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THE CIVIL JUSTICE REFORM ACT CONFERENCE: A REPORTER'S VIEW

*Carol M. Rice**

As a professor, former civil litigator and continuing student of civil procedure, I was thrilled to serve as one of several "reporters" at the Civil Justice Reform Act¹ Conference, in Tuscaloosa, Alabama, co-hosted by the American Bar Association and the University of Alabama School of Law. Although the centerpiece for the Conference, the congressionally mandated RAND Study of case management in federal court,² drew a mixed reaction,³ the Conference itself was a unique opportunity for debate on federal procedural reform. Perhaps the most notable feature of the Conference was the participants themselves. Gathered together in Tuscaloosa were more than 150 invited procedural experts and enthusiasts: federal and state court judges, leading practitioners, scholars, and officers of private legal organizations, such as the American Bar Association and the American Arbitration Association.

The Conference gave this diverse collection of lawyers a variety of forums in which to debate and consider federal proce-

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1. In the Civil Justice Reform Act, Congress mandated, among other things, that the district courts develop a "civil justice expense and delay reduction plan . . . to facilitate deliberate adjudication of civil cases on their merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes." 28 U.S.C. § 471 (1994) [hereinafter CJRA]. The CJRA directed ten district courts to be "pilot" programs on reform and ordered a comparison study of those pilot programs. CJRA § 471 note (1994) (reproducing Pub. L. No. 101-650, 104 Stat. at 5097-98 (1990)).

2. RAND was chosen as the independent organization to perform the comparison study of case management techniques in federal courts mandated by the CJRA. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) [hereinafter RAND REPORT].

3. See John Gibeaut, *Was RAND Right? Conference Attendees Differ on Whether Civil Justice Study was Too Harsh*, A.B.A. J., May 1997, at 98.

dural reform, ranging from the studied insight of specialists at the plenary sessions⁴ to informal chat at meals and coffee breaks. A significant part of this debate took place in the "break-out" sessions in which the Conference attendees broke up into nine groups, each with an assigned leader⁵ and reporter,⁶ for more intimate discussions of procedural issues. The break-out groups discussed the issues raised by the panelists at the Conference's plenary sessions, debated reform proposals and shared their varied experiences with case management.

Participants generally applauded the full and frank discussions of the break-out groups, so much so that they suggested that the work of the break-out groups be preserved. The nine reporters of these groups met at the end of the Conference to compare their groups' results and share their work with the Conference's wrap-up speakers—Professor Geoffrey Hazard,⁷

4. The plenary speakers presented the papers that are the subject of this edition of the *Alabama Law Review*, including James S. Kakalik et al., *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*; Paul D. Carrington, *Renovating Discovery*; Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*; Bryant Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*; Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*; and Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*.

5. The group leaders were Philip Anderson (the Little Rock law firm of Williams & Anderson), Dianne Dailey (the Portland, Oregon firm of Bullivant, Houser, Bailey, et al.), Hon. Richard Fruin (Los Angeles Superior Court), Hon. David Horowitz (Judge, Los Angeles Superior Court), Dudley Oldham (the Houston law firm of Fulbright & Jaworski), Hon. Lee Rosenthal (United States District Court for the Southern District of Texas), Hon. Norma Shapiro (United States District Court for the Eastern District of Pennsylvania), Jerome Shestack (the Philadelphia law firm of Wolf, Black, Schorr & Solis-Cohen), and H. Thomas Wells, Jr. (the Birmingham law firm of Maynard, Cooper & Gale).

6. The other reporters were Professor Janet Alexander (Stanford Law School), Luke Bierman (American Bar Association), Professor Edward Cavanaugh (St. John's University School of Law), Robert Evans (American Bar Association), Professor Marc Galanter (University of Wisconsin Law School), Jack Hanna (American Bar Association), Robert Hirshon (the Portland Maine law firm of Drummond, Woodsum & MacMahon), and Robb Jones (Federal Judicial Center).

7. Trustee Professor of Law, University of Pennsylvania School of Law, Philadelphia, Pennsylvania.

Judge Patrick Higginbotham,⁸ and Dr. Deborah Hensler.⁹ As a result, the final presentations of these three speakers reflected at least some of the views of the break-out groups, but the speakers did not purport to summarize the work of the break-out groups.¹⁰ The *Alabama Law Review* therefore asked me to supplement that review and to report further on the discussions of the break-out groups.

This is a broad overview of the opinions expressed in the break-out groups. It is neither a complete record nor a definitive analysis. I attended only the meetings of the break-out group for which I was the reporter,¹¹ but I am fortunate to have the notes of four other reporters, Luke Bierman, Edward Cavanaugh,¹² Jack Hanna, and Robert Evans, who preserved and graciously gave me their notes. Even if I had been able to attend every meeting of every group, however, I could not give the definitive analysis of the break-out sessions. As Dr. Hensler noted in her concluding speech, the views reported from the break-out sessions were "as diverse as the local rules and as difficult to analyze as judicial behavior."¹³ Accordingly, in this short article I merely continue my role as reporter and present some of the views expressed in a few of the break-out groups, in the hope that these views give some insight into the work of the

8. Circuit Judge, United States Court of Appeals for the Fifth Circuit, Dallas, Texas.

9. Director, RAND Institute for Civil Justice, Santa Monica California.

10. Videotape: CJRA Conference, Plenary Session #7, "Where Do We Go From Here?" (March 22, 1997) (on file with the University of Alabama School of Law Library) [hereinafter CJRA Videotape].

11. I served as reporter for the group led by Jerome Shestack, current president of the ABA. Our group was representative of the Conference as a whole and included: Hon. John Carroll (Magistrate Judge, United States District Court for the Middle District of Alabama), Hon. Richard Enslin (United States District Court for the Western District of Michigan), Hon. Thomas Griesa (Chief Judge, United States District Court for the Southern District of New York), Hon. Patrick Higginbotham (United States Circuit Court for the Fifth Circuit), Professor Thomas Jones (Professor Emeritus at the University of Alabama School of Law), Professor Henry Ramsey (Professor and former Dean of the Howard University Law School), Dennis Rose (the Cleveland firm of Hahn, Loeser & Parks), William Slate (President of the American Arbitration Association), and David Wagoner (International Arbitration Chambers).

12. Professor Cavanaugh and David Wagoner the CJRA and the Conference in an article published in the Federal Rules Decisions reporter. Edward D. Cavanaugh, *The Civil Justice Reform Act of 1990: Requiescat In Pace*, 173 F.R.D. 565 (1997).

13. CJRA Videotape, Plenary Session #7, "Where Do We Go From Here?" (March 22, 1997).

Conference as a whole.

I. THE CJRA, THE RAND STUDY, AND EMPIRICAL RESEARCH OF COURTS

Few participants spoke strongly in favor of the CJRA itself. Those who vocalized their opinions tended to oppose the experiment, raising one of several criticisms of the CJRA. Many felt that Congress acted too hastily, without sufficient study, and as a result addressed "problems" that may not even exist, or at least problems that had not been sufficiently defined or identified by empirical research. Others criticized the proposed "fix" in the CJRA. They felt that even if problems in federal case disposition existed, the CJRA was ineffectual because it directed the judiciary to do what many federal judges already were doing—case management.¹⁴ Others were critical only as to certain aspects of the CJRA. For example, there was near unanimity in opposition to local rules that contravened the national rules of civil procedure, a phenomenon that many participants felt that the CJRA created or at least exacerbated.

The RAND Study itself drew a somewhat tepid reaction. Some views of the RAND Study merely reflected criticism of the CJRA. For example, many participants said that they were not surprised by the RAND Study conclusion that the case management techniques mandated under the CJRA had little effect on cost and speed of case disposition.¹⁵ After all, many judges felt that they already were doing what the CJRA mandated, before the comparison study even began, and that there was no comparison to be made.

Other participants, particularly supporters of Alternative Dispute Resolution (ADR), expressed disappointment, if not

14. Judge Griesa, Chief Judge of the Southern District of New York, was the most vocal proponent of this view. In fact, he joined the final speakers at the conference so that he could elaborate on this view that the CJRA primarily asked the federal judiciary to do only what they already were doing. He used his own district as an example and explained how it responded to the CJRA. See CJRA Videotape, Plenary Session #7, "Where Do We Go From Here?" (March 22, 1997). See Thomas P. Griesa, *Comment: One Court's Experience with the CJRA*, 49 ALA. L. REV. 261 (1997).

15. RAND REPORT, *supra* note 2, at 83 Table 9.2, 90.

surprise, in the RAND Study's results. Some felt that the RAND Study did not accurately reflect the importance of intangible factors. For example, many advocates of ADR believe that the primary benefit of ADR is party satisfaction; the parties like the personal involvement and sense of control they get in many forms of ADR. Although the RAND Study reported party satisfaction as one of the effects of ADR, these supporters feared that the RAND Study's report of this benefit might be lost among the RAND Study's "hard data" results, such as ADR's reported minimal impact on cost and time to disposition.¹⁶

Other conferees questioned the methods of the RAND Study. Indeed, they questioned any empirical study of the judiciary. They felt that empirical studies often do not capture the true value of case management techniques because they use a wrong measure of effectiveness or fail to choose the proper cases for meaningful comparison. Some groups, for example, believed that the RAND Study undervalued case management in its ultimate time and cost measurements by mixing types of cases together, including both cases that benefitted from active judicial oversight and those that did not. They claimed that qualitative analysis of the cases was needed to screen the comparison cases before any empirical study compared quantitative data.

These concerns were most frequently raised with regard to studies of ADR. First, some participants noted that a comparison of case disposition rates may not be the proper measure of the effectiveness of ADR. Disposition rates reflect early judicial dismissal through motions, cases that arguably do not warrant ADR. They suggested that the better test might be a comparison of cases that go or would have gone to trial. Others pondered whether the reported litigant and lawyer satisfaction with the ADR process derive from the fact of settlement, which may occur without ADR, rather than the ADR process itself. Still others suggested that reports of ADR success rates might induce litigants to file suit and take advantage of court-annexed ADR, causing the ADR success rate to include cases that otherwise would have settled privately.

On the other hand, some attendees were encouraged by the RAND Study and called for more empirical research.¹⁷ They

16. *Id.* at 71, 75.

17. Some groups asked that at a minimum the underlying data from the RAND

argued that empiricism already has helped rulemakers avoid making unfounded changes to the rules governing class actions and discovery.¹⁸ Others felt that empirical data was needed to combat popular misconceptions about judges, lawyers, and the legal system. They complained that the public does not know how judges spend their days or how a case progresses through the system and that some critics of the system use unsubstantiated anecdotal information to attack the judiciary. Empirical studies and data would help counter that attack and promote public (and Congressional) understanding of the work that is actually done in the judicial system.

Some groups offered specific suggestions for further research, both anecdotal and empirical. For example, many judges urged that judges be polled anonymously for their thoughts and suggestions for reform. The most common suggestion for empirical research was a study of state courts because state courts have more variants on procedure and more cases to study and compare. Specific suggestions included comparison of RAND Study results to state court studies and a study of state courts that had adopted case management systems against states that had not. The groups also were eager to learn more about juries and their selection. They suggested a study of six versus twelve person juries, a comparison of a random jury against a jury actually selected in a case, and a study of lawyer voir dire.

Finally, some participants raised a cautionary note for any future studies. They feared that studies that compare actual cases under different proposed case management systems raise some of the same fundamental concerns as medical trials on human subjects. Presumably, the purpose of any study of alternative litigation procedures is to evaluate whether new proce-

Study be made available for further analysis.

18. Two members of the panel on empiricism reported their recent experience, as members of the Advisory Committee on Civil Rules, with empiricism. Professor Thomas Rowe, Jr., of Duke Law School, said that empiricism played a role in the committee's proposed changes to Rule 23 governing class actions: they decided not to collapse the three categories of class actions, currently embodied in Rule 23(b)(1), (2), and (3), into a single set of standards for a class action. Likewise, Judge David Levi reported that the current committee was reevaluating claims of discovery abuse and calls for change to the discovery rules in light of empirical research that showed far less discovery abuse than popularly believed. CJRA Videotape, Plenary Session #5, "Empiricism and Procedural Change" (March 21, 1997).

dures bring advantages over existing methods. Whether the new system under study proves to be beneficial or detrimental, the study participants—actual litigants with real money at stake—would not all get the same procedural opportunities and advantages. Although these conferees stopped short of saying that such studies violate the due process rights of the studied litigants, they urged study planners in the future to consider and address due process and fairness concerns.

II. GENERAL CASE MANAGEMENT AND LOCAL RULES

Most participants supported the general concept of judicial case management and felt that it as a whole has improved disposition of cases in federal court. Many of the federal judges perceive that cases are settling earlier and that fewer are going to trial. Some reported that case management has a positive effect on lawyers even before the case is filed. They claim for instance, that a plaintiff's lawyer may wait to file suit and better prepare his case in anticipation of the judge imposing deadlines once the case is filed.

Yet, despite this general support for "case management," Conference participants could not agree as to what constituted "management" by a judge. Some opposed active judicial management as an ineffectual use of judicial resources. They claimed that lawyers and parties are capable of managing their cases themselves so long as they know that the judge will be firm and enforce the rules with sanctions. Thus, even this group believed in some form of judicial management—a strong judge who insists that the parties comply with the rules and set and meet their own deadlines—even though they may not characterize it as "case management."

For the most part, the Conference attendees agreed with Judge Schwarzer's assessment that case management is "more of an art than a science."¹⁹ A particular technique might work well for one judge in one type of case but not work as well for another judge or even for the same judge in a different case. Therefore, most participants, especially the judges, argued for

19. William Schwarzer, CJRA Videotape, Plenary Session #2, "Discovery and Judicial Case Management" (March 20, 1997).

flexibility in the rules governing case management. Many felt that the current rules, particularly Rule 16,²⁰ give judges sufficient power and guidance to effectively manage and dispose of cases. Although most participants agreed that judges should hold mandatory Rule 16 conferences early in the case—within six months of filing²¹—they also reported that some judges do not hold early, or in some cases any, Rule 16 conferences.

Inconsistent application of existing rules and available techniques prompted some conferees to urge that judges be educated in case management techniques. Others argued that the Federal Judicial Center already teaches case management, noting that over the past twenty years of training programs for new federal judges, “case management” has evolved from a relatively insignificant side issue to a major focus of the program. This group claimed that the problem was more fundamental: the constitutionally mandated independence of federal judges limits what Congress, or even other judges, can do to promote a discretionary function such as case management by recalcitrant judges.

Another subject of spirited debate was the proper relationship between local rules and case management techniques. First, the groups differed on the effect of local rules on case management. All seemed to agree that a judge needs discretion to properly manage a case. Some groups expressed a concern that a prohibition against local rules would tie a judge’s hands and impair his or her discretion. Others believed the opposite. They argued that local rules, not national rules, unduly inhibit the individual judge and that the general dictates of the national rules give federal judges sufficient guidance and discretion.

The debate about local rules was confounded by definitional problems. The groups seemed to disagree as to what constituted the “rules” that they were debating. Most seemed to support “supplemental” or “housekeeping” rules on a district or individu-

20. Rule 16 of the Federal Rules of Civil Procedure allows a district judge to hold pre-trial conferences at which the court and the parties may discuss topics such as the control and scheduling of discovery, settlement and ADR options, and any other matter that “may facilitate the just, speedy, and inexpensive disposition of the case.” FED. R. CIV. P. 16(c).

21. Some districts mandate early conferences by local rule. *See, e.g.*, W.D. MICH., LOCAL R.: Differentiated Case Management Plan, 3 (within 45 days); N.D. OHIO, LOCAL R. 16.1(b)(2) (within 30 days as a general rule).

al judge basis. A judge, for example, should have discretion to run his or her own courtroom and set the time and day for routine motion call or tell the lawyers where to stand and sit in the courtroom. Beyond that point, however, the groups could not agree as to the proper use of rules by individual judges or by districts.

Some members of the break-out groups argued for recognition of the reality of judicial preferences. Most judges have at least some preferences as to how the parties should proceed. These groups felt that fairness dictated that parties be informed of a judge's idiosyncratic preferences to prevent surprise and to avoid giving local lawyers an unfair advantage. But even this group disagreed as to whether these preferences constitute local "rules" and whether a judge should communicate his or her preferences informally or in written guidelines.

Other attendees argued that "rule-making" by judges too often gets out of hand. They complained of districts where judges regulate minutia through their own set of rules or "guidelines," such as a 10-page memoranda on summary judgment practice. Those of this view tended to oppose any form of rule-making by individual judges, but conceded that to the extent that such rules exist at all, they should be in written form. They believed that the confusion of individualized rules is only compounded when the rules and standards are not clearly set out in writing.

Finally, the groups debated the proper subjects of local rules, such as discovery management. Some contended that discovery limits are like speed limits and that some districts have circumstances that warrant specialized restrictions on discovery, such as the length and number of depositions. Others argued that a single standard should govern discovery nationwide so long as it has sufficient flexibility to enable a judge to tailor discovery requirements to a particular case. The application of the rule may differ, but the rule would remain the same. Some cited the widely varying status of the new mandatory disclosure provisions, and the resultant forum shopping between districts, as an illustration of the harm of local differences in discovery standards.²²

22. As part of the CJRA mandate, some districts experimented with disclosure

III. DISCOVERY

The general consensus about discovery reform was to tread carefully. Most participants felt that the popular perception of problems in discovery was overblown. Some types of cases have discovery problems, and individual lawyers and litigants may abuse discovery, but discovery works well enough in most cases. Yet, most attendees at the Conference wanted to see improvement. As Professor Hazard perceptively noted, the troops are "sullen but not mutinous."²³

The discussions in the break-out groups reflected widely varying views on any given discovery reform or proposal. This difference of opinion was illustrated by the group's reaction to the new mandatory disclosure provisions in the national rules.²⁴ Some participants supported disclosure because it can streamline formal discovery and reduce costs, especially given that most of the information subject to the disclosure requirements under the national rule is (or should be) sought by litigants in the typical case in any event. Others feared that disclosure is too open to abuse. Some felt that the new disclosure rules take discovery out of the adversary system and put it into the realm of professional responsibility. They believed that because disclosure is largely self-executing, an individual lawyer's own ethics, not the diligence of opposing counsel, will determine what information is exchanged.

The groups also disagreed as to whether mandatory disclosure has proven to be effective. Judges generally thought disclo-

requirements. For example, unlike the national rule that limits disclosure to materials "relevant to disputed facts alleged with particularity in the pleadings," *see* FED. R. CIV. P. 26(a)(1)(A) and (B) and *infra* note 24, the Southern District of Illinois ties its initial disclosure to information and documents that "bear significantly on the claims and defenses." S.D. Ill., Local R. 12.(a)(1)(A) & (B). Other districts opted out of the disclosure rule altogether. For a summary of the statutes of the disclosure rules in the 94 district courts, *see* FEDERAL JUDICIAL CENTER REPEPORT (March 1996).

23. CJRA Videotape, Plenary Session #7, "Where Do We Go From Here?" (March 22, 1997).

24. FED. R. CIV. P. 26(a). (The disclosure provisions of Rule 26(a) fall into three categories, initial disclosure at the beginning of the suit of certain "core" information, exchange of expert witness information following most of the discovery, and pre-trial exchange of trial information such as witness lists.).

sure was working, while the lawyers were more pessimistic, particularly as to the initial disclosure of core information under Rule 26(a)(1). Some lawyers believed that litigants just go through the motions and do not actually exchange the information as required under the disclosure rules. However, both judges and lawyers were more enthusiastic about the new expert disclosure rules of Rule 26(a)(2), though some believed that even these disclosures unduly increase costs.

The views were equally varied as to other discovery reform topics and proposals, including those collected and proposed by Professor Paul Carrington.²⁵ First, as to the proposal that the loser always pay for the costs of any discovery motion, opponents feared it would inhibit parties, especially plaintiffs in contingent fee cases, from pursuing legitimate discovery needs. Supporters liked fee shifting precisely because of its influence on the parties; they hoped it would encourage parties to settle the dispute themselves. One group reported that California state courts already have had success with a fee shifting system.²⁶ This group noted that in California, the lawyer, not the party, usually pays the costs of lost discovery motions, and this group likewise supported the idea of the lawyer paying for discovery disputes in federal court.

Similarly, some lawyers, particularly defense counsel, opposed a prohibition against settlement agreements that would require the destruction of discovery materials, while others wanted such a ban to avoid redundant costs and encourage full revelation of the facts in future cases. Still others were non-committal, noting that settlement often would not be reached without confidentiality of discovery materials. Similarly, many had a mixed reaction to a rule that would require parties to immediately produce an "adopted witness statement," a statement signed by the witness for example, rather than withholding it as work product in the first instance. They had no real objection to such a rule, but they also recognized that the new rule would mean that lawyers would create fewer adopted witness statements.

Deposition reform also sparked debate. Some, particularly

25. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51 (1997).

26. See CAL. CIV. PROC. CODE § 2023 (West Supp. 1997).

judges, generally liked pre-set limits, such as time restrictions on the length of deposition or limits on the number of depositions that a side may take. The lawyers were wary. They felt that one party can too easily manipulate such limits, and that debate over these limits would produce excessive satellite litigation. Similarly, some lawyers did not see the need for a rule requiring a lawyer to hold objections until the end of a deposition. They argued that if lawyers simply state the objection, they will not unduly interfere with the deposition, will better preserve privileged or protected material, and may even help the deposing lawyer by pointing out the flaw in his question. Others agreed with this ideal procedure, but argued that lawyers do not live up to this ideal in practice.

Thus, as a whole, the Conference participants seemed to oppose any wide-sweeping changes to the discovery rules. They instead preferred to use methods available under the current rule structure to control discovery abuse. Not surprisingly though, the groups disagreed as to how to best use even the existing rules. For example, most attendees agreed that litigant access to and prompt rulings by a judicial officer was essential to curb discovery abuse, but they disagreed as to the degree to which sanctions should be imposed. Some, particularly the lawyers, argued for increased use of sanctions, while others, including a number of judges, cautioned against over-aggressive enforcement through sanctions.

The groups likewise disagreed as to whether the supervising official should be the district judge or the magistrate judge. Some argued that district judge supervision would give the judge greater familiarity with and control over the case and the lawyers, thereby better deterring abuse by litigants. Others were concerned about the time constraints and limited availability of district court judges. They felt that magistrate judges give districts more options to innovate solutions to discovery abuses. For example, the Western District of Michigan actively uses its magistrate judges to control discovery abuse: when a party believes that the other is obstructing depositions, it can go to the courthouse to conduct depositions, subject to the supervision of the magistrate judges.

IV. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Most participants were in favor of ADR, at least in some form, and believed that ADR was "here to stay."²⁷ Despite this consensus, the discussion of ADR was confounded in part by differing perceptions and perhaps confusion about ADR. This problem was demonstrated by the break-out groups' discussion of the relative merits of arbitration. Some groups defended arbitration, saying that it is disliked for reasons that are no longer true—that arbitration is mistakenly considered to lead to "split" results. Yet other groups praised mediation for reaching creative "win/win" solutions, in contrast to arbitration which they characterized as more often resulting in a firm judgments for one side or the other.

Much of the problem arose from inaccurate terminology. Most courts apparently use a single form of ADR, often with labels or procedures that do not correspond to ADR used in other courts. "Mediation," which seemingly is the most common form of court-annexed ADR, means different things in different courts. Some apparently call discussion of settlement at a Rule 16 conference mediation; whereas, others consider mediation to be a formal process guided by an outside neutral. Indeed, some Conference participants suggested that even the term "ADR" is no longer a good description of the process because the term "alternative" connotes a secondary rather than primary means of dispute resolution. They suggested that better terms might be "Appropriate Dispute Resolution" or "Satisfactory Dispute Resolution."

Even when the groups agreed on terminology, they disagreed as to the mechanics of using ADR, such as the optimum timing of ADR. Many thought that ADR should wait until the parties have conducted at least some discovery. Others felt that discovery is precisely one of the problems of the traditional court system that ADR seeks to avoid. Still others believed that the amount of discovery will depend both on the type of case and the ADR method. Arbitration, for example, likely will need more discovery than mediation.

27. Geoffrey C. Hazard, Jr., CJRA Videotape, Plenary Session #7, "Where Do We Go From Here" (March 22, 1997).

Another hotly debated issue was whether court-annexed ADR should be mandatory. Private ADR usually is binding, but court-annexed ADR rarely is. Some felt that court-annexed ADR needs to be mandatory in order to work. Others felt that even though the initial decision to go to ADR may be "forced" upon the parties, the parties should have some say in its operation. They suggested, for example, that the parties should choose their own mediator or neutral rather than having to use a person selected by the court.

Others felt that ADR should not be pressed on the parties. Some feared that ADR can be harmful in certain cases. They cited as an example domestic disputes and argued that the mandatory mediation often required in domestic cases is ineffectual and perhaps dangerous in cases of domestic violence. Some opposed mandatory ADR because it can waste the party's time and resources for little gain. An experienced lawyer may know the value of the case far better than a mediator. And ADR can be costly. Some claimed that ADR in complex cases is more expensive, not cheaper, than traditional court resolution. Indeed, one group characterized the cost of ADR as a "hideous expense."

The cost of ADR prompted some to raise the concern that private judges and other forms of private ADR create unequal access to justice. In places such as California, where litigants routinely pay for private judges, the cost of ADR can be quite high, giving the impression that only the rich can afford this form of justice. Others argued that the rich leaving the official court system actually gives the poor greater access to the courts. In addition, they noted that ADR need not be expensive. Public judicial personnel, such as magistrate and senior status district court judges, can, and do, act as neutrals at no extra charge to those who cannot afford private ADR. Others questioned whether such use of federal employees was proper given that the public already is paying for and providing a judicial system for resolution of disputes.

The groups also debated the advisability of the district judge personally engaging in ADR. Some opponents had a fundamental concern. They believed that the role of the federal district judge is to fulfill the judicial functions contemplated in Article III, not to act as outside counselor. If a party files a suit in federal court, he is entitled to have his case heard. Others coun-

tered that a judge is fulfilling his judicial function when he facilitates ADR. Rule 16, for example, directs a judge to "facilitat[e] settlement."²⁸ This group believed that judges have the power, and perhaps the duty, to at least educate and advise litigants about ADR. Still others supported court-annexed ADR but opposed, for strategic reasons, direct involvement by the judge. They felt that the judge might interfere with the collaborative process of ADR. For instance, litigants may be more civil and willing to listen in ADR, out of fear that an outside neutral, unlike a judge, would hold bad behavior against them.

V. CONCLUSION

Although the CJRA Conference break-out groups reached a consensus as to few points of federal procedural reform, their varying opinions were themselves instructive. Indeed, the break-out groups showed that federal courts are using many different techniques to manage their caseloads, to varying effect. Moreover, the break-out group debate about these techniques not only helped flesh out the perceived advantages and disadvantages of different reform proposals, but also exposed some of the flaws impeding debate about reform, such as confused terminology and misconceptions about actual practices. Having had this opportunity to share and learn from each other they can better propose, evaluate, and implement procedural reform.

28. FED. R. CIV. P. 16(a). *See also supra* note 20.

