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LOOK BEFORE YOU LEAP AND KEEP ON LOOKING: LESSONS FROM THE INSTITUTIONALIZATION OF COURT-CONNECTED MEDIATION

Bobbi McAdoo & Nancy A. Welsh*

INTRODUCTION

In this symposium issue, Professor Carrie Menkel-Meadow proposes that new processes encouraging “deliberative democracy” ought to be institutionalized, to supplement or even supplant the processes that currently characterize public decision making. Professor Menkel-Meadow expresses disillusionment with this country’s traditional decision making processes for many reasons: they encourage bi-polar thinking; they do not elicit multiple voices; they discourage creativity; and, ultimately, they may be “ill-suited to resolving, managing or at least, handling, modern day legal and social problems” that “require input from a multiplicity of constituencies and coordinated action by a multiplicity of legal and political institutions.”¹ Simultaneously, Professor Menkel-Meadow places substantial faith in the potential of both alternative, more flexible processes and members of the legal profession. But can we be sure that a largely-untested new will be better than the admittedly-flawed old? What happens as innovations are absorbed into pre-existing institutions? And are lawyers really best-suited to be the architects of these new processes and their institutionalization?

These are weighty questions with only uncertain answers. History, however, can sometimes provide helpful guidance. More than twenty-five years ago, a group of lawyers and judges gathered in St. Paul, Minnesota, to confront problems in the operation of the nation’s overwhelmed courts. Much like Professor Menkel-Meadow today, they were searching for innovations that could help the courts better address citizens’ needs. When Professor Frank Sander introduced the concept of the multi-door courthouse at the Pound Conference, the great experiment with the institutionalization of court-connected ADR – particularly mediation – began.

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¹ Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L. J. 347, 348 (2005).

This article will use the institutionalization of general civil mediation² into the courts as a case study, with both hopeful and cautionary lessons for policy makers who are drawn to Professor Menkel-Meadow's proposal. There can be little doubt that court-connected mediation has been successful in achieving widespread institutionalization in the nation's courts. But widespread institutionalization alone does not constitute success.³ Instead, pronouncements of success should be grounded in the achievement of goals that enable institutions to better fulfill their missions. Therefore, policy makers considering the adoption of alternative processes like those proposed by Professor Menkel-Meadow must first answer the following questions: (1) what are the core missions of the institutions that will use these processes? (2) what improvements are to be achieved through the institutionalization of new, alternative processes? (3) at what points could the institutionalization of new, alternative processes actually threaten an institution's ability to fulfill its core mission? (4) how can the potential improvements and threats be measured? (5) what monitoring and evaluation mechanisms will be put in place to take these measurements? and (6) who will be responsible for taking responsive action and how can such action be ensured?

This article begins by examining the goals for court-connected ADR that were discussed at the Pound Conference and that have guided courts' adoption of mediation programs. Importantly, all of these goals are grounded in the courts' institutional mission, to deliver justice – substantive justice, procedural justice, and efficient justice in appropriate forums.⁴ In Section II, the article turns to the perspectives of judges, lawyers and parties to assess whether and to what extent court-connected mediation has achieved these goals. This section pays particular attention to the recently-gathered perceptions of state trial court judges in Minnesota, the very state where the Pound Conference initiated the experiment with court-connected ADR. As the stakeholders who are charged with translating the courts' lofty mission into reality, judges' perspectives are particularly important. Based on the successes and limitations revealed by the perspectives of judges, lawyers, and parties, Section III proposes reforms of court-connected mediation to better ensure the achievement of justice. Finally,

² This excludes family and small claims mediation, which have also been institutionalized in the courts.

³ Early advocates of mediation, including the authors, sometimes pointed to the extent of ADR use (its institutionalization) as evidence of the success of ADR. We recognize the fact that institutionalization can encourage the achievement of ADR's goals and vice versa; however, without knowing more specifically what is institutionalized, the extent of use of ADR *per se* does not signal "success."

⁴ Others have also grappled with defining the goals and objectives for a civil justice system. See, e.g., Jean Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 299 (2003) (speculating that disputants seek: a civil justice system that provides "a substantively fair/just result;" a system "that meets the procedural justice criteria[;]" and "a system that helps them to achieve other personal and emotional goals . . . or that at least does not leave them feeling worse"); Adrian Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, in CIVIL JUSTICE IN CRISIS 3, 10 (Adrian Zuckerman, ed. 1999) (suggesting that systems of justice should be evaluated along three dimensions: whether the system produces correct judgments; whether the system provides timely judgments; and whether the system is so costly that it affects access to justice and/or provides wealthy litigants with a procedural advantage).

in Section IV, the article suggests how the experience with court-connected mediation should inform the development and implementation of processes to institutionalize Professor Menkel-Meadow's "deliberative democracy."

I. DEFINING THE GOALS OF ADR⁵

In order to assess court-connected mediation's success in achieving its goals, it is essential to begin with definitions of those goals.⁶ Therefore, this article offers a brief look at ADR's roots, specifically insights from the Pound Conference that gave rise to court-connected ADR.⁷

Dean Roscoe Pound gave a key speech in St. Paul, Minnesota in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." Cataloguing the causes of dissatisfaction at that time, Pound suggested a wide-ranging course of reforms, hoping the country would be able to ". . . look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."⁸ His suggestions, however, were met with marked coolness by the elite American Bar Association. In 1975, Chief Justice Warren Burger began a new push for "a conference of representative leaders to consider the problems of justice and the need to anticipate problems as yet unidentified that the nation would face in the remainder of this century."⁹ The resulting conference, jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Judges, and the American Bar Association, had as its focus the "unfinished business" of Pound's 1906 speech. It was symbolically held in St. Paul in 1976, almost exactly seventy years after the original Pound Conference.¹⁰

Justice Burger articulated the questions addressed at the conference as: (1) what types of disputes can best be resolved by judicial action and what alternatives are superior? and (2) how can we serve the interests of justice with processes that are more speedy and less expensive?¹¹ These questions were grounded in the perception that the court system as a whole was being dangerously overwhelmed by the tremendous increases in litigation that occurred dur-

⁵ We first articulated the idea of using the Pound Conference to develop these goals at the 2004 annual conference of the ABA Section on Dispute Resolution. We thank those who gave us feedback at that time, particularly Donna Stienstra, Jean Sternlight and Gary Weiner.

⁶ Ideally, this exercise is similar to that of setting goals and then evaluating their achievement for any individual ADR program. See Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES (Donna Stienstra & Susan Yates eds., 2004) (without clear goals, effective monitoring and evaluation is unlikely to occur).

⁷ THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (A. Leo Levin and Russell R. Wheeler eds., 1979) [hereinafter "POUND PROCEEDINGS"]. Excerpts from the Pound Conference are also found in *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).

⁸ POUND PROCEEDINGS, *supra* note 7, at 353.

⁹ *Id.* at 5.

¹⁰ *Id.* at 5-6. This 1976 conference is often referred to as the beginning of modern day ADR.

¹¹ *Id.* at 6.

ing the 20th century. To prepare for the challenges of the 21st century, the judges, lawyers and academics assembled in St. Paul were to offer bold ideas for change.¹²

In a foreword to the published proceedings, three former ABA presidents argued for serious consideration of the agenda developed at the Pound Conference. They asserted that there had been an excessive resort to litigation because the nation's citizens had *so much* respect for the courts. Specifically, these lawyers wrote that people:

feel and see that they are getting a measure of justice in the courts, the kind of respectful attention and thoughtful consideration that they do not think they get anywhere else The real and present danger in our day is that the never-ending demands on the American judicial system may, if there is no relief, so overwhelm the capacity of the courts, that people will become disenchanted with the courts too.¹³

These bar leaders further maintained that the 2000 A.D. deadline Justice Burger established at the conference allowed for the reconstruction needed "if our legal institutions, and particularly our courts, are to function as well as they must in order to maintain the rule of law as the principle of order in our conflict-ridden and ever-changing society."¹⁴

Chief Justice Burger delivered the keynote address at the conference and made clear his view that "[t]here is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgment Efficiency – like the trial itself – is not an end in itself. It has as its objective the very purpose of the whole system – *to do justice*."¹⁵ Justice Burger referred to Justice Pound's view that ". . . the function of the courts [is] to deliver social and economic justice according to standards established by law."¹⁶

The Pound Conference address given by Harvard Professor Frank E. A. Sander is now a part of the historical lore of the ADR movement. Among other ideas offered to address the problems of court overload, Professor Sander introduced the multi-door courthouse.¹⁷ He encouraged the exploration of alternative ways of resolving disputes outside the courthouse, suggesting that there is a "rich variety of different processes, which, I would submit, singly or in combination, may provide far more 'effective' conflict resolution."¹⁸ He also suggested that rational criteria could be developed "for allocating various types of disputes to different dispute resolution processes."¹⁹

¹² Burger suggested a need to "open our minds to consideration of means and forums that have not been tried before." *Id.* at 32.

¹³ *Id.* at 11.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 29. Burger made clear that his objective was not to *reduce access* to justice. He recognized, however, the need to ensure an orderly evolution of the judicial system. To that end, he said, "[t]here is nothing dangerous about studying and considering basic change, if the alterations will preserve old values and 'deliver' justice at the lowest possible cost in the shortest feasible time." *Id.*

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 84.

¹⁸ *Id.* at 67. Sander suggested possible effectiveness criteria to be "cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important." *Id.* at 67 n.7.

¹⁹ *Id.* at 67.

Professor Sander educated those at the conference about the range of available alternatives and quoted Lon Fuller regarding the “central quality of mediation,” namely “its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”²⁰ He contrasted this potential with limiting aspects of a judicial process – “the use of a third party with coercive power, the usually ‘win or lose’ nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter at issue as distinguished from a concern with the underlying relationship between the parties.”²¹ Professor Sander stated that especially when disputes arose between individuals in a long-term relationship, a mediated solution worked out by the parties was “likely to be far more acceptable (and hence durable).”²² Professor Sander also made clear that he was not “maintaining that cases asserting novel constitutional claims ought to be diverted to mediation or arbitration.” On the contrary, the “goal is to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.”²³

A. Leon Higginbotham, then a federal district court judge, served as a sort of moral compass for the conference, to ensure that the deliberations would not lose sight of the need for basic fairness both in judicial process and outcome. He expanded upon Professor Sander’s caution:

I hope that the fruits of [the conference’s] success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this – the weak, the poor, the powerless – those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.²⁴

Finally, one of the commentators for the conference, Judge Wade McCree of the United States Court of Appeals for the Sixth Circuit, sounded a major conference theme: “The courts must not improve efficiency in ways that endanger justice, that endanger the appearance of justice, that endanger principled decision making, or the evolution of doctrines that are responsive to the needs of society.”²⁵

At the conclusion of the conference, the Pound Conference Follow-Up Task Force chaired by the Honorable Griffin Bell provided oversight to ensure that conference proposals would be developed and implemented where appropriate. Soon after the conference, Bell became the Attorney General of the United States, and this proved to be fortuitous for the ultimate success of some

²⁰ *Id.* at 69.

²¹ *Id.*

²² *Id.* at 74.

²³ *Id.* at 85.

²⁴ *Id.* at 110.

²⁵ *Id.* at 24.

of the conference proposals.²⁶ The Task Force issued several reports and catalogued the progress being made. The importance of "justice" as critical to the reforms proposed by the Pound Conference was again emphasized:

It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all. The ultimate goal, it is worth reiterating, is the fullest measure of justice for all.²⁷

Much has happened since the Pound Conference. Federal and state courts located throughout the nation have embraced ADR, particularly mediation. Individual courts and entire state court systems have identified their own reasons for making mediation part of the civil litigation process,²⁸ as well as their expectations of court-connected mediators.²⁹ Often, the courts' goals and expectations sound quite consistent with those identified during the Pound Conference. In some instances, though, courts or individual judges have suggested additional aspirations. Magistrate Judge Wayne Brazil, for example, has emphasized the importance of providing *litigants* with the *ability to choose* the process that best meets their needs.³⁰ In addition, many courts' ethical codes for mediators highlight the importance of protecting parties' *self-determination*, including the ability to choose the outcome that best meets their needs.³¹

How, then, can this article assess whether court-connected mediation has been successful? Based on the Pound Conference and the subsequent experience with court-connected mediation, we will anchor our analysis in the achievement of three goals, with each divided into several measurable objectives. For court-connected mediation to be considered successful, it must *help courts* deliver:

(1) Substantive justice, including:

- Outcomes that are consistent with the rule of law;
- Outcomes that are responsive to litigants' needs;
- Outcomes that are consistent with parties' self-determination;

²⁶ Attorney General Bell was instrumental in ensuring funds for the implementation of three Neighborhood Justice Centers to experiment with a variety of methods of processing disputes, i.e., to provide practical models of Frank Sander's multi-door courthouse concept. JAMES ALFINI, ET AL., *MEDIATION: THEORY AND PRACTICE* 11 (2001).

²⁷ POUND PROCEEDINGS, *supra* note 7, at 300.

²⁸ See McAdoo & Welsh, *supra* note 6, at 2 (describing goals of various courts).

²⁹ *Id.* at 30-33 (describing ethical codes applying to court-connected neutrals generally and to mediators in particular).

³⁰ Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002) (urging that providing parties with the ability to choose is part of ensuring process fairness).

³¹ See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEG. L. REV. 1, 1-2 (2001) (provisions regarding self-determination in the Model Standards of Conduct for Mediators, as well as the ethical codes adopted in Minnesota, Florida, Massachusetts and Virginia for court-connected mediators).

- Outcomes that are durable;
- Outcomes that maintain or improve relationships;
- Outcomes that parties will perceive as fair;
- (2) Procedural justice, including:³²
 - A process that is perceived as fair by the parties;
 - An opportunity for parties to express their views (“voice”);
 - An opportunity for parties’ views to be heard and considered by someone involved in decision-making;
 - Treatment that will be perceived by parties as even-handed;
 - Treatment that will be perceived by parties as dignified and respectful;
 - and
- (3) Efficient justice in an appropriate forum, including:
 - Savings in time and costs for parties;
 - Savings in time and costs for courts;
 - Shorter time periods between filing and disposition;
 - A reduction in the number of court trials;
 - Matching of the forum to the needs of the case and the litigants;
 - An opportunity for parties to access the process they believe will be most appropriate for the resolution of their case.

With these goals and objectives as our benchmarks, this article will now examine empirical data revealing the perspectives of judges, attorneys and parties about ADR, particularly mediation, in order to glean what this data says about the achievement of the key goals and objectives identified above.

II. EMPIRICAL DATA REGARDING COURT-CONNECTED MEDIATION’S SUCCESS IN ACHIEVING ITS GOALS AND OBJECTIVES

A. *The Judicial Perspective*

Many judges have written thoughtfully about their own experiences as lawyers, ADR neutrals and judges, drawing conclusions about effective ADR and its use for the administration of “justice” in our court systems.³³ The Federal Judicial Center (FJC), the National Center for State Courts (NCSC) and other organizations have also published excellent books and manuals directly related to best practices for court-annexed ADR.³⁴ These resources certainly

³² Beginning in the 1970s, social psychologists conducted extensive research clarifying the process characteristics that communicate procedural justice. Those process characteristics are reflected in the objectives listed here. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It?*, 79 WASH. U. L. Q. 787, 820-26 (2001); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *EVERYDAY PRACTICES AND TROUBLE CASES 177* (Austin Sarat et al. eds., 1998).

³³ See, e.g., Brazil, *supra* note 30, at 93; William Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations From the New Mexico Experience*, 32 N.M. L. REV., 181 (2002); William W. Schwarzer, *ADR & the Federal Courts: Questions & Decisions for the Future*, FJC DIRECTIONS, No. 7, 2 (1994); D. Brock Hornby, *Federal Court-Annexed ADR: After the Hoopla*, FJC DIRECTIONS, No. 7, 26 (1994).

³⁴ See e.g., ROBERT J. NIEMIC ET AL., *GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR* (Federal Judicial Center 2001); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (Center for Dispute Settlement/The Institute for Judicial Admin.1998), www.cadrs.org/downloads/NationalStandards.pdf; MONITORING & EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND COURT MANAGERS

provide insights into judicial perspectives on ADR. They do not, however, offer an empirical basis for assessing court-connected mediation's success in achieving its goals and objectives.

Some limited empirical data regarding judicial perspectives on court-connected mediation exist. It is important to note, however, that some of this research details only judicial *expectations* about what ADR *might* contribute to a court system; other research is based on fairly limited judicial experience with new ADR programs. In Indiana, for example, a benchmark study for a new ADR rule examined the attitudes of Indiana trial-court judges regarding the *anticipated* strengths and weaknesses of mediation. The study found strong support for the perception that mediation is not redundant (i.e., does not duplicate what attorneys normally do); that mediation tends to save time and not add significantly to the costs of civil case processing; that agreements reached in mediation are more likely to be maintained; and that mediation encourages parties to take more responsibility for dealing with their conflicts.³⁵

Research in California was designed to determine how "the courts and the ADR community might be brought into a closer working relationship to reduce court filings and to promote fair and efficient settlement of filed cases."³⁶ The judges' reported expectations were encouraging for mediation advocates:

Judges familiar with ADR had high praise for such processes, especially mediation. In interviews and . . . questionnaires they described mediation as an effective way to educate parties about the relative costs and benefits of settlement compared to litigation and about the realistic possibilities of settlement; to give the parties a more accurate evaluation of their case's worth; to help the parties resolve relationship problems that might otherwise interfere with settlement; and to allow the parties to tailor settlements that best meet their individual or corporate needs. As a result, they had no doubts that ADR could significantly help to bring about more, quicker, and fairer settlements, thereby easing the burden on the courts and increasing citizen access to justice.³⁷

The Federal Judicial Center, meanwhile, studied several federal district court programs established under the Civil Justice Reform Act of 1990 and published a detailed report that included a great deal of data about judicial perceptions of the success of various ADR programs.³⁸ Key conclusions about the ADR programs in the Northern District of California and the Western District of Missouri included the following:

(National Center for State Courts 1997); MELINDA OSTERMEYER AND SUSAN KEILITZ, *Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers* (National Center for State Courts 1997); ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR & SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS* (Federal Judicial Center & CPR Institute for Dispute Resolution 1996). Other resources can be found in McAdoo & Welsh, *supra* note 6, at 1 n. 1.

³⁵ Morris Medley & James Schellenberg, *Attitudes of Indiana Judges Toward Mediation*, 12 *MEDIATION Q.*, 185, 190 (1994).

³⁶ Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 *U.S.F. L. REV.* 343, 347 (1992).

³⁷ *Id.* at 365. These were of course all judicial *expectations* for mediation.

³⁸ DONNA STIENSTRA ET AL., *REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990* (Federal Judicial Center 1997).

In California, judges felt that their Multi-Option Program succeeded in giving choices to parties for case resolution so that attorneys did get together and talk about the best way to resolve the case; the need for litigation was decreased; and the ADR program led to and encouraged early resolution.³⁹

In Missouri, the Early Assessment Program (EAP), akin to an early evaluative mediation session conducted by a staff mediator,⁴⁰ was cited for its ability to provide earlier case resolution. The judges felt that the program reduced their workloads and saved court time; that there was substantial litigant satisfaction, even though the program had initially met with strong resistance from the Bar; and that client attendance had helped achieve the settlements.⁴¹

Importantly, however, the data collected in the Federal Judicial Center's research project reflected only three to five years of operating program experience.

It is therefore important to see the effects of well-established and widely-used – i.e., *institutionalized* – court-connected mediation programs on courts' ability to achieve their missions. The Minnesota state court system's mediation program offered just such an opportunity, and in January 2003, one of the authors of this article conducted a survey of trial judges there. In order to put these judges' perceptions of ADR and court-connected mediation in context, it is useful to describe both the Minnesota state court experience with mediation and the background of the survey.

In Minnesota, a "mandatory consideration" ADR rule has been in place since 1994 and a considerable amount of ADR, especially mediation, has occurred as a result.⁴² After almost a decade of judicial experience with ADR, especially mediation, the Minnesota ADR Review Board, charged with oversight of ADR implementation, surveyed all 287 Minnesota state district court judges to determine how the rule was being implemented throughout the state and whether any changes to the rule were needed.⁴³ With ample opportunity on the survey instrument for individualized comments, an analysis of survey responses provides a unique empirical picture of current judicial thinking about the achievements and limitations of a widely-used court-connected mediation program.

The structure of the mandatory consideration rule in Minnesota is as follows: attorneys are required to consider the use of ADR in every civil case,

³⁹ *Id.* at 193.

⁴⁰ See *id.* at 228 for a description of the program.

⁴¹ *Id.* at 217.

⁴² MINN. GEN. R. PRAC. 114. Although Minnesota does not keep statistics on the use of ADR, Minnesota's experience in institutionalizing ADR is detailed in Bobbi McAdoo, *The Minnesota Experience: Exploration to Institutionalization*, 12 *HAMLIN J. PUB. L. & POL'Y* 65 (1991). In addition, an earlier evaluation of the rule from the attorney perspective is in Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 *HAMLIN L. REV.* 403 (2002) [hereinafter "McAdoo, *Lawyer Report*"].

⁴³ The survey instrument was developed by Bobbi McAdoo and included a section of questions specifically about referrals to mediation, the clear process of choice in Minnesota. The Minnesota Supreme Court Administrator's office mailed the survey and collected the responses. The response rate was 71% (203 judges). The subsequent analysis and report to the ADR Review Board was prepared by Bobbi McAdoo. See BOBBI McADOO, *THE JUDICIAL PERSPECTIVE ON RULE 114 IN MINNESOTA* (2004).

discuss ADR with their client(s) and opposing counsel and advise the court regarding their conclusions about ADR. This includes the selection of both a process and neutral, along with the timing of an ADR process. Although the parties (or more accurately, the parties' attorneys) have complete discretion in their choices to this point, if they decide not to use ADR and report this to the court, judges can nonetheless order the parties into non-binding ADR.⁴⁴ What happened in practice in Minnesota, after the new rule was in place, was that judges often ordered ADR, sometimes even when the parties and counsel had advised the court that ADR was not appropriate. In fact, within only two years of the effective date of the mandatory consideration rule, and especially in the Twin Cities urban area, judges' routine ordering of ADR was a key factor motivating attorneys to select mediation.⁴⁵ Once attorneys began to select and participate in mediation routinely, its use became "institutionalized." Thus, the Minnesota courts' ADR program is mostly lawyer-driven and virtually runs itself, theoretically needing no additional court resources to manage, monitor or evaluate its operation or results.

If "institutionalization" is defined in terms of the availability and routine use of alternatives to trial, then the structural design of Minnesota's "mandatory consideration" rule has resulted in the clear institutionalization of ADR, especially court-connected mediation.⁴⁶ But it is important to restate here that the authors of this article do not believe that institutionalization, *without more*, signals success. Institutionalization, *without more*, does not ensure that any of court-connected mediation's justice goals have been achieved.⁴⁷

We turn now to the data regarding the judicial perspective, and specifically to an analysis of the successes and limitations of court-connected mediation that are suggested by this data. It is a daunting task, but thinking in terms of court-connected mediation's goals and objectives should help to frame and improve the productivity of future dialogue regarding courts' integration of ADR and the institutionalization of alternative processes in other important contexts.

⁴⁴ MINN. GEN. R. PRAC. 114.

⁴⁵ McAdoo, *Lawyer Report*, *supra* note 42, at 472. Some attorneys noted a decision to "choose mediation voluntarily" to ensure they did not get ordered to non-binding arbitration. *Id.* at 429.

⁴⁶ In fact, almost 80% of judges perceive that when ADR is used in a case, mediation is the process used more than 75% of the time. McAdoo, *supra* note 43, at 22. Thus it is fair to assume in the analysis of the data that answers given about the use of ADR are usually answers about the use of mediation.

⁴⁷ For example, many judges perceive "local court policy to send cases to ADR/mediation" as a reason to order cases to mediation. McAdoo, *supra* note 43, at 17. A clear court policy lends needed legitimacy to court programs expanding the use of ADR, but it says nothing about whether "justice" is actually done in ADR. Mandatory programs have contributed to the institutionalization of ADR; for that reason we have supported this approach in the past. McAdoo & Welsh, *supra* note 6, at 10. We are now re-thinking our stance on this issue. See *infra* sections II.A.4 and III.A.

1. Court-Connected Mediation's Success in Achieving the Goal of Substantive Justice

In determining whether court-connected mediation has achieved its goal of substantive justice, it is essential to focus on the *quality* of dispute resolution *outcomes*. The outcome-related factors used by judges when deciding whether to order a case to mediation⁴⁸ are encouraging. Judges perceived the following substantive factors as "very important": "mediation can provide better,⁴⁹ more durable outcome for parties;"⁵⁰ and "the case needs a neutral with specific expertise."⁵¹ These responses are consistent with judicial opinions on the most important mediator qualifications: "creative problem solver;"⁵² "legal experience;" and "substantive knowledge in area of case being litigated."⁵³

In the courtroom, "just" outcomes are determined by applying the law to the specific facts of the case. Thus, it is not surprising that judges choosing mediation to settle cases prefer to have a "problem-solving" lawyer with knowledge of the relevant law presiding over the process. Indeed, these survey answers support a largely evaluative view of mediation,⁵⁴ similar to the judicial settlement conference model with which judges are familiar,⁵⁵ albeit with a

⁴⁸ The question was: "[i]f you order a case to mediation, when the attorneys or pro se parties have not made the choice themselves, how important are each of the following factors in warranting your order?" Each possible factor could be rated "not at all important," "somewhat important," or "very important." A follow-up question allowed for additional judicial input. McADOO, *supra* note 43, at app. A, 5.

⁴⁹ Although "better" was not defined explicitly, judicial responses throughout the survey suggest some expected quality beyond simple efficiency, although that is always included and critical. One judge wrote: "[w]hen parties reach their own settlement, they are more 'vested' in the outcome." (Q 19, Judge # 188). Another wrote: "[s]ettled matters, generally, provide [a] greater sense of satisfaction to litigants." (Q 16, Judge # 9).

⁵⁰ From the list of factors, the highest number of judge respondents (56%) made this choice. McADOO, *supra* note 43, at 17.

⁵¹ The third highest number of judge respondents (42%) made this choice. *Id.*

⁵² The question was: "[w]hen you choose the mediator, what qualifications are important to you?" There were 11 choices plus an "other" category, each of which the judges rated "very important," somewhat important," or "not at all important." *Id.* at app. A, 7. The highest number of judge respondents (79%) rated "creative problem solver" as "very important." *Id.* at 23.

⁵³ These choices were both selected by 70% of the judges. *Id.*

⁵⁴ Court-connected mediation is not a process with "transformation" as its goal. Judges want *settlements*, and "transformative mediation" does not have the production of settlements as one of its goals. Rather, the "value-added" of transformative mediation involves bringing party empowerment and recognition to the negotiation process, i.e., the enhancement of the quality of each party's own decision-making and the improvement of inter-party communication and understanding. Robert A. Baruch Bush, *What Do We Need a Mediator For? Mediation's "Value-Added" For Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 36 (1996).

⁵⁵ See Welsh, *supra* note 31, at 25-26. See also Jonathan Hyman & Milton Heumann, *Minitrials and Matchmakers: Styles of Conducting Settlement Conferences*, 80 JUDICATURE 123 (1996) (In observations of judicial settlement conferences, the authors observed two distinct styles, depending on whether the substantive issues of the disputes (the legally relevant facts), or the process of settlement negotiations (drawing out common settlement numbers in caucus), were stressed. These models were not found to be mutually exclusive; each requires an evaluative mindset and a push for settlement.)

neutral lawyer in charge.⁵⁶ Presumably this model, with its emphasis on neutral legal expertise, helps to ensure a measure of substantive justice for the litigants before the court.

These perceptions of the value of mediation suggest that judges perceive mediation as achieving the following substantive justice objectives identified *supra*:

- Mediated outcomes consistent with the rule of law;⁵⁷ and
- Mediated outcomes that are durable.

2. *Court-Connected Mediation's Success in Achieving the Goal of Procedural Justice*

Another "very important" factor cited by judges as a basis for ordering mediation is that "[t]he use of mediation gets the clients directly involved in discussions."⁵⁸ It is likely that the judges view clients' involvement as important simply because it makes settlement more likely.⁵⁹ In addition, however, if parties are directly involved in the discussion of their lawsuits, they will have an opportunity to express themselves and gauge the extent to which they have been heard and understood by the other side and the mediator. These process characteristics make it more likely that the parties will perceive the mediation process as procedurally just. But judges can only assume the parties' direct and active participation, and there is significant research indicating that parties' voices are heard much less frequently than those of their attorneys.⁶⁰ Nonetheless, the judges' appreciation of client involvement suggests that, at least as compared to attorneys' bilateral settlement negotiations, the following procedural justice objectives are being achieved to some extent:

- Parties have the opportunity to express their views ("voice"); and
- Parties have the opportunity to have their views heard and considered by someone involved in decision-making.

3. *Court-Connected Mediation's Success in Achieving the Goal of Efficient Justice in an Appropriate Forum*

The survey of Minnesota judges clearly illustrates that judges think the goal of efficient justice is being addressed by ADR, including mediation. Perhaps this result is not surprising in view of the settlement culture to which judges are now accustomed.⁶¹ In answer to a question about whether the ADR

⁵⁶ Although the neutral lawyer is assumed to have more license to be a "creative" problem solver, it is doubtful that this has translated into much dispute resolution outside of legal norms. Craig McEwen distinguished predictive from problem-solving mediation in, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV., 77, 78-79 (1991). See also *infra* sections II.A.4 and II.B.1.

⁵⁷ Particularly because one of the litigants has chosen to bring his/her dispute to the courts for resolution, it is possible – but not certain – that "outcomes consistent with the rule of law" will also often be "outcomes responsive to litigant needs." See *infra* notes 80 and 131.

⁵⁸ This choice was selected by 50% of the judges. McADOO, *supra* note 43, at 17.

⁵⁹ See STIENSTRA, *supra* note 38 (indicating that Missouri judges similarly valued the Early Assessment Program because client attendance helped produce settlements).

⁶⁰ Welsh, *supra* note 31, at 4-5.

⁶¹ The relationship between the settlement culture and ADR is beyond the scope of this article. Nevertheless, the settlement culture exists and presumably supports efficiency goals

rule had changed their judicial workload, two thirds of the judges answered in the affirmative. Almost all of these judges' written responses (95%) involved some version of ADR getting cases settled, reducing the number of trials, or contributing to earlier settlements or earlier trial dates for those cases that do not settle. A few examples of what the judges wrote include the following:

"[ADR] has decreased the number of civil and family cases actually going to trial."
(Judge #3)

"Some complex cases have been settled either directly or indirectly as a result of mediation." (Judge #112)

"Most cases settle prior to holding, or even scheduling, a settlement conference with the court, reducing the time needed for settlement efforts and trials." (Judge #17)

"It has produced settlements in many cases or has limited the contested issues."
(Judge # 68)

"One benefit is all cases will go to trial within 12 months of filing. Without ADR I estimate the waiting period would be at least 24 months." (Judge #97)

"My civil caseload would crash without ADR." (Judge # 150)

These responses speak to a judicial perception that the goal of efficient justice is being achieved in some measure. Specifically, these responses support the achievement of the following objectives:⁶²

A reduction in the number of court trials;

Shorter time periods between filing and disposition; and

Saving of time and costs for courts.

If we ended our analysis of the empirical data here, it would be tempting to conclude that in judges' opinions,⁶³ the integration of court-connected mediation into civil litigation has "worked." It has achieved, at least to a reasonable degree, important justice goals. This positive data by itself, however, does not address all of the specific objectives identified earlier. Moreover, further analysis of other data in the judicial survey suggests policy issues that require careful attention, and even calls into question the heralded success of court-connected mediation.⁶⁴

for the parties and the court. Without a measurable link to the goals of substantive, procedural or efficient justice, however, increases in settlement alone do not signal ADR success.

⁶² Interestingly, there were two factors related to efficiency goals that were not chosen by even 1/3 of the judges as "very important" in ordering cases to mediation: "case will take too much court time," and "mediation will cost the parties less." (both 31%). McADOO, *supra* note 43, at 17. This could be a sign of some agreement with what Chief Justice Burger said at the time of the Pound Conference: efficiency is not an end in itself. POUND PROCEEDINGS, *supra* note 7, at 32. It could also be a sign that judges do not expect most cases to go to trial or do not believe that mediation reduces parties' costs. See *infra* Section II.A.6.a. and section II.A.6.b.

⁶³ At least in Minnesota, although many of these successes seem confirmed by the research cited earlier. See *supra* notes 35-41 and accompanying text.

⁶⁴ Professor Menkel-Meadow's prolific writing elsewhere recognizes many of the problems we will address. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR*, 19 FLA. ST. U. L. REV. 1 (1991); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

4. *Limitations in Court-Connected Mediation's Achievement of the Goal of Substantive Justice*

The judges' responses to questions in the survey revealed awareness of the danger that ADR, particularly mandatory mediation, may actually threaten litigants' rights to substantive justice. Judicial responses acknowledged that some cases do, indeed, *need their day in a real court*.⁶⁵ The survey asked the following question: "When you do not order parties to ADR, please explain generally why not." In their written answers, some judges responded as follows:

"Legal issue appears dispositive." (Judge # 51)

"A stark factual dispute regarding liability which requires a jury trial (e.g., one party is adamant light was red and the other party is adamant light was green." (Judge # 108)

"I am still able to assure reasonably prompt disposition of cases in court and try to accommodate parties and attorneys regarding scheduling. If they want to stay in court, I am reluctant to order them out." (Judge # 136)

"I will consider withdrawing a case from ADR only if it is a case with no chance of settlement and they need a trial, i.e., medical and legal malpractice mostly." (Judge # 15)

"[I don't order ADR] only if case is important precedent setting and the parties need a court decision." (Judge # 97)

"Cost is too great or ADR would not be effective, e.g., parties refuse and want their day in court." (Judge # 35)

Another survey question also gave judges an opportunity to weigh in on the issue of a litigant's right to expect a judicial merits-based decision. The question was: "If the parties are using a mediation process and one of them files a motion for summary judgment, [do you rule on the motion first, or wait for the result of the mediation]?"⁶⁶ Although almost two-thirds of the judges responded that they would rule first,⁶⁷ their written comments and the comments of those who indicated that they would wait for the results of the mediation, underscore concerns about the potential negative effect of mandatory ADR upon the substantive justice that is delivered by the courts. First, here are some examples from those who answered "rule first:"

"My job is to decide these issues as soon as possible." (Judge # 103)

⁶⁵ See John Wade, *Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge*, 18 *MEDIATION Q.*, No. 3, 259, 263 (2001) (A list of twenty-two indicators for conflicts that may need a judicial decision, including: the need to shift resolution responsibility elsewhere; the need for decision when there are no objective criteria to assist negotiations ("indeterminate result, uncertain rules")); the need to control precedent; and the need for decision when there is high conflict about low resources. *Id.* at 263-64. Judge Higginbotham also cautioned at the Pound Conference that "Some rights, . . . must be asserted through traditional litigation processes." *POUND PROCEEDINGS*, *supra* note 7, at 88.

⁶⁶ This issue is particularly interesting since there is data that confirms the likelihood of settlement when the court rules on dispositive motions before a mediation process is undertaken. See McAdoo & Welsh, *supra* note 6, at 18; see also Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 *OHIO ST. J. ON DISP. RESOL.* 641 (2002).

⁶⁷ Only 17% of the judges specifically chose "wait for the result of the mediation," although 21% of the judges chose "other" as the answer to this question and wrote in such answers as "depends on the case," "ask attorneys/parties," or, put the case on a "dual track." McAdoo, *supra* note 43, at 19.

“Mediated settlement should be based on application of law to facts, not on fear of the unknown.” (Judge # 129)

“If party is entitled to dismissal then they shouldn’t be coerced to settle.” (Judge # 143)

“If there is an unanswered question of law, the parties cannot effectively mediate.”⁶⁸ (Judge # 20)

In contrast, those judges who responded “mediate first” explained:

“Uncertainty breeds resolution.” (Judge # 102)

“I tell each side to go to mediation assuming the summary judgment motion will be granted in favor of the opponent.” (Judge # 97)

“Let the parties reach their own settlement. They are more ‘vested’ in the outcome.” (Judge # 188)

“It is a needless expenditure of limited court time to rule on summary judgment when the case may settle.” (Judge #4)

“Don’t bother the court until you have exhausted efforts.” (Judge # 120)

It is difficult to avoid the worrisome conclusion that in a court-sanctioned mediation program, at least some parties may be denied merits-based adjudication when they are entitled to it, have requested it and would prefer it. This result would be inconsistent with the substantive justice objective of “outcomes that are consistent with the rule of law.”⁶⁹

Such concerns become even stronger when considering judges’ treatment of *pro se* parties. One survey question asked judges to assume that represented parties or *pro se* litigants had filed a case and did not voluntarily choose ADR. Judges were asked how often they would:

MENTION ADR to the attorneys or *pro se* parties;

REQUEST attorneys or parties to consider the use of ADR; or

ORDER ADR when attorneys or parties had not chosen to pursue it.⁷⁰

It was hoped that judges would view these choices as representing a continuum of judicial action on ADR, and it was assumed that many more judges would MENTION or REQUEST ADR than ORDER its use, especially when *pro se* parties were involved. The data largely illustrate judicial acceptance and routine use of ADR, including judicial proclivity to order *pro se* parties to use ADR.⁷¹ (See Figure 1).

⁶⁸ Judges also noted that one of the reasons attorneys give when they do not want to use mediation is a planned dispositive motion. *Id.* at 15.

⁶⁹ Along with the efficient justice/appropriate forum goal of “an opportunity for parties to choose the most appropriate process for their case.”

⁷⁰ The answer choices for each part of the question were: never, rarely, occasionally, usually or always. McADOO, *supra* note 43, at app. A, 2.

⁷¹ There are some problems with the numbers of responses to the individual parts of this question, suggesting some confusion in the instructions. The numbers of respondents are large enough, however, to allow for analysis and to draw some conclusions.

FIGURE 1:

When attorneys or pro se litigants have not chosen to use ADR, how often do judges:

Choices Statewide Data⁷²

Mention ADR

Represented parties 85%

Pro se parties 70%

Request Use of ADR

Represented Parties 82%

Pro se Parties 67%

Order ADR

Represented Parties 49%

Pro se Parties 43%

Mandatory mediation for unrepresented parties raises especially grave concerns.⁷³ Mediation is a largely informal and confidential process.⁷⁴ In court-connected mediation, mediator interventions often include evaluative techniques such as assessing the strengths and weaknesses of parties' cases, predicting court outcomes, and proposing possible settlement options.⁷⁵ The mediators, however, are largely unregulated, and few courts operate rigorous monitoring systems, or any systems at all.⁷⁶ The potential for coercion is very real, and suggests that court-connected mediation's substantive justice goal could be jeopardized by the over-enthusiastic use of mandatory mediation.

Finally, judges do not appear to consider the maintenance of party relationships or the development of remedies based on extra-legal (or simply non-legal) norms as particularly compelling substantive justice objectives. Looking again at the survey question regarding factors that judges consider when ordering parties to mediation, few selected either "continuing relationship to preserve" or "relief is outside the court's jurisdiction."⁷⁷ The potential for mediation to be helpful in cases with continuing relationships, long a favorite

⁷² When the responses to this question were separately analyzed for the Twin Cities metropolitan area, 64% of these judges said they would "order" *pro se* parties into mediation. McADOO, *supra* note 43, at 16.

⁷³ To be fair, many judges (about 20%) recognized factors such as "domestic violence," "unequal bargaining," "highly emotionally charged parties," and "parties are too hostile," as possible cases or parties "inappropriate for mediation." McADOO, *supra* note 43, at 18. This hardly covers the ground of possible issues implicated in ordering *pro se* parties to mediation.

⁷⁴ Dr. Iur. Ulrich Boettger, *Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 16 (2004).

⁷⁵ See Welsh, *supra* note 32 at 805-09, 846-51 (regarding the preference for evaluative interventions by mediators in court-connected mediation).

⁷⁶ For example, one expects that courts with mandatory court-connected mediation programs will at least take the responsibility for ensuring the availability of a sufficient number of qualified neutrals. SOC'Y FOR PROF'L IN DISP. RESOL., MANDATED PARTICIPATION & SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991). Yet in Minnesota, over 40% of the judges located outside the Twin Cities metropolitan area raised the concern that there were only an "adequate, but quite limited" or "not enough" qualified neutrals. McADOO, *supra* note 43, at 11.

⁷⁷ These factors were chosen by only 28% and 13% of the judges. McADOO, *supra* note 43 at 17.

mantra of mediation advocates,⁷⁸ rarely fares well in the empirical work on ADR.⁷⁹ And although it is true that apologies and other non-legal relief sometimes are achieved in mediation, the data suggest that these outcomes are not what judges expect, experience or value when they order parties to mediation.⁸⁰

As observed above in Section II.A.1, it appears that some substantive justice objectives are being achieved through the use of court-connected mediation.⁸¹ Some of the same substantive justice objectives, however, can be negatively affected, especially in a mandatory program. Other substantive justice objectives are simply not relevant to most trial court judges. From the foregoing, it is reasonable to conclude that:

- Outcomes might not be consistent with rule of law;
- Outcomes might not be responsive to litigant needs;
- Outcomes might not be perceived as fair; or
- Outcomes are unlikely to maintain or improve relationships.

5. *Limitations in Court-Connected Mediation's Achievement of the Goal of Procedural Justice*

The judicial survey responses suggest that procedural justice goals are discounted in court-connected mediation. For example, in answer to the question of whether it is important that clients be present at the mediation session, only 70% of responding judges answered in the affirmative for *all cases*.⁸² It could be argued that those judges (29%) who felt that clients needed only to be present in *most cases* were thinking about personal injury cases (often attended only by insurance company representatives).⁸³ It is problematic, however, to find any judges assuming that it can be appropriate to exclude the parties from a court-provided process. Procedural justice can be achieved only if parties have an opportunity to express themselves and be heard in an even-handed, respectful process. If parties do not attend their mediation session, they are extraordinarily unlikely to perceive that they were offered such an opportunity.⁸⁴

⁷⁸ See *supra* text accompanying notes 20-23 (regarding Lon Fuller's description of mediation).

⁷⁹ See McAdoo, *Lawyer Report, supra* note 42 at 429; Dwight Golann, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study and its Implications*, 7 HARV. NEGOT. L. REV. 301, 331 (2002) (“Even when able mediators work with parties whose dispute arises in the context of a significant prior connection with each other, relationship repairs in legal mediation appear to be uncommon events.”); Roselle R. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 67 (2004) (The highest percentage from various studies stated that 43% of litigants thought mediation improved relationships with other party; most studies did not support this.).

⁸⁰ Obviously the goal of an outcome that is “responsive to litigant needs” (e.g., considers relationship issues and extra-judicial remedies) may conflict with that of ensuring an outcome consistent with the rule of law; we are concerned that the “rule of law” outcome is so pervasive that it always trumps all others.

⁸¹ See *supra* text accompanying notes 48-57.

⁸² McADOO, *supra* note 43, at 23.

⁸³ There was no follow up question.

⁸⁴ They are also less likely to perceive that they exercised “self-determination” in their decision-making. See Welsh, *supra* note 31, at 18-19 & 40 (contrasting the original, par-

An analysis of the answers to this one question suggests limitations in court-connected mediation's achievement of its procedural justice objectives. The data indicate that in court-connected mediation:

- The parties might not have the opportunity to express themselves;
- The parties might not have the opportunity to be heard by someone involved in decision-making;
- The parties might not perceive that they have been treated in an even-handed and dignified manner; or
- The parties might not perceive mediation as fair.

6. *Limitations on Court-Connected Mediation's Achievement of the Goal of Efficient Justice in an Appropriate Forum*

As noted above in Section II.A.3, the pre-existing settlement culture of the courts represents fertile soil within which court-connected mediation programs have grown, and judges particularly value mediation's contribution to the settlement of cases.⁸⁵ The judges' responses to the survey raise questions, however, about whether there *really* is more efficient justice as a result of court-connected mediation. In Minnesota, and in many other parts of the country, there is no consistent data collection, monitoring, or evaluation regarding time or cost savings.⁸⁶ Unfortunately, there has been little effort to follow Chief Justice Burger's astute admonition at the Pound Conference: "When we make changes, their operation must be monitored to be sure they are working as we intended."⁸⁷

Two main points raised by the judges cast particular doubt on court-connected mediation's achievement of the goal of efficient justice:⁸⁸ (1) cases settle anyway;⁸⁹ and (2) mediation actually may increase some parties' costs.

tipatory vision of party self-determination with a vision that focuses narrowly on clients' control over the decision "to agree or not to agree").

⁸⁵ See Section II.A.3 *supra*.

⁸⁶ Professor Deborah Hensler has long questioned the claim of time and cost savings in ADR. She writes: "The discrepancy between subjective and objective data gives empiricists pause" and has been forceful in asking for more research that compares mediation to "old-fashioned negotiation" rather than trial in order to develop a more accurate picture of mediation. See Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG. 15, 16 (1999). See also McAdoo & Welsh, *supra* note 6, at 39-40 (providing ideas for collecting quantitative and qualitative data).

⁸⁷ POUND PROCEEDINGS, *supra* note 7, at 29. There was also emphasis "on the paucity of data available for an adequate understanding of the reasons for the critical problems of judicial administration and for informed consideration of the alternatives to judicial resolution of disputes." *Id.* at 329.

⁸⁸ Particularly because some objective data has been gathered regarding mediation's lack of success in achieving cost and time savings, we recognize the danger in relying on judicial perceptions to reach conclusions here. We also note, however, that much of the data regarding cost and time savings relies upon *attorneys'* perceptions which may also be suspect.

⁸⁹ Also noted was the observation that because ADR is available for so few cases overall, any effect on the court is extremely limited. "I think ADR does settle some cases that might otherwise reach trial. But to be frank, in our courts in which we handle on a regular basis all types of cases, only a small percentage of which ADR even applies to, the impact of ADR on the work load is almost imperceptible." (Judge # 198). McAdoo, *supra* note 43, at 13.

a. *Cases Settle Anyway*

Judges were clear about the perceived settlement value of ADR. A few, however, questioned whether ADR actually was the cause of settlement. In response to the question of why they do NOT order ADR, three representative answers follow:⁹⁰

“If parties or attorneys feel they can negotiate a settlement, why have ADR?” (Judge # 91)

“I do not believe ADR should be mandatory in every single case. . . . To require [attorneys who can settle their own cases] to spend additional time and money on mediation when they have already used their best efforts to settle the case is a waste of both the time and expense.” (Judge # 34)

“Experienced attorneys usually can settle cases without mediation.” (Judge # 161)

Comments from judges about changes in their judicial workload included these:⁹¹

“Given the high number of cases that settle before trial I am assuming that ADR has a significant impact. However, it is difficult to know how many of these same cases would settle even without ADR.”⁹² (Judge # 25)

“I believe cases are settled earlier, but I’m not sure the number of cases settled has changed.” (Judge # 193)

“How can we know for sure[?]” (Judge # 46)

Finally, one judge gave this “suggestion” to the Supreme Court:

“I would like to . . . study to see if ADR is effective. Many factors grant settlement of cases.” (Judge # 2)⁹³

b. *Mediation May Increase Costs*

The need for cost effective dispute resolution was often cited at the Pound Conference, and there is the potential for such savings from the use of mediation. But the judges’ responses indicate that mediation does not uniformly offer this benefit. On the issue of costs,⁹⁴ for example, one judge said s/he didn’t order ADR when the “[c]ost and time spent isn’t [sic] justified by value of case or amount in controversy.” (Judge # 57).⁹⁵ Another concurred that when it is “too expensive in relation to [the] controversy,” (Judge # 100), the case is not appropriate for mediation. Queried for reasons attorneys give when they prefer not to use ADR, the top reason was that it “would add cost to the case.”⁹⁶ Finally, in a question asking for complaints about the use of ADR, almost one-third of the judges answered that they have received complaints, and over half of these were about cost and delay issues, e.g., mediation adds “a layer of time, complexity and cost.”⁹⁷ (Judge # 169).

⁹⁰ *Id.* at 13-14.

⁹¹ *Id.*

⁹² Another key reason attorneys give judges for why they don’t want to use ADR is that settlement has already been attempted. *Id.* at 16.

⁹³ *Id.* at app. C, 15.

⁹⁴ Recall that the opportunity to “save costs” was not a key reason judges order mediation. *Id.* at 17.

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 15.

⁹⁷ *Id.* at 21.

Reducing the amount of discovery done in a case would have a particularly potent effect on the time and cost savings experienced by parties. If mediation only replaces bilateral attorney negotiations on the courthouse steps or a last-minute judicial settlement conference, the potential for significant savings is limited. Previous research has concluded that most mediation occurs after almost all discovery has been completed,⁹⁸ and we have written elsewhere that this practice limits the efficiency achieved by mediation.⁹⁹ A majority of Minnesota's judges (57%) confirmed that mediation occurs after all or almost all discovery is completed. However, 25% of this majority indicated their belief that mediation *could* and *should* take place either after limited targeted discovery has been done, or before much discovery has been done.¹⁰⁰

The data also suggest limitations upon court-connected mediation's achievement of the goal of providing alternative, potentially more appropriate forums to litigants. As noted above in Section II.A.4, in the discussion of substantive justice, courts using mandatory mediation are ordering parties into this process even when the parties or their attorneys do not perceive it as the most appropriate process. Further, even though court-connected mediation is a confidential, informal, largely-unregulated process, substantial numbers of *pro se* litigants are being ordered to participate in it. Last, even though court-connected mediation is often described as a "facilitative" process, i.e., invoking a new problem-solving, consensual paradigm that might better serve parties' needs, the process is often characterized by evaluative interventions similar to interventions used traditionally by judges in settlement conferences.

Though there is a lack of definitive data, the available evidence points toward serious limitations upon any claim that court-connected mediation helps the courts to achieve more efficient justice or the matching of cases with appropriate forums:

- The use of ADR might not save (and may even increase) time and costs for parties;
- The use of ADR might not save time and costs for the court;
- Cases in ADR might not have shorter time periods between filing and disposition;
- The number of court trials might not decrease or even be related to the amount of ADR;
- Forums might not be matched to the needs of the case and the litigants; or
- Parties might not have the opportunity to access the process they believe will be most appropriate for the resolution of their case.

7. *Conclusions from the Judicial Perspective*

Judges perceive the potential for mediation to deliver "justice:" to ensure a fair outcome consistent with what might be achieved in court; to provide a process that includes the litigants; and to promote a speedier, less costly way to get to this resolution. Their responses also point out, however, that success in achieving substantive justice is not ensured, especially when mediation is

⁹⁸ McAdoo, *Lawyer Report*, *supra* note 42, at 472-73; Wissler, *supra* note 79 (in some programs, design features promote earlier mediation; in many, most or all discovery is completed prior to mediation.).

⁹⁹ Bobbi McAdoo et al., *Institutionalization: What do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RES. MAG 8, 9 (2003).

¹⁰⁰ McAdoo, *supra* note 43, at 22.

mandatory. Sometimes, judges apparently are abrogating their responsibility to provide access to the courts or to rule on specific legal issues, when litigants are entitled to court action. One Minnesota judge wrote, "Parties are discouraged from using the court system."¹⁰¹ Another opined: "Mediated agreement doesn't provide sense of fair process or fair result – but rather, just a cheaper result they will live with."¹⁰² As the last judge's remark suggests, mediation also may not serve the goal of procedural justice. This is particularly true if the parties are not included in the process, perceive their participation as discounted, or ultimately fail to conclude that they are receiving "respectful attention and thoughtful consideration" from the court.¹⁰³ Last, there is a danger that court-connected mediation is not achieving the goal of efficient justice. Mediation actually can increase time and costs. Most cases settle without mediation, and it appears that few discovery costs are being saved in the present court-connected mediation environment.

This article focuses on the perceptions of judges, but attorneys and litigants are also important stakeholders in the civil litigation system. Therefore, the Article now briefly reviews the literature regarding these stakeholders' perceptions in order to determine whether they support or contradict those of the judges.

B. *The Attorneys' Perspectives*

Empirical work on attorney perspectives also supports the conclusion that ADR has achieved widespread institutionalization, but does not clearly signal whether the goals of substantive, procedural and efficient justice have been achieved.

1. *Court-Connected Mediation's Achievement of the Goal of Substantive Justice*

Attorneys view mediation primarily as a faster and less expensive route to settlement,¹⁰⁴ though various research studies also indicate that attorneys perceive most mediated outcomes as fair.¹⁰⁵ Attorneys view settlement as more likely if mediators engage in evaluative activities that help parties see where

¹⁰¹ *Id.* at 22 (Judge # 191).

¹⁰² *Id.* (Judge # 172).

¹⁰³ See *supra* note 13.

¹⁰⁴ See STIENSTRA, *supra* note 38, at 187 (attorneys choose mediation to resolve the case more quickly); KEITH SCHILDT ET AL., MAJOR CIVIL CASE MEDIATION PILOT PROGRAM: 17TH JUDICIAL CIRCUIT OF ILLINOIS, PRELIMINARY REPORT (N. Ill. Univ., 1994); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 Mo. L. REV. 473, 512-13 (2002) (reporting that top factors motivating lawyers to choose mediation are: saving litigation expenses (85%) and speeding settlement (76%)).

¹⁰⁵ JULIE MACFARLANE, LEARNING FROM EXPERIENCE: AN EVALUATION OF THE SASKATCHEWAN QUEEN'S BENCH MANDATORY MEDIATION PROGRAM, WINDSOR, ONTARIO: UNIV. OF WINDSOR (2003), <http://www.saskjustice.gov.sk.ca/DisputeResolution/pus/QBCivilEvaluations.pdf>; SCHILDT, *supra* note 104, at 28 (83% of attorneys thought settlement outcomes were fair); Wissler, *supra* note 66, at 667 (75% of attorneys thought settlement was fair).

their cases fit within "the shadow of the law."¹⁰⁶ Not surprisingly then, attorneys seek mediators who are litigators and have relevant substantive expertise.¹⁰⁷ Also not surprisingly, few lawyers perceive mediation as increasing their clients' control.¹⁰⁸ Ultimately, attorneys choose mediation because of its ability to provide a reality check for their own clients or opposing parties¹⁰⁹ and thus ease settlement. Together, attorneys' focus on settlement and their powerful "philosophical map" push parties towards the substantive justice objective of achieving "outcomes consistent with the rule of law."

It is highly questionable whether mediation promotes many settlements that meet litigants' needs by involving something other than monetary rewards.¹¹⁰ Certainly, the achievement of extra-legal outcomes is not why lawyers generally choose mediation; nor is there much empirical support for the proposition that attorneys choose mediation to preserve ongoing relationships.¹¹¹ Moreover, when lawyers do not want to use ADR, it is often because they believe they can settle their own cases on the same terms as those achieved in mediation, again raising the question of whether mediation is truly "value-added."¹¹²

2. *Court-Connected Mediation's Achievement of the Goal of Procedural Justice*

According to lawyers, mediators allow clients to be more involved in the resolution of their cases than they would be otherwise.¹¹³ Lawyers perceive mediators as effective in engaging parties in meaningful discussion,¹¹⁴ and they notice mediators' encouragement of client participation.¹¹⁵ Attorneys view mediators as neutral and the mediation process as fair.¹¹⁶ They also report that mediation results in a less adversarial process.¹¹⁷ All of these observations

¹⁰⁶ Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 986-87 (1979).

¹⁰⁷ McAdoo, *Lawyer Report*, *supra* note 42, at 475. In Missouri research similar to that conducted in Minnesota, 87% of the attorney respondents wanted mediators who knew "how to value a case." McAdoo & Hinshaw, *supra* note 104, at 513.

¹⁰⁸ McAdoo, *Lawyer Report*, *supra* note 42 at 473; STIENSTRA, *supra* note 38, at 217 (Attorneys did think client attendance helped with settlement).

¹⁰⁹ McAdoo, *Lawyer Report*, *supra* note 42, at 428-30, 472.

¹¹⁰ *Id.* at 471.

¹¹¹ STIENSTRA, *supra* note 38, at 187; McAdoo, *Lawyer Report*, *supra* note 42, at 472; *but see* Wissler, *supra* note 66, at 664 (32% of attorneys believed that mediation improved parties' relationship).

¹¹² Research in North Carolina found that mediated settlement outcomes were indistinguishable from conventional negotiation settlements, *see* Stevens H. Clarke & Elizabeth Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUS. SYS. J. 311, 321 (1997).

¹¹³ STIENSTRA, *supra* note 38, at 204.

¹¹⁴ Wissler, *supra* note 66, at 663.

¹¹⁵ McAdoo, *Lawyer Report*, *supra* note 42, at 474.

¹¹⁶ Wissler, *supra* note 66, at 663; SCHILDT, *supra* note 104, at 27.

¹¹⁷ McAdoo, *Lawyer Report*, *supra* note 42, at 473. An interesting look at how difficult it is for lawyers to change their philosophical map can be found in Milton Heumann & Jonathan Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 257 (1997) (Even though litigators would like the methods used in their negotiations to be more "problem-solving"

suggest that court-connected mediation is delivering procedural justice, particularly in comparison to bilateral settlement negotiations between attorneys.¹¹⁸

However, in deciding whether to use mediation, lawyers rarely focus on whether their clients like mediation, nor do most attorneys perceive mediation as increasing client satisfaction.¹¹⁹ So although the data from lawyers support progress on the achievement of some procedural justice objectives, the data also suggest that lawyers view client participation primarily as a means to reach settlement, not to ensure clients an experience of procedural justice.

3. Court-Connected Mediation's Achievement of the Goal of Efficient Justice in an Appropriate Forum

As was the case with the judicial survey data, lawyers choose ADR for the achievement of efficiency objectives directly tied to settlement. They want someone to facilitate settlement discussions, reduce litigation time and costs, and resolve their cases more quickly.¹²⁰ According to some studies, attorneys perceive that these objectives are being met.¹²¹

On the other hand, objective data raise doubts about whether settlement rates increase or trial rates decrease with the use of mediation.¹²² Further, most lawyers perceive that neither the volume nor the timing of their discovery has changed as a result of the institutionalization of mediation.¹²³ When asked why they do not go to ADR, many attorneys answer that they settle their cases without the use of ADR.¹²⁴ Thus, despite lawyers' positive assessment of mediation, it is not at all clear that court-connected mediation is helping the courts to achieve efficient justice in appropriate forums.

and less "positional," this has not happened, perhaps because of a "combination of persistent litigator habits, a limited vocabulary of negotiation, and the time and expense necessary to change established practices").

¹¹⁸ See Welsh, *supra* note 32, at 839-46, 852-55 (urging that if disputants are present in mediation sessions, their ability to observe all of the actors makes it more likely that they will perceive that they had "voice," were heard, and were treated in an even-handed and dignified manner).

¹¹⁹ McAdoo, *Lawyer Report*, *supra* note 42, at 473; STIENSTRA, *supra* note 38, at 217 (attorneys did think client attendance helped with settlement).

¹²⁰ McAdoo, *Lawyer Report*, *supra* note 42, at 472; STIENSTRA, *supra* note 38, at 21 (attorneys expect ADR to help settle cases; when it does not, their view of the process becomes less positive); Wissler, *supra* note 66, at 664.

¹²¹ McAdoo, *Lawyer Report*, *supra* note 42, at 473; STIENSTRA, *supra* note 38 at 192-93, 249; *but see* Wissler, *supra* note 66, at 664-65 (various program reports mixed results on these factors); Hensler, *supra* note 86, at 15-16. *See also* Clarke & Gordon, *supra* note 112, at 332 (settlement involved lower costs than going to trial, but mediated settlement was not cheaper than conventional unassisted settlement).

¹²² Clarke & Gordon, *supra* note 112, at 326. *See also* Wissler, *supra* note 66, at 669-71; Hensler, *supra* note 86, at 15-16.

¹²³ In both Minnesota and Missouri, about 2/3 of the lawyers responded "no change" in either the volume or timing of discovery. The predominant reason for not reducing the volume of discovery was that "case circumstances usually require full discovery before case is ready for mediation." *See* McAdoo, *Lawyer Report*, *supra* note 42, at 472-73; McAdoo & Hinshaw, *supra* note 104, at 584-85. *See also* STIENSTRA, *supra* note 38, at 192. *But see* Wissler, *supra* note 66, at 694 (cites to several studies where the design of the program ensured an early mediation, and then discovery was decreased.).

¹²⁴ McAdoo, *Lawyer Report*, *supra* note 42, at 466.

4. *Conclusions from the Attorneys' Perspectives*

The phrase “business as usual” seems to capture attorneys’ perceptions of court-connected mediation programs.¹²⁵ Attorneys using the process perceive that they still:

- Step 1: File the case;
- Step 2: Do all necessary (often extensive) discovery; and
- Step 3: Settle the case just before trial.¹²⁶

Because the mediation process is overseen by a lawyer who is probably a substantive expert in the subject matter of the litigation, settlement generally occurs within the “shadow of the law,” thus suggesting that outcomes are consistent with the rule of law. However, most of the other substantive justice objectives – responsiveness to litigant needs; consistency with party self-determination; and improvements in relationships – are not even acknowledged, much less achieved. As for the procedural justice objectives, because court-connected mediation generally includes the parties, it is more likely than traditional lawyer-only settlement negotiations (or judge-supervised settlement conferences) to leave the parties feeling that they have experienced justice. But, because lawyers dominate both negotiation and mediation, they find it difficult to appreciate the significance of procedural justice and how the experience of procedural justice could vary between the processes. Last, it is far from clear that settlement rates have actually increased or that expensive discovery is reduced as a result of using mediation, although attorneys perceive that mediation has promoted some time and cost savings.¹²⁷

C. *The Parties' Perspectives*

In this section, we finally turn to the perspectives of the stakeholders who are not dominant players in the civil litigation system, but are the people for whom the civil litigation system exists: the litigants. Unfortunately, because these are not the dominant players, there is relatively little in-depth data regarding parties’ perceptions of court-connected mediation.¹²⁸

1. *Court-Connected Mediation's Achievement of the Goal of Substantive Justice*

In general, and regardless of the interventions used by mediators, most parties participating in court-connected mediation perceive mediated settle-

¹²⁵ Bobbi McAdoo, *The Future of ADR: Have They Come for the Right Reason?*, 3 J. ALT. DISP. RESOL. IN EMP. 2 (2001).

¹²⁶ *Id.*

¹²⁷ Professor Hensler explains this phenomenon this way: “[s]ince every lawsuit has a small probability of going to trial and since the costs of trial can be enormous, it would not be surprising for those costs to loom large in individuals’ subjective calculus of savings associated with ADR.” Hensler, *supra* note 86, at 16.

¹²⁸ See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 594-600 (2004) (describing the limited qualitative data available regarding parties’ perceptions).

ments as fair or are satisfied with them.¹²⁹ Interestingly, however, parties seem to judge the process of court-connected mediation as fairer when mediators evaluate the merits of cases.¹³⁰ This reaction suggests that like judges and attorneys, parties who are involved in court-connected procedures prefer and appreciate mediators' help in achieving outcomes that are consistent with the rule of law.¹³¹

A majority of parties also perceive that they had input in determining mediated outcomes.¹³² It is not so clear, however, that parties perceive that they *control* the outcomes of mediation sessions (or, in other words, exercise self-determination).¹³³ Further, few parties perceive mediation as improving their relationships.¹³⁴ Most parties, in fact, view mediation as having no effect on relationships.¹³⁵

2. Court-Connected Mediation's Achievement of the Goal of Procedural Justice

As observed above, people turn to the civil litigation system for resolution based on "respectful attention and thoughtful consideration."¹³⁶ In other words, they seek procedural justice. Processes are more likely to be perceived as fair if they possess the following characteristics: an opportunity for parties to be heard (also called "voice"), thoughtful consideration of the parties' views

¹²⁹ SCHILDT, *supra* note 104, at 25-27; PHILIP J. HARTER & MICHAEL FIX, *HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF SUPERIOR COURT OF THE DISTRICT OF COLUMBIA* 68-69, 140-41 (The Urban Institute 1992).

¹³⁰ Wissler, *supra* note 66, at 679-80, 684-85.

¹³¹ People turn to the civil litigation system because they seek some form of resolution that also will offer accountability and either compensation or a change in the *status quo*. See Deborah Hensler, *The Real World of Tort Litigation*, in *EVERYDAY PRACTICES AND TROUBLE CASES*, 155-163 (A. Sarat et al eds., 1998) (contrasting tort plaintiffs' desire for accountability and vindication of their legal rights with lawyers' monetary focus in assessing claims); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 *JUST. SYS. J.* 151, 153 (1984) (once plaintiffs seek assistance from courts or attorneys, they want vindication); Welsh, *supra* note 128, at 663 (concluding from interviews that disputants value mediation primarily for the procedural justice and progress toward resolution that it offers). These preferences suggest that plaintiffs who have made their way through the naming-blaming-claiming cycle seek outcomes based on the application of social norms recognized as legitimate. And when plaintiffs invoke the power of the courts, it is reasonable to assume that they seek the application of legal norms. Robert Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 *OHIO ST. J. ON DISP. RESOL.* 27, 55 (2002); James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 *CLINICAL L. REV.* 457, 487 (1996).

¹³² R. J. MAIMAN, *MASSACHUSETTS SUPREME JUDICIAL COURT: AN EVALUATION OF SELECTED MEDIATION PROGRAMS IN THE MASSACHUSETTS TRIAL COURT* 14, 44 (1997); SCHILDT, *supra* note 104, at 29-30.

¹³³ See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 *J. DISP. RESOL.* 179, 182-84 (2002).

¹³⁴ MAIMAN, *supra* note 132, at 8, 9, 35, 37.

¹³⁵ See Wissler, *supra* note 79 (summarizing research regarding the perceived effect of mediation on relationships).

¹³⁶ POUND PROCEEDINGS, *supra* note 7; see also Welsh, *supra* note 128, at 663.

by the decision-maker, and even-handed and dignified treatment for the parties.¹³⁷

Most parties participating in court-connected mediation perceive that they received a sufficient opportunity to present their views¹³⁸ and that the mediator understood the issues in dispute.¹³⁹ Further, most parties perceive mediators as treating them with respect,¹⁴⁰ remaining neutral¹⁴¹ and not pressuring them into settlement.¹⁴² Ultimately, most parties judge court-connected mediation to be a fair process.¹⁴³ Their assessments are even more likely to be positive if their attorneys prepared them for mediation¹⁴⁴ and/or if opposing counsel was cooperative during the mediation session.¹⁴⁵ The simple fact of court-mandated participation in mediation does not appear to reduce parties' satisfaction with the process or their assessments of process fairness.¹⁴⁶ Overall, then, it appears that court-connected mediation has been successful in achieving the very important goal of providing procedural justice. Further, achievement of this goal makes it more likely that parties will perceive that they have received *substantive* justice.¹⁴⁷

Some mediator interventions, however, cause parties' perceptions of procedural justice to suffer. When mediators recommend a particular settlement, parties are more likely to feel pressured to settle and less likely to perceive the process as fair.¹⁴⁸ Parties also are bringing a small but growing number of complaints about mediators to courts and disciplinary bodies.¹⁴⁹ Many of these complaints involve allegations that mediators behaved in a coercive manner and/or permitted one of the parties to behave in a coercive manner, thus undermining the neutrality, dignity and mutual respect that parties expected to find in the mediation process. In addition, research suggests that parties' perceptions of mediation's process fairness are likely to suffer if court-connected mediation programs do not permit or require parties to attend mediation sessions.¹⁵⁰ Though aggressive mediator behaviors and the occasional exclusion of parties

¹³⁷ See Welsh, *supra* note 32, at 817.

¹³⁸ See HARTER & FIX, *supra* note 129, at 77-78, 151-152.

¹³⁹ See R.G. HANN & C. BAAR, EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): FINAL REPORT - THE FIRST 23 MONTHS 16 (2001), <http://www.attorneygeneral.jus.gov.on.ca/html/MANMED; MAIMAN, supra note 132, at 44>.

¹⁴⁰ See UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, REPORT ON MEDIATION 17-18 (2002), <http://www.ned.uscourts.gov/mediation/medweb/report-02.pdf> [hereinafter "NEBRASKA REPORT"].

¹⁴¹ See SCHILDT, *supra* note 104, at 29.

¹⁴² See *id.* at 30.

¹⁴³ *Id.* at 23-24, 27; see MAIMAN, *supra* note 132, at 11-12, 14-15, 40, 43-44; Clark & Gordon, *supra* note 112, at 323.

¹⁴⁴ See Wissler, *supra* note 66, at 698.

¹⁴⁵ See *id.* at 686.

¹⁴⁶ See *id.* at 697.

¹⁴⁷ See Welsh, *supra* note 32, at 818.

¹⁴⁸ See Wissler, *supra* note 79.

¹⁴⁹ See Welsh, *supra* note 31, at 9; but see James Coben, *Mediation Case Law: 2003 in Review*, 15 WORLD ARB. MEDIATION REP. 163 (2004) (listing no litigated cases in 2003 involving allegations of mediator misbehavior).

¹⁵⁰ See Welsh, *supra* note 32, at 838-39; E. Allan Lind, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 963 (1990).

from mediation sessions may be viewed as producing more efficient settlements, these process characteristics also do not serve the procedural justice goal.

3. *Court-Connected Mediation's Achievement of the Goal of Efficient Justice in an Appropriate Forum*

Though few parties have any real basis for judging the relative efficiency of court-connected mediation, parties have evaluated mediation quite favorably. They perceive mediation as more efficient than litigation¹⁵¹ and as reducing costs.¹⁵² In the only study that assessed parties' perceptions of *early* court-mandated mediation – held before all discovery was completed – the parties were quite positive about the benefits of beginning negotiations earlier.¹⁵³ For the parties, then, it appears that court-connected mediation does deliver efficient justice.

4. *Conclusions from the Parties' Perspectives*

Overall, the parties participating in court-connected mediation perceive the process as achieving two of the objectives that evidence substantive justice. Court-connected mediation produces fair outcomes and, especially when mediators evaluate parties' cases, provides some reassurance that outcomes are consistent with the rule of law. The goal of procedural justice also seems to be achieved by court-connected mediation – except when mediators engage in aggressively evaluative behaviors, permit one of the parties to behave in a coercive manner, or exclude the parties from mediation sessions. Last, limited data indicates that parties perceive that the goal of efficient justice is being achieved.

III. PROPOSALS FOR COURT PROCESSES

What does this data suggest regarding reforms to court-connected mediation programs that would help courts to achieve the goals of substantive justice, procedural justice, and efficient justice in an appropriate forum?

A. *Achieving the Goal of Substantive Justice*

1. Courts should permit parties seeking a merits-based decision to opt out easily from a mandatory mediation program.
2. Courts should require that parties receive timely rulings on merits-dispositive motions, regardless of whether they are in mediation.
3. Courts should clarify that their primary objectives are to provide outcomes that are: perceived as fair; consistent with the rule of law; and likely to be durable. Much less significant are the objectives of providing outcomes that respond to

¹⁵¹ See WAYNE KOBBERVIG, *MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION* 24 (1991).

¹⁵² See HANN & BAAR, *supra* note 139, at 9; NEBRASKA REPORT, *supra* note 140, at 19.

¹⁵³ See HANN & BAAR, *supra* note 139, at 7.

litigants' needs, represent the exercise of parties' self-determination or maintain or enhance relationships.¹⁵⁴

In many ways, court-connected mediation is structured to achieve the goal of substantive justice, if that goal is reduced to include only two objectives – producing outcomes that are consistent with the rule of law and that are perceived as fair. The parties' attorneys can select mediators who have relevant substantive expertise, and many court-connected mediators educate parties and attorneys regarding the application of the law to their cases. However, a significant percentage of judges seem to be using court-connected mediation in a manner that could be inconsistent with producing outcomes consistent with the rule of law. Rather, these judges are using court-connected mediation as a mechanism to ration parties' access to pure merits-based adjudication. *Pro se* litigants are forced to participate in mediation, and judges may decline to rule on summary judgment motions until mediation has been attempted. Mandatory mediation makes these judicial choices possible. At the very least, mandatory mediation programs should be changed to permit parties to opt out easily and to receive timely rulings on merits-based dispositive motions. This arrangement would allow mediation to remain the new “default” process – thus increasing the likelihood that parties will use it¹⁵⁵ – but would also provide parties with the power to place meaningful limits upon some judges' tendency to order parties into ADR inappropriately.

Meanwhile, the perspectives of judges, attorneys and parties suggest that most of the other objectives raised by participants at the Pound Conference and in subsequent years are relatively unimportant in the civil non-family court-connected context. Few stakeholders in the civil non-family context seem to worry about producing outcomes that respond to litigants' unique extra-legal needs or represent parties' self-determination or maintain or enhance relationships. If they are honest, courts will clarify that though these objectives are laudable, they must yield to the objectives that are more salient to the mission of a public civil litigation system.

B. Achieving the Goal of Procedural Justice

1. Courts should prohibit mediator recommendations regarding appropriate settlements.
2. Courts should prohibit the use of over-aggressive evaluative interventions by mediators that diminish the opportunities for parties to be heard and understood and/or to be treated in an even-handed, dignified manner.
3. Courts should always encourage the parties to attend mediation sessions.
4. Courts should establish monitoring and evaluation mechanisms to ensure the quality of mediator performance, with emphasis upon procedural justice factors.

¹⁵⁴ We believe these represent important objectives and, theoretically, the courts could commit to the institutionalization of a different, “alternative” paradigm that aims at their achievement. The data described in this article, however, lead us to be skeptical about the likelihood that the courts will embrace such a paradigm, at least for civil non-family cases. As a result, we recommend that the courts be realistic and clear about the objectives that they will seek to achieve.

¹⁵⁵ See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 80-81 (2002) (describing the status quo bias and the power of a “law-supplied default”).

5. Courts should establish ethical requirements for mediators, as well as easily-accessible grievance procedures.

Though judges and attorneys seem to have little understanding of the independent importance of procedural justice, it appears that parties generally perceive mediation as a procedurally just process. There are exceptions, however, when mediators propose particular settlements or behave too aggressively, or permit one of the parties to behave too aggressively, or exclude the parties from all or part of mediation sessions. Court rules should make it clear that the parties are always invited and even expected to attend mediation sessions. They should also make it clear that mediation is expected to be a dignified process. Further, based on the data described *supra*, even if courts allow or encourage mediators to provide their assessments of parties' cases, courts should prohibit mediator recommendations regarding appropriate settlements and over-aggressive evaluation. In some sense at least, courts are delegating one of their judicial functions to court-connected mediators. The courts ultimately should remain accountable for their delegates' performance. Therefore, effective monitoring and evaluation, including ethical requirements and grievance procedures, should always accompany court-connected mediation programs.

C. Achieving the Goal of Efficient Justice and Appropriate Forums

1. Again, courts should permit parties seeking a merits-based decision to opt out easily from a mandatory mediation program.
2. Courts should require the use of court-connected mediation earlier in the discovery stage.
3. Courts should establish monitoring and evaluation mechanisms that measure whether or not programs are providing cost and time savings.

Often, mediation advocates have used efficiency arguments to persuade courts to adopt mediation programs. It is striking that even though objective measures often do not prove that mediation is saving courts and/or parties' time and money, judges and attorneys perceive that it is doing so. Courts should require earlier use of court-connected mediation, perhaps after essential discovery has been completed, but certainly well before trial. Then this change should be evaluated to determine whether the phantom savings perceived by judges and lawyers are actually realized. In addition, the earlier use of mediation should be evaluated for its effect on perceptions of substantive and procedural justice.

D. Overall Proposal

1. Courts should seek, and legislatures should provide, funding to ensure a sufficient number of judges, support staff, courtrooms, etc., as well as high-quality adjunct processes such as court-connected mediation.

To this point, we have made concrete proposals focused on using court-connected mediation programs to achieve the goals of substantive, procedural and efficient justice. This last proposal does not focus particularly on mediation, but we believe that it is essential to providing an experience of justice to all seeking access to our court system.

Mediation, and court-connected ADR more generally, were introduced as coping mechanisms, to help overwhelmed courts make better use of their existing resources in light of dramatically-expanded demands. A number of speakers at the Pound Conference, however, also spoke of the need for legislators to appropriate more funds to permit the courts to expand, particularly the number of judges and courtrooms available to citizens.¹⁵⁶ Too many mediation advocates have relied on “court bashing” to argue for the superiority of mediation. Mediation and other ADR processes, however, should not be imagined as replacements for our courts or used as justifications for continued under-funding. A democratic nation’s citizens should not be discouraged from accessing their public courts or find that their access is rationed depending upon their ability to withstand the financial and emotional costs of litigation (which now includes ADR). Mediation and other ADR processes, rather than being viewed as replacements, should complement a healthy judicial system.¹⁵⁷

Moreover, if court-connected mediation is to help the courts provide substantive and procedural justice, courts require sufficient resources to ensure high-quality adjunct programs. People believe in the substantive and procedural justice that can be found in the courts, including the adjunct processes offered pursuant to court rules and statutes. This faith is important and something to be nurtured. The stakes are high: the very legitimacy of the nation’s courts.

A speaker at the Pound Conference eloquently foreshadowed many of the proposals we have made here. Professor Earl Johnson suggested that the investment being made in the nation’s judiciary was too low. He was particularly concerned that poor people or modest disputes might be shuffled to cut-rate justice and observed that the benchmark for change should *not* be:

our system as presently structured and financed, but rather what it would cost to provide a fully subsidized judicial system [Also,] we have to bear in mind that we don’t want to be ‘supposedly’ saving money, but merely casting things into even more expensive forums that happen to be outside the judiciary, unless for some reason these forums are doing a measurably better job than the courts for the cases assigned to them [W]e have to pay a great deal of attention to the quality of justice that’s dispensed in the alternative institutions as well as the cost. I think we may very well find that in some instances the price of low cost justice is simply too high.¹⁵⁸

IV. BROADER IMPLICATIONS FOR DELIBERATIVE DEMOCRACY

The courts’ experience in institutionalizing mediation should prove instructive for policymakers considering the adoption of alternative processes like those proposed by Professor Menkel-Meadow. Many lawyers served as “process architects” for the development of a new paradigm of dispute resolu-

¹⁵⁶ POUND PROCEEDINGS, *supra* note 7, at 112, 118.

¹⁵⁷ See Nancy Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 1 CARDOZO ONLINE J. OF CONF. RESOL. 117, 141 (2004); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 194-97 (2003).

¹⁵⁸ POUND PROCEEDINGS, *supra* note 7, at 123-24. Other speakers also spoke to the dire funding needs of the court system as a whole. *Id.* at 16, 112, 118.

tion practice in the courts. The results? Significant success, but with serious and sometimes worrisome limitations. Before leaping into the implementation of new, alternative processes for “deliberative democracy,” therefore, we urge policy makers and process architects to answer the following questions.

A. What Are the Core Missions of the Institutions That Will Use These Processes?

At times, the focus on institutions’ shortcomings can blind us to what they do well and the important societal roles they play. Participants in the Pound Conference were attuned to the courts’ mission of delivering substantive, procedural and efficient justice in an appropriate forum. The jurists, legal academics and bar leaders responsible for the subsequent implementation of court-connected ADR programs, however, may not have taken seriously enough the complexity of protecting that mission and ensuring that “justice” is always done or at least sought.

It is true that today’s legislatures are afflicted by bi-polar thinking and limited input. But these legislatures also represent important, democratically-elected forums for decision-making regarding difficult social issues. The goal of any alternative, deliberative processes should be only and always to better enable legislatures and agencies to achieve their unique missions within the context of a democratic nation.

It is also true that the concept of thinking or acting like a lawyer can be expanded to allow lawyers to serve as the architects of innovative processes. The experience with court-connected mediation, however, demonstrates the incredible difficulty of placing procedural justice, relationships and extra-legal remedies on many lawyers’ “philosophical map.” Policy makers must plan for these obstacles, not just wish them away.

B. What Specific Improvements Are to Be Achieved Through the Institutionalization of New, Alternative Processes and Which of These Are Most Important?

This article has argued that courts have had three goals in implementing court-connected mediation: (1) substantive justice; (2) procedural justice; and (3) efficient justice in appropriate forums. This article also identified several objectives for each of these goals. Every goal is appealing; every objective is worthwhile. But policy makers must be more selective, clarifying which goals and objectives are most important and what they mean. Close analysis of the Pound Conference proceedings, for example, strongly suggests that efficiency was always meant as a secondary goal, serving the primary goals of substantive and procedural justice. But many courts have established their court-connected mediation programs based primarily on the goal of achieving greater efficiencies for the judicial system, apparently assuming that the goals of substantive and procedural justice do not require attention.

Court-connected ADR has also been charged with meeting many objectives, some of which conflict. For example, how can the courts ensure that all mediated outcomes are consistent with the rule of law *and* represent the exercise of parties’ self-determination? What if these objectives clash? Which

takes priority? Further, not all of the objectives for court-connected mediation have been clearly defined. What does it mean, for example, that mediated outcomes should respond to parties' *needs*? Which needs?

For policy makers considering the adoption of the deliberative processes proposed by Professor Menkel-Meadow, the lessons are clear. Define your goals and objectives clearly. Prioritize them. And to return to the point made above in Section IV.A; do not forget the missions of the institutions that will use these processes.

C. At What Points Could the Institutionalization of New, Alternative Processes Actually Threaten an Institution's Ability to Fulfill its Core Missions?

The experience of the courts, particularly the experiment with mandatory mediation, suggests that if new processes *supplant* the old, they may indeed threaten the ability of an institution to fulfill its core mission. The system of checks and balances that characterizes our system of government¹⁵⁹ provides a useful, pragmatic model to address this danger. For example, we have seen that mandatory mediation can be used to ration people's access to merits-based adjudication. If parties are able to opt out easily from mandatory mediation, however, this level of individual discretion places an important check upon some judges' tendency to order all parties into mediation regardless of its appropriateness, as well as some mediators' tendency to behave in an overaggressive manner. In fact, the provision of this check upon judges' and mediators' power almost necessarily means that court-connected mediation will serve as a supplement or complement to the traditional operation of the courts.

Similarly, though new processes may nurture productive deliberation and democracy, they also may be abused and used to limit citizens' access to public decision-making. Citizens should therefore continue to be able to access and use referenda and other traditional forms of political action.

D. How Can the Potential Improvements and Threats Be Measured, and What Monitoring and Evaluation Mechanisms Will Be Put in Place to Take These Measurements?

Besides clarifying and prioritizing objectives, it is essential to determine how to measure their achievement. The entrepreneurs promoting innovations – often true believers – sometimes find the need to transform their vision into concrete, measurable results to be dull at best, and threatening at worst. Yet early work to develop measurable outcomes will provide valuable information regarding the successful implementation (or not) of a new paradigm for deliberation and decision-making. In addition, putting together monitoring and evaluation mechanisms early is much easier than developing such mechanisms after a new program has developed its own vested constituencies (e.g., in the case of court-connected mediation, paid mediators and judges relying on mediation to clear dockets).

¹⁵⁹ See generally THE FEDERALIST No. 51 (James Madison).

E. Who Will Be Responsible for Taking Responsive Action and How Can Such Action Be Ensured?

In a way, this question brings us back to the first one. If an institution has an important core mission, its ability to fulfill that mission must be protected. If the institutionalization of new processes ever threatens the legitimacy of an institution, accountable public actors must be ready to take responsive action.

CONCLUSION

We agree, as Professor Menkel-Meadow urges, that we may need “new social, political and legal forms to deal with our modern problems of social complexity.”¹⁶⁰ We suggest, however, that policy makers who consider Professor Menkel-Meadow’s innovative proposal proceed very deliberately, “in the fashion of an artist creating a great mosaic.”¹⁶¹ Though one complicated section of the mosaic may require close attention, the artist also must step back and judge whether the section fits with what has come before and what will be added in the future. In other words, there must be faithfulness to an overarching vision.

At the Pound Conference, many participants cautioned that the implementation of alternatives to the judicial system could erode both important rights guaranteed to all citizens and the processes that had evolved over centuries to secure those rights. Thus, these participants worried that the alternatives might provide neither appropriate and effective dispute resolution, nor “justice.” There are signs of danger in our analysis of the justice goals and objectives that have and have not been achieved in court-connected mediation.

Professor Menkel-Meadow also writes that “[i]f process is to be the foundational justification of democratic institutions, then lawyers have a great role to play in the practice of democracy as both ‘process architects’ and as process managers.”¹⁶² Yet the story of court-connected mediation reveals that judges and lawyers find it very difficult to embrace “different orienting frameworks”¹⁶³ and rarely recognize the importance of facilitating “true participation” by parties. Overall, and probably for a variety of unsurprising reasons,¹⁶⁴ lawyers have failed to make significant shifts in their roles despite the

¹⁶⁰ Menkel-Meadow, *supra* note 1, at 352.

¹⁶¹ POUND PROCEEDINGS, *supra* note 7, at 278.

¹⁶² Menkel-Meadow, *supra* note 1, at 352.

¹⁶³ *Id.* at 351.

¹⁶⁴ It is beyond the scope of this Article to explore the reasons why attorneys may be resistant to changes in their roles. But certainly, it is worth noting that any profession is likely to cling to the unique abstract knowledge that serves as the basis for that profession’s claim of autonomy. The legal profession’s unique abstract knowledge is contained in “the law” so it should not be surprising that lawyers will favor a focus on legal norms or analysis over non-legal alternatives. See Nancy Welsh, *Institutionalization & Professionalization*, in *HANDBOOK OF DISPUTE RESOLUTION* (Bob Bordone & Michael Moffitt, eds.) (forthcoming 2005) (describing elements that characterize professions). Further, lawyers tend to rely on rational analysis in making decisions and have a need for control, dominance and leadership. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1352, 1420 (1997). Lawyers also do not tend to listen to their clients or strategize with them (particularly individual, one-time players), but instead cast the clients in the role of helpless individuals who require rescue

nearly thirty years of experience with court-connected ADR that began with the Pound Conference.

We end with these words from A. Leon Higginbotham at the Pound Conference to remind us – and policy makers – of the “frame” for any proposed changes to traditional democratic processes:

our goal cannot be merely a “reform” that seeks to ease the courts’ caseloads. For what does it profit us if, in making things easier for ourselves, we make things more difficult for others? What does it profit us if, in shifting our burdens to other agencies and institutions, we make impossible the burdens on those who must deal with those agencies and institutions? What does it profit us if, in putting our own judicial houses in order, we have no room in them for those who have relied and must continue to rely on the hospitality of the courts for the vindication of their rights? What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice?¹⁶⁵

Court-connected ADR and the alternative deliberative processes recommended by Professor Menkel-Meadow have the potential to enhance the engagement of citizens in the life of a democratic nation. They also have the potential to get in the way and, indeed, subvert the implementation of democracy. These alternative processes are simply new and fascinating tools. Their ultimate value will depend upon our care in choosing how and when to use them.

through benign intervention. See Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 456 (2004). Once again, it should not be surprising that in most court-connected non-family civil mediation, lawyers have come to dominate the process and prefer evaluative interventions by mediators. Last, lawyers do not tend to be creative, and neither legal education nor the importance of rules, precedent and adversarial posturing in legal practice are likely to encourage breakthrough thinking. See Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 845 (2003); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 788 (1999). Given the psychological profile and professional role of lawyers, why should it be surprising that mediation sessions involving lawyers generally produce the same monetary settlements generated by traditional negotiation sessions and trial?

¹⁶⁵ POUND PROCEEDINGS, *supra* note 7, at 91.