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Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators, and Lawyers.

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ARTICLE

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Abstract. This Article probes the fundamental assumptions behind the use of mandatory or court-ordered mediation. The authors question the predominant use of standing rules or judicial practices referring cases to mediation. These referrals are inconsistent with the traditional roles of judges and courts, exclude the public from the justice system, and allow repeat players to develop a private justice system with little to no oversight. The Article questions why judges allow and encourage mandatory mediation and calls for all participants to take a more active role in the process. Based on surveys of judges, mediators, and lawyers, the Article exposes troublesome trends that further support the need to either abandon mandatory mediation or substantially revise the responsibilities of judges, mediators, and lawyers in the process to better protect litigants.

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I. INTRODUCTION

When invited to speak at a legal conference in 1976, Harvard Law Professor Frank Sander revealed his vision for alleviating the dissatisfaction attributed to the costs and delays of overcrowded judicial dockets.[1] His vision came to be known as the "multi-door courthouse":

> The idea is to look at different forms of dispute resolution—mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some kind of taxonomy of which disputes ought to go where, and which doors are appropriate for which disputes. . . . [T]he thing about the multi-door courthouse is that it is a simple idea, but not simple to execute because to decide which cases ought to go to what door is not a simple task.[2]

While the concept of the multi-door courthouse has led to a proliferation of court-connected alternative dispute resolution (ADR) programs, the task of deciding "which cases ought to go to what door" has largely been ignored.[3] The result is that the judicial system's anticipated use of discretion in determining which resolution process might best fit a case has been preempted in most instances with a court rule or practice that automatically refers cases to mediation.[4]

Indeed, if we take this automatic referral further down the road, how far would we have to go until a new local rule or legislative provision came along that read something like this:

> A mediator will refer to the courts for trial only those cases that the mediator has decided are suitable for a trial in court. Otherwise, all cases will be required to be scheduled for mediation. In their sole discretion, mediators may refer a case to the courts for trial upon the parties' showing that their case would best be served by an adjudicated outcome.

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1. For a complete reprint of Professor Sander's lecture at the 1976 Pound Conference, see Frank E. A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65 (A. Leo Levin & Russell R. Wheeler eds., 1979).

2. Transcript, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L.J. 665, 670 (2008).

3. *Id.*; *see also* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 370–72 (1996) (addressing the shortcomings of the intake system and the assignment of "doors" at the multi-door courthouse).

4. For example, Texas law gives the court discretion to refer cases to ADR, see TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a) (West 2011), but local court rules or practices circumvent that discretion. *E.g.*, TRAVIS CNTY. LOC. R. 2.2 (referring to pretrial mediation, automatically, all cases set for trial on the merits that are expected to take more than three hours to hear).

Sound crazy? It shouldn't. In practice, mediation has been the de facto resolution process for litigants for nearly two decades in many jurisdictions.[5] Judges, mediators, and lawyers have all participated in the steady movement of cases from the courts to a system of private justice that is largely out of the public's view—and often detrimental to the public's interest in learning the outcomes of a variety of disputes.[6]

This Article considers the roles that judges, lawyers, and mediators play and could play in making ADR a true choice when resolving court cases. It calls for: (1) deliberation on the part of judges in asking fundamental questions about their elected positions and whether automatic referrals to mediation can be consistent with their roles; (2) deliberation on the part of the ADR community[7] in asking itself what it means to be a provider of justice when resolving court cases and what it is doing to truly protect the interest of litigants; and (3) deliberation on the part of lawyers in examining their motives for submitting their cases to mediation and their behavior once there, especially in light of their professional obligations to clients, opponents, and tribunals under the disciplinary rules and other laws.

While the focus of the Article relates to mandatory mediation, some of the concerns extend to all court-connected mediations as well. In probing the responsibilities of judges, lawyers, and mediators within the judicial system and court-connected mediations, we are mindful that while these distinctions are meaningful to us as lawyers and regular participants in the civil justice system, they are rarely known or understood by the public at large. To the litigant who decides to file a lawsuit, it is likely of little

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5. The Texas Alternative Dispute Resolution Act's passage in 1987 "served to jump-start the use of mediation in Texas." L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 327 (2006). Thus, it is Texas's policy to "encourage the peaceful resolution of disputes" and for the parties to engage in the "early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2011).

6. *Compare* Arlin R. Thrush, Comment, *Public Health and Safety Hazards Versus Confidentiality: Expanding the Mediation Door of the Multi-Door Courthouse*, 1994 J. DISP. RESOL. 235, 248–51 (discussing confidentiality in the realm of alternative dispute resolution and its effect on the public's health and safety), *with* Savage & Associates, P.C. v. Mandl (*In re* Teligent, Inc.), 417 B.R. 197, 205–06 (Bankr. S.D.N.Y. 2009) ("Mediation requires confidentiality to promote the candor critical to its success.").

7. In this Article, the term "ADR community" encompasses mediators and other impartial third parties that are engaged in the resolution of court cases through various ADR procedures, distinct from judges.

significance whether it was a local rule, a judge's referral, or the attorneys' decisions that landed the parties in mediation. Yet, it is for that litigant that we need to design our civil justice system such that the selection of the resolution process that best fits the case can be based on an informed and voluntary decision by the parties and their counsel.

Each of the authors comes to this Article with a different expertise.[8] We hope this balances the perspectives and tempers the tendency to compare the worst of one process to the best of the other.[9] We learned from our discussions and extensive interviews that there is much we must learn from each other as we work toward developing a better system for those with disputes. Like most jointly authored articles, it expresses more of our philosophical compromises than solely our individual views.

Finally, we chose to "probe" because this word has several meanings, including: "a penetrating or critical investigation" and "any of various testing devices or substances."[10] We expect that by being critical of each other, investigating our assumptions, and testing our practices, we will challenge the status quo.

As a basis for our critical investigation, we start with some initial observations:

First, we backed our way into a new status quo over a period of two decades or more without analyzing the consequences of a shift toward a private resolution system. Before we continue what started as a court management practice,[11] we owe it to litigants and the justice system to examine the ramifications of having court cases resolved without judicial scrutiny.[12] Retracing our collective steps is a useful practice, particularly

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8. Susan Schultz provides the ADR perspective, James McCormack specializes in legal ethics and lawyer discipline, and Tracy Walters McCormack has practiced and teaches civil litigation.

9. *See* Michael Moffitt, *Which Is Better, Food or Water? The Rule of Law or ADR?*, DISP. RESOL. MAG., Summer 2010, at 8, 8 ("The one thing we cannot responsibly do is compare the idealized vision of one practice against the sloppy reality of the other." (quoting Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1224 (2009)) (internal quotation marks omitted)).

10. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 989 (11th ed. 2003).

11. *See* Frank Evans & Teresa Stanton Collett, Foreword to Symposium, *The Lawyer's Duties and Responsibilities in Dispute Resolution*, 38 S. TEX. L. REV. 375, 388–89 (1997) (stating that during the late 1980s Texas courts saw the value of using ADR processes "to relieve their overburdened trial dockets").

12. As the term "alternative" implies, ADR takes place away from the courts and apart from the influence of judges.

when we may not realize that we have incrementally replaced one dispute resolution system with a radically different one. Before we continue down this road for another twenty years or longer, we must assess where we are and what we have given up to get here.[13] It is a rare reform that does not, in turn, require reforming.

Second, mediation has taken on the predominant mantle of case resolution;[14] however, because of its confidentiality protections and the practices of some mediators, it lacks the mantle of procedural and substantive fairness provided by the trial and appellate courts. This leaves clients without even the most minimal of protections that a judge and public justice system offer. Mediators resist the responsibility for ensuring that participating lawyers have done at least an adequate job of meeting their professional responsibilities to their clients.[15] As some lawyers might claim that "doctors bury their mistakes," could doctors have a good reason to counter that lawyers conceal their mistakes by settling in confidential mediation?[16]

Third, we have traded the rule of law for the alleged virtues of "party determination" and "preservation of relationships" while eclipsing the "shadow" of the law under which settlements are supposed to take place. In turn, this leaves litigants unprotected at the supposedly equal mediation bargaining table.

Fourth, we must seriously consider ending mandatory mediation or

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13. *See generally* Frank G. Evans, Introduction to Symposium, *Problem Solving Processes: Peacemakers and the Law*, 11 TEX. WESLEYAN L. REV. 1, 1–4 (2004) (discussing the history of Texas ADR); Frank Evans & Teresa Stanton Collett, Foreword to Symposium, *The Lawyer's Duties and Responsibilities in Dispute Resolution*, 38 S. TEX. L. REV. 375, 388–92 (1997) (summarizing the first ten years of Texas ADR development).

14. *See, e.g.*, Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better than I Thought*, 3 NEV. L.J. 196, 200 & n.23 (2002) (stating that the Civil Justice Reform Act of 1990 mandates the federal trial courts to consider various ADR methods in order to resolve cases in the interest of reducing expense and delay).

15. For further analysis on ethical dilemmas in alternative dispute resolution, see Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

16. *Cf.* Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 220 (Ct. App. 2007) ("[A] strict approach to mediation confidentiality often prevents courts from 'exploring and justly deciding controversies that might arise out of mediated agreements.'" (quoting Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. DISP. RESOL. 135, 138 (footnote omitted))).

adopting new reporting requirements for lawyers and mediators and insisting that judges take more responsibility pre- and post-referral to ensure that a threshold level of procedural and substantive fairness has been observed within the process.

Collectively, we owe it to our clients, the civil justice system, and the public to ask the hard questions and fashion a new direction that is worthy of our obligations. We are not the first to raise many of these questions or concerns. Our inquiries and arguments have been formed in reliance on numerous articles, extensive interviews and surveys, as well as our own experiences.[17]

II. OVERVIEW

Texas recently celebrated the twentieth anniversary of the Texas ADR Act,[18] which allows judges to refer cases to ADR.[19] The ADR Section of the State Bar of Texas dedicated a special issue of its newsletter to reflect on the history and status of ADR in Texas.[20] A lead article lays out the history behind the drafting and enacting of the ADR Act and highlights how some of the key provisions were included.[21] One of the parties leading the effort toward alternative dispute resolution was Ed Sherman, a law professor from the University of Texas, who felt strongly about mandatory ADR for court cases.[22] Professor Sherman believed that the

17. In 2010, three state-wide ADR surveys were conducted. Those surveyed included judges (Tracy Walters McCormack et al., TEXAS ADR SURVEY–JUDGES (2010) (unpublished survey) (on file with the St. Mary's Law Journal)), lawyers (Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal)), and mediators (Tracy Walters McCormack et al., TEXAS ADR SURVEY–MEDIATORS (2010) (unpublished survey) (on file with the St. Mary's Law Journal)). The *Texas ADR Survey–Judges* generated 102 responses; the *Texas ADR Survey–Lawyers* generated 77 responses; the *Texas ADR Survey–Mediators* generated 180 responses. All surveys were internet-based, conducted using SurveyMonkey.com.

18. Act of June 20, 1987, 70th Leg., R.S., ch. 1121, § 1, 1987 Tex. Gen. Laws 3841, 3841–44 (West) (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001–.073 (West 2011)).

19. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a) (West 2011) (permitting a judge to "refer a pending dispute for resolution by an alternative dispute resolution procedure").

20. Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLS. (State Bar of Tex., Alt. Dispute Resol. Section), Special Ed. 2007, at 2, 2, *available at* http://texasadr.org/2007_special_edition2.pdf.

21. *Id.* at 2.

22. *Id.* at 5.

new statute needed "to authorize judges to require use of an ADR process and thus to make ADR an integral part of litigation."[23] Under the current statute, "[a] court may, on its own motion or the motion of a party, refer a pending dispute" to ADR.[24] Yet, the Act also provides that "[t]he court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure."[25] Regarding ADR procedures, the Act provides a non-exclusive list that includes not only mediation but mini-trial, moderated settlement conference, summary jury trial, and non-binding arbitration.[26] In addition, the Act provides a framework to ensure that the court is diligent about selecting the best resolution procedure for each case, the parties are engaged in that deliberation, and all parties are informed about the choices that are available.[27] Yet, in practice and through many local court rules, mandatory mediation has become the norm[28]—at the expense of engaging the parties in an evaluation of their specific circumstances and attempting to match their dispute to the most appropriate available process.[29]

Based on observation over many years in courtrooms and more recent interviews,[30] judges have a difficult job. On most days, a judge may be

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23. *Id.* (quoting e-mail from Ed Sherman, Tulane Law School, to Lisa Weatherford (Jul. 19, 2007, 22:16:49 CDT) (on file with Lisa Weatherford)) (internal quotation marks omitted).

24. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a) (West 2011).

25. *Id.* § 154.021(b).

26. *Id.* §§ 154.023–.027.

27. *See* Walton v. Canon, Short & Gaston, P.C., 23 S.W.3d 143, 150 (Tex. App.—El Paso 2000, no pet.) (recognizing that the ADR Act allows trial courts discretion to determine the appropriate action regarding alternative dispute resolution); Aric J. Garza, *Resolving Public Policy Disputes in Texas Without Litigation: The Case for Use of Alternative Dispute Resolution by Government Entities*, 31 ST. MARY'S L.J. 987, 990 (2000) ("The Code defines and outlines the use of various ADR procedures; provides for the appointment, standards, and qualifications of impartial third parties; defines the scope of written settlement agreements; and promotes confidentiality of communications in ADR procedures.").

28. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2011) ("It is the policy of this state to encourage the peaceable resolution of disputes ... through voluntary settlement procedures."); Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 7 (2004) ("Not surprisingly, courts endorsed mediation not only as a beneficial procedure for the parties, but also as a means of clearing their dockets.").

29. *See* Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 10 (2004) ("Mandatory mediation and the increased possibility of settlement saved the parties and the courts time and money, but did not guarantee the parties' outcome satisfaction.").

30. In depth interviews were conducted with both sitting and former judges at the county,

overwhelmed with more demands for justice than can possibly be dispensed over the course of the morning or afternoon docket. On other days, they wonder how many divorces or discovery disputes they can possibly hear in an afternoon. They see lawyers of varying competence, mostly on the lower end of the scale. There is little time for them to step out of the trees to contemplate the larger forest or their role in it.

After a while on the bench, judges are usually able to shed themselves of the tunnel vision that lawyers and litigants tend to have concerning their cases. An experienced judge's objectivity becomes more attuned in identifying cases that would be most appropriate for mediation, other forms of ADR, or trial. Hence, judges justify their decisions to send so many cases to ADR.

However, judges must question whether mandatory mediation may be a product of a sunk-cost or status-quo trap.[31] Borrowed from the business world, sunk costs refer to "mak[ing] choices in a way that justifies past choices, even when the past choices no longer seem valid"; its effect can be compounded when coupled with the status-quo trap, which identifies our "strong bias towards alternatives that perpetuate the status quo."[32] Mandatory mediation is so entrenched and has become such an institutional fixture in our judicial system[33] that we do not want to imagine what the system would be like without it. Judges may fear dockets will spiral out of control. There is a segment of the judiciary that has become persuaded that its judicial function includes the settlement of cases.[34] This belief has become solidly ingrained in many courts where judges appear to view coercing settlement as a judicial imperative. Mediators may fear sharp business declines. Yet, as officers of the court and guardians of the civil justice system, we are required to set aside our

district, and appellate levels. The authors have viewed many hours of typical courtroom activity as observers and litigators.

31. *See* John S. Hammond et al., *The Hidden Traps in Decision Making*, HARV. BUS. REV., Sept.–Oct. 1998, at 47, 50–51 (identifying and defining the terms "sunk-cost trap" and "status-quo trap").

32. *Id.*

33. *See* Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal) (noting that 68% answered they represented clients in mediation in 75% or more of their cases).

34. *See* Kennedy v. Hyde, 682 S.W.2d 525, 530 (Tex. 1984) ("In a day of burgeoning litigation and crowded dockets, the amicable settlement of lawsuits is greatly to be desired.").

fears and objectively assess what is best for litigants and the general public, ignoring our personal objectives and interests. Like all reforms (alleged and real), there comes a time to re-examine whether the arguments for adopting them are still true or whether the reform was carried far beyond what should have been intended.

We believe that the primary driving force for compelling mandatory mediation is spent. In interviews with mediators, they do not believe that abolishing mandatory referrals will negatively impact mediations of court cases, precisely because it has become the "go to" choice for litigators. Mediation hardly needs "affirmative action" imposed by the courts for its continued viability. There is no question that litigators have far more experience with mediation than trial.[35] That situation will not change overnight, if ever. It is appropriate for both the judicial community and the ADR community to ask the hard questions of the institutions now, sharing in the routine delivery of public and private justice.

III. PEELING AWAY THE CURTAIN OF MANDATORY MEDIATION

"No one gets in to see The Wizard, not no one. Not no how."[36]

In *The Wizard of Oz*, Dorothy and her companions are sent away for further tests and hardships, even after they have completed their initial perilous journey to Oz.[37] Litigants may feel much like Dorothy as they struggle to have a jury trial heard by a judge. Why has access to a judge and the court system become so difficult, and why do courts use mandatory mediation as one more obstacle before an audience with "the great and powerful Oz?" Is it really a constitutional function of the

35. *See* Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal) (indicating that while 92.2% of attorneys surveyed had represented clients in court-referred mediations, 52.5% of respondents had tried less than twenty-five cases in civil trials); *see also* David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1385 (2010) (stating that mediation and a diminishing number of capable trial attorneys have contributed to the decreasing number of jury trials); Sam Sparks & George Butts, *Disappearing Juries and Jury Verdicts*, 39 TEX. TECH L. REV. 289, 296 (2007) (recognizing that a new class of attorneys has emerged out of the increase in alternative dispute resolution, who often have little trial experience).

36. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

37. *Id.*

judiciary to create an extra hoop through which litigants must first jump in order to get what they originally sought when they filed suit or an answer?[38] Is judicial time really so scarce that courts need to deflect people from using it? Do we believe that litigants are not capable of choosing between a judge or jury and mediation so we choose for them?[39] Is mediation a better solution than a jury trial or judicial decision? Are darker unconscious forces at play? Could it be that a lack of confidence in juries lingers among many participants, including lawyers and judges, and we continue to limit the jury's role accordingly?[40] Do we no longer want to engage in the business of judging and declaring winners and losers? Are there so few actual trial lawyers left that clients must be funneled to a "kinder, gentler" solution that is more palatable for our "no losers, all winners" society, which is marketed as better for the would-be litigants as well?

Judicial efficiency is a legitimate concern,[41] but we cannot keep reflexively invoking the concept to automatically relegate cases to a private resolution system without questioning why or even tracking what happens to these cases in and out of the courthouse. If judicial resources are scarce and must be rationed, why do we not prioritize their use? We know that jury trials are not taking up significant judicial time since they rarely occur. The number of jury trials in U.S. District Courts dropped one-third from 1976 to 2002.[42] What fills the dockets the remaining weeks? Bench trials

38. *Cf.* Scott A. Miller, Note, *Expanding the Federal Court's Power to Encourage Settlement Under Rule 16:* G. Heileman Brewing v. Joseph Oat, 1990 WIS. L. REV. 1399, 1402–03 (discussing the constitutional authority for federal courts to manage their dockets).

39. *See generally* Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 483–84 (2010) (suggesting that forcing lawyers and clients into mediation is the best way to overcome the ignorance of the process's benefits).

40. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1272–73 (2005) (noting that one reason for the large departure from civil trials is a perception of biased juries).

41. *See In re* Prudential Ins. Co., 148 S.W.3d 124, 137 (Tex. 2004) (identifying the two factors which justified mandamus relief in *In re Masonite Corp.* as the lack of the trial court's authority and the strain on the legal system); *In re* Masonite Corp., 997 S.W.2d 194, 198 (Tex. 1999) (using waste of judicial resources as a factor contributing to the adequacy of appellate relief to determine whether a writ of mandamus should be issued); Eckman v. Centennial Sav. Bank, 784 S.W.2d 672, 675 (Tex. 1990) (applying a judicial efficiency rationale for placing the burden on the defendant to raise an affirmative defense).

42. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7; *see also* Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV.

in U.S. District Courts are down as well: the number of cases reaching bench trials in 1976 dropped from 34% to 15% by 2002.[43] The myth of too many lawsuits and the need for "tort reform" to save the courts from hearing frivolous cases has been debunked.[44] Even judges recognize some of the mythology at work, but can still easily succumb to erroneous conventional wisdom.[45]

Judicial campaigns are usually won or lost on the judge's (or would-be judge's) qualifications to provide substantive justice. Judicial campaigns are typically unconcerned with procedural justice. To the extent that voters have interest in judicial races at all, their interest is, vaguely, in outcomes and less, if any, on process. Candidates do not campaign on their ability to spot a fact issue better than their opponent, nor to efficiently assess which documents a party needs in a discovery dispute.

Is substantive justice being hijacked by motion practice? Have the courts become lost in the weeds of discovery disputes and non-dispositive motions? If so, then perhaps motion practice on these procedural matters ought to be referred to mandatory mediation instead of consuming courtroom time. The irony of our current system is that minor, mostly procedural, disputes are resolved by our chief elected decision-makers while substantive outcomes are determined behind closed doors. It should be reversed.

Substantive outcome justice should be dispensed by the judges who

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163, 169–70 (2005) (analyzing the decline in jury trials in Texas from 1986 to 2004).

43. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 9; *see also* Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 169–70 (2005) (discussing the decrease in the number of jury trials in Texas from 1986 to 2004).

44. *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 21–22 n.56 (providing analysis of empirical data and concluding that the decline in trials has resulted from a broad shift in legal culture); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1273 (2005) (stating that the large departure from civil trials is, in part, due to misperceptions).

45. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22. "In a series of articles, Clermont and Eisenberg have documented that defendants enjoy substantial advantages over plaintiffs in the disposition of appeals. In light of the weakness of various alternative explanations, they conclude that this probably reflects appellate judges' misperceptions that trial level adjudicators (especially juries) are biased in favor of plaintiffs." *Id.* at 22 n.56 (citing Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125 (2001); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947).

remain accountable for their performance to the people who elected them. Why can't mediators help parties take control of the costs of discovery, litigation gamesmanship, and pre-trial costs? Why allow those costs to become the extortion that is the basis for going to mediation? Judges and mediators pressure parties to settle every day because of the "costs" and "risks" of going to trial.[46] How many lawyers would pursue as many discovery fights or motions if they knew that, instead of a chance to get an audience with a judge, they would be forced to sit at a mediation table with their client in tow and self-determine a solution with their opponent? If lawyers are forced to explain to their clients, in the presence of others, the true value of motions and discovery fights, those sideshows in the litigation process might decrease as clients begin to wonder whether the costs involved are worthwhile.

IV. GOOD PRACTICE?

Most Texas judges surveyed refer cases to mediation because, in their view, it is "good practice."[47] Mandatory mediation has certainly become a well-entrenched practice, but few ever ask whether it actually is a good practice and why that is always so.

The decision to force mediation rests on several assumptions:

A. *Mandatory Mediation Assumes that Parties Will Not Choose Mediation Voluntarily*

First, it assumes that parties will *not* choose mediation voluntarily. While this may continue to be a valid assumption for pro se parties, there are far more efficient and effective ways to educate self-represented parties about the benefits of ADR than to force-feed them—and everyone else—some form of mandatory mediation. If we are seriously concerned that

46. Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 180 n.102 (2005) (discussing how judges may pressure litigants to settle because case management suggests that settlement is a better result than trial); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2086 (1993) (noting settlement procedures, be it ADR or judicial conference, often involve pressure tactics).

47. 96% said cases in their court get referred to ADR. When asked to define their top reason for doing so, 64% said it was good practice and 35.8% contributed referrals to docket management. Tracy Walters McCormack et al., TEXAS ADR SURVEY–JUDGES (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

litigants, pro se or otherwise, do not know enough about mediation and other dispute resolution procedures to invoke them, wouldn't it be easier to inform them about these methods pre-suit? Otherwise, our current system seems to assume that would-be litigants have unwittingly requested a judge when they really wanted a mediator.

Wouldn't a one-page information form objectively communicating the potential benefits of mediation versus the potential benefits of a court proceeding (and signed by plaintiffs) before suit could be filed, be a cheaper fix than requiring parties to spend hundreds, if not thousands, of dollars on a mediator before they can get a court's attention on the merits? The expense of mediation to litigants has been largely swept under the rug by the justification that an early-round, successful settlement saves more money down the road and that mediation need not always be costly.[48] While many counties have settlement weeks or community dispute resolution centers with sliding scale fees,[49] many litigants are not aware of them, or they have attorneys who do not choose free or reduced fee mediation over the more costly version. Further, there is more to the expense of mediation than the mediator's fees alone. Lawyers bill extensively for their preparation time. Those elaborate settlement memos for mediators and pre-mediation conferences can result in some very impressive additional costs.

B. *Mandatory Mediation Assumes that Lawyers Will Not Voluntarily Recommend ADR to Clients in Appropriate Cases*

Second, and more troubling, the widespread use of mandatory mediation assumes that lawyers will not voluntarily recommend ADR to their clients in appropriate cases. Several justifications might be involved:

1. Judges understand the value of mediation better than anyone else and should use their "*parens*" authority to protect innocent clients from their incompetent lawyers. And yet, judges have no responsibility for the costs they impose on the parties and no liability for an ill-conceived

48. *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2087 (1993) (stating that mediation may prove costly and time-consuming).

49. *See, e.g.*, CTR. FOR PUB. POLICY DISP. RESOL., http://www.utexas.edu/law/centers/cppdr/resources/adr_drcs.php (listing "Texas Community Dispute Resolution Centers").

decision to make the parties incur that expense. More disturbingly, in many circumstances, the mediation referral occurs with no active judicial thought or participation at all.[50] What does this say about judicial confidence in lawyers to assume that lawyers are either ignorant of available resolution methods or, if they are aware, that lawyers cannot be trusted to exercise their fiduciary duties to their clients? If the system believes either of these allegations to be true, then how do we justify the continued use of a mediation process that fails to monitor or report the behavior of these lawyers in mediation? Apparently, neither judges nor lawyers seem to know much more about ADR methods beyond mediation and contractual arbitration.[51] Judges might be correct that some lawyers are not sufficiently experienced to recognize and utilize the full complement of dispute resolution methods available.[52] Yet, clients are under-served by a judicial system that disregards the value of true informed consent to participation in case resolution methods. Mandatory mediation rules perpetuate that disservice. Mandatory mediation is the new hammer that sees all disputes as nails. Trading one inflexible solution (mandatory mediation) for another (jury trial) still leaves the public disserved if no one is making a conscious assessment of which method best suits a particular dispute.

Plainly, lawyers must become familiar and experienced with all dispute resolution methods so that they can truly help their clients make informed decisions. If courts are going to second-guess the lawyer's decision about what best suits the client and the circumstances, then the courts must become familiar with all methods—and their shortcomings—as well. Courts must also exercise independent judgment about each case so that

50. This would have to be the case in counties with blanket standing rules or counties with central dockets. *See, e.g.*, BEXAR CNTY. (TEX.) CIV. DIST. CT. LOC. R. 9A (setting all jury cases on the ADR docket—the court will presume that mediation be ordered at the ADR hearing).

51. A recent national survey, which includes responses from 195 Texas mediators, shows that 41% of mediators rated lawyer knowledge of other forms of ADR at three or lower on a scale of one to seven with one being not informed and seven being very informed. *See* NAT'L MEDIATOR SURVEY (2008) (showing, in addition to the 41% at three or lower, only 8% rated as being very informed).

52. *See* Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 196 (1999) (stating that "a conflict of interest" may arise when inexperienced attorneys pursue unfamiliar ADR methods, and recommending that these attorneys refer their clients to another lawyer).

the referral of a particular resolution method or resolution provider is as balanced and thoughtful as any other judicial decision. In any other circumstance, if a court acted without regard to controlling legal principles (i.e., its decision was arbitrary and capricious), that injudicious act would be an abuse of discretion.[53] It cannot be more arbitrary and capricious than to refer cases to mediation, with no post-ADR submission or review, without even reading a pleading, conducting a fact-finding inquiry, and articulating any legal authority.[54]

2. Mandatory mediation assumes that judges must believe a mediated settlement is preferable to, or at least as good as, a judicial decision. We know that judges make the referrals and rarely excuse parties from having to participate.[55] So, once again, the question is why?

Is going to mediation at least the same as going to court, if not better? The rhetoric of mediation certainly sounds better: self-determination, creativity, control, equality at the bargaining table, and confidentiality. If judges are embracing these principles, how are they gauging if parties actually experience that kind of mediation? Did the judge choose a specific mediator to ensure that the creativity needed to resolve this case will be fostered? Of course, mediation offers the ability to craft solutions the law could not provide,[56] but how often does it happen in reality?

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53. *See* Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) ("A trial court clearly abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'" (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985))).

54. In the 2010 ADR survey, mediators replied that while 93.9% of mediators mediate court cases, 28.8% are never asked to file a report by the court, 12.5% rarely do, and only 36.3% say they always do. Tracy Walters McCormack et al., TEXAS ADR SURVEY–MEDIATORS (2010) (unpublished survey) (on file with the St. Mary's Law Journal). However, in the 2010 ADR Judges Survey, 49.5% said they require a report to be filed when they refer cases to ADR (a broader subset than just mediation), and only 12.4% of judges say they play a continuing role in all of their cases submitted to ADR. Tracy Walters McCormack et al., TEXAS ADR SURVEY–JUDGES (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

55. In the 2010 ADR survey of judges, 98% of judges indicated that objections to referrals to ADR were raised 10% or less of the time, and 69% of judges indicated that they granted objections only 10% of the time or less. Tracy Walters McCormack et al., TEXAS ADR SURVEY–JUDGES (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

56. *See* Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S6 (1989) (finding that "the potential outcomes of the mediation process are not limited to preexisting legal remedies"); Gary D. Williams, Note, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819, 820–21 (2001) (arguing that mediation "produces

Attorneys in our surveys reported that less than a quarter of mediated agreements included relief beyond what the court could have granted.[57] Likewise, when asked to estimate how many minutes lawyers and their clients spent together in the opening session after the mediator's explanation of the process, 17.5% of lawyers said less than ten minutes, and 52.6% said ten to thirty minutes.[58] Because mediation is cloaked in confidentiality, it creates its own limitations on evaluating whether the reality of mediation matches its potential or whether the practices of some mediators undermine its value.

What do judges do to ensure that all parties will be equal at the bargaining table and that all voices will be heard? In *The Mediation Alternative: Process Dangers for Women*, Trina Grillo states that "mandatory mediation can be destructive to many women and some men."[59] Her research raises troubling concerns about the mediation process and how it can silence the voices of some and lead to easy manipulation of others.[60] In fact, as a mediator herself, she cautions that "[v]oluntary mediation should not be abandoned, but should be recognized as a powerful process which should be used carefully and thoughtfully."[61] What if we were to give mediation its full value? Rather than using it as a routine measure to keep parties occupied with the hope that the dispute will go away, what if we treated it like the extraordinary remedy it is? No judge would issue a standing injunction under every circumstance. No judge would dream of issuing an injunction without a hearing, or without considering relevant authorities. Nor, presumably, would any judge refer an injunction motion out to an unknown private individual to mediate with no subsequent accountability for what happened.[62] Yet, we devalue mediation with every

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unique client-driven solutions").

57. In the 2010 ADR survey of lawyers, 73% of attorneys responded as such. Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

58. Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

59. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991).

60. *See id.* (arguing that mediation "imposes a rigid orthodoxy" that "often excludes the possibility of the parties' speaking with their authentic voices").

61. *Id.*

62. While Texas Civil Practice and Remedies Code section 154.021(a) allows a court to refer a case to ADR, there is no concomitant requirement that the court follow up to see what happened to

mandatory referral and overlook that it can stand on its own without disregarding the parties' capability to make their own choice.

> As mediation caught on, it began to be heralded as the cure for the various ills of adversary divorce. It was touted as a process in which the parties would voluntarily cooperate to find the best manner of continuing to parent their children. Consumers, however, were not embracing the mediation cure. Whether because of lack of familiarity with the process, the hostility of the organized bar, or some more considered reluctance, few divorcing couples chose to enter mediation. In order to bypass this consumer resistance, some state legislatures established court-annexed mediation programs, requiring that couples disputing custody mediate prior to going to court.[63]

Although Grillo's statement describes the California family law program, it also reflects the growth of mediation and limitation in Texas civil courts.[64] Grillo raises concerns about the California process even though the level of judicial scrutiny and mediator training there far surpasses the norm in Texas. "Mediators must have a master's degree in psychology, social work, or another behavioral science; experience in counseling or psychotherapy; knowledge of the California court system and family law procedure; and knowledge of adult and child psychology, including the effects of divorce on children."[65] Whether we choose to limit our concerns to court-mandated or include court-connected mediations, we must acknowledge the potential for mediation, in some instances, to do more harm than good. With that acknowledgment, we must also reconsider our role in forcing parties to spend their limited resources.

V. COMPLEXION OF PRIVATE JUSTICE

The judicial system has consistently worked to increase the number of

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the case in the ADR process. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (West 2011).

63. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1552 (1991).

64. *See id.* at 1551–55 (discussing mandatory mediation for custody matters in California).

65. *Id.* at 1553. In contrast to the California requirements, Texas requires mediators to receive forty hours of mediation training. *See* L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 339 (2006) (noting that, in Texas, there is no governmental method of certification for mediation (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.052 (West 2011))).

women and minorities in law schools and on the bench.[66] These efforts recognize the need for diversity in the courthouse to better represent diversity in the population. If the judiciary is actively promoting mediation as an alternative path to justice for the public, is the ADR community doing the same to promote diversity among those who practice court-connected mediation?[67] Currently, the ADR community does not seem to be tracking that data in Texas.[68]

Litigants submit their cases to an open, transparent, and representative justice system. Available to them are judges and jurors of color, gender, orientation, and religious diversity.[69] They have access to appellate courts that can review the fairness of the process. Yet, even though that is the system they access, litigants are forced into the private justice system,[70] where confidential resolutions take place behind conference room doors with the assistance of mediators who are predominantly male and white. People, including mediators, are mostly products of their environment. What group norms do mediators bring, consciously or unconsciously, to the table? What class and social identities do mediators reflect when offering their views about settlement values and their predictions about probable outcomes to participants with dissimilar backgrounds and cultures?

While mediators admittedly don't make decisions on behalf of the parties,[71] they are still active (to varying degrees) in the negotiation and

66. The United States Supreme Court has consistently found that diversity in education is a laudable goal. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (concluding that diversity is a compelling interest because "attaining a diverse student body is at the heart of the Law School's proper institutional mission").

67. Anecdotally (from interviews of mediators, judges, and experience), there seem to be few women and mediators of color engaged in the active practice of court-connected mediation. Data was requested, but unavailable for demographics of mediators.

68. *See* STATE BAR OF TEX. ALT. DISPUTE RESOL. SECTION, http://www.texasadr.org/index.html (last visited May 10, 2011) (lacking statistics on the demographics of mediators in Texas).

69. *See* Royal Furgeson, *The Jury in* To Kill a Mockingbird*: What Went Wrong?*, 73 TEX. B.J. 488, 490 (2010) ("'One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury.'" (quoting Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 227 (2008))). *But see* Rob Walters et al., *Are We Getting a Jury of Our Peers?*, 68 TEX. B.J. 144, 145 (2005) (finding that "public participation in our jury system . . . is at an all-time low and continues to decline" and that "[a]mong those citizens who do participate, Latinos, young adults, and lower-income, hourly wage earners are substantially under-represented").

70. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (West 2011) (allowing courts, on their own motion, to transfer cases "for resolution by an alternate dispute resolution").

71. *See id.* § 154.023(b) (stating that a mediator is not allowed to force his judgment upon the

evaluation of the cases. Litigants rely on mediators to set the tone, establish a safe environment, and keep the negotiations going.[72] To that extent, mediators are in a position of power and trust. People usually trust those with whom they can identify. How do judges maximize the building of that trust in the mediation process? For courts that use mediator rosters for mandatory mediation, are these rosters closely scrutinized for diversity? To the public, the face of private justice can look like the justice, or injustice, of the 1950s without regard to the hard-fought social changes of the last sixty years. Neither the judiciary nor the ADR community should want to be complicit in a private system that may look like a "bait and switch" on diversity issues to public litigants.

Access to a fair and impartial judicial system remains an active and legitimate concern.[73] We are only just beginning to increase our awareness and sensitivity to the implicit and unconscious ways that issues of race and socioeconomics can invade our decision making.[74] The National Center for State Courts is actively promoting the training of judges to combat implicit biases in decision making.[75] As society has

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parties).

72. *See id.* § 154.023(a) (explaining that the role of a mediator is to facilitate communication and promote some understanding or settlement between the parties); Luciano Adrian Rodriguez, *Mediation Myths and Lies*, 70 TEX. B.J. 598, 598 (2007) ("The mediator's role is to communicate these offers precisely, analyze the differences between the parties, and discuss in detail any counteroffers with each of the parties.").

73. *See Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE, 4 (Aug. 2010), http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf (finding shocking evidence that African Americans in the South are still routinely excluded from jury service).

74. *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1336 (2010) (examining Harvard Law School's Project on Law and Mind Sciences and how it explains the perceptions and beliefs that constitute the American legal system); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345, 347 (2007) (arguing that judicial decision makers often "unintentionally and automatically 'misremember' facts in racially biased ways").

75. *See* Jerry Kang, *Implicit Bias: A Primer for Courts*, NCSC, August 2009, at 1, 6, *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf ("It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done—and be seen to be done."); *see also About Us*, NSCS.ORG, http://www.ncsc.org/about-us.aspx (last visited May 10, 2011) (remarking that the National Center for State Courts promotes "judicial administration that supports fair and impartial decision making"); Mark A. Drummond, *ABA Section of Litigation Tackles Implicit Bias*, AM. BAR. ASS'N (Feb. 1, 2011),

progressed, we have worked to provide better access to the courts for all our citizens.[76] If courts continue to promote mediation of court cases, should we not also take measures to promote diversity among mediators that serve in these cases?

VI. INEQUALITY AT THE BARGAINING TABLE

As the disenfranchised have more access to the courts,[77] the courts' function of protecting and enforcing those rights is more critical and yet less present.[78] Standing orders fail to take into account whether a case involves the ADA or Title VII—areas of law where Congress has enacted legislation aimed at influencing public behavior and rights.[79] Judges easily side-step those goals by making public judgments that private settlements are "better" for those cases as well. Those laws and others were designed to deal with inherent inequities.[80] A fundamental tenet of mediation is that everyone at the table has a voice and can be equally heard. Yet, we know that the unequal bargaining power among litigants follows them into the mediation.[81] Do legislative protections also follow them? Do balancing schemes like pre- and post-judgment interest receive full credit in mediation? Court-mandated mediation becomes an explicit rejection of

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http://apps.americanbar.org/litigation/litigationnews/top_stories/020111-implicit-bias-research.html (discussing the ABA Section of Litigation's efforts to eliminate bias through awareness).

76. *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13 (noting that "an increasing portion of the population has gained access to the courts" while the court system is unable to handle the increased case load).

77. *See id.* (recognizing that the current court system is accessible by minorities, prisoners, women, and "other once legally quiescent groups").

78. *See id.* (observing that as more people use the court system, fewer actually make it to trial); *see also* Tracy Walters McCormack, *Privatizing the Justice System*, 25 REV. LITIG. 735, 737 (2006) (identifying the large increase in cases filed in the 1970s and 1980s that led to a growth in ADR and more of a "vanishing jury trial").

79. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1074–75 n.9 (1984) (discussing the concept that a victorious defendant may not recover court costs and attorney's fees from an unsuccessful Title VII plaintiff).

80. *See generally* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12300 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

81. DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 10 (2008); *see also* Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 153 (stating that even in mediation one party may have more control over the other); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (concluding that unequal resources between the parties can influence the outcome of settlement).

these public policy considerations.[82] It is no more legitimate for a judge to ignore a statute, or the public policy reflected in that statute, when diverting disputes into the private justice system than it would be if the judge disregarded those laws in trying the case itself.

Even in relatively simple cases, how equal are the parties at the bargaining table? The advantage of repeat players remains unchecked by either the ADR community or the judicial system.[83] As the cycle of "self-determined" settlement values is dominated by repeat players among insurers or other institutional defendants, mediators and lawyers become complicit players in the charade.[84] Imagine a standard auto collision case at mediation. At a certain point, an offer is made by the defendant's insurance adjuster. The plaintiff's counsel can only compare it to other settlements achieved by his colleagues against the same or similar company adjusters. The mediator can only compare it to other mediations with the same or similar adjusters. The lawyer will counsel that it is a reasonable settlement based on his or her very limited database of settlement "norms." The mediator will play "reality check" with the parties by comparing a current offer to a relatively small database of allegedly comparable settlements of which the mediator is aware. Consequently, a client will often be convinced that the offer on the table is a reasonable outcome, and will often be encouraged in this conclusion by the repeat players' emphasis on the uncertainties of what a judge or jury might do, even though the lawyers and mediator may never have tried a jury trial.[85] But, these scare tactics often prevail and the system will declare that, once again, "self-determination" has prevailed, that the parties had an equal ability to control and craft their solution, and the courts, ignorant of the private process, will have no idea—and perhaps little interest—in whether justice

82. *Cf.* Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 815 (2009) (encouraging trial judges not to "lose sight of the fact that managing and settling cases should never become the primary focus of the bench").

83. *See* Tracy Walters McCormack, *Privatizing the Justice System*, 25 REV. LITIG. 735, 742 (2006) (identifying the repeat players and recognizing that the judicial system has no oversight in this process).

84. *Id.*

85. *See* Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 178 (2010) (exploring the problematic issues involved when mediating with an attorney or mediator who lacks trial experience).

was in fact served.[86]

VII. REBALANCING THE SCALES

If we originally adopted mandatory mediation to clear court dockets and continue the practice based mostly on the perceived success of "party self-determination," we owe it to our justice system to pull back the curtain and examine whether those original goals are now outweighed by adverse effects. Even if we add the number of bench trials and jury trials together, the scale will not even come close to equaling the cases that are resolved through ADR.[87]

If judges reflect on the system that they helped create and certainly maintain, what are they saying about themselves and the public justice system when they outsource their responsibilities? Do they truly believe that they do not offer anything special to the delivery of justice? Since we live increasingly in a world without a lot of devotion to fact, and opinions rule the day,[88] we should all be especially careful about protecting the role truth and facts play in the justice system. If "[w]e have lost confidence in the capacity of judges and jurors, among many other institutions, to determine the truth,"[89] where does that leave us now?

Judges empower parties to negotiate their own "truth," "law," and "justice" every time they automatically refer a case to mediation. They empower "alternative" dispute resolution and elevate its status as a superior method every time they reinforce the notion that there is no objectivity to law, no standard of justice, no reality to facts, and that leaving outcomes to

86. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086 (1984) (providing that judges suggest settlement to move cases along, knowing that there is no guarantee justice will be served).

87. *See* DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 10 (2008) (stating that over 90% of cases are settled before trial); *see also* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 8–12 (referencing the numbers of jury and bench trials, and concluding the existence of a rapid decline in cases going to trial).

88. *See* Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 131, 139 (referring to the fact that the excess of available information forces people to choose who to listen to and what to believe). *See generally* FARHAD MANJOO, TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY 229 (2008) (discussing the "new medium" in which people decide their own reality and place trust in that created reality).

89. Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 131.

the courts is a mistake.[90] The beauty of the jury system is that citizens of differing backgrounds will come together and decide facts and truth.[91] People of varying political, religious, and socio-economic backgrounds will attempt to set aside their opinions and unite in the articulation of community values.[92] Similarly, judges will attempt to decide facts and apply uniform law fairly, evenly, and publicly.[93] Courtrooms and trials apply strict rules of evidence and procedure.[94] A party's opinion about an event is less important than the factual evidence presented. A jury trial challenges us to set aside our opinions (and biases) and decide cases on facts and in conformity with principles of law.[95] Should the justice system not be the counterbalance to a culture that tries desperately to polarize us at every turn by disdaining facts and stressing opinions alone? We should not contribute to perpetuate the fragmentation of society into separate truths.[96]

Perhaps some judges believe that "civil justice is essentially a private matter" between litigants.[97] Perhaps they have bought into the notion that "in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own

90. *See* Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 814 (2009) (noting that, during the author's law school education, a trial was considered a "failure of the system").

91. *See* Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 175 ("Jury service provides an exceptional opportunity for participatory citizenship.").

92. *See* Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 227 (2008) (describing the success of diverse juries).

93. *See* Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 142 (concluding that judges and juries will determine the truth in order to reach a fair decision); *see also* MODEL CODE OF JUD. CONDUCT Canon 1 (2010) (referring to the duties of judges); *id.* R. 2.2 (requiring judges to act with fairness and impartiality).

94. *See generally* FED. R. CIV. P. (containing the rules of civil procedure); FED. R. CRIM. P. (referring to the rules of criminal procedure); FED. R. EVID. (providing the rules of evidence).

95. *See* Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 226–27 (2008) (referring to juries and their ability to reach verdicts based on the strength of the evidence and concluding that juries do set aside bias and make decisions based on the evidence presented at trial).

96. *See* Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131, 136 (discussing the fragmentation of American cultural reference and beliefs).

97. John Lande, *Introduction to Vanishing Trial Symposium*, 2006 J. DISP. RESOL. 1, 2.

way without judicial interference."[98] That was the basis of Roscoe Pound's comments at the ABA meeting in 1906.[99] Have we come full circle in our civil justice system where judges are satisfied merely to be procedural arbiters?

Every mandatory mediation referral allows institutional repeat players "to have it both ways."[100] Institutional parties enjoy the legitimacy of the law while exerting their economic and political power in a system that has no checks.[101] Are judges not both curious and offended at the exodus of cases from their scrutiny? The powerful are not just escaping juries; when the conference room doors close, judges are excluded as well.[102] If courts were the only problem, parties would not spend five-hundred dollars an hour for former judges to act as mediators and arbitrators, when sitting judges receive public salaries. Both judges and the ADR community should wonder why there are no complaints about a system that excludes judicial scrutiny and allows "[c]ontests of interpretation [to] replace contests of proof."[103] The rule of law requires judges and lawyers to exercise their training and creativity to the pursuit of a system that "aspires to an autonomy from distributional inequalities."[104] Not only have we allowed parties to escape the "deep accountability"[105] of a public process, but most judges would not even know whether "distributional inequalities" occur because there is no reporting system.[106] Likewise, mediators have no established safeguards to either detect or prevent such

98. Roscoe Pound, Address at the Annual Meeting of the American Bar Association (Aug. 29, 1906), *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337, 344 (A. Leo Levin & Russell R. Wheeler eds., 1979).

99. *Id.*

100. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 31.

101. *Id.*

102. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082 (1984) (indicating that while the judge continues to be involved in the judicial process, he is not involved in the settlement process).

103. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 29.

104. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078 (1984).

105. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22.

106. According to our findings, over 50% of judges do not have a reporting system in place, and over 60% do not have a mechanism for tracking cases once they are referred to ADR. Tracy Walters McCormack et al., TEXAS ADR SURVEY–JUDGES (2010) (unpublished survey) (on file with the St. Mary's Law Journal); Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal); Tracy Walters McCormack et al., TEXAS ADR SURVEY–MEDIATORS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

inequalities. If insurers were to methodically drive down the compensation for a certain category of injury, mediators would have no way of knowing about or dealing with such behavior.

Maybe judges and mediators are willing to concede that there is no place for definitive adjudication in a post-factual world, but lawyers and the public should be alarmed by this development.[107] Judges at all levels should be concerned that most matters totally escape their scrutiny and that those that do not, rarely involve litigated facts.[108] We should be even more concerned by a system that can neither detect nor correct abuses when they occur.

There are serious social consequences when we remove the public from the democratic process. As Thomas Jefferson said, "I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution."[109]

> Trial by jury is a privilege of the highest and most beneficial nature and our most important guardian both of public and private liberty. Our liberties cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks, but also from all secret machinations which may sap and undermine it.[110]

Yet, somehow, both the judiciary and ADR community largely undermine this wisdom. Robert Ackerman in his article, *Vanishing Trial, Vanishing Community?*, cautions that we should be concerned about developments that "remove law and legal institutions from broad participation by the citizenry and concentrate them in the hands of an educated elite."[111] He further remarks:

> "[R]esort to litigation involves an affirmation of community," a willingness to subject oneself to the community's standards and procedures and "cede a

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107. *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 31 (referring to the "shrinking of the role of definitive adjudication").

108. *See* Tracy Walters McCormack, *Privatizing the Justice System*, 25 REV. LITIG. 735, 737 (2006) (concluding that trials are vanishing and that judges recognize this phenomenon).

109. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* THE PAPERS OF THOMAS JEFFERSON 269 (Julian P. Boyd ed., 1958).

110. GODFREY D. LEHMAN, WE THE JURY: THE IMPACT OF JURORS ON OUR BASIC FREEDOMS 14 (1997) (quoting 4 WILLIAM BLACKSTONE COMMENTARIES *343) (internal quotation marks omitted).

111. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 165.

> degree of autonomy in the interest of community cohesion." Because the trial is the most visible and public of dispute resolution processes, a reduction in its use may be cause for concern among communitarians. If . . . participation in community activities is an important barometer of national health, then the opportunity to participate (as a litigant, a juror, or an observer) in a public, legally binding dispute resolution process is an important measure of the health of our democracy.[112]

If the jury trial and judicial support of it are any indication of the health of our democracy, then democracy is in critical condition.

VIII. TURNING AWAY FROM THE COURTHOUSE

If actions speak louder than words, then we are screaming a lack of faith in our system. We are creating and perpetuating a system that allows the "haves" to be judged only by the "haves" and where the "have-nots" never see a courtroom of their peers because they are diverted into conference rooms.[113] Neither should be acceptable and both should cause all of us to probe why.

In *A World Without Trials?*, Marc Galanter offers an analysis of both a broader turning away from law and the aversion of trials:

> It is part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication. This aversion to adjudication is part of a mutually supportive complex of beliefs and practices—beliefs that we are suffering a litigation explosion, that juries are biased against corporate defendants, that courts should not be growing edge of rights, that litigation is hurting the economy, and that the solution is to curtail remedies, privatize, and de-regulate. . . .
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> . . . The animus against trials is not just objection to generous or individuated or expensive remedies; it also involves an aversion to the determination of corporate accountability in public forums. The trial is a site of "deep accountability" where facts are exposed and responsibility assessed, a place where the ordinary politics of personal interaction are suspended and the fictions that shield us from embarrassment and moral

112. *Id.* at 167 (footnote omitted) (quoting Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 55–56 (2002)).

113. *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 19–20 (tracing the trend of mid-twentieth century litigation that granted protection to the "have-nots" through the overly litigious period in the 1970s, which resulted in skepticism against litigating). The increase of businesses in litigation added to the movement toward ADR. *See id.* at 22 (attributing the corporate rejection of a jury trial to the belief that juries have a propensity to side with the layman rather than a corporation).

judgment are stripped away.[114]

It makes sense that litigants might seek to escape a venue of "deep accountability," but why do we acquiesce in their attempt? Why have we become so focused on avoiding the public court system by engaging in private justice? There are two possible answers: One answer may have to do with our current culture. The other answer may reflect the level of our faith in juries.

One of the oft-cited virtues of mediation—and corresponding ills of the judicial system—is that ADR does not declare winners and losers.[115] It is touted as a "win-win" process, which, in turn, preserves relationships going forward.[116] There is a consequence to using mediation to create a new "participation trophy" like those awarded at the end of every Little League season, instead of recognizing the importance of declaring winners and losers when appropriate. There is a consequence to preserving relationships while sacrificing the rule of law and allowing even a wrongdoer to feel that he or she has won.

In the beginning, litigators and the ADR community pitted themselves against each other by stressing a dichotomy between the "'legal combat'" approach versus "'the gentler art of reconciliation and accommodation.'"[117] Since then, litigators and the ADR community have followed the cultural trend toward political correctness and polarization so that we no longer know how to positively engage in conflict and still preserve relationships. As a learned profession, we decry the loss of civility among our members, but how often do we teach the art of losing graciously? How often do we model the behavior of engaging in conflict, even combat, without it becoming personal? Instead, we devise whole systems to avoid declaring a winner because we don't want a loser. We prefer a putative win-win model, even if it may not be true, and even if it

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114. *Id.*

115. *See generally* James F. Henry, *The Courts at a Crossroads: A Consumer Perspective of the Judicial System*, 95 GEO. L.J. 945, 959 (2007) (describing ADR as a superior choice in resolving issues without requiring one party to lose (citing ROGER FISHER & WILLIAM URY, GETTING TO YES (2d ed. 1991))).

116. *See* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 188 (2000) (recounting the perception of ADR as a win-win solution and the lawsuit as a win-lose situation).

117. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073 (1984) (quoting Derek Bok, *A Flawed System*, HARV. MAG., May–June 1983, at 38).

replaces actual substantive justice.[118] Instead of modeling at the courthouse that justice is blind and that she declares winners and losers equally without regard to status, consequently, we undermine faith in that system and refer cases out to avoid the hard work of teaching positive conflict engagement. Because we try so hard to avoid having losers, we no longer know how to lose without losing being viewed as some calamity that must be avoided at any cost.[119]

One of the values of actively trying cases to a verdict is that when you are in the system long enough, you learn how to win and lose with grace. You learn on that long trip back to your office after losing a trial that you are the same person when you both win and lose. There is nothing necessarily polarizing about that experience. Lawyers can learn how to shake hands when you win and lose without resorting to divisive behavior. Lawyers can model that behavior for clients, jurors, and young lawyers.

The legal and ADR communities should review the simple lessons that we learned in Little League athletics. Spend any time watching a sporting event and you will notice that players still shake hands after engaging in open competition on the field with a score board that openly displays a winner and a loser. Referees make calls openly and publicly. They do not gather the coaches and try to have them agree on a call in order to avoid having to use their best judgment to call it as they saw it, even though they know all of America can watch the play over and over again with each questionable factor magnified a thousand times. Right or wrong, the referees do their job play after play, week after week. The coaches and teams have objective winning or losing records. It seems doubtful that anyone playing or watching sports would continue if the rules were to change and we said: Let's not keep score, let's not call fouls, let's bring everyone together and talk about who worked harder and agree upon a win-win situation for this game because we don't want anyone to feel badly about the score. Who would have ever thought that sports would come closer to the rule of law than a private justice system of little or no

118. *See id.* at 1076 (addressing the disproportionate resources between the conflicting parties and the resulting injustice in settlements).

119. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES (2d ed. 1991) (discussing the concept that parties succeed through win-win conflict resolution in contrast to the win-lose results in trials).

accountability composed of completely private outcomes?

The trend away from accountability also belies a lack of faith in our fellow citizens. We have been all too willing to believe the cries of "runaway juries" and oversized rewards for frivolous lawsuits.[120] Even, some would say, our appellate courts have a pro-defendant bias because of an erroneous belief that juries are easily misled and that their judgment about what they heard and saw in the courtroom cannot possibly be correct.[121] But, if jurors are allegedly not capable of reaching thoughtful decisions, then how does jettisoning them from the system correct that problem?

Why have we been willing to believe the frequent and very organized complaints about a continuing deluge of frivolous suits instead of trusting the views of our own judiciary, which has first-hand experience with juries?[122] Should we not be suspicious by the notable absence of complaints and suspicions from the same quarters about alleged juror incompetence when we ask jurors to decide death penalty cases? And yet, the jury pool for deciding the most serious criminal matters is the same as for deciding the most serious civil disputes?[123] Why trust that, in one instance, jurors can do no wrong and, in the other, the same jurors can do no right?

> The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. . . . Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equaled in other areas of public service.[124]

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120. *Cf.* Larry Lyon et al., *Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 420 (2007) (questioning the basis of the concept of the "runaway jury").

121. *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22 n.56 (referring to studies that attribute a documented advantage of defendants in appellate decisions to the misperception that juries favor plaintiffs).

122. Research has long shown that judges and juries rarely differ significantly in their decisions. *See* RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY 236 (2003) (addressing numerous studies that reveal little divergence between civil decisions by judges and those by juries).

123. *Compare, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.11 (West 1991) (indicating that the selection of jurors is random), *with* TEX. R. CIV. P. 224 (providing the procedure for the random selection of jurors).

124. *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 429–30 (9th Cir. 1979).

> Civil juries also serve as a guard against special interests structuring civil law to the detriment of those participating less directly in shaping legal standards. Such a tempering effect encourages both compromise among interest groups and the development of societal mechanisms that mirror the wisdom of the civil jury.[125]

We have the opportunity to reaffirm the fundamental notion that to "'resort to litigation [is] an affirmation of community.'"[126] In a democracy we have a shared accountability and shared responsibility for the justice system. We should all be equally invested in the community of our peers and should work to ensure their competence to fairly evaluate our claims. Citizens pay taxes and recite the Pledge of Allegiance with an expectation that the protections of the jury system will be there if and when they need them.[127] Under what presumed authority do we deprive the public of those protections? Surely no judge gained election on a platform of no jury trials and mandatory mediation. Just as the U.S. Supreme Court's decision in *Batson v. Kentucky*[128] protects the due process right of the juror to participate (by not allowing litigants to exclude jurors based upon race alone), how do we deprive whole segments of the community the right to participate?[129]

Mandatory mediation places the needs of the judiciary and the preference of some litigants above the rights of the community and the needs of democracy as a whole.[130] Every automatic dispute referral incrementally erodes public confidence in the system and weakens the public's ability to participate and appreciate the unique role and obligation

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125. Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 731 (1991) (footnote omitted).

126. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 167 (quoting Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 55–56 (2002)).

127. *See id.* at 172 ("People pay their taxes, recite the *Pledge*, send their children to school, and serve in the nation's armed forces, all in exchange for a minimal expectation of due process and fundamental rights.").

128. Batson v. Kentucky, 476 U.S. 79 (1986).

129. *See id.* at 87 (explaining that excluding a juror from participating in a trial due to his race violates his constitutional rights).

130. *See, e.g.*, Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 29–30 (asserting that mandatory mediation clauses deny the equal protection of courts to litigants in exchange for a forum that may benefit a "repeat player").

of being a citizen.

We should be strengthening the social fabric by showing that a diverse body of people can agree on facts and apply the law in a context of a community. Most Americans are more likely to experience the American legal system as a juror than as any other type of participant.[131] "Twenty-nine percent of the adult American population has served as a juror. The remaining 71% of Americans live with, live next to, work with, or otherwise hear about the experiences, good and bad, of those 29% who have lived it first hand."[132] When jury service has the potential to promote a healthier democracy and encourage increased participation by all segments of society, should courts be engaged in any practice that undermines this goal? Once courts and the ADR community carefully retrace their collective steps and rebalance the scales to account for the true social cost of mandatory mediation, its costs should outweigh any benefit.

IX. BE CAREFUL WHAT YOU ASK FOR

Having challenged the judiciary in the earlier parts of the Article to reassess its role, it is only right to scrutinize the role of the ADR community—and lawyers. The ADR community in Texas recently celebrated the "early risk-takers who shepherded" the enactment of the Texas ADR Act in "what has been termed the most significant change in the practice of law in Texas in the last quarter century."[133] The notion is that ADR is now so integrated in our civil justice system that the qualifier "alternative" should be replaced with "appropriate."[134] However, does that not prompt the question: Who is actually making a determination that the procedure is indeed appropriate for that particular case and whether the outcome was worthy of the process selected?

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131. *See Backgrounder*, NAT'L CENTER FOR STATE CTS. (Apr. 29, 2010), http://www.ncsc.org/newsroom/backgrounder/2010/juror-appreciation.aspx ("Most Americans' knowledge of and experience with the justice system comes in the form of jury service.").

132. NAT'L CENTER FOR STATE CTS., http://www.ncsconline.org/D_Research/cjs/ (last visited May 10, 2011) (quoting Tom Munsterman, Director Emeritus, Center for Jury Studies).

133. Cecilia H. Morgan, *Chair's Corner*, ALTERNATIVE RESOLS. (State Bar of Tex., Alt. Dispute Resol. Section), Special Ed. 2007, at 1, 1, *available at* http://texasadr.org/2007_special_edition2.pdf.

134. Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLS. (State Bar of Tex., Alt. Dispute Resol. Section), Special Ed. 2007, at 2, 2, *available at* http://texasadr.org/2007_special_edition2.pdf.

Mediators may extol the benefits of ADR in resolving court cases, yet, like judges, they have very little objective data about what goes on in other mediations and little factual basis for assessing the system overall.[135] The most information that courts require is a status update about whether the case has settled in mediation so that it may be taken off the docket, set for trial, or put on the dismissal docket.[136] Beyond that, there is no statewide reporting requirement for courts or mediators about such basic information as: the number of cases that are referred to mediation each year, the number that settle in mediation, whether parties are told about all ADR processes available, how mediators are chosen, whether lawyers or parties participate in negotiations, how much time parties have in joint session, and whether the mediated settlement includes relief beyond what a court could have granted.[137] Without violating confidentiality, basic information gathering would help evaluate the handling of mediation by parties, lawyers, and mediators.

The ADR community has experienced explosive growth over the last twenty years.[138] As Winston Churchill said, "The price of greatness is responsibility."[139] When mediation is the expected path to case resolution and the required path before setting a case for trial, then it's time for the ADR community to step up and join in the evaluation of how ADR should integrate with the civil justice system. For example, one relevant inquiry would ask whether there are systemic weaknesses in that

135. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 154.072 (West 2011) (failing to provide a specific requirement enabling statistical analysis of the ADR system).

136. *See, e.g.*, W.D. TEX. LOC. R. 88(k) (requiring a report to be submitted at the completion of the ADR proceeding to include "outcome, including the style and number of the case, the type of case, the method of ADR, whether the case has settled, and the provider's fees").

137. The only statewide reporting on mediations in Texas is the voluntary reporting by the community dispute resolution centers (DRCs) to the Office of Court Administration. DRCs, in general, handle less than 10% of the civil case mediations in a county. *See generally* AUSTIN DISP. RESOL. CTR., http://www.austindrc.org (last visited May 10, 2011). For a list of Texas community dispute resolution centers, see CTR. FOR PUB. POL'Y DISP. RESOL., http://www.utexas.edu/law/centers/cppdr/resources/adr_drcs.php.

138. *See* Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLS. (State Bar of Tex., Alt. Dispute Resol. Section), Special Ed. 2007, at 2, 2, *available at* http://texasadr.org/2007_special_edition2.pdf ("[I]t is easy to forget that only twenty years ago conflicts were resolved by trial more frequently than through mediation and other ADR procedures.").

139. Winston Churchill, *The Gift of a Common Tongue*, Address at Harvard University (Sept. 6, 1943), *reprinted in* NEVER GIVE IN! THE BEST OF WINSTON CHURCHILL'S SPEECHES 357 (2003).

relationship that undermine the goal of "equal justice under law" and, more provocatively, whether ADR, in some instances, can be detrimental to society's interests.

On our way there, another initial question arises: Who will speak on behalf of the ADR community? ADR is multi-faceted and is not organized based on academic degrees or professional licenses.[140] Yet, over the years, many voluntary ADR organizations have been established both on the national and state levels.[141] However the ADR community decides to organize itself, it needs to be able to engage in dialogue and contribute its perspective to a frank discussion of the issues raised here. If the multi-door courthouse is to materialize, each door has to have a system capable of being responsive to the others, and all must be accountable to the public. The ADR community needs a unified body capable of making and enforcing rules, holding itself and its members accountable, and reclaiming the true value of its processes.

The framework within which mediators practice, at least in Texas, includes governing statutes such as the Texas ADR Act and Ethical Guidelines for Mediators, which were adopted by various organizations and the Texas Supreme Court.[142] In addition, some organizations have

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140. *See* MEDIATIONADR.NET, http://www.mediationadr.net/Conflict/InformationPublicMeds/BecomingMedtr.html (last visited May 10, 2011) (noting the lack of uniformity in certification for mediators); TEX. MEDIATOR CREDENTIALING ASS'N, http://www.txmca.org/credmed.htm (last visited May 10, 2011) (listing the diverse requirements for being listed as a mediator).

141. In Texas, for example, such ADR organizations include the Texas Association of Mediators, Texas Mediator Credentialing Association, the Association of Attorney Mediators, and the ADR Section of the State Bar. *See* TEX. ASS'N OF MEDIATORS, http://www.txmediator.org/membership/levels.php (last visited May 10, 2011) (requiring a minimum education level of "[a]n undergraduate or graduate degree from an accredited college, university or law school"); ASS'N OF ATT'Y-MEDIATORS, NEW APPLICANT INFORMATION, *available at* http://www.attorney-mediators.org/join.cfm (requiring the applicant to be a licensed attorney with at least two years of experience for this national level organization); STATE BAR OF TEX. ALT. DISPUTE RESOL. SECTION, http://www.texasadr.org/join_us.html (last visited May 10, 2011) (distinguishing the application for lawyers and non-lawyers).

142. *Ethical Guidelines for Mediators*, STATE BAR OF TEX. ALT. DISPUTE RESOL. SECTION, ETHICAL GUIDELINES FOR MEDIATORS, *available at* http://www.texasadr.org/SBOT%20ADR%20Ethical%20Guidelines%20for%20Mediators%20(2008%20Amendments).pdf; *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 856–58 (2005); *see also* DISPUTE RESOLUTION—TEXAS STYLE, STATE BAR OF TEX. ALT. DISPUTE RESOL. SECTION, http://www.texasadr.org/texas_style.html (commenting on the "comprehensive framework" provided by the Texas ADR Act).

established grievance procedures to handle complaints against individual mediators.[143] The Ethical Guidelines underscore the nature of the mediation process and the role of the mediator, including such definitional provisions as follows:

> 1. *Mediation Defined.* Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.
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> . . . .
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> 2. *Mediator Conduct.* A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.
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> . . . .
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> 6. *The Mediation Process.* A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.
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> . . . .
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> 10. *Disclosure and Exchange of Information.* A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.
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> . . . .
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> 13. *Termination of Mediation Session.* A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.[144]

Beyond these fundamental guidelines, we are suggesting that mediators need to take a more expansive look into such questions as: How should parties be informed about all the available ADR processes (not just mediation) to resolve their case? What steps should be followed to report attorney malpractice or misconduct in representing the clients in mediation? Who "reality checks" what mediators or lawyers say to clients?

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143. *See, e.g.*, TEX. MEDIATOR CREDENTIALING ASS'N, http://www.txmca.org/grievance.htm (last visited May 10, 2011) (summarizing the grievance complaint process).

144. *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 857–58 (2005).

We have already explored the pitfalls of the process with regard to repeat players and the balance of power. Additionally, previous research confirms that mediators rarely ascertain the jury trial experience of the lawyers even though efforts at "jury prediction" are an important part of the process.[145] The vast majority of mediators believe they have no responsibility for verifying legal contentions of parties, exposing attorney malfeasance to a client, or intervening to help an inadequately represented party.[146] Granted, this level of mediator scrutiny was never contemplated when mediators were supposed to be facilitators in a voluntary setting, but that is not the case with mandatory mediation.[147] As long as mediation continues to be the prescribed process for resolving court cases, mediators have to take on greater responsibility for monitoring and upholding the principles of the process.[148]

X. CONCEALING MISTAKES, NEGATING CONSENT

In our most recent survey, we asked about one potential trouble spot: To what extent do lawyers "whitewash" their errors (whether they rise to the level of actionable malpractice or not) in the mediation process? Any significant error or omission by the lawyer that affects the client's ability to achieve the objective of the representation or undermines the value of the client's position is material and must be disclosed to the client.[149]

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145. *See* Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 172 (2010) (discussing the disadvantages an inexperienced litigator faces in the mediation setting).

146. *Id.*

147. *See, e.g.*, Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 511–12 (1985) (suggesting that courts are "moving in [the] direction" of mandatory settlement conferences); *accord* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 952–53 (2000) (hypothesizing that "there will be increased use of assorted processes in addition to mediation" in the future).

148. *See* L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 342 (2006) ("It is the duty of the third-party-neutral, appointed as the mediator, to 'encourage and assist the parties in reaching a settlement of their dispute but [the mediator] may not compel or coerce the parties to enter into a settlement agreement.'" (alteration in original) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (West 2005))); *see also* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 981 (2000) (contemplating the duties of lawyers in ADR processes).

149. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2009) (denoting that the lawyer should "reasonably consult with the client about the means by which the client's objectives are to be accomplished"); *see also* Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own*

Material errors that are not disclosed to the client effectively destroy a client's true informed consent to that settlement.[150] Both lawyers and mediators were asked about material errors and their disclosure to assess the frequency of disclosure or perceived nondisclosure in mediation.

Lawyers Survey Results: About 62% of surveyed lawyers who answered a question about disclosure indicated that they disclose all factors, including errors, that could affect the value of their case in mediation all of the time.[151] This leaves approximately 38% of our surveyed lawyers who do not always discuss all factors, including errors, which could affect the value of the client's case in mediation.[152] Perhaps not surprisingly, nearly 97% of lawyers who answered a question about errors by opposing counsel believe that they have mediated cases in which the opposing lawyer has committed an error that affects the settlement value of the case; although the majority of responding lawyers indicate that this occurred in 10% or less of their mediated cases (while nearly a quarter of responding lawyers believed that this occurred in about 25% of their cases).[153] In response to a related question, 41% of lawyers responded that in none of their mediated cases do they believe the error was an open part of the mediation such that the opposing lawyer's client would be aware of that error.[154]

Mediator Survey Results: 96% of responding mediators believe that at least some attorneys withhold material facts from the other side during

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Malpractice, 61 BAYLOR L. REV. 174, 194–97 (2009) (distinguishing between material situations that warrant self-reporting from other circumstances that merely involve a minor error).

150. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 686 (1990) (articulating the materiality standard as "whether the information might cause a reasonable client to alter her conduct"); *accord* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 44 (1979) (tracing the history of the informed consent doctrine). Initially regarded in the doctor–patient context, "[c]onsent is not meaningful unless a person understands what he is consenting to; understanding requires information . . . ." *Id.* at 45. Therefore, one could conclude that material omissions destroy a client's informed consent because he no longer would have the appropriate information or understanding regarding the proposed settlement. *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 785 (1999) ("The foundational analysis of an informed consent principle in the lawyer–client relationship is rooted in the lawyer's professional obligation to inform clients of relevant information and in the client's autonomy interest in participatory decisionmaking.").

151. Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

152. *Id.*

153. *Id.*

154. *Id.*

negotiation.[155] Over one-half of those mediators hear attorneys complain that the other side is lying or failing to disclose material facts at least 50% of the time.[156] Around 81% of mediator respondents believe attorneys disclosed what the mediator felt to be material information and requested that the mediator not disclose it to the attorney's client at least some of the time (with a third of responding mediators indicating that this happens in at least half of their mediations).[157] Almost 95% believe that attorneys have made an error in the case that substantially affected the value of the case in at least 10% of the cases they have mediated.[158]

It is imperative to put these statements in proper perspective and in light of the attorney disciplinary rules that apply to the obligations of lawyers to disclose material information to their clients and follow their clients' instructions. The disciplinary rules in virtually every jurisdiction are similar in substance and goals. In Texas, for example, those requirements under the Texas Disciplinary Rules of Professional Conduct include the following:

1. *Rule 1.02 (Scope and Objectives of Representation)*: This Rule requires lawyers to "abide by a client's decisions: (1) concerning the objectives and *general methods of representation*; and (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law."[159] Beyond some narrow exceptions that exclude client decisions that implicate lawyers in crime or fraudulent activities[160] and other actions prohibited by other disciplinary rules, lawyers are sometimes very surprised to learn that an attorney must carry out a client's decisions concerning the objectives and general methods of representation.[161]

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9). (emphasis added); *see* Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 982 (2000) (emphasizing that the client and the lawyer reach a conclusion together on which ADR process to use).

160. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02 cmt. 7 ("[A] lawyer may not knowingly assist a client in criminal or fraudulent conduct.").

161. *Compare id.* R. 1.02 cmt. 1 ("The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation."), *with* MODEL RULES OF PROF'L CONDUCT R.

The general method of the representation aspect gives a client considerable latitude to make informed decisions about how he or she prefers the attorney to conduct the representation.[162] Lawyers who represent experienced and sophisticated clients already understand how much those clients can, legitimately (if not always wisely), micromanage the attorney's representation.[163] Lawyers representing less experienced, unsophisticated clients,[164] in more retail legal practices, quickly realize that the client is directing very little, except perhaps the initial setting of a particular goal[165]—and even goal-setting can be entirely within the province of the lawyer in some instances.[166] Even in situations where the client is clear about what the client wants, the lawyer may reset the client's goals and expectations early in the attorney–client relationship and may rarely advise a client that he or she has choices about how the lawyer conducts the representation.[167] Some retail litigation in family law,

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1.4(a)(2) (2009) (mandating attorney consultation "by which the client's objectives" are to be achieved).

162. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02 cmt. 1 (explaining that "a lawyer has very broad discretion" in regard to which legal tactics to use, "subject to the client's wishes"); *see also* Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer*, 35 ST. MARY'S L.J. 963, 973 (2004) ("[T]he goals [of ADR processes] are to empower clients to make their own informed decisions about how to proceed and how to develop their own creative solutions to disputes.").

163. *See* David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 547, 548 (1998) (indicating a trend that "disappointed clients . . . second-guess their lawyer's performance"); Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 726–27 (2000) (defining the sophisticated client as "social entities in and of themselves: mega-firms with millions of dollars of revenue, their own legal services departments, or corporate counsel"). It is suggested that these sophisticated clients "demand[] recognition by . . . ethics rules." *Id.* at 727.

164. *See, e.g.*, Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 701 n.12 (2000) ("'Moreover, *the unsophisticated client*, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him.'" (quoting Kelly v. Greason, 23 N.Y.2d 368, 378 (N.Y. 1968))).

165. At the outset of litigation, 41% of the time the primary goal of the client is to obtain the cheapest solution; 39% of the time the primary goal of the client is the fastest solution. Tracy Walters McCormack et al., TEXAS ADR SURVEY–MEDIATORS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

166. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) ("The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action.").

167. *But see* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 792 (2003) ("[T]he duty of 'absolute and perfect candor' should be interpreted as limited to situations where the interests of attorney and client are adverse, as in the case of a business

personal injury law, and consumer disputes has a strong "cookie-cutter" orientation[168] that lawyers like for its "one-size-fits-all" or "easy-to-replicate" pattern. This is not necessarily bad for clients; however, clients may rarely understand the formulaic approach in which their case is handled.[169] Client options are foreclosed where a lawyer handles many matters the same way regardless of whether a particular client might benefit from taking a different course to resolution.[170]

The general method of representation requirement also means that clients must be told enough about the choices that determine how their objectives will be achieved.[171] Not surprisingly, clients often receive little

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transaction, or to the few areas in which particular rules of conduct call for a high degree of disclosure, such as the rules relating to conflict of interest, client property, contract initiation, and settlement offers."). The goals of ADR are vastly different from trial work in that self-determination is a controlling principle. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 777 (1999) (maintaining that an underlying value of mediation involves empowerment and autonomy, thereby "giving parties control").

168. *E.g.*, Michael Manely, *Family Law: Is It All for Show?*, ALL FAMILY L. BLOG (Jan. 18, 2011), http://allfamilylaw.blogspot.com/2011/01/family-law-is-it-all-for-show.html (indicating that most family law cases are "handled in a cookie cutter fashion").

169. *See, e.g.*, Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer*, 35 ST. MARY'S L.J. 963, 975 (2004) ("In order for a client to make an informed choice to opt out of the adversary system, a necessary corollary is that the client must understand the extent to which the lawyer will *not* act as a zealous advocate of the client's position under the rules of the alternative system."). Disclosure to clients would "assist parties in understanding relevant information" so that they may make an educated decision about their participation in ADR processes. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 812–13 (1999).

170. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 738 (2003) (pondering to what extent "lawyers must diligently apprise clients of matters bearing upon their affairs"). Without the information to make an informed decision, "a consumer of legal services would often be unable to chart an intelligent course, and to that extent would be deprived of the right to self-determination." *Id.* Therefore, it is appropriate to conclude that "[l]awyers will need to be aware of the nature, benefits, and risks of all the ADR options in order to advise their clients about them." Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 982 (2000).

171. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(1) (requiring lawyers to follow a client's decision about the objectives of the representation).

> It would seem then, that best practice would be to discuss with a client the options available early on, for only with adequate information can the client make informed choices about the course of representation. In counseling clients about ADR options, the lawyer should be careful to explain the differences among the ADR processes, so that an understanding of the benefits and drawbacks of each process is achieved and appropriate choices made.

Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 982 (2000).

or no information about various options concerning how their lawyer will proceed.[172] Are opportunities to engage or not engage in ADR fully explored with clients? If so, are all reasonably available ADR methods discussed? Does anyone in the system, including judges, lawyers, or mediators ever encourage any other ADR process other than mediation or arbitration? Do lawyers seriously consider whether a trial should be the primary general method employed to achieve the client's objective? In client discussions, is compromise via mediation the primary method of representation that receives any emphasis?[173]

2. *Rule 1.03(b) (Communication)*: This Rule states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[174] The official comment to this Rule further states:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party.[175]

There is no reason to assume that decisions regarding the use of ADR to achieve a client's objectives should be less than "informed decisions" under this Rule.[176] "Informed decisions" result from a client having enough

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172. *Cf.* Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer*, 35 ST. MARY'S L.J. 963, 976–77 (2004) (suggesting that lawyers "should be under an affirmative duty to inform clients of *all* dispute resolution options, including that the client may choose to opt out of the adversary system altogether").

173. For example, suppose a defendant wants her name cleared, to pay no money, or get the equivalent of a take nothing judgment. In the 2010 ADR Lawyer Survey, 35.2% said that none of their mediated cases obtained that result, 38.9% said it occurred in 10% of their cases, and only one responding lawyer reported that it happened in all of her cases. Tracy Walters McCormack et al., TEXAS ADR SURVEY–LAWYERS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

174. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(b).

175. *Id.* R. 1.03 cmt. 1.

176. *Cf.* Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 190–91 (1999) (noting that the *Restatement (Third) of the Law Governing Lawyers* suggests that clients should make informed decisions on whether or not to use ADR methods).

information, and enough analysis of that information from the lawyer, to understand the choices and the relative advantages—and disadvantages—of each choice.[177] This is not the same as having "perfect information" or "perfect analysis" (since neither exists in the real world), but instead, the concept of "informed consent" means adequate information and analysis under the circumstances to enable the client to reasonably sort through the choices and pick one to the best of their ability and temperament.[178] Certainly, perfect information and analysis are not required for a competent lawyer to adequately advise the client about which ADR method, if any, is most suitable for achieving the client's objectives—or whether a trial or other adjudicatory proceeding with a definite "winner" or "loser" is better aligned with what the client really wants. And, if the lawyer's errors have decreased the usefulness of any ADR method or adjudicatory proceeding, those errors need to be fully disclosed to the client and not simply swept under the rug in a confidential mediation where everyone—except the client—knows why the client's case is really being settled.[179]

3. *Rule 1.06(b)(2) (Conflict of Interest: General Rule)*: This "conflict of interest" provision states that "a *lawyer shall not represent a person if the representation of that person: . . .* (2) *reasonably appears to be or become adversely limited* by the lawyer[']s or law firm's responsibilities to another client or to a third person or *by the lawyer[']s or law firm's own interests.*"[180] A lawyer's or law firm's interest can show up in a variety of client representation scenarios, including where the lawyer or law firm prefers not to try cases because they lack sufficient experience, knowledge, or resources to do so.[181] A lawyer whose only interest is turning volume

177. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03 cmt. 2 ("The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.").

178. *Id.* R. 1.03 cmts. 1 & 2; *see also* James v. Comm'n for Lawyer Discipline, 310 S.W.3d 598, 612 (Tex. App.—Dallas 2010, no pet.) (holding that the lawyer did not keep the client adequately informed when he failed to tell her about a counterclaim, sanctions, and an opportunity to settle).

179. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 2.01 (requiring that when "advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice").

180. *Id.* R. 1.06(b)(2) (emphasis added).

181. *Cf.* Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional*

cases over as quickly as possible—like a restaurant wanting to serve customers quickly, but not always well—has a natural conflict of interest with his or her client if the client is not told upfront, "we settle cases here because trying cases is too expensive and we lack the experience to do much beyond mediate."[182] Or, "we love mediation because it is the lowest risk, biggest potential payoff combination for us, although it may not be best for you." Similarly, a lawyer who has done something—or failed to do something—that materially affects the client's ability to proceed to or prevail at trial has a conflict of interest that requires disclosure and waiver (if possible) or withdrawal. Going to mediation and urging settlement under these circumstances, and without telling the client why settlement at mediation is imperative, exacerbates the conflict.

4. *Rule 3.03 (Candor Toward the Tribunal)*: This Rule prohibits a lawyer from making a "false statement of material fact or law to a tribunal" and from failing "to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act."[183] "Tribunal" is a defined term in the Texas Disciplinary Rules of Professional Conduct and expressly includes mediators, arbitrator, special masters, and referees as "tribunals."[184] Therefore, professional misconduct includes misleading a mediator or arbitrator by affirmative false statements about facts or law or the failure to disclose material facts or law.[185] While our focus has been on material factual misstatements or a failure to disclose material information by lawyers to clients, it is clear under this Rule that a misleading statement by a lawyer to a mediator—or even silence in the face of a clear misunderstanding by a mediator, which has been encouraged by the lawyer—would violate this Rule.[186] In our context, a false or misleading response by the lawyer to the mediator's inquiry about whether the lawyer perceives any problems with the lawyer's case going forward would be unethical.

Codes, 59 TEX. L. REV. 689, 716 (1981) (recognizing the expense for both an inexperienced lawyer and his client when that lawyer attempts to adequately represent the client on an unfamiliar matter).

182. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 5 ("The lawyer's own interests should not be permitted to have [an] adverse effect on representation of a client.").

183. *Id.* R. 3.03 (a)(1)–(2).

184. *Id.* terminology.

185. *Id.* R. 3.03 cmts. 2 & 3.

186. *Id.* R. 3.03 cmt. 2.

5. *Rule 8.04(a) (Misconduct)*: This Rule contains several prohibitions regarding misconduct that are more general in nature or that are not specifically dealt with in one of the other disciplinary rules. For example, this Rule provides that a "*lawyer shall not: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.*"[187] Certainly, misleading a client—or anyone else—by false or misleading statements would qualify.[188] Fraud can occur by omission of material information where a client is relying on prior material statements of the lawyer that are no longer true and the lawyer knows of the client's reliance—or by affirmative material misrepresentations by the lawyer to the client where the lawyer expects and receives reliance by the client.[189]

Beyond the disciplinary rules, fiduciary duty law has strict requirements of honesty, loyalty, "most abundant good faith," and the absence of deception, however slight, owed by lawyers to their clients within the scope of representation.[190] While a disciplinary rule, in some instances, might have a relatively narrow application in the attorney–client relationship,[191] a lawyer's fiduciary duty is expansive and represents the highest duty under

187. *Id.* R. 8.04(a)(3) (emphasis added).

188. *See, e.g.*, Williams v. Comm'n for Lawyer Discipline, No. 13-08-00111-CV, 2009 WL 2058909, at *1–3 (Tex. App.—Corpus Christi July 16, 2009, no pet.) (mem. op.) (affirming lawyer's sanctions where he misrepresented to an investigator that he had sent a letter on behalf of a client); Onwuteaka v. Comm'n for Lawyer Discipline, No. 14-07-00544-CV, 2009 WL 620253, at *7 (Tex. App.—Houston [14th Dist.] March 12, 2009, pet. denied) (mem. op.) (holding that evidence establishing that the plaintiff's lawyer had received payments from the defendant, did not disclose this fact to the plaintiff, and paid clients smaller amounts was sufficient to establish that he had misled them and was thus liable under Rule 8.04(a)(3)).

189. Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 281–82 (2009); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT terminology (defining "fraud" as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information"); Eureste v. Comm'n for Lawyer Discipline, 76 S.W.3d 184, 198 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (stating that "fraud is not the only conduct prohibited by Rule 8.04(a)(3) [and a]ny conduct involving dishonesty, deceit, or misrepresentation is also prohibited by Rule 8.04(a)(3)").

190. Combs v. Gent, 181 S.W.3d 378, 384 (Tex. App.—Dallas 2005, no pet.); Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

191. Indeed, the Rules state that a violation thereof "does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached." TEX. DISCIPLINARY RULES PROF'L CONDUCT pmbl. ¶ 15. While this is true, a violation of a rule may be evidence that an attorney has breached a fiduciary duty. *See* Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001) (arguing that although the rules governing lawyers do not create a private cause of action, such violations can be considered by a trier of fact when determining a breach of fiduciary duty), *rev'd on other grounds*, 145 S.W.3d 150 (Tex. 2003).

the law.[192] In the context of our discussion, it is clear that a lawyer who intentionally fails to disclose material errors that limit the client's ability to achieve the client's objectives or limit the client's trial or settlement options has breached his or her fiduciary duty to that client.[193] A lawyer might be negligent as well in failing to advise a client about available resolution options and considerations, including whether ADR is consistent with the client's objectives and the availability and merits of various ADR options beyond mediation alone (e.g., summary jury trials).[194]

XI. NEED FOR DISCLOSURE

Neither mediators nor lawyers can bury their head in the sand about a practice that appears to be occurring with some regularity. Mediation becomes the venue for the "perfect crime" when the lawyer never tells the client about lawyer errors that make a mediated settlement the only recourse for the client, the mediator remains silent about lawyer errors, and the case gets settled without the client ever realizing why a trial or further court proceedings would have been fatal to his or her claims. All lawyerly errors and omissions are then shielded by the cloak of confidentiality. The lawyers, if they report back to the court at all, need only say that the parties came to a voluntary agreement and are dismissing their claims.

It is only too foreseeable that lawyers could get tunnel vision and only focus on hiding or minimizing their own errors as opposed to doing what is best for the client.[195] The disciplinary system and the misconduct

192. Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964).

193. *See* Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (stating that an attorney's fiduciary duty requires him to disclose all material facts concerning his client's representation, and that, due to this fiduciary duty, the client will most likely rely on the attorney's disclosures as being complete).

194. *See* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 458–59 (2000) (concluding that because lawyers are required to discuss substantive options with clients, lawyers should be bound to discuss ADR options with clients at least to the extent that such discussion will help the client make an informed decision). However, express language requiring attorneys to discuss ADR options with clients is noticeably absent from the Texas Disciplinary Rules of Professional Conduct. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.2 & cmt. (failing to mention requirements for attorneys with regard to ADR), *with* VA. STATE BAR PROF'L GUIDELINES R. 1.2., cmt. 1 (stating that "a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing [her] objectives").

195. *See* Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 185 (2009) (arguing that lawyers may want to settle quickly in order to

reporting duties of lawyers[196] and courts exist, in part, because we have never expected offending lawyers to effectively police themselves.[197] The current public justice system, at a minimum, provides a few mechanisms that will openly reveal the lawyer's error in open court. Motions may be filed (e.g., to strike experts or jury demands that are untimely filed), courts will issue orders enforcing the consequences of the mistake, and a trial can expose the errors in a very public way.[198] While not foolproof, the public system provides some opportunities for clients to learn of their lawyers' errors. Likewise, judges and lawyers who observe persistent errors or certain types of serious misconduct are obligated to report to the appropriate disciplinary authorities.[199]

Regrettably, mediators, perhaps hiding behind their own "neutrality" in the mediation process, feel no obligation to alert clients. In response to the survey, only 13% of responding mediators have ever asked a judge to intervene in a mediation, and, out of that group, 24% of respondents asked the court to do so because of attorney misconduct.[200] To address these concerns, lawyers could be required to submit a confidential disclosure form to the mediator, stating that they have fully disclosed any errors or made none. They could also be required to disclose the errors that they believe have been committed by their opponent. The mediator could be required to verify with the clients the lawyer's claimed disclosures.

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minimize a malpractice action, or litigate without regard to the client's best interest of a quick and less expensive resolution).

196. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(a).

197. There is not a present duty for a lawyer to report his or her own misconduct to the appropriate disciplinary authorities; however, a lawyer has a fiduciary duty to report instances of negligence and/or breaches of a fiduciary duty to clients. *Compare id.* (stating that "a lawyer having knowledge that *another* lawyer has committed a violation . . . shall inform the appropriate disciplinary authority" (emphasis added)), *with* Jon Newberry, *Nobody's Perfect: For Lawyers Who Think They Must Always Be Invincible, Acknowledging an Error and Taking Corrective Action Go Hand in Hand*, 82 A.B.A. J., March 1996, at 70, 72 (arguing that a lawyer must report her own ethical misconduct because "[n]othing in the ABA Model Rules of Professional Conduct distinguishes between personal misconduct and misconduct by another lawyer").

198. *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 34–36 (1997) (documenting cases where a lawyer's untimeliness had serious adverse consequences, indicating that "in our system such attorney errors are attributed to clients," and hinting that such errors may correctly give rise to sanctions and legal malpractice claims).

199. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(b)(2), R. 8.03.

200. Tracy Walters McCormack et al., ADR SURVEY–MEDIATORS (2010) (unpublished survey) (on file with the St. Mary's Law Journal).

If discrepancies remain, the mediator might then need to refer the matter to a judge for determination or forward a report to the appropriate disciplinary authorities in situations where the lawyer has been dishonest with the client or mediator.

While imposing new obligations is more often met with resistance rather than applause, the ADR community should embrace this opportunity and invite a dialogue about how best to preserve the integrity of the bargaining process by ensuring that clients know and understand critical information that affects their bargaining position. While many mediators might resist any reporting responsibility on the theory that it discourages candor by lawyers to the mediator during mediation, that candor should extend to the client. In the absence of that, the mediator merely receives confidential information from lawyers that the mediator cannot candidly disclose to the only decision-maker who matters.

Certain questions about how ADR fits into the civil justice system are not new, but the urgency of addressing these questions in a comprehensive way now is essential to ensuring professional and judicial "quality control" of the process. In the summer 2010 ABA Section of Dispute Resolution Magazine, a series of articles addressed the relationship between the rule of law and ADR.[201] In his article entitled *Rights and Resolution in Mediation: Our Responsibility to Debate the Reach of Our Responsibility*, Wayne Brazil speaks of the tension between the courts' interests in honoring substantive rights and California's strong protection of mediation confidentiality.[202] Judge Brazil posits that when we refer cases to mediation so prevalently, we may be affirming the public's alienation with the courthouse and glorifying the expediency of resolution over the adjudication of rights.[203] Another article just as poignantly relates how mandatory mediation has dramatically changed the nature of the parties' choices in that process. It observes that "court-connected mediation has evolved from a process that focused on enhancing individual citizens' voice, control and assurance of accountability into a mechanism that resolves cases by reconciling these citizens to the institutional reality (or at

201. DISP. RESOL. MAG., Summer 2010.

202. Wayne D. Brazil, *Rights and Resolution in Mediation: Our Responsibility to Debate the Reach of Our Responsibility*, DISP. RESOL. MAG., Summer 2010, at 9, 9.

203. *Id.* at 12.

least mediators' and attorneys' perception of the reality) of the courts and litigation."[204]

To realign the mediation practice with our democratic court system, Professor Nancy Welsh offers at least two proposals: (1) that ADR advocates should support a healthy court system, believing that there can truly be a symbiotic relationship between the courts and ADR; and (2) that mandatory mediation should be phased out.[205] Concerning this second proposal, Welsh suggests that the court's authority to mandate mediation should expire within two to three years after a court-connected program is started.[206]

As provocative as her thoughts may sound to people who are very accustomed and comfortable with the current arrangement, we suggest that her ideas are hardly radical. ADR itself represented a radical departure from the norms of only a few decades ago.[207] The mere idea of a facilitated settlement conference with a neutral third party was considered by many litigators to be a pointless exercise. ADR has proven that it has both value and staying power.[208] Our concern is whether we have abdicated some of our core responsibilities, allowing ADR to carry a burden to the detriment of our institutions and communities alike.

XII. CONCLUSION

ADR has been and can be "termed the most significant change in the practice of law in Texas in the last quarter century."[209] Yet, another quote

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204. Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 138–39 (2004).

205. *Id.* at 141–42.

206. *Id.* at 142.

207. *See Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1854, 1859 (2000) ("Over the past few decades, ADR has emerged from a shadowy 'alternative' status into common legal parlance."). Further, some of the early critics lamented that ADR would subrogate "the primary function of the judiciary—the articulation of public values through the application of legal principles—to its ancillary role of resolving private disputes." *Id.* (citing Owen M. Fiss, *Against Settlements*, 93 YALE L.J. 1073, 1085–87 (1984)).

208. *See* Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLS. (SPECIAL ED.) (State Bar of Tex., Alt. Dispute Resol. Section), 2007, at 2, 2, *available at* http://www.texasadr.org/2007_special_edition2.pdf (documenting that ADR's success has been "esoteric" but that now "alternative dispute resolution . . . is so thoroughly integrated into our justice system that scholars often substitute 'appropriate' for 'alternative'").

209. Cecilia H. Morgan, *Chair's Corner*, ALTERNATIVE RESOLS. (SPECIAL ED.) (State Bar of Tex., Alt. Dispute Resol. Section), 2007, at 1, 1, *available at* http://www.texasadr.org/

from the same publication is also true:

> "Of all the things that have happened during my career as a trial lawyer (including tort reform), nothing has had so significant an impact on the trial practice as the passage of your ADR bill in 1987; at any time tomorrow afternoon, you could shoot a cannon in the courthouse and no one would be injured (except a few family lawyers)." —Sam Millsap, former Bexar County District Attorney.[210]

Regardless of how you view the addition of ADR to the litigation process, we end where we started: judges, mediators, and lawyers are inextricably intertwined. While this Article only scratches the surface of issues arising out of that relationship, it establishes the need for future dialogue, data, and reform. As a result of our probing, both the Bar (judges and lawyers) and the ADR community should:

1. Develop a task force to explore better methods of integrating their processes to allow for true informed consent and choice by litigants.

2. Create agendas at the judicial conferences to evaluate the impact of the "vanishing trial" and to support the continued availability of a jury trial without impediments, such as mandatory mediation, to litigants who choose it.

3. Increase awareness of additional ADR methods, such as summary jury trials, that allow for public input, judicial scrutiny, and that are compatible with mediation.

4. Re-examine the message that mandatory referral to mediation sends both to litigants and society at large.

5. Re-balance the scales of justice to reflect the true costs of mandatory mediation in hard dollars and lost opportunities to engage the public.

6. Devise monitoring and reporting systems to protect litigants in the ADR system.

7. Re-evaluate the litigation system to ensure that judges are operating at their highest and best use, instead of being relegated to the margins of procedural justice only.

8. Restore our commitment to justice, delivered fairly and efficiently.

2007_special_edition2.pdf.

210. Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLS. (SPECIAL ED.) (State Bar of Tex., Alt. Dispute Resol. Section), 2007, at 2, 2, *available at* http://www.texasadr.org/2007_special_edition2.pdf (footnote omitted).