programs are directed to promoting settlement, there are considerable differences in the way that objective is pursued. In some, the ADR event is essentially a settlement conference. In others, the event resembles much more closely a classic mediation. In some measure, such differences may reflect differences in local legal culture. It appears, for example, that parties are much more likely to encounter a neutral who is analytically and perhaps even psychologically aggressive in the Second Circuit's program than in the program in the Sixth Circuit, where mediators are encouraged to follow a less interventionist, more purely facilitative model.<sup>13</sup>

What all this means, of course, is that the likelihood that a given set of litigants will receive ADR services while their case is on appeal in the federal court system varies dramatically from court to court--as does the kind of service they are offered and the kind of person who will serve as their neutral.

Given how ADR programs have evolved, differences like these between courts are at least in some measure understandable. Much less understandable are differences within the same court. To explain this problem, we shift focus back to the trial courts. Unhappily, there seem to be a fair number of federal district courts where the question of whether parties in an individual case will receive any ADR service at all depends in substantial measure on which judge the case was assigned to at the time of filing. This is especially likely to be true when referral to ADR

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12. I am informed by staff at the Ninth Circuit that in that court's mediation program staff attorneys identify about 1400 cases annually to which ADR services will be offered. This represents between 50% and 60% of the civil cases that would be deemed "eligible" for ADR by application of objective criteria. ADR services are generally not offered to appeals of criminal cases and to some other categories of cases which, measured in raw numbers, make up significant percentages of the court's docket, e.g., habeas petitions.

13. These generalizations are based on impressions from knowledgeable neutrals but, I am sure, are subject to a goodly number of exceptions.

depends on the assigned judge taking the initiative to raise the question or to encourage the lawyers and parties to take seriously the possibility that ADR might benefit them. The level of knowledge about, interest in, and attitude toward ADR varies substantially among federal district judges--sometimes even within the same court. Because of that fact, the incidence of case referrals to ADR in a court that leaves referral decisions to individual judges can vary substantially from judge to judge.

There are two additional variables in court ADR programs that warrant specific discussion here. One is the cost to the litigants of ADR services. The other is levels of funding for ADR programs. How much it costs the parties to participate in an ADR program or to receive ADR services can vary dramatically from court to court. In some programs, the neutrals are not paid at all, or are paid (almost always at below market rates) by the court. In such programs, the "neutraling" itself costs the litigants nothing. And some courts take steps to try to limit the length of ADR events, and/or to limit the number of such events the court will urge or require the parties to attend. In these courts, there also are real limits on the transaction costs of participating in ADR (costs which include the fees parties must pay their own lawyers for preparing and participating, any fees they must pay experts, and the indirect costs imposed by being away from the productive work they otherwise would be doing).

On the other end of the spectrum, there are courts that do nothing to contain the cost of participation in ADR. They permit neutrals to charge whatever the market will bear.<sup>14</sup> They impose no limits (at least by rule) on the number of hours the ADR sessions can continue, or on the number of sessions the neutrals might press the parties to attend. Nor do they take active steps to assure that an economically more powerful party will not use the cost of the ADR proceedings to gain leverage on an economically vulnerable party.

There is some reason to hope that over time there will be fewer and fewer courts who are so passive about these matters. The Judicial Conference of the United States, for example, is trying to encourage district courts to be more sensitive to issues related to the expense to parties of participating in ADR. At its meeting in September of 1999 the Conference adopted a policy that directs each district court to establish "a local rule or policy regarding the compensation, if any, of neutrals" serving in programs under the ADR Act of 1998.<sup>15</sup>

In addition, the Conference adopted two "discretionary principles" that are intended to offer guidance to district courts as they formulate local rules in this arena. Under the first of these principles, courts "should make explicit the rate of and limitations upon compensation" when their ADR program provides that the neutrals can be paid.<sup>16</sup> Commentary to this "principle" urges district courts to take

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14. As I discuss later in this essay, the notion of "market" here is at least a little misleading--in part because of the potential distortion of the bargaining process that can result from a party trying to "negotiate" a fair rate with a person whom that party knows (while negotiating) could be in a position down the road to influence a great deal how the case might be resolved--and thus could be in a position to help or hurt the party's important underlying interests.

15. COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 53 (1999).

16. *Id.*

care to “minimize undue burden and expense [for the parties] for ADR.”<sup>17</sup>

The second non-binding principle that the Conference adopted actually has two separate components. The first urges courts that permit neutrals to be compensated to “require both the neutrals and the parties to disclose all fee and expense requirements and limitations . . . .”<sup>18</sup> In its second component, this principle announces that participants who are “unable to afford the cost of ADR should be excused from paying.”<sup>19</sup>

How quickly district courts will follow these leads remains to be seen. For reasons I describe later in this essay, however, it would be a mistake simply to assume that policy pronouncements in this arena will lead promptly to widespread action in the district courts.

The one other factor that must be mentioned in any account of the range of variability in court-sponsored ADR programs is funding. There are huge discrepancies between courts and court systems in levels of funding provided to support ADR programs. This fact is well illustrated in the federal trial courts. During the early and mid-1990’s some federal district courts received modest levels of funding for staff positions to support ADR programs as a result of the Civil Justice Reform Act (“CJRA”).<sup>20</sup> The levels of funding provided, however, were very uneven--in part because the Act called for only a limited number of “pilot” and “demonstration” districts and in part because how much money individual courts received depended heavily on the level of initiative and commitment in each court--and these varied widely from district to district. A good many courts implemented no ADR activity under the CJRA--and thus got no money for its support.

Graphic evidence of the ambivalence within the federal judicial family toward ADR programs--and of the fragility of funding for them--surfaced in the spring of 1998. The CJRA had run its statutorily pre-set course,<sup>21</sup> and the Judicial Conference had to decide what to do about funding for the staff positions that had serviced ADR programs during the Act’s tenure. The recommendation that initially emerged from the Conference’s Committee on Court Administration and Case Management was that all centralized funding for such positions be terminated. That would have meant that any district court that wanted to commit staff time to support any ADR program would have had to ‘steal’ the staff time from some other, traditional court staff position.

Fortunately, the Committee on Court Administration changed its mind just before the Conference was asked to vote on the matter. So instead of terminating centralized support, the Conference directed its committees to assess the relative vitality of ADR programs in the district courts and then to establish formulae for centralized staff funding that would yield positions to individual districts in proportion to that relative vitality. Responding to that directive, the Administrative Office of the United States Courts sent a questionnaire and a request for ADR self-certification to all ninety-four district courts. Despite the fact that it was clear that

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17. *Id.* at 54.

18. *Id.*

19. *Id.*

20. Some funding also was provided for training and logistical support.

21. See 28 U.S.C. § 482(b)(2) (1994) (declaring that the requirements imposed by the Civil Justice Reform Act would expire seven years after the date of enactment, which was December 1, 1990).



the only way any federal trial court could receive any funding for any ADR staff was by answering the questionnaire and providing the self-certification, thirty-one of the ninety-four district courts did not even bother to respond. An additional twenty-one district courts responded either by reporting that they had no ADR program at all or that the program they had did not satisfy the criteria for effectiveness that the Conference had approved.<sup>22</sup> Thus, fewer than half of the ninety-four federal trial courts even tried to qualify for staff funding for ADR.

Of the forty-two courts that qualified for some funding, only six were deemed to have “robust” ADR programs--measured, essentially, by how much clerk’s office staff time the court already committed to ADR and how many cases the program serviced annually. In 1999, two additional courts were added, as a result of petitions they submitted, to the robust category. So today thirty-four district courts are deemed, for these funding purposes, to have “basic” ADR programs--which appears to mean that they receive, on average, about one clerk’s office position per court. The eight courts whose programs are deemed “robust” receive funding for a number of positions that ranges from two to five.<sup>23</sup> But under the current system,<sup>24</sup> fifty-two federal district courts (fifty-five percent of all such courts) receive no centralized funding at all for staff to support any ADR activity.

All of this variability in ADR programs raises many policy concerns--but among these one of the most troublesome is about fairness in access to ADR. As things stand now, the courts offer nothing approaching equal access to ADR services. Litigants in some categories of cases filed in some courts are provided an array of ADR services at little or no cost, while similarly situated litigants in other courts receive nothing in this arena. Fortuity, or, from a litigant’s perspective, arbitrariness, play far too large a role in determining whether individual parties are afforded, through ADR, special opportunities to save money and time and to participate more actively and constructively in the proceedings through which their problems are addressed. The judicial system’s capacity to generate respect will be compromised as long as the quality and value (to the litigants) of the service that parties receive turns so much on which court their case ends up in. And unless the courts themselves take the initiative to at least reduce in some measure the great disparities

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22. Significantly, the criteria for “effectiveness” that the Conference had adopted for this survey did not include any assessment of the effects of the district court’s ADR program on docket backlog or on incidence or timing of settlement. Instead, the Conference chose, at this juncture at least, to use process-values to measure effectiveness: (1) had the district court, in consultation with the bar, identified the goals of its ADR program and then used the local rules process to set up the program, (2) did the court provide administration of the program through a judge or administrator trained in ADR, (3) had the court established a roster of neutrals and specified training and experience requirements, (4) had the court adopted ethical principles for its neutrals and rules governing confidentiality of ADR proceedings, (5) had the court set up procedures to receive complaints about its ADR processes and to enforce its ADR rules, and (6) had the court attempted to evaluate the success of its ADR program--in terms of whether it was achieving the goals the court had set for it.

23. The formula under which positions are allocated sometimes yields fractions of positions--e.g., 2.5 or 5.3.

24. The Administrative Office is developing a comprehensive new staffing formula for all district court staffing needs this year. While ADR positions are included, it is likely that they will continue to be allocated on the basis of factors similar to those used in 1998--some combination of hours of clerk’s office staff time devoted to ADR programs and number of cases served. I discuss some of the potential dangers of using these kinds of formulae in a subsequent section of this essay.

in services offered, there is a risk that the legislative branches will impose an artificial and counterproductive uniformity on court ADR programs--ignoring important differences in types of cases served,<sup>25</sup> as well as differences between courts in administrative and cultural context.

Fortunately, Congress recently decided to move in a much healthier, more realistic direction. Declining to adopt earlier proposals that would have imposed arbitration programs on all federal district courts, Congress chose a much more flexible approach when it enacted the ADR Act of 1998. That statute is of considerable philosophic importance--as it, for the first time, makes ADR an integral part of the national policy of judicial administration. The statute requires every district court to "devise and implement" an ADR program which compels all civil litigants to consider the use of ADR and provides them with at least one ADR process, but each court is permitted to choose which processes it will offer and which categories of cases will be exempt from its ADR program. For a host of reasons, however, it would be unrealistic to expect this statute to cause a prompt transformation of the ADR landscape in federal district courts--or to cure, even gradually, the problems attributable to the fact that there is so much variability in court-sponsored ADR programs.

The first reason for tempered expectations is the content and language of the Act itself. In part as a matter of political necessity,<sup>26</sup> and in part because the sponsors of the legislation recognized that it is inappropriate to impose one process on all courts and cases, the Act confers on each district court considerable discretion in fixing the content and scope of its ADR program. As noted, each court may decide for itself (after consultation with the bar and the local U.S. Attorney) which ADR process or processes it wants to offer, which kinds of cases will be served, whether to make participation for some or all cases voluntary or mandatory,<sup>27</sup> how and when to make referrals to the ADR program, at which juncture in the pretrial period the ADR event or events will occur, who the neutrals will be, what fees, if any, to impose on the parties, as well as many lesser matters.

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25. It is not likely, for example, that the same ADR program would be appropriate for child custody disputes and securities class actions.

26. Securing support for the legislation (or at least non-opposition) from the Judicial Conference of the United States, for example, was quite a delicate undertaking. For years there have been deep divisions of opinion within the Conference, and among federal judges generally, about ADR. The Conference had declined to support, or had openly opposed, earlier legislative initiatives in this arena, especially those that sought to impose compulsory arbitration programs. And while there seems to be some movement within the federal judicial family toward greater acceptance of ADR, there remains considerable diversity of view on this topic. So the task of crafting legislation that would not provoke opposition from the Judicial Conference was complex and demanding. Sponsors of the legislation and representatives of the Justice Department had to work closely with members of the Conference's Committee on Court Administration and Case Management to fashion a statutory scheme that a majority of the members of the Judicial Conference would feel the district courts could live with. In the end, the one feature of the Act that proved most critical in this political process was flexibility. As pointed out in the text, the Act gives individual district courts considerable discretion in fashioning local programs that will comply with the statute's mandates.

27. Under the Act, courts are empowered to compel participation only in ENE or mediation--except that the 10 courts with grand-fathered mandatory arbitration programs may continue to require a limited universe of cases (essentially, contract and personal injury matters with a real value of no more than \$150,000) to participate in non-binding arbitration. 28 U.S.C. §§ 652(a), 654 (Supp. IV 1998).

The Act also gives courts apparently limitless discretion about when to comply: it sets no deadlines for courts to adopt the measures it prescribes, imposes no reporting requirements, establishes no mechanism for enforcing its terms, and imposes no sanctions for courts who ignore its mandates.

Nor does the statute compensate for the absence of any such "sticks" by including any "carrots": while authorizing Congress to provide the funding that would be necessary to implement its terms, the Act itself provides no money. And Congress has not chosen to provide money through any other measure. So neither the Act nor any parallel budgetary measure has done anything to alleviate the serious resource constraints on ADR programs or to address the considerable disparities in funding for staff positions that preceded its adoption. So those constraints and disparities are very likely to continue, at least in the foreseeable future. In other words, lack of money will continue to retard the implementation of new ADR programs in federal courts and will continue to act as a barrier to efforts to equalize ADR opportunities across court lines.

The other major barrier to implementation of the Act is attitudinal. As I have described elsewhere,<sup>28</sup> there are deep divisions of opinion within the federal judiciary about whether ADR belongs in the courts at all. Some judges are openly hostile to ADR in concept and practice. Many more are ambivalent. And many feel that their courts already are overwhelmed with traditional duties that their current resources enable them just barely to perform. So they greet with dismay a directive by Congress to add more programs and services--especially when that directive is accompanied by no funds.

Given these realities, it is hardly surprising that the Act has produced no rush to "reform." It also is not surprising that at least some courts seem inclined to look to ambiguities in the Act's language to justify concluding that "compliance" really requires them to do very little. Two examples will make the point.

While the Act requires each district court to "provide litigants in all civil cases with at least one alternative dispute resolution process," the statute does not say what the term "provide" means or requires.<sup>29</sup> Thus, some courts seem to feel that they can comply with the Act's mandate that each court "devise and implement its own alternative dispute resolution program"<sup>30</sup> by doing little more than compiling a list of ADR neutrals or provider organizations that meet certain minimal requirements and then informing litigants (passively, by publication) that they are free to make arrangements for ADR services, if they choose, with any of the listed persons or entities. While such a response would evade the spirit of the Act entirely, and would not comply with several of its specific mandates,<sup>31</sup> there is reason to fear that some courts will be tempted to follow this course.

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28. Wayne D. Brazil, *ADR and the Courts, Now and in the Future*, 17 ALTERNATIVES TO HIGH COST LITIG. 85, 101 (1999).

29. 28 U.S.C. § 652(a) (Supp. IV 1998).

30. *Id.* § 651(b).

31. The Act requires each district court to establish training and qualification standards for neutrals, to adopt rules regulating compensation for and disqualification of neutrals, to establish rules relating to the confidentiality of ADR proceedings, and to designate a judicial officer or court employee to be responsible for overseeing, administering, and evaluating the ADR program. 28 U.S.C. §§ 653, 658, 653(b), 652(d), 651(d) (Supp. IV 1998).

Another course to which some courts seem drawn misses the legislation's point even farther. Under this course, a district court's ADR "program" would consist of nothing more than announcing (by local rule) to civil litigants that its magistrate judges are available, upon jointly made request, to host settlement conferences. While such settlement conferences are an important part of the services district courts offer, it cannot be persuasively argued that a "program" that is so limited would comply with the ADR Act.<sup>32</sup> The statute specifically identifies the purpose that must be served by the ADR program that each district court is required to "devise and implement"--and that purpose is "to encourage and promote the use of alternative dispute resolution in its district."<sup>33</sup> As Congress well knew before it enacted this legislation, settlement conferences hosted by magistrate judges have been a well-established part of the system of judicial administration for about twenty-five years. Because such conferences were common before the Act, there would have been no need for the legislation at all if its objectives could be met simply by announcing that such conferences were (still) available. Obviously, the Congress that decided that this legislation was needed did not believe that the availability of judicially hosted settlement conferences constituted an ADR "program" that was designed "to encourage and promote the use of alternative dispute resolution in its district."<sup>34</sup>

It also is significant that the Act nowhere even intimates that judicially hosted "settlement conferences" might serve as an "alternative dispute resolution process" for purposes of complying with the statute.<sup>35</sup> The argument that such conferences might suffice rests on the broad definition of "alternative dispute resolution" in 28 U.S.C. § 651. Under that definition, "an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy . . . ."<sup>36</sup> Taken out of context, these words would cover a judicially hosted settlement conference.

But the words cannot be taken out of context. Context is critical to meaning. And one important element of context here consists of the words that complete the definition sentence. After the phrase "resolution of issues in controversy" Congress

32. In taking this position, I must acknowledge that it is by no means universally shared. In fact, at least one of the two judges who hosted the first educational program about the Act that the Federal Judicial Center sponsored took the position that a district court ADR program that consisted only of settlement conferences hosted by magistrate judges would comply with the statute. See Videotape: The ADR Act of 1998 (Federal Judicial Center 1999) (on file with the Federal Judicial Center).

33. 28 U.S.C. § 651(b) (Supp. IV 1998).

34. *Id.*

35. Another argument against the notion that a court could comply with the Act simply by offering settlement conferences hosted by magistrate judges builds on Congress' understanding that district courts already use magistrate judges to perform a wide variety of important judicial work and that in many courts performance of that work leaves the magistrate judges with no time to take on additional duties. Because the Act requires each court to "provide" an ADR process in every civil case (except in categories of cases that are locally exempted), a court that sought to comply only by offering settlement conferences hosted by magistrate judges would be constrained to offer such conferences in a great number of cases. But most courts are in no position to deliver on a promise that their magistrate judges would be available to host settlement conferences in most of their civil cases--a fact of which Congress presumably was aware.

36. 28 U.S.C. § 651(a) (Supp. IV 1998).

added “through processes such as early neutral evaluation, mediation, mini-trial, and arbitration as provided in sections 654 through 658.”<sup>37</sup> Significantly, this list of examples of the kinds of ADR processes that Congress had in mind does not include judicially hosted settlement conferences. And the omission cannot be because Congress didn’t know about judicially hosted settlement conferences. We must infer that Congress self-consciously chose not to include such conferences in the list of examples.

Why did Congress do that? Because the entire purpose of the Act was to require courts that did not already have meaningful ADR programs to add new dispute resolution services to the well-established, traditional procedures that federal courts already made available—procedures that Congress well-knew included settlement conferences. Congress adopted such a broad definition of “alternative dispute resolution process” not because it sought to include settlement conferences, but because Congress knew that the field of ADR outside the courts was marked by both variety and change, and Congress did not want to foreclose use of processes either that Congress did not know about at the time it adopted this legislation or that had not yet been developed but that might be developed in the future and prove quite useful.

None of this is to suggest that Congress intended through the Act either to discourage the use of judicially hosted settlement conferences or to preclude a significant role for magistrate judges in the ADR programs that courts were directed to “devise and implement.” Had Congress wanted to direct district courts not to commit judge time to settlement work Congress clearly could have done so—in fact, if Congress had had any such purpose, it would have made no sense not to make that purpose explicit in this Act. In other words, this Act presented the perfect opportunity and the appropriate occasion to send such a message. But no such message can be found anywhere in this legislation.

And the fact that Congress contemplated the real possibility that magistrate judges could play important roles in ADR programs adopted under the Act is clear from the provisions in section 653 related to “neutrals.” After declaring that every person who serves as a neutral in a district court program “should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process,” Congress offered a non-exhaustive list of the kinds of persons who might appropriately so serve.<sup>38</sup> First on that list are “magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes . . . .”<sup>39</sup> Through this language, Congress clearly rejected the notion that a person was qualified to serve as a neutral in an ADR program simply because that person already was a magistrate judge. Rather, to serve as a neutral in one of the kinds of ADR processes that Congress contemplated here, a magistrate judge would need to

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37. *Id.*

38. *Id.* § 653(b).

39. *Id.* The sponsors of this legislation might well have known that some courts already had substantial experience using magistrate judges in ADR processes other than settlement conferences. For example, for a good many years magistrate judges had hosted early neutral evaluation sessions in the United States District Court for the Southern District of California. In the District of Massachusetts (and elsewhere) magistrate judges had presided over summary jury or bench trials. And in the district courts in Oklahoma, magistrate judges had been active in advancing mediation techniques.

be specially trained. Because Congress knew that magistrate judges had been hosting settlement conferences for some twenty-five years, we can infer that Congress assumed that magistrate judges either already had training in such work or that they did not need special training to perform effectively in that capacity. So while Congress clearly contemplated the possibility that courts might use magistrate judges to serve as neutrals in ADR programs under the Act, that use would not be simply as hosts of settlement conferences, but as neutrals in distinct ADR processes like early neutral evaluation or mediation, roles in which magistrate judges would not be qualified to serve without specialized training.

Before shifting focus to another topic I should point out one additional feature of the ADR Act that some courts might use to rationalize adopting very limited programs in response to the statutory mandate. 28 U.S.C. § 652(b) of the Act permits each district court to exempt from its ADR programs “categories of cases in which use of alternative dispute resolution would not be appropriate.”<sup>40</sup> The statute offers no clues about what the criteria might be for making this “appropriateness” determination. The only constraint on exercise of this power is the requirement that courts “consult with members of the bar, including the United States Attorney” before deciding which categories of civil cases to exempt.<sup>41</sup> After so consulting, each court is apparently free to decide for itself how big a chunk of its civil docket to excise from its ADR program. This gives individual courts who are so inclined (for whatever reason--budgetary, philosophic, inertia) a vehicle for arguing that they have complied with the Act even though their program exempts all but a few categories of cases.

In sum, for the several different reasons discussed in the preceding paragraphs, we cannot assume that the passage of the ADR Act of 1998 will result promptly in major changes in the ADR offerings that are available in the federal district courts. Over time, however, the picture is brighter. The statute lays the philosophic foundations for major changes--and delegitimizes arguments, made vociferously in the past by some federal judges, that ADR has essentially no place in federal courts. It even permits courts to make participation in mediation or in early neutral evaluation mandatory in classes of cases. The Act also gives the judicial branch a firm basis for including in the budgets it submits to Congress in the future requests for substantial additional funding for ADR activity. Gradually (probably very gradually) there will be more money--not tons, but some. And gradually there will be more programs. It is in this context that we turn, in the next section, to the tasks of identifying values we must preserve and dangers we must avoid on the road ahead.

## II. THE ROAD AHEAD: VALUES TO PRESERVE AND DANGERS TO AVOID

As I have discussed at length elsewhere,<sup>42</sup> there is a danger that as we design and implement new ADR programs over the next decade we will fail to keep clearly in

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40. 28 U.S.C. § 652(b) (Supp. IV 1998).

41. *Id.*

42. See Brazil, *supra* note 4.

mind the values that are most important to us as public courts in a democratic society. Out of eagerness to serve, or in response to pressures from dockets or budgets, we might unintentionally construct or administer our ADR programs in ways that threaten those values. So it is important to articulate those values openly and then to sustain our focus on them.

As courts, our most precious asset is the public's trust. Every program we sponsor or sanction must be designed to inspire and sustain the public's respect and confidence.

The public believes that, as courts, our core responsibility is to do justice. The public also believes that the aspect of justice for which we are primarily responsible is process fairness, process integrity. It follows that the characteristic of our ADR programs about which we must be most sensitive is fairness, especially process fairness. This means that in program design and administration our paramount concerns must be with process integrity and quality control.

Over the next several years we will face several threats to these values. One of the most obvious will be the temptation to sacrifice quality for quantity--to cut quality corners in pursuit of volume. That temptation could be inspired by respect worthy goals--to broaden, democratize, or truly equalize access to ADR services. Or it could be inspired by a more pedestrian drive to qualify for more financial support for our ADR programs. This second danger warrants some elaboration.

As I understand it, there are two important variables in the formula that currently is used to determine how much money individual federal district courts receive to staff ADR programs: the number of cases the ADR program services and the amount of staff time devoted to that work. To generate an entitlement to substantial money for ADR staff positions, a court must either service a large number of cases or devote a great deal of staff time to a smaller number of matters. But the way the system works (at least now), a court's entitlement is based on what it did during the preceding year--which means that to establish a basis for an entitlement to more staff in the future, a court must use its existing personnel to service a larger number of cases. In other words, to qualify for more money for ADR, a court must either require its existing ADR staff to do more than was thought appropriate under current budgets or "steal" time from clerks' office staff who are assigned to other, more traditional duties. Stealing staff from other functions is very difficult, especially when clerks' offices already are operating with only eighty-four percent of the person-power their workloads justify. Moreover, staff that is stolen from other functions may give short shrift to their add-on ADR duties, or may not be very good at them (not having been recruited and trained for this specialized work).

The upshot of all this is a budgetary catch-22 in which quality is the most likely victim. The temptation to which courts that want more money for ADR are most likely to succumb is the temptation to expand their program so that it reaches more cases than existing staff can serve with an appropriate level of quality assurance. And that risks disaster in the arena of public confidence.

Let me be more specific. Neutrals in court-sponsored programs are perceived by litigants, lawyers, and the public generally as agents of the court--representatives of the court. How they perform will affect directly the public's feelings about the court. If they perform badly, if they make process mistakes or ethical mistakes or

substantive mistakes, or if their conduct is insufficiently constrained and dignified, or if they fail to follow the process protocols that the court's rules and literature lead parties to expect, they will erode public trust in the court. We must do everything we reasonably can to avoid such erosion.

Stated differently, we cannot afford to let loose on the public neutrals in whom we do not have a full measure of confidence. That means that we must have real and substantial quality control in our programs--and that kind of quality control can be achieved in most settings<sup>43</sup> only through labor intensive commitments by court staff. To be responsible about and for our programs, we should have court staff directly and deeply involved in all aspects of our programs: design, administration, and evaluation, and especially in selecting, training, monitoring, assessing, re-educating, and re-energizing the human beings who serve as the neutrals. For in the end, it is the conduct of the neutrals that is by far the most critical factor in determining the value and character of a court's ADR program--and thus how well that program reflects on the court itself.

It is because quality control in our programs is so important and so labor intensive that I believe the current formula for staff funding is ill-advised--almost dangerous. The formula increases the risk that ADR programs will harm public confidence in the courts. It should be changed so that the incentives it generates are toward quality, not quantity, and so that courts have adequate staff funding from the time they begin working toward launching their programs rather than only after they have been running those programs for a couple of years on a shoestring budget that unjustifiably risks harming public trust in our judicial institutions.

While we are addressing these matters, we also should begin working toward eliminating the unfairness in the current system under which funds are provided for staff support for ADR programs in federal district courts. The system that is in place now is an understandable product of the Civil Justice Reform Act of 1990. The great differences in levels of funding for ADR court staff (from zero in many courts to hundreds of thousands of dollars in a few) can be traced for the most part to a system that sought to reward those courts that demonstrated the greatest initiative and that committed the most resources to ADR programs in the early and mid-1990's. The funding disparities were understandable in the legislative environment that then existed--where Congress imposed special obligations on a limited number of specified "demonstration" and "pilot" districts, and where most other courts were only encouraged, but not required, to experiment with ADR programs.<sup>44</sup>

With the passage of the ADR Act of 1998, however, the legislative environment

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43. In rare instances, a district court might be able to piggy-back on a high quality program that has been developed by an outside organization, e.g., by a state court, a bar association, or a consortium of local service institutions. But a federal court could not rely on such a program without first committing significant staff time to assuring itself about a host of features in the program (e.g., recruiting and training and monitoring neutrals, conflicts and other ethics rules and provisions for their enforcement, compensation, confidentiality rules and their enforcement, etc.). And being satisfied about all these matters at the time the outside program was adopted would not be sufficient--the court also would need either to set up or to review in depth systems for regular monitoring and independent evaluation of the outside program.

44. See 28 U.S.C. § 471 & note (1994) (Congressional Statement of Findings). This statute became effective December 1, 1990, and expired by its own pre-set terms on December 1, 1997. 28 U.S.C. § 471 note (1994) (Implementation of Plans).



has changed dramatically. Now every federal district court must “devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district.”<sup>45</sup> Because all courts are now required to comply with the same statutory mandate, all courts should have access on equal grounds to funding for the staff positions that are necessary to make ADR programs work. The use of different funding formulae for courts with “basic” programs and for courts with “robust” programs can no longer be justified. Moreover, to enable courts to meet their statutorily imposed obligations, and to begin the process of equalizing access--across district lines--by parties to ADR services, some meaningful level of funding for ADR staff positions should be provided to every district court.

We turn our attention at this juncture to other potential threats to the process integrity and quality control values that should occupy center stage in court ADR programs. The court itself can be a source of such threats. We must vigilantly protect the neutrals who serve in our programs from role distorting pressures that we as courts might impose. For example, we must be sensitive to the confidentiality promises that attend most ADR processes--and we must discipline ourselves, as judges, not to press or permit our neutrals to make unauthorized, inappropriate disclosures<sup>46</sup> to us of communications that were made or developments that occurred in our ADR processes. For example, as much as we might want to know whether a case that would take considerable time to try is likely to settle, we must resist the temptation to ask the neutral about what is happening within the ADR process. We must confine our communication with our neutrals about their work in our cases strictly to the boundaries fixed by the law and our programs’ rules--and that communication should be on the record or in writings that are available for all to see (so there is no occasion for the parties to fear that the neutrals are communicating in secret with us).

Even more fundamentally, we must protect our neutrals from feeling pressure to “get the cases settled.”<sup>47</sup> That kind of pressure can push neutrals into behaviors that are ethically wrong and that are deeply resented by litigants and lawyers. In addition, when program participants feel that they are being pressured to settle they will draw inferences about the motives that inspire the court’s ADR program that undermine public respect for the judiciary. Litigants who feel pressured to settle will infer that the purpose of the ADR program is not to offer services to parties that the parties themselves value, but to advance the court’s institutionally selfish interest in reducing its workload. Such cynicism about the court’s motives undermines trust

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45. 28 U.S.C. § 651(b) (Supp. IV 1998).

46. Some kinds of disclosures may be appropriately authorized by local ADR rules, e.g., standard reports about whether all parties attended the ADR event or whether that event yielded a signed settlement agreement. And there may be circumstances--arising very rarely--in which a court concludes, after going through an analysis that gives full weight to the importance of the values served by the confidentiality or privilege legislation, that it is necessary to compel a mediator to make certain disclosures in order to protect rights or to secure interests of even greater magnitude. See, e.g., *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999); *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (3d Dist. 1998).

47. Such pressure can be generated in subtle ways. For example, neutrals might feel such pressure if they knew the court kept statistical track, by individual neutral, of the incidence of settlements achieved.

in the judiciary and, simultaneously, reduces the likelihood that parties will understand and take advantage of all the opportunities that ADR can offer.

This leads us to a broader point about program design: we must take care not to make design decisions that call into question the institutional motives underlying a court ADR program. For example, we must be aware of the possibility that outsiders will infer that the purpose of a program is to liberate judges from having to deal with kinds of cases that they find unpleasant or unimportant or not interesting. A program that required participation only by “small” or politically unpopular cases, for example, might be so perceived. Similarly, we must take care not to establish programs in which it appears that what is being offered to “ADR cases” is some second class, quick-and-dirty procedure. Such inferences might be encouraged if the quality of the ADR proceedings was poor, or if the court devoted very little of its own resources to supporting the program, or if participation was rigidly mandatory and/or insensitive to the burdens (economic and others) it imposed on the parties, or if the court interposed unreasonable barriers to cases either getting out of the ADR track or getting back into the trial line in about the same place they would have been if they had not been designated an ADR case.

To inspire public trust and confidence we also must do our best to democratize access to the ADR services that we as public courts provide. At a minimum, we should strive to offer ADR services equally to all cases in the same class or category. And when we do not offer ADR services to some groups of cases, or when we offer some groups of cases different ADR services than others, we should take care to explain why--in ways that really reach the affected parties and lawyers.

Decisions we make about whether our neutrals are compensated, and on what basis, also can affect participants’ feelings about the motives that underlie an ADR program--and can create larger risks to fairness and integrity values. In crafting compensation rules we must be especially alert to two potential dangers: (1) the risk that we will impose role distorting economic pressures on our neutrals and (2) the risk that we will expose participants in the program to economic burdens that result in unfair disadvantages.

A compensation system in which neutrals are paid a flat and obviously modest fee for each case in which they serve, regardless of how much time they devote to the matter, could lead to poor (under-involved, under-energized) performances by neutrals and could encourage participants to view the program as offering only a quick and dirty substitute for the “real” thing. In contrast, a system in which neutrals are paid by the hour, at real market rates, but that imposes no limit on the number of hours through which a neutral can protract the proceedings, risks imposing unjustifiable economic burdens on the litigants (or the taxpayers), discrediting the ADR process itself, and encouraging an inference that the real purpose of the ADR program is to remove cases permanently from the trial track by slowly bleeding them (financially) into settlement submission. A compensation system without real external constraints also could create opportunities for economically stronger litigants to gain unfair settlement leverage over financially vulnerable opponents, *e.g.*, by protracting the ADR process so that it becomes a major component of transaction costs by which the more vulnerable party feels buried. A system that can be so abused is likely to inspire respect in neither the party who suffers under it nor the party who exploits it.

Our decisions about compensation systems could create one other threat to fairness values that deserves comment here. I think it is incumbent on courts to protect litigants from having to bargain with neutrals over the rate or amount of compensation the neutrals will receive. Courts that permit the “market” to set these levels of compensation risk putting litigants in an untenable and unfair position. This is especially true if the court has assigned the neutral to the case--so the parties cannot look elsewhere for the service. But even when the parties are not stuck with a pre-assigned neutral, their bargaining position is compromised. The parties know, when the fee negotiations commence, that the person on the other side of the table either will be or might be the neutral in a process that could have a substantial affect on whether the case settles and for how much. Parties in that position will not want to do anything that might alienate or anger that person--they will want him or her to be kindly disposed toward them. So if the neutral suggests a high hourly rate, or a large flat or daily fee, the parties are vulnerable--they are not bargaining from a position of comparable strength. And if the neutral already has been assigned, the parties may feel almost completely at his or her mercy. Moreover, this is another arena in which an economically weaker party is likely to feel disadvantaged--by not wanting to be the one to incur the neutral’s displeasure by suggesting that the fee the neutral proposes is too high. It is not clear that there is any good reason for a court to put litigants in these kinds of positions--and courts that do so will risk generating keen resentment.

I should mention briefly two additional dangers related to neutrals. One is that we will fail to build into the panels of lawyers and others who serve in our programs the balance and breadth that is necessary to inspire confidence from all sectors in the spectrum of litigants and lawyers who appear in our courts. In constructing our panels, we should take special care to build in real and visible diversity of experience and perspectives--and then to structure education and training programs that permit the neutrals to learn meaningfully from one another. Steps like these will reduce the risk that any particular group of litigants will feel that the panel of neutrals is incapable of providing people who will be able to understand the experience or perspective of that group.

Similarly, we must take care to avoid creating the impression that our panels of neutrals are products of the old boys’ network--small clubs of “elite” lawyers who enjoy special levels of confidence by the judges. When panels are so perceived, other lawyers, outside the anointed circle, can be both resentful and suspicious--fearing that they will be at a distinct disadvantage if their opposing counsel in a case being litigated in the court is a member of the favored club. To guard against such risks, courts should consider leaving their judges out of the process of constructing the panels of neutrals. Courts also might consider establishing policies under which individual judges are not told which neutrals have served or are serving in their cases--so that there is no occasion for any given judge to develop a sense of indebtedness (perceived or real) to any particular lawyer or group of lawyers in the panel.<sup>48</sup>

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48. A system in which the assigned judge does not know which neutrals are serving in her cases also should reduce fear among litigants that there might be unauthorized communication about the ADR proceedings between the neutral and the judge.

Having discussed some of the threats to values related to process integrity and fairness that we must address in the coming years, I would like to shift focus to some additional concerns about the road ahead for court ADR.

For several different reasons, we need to guard against the “litigation” of ADR. By this I mean the apparently growing tendency to convert ADR proceedings into just another arena in which traditional litigation behaviors are played out—even if with a bit more subtlety than in trial. In this setting, I use the phrase “traditional litigation behaviors” to cover a wide range of conduct that lawyers and litigants have been known to use to artificially manipulate their dynamic with other parties in order to try to gain some advantage that would not be accessible through a straight-forward exploration of the merits of the case and that would not be justified by the realities of the parties’ extra-litigation circumstances. These behaviors include (but, as the briefs always say, are not limited to): self-conscious posturing, feigning emotions (even anger) or states of mind, pressing arguments known or suspected to be specious, concealing significant information, obscuring weaknesses, attempting to divert the attention of other parties away from the main analytical or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented (*e.g.*, projected testimony from percipient or expert witnesses), resisting well-made suggestions, intentionally injecting hostility or friction into the process, remaining rigidly attached to positions not sincerely held, delaying other parties’ access to information, or needlessly protracting the proceedings—simply to gain time, or to wear down the other parties or to increase their cost burdens. The invasion of these kinds of behaviors into the ADR world is visible in titles of continuing education courses with themes like “How to Win in ADR” and “Successful Advocacy Strategies for Mediations.”

Of course, some forms of ADR, like arbitration and the summary jury or bench trial, are relatively trial-like, so we should expect to see some litigation behaviors in these kinds of proceedings. But other forms of ADR, most notably facilitative mediation, are supposed to be decidedly different from traditional adversarial litigation—and it is that decided differentness of tone and style that make these kinds of processes truly an “alternative.” So the more that lawyers and clients infect mediation with the behaviors that have intensified the need for an alternative to litigation, the greater the risk that mediation will lose its philosophic center, lose its capacity to contribute in unique ways to problem solving, and lose the special protections it has enjoyed under the law.

Among those special protections, confidentiality is considered by many to be the most important. Why have the policy makers in so many jurisdictions conferred special confidentiality protections on mediations? The answer, generally, is that they have felt that confidentiality protections are necessary to make mediations “work”—meaning, in the narrow view,<sup>49</sup> to make mediations likely to generate settlements. In making that judgment, policy makers have assumed that constructive progress toward settlement was appreciably less likely to occur if parties and counsel did not feel a substantial level of confidence that what they said, conceded, and did in a

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49. As I discuss in a subsequent section, one of the challenges we face on the road ahead is to resist the pressure to use criteria that are far too narrow when we define “success” in an ADR program or event.

mediation would not be used later, by some adversary or the court, against them.<sup>50</sup> The legislators may well have assumed that it is, to a significant extent, the fear of future adverse consequences, perhaps especially future adverse consequences that are unknown, that inspires many of the dysfunctional adversarial behaviors that make traditional litigation so awkward, oblique, and expensive. Thus, one of the theories that supports the policy of extending confidentiality protections to mediations is to reduce that fear--not as an end in itself, but in order to discourage the kinds of behaviors the fear inspires. In short, the protections are intended to encourage parties and lawyers to be more forthright and less manipulative, and to be more open to making concessions and to taking process risks.

But if parties and counsel corrupt the mediation process by "litigizing" it, *i.e.*, by bringing extensively into it the kinds of behaviors that have characterized traditional litigation, there is a risk that the policy makers will conclude that the premise for the grant of confidentiality was misplaced and that there is no justification for continuing to offer the protection. Stated differently, the policy makers may have an expectation of reciprocity in this arena--an expectation that counsel and parties will reciprocate for the grant of confidentiality by adopting a tone and methods in mediation that are different from the litigation norm. And the policy makers might withdraw that protection if they believe that parties and counsel are failing to keep their end of this "bargain."

Something akin to this reasoning is reflected, in part, in a recent, very controversial opinion from a California court of appeal about confidentiality in mediation. In *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*,<sup>51</sup> the court ruled that, even though the state legislature had adopted what appeared to be a strict mediation privilege, a trial judge could consider a factual report from a mediator about conduct that occurred and statements that were made during a court-ordered mediation to the extent necessary to determine whether a party or lawyer had violated an order to participate in the mediation in good faith.<sup>52</sup>

En route to this holding, the California Court of Appeals pointed out that the legislature's purpose in adopting the privilege was to make mediations more productive.<sup>53</sup> To achieve that end, the legislature felt that it was important to encourage full good faith participation in the process--and it was to encourage that kind of participation that the confidentiality provisions were added to the laws.<sup>54</sup> Explicitly connecting the right to the protection of the privilege with the duty to participate in "good faith," the *Foxgate* court declared: "Without [good faith participation], there will be few if any confidential communications to protect."<sup>55</sup>

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50. Even courts that have concluded that some competing and compelling interests may require limited disclosure of mediation communications have acknowledged that substantial confidence in the protected status of mediation statements appears to be important to the success of mediation. See, e.g., *Olam*, 68 F. Supp. 2d at 1133-36; *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 78 Cal. App. 4th 653, 665-66, 668-69 (2d Dist. 2000), *reh'g denied*, Mar. 21, 2000; *Rinaker*, 62 Cal. App. 4th at 165-66; cf. *Foib v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171-76 (C.D. Cal. 1998) (concluding in a federal question case that there is a federal common law mediation privilege).

51. 78 Cal. App. 4th 653 (2d Dist. 2000), *reh'g denied*, Mar. 21, 2000.

52. *Id.* at 669.

53. *Id.* at 668-69.

54. *Id.*

55. *Id.* at 668.

As this statement indicates, one of the rationales for the court's holding was that the legislature could not have intended to enable a party who had refused to participate in good faith to use the privilege to shield himself from detection and sanction--because permitting that use of the privilege would enable a party to defeat the very purpose that inspired the legislature to approve the privilege in the first place.

Both the reasoning and the holding in *Foxgate* have caused great consternation among many mediators. Because that reasoning and holding turn in such substantial measure on the fact that the trial court's order that sent the parties to mediation explicitly required the parties to participate in good faith, we should pause to consider whether it is wise to impose such a requirement. Obviously, this is an important issue with which legislatures and courts will grapple in the next few years.

While I do not claim to understand all the factors that should be considered in addressing this matter,<sup>56</sup> the *Foxgate* opinion exposes a need to make sure we identify the considerations that counsel against formally imposing a requirement that parties participate in court ordered mediation<sup>57</sup> "in good faith." The first such consideration (not necessarily in order of importance) is the difficulty of defining "good faith" in this setting. As case law suggests, a refusal to settle, by itself, does not constitute "bad faith."<sup>58</sup> Would it be "bad faith" for a party to decline to expose, during a mediation, all the private reasoning that supported the decisions the party was making about settlement, or to decline to disclose how the party intended to develop and present its case at trial? Or are at least some such declinations supportable on the ground that the information sought is protected by the work product doctrine<sup>59</sup> and/or the attorney client privilege? Given these legal issues, and the elusiveness of the concept of "good faith" itself, courts are likely to feel confident that a party has violated a requirement to proceed in "good faith" only when the offender's conduct is extreme, e.g., when she fails to show up at all or walks out after five minutes. But when the offending conduct is extreme, courts are likely to be able to impose an appropriate sanction without resort to any "good faith" requirement.

Moreover, the indeterminacy of the concept increases the threat it poses to other important values. One such value is fundamental fairness--which requires that parties be able to understand, pretty clearly, what they must do to comply with a norm whose violation could expose them to punishment. It would be unseemly, at

56. For a much more thorough exploration of this matter, see Kimberlee K. Kovach, *Good Faith in Mediation-Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997) [hereinafter Kovach, *Good Faith in Mediation*]. See also Ms. Kovach's much shorter piece: Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISP. RESOL. MAG., Winter 1997, at 9 [hereinafter Kovach, *Lawyer Ethics in Mediation*]. For a contrary view, see Edward G. Sherman, 'Good Faith' Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL. MAG., Winter 1997, at 14.

57. Reasoning about whether to require "good faith" participation in mediation is quite likely to be different from reasoning about whether to impose such a requirement for some other forms of ADR, e.g., court sponsored non-binding arbitration or early neutral evaluation. The comments in the text, above, about the problems with imposing a "good faith" requirement focus exclusively on mediation--and assume a form of mediation that is not aggressively evaluative.

58. See, e.g., *Triplett v. Farmers Ins. Exch.*, 24 Cal. App. 4th 1415, 1422 (4th Dist. 1994).

59. The *Foxgate* court acknowledged a possible work product issue, but offered no substantive discussion of the matter because the court held that the defendant had waived any right it might otherwise have had to invoke work product protections. *Foxgate*, 78 Cal. App. 4th at 658 & n.8.

best, for courts to impose a requirement whose contours they could not clearly define.

As important, uncertainty about what "good faith" is would increase the harm that such a requirement could do to the mediation process itself. A vague or expansive "good faith" requirement could distort both the role of the neutral and the way the parties participate in the mediation.

A mediator who knows that the parties have a legal duty (whether imposed by court order, rule, or legislation) to participate in "good faith" might well feel obligated to pass judgment on the quality or character of each player's participation. A mediator who accepts that duty converts herself, in part, to a judge. Yet to many mediators there is a fundamental incompatibility between being a judge and being a facilitator. To these mediators, there would be a deep and irreconcilable tension between a duty to pass judgment and the need they feel, as mediators, to build relationships with the parties that are grounded fundamentally in trust, confidence, and confidentiality. A duty to pass judgment also would threaten a core component of their sense of professional self--a sense at the center of which is a version of "neutrality" built around the notion that a facilitative mediator is never to form or express normative or analytical critiques.<sup>60</sup>

Mediators who know that the law requires the parties to participate in "good faith" are more likely to worry about whether they have a duty to report, on their own initiative, perceived violations of that duty. They also are more likely to fear that they will be pressed by a court or a party to divulge their private views on these matters, or to give testimony in a proceeding to determine whether sanctions should be imposed.<sup>61</sup> Apprehension about such duties or pressures could create counter-productive distractions for mediators who are trying to build relationships and to help the parties during a mediation, and even could discourage some good mediators from agreeing to serve.

Imposing a requirement of "good faith" participation also is likely to distort, in some measure, the ways the parties and their counsel interact with the mediator. Parties who feel that the mediator is passing judgment on the character of their participation may well fear the mediator--and fear that she might feel constrained to report them to the court. They also will be tempted to "perform" for her. To the extent that they feel fear and a compulsion to perform, they are less likely to let down their litigation hair--less likely to be open, less likely to feel comfortable, less likely to trust the process and the person at its center. Moreover, if they worry that their mediator is forming judgments about how they participate, they also might worry that she is forming judgments about other matters, *e.g.*, the viability of their positions on the merits, or the moral force of their arguments about proposed terms of settlement. And if they worry that she is being evaluative, they will be tempted

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60. There are, of course, many other people who consider themselves "mediators" who are comfortable being "evaluative," at least when parties seem to want analytical feedback. Even these mediators, however, generally feel that the level of help they can offer the parties depends, in substantial measure, on their ability during the mediation process to build relationships of trust and confidence. Even "evaluative" mediators are likely to feel that their ability to develop these kinds of relationships would be compromised if they had a duty to determine whether parties were participating in "good faith."

61. See, *e.g.*, *Foxgate*, 78 Cal. App. 4th at 653.

to try to manipulate her, or the flow of information to her--as part of an understandable desire to convert her into an ally in settlement negotiations with their opponents. Most mediators are likely to believe that all such impulses damage prospects for constructive mediation.

Imposing a requirement of "good faith" participation also could distort the dynamic between the parties during or after the mediation. Knowing that his opponent might be tempted to report him, or seek to have him sanctioned, for an alleged violation of a "good faith" requirement could intensify a party's or a lawyer's distrust and fear of his opponent. Increasing fear and distrust across party lines is not likely to enhance mediations. Moreover, the existence of an explicit, highly visible "good faith" requirement likely would increase some litigants' temptation to file tactically driven motions for sanctions--*i.e.*, motions whose primary purpose is not to protect the integrity of mediation, but to gain some litigation advantage or to turn the judge against an opponent.

As the preceding paragraphs suggest, formalizing a requirement of "good faith" participation might well have the ironic effect of intensifying the temptations to "litigize" mediation--and thus to corrupt its spirit and frustrate achievement of its potential. Realizing this, we should proceed with considerable caution. While we acknowledge that policy makers might have granted a specially protected status to mediation communications in the hope and expectation that the protection would foster a kind of participation in mediation that was decidedly un-litigation like, it does not follow that it would be wise to formalize a dependency between the availability of a mediation privilege and a requirement of "good faith" participation. In fact, given the long (and not likely exhaustive) list of negatives described in the preceding paragraphs, there is a substantial risk that imposing a good faith requirement would tend to defeat the goal of encouraging the more open, cooperative, and constructive participation that deserves the label "good faith." In sum, while there are arguments in favor of adopting a requirement that parties participate in mediation in "good faith,"<sup>62</sup> I believe that policy makers and courts should decline to impose such a duty at least until its proponents have made a stronger showing of need.

Our concern about the possible "litigization" of mediation has additional implications for court-sponsored ADR program design. As suggested above, it is likely that the risk of 'litigization' increases with the extent to which the ADR proceedings are explicitly "evaluative." In an ADR process that will include an express assessment of the merits of the parties' positions by the neutral, the lawyers and their clients have a substantial incentive to compete to try to "win" the neutral's mind. Each side will want the neutral not only to accept a view of the merits that is favorable to it, but also to press that view on the other side. Each side, in other words, will be tempted to try to convert the neutral into its ally, into an instrument to be used against its opponent in the push for a favorable settlement. That goal--of getting the neutral into your corner--increases the temptation to resort to the methods of manipulation and persuasion that lawyers are most accustomed to using, the methods of litigation. While this consideration is only one among a great many that

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62. See, e.g., Kovach, *Good Faith in Mediation*, *supra* note 56; Kovach, *Lawyer Ethics in Mediation*, *supra* note 56.



must affect program design, we should bear it in mind when we are deciding what kinds of roles we want the neutrals to play in the ADR processes we sponsor. In addition to "litigization," there are several other dangers on the road ahead that warrant comment. One is pressure from proceduralists (not a term of derogation) to elaborate and formalize ADR proceedings, even to record them. The several sources of this pressure are respect-worthy. They include concerns about sloppy processes increasing the risk of premature judgment and significant analytical error, about unfairness resulting from abuses of power imbalances among the parties, and about agents of the court (the neutrals) pressuring litigants to settle. These are matters of consequence that program designers must take steps to address--but it would not be wise to use extensive process elaboration as the tool to achieve this end. I hasten to emphasize that the issue here is not whether neutrals should adhere to clear procedural protocols--as I have said, that is crucial to quality control and public trust. Rather, the issue is whether it is wise to build additional procedural elaboration, formality, and recording into ADR. The difficulty, of course, is that these kinds of "reforms" would essentially convert ADR back into traditional litigation--sending transaction costs skyward and robbing ADR processes of the spirit and the interactive techniques that make them truly an alternative.

A different danger lies on the other end of the process spectrum. That danger is that we will "blur" what should be distinctive ADR processes into one conglomerate mediation or settlement conference model. We must work to preserve ADR process differentiation--to preserve the integrity of each ADR process model. Several considerations support this view. One is the fundamental notion that each of the major ADR processes that have been developed to date offers unique features and opportunities, a unique constellation of advantages and limitations. We would badly compromise our ability to match litigant needs and circumstances with the process that promises to deliver the greatest benefits if we permitted our ADR offerings to blur into one undifferentiated proceeding.

Moreover, if only one ADR process survives, it is likely to be some form of evaluative mediation--and thus not substantially different from the approach used in many judicially hosted settlement conferences. If we traveled that road it would be fair to ask what ADR was really adding to the services courts traditionally have offered.<sup>63</sup> There also is a risk that if we offer only one process we will try to capture in it all the major benefits of all the major processes--resulting in a hodgepodge (1) whose course in any given case is impossible to predict, (2) whose procedures are internally inconsistent and expose neutrals to unresolvable ethical tensions, and (3) that is very difficult for the court to control or for the parties to prepare for.

Reducing our ADR offerings to one process, blurred or otherwise, also would deprive of us important opportunities that only multi-option programs can offer. As Professor Sander has observed, considerable ignorance and misunderstanding about

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63. There are answers to this question, but it is not at all clear that we should be satisfied with them. An ADR program limited to evaluative mediation might extend the services the court traditionally offered in at least two significant ways. By using neutrals other than judges, such a program might be able to offer mediation services to an appreciably larger number of cases than it otherwise could. The court also might be able much more often to provide the parties with neutrals who not only had special process training but also had deep subject matter expertise, something judges cannot offer in a wide range of case types.

ADR persist among a good many lawyers and clients, some of whom think they understand much more than they actually do. One of the best ways to extend reliable knowledge about ADR is to require parties to choose a particular form of ADR for their case from among specified options. In the multi-option program in the Northern District of California, for example, the court presumes that every civil case (within broad categories) will participate in some form of ADR, but our rules press the parties to try to agree on the form that is best for their case from several quite distinct process options that we offer. If the parties cannot agree, they enter a dialogue with the court (first the court's professional ADR staff, then, if they still have reached no agreement, with the assigned judge) that will yield a decision either by them or the court about which process (if any) they should use. Thus our program constitutes at least a version of the public dispute resolution centers that Professor Sander suggests are too rare across the country today.

Our system delivers several benefits that a one-process program could not deliver. First, it involves the litigants themselves directly in the process of identifying which ADR process best fits their needs and circumstances. This is important to us philosophically. It also increases the likelihood that the litigants (and counsel) will "buy-into" the process they select--that they will have a heightened investment in trying to make it work. Lastly, but by no means least important, this system has a unique power to drive lawyers and litigants to better educate themselves about ADR. Pressed by the rules to choose between several distinct process options, lawyers who want to avoid malpractice and who want to serve their clients most effectively feel constrained to learn what the differences between the various processes are--and to teach their clients what they have learned, in part to reduce the risk of being second-guessed by their clients later on. Working through these comparisons teaches counsel, and client, what the key features of each process are--so that, in the end, they have an appreciably more refined sense of each of our different ADR offerings. A one-process program has none of this pedagogical potential.

A different danger on the road ahead would result from a "blur" of another kind. The blur to which I allude here would be between private and public ADR. In the coming years there may be pressure to merge, at least in some important respects, private and public ADR. Some courts might be tempted to meet their ADR needs simply by adopting a major service provider from the private sector, essentially incorporating it into the court fold for this purpose. And private providers might gravitate toward courts--trying to tap into or create a stream of fee generating work, or to mimic programs or processes that enjoy public confidence because the courts have visibly endorsed them. At least if they became too pronounced, these trends would be unhealthy.

The future of ADR will be healthiest if it is supported by vigorous and partly independent development in both spheres. A responsible court cannot simply adopt a private provider and cannot simply import, without independent critical scrutiny, processes that are developed in the private sector. A court that adopts one private provider confers a benefit on it that other private providers also would want--something that should not happen without, at least, a fair process of competitive bidding both at the time the program is launched and every few years thereafter. And a court that is considering including in the processes it sponsors or sanctions a

method of ADR that has been developed privately must first conduct a careful review to make sure that the new ADR method poses no threat to the policy and value constraints that are unique to courts. Moreover, because of the centrality of process integrity to their mission, public courts are uniquely positioned to make important contributions to the development of ADR processes that are both sophisticated procedurally and well-grounded ethically.

It also would be unhealthy, however, if the private sector were to lose its independent ADR edge--to slip into merely mimicking processes and programs provided by the courts. The risk that "ADR" would degenerate into one amorphous process, largely evaluative, perhaps even quasi-adjudicative, increases dramatically if the private sector looks too much for leadership (or money) to the public courts. Historically, most of the innovation in ADR has occurred in the private sector. We should expect that pattern to continue. Public courts have been, and will continue to be, reactive institutions to which change is slow to come and in which imaginative programs are difficult to sustain over time. The relentlessness of the courts' core adjudicative responsibilities, and the magnitude of the burdens they impose, make these facts of life likely to continue indefinitely.

In contrast, the private sector is free from many of the constraints that policy and workload impose on the courts. So there are freedoms and opportunities in the private sector that have no parallel on the public side. These facts create an environment in which parties and theorists not only can experiment with new procedures, but also can expand our views about the ends or purposes that ADR can be used to achieve. Thus the private sector should remain the locus of critical innovation in this field.

There is one final set of dangers on the road ahead that I would like to discuss. There is a risk that we will expect too much from ADR and, simultaneously, that we will permit ADR's "success" to be judged by criteria that fail to reflect the full range of values that ADR can advance.

Professor Sander expressed related concerns when he discussed the demand by Massachusetts legislators for cost-benefit studies of ADR--studies that would show how much money is saved by the expenditure of the public funds that the legislature commits to the support court-sponsored ADR programs. Professor Sander points out that it is extremely difficult to conduct an analysis of the full range of the "savings" that such programs might deliver--in part because some of those savings would be detectable only over long periods of time and, in part, because they would be the product of things not happening--like disputes not arising that otherwise might, or disputes being resolved so well and so privately that no study could ever capture them. Prompted by these observations, I would like to focus on the threats to important public values that can be created by the use of misguided criteria to determine whether given ADR programs "work" or are "worth the money."

In approaching these issues we must take special care, at the outset, to be sure that we do not claim too much for or expect too much from court-sponsored ADR. It will not change the fundamentals of human nature. It will not re-distribute wealth or power. Nor will it produce any other systematic re-ordering of relationships. Court-sponsored ADR will not displace litigation, and it cannot and should not relegate the jury trial to the periphery of the justice system. We should clearly disclaim any such misplaced ambitions. At the same time, however, we should feel

centered in and proud of the still very significant role that ADR can play in our courts.

As we work with the policy makers to assess that role, we must be especially alert to the considerable risk that they will succumb to the temptation and the pressure to use the incidence or the timing of settlements as the sole or the primary criteria for judging the success of court-sponsored ADR programs. Emphasizing these criteria can be dangerous in three ways: (1) it can cause serious distortions in ADR processes--and pose threats to important public values, (2) it can discourage appreciation of more subtle but arguably more important contributions a good court-sponsored ADR program can make, and (3) it can reinforce misguided notions about the mission of public courts--in part by encouraging an unseemly and unhealthy institutional self-absorption.

If we measure the "success" of our programs by the rate or timing of settlements we put pressure on ourselves to use our ADR program to generate settlements. We thereby increase the risk that we will pressure our neutrals (e.g., in training programs and in rewards and recognition) to permit pursuit of settlement to dominate their processes. This can have two untoward effects.

First, it can cause our neutrals to put pressure on parties to settle, either overtly and directly or, as perniciously, by breaking trust with the parties and violating fundamental ethical norms. A neutral who feels pressure to 'get the cases settled' will be tempted to manipulate herself and the parties toward that end. She will be tempted to cheat--meaning, among other things, that she will be tempted to hold back information that she otherwise would share, or to encourage misperceptions or misunderstandings, as long as doing so greases the settlement skids. A neutral who is so motivated also is less likely to take any steps either to protect against a patently unfair outcome or to correct or compensate for clear process wrongs that occur during a session. And a neutral who is preoccupied with achieving settlement is more vulnerable to forgetting whose case it is, to asserting herself into the central role in the ADR dynamic, pushing parties and lawyers to the periphery in her quest for disposition.

Secondly, if we permit pursuit of settlement to dominate an ADR program we reduce our ability to constrain our neutrals to play, when we want them to, purely facilitative roles. Neutrals who feel driven to get cases settled are much more likely to be analytically assertive and expressly evaluative than neutrals who measure their success by more subtle process values. So when pursuit of settlement dominates an ADR program it is much more difficult for that program to deliver to parties a controlled range of neutral roles.

Emphasizing settlement rates when we measure the success of our programs also can discourage appreciation of the many other values--values of great societal significance--that a good ADR program can promote. These include: increasing the rationality, the fairness, and the civility of the disputing process; expanding the information base on which parties make key decisions in litigation and in settlement; reducing parties' alienation from the judicial system (and thus from society) by increasing their participation in, understanding of, and power over the processes by which their problems are addressed; encouraging parties to assume greater responsibility for both the character of the dispute resolution process and its outcome (in this sense, "empowering" the parties); expanding parties' opportunities to act

constructively and creatively, and to try to form connections across party lines; helping parties understand and vent emotions--and expanding their capacity to determine what role emotions will play in the disputing process; and, generally, expanding the parties' tools for dealing with the psychological, social, and economic dynamics that always accompany and sometimes drive litigation. Through a good ADR program, a court becomes a teacher of constructive ways to approach problem solving--and the parties and lawyers can take the lessons they learn into the other aspects of their lives.

But there is more. By providing a good ADR program, a court (and thus our government generally) reaches out to the people who need its services and says, in appreciated effect, "we know you have a problem; we acknowledge that you have your own set of values and concerns; we understand that it is our job to meet you more than half way and not just on terms that we have defined; rather, we want to provide you with processes that really are accessible to you and among which you can find one that maximizes the odds that you will be able to solve your problem in a way that honors the values most important to you."

There are several deeply important messages here. One is that the court is a service-oriented institution and that the people it is to serve are the litigants (not the judges, not the lawyers, not the administrators). Another message has two parts: an acknowledgment that transaction costs and delays have effectively frozen some claimants out of the public court system and a commitment by the court to try hard to correct that unacceptable state of affairs. A related two-part theme consists of (1) an acknowledgment that the arcane ways of the law have left some litigants feeling intimidated by and excluded from their own system of justice and (2) a commitment to attempt in concrete ways to rectify that situation.

By giving reality to these messages, good ADR programs inspire both respect for and gratitude toward the courts--and toward our system of government by democratically developed law. The gratitude can be palpable. It is reflected in feedback that we get from litigants who tell us thank you for providing dispute resolution tools that really were economically and psychologically accessible--and that really gave the parties an opportunity (whether 'successful' or not) to try to solve their problems--with some sophisticated, constructive help from a neutral the court provided. Inspiring respect and gratitude toward public institutions is a big deal--a fact that we should not permit the policy makers to forget in their "cost-benefit" analyses.

The third major reason to resist the use of settlement rates to measure the full value of our ADR programs is this: a preoccupation with settlement rates would reflect and reinforce misguided notions about the central mission of the courts. Emphasizing the importance of "getting the cases settled" suggests to the public that the real purpose of ADR is to get the cases out of the court--to make life easier for the judges and the administrators. When we use settlement rates as the dominant criterion for measuring ADR success the message we risk sending to the public is that we (courts) really don't want you (litigants and lawyers) to bother and burden us with your cases--so we send you to our ADR program to get you to go away.

This is the unseemly and unhealthy institutional self-absorption to which I alluded earlier. Rather than reinforcing fears about judicial self-interest and institutional selfishness, our ADR programs should be vehicles for demonstrating our

commitment to serve the needs of the people. Toward that end, we should use a sophisticated set of criteria for measuring the value of those programs that reflect the full range of benefits (economic, emotional, philosophic, sociological) that a good ADR program can deliver to the people the courts serve and to the long-range health of our society.

