

ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”

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In the past quarter-century, significant changes have occurred in the ways lawyers approach conflict. There have been unprecedented efforts to develop strategies aimed at more efficient, less costly, and more satisfying resolution of conflict, including more extensive and appropriate use of mediation and other “alternative dispute resolution” (ADR) approaches. This study examines what we know and do not know about the growth and impact of ADR in federal and state courts, in the business sector, and in employment and consumer settings. The analysis examines the relationship between ADR and court trial, but also underlines the broader uses of and rationale for mediation and other process choices. Although there is clear positive evidence of cost and time savings and numerous other benefits of some court-annexed ADR programs, it is evident that much depends on the shape and structure of such programs. Studies of ADR in commercial sectors suggest that the use of mediation has grown in recent years, reflecting perceptions that it offers significant potential benefits to business. Some businesses have developed more integrated, systematic approaches to the management of conflict, although most appear to have taken a more ad hoc, reactive approach to dispute resolution. There are many different kinds of programs for the management of employee grievances, including stepped processes that usually resolve disputes without adjudication. Several scholars have begun to develop a body of data on experience and perceptions of employees and their counsel. The availability of data on investor/broker arbitration is critical for promoting transparency and fairness in the securities field. Lawyers have a growing number of tools for pro-

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viding clients with appropriate ways of managing and resolving conflict, but we still have much to learn about these choices. Quantitative and qualitative research is essential to provide guideposts for the future.

I. INTRODUCTION

Did a quarter-century of proliferating and widely disparate efforts to change the culture of conflict resolution—encompassing thousands of federal and state court community, business, and administrative agency initiatives promoting mediation,¹ arbitration,² or other strategies;³ the spawning of new professional fields; and reforms in the education and training of lawyers and law students—transform the litigation experience of disputants, attorneys, and judges? The answer is undoubtedly a resounding “yes”—but why?

A year ago, the author was invited by Professor Marc Galanter to participate in the ABA Section on Litigation’s Symposium on “The Vanishing Trial.” The Symposium brought together scholars, judges, and practitioners to explore why fewer federal and state court cases are going to trial even though court filings have greatly increased.⁴ The author’s task was to address the role of ADR in reduced rates of trial. The following is an effort to summarize what we know—and do not know—about

¹According to a typical definition, “[a] process that calls for parties to work together with the aid of a neutral facilitator . . . who assists them in reaching a settlement. The mediator’s role is advisory and resolution of the dispute rests with the parties themselves.” American Arb. Ass’n, *Definitions—Introduction to the Terminology of Dispute Avoidance and Resolution 1* (1998).

²“The reference of a dispute to an impartial person chosen by the parties to the dispute who agree in advance to abide by the arbitrator’s award issued after a hearing at which both parties have an opportunity to be heard.” *Black’s Law Dictionary* 96 (5th ed. 1979). For an extended discussion of definitional issues under the Federal Arbitration Act, see Ian R. Macneil, Richard Speidel & Thomas J. Stipanowich, *Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act* 2:7 (1994).

As we shall see, many federal and state courts sponsor arbitration programs for certain classes of cases, but in the absence of an agreement by the parties, the resulting arbitration awards will not be binding or prevent a party from seeking relief in court. There are also systems of nonbinding arbitration outside the courts. See Thomas J. Stipanowich, *Contracts Symposium: Contract and Conflict Management*, 2001 *Wis. L. Rev.* 831, 852–53 (2001) [hereinafter Stipanowich, *Contracts Symposium*].

³Other, less widely used approaches include mini-trial, summary jury trial, and nonbinding evaluation or assessment. See Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 *Ky. L.J.* 855, 865–68 (1993) (describing approaches, their uses, and attributes).

⁴Indeed, in terms of filing complaints, we are “going to court” more frequently than ever. Filings in U.S. district courts have increased from around 35,000 to more than 250,000 during the past six decades—a rate more than treble the growth of the U.S. population! Annual case filings in federal courts of appeal have grown from 2,800 to more than 57,000 in the last 50 years—a 2000% increase. Senger, *Federal Dispute Resolution: Using ADR with the United States Government* 3 (2004), citing Administrative Office of the U.S. Courts, *U.S. District Court Judicial Caseload Profile* (Administrative Office of the U.S. Courts, 2001).

the relationship between ADR and litigation while attempting to convey to the reader a broader sense of what this “quiet revolution” in dispute resolution was all about. Although necessarily selective in its treatment of public and private developments, this article reaches beyond “ADR” into the broader rubric of active conflict management. It flavors statistical data with qualitative and anecdotal evidence, and looks beyond reduced trial rates to examine the broader impact on the litigation experience, as well as the underlying reasons why ADR in various forms has flourished. Finally, it acknowledges the boundaries of our present understanding and posits realms of future inquiry.

A. Problem 1: ADR is a Vast and Increasingly Specialized Realm

The first obstacle to an understanding of the role of ADR is the sheer breadth and diversity of activities to be taken into account, a breathtaking range of approaches and strategies that we lump under the heading of “ADR” (an outmoded acronym that survives as a matter of convenience).⁵ An obvious starting point is court-connected mediation and arbitration programs—direct efforts to reduce the cost and time associated with litigation and to promote more satisfactory resolutions in a litigation context; these developments are treated in Section II. Section III addresses the business sector, which has broadly embraced arbitration and, more recently, mediation as alternatives to litigation. In light of its central importance to current policy debates regarding the effectiveness of private dispute resolution as a substitution for civil adjudication—a primary subtext of “The Vanishing Trial”—Section IV summarizes current data on ADR in consumer, employment, and other settings affected by “adhesion” concerns. A more comprehensive effort might have reviewed and summarized data on ADR in another important “litigation” realm—federal and state agencies,⁶ the role of ADR in out-of-court mass claims facilities, the long experience of arbitration and mediation in the field of labor and industrial relations, the realm of community dispute resolution programs, or the specific impact of mediation in the arena of domestic relations.

Even with these limitations, however, it is virtually impossible in a single study to summarize, let alone analyze, all the pertinent applications of ADR. Even a bare-

⁵As a California taskforce observed, “not only is ‘alternative’ unhelpful—alternative to what?—but ‘appropriate’ better conveys the concept of ‘method best suited to resolving the dispute . . .’” Report of the Commission on the Future of the California Courts, *Justice in the Balance—2020*, 40 (1993), cited in Report of the Task Force on the Quality of Justice Subcommittee on Alternative Dispute Resolution and the Judicial System, *Alternative Dispute Resolution in Civil Cases 3* (1999) [hereinafter *California Report on ADR in Civil Cases*]. The concept also fails to take into account strategies and approaches aimed at managing issues between parties before they become full-fledged disputes, including open-door policies and programs that form early tiers of conflict-management schemes for employees. See *infra* text accompanying notes 198–202.

⁶A comprehensive and thoughtful examination of federal agencies programs may be found in Senger, *supra* note 4.

bones analysis must take account of the fundamental differences between binding private adjudication (arbitration) and mediation and other processes aimed at helping parties find mutually acceptable solutions, improve communications, or strengthen relationships.⁷ Like tones of the musical scale, however, three or four elemental process formats have evolved into a formidable and continually morphing array of applications. Few practitioners, judges, or scholars have first-hand experience, or even a clear appreciation, of the minute dynamics of more than a few of these. Despite the growth of organizations seeking to span the field, such as the Association for Conflict Resolution (ACR), ADR is becoming increasingly specialized and, like politics, “local”—a creature of an industry or practice area, a court jurisdiction or geographical region, a culture, community, relationship, or transaction. One of the abiding themes of the empirical studies cited below is that when it comes to mediation, or to arbitration, everything hinges on the details. Overgeneralization undermines much of the argument passing as scholarly debate in the field.

Moreover, a complete picture of the impact of process alternatives requires consideration of programs aimed at actively managing conflict before the filing of a complaint or an arbitration demand. For example, programs incorporating approaches for early screening of disputes are now employed by major companies seeking to minimize the direct and indirect costs of trying cases;⁸ institutional employment ADR programs commonly consist of a series of three or more “steps” aimed at addressing grievances or disputes as directly, efficiently, and informally as possible.⁹

B. Problem 2: Finding and Employing Useful Information

A second fundamental problem is a paucity of useful, reliable information. Although vast amounts of information are available in print or on the Internet describing court, agency, and private programs, or touting the theoretical benefits of mediation and other approaches, public and private dispute resolution programs seldom report statistics beyond the volume of matters filed or resolved. Many court programs lack the resources to develop additional data; ADR institutions and businesses often maintain valuable information, but treat it as proprietary.¹⁰ When more extensive data are pub-

⁷See Stipanowich, *supra* note 2, at 834. There are still lawyers and judges who, sometimes through ignorance, fail to discriminate; some federal and state court opinions have addressed enforcement of contractual agreements to mediate under the rubric of arbitration law! See *id.* at 860–61 (discussing and critiquing “expansive” applications of federal and state arbitration law).

⁸See generally, CPR Inst. for Disp. Resol., *How Companies Manage Employment Disputes: A Compendium of Leading Corporate Employment Programs* (2002) (describing and comparing numerous programs).

⁹*Id.*

¹⁰The American Arbitration Association has from time to time made available data on current or closed cases for the benefit of researchers, including Professors Eisenberg and Bingham, Elizabeth Hill, and Lewis Maltby. See *infra* text accompanying notes 240–248.

lished, they are often compromised by faulty research and analysis, or by questions about the biases or motives of those collecting or offering information. There are, however, a growing number of very useful studies, some of which are discussed below. To appreciate the true value of ADR in operation, one cannot depend exclusively or even primarily on statistical data, however rich. Ultimately, we need to “go . . . beyond large-scale research to small-bore case studies” qualitatively illuminating the evolution of ADR within various contexts and the experiences of those who play a part in it.¹¹ The following exposition combines selected statistical data with summaries of key studies, anecdotal examples, and other information to provide clues to the nature and scope of ADR programs or procedures, as well as various measures of their effectiveness as litigation alternatives.

C. Problem 3: ADR is Much More Than a Substitute for Trial

Finally, there is the inherent difficulty that mediation and other forms of ADR—with the notable exception of binding arbitration—cannot and should not be evaluated primarily as trial substitutes. Because the espoused goal of the Symposium was to discuss the trend toward fewer civil trials, and assess its causes and implications, much effort was devoted to assaying not only the extent to which mediation or binding arbitration have diverted matters from a litigation track, but also what we know about the apparent costs or consequences. For example, it is important to understand how court-connected mediation affects user perspectives as well as judicial and legal resources. When binding arbitration is conducted pursuant to boilerplate that is a condition of employment, it raises questions about the ability of private judges and private procedures to protect employee rights and remedies—whether stemming from constitutional and statutory protections or reasonable expectations under a bargain. We will address such scenarios in Section IV.

However, court trial is and always was an exceptional event with very limited aims. As Professor Galanter so memorably observed, for the great majority of users of the court system, the name of the game is “liti-gotiation”—a process of negotiation, adjustment, and accommodation that is carried on against the backdrop of the series of events leading up to trial and, in very rare cases, beyond.¹² Whether the “proper” rate of trial is 2 percent or 4 percent, the fact is that the great majority of matters never reach the courtroom—having been negotiated or resolved in some other fashion short of trial, or even the onset of litigation. This fact of life, the strong personal, business, and political dynamics that underlie it, and the rising costs and

¹¹Deborah Hensler, A Research Agenda: What We Need to Know about Court Connected ADR, 6 *Disp. Res. Mag.* 15, 17 (1999).

¹²Professor Galanter has also observed that most disputes “are settled bilaterally, without the intervention of a third party.” Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society, 31 *UCLA L. Rev.* 4, 18 (1983).

perceived risks of going through the court system also largely explain why in the last quarter-century there has been an emphasis on developing approaches that help reach quicker or better or more lasting results through something other than trial. Thus, in most cases the best measure of effective ADR is not as a surrogate for public adjudication, but as an intervention strategy to promote what a trial was not designed to accomplish: getting quicker and less costly resolution, tailoring creative solutions, serving business goals, improving relationships, enhancing the quality of human interaction, and “opening up” the dispute resolution process to the broader community.¹³ Indeed, one recent study of court-connected mediation concluded that “mediation and the judicial system are built on incompatible assumptions about human nature, human capacity, and the goals of conflict interaction.”¹⁴ Perhaps for this reason, studies of court-connected mediation programs do not generally focus on reductions in actual days of trial—although questions are often asked about general satisfaction, cost saving, and the like.¹⁵ Our own inquiry, likewise, must examine not only the impact of mediation and other ADR approaches on the litigation process, but also their broader attributes and ends.

II. THE GROWTH AND IMPACT OF COURT-CONNECTED ADR

In the last quarter of the 20th century, a tide of change swept over federal and state court systems in the United States. It took a variety of forms, usually centering on mediation or nonbinding arbitration,¹⁶ aimed at providing parties with choices of intervention strategies for resolution of disputes. Although a few courts embraced the “multidoor courthouse” model propounded by Professor Frank Sander in 1976, most have tended to be more selective in the programs they sponsor.¹⁷ By far the pre-

¹³See Dorothy J. Della Noce et al., *Assimilative, Autonomous or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 *Pepp. Disp. Resol. L.J.* 11 (2002).

¹⁴*Id.* at 36.

¹⁵See *infra* text accompanying notes 46–52, 71–75.

¹⁶See generally, Elizabeth Plapinger & Donna Steinstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers* (1996) [hereinafter *Federal Sourcebook*] (extensively detailing various ADR programs in the federal district courts); National Center for State Courts and State Justice Institute, *Symposium on Court-Connected Dispute Resolution Research* (Susan Keilitz ed., 1994). The website of the National Center for State Courts provides links to a myriad of state court and agency ADR programs and related sites. See <www.nsonline.com>.

¹⁷See Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 *Ohio St. J. Disp. Resol.* 303, 303–28 (discussing the difference between court programs and the Sander model, but pointing out how the same ends were being achieved in some cases by the creative roles of magistrates and special masters).

dominant process choice is mediation, with its much-touted potential benefits of flexibility, party control, confidentiality, relatively low cost, and minor risk.¹⁸

A. ADR Programs in the Courts

1. Federal Court Programs

In 1990, Congress passed the Civil Justice Reform Act (CJRA),¹⁹ which encouraged federal district courts to develop programs utilizing alternative dispute resolution approaches. The Alternative Dispute Resolution Act of 1998²⁰ required each of the 94 districts to “authorize” use of ADR in civil actions. Each district was empowered to design its own ADR program, but required to adopt procedures for making neutrals available to parties. Sixty-three districts currently authorize mediation; 28 authorize some form of nonbinding arbitration; and 23 authorize early neutral evaluation.²¹ Although some federal courts require parties to use a particular ADR process, most do not. In FY2001, approximately 24,000 cases were referred to one or another form of ADR in the district courts.²²

2. State Court Programs

In 1990, it was estimated that more than 1,200 ADR programs were being operated by or in conjunction with state courts.²³ The nation’s most extensive court mediation and ADR system is that of Florida, which began with the establishment of one of the first citizen dispute settlement centers (CDS) in Dade County in 1975.²⁴ In 2003, Florida boasted 11 CDS programs, 41 country mediation programs covering all cir-

¹⁸For a court program director’s view of potential advantages and concerns, see Stipanowich, *supra* note 3, at 870–75.

¹⁹28 U.S.C. §§ 471–482 (1990).

²⁰28 U.S.C. §§ 651–658 (1998), discussed in Donna Stienstra, *The Alternative Dispute Resolution Act of 1998: Seeds of Change in the Federal District Courts*, available at <http://www.ncsconline.org/WC/Publications/KIS_ADRMed_Trends99-00_98ActPub.pdf>.

²¹Details of many of the programs are set forth in *Federal Sourcebook*, *supra* note 16. See also <www.uscourts.gov>.

²²One former judge observes that, “[a]necdotally, somewhere between 50–60% of the cases referred [to ADR] appear to settle through the ADR process.” Richard A. Levie, *Recent Trends in Alternative Dispute Resolution*, delivered at *What’s New in U.S. Litigation*, Manchester, UK (Oct. 25, 2002), available at <<http://www.adrassoc.com/Publications%5CLEvie%20Fall-02.pdf>>.

²³State Justice Institute & American Judicature Society, *Proceedings of Conference on the Future and the Courts* (May 1990).

²⁴Available at <<http://www.flcourts.org/osca/divisions/adr/adrintro.html>>.

cuits in the state, 23 family mediation programs, 11 circuit civil programs, 22 dependency mediation programs, an appellate mediation program, and several court-connected arbitration programs.²⁵ As of August 2003, more than 16,200 persons had received state-certified mediation training, and there were more than 2,917 certified county mediators, 1,883 family mediators, 2,387 circuit mediators, and 144 mediators for dependency cases.²⁶

A summary of Illinois court ADR programs also reflects the breadth and diversity of initiatives now in operation. It details general civil, probate, domestic relations, and small-claims mediation or evaluation programs, as well as a multicircuit court-connected nonbinding arbitration program that handled more than 30,000 cases in the last four years, more than half of which were in Cook County alone.²⁷ In addition, it catalogues a number of community-based ADR initiatives, including victim-offender mediation programs, and juvenile offender mediation programs, which are not sponsored by the courts, but work with public authorities.

3. General Limitations of Court Data

Unfortunately, even well-established federal and state court ADR programs seldom collect sufficient information to provide a clear understanding of their impact on the litigation process, including the number of trials. For one thing, court administrative systems are generally geared to reporting annual changes in total number of cases—the kind of information that is critical to identifying resource needs; they are not typically designed to yield evaluative data on a court program.²⁸ More sophisticated tracking systems require resources that many courts do not have. Every year, for example, the State of Florida publishes a compendium of data on its state court mediation and ADR program, the nation's most extensive state system.²⁹ Yet while thousands of cases were referred to and mediated in Florida's County and Circuit Civil, Family and Dependency Mediation Programs, producing thousands of agreements,³⁰ we cannot pin down the impact of mediation in reducing trial days or court

²⁵Id.

²⁶Id.

²⁷Available at <http://www.caadrs.org/studies/adr_summary.htm>.

²⁸This subject is discussed on the website of the Center for Analysis of Alternative Dispute Resolution Systems, a Chicago-area nonprofit that collects information on court-related ADR. See <<http://www.caadrs.org/statistics/backgrnd.htm>>.

²⁹See Della Noce et al., *supra* note 13.

³⁰See generally, 2003 Florida Mediation and Arbitration Programs: A Compendium (Fla. Disp. Resol. Ctr. 16th ed.) (summarizing caseloads for many court mediation programs in Florida, as well as breakdowns of types of cases submitted).

resources devoted to supervising litigation, or its specific effect on the time, expense, and degree of satisfaction experienced by litigants.

For a number of years, the Federal District Court for the Eastern District of New York has sponsored a program for judicial referral of cases to mediation as well as a program for court-connected arbitration.³¹ In a typical year, according to the program administrator, a volume of cases approximating 10 percent of the court's yearly case filings go to mediation or arbitration through the court programs.³² Like most courts, the Eastern District maintains basic statistics on case filings and dispositions in the ADR program. According to statistics published on the Internet,³³ 180 cases were referred to mediation up through October of the year 2000 in the Eastern District. The published records indicate that about one-third of those matters (61) had been successfully mediated, but another 51 were "not settled" through the process.³⁴ Another 51 were "still active," meaning, presumably, that mediation had not yet taken place or was in process, and 11 cases were "withdrawn" or otherwise concluded.

These bare statistics tell us little, and the impact of these programs on the overall disposition of cases, litigation events, or the incidence of court trial is unclear. We do not know the nature of the matters disputed or the likelihood that those "successfully mediated" would have been resolved in some fashion before trial like the vast majority of civil matters in the federal system. We know even less about the many matters—perhaps approximating half the number of initial referrals—that are not mediated to settlement.³⁵

Over the years, however, there have been a number of efforts to obtain more specific information about the results of court-connected ADR programs, their impact on the litigation process and experience, as well as other effects. Although varying greatly in scope, methodology, and utility, these efforts illustrate the importance of context, specific process elements, program goals, and differing participant perspectives in understanding and evaluating court programs. They also demonstrate that mediation and other forms of ADR can produce significant benefits for litigants and court systems.

³¹For details of the program, see Federal Sourcebook, *supra* note 16, at 189–95.

³²Telephone interview with Gerald P. Lepp, ADR Administrator, Federal District Court for the Eastern District of New York (Oct. 2003).

³³Statistics regarding court mediation referrals and settlements may be found at <www.nyed.uscourts.gov/adr>.

³⁴One presumes that "partially settled" cases were included in the "not settled" category.

³⁵Even in Florida, the Dispute Resolution Center reports that although all state circuit courts make referrals to mediation, the state is able to collect statistics only from those offices that have identified a director or coordinator for mediation services. See *supra* note 24.

*B. Studies on the Impact of Federal Court ADR Programs on Litigation and Participants' Experience*1. A Snapshot of Program Evolution: *RAND Report* (1996)

In the wake of the Civil Justice Reform Act, the Judicial Conference of the United States contracted with the RAND Corporation's Institute for Civil Justice to produce an independent evaluation of policies and programs developed by federal district courts for managing their civil dockets. The *RAND Report*³⁶ contained many findings, but none generated more comment or criticism³⁷ than its conclusion that:

[ICJ] found no strong statistical evidence that the mediation or neutral evaluation programs, as instituted in the six districts studied, significantly affected time to disposition, litigation costs, or attorney view of fairness or satisfaction with case management. The only significant outcome is that these ADR programs appear to increase the likelihood of a monetary settlement.³⁸

A statement signed by 32 lawyers, scholars, judges, and others under the rubric of the CPR Institute for Dispute Resolution raised a number of questions and concerns regarding the study.³⁹ The statement applauded the RAND researchers' "cautious and candid presentation," but warned that its "important and nuanced conclusions" regarding six federal district court programs should be read with care. Among other things, the program studies were not representative of the 51 mediation and 14 early neutral evaluation programs then operating—programs that are different in design and operation.⁴⁰ The statement also observed that some of the programs studied "had

³⁶J. Kakalik et al., *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (Vol. I); Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts (Vol. II); An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (Vol. III); and An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act (Vol. IV)* (RAND ICJ, 1996).

³⁷See, e.g., 3 *Disp. Resol. Mag.* 2–19 (1997) (10 articles responding to and critiquing elements of the *RAND Report*, suggesting consequences); Francis O. Spalding, *The RAND Report, the Federal Judicial Center Study and Alternative Dispute Resolution in United States District Courts*, Presentation for ADR in U.S. Courts: 1997, 27th Annual Workshop on Commercial & Consumer Law, University of British Columbia, Vancouver, B.C. (Oct. 17–18, 1997) (unpublished manuscript on file with author).

³⁸See Kakalik, *Evaluation of Mediation and Early Neutral Evaluation*, *supra* note 36, at 53.

³⁹Statement of Concerns Regarding RAND ADR Study of March 14, 1997 [hereafter Statement].

⁴⁰The RAND researchers themselves observed that mediation and early neutral evaluation programs involved many different process options:

Referral of cases may be mandatory or voluntary, or judicial discretion may be used to decide which cases are referred. Parties may be able to opt out after referral, or not. The cases eligible for referral to ADR vary, based on the type of case, the amount at stake, or other factors. The ADR provider may be a judicial officer, or a neutral lawyer, or someone trained in ADR techniques who is not a lawyer. The ADR

significant design flaws, later corrected, at the time they were studied.” One mediation program “required no training for its lawyer-mediators, excluded settlement-empowered clients and insurers from the mediations, and held short and often perfunctory mediation sessions,” violating “most of what is known about building successful court ADR programs.”⁴¹ Moreover, researchers were not capable of isolating ADR effects among many case-management innovations and changes.

2. Multi-Option Pilot Program of the Northern District of California

Near the time of the *RAND Report*, a Federal Judicial Center (FJC) report to the U.S. Judicial Conference Committee on Court Administration and Case Management documented significant savings in dispute resolution time and cost in federal district court programs.⁴² Each of the selected programs was at a “demonstration” district presided over by judges who had shown commitment to pioneering ADR—and reflect the programs’ different contexts. Notable among these was the Multi-Option Pilot Program of the Northern District of California, a much-studied program administered by Magistrate Judge Wayne Brazil. The court’s court-annexed arbitration program, and a carefully crafted early neutral evaluation (ENE) program, both predated the CJRA.⁴³ The court’s demonstration project aimed at providing full-time professional staff support for the court’s programs, assessing current programs, and developing a mediation program if appropriate.⁴⁴ The declared purposes for the Multi-Option approach included providing parties with options, including some new choices (such as mediation), saving time and cost by resolving cases early, and heightening awareness of ADR and the appropriateness of various options for different kinds of cases.⁴⁵

The FJC findings regarding the Northern District’s program indicate that with careful design and adequate support, a court-connected ADR program may produce

provider may be paid or work pro bono. ADR training may or may not be required. The ADR session may be early or later in the life of a case. The session may be only an hour long or may consume several hours over more than one day.

Supra note 36, at xxviii.

⁴¹Statement, supra note 39.

⁴²Donna Stienstra et al., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 (Federal Judicial Ctr., 1997) [hereinafter FJC Study]. Also discussed in Spalding, supra note 37.

⁴³Id. at 176.

⁴⁴Id.

⁴⁵Id. at 177–81.

multiple benefits for the court system and individual participants. The FJC study found:

- Most judges involved with the program believed it was achieving its intended goals, and were generally favorable toward the program.⁴⁶
- Sixty-one percent of the lawyers participating in the ADR programs who responded to the FJC survey reported that their entire case settled, and another 4 percent reported partial settlement.⁴⁷
- Sixty-one percent of responding lawyers perceived that participation in the ADR program had decreased case disposition time.⁴⁸
- Sixty-two percent believed the process had reduced the cost of resolving the case.⁴⁹

More than half of responding lawyers believed the process was helpful in moving the parties toward settlement, clarifying or narrowing monetary differences, encouraging the parties to be more realistic . . . ; giving one or more parties an opportunity to “tell their story,” providing a neutral evaluation of the case; clarifying or narrowing liability issues . . . ; allowing clients to become more involved in the resolution of their case; and improving communication⁵⁰

- Eighty-one percent of respondents were satisfied with the ADR outcome, and 98 percent viewed the neutral as “fair.”⁵¹
- Ninety-four percent of responding lawyers were willing to volunteer appropriate future cases for submission to the ADR process they were evaluating.⁵²

3. Early Assessment in the Western District of Missouri

An effort to examine the specific impact of a very different kind of federal court program involved the Early Assessment Program of the Western District of Missouri

⁴⁶Id. at 195–96.

⁴⁷Id. at 197–98.

⁴⁸Id. at 199–200.

⁴⁹Id. at 200–03.

⁵⁰Id. at 204–05.

⁵¹Id. at 206–07.

⁵²Id. at 207. Even more specific and generally positive data regarding the early neutral evaluation (ENE) program at the court is provided in Joshua D. Rosenberg & H.J. Folberg, *Alternative Dispute Resolution: An Empirical Assessment*, 46 *Stanford L. Rev.* 1487 (1994).

Table 1: Proximity of Case Resolution to the Early Assessment Session in Cases Terminated After at Least One Early Assessment Program Session, January 1, 1992 to August 31, 1998, Western District of Missouri, Kansas City Division

<i>Timing of Case Termination</i>	<i>Percent of Cases (N = 605)</i>
After Early Assessment Program session	38.0
1–31 days after session	19.0
32–91 days after session	17.0
92+ days after session	26.0

SOURCE: Donna Stienstra, "Demonstrating the Possibilities of Providing Mediation Early and by Court Staff: The Western District of Missouri's Early Assessment Program," in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds.), ABA Section of Dispute Resolution (1998), Table 4, at 261.

by Donna Stienstra of the Federal Judicial Center.⁵³ The program was designed to resolve disputes earlier in order to lower the costs of litigation.⁵⁴ Under the program, the parties were required to meet with a Program Administrator within 30 days of the completion of responsive pleadings in order to discuss the case, consider ADR choices, devise a plan for information exchange or key discovery, or, if the parties wished, engage in mediation.⁵⁵ In light of the fact that some judges had initial reservations about the program, it was agreed to conduct an experiment by randomly assigning civil cases into one of three comparison groups: (1) cases required to participate in Early Assessment, (2) cases in which parties would be invited to voluntarily participate, and (3) a "control" group of cases that would follow the usual litigation path without early assessment.⁵⁶

The resulting data provide a very comprehensive assessment of the relative costs and benefits of the program. At a cost of approximately \$700 per case, the program:

- Reduced the average case disposition time by more than two months, and resulted in 57 percent of matters being resolved within 31 days of the Early Assessment, as shown in Table 1.⁵⁷

⁵³Donna Stienstra, *Demonstrating the Possibilities of Providing Mediation Early and by Court Staff: The Western District of Missouri's Early Assessment Program*, in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds., 1998 A.B.A. Sec. Disp. Resol. 251).

⁵⁴*Id.* at 252.

⁵⁵*Id.* at 252–53.

⁵⁶*Id.* at 254.

⁵⁷*Id.* at 261.

Table 2: Attorney Estimates of the Early Assessment Program's Impact on Their Client's Total Litigation Costs, Western District of Missouri, Kansas City Division

<i>Effect on Costs</i>	<i>Percent of Attorneys</i>		
	<i>Selecting Response (N = 847)</i>	<i>Median Per Party</i>	<i>Mean Per Party</i>
Decreased client's costs	69.0	\$15,000 N = 383	\$32,007
Increased client's costs	10.0	\$1,500 N = 67	\$3,552
No effect	21.0	N/A	N/A

NOTE: Median savings are reported per party, not per questionnaire respondent. That is, when more than one attorney responded for a single party, the attorneys' estimates were averaged.

SOURCE: Donna Stienstra, "Demonstrating the Possibilities of Providing Mediation Early and by Court Staff: The Western District of Missouri's Early Assessment Program," in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds.), ABA Section of Dispute Resolution (1998), Table 5, at 262.

- Reduced litigation costs in cases reported by more than two-thirds of participating attorneys (median reduction \$15,000), as shown in Table 2.⁵⁸
- Produced evidence that in most cases, the program provides other benefits, including encouraging the parties to be more realistic about their positions, giving the parties more involvement in the resolution of their case, providing an opportunity to meet and talk with opposing counsel, and better understand and evaluate the other side's position, prompting early definition of issues, encouraging parties to consider alternatives to litigation, and other benefits, as shown in Table 3.⁵⁹
- Indicated that the Early Assessment Program was effective in the majority of cases despite being conducted prior to discovery.⁶⁰

Ninety-six percent of all participating attorneys expressed support for the continuation of the Early Assessment Program, and offered strong positive comments about the program.⁶¹ The study also provided qualitative guidance on a range of important practical issues, including the particular value of using an experienced professional staff mediator and the limitations of the approach taken by the district court.⁶²

⁵⁸Id. at 262.

⁵⁹Id. at 265.

⁶⁰Id. at 268.

⁶¹Id. at 269.

⁶²Id. at 271-75.

Table 3: Attorney Ratings of the Early Assessment Program's Helpfulness in Providing Several Kinds of Assistance, Western District of Missouri, Kansas City Division

<i>Assistance Early Assessment Program (EAP) is Intended to Provide</i>	<i>Percent of Attorneys Saying the EAP</i>		
	<i>Was Helpful</i>	<i>Was Detrimental</i>	<i>Had No Effect</i>
Encouraging the parties to be more realistic about their respective positions in this case ($N = 1,301$)	77.0	4.0	20.0
Allowing the parties to become more involved in the resolution of this case than they otherwise would have been ($N = 1,301$)	72.0	1.0	26.0
Enabling you to meet and talk with the opposing attorney ($N = 1,304$)	71.0	1.0	28.0
Allowing you to better understand and evaluate the other side's position ($N = 1,296$)	68.0	1.0	31.0
Prompting early definition of the issues ($N = 1,303$)	67.0	1.0	33.0
Encouraging the parties to consider methods other than litigation to resolve their dispute ($N = 1,297$)	66.0	1.0	33.0
Allowing you to identify the strengths and weaknesses of your client's case ($N = 1,303$)	65.0	1.0	34.0
Providing an opportunity to evaluate the other side's attorney ($N = 1,297$)	63.0	1.0	36.0
Improving communications between the attorneys in this case ($N = 1,299$)	60.0	3.0	38.0
Improving communications between the parties in this case ($N = 1,296$)	55.0	5.0	40.0
Improving relations between the parties in this case ($N = 1,297$)	42.0	8.0	50.0
Encouraging earlier discovery ($N = 1,284$)	38.0	2.0	60.0

SOURCE: Donna Stienstra, "Demonstrating the Possibilities of Providing Mediation Early and by Court Staff: The Western District of Missouri's Early Assessment Program," in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds.), ABA Section of Dispute Resolution (1998), Table 6, at 265.

4. Other Studies

The foregoing studies provide statistical evidence of court-connected ADR programs fulfilling established goals and providing measurable benefits to courts and disputants; however, there are other studies that provide less clear results. For example, an examination of the Settlement Program for the Northern District of Oklahoma, a program requiring the pro bono assistance of local attorneys as "adjunct settlement judges" providing early evaluation of disputes, was viewed as a success by surveyed judges; but the study's author pointed out that the 50 percent rate of resolution compared unfavorably to the results achieved in private ADR, and raised questions about the pro bono character of the program and the limited training received by participating adjuncts.⁶³

⁶³Frederic R. Dichter, A Study of the Northern District of Oklahoma Settlement Program, in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds., 1998 A.B.A. Sec. Disp. Resol. 337, 345-46). See also Barbara S. Meierhofer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center, 1999) (describing varying results among 10 court-annexed arbitration programs).

C. Studies on the Impact of State Court ADR Programs on Litigation and Participants' Experience

1. Self-Collection of Data at the San Mateo Superior Court

Although, as noted above, federal and state court programs are usually hampered by the cost and administrative difficulties of obtaining information on the performance of court-connected ADR programs, a few court systems have made notable efforts to obtain more specific information about the relationship between ADR and the litigation process. An example is the Superior Court of San Mateo County, California, which established a Multi-Option ADR Project (M.A.P.) in 1996.⁶⁴ This program was developed as a partnership of the court, bar, and community to give civil litigants "an early opportunity to resolve their dispute before making a substantial financial and emotional commitment to the litigation process."⁶⁵ Each year, administrators of M.A.P. conduct an extensive survey of participants in the program. In 2002, questionnaires were mailed to about 694 ADR participants to determine the status of and perspectives regarding civil cases referred to the program between July 2001 and July 2002, generating 515 responses (a 74 percent response rate).⁶⁶ As reflected in Table 4, the types of cases submitted to the civil ADR program were representative of the court's civil docket.⁶⁷

⁶⁴See generally, Jeniffer Bundagg & Rosario Flagg, Multi-Option ADR Project Evaluation Report, July 2001–July 2002, Superior Court of California, County of San Mateo (March 2003). Although M.A.P. was conceived as a full-blown "multi-door courthouse" program, mediation is the overwhelming choice of program participants. See *id.* at 12. Compare Stipanowich, *supra* note 17, at 311–28 (discussing relative rarity of full-blown multidoor programs).

⁶⁵*Id.* at 5. Parties are encouraged to meet with M.A.P. staffers who describe ADR options and provide a list of M.A.P. neutrals, along with detailed resumes. Parties may select a listed M.A.P. panelist or a mutually acceptable unaffiliated neutral.

⁶⁶The 553 respondents included 175 plaintiffs' attorneys, 189 defendants' attorneys, 101 plaintiffs, 81 defendants, and 7 "other clients" who had participated in the ADR program during the survey period. The authors of the survey cautioned that despite the high response rate, the results should be treated as "illustrative rather than comprehensive." *Id.*

Although the total number of cases filed in the ADR program during the relevant period was not available, the ADR Director reports that:

The average case management calendar has about 20 (new) cases a day on it, these are held 4 days a week and we average 2–8 ADR referrals a morning, so of 80 cases a week I would say we receive approximately 13 ADR referrals a week. When you exclude holidays the court hears calendars about 48 weeks a year so 80 × 48 weeks gives you 3840 civil case management conferences and 13 × 48 gives you 624 civil ADR referrals annually.

Telephone interview with Sheila Rose Purcell, ADR Director, Multi-Option ADR Project (Dec. 1, 2003).

⁶⁷The program was dominated by "personal injury" matters including premises liability, automobile accident, medical malpractice, wrongful death, and product liability cases, and by "business" matters including breach of contract, collections, bankruptcy, copyright, trade secret, partnership, and fraud/misrepresentation cases. *Supra* note 64, at 13.

Table 4: Types of Cases in the San Mateo Superior Court ADR Program (1998–2002)

<i>Dispute Type</i>	<i>% of Cases in 1998–1999</i>	<i>% of Cases in 1999–2000</i>	<i>% of Cases in 2000–2001</i>	<i>% of Cases in 2001–2002</i>
Personal injury	30	20	31	41
Business	11	19	31	30
Real estate	18	18	17	13
Other	2	2	—	4
Construction	13	9	2	2
Employment	10	7	9	6
Malpractice	4	6	4	4

NOTE: “Other” includes, among other things, probate, insurance, neighborhood, and landlord-tenant cases. SOURCE: Jeniffer Bundagg & Rosario Flagg, Multi-Option ADR Project Evaluation Report, July 2001–July 2002, Superior Court of California, County of San Mateo 14 (March 2003).

Table 5: Effect of ADR on Court Time Devoted to Case—San Mateo County Superior Court

<i>ADR Effect on Court Time</i>	<i>% of Cases in 1998–1999</i>	<i>% of Cases in 1999–2000</i>	<i>% of Cases in 2000–2001</i>	<i>% of Cases in 2001–2002</i>
Reduced	68	76	94	95
No effect	28	13	—	—
Increased	2	7	6	5

SOURCE: Jeniffer Bundagg & Rosario Flagg, Multi-Option ADR Project Evaluation Report, July 2001–July 2002, Superior Court of California, County of San Mateo 14, at 17 (March 2003).

Asked about the effect of ADR (which nearly always meant mediation)⁶⁸ on the amount of court time devoted to the case, the overwhelming majority of those responding (95 percent) indicated that ADR reduced court time.⁶⁹ Table 5 compares responses for recent years. Responses also tended to reflect savings of court time, as shown in Table 6. Although the unfortunate overlap in the categories makes the results less precise than they might have been, it is clear that nearly two-thirds of the 364 participating attorneys who filled out survey forms expected that their particular matter would have continued through the litigation process—in most cases to trial. Even assuming participating attorneys might have overestimated the likelihood that their case would result in trial, the foregoing data are a strong indication

⁶⁸Mediation use ranged from 88 percent of all ADR applications in 1998–1999 to 97 percent in 2001–2002. *Id.* at 12.

⁶⁹In response to a separate question, the great majority of responding participating attorneys indicated that ADR was an important or very important factor in the settlement of their case. *Id.* at 20.

Table 6: San Mateo Superior Court ADR: Participating Attorneys' Estimates of Court Days Saved

<i>Estimated # Saved Days</i>	<i>1-3 Days</i>	<i>3-5 Days</i>	<i>5-10 Days</i>	<i>10-20 Days</i>	<i>20+ Days</i>
# of responses	55	57	96	24	5

SOURCE: Jeniffer Bundagg & Rosario Flagg, Multi-Option ADR Project Evaluation Report, July 2001-July 2002, Superior Court of California, County of San Mateo 14, at 18 (March 2003).

Table 7: San Mateo Superior Court ADR: Participating Attorneys' Perceptions of Litigation Events Avoided

<i>Type of Event</i>	<i>Case-Management Conference</i>	<i>Summary Judgment</i>	<i>Pretrial Conference</i>	<i>Judicial Settlement Conference</i>	<i>Trial</i>	<i>Other</i>
# of responses	40	57	128	174	196	8

SOURCE: Jeniffer Bundagg & Rosario Flagg, Multi-Option ADR Project Evaluation Report, July 2001-July 2002, Superior Court of California, County of San Mateo 14, at 21 (March 2003).

of the potential impact of a court-connected mediation program on the incidence of trial.⁷⁰

Since, for the first time, the 2002 survey also asked participating attorneys to describe "litigation activity avoided" through the use of ADR, we have a more direct measure of attorney perspectives regarding the impact of ADR on the litigation process. Table 7 summarizes their responses. Much of the information collected, however, addresses more general perceptions of satisfaction with the process and perceived cost or time savings in resolving disputes.

2. The CAADRS Summaries

An effort to collect and summarize empirical research on court-related mediation programs was sponsored by the Chicago-based Center for Analysis of Alternative Dispute Resolution Systems (CAADRS). The CAADRS website is currently the closest equivalent to a motherlode of empirical data on court-connected mediation and other ADR programs, primarily in state courts.⁷¹ A CAADRS annotated bibliography provides summaries in a common format of 62 studies of mediation in more than

⁷⁰It should be noted, however, that because multiple attorneys filled out surveys with respect to most cases, the number of trials avoided would in any case be significantly smaller than the total number of responding attorneys.

⁷¹See Jennifer E. Shack, Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs (Center for Analysis of Alternative Dispute Resolution Systems, 2003), available at <<http://www.caadrs.org/studies/MedStudyBiblio.htm>>.

100 different court programs, as well as an overview of the studies.⁷² Several of the studies focus on the impact of mediation on trial rate—with mixed findings: in most of these studies, mediation was found to have no effect on the incidence of trial.⁷³

The greatest value of this diverse group of studies is, however, in providing a more nuanced if incomplete picture of mediation in operation, divorced from the hyperbole that so often surrounds discussion of ADR and its perceived benefits. Although the studies reflect a wide range of research methods, with many but not all employing comparisons between groups of mediated cases and a control group of nonmediated matters, they collectively demonstrate the many ways mediation may alter the dispute resolution experience, apart from mediation's impact on litigation events. These include effects on settlement rate, overall satisfaction with the process or its results, perceptions of fairness, perceived costs, speed of resolution, continuing relations between family members or other participants, compliance, and collection of restitution in victim-offender scenarios. Although the collective results are anything but uniform, it is fair to represent the overall picture as very positive: the data show that mediation very often resulted in greater satisfaction among participants with the process or result, cost or time savings, improved relations or compliance, and other benefits. On the other hand, that when it comes to mediation programs, much depends on the nature of the program and of the participants: some

⁷²Jennifer Shack, *Mediation Can Bring Gains, But Under What Conditions?* 9 *Disp. Resol. Mag.* 11 (2003) (providing general description of surveys summarized more specifically on the CAADRS website).

⁷³See, e.g., Stevens H. Clarke, Elizabeth D. Ellen & Kelly McCormick, *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects* (Institute of Government, University of North Carolina at Chapel Hill, 1995) (study of civil case pilot programs in several North Carolina counties found that trial rate did not appear to be affected, although case-processing time was lower than that of control group); Stevens H. Clarke, Ernest Valente, Jr. & Robyn R. Mace, *Mediation of Interpersonal Disputes: An Evaluation of North Carolina's Programs* (Institute of Government, University of North Carolina at Chapel Hill, 1992) (evaluation of mediation of misdemeanor cases in three counties finds trial rate was unaffected in two counties and decreased in a third); Laura F. Donnelly & Rebecca G. Ebron, *The Child Custody and Visitation Mediation Program in North Carolina* (North Carolina Administrative Office of the Courts, 2000) (comparison of two sample mediation programs and two nonprograms found no difference in trial rate); Michael Fix & Philip J. Harter, *Hard Cases, Vulnerable People: An Analysis of Mediation Programs at the Multi-Door Courthouse of the Superior Court of the District of Columbia* (1992) (comparative study of mediated and nonmediated civil and domestic relations cases found that 80 percent of domestic relations cases settled out of court, compared to only 53 percent of nonmediated cases); Georgia Office of Dispute Resolution, *Participant Satisfaction Survey of Court-Connected ADR Programs* (2000), available at <www.ganet.org/gadr/pdfs/finalsji.pdf> (survey of participants in 15 civil mediation programs in Georgia showed that they did not feel they spent less time litigating if case went to mediation); Susan Keilitz, *A Multi-State Assessment of Divorce Mediation and Traditional Court Processing* (National Center for State Courts, 1992) (comparative study found that mediation did not reduce the number of hearings held); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 *Ohio St. J. on Disp. Resol.* 641 (2002) (no difference found between mediated and nonmediated cases in the number of motions filed or decided). See also James B. Eaglin, *The Pre-Argument Conference in the Sixth Circuit Court of Appeals* (Federal Judicial Center, 1990) (study of appellate court mediation concluded that 57 percent of mediated cases reached argument or submission, as opposed to 69 percent of nonmediated cases).

studies, for example, indicate that subjective perceptions of satisfaction with a process or result may vary with gender⁷⁴ or cultural or racial background.⁷⁵

3. The California Early Mediation Pilot Programs and Report (2004)

A 2004 report published by the Judicial Council of California appears to have broken new ground in this regard, providing what may be the most enlightening examination of court-connected mediation ever conducted.⁷⁶ A statute mandated Early Mediation Pilot Programs in four superior courts⁷⁷ and required the Judicial Council to study these programs;⁷⁸ voluntary programs were also studied by the council. The aim of the study was to assess the impact of the mediation programs in four distinct areas: settlement/trial rate, disposition time, litigant/attorney satisfaction, cost for litigants and the court's workload.⁷⁹ To measure the overall effectiveness of the programs, the research study used data provided by the courts' computerized case-management system (CMS) and surveys of the parties, attorneys, and judges.⁸⁰ During the pilot period, nearly 8,000 cases were mediated in the programs.⁸¹

One significant element of the study was the use of comparison groups. In pilot programs involving mediation by court mandate, the comparison was between a "program group" of matters directed to mediation and a "control group" of other cases; in pilot programs involving voluntary mediation, the comparison involved cases conducted immediately prior to the pilot program or cases where mediation was not elected.⁸² The authors of the study also employed regression analysis to

⁷⁴See Keilitz, *supra* note 73 (women gave more favorable ratings to mediation than adjudication in comparative study involving mediated and nonmediated divorce cases; men's responses to mediation did not differ greatly from their responses to adjudication).

⁷⁵See Michelle Hermann et al., *The Metrocourt Project Final Report* (University of New Mexico Center for the Study and Resolution of Disputes, 1993) (minority claimants in Albuquerque small-claims mediation program received less in mediation than nonminorities, but had highest rates of satisfaction).

⁷⁶Evaluation of the Early Mediation Pilot Projects, Judicial Council of California, Administrative Office of the Courts, Office of General Counsel (2004).

⁷⁷*Id.* at 2. mandatory (San Diego and Fresno Counties) and two voluntary (Contra Costa and Sonoma Counties) pilot programs were established and studied.

⁷⁸*Id.* at xix. In 2001, the Code of Civil Procedure was amended so as to include the Los Angeles Court. See *id.*

⁷⁹*Id.*

⁸⁰*Id.* at 11–12.

⁸¹*Id.* at 29.

⁸²*Id.* at 7.

Table 8: Evaluation of the Early Mediation Pilot Projects, Judicial Council of California: Comparison of Mediation Referral, Mediation, and Settlement Rates in the Pilot Programs in Numbers—Cases Valued under \$25,000 Filed in 2000 and 2001

	# Eligible Cases	# Cases Referred to Mediation	# Cases Mediated	# Cases Settled at Mediation	# Cases Settled at & Direct Result of Mediation
San Diego	5,612	2,112	1,357	845	990
Fresno	1,460	414	213	124	130
Sonoma	655	45			
Total	7,727	2,571	1,570	969	1,120

SOURCE: *Evaluation of the Early Mediation Pilot Projects, Judicial Council of California, Administrative Office of the Courts, Office of General Counsel 36 (2004).*

Table 9: Evaluation of the Early Mediation Pilot Projects, Judicial Council of California: Comparison of Mediation Referral, Mediation, and Settlement Rates in the Pilot Programs in Percentages—Cases Valued under \$25,000 Filed in 2000 and 2001

	% Eligible Cases Referred to Mediation	% Referred Cases Mediated	% Cases Settled at Mediation	% Cases Settled at & Direct Result of Mediation
San Diego	38	64	62	76
Fresno	28	52	58	61
Sonoma	7			

SOURCE: *Evaluation of the Early Mediation Pilot Projects, Judicial Council of California, Administrative Office of the Courts, Office of General Counsel 36 (2004).*

determine whether the impact of the voluntary mediation programs varied depending on the characteristics of a dispute or the parties involved,⁸³ including the nature of the dispute, amount of damages sought, number of parties involved, complexity of the case, initial hostility between the parties, and the relationship between the parties.⁸⁴ Finally, the study included a number of interviews with judges and focus groups, surveys of mediators' perceptions of factors affecting resolution, and attorneys' views on the long-term impacts of mediation.⁸⁵

The California study produced a host of findings, including positive impacts on settlements and trial rate, disposition time, satisfaction, and costs.⁸⁶ Some salient points:

⁸³Id. at 27.

⁸⁴Id. at 14.

⁸⁵Id. at 15.

⁸⁶Id. at 29–31.

- In the San Diego and Los Angeles programs, the incidence of trial was 24–30 percent lower among cases in the mediation program group than those in the control group.⁸⁷
- All five pilot programs appeared to have resulted in reduced “disposition time” for cases, as shown in Tables 10 and 11,⁸⁸ and enhanced attorney perceptions of the services provided by the court and/or the litigation process, as shown in Table 12.⁸⁹
- Additionally, four of the five pilot programs appear to have resulted in a reduced number of motions or other pretrial court events.⁹⁰
- The data evidence significant reductions in litigant costs and attorney time resulting from the pilot programs: attorney estimates indicate that during 2000 and 2001, the programs may have saved in excess of \$49 million in litigant costs and more than a quarter of a million attorney hours.⁹¹

Within the 370+ pages of the report are important indicators of how program characteristics, the actions of courts, and local legal culture can cause wide variations in results. For example, whether a court-connected mediation program is officially “voluntary” or “mandatory,” will result in experiences, perceptions, and results varying considerably depending on the degree of judicial pressure to mediate on the one hand, and the discretion judges show in determining which matters may be appropriately mediated on the other.⁹² California’s landmark study strongly supports the notion that court-connected mediation programs are capable of producing important benefits for courts, litigants, and lawyers; it also reinforces the notion that much depends on the specific characteristics of a program and the context within which it is established. The California data come not a moment too soon; at least one of the court administrative centers connected to the pilot programs has already shut down for lack of funds.⁹³

⁸⁷Id. at xx, 29.

⁸⁸Id. at xx, 30.

⁸⁹Id. at xx–xxi, 30.

⁹⁰Id. at xxi–xxii, 31.

⁹¹Id. at xxi, 30–31.

⁹²Id. at 38.

⁹³See Russ Bleemer, *California Changes Its Court Rules on ADR Administration*, 22 *Alt. to High Cost Litig.* 20 (Feb. 2004).

Table 10: Evaluation of the Early Mediation Pilot Projects, Judicial Council of California: Average and Median Disposition Times and Cumulative Disposition Rates for Cases Valued Over \$25,000

	<i>Average Disposition Time</i>			<i>Median Disposition Time</i>			<i>Cumulative Disposition Time</i>
	<i>Program Cases</i>	<i>Nonprogram Cases</i>	<i>Difference (in Days)</i>	<i>Program Cases</i>	<i>Nonprogram Cases</i>	<i>Difference (in Days)</i>	
San Diego	323	335	-12	310	329	-19	Rate for program cases was higher for entire 24-month follow-up period, but most clearly from 5 to 13 months after filing (when rates for both program and control groups leveled off). Program rate ranged from 1.4 (at 3 months) to 7 percent higher (at 10 months).
Los Angeles	261	267	-6	241	248	-7	Rate for program cases was higher for entire 24-month follow-up period. Rate stayed about 2 to 3 percent higher than for control cases. Rate ranged from 1.7 (at 2 months) to 9.2 percent higher (at 13 months) than for control departments.
		(control group) 280 (control dept's)	-19		264 (control depts.)	-23	
Fresno	400	439	-39	348	398	-50	Rate for program cases was higher from 10 months after filing to end of the 34-month follow-up period; the largest difference was 17 percent at 14 months after filing.
Contra Costa	358	359	-1	328	336	-8	Rate for program cases was higher for entire 34-month follow-up period, but most clearly from 6 to 12 months after filing; the largest difference was 3.1 percent at 11 months after filing.

Table 10: Continued

	<i>Average Disposition Time</i>			<i>Median Disposition Time</i>			<i>Cumulative Disposition Time</i>
	<i>Program Cases</i>	<i>Nonprogram Cases</i>	<i>Difference (in Days)</i>	<i>Program Cases</i>	<i>Nonprogram Cases</i>	<i>Difference (in Days)</i>	
Sonoma	482	496	-14	436	456	-20	Rate for program cases was higher for entire 34-month period, but most clearly from 7 months after filing; the largest difference was 7 percent at 14 months after filing.

NOTE: In mandatory pilot programs (San Diego, Los Angeles, Fresno), “program cases” were program-group cases and “nonprogram cases” were control-group cases. In voluntary programs (Contra Costa, Sonoma), “program cases” were postprogram cases filed in 2000 and “nonprogram cases” were preprogram cases filed in 1999.

SOURCE: *Evaluation of the Early Mediation Pilot Projects*, Judicial Council of California, Administrative Office of the Courts, Office of General Counsel 36, 46 (2004).

D. The U.S. Justice Department and ADR

Of course, research on the impact of court-connected mediation, early neutral evaluation, or arbitration programs presents a partial picture at best. Another way of examining the growth of ADR against the backdrop of litigation is from the perspective of the user. There is, of course, no more regular participant in court proceedings than the U.S. government, which through various agencies is involved as a party in nearly one-third of all civil cases in federal district court.⁹⁴ In part because “the government simply does not have the resources to take all of these cases to trial,”⁹⁵ less than 2 percent of federal cases where the government is a party actually reach trial on the merits.⁹⁶ In recent years, the Justice Department has broadly embraced the use of ADR. In 1995, the Department employed mediation or some other ADR procedure in roughly 500 cases; by 2002, this number had grown to almost 3,000 cases.⁹⁷ In a report issued in 2000, Jeffrey Senger found that Justice Depart-

⁹⁴See Senger, *supra* note 4, at 3.

⁹⁵*Id.*

⁹⁶*Id.*, citing U.S. Attorney Annual Statistical Report (U.S. Department of Justice, 2002).

⁹⁷Senger, *supra* note 4, at 2.

Table 11: Evaluation of the Early Mediation Pilot Projects, Judicial Council of California: Average and Median Disposition Times and Cumulative Disposition Rates for Cases Valued Under \$25,000

	<i>Average Disposition Time</i>			<i>Median Disposition Time</i>			<i>Cumulative Disposition Rate</i>
	<i>Program Cases</i>	<i>Nonprogram Cases</i>	<i>Difference (in Days)</i>	<i>Program Cases</i>	<i>Nonprogram Cases</i>	<i>Difference (in Days)</i>	
San Diego	269	279	-10	247	272	-25	Rate for program cases was higher from 3 to 12 months after filing (when the disposition rates for both the program and control groups began to level off); the largest difference was 8.6 percent at 9 months after filing.
Fresno	321	347	-26	294	300	-6	Rate for program cases was higher from 9 months after filing to the end of the 34-month follow-up period; the largest difference was 12.3 percent at 13 months after filing.
Sonoma	374	411	-37	330	346	-16	Rate for program cases was higher for almost the entire 34-month follow-up period, but most clearly from 5 months after filing; the largest difference was 9.1 percent at 14 months after filing.

SOURCE: *Evaluation of the Early Mediation Pilot Projects, Judicial Council of California, Administrative Office of the Courts, Office of General Counsel* 36, 47 (2004).

ment lawyers estimated average savings of approximately 89 hours of staff and attorney time through the use of ADR in a matter.⁹⁸ The lawyers also reported ADR-related savings of \$10,700 in litigation-related expenses in each case.⁹⁹

⁹⁸Id. at 4, citing Jeffrey M. Senger, *Evaluation of ADR in United States Attorney Cases*, 48 U.S. Att'ys' Bull. 25, 26 (Nov. 2000).

⁹⁹Id.

Table 12: Evaluation of the Early Mediation Pilot Projects, Judicial Council of California: Average Satisfaction Levels Reported by Attorneys

	Court Services			Litigation Process			Outcome		
	Program	Nonprogram	Difference	Program	Nonprogram	Difference	Program	Nonprogram	Difference
	San Diego	5.4	5.6	-0.2	5.2	5.4	-0.2	5.1	5.2
Los Angeles	5.6	5.0	0.6	5.3	5.0	0.3	5.2	5.2	0
Fresno	5.7	5.0	0.7	5.3	5.0	0.3	5.0	5.0	0
Contra Costa	5.4	4.7	0.7	5.1	4.8	0.3	5.0	5.3	-0.3
Sonoma	5.1	4.9	0.2	5.2	4.9	0.3	5.3	5.4	-0.1

NOTE: In mandatory programs (San Diego, Los Angeles, Fresno), "program cases" were program-group cases and "nonprogram cases" were control-group cases. In voluntary programs (Contra Costa, Sonoma), "program cases" were cases that stipulated to mediation and were disposed of six or more months after filing and "nonprogram cases" were cases that did not stipulate to mediation under the pilot program and that were disposed of six or more months after filing.

SOURCE: *Evaluation of the Early Mediation Pilot Projects, Judicial Council of California, Administrative Office of the Courts, Office of General Counsel* 36, 55 (2004).

E. Private ADR and the Courts

1. Generally

The expansion of court-connected and community dispute resolution programs, the growing appreciation of the benefits of mediation and other conflict-management approaches by business, and the changing attitudes of courts toward binding arbitration was accompanied by the burgeoning of an industry dedicated to the provision of mediation, arbitration, early neutral evaluation, and other dispute resolution services—usually for a fee.¹⁰⁰ Although there are thousands of individuals and entities engaged in such activities on a full- or part-time basis, our understanding of the relationship between the private ADR “industry” and reduced trial rate is limited.¹⁰¹

2. RAND Study of Private ADR in the Los Angeles Area (1992–1993)

Research has revealed a single attempt to formally assess the private dispute resolution industry and its impact on court cases: this study was conducted on behalf of the RAND Institute for Civil Justice in the early 1990s and focused on a single major metropolitan area—Los Angeles.¹⁰² The area was selected because of its large and diverse court caseload, which had been extensively studied, and because it was believed that the Los Angeles area had “an active and rapidly growing private ADR marketplace . . . on the ‘cutting edge.’”¹⁰³ The study focused on “civil money disputes” (including a broad range of contract and tort matters while excluding family law and probate cases). It was based on data from (1) interviews with firms provid-

¹⁰⁰Such services may be provided by national firms such as the nonprofit American Arbitration Association (AAA) or the for-profit Judicial Arbitration and Mediation Services (JAMS), regional or local entities, or by individuals unaffiliated with a firm. They may be rendered pursuant to (1) a provision in a commercial, construction, employment, consumer, insurance, or other contract; (2) an ad hoc postdispute agreement; or (3) judicial reference or “encouragement” to use private neutral services. See Elizabeth S. Rolph, Erik Moller & Laura Petersen, *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles* 2–3 (1994); Stipanowich, *supra* note 2, at 870–79 (discussing third-party “interveners”). The CPR Institute for Dispute Resolution, a nonprofit New York City-based organization, provides lists of arbitrators and mediators, but does not normally provide administrative services beyond assistance with neutral selection where requested.

¹⁰¹“Because this is a private market, there are no public records to document changes in use, and the decentralized and often sketchy information that exists in the private sector is generally very tightly held.” See Rolph et al., *supra* note 100, at 15. My own efforts to obtain meaningful information from some ADR provider firms strongly reinforce the last conclusion.

¹⁰²See generally, Rolph et al., *supra* note 100.

¹⁰³*Id.* at 5.

ing ADR services, (2) case records from some of those firms, (3) a survey of third-party neutrals in the area, and (4) superior court case records.¹⁰⁴

Of most pertinence were the study's findings regarding the volume and character of the private "caseload." During 1993, the entire estimated private caseload of 23,672 cases was only about one-twentieth the size of the "public" caseload in Los Angeles County superior, municipal, and small-claims courts (441,906) during the same period.¹⁰⁵ The study found, however, that the private caseload in the Los Angeles area grew by an average of 15 percent per year between 1988 and 1993, while the caseload of the court system was more or less stable.¹⁰⁶ Moreover, the disputes going to private ADR tended to be of somewhat higher value than claims underlying a court complaint. Study data indicated that 60 percent of privately handled cases involved claims over \$25,000 (as contrasted with only 14 percent of claims taken to court).¹⁰⁷ Although it was not possible to make exact comparisons between the public and private sectors, the study found the private caseload reflected a somewhat different mix of case types than the court system. In particular, auto personal injury cases were much more frequently handled in the private system.¹⁰⁸ Moreover, business-to-business disputes represented a larger percentage of the private ADR caseload than of the court caseload. However, disputes between businesses and

¹⁰⁴Id. at 6–8. The study identified 22 national or local firms, such as the AAA and JAMS, providing ADR services in Los Angeles County, and focused on nine (five national, four local) that offered private services for resolution of civil money disputes. It also tallied approximately 1,200 individuals who purported to offer services as arbitrators, mediators, or private judges. Id. at 35–38. All the firms and 98 percent of individual neutrals offered arbitration services; all firms and 55 percent of individuals provided mediation services. Arbitration and mediation also dominated the overall private caseload, with arbitrations accounting for 58 percent of the total and mediations for 22 percent. Id. at 38, tbl. 4.3.

¹⁰⁵Id. at 17–18.

¹⁰⁶Id. at 18–20.

¹⁰⁷Id. at 20–21. Cases in the private system were also described as tending to be more "durable," since 73 percent reached some form of intervention by a third-party neutral (e.g., mediation, evaluation, or arbitration), whereas only 14 percent of superior court cases remained in litigation long enough to reach the mandatory settlement conference procedure, which involves considerable judicial intervention. Id. at 23. The "durability" characterization is questionable. Because ADR processes are often aimed at promoting earlier resolution through earlier third-party intervention, one cannot draw the conclusion that disputes that are arbitrated or mediated would have gotten as far as a settlement hearing in court. For example, in a fast-track arbitration process, parties may be contractually bound to participate in a hearing—perhaps a paper-only hearing—within days or weeks of the filing of a complaint; there will be little time to reflect on options, and few if any "settlement points" such as motion hearings or depositions that might trigger a resolution short of a hearing. The same case might have been dropped or negotiated to a resolution prior to a settlement conference in a court of law.

¹⁰⁸The data also reflect the heavy emphasis of some firms on encouraging companies to incorporate their dispute resolution procedures (and hence their services) in various kinds of contracts. Id. at 25, tbl. 3.5.

individuals were much less frequently represented in the private sector than in the court system.¹⁰⁹

In conclusion, the study found that

private ADR cannot be lightening the civil caseload of courts in Los Angeles to any appreciable degree. The private caseload is simply too small. However, . . . it does have considerable potential for accomplishing this goal eventually, because it is such a rapidly developing component of all dispute resolution activity. Furthermore, a disproportionate share of high-value and durable disputes—disputes that might be expected to consume larger-than-average amounts of court time—go to private ADR, suggesting it holds even greater potential for reducing demands on the courts than might initially be expected.¹¹⁰

The authors also concluded that the size and mix of the current private caseload in the Los Angeles area did not justify fears that the growth of private ADR “will divert cases that may have precedential value and reduce the courts’ ability to reinforce social standards through the public decision process.”¹¹¹ The authors made the obvious point that such fears might be realized if larger proportions of particular categories of disputes “over issues where the case law is still fluid” were diverted to private processes in the future.¹¹² (We will revisit this general topic in the context of employment and consumer disputes in Section IV.)

The RAND study leaves unanswered some basic questions regarding the effect of ADR on the incidence of court trial. Ideally, the data would have included a longitudinal comparison of those kinds of cases that make up the relatively tiny percentage of court filings that result in trial, and tally the number of similar cases that were probably diverted from litigation by predispute contractual agreements or post-dispute arrangements.¹¹³ It is likely that, among other things, this would have required information that was and is not accessible through court records.

The 1993 RAND study was the last formal effort to ascertain the impact of “private ADR” on the public justice system at any level; we do not even have supplementary information regarding developments in the Los Angeles area for the years 1994–2003. In the absence of meaningful data, we are left to draw inferences from

¹⁰⁹Id. at 28–29, tbl. 3.7.

¹¹⁰Id. at 57.

¹¹¹Id. at 58.

¹¹²Id.

¹¹³See, for example, the control group approach in the study by the Judicial Council of California cited *supra* note 76.

Table 13: AAA Caseload Statistics 1997–2002

<i>Year</i>	<i>Total Cases</i>	<i>Mediation</i>	<i>Conciliation</i>	<i>Arbitration, Other</i>
2002	230,258	2,683	77,566	150,009
2001	218,032	3,800	84,977	129,255
2000	198,491	4,188	73,352	120,951
1999	140,188	3,575	N/A	136,613
1998	95,143	3,043	N/A	92,100
1997	78,769	2,625	N/A	76,144
1996	72,200	—	—	—
1995	62,423	—	—	—
1994	59,424	—	—	—
1993	63,171	—	—	—

SOURCE: American Arbitration Association, Department of Case Administration.

what fragmentary information does exist.¹¹⁴ We do know, for example, that five of the largest ADR firms (including the two largest) in California handled a total of 19,900 cases in 1997.¹¹⁵ Making the conservative assumption that these firms account for only 20 percent of the private ADR market in the state, it was determined that the total private caseload (95,500 cases) would still be only around one-twentieth of the number of statewide civil filings in superior and municipal courts (1,686,493) in 1997.¹¹⁶ Again, however, it is not possible from such general data to correlate the impact of ADR on the incidence of court trial and other litigation events, or on the kinds of cases that are diverted from the courtroom.

Efforts to obtain specific caseload statistics from two of the leading national providers of ADR services, JAMS and National Arbitration Forum, were unsuccessful. However, the AAA, the nation's largest ADR provider firm, provided some longitudinal information on its caseload, which reflects considerable growth through 2002. Between 1993 and 2002, as reflected in Table 13, the overall AAA caseload grew from 63,171 to 230,258—a 264 percent increase in annual filings during the period. Most of this, however, is attributable to the AAA's administration of tens of thousands of no-fault automobile insurance cases in New York and New Jersey.¹¹⁷ In 2003, after

¹¹⁴The absence of solid empirical data proved a major impediment in a more recent investigation into the impact of ADR on the court system in California. See generally, California Report on ADR in Civil Cases, *supra* note 5.

¹¹⁵*Id.* at 22.

¹¹⁶*Id.*

¹¹⁷In 1997, the New York Insurance Department disbanded its public conciliation department and turned it over to the AAA, leading to a major jump in the insurance caseload. Telephone interview with Frank Zotto, Vice President for Case Management, American Arbitration Association (Dec. 1, 2003).

Table 14: AAA Caseload Statistics—Major Categories of Cases Filed 1997–2002

<i>Year</i>	<i>Insurance Cases Filed</i>	<i>Commercial Cases Filed</i>	<i>Labor Cases Filed</i>
2002	198,358	17,105	13,287
2001	186,186	17,297	13,035
2000	142,650	17,791	13,680
1999	52,753	16,822	14,127
1998	64,076	15,232	14,623
1997	49,127	13,813	15,670

SOURCE: American Arbitration Association, Department of Case Administration.

Table 15: AAA “Commercial” Case Filings 1997–2002

<i>Year</i>	<i>Overall Commercial</i>	<i>Construction</i>	<i>Employment</i>	<i>Intellectual Property</i>
2002	17,105	4,319	2,133	210
2001	17,297	4,576	2,159	133
2000	17,791	4,677	2,049	164
1999	16,822	4,589	1,973	N/A
1998	15,232	4,222	1,728	N/A
1997	13,813	4,166	1,342	N/A

SOURCE: American Arbitration Association, Department of Case Administration.

a dramatic reduction in no-fault cases, the total number of cases dropped below 175,000.¹¹⁸ For the most part, as shown in Table 14, the AAA caseload data show slow and steady growth or stability in most categories of cases, building on prior years,¹¹⁹ “commercial” case filings gradually increased from about 1,000 cases in 1960 to more than 17,000 in 2002, as shown in Table 15, but dropped to 15,800 in 2003.¹²⁰

One final observation involves the potential impact of court mediation programs on the growth of private services. In Florida, program directors for the Circuit Court Civil Mediation Programs report that “in over 90% of the cases, parties are selecting their own mediator” rather than wait for the court to appoint one.¹²¹

¹¹⁸Scott Atlas & Nancy Atlas, *Where Have All the Trials Gone? To Mediation or Arbitration* (May 2004) (unpublished draft, on file with author).

¹¹⁹See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) (noting growth of AAA Commercial Arbitration Docket from 1,000 cases in 1960 to 11,000 cases in 1988).

¹²⁰Scott Atlas & Nancy Atlas, *supra* note 118, at 3.

¹²¹Sharon Press, *Florida’s Court-Connected State Mediation Program*, in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman eds., 1998 A.B.A. Sec. Disp. Resol. 55, 111, Appendix E).

F. Looking Ahead: What We Still Need to Know About Court-Connected ADR

Professor Bobbi McAdoo, who has devoted considerable effort to examining court-connected ADR in the Minnesota state court system,¹²² recently conducted an in-depth survey of 287 state district court judges on the use of ADR (including court-connected mediation and arbitration programs).¹²³ The 203 responses (a 71 percent response rate) made it clear that court ADR has been “institutionalized” in Minnesota. Statewide, 55 percent of responding judges indicated that ADR was employed in 76–100 percent of their cases; the number rose to 83 percent in the major metropolitan areas of Hennepin and Ramsey Counties.¹²⁴ Mediation was the most frequently utilized process.¹²⁵ Two-thirds of the respondents indicated that court rules authorizing them to utilize ADR had changed their judicial workload, and the great majority of explanatory comments reflect widespread perceptions that ADR “reduces the number of trials,” “gets cases settled,” or brings about earlier settlements.¹²⁶

However, the quantitative and qualitative information on judicial perspectives also reinforces concerns about the extent of ADR usage and the role of courts in promoting or directing its use—and supports the need for hard data on the use and operation of ADR for monitoring and evaluation purposes. For example, although the judges indicated that the resort to ADR was usually a matter of party election,¹²⁷ judges tended to encourage the use of ADR in the great majority of cases, and very often ordered the parties into ADR processes, even where parties were appearing pro se.¹²⁸ On the other hand, respondents’ comments indicate that judges often recognized important limitations on the use of ADR,¹²⁹ such as the inappropriateness of mediating domestic violence cases involving significant disparities in bargaining power.¹³⁰ In addition, the responses suggested that although most responding judges

¹²²See, e.g., Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 *Hamline L. Rev.* 403 (2002).

¹²³Bobbi McAdoo, *The Judicial Perspective on Rule 114 in Minnesota* (unpublished draft of May 6, 2004) (on file with author).

¹²⁴*Id.* at 4.

¹²⁵*Id.* at 18.

¹²⁶*Id.* at 5.

¹²⁷*Id.* at 4–5.

¹²⁸*Id.* at 12.

¹²⁹*Id.* at 6–7, 12–18.

¹³⁰*Id.* at 14.

(57 percent) believed that mediation usually takes place after all or almost all discovery has occurred, only 43 percent thought it should take place so late in the litigation process.¹³¹

Professor McAdoo's research illustrates that after nearly three decades of experimentation with court-connected ADR, there is still much we do not know. Although we have clear positive evidence of cost and time savings and various other perceived benefits of some programs, courts often embrace the use of mediation or other ADR approaches without a clear set of goals or the ability to measure how well those goals are being accomplished. We still need more definitive information on:

- The relative costs and benefits of different alternatives (mediation, early neutral evaluation, arbitration).
- The impact of judicially mandated ADR versus party autonomy in opting for such processes, versus "strong judicial encouragement."
- The timing of ADR in the litigation process.
- The impact of different neutral intervention strategies, and of different approaches neutrals use in "evaluating" issues.
- The role of active case management by courts, magistrates, or special masters in achieving or enhancing the desired benefits of ADR.
- The relative merits, short and long term, of mediators and other neutrals serving as pro bono public versus professional staff.

Inextricably intertwined with such issues are important policy questions that should be a part of the discussion surrounding the "Vanishing Trial."

- What are the goals and ends of a government-supported justice system?
- To what extent should the commonweal support not only an adjudication mode, but the resolution through settlement of conflict?
- Is there, in any category of cases, a threat to our system of case precedents as a result of increased emphasis on settlement?

III. ADR AND CONFLICT MANAGEMENT IN COMMERCIAL SECTORS

A. The Search for Less Costly, More Timely Resolution

The rapid growth of federal and state court-connected ADR programs affected, and was paralleled by, developments in the business arena. Even as many commercial disputes were being channeled into mediation and other ADR processes by judges and

¹³¹Id. at 18–19.

magistrates, leading business lawyers organized their own initiatives to promote mediation and other alternatives to litigation, including the Center for Public Resources (now the CPR Institute for Dispute Resolution)¹³² and the CPR Commitment to attempt to resolve disputes without litigation.¹³³ The motivating concerns were not only the cost of judgments or settlements, but also transaction costs, including the expense of legal counsel, supporting experts, preparation time, and discovery—costs that are often a multiple of the amount of settlement.¹³⁴ Business concerns have been exacerbated by dramatic increases in hourly billing rates at most law firms, the failure to manage discovery and related costs, the waning of professionalism and an increase in “Rambo”-style tactics, and perceptions that jury verdicts have become more unpredictable.¹³⁵ In one 1998 study cited below, Craig McEwen reported that one company he examined “reported a nine-fold increase in legal costs over the ten years prior to the study, while another reported a ten-fold increase.”¹³⁶ The costs of outside counsel, particularly those associated with discovery, tended to be a primary concern, along with the drain on internal human resources¹³⁷ and consequent lost opportunities.

Commercial mediation has enjoyed growing popularity as a response to these and other concerns.¹³⁸ In addition to protocols such as the CPR Commitment or

¹³²In 1979, a group of Fortune 500 corporate general counsel gathered together to form a nonprofit organization they called the Center for Public Resources. One of their primary concerns was the high cost and uncertainty of litigation; encouraging and informing lawyers about constructive alternatives to court trial became a central focus of the organization, now known as the CPR Institute for Dispute Resolution. To promote a new problem-solving culture among lawyers, the Institute sponsors conferences; has developed an extensive array of publications, procedures, and protocols for dispute resolution; and has fielded a list of “distinguished neutrals,” including former cabinet officers and retired federal appellate judges. As a part of its broad public policy effort, the Institute also produces guidance for court-connected ADR programs.

¹³³The CPR Commitment, or “Pledge,” has been signed by corporate general counsel and managing partners on behalf of major corporations and law firms. Representatives of a total of more than 4,000 corporations, including subsidiaries, and hundreds of law firms have signed some version of the CPR Commitment, including industry-specific commitments. Although most versions of the Commitment do not carry legal weight, a few, such as the Chemical Industry Commitment, are intended to be enforceable in a court of law.

¹³⁴David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. Pa. J. Lab. & Emp. L. 133, 142 (1998); Craig A. McEwen, Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation, 14 Ohio St. J. Disp. Resol. 1 (1998); John Lande, Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions, 3 Harv. Negotiation L. Rev. 51 (1998).

¹³⁵McEwen, *supra* note 134, at 2–3.

¹³⁶*Id.* at 7.

¹³⁷*Id.* at 8–9.

¹³⁸See Lisa Brennan, What Lawyers Like: Mediation, Nat’l L.J., Nov. 15, 1999, at A1 (reporting that four out of five outside lawyers and house counsel responding to survey say they use mediation because it saves time and money; approximately half say that mediation preserves relationships). See also Marc J. Sonnefeld & Paul J. Greco, ADR as Good Corporate Policy, 6 Metro. Corp. Couns., Sept. 1998, at 8, col. 1 (ADR is well

“Pledge,” recent decades saw the development of more sophisticated dispute resolution provisions in contracts and the evolution of industry-specific procedures.¹³⁹ In some cases, as we will see, “ADR” has been employed in the context of systematic corporate programs governing management of different kinds of conflict.

B. *An Industry’s Use of ADR*

In some industries, ADR is an established element of practice for business lawyers and clients. The construction industry, a “crucible of conflict,” has a long tradition of out-of-court approaches to conflict resolution.¹⁴⁰ The industry inspired some of the earliest and most comprehensive efforts to study the use of arbitration, mediation, and other dispute resolution options.¹⁴¹ These studies revealed a great deal about the specific characteristics and results of out-of-court processes in one commercial venue, and the experiences and perceptions of lawyers and clients. For example, respondents related details of 459 individual experiences with mediation, of which 65 percent occurred pursuant to postdispute agreements and more than 29 percent by court order or pursuant to court rules.¹⁴² Among other results, the study revealed that significantly more full or partial settlements occurred in mediations conducted under postdispute agreements, as opposed to court order or court-imposed rules.¹⁴³

sued to support corporate objectives, including saving time and money, adapting a problem-solving approach to fit particular problems, and reducing uncertainty and risk, maintaining privacy and confidentiality, and preserving business relationships). A broad range of data on cost and time savings, as well as other benefits associated with ADR, was published by the CPR Institute in 1994. See CPR Inst. for Disp. Resol., *ADR Cost Savings & Benefits Studies* (Catherine Cronin-Harris ed., 1994). The same year, the CPR Institute published an extensive study of practices among leading law firms. Susan Scott, *Law Firm Practices in ADR: 1994 Survey Findings* (CPR Inst. for Disp. Resol., 1994). Two years later, the Institute published a survey of practices among corporate law departments. Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 *Alt. to High Cost of Litig.* 158 (Dec. 1997).

¹³⁹Harry N. Mazadoorian, *At a Crossroad: Will the Corporate ADR Movement be a Revolution, or Just Rhetoric?*, *Disp. Resol. Mag.* 4 (Summer 2000).

¹⁴⁰See generally, Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 *Ohio St. J. Disp. Resol.* 303 (1998) [hereinafter Stipanowich, *Multi-Door Contract*].

¹⁴¹See generally, Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *Ind. L.J.* 425 (1987) [hereinafter Stipanowich, *Rethinking American*] (summarizing and analyzing results of ABA Forum on the construction industry survey of construction lawyers regarding arbitration experiences and results); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 *Wake Forest L. Rev.* 65 (1996) [hereinafter Stipanowich, *Beyond Arbitration*] (detailing results of two surveys on mediation and other ADR processes).

¹⁴²Stipanowich, *Beyond Arbitration*, supra note 141, at 111.

¹⁴³*Id.* at 122. There was also a significantly higher rate of settlement where the parties used their own mediation procedures, rather than standardized or court rules; a similar effect was noted where the parties agreed on a mediator, as opposed to the mediator being appointed by a court or other third party. *Id.* at 122–23.

Table 16: Multidisciplinary Survey on Dispute Avoidance and Resolution in Construction Industry 1994—Reports of Actual Positive or Negative Experiences with Partnering and Dispute Resolution Approaches

	Mediation				Binding Arbitration			
	Reports of Positive or Innovative Experiences		Reports of Negative Experiences		Reports of Positive or Innovative Experiences		Reports of Negative Experiences	
	N	%	N	%	N	%	N	%
ABA forum attorneys	166	66.1	85	33.9	90	38.6	143	61.4
Design professionals	125	66.8	62	33.2	88	47.1	99	52.9
ABA forum contractors	46	63.9	26	36.1	64	56.6	49	43.4

SOURCE: Thomas J. Stipanowich, “Beyond Arbitration: Innovation and Evolution in the United States Construction Industry,” 31 *Wake Forest L. Rev.* 169 (1996).

Table 17: Multidisciplinary Survey on Dispute Avoidance and Resolution in Construction Industry 1994—Nature of Positive Results

	Mediation			Binding Arbitration		
	Attorneys	Design Professional	Contractors	Attorneys	Design Professional	Contractors
Resolving individual disputes	122 (73.5%)	48 (38.4%)	20 (43.5%)	49 (54.4%)	55 (62.5%)	32 (50.0%)
Preserving or improving communications or relations between parties	60 (36.1%)	36 (28.8%)	61 (3.0%)	17 (18.9%)	10 (11.4%)	5 (7.8%)
Establishing procedures for handling future problems	17 (10.2%)	4 (3.2%)	5 (10.9%)	9 (10.0%)	12 (13.6%)	6 (9.4%)
Reducing the cost, delay associated with dispute resolution	126 (75.9%)	87 (69.6%)	23 (50.0%)	67 (74.4%)	29 (33.0%)	23 (35.9%)

SOURCE: Thomas J. Stipanowich, “Beyond Arbitration: Innovation and Evolution in the United States Construction Industry,” 31 *Wake Forest L. Rev.* 169 (1996).

In the 1990s, construction mediation experienced significant growth. Binding arbitration, long the industry mainstay, is often accorded the status of a last resort as mediation and other tailored intervention strategies, such as the use of standing project “dispute review boards,” have come to the fore.¹⁴⁴ Tables 16 and 17 report statistics from the mid 1990s relating to individual experiences with mediation, arbitration, and other processes. These data provide evidence that construction lawyers have tended to find mediation more effective than arbitration in producing positive

¹⁴⁴Stipanowich, Multi-Door Contract, *supra* note 140, at 336–78.

results,¹⁴⁵ including resolving individual disputes or preserving or improving communications or relations between parties, and reducing the cost and delay associated with dispute resolution.¹⁴⁶

The industry also spearheaded the most intriguing applications of facilitated “relationship building” under the rubric of “partnering” or “alliancing.”¹⁴⁷ These efforts were aimed at avoiding or managing conflict by improving communications between parties; clarifying roles, responsibilities, and mutual expectations; and laying the groundwork for effective problem solving through “dispute resolution ladders” and the like. Based on the literature and other anecdotal evidence, however, these approaches appear to be less widely used today than they were a decade ago.

C. *ADR in the Fortune 1,000: The Cornell/PERC Study (1997)*

In 1997, a study of ADR use among Fortune 1,000 corporations was conducted by Cornell University.¹⁴⁸ Based on responses from more than 600 companies, the study concluded

that ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes . . . [and] ADR practice is not haphazard or incidental but rather seems to be integral to a systematic, long-term change in the way corporations resolve disputes.¹⁴⁹

The study reflects wide usage of ADR processes by businesses, although the foregoing appears to overstate the degree of systematization in corporate conflict management.¹⁵⁰ As reflected in Table 18, a full 87 percent of responding companies reported some use of mediation in the prior three years, and 80 percent reported using arbitration during the same period.¹⁵¹

¹⁴⁵Stipanowich, *Beyond Arbitration*, supra note 141, at 172.

¹⁴⁶Id. at 172, tbl. LL-1. Attorneys.

¹⁴⁷Stipanowich, *Multi-Door Contract*, supra note 140, at 378–402.

¹⁴⁸See generally, David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Cornell/PERC Inst. on Conflict Resol., 1998).

¹⁴⁹Id. at 8. The survey was directed to general counsel or heads of litigation at the Fortune 1,000 companies. For the purposes of the survey, ADR was defined as “the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute.” Id. at 7. (Actually, the survey included queries regarding other forms of ADR as well.)

¹⁵⁰As much is acknowledged by the authors in a follow-up study taking a closer look at corporate ADR and conflict-management practices. See *infra* text accompanying notes 186–188.

¹⁵¹A difficulty in the term “arbitration” is that it comprehends the very different systems of binding arbitration pursuant to agreement and court-ordered arbitration, which is rarely binding unless the parties subsequently so agree. The responses appear to have contemplated one or the other or both kinds of

Table 18: Fortune 1,000 Experience with Forms of ADR in the Prior Three Years

<i>Mediation</i>	<i>Arbitration</i>	<i>Med-Arb</i>	<i>In-House Grievance</i>	<i>Mini-Trial</i>	<i>Fact Finding</i>
87%	80%	40%	33%	20%	20%

SOURCE: David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 9, Chart 2 (Cornell/PERC Inst. on Conflict Resol., 1998).

Table 19: Frequency of Mediation, Arbitration Use of Fortune 1,000 Respondents

<i>Frequency</i>	<i>Mediation of Rights Disputes</i>	<i>Mediation of Interest Disputes</i>	<i>Arbitration of Rights Disputes</i>	<i>Arbitration of Interest Disputes</i>
Very frequently	5.6%	1.7%	7.5%	3.0%
Frequently	13.1%	2.1%	13.1%	2.1%
Occasionally	43.2%	7.6%	41.6%	10.7%
Rarely	29.9%	28.2%	33.2%	20.5%
Not at all	8.1%	60.4%	4.5%	63.7%

NOTE: The authors of the study, reflecting their background in the labor field, chose to divide disputes into those involving “rights”—as they defined it, involving “a conflict that arises out of the administration of an already existing agreement,” and “interests”—involving a dispute arising “between parties trying to forge a relationship.”

SOURCE: David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* Tables 3, 4, & 10 (Cornell/PERC Inst. on Conflict Resol., 1998).

Other forms of ADR, such as in-house grievance procedures, mini-trial, fact finding, and ombuds, were also used by some companies.¹⁵² However, as shown in Table 19, approximately four-fifths of the group engaged in mediation or arbitration only “occasionally.”¹⁵³ Although more than one in ten companies purports to “always try to use ADR,” as reflected in Table 20, companies with policies emphasizing litigation, or an ad hoc approach to dispute resolution, outnumber those asserting pro-

“arbitration”—and perhaps private nonbinding processes as well. These are all very different species with varied functions: nonbinding arbitration is typically a spur to settlement, while binding arbitration is a wholesale substitute for court trial.

¹⁵²One puzzling statistic relates to the apparent use of “mediation-arbitration” by almost 40 percent of responding companies. Although the term was not defined in the survey instrument, it is frequently used with respect to a procedure in which a single individual or team of neutrals fills the dual roles of mediator and arbitrator. See Lipsky et al., *supra* note 148, at 9. However, anecdotal evidence suggests that this somewhat controversial approach was employed by 4 out of 10 companies. It may be that at least some of the respondents interpreted “mediation-arbitration” to include any procedure in which a mediated negotiation process was followed by arbitration.

¹⁵³*Id.* at 10.

Table 20: Conflict Resolution Policies of Fortune 1,000 Respondents

<i>Corporate Policy</i>	<i>Defending Party</i>	<i>Initiating Party</i>
Always litigate	5.0%	6.1%
Litigate first, then move to ADR when appropriate	24.7%	21.4%
Litigate only when appropriate, then use ADR for all other disputes	25.2%	27.0%
Always try to use ADR	11.7%	11.3%
No company policy	20.8%	22.1%
Other	12.6%	12.1%

SOURCE: David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* Table 5, at 11 (Cornell/PERC Inst. on Conflict Resol., 1998).

Table 21: Percent of Fortune 1,000 Respondents Indicating ADR Use by Type of Dispute

<i>Type of Dispute</i>	<i>Mediation</i>	<i>Arbitration</i>
Employment	78.6%	62.2%
Commercial/contract	77.7%	85.0%
Personal injury	56.5%	31.8%
Construction	39.3%	40.1%
Product liability	39.3%	23.3%
Real estate	31.9%	25.5%
Environmental	30.8%	20.3%
Intellectual property	28.6%	21.0%
Consumer rights	24.1%	17.4%
Corporate finance	13.3%	12.3%
Financial reorganization/workout	10.3%	8.1%

NOTE: Please note that these data do not provide any indication of the percentage of employment or other disputes that are referred by companies to ADR, or the companies' policies in that regard. Moreover, the data reflect not only the choice of mediation or arbitration, but also the incidence of various kinds of disputes in the company. Thus, for example, the fact that many companies do not routinely have construction disputes is reflected in the lower percent figure for construction.

SOURCE: David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* Table 6, at 11 (Cornell/PERC Inst. on Conflict Resol., 1998).

ADR policies. Usage patterns vary considerably by type of dispute, and by industry, as shown in Tables 21 and 22.¹⁵⁴

Mediation was far and away the preferred ADR process.¹⁵⁵ As Table 23 shows, there were numerous reasons for this preference, most notably perceptions that mediation offers potential cost and time savings, enables parties to retain control over issue resolution, and is generally more satisfying both in terms of process and outcomes. Companies come to mediation in a variety of ways: frequent users tend to

¹⁵⁴Once again, it would be helpful to know what kind of "arbitration" is described in this response.

¹⁵⁵See Lipsky et al., supra note 148, at 12.

Table 22: Percent of Respondents in Each Industry that Have Used Each Form of ADR

Procedure	Durable		Nondurable		Transport/Commun/Utilities	Trade	Finance	Insurance	Service
	Mining/Construction	Manufacturing	Manufacturing	Manufacturing					
Mediation	100%	87%	88%	90%	90%	89%	90%	87%	84%
Arbitration	100%	74%	84%	86%	80%	73%	80%	79%	75%
Med-arb	45%	41%	37%	42%	41%	40%	41%	49%	35%
In-house grievance	27%	28%	24%	41%	49%	34%	49%	39%	35%
Mini-trials	36%	29%	25%	23%	22%	18%	22%	16%	11%
Fact finding	9%	20%	15%	21%	22%	30%	22%	20%	23%

SOURCE: David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* Table 7, at 12 (Cornell/PERC Inst. on Conflict Resol., 1998).

Table 23: Percentage of Companies that Elect Mediation or Arbitration for Particular Reasons

<i>Reasons</i>	<i>Mediation</i>	<i>Arbitration</i>
Saves time	80.1%	68.5%
Saves money	89.2%	68.6%
Uses expertise of neutral	53.2%	49.9%
Preserves good relationships	58.7%	41.3%
Required by contract	43.4%	91.6%
Provides more durable resolution	31.7%	28.3%
Preserves confidentiality	44.9%	43.2%
Avoids legal precedents	44.4%	36.9%
More satisfactory settlements	67.1%	34.8%
More satisfactory process	81.1%	60.5%
Court mandated	63.1%	41.9%
Dispute involves international parties	15.3%	31.9%
Allows parties to resolve disputes themselves	82.9%	—
Limited discovery	—	59.3%
Standard industry practice	—	33.7%

SOURCE: David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* Table 15, at 17 (Cornell/PERC Inst. on Conflict Resol., 1998).

rely on contractual provisions or company policies, while other companies usually arrive at mediation as the result of ad hoc decisions or court directives.¹⁵⁶

D. Beyond ADR: Corporate Conflict Management

1. Systemic, Integrated Conflict Management: McEwen Study (1998)

Craig McEwen closely examined the way six large companies managed business-to-business disputes¹⁵⁷ and concluded that whether or not a company employs mediation may be less important than the extent to which mediation is employed in the context of a systematic approach to the “management of disputing.” Interviews with business leaders and senior corporate counsel and a study of roughly 170 disputes led McEwen to identify four major factors preventing faster and less costly resolution of disputes: contentious and competitive corporate cultures, the personal emotional investment of business managers in disputes, “misaligned incentives” such as hourly billing arrangements for outside counsel, and the professional legal culture that expects full information (and thus, discovery) before deciding how to dispose of the case.¹⁵⁸

¹⁵⁶Id., at 18.

¹⁵⁷See McEwen, *supra* note 134.

¹⁵⁸Id. at 9–24.

Several of the companies used mediation (some quite often), and all were concerned about litigation costs and had tried to address such concerns. However, one company (which McEwan designated “MOD”) distinguished itself by embracing an overall strategy for achieving corporate goals through thoughtful dispute management. Motivated by a companywide effort to define efficiency and quality management in measurable ways, MOD’s general counsel and several other key attorneys moved beyond the traditional “case-by-case client service role” and assumed the role of managers of the disputing process.¹⁵⁹ The MOD legal division developed a clear organizational mission—“to maximize prompt and favorable settlements,” measured by the shortness of dispute resolution, “favorable outcomes, cost savings, and client satisfaction.”¹⁶⁰ The program that evolved from these initial determinations included:

- Redesign of the dispute resolution approach, including early case evaluation by inside and outside counsel to achieve earlier and less costly settlement in “Stage 1” (prior to discovery).¹⁶¹
- Examination of “patterns of disputing” in different business units, and efforts to train business managers about how to achieve the objectives of earlier settlements and fewer lawsuits.¹⁶²
- The use of “wise advisors”—high-level individuals without personal involvement in disputes who could promote reasonable outcomes.¹⁶³
- Changes made to billing practices, including billing business units directly for outside counsel fees.¹⁶⁴
- Encouraging lawyers and businesspeople to learn about, understand, and apply the principles underlying mediation and interest-based negotiation.¹⁶⁵
- Periodic measurements of favorable outcomes and other benchmarks of success.¹⁶⁶

¹⁵⁹Id. at 16.

¹⁶⁰Id.

¹⁶¹Id. at 18.

¹⁶²Id. at 19.

¹⁶³Id.

¹⁶⁴Id. at 19.

¹⁶⁵Id. at 20.

¹⁶⁶Id. at 17.

Thus, “the lawyers at MOD went well beyond the more typical, reactive and case-centered roles of other corporate counsel by taking on leadership as managers of the disputing process” and achieved a greater level of success in altering the cost and timing of disputes as well as the quality of outcomes.¹⁶⁷ In other words, instead of incorporating mediation into the traditional “liti-gotiation” culture of their company, the MOD legal department set about changing the whole culture of conflict management, employing mediation in the context of a systemic approach built on a clearly defined corporate objective aimed at speedy and low-cost resolution through settlement and preserved business relationships.¹⁶⁸ The principles underlying mediation, including active listening and understanding and responding to interests, were integrated into the evaluative and negotiating efforts of lawyers and businesspersons.¹⁶⁹

2. CPR Institute 1997 Guidelines; 2002 Survey

Around the time Professor McEwen was describing systemic conflict management at MOD, the CPR Institute produced a detailed template for such approaches based on current practices of a number of leading corporations such as General Electric, Motorola, and Xerox.¹⁷⁰ The template, which drew on elements of numerous existing corporate programs, envisioned the use of mediation within a broader “ADR system” incorporating all elements of the MOD approach and more.

Recently, the CPR Institute conducted another examination of corporate approaches to conflict management as revealed in a 2002 survey of corporate counsel.¹⁷¹ The survey collected responses from 43 Fortune 1,000 companies, most of which appeared to favor some use of ADR or other constructive conflict management practices. They were queried regarding their use of mediation, arbitration, and other approaches in different transactional and dispute settings, as well as other strategies and tools.¹⁷² Such companies’ legal departments typically handle several

¹⁶⁷Id. at 20.

¹⁶⁸Id. at 23.

¹⁶⁹Id. at 20–22. MOD attorneys were careful to explain that their approach was moderated by the principle that the company would vigorously defend itself to protect important corporate interests. Id. at 21.

¹⁷⁰Catherine Cronin-Harris, *Building ADR into the Corporate Law Department* (CPR Inst. for Disp. Resol., 1997).

¹⁷¹Responses and summary of results are on file with the author and the CPR Institute for Dispute Resolution.

¹⁷²Because the response rate was so low, one cannot describe the responses as representative of Fortune 1,000 companies in general. It does, however, provide significant data regarding practices among companies that are probably among the most enthusiastic users of ADR.

hundred disputes each year, and most have implemented procedures to provide an early assessment of the suitability of disputes for settlement, and conduct postdispute review of dispute resolution with affected business units. Most employ provisions for ADR in company contracts, and rely to one degree or another on mediation; more than half the respondents reported their use of mediation increased in the past three years (with usage increases ranging from 10–50 percent). Respondents reported generally high levels of satisfaction with private mediation, and most reported associated annual process cost savings of \$500,000 or more.¹⁷³

Importantly, the CPR study produced information that suggests that for many larger companies, the use of mediation, arbitration, and other ADR approaches is a facet of more extensive programs aimed at constructively managing conflict. Among approaches employed by many companies responding to the CPR survey were: the appointment of an “ADR counsel” within the legal department; the use of standardized internal analyses to develop strategies for dispute resolution; written policies respecting settlement for inside or outside counsel, including expectations regarding the use of ADR in retainer agreements with outside counsel; making early settlement or mediation presumptive process (and requiring attorneys to justify proceeding to trial); informing business executives of ADR options; and charge-back of dispute resolution costs to responsible corporate departments.

Generally speaking, corporate conflict management approaches and use of ADR varied with the company and the nature of the dispute. Although mediation was the most frequently preferred approach in employment or product liability disputes, in other areas companies appeared to place more emphasis on litigation or arbitration.¹⁷⁴ Moreover, corporate policies regarding conflict management often change over time, reflecting the experience of legal departments as well as the personalities and philosophies of managing counsel.¹⁷⁵

E. Examples of the Impact of ADR and Conflict Management on Litigation and Related Costs

1. Toro Company

From the foregoing, it is clear that the use of mediation and systemic approaches to managing conflict have resulted in reduced dispute resolution expenses for many

¹⁷³In some cases, companies described annual cost savings of several million dollars.

¹⁷⁴In contrast to mediation, binding arbitration was not often associated with high levels of satisfaction or cost savings, and within responding companies the volume of arbitration had been static or decreasing over the prior three years.

¹⁷⁵See, e.g., Kathleen A. Bryan, *Motorola's Experience Using Mediation in Commercial Transactions, Business Litigation and Workplace Disputes, Resolving Conflict*, Baltimore, Maryland (May 24, 2001) (discussing stages of evolution in Motorola's corporate conflict management programs).

large companies. A rare glimpse into corporate cost savings is provided by data reported by the Toro Company regarding its preadjudication screening and mediation program for product liability and other claims.¹⁷⁶ Through a national program of early in-house assessment (typically leading to an early negotiated settlement) and, where necessary, mediated negotiation of claims, Toro reports that between 1992 and 2003 it resolved 984 product liability claims, more than 62 percent within 12 months. Toro states that average per-claim costs and fees were reduced from a pre-1991 average of \$47,252 to \$9,074—an 81 percent reduction; the average verdict or settlement was reduced from a pre-1991 figure of \$68,368 to \$26,589—a 61 percent reduction. As of the end of 2002, Toro had only two open files in litigation, and 35 active claims; 10 years previously, there had been 60 cases in litigation and 150 active claims.¹⁷⁷

2. Georgia-Pacific Corporation

After years of resolving business disputes in the traditional way (filing pleadings, conducting discovery, and negotiating a settlement), Georgia Pacific Corporation established a company policy to employ tailored dispute resolution agreements in commercial contracts, and to carefully evaluate business disputes at an early stage to determine whether some form of ADR might be employed to settle the case.¹⁷⁸ With the support of top management and the assignment of a senior counsel to implement the policy, Georgia-Pacific has enjoyed significant savings in dispute resolution costs in recent years,¹⁷⁹ as reported in Table 24.

The Toro and Georgia-Pacific programs illustrate that at least for some companies, a deliberate effort to reduce litigation-related costs, including attorney fees, verdicts, and settlements—an effort that employs mediation in the context of a well-developed internal program for management of claims—has yielded significant benefits. Although Toro's and Georgia-Pacific's experiences may be exceptionally successful, there is no question that programmatic efforts within the business sector to resolve problems with little or no court involvement have substantially reduced

¹⁷⁶J. Lawrence McIntyre, *Toro's ADR Program—Pre-Litigation Mediation: Managing Risks, Responsibilities and Rewards in a New Legal Environment*, PowerPoint Presentation, Corporate Legal Times 2003 Superconference, Chicago, IL (June 12–13, 2003) (on file with author).

¹⁷⁷*Id.*

¹⁷⁸See Phillip M. Armstrong, *Case Study: Georgia-Pacific's Aggressive Use of Early Case Evaluation and ADR*, 16 No. 6 ACCA Docket, Nov./Dec. 1998, at 42.

¹⁷⁹E-mail to author from Phillip M. Armstrong, Associate General Counsel, Georgia-Pacific Corporation (Jan. 25, 2004) (on file with author).

Table 24: Georgia-Pacific Corporation, Summary of ADR Savings, 1995–2002

<i>Year</i>	<i>No. of Cases</i>	<i>Estimated Savings</i>
1995	13	\$1.00 million
1996	26	\$1.50 million
1997	84	\$6.50 million
1998	110	\$6.00 million
1999	94	\$2.50 million
2000	68	\$4.25 million
2001	43	\$2.97 million
2002	44	\$2.30 million

SOURCE: E-mail to author from Phillip M. Armstrong, Associate General Counsel, Georgia-Pacific Corporation (January 25, 2004) (on file with author).

the litigation portfolio and/or dispute resolution costs of a number of major companies.¹⁸⁰

F. Looking Ahead: Questions About the Future of Commercial ADR and Conflict Management

1. Questions About Corporate Conflict Management: Cornell II (2003)

In 2003, the authors of the 1997 Cornell survey released findings from a follow-up study looking more closely into the very different conflict-management practices of 20 of the companies surveyed earlier.¹⁸¹ Their intent was to try to explain the significant variances they encountered in corporate approaches (ranging from “traditional reliance on litigation, to experimentation with ADR techniques, to the adoption of a full-blown conflict management system”).¹⁸² The survey authors’ general observations, while hardly conclusive findings, point up the great diversity of corporate approaches to conflict, the continuing role of litigation as a predominant or elective strategy, and the ad hoc, reactive approaches to conflict taken by the great majority of companies and their legal departments.

¹⁸⁰See, e.g., Thomas L. Sager, Get the Word Out: Communicating Your Litigation Strategy, in *Managing Risks, Responsibilities and Rewards in a New Legal Environment*, Corp. Legal Times 2003 Superconference, Chicago, IL (June 12–13, 2003) (describing in nonspecific terms DuPont’s significant success in reducing settlements and outside legal costs during the period from 1996 through 2000).

¹⁸¹See generally, David B. Lipsky et al., *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Manager and Dispute Resolution Professionals* (2003); David B. Lipsky et al., *An Uncertain Destination: On the Development of Conflict Management Systems in U.S. Corporations*, in *Alternative Dispute Resolution in the Employment Arena*, Proceedings of New York University 53rd Annual Conference on Labor 109 (Samuel Estreicher & David Sherwyn eds., 2004) [hereinafter Lipsky et al., *An Uncertain Destination*].

¹⁸²Lipsky et al., *An Uncertain Destination*, at 110.

They observe that a relatively small percentage of Fortune 1,000 companies, including businesses such as Emerson Electric Corporation and Hewlett Packard, have a policy of contending most claims and controversies, rigorously employing litigation (or the threat of litigation). Decisionmakers tend to view dispute resolution as a zero-sum game, and view ADR as undermining their reputation for fighting non-meritorious claims.¹⁸³

Another, somewhat larger minority of companies have policies to always use intervention strategies aimed at preventing or resolving at least one kind, and perhaps all kinds, of business-related disputes. Some of these companies, such as General Electric and Johnson & Johnson, have adopted systemic approaches for conflict management like the ones identified in the McEwen study, the CPR Institute's 1997 guidelines, or the CPR 2002 survey.¹⁸⁴ The latter tend to take proactive approaches to conflict, and have developed and implemented these approaches throughout the organization.¹⁸⁵ (We will briefly consider examples of conflict-management systems that seek to address employee grievances proactively and early in Section IV.)

However, the Cornell study authors believe that the great majority of companies—perhaps approaching three-quarters of the Fortune 1,000—still tend to rely on ad hoc approaches to the resolution of conflict. Rather than systematically laying the groundwork for avoiding or managing conflict, their approach tends to be reactive; that is, they think in terms of how to respond when a matter ripens into a dispute. Their use of ADR is tactical rather than strategic, and incremental rather than integrated. Mediation or arbitration is employed experimentally (either postdispute or in predispute contractual provisions) in the context of specific categories of disputes. Success in one arena may lead to applications in other kinds of disputes.¹⁸⁶

¹⁸³Id. at 119–22.

¹⁸⁴Id. at 128–32.

¹⁸⁵Id. at 130. An outstanding illustration of such practices is revealed in Thomas L. Sager, *Changing Rules, Changing Roles*, 2 *Litig. Mgmt.* 18 (2004).

The American Arbitration Association employed a market research firm to conduct a study of corporate approaches to conflict, resulting in a report entitled *Dispute Wise Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts* (2003). In addition to reinforcing many of the findings of the original Cornell study regarding the use of mediation, arbitration, and other approaches by companies, the study identified various characteristics of what the AAA calls “dispute-wise” companies, including: (1) the integration of the legal staff into the corporate planning process; (2) an appreciation by the legal department of broader business issues confronting the company; (3) involvement with complex and technical issues; (4) involvement with cross-border disputes; (5) an emphasis by senior management on preserving relationships and settling disputes; (6) less primary focus on review of legal documents; and (7) less emphasis on litigation as a dispute resolution strategy.

¹⁸⁶*Supra* note 181, at 122–26.

Expecting to find a general trend toward systematic and proactive approaches to conflict, the authors instead concluded that the corporate sector's use of ADR tends to be far from "institutional." Although a confluence of factors (such as a company's perceived exposure to great risks in litigation, the background and attitude of corporate business leaders and general counsel, and the presence of committed "champions")¹⁸⁷ sometimes produce an institutional commitment to actively managing conflict, the authors "were surprised at the lack of 'integration' in approach to conflict in many of the corporations."¹⁸⁸ Although it is understandable and appropriate that companies tailor approaches to conflict to specific circumstances, the authors' conclusions indicate that companies may be failing to embrace lessons learned by others within their own organization—let alone those of others in the marketplace.

The Cornell studies offer more questions than answers regarding the present and future of corporate ADR and conflict management. There remains much more to understand about the environmental and internal factors that determine corporate approaches to conflict, how ADR can be effectively integrated into corporate policies and programs, and why only a small minority of businesses have embraced systemic approaches to the management of disputes.

2. MACRO Study of Maryland Businesses (2003)

The 2003 Business ADR Benchmarking Study sponsored by the Maryland Mediation and Conflict Resolution Office (MACRO) reinforces earlier findings regarding the diversity of experience with and attitudes toward ADR.¹⁸⁹ It also underlines the point that relatively few companies have embraced integrated approaches to managing conflict.

The study was intended to provide a benchmark against which Maryland businesses could assess their own conflict resolution efforts using the components of an Integrated Conflict Management System developed by the Society of Professionals in Dispute Resolution.¹⁹⁰ That System contemplates (1) a business's use of dispute resolution options for all kinds of problems in an institution; (2) a culture that encourages dissent, and the early resolution of conflict, at the lowest possible level; (3) the provision of multiple access points for those seeking dispute resolution resources, and multiple options for addressing conflict; and (4) the provision of a system of

¹⁸⁷Id. at 142–44.

¹⁸⁸Id. at 147.

¹⁸⁹The Use of Alternative Dispute Resolution (ADR) in Maryland Business: A Benchmarking Study (Maryland Mediation and Conflict Resolution Office, 2004) [hereinafter *ADR in Maryland Business*].

¹⁹⁰Id. at 2.

Table 25: Maryland Business ADR Study: Considerations that Business Organization Perceive as Important in Assessing the Benefits of Using Mediation and Other Conflict Resolution Processes to Resolve External Disputes (e.g., Disputes with Vendors, Customers, Partners, and Competitors)

	<i>Strongly Agree</i>	<i>Agree</i>	<i>Neither Agree nor Disagree</i>	<i>Disagree</i>	<i>Strongly Disagree</i>
1. Whether the dispute is one of a recurring type (e.g., frivolous claims)	8.1%	43.2%	27.0%	10.8%	8.1%
2. The type of dispute at issue (e.g., contract, tort, etc.)	13.5%	56.8%	13.5%	2.7%	8.1%
3. The estimated transaction costs in terms of outside counsel, experts	40.5%	32.4%	10.8%	2.7%	5.4%
4. The indirect costs of the dispute (e.g., disrupted relationships)	21.6%	37.8%	27.0%	5.4%	5.4%

SOURCE: *The Use of ADR in Maryland Business: A Benchmarking Study*, Maryland Mediation and Conflict Resolution Office 22 (2004).

support structures, including institutional champions for conflict management, oversight by a body representing various stakeholders within the organization, and a mechanism for monitoring and evaluation.¹⁹¹ Although it is unclear whether the group of surveyed corporations is representative of the entire Maryland business community from large corporations to small businesses,¹⁹² it is probably fair to say that the survey results depict the practices and perceptions of organizations that have at least as much, and perhaps more, ADR experience than the general business population.

The MACRO survey responses indicate that in making decisions about the use of “mediation and other conflict resolution processes,” lawyers in business organizations take into account the nature and frequency of disputes, as well as estimated transaction costs and indirect costs (such as disrupted relationships), as reported in Table 25. However, as reflected in Table 26, only a minority of respondents make a practice of exploring ADR prior to or after suit has been filed.

Similarly, the results in Tables 27 and 28 indicate that while some companies have embraced some or all of the various elements often associated with more systematic, integrated approaches to conflict management, including corporate ADR policy statements or commitments, early case analysis (ECA), ADR training and education for staff, and other approaches, most have not. (Unfortunately, the report

¹⁹¹Id. at 14.

¹⁹²The report’s description of the survey methodology, the method for identifying survey targets, and the representativeness of the results are confusing, although the distribution of responses the authors describe “strongly resembl[ing] a stratified random survey” of the total population of Maryland businesses. Id. at 17–19.

Table 26: Practices Applied in Surveyed Maryland Business Organizations

	<i>Extensively Applied</i>	<i>Frequently Applied</i>	<i>Occasionally Applied</i>	<i>Seldom Applied</i>	<i>Never Applied</i>
1. ADR explored prior to filing suit	10.8%	18.9%	13.5%	16.2%	37.8%
2. ADR explored after suit has been filed	10.8%	18.9%	16.2%	10.8%	40.5%
3. Outside counsel provided incentives to encourage use of ADR approaches	2.7%	2.7%	13.5%	16.2%	59.5%
4. ADR is viewed as a cost-saving approach to resolve conflicts	13.5%	21.6%	13.5%	16.2%	32.4%

SOURCE: *The Use of ADR in Maryland Business: A Benchmarking Study, Maryland Mediation and Conflict Resolution Office 22, 23 (2004)*.

Table 27: Approaches/Procedures/Tools Applied to Resolve External Conflicts and Disputes in Maryland Business Organizations

	<i>Extensively Applied</i>	<i>Frequently Applied</i>	<i>Occasionally Applied</i>	<i>Seldom Applied</i>	<i>Never Applied</i>
1. Corporate ADR policy statements on ADR use (endorsement of interest and institutional support of ADR)	5.4%	5.4%	10.8%	18.9%	56.8%
2. Industry ADR commitments (collaboratively developed negotiation/mediation/arbitration procedures)	2.7%	8.1%	8.1%	16.2%	62.2%
3. ADR suitability screens (examines whether disputing parties would favor ADR)	0.0%	5.4%	16.2%	24.3%	51.4%
4. Early case analysis (a process that develops strategy, limits discovery, and charts ADR use)	5.4%	8.1%	13.5%	21.6%	48.6%
5. Decision analysis aids (a process designed to help make an informed judgment about the liability and damages that could result from litigation)	8.1%	10.8%	8.1%	24.3%	45.9%

NOTE: Cases in which respondents failed to indicate their response are categorized as "Missing System," but are not depicted in the tables. Therefore, the percentages for the tables may not total 100 percent.

SOURCE: *The Use of ADR in Maryland Business: A Benchmarking Study, Maryland Mediation and Conflict Resolution Office 22 (2004)*.

does not present data by size of organization, so no conclusions can be drawn regarding differences between large, medium-sized, and small companies.)

The survey's authors conclude that as a general rule: "Even businesses that have made commitments to use ADR still appear to use it reactively rather than designing a system to prevent conflicts from escalating."¹⁹³

¹⁹³Id. at 31.

Table 28: Characteristics of Dispute Resolution Efforts by Maryland Business Organizations

	Yes	No
1. ADR training and education for the legal staff	35.1%	56.8%
2. ADR training and education for the nonlegal staff	13.5%	78.4%
3. The allocation of financial and human resources sufficient to support our efforts	54.1%	35.1%
4. Legal staff are involved in dispute resolution design	67.6%	24.3%
5. External conflict resolution practitioners are used in dispute resolution design and/or execution	37.8%	51.4%
6. Financial and/or performance incentives are awarded for effective use of ADR	5.4%	86.5%
7. Clear guidelines regarding the selection of external neutrals	10.8%	81.1%
8. The opposing party and my organization collaborate on the recommendation of dispute resolution procedures and/or neutrals	32.4%	59.5%
9. Opposing counsel provides barriers to the use of alternative dispute resolution processes in resolving disputes	24.3%	64.9%
10. My organization is frequently involved in disputes with others, and we have agreed to use alternative processes to resolve those frequent disputes	11.8%	88.2%
11. A tracking system that quantifies historical data and provides a reasonable baseline of average costs against which performance can be measured is used	16.2%	70.3%

SOURCE: *The Use of ADR in Maryland Business: A Benchmarking Study, Maryland Mediation and Conflict Resolution Office* 22, 23 (2004).

3. Questions about the Role of Contract Planners and Drafters

Perhaps it should not be surprising that when it comes to managing conflict, so many businesses remain passive instead of proactive, ad hoc rather than systematic. Through ignorance or inclination, the pivotal players in the development of approaches to resolving conflict have often failed to move beyond traditional “litigation” approaches. As observed in the 2003 Maryland study, “while attorneys may be trained in representing parties in disputes, most have not been specifically trained in ADR techniques and processes.”¹⁹⁴

A particular concern is the relative ignorance of ADR and conflict management options among those who have the responsibility to negotiate and draft contracts. Although “trial lawyers” have often had experience with mediation and other approaches, corporate transactional counsel tend to have had little or no experience with these choices—and are reluctant or unable to incorporate discussions about dispute resolution in commercial contract negotiations.¹⁹⁵ Thus, opportunities to

¹⁹⁴Id. at 8.

¹⁹⁵As one senior lawyer at a leading Boston law firm fretted:

As an advocate who is a member of a good-sized law firm, I found one of the problems was that many of these ADR issues were addressed by my transactional corporate partners, who didn’t like me tinkering with the ADR provisions at the end of the deals so they couldn’t close the transaction.

incorporate lessons learned from a company's or department's negotiation, mediation, or arbitration experiences are often foregone. Among other things, our investigations into corporate dispute management must help us to understand how to effectively channel feedback into the negotiating and drafting process.¹⁹⁶

4. Commercial Arbitration: The New Litigation?

U.S.-style litigation continues to have an impact on commercial conflict resolution, despite the reduced number of court trials. It has become the dominant model for commercial arbitration in this country¹⁹⁷ and, increasingly, internationally.¹⁹⁸ An experienced commercial lawyer and arbitrator succinctly summed up the modern course of arbitration.

Commercial arbitration has evolved along many lines. It has expanded beyond conventional settings—construction, maritime, insurance, commodities, apparel industry, and the like—where particular expertise was expected of an arbitrator and relatively well cabined disputes were anticipated. It now covers commercial matters of all possible configurations, including vast, complex matters with high stakes. It has become virtually indispensable in the international field, where the home court advantage and forum selection are unattractive disincentives to litigation as a method for resolving commercial conflicts. These developments have led to a proliferation of providers, rules and regimes, more involvement by attorneys, and much more complexity. *Arbitration has become a legalistic method of adjudication.*¹⁹⁹

Another pair of experienced commentators echo the observation that as arbitration has increasingly been employed in complex, high-stakes commercial disputes, it has taken on more and more of the characteristics of a court trial.

Arbitrators now are charged with ethical and procedural duties much like judges. They must make more pretrial . . . disclosures, allow more discovery, hold more procedural pre-

Unfortunately, the clauses they used were often taken out of form books and not really discussed between the parties.

Commercial Arbitration at Its Best: Successful Strategies for Business Users 8 (Thomas J. Stipanowich & Peter Kaskell eds., 2001) [hereafter *Commercial Arbitration*] (quoting CPR Commission member Harold Hestnes, Hale & Dorr).

¹⁹⁶The CPR Institute recently made an effort to inform and educate corporate counsel and businesspersons by assembling guidelines for drafters. See generally, Kathleen Scanlon, *Drafter's Deskbook: Dispute Resolution Clauses* (2002).

¹⁹⁷See *Commercial Arbitration*, supra note 195, at xxi (quoting CPR Commission member Louis Craco regarding legalization of arbitration).

¹⁹⁸See Bryant Garth & Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* 31 (1996).

¹⁹⁹See supra note 195 (italics added).

Table 29: *Corporate Legal Times* Survey of In-House Counsels—Comparison of Arbitration to Traditional Adjudication Processes in Terms of Cost, Fairness, and Time to Resolution

	<i>Cost</i>	<i>Fairness</i>	<i>Time to Resolution</i>
Less	59.3%	17.0%	78.0%
More	—	22.0%	1.7%
Equally	40.7%	61.0%	20.3%

SOURCE: Michael T. Burr, “The Truth about ADR: Do Arbitration and Mediation Really Work?” 14 *Corp. Legal Times* 44, 45 (2004).

liminary hearings, and increasingly conduct hearings under rules of procedure and evidence and write reasoned and detailed opinions. . . . Arbitrators are now often empowered to and occasionally are awarding punitive damages. While avoiding jury trials, these developments have increased . . . costs, lengthened times to final decisions, and created more bases for complaints about the procedures or their results, all resulting in less finality of decision. . . .²⁰⁰

Even though, as Table 29 suggests, there is evidence that arbitration tends to be less costly and lengthy than litigation,²⁰¹ one often hears complaints such as that made recently by one corporate general counsel.

[W]e found arbitration generally is as expensive [as litigation] . . . less predictable, and not appealable. Arbitration is often unsatisfactory because litigators have been given the keys to run [it] . . . and they run it exactly like a piece of litigation.²⁰²

A recent survey circulated among 85 leading commercial arbitrators in the United States asked them whether they “believe[d] that arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost efficient means of resolving commercial disputes,” and, if so, whether this

²⁰⁰Scott Atlas & Nancy Atlas, *supra* note 118, at 5–6.

²⁰¹See, e.g., Michael T. Burr, *The Truth about ADR: Do Arbitration and Mediation Really Work?*, 14 *Corp. Legal Times* 44, 45 (2004).

²⁰²Jeffery Carr, Vice President & General Counsel, FMC Technology, in *The Torch is Passed, Corporate Counsel Panel Discussion, Annual Meeting, CPR Institute for Dispute Resolution, Jan. 29–30, 2004*. Williams Companies General Counsel James Bender agrees:

Our experience has not been that arbitration is less expensive [than litigation]. In fact, if you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation and as a result of that, the same kinds of costs and other issues.

We certainly favor and have recently had some success in mediation and other step processes in trying to address dispute resolution early. Our job as in-house counsel . . . is cost control; and it's not so much winning a case as it is getting a resolution—maybe a business resolution that works and can be done quickly.

Table 30: *Corporate Legal Times* Survey of In-House Counsels—Engagement of Companies in ADR Procedures Within a One-Year Period

	<i>Arbitration</i>	<i>Mediation</i>
More than in previous years	17.9%	39.0%
Equal to previous years	20.5%	49.4%
Less than in previous years	15.4%	3.8%
Not applicable	46.2%	7.8%

SOURCE: Michael T. Burr, "The Truth about ADR: Do Arbitration and Mediation Really Work?" 14 *Corp. Legal Times* 44, 48 (2004).

was a noticeable trend.²⁰³ Thirty-one of the 42 arbitrators (72 percent) who answered the question responded affirmatively.²⁰⁴ One respected former judge and full-time arbitrator stated:

Arbitration is indeed trending most harmfully in the direction of the litigation model. The value of arbitration to business people is being undermined by these changes.²⁰⁵

Arbitration remains an important and sometimes indispensable alternative to litigation, but it tends to be viewed less favorably than mediation, which is often perceived as a more effective approach for achieving benefits such as time and cost savings, preserved relationships, and more satisfactory results.²⁰⁶ As Table 30 shows, studies suggest that while the use of mediation has continued to grow in recent years, the use of arbitration has remained relatively steady.²⁰⁷

To employ binding arbitration most effectively in business disputes, it is critical to understand as much as possible about the numerous process choices afforded by arbitration, and address them in the context of specific business goals.²⁰⁸ Moreover, we must continue to study the dynamics of arbitration within the context of broader corporate policies or programs for conflict management. For example, recent guidelines published by a group of leading attorneys propose that arbitration, while generally preferable to litigation for the adjudication of commercial matters,

²⁰³Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 37 *Disp. Resol. J.* 37 (2003).

²⁰⁴*Id.* at 38.

²⁰⁵*Id.* at 39.

²⁰⁶See *supra* text accompanying note 151; see also *supra* text accompanying notes 155–156.

²⁰⁷See, e.g., Burr, *supra* note 201, at 48.

²⁰⁸Commercial Arbitration, *supra* note 195, at xxiv–xxv.

should normally be undertaken only after efforts have been made to negotiate and, perhaps, to mediate the dispute.²⁰⁹

5. The Advent of ODR

No treatment of evolving approaches in conflict resolution can ignore the advent of online dispute resolution, or ODR.²¹⁰ The Internet affords extraordinary opportunities for resolving disputes over long distances efficiently and at minimal cost, and it is only a matter of time before the new electronic media revolutionize our approaches to resolving disputes, along with most other aspects of modern life. One harbinger of what is to come is Square Trade's Office of Online Dispute Resolution Services, which has achieved some prominence as the mechanism for online negotiation and mediation of disputes between buyers and sellers on eBay. Since February 2000, Square Trade's growing range of applications (including eBay, Yahoo!, Google, the Federal Trade Commission's *econsumer.gov* program, and the California Association of Realtors) has resulted in over 1.5 million disputes being handled online (with participants representing 120 different countries), at a current rate of approximately 80,000 new online case filings a month.²¹¹ Square Trade claims success rates of over 80 percent when both parties participate in online mediation, and that over 98 percent of those parties follow through on settlement agreements. More than 80 percent of buyers and sellers report satisfaction with their experience.²¹²

ODR is still in its infancy, but will come to the fore as new generations of lawyers and potential users accustom themselves to performing all kinds of tasks online. Ultimately, the concept of interaction in a virtual reality will likely transform many of our concepts of negotiating and adjudication, and even our notions of "in court" and "out of court."

IV. ADR, CONFLICT MANAGEMENT, AND EMPLOYMENT AND CONSUMER CONTRACTS

A. *Generally*

In recent years, fierce debate has surrounded the growing use of ADR, and particularly binding arbitration, pursuant to provisions in standardized individual employ-

²⁰⁹*Id.* at 5–6.

²¹⁰See Ethan Katsh & Janet Rivkin, *Online Dispute Resolution—Resolving Conflicts in Cyberspace* (2001).

²¹¹E-mail to author from Steve Abernathy, President and CEO, Square Trade (June 18, 2004) (on file with author).

²¹²*Id.*

ment and consumer contracts.²¹³ The evolution of these contracts has raised a variety of concerns regarding private dispute resolution systems, procedures, and outcomes²¹⁴—concerns that formed a primary subtext for the “Vanishing Trial” Symposium. In this area, qualitative and quantitative data are a much-needed foundation for the debate about the nature and impact of private or quasi-private alternatives.

Prior to the late 1980s, the term “employment arbitration” was taken to refer to arbitration of grievances and other matters pursuant to the terms of a collective bargaining agreement. For many years, “consumer arbitration” was primarily represented by dispute resolution procedures under state motor vehicle lemon laws. Such programs typically feature a quick and informal alternative to court litigation for “problem” vehicles, while preserving consumers’ right to trial,²¹⁵ and are usually overseen by state offices of attorneys general. Tens of thousands of matters have been resolved in this fashion over the years: between 1987 and 2000, for example, the New York State Attorney General’s Office documented 17,154 cases accepted to lemon law programs within the state, 11,440 hearings, and 10,273 decisions (53 percent pro-consumer), with consumer recoveries totaling \$172 million.²¹⁶

In the past two decades, however, a series of Supreme Court and appellate court opinions broadening federal arbitration law under the Federal Arbitration Act have paved the way for widespread use of standardized provisions for binding arbitration in securities brokerage, individual employment, and other kinds of contracts for consumer goods and services.²¹⁷ These developments raise special and continuing questions regarding the displacement of the public justice system by private fora.

²¹³Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, in *Alternative Dispute Resolution in the Employment Arena*, Proceedings of New York University 53rd Annual Conference on Labor 331, 332–34 (Samuel Estreicher & David Sherwyn eds., 2004) [hereinafter Hill, *Due Process at Low Cost*] (citing leading articles and arguments advanced by proponents and opponents of “promulgated” or “mandatory” arbitration provisions in employment contracts).

²¹⁴See Stipanowich, *Contract Symposium*, *supra* note 2, at 888–917.

²¹⁵In the typical lemon law program, abbreviated hearings are presided over by a panel comprised primarily of persons not affiliated with the auto industry, after which the panel determines whether the consumer is entitled to a remedy (perhaps a replacement vehicle or damages). Consumers usually have the option of taking the matter to court if dissatisfied with the panel’s decision. See *id.* at 899–900 (describing operation of Maine lemon law).

²¹⁶Telephone interview with Sandy Mindell, Director, New York Lemon Law Program, New York Office of the Attorney General (Oct. 1, 2003).

²¹⁷See generally, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in the Age of Compelled Arbitration*, 1997 *Wis. L. Rev.* 33.

- Was there effective consent to this displacement?²¹⁸
- How was the private system established, and what oversight, if any, is there by regulatory agencies, consumer protection groups, or other entities that represent some balancing of interests?²¹⁹
- Are the procedures that have been substituted for civil rules and rules of evidence sufficient to protect the rights and reasonable expectations of the employee or consumer, and is the private tribunal independent of the company that drafted the contract?²²⁰
- How do the potential or actual outcomes of the procedure, such as, for example, the range of available remedies, compare to those available in the public forum?²²¹

At the same time, proponents of out-of-court dispute resolution argue that mediation and arbitration offer potential savings and efficiencies for aggrieved consumers and employees—and provide viable process alternatives for protagonists who may not have the money or resources to make use of the court system. In 1994, the Dunlop Commission on the Future of Worker Management Relations concluded that low-income workers do not have equal access to the courts, and that court tends not to be the optimum forum for those who want to continue working for their employer.²²²

Although a thorough treatment of these issues, which have inspired the publication of a torrent of academic and professional perspectives, is beyond the scope of this article, it is appropriate to briefly take stock of what we know—and don't yet know—about the scope and character of conflict resolution, and particularly binding arbitration, as experienced by those bound by consumer and employment contracts.

B. The Employment Arena

No study has fully documented the extent of employment arbitration and ADR in the United States, although General Accounting Office surveys found that between 1995 and 1997 the percentage of employees pursuing employment claims through

²¹⁸Stipanowich, *Contracts Symposium*, *supra* note 2, at 890–98.

²¹⁹*Id.* at 898–903.

²²⁰*Id.* at 903–13.

²²¹*Id.* at 914–17.

²²²See *ADR in Maryland Business*, *supra* note 189, at 17.

arbitration nearly doubled (jumping from 10 percent to 19 percent),²²³ and the American Arbitration Association (AAA) has claimed that between 1997 and 2002, the number of employees covered by AAA employment arbitration plans grew from 3 million to 6 million.²²⁴ The AAA's employment case filings grew from 422 cases in 1993 to 2,133 cases in 2002—a five-fold increase. As these numbers reveal, however, the overall employment caseload remains miniscule compared to the number of covered employees; moreover, the AAA anticipates that employment arbitration filings may actually taper off as more and more companies adopt a policy of settling more cases prior to adjudication.²²⁵

1. Employment ADR in U.S. Government Agencies

Much of the U.S. government's experience with ADR involves the resolution of employment disputes. The specter of a significant rise in administrative equal employment opportunity (EEO) complaints and EEO case backlogs, including hearing delays at the Equal Employment Opportunity Commission, have prompted widespread use of mediation of workplace disputes.²²⁶ The EEOC encourages the use of mediation in the formal complaint stage of EEO procedures.²²⁷

The U.S. Postal Service conducts mediation in about 10,000 matters each year. In the first year after ADR was introduced to address employment disputes, the number of formal workplace complaints filed fell by almost a quarter,²²⁸ and by another 20 percent the following year²²⁹—results agency personnel attribute to the positive impact of ADR in enhancing communications between employers and supervisors.²³⁰ The average mediation takes about four hours and results in settlement more than 80 percent of the time.²³¹

²²³U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 (1995); U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, GAO/GGD-97-157, 2 (1997).

²²⁴See Hill, *Due Process at Low Cost*, *supra* note 213, at 332–33.

²²⁵Telephone interview with Frank Zotto, Vice President for Case Management, American Arbitration Association (Dec. 1, 2003).

²²⁶Senger, *supra* note 4, at 6.

²²⁷*Id.* at 133.

²²⁸*Id.* at 6, citing Federal Interagency ADR Working Group, *Report of the Interagency Alternative Dispute Resolution Working Group to the President of the United States* 2–3.

²²⁹*Id.*

²³⁰*Id.*

²³¹Senger, *supra* note 4, at 130.

2. Conflict Management and Employment

Workplace conflict is a primary concern of employers in the private as well as the public sector, and many companies have devoted considerable resources to actively managing employment disputes. One of the first and most visible of such multifaceted programs was developed by Kellogg Brown & Root. It includes several process elements aimed at encouraging employees to seek resolution of their issues early and, if possible, in a collaborative fashion.²³²

A recently published description and analysis of employment ADR programs at 20 major institutions provides an interesting perspective on the use of mediation, arbitration, and other approaches in this arena; key attributes of these programs are summarized in Table 31.²³³

Among this group of large institutional employment programs, arbitration is prevalent but not ubiquitous. Companies often make the use of binding arbitration, or of the entire conflict resolution program, a condition of employment; in some cases, however, arbitration or other elements are presented as an option that employees may exercise.

Moreover, where arbitration is employed, it is usually the final stage of a carefully designed stepped process aimed at “filtering” grievances and disputes through a series of intervention strategies, starting with informal communications between an employee and a manager or internal third party.²³⁴ The goal, in the words of a representative of Credit Suisse First Boston, is “to provide employees with a means of raising and resolving workplace concerns at an early stage.”²³⁵ Mediation is normally an intermediate stage. Some programs, such as Shell’s, offer incentives, and others (like GE’s) offer rewards, to encourage employees to obtain independent legal advice to assist the employee in making an informed decision with respect to settle-

²³²See ADR in Maryland Business, *supra* note 189, at 16.

²³³See generally, CPR Inst. for Disp. Resol., *How Companies Manage Employment Disputes, A Compendium of Leading Corporate Employment Programs (2002)* [hereinafter CPR, *How Companies Manage Employment Disputes*]. Compare Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 Univ. of Ill. L. Rev. 695, 720–41 (surveying extant franchise contracts, incidence of binding arbitration clauses, and incidence of different kinds of “unfair” provisions in arbitration provisions).

²³⁴One source estimated that more than 50 percent of nonunion workplaces in the United States now have some form of in-house ADR program. See Alexander Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 Ohio St. J. Disp. Resol. 643, 646 (2001) (citing Casey Ichniowski & David Lewin, *Characteristics of Grievance Procedures: Evidence from Nonunion, Union and Double-Breasted Business*, Proceedings of the 40th Annual Meeting of the Industrial Relations Research Association (1988)). Colvin conducted a survey of 302 workplaces in the telecommunications industry, and determined that of the 16 percent of workplaces that had adopted external binding arbitration procedures, 64 percent had also adopted in-house dispute resolution procedures of some kind. *Id.* at 649.

²³⁵See CPR, *How Companies Manage Employment Disputes*, *supra* note 233, at 88 (statement of Elizabeth W. Millard, Director and Counsel, Credit Suisse First Boston).

Table 31: CPR 2002 Survey of 20 Institutional Employment ADR Programs

<i>Name of Institution</i>	<i>Nature of ADR Program</i>
ALCOA	After controversy arises, employee may VOLUNTARILY agree to submit complaint to Resolve It program; after preliminary management review, employee MAY make separate additional election for mediation, and, if mediation fails to resolve the matter, for binding arbitration.
Anheuser-Busch	Dispute Resolution Program (DRP) consists of local management review followed, if necessary, by mediation and by binding arbitration. The DRP is a condition of employment.
Bank of America	Three-step dispute resolution program involves management review, review by personnel department, and, finally, by ombudsman.
CIGNA	Employment dispute resolution begins with Speak Easy process involving management or human resources review, followed if necessary by separate consultant. If employee wishes to press claim, binding arbitration is required in lieu of filing a civil suit. Mediation may be requested prior to arbitration.
Credit Suisse First Boston	Dispute Resolution Program consists of an internal grievance procedure followed, if necessary, by mediation and by binding arbitration. The Program is a condition of employment.
General Electric	After an initial informal process, the Resolve Program requires employees to use two levels of internal grievance procedures, followed by mediation and binding arbitration. All employees hired on or after the effective date of the Program are bound to utilize the Program in lieu of going to court.
Halliburton Company	The Dispute Resolution Program consists of local management review followed, if necessary, by mediation and by binding arbitration. The DRP is a condition of employment.
Johnson & Johnson	The Common Ground Program consists of three steps: an Open Door process involving management and human resources, a company-sponsored facilitation process, and independent mediation. There is NO provision for binding arbitration.
Masco	The Dispute Resolution Policy consists of an Open Door process involving management and/or human resources, followed, if necessary, by mediation and by binding arbitration. The Policy is a condition of employment.
McGraw-Hill	The FAIR Program consists of an Open Door process involving management and/or human resources, followed, if necessary, by mediation and by binding arbitration. (Unclear from materials whether the Program is a condition of employment.)
MG Company	Two-step process consists of mediation and binding arbitration. The policy is a condition of employment.
Pfizer	Program consists of an Open Door policy under which employees may take problems to higher levels of management.
Philip Morris USA	Program involves arbitration, and perhaps mediation, pursuant to AAA Employment Dispute Resolution Rules. Program is a condition of employment.
Rockwell Automation	Multiphase process consists of (1) discussions between employee and manager, followed if necessary by (2) facilitated process with the help of human resources, (3) review by senior management, and (4) appeal to the Business Group Board of Review. The dispute may then be submitted to binding arbitration if both parties concur. (However, agreement to arbitration is a condition of employment for new employees and various others.)

Table 31: Continued

<i>Name of Institution</i>	<i>Nature of ADR Program</i>
Shell	Shell Resolve program involves multiple steps culminating in mediation and OPTIONAL arbitration. Even after arbitration award, an employee may enforce it against the company OR FILE SUIT IN COURT.
Texaco	Solutions process involves multiple steps culminating in arbitration. (The employee has the option of skipping all steps prior to arbitration.) The employee may enforce the arbitration award against the company OR FILE SUIT IN COURT; the award may be entered as evidence in court.
United Parcel Services	The Employee Dispute Resolution (EDR) program consists of five steps including Open Door, Facilitation, Peer Review, and Mediation, followed by OPTIONAL binding arbitration.
UBS Paine Webber	F.A.I.R. Program consists of multiple steps; binding arbitration is OPTIONAL for discrimination, harassment, and retaliation issues; employee may alternatively file suit in court or seek relief before an appropriate administrative agency.
U.S. Air Force	Mediation program is part of agency employment ADR program.
U.S. Postal Service	Redress Mediation Program.

SOURCE: CPR Institute for Dispute Resolution, *How Companies Manage Employment Disputes, A Compendium of Leading Corporate Employment Programs* 103-499 (2002).

ment.²³⁶ In practice, the vast majority of disputes are resolved in the early stages; it is the exceptional case that reaches arbitration or litigation.²³⁷

The 2003 MACRO study of conflict resolution in Maryland business organizations includes substantial data on approaches for the resolution of workplace disputes.²³⁸ To the extent that the MACRO results reflect the spectrum of business experience in Maryland, they suggest that businesses do tend to place a good deal of emphasis on the identification of workplace conflicts, and often employ formal grievance procedures. Interestingly, it appears that only a minority of companies have embraced the use of mediation or other conflict-management practices identified among the companies in the CPR Institute survey.²³⁹

²³⁶See *id.* at 69-70 (statement of Wilbur Hicks, Ombudsman, Shell Oil Company).

²³⁷Cindy Halberlin, Director of Giant Food's Fair Employment Practices Program, reports that the company mediates most EEO claims and cases filed in the courts. Her office employs approaches to respond to and resolve workplace disputes early. Of 800 internal workplace complaints filed in 2002, only 20 resulted in formal complaints; of the latter, 90 percent were resolved. See ADR in Maryland Business, *supra* note 189, at 16-17. See also David Lewin, Dispute Resolution in the Nonunion Firm, 31 J. Conflict Resol. 465, 483 (1987) (concluding that in multistep programs, the majority of claims settle at first step of ADR, most of the remaining claims settle at the second step, etc.).

²³⁸See ADR in Maryland Business, *supra* note 189, at 24-26.

²³⁹*Id.*

3. Empirical Studies of Binding Arbitration of Employment Cases

Having observed that companies have a number of conflict-management and resolution options short of binding arbitration, and that there is substantial evidence that these can be mutually advantageous for both employees and employers, there remain discrete questions about the practical impact of submitting employment discrimination or other claims to binding arbitration instead of a court of law. A number of empirical studies have now explored this issue.²⁴⁰ Eisenberg and Hill recently published a study comparing a randomly selected sample of arbitrated cases under the American Arbitration Association's National Rules for Resolution of Employment Disputes in 1999–2000 with state court trial outcomes reported by the Civil Trial Court Network.²⁴¹ They concluded that higher-paid employees pursuing non-civil-rights employment claims—the group most likely to be able to afford to go to court and therefore most represented in state court trials²⁴²—won more frequently in arbitration than at trial.²⁴³ The authors found no statistically significant difference in median or mean awards in trial and arbitration.²⁴⁴ Moreover, the evidence indicated that the mean and median times to resolution were much shorter in arbitration than in litigation.²⁴⁵ They also observed that some pro-employee arbitration awards would probably have ended up as pro-employer summary judgments in litigation, since courts are significantly more likely than arbitrators to dismiss claims prior to trial on the merits.²⁴⁶

²⁴⁰See Hill, *Due Process at Low Cost*, *supra* note 213, at 338–45 (summarizing recent studies on employment arbitration).

²⁴¹Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 *Disp. Resol. J.* 44 (2004).

²⁴²See Hill, *Due Process at Low Cost*, *supra* note 213, at 335–36. A survey of 321 plaintiffs' attorneys determined that responding lawyers accepted only 5 percent of the employment discrimination cases of prospective clients seeking representation. They required, on average, minimum provable damages of \$60,000–65,000, a retainer of \$3,000–3,500, and a 35 percent contingency fee. William Howard, *Arbitrating Claims of Employment Discrimination*, 50 *Disp. Resol. J.* 40, 44 (1995).

²⁴³*Supra* note 241, at 48. See also Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms*, 58 *Disp. Resol. J.* 56 (2004) (comparing results of jury trials in federal court in Southern District of New York with results in employment arbitrations at NASD; finding that in arbitrated and litigated employment cases completed during same period, claimants had higher success rate in arbitration than in court).

²⁴⁴*Supra* note 241, at 49.

²⁴⁵*Id.* at 51.

²⁴⁶*Id.* at 52. See also Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 *U.S. F. L. Rev.* 105, 112–14 (2003) (discussing impact of summary judgment in court).

Once again, the Eisenberg and Hill study reinforces the critical importance of carefully scrutinizing “case specifics”—here, distinguishing between different classes of claimants (higher- versus lower-paid employees) and different kinds of disputes (such as civil rights versus non-civil-rights employment claims). They also point out the significance of procedural context: the AAA had sponsored, and adheres to, the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship,²⁴⁷ which attempts to address many of the issues of procedural fairness that have been raised by employee advocates; some other employment ADR procedures do not provide such due process protections. The latter conclusion—that the imposition of community due process standards in private arbitration has positive implications for employees—is reinforced by the latest research conducted by Lisa Bingham.²⁴⁸

C. Regulated Arbitration and Mediation of Investor/Broker Disputes

1. Displacement of Court Litigation in Securities Disputes

Since the U.S. Supreme Court paved the way for broad enforceability of arbitration provisions in contracts between investors and securities brokers,²⁴⁹ such provisions have become ubiquitous. A growing number of investor-claimants have found themselves before tribunals of the National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE), and other self-regulatory organizations (SROs) of the securities industry. Composite figures for the NASD and other SROs reflect important growth in case filings during the past two decades: the tremendous growth of the investor base and recent market reverses have added new momentum to the long-term trend. Equally impressive is the growth of investor-broker mediation under the auspices of recently established programs at the NASD and the NYSE, as shown in Table 32.

²⁴⁷See National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims Under Employer-Propagated Systems, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 21, 1997), available at <<http://www.naarb.org/>>. Although the standard is by no means a standard embraced by the whole community of employment lawyers, it is an important effort to establish a basic floor of expectations for employment arbitration processes.

²⁴⁸See generally, Lisa B. Bingham & Shimon Sharaf, Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference, in *Alternative Dispute Resolution in the Employment Arena*, Proceedings of New York University 53rd Annual Conference on Labor 303 (Samuel Estreicher & David Sherwyn eds., 2004).

Professor Bingham’s earlier research has been much cited as the basis for concerns regarding the “repeat player effect” in employment arbitration, but the relevant study does not make clear that it is an employer’s multiple experiences with the same arbitrator, as opposed the presence of a personnel manual, that is significant. See Hill, *Due Process at Low Cost*, supra note 213, at 340.

²⁴⁹See *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 Act are subject to arbitration).

Table 32: Composite Figures—Arbitration Filings, Mediation at NASD, NYSE, and Other SROs

<i>Year</i>	<i>Total Cases Received in Arbitration Programs</i>	<i>Mediations Held at NASD, NYSE (Since 1998)</i>
2002	9,099	2,542
2001	7,742	494
2000	6,156	531
1999	6,274	512
1998	5,575	517
1997	6,665	—
1996	6,510	—
1995	7,271	—
1994	6,531	—
1993	6,562	—
1992	5,451	—
1991	5,869	—
1990	5,332	—
1989	5,404	—
1988	6,097	—
1987	4,357	—
1986	2,837	—
1985	2,788	—
1984	2,464	—
1983	1,737	—
1982	1,319	—
1981	1,034	—
1980	830	—

SOURCE: Data provided by George Friedman, Director, NASD Dispute Resolution Program (October 2003).

Out-of-court dispute resolution has virtually displaced court litigation as a means of resolving disputes in the arena of investor-broker disputes. Investor-broker arbitration and mediation are regulated more extensively than any other form of out-of-court dispute resolution. The Securities and Exchange Commission (SEC) oversees the practices and policies of all SRO arbitration programs, conducting audits and passing on changes to arbitration procedures; the General Accounting Office also conducts occasional reviews, such as a recent study on the payment of arbitration awards by brokerage firms. The Securities Industry Conference on Arbitration (SICA), established two decades ago at the behest of the SEC, provides a forum for debate on policy and procedural issues among representatives of SROs, the securities industry, and representatives of the investing public.²⁵⁰ SICA produced the original Uniform Code of Arbitration, the model (and minimum standard) for all current SRO arbitration procedures; it continues to review and revise provisions of

²⁵⁰See generally, Constantine N. Katsoris, SICA: The First Twenty Years, 23 *Fordham Urb. L.J.* 483, 535–38 (1996).

the Code and offer guidance regarding parallel SRO rules. The NASD also has an advisory body representing different constituencies.

Judicial encouragement of securities arbitration is founded in part on the perceived benefits of the alternative for both industry members and customers, including reduced costs and speedier results.²⁵¹ As in the employment arena, the arbitration system has made it possible to try smaller cases that might never have seen the inside of a courtroom.²⁵² At the same time, the costs associated with arbitration hearings, including administrative costs and arbitrator fees, can in some cases be an obstacle.²⁵³

2. Comparisons to Court Process

In the quarter-century since *McMahon*, securities arbitration continues to evolve. It remains something different and apart from court litigation, but has come to share more and more features with traditional court trial in some respects, including increased emphasis on prehearing discovery and the availability of punitive damages. Moreover, the growth of securities arbitration has stimulated the establishment of the Public Investors Arbitration Bar Association (PIABA), an organization of “repeat players” in securities arbitration who are among the most active representatives of the investing public. PIABA holds conferences, publishes educational materials, and lobbies the SEC and other regulatory bodies on behalf of its constituency.

And, while arbitration is not a system of precedents, there are also published decisions in the securities arena. A periodical called the *Securities Arbitration Commentator* (SAC) scrutinizes developments in the field and summarizes and analyzes

²⁵¹Michael A. Perino, Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations 7 (Nov. 2002) [hereinafter Perino Report].

²⁵²One leading Atlanta-based investor attorney (and former President of the Public Investors Arbitration Bar Association) states:

One very positive effect of SRO arbitration is that it has made it economically feasible to file and prosecute [cases involving less than \$100,000 in damages, of which there are many], whereas they never could have been brought in the Federal court system. The cost would be prohibitively expensive, and the time from filing to judgment equally burdensome. But these cases can be done in arbitration and in many parts of the country constitute a significant percentage of the caseload. In my observation, oftentimes the people who have lost \$50,000–75,000 are the ones who are most affected by their losses.

E-mail to author from J. Patrick Sadler, Partner at Sadler & Hovdesven, P.C. (May 10, 2004) (on file with author).

²⁵³J. Patrick Sadler relates:

At the same time, we must work to keep the cost of arbitration for the public customer as low as possible. At the NASD, a two day hearing on a \$60,000 claim costs \$3000, or 5% of the claim amount. Not only are the costs of arbitration a significant percentage of smaller claims, but often the dollar costs are prohibitive for people who have already lost most or all of their savings.

arbitration awards, which have been routinely published in *SAC Award Surveys*.²⁵⁴ Richard Ryder, the Editor of *SAC*, explains the importance of making data on arbitration of investor-broker disputes broadly available to the public.

My years in the securities industry have taught me that sunshine is the best antiseptic. . . . It relieves distrust, empowers those who are sympathetic, and it steals thunder from your detractors. Perhaps the most potent remedy delivered by SICA to the unfairness perceptions that face securities arbitration has been the Public Award. Employment and consumer arbitration involves the "little guy" and that's who the courts, the media and public officials are paid to protect. In B2B arbitration, confidentiality is a constructive and helpful tool. In consumer arbitration, it is anathema.

The process can be private, so long as there is the opportunity for evaluation. Public Awards provide information about cases and the people in them that enable myths to be dispelled and sound hypotheses to be tested. Over the years, SAC has provided statistical information garnered from Public Awards to the GAO, the media, and other agencies that have allowed those evaluators to accept what they have been told by supporters of the process—because they have been able to independently verify the information with quantitative data. SAC has used the Award Database during these past 15 years to publish its own statistical comparisons. We have put the Awards on the Internet for public inspection.

. . . [T]he availability of Public Awards has permitted us to survey such aspects of the arbitration process as the frequency of arbitrator service, the prevalence of attorney fee awards, the dynamics of defamation and discrimination cases, employment awards in general, how forum fees are assessed among the parties, how customers fare in arbitration, outcomes in online trading cases, the results for pro se claimants, the use by arbitrators of punitive damages, their willingness to impose other sanctions, details about raiding cases, situs as a factor in outcomes, the top 100 broker/dealers in arbitration, and numerous other mini-surveys.

The Awards must supply reliable and substantive information, because they are the raw material with which outsiders must work.²⁵⁵

Reflecting endless rounds of debates over the rights of investors and the needs of brokers, the NASD and NYSE Arbitration Rules have become increasingly lengthy and detailed. Here, again, anecdotal evidence supports the notion that the litigation model has had considerable impact on private arbitration. As one long-time advocate familiar with the NASD securities and employment arbitration programs says:

The rules are starting to look like the Federal Rules of Evidence. For the types of clients I represent, it is an impediment to getting a reasonable, fair and expeditious answer.²⁵⁶

²⁵⁴See *SAC Award Surveys*, Sec. Arb. Commentator (2004).

²⁵⁵E-mail to author from Richard Ryder, Editor of *Securities Arbitration Commentator* (May 3, 2004) (on file with author).

²⁵⁶Interview with Pearl Zuchlewski, Partner at Goodman & Zuchlewski LLP, New York, May 4, 2004.

In 1996, concerns regarding the growing cost and complexity of securities arbitration procedures led to a set of proposals for the reform of NASD arbitration by a group headed by former SEC head Professor David Ruder.²⁵⁷ It is no surprise that, as in the court system, mediation has become an increasingly popular alternative.²⁵⁸

3. The Need for Empirical Information

In 2002, the SEC sponsored a study by Professor Michael Perino regarding the operation of arbitrator disclosure requirements in securities arbitration.²⁵⁹ Among other information, Professor Perino sought empirical data on the experience of investors in securities arbitration, and determined that the most comprehensive study of investor outcomes was the GAO's 1992 report, *Securities Arbitration: How Investors Fare*,²⁶⁰ which examined results in arbitration over an 18-month period between 1989 and 1990. The report found "no evidence of a systemic pro-industry bias" in arbitrations sponsored by the NASD, NYSE, and other SROs when compared to arbitrations conducted by the AAA. Among other things, the GAO noted, in SRO arbitrations, panels found for investors in about 59 percent of arbitrations versus 60 percent of AAA-sponsored arbitrations. Prevailing investors received average awards of about 61 percent of the damages claimed, as opposed to awards averaging 57 percent of amounts claimed in AAA proceedings.²⁶¹

The Perino report summarizes more recent GAO findings as well as SICA and NASD data on arbitration outcomes, pointing out minor reductions in the percentage of investor awards and higher rates of settlement. From 1980 to 2001, Perino notes, of 31,001 public customer cases in SRO arbitrations, 16,294 (or between 52–53 percent) resulted in some award for the customer.²⁶² In the three years since GAO's last report, moreover, customers won in 54.18 percent of the cases.²⁶³

²⁵⁷See Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers, Inc. 87, 433 (Jan. 1996). See also Perino Report, *supra* note 251, at 7.

²⁵⁸See Table 32.

²⁵⁹See Perino Report, *supra* note 251.

²⁶⁰*Id.* at 31, citing GAO, *Securities Arbitration: How Investors Fare*, Rep. No. GAO/GGD-92-74 (May 1992) [hereinafter *How Investors Fare*].

²⁶¹*Id.*

²⁶²*Id.* at 32.

²⁶³*Id.* at 33.

Importantly, SRO-sponsored arbitration—arbitration before panels under the auspices of the NASD and NYSE—is more than ever the only adjudicative choice; even non-SRO arbitration is very rare. As Perino observes, a two-year SICA-sponsored pilot project aimed at encouraging investors and their counsel to choose outside arbitration produced hardly any positive response,²⁶⁴ and the NASD has produced surveys suggesting investors and counsel tend to be satisfied with the process.²⁶⁵ Perino concludes, however, that more is needed.

Given the unquestioned significance of securities arbitrations, it is critical that the SROs resolve any lingering concerns about pro-industry bias. To date, available empirical evidence, particularly with respect to investor perceptions of the arbitration process, is fairly limited and only suggests that there are no substantial systemic problems in SRO arbitrations. As a result, this Report recommends the SROs sponsor additional independent studies to further evaluate the impartiality of the SRO arbitration process.²⁶⁶

SICA, the NASD, and the NYSE have convened a committee for the purpose of creating and executing such a study. One issue to be addressed, however, is how to “benchmark” results and perceptions in SRO arbitration against results and perceptions of court resolution, given the absence of current court cases.

D. Looking Ahead: What We Need to Know

The need for reliable, useful empirical evidence is most crucial in the ongoing debate regarding private justice systems. We know that companies sponsor many different kinds of programs for the management of employee grievances, and that such programs usually resolve disputes without adjudication. Given the willingness of some provider organizations to share raw data on case filings and dispositions, several scholars have begun to develop a growing body of data permitting comparisons between arbitration and litigation. In the securities arena, the broad availability of data on arbitration awards is an integral part of regulated investor-broker arbitration, and provides a specific measure of comparison with results in public fora.

Quantitative and qualitative information about the costs and benefits to employees and consumers should underpin the arguments of academics and the logic of courts. This sort of information may also lead some drafters to conclude that as a private forum becomes more and more like litigation, it may or may not be preferable to court trial.

²⁶⁴Id. at 34, citing SICA, Final Report, Securities Industry Conference on Arbitration Pilot Program for Non-SRO Sponsored Arbitration Alternative (2002).

²⁶⁵Id. at 34.

²⁶⁶Id. at 37.

V. CONCLUSION

The many-faceted “quiet revolution” in ADR and conflict management has resulted in many changes in the environment of court litigation, including the evolution of a wide range of process tools aimed at managing conflict. There is substantial evidence that mediation and other ADR approaches can result in enhanced satisfaction, reduced dispute resolution costs, shorter disposition times, improved compliance with a settlement, and other benefits in some contexts. Much, however, hinges on the nature of the program and the participants, and there is still much to learn—and decide—about the role of ADR in the public justice system.

Confronted with increasingly daunting litigation costs and perceived great risks, the great majority of major businesses were led to experiment with ADR. In recent years, mediation has become a more and more popular alternative. A number of companies have taken a strategic approach to conflict management and established programs aimed at resolving various kinds of disputes early, informally, and at least cost; such companies can often document significantly reduced levels of litigation. Most companies, however, continue to take an “ad hoc” approach to conflict resolution, and employ mediation or arbitration within the context of a more traditional legal practice. Many corporate transactional lawyers lack fundamental information about conflict resolution options. Meanwhile, commercial arbitration has come to look a lot like litigation.

As for litigation, to paraphrase Mark Twain, the rumors of its demise are greatly exaggerated. If fewer litigators are plying their trade in the courtroom than two decades ago, more seem to be finding employment in business and other arbitration, and in mediated negotiation. What does this portend for participants, counsel, and the justice system? For one thing, various forms of binding arbitration have taken on more and more of the features of court litigation; while some tend to focus on the need for private adjudication to embrace facets of court procedure to handle complex disputes or ensure a party due process, others complain about perceived delay and added expense. In the latter vein, one has even begun to hear concerns that lawyers will “judicialize” mediation, robbing it of the benefits that have encouraged its extraordinary growth.²⁶⁷

The implications of displacing public procedures and precedents are of most concern in those contexts involving significant disparities in bargaining power, including individual employment and consumer contracts. Encouraged by receptive federal and state courts, many companies have incorporated binding arbitration agreements in consumer services and employment contracts. Many businesses, moreover, now have multistep conflict-management systems designed to address employee

²⁶⁷See Stipanowich, *Multi-Door Contract*, *supra* note 140, at 403 (discussing the “colonization” of commercial arbitration by lawyers, and potential fate of mediation).

grievances and disputes without public or private adjudication. Current data indicate that, under procedures incorporating recent due process standards (such as the AAA Rules), white-collar employees may enjoy outcomes comparable or superior to litigation, and for some, arbitration may currently be the only affordable mechanism to adjudicate a claim. We must go much further with our quantitative and qualitative investigations of ADR in these realms, however, in order to confidently address the important controversies surrounding due process in employment and consumer arbitration—particularly where, as in the securities arena, court litigation and its related procedures and system of precedents are effectively displaced by out-of-court processes.

Looking back over the last quarter-century, in which members of the bench and bar played a pivotal role in promoting alternatives to traditional litigation in an effort to provide more rapid, more flexible, and/or more appropriate relief, one is reminded of the long-ago evolution of the Court of Chancery and the tension between the Equity Court and courts of common law.²⁶⁸ As that history illustrates, our system of justice will continue to evolve; and there will continue to be tensions between the desire for more perfect adjudication on the one hand, and less expensive, more efficient, or more flexible choices on the other. There will always be a need for carefully crafted and effectively executed research, both qualitative and quantitative.

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²⁶⁸A dramatic retelling of the apogee of the struggle may be found in Catherine Drinker Bowen, *The Lion and the Throne*, ch. 27 (1957).