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ADR in the Federal Courts: Would Uniformity be Better?

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In 1990, the United States Congress passed the Civil Justice Reform Act ("CJRA" or the "Act"),¹ initiating a far-reaching experiment in procedural reform within the federal court system. The Act requires all federal district courts to develop civil justice expense and delay plans, which implement new procedures for alternative dispute resolution ("ADR"), differential case management and discovery.² The purpose of the plans is to combat cost and delay in civil litigation on an individual district basis.³ The

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1. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-06, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-82 (Supp. V 1993)).

2. CJRA § 103(a) (codified at 28 U.S.C. § 473 (Supp. V 1993)). The district courts were required to complete their civil justice expense and delay reduction plans by December 1, 1993. CJRA § 103(b) (codified at 28 U.S.C. § 471 note (Supp. V 1993)). To assist in the preparation of the plans, the Act required each district court to appoint a local advisory group composed of attorneys, judges, corporate executives, academics and community leaders. CJRA § 103(a) (codified at 28 U.S.C. §§ 472, 478 (Supp. V 1993)). The advisory groups' role was to assess the current condition of each district's docket and to prepare a report with recommendations on how to reduce the cost and delay of litigation. *Id.*

3. S. REP. NO. 416, 101st Cong., 2d Sess. 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6803-04.

Act authorizes the district courts to refer cases to ADR, specifically listing mediation,⁴ mini-trials⁵ and summary jury trials⁶ as ADR processes which the district courts might offer.⁷ Moreover, it encourages the district courts to develop early neutral evaluation ("ENE") programs.⁸

It is within these broad parameters that the district courts devised ADR programs. Congress purposefully did not provide the districts with more definite guidelines because it wanted to use the federal courts as laboratories.⁹ Under the Act, district courts are expected to experiment with different approaches to ADR, thus fomenting procedural reform from the "bottom up."¹⁰

As with all experiments, Congress will eventually assess the results of the Act. To facilitate this endeavor, Congress requested that the Judicial Conference of the United States study the experiences of pilot districts¹¹ and submit a report to the House and the Senate by December 31, 1996.¹² At that point, Congress

4. In mediation, a third-party neutral meets with the parties involved in an attempt to facilitate settlement. S. REP. NO. 416, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6832.

5. In a mini-trial, attorneys present evidence and legal arguments to representatives of the parties, usually corporate executives, so that the latter will better understand the issues of the case and be in a better position to settle the case. S. REP. NO. 416, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6832.

6. In a summary jury trial, the parties present condensed versions of their case to a jury, which renders an advisory opinion. S. REP. NO. 416, 101st Cong., 2d Sess. 28-29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6831-32.

7. CJRA § 103(a) (codified at 28 U.S.C. § 473(a)(6) (Supp. V 1993)).

8. CJRA § 103(a) (codified at 28 U.S.C. § 473(b)(4) (Supp. V 1993)). In ENE, a third-party neutral meets with the parties to discuss the case and to foster settlement. S. REP. NO. 416, 101st Cong., 2d Sess. 29-30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6832-33. The third-party neutral may provide an independent evaluation of the strengths and weaknesses of each side's position. *Id.*

9. See S. REP. NO. 416, 101st Cong., 2d Sess. 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6833 ("These principles and guidelines are by description, general and flexible. The district courts are given the discretion to mold the principles and guidelines to their local conditions.").

10. See S. REP. NO. 416, 101st Cong., 2d Sess. 14-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6817-19.

11. Any district court which implemented its civil justice expense and delay reduction plan before December 31, 1991 was designated as an early implementation district and was eligible for additional resources, such as technological and personnel support and information systems. CJRA § 103(b), (c) (codified at 28 U.S.C. § 471 note (Supp. V 1993)). Additionally, ten districts were selected to be pilot districts; their expense and delay reduction plans were required to "include the 6 principles and guidelines of litigation management and cost and delay reduction identified" in 28 U.S.C. § 473(a). CJRA § 105(b) (codified at 28 U.S.C. § 471 note (Supp. V 1993)). The remaining districts completed their plans by December 1, 1993. CJRA § 103(b)(1) (codified at 28 U.S.C. § 471 note (Supp. V 1993)).

12. CJRA § 105 (codified at 28 U.S.C. § 471 note (Supp. V 1993)). The pilot program, originally set to expire on December 31, 1995, was extended for an addi-

will evaluate whether to continue the ADR experiment, modify it somewhat, or impose a uniform system of ADR on the district courts.

The purpose of this article is to examine whether Congress should promote ADR uniformity in the federal system. The article begins by examining the diversity of ADR programs in the federal system and considers important policy issues raised by these programs. It then examines whether the procedural diversity promoted by the Act is harmful to the federal system. Next, it analyzes how ADR impacts indigent litigants and suggests that the federal system reevaluate its approach toward indigents and ADR. Finally, the article proposes an approach to ADR uniformity which balances the autonomy of the district courts' ADR programs and the preservation of core federal values.

The objective of this article is not to evaluate the effectiveness of particular ADR programs or to recommend specific ADR processes. At this point, the empirical data is not sufficient to assess the effectiveness of ADR in the federal system.¹³ Furthermore, this article is not intended to be an exhaustive survey of ADR programs in the federal system, but instead attempts to capture a cross-section of the different ADR processes and rules which districts have implemented.

I. THE DIVERSITY OF ADR PROGRAMS WITHIN THE FEDERAL SYSTEM

The ADR programs adopted by the federal district courts

tional year by the Judicial Amendments Act of 1994, Pub. L. No. 103-420, § 4, 108 Stat. 4343, 4345 (codified at 28 U.S.C.A. § 471 note (1993 & Supp. 1995)). The CJRA states that the Judicial Conference should recommend, as part of its report, whether all the district courts should be required to include the Act's six principles for litigation management and cost and delay reduction in their expense and delay reduction plans. CJRA § 105(c)(2)(A) (codified at 28 U.S.C. § 471 note (Supp. V 1993)). These principles are: 1) differential case management for civil cases; 2) early judicial involvement in litigation management; 3) discovery-case management conferences for complex cases; 4) voluntary exchange of information in discovery; 5) certification of good faith efforts to resolve discovery disputes; and 6) referral of appropriate cases to ADR. CJRA § 103(a) (codified at 28 U.S.C. § 473 (Supp. V 1993)). This article focuses on the sixth principle: referral of appropriate cases to ADR. For further discussion of the first five principles, see S. REP. NO. 416, 101st Cong., 2d Sess. 53-57 (1990), reprinted in 1990 U.S.C.A.N. 6803, 6842-46.

13. The Judicial Conference of the United States asked the Rand Corporation to analyze preliminarily the ADR programs of the pilot districts. Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1303 (1994) [hereinafter Rand Report]. The authors of the Rand Report concluded that there was not sufficient information to determine whether the Act has resulted in the disposition of cases in a more timely and cost-effective manner. *Id.* at 1337.

reflect remarkable diversity and demonstrate that Congress succeeded in promoting experimentation within the federal system. The federal district courts have adopted six principal forms of ADR: mediation,¹⁴ court-annexed arbitration,¹⁵ settlement conferences,¹⁶ ENE,¹⁷ mini-trials,¹⁸ and summary jury trials.¹⁹ The combination of ADR processes offered varies from district to district, although few offer all six processes.²⁰

Among the district courts, the most popular ADR process is a settlement conference, with two-thirds of the districts offering some variation of it.²¹ In a settlement conference, either a judge or a magistrate judge meets with the parties to discuss the possibility of resolving the case.²² The district courts employ different procedures for triggering a settlement conference. In the Southern District of California, settlement conferences are mandatory, even if the parties object.²³ In contrast, for there to be a magistrate judge settlement conference in the District of Wyoming, the parties must first request the conference, and the court must then approve it.²⁴

14. See *supra* note 4 for a description of mediation.

15. Arbitration is a process in which "a third party neutral (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard." BLACK'S LAW DICTIONARY 105 (6th ed. 1990). Private arbitration is generally voluntary and binding, whereas court-annexed arbitration is compulsory and non-binding. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DISPUTE RESOLUTION PROCEDURES FOR THE NORTHERN DISTRICT OF CALIFORNIA § B.II (Dec. 1991), available in 1991 WL 525114 (C.J.R.A.) Appendix B [hereinafter NORTHERN DISTRICT OF CALIFORNIA PROCEDURES].

16. Settlement conferences are meetings between party representatives familiar with the case and with authority to negotiate a settlement; these conferences are facilitated by a judge or magistrate who promotes communication between the parties and suggests settlement options. NORTHERN DISTRICT OF CALIFORNIA PROCEDURES, *supra* note 15, § B.IV.

17. See *supra* note 8 for a description of ENE.

18. See *supra* note 5 for a description of mini-trials.

19. See *supra* note 6 for a description of summary jury trials.

20. For plans which offer all six processes, see, for example, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Jan. 19, 1993), reprinted in 1 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter SOUTHERN DISTRICT OF CALIFORNIA PLAN] and UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Dec. 7, 1992), reprinted in 3 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter WESTERN DISTRICT OF MISSOURI PLAN].

21. JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT 6 (1994) [hereinafter CIVIL JUSTICE REFORM ACT REPORT]. The Judicial Conference of the United States prepared this comprehensive report on the implementation of the Civil Justice Reform Act, pursuant to 28 U.S.C. § 479(a). *Id.* at 1.

22. See *supra* note 16.

23. SOUTHERN DISTRICT OF CALIFORNIA PLAN, *supra* note 20, § N.11.

24. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § C.5 (Dec. 31, 1991) (citing D. WYO.

Mediation is the second most popular ADR process, as one-half of the district plans include a variant of this process.²⁵ The Judicial Conference of the United States found that a "third of the plans authorize a court-based program in which the court maintains a roster of court-approved attorney neutrals, establishes criteria for the selection of cases and assignment of neutrals, and sets rules for procedural matters such as the conduct of ADR sessions."²⁶ In contrast, the remainder of districts which include mediation in their plans offer litigants less formal mediation programs. The District of Montana, for example, maintains a list of court-approved "mediation masters" from which parties may select a third-party neutral.²⁷

A third of the district courts include some form of arbitration in their plans, with several operating mandatory court-annexed programs.²⁸ In the Eastern District of Pennsylvania, the court clerk assigns to compulsory arbitration all civil cases (excluding social security cases, prisoner cases, and constitutional cases) in which the damages sought are less than \$100,000.²⁹ The parties may also agree to submit their case to arbitration if damages exceed \$100,000.³⁰

As part of the Act, Congress asked the district courts to consider including ENE in their expense and delay reduction plans.³¹ The ENE program in the Eastern District of New York is representative of those in the federal system. The district created a panel of private attorneys to meet with the parties and evaluate their cases.³² The role of the third party is to "identify the primary issues in the dispute, explore the possibility of settlement, assist the parties in formulating a discovery plan, and, if appropriate, provide an assessment of the case."³³ The court

R. 220), reprinted in 5 Federal Local Court Rules (Law. Co-op. 2d ed. 1995).

25. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 21, at 6.

26. *Id.*

27. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § VI.B (Apr. 1, 1992), reprinted in 3 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter District of Montana Plan].

28. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 21, at 6.

29. E.D. PA. CIV. R. 8.

30. *Id.* In the Eastern District of New York, only cases with monetary damages involving less than \$100,000 are eligible for arbitration, unless the parties consent to this form of dispute resolution. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § III.A.1 (Dec. 17, 1991), reprinted in 3 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter EASTERN DISTRICT OF NEW YORK PLAN].

31. CJRA § 103(a) (codified at 28 U.S.C. § 473(b)(4) (Supp. V 1993)).

32. EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30, § III.A.2.a.

33. *Id.* § III.A.2.

may refer a case to ENE "in its discretion or on the consent of the parties."³⁴

ENE has received a mixed reception in the federal system. Among the district courts, only sixteen included ENE in their ADR programs.³⁵ The District of Maine rejected outright the adoption of an ENE program, stating that the court's "volume does not justify the creation of such a program."³⁶

Thirty-nine federal district courts approve of the use of summary jury trials,³⁷ and twenty-five approve of mini-trials.³⁸ The Northern District of Texas plan describes one variation of how summary jury trials and mini-trials are conducted. At a summary jury trial, a judge presides, and the parties present condensed versions of their evidence to jurors who do not know that they are rendering an advisory opinion.³⁹ After the verdict, the "attorneys may . . . question the jurors about their responses to and reasoning concerning the issues and facts."⁴⁰ The district's plan estimates that a summary jury trial will take "a day or less."⁴¹ By giving the parties a snapshot of how they might fare at trial, summary jury trials attempt to facilitate settlement and obviate the need for lengthy proceedings.

The Northern District of Texas also authorizes mini-trials, but it is the parties' responsibility to make the necessary "arrangements including the payment of all costs."⁴² In mini-trials, top decision-makers of the parties listen to evidence presented by attorneys so that they may better understand the dispute's legal and factual issues.⁴³ In this district, a third-party advisor may attend the mini-trial and participate in settlement negotiations

34. *Id.*

35. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 21, at 7. In the Southern District of California, a judicial officer, rather than a private attorney, conducts the ENE session, raising a question of whether this type of ENE is in fact a settlement conference. See SOUTHERN DISTRICT OF CALIFORNIA PLAN, *supra* note 20, § N.7.

36. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § IV.10 (Aug. 1, 1993), *reprinted in* 2 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter DISTRICT OF MAINE PLAN].

37. See generally FEDERAL JUDICIAL CENTER, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK, 285-98 (1995) (listing the ADR methods approved by each district court) [hereinafter the SOURCEBOOK].

38. See generally the SOURCEBOOK, *supra* note 37, at 285-98.

39. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, ALTERNATIVE DISPUTE RESOLUTION (1993), *available in* 1993 WL 334774 (C.J.R.A.) [hereinafter NORTHERN DISTRICT OF TEXAS ADR PAMPHLET].

40. NORTHERN DISTRICT OF TEXAS ADR PAMPHLET, *supra* note 39.

41. *Id.*

42. *Id.*

43. *Id.*

after the hearing.⁴⁴

The plans of many districts indicate that summary jury trials and mini-trials are available as ADR mechanisms, but do not specify procedures or rules for conducting these processes.⁴⁵ The plans' cursory references to these processes suggest that summary jury trials and mini-trials may not be employed in district courts as commonly as these plans would suggest.⁴⁶

Because many plans do not include procedures for summary jury trials, judicial officials who preside over such trials presumably have discretion to devise their own procedures, perhaps in consultation with the parties. This lack of detail may be appropriate for mini-trials because judicial participation in this process is minimal, and the parties are largely responsible for establishing their own procedures.⁴⁷

While the plans of many districts embrace ADR with zeal, it is important to note that several districts do not share this enthusiasm for ADR, principally because their dockets do not require full-scale ADR programs.⁴⁸ For example, the only option offered by the Northern District of Florida is a "simple" mediation program "which requires almost no administration."⁴⁹ Similarly,

44. *Id.*

45. See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § II.F.2 (Dec. 1, 1993), reprinted in 3 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter DISTRICT OF NEW HAMPSHIRE PLAN]; UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN art. 4(b) (June 9, 1993), reprinted in 2 Federal Local Court Rules (Law. Co-op. 2d ed. 1995); DISTRICT OF MAINE PLAN, *supra* note 36, § I.9.

46. The Eastern District of New York does not include mini-trials or summary jury trials in its ADR program. EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30, § III.A. The reason given by this district's advisory group may explain why more districts have not adopted summary jury trials: "The case for summary jury trials has not been established with a sufficient degree of clarity to justify its use as an official part of the functioning of the court." UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, EARLY IMPLEMENTATION DISTRICT, FINAL REPORT TO HONORABLE THOMAS C. PLATT, CHIEF JUDGE § IV.A.7 (Dec. 9, 1991), available in 1991 WL 525111 (C.J.R.A.).

47. See, e.g., UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, REPORT AND PROPOSED PLAN OF THE CIVIL JUSTICE ADVISORY GROUP SOUTHERN DISTRICT OF INDIANA APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 § I.L.D.1 (Dec. 1991), available in 1991 WL 525128 (C.J.R.A.) (noting that there are no formal rules for the utilization of summary jury trials and mini-trials, and that their use should be on an ad hoc basis and without established guidelines).

48. CIVIL JUSTICE REFORM ACT REPORT, *supra* note 21, at 6 (noting that three-quarters of the plans indicated that they have or intend to establish ADR programs, and that seven districts reject ADR outright).

49. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § (6) (Jan. 1, 1994), reprinted in 1 Federal Local Court Rules (Law. Co-op. 2d ed. 1995). The plan rejects the advisory group recommendation that the district adopt an ENE program and a formal-

the District of Minnesota relies upon "highly experienced, skilled" magistrate judges to assist the parties with settlement.⁵⁰ In its plan, the district explicitly rejects a formal ADR program because of the bureaucratic resources necessary to administer such a program.⁵¹ However, the district permits judges to refer parties to ADR on a case-by-case basis, provided that the parties agree to bear the cost.⁵²

An additional factor may undercut reliance on ADR in some federal courts. Although the plans of many district courts include several ADR mechanisms, it is uncertain how frequently federal courts actually utilize these processes. Many ADR programs are informal in nature, with the judges determining whether to refer cases to ADR.⁵³ It is possible that in practice these district courts employ ADR on an irregular basis. Similarly, even in districts in which ADR is mandatory for certain cases, a judge may nonetheless decline to assign a case to ADR if the parties contend that ADR would not be beneficial.

As Congress begins to assess which ADR processes the federal system should offer, it needs to look beyond the text of the district plans and determine how frequently the federal courts actually resort to these processes. Such an inquiry would reveal whether the use of ADR in the federal system is as wide-spread as the district plans suggest.

ized mediation program. *Id.*

50. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § V (Aug. 23, 1993), *reprinted in* 2 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter DISTRICT OF MINNESOTA PLAN].

51. DISTRICT OF MINNESOTA PLAN, *supra* note 50, § V.

52. *Id.*

53. The Western District of Tennessee, for example, states in a single sentence that "other methods that the court may use to facilitate settlement in appropriate cases include mini-trials, summary jury trials, and mediation by respected attorneys or retired judges." UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § I.F (Dec. 31, 1991), *reprinted in* 4 Federal Local Court Rules (Law. Co-op. 2d ed. 1995). The plan does not elaborate upon which cases are suitable for these processes, nor does it establish rules for conducting them. Similarly, the District of New Mexico urges the district and magistrate judges to offer arbitration, mediation, mini-trials, summary jury trials and settlement conferences, but provides no further guidance. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § F.2.a (Jan. 1, 1993), *reprinted in* 3 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter DISTRICT OF NEW MEXICO PLAN].

II. DIFFERENCES IN ADR POLICY WITHIN THE FEDERAL SYSTEM

The experimentation with ADR in the district courts has given rise to a multitude of ADR policy issues which are currently percolating in the federal system. Many of these issues cut across more than one ADR process and go beyond mere "house-keeping" rules.⁵⁴ They are a reflection of the federal system's underlying attitude and approach towards ADR. If Congress decides to legislate ADR procedures for the federal system, uniformity in these key policy areas would be particularly important to assure that ADR programs in all the districts effectuate the primary goals of the program. Once again, the purpose of this article is not to advocate particular policies for the federal system, but to highlight policy differences ripe for harmonization.

The first key issue raised by the district courts' expense and delay reduction plans is whether ADR should be voluntary or mandatory. Each of the principal ADR processes is mandatory in at least one district. Congress must therefore consider the benefits of compelling parties to participate in ADR programs. It may turn out that certain ADR processes are particularly well-suited for mandatory participation, while others may not be. For example, it may be desirable to conduct mandatory settlement conferences in the types of cases which are likely to settle as a result of active judicial involvement. On the other hand, compulsory participation may not be appropriate for mini-trials and summary jury trials;⁵⁵ these processes require enormous resources, and it is important that the parties are committed to resolving their disputes through these processes.

If certain ADR processes are mandatory in the federal system, defining the criteria for selecting suitable cases becomes important. Should such criteria include a ceiling or floor on the dollar value of the cases assigned to mandatory ADR? Should certain cases, such as social security and those raising constitutional issues, be exempt from ADR altogether? Moreover, if a case qualifies for mandatory ADR, should the parties be allowed to

54. See Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 914 (1990) (noting that in the federal system the term "housekeeping" has been used to describe practices or rules that are "unimportant, trivial or not worthy of much attention.").

55. One circuit court has held that a trial court may not compel a litigant to participate in a summary jury trial. See *Strandell v. Jackson County*, 838 F.2d 884, 887-88 (7th Cir. 1987); cf. Anne C. Morgan, Note, *Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court: Strandell v. Jackson County*, 40 CASE W. RES. L. REV. 491 (1990) (arguing that federal district courts are authorized to order summary jury trials).

opt-out, and if so, what showing must a party make to opt-out?⁵⁶

The formality of ADR programs is another key policy issue to consider. Several district courts have implemented court-annexed mediation and arbitration programs, employing ADR administrators and maintaining rosters of third-party neutrals.⁵⁷ Other districts have opted for a more informal approach, leaving the details of ADR to the parties. In these districts, the litigants must make their own arrangements for ADR.⁵⁸ The level of formality in ADR may impact how frequently these processes are employed,⁵⁹ and may ultimately reflect a district court's commitment to ADR. It is therefore important for Congress to address whether the district courts should establish formal, structured ADR programs or continue to offer informal ADR programs.

Another important question is whether the district courts should charge the litigants for ADR services. In many district courts, there is no fee for court-sponsored ADR services, but in several districts, the parties must pay for mediators when they participate in the court's mandatory mediation program.⁶⁰ There are competing policy arguments in favor of each approach. On the one hand, providing free ADR services is cost-effective if such a policy settles more cases, thus reducing the overall de-

56. The Western District of Missouri is currently conducting an experimental ADR program in which one-third of all cases are assigned to an "automatic program." WESTERN DISTRICT OF MISSOURI PLAN, *supra* note 20, at Exhibit A § II.a.2. The parties meet with an ADR administrator to determine which ADR process is most appropriate for their case. *Id.* at Exhibit A § II.B.5. If the parties cannot agree, then the administrator selects the process. *Id.* The parties are "normally" not permitted to opt-out, "primarily because of the experimental nature of the program and the need for empirical data to test it." *Id.* at Exhibit A § II.C. However, if the parties can demonstrate "good cause," they may petition to opt-out. *Id.* The administrator decides whether to grant or deny the petition; the parties may appeal this decision to the district court judge assigned to the case, but this avenue is "discouraged." *Id.*

57. See, e.g., UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, GEN. ORD. NO. 36 ADR MULTI-OPTION PILOT PROGRAM (July 1, 1992), reprinted in 2 Federal Local Court Rules (Law. Co-op. 2d ed. 1995); W.D. WASH. CIV. R. 39.1.

58. See, e.g., UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § IV.B (Oct. 18, 1993), reprinted in 2 Federal Local Court Rules (Law. Co-op. 2d ed. 1995); DISTRICT OF MINNESOTA PLAN, *supra* note 50, § V.

59. See Rand Report, *supra* note 13, at 1333 (noting that two districts with formal mediation programs, in which the clerk's offices administer the program and maintain lists of mediators, refer substantially more cases to mediation than districts which lack these structures).

60. See, e.g., NORTHERN DISTRICT OF TEXAS ADR PAMPHLET, *supra* note 39; S.D. FLA. GEN. R. 16.2.B.6.

mand on judicial resources. On the other hand, a strong argument can be made that federal courts should not use federal tax dollars to subsidize ADR; if the parties consider ADR to be effective at resolving disputes, they should procure these services on their own.

One possible solution to the fee quandary would be for a district court to offer initial ADR sessions free of charge, and then charge a fee if the litigants' participation exceeded a certain number of hours. This approach would encourage parties to experiment with ADR, but would also require them to shoulder part of its expense if they found the ADR services to be beneficial.

Another important consideration in assessing whether federal courts should charge for ADR is the financial impact of ADR on indigent clients. Indigents may choose not to participate in ADR if they find that the expense of ADR processes outweighs the benefit. This issue will be developed later in this article.⁶¹

A related issue is whether district courts should compensate third-party neutrals for their services.⁶² With the exception of several districts,⁶³ most courts sponsoring court-annexed ADR programs do not provide compensation for mediators, arbitrators or neutral evaluators. Remuneration for third parties is more common in districts which do not sponsor formal ADR services. In these less formal programs, a judge may refer the parties to ADR, but the parties are responsible for arranging and paying for the services of the neutrals.⁶⁴

The Eastern District of Pennsylvania justifies not compensating mediators and arbitrators on the ground that such work is a pro bono service.⁶⁵ An additional reason in favor of non-compensation is that participation in federal ADR programs is professionally prestigious for attorneys and confers significant, non-monetary compensation. However, there is an argument that a policy of non-compensation is harmful to ADR in the long run; members of the advisory group for the District of Columbia

61. See *infra* Section IV.

62. Even if a district court charges for court-sponsored ADR services, it could use the fees to administer its ADR program, rather than to compensate third-party neutrals.

63. See, e.g., S.D. FLA. GEN. R. 16.2.B.6 (mediators receive compensation from the parties at a rate set by the court or by agreement between the parties and the mediator); NORTHERN DISTRICT OF TEXAS ADR PAMPHLET, *supra* note 39 (noting that most mediators in Texas charge fees which start at a few hundred dollars per day).

64. See, e.g., NORTHERN DISTRICT OF TEXAS ADR PAMPHLET, *supra* note 39; D. KAN. R. 214.

65. E.D. PA. CIV. R. 15.2.

assert that mediators should be compensated in time-consuming cases because, "if ADR is to develop as a profession, and if mediation is to be widely used in large-scale commercial and public policy disputes, this system cannot rely exclusively upon volunteers."⁶⁶ However, the advisory group's position is suspect given that the District of Columbia is unable to accommodate all the attorneys who wish to serve in its mediation program.⁶⁷

A final financial issue affects litigation decisions of parties that participate in court-annexed arbitration. Several districts require a party to pay arbitration fees if the party rejects an award made by the arbitration panel, requests a trial de novo and then gets a less favorable result at trial.⁶⁸ Congress must decide whether the benefits of this rule, if any, justify extending it to all districts offering arbitration.⁶⁹

In conclusion, there are numerous policy issues which Congress must address as it considers whether to impose a uniform system of ADR in the federal courts.

III. UNIFORMITY WITHIN THE FEDERAL SYSTEM

The Federal Rules of Civil Procedure (the "Federal Rules") were promulgated by the Supreme Court of the United States in 1938 in order to promote procedural uniformity within the federal court system.⁷⁰ The Federal Rules were an attempt to harmonize the rules governing such matters as pleadings,⁷¹ joinder⁷² and discovery.⁷³ The introduction of the Federal Rules displaced the Conformity Act of 1872, which dictated that a

66. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA § XIA Recommendation 36 (Aug. 1993), available in 1993 WL 524473 (C.J.R.A.).

67. Approximately 120 people applied for 28 positions in the September 1994 training class for the District of Columbia mediation program. Telephone Interview with Nancy Stanley, Director of Dispute Resolution for the District of Columbia Circuit (Feb. 23, 1995).

68. See, e.g., E.D. PA. CIV. R. 8.7; EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30, § VI.B.I.

69. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2215-39 (1993) (analyzing how a post-arbitration fee and cost-shifting provision in a court-annexed arbitration program affects the litigation decisions of parties).

70. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 1999-2000 (1989). The Federal Rules were adopted pursuant to the Rules Enabling Act, Act of June 14, 1934, ch. 651, § 2, 48 Stat. 1064.

71. See FED. R. CIV. P. 7-16.

72. See FED. R. CIV. P. 18-22.

73. See FED. R. CIV. P. 26-37.

district court follow the procedural rules of the state in which it sat.⁷⁴ Proponents of the Federal Rules argued that it was inefficient for the federal courts to conform their procedures to those of state courts.⁷⁵ Among their criticisms, the proponents asserted that it was too complicated and costly for federal judges and practitioners to ascertain what state rules apply in federal court.⁷⁶ The movement to reform federal procedure was thus partly an effort to simplify a complex system of procedure.⁷⁷

Advocates of the Federal Rules also argued that divergence of procedure in the federal system increased the expense of litigation for parties, especially corporations, which transacted business in several jurisdictions.⁷⁸ These clients had to hire law firms familiar with the procedural rules of individual district courts.⁷⁹ In contrast, the Federal Rules make it easier for a client to employ a single law firm to represent it throughout the United States.

The appeal of uniformity was the underlying reason for the adoption of the Federal Rules during the 1930's.⁸⁰ Ironically, as Congress attempts to improve the civil justice system at the end of this century, it has given its blessing to non-conformity in the federal system. The Act authorizes all ninety-four district courts to design and implement their own procedural rules for differential case management, discovery, and ADR.⁸¹ The expense and delay reduction plans of many districts are over twenty pages long and include complicated rules which differ from district to district. For example, while some districts have not espoused differential case management⁸² (the process of assigning cases to different categories based on complexity), others segregate cases into two, three or even five tracks.⁸³ Moreover, districts

74. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

75. Subrin, *supra* note 70, at 2002-06.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Subrin, *supra* note 70, at 2002-06.

81. CJRA § 103(a) (codified as amended at 28 U.S.C. § 471 (Supp. V 1993)).

82. See, e.g., EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30; UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (July 14, 1993), reprinted in 5 Federal Local Court Rules (Law. Co-op. 2d ed. 1995).

83. See, e.g., DISTRICT OF NEW HAMPSHIRE PLAN, *supra* note 45, § IIA.2 (segregating cases into 4 tracks); UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § 1.II.A. (July 14, 1993), reprinted in 3 Federal Local Court Rules (Law. Co-op. 2d ed. 1995) [hereinafter WESTERN DISTRICT OF NORTH CAROLINA PLAN] (segregating cases into 5 tracks).

have taken very different approaches to phased discovery (the sequence in which discovery must be completed).⁸⁴

Congress' flirtation with experimentation raises two important questions—first, whether the Act represents a significant departure from the Federal Rules; and second, whether the absence of uniformity in these procedural areas is harmful to the federal system.

Although the Act complicates the procedural landscape of the federal system, it does not present a new approach to civil procedure. Since the inception of the Federal Rules in 1938, the federal system has tolerated a great deal of variation among the district courts.⁸⁵ Federal Rule 83 empowers district courts to adopt local rules of practice if the rules are not "inconsistent with" the Federal Rules.⁸⁶ The drafters included this rule in the Federal Rules for the same reasons that Congress endorsed the Civil Justice Reform Act—a desire to adapt procedures to local conditions and to encourage procedural experimentation.⁸⁷

Granting rule-making power to the district courts has led to a profusion of local rules.⁸⁸ One commentator described the development of Rule 83 in the following terms:

Although the need for local rules was viewed as quite limited, the district courts have taken up their rulemaking power with an enthusiasm that would astound the framers of rule 83. In the past four-and-one half de-

84. See AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 9-15 (July 1992). This report describes the case management techniques, discovery limitations and alternative dispute resolution mechanisms adopted by the pilot and early implementation districts. *Id.* at 2-3.

85. See Subrin, *supra* note 70, at 2018-21.

86. FED. R. CIV. P. 83. Commentators have suggested that several local rules conflict with the Federal Rules. See David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 542-44 (1985); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991). The CJRA does not contain a comparable provision prohibiting district courts from implementing rules inconsistent with the Federal Rules. As a result, the Eastern District of Texas' plan states that if the Federal Rules and the its plan's rules conflict, the latter is controlling. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN art. 6(5) (Oct. 26, 1994), reprinted in 4 Federal Local Court Rules (Law. Co-op. 2d ed. 1995). See Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1452-54 (1994) (discussing examples of provisions in expense and delay reduction plans which are inconsistent with the Federal Rules).

87. Roberts, *supra* note 86, at 549-50.

88. During the 1980's, prior to the enactment of the CJRA, several district courts began to experiment with various ADR mechanisms on the basis of their authority under Rule 83. See S. REP. NO. 416, 101st Cong., 2d Sess. 30 (1990), reprinted in 1990 U.S.C.C.A.N. 6803, 6833 (citing favorably experiences of the Northern District of Illinois and Northern District of California).

cares, the district courts have promulgated nearly 3,000 local rules. The rules cover a wealth of areas, ranging from trivial to the profound. In some districts, they are nearly as important as the federal rules themselves.⁸⁹

The pervasive growth of local rules has thus undermined the original objective of achieving procedural uniformity and has contributed to the "balkanization of federal civil procedure."⁹⁰

Given the history of Rule 83, the procedural dissonance fostered by the Act does not represent a turning point in civil procedure. It merely adds another layer of complexity to what is already a complicated procedural framework.⁹¹ Nonetheless, acknowledging this trend away from uniformity does not address the more fundamental issue of whether this development is desirable. To answer this question, Congress needs to evaluate the Act and ADR programs in light of the twin objectives of the Federal Rules—procedural simplicity and the reduction of litigation costs.

At this stage, it is premature to determine whether the procedural complexity created by the Act has made it more difficult for an attorney to litigate in more than one federal jurisdiction. There are indications of the legal profession's dissatisfaction with the Act, but these are by no means conclusive. Professor Carl Tobias asserts that the expense and delay reduction plans "could significantly change the nature of federal court practice, making it more difficult for attorneys to practice outside their own federal districts."⁹² Another professor stated that "the new layer of de facto local rules implemented under various plans has led to confusion and uncertainty in federal practice."⁹³ Regrettably, no

89. Roberts, *supra* note 86, at 537-38.

90. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992). Professor Mullenix argues that the effort to reform the civil justice system through the CJRA ought to be shelved and that the Advisory Committee system of the federal judiciary should be responsible for implementing procedural reforms. *Id.* at 385.

91. See Mullenix, *supra* note 90, at 380-81 ("As a consequence of the Act, the practitioner's life will now be further complicated by the overlay of new rules, measures, and programs promulgated and implemented on the recommendation of ninety-four local advisory groups."). See also Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1623-25 (1994) (arguing that the passage of the CJRA undermined Congress' efforts to reform the local rules in the 1988 Judicial Improvements and Access to Justice Act).

92. Carl Tobias, *quoted in* Randall Samborn, *The Battle Escalates on Reform: Will Case Management Measures Work?*, NAT'L L.J. 1, March 2, 1992. In a later law review article, Professor Tobias argues that the adoption of procedures such as automatic disclosure, case-management techniques and referrals to ADR has sacrificed uniformity and simplicity and imposed additional costs. Tobias, *supra* note 91, at 1621. However, the article presents no statistical evidence to support this conclusion.

93. Edward D. Cavanagh, *Unclogging the Judicial Pipeline*, THE CONN. L. TRIB., Jan. 17, 1994, at 25. Cavanagh notes that in a survey of attorneys who were

empirical studies have been completed to support these impressions, and the Rand Report, commissioned by the Judicial Conference of the United States to analyze the Act, was unable to reach a conclusion concerning the Act's impact on expense and delay in the federal system.⁹⁴ It is, therefore, too early to say whether the Act is the proverbial "straw that broke the camel's back."

It is equally difficult to pinpoint the extent to which the ADR component of the Civil Justice Reform Act contributes to the Act's overall procedural complexity. The current approach to ADR is part of a broader federal scheme, which includes experimentation with discovery and differential case management. Isolating the procedural burdens imposed by ADR alone is therefore problematic.

ADR's contribution to procedural complexity may not be as considerable as other aspects of the Act, such as discovery. Parties that participate in ADR can familiarize themselves with ADR procedures on a need-to-know basis. An attorney must master the rules for court-annexed arbitration only if a claim is assigned to that process. In contrast, the attorney must be conversant with a district court's discovery rules for all cases which are litigated in that forum.

Lessening procedural complexity within the federal system was only one of the objectives behind the Federal Rules. The other goal of the Federal Rules—containing the litigation costs of corporations—gave rise to the movement for civil justice reform at the end of the 1980's. Proponents of reform were concerned that the "litigation explosion" was driving up the price of American products and making them less competitive in international markets.⁹⁵ They pressed for measures to make litigation less expensive for corporations.⁹⁶

counsel of record in the Eastern District of New York, forty percent did not know about the mandatory disclosure requirements in that district's expense and delay reduction plan. *Id.*

94. Rand Report, *supra* note 13, at 1337.

95. See Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244 (1992) (analyzing the civil justice reforms proposed by then-Vice-President Dan Quayle and the Council on Competitiveness, and questioning the "connection between our legal system and economic problems."); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 38 (1986) (arguing that the recent hysteria over the litigation explosion is unfounded. "We are not faced with an inexorable exponential explosion of cases, but rather with a series of local changes, some sudden but most incremental, as particular kinds of disputes move in and out of the ambit of the courts.").

96. See Hensler, *supra* note 95; Galanter *supra*, note 95.

Ironically, the current reform efforts may actually increase the resources which corporations must devote to litigation. As a result of the Act, law firms must acquaint themselves with numerous district courts' expense and delay reduction plans and ADR programs. Firms must also develop technical expertise in ADR processes. Invariably, corporate clients will foot the bill for this acculturation. Professor Lauren Robel stated: "[P]eople with national practices are going to be hit with a kind of local diversity they have never seen before, which paradoxically may raise costs."⁹⁷

Moreover, participation in court-sponsored ADR programs may increase the litigation costs of corporate clients. The nominal fees which some district courts charge for court-annexed mediation and arbitration scarcely detract from the corporate bottom-line, but the hours which corporate law firms bill to prepare for and attend ADR sessions may be substantial. Additionally, corporate officials are often required to attend mediation and ENE sessions, taking them away from other business responsibilities.⁹⁸

Whether ADR in federal courts saves or magnifies costs for corporate clients will greatly depend upon its success at settling cases early in the proceedings and the amount of "sunk costs" which parties must incur before resorting to ADR. Litigants may choose to conduct extensive discovery in order to prepare to engage in serious settlement negotiations or to present evidence in a summary jury trial or a mini-trial. Moreover, in complex cases, the mediators may request additional discovery so that the neutrals and the parties may better understand the issues in the case. Consequently, corporations may potentially incur financial burdens as a result of the very reforms which were intended to benefit them.

At this juncture, it is difficult to determine whether the procedural non-conformity fostered by the Act is harmful to the federal system. The principal evidence of the Act's impact upon litigation costs and delays has been anecdotal in nature, and extensive empirical studies have not yet been conducted. There is, therefore, a great need for further study in this area. As Congress

97. Lauren Robel, *quoted in* Don J. DeBenedictis, *An Experiment in Reform: Like Snowflakes, No Two Plans for Reducing Civil Delays are Alike*, A.B.A. J. 16, 17 (Aug. 1992). Robel's conclusion is tempered, however, by the realities of the modern legal profession, in which large law firms have offices in many cities across the country, and the attorneys practicing in these local offices are familiar with local procedures as well as the local expense and delay reduction plans.

98. See, e.g., S.D. FLA. GEN. R. 16.2.E ("[A]ll parties, corporate representative and any other required claims professionals (insurance adjustors, etc.) shall be present at the mediation conference with full authority to negotiate a settlement.")

evaluates whether to continue with the ADR experimentation spawned by the Act, its analysis should go beyond identifying which procedures are most effective at reducing expense and delay. It must also assess whether diverse procedural rules within the federal system burden litigants and increase litigation expenses. Surveying the users of the federal system would be particularly instructive. The case for imposing a uniform system of ADR in the federal courts will hinge considerably on the conclusions of such a study.

IV. ADR AND INDIGENT LITIGANTS

While concern for corporate litigation expenses was an impetus behind the Federal Rules movement in the 1920's and 1930's,⁹⁹ those debating the merits of the Federal Rules paid little attention to their impact on indigent parties. Such disregard for the interests of the economically less fortunate is no longer acceptable in the 1990's. Over the last thirty-five years, the role of the federal courts has changed significantly, as the courts have become the principal mechanism for enforcing individual rights and civil rights statutes.¹⁰⁰ Consequently, any proposal to implement ADR in the federal courts must take into account how these processes will affect indigent parties. Congress must be careful that its legislation reflects a "sensitivity to the needs of poor people."¹⁰¹

99. Subrin, *supra* note 70, at 2002-06.

100. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 80-81 (1985).

101. Linda Singer et al., *Alternative Dispute Resolution and the Poor—Part II: Dealing with Problems in Using ADR and Choosing a Process*, 26 CLEARINGHOUSE REV. 288, 291 (July 1992).

Professor Mullenix argues that in passing the Act, Congress was primarily concerned with reducing the litigation costs of corporations and insurance companies and paid little thought to the needs of "other users includ[ing] poor people, discrimination victims, consumers, environmental and social activists, as well as tort victims." Mullenix, *supra* note 90, at 438. As evidence, Professor Mullenix cites the professional composition of the Brookings Institute task force whose report served as the policy foundation for the Act: "Its membership was heavily weighted with corporate and insurance interests." *Id.* at 389 n.42. *But see* S. REP. NO. 416, 101st Cong., 2d Sess. 13-14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6816 (citing favorably BROOKINGS INSTITUTE TASK FORCE, *JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION* (1989), and noting that the task force was "composed of a vast array of individuals representing competing interests within our civil judicial system." (citation omitted)).

The composition of the local advisory groups which drafted the district courts' expense and delay reduction plans also supports Mullenix's point. Members of private law firms are over-represented while public interest groups are under-represented. Professor Robel conducted a survey of the advisory groups of twenty-six districts, finding that 61% of respondents were employed by law firms, 2.6% by corporate counsel's offices, and 2.1% by public interest groups or legal services.

Unfortunately, there is a real danger that Congress' current fascination with experimentation may reduce indigents' access to the federal courts.¹⁰² The ADR component of many district plans imposes user fees and other procedural devices which make these forums less hospitable for indigent parties. For example, in several jurisdictions parties are required to pay the costs of court-annexed mediation and arbitration.¹⁰³ While opposing parties generally split the cost of these services, these additional procedural hurdles can significantly increase litigation expenses, especially if the parties hire attorneys to represent them during ADR sessions.

Of course, resorting to ADR in some cases may resolve disputes earlier in the proceedings and thus reduce litigation costs. However, from the perspective of indigent parties, the known costs of ADR may outweigh its uncertain benefits; in some cases, the probability of reaching a settlement through ADR may not be high enough to justify ADR's additional expense. For example, some jurisdictions mandate court-annexed arbitration for cases below a specified monetary amount (generally contract and torts cases).¹⁰⁴ For indigent clients, it is expensive to hire counsel to prepare for an arbitration session and attend the hearings. Moreover, after participating in arbitration, there is no guarantee that the dispute will be resolved. The arbitration award is non-binding, and the opposing side may decide to pursue a trial *de novo*. As a result, economic incentives may weigh against indigent parties' participation in ADR if, by choosing ADR, indigent litigants must incur substantial expense in exchange for uncertain benefits.

The Legal Services Corporation (the "LSC")¹⁰⁵ may somewhat

Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 893-95 (1993). Only 6 of 194 survey respondents practiced civil rights law. *Id.*

102. ADR processes such as neighborhood justice clinics were originally designed to provide these individuals with a more accessible and less expensive forum to resolve disputes. Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269, 274 (1994) (discussing the original impetus for Neighborhood Justice Centers). It would be ironic if the adoption of ADR programs resulted in the exclusion of lower income parties from the federal courts.

103. See, e.g., NORTHERN DISTRICT OF TEXAS ADR PAMPHLET, *supra* note 39. The fee for mediation in Texas usually starts at a few hundred dollars a day, which the parties generally split equally. *Id.* If a party cannot afford mediation, they should "talk to the mediator about his or her fee. Most mediators will either reduce their fee or eliminate the fee entirely, depending upon [the party's] financial situation." *Id.*

104. See, e.g., E.D. PA. CIV. R. 8; EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30, § III.A.1.

105. The LSC is funded by the federal government and provides legal services

alleviate the costs of ADR for indigent parties and provide them with greater access to these mechanisms. A party whose income falls below a certain level may be eligible for free legal counsel in ADR proceedings,¹⁰⁶ an arrangement which can significantly reduce the cost of ADR for indigent clients. However, the resources of the LSC are limited, and it is unable to represent all those requiring legal assistance. Moreover, expanding the LSC's involvement in ADR may effectuate an undesirable diversion of resources by increasing the overall work-load of poverty law attorneys, thereby reducing the number of cases which legal services organizations can manage.

Economics is not the only obstacle to indigent parties' participation in ADR; district courts are also reluctant to refer pro se parties to ADR, and as a result, pro se parties do not usually participate in ADR programs.¹⁰⁷ An ADR Administrator for the Eastern District of New York explained that "it makes people nervous to send pro se parties to mediation."¹⁰⁸ In deciding whether to refer a pro se party to ADR, a district court judge makes a qualitative assessment as to whether the individual has "business sense."¹⁰⁹ Only one or two pro se parties participate in the Eastern District of New York mediation program annually.¹¹⁰ In the District of Columbia, on the rare occasion when a judge refers a pro se litigant to mediation, the ADR administrative staff often asks the judge to appoint an attorney from the court's pro bono panel to represent the party at the session or asks the judge to require that the settlement agreement be read in open court.¹¹¹

to indigent clients by dispersing funds to local legal aid programs. See Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOOD HALL L.J. 29, 29 (1984) (analyzing the four historical periods of legal aid in the United States).

106. Linda Singer et al., *Alternative Dispute Resolution and the Poor—Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE REV. 142, 151-53 (May/June 1992) (urging legal services attorneys to become familiar with and take advantage of ADR on behalf of their clients).

107. In the Northern District of California, only a small number of pro se clients is referred to ADR each year. Telephone Interview with Mimi Arfin, Deputy Director of ADR for the Northern District of California (May 3, 1994). In the Eastern District of Pennsylvania, it is estimated that pro se litigants participate in the district's ADR program "half a dozen times a year." Telephone Interview with Joseph Benedetto, Chief Deputy Clerk for the Eastern District of Pennsylvania (Feb. 23, 1995).

108. Telephone Interview with Jerold Lepp, ADR Administrator for the Eastern District of New York (May 3, 1994).

109. *Id.*

110. *Id.*

111. Telephone Interview with Nancy Stanley, Director of Dispute Resolution for the District of Columbia Circuit (Feb. 23, 1995).

Courts are hesitant to refer unrepresented parties to ADR because these parties may not understand their rights and may unknowingly relinquish them during informal ADR sessions.¹¹² "[T]hey are often vulnerable to pressure to settle and to accept unfair results."¹¹³ In contrast, formal adjudication enables federal judges to ensure that the interests of pro se parties are adequately protected. Moreover, all the proceedings in the courtroom are on the record, and thus, if an opposing side attempts to take advantage of an unrepresented party's lack of legal sophistication, the latter will have legal recourses, such as an appeal, which are not available in ADR.¹¹⁴

While active judicial participation is vital to safeguarding the rights of pro se parties, the federal judiciary nonetheless needs to reevaluate its seemingly blanket rule against indigent parties' participation in ADR. Excluding resource-poor parties from ADR deprives them of the benefits of these mechanisms.¹¹⁵ It also suggests that the quality of justice in the federal system depends upon whether a party has the financial resources to secure legal representation.¹¹⁶ The federal system must therefore shed its instinctive reaction against pro se litigants' participation in ADR and recognize that ADR may be worthwhile in certain pro se cases.

One policy option would be to require district courts to hold a hearing in all cases involving pro se parties (with the exclusion of prisoner cases) to determine whether an unrepresented party possesses the legal sophistication to participate in ADR.¹¹⁷ A

112. CENTER FOR DISPUTE SETTLEMENT, THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS 1.4 cmt. (undated) [hereinafter NATIONAL STANDARDS FOR MEDIATION].

113. NATIONAL STANDARDS FOR MEDIATION, *supra* note 112, at 1.4 cmt.

114. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367-75 (1985) (arguing that trial judges, the jury system, and the rules of procedure and evidence reduce racial and ethnic prejudice in formal adjudication, while such prejudice is possible in ADR because of the absence of procedural safeguards).

115. The federal courts' current attitude toward indigent parties denies this group the discovery benefits stemming from ADR. Litigants learn a great deal through ADR about an opposing party's evidence and legal theories. At the same time, the federal system's reluctance to refer indigents to ADR deprives them of cost-savings which can accrue from speedy resolution of their claims through ADR. See NATIONAL STANDARDS FOR MEDIATION, *supra* note 112, at 1.4 cmt. ("[P]ro se litigants are often the individuals who could most benefit from the lower cost and lack of procedural complexity of mediation.")

116. See Spain, *supra* note 102, at 274 (noting that ADR increases indigent parties' access to dispute resolution because it does not require the services of an attorney).

117. In many cases, an ADR hearing could be incorporated into the regular status conferences which federal district courts hold. Formalizing this procedure would

hearing would also provide an opportunity to explore other alternatives, such as providing counsel solely for the purpose of ADR or arranging for ADR on a pro bono basis. This approach would enable knowledgeable pro se parties to reap the benefits of ADR, while leaving vulnerable parties under the aegis of the district court.

Once indigent parties gain access to ADR, they confront another set of financial hurdles.¹¹⁸ The ADR programs of some district courts may constrain the litigation autonomy of indigent parties. For example, in some jurisdictions offering court-annexed arbitration, parties that submit to arbitration have the right to request a trial de novo if they are not satisfied with the award of the arbitration panel; however, if they fare worse at trial, they must pay an arbitration fee.¹¹⁹ While the purpose of this rule is to encourage parties to accept the original award, it disproportionately limits the choice of indigent parties because it deters them from requesting a trial de novo. In contrast, a wealthier client's decision to accept or reject an arbitration award will almost certainly not hinge on the possibility of paying an arbitration fee.

Similarly, in jurisdictions which impose sanctions for failure to participate fully in ADR,¹²⁰ indigent parties may find it necessary to be more cooperative than wealthier parties because they cannot afford to run the risk of being sanctioned.

Arbitration fees and court sanctions are two financial obstacles which may place indigent parties at a disadvantage relative to their wealthier counterparts when interacting in ADR. The manner in which a district court structures its ADR program may further exacerbate this imbalance. The potential harm to indigent parties from haphazard experimentation with ADR suggests that Congress should adopt a national policy for ADR as it applies to indigent litigants. This approach would ensure that ADR neither disadvantages lower income parties nor deprives them of access to the federal courts.

ensure that judges consider the advantages and disadvantages of ADR on a case-by-case basis.

118. See Tobias, *supra* note 91, at 1619 ("Resource-poor litigants often require greater time to complete discovery and assemble sufficient information to prove their cases; consequently, measures that seek to expedite litigation may actually diminish these parties' access to the courts.")

119. See, e.g., E.D. PA. CIV. R. 8.7; EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30, § VI.B.I.

120. See, e.g., W.D. MO. R. 30.L ("If a party fails to participate [in ADR in good faith], the court may impose appropriate sanctions."); WESTERN DISTRICT OF NORTH CAROLINA PLAN, *supra* note 83, § 4.III.J (imposing sanctions for failure to attend an ADR conference without good cause).

There are several feasible policy options. First, Congress could require that all ADR programs in district courts be voluntary. A party could thus opt-out of any ADR program which it could not afford. However, this solution is inadequate because it suggests that access to ADR depends on the income levels of litigants. Moreover, there may be countervailing reasons why district courts should be able to mandate participation in ADR.¹²¹

A preferable policy would be to exempt all indigent clients from paying fees for court-annexed mediation and arbitration.¹²² This approach would resemble the federal system's current practice of waiving fees and costs for parties that proceed *in forma pauperis*.¹²³ Several district courts have included a fee waiver for mediation in their plans.¹²⁴ This solution would mitigate potential financial burdens imposed upon a litigant participating in ADR.¹²⁵ Moreover, to protect the litigation autonomy of indigent clients, district courts should not require this group to pay an arbitration fee, even if they reject the arbitration award and do worse at trial.¹²⁶

Such fee waiver policies would not alleviate a substantial expense associated with ADR—attorney fees. However, it is unlikely that Congress would agree to reimburse indigent parties for legal representation because, as a rule, expenses incurred by parties during litigation are not recoverable from courts. One possible solution would be to increase Congress' appropriations for the Legal Services Corporation so that ADR programs in

121. This point should not be construed as an endorsement of mandatory ADR. It is only intended to suggest that the benefits of mandatory ADR may outweigh any harm to indigent parties, especially if measures such as fee waivers are used to protect the interests of this group. Whether Congress should support voluntary ADR or mandatory ADR or defer entirely to the district courts on this issue must await further empirical study.

122. See Spain, *supra* note 102, at 274-75 (arguing that access to ADR should not depend on an individual's financial ability).

123. See 28 U.S.C. § 1915 (1988 & Supp. V 1993).

124. See, e.g., WESTERN DISTRICT OF NORTH CAROLINA PLAN, *supra* note 83, § 4.III.I; EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30.

125. In the Southern District of Florida, mediators receive compensation for their services but are required to agree to conduct two pro bono mediation sessions. Interview with T.G. Cheleotis, Special Assistant to the Court Administrator for the Southern District of Florida, in Miami, Florida. (Feb. 27, 1995). However, the Clerk's Office in that district usually arranges free mediation for only one case a year. *Id.*

Establishing a pro bono mediation program in the federal courts could be a satisfactory policy alternative if it effectively provides indigents with access to free mediation.

126. The Eastern District of Pennsylvania currently waives the arbitration fee for all pro se and *in forma pauperis* litigants. Telephone Interview with Joseph Benedetto, Chief Deputy Clerk for the Eastern District of Pennsylvania (Feb. 23, 1995).

federal courts do not diminish indigents' overall access to free legal representation.¹²⁷

V. FORUM SHOPPING ON THE BASIS OF ADR

The diversity of ADR programs sponsored by the district courts and their potentially high costs may influence a party's selection of venue in the federal system. The incentive to forum shop on the basis of variations in ADR programs in the district courts will likely increase as more cases are channelled into these alternative mechanisms. Parties which are cost-conscious or skeptical of ADR's benefits may choose to litigate in forums which do not offer ADR programs or whose ADR programs are not mandatory. Alternatively, some litigants may choose forums which offer a particular ADR mechanism. For example, corporations may be attracted to districts which offer summary jury trials or mini-trials. By participating in court-sponsored summary jury trials, corporate litigants avoid the cost of compensating judges and jurors, an expense which they would otherwise incur if they arranged their own ADR procedures.

Other strategic considerations may motivate a party to seek a district court offering a particular ADR process. Plaintiffs in the process of developing their cases may want to use ADR as an alternative discovery mechanism. They benefit from processes such as court-annexed arbitration or summary jury trials which require the other side to reveal its theory of the case and its most compelling evidence. Similarly, some defendants may use ADR as a means of delaying the case and ultimately plaintiffs' recoveries. These defendants would prefer to litigate in districts which do not have short timetables for settlement conferences and mediation.

Forum shopping is not limited to choosing among federal district courts. Litigants must also decide whether to sue in federal or state court. Significant differences between federal and state ADR programs may further complicate a party's choice of venue.

Of course, there are several reasons why variations in ADR programs may not be a significant consideration in forum selection. First, in selecting a forum, a litigant is likely to give greater

127. The prospects of this policy option have diminished significantly since the Republican Party gained control of both houses of Congress in the 1994 elections. The budget for the Legal Services Corporation was \$415 million in 1994. John Flynn Rooney, *Senate Action Saving LSC Draws Praise*, CHI. DAILY L. BULL., Oct. 2, 1995, at 1. However, there is a strong possibility that Congress may sharply cut or eliminate its budget in future years. David G. Savage, *Ax Hangs Heavily over Legal Aid Services for the Poor*, L.A. TIMES, Feb. 15, 1995, at A5.

weight to favorable substantive law or the convenience of a forum than to the dimensions of an ADR program,¹²⁸ although such considerations may be inapplicable if a litigant is choosing between federal and state courts sitting in the same state. Second, in many federal programs, cases are assigned randomly between traditional adjudication and automatic ADR programs.¹²⁹ Consequently, litigants cannot be certain that they will be able to participate in the ADR program of their choice. Finally, the personality and skills of third-party neutrals are vitally important to successfully resolving a case in ADR. The parties, however, have little control over which third-party neutral is assigned to their case. As a result of these various factors, the benefits of forum shopping on the basis of ADR programs may not be easy to capture.

Even if such forum shopping were common, its occurrence may not be harmful to either individual litigants or the federal system. Opposition to forum selection originally developed during the 1930's out of a belief that the outcome of a lawsuit should not hinge on the selection of a forum; the resolution of a case should be consistent in the federal and state courts of the same jurisdiction.¹³⁰ However, it is doubtful that forum shopping on the basis of ADR programs implicates these same concerns. While the dimensions of a district court's ADR program may affect the results of lawsuits, a district's ADR policies are not as outcome determinative as that forum's substantive law. It is impossible to predict *a priori* how a case will be resolved based upon an understanding of the ADR program available in a district court.

However, forum shopping based upon variations in ADR programs may be beneficial because it advances one of the underlying purposes of ADR—facilitating quick and efficient resolution of disputes. If the parties believe that a particular form of ADR would assist them in resolving their dispute, then they should be

128. The issue of forum shopping has recently arisen in the context of the new amendment to Rule 26 of the Federal Rules, which permits district courts to opt-out of the mandatory disclosure provisions for discovery. See FED. R. CIV. P. 26. There is "speculation that some plaintiffs may engage in a form of federal forum shopping to select a court on the basis of whether or not the new rules apply." Ralph A. Taylor, *Revised Federal Rules Leave Lawyers, Judges with Questions*, A.B.A. LITIG. NEWS, April 1994, at 1, 8.

129. See, e.g., NORTHERN DISTRICT OF CALIFORNIA PROCEDURES, *supra* note 15, § B.I ("[E]very even numbered case . . . is automatically referred to ENE."); WESTERN DISTRICT OF MISSOURI PLAN, *supra* note 20, at Exhibit A § II.A.2 ("One of every three civil cases . . . shall be randomly assigned to [ADR].").

130. See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts sitting in diversity must apply the substantive law of the applicable state).

able to select a forum offering such a service. Alternatively, if the parties believe that ADR would be counter-productive, they should not be encumbered by procedures which they perceive to be unnecessary.¹³¹ Thus, non-conformity within the federal system may enable parties to select the most efficient procedures for resolving their particular dispute.

There are limits to how far the benefits of efficiency can stretch. First, in most cases only one of the parties has the opportunity to choose the federal forum—either the plaintiff that files the lawsuit or the defendant that removes it from state to federal district court. In evaluating forums, these parties will look for the ADR program which is most compatible with their own litigation strategy, without regard to the needs of the opposing party. Forum shopping may thus maximize the efficiency of ADR from the perspective of only one of the parties to a law suit.

Second, forum shopping on the basis of ADR programs may be disruptive to the federal system because it could lead to a docket imbalance amongst district courts. Complex cases may gravitate from district courts with few ADR options and congregate in those offering more specialized processes, such as summary jury trials, mini-trials or court-annexed arbitration. This movement will further upset the latter's work-load because complicated cases usually demand greater judicial management and court resources.

Third, subsidizing ADR in federal courts may lead to a greater demand for ADR services than there would be if the litigants shouldered the costs. This would be especially true of more expensive forms of ADR, such as mini-trials and summary jury trials. This excess demand for ADR will further strain the limited resources of the federal system.¹³² Thus, even if forum shopping on the basis of ADR is not harmful to litigants, it may produce administrative inefficiencies within the federal system.

VI. A PROPOSED APPROACH TO ADR UNIFORMITY IN THE FEDERAL SYSTEM

Congress' purpose in passing the Act was to reduce the delay

131. One argument in favor of mandatory ADR is that parties may be unfamiliar with ADR and may not recognize the value of these processes. Forcing them to participate would educate them about the benefits of ADR.

132. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 373 (1986) ("Reducing [by subsidizing] the litigants' costs of settling cases might, by reducing the cost of resorting to the courts in the first place, actually increase the total costs of the system.").

and expense of litigation in the federal system.¹³³ Congress recognized that docket conditions would differ significantly from district to district, and consequently, a national solution for reducing cost and delay would not be optimal.¹³⁴ Districts with modest backlogs do not require extensive ADR programs, while those with long delays should be free to experiment with ADR.

In analyzing the district courts' expense and delay reduction plans, it is apparent that the district courts have embraced ADR with differing levels of enthusiasm; the extent of their ADR programs is correlated to the size of their dockets, although this relationship is not invariable. Not surprisingly, less densely populated areas, such as Montana, New Mexico and Maine, offer fewer ADR options and less developed programs,¹³⁵ while urban districts situated in New York City, Philadelphia and San Francisco tend to offer a greater number of ADR processes and more formal procedures.¹³⁶ Nonetheless, the correlation between population size and ADR does not always hold, as several district courts in congested urban areas have surprisingly few ADR options. For example, the only established option offered by the District of Maryland, centered in Baltimore, is a magistrate conference at the request of the parties.¹³⁷ Similarly, the Southern District of Florida, based in Miami, has only recently adopted a court-annexed mediation program.¹³⁸ After reviewing their dockets, these districts have concluded that their districts do not require extensive ADR programs.

These varying approaches to ADR suggest that it may not be prudent for Congress to mandate a uniform ADR program for the federal system. The district courts are in a better position to determine whether certain ADR programs would be effective at reducing litigation expense and delay.¹³⁹ As a result, recent ex-

133. See CJRA § 102 (codified at 28 U.S.C. § 471 note (Supp. V 1993)); S. REP. NO. 416, 101st Cong., 2d Sess. 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6803-04.

134. See S. REP. NO. 416, 101st Cong., 2d Sess. 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6833 ("These principles and guidelines are by description, general and flexible. The district courts are given the discretion to mold the principles and guidelines to their local conditions.")

135. See DISTRICT OF MAINE PLAN, *supra* note 36, § IV.6; DISTRICT OF MONTANA PLAN, *supra* note 27, § VI; DISTRICT OF NEW MEXICO PLAN, *supra* note 53, § F.

136. See NORTHERN DISTRICT OF CALIFORNIA PROCEDURES, *supra* note 15; EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 30, § III; E.D. PA. CIV. R. 15.

137. See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § D.2 (Dec. 1, 1993), *reprinted in* 2 Federal Local Court Rules (Law. Co-op. 2d ed. 1995). However, the court will make mediators available upon request and will consider mini-trials. *Id.* § D.3.

138. See S.D. FLA. GEN. R. 16.2.

139. If Congress were to mandate that all district courts offer certain ADR pro-

perience with ADR programs in the federal system suggests that Congress should continue to grant the district courts wide discretion to structure their own ADR programs.

Nonetheless, following this flexible approach does not mean that Congress should not play a role in setting ADR policy within the federal system. Certain policy issues are too important to be left to the whims of individual district courts. These areas could potentially discourage the use of ADR in the federal courts or disproportionately impact a particular class of litigants.¹⁴⁰ Uniform policies in these key areas, therefore, may be desirable within the federal system.

One possible approach would be to give district courts broad autonomy in the selection of ADR processes, but prescribe minimum guidelines which the district ADR programs must satisfy.¹⁴¹ For example, Congress could state that if a district chooses to offer mediation services, that court must refer all commercial cases within a certain dollar range to this process. Similarly, the legislative branch may want to enumerate specific rules for all court-annexed arbitration programs. At the same time, certain policy prescriptions which Congress adopts could apply to more than one ADR process. Congress, for instance, could exempt all indigent parties from paying fees for ADR services or could exclude constitutional cases from ADR altogether.

The advantage of this approach is that it preserves district courts' autonomy to devise ADR programs according to their local needs, while ensuring that their programs do not compromise values important to the federal system. Moreover, promoting uniformity in this manner will reduce the procedural complexity fostered by the Civil Justice Reform Act. Parties can more easily determine when participation in ADR is mandatory and which

cesses, some districts may find them to be unnecessary and costly, given the condition of their dockets.

140. See *supra* Section IV for a discussion of the impact of various district court ADR policies on indigent litigants.

141. Such an approach may raise constitutional issues regarding the power of Congress to mandate ADR procedures for federal courts. Academics are currently debating whether the Civil Justice Reform Act violates the doctrine of separation of powers. Compare Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297-98 (1993) (arguing that the Act is a violation of separation of powers because Congress removed rule-making power from Article III judges and delegated that power to advisory groups, thus interfering with the federal courts' power to prescribe procedural rules) with Robel, *supra* note 86, at 1472-83 (arguing that the Act does not violate separation of powers because first, Congress possesses the power to regulate procedure in the federal courts, and second, the Act permits the district courts to accept or reject the recommendations of the advisory groups, leaving the judiciary with ultimate control over the contents of the civil justice reform plans).

rules of procedure govern their involvement.

At the same time, as Congress begins to evaluate the Act, it needs to broaden its focus. The legislative branch's overriding concerns in passing the Act in 1990 were expense and delay; it viewed ADR as a means of reducing district courts' backlogs and litigation costs.¹⁴² However, by concentrating on these twin objectives, Congress overlooked the qualitative aspects of ADR. The objective of ADR is not only to dispose of cases in an expeditious manner, but also to achieve satisfactory results from the perspective of the parties involved. For an ADR program to be effective, it must address the individual needs of litigants and provide feasible solutions to their problems. Parties should walk away from ADR with the feeling that they have been treated fairly and have obtained a result which is superior to the one offered by formal adjudication.¹⁴³ In the long run, the legitimacy and effectiveness of ADR will depend greatly upon its ability to resolve disputes to the satisfaction of those affected.

Unfortunately, when Congress drafted the Act, it gave little consideration to such aspects of ADR. Congress failed to recognize the importance of achieving qualitative outcomes through ADR. As a result, the priorities embodied in the Act are somewhat misplaced. For example, the Act instructs the advisory groups of the district courts to "determine the conditions of the civil and criminal dockets" and to "identify the principal causes of cost and delay in civil litigation."¹⁴⁴ However, the Act does not specifically direct the advisory groups to analyze the substantive

142. S. REP. NO. 416, 101st Cong., 2d Sess. 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6803-04. Congress should also evaluate the Act's underlying assumption that the dual objectives of reducing delay and expense go hand-in-hand. Certain ADR processes may be better suited at decreasing cost than diminishing delay. For example, the Expense and Delay Reduction Plan for the District of Maine notes that it is not currently experiencing litigation delay, and the objective of its plan is therefore to reduce the cost of litigation. DISTRICT OF MAINE PLAN, *supra* note 36, § I. Accordingly, the district offers "intensive settlement conferences," but does not believe that its docket requires formal programs such as ENE, arbitration or mediation. *Id.*

In considering the types of ADR programs to endorse, Congress should study carefully whether an ADR program is more adept at reducing cost or delay.

143. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985) (arguing that the goal of mandatory settlement conferences should be to obtain quality solutions to disputes which are "tailored to the parties' polycentric needs and . . . achieve greater party satisfaction and enforcement reliability." (footnotes omitted)).

144. CJRA § 103(a) (codified at 28 U.S.C. § 472(c)(1)(A)-(C) (Supp. V 1993)). In addition, the Act states: "In developing its recommendations, the advisory groups of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court and the litigants' attorneys." CJRA § 103(a) (codified at 28 U.S.C. § 472(c)(2) (Supp. V 1993)).

nature of their districts' dockets or to determine whether certain types of cases predominate. As a result, the district expense and delay reduction plans generally fail to consider the types of cases that comprise their respective court dockets.

One consequence of this oversight is that the district courts fail to tailor their ADR programs to the substantive nature of their caseload or to develop ADR processes which are effective at resolving the predominant types of cases in their dockets.¹⁴⁵ This short-sighted approach could be harmful to the federal system if ADR resolves fewer disputes and leaves litigants displeased with the results of litigation.

When Congress appraises the effectiveness of the Civil Justice Reform Act following its receipt of the Judicial Conference Report in 1996,¹⁴⁶ it must consider expanding the objectives of ADR programs to include less tangible goals such as improving the qualitative delivery of justice in the federal system. Although cost and delay reduction should remain important aspirations of ADR programs, they should not be the exclusive ones.

Moreover, reevaluating the objectives of ADR may become necessary depending upon the findings of empirical inquiries. There is a possibility that future studies of the Act may show that the use of ADR has done little to correct the delay and expense of litigation in the federal courts.¹⁴⁷ In the event that it is demonstrated conclusively that the ADR component of the Act

145. The Northern District of California is an exception to this general trend. It has found that ENE is particularly beneficial for cases involving contracts, torts, civil rights (employment), intellectual property, antitrust, RICO, and securities. NORTHERN DISTRICT OF CALIFORNIA PROCEDURES, *supra* note 15, § B.I. The district assigns all even-numbered cases within these subject matters to compulsory ENE. *Id.* It also assigns all personal injury, property damage and contract cases (not exceeding \$150,000 in amount in controversy) to court-annexed arbitration. *Id.* § B.II. Moreover, the ADR administrators for the district conduct telephone conferences with the parties to tailor ADR to their needs. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN § III.B (Dec. 1991), reprinted in 1 Federal Local Court Rules (Law. Co-op. 2d ed. 1995).

146. See *supra* notes 11-12 and accompanying text for a discussion of the 1996 report to Congress.

147. Two recent studies examining ADR in the federal system reached such a conclusion. Employing an empirical study on ADR in the federal system, one researcher concluded that "[t]hese analyses establish rather conclusively that claims concerning ADR's potential to reduce costs and delays are greatly exaggerated." Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 916 (1991). "The data analyses indicate that ADR districts do not differ from non-ADR districts with respect to the variables that are indicators of cost and delay." *Id.* See also Bernstein, *supra* note 69, at 2211 ("A review of the empirical literature on federal [court-annexed arbitration] programs . . . suggests that there is no conclusive evidence that [court-annexed arbitration] reduce[s] either the private or social cost of disputing.").

has not cured the twin evils of litigation, Congress will have to reconsider the value of ADR programs in federal district courts and determine whether ADR's qualitative benefits alone justify the commitment of federal resources to ADR.

