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ADR: To Be Or...

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ADR: TO BE OR . . .?

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I. INTRODUCTION

Is alternative dispute resolution (ADR) successful? Yes, no, and maybe. The answer depends on why it is used and what it is supposed to accomplish. Additionally, valuation of ADR depends on how its goals are measured, how it compares to alternative procedures, and how it fits one's conception of American justice. Given the increasing interest in ADR,[1] answers regarding its success will affect allocation of both public and private resources.

The term "ADR" encompasses many dispute resolution techniques. Mediation, arbitration, summary jury trials (SJTs), early neutral evaluation (ENE), and minitrials are several of the more familiar examples. ADR may be public or private, voluntary or compulsory, costly or free. Its clients possess diverse demographic characteristics, and their experience with ADR is likely to differ depending upon their background, experience, education, and expectations. The type of dispute involved will also

1. The American Bar Association is promoting ADR with its 1994 theme: "Justice for All—All for Justice." R. William Ide III, *Summoning Our Resolve*, A.B.A. J., Oct. 1993, at 8 (1993). ADR is considered necessary to this egalitarian theme because ADR works. *Id.*

The American Arbitration Association, a national nonprofit organization, reports that its 35 offices completed 7161 resolutions in 1991, an increase from 5386 in 1990 and 4801 in 1989. Steve Kaufman, *See You Out of Court*, NATION'S BUS., June 1992, at 58. Court-annexed arbitration programs are operating in 21 states. Craig Boersema et al., *State Court-Annexed Arbitration: What Do Attorneys Think?*, 75 JUDICATURE 28, 28 (1991). Ten federal district courts (E.D. Pa., M.D. Fla., W.D. Mo., W.D. Okla., N.D. Cal., W.D. Mich., D.N.J., W.D. Tex., E.D.N.Y., and M.D.N.C.) have mandatory court-annexed arbitration programs funded by Congress. BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 1 (1990). *See generally*, OFFICE OF THE GENERAL COUNSEL, ARBITRATION AND THE LAW, AAA GENERAL COUNSEL'S ANNUAL REPORT 1991-1992 (1992); ABA Standing Committee on Dispute Resolution, Legislation on Dispute Resolution, 1990/1991 Addendum (1992) (reviewing ADR legislation and caselaw).

affect the perceived result.[2] These independent variables complicate any attempt to predict ADR success.

The results, or outcomes, of ADR are not only difficult to predict, but also difficult to measure. Current research has attempted to define success by using such criteria as client satisfaction, pace of litigation, increased options, caseload reduction, compliance, and long-term stability.[3] Time and cost savings are frequently accepted as valid measures of success.[4] Opinions of the bench and bar are solicited for appraisal of ADR's practicality.[5] Whether any of these criteria are valid for determining success is controverted.

Current studies of ADR have generated almost as many questions as were initially addressed. Data on cost savings and efficiency is not compelling. The desirability of promoting settlement, imposing preconditions to court access, and granting neutrals decision-making power is challenged. Opinions about ADR range from enthusiastic support to dire predictions of institutionalizing a second class legal system.[6] Consequently, due process, equal protection, and social policies regarding the aims of ADR are being scrutinized.[7] Whether ADR is an adequate solution to perceived problems in the legal system, or whether it is needed at all, is debated.[8]

Obstacles in research design and methodology are frequently encountered in social science research. The strongest studies utilize a

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2. *See* David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 383 (1989) (advocating consideration of the " 'relevantly different' contexts" in which ADR occurs).

3. *E.g.*, the Federal Judicial Center (FJC) evaluated 10 arbitration programs on cost, time, court burden, fairness, and availability of additional methods. MEIERHOEFER, *supra* note 1, at 1. Mediation reviews have emphasized assessment of client satisfaction, compliance rates, mediator effectiveness, and disputants' learning as measures of effectiveness. Hugh O'Doherty & Faculty Consortium on Dispute Resolution Research, *Mediation Evaluation: Status Report and Challenges for the Future*, 10 EVALUATION PRAC. 8, 13-17 (1989).

4. *E.g.*, E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 956-57 (1990).

5. *See, e.g.*, John Barkai & Gene Kassebaum, *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133, 141 (1991) (measuring satisfaction by assessing lawyers' attitudes); *see also* Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 364-66 (1992) (surveying judges' knowledge and use of ADR).

6. Critics worry that ADR may deprive disadvantaged groups of legal rights and compromise legal ethics; advocates praise its efficiency (speed, cost, access) and commitment to a consensual social order. Luban, *supra* note 2, at 381; Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303, 304-06 (1990).

7. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1 (1993).

8. *See* G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34, 38 (1991). The legal "crisis" suggested as a justification for imposing mandatory ADR does not exist. *Id. But see* Richard Danzig & Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 691 (1975). The lack of readily available, reasonably priced methods for settling disputes is costly for everyone. *Id.*

control group, but identifying controls and randomizing subjects is difficult.[9] The task of selecting reliable and valid instruments for defining and measuring program goals and the corresponding changes in behavior, attitudes, and values of the subjects is challenging.[10] Qualitative methods, such as case studies and self-reports, provide perspective but also have limited generalizability.[11] These research caveats are applicable to attempts to evaluate, measure, and predict the effects of ADR.

The value of evaluation lies in providing useful information to decision-makers and consumers.[12] To measure success, evaluators must be able to describe intended results and propose questions that will provide the corresponding information.[13] This is difficult as long as the concept of ADR remains amorphous and ambiguous.[14] Until what is being measured is clarified and the right questions selected, data will be misleading, irrelevant, and uninformative.

Regardless of one's initial perspective on ADR, determining its relative advantages and disadvantages will aid both advocates and detractors in making informed choices. Much preliminary information is available. Well-designed evaluations can focus that information, respond to concerns, and guide fiscal and social policies. It can suggest appropriate, attainable goals: "In short, if you know where you are going, you have a better chance of getting there."[15]

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9. JACQUELINE KOSECOFF & ARLENE FINK, EVALUATION BASICS: A PRACTITIONER'S MANUAL 22 (1982). The control group is exposed to the trial program or service while a comparison group is not. *Id.*

10. *Id.*

11. *See* MICHAEL A. PATTON, QUALITATIVE EVALUATION METHODS (1980) (describing procedures for collecting and analyzing qualitative data for social science research); CAROL TAYLOR FITZ-GIBBON & LYNN LYONS MORRIS, HOW TO DESIGN A PROGRAM EVALUATION (1978) (recommending several practical designs for program evaluation).

12. KOSECOFF & FINK, *supra* note 9, at 20-21. "Evaluation is a set of procedures to appraise a program's merit and to provide information about its goals, expectations, activites, outcomes, impact, and costs." *Id.* at 20.

13. *Id.* at 23.

14. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversay Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 44 (1991). Descriptive words and labels must be more precise in order to make accurate comparisons. *Id.* ADR has been described as a "cloudy elephant"—so big that it can not help attracting attention but so confusing that the legal system cannot manage it. Stephenie Overman, *Why Grapple with the Cloudly Elephant?*, HR MAG., Mar. 1993, 60 (attributing the latter thought to attorney Lynn Laughlin, director of Employment Dispute Resolution, Inc.).

15. ROBERT F. MAGER, PREPARING INSTRUCTIONAL OBJECTIVES 6 (2d ed. 1975) (describing techniques for organizing instruction).

II. MEDIATION

A. IS MEDIATION SUCCESSFUL?

1. *Client Satisfaction*

Client satisfaction is one criterion for measuring the success of mediation programs. Typically, 75% or more of mediation participants report being satisfied even when an agreement is not reached.[16] Although satisfaction is not easily quantified or comparable among different individuals, data relates it to clients' perceived control of the process, privacy, and the opportunity for expression of opinions.[17] Satisfaction is also closely linked with clients' perceptions of fairness, a finding that is confirmed in studies of victim-offender mediations.[18] The positive effects of participation in such programs were attributed to the victim's opportunity to confront the offender, express concerns, receive answers to questions, and negotiate a restitution plan.[19] Overall, involvement and the perception of fairness were positively related.[20]

A more extensive evaluation of victim-offender programs, consisting of cross-state interviews of 868 victims and offenders, confirmed that victims participating in mediation were more satisfied than victims who did not participate in mediation.[21] Victims who participated in mediation were significantly less disturbed about the crime and less fearful of its being repeated.[22] Both victims and offenders believed that mediation enhanced fairness, and they perceived the juvenile justice system posi-

16. Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 394, 395-96 (Kenneth Kressel et al. eds. 1989) [hereinafter *A Research Perspective*].

17. *Id.* at 396.

18. *See* Mark S. Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52, 55 (1989). Fifty burglary victims referred to a victim-offender mediation program, the Minnesota Victim Offender Reconciliation Project, were surveyed concerning fairness and satisfaction. *Id.* at 52. One participant summarized the group consensus stating, " 'I think the more involved you are, the more satisfied you are that it has been taken care of properly.' " *Id.* at 55.

19. *Id* at 55. It was important to negotiate the restitution agreement for 86% of the victims, to personally meet the offender for 66% of the victims, to express their fears directly to the offender for 78% of the victims, and to receive answers about the crime for 76% of the victims. *Id.* at 55. Restitution agreements were considered fair by 93% of the victims. Umbreit, *supra* note 18, at 56.

20. *Id.* at 55. Twice as many mediation participants thought the dispositions of their cases were fair when compared to parties who refused to participate in mediation. *Id.* at 56. Being treated fairly was reported by 97% of those in the mediation sessions. *Id.* Victims participating in mediation also reported high levels of satisfaction. *Id.* at 55. Meeting the offender was the most commonly identified reason for satisfaction. Umbreit, *supra* note 18, at 56.

21. Mark Umbreit & Robert B. Coates, *The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States*, 1992 JUV. & FAM. CT. J. 21, 21-22 (1992) (describing the victim-offender mediation programs affiliated with the juvenile courts in Albuerquerque, New Mexico; Minneapolis/St. Paul, Minnesota; and Oakland, California). Pre- and post-mediation interviews were administered to three groups: those referred to mediation but choosing not to participate, groups not referred to mediation, and the mediation participants. *Id.* at 22. All groups were matched for age, race, sex and offense. *Id.* The interviews addressed satisfaction, fairness, and restitution completion. *Id.*

22. *Id.* at 24.

tively.[23] However, although the process was considered fair, offenders did not indicate any greater satisfaction with the outcome of mediation compared to results decreed by the court.[24]

Disenchantment with the adversarial process and its frustration of cooperation and compliance has been suggested as one reason for the dramatic increase in the number of divorce mediation programs.[25] These programs consider client satisfaction an important outcome and have been active in attempting to determine its antecedents. For example, court programs in California, Connecticut, and Minnesota offering mediation services for contested child custody and visitation distributed and analyzed identical client questionnaires.[26] At all locations, users were highly satisfied with mediation.[27] Clients who reached agreements were the most enthusiastic, but even a majority of those who did not reach agreement would recommend mediation to others.[28] Considering the needs of the children, providing an opportunity to vent grievances and keeping discussions focused were the most appreciated features of mediation.[29]

Numerous investigations have replicated the findings of greater client satisfaction in mediation compared to litigation.[30] A Denver study indicated that 77% of the parties were satisfied with mediation compared

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23. *Id.* at 25.

24. *Id.* Offenders reported no significant difference in satisfaction with the justice system whether they participated in the mediation or not. *Id.* at 24.

25. Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation Programs*, 23 CONCILIATION CTS. REV. 1, 1 (1985) [hereinafter *A Preliminary Portrait*] (citing Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION CTS. REV. 1-24 (1983)); Ralph C. Cavanagh & Deborah L. Rhode, Note, *The Unauthorized Practice of Law and Pro Se Divorce*, 86 YALE L.J., 104, 165-66 (1976) (reporting that feelings of intimidation are minimized when lay assistants help with the divorce process).

26. Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 2. This research was sponsored by the Children's Bureau of the United States Department of Health and Human Services and included the Los Angeles Conciliation Court, the Family Relations Division of the Connecticut Superior Court, and the Domestic Relations Division of the Hennepin County Family Court. *Id.* at 2. Demographics were similar across sites but reflected the general population of each area. *Id.* at 3. Clients completed questionnaires prior to mediation, 15 weeks following the first contact, and 12 months later. *Id.* at 2.

27. *Id.* at 6-7. Before mediation, 33 to 38% of the clients at all sites indicated great dissatisfaction with their initial custody arrangements. Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 3.

28. *Id.* at 7.

29. *Id.* at 7-8. Approximately 70% of the clients cited these factors. *Id.*

30. *E.g.*, Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 429, 437 (Jay Folberg & A. Milne eds., 1988) [hereinafter *Research Results*]. The Divorce and Mediation Project, designed to assess comprehensive divorce mediation in northern California, reported that 74% of both men and women completing mediation would recommend the process to a friend. Joan B. Kelly & Lynn L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes*, MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION, 263, 278 (Kenneth Kressel et al. eds, 1989).

to less than 40% using an adversarial approach.[31] Degree of satisfaction with the final divorce decree was significantly greater for a mediation group compared to an adversarial group as reported on 101 mail questionnaires from Kansas and California.[32] Satisfaction with the mediation process persists beyond settlement. In field studies using random assignment, mediation participants were three times more likely to report that the situation had improved six weeks following the settlement.[33] The mediation process continued to be rated fairer and more satisfying than adversary procedures when reevaluated six and twelve months later.[34]

Field studies have attempted to determine whether the antecedents of satisfaction are different for men and women, as contrasting data has been published regarding sex differences and mediation. Both men and women report more satisfaction with mediation compared to litigation, but aspects of the process are perceived and rated differently.[35] A longitudinal study examining the factors contributing to client satisfaction for males and females found both groups significantly more satisfied with the mediation process and outcomes than an adversarial group was with their divorce.[36] However, men in both groups were significantly more likely to believe they had wasted time.[37] Men, more than women in both groups, rated their attorneys or mediators as supporting their spouses' viewpoint more than their own.[38] Women in the mediation sample were most likely

31. Pearson & Thoennes, *Research Results*, *supra* note 30, at 429. Research psychologists Kelly and Gigy report a high percentage (78% of men and 72% of women) at least somewhat satisfied with divorce mediation. Kelly & Gigy, *supra* note 30, at 278.

32. Barbara J.Bautz, *Divorce Mediation: For Better or for Worse?*, 22 MEDIATION Q. 51, 55, 57 (1988). Bautz investigated the correlation between satisfaction with the final divorce and type of divorce process—contested, uncontested, or mediated. *Id.* at 51-52.

33. Robert E. Emery & Melissa M. Wyer, *Divorce Mediation*, 42 AM. PSYCHOLOGIST 472, 474 (1987).

34. Nancy Pearson & Jessica Thoennes, *The Mediation and Adjudication of Divorce Disputes: Some Costs and Benefits*, 4 FAM. ADVOC., Winter 1982, at 26, 31 [hereinafter *Costs and Benefits*]. Communication had improved. *Id.*; *see also* Nancy Pearson & Jessica Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L. Q. 497, 506 (1984) [hereinafter *Longitudinal Evaluation*] (stating that better communications follow mediation).

35. *See, e.g.*, Emery & Wyer, *supra* note 33, at 474 (reporting sex differences). *But see* Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, 6 MEDIATION Q. 71, 86 (1989) (failing to replicate Emery's findings and describing both sexes as equally satisfied with mediation overall).

36. Kelly, *supra* note 35, at 84. Two hundred twenty-five divorcing individuals comprised the adversarial sample; 212 respondents represented the voluntary mediation participants. *Id.* at 73. The samples were not randomly selected. *Id.* at 75. Both groups completed questionnaires at five points in time. *Id.* at 73. At the final divorce, 69% of the mediation group was "somewhat" to "very satisfied" compared to only 47% of the adversarial group. *Id.* at 84. Communication in the adversarial group had deteriorated. *Id.* at 82. Findings consistently favored mediation for reaching comprehensive divorce agreements. *Id.* at 84. Except for child support, which was perceived as inadequate by women in both groups, mediation was more satisfactory on all outcomes. *Id.* at 85. No significant gender differences regarding satisfaction were found. *Id.*

37. *Id.* at 81.

38. *Id.*

to report that the mediation process helped them assert themselves when compared to adversarial women and men.[39]

Significant sex differences were found in a court-based mediation study.[40] Again, consistent and statistically significant differences favored mediation over litigation.[41] Yet, differences between groups were much greater for fathers than mothers with the men significantly more satisfied.[42] Women believed that children's needs were well-addressed in mediation, but that they personally won more and lost less in litigation.[43] A comparison of fifteen mediating families to sixteen litigating families revealed similar findings.[44] The mediation results were positive, but mothers and fathers responded differently.[45] Fathers were more satisfied with the process and the effect on themselves and their former spouse; women were more satisfied with the effect on the children.[46]

Why is mediation more satisfactory for fathers compared to mothers? The reported differences favoring fathers' satisfaction did not result from womens' dissatisfaction with mediation.[47] The disparity resulted from comparing the two groups of men with the litigation group being very displeased.[48] Women won in litigation so mediation could not improve

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39. *Id.* at 80. Women in mediation felt empowered and were confident that they had influenced the agreement, *id.*, suggesting that mediation was able to balance the relative power of the participants. *Id.* at 85.

Critics of mediation are concerned that women may be disadvantaged in mediation because they typically have less power and knowledge about the situation. *Id.* However, in this study, women in the adversarial group did not express more satisfaction on any item than women in mediation. *Id.* at 85-86. Mediating women were as satisfied as men with the overall process and reported exerting as much influence. *Id.* at 86. In a supporting study, women reported greater improvement in psychological functioning and greater resolution of their disputes in mediation when compared to litigation. Christopher W. Camplair & Arnold L. Stolberg, *Benefits of Court-Sponsored Divorce Mediation: A Study of Outcomes and Influences on Success*, 7 MEDIATION Q. 199, 209 (1990).

40. Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, 6 MEDIATION Q. 3, 12 (1989). Court-based mediation services were evaluated by random assignment to mediation or traditional adversarial methods. *Id.* at 9. Variables measured for the 71 families included the number of agreements, speed, content, satisfaction, perceptions of the effect on themselves, their children, and former spouse, and three measures of general postdivorce functioning. *Id.* at 10.

41. *Id.* at 11.

42. *Id.* at 12. Men in mediation were more satisfied with the process, with negotiations, and with the psychological impact on themselves and their spouses than men who litigated. *Id.* at 12. However, in this study, women in mediation reported less satisfaction than those in litigation. Camplair & Stolberg, *supra* note 39, at 200.

43. Emery & Jackson, *supra* note 40, at 12.

44. Robert E. Emery et al., *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. CONSULTING & CLINICAL PSYCHOL. 410, 414 (1991).

45. *Id.* at 411. Mediation kept a substantial number of divorcing couples out of court, and agreements were produced in less than half the time it took to litigate. *Id.* at 415. A statistically significant and meaningful increase in satisfaction was noted for fathers. *Id.* at 410.

46. Emery & Wyer, *supra* note 33, at 474; Emery, *supra* note 44, at 410.

47. Emery & Jackson, *supra* note 40, at 12.

48. *Id.* at 12, 15. Satisfaction may be attributed to fathers' greater participation in the custody decisions. *Id.* at 16. However, the authors warn that these findings may only generalize to court settings and to subjects from lower socioeconomic groups. *Id.*

their results; results, however, could improve for fathers.[49] Fathers tend to benefit from social innovations, such as mediation, that alter the status quo. If the topics mediated are areas in which mothers have been traditionally favored, such as custody and visitation, men are more likely to report gains.[50] If topics of concern to women, such as support and financial settlements, are mediated, a corresponding increase in women's satisfaction should occur.[51]

Even in studies that report greater satisfaction for mediation participants, individual reactions vary. Group averages will thus not be accurate predictors for specific clients.[52] Some comments regarding dissatisfaction with the mediation process included feeling tension, discomfort, and confusion.[53] Others may have been unhappy due to faulty expectations of the process. Misconceptions included the belief that mediation would save the marriage, that the mediator would make the final custody decision, or that mediation was a form of counseling.[54] False expectations are apparently a widespread problem regardless of the content of the mediation.[55]

Satisfaction may not always be the best criterion of success. It is important, but difficult to measure, and its overemphasis may lead to minimizing other equally important goals. For example, mediation of special education disputes has been considered successful.[56] One extensive

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49. Women have an advantage in litigation due to a custodial preference for mothers. Emery, *supra* note 44, at 416. In fact, mothers won 90% of the litigated custody battles. *Id.* at 415.

50. Emery & Wyer, *supra* note 33, at 475.

51. Actually, the custody agreements reached in litigated and mediated groups did not differ in actual time spent with the children except that the mediated agreements provided for more joint legal custody. Emery & Jackson, *supra* note 40, at 15-16. Barbara J. Bautz & Rose M. Hill, *Divorce Mediation in New Hampshire: A Voluntary Concept*, 7 Mediation Q. 33, 37 (1989). Fathers may have derived greater satisfaction from having their parental role recognized even if the actual results did not differ. *Id.* In a state with the presumption of joint legal custody, mediation was more likely to produce that result. *Id.*; *see also* Emery & Wyer, *supra* note 33, at 478.

52. *See, e.g.*, Bautz & Hill, *supra* note 51, at 37. Although couples in mediation were significantly more satisfied with the final divorce agreement than the adversarial couples, responses in both groups ranged from "very satisfied" to "very dissatisfied." *Id.*

53. Pearson & Thoennes, *Reseach Results*, *supra* note 30, at 439. Approximately half of the mediation participants agreed with the statements: "The sessions were tension-filled and unpleasant" and "I felt angry during much of the session." *Id.* Feeling defensive was acknowleged by 45% of the participants, and some were worried that the mediator would fail to detect dishonesty in their spouses: "He's smart . . . he can do anything . . . I was afraid they (the mediators) would believe him." He "did a better job of selling himself." *Id.*

54. *Id.* Approximatedly one-fourth agreed that "mediation was confusing." *Id.* Interviews revealed that clients often distorted the purpose of mediation. *Id.*

55. *See, e.g.*, Mary P. Van Hook, *Resolving Conflict Between Farmers and Creditors: An Analysis of the Farmer-Creditor Mediation Process*, 8 Mediation Q. 63, 68 (1990). Lack of experience with mediation led to expecting both too much and too little at times. *Id.* The Iowa Farmer-Creditor Mediation Servies (IFCMS) randomly sampled farmers, representatives of financial institutions, and mediators. *Id.* at 65. Lack of experience contributed to misunderstandings and problems, *e.g.*, farmers not knowing how to prepare for mediation and not bringing adequate information to the sessions. *Id.* at 68-69.

56. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 682 (1986). The majority of disputes have settled and parents' reactions are positive. *Id.* (citing L. Singer & E. Nace, Mediation in Special Education: Two States' Experiences (1985)).

study, comparing the effectiveness of mediation as an alternative to traditional due process hearings for determining custodial placement, found that mediation had a stronger correlation with parental satisfaction.[57] However, because there was no greater satisfaction with the outcome from mediation than from litigation, no higher rating of approval with the school personnel, and no lowered financial cost, the study concluded that mediation was not achieving its potential as an effective method of conflict resolution in special education.[58] Thus, even if the parties are satisfied, the dispute may not be efficiently or effectively resolved. Other quantitative and qualitative measures can provide additional information and may be necessary to complement satisfaction as criteria of success.

2. *Settlement Rate*

Reported settlement rates achieved in mediation vary greatly.[59] Conservative estimates for settlement in all types of mediation range between 20% and 80% with a median rate of 60%.[60] These figures are consistent with those reported in the divorce mediation literature.[61] Mandatory farm mediation programs produce comparable settlement rates and have been judged successful.[62] Generally, court programs settle from one-half to three-quarters of the cases referred to mediation.[63]

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57. H.R. Turnbull H.R. & Kathleen H. McGinley, *Evaluating the Effectiveness of Mediation as an Alternative in the Due Process Theory in Special Education*, Final Report, 9/1/86-8/31/87 (ED 345422) at 142. A parent satisfaction survey was administered to parents of children disagreeing with school placements. *Id.* at 155.

58. *Id.* at 170, 195. Although satisfaction with the process was high, the parents' previous relationship with the school was critical for both groups. *Id.* at 158. The authors suggest that mediation in special education suffers from ineffective implementation and lack of nationwide uniformity. *Id.* at 195.

59. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 397.

60. *Id.*

61. *See* Camplair & Stolberg, *supra* note 39, at 208. Sixty-nine percent of the couples in mediation resolved at least one dispute, and over one-third successfully resolved all disputes. *Id. See also* Emery & Wyer, *supra* note 33, at 474. More cases were settled in mediation than through attorney negotiations in three quasi-experimental field studies. *Id. But see* Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 9. Only 35-40% reached agreement. *Id.* However, even this lower rate was augmented by another 20-30% reaching some type of agreement, perhaps temporary. *Id.*

62. Bureau of National Affairs, *Farmer-Lender Debt Mediation is Growing in Midwest States*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 126, 128 (Martha A. Matthews ed., 1990) [hereinafter *Debt Mediation*]. A report of mandatory mediation documented a 50% settlement rate in Minnesota, most involving 3 to 4 creditors, *id.* at 126, and a 62% settlement rate in Iowa. *Id.* at 127.

63. Emery & Wyer, *supra* note 33, at 474. In Los Angeles County, 55% of the 500 couples entering divorce mediation each month reach an agreement. *Id.* (citing H. McIsaac, *Court-Connected Mediation*, 21 CONCILIATION CTS. REV. 49-56 (1985)). In Connecticut, where referral is at judicial discretion, 64% have reached agreement. *Id.* (citing A.J. SALIUM & S.D. MARUZE, The Use of Mediation in Contested Child Custody and Visitation Disputes (1982) (unpublished manuscript) (1982)). Smaller public mediation services report reaching agreements in one-half to three-quarters of their cases. *Id.* at 474 (citing H.H. Irving, et al., Final Research Report, Toronto, Canada: Provincial Court (Family Division)); Pearson & Thoennes, *Costs and Benefits*, *supra* note 34, at 28-29.

Reliance on settlement rates as an indication of success may be misplaced. Rates are inflated for various reasons, and reports may be inaccurate. One-third of the parties reaching an agreement in a divorce mediation still insisted that they made little or no progress.[64] On the other hand, there may be more success than indicated by the settlement numbers because clients who fail to reach an understanding during the mediation sessions may eventually complete an agreement.[65]

3. *Efficiency*

The available evidence suggests that mediated cases settle more quickly than comparable cases using an adversarial approach.[66] In child custody settlements, with random assignment to either mediation or litigation, settlement time for the mediation group was significantly shorter.[67] A review of mediations for minor disputes indicated that resolution occurred considerably faster than court hearings could be held.[68] Advocates claim that mediation may permit a more complete examination of issues than that usually allowed in court.[69] When a thorough analysis is quicker, time and effort are saved for both litigants and the public.[70]

Resolving disputes quickly can lead to a reduction in the number of cases actually litigated.[71] Trial judges hearing divorce cases in McLean County, Illinois, agreed that mediation led to a significant reduction in the

64. Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 13.

65. *Debt Mediation*, *supra* note 62, at 127.

66. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 398.

67. Emery & Jackson, *supra* note 40, at 11. Mediation took an average of three weeks to reach a settlement, compared to seven weeks for the adversarial group. *Id.* The amount of time required for mediation varies. *Id.* at 6. Court programs in Minnesota for custody and visitation typically average 4.3 hours spread over an average of 3.3 mediation sessions. In California, the same type of program averages 1.7 sessions lasting a total of 3 hours. Connecticut averages 2.3 hours, which take an average of 1.5 sessions. *Id.* Only 21% of the respondents in Minnesota attended one session, compared to 57% in California and 65% in Connecticut. *Id.*

The time required to complete mediation also varied at each site depending upon the individual case. *E.g.*, Lynelle C. Hale & James A. Knecht, *Enriching Divorced Families Through Grass Roots Development of Community-Wide Court-Referred Mediation Services*, 24 Conciliation Cts. Rev. 7, 12 (1986). Twenty-nine cases studied in McLean County, Illinois following the first year of court-referred mediation services required from .5 to 25 weeks to complete, with an average of 4.7 weeks. *Id.* The actual number of sessions ranged from of 1 to 9, with an average of 2.8 sessions for the mediation. *Id.*

68. Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, *in* Mediation Research: The Process and Effectiveness of Third-Party Intervention, *supra* note 16, at 31, 33. Reports disputing the relative speed of mediation have tended to compare the time interval between intake and mediation to the interval between intake and dismissal. *Id.* at 34. It would be more appropriate to compare the time between intake and mediation to the time between intake and trial because many cases are dismissed early, distorting the comparison. *Id.*

69. Kent E. Menzel, *Judging the Fairness of Mediation: A Critical Framework*, 9 Mediation Q. 3, 9 (1991) (citing R. Albert and D. Howard, *Informal Dispute Resolution Through Mediation*, *in* Evaluative Criteria and Outcomes in Divorce Mediation 100 (J. A. Lemmon ed., 1985)).

70. Menzel, *supra* note 69, at 10. If the process can be completed in a shorter time without sacrificing completeness, a better solution with less stress will be more likely. *Id.*

71. *Id.* at 9.

number of trials scheduled.[72] Diversion of cases from court proceedings by mediation is substantial;[73] however, results on reducing court backlogs are not all positive.[74] Less than optimal results have been attributed to lack of popular support for using mediation, an attraction of cases that would not have been initiated as legal actions, and time expended mediating cases that would have been dismissed at an early stage.[75] Between one-third and two-thirds of offers to enter mediation are refused, thereby preventing an accurate estimation of the number of cases that might be successfully diverted.[76]

4. *Cost*

In general, mediation should reduce the cost of resolving disputes.[77] Cost savings appear to be more pronounced for public entities compared to private parties. For example, the city of Los Angeles reported savings of approximately $175,000 in 1978 with mandatory custody mediation.[78]

For litigants, results have varied. Significant cost savings with mediation have been documented, but other studies have reported only modest savings.[79] Cost savings may depend on the type of dispute.[80] Overall, successful mediation appears to save costs, while unsuccessful mediation does not necessarily increase costs.[81]

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72. Hale & Knecht, *supra* note 67, at 15. Most referrals were voluntary rather than court-ordered. *Id.*

73. Emery, *supra* note 44, at 414.

74. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 398.

75. Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41(2) J. SOC. ISSUES 179, 182-83 (1985) [hereinafter *Themes*].

76. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 399. This refusal rate is consistent even when mediation is offered at little or no cost. *Id.*

77. Speed in attaining settlement makes divorce cheaper. *E.g.*, Pearson & Thoennes, *Longitudinal Evaluation*, *supra* note 34, at 507-08.

78. Kressel & Pruitt, *Themes*, *supra* note 75, at 182.

79. *See* Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 MEDIATION Q. 15, 19 (1990) (reporting significant savings, *e.g.*, $12,226 for adversarial divorces compared to $5,234 for mediated divorces). *But see* Pearson & Thoennes, *Research Results*, *supra* note 30, at 447 (indicating only modest savings).

80. *See, e.g.*, Bureau of National Affairs, *Manager of Community Relations Unit in Arizona Describes State Mediation of Civil Rights Cases*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES, 119, 121 (Martha A. Matthews ed., 1990). The Civil Rights Division of the Arizona Attorney Gereral's Office referred nearly 300 discrimination charges to mediation and concluded that the process was cost effective. *Id.* at 119. Of three hundred cases referred, 276 discrimination charges were mediated. *Id.* at 121. A total of 181 charges were successfully resolved, awarding an average of $3,635.79 per claim. *Id.* However, reviews of other types of programs, including both neighborhood justice centers and environmental mediation programs, have concluded that cost effectiveness is difficult to measure, and cost savings may not necessarily be realized with mediation. Roehl & Cook, *supra* note 68, at 39; Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 398 (citing G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986)).

81. Pearson & Thoennes, *Research Results*, *supra* note 30, at 447.

5. *Content*

Mediated agreements may involve more compromise and more equal apportionment of resources than adjudicated agreements. Settlements are described as "very" to "somewhat fair" by couples in mediation, while adversarial groups report "somewhat fair" to "very unfair" settlements.[82] Divorce mediation clients are more likely to report acceptance of the idea of receiving their spouses' settlement as their own.[83] In small claims cases, a study found awards were made solely to plaintiffs in only 17% of the mediated cases compared to almost 50% of adjudicated decisions.[84] Thus, it appears that fewer imbalanced agreements are reached in mediation.

Won-lost ratings are more divergent for litigation couples and more alike for mediation couples.[85] In mediation groups, both parties described their winning and losing closer to the midpoints of a scale, whereas ratings were at the extremes for litigation groups.[86] In litigation, the more one parent felt like a winner, the more the other felt like a loser. In mediation, the more one parent felt like a winner, the more the other felt the same.[87] The win-lose orientation of litigation and the win-win orientation of mediation have been notably consistent.[88] As opposed to traditional litigators, mediators may be predisposed to empower everyone to win and thus, agreements may reflect more balance. Or, by encouraging communication, mediation may encourage expression of each party's most important issues and facilitate winning for both when compromise is possible.

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82. Bautz & Hill, *supra* note 51, at 37-39. Mediation is voluntary in New Hampshire. *Id.* at 33. A mail survey queried 500 randomly selected families, including both mediating and nonmediating couples. *Id.* at 35. Thirty-two percent responded. *Id.*

83. Kelly, *supra* note 35, at 83. These responses suggest perceived equity. *Id.*

84. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 397-98. However, pressure to settle may lead to post-mediation dissatisfaction. *Id.* In small claims cases, clients felt compelled to settle as a result of "strong-arm tactics." *Id.* (citing N. Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. Soc. Issues 127, 136 (1985)). Approximately 25% to 50% of the clients in divorce mediation have reported experiencing pressure to settle. *Id.* at 398. Less powerful groups may be more susceptible to coercion. While not describing the mediators' tactics as coercive, women have reported that mediators control the terms of the agreement. Pearson & Thoennes, *Research Results*, *supra* note 30, at 441. However, evidence on whether court forums are better at protecting the rights of the disadvantaged when compared to mediation is inconclusive and contradictory. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 399.

85. Emery & Jackson, *supra* note 40, at 12.

86. Emery et al., *supra* note 44, at 416.

87. *Id.*

88. *Id.*

6. *Impact on Psychological Functioning*

Although mediation is popular in family disputes, the effects on the family are not well documented.[89] Theoretically, mediation should elicit behaviors that are conducive to cooperation and communication, and couples in mediation do demonstrate gains in cooperation.[90] Clients attaining agreements of any type credit mediation with improving their relationship with their ex-spouse.[91] Couples who used mediation described their post-divorce relationships as harmonious, whereas couples who used traditional methods more frequently reported their relationship as uncomfortable.[92] Subjective reports have indicated that parties using mediation are more likely to be satisfied and to sense improvement in their lives compared to those in the adversarial process.[93] This is true even when baseline differences measuring marital conflict and tension are similar.[94]

Parents participating in mediation were significantly more likely to report that custody and visitation were better for the entire family than parents participating in the adversarial process.[95] Positive changes followed mediation, including parents experiencing less hostility toward family members and spending more time with the children.[96] Children whose parents mediated their divorces seemed to adjust better than children whose parents divorce through the adversarial process.[97]

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89. Camplair & Stolberg, *supra* note 39, at 199. Research assessing the effect of mediation on family adjustment is limited. *Id.* at 200.

90. Pearson & Thoennes, *Research Results*, *supra* note 30, at 443.

91. Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 9.

92. Bautz & Hill, *supra* note 51, at 39.

93. Emery & Wyer, *supra* note 33, at 474.

94. Kelly, *supra* note 35, at 75. Few initial differences on measurements of marital conflict and tension were reported contradicting presumptions that couples choosing mediation are less angry and more cooperative. *Id.*

95. *Id.* at 83.

96. Camplair & Stolberg, *supra* note 39, at 200-01. Camplair and Stolberg studied 76 divorcing couples assigned either to mediation or litigation for the resolution of their child custody disputes. *Id.* at 201. The couples completed tests measuring co-parenting and family functioning before and after the intervention. *Id.* at 202-03. There were no differences in initial behaviors, but mediation couples presented more disputes of greater severity. *Id.* at 206.

97. Menzel, *supra* note 69, at 12 (citing D. Stull & N. Kaplan, *The Positive Impact of Divorce Mediation on Children's Behavior*, *in* NEW INSIGHTS INTO FAMILY MEDIATION (J.A. Lemmon ed., 1987)). Significant differences in the behavior of children whose parents mediated their divorce compared to children whose parents divorced through the adversarial process have also been noted. *Id.* After an adversarial divorce, the oldest was "less likely to get involved in school activities, less likely to interact with others outside of school, but more likely to use drugs and more likely to break the law . . . than child 1 [oldest] of a parent who went throught mediation." *Id.* For the youngest child, Stull and Kaplan found that children whose parents did not mediate were "less likely to do well in school but more likely to show affection to the respondent." *Id. But see* Pearson & Thoennes, *Research Results*, *supra* note 30, at 445-46 (finding no statistical differences on behavioral checklist ratings between children whose parents mediated or litigated, but suggesting that reports favoring the effects of mediation on children are encouraging and they recommend larger sample sizes to better test this hypothesis).

Other studies have concluded that mediation was not significantly more effective in reducing stress and dysfunction.[98] In one study, standardized psychological tests were administered to clients in either mediation or traditional litigation at the beginning of a study, at the completion of mediation, and six months later.[99] The study found that psychological changes were attributed to the passage of time and not to the type of intervention.[100] Other studies have also reported that mediation does not lead to improvement in the psychological functioning of divorcing spouses and that mediation produces only slight changes in relationship patterns.[101] Perhaps the mediation process is too short, problems too ingrained, and the situation too stressful for measurable or long-lasting changes to occur.[102]

7. *Compliance*

Data strongly suggests that mediation agreements foster compliance and long-term stability.[103] Compliance is reported to be 67% to 87% in neighborhood mediation centers.[104] In a small claims sample, full compliance has been obtained in 81% of the mediations compared to 48% of adjudications.[105] "[F]ailure to pay anything is . . . four times as likely in adjudicated [cases] as . . . [compared to] mediated cases."[106] Compliance may be greater in mediation due to specification of details in mediated settlements, smaller settlements, or perceived fairness.[107]

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98. Joan B. Kelly et al, *Mediated and Adversarial Divorce: Initial Findings From A Longitudinal Study*, *in* Divorce Mediation: Theory and Practice 465 (Jay Folberg & A. Milne eds., 1988).

99. *Id.*

100. *Id.* at 466. Mediation was slightly, but not significantly, better at reducing anger. *Id.*

101. *See* Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 13. One-third of the participants reaching permanent agreements reported that conflict and lack of progress continued. *Id.* Approximately half characterize the mediation sessions as tension-filled. *Id.*

102. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 399; Menzel, *supra* note 69, at 16. Agreements may be maintained, but only with difficulty and frustration. Menzel, *supra* note 69, at 16 (reporting a study by M. Brotsky et al., *Joint Custody Through Mediation—Reviewed: Parents Assess Their Adjustment 18 Months Later*, 26 Conciliation Cts. Rev. 53-58 (1988)). Of 48 mediated agreements one year after divorce, 20 agreements were maintained only with conflict. *Id.* Only 12 agreements were maintained with a minimum level of stress, and 15 couples had failed to achieve an agreement at all. *Id.*

103. Menzel, *supra* note 69, at 8.

104. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 396.

105. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, *in* Mediation Research: The Process and Effectiveness of Third-Party Intervention 53, 55 (Kenneth Kressel et al. eds., 1989). Partial compliance is reported for 93% of mediated cases compared to 67% of adjudicated cases. *Id.* at 56.

106. Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 Law & Soc. Rev. 11, 20 (1984).

107. McEwen & Maiman, *supra* note 105, at 58-59.

Of particular interest in mediated custody disputes is compliance with payment of child support.[108] Again, evidence regarding mediation is generally favorable. One study reported that 97% of parents whose child support was determined in mediation made all payments.[109] The litigated group reported late or no payments at the significantly higher rate of 37%.[110] Similar positive results have been reported for spousal support payments.[111]

Recidivation is less likely for juveniles in mediated criminal justice programs.[112] Offenders who negotiated restitution plans were more likely to fulfill their obligations than offenders who were ordered to pay.[113] Mediated agreements appear to produce compliance based on perceived fairness rather than on penalties for noncompliance.[114] Increased compliance with restitution plans may also result from participation in developing the plan and from direct involvement with the victim.[115]

Stability is also enhanced with mediated agreements. Full compliance occurred in 79% of mediated settlements compared to 67% of adversarial settlements.[116] Later, 33% of this adversarial group reported serious disagreements over their settlement compared to only 6% of the mediated group.[117] Repeated measures at six months and one year indicated that clients were more likely to have adhered to mediated agreements.[118] In a major review of mediation research, no data on relitigation is reported to be less favorable following mediation,[119] lending support to

108. Only half of the women who were owed child support in 1989 received the full amount. Margaret C. Haynes, *Understanding the Guidelines and the Rules*, 16 FAM. ADVOC. 14, 17 (1993) (citing U.S. Census Bureau, Child Support and Alimony: 1989 (Sept. 1991)).

109. Bautz & Hill, *supra* note 51, at 37. For a description of the study, see *id.* at 34-35.

110. *Id.* at 37. Support payments required for both groups did not differ significantly. *Id.* at 39.

111. *See* Pearson & Thoennes, *Research Results*, *supra* note 30, at 441. Subsequent reports in the Denver Custody Mediation Project, *id.* at 429, indicated that 79% of clients with mediated agreements reported full compliance with all terms. *Id.* at 441. However, the authors warn that initial conditions may influence the relatively high success rate. *Id.*

112. *E.g.*, Menzel, *supra* note 69, at 10.

113. Umbreit & Coates, *supra* note 21, at 26. Restitution compliance was analyzed by comparing groups matched on age, race, sex, offense, and restitution amount. *Id.* at 22.

114. Menzel, *supra* note 69, at 8.

115. Umbreit & Coates, *supra* note 21, at 26. Acknowledging the victim as a person may lead to greater awareness of the consequences of the crime. *Id.*

116. Pearson & Thoennes, *Research Results*, *supra* note 30, at 441. When data for the two groups was adjusted by a measurement of initial cooperation, the results were less compelling but still consistent. *Id.*

117. *Id.*

118. Hale & Knecht, *supra* note 67, at 12, 14. This court-referred program requires a minimum of three hours of mediation for all contested custody/visitation cases before a court hearing may be scheduled. *Id.* at 11. In another study, at two years following mediation, only 13% of the mediation participants sought court modifications, compared to 35% of the adversarial clients. Pearson & Thoennes, *Research Results*, *supra* note 30, at 442.

119. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 396.

the contention that both compliance and long-term stability are associated with mediation agreements.[120]

B. Attitudes of the Bench and Bar

1. *Attorneys*

Six months after the initiation of a court-referred mediation service, eighteen family law attorneys were interviewed.[121] Results were generally positive and comments suggested that even when agreements were not reached, issues were clarified and anger dissipated.[122] Confirming these results, another survey of thirty-five attorneys indicated that 90% of the attorneys were happy with mediation compared to a 50% satisfaction rate following litigation without or after mediation.[123]

Of the positive aspects of mediation, its impact on clients' emotional well-being was rated highest. Attorneys reported that conflict in parenting styles following the divorce was reduced, emotions were expressed, mediation time provided a cooling-off period, and trauma for the entire family was reduced. Clients also complied with the mediated agreement which reduced the possibility of renewed strife for both parties.[124]

Attorneys' negative comments about mediation are that delay may deny clients access to the legal system; temporary hearings, which sometimes influence the final outcome unfairly, remain necessary; the trial is an additional expense if settlement is not reached; some mediators are inadequate; and policies for referral, screening, and exemptions are frequently lacking.[125] Ethical concerns include mediators' giving legal

120. *E.g.*, Menzel, *supra* note 69, at 8. Menzel suggests that fairness may be partially assessed by compliance. *Id.*

121. Hale & Knecht, *supra* note 67, at 13. This court-referred program was initiated in 1985, *id.* at 11, and evaluated after 6 months using case termination records and personal interviews. *Id.* at 12-13.

122. *Id.* at 13.

123. Leland C. Swenson & D. Heinish, Attorney and Parent Attitudes Related to Successful Mediation Counseling in Child Custody Disputes 2-3 (Apr. 23-26, 1987) (paper presented at the Annual Meeting of the Western Psychological Ass'n, 7th, Long Beach, CA, microfiche ED279923). They surveyed 48 clients, 35 attorneys, and 4 mediators at conciliation court offices in Los Angeles. *Id.* at 4.

124. Hale & Knecht, *supra* note 67, at 14.

125. *Id.* at 14. Attorneys participating in farmer-creditor mediation reflect the dichotomy in opinions. Some who have represented farmers as well as creditors suggest that the farm mediation program is unnecessary—that both parties were negotiating debts before mediation was tried and will continue to do so. Bureau of National Affairs, *Farmers' and Lenders' Attorneys Discuss Pros and Cons of Mandatory Mediation*, *in* Alternative Dispute Resolution: Practice and Perspectives 129, 129 (Martha A. Matthews ed., 1990). An attorney in Olivia, Minnesota, stated that mediation only postponed the inevitable, and a waiting period might produce the same results. *Id.* at 130. The process just becomes more expensive as debtors and creditors need attorneys for assistance. *Id.* Even when trying to help, mediators do not structure the sessions well. In contrast, a Redwood Falls, Minnesota, attorney stated that mediation shortened the time required for such cases and reduced costs. *Id.* "They [farmers] were in a one-down situation. . . .[t]o say mediation wasn't necessary because the two sides were talking anyway is basically baloney." *Id.* at 131.

advice, lack of confidentiality, and judges' shifting their work to the mediators.[126]

Attorneys suggested that mediation should be voluntary, that courts should monitor progress so that it cannot be used as a delay tactic, that judges should use a consistent referral policy, and that procedures should be standardized.[127] Due to concerns about privacy and confidentiality, the possibility that ethical standards should include all participants, rather than focus on mediators and parties, has been raised.[128]

Attorney attitudes are important to the implementation and successful use of mediation. Clients whose attorneys have positive attitudes toward the process are more likely to emulate these beliefs and to negotiate successfully.[129] Thus, there is a need for attorneys to be aware of their comments and the impressions they project.[130] Whether attorneys are actually willing to encourage mediation is not certain.[131] Several incentives for their doing so include solidifying bench and bar relationships for professional advantage, increasing their knowledge of court policies, and improving client advocacy.[132]

2. *Judicial Input*

Judges familiar with mediation consider it effective for educating clients about the relative costs and benefits of settlement compared to litigation, for evaluating the potential of a case, and for adapting settlements to meet individual needs.[133] Many judges consider mediation appropriate for all types of civil cases, especially those in which the potential costs of litigation are greater than the amount in controversy.[134] Frequently, these happen to be cases with high rates of occurrence.[135] Additionally,

126. Hale & Knecht, *supra* note 67, at 14. Similar concerns were echoed by attorneys in other interviews, especially doubts about confidentially. Attorneys questioned whether the focus on confidentiality was sufficient and whether the lack of written records will foreclose examination of the negotiations. Jennifer A. Mastrofski, *Reexamination of the Bar: Incentives to Support Custody Mediation*, 9 MEDIATION Q. 21, 29 (1991). Mastrofski interviewed judges, mediators, attorneys, court administrators, and participants in family-court reform. *Id.* at 22-23. Forty-two interviewees were attorneys. *Id.* at 23. Related to confidentiality concerns were the questions of whether mediation is formal discovery and how confidentiality may be assured given that parties may learn new information. *Id.* at 28.

127. Hale & Knecht, *supra* note 67, at 14.

128. Mastrofski, *supra* note 126, at 29.

129. Swenson & Heinish, *supra* note 123, at 14. In fact, attorney attitudes are critical. *Id.*

130. *Id.* at 14-15.

131. *See* Mastrofski, *supra* note 126, at 29-30 (addressing the problem of lawyers' experiencing territorial threat).

132. *Id.* at 29-30.

133. Folberg, *supra* note 5, at 365. Questionnaires were sent to all trial judges in California over a three-month period to assess attitudes toward ADR. *Id.* at 355.

134. *Id.* at 366.

135. *Id.* These include landlord-tenant, small claims, civil harassment, and debt collection. *Id.*

some trials are avoided by mediation lightening judges' schedules and resulting in cost savings.[136]

Although mediation is perceived favorably, judges have expressed some concerns. First, they were concerned that the mediation process is not as restrictive as is the courtroom with its procedural safeguards.[137] Time delays were considered a potential problem.[138] Support for promoting pre-filing mediation was almost unanimous but was offset by concerns about starting the process before discovery.[139] When mediation resulted from judicial intervention, judges wanted the results registered with the court to preserve a record and to assist implementation.[140] Guaranteeing the quality of mediation services was also important.[141]

Many judges were concerned about the resulting public perception of the judicial system if mediation were to be used more than minimally. Thirty percent of the judges responding to a survey thought that if mediation is required or suggested for only smaller or pro se cases, it might be considered second-class justice; but if it were suggested only for those who could afford to pay more, the courts might be perceived as being abandoned by those who could afford to purchase a private judicial system.[142]

C. Future Directions

1. *Evaluation Limitations*

The success of mediation is difficult to assess given the limitations in methodology and research design common in much of the published literature. Random assignment and use of matched samples is frequently impossible or not attempted. Participation is voluntary and self-reports

136. Hale & Knecht, *supra* note 67, at 14.

137. However, in certain situations this may be an advantage: "The court system is not designed to solve the angry feelings between two families. It's like Joe Friday says, 'the facts ma'am, just the facts.'" Bureau of National Affairs, *Mediator Stabilizes Violent Dispute Between Families After Court Referral*, *in* Alternative Dispute Resolution: Practice and Perspectives 7, 9 (Martha A. Matthews ed., 1990). For example, a neighborhood dispute was referred to the Center for Dispute Settlement in Rochester, New York when "the legal system just didn't work." The neighborhood dispute originally began as a minor dispute over music and eventually included 86 criminal charges. *Id.* at 7. Personal injuries included a miscarriage and the accidental shooting of a bystander. *Id.* Despite the series of events that had occured, the parties called a truce following mediation. *Id.* at 8.

138. Folberg et al., *supra* note 5, at 369. Judges were in favor of beginning the mediation as soon as possible. *Id.*

139. *Id.* at 369. Judges did not want mediation to conflict with statute of limitation requirements or delay access to the court. *Id.* at 369-70.

140. *Id.* at 366-67.

141. *Id.* at 368. Judges measured quality by the percentage of cases resolved, client satisfaction, and impressions of the local bench and bar. *Id.*

142. *Id.* at 367. Several judges were concerned about additional cost, especially after paying the initial filing fee. *Id.* On the other hand, if parties cannot afford representation, they are benefited by the intercession of mediators. *Id.*

are prevalent.[143] Longitudinal studies are rare and long-term follow-up is nonexistent.[144] Most research has examined private rather than court-ordered mediation.[145] However, public clients may have different characteristics and attitudes than private clientele. In the court-mandated programs, results obtained in one jurisdiction may not generalize to another location or type of program.[146] It is encouraging that similar accounts of satisfaction have been reported for various mediated topics; however, random assignment, matched groups, longitudinal data, comparison of public mediation versus private mediation, and examination of different locations would enhance the reliability of the data obtained.

Mediation programs have established methods for collecting evaluation data, but the data is incomplete and unstandardized so that comparison of results will not be effective.[147] Effectiveness is generally categorized by measures of satisfaction, compliance rates, mediator effectiveness, and client learning. These criteria, however, do not provide a complete measure of success. Although client satisfaction is intuitively an important attribute of a successful process, it may be overrated. Satisfaction may be unrelated to the actual outcome or not based on a realistic appraisal of alternative solutions. Satisfaction may reflect avoidance of a less preferable alternative or distrust of the legal system. Moreover, "satisfaction" as a category in interviews and surveys is often undefined.

Settlement rates are used as a criterion of success on the assumption that settlement is beneficial and programs with higher rates are better. This, however, may not be the case.[148] Attaining an agreement may not represent a solution to the problem because conflict and dissatisfaction may continue.[149] Supporters of mediation promise low cost and efficiency, but, although desirable, these attributes are not inherently fair.[150] Attempts to save money and time may rush the process and value settlement at the expense of thoroughness. There is little data on long-term compliance or noncompliance and the factors influencing both.[151]

143. *E.g.*, Emery & Wyer, *supra* note 33, at 475 (recommending caution in interpreting field studies of client satisfaction).

144. *E.g.*, Camplair & Stolberg, *supra* note 39, at 211-12 (discussing methodological limitations in their study).

145. Kelly, *supra* note 35, at 71.

146. *E.g.*, *id.* at 86-87.

147. O'Doherty, *supra* note 3, at 12-13. Interviews of 95 mediation program directors in 25 states indicated that only 39 programs systematically collected written evaluations, including descriptive data such as demographics of the users. *Id.*

148. Pearson & Thoennes, *A Preliminary Portrait*, *supra* note 25, at 9.

149. *Id.* The issues are so personally difficult for some participants that no satisfactory agreement is possible. *Id.*

150. Menzel, *supra* note 69, at 9.

151. O'Doherty, *supra* note 3, at 14-15.

One criticism of program evaluations is that the data is helpful but incomplete and nonspecific.[152] For example, questions concerning the reasonableness of agreements frequently do not define "reasonable" or simply elicit personal definitions of the term.[153] Another criticism is that feedback is not provided to the mediators. Frequently, in response to difficulties, the mediator is simply not asked to participate again rather than attempting to correct the mediator's inadequacy.[154]

2. *Discussion*

Is mediation successful? A blend of quantitative and qualitative standards for measuring success would provide the most useful information for answering this query. Rather than judging success on the basis of the number of agreements reached, some qualitative evaluation of the settlements should be available. This would require developing a standard for examining agreements to assess specifically whether there are benefits for the litigants and the public.[155] Settlements should not be promoted or discouraged but rather, should be monitored to find ways to encourage settlements encompassing qualities that are deemed desirable.[156]

Evidence indicates that when compared to litigation, mediation may be superior in areas of compliance, cost, efficiency, and agreement stability. Mediation advocates assume that better communication and emotional catharsis will relieve stress and improve the attitudes of the parties. However, access to justice, improvement in relationships, and psychological effects are unsubstantiated and need to be more fully investigated.[157]

A consideration of the conditions making mediation advisable would add to its effective use. Procedural and substantive outcomes contribute to the fairness of mediation.[158] Both are influenced by factors which may not be negotiable or even acknowledged. These include public influences, such as case and statutory law, and private influences, such as family norms, religious beliefs, and specific family needs. Better

152. *Id.* at 15. For example, when parties indicate feeling discomfort during the mediation sessions, they are not specifically asked whether the feelings are attributable to characteristics of the mediator or to aspects of the mediation process. *Id.* Similarly, if new skills are learned, participants are not asked for a description. *Id.* at 16.

153. *Id.* at 14.

154. O'Doherty, *supra* note 3, at 16.

155. Menzel proposes a number of variables to be used for defining and measuring "fairness." Menzel, *supra* note 70, at 17.

156. Marc Galanter, *The Quality of Settlements*, 1988 J. DISPUTE RES. 55, 83 (1988).

157. Kelly et al, *supra* note 98. The lack of reseach addressing these claims precipitated Kelly's study. *Id.* The authors concluded that mediation has a beneficial impact on the future relationship of the spouses rather than producing any immediate improvement in the current situation. *Id.* at 472.

158. Procedural outcomes refer to the process of reaching an agreement and include assessing the impartiality of the mediator, the access to data, the degree of disclosure, and the relative power of the parties. John Dworkin and William London, *What is a Fair Agreement?*, 7 MEDIATION Q. 3, 5-6 (1989). Substantive outcomes include the number of disputes resolved, the content of any agreement reached, and the decisions regarding implementation. *Id.* at 6-7.

understanding of these influences and corresponding pressures should improve the process of mediation and the resulting agreements.

Factors such as the importance of the dispute and the willingness to compromise may be linked to success.[159] If these can be assessed prior to implementation, better referral and more accurate expectations of the process can be expected. Clients are often confused about what mediation is supposed to do, and client education may help eliminate false expectations. It may also help identify the couples that could benefit the most from mediation. Couples with fewer and less troubling issues may choose traditional adversarial methods, while couples who choose to mediate may want to present a wide range of problems to maximize the benefits of compromise.[160]

Mediation can be viewed as part of a trend toward the "private ordering" of divorce.[161] As a significant number of cases become diverted from the courts, the role of our legal institutions in establishing norms, promoting social goals, and monitoring compliance must be redefined. Overall, the results regarding mediation are positive and optimistic. It has reached the stage in which carefully developed research may be able to predict and suggest appropriate norms and procedures for optimal use in the public and private sector.

III. ARBITRATION

A. IS ARBITRATION SUCCESSFUL?

Public and private use of arbitration is increasing.[162] Accelerated disposition, simplified procedures, and cost savings are promoted as benefits of this ADR method. Accordingly, evaluations have focused on accomplishment of these objectives.

159. Camplair & Stolberg, *supra* note 39, at 209. For example, Camplair and Stolberg's study of 76 divorcing couples indicated that the settlement was a function of the content of the dispute and the importance to the individual. *Id.* Custody disputes were resolved more often than visitation or child support disputes, but the rate for custody disputes was lower when either the father or mother considered it the primary dispute. *Id.* When both the mother and the father rated it as the primary problem, success in reaching a settlement dropped to 33%. *Id.* The authors suggest that when custody is of secondary importance, it may be used for bargaining. *Id.* at 209-10. Economic issues were more easily resolved when one party was strongly motivated and the other presented a noneconomic issue. Camplair & Stolberg, *supra* note 39, at 210. Resolving economic issues in mediation is especially difficult when they are important to both parties. *Id.* The authors concluded that the content of the dispute and its relative importance are variables to be considered. *Id.* at 211.

160. *Id.* at 211. The selection of litigation to resolve less troubling issues is contrary to the belief that fewer and easier disputes are more suitable for mediation. *See* Emery & Wyer, *supra* note 33, at 476.

161. *Id.* at 472. The growth of no fault divorce has resulted in partially removing divorce from public decision-making and has made standards more ambiguous as they are left to the discretion of the individual couples. *Id.* at 473 (citing R.H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226-92 (1975)).

162. *See* Kaufman, *supra* note 1, at 58-59 (reflecting increasing use).

1. *Disposition*

Because all court-mandated arbitration programs permit trial de novo, one issue is whether arbitration actually alleviates court dockets and promotes quicker resolution of cases. An arbitration program initially instituted as a component of tort reform in Hawaii provides a partial answer.[163] The program was analyzed using a randomized experimental design, in which half of the tort cases were assigned to arbitration and half to litigation.[164] The data reviewed included case records, surveys of arbitrators and lawyers, and personal interviews.[165] Since 1986, over 2,000 cases entered the program and the majority of these cases settled.[166] With only five cases actually going to trial, the arbitration program was considered effective at reducing Hawaii's court dockets.[167]

The Federal Judicial Center (FJC) evaluated ten federal district courts with mandatory, court-annexed arbitration programs.[168] The study considered cost reduction, pace of litigation, provision of additional options for litigants, and reduction of the federal caseload.[169] The FJC generated the data by interviewing court personnel, tracking cases, and surveying participants.[170] In terms of case disposition, the majority of cases closed prior to the arbitration hearing and two-thirds terminated before being scheduled on the trial calendar.[171] Requests for trial de novo ranged from 7% to 32% of the arbitration caseload, a number characterized as low.[172] Less than half of the arbitrated awards were accepted, yet litigants stated that the experience was useful as a starting point for negotiations.[173]

In some instances, submission to arbitration is required as a prerequisite for access to the court. For example, the Maryland Health Claims Arbitration Act requires that all malpractice claims in excess of $5,000 be

163. Barkai & Kassebaum, *supra* note 5, at 134-35. The program includes all tort cases filed with exemptions permitted for damages exceeding $150,000. *Id.* at 134.

164. *Id.* at 135.

165. *Id.* The evaluation considered cost, pace, and satisfaction. *Id.*

166. Barkai & Kassebaum, *supra* note 5, at 135. Cases are three times more likely to settle than to complete the arbitration process. *Id.* at 135-36. Half of the cases that do proceed through arbitration are appealed, but most of these also eventually settle. *Id.* at 136.

167. *Id.*

168. Meierhoefer, *supra* note 1, at 15. In contrast to traditional arbitration, the court-annexed programs are compulsory and not binding. *Id.* at 29. Local rules determine program eligibility. *Id.* Types of cases heard and potential awards vary between jurisdictions. *Id.* Following a hearing, a decision and award are determined. *Id.* The parties may then file for trial de novo. *Id.* The courts, in all except one jurisdiction, discourage new trials by requiring litigants to pay an amount equal to the arbitrators' fees if they do not receive a more favorable judgment at the trial de novo. *Id.* at 39.

169. *Id.* at 18. The emphasis on goals varied among the districts. *Id.*

170. *Id.* at 21-23. The Center analyzed survey responses from 3,501 attorneys, 62 judges, and 723 participants. *Id.* at 2.

171. *Id.* at 48.

172. *Id.*

173. Meierhoefer, *supra* note 1, at 62. The litigants ultimately have the authority to decide whether a trial de novo will be held, which presumably increases feelings of control. *Id.*

submitted to arbitration preceding any litigation.[174] In a study of 3,277 claims filed, 32% were dismissed, 13% were resolved before the prehearing conference, 27% settled before the formal arbitration hearing, and 25% completed a formal arbitration hearing.[175] Of 381 cases that filed for trial, only eighty-four continued to a trial verdict.[176] Thus, a very high proportion were effectively resolved by the arbitration panels.[177] Twenty-six states have similar nonbinding arbitration or pretrial screening for medical malpractice claims.[178] Four states passed such legislation, repealed it, and reenacted it when claims subsequently increased.[179]

State agencies have reported that arbitration is successful in disposing of cases effectively. The Washington State Attorney General's Office Consumer Protection Restitution Program provides for arbitration and negotiation of restitution as alternatives to either litigation or settlement.[180] In one example, concerning a dispute with a health club, 1,703 claims were received.[181] Of these, 60% settled and 15% were submitted to arbitration.[182] The total time for resolution of the complaints was seventeen months.[183] The program was effective in providing a quick response, consolidating complaints for economical investigation, and achieving results.[184]

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174. Bureau of National Affairs, *Health Care Arbitration System in Maryland Still Evokes Controversy, in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 122, 122 (Martha A. Matthews ed., 1991) [hereinafter *Health Care*]. The arbitration conducted by the Health Claims Arbitration Office is nonbinding and assists with pretrial screening. *Id.* Between 1976 and 1987, 4000 malpractice claims were filed with 1600 heard by arbitration panels. *Id.* Between 10% and 15% of these claims were actually tried before the circuit courts on appeal. *Id.*

175. *Id.* at 125. Forty percent of all claims that progressed to a formal arbitration hearing were found in favor of the claimant. *Id.* Awards ranged from $300 to $5.4 million. *Id.* Notice of intent to appeal was filed for 19% of all closed claims. *Id.*

176. *Id.* Liability verdicts were the same as the arbitration panels' determinations in 60 of the cases and were reversed in 24. *Id.*

177. *Id.* at 123. Ninety-five percent of the malpractice cases closed within 15 months of the initial report which is claimed to be an expedited disposition rate. *Id.* at 123-24.

178. *Id.* at 125.

179. *Health Care*, *supra* note 174, at 125.

180. Michael S. Gillie, *Consumer Protection Restitution Programs Offer Benefits of ADR to Consumers, Businesses, and State, in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 115, 116 (Martha A. Matthews ed., 1990). When complaints about a business reach a certain level, the Attorney General's Office initiates an investigation. *Id.* at 115. If consumers can prove they were treated unfairly, damages or modification of the contract are available. *Id.* at 116. The business pays administrative costs. *Id.*

181. *Id.* at 118.

182. *Id.* After screening, 12% of the claims were withdrawn. *Id.* Arbitration resulted in awards for the consumer 74% of the time and awards for the health club 26% of the time. *Id.* The total restitution was $355,307, and 1,130 memberships were cancelled. *Id.*

183. *Id.*

184. Although the examples reported were consumer protection cases, the process is considered adaptable to many types of disputes, such as personal injury or civil rights. *Id.*

2. *Saving Resources*

Arbitration is claimed to provide time and cost savings.[185] Time savings are generated by enforcing requirements that the arbitration progress within a proscribed plan.[186] The plan generally includes such features as automatic scheduling of the prehearing conference upon completion of certain events, limited discovery, and restricting the time allowed for demanding trial de novo, which not only saves time, but produces corresponding savings in cost.[187]

Feedback from arbitration programs indicates that time and cost savings are not as positive as might be expected. For example, attorneys participating in Fulton County, Georgia's state court-annexed arbitration program reported modestly improved disposition times.[188] The median disposition time was 399 days for cases filed before arbitration began and 324 after mediation began.[189] Arbitration did not have much of an effect on attorneys' time.[190] However, those attorneys who reported time savings also experienced cost savings.[191]

An attorney who was active in promoting passage of the Maryland health law thought arbitration would be more satisfactory and cheaper than jury trials because awards would be determined by a three-member panel.[192] However, the size of damage awards has not decreased, and the number of claims has increased.[193] The arbitration awards do seem to be

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185. Lind et al., *supra* note 4, at 957.

186. For example, the Hawaiian tort reform program, *see supra* note 163, requires closure within nine months from service of the complaint. Barkai & Kassebaum, *supra* note 5, at 134. Following the last answer, an arbitrator is assigned and a prehearing conference is held within 30 days. *Id.* No discovery is permitted without the consent of the arbitrator. *Id.* Awards are filed within seven days following the hearing. *Id.* The decision is final if there is no appeal and request for trial de novo is made within 20 days. *Id.* at 135.

187. Lawyers reported that the costs of discovery in tort cases were reduced in Hawaii. Barkai & Kassebaum, *supra* note 5, at 137. However, with contingency fee arrangements, reduction of discovery costs will not reduce fees for plaintiffs as it should for defendants. *Id.* at 139. Also, a significant percentage thought that restricting discovery may have affected the outcome. *Id.* at 136.

188. Boersema et al., *supra* note 1, at 28. Beginning in 1986, the program included all civil cases requesting less than $25,000 in damages. *Id.* at 29. It began as a response to crowded criminal dockets and judges' concerns about civil cases not receiving their share of judical resources. *Id.* Judges appreciated that arbitration guaranteed third-party involvement. *Id.*

189. Roger Hanson and Susan Keilitz, *Arbitration and Case Processing Time: Lessons from Fulton County*, 14 JUST. SYS. J. 203, 214 (1991).

190. Boersema et al., *supra* note 1, at 32.

191. *Id.* The greatest cost savings resulted from spending less time communicating with clients. Time saved from responding to motions and discussing settlements also reduced costs. *Id.*

192. *See supra* note 174 (describing the Maryland health care program).

193. The insurance company created by the legislature to insure physicians distributed one-third more in claims after arbitration was instituted compared to the number of pre-arbitration claims paid. *Health Care, supra* note 174, at 122. Other reforms have attempted to address these concerns. *Id.* at 123. Plaintiffs and defendants must each file certificates of merit within a specified time following the initial filing. *Id.* A limit of $350,000 for noneconomic damages has been established. *Id.* These rules have significantly reduced the number of claims. *Id.*

reasonable; however, they often match the verdicts attained by parties exercising the right to a jury determination.[194]

The FJC study of arbitration in federal courts concluded that arbitration has the potential for reducing time, but is not always successful at doing so.[195] Attorneys agreed that referring a case to the arbitration program resulted in earlier settlement discussions but also agreed that cases did not settle more quickly than had been expected at their initiation.[196] Seventy percent of the litigants in the FJC study considered the time required for arbitration to be reasonable.[197] Cases that were resolved by arbitration ended two to eighteen months sooner than those concluded by trial.[198] Attorneys reported favorably on time and cost savings.[199] However, those savings vanished if a trial de novo was held.[200]

3. *Fairness and/or Satisfaction*

Tort litigants whose cases had been resolved by trial, court-annexed arbitration, settlement conference, or bilateral settlement were interviewed to determine their impressions of the fairness of the procedures and their satisfaction with the decisions.[201] Research had suggested that fairness and satisfaction may be different, although it is frequently assumed that they are related.[202] The study also addressed whether satisfaction and perceived fairness are linked to cost and delay.[203]

Both trial and arbitration were considered fairer than bilateral settlement.[204] Impressions of fairness did not differ depending upon gender, race, income, or employment status.[205] No significant relationship between fairness and objective measures of case outcome, cost, or length

194. *Health Care*, *supra* note 174, at 125.

195. MEIERHOEFER, *supra* note 1, at 109.

196. *Id.* at 103, 104. Large variations between districts were reported. *Id.* at 103.

197. *Id.* at 110. Approximately two-thirds of the parties and attorneys requesting trial de novo indicated that arbitration was not a waste of time. *Id.* at 60-61. However, attorneys in de novo cases did believe that arbitration delayed settlement. MEIERHOEFER, *supra* note 1, at 110. The rejection of many awards suggests that not all parties were satisfied with the arbitration. *Id.* at 62.

198. *Id.* at 59-60.

199. *Id.* at 93. Sixty percent of the attorneys reported time savings, 62% reported cost savings, and 65% thought clients had saved time. *Id.* at 85.

200. MEIERHOEFER, *supra* note 1, at 89. Even with a trial de novo, costs are still considered reasonable. *Id.* at 93. Parties are likely to spend more in arbitration than settlement, but less than if a trial were pursued. *Id.* Parties report that arbitration was reasonable in terms of cost and time expended. *Id.* at 89-90.

201. Lind et al., *supra* note 4, at 954. Litigants were located in Virginia, Pennsylvania, and Maryland. *Id.* at 961-62.

202. *Id.* at 955. It is also assumed that outcome is one of most important determinants of satisfaction. *Id.* *See* John Thibaut and Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 541-66 (1978) (theorizing that the type of procedure selected affects the relative attainment of justice or truth).

203. Lind et al., *supra* note 4, at 967. If the two are not linked, savings, but not fairness and satisfaction, may be augmented. *Id.* at 957.

204. *Id.* at 965.

205. *Id.* at 973.

was reported.[206] Whether the outcome matched expectations rather than the objective outcome seemed to be the most significant determinant of fairness.[207] Although not as important as obtaining the expected outcome, impressions of the process, especially having positive feelings of control, dignity, and comfort, were strongly correlated with perceived fairness.[208]

The importance of being treated with respect and dignity was reflected in clients' assessments of alternative procedures. Trials were considered fairer than bilateral settlement, perhaps because litigants were pleased that their problem received time and attention from the court.[209] Arbitration, which has relatively more formality than bilateral settlement, was also perceived as fairer than bilateral settlement.[210] Thus, the ceremony and ritual that accompanies trials, and to a lesser degree, arbitration, may enhance a sense of dignity and worth for the participants.[211]

Litigants participating in mandatory arbitration in the federal courts did not believe that they received second class justice.[212] Eighty-four percent approved of the arbitration concept and programs as instituted.[213] Eighty percent of the parties rated the procedure as fair, even those who were dissatisfied with the result.[214] A sense of fairness was enhanced when litigants understood the procedure, experienced control, and considered the time reasonable.[215] Ninety-two percent of the attorneys

206. Lind et al., *supra* note 4, at 968. A slightly stronger relationship was established with subjective measures of outcome, cost, and time, but these were still not good predictors of perceived fairness. *Id.* at 971.

207. *Id.* Similar results were reported in a study of arbitration of malpractice claims. Despite the fact that doctors are found liable in cases using an arbitration panel more often than with the jury system and that the size of awards has not been reduced in arbitration, some doctors and malpractice insurers contend that arbitration is a method for reducing the number of cases. *Health Care*, *supra* note 174, at 122, 124.

208. Lind et al., *supra* note 4, at 973. Personal characteristics, including age, gender, race, income, employment status, and marital status, had little effect on perceptions of procedural fairness. *Id.*

209. *Id.* at 981. Opinions of trials were more favorable than expected. *Id.*

210. *Id.* at 982. Formality was apparently associated with the arbitration process but was found lacking during negotiations. *Id.* It appears possible to provide adequate dignity with less than a full trial. *Id.*

211. The author warns against overgeneralizing the less favorable reactions to adjudication beyond this particular tort sample and notes that more favorable reactions to settlement procedures have been noted in small claims and criminal court settings. *Id.* at 983. See Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 Law & Soc'y Rev. 237, 249 (1978) (reporting that a sense of equity is related to fair treatment for criminal defendants); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 Law and Soc'y Rev. 11, 41 (1984) (emphasizing the importance of obtaining consent to achieve positive results in small claims compliance).

212. Meierhoefer, *supra* note 1, at 82.

213. *Id.*

214. *Id.* at 63. The range was 76% to 98% of the parties. *Id.*

215. *Id.* at 65. Eighty-one percent considered the actual hearing to be fair. *Id.* Satisfied parties were more likely to consider it fair. *Id.* Significantly lower fairness ratings were reported when the participants did not understand what was occuring, when the arbitrators were unprepared, or when the opportunity to explain and discuss claims was inhibited. *Id.* at 67.

involved with arbitrations regarded the hearings as fair; fair being defined as having sufficient formality, adequate time, well-prepared arbitrators, and time and cost savings.[216] In considering cost, time, and fairness, half of the litigants and a plurality of the attorneys in arbitration preferred arbitration over a judge or jury trial.[217]

B. ATTITUDES OF THE BENCH AND BAR

1. *Attorneys*

Opinions about a state court-annexed arbitration program were solicited from 136 attorneys in Georgia.[218] The consensus was that the process is fair and outcomes are satisfactory.[219] Two-thirds of the attorneys thought that panel members possessed the necessary skills for conducting the arbitration hearing and that the hearing was impartial.[220] The process was rated more favorably than the results.[221] Satisfaction with the decisions corresponded to the attorneys' views of its fairness.[222] The third-party review was valued by two-thirds of the attorneys, and a majority thought that the arbitration process initiated serious negotiations.[223] The favorable results regarding arbitration replicated the results of a similar survey of 600 attorneys in the Eastern District of Pennsylvania.[224]

Lawyers may be more satisfied with litigation than arbitration.[225] Although a majority of the lawyers participating in a mandatory state

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216. *Id.* at 67, 82. Formality was an important characteristic for attorneys but not for parties in this study. *Id.* at 67-68. This contrasts with Lind's findings, *supra* note 5, and with an independent privately funded evaluation of the federal pilot program in North Carolina. *Id.* at 68 n.55 (citing E. LIND, ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT 15-22 (Rand Corp. 1990) (reporting that private parties like less formal proceedings than those preferred by commercial parties)).

217. *Id.* at 82. Arbitration was preferred by all attorneys when it saved time. *Id.* Plaintiffs' attorneys rated arbitration more favorably than did defendants' attorneys. *Id.* at 79. The higher the fees being paid to the arbitrators, the lower the attorneys' approval ratings. *Id.* at 83.

218. Boersema et al., *supra* note 1, at 30. For a description of the Georgia program, see *supra* note 190. The civil cases were predominantly automobile torts followed by other torts, contracts, collections, and administrative matters. *Id.* at 29. Cases were referred to panels of three attorneys after the deadline for discovery had passed. *Id.*

219. *Id.* at 30. Rules and procedures were considered fair by 92% of the attorneys. *Id.* at 30, T.2.

220. *Id.* at 31. Ninety percent reported that the arbitrators showed no favoritism. *Id.* at 30, T.3.

221. *Id.* at 31. Twenty percent thought the results were unfair and another 20% reported some degree of unfairness. *Id.*

222. *Id.* at 32. The two were significantly related: The greater the satisfaction with the award, the higher the rating of fairness. *Id.* at 32 n.16. Both the fairness of the process and the ability of the arbitration to advance negotiations and settlement were independently related to satisfaction. *Id.* at 33.

223. Boersema et al., *supra* note 1, at 31. However, only 41% think that arbitration is able to contain monetary awards within limits. *Id.*

224. Raymond J. Broderick, *Court-Annexed Compulsory Arbitration Providing Litigants with a Speedier and Less Expensive Alternative to the Traditional Courtroom Trial*, 75 JUDICATURE 41, 41 (1991). A survey of 600 attorneys indicated that 93% approved or strongly approved of the program. *Id.* at 43. Attorneys reported both time and cost savings. *Id.* For cases similar to the type referred to arbitration, 61% preferred arbitration to a judge or jury. *Id.*

225. Barkai & Kassebaum, *supra* note 5, at 142.

court-annexed program reported being satisfied, the imposed awards were considered less satisfactory than voluntary settlements.[226] In addition to the awards being less than satisfactory, arbitration was perceived as an unnecessary burden when it was an additional step to litigation.[227]

2. *Judicial Input*

Judges are generally positive about the use of state court-annexed arbitration.[228] When it was initiated in Eastern Pennsylvania fourteen years ago, some judges were opposed to arbitration, but a survey published recently indicated unanimous support.[229] The judges are convinced that arbitration provides speedier resolution of all litigation.[230] The median time from the date of the answer until arbitration is five months instead of twelve, which is the median time required to reach trial.[231] Shorter time results in savings in attorney fees, discovery, and related costs.[232] Judges report that settlements tend to be accepted by the parties and that a large percentage of litigants are satisfied. Limited reports indicate that the process is viewed as fair.[233]

Success in state court programs has not been uniformly achieved or acknowledged, however.[234] In state court programs, arbitrated settle-

226. *Id.* at 141. Defense lawyers are more satisfied with regular litigation settlements. *Id.* at 142. There is a loss of revenue with arbitration, possibly due to working fewer hours on each case. *Id.* However, settlements from arbitration or litigation are equally satisfying to plaintiffs' attorneys. *Id.* Plaintiffs' attorneys in the federal programs were also more pleased with the arbitration than defense counsel. MEIERHOEFER, *supra* note 1, at 79.

227. *Health Care, supra* note 174, at 122-123. The attorneys' concern is that arbitration only delays the inevitable litigation. *Id.* at 122. Speaking about medical malpractice arbitration, one lawyer concluded: "It just hasn't turned out to be a good idea, although organized medicine is still willing to give it a try." *Id.* at 123.

228. Edwards, *supra* note 56, at 674. *But see* Honorable Bruce M. Van Sickle, *Open Letter*, 70 N.D. L. REV. — (1994) (suggesting that a jury's consideration of emotional factors is more valuable for society than any mandatory ADR); Judge Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. REV. — (1994) (proposing that ADR is an unsatisfactory and possibly unconstitutional alternative to jury trials).

229. Broderick, *supra* note 224, at 41.

230. *Id.* The arbitration rule is named the "Speedy Civil Trial." *Id.* at 42 (describing the procedure). "It is not a 'mini-trial;' it is not a 'summary jury trial;' it is not a 'settlement conference.' It is a civil trial." *Id.* at 43. In Eastern Pennsylvania, statistical summaries are prepared each month. *Id.* Over the past 160 months, 21,922 cases entered arbitration and 96% were terminated: 44% by settlement, 36% by motion, and only 2% by demand for trial de novo. *Id.* at 43-44.

231. *Id.* at 44.

232. *Id.* For example, in Pittsburgh, court-annexed arbitration ends three-quarters of all cases without a court appearance. Edwards, *supra* note 56, at 674 (citing INSTITUTE FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST FIVE PROGRAM YEARS 36 (1983)). It is also quicker. The median time to an arbitration hearing is three months compared to 18 months' wait for trial. *Id.* In Michigan, although the arbitration award is accepted in less than half of the cases, only 7% continue to trial. *Id.* (citing Kathy L. Shuart et al., *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307, 315 (1983)). The Michigan program reported that the program itself was more effective in eliminating demands for trial de novo than the penalty assessment. Shuart, *supra*, at 323.

233. Edwards, *supra* note 56, at 674 (citing INSTITUTE FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST FIVE PROGRAM YEARS 36 (1983)).

234. *Id.*

ments must be nonbinding unless the parties agree otherwise. If trial de novo remains available following disappointing results, parties are likely to choose that option.[235] Thus, arbitration may be effective only if litigants are willing to waive their jury rights.[236] Although the ultimate potential of arbitration has not been attained, even critics acknowledge that the parties obtain a neutral assessment of their case and often settle earlier.[237]

In one study, federal judges rated mandatory arbitration programs after participating for eighteen months.[238] They supported their own programs, with support directly related to the degree that arbitration reduced caseloads.[239] Judges indicated that their work was reduced depending upon the number of cases diverted to arbitration, the extent of judicial involvement in the prehearing arbitration, and the number of cases returning for trial.[240]

The United States Supreme Court has indicated support for arbitration by refusing to legitimize speculation that arbitration cannot furnish adequate dispute resolution.[241] Justice White reiterated the Court's position that generalized attacks on arbitration " 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.' "[242]

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235. *Id.* Judge Edwards notes that over half of the arbitrated health claims in the Maryland system are refused in favor of a trial de novo. *Id.* (citing James K. MacAlister & Alfred L. Scanlan, Jr., *Health Claims Arbitration in Maryland: The Experiment Has Failed*, 14 U. BALT. L. REV. 481, 501 (1985)).

236. *Id.* at 674.

237. *Id.* at 675.

238. MEIERHOEFER, *supra* note 1, at 111.

239. *Id.* at 118. Ninety-seven percent said caseloads were reduced. *Id.*

240. *Id.* at 115. Certain characteristics are indicative of a greater likelihood of requiring trial, i.e., a contract case in a program that specifies a longer answer-to-hearing time, and a panel paid lower fees. *Id.* at 118. An attempt to expand the federal arbitration program to encompass all federal courts failed in Congress after being opposed by some of the federal judiciary. Henry Reske, *Bill to Expand Arbitration Defeated*, 80 A.B.A. J., Feb. 1994, at 22. The pilot program was continued until December 31, 1994. *Id.*

241. *See* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991). Robert Gilmer, terminated at age 62, brought suit against Interstate/Johnson in the United States District Court under the Age Discrimination and Employment Act of 1967 (ADEA). *Id.* at 1651. Gilmer challenged the use of arbitration maintaining that a judicial forum was necessary to protect his rights. *Id.* at 1653. Respondent sought to compel arbitration based upon an agreement in Gilmer's registration as a securities representative and the Federal Arbitration Act. *Id.* at 1650-51. The District Court denied the motion, reasoning, in part, that Congress had not intended to foreclose a judicial forum to ADEA claimants. *Id.* at 1651. The Fourth Circuit Court of Appeals reversed, holding that Congress had not intended to preclude enforcement of arbitration agreements. *Id.* For a more detailed analysis of *Gilmer*, *see* Heidi M. Hellekson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. — (1994).

242. *Id.* at 1654 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

The Court noted that arbitration rules provide adequate safeguards against biases.[243] The limited discovery in arbitration is not insufficient.[244] In affirming a Circuit Court of Appeals decision upholding an arbitration agreement in an age discrimination action, the Court noted: "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunal inhibited the development of arbitration as an alternative means of dispute resolution."[245]

C. Future Directions

1. *Measurement Problems*

Much of the evaluation of arbitration has focused on speed, cost, and efficiency. Results have been generally positive with respect to these limited variables. To accurately assess arbitration, comparisons with actual trial situations are necessary. However, adequate comparisons are difficult to make. The number of cases settled through arbitration is not an accurate measure of success because most cases would eventually settle even if they were not in arbitration. Moreover, there is no direct parallel to arbitration awards in litigation.[246] Arbitration awards are not actually settlements because they are nonbinding, follow a hearing, and involve a third-party neutral. Furthermore, no court trial or option for appellate review is provided for arbitration awards.[247]

Client perceptions are addressed less frequently in arbitration critiques than in mediation reviews. However, there is some indication that concern for litigants' intimidation by formal court procedures is unfounded.[248] Reducing cost and delay may fail to improve subjective evaluations of outcomes, costs, or delays.[249] In fact, innovations that are created to increase settlement rates may diminish understanding, participation, and perceived fairness.[250]

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243. *Id.* For example, the applicable arbitration rules require disclosure of employment histories, allow one peremptory challenge, allow unlimited challenges for cause, and provide that results may be overturned upon evidence of bias. *Id.*

244. *Id.* The Court considered that the relaxation of the rules of evidence was counterbalanced by allowing limited discovery. *Id.* at 1655.

245. *Id.* at 1656 n.5 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985)).

246. Barkai & Kassebaum, *supra* note 5, at 146. It is inaccurate to compare costs and benefits of arbitration to litigation. *Id.* Receiving an award through arbitration is more expensive than receiving an award through settlement, and most cases would eventually settle without arbitration. *Id.*

247. *Id.* The most appropriate comparison may be to pleadings, motions, and settlement conferences. *Id.*

248. Lind et al., *supra* note 4, at 981. Assumptions made by ADR advocates that the formality of trials has a negative effect on clients are disputed. *Id.* at 982.

249. *Id.* at 957.

250. *Id.* at 982. *See also* Howard Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 Law and Soc'y Rev. 585, 596-97 (1987) (suggesting that discretion may be undesirable because nonlegal considerations, intimidation, and financial leverage may influence the results).

Social theories regarding the purpose of arbitration suggest different models for evaluation. For example, exchange theorists suggest that outcomes are evaluated according to personal standards or expectations.[251] The closer the result approximates expectations, the greater the party's satisfaction.[252] A different hypothesis is proposed by procedural justice theorists, who suggest that sensitivity to the process is most crucial.[253]

The questions asked by researchers will vary depending upon the model that is most attractive and plausible to them. Knowing the hypotheses that generated certain studies would help to interpret the results.[254]

2. *Discussion and Suggestions*

Satisfaction with arbitration is not unanimous, and some data indicates that lawyers, especially defense lawyers, consider litigation to be preferable.[255] Clients have criticized lawyers' lack of effort in promoting arbitration. As one physician involved in the arbitration of medical claims noted: lawyers do not conform to established standards of behavior. " 'We have a medical malpractice industry out there consisting of lawyers and liability insurance companies and they dislike the arbitration system because it is an interim step they would prefer not to go through. Lawyers love juries, and so long as the country appears to be run by lawyers, nothing will change.' "[256] The attitudes and practices of lawyers will continue to affect the public's perception and acceptance of arbitration.[257]

Is arbitration successful? The studies to date, while providing preliminary data and suggestions, elicit an even greater number of unresolved issues: What type of lawsuit, jurisdiction, or amount in controversy is best suited to arbitration?[258] Should a required percentage of

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251. Lind et al., *supra* note 4, at 957.

252. *Id.* at 975.

253. *Id.* at 957. Perceived control over the case outcome and the process determine whether the results are considered fair. *Id.*

254. Attorneys, in addition to researchers, remain an important source of information about arbitration, also. *Id.* at 959. Lawyers define the divorce situation for their clients and invite dependence. Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW AND SOC'Y REV. 737, 765 (1988). The situation is not always depicted in an impartial manner; lawyers explain their deficiencies in terms of being limited by other lawyers and judges. *Id.* at 763 n.12. Thus, clients may not have accurate information for their decision-making.

255. *See supra* note 216.

256. *Health Care*, *supra* note 174, at 124.

257. Ide, *supra* note 1, at 8. R. William Ide III, President of the American Bar Association, commented that emphasizing the use of ADR will contribute to improving the public's perception of lawyers. *Id.*

258. The Federal Judicial Center research did not identify any type of suit, jurisdiction, or amount better suited to arbitration than to litigation. MEIERHOEFER, *supra* note 1, at 123. Some evidence indicates that tort and civil rights cases might benefit from having increased options. *Id.* There is currently no mandatory referral for civil rights cases. *Id.*

cases be diverted to arbitration?[259] Can the best time for beginning the arbitration process be predicted?[260] What is the optimal time between the answer and the hearing?[261] Are appropriate and consistent screening and referral procedures instituted?[262] How many arbitrators should be used, and if they are not voluntary, how much should they be paid? Answers to these questions will have an impact on the results of and reactions to arbitration.[263]

IV. SUMMARY JURY TRIALS

A. ARE SUMMARY JURY TRIALS SUCCESSFUL?

In the federal court system, the summary jury trial (SJT) is the most frequently used method of alternative dispute resolution.[264] The SJT, which may be mandatory or voluntary, is also practiced in state courts. In a Florida study, greater satisfaction was reported following voluntary participation in state SJTs compared to the mandated federal SJT.[265] However, variables such as the amount in controversy or the type of litigation

259. If less than 15% of the cases are diverted to arbitration, the process is less likely to be considered helpful by judges. *Id.*

260. Requiring adherence to shorter time guidelines may speed settlement but could also result in holding a hearing before the parties have enough information. *Id.* at 127. On the other hand, earlier intervention may be helpful in preventing suits. Robyn S. Shapiro et al., *A Survey of Sued and Nonsued Physicians and Suing Patients*, 149 ARCHIVES INTERNAL MED. 2190, 2194 (1989). In a survey of 642 sued physicians, nonsued physicians, and suing patients, *id.* at 2190, both sued and nonsued psysicians reported that a malpractice claim or even the threat of one had a negative effect on their clinical practice. *Id.* at 2193. The survey confirmed that significant misunderstandings in the doctor-patient relationship exist just prior to filing a lawsuit. *Id.* at 2194. The number of litigated claims could be reduced by nonjudicial informal dispute resolution mechanisms made available at that time. *Id.*

261. A shorter time period is significantly associated with quicker settlements, as well as with fewer attorneys' selecting arbitration and with increasing probabilities that the case would continue to trial de novo. MEIERHOEFER, *supra* note 1, at 127.

262. Arbitration may be unsuitable in some instances. Some disputes require that legal precedent be determined or upheld. Practical considerations may foreclose the optimal use of arbitration. For example, when the preponderance of evidence supports one side or when one party would prefer settlement, arbitration is not likely to be an attractive option. Ryan Ver Berkmoes, *More Talk, Less Squawk!*, AM. MED. NEWS, Sept. 13, 1993, at 31, 32.

263. *See* MEIERHOEFER, *supra* note 1, at 127-29 (discussing the relationship between the number of arbitrators versus the cost and administrative burden). The negative appearance of only one arbitrator must be balanced against the expense of panels. *Id.* at 128. Attorneys are less likely to select arbitration when only one arbitrator is to decide the case; the number of arbitrators did not affect whether parties chose arbitration. *Id.* The issue of who is qualified to sit on various panels is an issue. For health care decisions, some think it is ridiculous to have persons other than physicians on the panels; others think the basic intelligence of lay persons is sufficient. *Health Care*, *supra* note 174, at 124.

264. Katz, *supra* note 7, at 13. In the summary jury trial, a sample jury, selected from the regular jury panel, hears a shortened presentation under altered procedural rules, and determines a nonbinding verdict. Thomas J. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 474-76.

265. James J. Alfini, *Summary Jury Trial in State and Federal Courts: A Comparative Analysis of the Perceptions of Particular Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 222 (1989). Two case studies summarized interviews of participants and mail surveys of attorneys who had participated in SJTs. *Id.* at 214.

may complicate direct comparisons.[266] Suggesting that the settlement award may be an appropriate measure of fairness, the Florida survey reported that 64% of the state lawyers considered it an accurate approximation of a jury verdict.[267] SJT verdicts were considered a good estimate of potential jury verdicts in 53% of the federal cases.[268]

The amount of the award in the SJT was the single most influential factor in producing a settlement.[269] After receiving a neutral estimate of the value of the case, parties may be more willing to alter their expectations and consider compromising.[270] The SJT's guidelines for scheduling and completion of tasks were also considered valuable aids to settlement.[271] Although participants are generally satisfied with the SJT, they report experiencing pressure to settle—even when they think the verdict is inaccurate and the result of inadequate procedures.[272]

Encouraging settlements may arise from the court's desire to increase efficiency.[273] Even so, SJTs may not be more efficient than traditional trials. In both state and federal courts in Florida, cases with intermediate SJT's fail to settle and thus proceed to trial at the same rate as cases without intermediate SJTs.[274] Setting limits on the amount in controversy for SJTs is an attempt to promote efficiency, but the practice is criticized as too controlling. When the award to be decided is small, trial de novo is not worth the added expense; if the potential award is higher and there is a lot at stake, trials are encouraged.[275]

Following a three-day SJT in federal district court, jurors were asked to complete an exit poll.[276] All ten jurors found it acceptable that they were led to believe that they were participating in an actual trial. Nine jurors indicated that they would not have decided differently if they had

266. For example, the length of the cases, complexity, and number of parties varied greatly between state and federal SJTs. *Id.* at 229.

267. *Katz*, *supra* note 7, at 49.

268. *Id.* The award was rated too low by 28% of the federal lawyers and too high by 19%. *Id.*

269. *Id.* at 224.

270. Katz, *supra* note 7, at 49.

271. *Id.* at 222. Litigants may hesitate to compromise on a settlement amount before receiving the SJT verdict. Katz, *supra* note 7, at 49.

272. Charles F. Webber, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 U. CHI. L. REV. 1495, 1517 (1989). Parties may be pressured to settle by their attorneys and by practical considerations, such as incurring additional time and cost. *Id.* at 1517-18.

273. *See* Eisele, *supra* note 8, at 36. Coerced settlement is the primary objective of compulsory ADR. *Id.*

274. Alfini, *supra* note 265, at 222-23. Nine percent of the state SJTs and 14% of the federal SJTs were followed by requests for an actual trial. *Id.*

275. Eisele, *supra* note 8, at 36. Judge Raymond Broderick of the Eastern District of Pennsylvania concedes that the required amount in controversy is selected to make a trial de novo economically unfeasible, because neither the court nor participants save money when the losing party is encouraged to demand a trial. *Id.*

276. Richard A. Enslen, *Federal Judge Says Summary Jury Trials Can Help Settlement in Toxic Tort Cases*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES (Martha A. Matthews ed., 1990), *supra* note 62, at 104, 105 (adapted from memorandum).

known their decision was not binding.[277] Nine thought their time on summary jury duty was well-spent.[278] Although one exit poll is a very limited sample, the jurors opinions were uniformly positive.

B. OPINIONS OF THE BENCH AND BAR

1. *Judicial Input*

Judges express divergent opinions about SJTs. Many are convinced that SJTs result in settlement and save time even when attorneys do not want to participate.[279] Judge Thomas J. Lambros, who instituted the procedure in the Northern District of Ohio, considers the SJT a success. Judge Lambros sampled 49 SJTs.[280] Ninety-two percent of his sample settled after the SJT.[281] Substantial cost savings were also reported.[282]

It is difficult to compare SJT results to what would have happened without the procedure, but the cases selected for SJT do not appear to be selected with any bias toward their potential success in reaching settlement. Thus, the SJT does appear to have an impact on settlement.

Other judicial opinions cite the participation of parties and the preview of eventual success or failure in court as factors contributing to the success of SJTs.[283] Cases that are optimal for the SJT are those in which 1) attorneys for both parties are similarly competent, 2) a genuine dispute about the monetary value of the case exists, and 3) court appearance might benefit the parties psychologically.[284]

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277. *Id.* at 106. Six of the 10 jurors did not experience difficulty understanding the lawyers; half were not hindered by the absense of cross-examination; half thought a video presentation helped; seven of the 10 thought too much information was presented; all were convinced they could remember and understand the directions; and nine considered the summary jury trial a worthwhile use of their time. *Id.*

278. *Id.*

279. Katz, *supra* note 7, at 21. *See, e.g.*, McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44-49 (E.D. Ky. 1988):

> In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for making summary jury trials mandatory in these cases, they would not have occurred.

Id. at 49. Similar opinions express confidence that SJTs can foster settlement for parties seemingly determined to litigate. *See, e.g.*, Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988) (describing the benefits of the SJT in promoting settlement).

280. Lambros, *supra* note 264, at 473.

281. *Id.* Eighty-eight cases had originally been scheduled for SJT, and 44% settled before that time. *Id.* at 472-73.

282. *Id.* at 473-74. The savings derived from the 49 SJTs was $73,702, approximately $1,504.12 each. *Id.* at 473.

283. Katz, *supra* note 7, at 21-22 (citing *McKay*, 120 F.R.D. at 50). Parties do not settle when they are unable to assess the strengths and weaknesses of their case accurately and when they feel deprived of the right to present their case in court. *Id. But see* Strandell v. Jackson County, Illinois 838 F.2d 884, 887 (7th Cir. 1987) (refusing to equate the SJT with settlement conferences and characterizing its use to compel negotiations as improper).

284. Clifford J. Zatz, *Toxic Tort Case Unlikely to Have Settled Without Summary Jury Trial, Lawyer Says, in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 107, 108

Other judges who have used the SJT are less favorably impressed. Judge Richard A. Posner of Northern Ohio is a dissatisfied user of the SJT. In an informal study he estimated that disposition times were greater and termination rates were lower following institution of the SJT.[285] Because SJTs have not been efficient, Judge Posner instead recommends limiting access to the courts.[286] His opinion implies that using jurors for SJTs may not be lawful and may have a negative impact on the jury system.[287]

Judge G. Thomas Eisele of the Eastern District of Arkansas also vigorously opposes court-annexed mandatory ADR programs in federal courts.[288] His concern is that the rules and procedures which have evolved to protect due process will be perceived as unimportant in ADR.[289] Voluntary programs which are designed to complement the current system would be preferable.[290] Even the term SJT evokes his heated response:

> Do truth in advertising laws not apply to federal courts? Is there any trial judge or trial attorney out there who really believes that what happens at one of these ADR proceedings is a trial? . . . . "Justice"—not compromise, not efficiency, not cost effectiveness, but justice. There ought to be a place where that—and that alone—controls and defines the parameters of permissible procedures . . . .[291]

2. *Attorneys*

Attorneys in federal SJTs were concerned that the summary juries did not weigh the evidence properly, but were swayed by the oral argu-

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(Martha A. Matthews ed., 1990) (discussing comments made by Judge Richard Enslen). Judge Enslen, after presiding over an SJT groundwater contamination case, was convinced that resources were saved. Enslen, *supra* note 276, at 105. In a three-day summary jury trial in federal district court, a $3,500,000 settlement was negotiated following a SJT. *Id.* If the case had proceeded to actual trial, additional costs were estimated to be approximately $3,000,000 for the defendants, and $500,000 for plaintiffs' discovery. *Id.* at 106. The defendants had over 60 experts as potential witnesses, and the plaintiffs had over 20 experts who would have testified if the SJT had not resolved the case. *Id.* Thus, the estimated savings greatly outweighed the cost of the procedure.

285. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 378-81 (1986).

286. *Id.* at 389.

287. *Id.* at 386. Courts have refused to compel members of the jury pool to serve as a summary jury. *See, e.g.*, Hume v. M & C Management, 129 F.R.D. 506, 509 (N.D. Ohio 1990). In part, the *Hume* court disapproves of SJTs because evidence and arguments may be manipulated. *Id.* at 508 n.3.

288. *See* Eisele, *supra* note 8, at 36 (arguing that ADR programs are coercive and deny parties access to the court).

289. Eisele, *supra* note 8, at 35. Judge Eisele believes that mandatory ADR programs send a message that ascertaining the truth and vindicating rights are not particularly important. *Id.*

290. *Id.* (urging lawyers to become familiar with ADR to be able to provide out-of-court alternatives).

291. *Id.*

ments and personalities of the lawyers.[292] The attorneys indicated that they experienced a lack of control over the presentations.[293] Yet, preparation was equally as demanding; discovery had to be extensive because there would be no cross examination.[294] Time limits were oppressive.[295] Strong opposition to the inability to object existed.[296] Defendants' attorneys contended that plaintiffs were permitted to present whatever arguments they chose at length without the restraint of cross-examination to check the emotional intensity and to shift the jury's attention.[297] Attorneys were doubtful about their ability to capture the essence of complex cases in a SJT.[298] Some thought that when the same judge would preside over the actual trial if one became necessary, an impartial decision was not possible.[299]

One perceived advantage of SJTs is that plaintiffs' lawyers are able to determine whether continued investment in a case is reasonable. Additionally, even if the case settles, plaintiffs have had an opportunity to present their case publicly.[300] Attorneys recommended allowing more time for presentations, adding restrictions to the presentation of evidence, allowing limited use of objections, and allowing cross-examination of key witnesses.[301]

C. Future Directions

The SJT is relatively harder to evaluate than mediation or arbitration because of the smaller number of cases involved and less formal methods of collecting information.[302] Goals of the SJT are to reduce litigation costs, speed the disposition of claims, and decrease the number of cases going to trial. Results for participants have been generally satisfactory; however, attorneys are not as pleased.[303] There is no consensus about whether SJTs are actually efficient in reducing the number of trials or

292. Alfini, *supra* note 265, at 220. Juries reacted emotionally, forming improper assumptions about facts for which no evidence had been presented. Zatz, *supra* note 287, at 110.

293. Zatz, *supra* note 284, at 110. All of the jurors in a toxic tort case indicated that they were confused by the experts' presentations on videotape. *Id.* at 110-11.

294. *Id.* at 108.

295. *Id.* at 111.

296. *Id.*

297. *Id.*

298. Zatz, *supra* note 284, at 111. Not only were jurors confused, but the attorneys believed that they could not completely explain the complicated scientific and medical principles related to liability. *Id.*

299. *Id.* at 112. However, judges also often form opinions during pretrial procedures. *Id.*

300. *Id.* at 107.

301. *Id.* at 112. The SJT is not perfect. However, as an alternative to a trial, it was considered a success. *Id.*

302. Katz, *supra* note 7, at 48.

303. *Id.* at 48-49. Attorneys' opinions are important because they are able to assess relative advantages and disadvantages. Boersema et al., *supra* note 1, at 28-29. Moreover, attorneys are in a position to obstruct or promote implementation. *Id.*

whether they are substitutes for settlements that would inevitably occur.[304]

Are SJTs a success? Questions for the future include: Should some types of cases should be excluded from SJTs? What is the purpose of the SJT, e.g., efficiency and docket reduction or qualitative changes in the judicial system? What procedures might increase effectiveness? What rules of procedure should be applicable? Should the SJT facilitate existing court functions or be an alternative option?[305]

V. THE QUALITY OF ADR

A. CONSTITUTIONAL CONCERNS

Constitutional challenges to ADR have been based on the Seventh Amendment right to jury trial; the Due Process Clause; the Equal Protection Clause; Article III judicial powers; the First Amendment; and corresponding rights guaranteed by state constitutions.[306] Claims based on constitutional violations, however, have not been particularly successful.[307]

Generally, mandatory ADR does not violate the Seventh Amendment if a jury trial de novo is available at some time.[308] ADR results which are not binding can be rejected. However, attempting to resolve the dispute with ADR may be a prerequisite to jury access or be associated with penalties designed to discourage requests for trial. If these restrictions unreasonably impair access to a jury trial, constitutional rights may be violated.[309] The test for impairment is historical, and the Supreme Court has repeatedly interpreted the Seventh Amendment to

304. Judges have noted that settlements tend to occur as the trial date approaches. Setting a firm trial date may accomplish the same purpose as the SJT. *See, e.g.*, E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313 (1986).

305. Edwards, *supra* note 56, at 671. ADR may result in the abandonment of legal enforcement by the government. *Id.* Perhaps "some forms of ADR should remain mandatory, but not binding." Menkel-Meadow, *supra* note 14, at 42. However, to compare the two, a sufficient number of both types is necessary. *Id.* If mandatory, adequate legal protections must be provided. *Id.* Stenographic recordings can provide a record for appeals. *Id.* Also, as protection for the litigant, ADR should not be conducted by the person who would preside at trial. *Id.* at 43.

306. *See* Katz, *supra* note 7, at 22-31 (increasing constitutional challenges to ADR occurred in the mid to late 1970s); *see also* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 487-564 (1989) (discussing constitutional problems raised by mandatory, nonbinding ADR).

307. Katz, *supra* note 7, at 22.

308. *Id.* at 23. ADR encompasses claims which traditionally allow the right to demand jury trial. Dwight Golann, *Reasonableness Standard Guides Analysis of ADR Burdens on Jury Trial Rights*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 251, 251 (Martha A. Matthews ed., 1990). Considerations include whether the process applies to a legal cause of action and the degree of compulsory participation. *Id.* The mediation and arbitration processes do not provide for jury trials, and even SJTs do not satisfy constitutional standards when binding decisions are issued. *Id.*

309. Katz, *supra* note 7, at 51.

permit innovations in civil procedure.[310] In the absence of historical precedent, a reasonableness standard is considered.[311] The benefits of eliminating frivolous suits and fostering efficiency have met this standard when weighed against possible burdens on the litigants.[312]

New procedures may be created and existing procedures may be altered as long as the essentials of due process are maintained.[313] However, the Due Process Clause could be violated if safeguards, such as adequate notice, are not provided.

Permitting only one party the option of selecting ADR and assigning ADR to restricted classes of lawsuits may violate the Equal Protection Clause.[314] Nevertheless, such classifications have been upheld when reviewed under the rational basis standard applied to social and economic legislation.[315]

Another concern is that vesting decision-making powers in nonjudges may obscure requirements regarding separation of powers.[316] Yet, ADR may be characterized as merely a delay rather than a bypass of judicial review, and thus, not violate Article III.[317] Especially when the results are only suggestions, courts are reluctant to invalidate assistance from third-party neutrals.[318] There are potential challenges, particularly to the specific implementation of ADR procedures; however, with few exceptions, ADR has been adjudged constitutional.

B. Social Policy

1. *Public vs. Private Justice*

Opinions about ADR range from concerns about depriving a segment of the population of important legal rights and fears about weaken-

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310. Golann, *supra* note 308, at 251; Katz, *supra* note 7, at 22.

> [T]he Seventh Amendment . . . does not require that old forms of practice and procedure be retained . . . . New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed such changes are essential to the preservation of the right.

In re Peterson, 253 U.S. 300, 309-10 (1920).

311. Golann, *supra* note 308, at 252. Imposition of penalties in response to demand for jury trial is not a constitutional violation, if the penalties are reasonable. Katz, *supra* note 7, at 23.

312. Katz, *supra* note 7, at 23.

313. *See* Matthews v. Eldridge, 424 U.S. 319 (1976) (permitting due process requirements to vary). Due process requirements depend upon a number of factors. Katz, *supra* note 7, at 24.

314. Katz, *supra* note 7, at 27. Claims have been upheld in the medical malpractice area. Applying ADR to specific classifications of suits is justified under the rational basis standard. Katz, *supra* note 7, at 26.

315. Katz, *supra* note 7, at 26-28.

316. *Id.* at 28. Judicial power is vested in judges appointed by the President. *Id.* Non-Article III judges may not decide disputes within the power of Article III courts. *Id.* (citing U.S. Const. art. III, cl. 1).

317. Katz, *supra* note 7, at 29.

318. *Id.* (citing DiBerardino v. DiBerardino, 568 A.2d 431, 437 (Conn. 1990)). Courts have invalidated lay assistance when binding decisions have been made. *E.g.*, Bernier v. Burris, 497 N.E.2d 763, 769 (Ill. 1986).

ing the morality of the law to advocacy of ADR because of efficiency (speed, cost, access) and enthusiasm for ADR as social progress.[319]

Critics maintain that the use of ADR to resolve important social issues or public rights is inappropriate.[320] ADR delays the evolution of society's standards by removing disputes from the aegis of public decision-making.[321] ADR may end litigation, but the public interest may not be served because private agreements do not necessarily foster group values.[322] Resolving disputes is secondary to using the law to shape public ideals. To be consistent with this philosophy, the law should interpret and enforce public values and rules rather than promote private aims.[323]

ADR advocates, however, do not agree that the public interest is ignored when efficiency issues are emphasized. Resolving disputes through ADR rather than through litigation achieves harmony at a lower cost.[324] The goal of making efficient use of finite resources does address public interest. Even if the result is less "just," there is value to society in terminating disputes.[325]

2. *Costs of Settlement vs. Judgment*

ADR is oriented toward settlement, a practice considered optimal because it has the parties' consent.[326] Settlement is not the preferred conclusion to disputes for everyone, however.[327] The settlement process may be flawed by inequities: participation may be constrained by contractual relationships or by lack of authority to speak for groups not present.[328] Effective participation may be hindered by power imbalances

319. *E.g.*, Luban, *supra* note 2, at 381.

320. *E.g.*, Edwards, *supra* note 56, at 676; Andrew McThenia & Thomas Schaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664 (1985).

321. Luban, *supra* note 2, at 388. The judicial system uses public resources and employs officials empowered by law rather than private agreement. Fiss, *supra* note 7, at 1085. The work of judges is impeded when their role is usurped by third-parties. *Id.*

322. *E.g.*, Edwards, *supra* note 56, at 678-79. One fear of ADR is that its "objective is to reduce the role of government in defining and enforcing" the rules of society. Brazil, *supra* note 6, at 305. The outcomes of ADR will remain secret, depriving society of information about curent developments and of the ability to shape public opinion. *Id.* Innovations such as ADR should be defined by broad social goals rather than self-interest. Posner, *supra* note 285, at 368.

323. Fiss, *supra* note 7, at 1089. This view contrasts with those who consider the purpose of the legal system to be management of Americans' litigious nature by ending disputes as expeditiously as possible. *Id.*

324. Fiss, *supra* note 7, at 1085. Many disputes cannot be resolved by enhanced communication and quick settlement. Edwards, *supra* note 56, at 678. When conflicts in basic values are involved, compromise may be impossible. *Id.*

325. Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 295 (1987). Dispute resolution answers a public need. *Id.* at 303. Appeasing individuals can satisfy a broader public interest because quick, consistent decisions can maintain the peace.

326. Fiss, *supra* note 7, at 1075.

327. *Id.* Fiss argues that settlement may not be preferable to judgment. *Id.*

328. *Id.* at 1078. Such situations are common when suits involve corporations, stockholders, unions, etc. *Id.* at 1078 n.17. Much federal litigation involves the government and requires determining a spokesperson with the requisite authority. *Id.* at 1079.

between the parties which can affect the presentation of the issues and willingness to be assertive.[329] Litigant access to resources may vary.[330] The party without adequate finances may not be able to engage in protracted negotiation or may settle to receive an award quickly.[331] Interpretations of law and post-settlement supervision are often necessary but hindered by private settlements.[332] Thus, parties may consent to a settlement but may lack adequate participation, or may be uninformed and unprotected.[333]

Rather than providing additional options for legal services, ADR may restrict access to the courts by exerting pressure to settle or imposing preconditions on court access. In one study, all trial judges in California were surveyed over a three month period.[334] There was near unanimous preference for more cases to settle, for cases to settle sooner, and for settlements to maximize fairness and creativity.[335] Although the judiciary was in favor of greater efficiency through settlement, critics fear that it may be at the cost of abandoning judicial duties.[336] Faced with this prospect, settlement is recommended merely as a technique for controlling crowded dockets, one that should be "managed rather than encouraged."[337]

Users of ADR assume that the decision ends the dispute. They tend to minimize the important remedial function of lawsuits.[338] Actually, the judgment merely marks a change in the balance of power in a continuing contest.[339] Settlement is inviting because it avoids trial, yet it provides no

329. *E.g., id.* at 1076-77. The informality of the process allows decisions to be made without the procedural safeguards which less powerful groups may need. *See* Emery & Wyer, *supra* note 33, at 477-78 (suggesting that independent legal advice is necessary before initiating some mediations). *But see* Kelly, *supra* note 35, at 80 (suggesting that mediation helped women's overall ability to be assertive).

330. Fiss, *supra* note 7, at 1076. A disadvantage in the ability to collect and analyze information will influence predictions and expectations regarding the outcome of the dipute. *Id.*

331. *Id.* Fiss is doubtful that contingency fees or low cost legal services for financially disadvantaged clients will equalize resources. *Id.* at 1077. Contingency fees do not help defendants, and plaintiffs must find attorneys willing to accept their cases on that basis. *Id.*

332. *Id.* at 1087.

333. Those encouraging ADR respond that the facilitator can encourage participation and lessen the impact of disparity by using techniques compatible with the particular ADR process being used. Such techniques include focusing the discussion and reframing answers in mediation and calling selective witnesses in SJTs. Although there is controversy about problems of power imbalance in mediation, most participants believe their agreements are fair. Roehl & Cook, *supra* note 68, at 44.

334. Folberg et al., *supra* note 5, at 355.

335. *Id.* at 357 (citing Barrett et al., *Use of ADR in California Courts, Findings and Proposals: Report to the Judicial Council of California Advisory Committee on Dispute Resolution*, Appendix 1 at 15 (1991)). *See also id.* at 415 (providing a summary of the judges' responses).

336. *E.g.*, Brazil, *supra* note 6, at 305. Because the decision-makers in ADR are not screened or accountable to the public, quality is sacrificed. *Id.*

337. Fiss, *supra* note 7, at 1075. Fiss compares settlement to plea bargaining. Consent may be coerced, parties lacking the authority to consumate the agreement may negotiate, and justice may be minimized. *Id.*

338. *Id.* at 1082.

339. *Id.* For example, much of the litigation in domestic relations cases, the largest category on state court dockets, occurs after the entry of the decree. *Id.* at 1083 n.26.

record of the situation at the time the settlement negotiations occur.[340] When a dispute resurfaces, it is difficult to assess the request and recommend action compatible with what the parties had foreseen.

Due to the many variables involved, it is impossible to adequately substantiate the claim that ADR results in more efficient case management.[341] Even if documented, speed and cost do not necessarily equal quality.[342] Settlement reduces direct costs at that point in time but potentially increases costs in the future.[343] Future costs include relitigation as well as possible legal errors.[344] Fewer decisions generate less precedent for predicting results and guiding behavior.[345] As social policy, proposing ways to minimize the cost of litigation may be preferable to increasing settlements.[346] Critics contend that if cost-savings cannot be demonstrated, then ADR unnecessarily increases the cost to the public by adding an additional process.[347] However, each process has benefits and disadvantages, and any thorough analysis must weigh both.[348]

3. *Mandatory vs. Voluntary ADR*

Compulsory ADR extends throughout the state and federal administrative and judicial systems.[349] Yet, the wisdom of mandatory arbitration and mediation is questioned. Robert Coulson, president of the American

340. Fiss, *supra* note 7, at 1084. Settlement also makes enforcement more difficult. *Id.* Courts are hesitant to enlist coercive powers to enforce agreements made by the parties. *Id.* Procedures developed for policing settlement when groups or organizations are involved have generally failed to consider obtaining the necessary consent or approval. *Id.* at 1081-82.

341. *E.g.*, Menkel-Meadow, *supra* note 14, at 9 (citations omitted).

342. *Id.* at 10. Progress through the legal system cannot be accurately measured by the number of cases completed. *See* Posner, *supra* note 285, at 388 (opining that reduction of total costs is the ultimate objective).

343. Posner, *supra* note 285, at 388.

344. *Id.* Posner rates procedural methods according to their economic value. *Id.* at 388 n.33.

345. *Id.* at 388. If settlement merely represses grievances, critics say the purpose of legal redress is thwarted. Luban, *supra* note 2, at 383.

346. Note, *Mandatory Mediation and Summary Jury Trial Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1095 (1990) [hereinafter *Guidelines*]. The public may pay more in the present, but the cost is worth the long-term changes in social justice. *Id.*

347. *Id.* Others consider that the cost of amicable dispute resolution is worth the expense to taxpayers. *Id. See also* Posner, *supra* note 285, at 388-89. If costs are lowered, the number of cases filed may increase. *Id.* Posner suggests raising the amount in controversy required for diversity cases, increasing filing fees, and expanding state court duties rather than attempting to reduce the demand for federal services. *Id.* at 389.

348. Cost-effectiveness is a measurement technique used when specific goals cannot be measured in dollars and when resources must be maximized. Henry Levin, *Cost-Benefit and Cost-Effectiveness Analysis, in* EVALUATION PRACTICE IN REVIEW 83, 85 (David Cordray et al. eds., 1987). For example, the social goals of a victim-offender program cannot be completely described by a financial statement. Cost-benefit and cost-effectiveness analysis may be used to make informed decisions about alternatives. *Id.* at 83. *See id.* at 83-84 (describing this type of analysis).

349. *E.g.*, Katz, *supra* note 7, at 1. ADR has been borrowed and incorporated from the private sector. *Id.* Washington's Superior Court, the local court for the nation's capital, established ADR in 1985. *Settling Out of Court: Alternative Dispute Resolution*, C.Q. RESEARCHER, May 22, 1992, at 447 [hereinafter *Settling Out Of Court: ADR*]. California requires couples to mediate before filing a divorce action. *Id.* Disputes under $10,000 require arbitration in Pennsylvania. *Id.* ADR is practiced in over 400 local court systems nationally. *Id.*

Arbitration Association comments, "Mandatory ADR verges on coercion. It hasn't simplified things; it's made them more complex."[350] Even when voluntary, the process is coercive.[351]

Approximately 80% of the participants in Washington, D.C.'s local court arbitration program are satisfied with the process whether or not they accept the recommended settlement. The program is voluntary, but critics say there is an element of coercion: "There is an implicit threat that the situation will be worse if you come back to court."[352]

The arguments against espousing settlement are even more compelling when considered in conjunction with compulsory ADR.[353] Arbitrary and unsatisfactory decisions due to inadequate participation, judicial overreaching, and lack of resources may diminish fairness.[354] Parties may be forced to deplete limited resources at the arbitration hearing.[355] Unsatisfactory results may not be redressed when the system inhibits and penalizes further action.[356] The combination of compulsory ADR and persuasion to settle may legitimize an inferior system of justice.[357]

Judges are generally positive about court-annexed programs reducing the cost of litigation, providing speedier resolution, and reducing the number of cases going to trial.[358] There are reservations, however. Rules and procedures, due process, and equal protection may be devalued.[359] ADR may become a barrier to accessing the legal system. Delay can be significant. Conversely, speed in the ADR process can destroy the development of evidence, especially when discovery is shortened.[360] Presentation of evidence not generally permitted may prejudice the outcome at a subsequent trial.[361] Public accountability is forfeited when mediators and arbitrators do not keep public records of their cases.[362] The role of judges in all forms of compulsory ADR is not well-defined. Clients' reactions are controlled by attorneys' opinions; judges are too interested in clearing the

350. *Settling Out of Court: ADR*, *supra* note 349, at 447 (quoting Austin Sarat).
351. *Id.*
352. *Id.* (quoting Austin Sarat).
353. *See* Eisele, *supra* note 8, at 36. Coerced settlement is the goal of compulsory ADR. *Id.*
354. *See* Katz, *supra* note 7, at 50-51.
355. Eisele, *supra* note 8, at 37.
356. *Id.* Judge Eisele criticizes the practice of setting arbitration awards at a level that will make it encomomically unfeasible for parties to demand trial de novo. *Id.* at 36.
357. Katz, *supra* note 7, at 5. Civil rights plaintiffs may be particularly disadvantaged, *id.* at 5 n.21, and their civil rights may be at risk in mandatory court-annexed programs. Eisele, *supra* note 8, at 40.
358. *E.g.*, Katz, *supra* note 7, at 50.
359. Eisele, *supra* note 8, at 34-35. *See also* Judge Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. Rev. 230-34 (1994) (suggesting that court-annexed ADR may be unconstitutional).
360. *E.g.*, Webber, *supra* note 272, at 1519. Constraints on discovery may reward the attorney who waits for the opponent to provide information and may contribute to inaccurate decision-making. *Id.*
361. *Id.* at 1515-16. The flexibility permits potentially serious errors. *Id.*
362. *See* Menkel-Meadow, *supra* note 14, at 42-43.

docket.[363] The satisfaction of judges, parties, and attorneys who use mandatory court-annexed programs does not legitimize their use.[364] Traditional standards of fairness and due process must override personal preference.[365]

The question of whether compulsory ADR is successful elicits mixed responses.[366] Judges are generally positive, and empirical studies indicate participant satisfaction.[367] However, answers about cost and time savings are not definitive. There is little conclusive data indicating that ADR saves significant time and money for participants or the legal system.[368] Mandatory arbitration diverts large numbers of cases from the courts,[369] but given the high rate of settlement in general, it is impossible to determine how many would have settled without ADR or similar intervention. Requiring an additional procedure adds a new layer of administrative expense for courts and costs for the participants. SJTs and arbitration may be less expensive than trial, but they are more costly than ordinary settlement negotiations.[370]

No arbitration method is completely mandatory—all have exemptions.[371] Parties may demand trial de novo. Disincentives discourage this demand but apparently not to a significant degree. Presumably, if voluntary programs were completely effective, they would be preferred by everyone.[372] However, providing ADR as an option has not been particularly

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363. Eisele, *supra* note 8, at 40. ADR is predicated upon the incompetence of trial lawyers and the self-interest of judges. *Id.*

364. *Id.* at 39.

365. *Id.*

366. Katz, *supra* note 7, at 45.

367. *Id.* at 45-46.

368. *Id.* at 46. A series of mandatory arbitration studies failed to confirm that efficiency was increased. *Id.* at 47. Arbitration is more likely to replace settlement than trial. *Id.* One discouraging review reported that a mandatory New Jersey automobile negligence program increased disposition time and resulted in no significant reduction of the trial rate. *Id.* at 47 (citing Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 239 (1991)). Mixed results regarding efficiency have been reported and gains have been only moderate. *Id.* at 47 (citing Keith O. Boyum, *Afterword: Does Court-Annexed Arbitration 'Work'?*, 14 JUST. SYS. J. 244, 245-47 (1991)).

369. *Katz*, *supra* note 7, at 45 (citing McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 49 (E.D. Ky. 1988) as an example).

370. Webber, *supra* note 272, at 1520. An opinion survey of 200 early neutral evaluation (ENE) participants (a procedure in which lawsuits are screened by a neutral third party who presents an opinion of the case and, if justified, a suggested award) reported that substantial amounts of money were not saved, but the procedure was not considered expensive. David I. Levine, *Perspective of Lawyers, Clients, and Evaluators Detailed in Survey of Early Neutral Evaluation*, ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 87, 87-88 (Martha A. Matthews ed., 1990). ENE was more effective than the settlement conference in promoting settlement. *Id.* at 89. Of the attorneys that settled, 88.2% thought ENE helped; of attorneys that did not, 61.4% thought ENE helped develop the case. *Id.*

371. MEIERHOEFER, *supra* note 1, at 119.

372. *Id.*

successful, and if enough cases are not attracted, the programs will not have an effect.[373]

Courts continue to address the legitimacy of mandatory ADR. For example, the Sixth Circuit recently ruled that parties may not be compelled to use alternative dispute resolution methods.[374] Also, the dissent to a Supreme Court decision contended that compulsory arbitration conflicts with the power to authorize broad injunctive relief to redress certain claims.[375] The proper balance between achieving efficiency and requiring compulsory participation in ADR remains unresolved for both social and legal theorists.

C. Recommendations

1. *Is ADR Successful? No*

ADR is a poorly developed program that will only create new problems if fully enacted.[376] It is "a technocratic solution to a non-technocratic problem," one that "trades justice for harmony."[377] It begins with a defined problem and underestimates the pressure to ignore grievances.[378] Advocates assume that dispute resolution is a rational process in which parties weigh the relative choices available to them.[379] Yet, ADR services are not sought voluntarily. It is a misconception to maintain that disputants merely want disputes resolved efficiently and are unconcerned about how that occurs.[380]

ADR does not provide a real alternative. Observational studies have indicated a remarkable degree of similarity between litigants' reactions in court settings and in mediation.[381] ADR is useful only if nonjudicial dis-

373. *Id.* at 120. Judges' satisfaction with arbitration was related to the number of cases diverted. *Id.* When less judicial involvement was required before arbitration, judges were correspondingly more pleased. *Id.* Thus, if judges must participate in the selection of cases or administration of the arbitration program, burdens, or perceived burdens, will not be decreased. *Id.*

374. *See* Stephanie B. Goldberg, *Courts Can't Order ADR*, 79 A.B.A. J., Dec. 1993, at 77 (discussing *In re* NLO Inc., 5 F.3d 154 (6th Cir. 1993)). A SJT had been ordered and refusal to participate was subject to sanctions. *Id.* The Sixth Circuit held that courts are not authorized by the Federal Rules of Civil Procedure, Rule 16, to order mandatory participation in ADR. *Id.* Alternatively, relying on the inherent authority of the court to legitimize such an order is an " 'imprudent expansion of the judicial power.' " *Id.* Participation must be voluntary. *Id.*

375. *Gilmer*, 111 S. Ct. at 1660 (Stevens, J., dissenting). Commercial arbitration is limited to specific disputes. *Id.* The holding in *Gilmer* thus frustrates the purpose of the ADEA and "eviscerates the important role played by an independent judiciary in eradicating employment discrimination." *Id.* at 1660-61.

376. Austin Sarat, *Alternative Dispute Resolution: Wrong Solution, Wrong Problem*, New Directions in Liability Law 162, 162 (Walter Olson ed., 1988).

377. *Settling Out of Court: ADR*, *supra* note 350, at 447.

378. Sarat, *supra* note 376, at 168-69.

379. *Id.* at 170-71.

380. *Id.* at 171.

381. *Id.* at 172 (citing Susan Silbey & Sally Merry, Interpretive Processes in Mediation and Courts 3-4 (1986) (unpublished manuscript)). Merry and Silbey observed mediations and adjudications of minor disputes over a three-year period. *Id.* They concluded that the processes are

pute resolution methods are distinct from judicial ones, if some methods are more preferable than others for resolving certain types of disputes, and if these disputes can be identified and assigned to the optimal method of resolution. There is, however, no consensus on when these conditions exist.

ADR is not the answer to demands for more efficiency. ADR has had too little impact on overcrowded dockets and the expenses of litigation. It does not necessarily reduce caseloads. ADR generally replaces ordinary settlement negotiation instead of replacing trials. It is a useful management tool, but other procedures are equally or more effective.[382] For example, greater emphasis on judicial techniques, such as discovery control and assertive use of deadlines, is more productive.[383]

Pitfalls of the ADR process include voluntariness (consent is considered a prerequisite to success),[384] proper timing, resources (preparation for litigation must continue because negotiations may fail),[385] and repetitiveness.[386] In addition to these generic criticisms, each type of ADR encounters criticism specific to its format. For example, critics claim that judicial functions are inappropriately relinquished in SJTs and the unequal status of participants in mediation is reflected in their agreements.

2. *Is ADR Successful? Yes*

The use of ADR should increase because disputes are not being resolved by present means,[387] and society is hurt by the lack of readily available, reasonably priced methods for resolving disputes.[388] ADR is often disguised in everyday contexts, and thus the use of and need for ADR may be greater than the public assumes.[389] People with resources

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similar. *Id.* Parties develop strategies to manage trouble and struggle to gain control of the situation. Both settings blended formal and informal decision-making. *Id.*

382. Katz, *supra* note 7, at 52.

383. *See id.* (noting that enthusiasm for ADR is waning and that statutes such as the Civil Justice Reform Act of 1990 have mandated experiments in local rulemaking for better judicial management).

384. David C. Bergmann, *ADR: Resolution or Complication*, 131 PUB. UTIL. FORT., Jan. 15, 1993, at 21.

385. *Id.* at 22. Resources were used in ADR "which would have been better spent on preparing for litigation." *Id.*

386. *Id.* "Forums and rights" need coordination so that one problem is not addressed multiple times. Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self-Interest Lie?*, 58 U. CIN. L. REV. 397, 429 (1989) (citing Summers, *Labor Law as the Century Turns: A Changing of the Guard.*, 67 NEB. L. REV. 7, 24-25 (1988)).

387. Disputes that are not resolved may be ignored because of Americans' high mobility and the relative ease of avoiding one another. Richard Danzig & Michael Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 679-80 (1975). On the other hand, Felstiner argues that avoidance is not detrimental because parties chose that option after considering the costs of confrontation. William L. F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 84-85 (1974). If adjudication and mediation processing are possible, avoidance of disputes is costly; when avoidance is acceptable, it is difficult to encourage parties to utilize either. *Id.*

388. Danzig, *supra* note 387, at 691.

389. *Id.* at 682-83.

hire third-party neutrals in the form of therapists, lawyers, and other professionals to help resolve problems. Those without access to private assistance frequently attempt to compel public officials, especially the police, into an ADR role.[390] Other disputes may remain unresolved.

ADR provides a superior alternative for the kinds of cases that courts mismanage because of its dependence upon the information presented, lack of enforcement power, and limited resources.[391] When surveyed, judges indicated that mediation could be useful in all kinds of civil cases,[392] especially for cases that have a high incidence of occurrence.[393] Moreover, ADR does not compromise dignity.[394] Advocates contend that ADR increases access to justice, improves the perception of fairness, and enhances client satisfaction and compliance. It promotes cost-efficiency and time savings,[395] permitting more adjudicative resources to be allocated to cases that require greater attention. To determine whether disputes should be diverted to ADR, proponents suggest considering the importance of the rights at issue, the probability of error, the need for finality, and public pressures.[396]

Adjudication is not essential for justice. Actually, justice is enhanced by the addition of alternative procedures.[397] ADR is described as a "no-lose" alternative with a no-risk approach.[398] Confidence in arbitration as an option was reinforced by the United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corporation.*[399] The Court found no inconsistency in allowing grievances involving social policy to be arbitrated because court resolution also entails decision-making regarding social pol-

390. *Id.* at 683-84. Most officials are neither trained, motivated, nor rewarded for using mediation. *Id.* The need for mediation and its use is often disguised in other contexts and is more prevalent than assumed. *Id.* at 682.

391. Sarat, *supra* note 376, at 164. ADR is expected to be most efficient and effective if no real dispute exists, for example, in an uncontested divorce, or in instances involving complex, continuing relationships. *Id.* at 164-65.

392. Folberg et al., *supra* note 5, at 366.

393. *Id.* These are "landlord-tenant, small claims, civil harassment, collection, and DUI cases." *Id.* However, complex cases should not necessarily be eliminated. *See, e.g.*, Kevin R. Casey, *ADR Hits Homerun in Patent Cases*, Barrister, Fall 1993, at 18 (noting that ADR was cost and time effective in a complicated patent infringement case).

394. Lambros, *supra* note 264, at 476.

395. *E.g.*, Lambros, *supra* note 264, at 476. The SJT requires fewer potential jurors than a tradition trial, uses magistrates effectively, and enhances judges' dispositional powers. *Id.* at 477.

396. Sarat, *supra* note 376, at 166-67.

397. Meierhoefer, *supra* note 1, at 59. Whether litigants take advantage of additional options depends upon weighing the loss of some procedures, such as rulings on motions, against gaining the opportunity for a hearing at an earlier date. *Id.*

398. Lambros, *supra* note 264, at 477.

399. 111 S. Ct. 1647 (1991). Gilmer filed an age discrimination suit in the United States District Court. *Id.* at 1651. Respondent sought to compel arbitration. *Id.* The court denied the motion, reasoning in part that Congress had not intended to foreclose a judicial forum to ADEA claimants. *Id.* The Fourth Circuit Court of Appeals reversed, and the Supreme Court affirmed. *Id.*

icy.[400] Arbitration does not deprive litigants of a forum,[401] nor does it stifle development of the law.[402] In response to concerns of being disadvantaged by unequal bargaining power, the *Gilmer* Court responded that "[m]ere inequality" cannot preclude enforceability of a contractual arbitration clause; cases must be considered on an individual basis.[403] Although judicial review is limited, "such review is sufficient to ensure that arbitrators comply with the requirements of the statute."[404] The Court refused to lend credence to unfounded fears about the arbitration process.

Participants in ADR are satisfied. The most favorable aspects of ADR "tend not to be cost and speed" but rather fairness and the opportunity for expression.[405] ADR may be helpful in several ways by educating the parties about the costs and benefits of settlement when compared to litigation, evaluating the value of a case, confronting personal problems that might interfere with the resolution of the dispute, and by individualizing settlements.[406] The American Bar Association is enthusiastic about ADR, stating that it has "the potential to become . . . an effective and cost-expeditious settlement device for attorneys and litigants."[407]

3. *How Can Success Be Measured?*

The answer depends on the purpose of ADR, the definitions of success or failure, and attainment of the selected criteria.[408] Judge Posner contends that anecdotes, testimonials, impressions, assertions, and glowing reports of ADR are unconvincing.[409] Innovations, including ADR, require experimentation and rigorous testing. Variables that can be manipulated and measured for proper experimentation include the use of

400. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1652 (1991). Gilmer claimed that the ADEA fosters broad social policies in addition to addressing individual grievances. *Id.* Gilmer further argued that arbitration deprived him of a judicial forum intended by the ADEA. *Id.* at 1653.

401. *Id.* at 1653-54. Justice White noted that Congress included informal methods of decision-making for the EEOC, and arbitration agreements provide increased options for selecting forums. *Id.* (citing Rogriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989)).

402. *Id.* at 1655. Gilmer alleged that the absence of written opinions will result in employers' concealing discriminatory policies, an inability to obtain adequate review, and stifling of development of the law. *Id.*

403. Gilmer was concerned about unequal bargaining power betweeen employers and employees. *Id.*

404. *Id.* at 1655 n.4 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

405. Katz, *supra* note 7, at 48-49.

406. Folberg et al., *supra* note 5, at 365. Judges thought that mediation was valuable when the cost of litigation outweighed the potential award. *Id.* at 366.

407. *Settling Out of Court: ADR*, *supra* note 349, at 447.

408. *See* John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499, 547-62 (1989) (providing a bibliography of ADR evaluations).

409. Posner, *supra* note 285, at 367.

alternative methods, the type of lawsuit, the public or private setting, client characteristics, and whether the ADR is voluntary or compulsory. Court-sponsored programs tend to focus evaluations on the speed of resolution; private, commercial sponsors focus evaluations on cost-savings.[410] Both groups have fostered evaluations based on efficiency.[411]

Even criteria assumed to reflect success may not be valid. Participant satisfaction is commonly measured to evaluate success, but it has been criticized as an unacceptable criterion of social justice, one that ADR should not be expected to achieve.[412] Satisfaction of participants may not accurately reflect social costs; expectations may have been lowered; or if a participant is too pleased, the settlement may have been unfair.[413] Moreover, the concept of fairness is elusive and difficult to measure.[414] Even results obtained do not provide an adequate benchmark for comparing ADR to litigation. It is impossible to accurately predict outcomes following a different type of procedure. Some evaluators consider the "shadow verdict" the only appropriate comparison.[415] However, because so many cases are settled, others think that the "shadow bargain," the outcome of fair negotiation, should be the appropriate comparison.[416]

There has been an exponential increase in the use of ADR. It will be useful to determine the types of cases that are most successful with ADR. Projections of expected increases in certain classifications of cases or elimination of types of ADR which do not work well can lead to better allocation of resources.[417] Determining the optimal conditions for ADR will enhance its use. For example, mediation is the most effective type of ADR for moderate levels of conflict, high motivation to reach agreement, requests for mediation by both parties, and equal bargaining power.[418]

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410. Luban, *supra* note 2, at 381.

411. The production argument is concerned with efficiency. *Id.* at 381-82 (citing Mark Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & SOC'Y 1, 8 (1985)).

412. *Id.* at 404.

413. *Id.* at 404-05. Parties may be satisfied with settlements for inappropriate reasons. Judge Susan Steingass notes that the optimal settlement in a divorce is one that makes neither party happy but is one that both can accept. *Id.* at 406.

414. One suggestion is to assess whether outcomes are respected and enforceable.

415. Luban, *supra* note 2, at 387-88. The shadow verdict is the predicted result of a fair trial; the shadow bargain is the result of fair negotiations. *Id.*

416. *Id.* at 388.

417. *See* G. Michael Flores, *Handling Employee Issues Through Alternate Dispute Resolution*, 176 BANKERS MAG., July/Aug. 1993, at 47. Employment litigation will increase over the next decade. *Id.* at 48. Cases which involve sexual harassment, discrimination, disability, and termination of employment are stressful and expensive for both parties, and ADR should be especially helpful. *Id.* Other types of cases will be eliminated. For example, one author reports that ADR is ineffective in utility ratemaking cases due to problems with the parties' having disparate resources and producing decisions that may conflict with statutory rules. Bergmann, *supra* note 384, at 21.

418. Kressel & Pruitt, *A Research Perspective*, *supra* note 16, at 402-05. Additionally, mediation is difficult when resources are scarce because it forecloses bargaining options. *Id.* at 403-04.

Combinations of ADR, such as mediation followed by a SJT, may prove to be the most effective.[419]

When outcomes are measured, they will affect the evaluation results. There are few repeated observations over time on compliance and relitigation. Research on the post-ADR functioning of parties is needed, considering the mixed results to date regarding claims of reduction in hostility and stress, improved cooperation, and better adjustment.[420] Measuring results immediately after resolution and again at a later date allows participants to compare their assessment of the settlement after intervening events and time to process the changes have occurred. However, the more time that elapses, the more difficult it is to obtain information.

Practical concerns, such as time and cost, may be addressed by more rigorous research design. In addition to efficiency, quality must be measured. Claims that ADR yields better justice because it fosters fundamental values, personal expression, participation, and less reliance upon professionals require qualitative evaluation methodologies.[421] Measurement of more abstract concerns such as justice, fairness, and social policy is troublesome.[422] Justice has been assessed using criteria such as accountability and fairness.[423] Defining justice and selecting measurable criteria is likely to stimulate development of acceptable goals for ADR rather than provide definitive answers to its existence.

4. *Suggestions*

Selection of ADR will be encouraged if litigants are aware of its availability and potential benefits. Benefits of ADR include possible cost savings, expedited resolution, and greater personal participation. To encourage making an educated selection of ADR, suggestions include providing brochures to all potential plaintiffs, requiring that attorneys and clients meet before or soon after filing to discuss ADR, and establishing financial incentives for the use of ADR, such as reduced filing fees for parties who attempt ADR before filing.

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419. A combination of ADR with adjudication allows participating attorneys to exercise dichotomous skills of cooperation and confrontation, allowing a greater range of possible techniques to be utilized.

420. *See supra* text accompanying notes 89-102 (discussing the lack of uniform results when measuring psychological changes).

421. Luban, *supra* note 2, at 382 (citing THE POLITICS OF INFORMAL JUSTICE (R. Abel ed., 1982)). The hypothesis that ADR is conducive to greater justice is the quality argument. *Id.* *See* Menkel-Meadow, *supra* note 14, at 6 (proposing to measure ADR using categories denominated quantitative-efficiency and qualitative-justice). Evaluations for the different methods of ADR should be distinct. *Id.* at 44.

422. *See* Menzel, *supra* note 69, 10 (defining fairness).

423. E.g., Umbreit, *supra* note 18, at 56 (maintaining that involvement of the victim is related to fairness).

Participation in ADR can be enhanced by providing clear expectations to clients and confirming that ADR's purpose and procedure are understood.[424] In addition to providing procedural safeguards and adequate screening procedures, ADR requires meaningful participation.[425] Thus, attendance and good faith participation of lawyers and principals with settlement authority should be required.[426] Ethical practice also requires prompt abandonment of the ADR effort if it is ineffective and causes delay in accessing the legal system.

In terms of timing, referral to ADR should not impede the progress of other court deadlines.[427] Judges almost unanimously support mediation before filing the action, but express concerns about starting ADR before discovery. In no case did judges want ADR to contribute to missing statute of limitation deadlines.[428] Efficiency is not the foremost goal of mediation, but the process should not create unnecessary delay.[429] Suggestions for enhancing efficiency include a procedure for bypassing ADR and sending some cases directly to trial and limiting mandatory ADR to one to two days.[430]

Determining the most suitable type of ADR will contribute to its success. ADR is most advantageous when the parties have a continuing or past relationship, when creative solutions are possible, when only damages are at issue, when a third-party expert would be helpful for understanding scientific or technical issues, and when communication problems are minimal.[431] A comparison of voluntary and compulsory SJTs strongly suggests that voluntary procedures result in greater diversion of cases and litigant satisfaction. Identifying factors which enhance voluntary participation may serve to minimize the expansion of mandatory programs while addressing the need to divert significant numbers of cases for efficiency.

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424. Clients in ENE seemed confused about the procedure. Levine, *supra* note 370, at 87, 88, 90.

425. *Guidelines*, *supra* note 346, at 1095-96.

426. *Id.* at 1096 The holding in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989), suggests that attendance at ADR may be compelled. *See Guidelines*, *supra* note 346, at 1096.

427. Folberg, *supra* note 5, at 369.

428. *Id.* at 369-70.

429. *Guidelines*, *supra* note 346, at 1102. Time preparing for the SJT is not wasted because the information and supporting materials that have been developed can be used at trial. *Id.* at 1102 n.116.

430. *Id.* at 1102.

431. Folberg et al., *supra* note 5, at 393. A particular type of ADR can be matched with the problem. In mediation, a neutral third party gathers as much information as possible from each side and helps generate a range of options. Bureau of National Affairs, *Lawyers Get Tips on Using Early Neutral Evalution From ENE Originator and Experienced Trial Lawyer*, *in* Alternative Dispute Resolution: Practice and Perspectives (Martha A. Matthews ed., 1990) 83, 85. In ENE, an expert evaluates the problem without necessarily considering individual interests. *Id.* Of these two methods, mediation would thus be more helpful if there are greater differences and more divergent problems rather than a single, straightforward issue. *Id.*

Optimally, courts should be allowed to order cases to ADR on a case-by-case evaluation.[432]

Every judicial system has existing court procedures. To effectively implement and use alternatives, the bench and bar must learn how ADR will relate to other case management practices in that jurisdiction. For example, the mandatory arbitration program in the District of Western Michigan, which had mandatory arbitration programs with the least favorable approval rating among the ten federal districts, apparently compared unfavorably with a mediation program that was already functioning in that jurisdiction.[433] Combinations of alternatives are possible, but they must complement each other. Western Oklahoma reported the highest proportion of "strongly approve" ratings from attorneys using court-sponsored settlement conferences in conjunction with SJTs.[434] The case must be matched to the procedure and the forum rather than being subjected to various alternatives and multiple attempts at resolution. There is a point when efforts to settle are counterproductive, and a trial may be less burdensome on judicial resources.[435]

Public reactions and publicity are important. Judges have expressed concern about what public perceptions would be if mediation is more than a minor addition to the traditional procedures.[436] Judges do not want ADR to be perceived as a private, expensive alternative to the public legal system. Alternatively, ADR should not be perceived as a mechanism for eliminating cases and clients of little value.[437] To counter possible concerns about secrecy and the lack of a public record, ADR results could be registered with the court.[438]

Standard rules and procedures will enhance fairness. Interviews of 652 citizens indicated that procedural justice, or fairness, positively affects

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432. Folberg et al., *supra* note 5, at 390. For example, mandatory mediation in civil cases under $50,000 and child custody and visitation cases tends to be cost-effective and more satisfactory than litigation. *Id.* at 388-89.

Folberg suggests considering a number of factors including the type of case, the relationship among the parties, the attitudes of counsel, previous settlement discussions, the amount in controversy, and the availability of ADR. *Id.* at 391.

Judges suggested experimenting with mandatory mediation for certain cases, such as landlord-tenant, but noted the lack of information available for determining whether the success in child custody and visitation cases could be replicated. *Id.* at 389, 390.

433. MEIERHOEFER, *supra* note 1, at 131. The original program applied fee sanctions if a rejected award was not improved at trial. *Id.* Attorneys complained about having to participate in both arbitration and mediation. *Id.*

434. *Id.* at 132.

435. *Id.*

436. Folberg et al., *supra* note 5, at 367.

437. Imposing additional costs after paying filing fees was considered problematic by some judges, especially for parties not represented by attorneys and for less wealthy parties. *Id.*

438. Menkel-Meadow, *supra* note 14, at 42-43. Confidentiality can be maintained if records are kept but made available only when results or procedures are challenged. *Id.*

satisfaction and evaluation.[439] Personal and demographic characteristics did not affect whether the procedure was considered fair; representation was the most important factor.[440] The meaning of procedural justice may be part of a cultural belief shared by members of the American society and expressed in common values.[441] This suggests that certain procedures will satisfy demands for fairness regardless of the particular population or jurisdiction.

Because ADR lacks the institutionalized power balancing of the judicial system, appropriate ways to monitor the process need to be developed. Confidentiality requirements make policing some aspects of ADR difficult. For example, in mediation, a lack of equality between the parties may affect the ability to negotiate. Parties in uncomfortable situations may only want a quick resolution and may neglect to consider the consequences. Pressure to settle following an arbitration or SJT verdict may constitute coercion rather than negotiation.[442] Thus, parties should be informed that they cannot be forced to settle and that codes of ethics forbid settlement coercion.[443] The quality of services must also be monitored. Judges appraise quality by the number of cases resolved, client satisfaction, and opinions of the local bench and bar.[444]

Critics of ADR question why participation in ADR is minimal if ADR is so attractive to consumers. Perhaps the public is not as dissatisfied with the legal system as commonly assumed. Litigants may not be aware of the alternatives. Attorneys may not suggest ADR for fear that choosing ADR indicates weakness in their case or because delay brought on by litigation is strategically favorable.

Participation can be increased by making the procedures mandatory; however, issues of coercion, judicial overreaching, and "second-class" justice make this option unacceptable to some. One alternative is to propose uniform referrals to ADR by statutory classifications with exemptions for

439. Tom Tyler, *What is Procedural Justice?: Criteria Used to Assess Procedural Justice*, 22 Law & Soc'y Rev. 103, 117-21 (1988).

440. *Id.* at 132.

441. *Id.*

442. Pressure in mediation may occur in various ways, such as by threatening further legal action, reframing statements for particular emphasis, and forcing agreements which sacrifice fairness. Roehl & Cook, *supra* note 68, at 45. However, if litigants are informed and are free to abandon the mediation, advocates of the mediation process do not think a problem will exist. *Id.*

443. Menzel, *supra* note 69, at 10 (stating that "all decisions are to be made voluntarily by the participants themselves") (citing ABA Divorce and Family Mediation: Standards of Practice 10 (1986)).

444. Folberg et al., *supra* note 5, at 368. The following percentage of judges relied on each criterion: 84%—the number of cases resolved; 85%—client satisfaction; and 83% and 78% respectively—judgments of the bench and bar. *Id.* at 368, nn.107-110. One suggestion is to provide a list of qualified mediators. North Dakota Administrative Rule 28 provides that a list of qualified mediators shall be maintained by the presiding judge of each district. N.D.A.R. 28.

new issues of law or changing precedents.[445] Another is to make only the provision of information about ADR mandatory. Allowing ADR to be ordered on a case-by-case basis through judicial discretion could also increase use of ADR without resort to completely compulsory programs.[446]

The roles of lawyers in implementing, encouraging, and participating in ADR are multiple. They serve as advisors, advocates, consultants, and educators. Because many attorneys are not familiar with ADR, adequately fulfilling these roles may be problematic.[447] Judges' attitudes toward ADR are dependent upon familiarity; however, a significant number of judges are unfamiliar with specific ADR procedures.[448] Education of the bench and bar, including coordination of ADR with existing procedures, would be beneficial. Champions of ADR are also needed. Such a role may be fulfilled by a liaison judge responsible for peer education and monitoring of the programs.[449] Leadership at subordinate levels is also seen as crucial.[450] Community participation and support through funding or volunteers may enhance a sense of public participation, ownership, and acceptance.[451]

The potential of ADR is great, but in order to fulfill its promise, it must be adequately monitored, measured, and promoted. Is ADR successful? It can be if designed in response to the "right" questions.

445. *Guidelines*, *supra* note 346, at 1103. Assignment to ADR could be determined by assessment of individual cases or by predefined categories. *Id.*

446. Folberg et al., *supra* note 5, at 390.

447. *Id.* at 383. *See* Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43 (1982) (stating that ADR is not part of most lawyers' traditional repertoire).

448. Folberg et al., *supra* note 5, at 365.

449. *Id.* at 398.

450. Richard H. Robinson, *EPA Official Reports Little Interest In Effort to Use ADR in Enforcement*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 146, 148 (Martha A. Matthews ed., 1990). To encourage the use of ADR in agencies, identifying at least one advocate at each organizational level is recommended. *Id.* Resistance to ADR may be based on fear of losing control of a case, lack of understanding ADR, and lack of incentives. *Id.* (citing Richard H. Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?* 18 ENVTL. L. REP. 10087, March 1988)). *See also* Marguerite Millhauser, *ADR Partner at Large Law Firm Discusses ADR Services, Lawyers' Varied ADR Roles*, *in* ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 199, 200 (Martha A. Matthews ed., 1990) (establishing the position of ADR specialist in a law firm to educate and train other attorneys in ADR techniques).

451. *See* Isolina Ricci, *Implementing a Legislative Mandate for Services and Coordination to California's Court-Connected Family Mediation and Conciliation Courts*, 30 FAM. & CONCILIATION CTS. REV. 169, 173-77 (1992) (planning implementation stategies to satisfy legislation requiring statewide coordination of family mediation). *See also* Folberg et al., *supra* note 5, at 379-407 (proposals for increasing the use of ADR).