

# Court ADR 25 Years After Pound: Have We Found a Better Way?

WAYNE D. BRAZIL\*

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\* United States Magistrate Judge, Northern District of California. In this essay, I speak as an individual, not as a representative of the court in which I sit. This essay is based on an oral presentation made at the national conference on court connected ADR that was held on April 4, 2002, in Seattle, Washington, in conjunction with the annual meeting of the ABA's Section of Dispute Resolution. I would like to thank Robert Rack, Jr., Roselle Wissler, Bobbie MacAdoo, Jennifer Shack, and Sharon Press for sharing data and insights with me from material that had not been published before the conference in April of 2002. Their generosity, of course, does not make them responsible for any of the views expressed in the pages that follow.

## I. INTRODUCTION

The architects of the inaugural national conference on ADR in state and federal courts crafted a series of questions to give focus and direction to the proceedings. I have used these questions, with some adjustment in sequence, to organize and focus the following material.

The questions are as follows: “Court ADR 25 years after Pound: have we found a better way?” “ADR outcomes: saves what—has court ADR kept its promise?” “Has the integration of ADR into the litigation process improved the administration of justice?” “What has been gained?” “What has not been gained?” “Where do the perils lurk?” “What are the primary challenges that court ADR faces and what are the most threatening dangers on the road ahead?”

No effort to address these questions should proceed without first paying special tribute to Professor Frank E. A. Sander of the Harvard Law School. Professor Sander’s seminal speech a quarter of a century ago<sup>1</sup> launched the undertakings that the national conference on court ADR was convened to appraise. His tireless work since then is responsible for so much of what has been gained. As so many people who work in this field fully appreciate, Professor Sander is the spiritual father of court ADR and it will remain forever in his debt.

## II. HAVE WE FOUND A BETTER WAY?

My answer is a resounding “No.” We have not found “a” better way. We have found nothing in the singular. What we have found is in the plural. And if what we have does not remain in the plural we will have seriously compromised our capacity for gains.

Moreover, we contravene the spirit of ADR if we insist on “winning”—if we insist on establishing that ADR is necessarily better than traditional litigation. ADR is *not* about being better than; it is about being in addition to. ADR is *not* about subtracting; it is about adding. And the perils we face will be much more threatening if we fail to make this point clear to those who see ADR as subtraction—especially those who see it as subtraction from the Seventh Amendment.

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<sup>1</sup> Frank E. A. Sander, *Varieties of Dispute Processing, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (Apr. 7–9, 1976), in 70 F.R.D. 79, 111–34 (1976).

### III. ADR OUTCOMES: SAVES WHAT? HAS COURT ADR KEPT ITS PROMISE?

The phrasing of this question offers me several useful foils. As I will try to make clear, the word “outcomes” is a source of many perils that court ADR faces. Its careless use can misdirect us and can invigorate those who challenge the programs we support.

Has court ADR kept its promise? In addressing this question, we must begin by weaning ourselves from the suggestion that the answer necessarily has anything to do with “savings,” unless what we are talking about saving is public trust in and respect for the system of justice.

Has there ever been just one promise of court ADR? Haven’t there been many different promises? And haven’t those promises changed, appropriately, over time?

Who are the primary promisees? The courts? Legislators and administrators trying to protect the public fisc? Lawyers? Professional neutrals? Or the people—especially people who need dispute resolution services?

Let me be clear from the outset about my core views on this matter. One of the defining beauties of court ADR is that it is not built on any one promise, but on many different kinds of promises—promises that can and should evolve over time. Another notion that is fundamental to court ADR is that the parties should decide for themselves which promises are most important to them.

As a matter of public policy, however, I believe that not all of the promises of court ADR are equal. Instead, there are among those promises two that are most significant. These are the promises of opportunity and of process integrity.

At the core of every court ADR program worthy of its name is one dominating set of messages. Through its ADR program, the court reaches out to the parties and says: “we acknowledge you, we acknowledge your needs, we acknowledge your entitlement to define for yourself what is most important to you, and we acknowledge that in some circumstances the established system of litigation serves some legitimate needs poorly. Just like when we provide you with a trial, we cannot and do not guarantee any particular outcome or achievement; we cannot and do not guarantee that if you use an alternative process you will be successful, by whatever criteria you define success. We cannot guarantee that you will save time or money. We cannot guarantee that you will achieve a better result than you would through litigation. Instead, the promise we make through our ADR program is to provide you with an opportunity, an opportunity to see if some other

way might serve you better.”

To illustrate this opportunity theme, I would like to describe some intriguing responses by litigants who were asked to compare non-binding court-connected arbitration to jury trials and to court trials. These responses support the notion that it is important to let the parties weigh the different values and interests that can come into play when deciding which process to use to attempt to resolve a particular case.

The study that generated these figures was undertaken by the Federal Judicial Center in the late 1980s.<sup>2</sup> The respondents were litigants and lawyers whose cases had been assigned in the mid-1980s to the presumptively mandatory, non-binding arbitration program in the United States District Court for the Northern District of California.<sup>3</sup> I focus here on two of the many questions in the survey. The first of these questions was: “Who do you think would have been most likely to come up with a decision that was fair to everyone?”<sup>4</sup> In response, the parties could select a judge, a jury, or an arbitrator, or they could indicate that there would be “no difference” in the fairness of decisions rendered by judge, jury, or arbitrator.<sup>5</sup> The responses by the parties fell into the following percentages:

Judge: 33%

Jury: 13%

Arbitrator: 17%

No difference: 38%<sup>6</sup>

The second question, posed a little later in the survey, was: “Considering costs, time, and fairness, would you prefer to have your case decided by a—

Judge: 29%

Jury: 11%

Arbitrator: 54%

No difference: 7%<sup>7</sup>

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<sup>2</sup> BARBARA MEIERHOEFER & CARROLL SERON, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN THE NORTHERN DISTRICT OF CALIFORNIA 1 (1988).

<sup>3</sup> *Id.* at 3. The vast majority of the cases assigned to this program (at the time of the study) involved either contract or tort claims with a likely judgment value of \$100,000 or less. *Id.* The number of parties who returned questionnaires was quite small, only about 86. *Id.* at 33–34. But the number of lawyers who returned questionnaires was much larger, about 400. *Id.* at 19–20. With respect to the questions discussed in the text above, there was considerable parallelism in the responses by the two groups (the only noteworthy difference being that lawyers were somewhat more likely than parties to believe that a judge was more likely than a jury or an arbitrator to produce a decision that was fair to everyone). *See id.* at 22–29, 35–40.

<sup>4</sup> *Id.* at 23, 39.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 39.

<sup>7</sup> *Id.* at 40.

Responses by the lawyers in the surveyed cases followed essentially the same pattern.<sup>8</sup>

In 1990, the Federal Judicial Center published the results of similar surveys taken in all ten of the federal district courts that sponsored non-binding arbitration programs in the late 1980s.<sup>9</sup> In these larger samples, the pattern of responses was not substantially different, in that more parties and more lawyers indicated that they would select arbitration as the method of resolving their dispute than indicated they would select either a court trial or a jury trial when they took into account cost, time, and fairness considerations.<sup>10</sup> The major difference between the pattern of responses in the Northern District of California, and the aggregate responses from all ten districts, was that in the aggregate sample the percentage of respondents who would select a court trial was somewhat lower (22–23%) and the percentage who would select a jury trial was somewhat higher (17–20%).<sup>11</sup>

These responses suggest that while many parties and lawyers feel that a judge is more likely than an arbitrator or a jury to deliver an outcome that is fair to all concerned, for many litigants and their counsel that difference in quality of decision-making is not huge and is outweighed by the substantial savings in cost and time that can be achieved through non-binding arbitration. Because it is the time, money, and sense of fairness of the *parties* that is primarily at stake, it is not obvious why courts should not give the parties the opportunity to decide for themselves how to weigh, in any given case, these sometimes-competing values.

As I mentioned above, there is a second promise of court ADR that is of paramount importance—that is the promise of process integrity. Because the public's trust and confidence in the courts is their most precious and essential asset, courts that sponsor ADR programs must promise the public that those programs will do nothing to diminish or undermine that trust and confidence, but, instead, will enhance it. This is the promise of court ADR that is most important and most difficult to keep. As I will discuss in subsequent sections, the challenges of keeping this promise are the sources of some of the greatest perils that court ADR programs face.

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<sup>8</sup> Asked who they thought was most likely to come up with a decision that was fair to everyone, 43% of the lawyers selected a judge, 12% selected a jury, 16% selected an arbitrator, and 29% indicated that there would be no difference. *Id.* at 23. When asked to take into account costs, time, and fairness, 29% of the lawyers indicated they would prefer to have their case decided by a judge, 12% would prefer a jury, 48% would prefer an arbitrator, and 12% indicated that it would make no difference to them. *Id.* at 22.

<sup>9</sup> See generally BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 70–73 (1990).

<sup>10</sup> *Id.*

<sup>11</sup> See *id.*

#### IV. HAS THE INTEGRATION OF ADR INTO THE LITIGATION PROCESS IMPROVED THE ADMINISTRATION OF JUSTICE?

Has ADR really been “integrated” into the “litigation process”? Is integration of ADR into the litigation process workable? Is it desirable? Answers to these kinds of questions may depend in part on what kind of ADR we are talking about<sup>12</sup> and on what we mean by “integration.”

At a minimum, we must acknowledge that for at least some kinds of ADR (most obviously, facilitative mediation) there are significant barriers to some kinds of integration with the litigation process. These barriers can include, among others, promises of confidentiality and rules that prohibit any subsequent use or disclosure of communications made in the ADR setting. A second source of barriers to integration is the sometimes sharp and intentional contrast between the spirit, methods, and purposes of litigation, on the one hand, and the spirit, methods, and purposes of certain kinds of ADR, especially facilitative or transformative mediation, on the other. Thus, we should acknowledge that for some kinds of ADR, the wisest policy might be to limit integration to simply including an ADR event in the elements of process that precede trial.

To address some of the important questions that are implicit in the larger query, however, I would like to reframe this integration question into a less difficult and more productive form: “Has the *addition* of ADR to pretrial processes improved the administration of justice?”

Before responding to this reframed question, we must try to identify the criteria we should use to identify “improvements” in the “administration of justice.” Hopefully, as we work through the issues, we will remain more concerned about justice than administration. It is simple-minded, however, to suggest that justice and administration are not related. So it is fair to ask, when we try to identify the criteria for identifying “improvements,” whether we should focus primarily on efficiency values. If so, efficiency for whom? For the courts? For lawyers? For parties? Is efficiency for one necessarily efficiency for all? Or, when we determine what constitutes an improvement in the administration of justice, should we also look to a broader range of values: (1) party and lawyer feelings about fairness and about the utility of the process (taking into account the full range of parties’ values), (2) the extent to which the process permits or encourages participation by parties

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<sup>12</sup> For example, it might be much easier to integrate early neutral evaluation into the litigation process than facilitative or transformative mediation. The primary purpose of some ADR processes is to enhance the efficiency, rationality, and fairness of the litigation process, whereas the primary purpose of other kinds of ADR is to create an environment that is as spiritually and procedurally different from litigation as possible.

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(reducing levels of alienation from the system), (3) what the process contributes to the clarity of the parties' understanding of their situation and their options, and (4) the parties' feelings about the system of justice and our judicial institutions.

With respect to the last mentioned criterion, we should take into account the impact the ADR process or program has on the inferences parties draw about what values and concerns animate the courts as institutions. We also should consider what effect the ADR programs have on how well served the parties feel by the system of justice and on whether their experience in the court system enhances or reduces their respect for and feeling of connection with their government. Because how people feel about their governmental institutions is so important in a democracy, when we ask whether the addition of ADR to the pretrial menu has improved the administration of justice, we need to give full and fair consideration to both *objective* and *subjective* measures.

As the RAND<sup>13</sup> and other studies<sup>14</sup> show, generating reliable objective measurements of the aggregate effects of court ADR programs is very difficult. There is no discernible pattern or consistency in the results of such studies, which can vary greatly from program to program. This is hardly surprising, given how great the differences can be between court ADR programs and between the profiles of the dockets (kinds of cases) covered.

Some studies suggest that programs with strong quality control deliver measurable improvements in aggregate time to disposition and in lowered transaction costs,<sup>15</sup> while other studies find no evidence of aggregate improvements in either arena.<sup>16</sup> The two things that are clear are that we need to continue and to sophisticate our efforts to generate reliable empirical assessments and that we need to remain acutely aware of the danger of

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<sup>13</sup> JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT xxxiv (1996).

<sup>14</sup> For a recent survey of many studies, some of perceptions and attitudes, some also of data about, among other things, effects on transaction costs and time to disposition, see Jennifer E. Shack, *Saves What? A Survey of Pace, Cost and Satisfaction Studies of Court-Related Mediation Programs*, Paper for the Mini-Conference on Court ADR 57, 58 (April 4, 2002) (Program Book for the Mini-Conference on file with author); see also Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401, 448 (2002); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 701-02 (2002).

<sup>15</sup> See, e.g., DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 5 (1997).

<sup>16</sup> E.g., KAKALIK ET AL., *supra* note 13, at 4.

generalizing from the study of one program to others.

We also need to ask whether our primary concern should be with “aggregate” results, or even with some kinds of empirical measures, if the primary promise of court ADR is that it will create *opportunities, through respect-worthy processes*, for parties to pursue ends that are appreciably more difficult to pursue through the traditional litigation system. Would it be wise policy to abandon an ADR program if comprehensive studies were to demonstrate that it left aggregate time to disposition and aggregate transaction costs about the same as they were before the program were implemented, but that 60–80% of the parties whose cases proceeded through the ADR program emerged with substantially greater respect for and gratitude toward the judicial system (for reaching out to them and giving them an array of high quality means to try to solve their problems), and that in about half the cases the parties succeeded in using ADR to achieve ends of real consequence to them? Shouldn’t we care a lot about how individual people who use our system of justice feel about it? If so, we should attend at least as carefully to subjective measures of the value of ADR programs as we do to aggregate objective assessments.

We should take heart from the fact that in studies of the programs that I know best, the subjective data support, often strongly, a conclusion that the addition of ADR to court services has improved (in the all-important eyes of users) the administration of justice—regardless of the criteria we use to define improvement. In this discussion, I will focus primarily on data from studies of the ADR programs in the Northern District of California. I will not attempt to survey or reconcile all the data about user perceptions that has been collected—a task well beyond my limited resources. It is important to emphasize, however, that when considering user perception surveys (or other kinds of studies), we must bear in mind that there are huge variations in the programs that have been studied.<sup>17</sup> The primary impression from Jennifer E.

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<sup>17</sup> Jennifer E. Shack recently reviewed as many studies of court-connected mediation (not other forms of ADR) programs as she could locate (most, but by no means all, in state courts). See Shack, *supra* note 14. The studies she examined covered mediation programs in all kinds of settings, even including criminal proceedings and small claims courts. *Id.* Not surprisingly, Ms. Shack discovered that there was a huge range of program characteristics and variables. *Id.* It also is significant that the extent of court sponsorship or involvement in or control over the mediation services the parties received spanned a considerable range. *Id.*

While most participants in most of the studies reported satisfaction with the mediation process, and the vast majority perceived the process as fair and were more satisfied with it than with adjudication, findings about efficiency in the various studies were mixed—both in objective measures and in perceptions. *Id.* Viewed collectively, there were about as many studies in which participants believed mediation had saved them time and money as there were in which participants believed either that mediation

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Shack's review of many studies of court-connected mediation is that reliable generalizations across the entire field are wholly inaccessible because there is such diversity of program character and quality and, presumably, in the character and quality of the studies. To assess the potential value and impact of court programs with some level of confidence, we need to focus on specific programs whose characteristics we understand and on studies conducted with high levels of social science professionalism. When we consider the implications of any particular survey or set of results, we must begin, each time, by understanding clearly the character of the particular program and we must take great care in attempting to generalize. And when trying to assess potential, we should attend most to studies of mature, well run programs with effective quality control.

With these cautions understood, we can begin by focusing on subjective assessments of efficiency values. In most of the studies that I have reviewed, more than half of the lawyers and parties report that the referral to ADR saved them time and money. Moreover, only relatively small percentages (5–20%) believe that the referral increased their costs or extended disposition time (the other respondents report no effect one way or the other).<sup>18</sup> It is comparably significant that in studies of ADR programs in the Northern District of California, lawyer estimates of how much money the referral to ADR saved are between six and ten times higher than the estimates (by the much smaller percentage of respondents who reported a net increase in costs) of how much money the referral added to the litigation bill.<sup>19</sup>

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had not affected these measures of efficiency or had increased their costs or their time to disposition. *Id.* Consistent with studies discussed more specifically in this essay, however, it is reasonable to infer that, overall, the percentage of respondents who believed that mediation had decreased efficiency was appreciably smaller than the percentage who believed mediation had improved efficiency. *See id.*

<sup>18</sup> This pattern is quite clear in the several studies of the programs in the Northern District of California, the programs and the studies that I know best—and in which, therefore, I have the most confidence. *See, e.g.,* STIENSTRA ET AL., *supra* note 15, at 173–74, 192 (reporting that more than 60% of respondents believed that the referral to ADR in the Northern District of California reduced client costs and the time to disposition, that 13% believed the referral increased costs, and that 11% believed the referral extended the time to disposition); MEIERHOEFER & SERON, *supra* note 2, at 24 (reporting that 63% of attorney respondents believed that the assignment of their case to the non-binding arbitration track reduced their client's litigation costs and that 52% believed that assignment to that track caused settlement discussions to occur earlier than they otherwise would have); *see also* KAKALIK ET AL., *supra* note 7, at 47 (reporting that in the six federal courts studied [which did not include the Northern District of California], 54% of the responding attorneys believed that the assignment to ADR reduced the time needed to resolve the case, whereas only 6% believed that the referral increased the time needed to resolve the case).

<sup>19</sup> STIENSTRA ET AL., *supra* note 9, at 174, 202 (reporting that the average estimated

Even if we use only efficiency criteria to assess value, shouldn't we be proud of programs that the parties feel reduce their expenses and reduce the time their problem remains unresolved in 50–70% of the cases, and that increase cost or delay in only 5–20% of the cases? These figures represent a ratio of perceived “addition” by ADR to perceived “subtraction” by ADR of about 4 to 1. We should welcome any reform that is viewed as improving the system by these measures in 50% or more of the cases—a glass half-full being far preferable to no glass at all.

In addressing our question about whether the addition of ADR to the elements of the court process before trial has improved the administration of justice, we also should consider evidence that lawyers tend to give higher marks to a court's overall approach to civil case management when ADR is included in the mix of pretrial services than when ADR is not included in that mix. For example, in the Federal Judicial Center's study of the ADR Multi-Option program in the Northern District of California in the mid-1990s, attorneys whose cases were referred to ADR were appreciably more likely than attorneys whose cases were not referred to ADR to report that the court's case management program decreased costs (43–26%) and expedited disposition (55–38%).<sup>20</sup>

A similar pattern in perceptions of the efficiency of the court's overall approach to processing civil cases was reflected in the study of an earlier iteration of the Northern District's Early Neutral Evaluation (ENE) program by two scholars from the law school at the University of San Francisco. Surveying counsel whose cases were filed between mid-1988 and mid-1992, Professors Rosenberg and Folberg found that 41% of the lawyers whose cases were automatically assigned to the ENE program strongly agreed that the court's overall approach to case management was efficient, while that figure fell to 31% among lawyers whose cases were not assigned to the ENE program.<sup>21</sup>

There is even stronger evidence that the addition of ADR to the

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cost savings attributable to the referral to ADR by the 62% of the lawyers who reported a positive effect was \$43,000, while the average of the estimated cost increases by the 13% who reported a negative effect on costs was \$3,900); *see also* Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1492, 1496, 1499–1501 (1994) (reporting results of surveys of an earlier, less controlled iteration of the early neutral evaluation (ENE) program in the Northern District [data from 1988–1992], in which only a slightly higher percentage of respondents [about 40%] believed the referral to ENE resulted in reduced litigation costs than those who believed the referral increased litigation costs [about 38%], but also reporting that the mean estimate of amount saved was almost ten times the mean estimate of increased cost [more than \$40,000 mean savings compared to about \$4,000 mean increase in costs]).

<sup>20</sup> *See* STIENSTRA ET AL., *supra* note 9, at 154, 159.

<sup>21</sup> *See* Rosenberg & Folberg, *supra* note 19, at 1503.

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traditional pretrial menu has improved the administration of justice when we broaden our vision so that it reaches beyond efficiency values and focuses on perceptions of fairness and of how well served the parties feel by the courts.

We begin our consideration of data in this arena by pointing out a suggestive difference between participant perceptions of how often ADR saved them money and time, on the one hand, and, on the other, participant feelings about how often the costs of the referral to ADR were outweighed by the overall benefits delivered by that referral. As I have noted above, the most recent comprehensive studies of ADR programs in the Northern District of California report that lawyers believe that the referral to ADR saved time and money about 60% of the time, but they report that the overall benefits of the referral outweigh the costs more than 80% of the time.<sup>22</sup>

The Federal Judicial Center's study of the ADR program in the Western District of Missouri reported differences between attorneys' views about ADR's contributions to efficiency and the overall value of the court's ADR program that cut generally in the same direction: while 69% reported that participation in the ADR program decreased clients' costs (only 10% believed that participation increased those costs), and 59% reported that the program had been "very helpful" in moving the case toward resolution (another 25% reported it had been "somewhat helpful"), 84% of the responding attorneys felt that the benefits of participation had outweighed any costs.<sup>23</sup> These differences suggest that many lawyers and litigants feel that they are getting something more than just cost and time efficiency out of ADR.<sup>24</sup>

This prompts us to ask: What kinds of things are included in the

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<sup>22</sup> See STIENSTRA ET AL., *supra* note 15, at 207 (83% of attorneys reporting that the benefits of being involved in the ADR process were greater than the costs).

<sup>23</sup> *Id.* at 241, 247; see also KAKALIK ET AL., *supra* note 13, at 51 (While this study failed to generate objective findings of cost or delay reduction, it reports that a majority of the lawyers in each of the six districts felt that the ADR programs were "worthwhile in general as well as beneficial for their individual cases.").

<sup>24</sup> Additional support for this inference appears to be provided in Jennifer Shack's ambitious recent review of studies of court connected ADR programs. Shack, *supra* note 14, at 57. Even though the number of studies reporting positive perceptions of ADR's effect on efficiency values is about the same as the number of studies reporting perceptions that ADR either had no effect on the efficiency of disposition or was inefficient, Ms. Shack also reports that

the majority of participants in mediation in virtually all the programs studied were satisfied with the process and outcome, and the vast majority perceived the mediation process and outcome to be fair. In addition, most studies found that mediation participants were more likely to be satisfied with the process and outcome and to find them to be fair than those who participated in adjudication.

*Id.* at 58.

“something more” that parties feel they get out of ADR programs? Research helps us identify some of the more valued contributions. When asked to identify ways in which ADR might have been helpful, 50% or more of the responding attorneys in the Northern District reported that their ADR experience had been helpful in (1) moving the parties toward settlement, (2) clarifying or narrowing monetary differences in the case, (3) encouraging the parties to be more realistic about their respective positions, (4) giving one or more parties an opportunity to “tell their story,” (5) providing neutral evaluation of the case, (6) clarifying or narrowing liability issues in the case, (7) allowing the clients to become more involved in the resolution of the case, and (8) improving communication between the different sides in the case.<sup>25</sup>

The Federal Judicial Center study of attorneys’ perceptions of the ways the ADR program in the Western District of Missouri had been helpful produced even higher levels of endorsement for similar kinds of contributions.<sup>26</sup> Significantly, 72% of the responding lawyers believed that the Early Assessment Program in that federal court “helped parties determine whether [the] case could be resolved through [a] method other than formal litigation.”<sup>27</sup> Helping parties make this determination, by itself, can constitute a major benefit—by helping litigants decide, earlier rather than later in the pretrial life of the case, how to focus their efforts, and by reducing the extent and duration of inter-party friction.

In addition, substantial majorities reported that the ADR program in the Western District of Missouri contributed by (1) encouraging parties to be more realistic about their respective positions (77%), (2) allowing the parties to become more involved in the resolution of the case than they otherwise would have (72%), (3) allowing counsel to better understand and evaluate the other side’s position (68%), (4) prompting early definition of the issues (67%), (5) permitting counsel to identify the strengths and weaknesses of their clients’ cases (65%), and (6) improving communications between opposing counsel (60%).<sup>28</sup> Most of these kinds of contributions tend to improve, from the litigants’ perspective, the quality of justice, and it strikes me that improving parties’ feelings about the quality of justice that the court system provides is a significant achievement.

We find additional important evidence that ADR can enhance litigants’ and lawyers’ respect for the quality of justice that courts deliver when we examine data about perceptions of fairness. Overwhelming majorities of

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<sup>25</sup> STIENSTRA ET AL., *supra* note 15, at 204.

<sup>26</sup> *Id.* at 215–54.

<sup>27</sup> *Id.* at 238.

<sup>28</sup> *Id.* at 249.

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lawyers and parties endorse the fundamental fairness of ADR processes in all the studies I have read. For example, in the Northern District of California, 98% of attorney respondents report that the ADR processes are fair.<sup>29</sup> Similarly, in the Western District of Missouri the Federal Judicial Center found that 92% of the responding lawyers believed that the court's staff neutral (who provided the vast majority of the ADR services) had "treated all parties fairly."<sup>30</sup>

These results are consistent with surveys that have assessed party and lawyer feelings about the fairness of a variety of ADR programs in other courts.<sup>31</sup> For example, in the Federal Judicial Center studies of non-binding arbitration in ten district courts (1990), more than 80% of the parties and more than 90% of the lawyers felt that the procedures in the arbitration hearing were fair.<sup>32</sup> In the surveys the RAND Institute for Civil Justice conducted in the early and mid-1990s in six federal district courts, nine out of ten lawyers felt that the ADR process was fair.<sup>33</sup>

After conducting an ambitious examination of studies of a large number and wide variety of ADR programs, most in state courts, Jennifer Shack found that "the vast majority [of participants surveyed] perceived the mediation process and outcome to be fair. In addition, most studies found that mediation participants were more likely to be satisfied with the process and outcome and to find them to be fair[er] than those who participated in adjudication."<sup>34</sup>

In a similar vein, the law professors who studied the early neutral evaluation program in the Northern District of California in the early 1990s reported that significant percentages of the lawyers and clients who responded to the survey believed that they had learned things through the ENE process that led to a fairer or more appropriate disposition of the case.<sup>35</sup> Moreover, attorneys in cases that were assigned to the ENE program were

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<sup>29</sup> *Id.* at 206 (85% view the processes as "very fair" and 13% view them as "somewhat fair").

<sup>30</sup> *Id.* at 238.

<sup>31</sup> See Shack, *supra* note 14, at 2 ("[I]n virtually all the programs studied . . . the vast majority perceived the mediation process and outcome to be fair."); see also Wissler, *supra* note 14, at 661-63.

<sup>32</sup> MEIERHOEFER, *supra* note 9, at 65.

<sup>33</sup> KAKALIK ET AL., *supra* note 7, at 49-51 (noting, among other things, that even though objective measures did not show improvements in cost or in time to disposition, most of the lawyers in all six studied districts "felt that the programs are worthwhile in general as well as beneficial for their individual cases . . . [and that] [t]he vast majority of lawyers in every program were satisfied with the ADR process itself and thought it was handled fairly.").

<sup>34</sup> Shack, *supra* note 14, at 2.

<sup>35</sup> Rosenberg & Folberg, *supra* note 19, at 1513-15.

appreciably more likely than lawyers whose cases were not assigned to ENE to feel that the court's overall procedures were fair. While 67% of the lawyers whose cases were assigned to the ENE track agreed strongly that the court's procedures were fair, only 53% of those whose cases were not assigned to ENE held that view.<sup>36</sup>

Because public confidence in the judicial system turns so much on perceptions of fairness of process, we should be especially proud of the ringing fairness endorsements that ADR programs have received. Given the data described in the preceding paragraphs, it is not surprising that most surveys reveal widespread user satisfaction with court connected ADR programs. A few examples, from a range of programs, will suffice.

The Federal Judicial Center's study of non-binding arbitration in ten district courts found that 84% of the responding attorneys approved of the arbitration programs generally and of the referral of their particular case to arbitration.<sup>37</sup> When a team of researchers at RAND studied ADR programs in six federal district courts in the early and mid-1990s, they could find no objective proof that referrals to ADR, in the aggregate, reduced cost and delay, but they did find that more than 90% of lawyers and almost 90% of parties endorsed those same ADR programs and that only a small percentage of respondents in any of the six studied districts were not satisfied with the ADR process to which they were referred.<sup>38</sup>

Less direct, but not necessarily less significant, evidence of parties' feelings about the value of court ADR comes from E. Allan Lind's study of non-binding arbitration in the federal court for the Middle District of North Carolina.<sup>39</sup> Sifting data from the late 1980s, Mr. Lind's analysis revealed that litigants whose cases were assigned to the arbitration track tended to remain in the system longer than comparably situated litigants not assigned to the arbitration track.<sup>40</sup> This fact suggested to Mr. Lind that parties saw the arbitration hearing as an opportunity to get something they considered important (something like a day in court—a hearing and a “judgment” by a neutral) that, without the arbitration program, they would not have been able to afford (remaining in the system to proceed through trial was too costly for many such litigants).<sup>41</sup> Litigants tended to view the arbitration hearing not as a substitute for a trial (a trial was not a realistic option), but as a substitute for

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<sup>36</sup> *Id.* at 1503.

<sup>37</sup> MEIERHOEFER, *supra* note 9, at 78–82.

<sup>38</sup> KAKALIK ET AL., *supra* note 13, at 48–51.

<sup>39</sup> E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES* 44–60 (1990).

<sup>40</sup> *Id.* at 42–43.

<sup>41</sup> *Id.* at xvii.

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bilateral settlement negotiations.<sup>42</sup> And many found the arbitration hearing much more satisfying than the settlement negotiation alternative,<sup>43</sup> which is hardly surprising, given the likelihood that the lawyers would dominate the settlement negotiations, relegating clients to either a secondary role or no role at all. It doesn't seem rash to guess that litigants are not likely to feel deep respect for a "system of justice" in which they sit in the hall while their lawyer negotiates a settlement in a closed room, or one in which they sit at home while their lawyer sits in her office negotiating settlement terms over the phone with opposing counsel or with a claims adjuster.<sup>44</sup>

Another instructive insight is afforded by data about the mediation program at the United States Court of Appeals for the Sixth Circuit. While 40–45% of the cases in which the court's mediators provide services are settled, a Federal Judicial Center study reported that 80% of responding lawyers said that if the court's ADR program had not existed they would not even have raised the issue of settlement negotiations.<sup>45</sup> Clients presumably feel well-served by a system whose institutionalized initiatives reduce substantially the likelihood that the parties will miss opportunities to solve their problems consensually.

Moreover, as Robert Rack, chief mediator of the Sixth Circuit, points out, there can be real "value to the parties in just knowing a case cannot be settled."<sup>46</sup> A good lawyer and a wise client will always want to know what their options are so they can feel centered in pursuing the course they elect. When an ADR program helps them explore the prospects for settlement and teaches them what terms are available by agreement, they can make much better informed decisions. And if they elect to proceed with the litigation,

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at xvi–xviii. Lind concluded that

[i]n consonance with previous research, this study showed that litigants want a forum in which their cases can be heard and that they will wait for such a forum if one is readily available . . . it would appear that an important part of what people seek from the civil justice system, across a wide range of disputes, is an opportunity to have their cases heard.

*Id.* at xviii.

<sup>44</sup> *But see* E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* vii–x, 13–14, 66 (1989) (finding that more favorable party feelings about arbitration and trial were correlated with perceptions of greater dignity and procedural care, but not with increased opportunities for participation).

<sup>45</sup> *See* Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 613n.19 & 621n.47 (2002) (citing JAMES B. EAGLIN, *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION* 5 n.8 (1990)).

<sup>46</sup> Rack, *supra* note 45, at 621 n.47.

they can do so with a clearer sense that that course is the wisest for them. We should not ignore the value of giving litigants an opportunity to develop that sense.

We also should not lose sight of the importance of generating feelings of respect for and gratitude toward governmental institutions. Courts promote respect for the system of justice when they provide processes that are perceived as fair and valuable. Courts generate gratitude when they are perceived as providing a valuable service and as acknowledging and servicing not just the values that are important to the governmental institution, but also the values that are important to the people. A court ADR program can generate gratitude that is informed by these kinds of feelings when litigants see a court reaching out to them through ADR services, giving them opportunities that otherwise would not be available, opportunities to try to advance the interests that the litigants feel are most important to them.

Evidence of such gratitude has surfaced many times in letters our court has received from lawyers and clients—letters expressly thanking the court for providing the neutral services that enabled the parties to understand one another better and to find common ground. Comparably significant expressions of gratitude also have emerged from surveys of litigants. Roselle Wissler's surveys of litigants in state courts in Ohio, for example, contain expressions of gratitude to the courts for offering the parties opportunities to try to come to an agreement, to reduce costs, to resolve the matter sooner and to avoid the stresses and expenses of trial.<sup>47</sup> The feedback from the parties suggested their appreciation for the court meeting them half-way, for understanding the burdens of litigation, and for offering a method for pursuing a resolution that is much more cost effective than formal litigation. These kinds of feelings toward governmental institutions can only make our democracy healthier.

## V. WHAT ELSE HAS BEEN GAINED?

With an appreciation of these subjective assessments of the value and fairness of court ADR programs as a base, we are positioned to broaden our inquiry into what has been gained. One of the least noted but most significant gains is an evolution in the judicial institution's understanding of itself, its role, its relation to the people. Experience with ADR programs has changed, in part, some courts' self-perception and the richness of their sense of mission. It has led some courts to a clearer understanding of themselves as service institutions and to a more sophisticated appreciation of the breadth of

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<sup>47</sup> Roselle L. Wissler, *Evaluation of the Pilot Mediation Program in Clinton and Stark Counties, August 1996 Through March 1997*, a report prepared for the Supreme Court of Ohio, Sept. 1997, at 7-8 (on file with author).

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the range of litigant values that court processes can and should try to serve. The reach of these changes is uneven and incomplete across the judicial system and even within individual courts, but its potential long-range implications are considerable.

To illustrate these developments I will describe, in summary form, the history of my court's understanding<sup>48</sup> of the purposes and orientation of its ADR programs. In our first foray into the ADR arena, we focused on efficiency values for modest-sized cases. When we launched the non-binding arbitration program in 1978 our primary objective was to offer parties in relatively straightforward cases (contract and personal injury matters) of modest economic value (\$100,000 or less) an opportunity to address the imbalance between transaction costs and case value, while giving them something akin to a "day in court." The goal was to provide parties with a more streamlined, compact case development process and a meaningful alternative to unaided settlement negotiations (trial not being an economically realistic alternative for a large percentage of the cases in this universe).

Several years later, when we added the early neutral evaluation (ENE) program for a much broader range of civil cases, we at first remained focused primarily on efficiency values (especially reducing costs), but we also sought to expand the role of clients and to reduce the alienation clients sometimes felt from the litigation process. We sought to enable clients to serve more effectively as sources of common sense and economic discipline. We also attempted to reduce client alienation rooted in not understanding the litigation process, participating in it only at the margins, and having virtually no power to control it. But as we gained more experience with ENE we came to appreciate that it also could be used (and was valued) by parties to improve the rationality of the decisions they were called upon to make by improving databases and quality of analysis. Parties also could use ENE to improve the fairness of the litigation process by increasing the likelihood that they would identify and understand one another's positions on the issues that really mattered and would have a meaningful opportunity to develop the pertinent evidence and to explicate the controlling law.

Our ADR program began having a more profound effect on the character of the court, and on its understanding of its mission, when we added mediation to the process options the court sponsored. Initially, our primary

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<sup>48</sup> The phrase "my court's understanding" is not meant to imply that all of the judges in the Northern District of California always have shared the same views (or had the same level of knowledge) about these matters. Rather, the changing "understanding" that I describe in the text usually has been shared at first only by a few judges (those most active in developing the court's ADR policies) and the ADR staff—then has spread, unevenly, to other judges and other court staff.

purpose in adding mediation was to offer parties an opportunity to pursue in different ways the efficiency, rationality, and party-empowerment values that our established non-binding arbitration and ENE programs served. But over time we began to absorb and be moved by the broader, richer spirit that has informed much of the mediation movement. We began to see that parties in our court could use mediation to pursue a much wider range of values than they could pursue effectively through litigation or through our other heavily rationalistic processes. We began to appreciate that mediation was a far superior tool for certain kinds of communication across party lines, for giving appropriate play to emotion, for repairing a person's sense of self, for preserving old relationships or forging new ones, and for encouraging parties to be more open to accepting responsibility for their present circumstances and for how to improve them.

As important, we came to understand that offering mediation democratized our institution in potentially profound ways because mediation permitted, in fact actively encouraged, the parties to decide for themselves which values were most important to them, then to use ADR to pursue those values. Because of essential characteristics of mediation as a process, by sponsoring its use the court was acknowledging (albeit unselfconsciously, at first) that values other than efficiency and rationality (the values that dominated the established litigation system and our other processes) could be more important to some parties and that it was legitimate for such parties to attempt to pursue those "alternative" values in the public system of justice.

Another way to conceptualize this evolution exposes additional dimensions of the institutional changes that have accompanied the development of the court's ADR program. When we first began developing our ADR programs more than two decades ago we were working in a context dominated by traditional adversarial litigation. Unlike mediation, the primary focus of most traditional adversarial litigation is backwards looking, meaning that the primary undertaking is to determine what the historical facts were and then to apply the law correctly to those facts. The first ADR processes we established, non-binding arbitration and ENE, were developed within the context of the traditional litigation system. They offered no challenge to the values that informed that system. They were designed, essentially, to improve that system by giving parties tools for dealing with some of the problems that were infecting it, especially transaction costs, delays, and the inefficiencies and unfairness that could be occasioned by insufficient adversarial restraint.

Then about a decade ago we began laying the groundwork for pathways that parties could use, if they chose, to travel outside the traditional litigation mold. The mediation processes we began offering could be focused primarily on the future, rather than the past, and could emphasize different values and

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call for different kinds of behaviors than traditional adversarial litigation. In these new processes, feelings could be as important as facts—and the making of judgments about events and people could be actively discouraged so that the participants could pursue more effectively the larger goals of repair of persons and relationships.

So one way to conceptualize our court now is as an institution that offers three kinds of processes (1) traditional litigation, (2) ADR processes (arbitration, ENE, and some versions of evaluative mediation) that proceed within the context of traditional litigation but help parties combat some of its limitations and problems, and (3) ADR processes (variations of facilitative mediation) that enable and encourage parties to pursue goals and to behave in ways that are quite different from those associated with traditional adversarial litigation.

Thus, our ADR programs reflect an appreciation of our mission as a court that is more complex than it was twenty years ago. This institutional openness serves very important ends. It communicates to people that the court defines itself fundamentally as a service institution and that its duty to serve runs primarily to the people. This message means, among other things, that the values and interests that ought to play a primary role in defining court policy and programs are the values and interests of the people. Those values and interests span a very wide range, only some of which are best served by traditional litigation. This message also means that when alternative processes clearly would better serve values of paramount importance to litigants, the court has a responsibility to offer those process alternatives. The court also has a duty to offer meaningful dispute resolution services to the whole range of litigants and cases, not just to the parties who can afford or the cases that can carry the economic burdens of full traditional litigation.

By offering services in this spirit, the court reaches out to the people and tries to meet them on their terms. When the people understand the court as doing that, they feel respect and gratitude. With such feelings comes a richer, more robust sense of connection to all of our democratic institutions.

I do not want to overstate the changes that have occurred in my court over the past two decades. The institution has not undergone a radical systemic transformation. The court does not commit equal resources to the provision of each of the three different kinds of services. Rather, the primary focus of the court is and quite likely will remain on traditional litigation and the processes that supplement and improve it, rather than on processes that are fundamentally different from it. The primary providers of ADR services that are most different from litigation will remain in the private sector, but the fact that courts like mine are prepared to recognize and to offer some fundamentally different kinds of services is quite significant. It is significant

because of the extension of our judicial institutions that this development reflects. It is also significant as evidence of the social reach and the moral power of the ADR movement.

The social reach of the ADR movement is reflected in another major gain since the Pound Conference—the widespread formal recognition and broad acceptance of ADR programs in state and federal courts. For example, every court of appeals in the federal system, save one (the Court of Appeals for the Federal Circuit), has an ADR or assisted settlement program.<sup>49</sup>

At the federal district court level, the most significant recent development was the adoption by Congress of the Alternative Dispute Resolution Act of 1998, which requires every federal trial court to “devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district.”<sup>50</sup> With some caveats, the Act imposes a duty on each federal trial court to require civil litigants to consider using ADR and to provide those litigants with at least one ADR process.<sup>51</sup> The statute also empowers the courts to make participation in either mediation or ENE mandatory.<sup>52</sup> For reasons I will describe in the next section, in the near term the Act may not have a dramatic impact on the accessibility of ADR services, but its philosophic significance is considerable. Through this statute, the legislative and the executive branches of the federal government for the first time have formally insisted, as a matter of national policy, that ADR be made an integral part of the federal system of judicial administration.

One additional source of evidence about the reach of ADR in the federal court system warrants mention here. At the Ninth Circuit’s annual conference of judges and lawyers in August of 2000, a poll was taken to explore views about ADR.<sup>53</sup> There were about 220 respondents from all over the western United States, divided about evenly between judges and lawyers.<sup>54</sup> The responses to three questions are particularly instructive. When asked whether “ADR is likely to yield sufficient value to justify its use in most civil cases,” 90% of the federal judges and 95% of the lawyers said yes.<sup>55</sup> When asked whether the court has “any responsibility to determine whether represented

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<sup>49</sup> See Kathleen M. Scanlon, *A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate “Path”*, 17 OHIO ST. J. ON DISP. RESOL. 379, 385 (2002).

<sup>50</sup> Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (2002).

<sup>51</sup> 28 U.S.C. § 652(a).

<sup>52</sup> 28 U.S.C. § 652(a).

<sup>53</sup> The questions and the responses are on file with the author and with the Office of the Circuit Executive of the Ninth Circuit in San Francisco, CA.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

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clients have had a meaningful opportunity to participate in decisions about whether to try using ADR,” 86% of the judges and 75% of the lawyers said yes.<sup>56</sup> Finally, 72% of the judges and 86% of the lawyers endorsed the view that there are circumstances in which it is “appropriate for a judge to order the parties to participate in a non-binding ADR process (other than a settlement conference) over a party’s objection.”<sup>57</sup> This data evidences a remarkable level of support for ADR among federal judges and lawyers in the fifteen districts in the Ninth Circuit.

There has been even more extensive development of ADR in state courts. It appears that there is at least some recognition of a role for ADR in most state court systems—and some states have well-developed programs that reach significant percentages of civil cases in a wide range of subject matter categories. Florida’s program, for example, delivers service to some 125,000 cases annually<sup>58</sup> in such diverse arenas as family law, general civil cases, dependency cases, juvenile cases, small claims cases, in county courts of lesser jurisdictional reach, and in the courts of appeal. Florida also has developed an extensive “Citizen Dispute Settlement” program that reaches into communities across the state and is open to a wide range of disputes and neighborhood frictions.<sup>59</sup> Another indicator of the spread of ADR is the fact that by 1997 “every state in the Union, with the exception of Delaware, ha[d] adopted a mediation privilege of one sort or another.”<sup>60</sup>

These developments in federal and state courts have been paralleled by rapid growth in interest among lawyers and other professionals in serving as ADR neutrals (full or part-time) and in the spread of mediation skills and attitudes into the community of litigators. Perhaps the most graphic evidence of these gains is the growth and size of the ABA’s Section of Dispute Resolution, whose annual conference now attracts a higher percentage of section members than any other section of the ABA.<sup>61</sup> The dramatic

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> This estimate was provided to the author by Sharon Press, Director of the Dispute Resolution Center in the Office of the State Courts Administrator, Tallahassee, Florida. For a compendium of information about seventy-five dispute resolution programs (many court-connected, some private) in California, see THE CALIFORNIA DISPUTE RESOLUTION INST., SURVEY OF CALIFORNIA ADR PROGRAMS (2001).

<sup>59</sup> See KIMBERLY ANN KOSCH, DISPUTE RESOLUTION CENTER, 2001 FLORIDA MEDIATION & ARBITRATION PROGRAMS; A COMPENDIUM (14th ed. 2001).

<sup>60</sup> *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (citing Pamela A. Kenra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 757.)

<sup>61</sup> *Spring Conference Provides Antidote to Potomac Fever*, JUST RESOLUTIONS

expansion over the past decade of the “neutraling” segment of the professional population is a product not only of increased demand for ADR, but also of the philosophic and psychological rewards that often accompany service in a role whose purpose is to be constructive, whose mandate is to be ethical, and whose marching orders are to encourage positive, respect-based human interactions. Many lawyers have reported to us how energized and elevated they feel when they switch roles from advocate to neutral and when the only demand of their “clients” is that they try to help make things better.

These kinds of rewards help explain the one additional “gain” that I would like to highlight. Over the course of my court’s efforts to develop our ADR program, we have made a moving discovery about the depth of the reservoir of pro bono resources in the legal community. In our ambitious program, lawyers who serve as volunteers, without pay, provide almost all of the neutral services. The pool of lawyers we have trained for this work is more than 500 strong, and we have many more applicants who would like to undertake our training and serve as neutrals than we can accommodate. This outpouring of public service beggars some common cynical notions about the profession and may be one of the most significant but overlooked positives to accompany the ADR movement.

#### VI. WHAT HAS NOT BEEN GAINED, AND WHAT REMAINS TO BE DONE?

My charge here is not to cheerlead, but to assess the current state of court ADR as comprehensively and realistically as I can. To be true to that charge, I must acknowledge that despite the considerable progress and the many achievements described in the preceding sections, we have not realized many ambitions. A great deal remains to be done. There are many challenges and dangers on the road ahead for court ADR, and we disserve ourselves and the values we hold dear if we do not try to identify them accurately and face them squarely.

In this spirit, we must begin by acknowledging serious shortfalls in the reach of court ADR programs in most jurisdictions. My guess is that appreciably less than half of the civil cases filed in this country have real access to court-sponsored ADR services. In many courts, there are entire categories of civil matters that receive no ADR services at all. Perhaps the most disturbing and challenging example is pro se cases.

Moreover, in many jurisdictions no parties can secure ADR services unless they pay full market rates for a private neutral whose connection with the court often is tenuous, at best (and over whom the court, realistically,

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(ABA SECTION OF DISPUTE RESOLUTION), May 2001, at 44.

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exercises virtually no “quality control”). The requirement of paying the neutral a substantial fee serves as a real barrier for some litigants and triggers difficult policy questions about why the courts offer litigation services for free, but ADR services only at a substantial price.

We also must acknowledge that in at least some court ADR programs there are large gaps between appearances and reality. Some programs appear to reach large numbers of cases but in fact deliver service to small numbers of litigants. This is especially likely to be true in courts where referral to ADR is contingent on initiatives taken by individual judges.

There also can be large gaps between the ADR processes described in a court’s rules and publications and the ADR processes that parties actually experience in their cases. We have learned, on occasion painfully, that some neutrals we have trained sometimes deviate substantially from our process protocols without our foreknowledge or permission.<sup>62</sup> We also have discovered occasions in which neutrals have misunderstood, sometimes fundamentally, the role they were to play or the specific characteristics of the process they were to host. We work hard to try to control what is being done by our neutrals under the auspices of our program, but we need to do more. We also worry about what happens in programs where the courts do less. Because of serious shortfalls in means to assure quality control in many programs there likely is considerable variability in the quality of the neutral services received in different cases.

There also is a distressing level of unevenness in ADR offerings between different jurisdictions. There are great differences in the provision of ADR services, for example, between the four federal district courts in California. Litigants whose cases are venued in the Northern District have ready access to (in fact are pressed to use) a range of ADR options and free services, while litigants whose cases are venued in the other three federal courts in California confront a very sparse ADR landscape.

Another example of considerable unevenness between courts in provision of ADR services becomes apparent when we compare federal courts of appeals with federal trial courts. As Robert Rack has pointed out, the courts of appeals in the federal system receive considerable funding for staff neutrals and staff neutrals provide virtually all of the ADR services in these courts.<sup>63</sup> But there is virtually no funding for staff neutrals at the district court level—where the vast majority of ADR services are provided by private lawyers who either are compensated by the parties or serve pro bono.<sup>64</sup> As Mr. Rack also points out, the formulas used to determine levels of support for clerk’s office staff to administer ADR programs in the district

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<sup>62</sup> See Rosenberg & Folberg, *supra* note 19, at 1523–29.

<sup>63</sup> Rack, *supra* note 45, at 612–13.

<sup>64</sup> *Id.*

courts effectively preclude hiring of staff neutrals.<sup>65</sup>

In combination, the facts of ADR court life that are described in the preceding paragraphs mean that our judicial system, viewed as a whole, falls far short of providing parties with equality of access to ADR services. In sum, there are great inequalities both in access to and in the character of court ADR products.

We also have fallen far short of making real Professor Sander's vision of the multi-door courthouse.<sup>66</sup> Many (perhaps most) court programs offer essentially only one process—a malleable, hybrid form of mediation. Non-binding, court-connected arbitration is in deep trouble—threatened with extinction by under-use and under-appreciation—despite the fact that it can offer a uniquely valuable service to litigants in at least one universe of cases.<sup>67</sup> Non-binding court sponsored arbitration also can be the most attractive and suitable form of ADR for individual parties who have an emotional or philosophic need for something like a day in court, who need to

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<sup>65</sup> *Id.* The way the formulas play out, the district courts simply receive too little money to hire professionals to serve as the neutrals in their ADR programs.

Two of the four district courts that receive some funding for staff neutrals (Western Missouri and Northern California) inherited budget leverage from the Civil Justice Reform Act of 1990. Those two districts and one other, the Northern District of West Virginia, were specifically mandated in the statute to engage in ADR demonstration projects. 28 U.S.C. § 471 (2000) (Demonstration Program); *see also* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 104, 104 Stat. 5090 (amended by Pub. L. No. 104-33, § 1, 109 Stat 292; Pub. L. No. 104-317, Title VI, § 608(9), 110 Stat. 3860 (1996)). Because that statute self-destructed (by pre-set sunset provision) in late 1997, it can no longer serve as a source of funding leverage for any courts. Moreover, in Northern California professionals on the court's staff perform only a very small percentage of the neutral services; private lawyers who have been trained in ADR roles by the court perform the vast majority of those services pro bono. Of the two other district courts that receive some funding for staff neutrals, one, the District of Columbia, essentially borrows financial support from funds formally dedicated to the program for the Court of Appeals. The district court in the District of Columbia also relies heavily on service by neutrals from the private sector—so of all the neutral services delivered through that federal trial court's ADR program, staff neutrals provide only a very modest percentage.

<sup>66</sup> Sander, *supra* note 1, at 130-31.

<sup>67</sup> Non-binding arbitration can be the most appropriate and useful ADR process in cases of relatively modest size and complexity that turn in substantial measure on the persuasive power of mutually exclusive testimony from a modest number of percipient witnesses. In an arbitration under the rules applicable in the Northern District of California, for example, testimony is taken under oath, can be recorded, and is subject to cross-examination. When recorded, such testimony could be used for purposes of impeachment in a subsequent trial de novo. All these circumstances, which are unique among ADR processes to arbitration, can discipline the way witnesses present information about critical factual matters to an extent that has no parallel in mediation, ENE, or settlement conferences.

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tell their story to a neutral who will pass judgment, or who need to be able to see the two competing stories (and the evidence supporting them) laid out side by side in a controlled setting—a setting that permits a fair comparison and provides a reasonable basis for an advisory judgment by an experienced and impartial neutral. These potential benefits seem largely lost on many lawyers and clients, who perhaps confuse non-binding court-sponsored arbitration with binding private arbitration, which many lawyers and clients apparently view as being accompanied by a great deal of unattractive baggage.

What are the primary sources of the shortfalls and unevenness I have just described? Without purporting to rank them in order of real world importance, the following should be included on what undoubtedly would be a longer (if comprehensive) list.

First, there are significant loopholes or limitations in some statutory or rule-based frameworks for court-connected ADR programs. The example I know best is the Alternative Dispute Resolution Act of 1998.<sup>68</sup> While appearing to mandate significant action, this statute offers federal district courts immense flexibility in determining what kind of ADR program to adopt and how extensive its reach will be.<sup>69</sup> As significant, the Act neither authorizes nor provides any funding, neither fixes nor suggests any deadlines for implementation, and neither offers incentives to comply nor threatens sanctions for non-compliance.<sup>70</sup>

The hardly surprising upshot is that there has been a wide range of responses to the Act among district courts. Some courts have done literally or essentially nothing,<sup>71</sup> some courts have “outsourced” virtually their entire program, some courts have taken the position that they comply with the Act simply by making their magistrate judges available to host settlement conferences on request (at least when their other duties leave the magistrate judges with some time for this kind of work),<sup>72</sup> while other courts have

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<sup>68</sup> See 28 U.S.C. § 652(b) (permitting courts to exempt from their ADR programs entire categories of cases); 28 U.S.C. § 652(a) (requiring courts to “provide” litigants with at least one ADR process [except in exempted classes of cases], but saying nothing about what “providing” means and offering no funds for this purpose).

<sup>69</sup> *Id.* Some judges have taken the view that their court “provides” ADR services within the meaning of this statute if it makes litigants aware of private providers and authorizes litigants to make arrangements to retain private neutrals.

<sup>70</sup> In some of these respects, the Civil Justice Reform Act of 1990 was appreciably more likely to cause federal courts to undertake significant self-examination and reform activity. The CJRA contained some very specific directives, imposed deadlines, provided some monetary resources and incentives, and imposed study and reporting requirements. See former 28 U.S.C. § 482(c); 28 U.S.C. § 471 notes (2000).

<sup>71</sup> In *re Atl. Pipe Co.*, 304 F.3d 135 (1st Cir. 2002).

<sup>72</sup> It is not at all clear why Congress would have adopted this legislation if it thought

designed and implemented significant new ADR programs.

A second source of the shortfalls and unevenness in court ADR programs is often woefully inadequate funding—a fact that forces many courts to run ADR programs on limited and strained budgets. That fact, in turn, creates temptations to cut administrative corners and sometimes to take great risks with quality control in an attempt to deliver service to a meaningful percentage of the cases that might benefit from ADR. Over time, taking such risks could jeopardize public confidence not only in ADR, but also in the courts themselves.

It is not enough, however, to decry such limitations in statutory frameworks and in funding. Instead, we must try to identify the sources of these circumstances. What are the underlying forces that restrain the development of support for court ADR? Pressing for answers to these questions both exposes additional limits on what has been gained and helps us identify perils on the road ahead.

#### VII. WHAT ARE THE UNDERLYING SOURCES OF RESISTANCE TO EXPANDING COURT ADR AND OF PERILS ON THE ROAD AHEAD?

If ADR is a “movement,” its penetration of our legal and political culture remains quite uneven and, at least in some jurisdictions, fragile. Many still remain unconverted. Why? We describe some of the reasons in the paragraphs that follow.

One is the fact that there is a tone of “movement” about ADR that is off-putting to some. The “movement” is accompanied in some quarters by an air of radicalism in spirit and of ambition in claims that can inspire skepticism, distrust, disrespect, even fear—especially among heavily rationalistic and sometimes cynical judges, lawyers, and institutional litigants. The suggestion that mediation could change human nature or work a fundamental re-ordering of the structure and character of our society strikes some important players as naive in the extreme—or conjures images of left-wing political experiments whose stock in the world community has taken a vigorous beating in the last two decades. A related problem is the fact that claims for ADR by the converted, especially for mediation, have been so eclectic and sometimes inconsistent.

These sources of skepticism have been reinforced by the failure of empirical research to “prove” that ADR delivers many of the benefits its proponents have promised.<sup>73</sup> Empirical support, especially for some of the

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that courts could comply simply by informing parties that they could ask for a settlement conference with a magistrate judge and would get one if the magistrate judges had time.

<sup>73</sup> The most famous example of a major study failing to generate empirical proof that court ADR programs save time or money, in the aggregate, is RAND’s KAKALIK ET

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least restrained early claims about the potential of ADR, simply has not been forthcoming. Much more work in this arena of scholarship needs to be done, but this kind of work is very difficult, is constrained by ethical and political considerations,<sup>74</sup> and is very expensive. Therefore, at least in the near term, we cannot expect to be rescued, or buried, by definitive empirical studies.

Perhaps as important, there have been shortfalls both in consensus and in sophistication about what criteria to use to measure the value of ADR. There are failures in some quarters (both among supporters and among skeptics) to appreciate the full range of contributions to the health of our society that court ADR programs can make.

Against this backdrop, we can look more specifically at where some of the primary perils lurk on the road ahead for court ADR. Peril number one, if not neutralized, could be the source of many other perils. It is, ironically, a process peril. It would be rooted in a failure to recognize, squarely, that we have many constituencies. But it is not enough just to recognize our important constituencies. Serious perils could arise from failures in how we respond to that recognition. With respect to any given constituent group, we might fail to communicate that acknowledgment, or fail to communicate it with sufficient perceived respect. Or we might fail to listen actively and to respond appropriately to the group, or fail to make appropriate adjustments to address the group's concerns. If ADR is to be protected and prosper, we must really listen and it must be clear to our constituencies that we are listening and responding. In short, we must practice in our policy and political lives what we preach about how to serve as neutrals in individual cases.

Having recognized this potential source of danger, I would like to organize the next part of my discussion of the perils that court ADR faces by focusing, *seriatim*, on some of our key constituencies. Of course, our single most important constituency is the people—the parties who seek to use the system of justice. Concern about our relationship with that constituency should dominate, as much of this essay suggests, our program design decisions and how we deliver our services. Having acknowledged that fundamental fact, I will consider in the sections that follow possible sources of peril for court ADR programs that derive from our relationships with (1) legislators, (2) judges and judicial administrators who influence court policy and court program funding, (3) practicing lawyers, and (4) what I will call (with apologies to other disciplines and entities) “the Fourth Estate,”

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AL., *supra* note 13.

<sup>74</sup> There are political or policy barriers, for example, to conducting “controlled” experiments with real cases and real litigants—especially in a system where the people look to the courts to protect or secure important rights. *See, e.g.*, FEDERAL JUDICIAL CENTER, EXPERIMENTATION IN THE LAW; REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW 10 (1981).

meaning full-time or part-time professional neutrals and other people who are interested in becoming professional neutrals.

After considering our relationship with these constituencies, I will close by identifying some internal sources of peril—matters about ourselves and our program design decisions that could become sources of danger for court ADR.

#### *A. Sources of Peril in Our Relationships with Legislatures*

We will begin by focusing on sources of peril in our relationships with legislatures. Legislatures are a critical constituency for court ADR programs for many reasons. They can provide or withhold sources of authority for court programs. They can provide or withhold the funding without which court programs could not function, and they can provide or withhold critical protections to parties, neutrals and processes (*e.g.*, in the form of privileges for mediation communications and immunities for neutrals) that are considered essential to the viability of virtually all kinds of ADR.

Among the possible perils in our relationship with legislatures, one has emerged recently with particular vigor in California, where a significant number of lawmakers have become very concerned about perceived abuses by corporate America of private ADR. One target of legislative concern has been binding private arbitration, which is viewed in some quarters as a tool that some corporations and health maintenance organizations are trying to use to deprive claimants of their rights under the Seventh Amendment. There also are suspicions that arbitration is used to hide from the public not only dangerous products, conditions, or substandard professional services, but also possible corruption in the private neutral community. This corruption can take the form of bias in favor of repeat corporate players who can be sources of a flow of business to the ADR providers.

There is a risk that perceived abuses of this kind in the private sector would unfairly contaminate the standing of all ADR in the minds of influential lawmakers and the public. The risk of contamination is particularly great in courts that “outsource” some or all of the ADR services they sanction or that fail to adopt stringent conflict of interest requirements and quality control mechanisms. The more a court depends on professional service providers from the private sector, the greater the risk that legislators will paint court and corporate ADR programs with the same broad brush of suspicion.

To reduce the risk that legislative minds will blur ethically unassailable court ADR programs with perceived corporate abuses of ADR processes it is imperative that the court ADR community take great care to distance itself in the minds of legislators and the public from controversial private ADR

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providers or schemes. We must be especially careful to make it clear that ADR in court programs is not binding. We also must publicize the measures that are built into court programs to assure the impartiality of neutrals, to empower litigants to force the recusal of a neutral about whom they have real concerns, and to protect litigants from abuses of ADR processes by opponents that are more powerful.

In addition, we must be careful not to make program design decisions that invite a mistaken inference that institutionally selfish motives animate court ADR programs. In particular, we must resist pressures to attach penalties to parties who proceed to trial after participating in an ADR process. We must also be careful not to force only unpopular or nettlesome classes of cases to participate in ADR programs. It is equally important to refrain from sponsoring ADR processes in which the goal of securing settlements is permitted to smother ethical principles or to displace the value of party self-determination.

Ironically, a second peril in our relationships with legislatures is animated by policy concerns that cut in the opposite direction. Legislatures can generate program-distorting pressures by insisting on using only efficiency criteria to assess the value of court ADR. Of course, pressure or temptation to use only efficiency values to assess ADR programs also can come from other quarters, including not only judges, but also administrators within the judicial branch who are positioned to influence funding for court programs. In fact, the danger posed by this limited vision of value may be greatest when it infects the judges who are most directly able to influence court ADR policy and practices. But we focus here primarily on legislatures because they usually control funding for court programs and because legislators feel so much pressure to justify how they spend tax dollars by simplistic cost-benefit accountings.

Missing the main policy point, legislators, judges or administrators whose interest in ADR is dominated by efficiency values are likely to focus on only two criteria when assessing an ADR program's "success" (1) whether it increases the rate or (2) advances the timing of dispositions by settlement. Permitting these two criteria to dominate assessments of success could adversely affect the character and quality of court ADR programs in many different ways. Focusing on these efficiency criteria could result in imposing role-distorting pressures on neutrals. Most obviously, it could cause neutrals to feel pressure to push for settlements and to sometimes cut big ethical corners towards that goal. In ironic contradiction of the core philosophy of mediation, neutrals could be tempted to elevate ends over means by, among other things, covering up significant analytical or informational shortfalls, powering through the parties' emotional or philosophic reluctances to settle, or choosing to ignore serious misconduct

during the ADR process that would undermine respect for the system of justice.<sup>75</sup>

Permitting efficiency values to dominate assessments of court ADR programs also could result in neutrals feeling pressure to compromise promises of confidentiality by initiating unauthorized communications with the assigned judge or by responding to solicitations by the judge for information that the ADR rules put off-limits. For example, a neutral who feels an overriding obligation to get a case settled might be tempted to suggest to the assigned judge ways she might manipulate procedure or substance to increase pressure on the parties to settle. The neutral might suggest to the judge that she could make settlement more likely by manipulating the timing of rulings on motions, access to dates for hearings or trials, or by including asides or adjectival editorials in rulings or in comments from the bench.

Preoccupation with using ADR to reduce caseloads can create a host of additional perils. Courts so preoccupied could well be tempted to force more cases or parties to use ADR than might be justified by the contribution ADR is likely to make to the parties' interests (in the individual case). Such courts also might be prepared to sacrifice quality control in ADR services for the sake of increasing the quantity of cases referred, thus increasing the risk that neutrals will not follow prescribed protocols or will perform poorly or unethically. On the other hand, courts whose interest in ADR is dominated by a desire to reduce trial rates might elect to limit access to ADR services to categories of cases the court believes are most likely to settle through ADR processes, thus threatening equality of access across the docket to ADR services.

Preoccupation with generating settlements also might tempt courts to permit only the most assertive lawyers or process professionals to serve as neutrals in their ADR program, or only those who appear to have the most clout with certain types of parties or lawyers. This kind of restriction, whether *de facto* or by formal policy, would limit access to the pool of court neutrals and limit the kinds of ADR processes that are available through the court program.

This last kind of limitation could be especially harmful. Courts that

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<sup>75</sup> Examples of misconduct or ethical dilemmas that a neutral might encounter, but ignore due to pressure to achieve a settlement include (1) learning in private caucus that a lawyer or party is intentionally hiding key evidence, (2) seeing a lawyer manipulate his own client into accepting terms that are good for the lawyer but obviously not in the client's best interests, (3) seeing a stronger party manipulate a weaker party into accepting settlement terms that are transparently unfair (*i.e.*, that clearly fall far short of the weaker party's entitlements under the law or that infringe rights of the weaker party that the law would protect), or (4) seeing parties and counsel collude on settlement terms that are illegal (*e.g.*, in violation of anti-trust laws).

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permit efficiency values to drive them into offering only one kind of ADR process, with that one being assertively evaluative, not only lose or reduce their capacity to be responsive to a range of case-specific circumstances and a variety of party interests and needs (both practical and psychological), they also increase the risk of party disaffection. The more assertively evaluative the mediation process, the more likely parties are to feel that they are being pressured to settle. Roselle Wissler's recently published study of mediations in personal injury cases in Ohio reports that while parties were more likely than not to accept and appreciate assessments of the merits from the mediator, they also were more likely to feel that they were being pressured to settle and that the process was unfair when the mediator recommended a particular settlement.<sup>76</sup>

Courts that compel party participation in ADR need to be especially sensitive to these risks. When it is an initiative by the court that lands a case in an ADR process there is a greater risk that parties will feel that they are under some kind of duty (to the court) to settle their case. That feeling, in turn, can encourage resentment—and an inference that the court's real purpose in making the referral to ADR was not to provide the parties with a service, but to get rid of them. Inviting inferences that the courts are institutionally selfish is not the preferred course.

Moreover, a court risks corrupting both evaluation and mediation when it offers only one ADR process but then expects its neutrals to adjust or manipulate the content or character of that process as they believe the circumstances of individual cases warrant. When a neutral offers an evaluation after caucusing separately with each side, the parties cannot know everything that affected the formation of that evaluation. As a result, they may have less confidence in the objectivity and reliability of the neutral's assessment. When parties believe that the overriding purpose of the neutral's evaluation is to lubricate the settlement process, they may fear either that the evaluation is based simply on the neutral's guess about what settlement terms might be acceptable (her guess about what might work) or that the evaluation is influenced by factors that have nothing to do with the merits of the parties' positions in the case (e.g., some sympathy for a party's predicament or feelings).

The flip side of this concern is that a court that offers only one ADR

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<sup>76</sup> Wissler, *supra* note 14, at 684. Ms. Wissler found no correlation, however, between a mediator offering an assessment of the merits of the case and the likelihood that parties felt pressured to settle. *Id.* Surprisingly, she found a positive correlation between mediators offering substantive assessments of the merits of the case or parties' positions and their feeling that the process was fair. *Id.* Curiously, her data also suggest that "[i]f the mediators kept their views of the case silent, parties felt *less* pressured by the mediators to settle than if the mediators disclosed their views." *Id.* at 684–85.

process risks converting mediation into something that is formless, unpredictable and difficult to prepare for. Such a situation reduces mediation's productivity and increases the risk that parties and lawyers will feel that the process is unfair—because they are surprised by some turn it takes or some element it includes or because they feel unable to prepare adequately for something whose shape and content are so ill-defined and so mobile.

For all the reasons set forth in the preceding paragraphs, those who would insist on using only efficiency criteria to assess the value of ADR programs jeopardize the courts' most precious and only necessary assets: public confidence in the integrity of the processes the courts sponsor and public faith in the motives that underlie the courts' actions. We must take great care not to make program design decisions that invite parties to infer that the courts care less about doing justice and offering valued service than about looking out for themselves as institutions (*e.g.*, by reducing their workload, or off-loading kinds of cases that are especially taxing or emotionally difficult or that are deemed "unimportant").

#### *B. Sources of Peril From Our Relationship with Judges*

Now I would like to focus on perils for court ADR that may arise more directly from the constituency that consists of judges. Before we can interact constructively with this extremely important constituency, we must try to understand sources of judicial ambivalence about ADR, or even hostility toward it. I will explore some of those sources in the paragraphs that follow.

Before turning to that task, however, it is important to emphasize that there is no one judicial attitude toward court or private ADR. Rather, there are many different attitudes, sometimes even within an individual judge, and those attitudes are not set in concrete. I do not know which concerns about ADR are most widespread or of the greatest moment (to judges generally or as sources of peril to court ADR). Nor do I mean to suggest that any one judge shares all of the concerns I will describe. In fact, some of these concerns are mutually exclusive and have roots in diametrically opposed political instincts. But each of the views I will describe is sufficiently likely to occur to at least some judges that we must acknowledge them squarely, take them seriously, and consider open-mindedly their validity and their reach. We must also make changes in our programs where necessary and reassure our critics where we can.

One additional prefatory observation is in order: we need to bear in mind that there is a wide range of sophistication among judges in understanding of the kinds of questions and policy issues about court ADR that we are addressing. We must be careful not to assume too much when we discuss

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these matters with members of the third branch.

The first of the concerns that can fuel judicial inhospitality to court ADR is fear that ADR threatens the vitality of the jury system as a critical tool of democracy—as an essential weapon to discourage and to discipline abuse of public or private power. There are judges who believe passionately that one of the most powerful and essential deterrents to misbehavior in our society is fear of the jury trial, the public exposure and humiliation it can generate, the great transaction costs it can impose, and the huge damage awards to which it can lead. Some judges fear that some litigants try to use ADR to keep their misconduct out of the public eye, or to conceal dangerous products or conditions from their victims. Other judges are afraid that ADR may be used to reduce the opportunities the courts and the public have to develop new legal norms or to fashion measures to meet threats to public health and safety, to our economic health, or to individual rights. Judges who subscribe to such views are likely to resist any change in the system of justice that appears to threaten the frequency, visibility, or accessibility of jury trials.

The perils with roots in these concerns are greater now than they might have been at other times because, in the federal courts at least, there is relatively widespread awareness among policymakers that the number of jury trials has been falling, as has the percentage of cases terminated by trial.<sup>77</sup> Statistics reported by the Administrative Office of the Federal Courts indicate that while 4.3% of all civil case terminations in federal district courts occurred during or after trial in 1990, that figure had fallen to 2.2% by the year 2000.<sup>78</sup> Data from the same source show that the number of trials conducted in federal courts was 9,263 in 1990, but had decreased to 5,780 in 2000.<sup>79</sup>

Some judges and legislators seem inclined to blame ADR for these declines and to pit ADR against the Seventh Amendment.<sup>80</sup> It is not at all

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<sup>77</sup> See Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (2002).

<sup>78</sup> L. RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 153 app. tbl. C-4 (1990); L. RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS; 2000 ANNUAL REPORT OF THE DIRECTOR 159 app. tbl. C-4 (2000).

<sup>79</sup> See sources cited *supra* note 78. The reliability of this data is subject to some question. The sources of the data are hundreds of different clerks in different courts—not all of whom work with the same level of competence or with the same reporting conventions. Some clerks or courts, for example, may have reported evidentiary hearings as “trials,” while others have not.

Interestingly, the rate of decline in jury trials over the decade of the 1990s was appreciably less (21%) than the rate of decline in trials to judges (55%). *Id.*

<sup>80</sup> See, e.g., William R. Wilson, Jr., *In Opposition to Statutory or Local Rule Amendments to the Seventh Amendment*, i.e., *In Opposition to Mandatory Arbitration In*

clear, however, that court sponsored ADR programs can be blamed, or credited, in any appreciable measure, for the reported changes in trial rates. To some extent, these declines probably are attributable to changes in the profile of cases filed in federal courts over this period. During the 1990s there was substantial growth in categories of cases that rarely proceed to trial: prisoner petitions, reviews of determinations by the Social Security Administration, and actions by the federal government to recover defaulted loans. In 1990, these categories of cases accounted for 28% of the federal civil docket (nationally), but by the year 2000 that figure had increased to 38%.<sup>81</sup> While these changes probably do not account for the entire decline in the incidence of trials, that decline would appear much less dramatic if the changes in case load profile were factored in.

Another potentially significant source of downward pressure on trial rates is the increase in transaction costs that appears to have further infected litigation over the past decade or so. Hourly rates charged by attorneys have increased dramatically, at least in urban areas. It is fair to assume that fees charged by other professionals who often are used in connection with trials, such as physicians, scientists, accountants, jury consultants, and other experts, also have increased. And a trial is likely to be the single most expensive event, by far, in most civil litigation. Today's clients who are cost conscious are more likely to be deterred from going to trial by this financial consideration than they would have been a decade ago. I would guess that the real underlying cause of the perceived trial rate "problem" probably is the expense of litigation—and that what ADR is doing is providing parties who would not go to trial anyway (for financial or other reasons) with ways to search for acceptable terms of settlement that are more satisfying and constructive than the "old" way.<sup>82</sup>

In addition to these considerations, we need to remind the judges and policymakers who are concerned about the declining trial rate that no study has generated solid empirical support for the suggestion that court ADR

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*Any Case*, FJC DIRECTIONS, Dec. 1994, at 15, 17; G. Thomas Eisele, *Differing Visions – Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1973 (1993); see also Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 952–55 (1991).

<sup>81</sup> Compare ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 78, at 141–42 app. tbl. C-3, with JUDICIAL BUSINESS OF THE UNITED STATES COURTS; 2000 ANNUAL REPORT OF THE DIRECTOR, *supra* note 78, at 141–42 app. tbl. C-3.

<sup>82</sup> See Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation through Research*, 2002 J. DISP. RESOL. 131, 133 (suggesting that mediation processes can deliver value to a litigant that often is not accessible through traditional lawyer negotiated settlement processes).

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programs have caused a general decline in trial rates. The most ambitious and sophisticated effort in this arena that I know about was attempted pursuant to statutory mandate<sup>83</sup> in the mid-1990s by a group of researchers at RAND's Institute for Civil Justice. While working with limited data and trying to analyze the effects of vastly different programs, some of which underwent change during the study period, the RAND social scientists found no statistically significant evidence that, in the aggregate, participation in ADR in the six district courts produced any significant effects on time to disposition, costs, or other measures.<sup>84</sup>

Despite serious questions about how real, enduring, or significant the decline in trial rates actually has been, and the possibility that the existence of ADR programs has had little to do with any such decline, we would err seriously if we failed to acknowledge the reality and good faith of the concern about this matter. We must take special care to reassure those who are worried about the trial rate that we fully support parties' rights under the Seventh Amendment. We also must assure them that good court ADR programs and the preservation of those rights are fully compatible. We need to remind our critics that the core value that animates ADR programs is party self-determination and that that value is reflected in full respect being accorded to a party's decision that she wants to take her case to trial.

We also need to emphasize that court ADR is not intended to serve as a barrier or hurdle to trial. Rather, litigants can and should use ADR processes to make access to trial more efficient by more reliably identifying the center of the case and then focusing their discovery and motion work more productively on that center. ADR processes can also be used to make the trial process itself fairer by increasing the likelihood that all the really pertinent evidence will be presented and that the parties and the court will understand

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<sup>83</sup> The Judicial Conference of the United States selected RAND's Institute of Civil Justice to conduct the studies mandated by the Civil Justice Reform Act of 1990. 28 U.S.C. § 471 (2000), note 105(c); *see also* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105(c) 104 Stat. 5090 (1990).

<sup>84</sup> KAKALIK ET AL., *supra* note 13, at 4. This empirical analysis of the six court ADR programs, as implemented, "provided no strong statistical evidence that time to disposition . . . [was] significantly affected, either positively or negatively . . . We have no justification for a strong policy recommendation because we found no major program effects, either positive or negative." *Id.* at 34, 40-41, 48, 50. While yielding some evidence that the studied ADR programs increased the percentage of cases terminated by settlement agreement, that increase appears to have been attributable, at least in significant measure, to a decrease in the percentage of terminations by motion, and while the samples were too small to support generalization, it appeared that participation in ADR had no effect on trial rates in half of the studied districts. *Id.* at 105, 173-74, 210. There was evidence in the other half of the districts that the percentage of cases that ended up in trial was smaller in the group assigned to ADR than in the group not assigned to ADR. *Id.* at 71, 138, 243.

accurately all the applicable legal principles.

Moreover, parties can use ADR to determine more reliably whether trial is necessary to achieve their ends. Through an ADR process, they can learn more accurately what they could achieve through settlement. Thus, ADR can teach them more clearly what the alternative to trial really is. Surely providing this kind of valuable information to the people is not something to be feared or discouraged. After all, it is for the benefit of the people that the entire system of justice is supposed to operate. We live in a democracy where our institutions are supposed to be designed to deliver maximum protection to freedom and self-determination.

We shift focus here to the second concern among judges that can serve as a source of ambivalence about court ADR programs. That concern is about money, more specifically, budgets for courts. The financial resources available to the courts to perform their traditional core functions are already strained in many jurisdictions, and some judges and court administrators fear that supporting good ADR programs consumes resources that the courts simply cannot afford to divert. The assumption underlying these concerns is that there is a fixed resource base for trial courts and that diversion of any resources to ADR reduces the courts' ability to manage cases, conduct hearings on motions, and to provide trials. From these premises, some judges conclude that even though litigants may value ADR services, those services should be provided either in the private sector or by some other public body, at least until the courts' resources are substantially increased.

The fact that these kinds of worries are as perennial as the grass does not make them any less real, especially in courts heavily impacted by criminal filings. We must acknowledge resource constraints squarely and work with judges and administrators both to try to increase funding for courts and to keep the administrative costs of court ADR programs as low as meaningful quality control permits. We also should encourage additional research aimed at determining to what extent there are kinds of ADR programs that deliver net reductions in consumption of court resources by reducing inter-party frictions, demand for judicially hosted settlement conferences, hearings on motions or case management interventions, or by avoiding unnecessary trials.

A very different source of judicial skepticism about the place of ADR in courts is concern that ADR processes, especially facilitative mediation, tend to be analytically sloppy. Some judges worry that there is considerable risk that decisions made by lawyers and clients in these settings will be based on unreliable data or inaccurate legal premises, or on a blurring of thinking and emoting about matters relevant under the law and matters irrelevant under the law. They fear all of this will increase the risk that important rights will not be protected and legal norms will not be followed.

In a variation on this theme, some judicial critics of ADR fear that

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despite rhetoric about the ascendant value of purity of process, mediators in fact may elevate the importance of ends over means. Under this line of reasoning, mediators are believed to be more concerned with achieving the end of settlement than with protecting the moral and legal integrity of the negotiation process. Distressingly, it is by focusing on “their” settlement rates that many mediators measure their success and advertise their ability.<sup>85</sup> We found subtle but significant evidence of the kind of ego-blur that makes some judges anxious about how well some mediators adhere to their own avowed principles in an early version of the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases in state courts in California.<sup>86</sup> The proposed Advisory Committee Comment to a rule prohibiting promises of results in promotional materials would have read as follows: “This rule is not intended to prohibit a mediator from making statements about *his or her* overall resolution rate.”<sup>87</sup> What is both curious and troublesome about this comment is the suggestion that the resolutions reached through mediations are somehow the mediator’s (*his or her* resolution rate), rather than the parties’. This suggestion would violate what is supposed to be the central tenet of mediation—that it is the parties who decide whether to settle and on what terms. If there is a settlement, it is the parties who achieved it, not the mediator.

Mediators are understood by many judges to subscribe passionately to a value system that elevates the virtues of agreement, connection, and social peace above the virtues of protecting rights or pursuing legal entitlements, and that mediators might tend to put moral or social pressure on litigants to accept the same value system. In so doing, a mediator would subtly make parties feel morally inferior if they insisted too rigidly on their rights being honored and enforced. There may even be some fear in judicial circles that mediators, in pursuit of the values they bring to their work, have incentives to blur analysis or to exaggerate risk when clearer analysis or more accurate understanding of risk would make it more difficult to persuade a party to agree to a compromise.

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<sup>85</sup> I am not aware of ethical guidelines or rules for mediators that prohibit the inclusion of “settlement rates” in advertising or promotional materials. *See, e.g.*, CPR INSTITUTE FOR DISPUTE RESOLUTION, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, 13, § VIII (2000) (prohibiting false or misleading claims about services, but permitting inclusion of “settlement rates”).

<sup>86</sup> Cal. R. for Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, Advisory Committee Comment (effective Jan. 1, 2003) (on file with author).

<sup>87</sup> *Id.* This proposed provision was later withdrawn. Fortunately, this part of the commentary was deleted before the California Judicial Council formally adopted the new rules on April 19, 2002. The comment that was subsequently withdrawn was included in a version of the proposed rules that was circulated for public comment in the late fall of 2001.

Hopefully these kinds of fears are at least exaggerated, if not entirely misplaced. In addressing them, we should emphasize that we take considerable pains to train mediators to be sensitive about and to avoid these potential hazards. In addition, we need to teach our constituents that mediators take great pride in being true to their craft—the central credo of which is to value process purity over settlement outcome. Thus, the mediators we train focus intently on following practices that are essential to real party self-determination.

A very different kind of concern among some judges is that ADR is intended or can be used to push certain unpopular, or highly emotional and difficult, or politically “unimportant” categories of cases or litigants out of courtrooms and into a second-class system of justice. This fear may be informed by two very different kinds of suspicions. One is that judicial proponents of ADR are lazy—that they just want to reduce their workloads or the length of the lines of litigants waiting to be heard. A second suspicion, informed by deeper cynicism, is that what really animates some judicial and legislative proponents of ADR is a hidden political agenda, the ultimate goal of which is to reduce or cut off access to our public courts by the poor, the unsophisticated, the most vulnerable and victimized segments of our society. Judges with these kinds of concerns may fear that by blocking access to the courts, ADR programs would block access to the only source of public power that people who have been politically and socially marginalized in our society could use to protect themselves.

In responding to such concerns, we first must be vigilant to ensure that only respect-worthy, service-oriented purposes inform the design and administration of court ADR programs. In advocating our programs, we must avoid the temptation to appeal to the docket-reducing interests of judges, court administrators, and legislators. We must educate our constituencies to understand that neither institutional selfishness nor any political agenda may be permitted to drive court ADR programs. Instead, the purpose of our programs always must be to deliver valued service to litigants.

We also must make clear that there is nothing “second class” about court ADR programs and that litigants use ADR to improve the efficiency and fairness of the administration of justice. Also, we must teach our constituents that litigants and lawyers in overwhelming percentages do not view ADR services as imposing senseless burdens, but welcome and endorse such services because of the special benefits they can confer and because of the opportunities they create to pursue interests that litigants themselves feel are important.

An independent judicial concern at a very different level is that ADR threatens delay or disruption of traditional litigation—that it jeopardizes timeliness of dispositions by eroding the pressure that derives from early and

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firm trial dates. While we should acknowledge that poorly designed ADR systems or undisciplined referrals to ADR in individual cases could have such effects, we also must reassure judges that these are readily avoidable problems and that there is data showing that well run programs can reduce aggregate times to disposition. Referral orders always should fix deadlines for completing ADR processes and set dates for follow-up case management events. Such orders can impose tight time frames and can require the parties, while they are committing some resources to mediation, to push forward simultaneously with standard case development work, such as discovery and motions.

For judges who remain concerned about the effect of a court ADR program on aggregate (court-wide) times to disposition we should point to the control-group study of the early assessment program in the federal district court for the western district of Missouri.<sup>88</sup> That careful study, conducted by social scientists at the Federal Judicial Center, found that cases that were “required to participate in the program have a median age at termination of 7.0 months, while cases [in the control group] not permitted to participate have a median age at termination of 9.7 months”—a 28% improvement attributed entirely to that particular ADR program.<sup>89</sup> It also is noteworthy that the RAND study of six very different (and still evolving) ADR programs in the early 1990s found that, in the aggregate, the ADR programs had no negative effect on time to disposition.<sup>90</sup>

There is one additional source of judicial ambivalence about (or, sometimes, hostility toward) court ADR programs that I would like to describe. The act of articulating these sentiments risks doing them injustice by over-simplifying and exaggerating them or by abstracting them from the complex emotional and philosophic context in which they exist, a context that can color their content and reduce their intensity. But the kinds of sentiments and attitudes that I will describe in the next paragraph can be real players in our environment and can be strongly felt, even though they sometimes are articulated only obliquely or not at all.

The gist of these feelings is that court ADR programs threaten both to

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<sup>88</sup> STIENSTRA ET AL., *supra* note 15, at 215.

<sup>89</sup> *Id.*

<sup>90</sup> KAKALIK ET AL., *supra* note 7, at xxx.

We have no strong statistical evidence that time to disposition is significantly affected by mediation or neutral evaluation in any of the six programs studied. There was no statistically significant difference in the time to disposition between the ADR sample cases and the comparison cases in five of the six ADR programs.

*Id.* The researchers inferred that the longer times in the sixth district were attributable to the fact that the judges there tended to refer to the ADR program the cases that they believed would be more difficult to settle. *See id.*

alter the role of the judge and to erode her importance in our system of government. Squarely acknowledged, these notions would take the following shape: “ADR threatens to change the character of my institution and of my job; it threatens to demand behaviors from me that I do not want to provide or would be no good at. ADR threatens to reduce my importance—to take cases and headlines away from me. ADR threatens to reduce the number of occasions on which I can exercise my power. ADR is, at its core, a criticism and denigration of the centuries old system in which I have flourished and at the top of which I sit.”

I have no idea how common feelings like these are, but where they exist they can be real and raw, and they can fuel a deeply rooted, even if not fully self-aware, opposition to court sponsorship of ADR programs. Appropriate responses could include reassurances that our goal is not to radically change the character of judicial institutions or the kind of work most judges spend most of their time doing. Instead, the goal is to supplement the core services courts long have provided and to add to those services rather than to displace or subtract from them. We also need to make it clear how much we respect the hallmark features of the civil adjudicatory system and the jury trial in particular, and how completely we agree that the preservation and strengthening of that system is essential to the long range health of our society. There will always be a place for litigation—a big, central, indispensable place. One of our goals is to help make sure that the societal resource that our civil adjudicatory system constitutes is well used and really is available when it is needed to perform the critical functions only it can perform.

### *C. Sources of Peril From Our Relationships with Practicing Lawyers*

Lawyers have been indispensable sources of support and service in a great many court ADR programs. Many court ADR programs exist today only because of initiatives taken and hard work performed by lawyers. In some courts, the judges have agreed to adopt ADR programs only after and because leaders of the bar have urged them to do so. Lawyers are credited with inventing and promoting, first in the private sector, several of the types of ADR processes that have been incorporated into court programs. So we must never forget that a great many lawyers have been our leaders and our allies over the quarter century since the Pound Conference.

We also need to acknowledge, however, that not all lawyers understand or accept ADR and that we could jeopardize court ADR programs if we do not appreciate sources of peril in our relationship with counsel. Lawyers could undermine or sabotage court ADR programs by failing to inform clients that they have ADR options, failing to accurately consider the pros

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and cons of those options with their clients, or by actively discouraging their clients from trying to use ADR or from participating in good faith in ADR events. Lawyers also may undermine ADR programs, more subtly but no less significantly, by failing to take full advantage of the potential in an ADR proceeding when they prepare for and attend it. Sometimes failings of these kinds are attributable to ignorance, sometimes to inertia, sometimes to fear of unfamiliar processes and fora, of loss of control over inputs to and from the client, and sometimes to greed.

Good court ADR programs must attack ignorance, inertia, and fear by (1) educating lawyers<sup>91</sup> and client groups, (2) building into the ADR and case management program a series of incentives and pressures to give real and fair consideration in each civil case to the use of ADR (with full inputs to and from clients), and (3) establishing and publicizing tight quality control mechanisms aimed, in part, at reducing lawyers' fear that the neutral will not be competent or will displace them or invade their relationship with their client.

What about lawyers who permit self-interest to compromise their loyalties to their clients? Many successful lawyers would argue, of course, that the dichotomy posed in this question is false, that there is no difference between being client-oriented and being self-oriented, between client interest and self-interest. They would contend that the more intelligently client-oriented lawyers are, the more business success they enjoy. But even for lawyers who view such notions with cynicism there can be at least some convergence in ADR programs between their personal interests and the interests of their clients (and of the courts).

As sophisticated lawyers understand, it can be very profitable to incorporate active use of ADR opportunities into a broader litigation strategy or a more comprehensive system for addressing client needs. The goal of such lawyers is not necessarily to make more money in any particular case,<sup>92</sup> but to increase the overall volume and quality of work they attract. The story goes as follows. Not all the time, but many times, ADR processes increase clients' understanding of their situation, and make them feel that they have reliably identified their options. It reduces their fear that they are missing undiscovered opportunities or making decisions on the basis of guesses in which they have no real confidence. ADR processes also reduce clients' transaction costs, produce agreements that otherwise would not be accessible, and enhance their satisfaction with both the terms of disposition and the

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<sup>91</sup> Education of lawyers will be especially effective if it is conducted by visibly successful lawyers and by judges who are highly respected and viewed as worldly and practical.

<sup>92</sup> Although creative lawyers sometimes negotiate compensation incentives for early dispositions.

process leading to it. Happy clients are more likely to be happy with their lawyers. Clients who are happy with their lawyers are likely to use those same lawyers again and are likely to refer additional clients. All this means more business for the lawyer who has used ADR to the benefit of his clients.

There is another important way that ADR processes can serve personal interests of lawyers. Being involved in ADR processes can improve the quality of a lawyer's professional life and make the lawyer feel better about being a lawyer. It can be very satisfying to help clients explore prospects for settlement earlier and more reliably, to enhance the efficiency and rationality of dispute processing, and to improve the interpersonal dynamics that attend negotiation and litigation. Sour or friction-riddled dynamics between lawyers are major sources of professional dissatisfaction among litigators. Moreover, client disappointment in or misunderstanding of a lawyer's work can be a source of frustration and loss of income—and of malpractice actions. ADR, intelligently used, can reduce the risk of client disaffection with counsel's work and can make the day-to-day dynamics in which lawyers make their living much more pleasant.

It also can be useful to remind lawyers that they need not fear that using ADR will make them any less effective protectors of their clients' rights or less vigorous pursuers of their clients' interests. We need to make sure that counsel understand that there are a wide range of ADR processes and that some of these processes focus primarily on evidence and law. We also need to teach lawyers that even participation in ADR processes like facilitative mediation—processes that can reach into arenas beyond law and evidence—need not compromise counsel's ability to accomplish what his client hired him to do. Being firm, resolute, and analytically sharp are not mutually exclusive with being courteous, thoughtful, and intellectually open. Agreeing to participate in a mediation is not tantamount to agreeing to compromise important interests or to replace keen, self-interested analysis with a soft, affect dominated interpersonal exercise. By agreeing to participate in mediation, neither lawyer nor client agrees to give up anything. Rather, lawyer and client merely agree to try using an additional process tool to search for what is best for the client. Mediations are designed to help parties understand more clearly what their own underlying interests are and to help parties use their own squarely identified values to prioritize those interests. A good lawyer, a lawyer who wants to energetically do as much for his client as the circumstances permit, embraces the use of tools that help him and his client more reliably and comprehensively understand both their own situation and their options for going forward.

*D. Sources of Peril in Our Relationships with the Fourth Estate*

As indicated earlier, I use the phrase “fourth estate” here to refer to lawyers and others who make or want to make some or all of their living by serving as ADR neutrals. Outside the world of organized labor relations, this group certainly was nothing approaching an “estate” at the time of the Pound Conference. Over the past fifteen years, however, that has changed.

I use the phrase “estate” because it suggests a group of size, force, and apparent longevity—an institutional player of significance. We need to acknowledge that this estate exists and that ADR neutrals have emerged as players of policy and political significance. We need to attend to our relationship with this group.

At the outset, it is important to point out that the fourth estate is hardly a monolith. It is, rather, a complex and loose aggregation of sub-groups between which there can be considerable differences of policy view and interests. Different sub-groups of this estate can have different kinds of tensions with or concerns about the courts and their ADR programs. One subset might worry most about the courts corrupting mediation. Another subset might worry most about the courts preempting the field, while another might worry most about the courts adopting policies (about confidentiality, compensation, or conflicts of interest) that could threaten the vitality or integrity of private ADR, especially private mediation.

But even though the fourth estate is complex and internally fragmented, it has demonstrated an ability to organize itself for some purposes into a powerful lobby. This lobby can affect public policy in arenas that can have considerable impact on judicial institutions and processes. For example, this estate can affect legislation conferring privileges or other confidentiality protections on people who participate in mediation.

The most important reasons for attending to our relationship with the fourth estate, however, are that it and the courts have much more in common than not in common, and members of this estate can be significant sources of learning and service for judicial institutions. Working synergistically, courts and the fourth estate can do much good. It follows that we must work to reassure the private ADR provider community that the courts have no ambition or capacity to preempt or dominate the ADR field. The policies that we adopt for court ADR programs about such sensitive matters as compensation and confidentiality are not aimed at undermining demand for or limiting the character of ADR in the private sector. Instead, they are rooted necessarily in sensitivities that are unique to the roles courts play as institutions of government in our democratic system.

To make our interaction with the fourth estate as thoughtful and

constructive as possible, however, we need to understand sources of potential tension between courts and the private ADR provider community. As explained in the paragraphs that follow, there will not always be perfect interest alignment between the courts and at least some subsets of private neutrals.

In lobbying legislatures and filing amicus briefs in litigation, organizations of neutrals (primarily mediators) believe that they are trying to protect the integrity and viability of the mediation process itself—as a value that is independent of the courts as institutions and of individual parties. In fact, some mediators would contend that the value of mediation derives primarily from the degree of separation, the degree of difference, between mediation and the judicial process. Some mediators believe that mediation as a process holds vastly greater social promise than the judicial process. Some believe that it has the potential and the power to literally transform, not only the dynamic through which individual disputes are resolved, but also the character of the parties to the disputes, of their value priorities and their most fundamental orientations.

In this vision, mediation as a process holds the promise of transforming our society, even of transforming human nature. Indeed, in its most ambitious proponents, this vision may even reject the concept of “human nature,” at least to the extent that that phrase suggests that “nature” (as primitively understood) need play a dominant role in human interactions and institutions.

But even mediators who are less sanguine about the transformative potential of mediation are likely to believe that preserving its vitality is a matter of great importance that is in substantial measure independent of society’s interest in preserving the integrity and vitality of judicial institutions. Further, some mediators would take the position that there is so much social value in promoting mediation as a process that if an irreconcilable conflict arises between the values critical to mediation and the values critical to the court system (at least on the civil side), or even values critical to the parties to a particular mediation, the court system and the parties must yield.

Tensions of these kinds surfaced in two recent cases in California, *Rinaker v. Superior Court*,<sup>93</sup> and *Olam v. Congress Mortgage*.<sup>94</sup> In *Rinaker*, a teenager was accused in a juvenile court proceeding of conduct that would

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<sup>93</sup> *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (Cal. Ct. App. 1998).

<sup>94</sup> *Olam v. Congress Mortgage*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For a very different example of a court struggling to resolve tensions between evidentiary needs and the mediation privilege, see *Rojas v. Superior Court*, 126 Cal. Rptr. 2d 97 (Cal. Ct. App. 2002).

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be deemed criminal if he had been an adult.<sup>95</sup> He believed that his accuser in the juvenile court had made admissions during an earlier mediation that would help exonerate him.<sup>96</sup> When he subpoenaed the mediator, Ms. Rinaker, to testify, she vigorously resisted, invoking protections and prohibitions on disclosure of mediation communications that had been enacted by the state legislature after successful lobbying by organizations of private mediators.<sup>97</sup> Ms. Rinaker took the position, as a matter of sincere principle, that her protections under the statutes were absolute and that the juvenile court defendant's interests could not be sufficient to outweigh what she viewed as the more compelling interest in protecting the integrity of the mediation process.<sup>98</sup>

The California Court of Appeals respectfully disagreed, holding that, if necessary, a mediator's statutorily rooted privilege against being compelled to disclose confidential mediation communications can be trumped (even in a nominally civil proceeding) by the constitutional rights of a defendant under the confrontation and due process clauses.<sup>99</sup> The court so held even though the applicable statutes did not recognize an exception in the situation the *Rinaker* court faced.

The conflict between the views of the mediator and the views of the court in *Rinaker* was stark. The mediator believed passionately that not even a demonstrable need to preserve fundamental constitutional rights should be permitted to jeopardize the sanctity of mediation confidentiality, and thus to jeopardize (in her view) both the philosophic core and the practical viability of mediation as a distinct process. On the other hand, the court's response to the dilemma it faced evidences acute judicial sensitivity to the singular and immensely important role of the courts to serve as the primary source of protection of fundamental (in the constitutional sense) civil rights, especially rights subject to abuse or invasion by majorities acting (through legislation sometimes actually secured by a special interest group) at the expense of minorities.

Another force likely at play in *Rinaker* was the court's passion for protecting the constitutional integrity of its own processes. In this case, the rights that were pitted against the mediator's interest in not breaching confidentiality promises were rights directly bound up in and critical to the fairness of the judicial process. Unlike mediators, courts exercise the immense power of the state. Sensitive to the responsibility that attends exercise of power, and of the moral duties that arise from the capacity to

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<sup>95</sup> *Rinaker*, 62 Cal. App. 4th at 162.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 163.

<sup>98</sup> *Id.* at 165.

<sup>99</sup> *Id.*

compel radical changes in the circumstances of the people who come through the judicial system, judges are deeply committed to doing everything they can to make sure that they exercise power justly and in strict accordance with the law. They also commit to ensuring that the processes over which they preside are fair, and that the public perceives and believes in the thoroughgoing fairness of the procedures and rules through which their courts can force changes on them. Ultimately, what is at stake here is nothing less than the public's confidence in our democratic form of government—because it is that government's power that the courts wield.

Shades of a similar kind of confrontation are visible in *Olam v. Congress Mortgage*.<sup>100</sup> Unlike the *Rinaker* case, the issues in *Olam*, where there were no criminal law undertones, did not implicate the confrontation clause. Nor did the *Olam* court reach arguments that might have been raised under the due process clause. But like *Rinaker*, the situation in *Olam* triggered a direct conflict between values dear to the mediation community and values dear to the courts. On one side was the mediators' interest in not being compelled to breach confidentiality promises, and the mediators' belief (legislatively supported) that being so compelled posed a grave threat to mediation generally. On the other side were substantive legal rights of great consequence to parties who had turned to the court to protect those rights, the court's capacity to perform its institutional function, and a threat to public confidence in how courts exercise the power of our government.

Ms. Olam was the plaintiff in the underlying case.<sup>101</sup> She was a single woman in her mid-60s with demonstrable health problems, some instability of judgment, no job and limited resources.<sup>102</sup> The defendant was a mortgage brokerage company from which Ms. Olam had borrowed money in the early 1990s.<sup>103</sup> She had defaulted on her payments, and several attempts to resolve the matter by agreement had failed.<sup>104</sup>

Ms. Olam had a very poor relationship with her lawyer, who had failed to file important papers for the final pretrial conference, exposing Ms. Olam to the prospect of a trial in which only documentary evidence submitted by her opponent would be admitted.<sup>105</sup> At stake in the trial were Ms. Olam's only assets and her primary sources of support—equity in two modest

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<sup>100</sup> *Olam*, 68 F. Supp. 2d at 1113. The purpose of the discussion of *Olam* in the text is not to defend its reasoning or holding, both of which have been the objects of thoughtful and sometimes telling criticism, but to explicate tensions that can arise between the judicial community and the mediation community.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1118.

<sup>103</sup> *Id.* at 1113.

<sup>104</sup> *Id.* at 1113–14.

<sup>105</sup> *Id.* at 1116.

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properties, one of which was her residence.<sup>106</sup>

In this setting, with encouragement from the court, the parties participated in a mediation one week before trial would commence, with no prospect of a continuance.<sup>107</sup> The mediation was hosted, at the court's request, by the Program Counsel to the court's ADR program, who was an employee of the court and one of the two professionals on staff most responsible for the design and implementation of the court's ADR program.<sup>108</sup> The mediation began in the morning and continued, without substantial interruption, until 1 a.m. the next morning, when, teary-eyed, Ms. Olam agreed to sign a settlement agreement.<sup>109</sup>

Under the terms of that agreement she gave up all her claims against the defendants and all her rights to damages, received no money, would lose immediately one of the two properties in which she had an interest, and would face a payment schedule that would make it difficult, at a minimum, to keep the other property.<sup>110</sup> So, the terms of the agreement created a real risk that she would lose all her property and would be unable to support herself even at a very modest level. To repeat, this agreement was reached at the end of a 14-hour process hosted by a court employee—an employee whom the public might reasonably fear was animated in some measure by a desire to please the court by orchestrating a settlement.

Ms. Olam arrived home about 1:30 a.m.<sup>111</sup> Around 10:00 a.m. that same day she called the judge's chambers, apparently feeling considerable stress about what had happened during the mediation.<sup>112</sup> The judge declined to speak with her.<sup>113</sup> Subsequently, she refused to sign a formalized settlement contract.<sup>114</sup> Additional efforts to settle were undertaken, but to no avail.<sup>115</sup> She fired her lawyer.<sup>116</sup> Defendants then filed a motion to enforce the terms of the agreement the parties had signed at the end of the mediation.<sup>117</sup>

In response, Ms. Olam contended that she could not be bound by the terms to which she had subscribed her name because at the time she signed the document (the document that the court's mediator had played a major

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<sup>106</sup> *Id.* at 1142–43.

<sup>107</sup> *Id.* at 1116.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1117.

<sup>110</sup> *Id.* at 1147 n. 61.

<sup>111</sup> *Id.* at 1117.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1118.

<sup>117</sup> *Id.* at 1113.

role in drafting) she was incapacitated by her emotional and physical state, and by the stress of her situation, from exercising meaningful freedom of will and from making any legally competent commitments.<sup>118</sup> She contended that her lawyer had done virtually nothing to assist or protect her in this setting.<sup>119</sup> She also emphasized that her lawyer's failures to comply with pretrial rules both had created the prospect of a completely unfair trial and had given her lawyer a keen incentive to pressure her to agree to a settlement (rather than go through a trial a week later saddled with such huge evidentiary disabilities and then face the prospect of a malpractice action).<sup>120</sup>

It was in this setting that the defendants were demanding that the court use the power of the state to force an older, partially incapacitated woman to adhere to settlement terms that could well leave her destitute. Is it remarkable that the court was deeply concerned both about doing the right thing, under the law, and about using procedures that would encourage the public to believe that the court was doing the right thing?

As the hearings on the motion to enforce the agreement unfolded, both Ms. Olam and the brokerage defendants decided that they wanted the mediator to testify about what happened during the mediation.<sup>121</sup> Both parties apparently felt that that testimony would be critical to their ability to secure their rights. The mediator declined to agree to testify and, on the court's active invitation, invoked his protections under California statutes which appeared to confer on mediators absolute protection (except in circumstances not implicated here) against being compelled to testify about mediation communications.<sup>122</sup>

In addressing this problem, the *Olam* court attempted to follow principles it drew from *Rinaker*. Trying to apply these principles in this different setting, the court concluded that it was permissible under California law to compel the mediator to testify—despite the fact that (as in *Rinaker*) the language of the applicable statutes did not recognize an exception for the kind of circumstance the *Olam* court faced. In construing the legislation to permit the court to compel the mediator to testify, the court in *Olam* emphasized that that testimony was essential to doing substantive and procedural justice and to being perceived by the public as so doing, that the integrity of the court and its ADR program were under direct attack, and that *all* the participants in the mediation (except the neutral) wanted the mediator

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<sup>118</sup> *Id.* at 1118.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1143–44

<sup>121</sup> *Id.* at 1129.

<sup>122</sup> *Id.* at 1130.

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to testify and waived their own privileges and protections.<sup>123</sup>

Vocal segments of the mediation community took strong exception to both the holding and the reasoning in *Olam*, in part on the ground that by judicially carving out an exception to the mediator's privilege in these circumstances the court was creating a serious threat to party confidence, generally, in the promise of mediation confidentiality. A threat to that confidence, the critics urged, created a serious threat to party willingness to use mediation at all.

The point here, of course, is not whether *Olam* correctly or incorrectly understood and applied California law.<sup>124</sup> Rather, the point of this discussion of *Olam* is to show that occasionally there can be tensions between the mediation community and the courts that implicate, directly, values and interests of great significance to both. It is important to the health of ADR to recognize that fact and then to engage in mutually respectful, thoughtful discussion of the issues raised on such occasions. During such discussions, however, it is critical to keep clearly in mind how much courts and the mediation community have in common—how many values and interests they share, and how often their purposes and philosophies are in harmony and synergistic.

There is one additional policy arena of potential tension between court ADR programs and the private ADR provider community that warrants mention here: compensation for neutrals. Some courts and parties will want neutrals to work at economy rates, or pro bono, while organizations of neutrals are likely to press for payment at professionals' market rates (agreeing to perform only limited work for free as a public service). While lobbying for higher levels of compensation may be vulnerable to cynical inferences about self-interest, organized mediators would contend that their real purpose is to protect against compromising the quality of mediator services. They would argue that if neutrals are not paid at market rates, the quality of neutrals will suffer, or the quality of the effort that neutrals are willing to commit to individual cases will suffer, thus harming the integrity and viability of mediation generally.

Courts must strike an appropriate balance in this arena between permitting the views and interests of private providers to dictate public

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<sup>123</sup> *Id.* at 1138–39.

<sup>124</sup> Because a federal court issued it, the *Olam* opinion could make no authoritative pronouncement about the meaning of California law.

No California court has subsequently addressed the issues that the *Olam* court confronted. In *Foxgate Homeowners' Ass'n, Inc., v. Bramalea Cal., Inc.*, the California Supreme Court discussed *Rinaker* with apparent approval and then described *Olam*, without clear expression of either approval or disapproval. *Foxgate Homeowners' Ass'n, Inc., v. Bramalea Cal., Inc.*, 26 Cal. 4th 1, 15–16 (Cal. 2001).

policy, on the one hand, and, on the other, compromising the quality of the processes courts offer or jeopardizing the viability of the private provider market, in whose robust health the courts have a substantial interest.

### *E. Perils with Sources in Ourselves*

Our focus shifts here to perils whose primary sources are internal to the community of supporters of court ADR. Having already strained your patience, I will not explore in detail any of these perils. Rather, I will simply identify (not in order of importance) and comment briefly on each—knowing that they have been, or will be, subjects of thorough examination in other settings.

#### *1. A Generalized “Good Faith” Requirement*

The first such peril arises from the temptation to impose on parties and their lawyers a generalized requirement to participate in “good faith” in our ADR processes.<sup>125</sup> Of course, external constituencies (most obviously legislatures) also could be a source of this peril. However imposed, such a requirement could do considerable damage without yielding sufficient offsetting benefits.

We note at the outset that we are aware of no evidence that there is much participation in “bad faith” in court ADR. So the problem at which a requirement of good faith would be aimed appears small, at worst.

In sharp contrast, the problems that imposing such a requirement and trying seriously to enforce it<sup>126</sup> would generate are considerable. Except with respect to very specific kinds of conduct, like not showing up for the ADR event or not submitting required papers in advance<sup>127</sup> (problems that can be addressed quite effectively through specific proscriptions), “good faith” is an elastic, vague concept whose content can vary dramatically in the eyes of different beholders. Attempting to hold parties to a poorly defined

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<sup>125</sup> For deeper treatment of considerations that should inform this debate, see John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. (forthcoming 2002) (suggesting less risky means to achieve some of the ends that are being pursued by proponents of imposing a generalized “good-faith” requirement); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997) (offering considered support for imposing such a requirement).

<sup>126</sup> It is generally not considered healthy for courts to adopt rules they will not seriously enforce.

<sup>127</sup> See, e.g., *Nick v. Morgan’s Foods, Inc.*, 99 F. Supp. 2d 1056, 1061–63 (E.D. Mo. 2000).

requirement can breed fear, resentment, and a sense that the court is being unfair.

A broad definition of “good faith” participation also would intensify risks of invasions by mediators of spheres protected by work product law— invasions that could intensify resentments and discourage voluntary participation in court programs.<sup>128</sup> Moreover, imposing a good faith requirement could distort the role of the ADR neutral, especially for mediators. This could happen by converting the mediator, in part, into a “judge” of the quality of the parties and lawyers’ participation. Such a requirement also could increase the occasions for neutrals reporting to the court about the content of mediations, thus intensifying parties’ concerns about the reality of promises of confidentiality.

Concerns about such matters could distort the way the parties participate in mediations, causing them to fear rather than trust the neutral, perhaps even increasing the temptation they feel to try to manipulate the neutral into becoming, in effect, their agent. Finally, a formal, rule-imposed good faith requirement also might increase the incidence of motions for sanctions, either as tactical maneuvers or simply as a result of one side misunderstanding what underlies an opponent’s conduct during the ADR event. An intensified risk of motions for sanctions could, in turn, foster distrust across party lines, causing parties to retreat into formality and caution, exactly the opposite kinds of behaviors deemed essential to the success and distinctiveness of mediation.

## 2. *Degeneration of Process Differentiation*

Like the imposition of a generalized good faith requirement, the devolution of court ADR programs into one hybrid but largely evaluative process could have several dangerous consequences. The risk of such a devolution occurring is real, especially in court-connected programs, where ADR always occurs within the context of pending (or at least threatened) litigation. We have learned that participants in mediation often pressure neutrals to provide substantive analytical input.<sup>129</sup> Even if the process being offered is intended to take the form of purely facilitative mediation, the neutrals often are drawn into an evaluative mode, at least in some portions of

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<sup>128</sup> See, e.g., *Strandell v. Jackson County, Ill.*, 838 F.2d 884, 887–88 (7th Cir. 1987); Dayton, *supra* note 80, at 935–37.

<sup>129</sup> See Wissler, *supra* note 14, at 684–85 (reporting generally more positive participant views of mediation when the neutral offered assessments of the merits of the parties’ positions). The view that movement toward a hybrid form of mediation is both inevitable and positive is well articulated in Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

the ADR event. We also have learned that parties to early neutral evaluations in our court often want the neutral to help facilitate settlement negotiations. There can be pressure on our evaluators to convert ENE into what becomes, essentially, an evaluative mediation.

In my view, it would be a serious policy mistake to permit such pressures, or poor training and quality control, to blur lines of distinction between ADR processes.<sup>130</sup> If we fail to maintain clear differences between processes and permit all court ADR to become some blur of evaluative mediation and a settlement conference we will needlessly compromise our ability to be responsive to the full range of values and needs that litigants bring to our courts. We will reduce the occasions on which parties perceive the court as reaching out to them, trying to help them pursue the goals that are most important to them. Offering only an evaluative form of ADR also could increase the risk of parties inferring that the courts' only real interest in the program is getting cases settled, thus reducing occasions for parties to feel grateful to the court for providing a party-oriented service. Moreover, the more that "evaluation" pervades an ADR process, the greater the risk of the "litigization" of that process, which in turn, reduces the capacity of ADR to contribute in unique ways to problem solving.<sup>131</sup>

Relying on a single blended process that includes both evaluative and facilitative techniques risks corrupting both mediation and evaluation. In the eyes of many, mediation has a special contribution to make only when the neutral encourages a broader and deeper sweep of inquiry and leaves the "evaluating" to the other participants in the process. The capacity to tap the potential of non-evaluative mediation processes would be lost if court programs encouraged or recognized only forms of mediation with a substantial evaluative component. Similarly, a blended approach would endanger one of the principal advantages of ENE: the confidence that each participant can have, because of the design of the process, that he or she knows all the input that the neutral has received from the parties and their lawyers *before* the neutral produces his or her evaluation. In mediations and settlement conferences, by contrast, the use of private caucusing prevents parties from knowing everything the other participants have told the neutral, which can undermine confidence in both what the basis is for the neutral's "evaluation" and in its impartiality.

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<sup>130</sup> See also Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 296-97 (2000).

<sup>131</sup> For more development of this concern, see Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29.

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Permitting distinct processes to devolve into one largely evaluative but malleable hybrid also would compromise courts' ability to develop coherent and teachable process protocols and to establish straightforward and consistent ethical guidelines that neutrals could learn and follow with confidence. These difficulties would impair both training of neutrals and quality control.

The more like a smorgasbord an ADR process becomes, the greater the risk that the neutral will make poor judgments about which process route to follow or which techniques are appropriate. As these risks increase, so does the likelihood that neutrals in the same court program, hosting what is nominally the same kind of ADR process, would use different procedures in similar circumstances. If neutrals in the same program use different procedures and techniques in parallel settings, it becomes appreciably more difficult for parties and lawyers to predict what will occur in any particular ADR event.

As predictability of process declines, so does the parties' ability to prepare adequately, which not only jeopardizes the usefulness of the ADR event but also increases the risk that parties will feel that the program is unfair. Parties are more likely to be resentful when they encounter turns in the process which they did not anticipate. Turns in process that parties do not anticipate are more likely to be viewed as inconsistent with the court's rules and of dubious propriety, or as offending deeply rooted feelings about what the appropriate roles of lawyers, clients, and the court are.<sup>132</sup> An ADR program that spawned resentment toward the court, instead of gratitude, could hardly be considered an improvement in the administration of justice.

### *3. Program Rigidification*

The prospect of ADR program rigidification raises two primary concerns. The first is the possibility that the way we institutionalize ADR programs could encourage, both in parties and counsel, dependency, complacency, and passivity about ADR (in particular) and settlement (in general). We need to design into our systems incentives and prods that will discourage litigants from simply sitting back and waiting for the ADR service that the court offers or compels. We must look for ways to encourage litigants to take the initiative to pursue settlement earlier and on their own.

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<sup>132</sup> For example, lawyers (and sometimes clients) are likely to be taken aback if a neutral pushes to meet privately with a party without his counsel, or seems set on displacing counsel by aggressively criticizing his analysis or approach.

The second, related concern is to avoid kinds of program rigidity in which routine referrals to ADR discourage or replace case-specific dialogue about ADR with a judge or a staff professional.<sup>133</sup> There is a growth curve in the history of ADR in most jurisdictions. Early in that history, before the local bar and litigant groups have developed a substantial appreciation for the benefits that ADR has to offer, courts may need to push litigants into ADR experiences. At some point, the angle of that learning curve will decline substantially and it is at that point that we need to be sure that our systems do not thoughtlessly force parties into ADR when it would likely not be productive for them. To do so discredits the court and makes its motives look institutionally selfish. In contrast, by engaging in real, open minded dialogue with litigants to determine what they need and whether there is a real prospect that they would benefit from a referral to ADR the court encourages respect for itself and a perception that it understands itself as fundamentally a service institution.

Moreover, if our rules and practices make ADR easier (and less expensive) to fake than to escape, we risk corrupting and de-valuing ADR. Parties who feel forced into ADR when it has little to offer them are more likely just to go through the motions and to be perceived by the neutrals and other parties as so doing. Such rituals without real prospect of reward can erode the public's confidence in both the court and in ADR, and foreseeable bad experiences with ADR are not likely to encourage parties to consider its use when it really could deliver value.

#### 4. *Overestimating ADR's Contribution*

Another peril with an internal source is that we will assess ADR program value with myopic self-congratulation or through ideological filters rather than with an accurate understanding of what our programs really are delivering and a square acknowledgment of their limitations. One source of this concern is a pattern I have noticed in responses to some surveys that ask parties, lawyers, and neutrals to report what occurred at an ADR session and to assess the contributions the ADR process made. In this pattern, which is reflected in surveys as disparate as those undertaken as part of the RAND study of ADR in six federal district courts in the first half of the 1990s<sup>134</sup> and

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<sup>133</sup> Sharon Press, Director of the Dispute Resolution Center in the Office of the State Courts Administrator in Tallahassee, Florida, sensitized me to the risks described in this section. She has become concerned that in some cases lawyers may accurately determine that ADR will yield no significant benefit to their case, but decide to go through the ADR motions anyway because they believe the court would not excuse them from participation even if they made a detailed and good faith showing in support of such a request.

<sup>134</sup> KAKALIK ET AL., *supra* note 13, at 24, 44, 47-48.

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those we conduct on an ongoing basis in the Northern District of California, the reports from the neutrals are consistently much more favorable than the reports from the lawyers or the parties. The lawyers usually are at least a little more positive than the parties, but often the gap is greater between the neutrals and the other participants.

Results of recently completed surveys in the Northern District of California are illustrative.<sup>135</sup> When asked whether the mediation in their particular case helped the parties bridge a communication gap, the affirmative response rates were 22% for parties, 19% for lawyers who represented parties in the mediations, but 47% for the mediators. When asked whether the mediation clarified or narrowed issues, 71% of the mediators said yes, while only 35% of the lawyers shared that view (our instrument did not pose this question to clients). There were similar substantial discrepancies in views about whether the mediation had included discussion of the relative strengths and weaknesses of the parties' legal positions: 86% of the responding mediators reported that such substantive discussions occurred, but that view was shared by only 66% of the responding lawyers and only about half of the litigants.

This pattern of pronounced differences between the perceptions of mediators and the perceptions of lawyers and litigants should prompt us to ask some serious questions of ourselves and to launch substantial efforts to answer them. Are we, in the mediation community, self-delusional? Is ideology, or the need for self-justification, distorting our vision? Are we giving ourselves credit for contributions that are only at the margins of the case or of the parties' concerns and that do not matter much to parties and lawyers? Or are these differences in perceptions attributable to our failures to teach, to help parties and lawyers understand what they actually are accomplishing during our mediations? Even if our perceptions are accurate and theirs are not (I seriously doubt that the differences can be explained solely on this basis), we disserve our craft and our programs if we are not educating the people we serve to appreciate all the different things they accomplish through their mediations.

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<sup>135</sup> Survey results on file with the author and the ADR unit in the Northern District of California. It is important to emphasize that the return rates on the questionnaires from which the data in the text are taken was quite low for parties (25%) and for lawyers who represented parties in mediations (35%), while the return rate for mediators was much higher (67%). It is possible that the differences in response patterns reported in the text are attributable, in some measure at least, to the differences in response rates. While RAND also reported substantial differences in response rates (11% for parties, 45% for lawyers representing parties in ADR events, and 67% for neutrals), it seems unlikely that these differentials are sufficient to explain the parallel patterns, given their consistency across such diverse programs and in response to so many different questions. KAKALIK ET AL., *supra* note 13, at 24.

At the same time, we also must take great care to avoid the perils that we would create if we were to promise our constituencies or ourselves that our ADR programs will deliver more than they can. Creating unrealistic expectations would unnecessarily invite judgments under inappropriate standards, thus both jeopardizing appreciation for what the programs are in fact accomplishing and generating falsely premised disappointment and disaffection. We increase the risk that both our constituents and we will turn away from this work if we succumb to the temptation to claim too much.

As important, inflated expectations or promises could tempt us to cut process or program design corners that could compromise values that are essential to public confidence both in ADR and in the court system. If we promise “results” as measured by specified effects on the courts’ dockets, for example, we will feel pressure to increase settlement rates—and that pressure could lead us to pressure our neutrals to elevate ends over means or to insist on using only one assertively evaluative approach even when parties would be comfortable only with a purely facilitative process. Or if we strain our resources to try to serve the greatest possible number of cases we take serious risks with quality control and thus with the character of the work done in the courts’ name. So we must discipline ourselves to abjure the temptations that beset unbridled enthusiasts. Ours is not a movement rooted in unconditional faith, but simply an effort to better serve.

##### *5. Underestimating the Importance of What We Are Trying to Do*

The temptation to over-promise, however, may not be the greatest peril with an internal source. Ironically, that peril could well be underestimating the importance of what we are trying to do.

Even with expectations firmly rooted in reality, we will experience disappointments. We will make mistakes—in policy, in program design, in training, in administration, in response to problems. There will be occasions in which our neutrals perform poorly or even violate principals we hold dear. There will be occasions in which lawyers or parties abuse our processes or fail, completely, to understand or respect the spirit in which we try to work for them. There are people, not in insignificant numbers, who are not animated by values or interests that we respect and whose conduct will not change regardless of the process setting.

There are many more people, however, who will understand and appreciate the spirit that drives our service and who will find real value in what we do. It is for that reason that adding substantial ADR services to the pretrial process—and thereby reaching out to litigants, encouraging them to decide which interests are most important to them, permitting them to choose or fashion a procedure that is tailored to pursue those interests and that offers

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them an opportunity to reclaim power over and responsibility for how their dispute is resolved—might just be the greatest single reform in the history of this country's judicial institutions.

