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DOES ADR REALLY HAVE A PLACE ON THE LAWYER'S PHILOSOPHICAL MAP?¹

Barbara McAdoo and Nancy Welsh²

I. INTRODUCTION

For nearly two decades, proponents of alternative dispute resolution (ADR) have touted the advantages of institutionalizing ADR within the courts.³ The anticipated benefits have included: quicker settlements, better settlements, resolution which is less expensive for the courts and litigants, and greater litigant satisfaction with both the procedure and the outcome.⁴ Many state and federal courts have listened. Indeed, in nearly every state, at least one local state and/or federal court has incorporated ADR in some manner.⁵ In Minnesota, with the

1. Professor Leonard Riskin first articulated this concept:
The lawyer's standard philosophical map is useful primarily where the assumptions upon which it is based, adversariness and amenability to solution by a general rule imposed by a third party, are valid . . . . The problem is that many lawyers, because of their philosophical maps, tend to suppose that these assumptions are germane in nearly any situation that they confront as lawyers. The map, and the litigation paradigm on which it is based, has a power all out of proportion to its utility. Many lawyers, therefore, . . . see the kinds of unique solutions that mediation can produce as threatening to the best interests of their clients.


2. Copyright 1997 Barbara McAdoo and Nancy Welsh. Barbara McAdoo is a professor at Hamline University School of Law and director of Hamline’s Dispute Resolution Institute. She serves on the Minnesota ADR Review Board and earned her J.D. from George Washington University. Nancy Welsh is executive director of the Mediation Center in Minneapolis and serves on the Minnesota ADR Review Board. She earned her J.D. from Harvard Law School. The authors note that this article expands on one previously published. Barbara McAdoo & Nancy Welsh, The Times They Are a Changin’ - Or Are They? An Update on Rule 114, 65 HENNEPIN LAW. 8 (July-Aug. 1996). The authors would like to thank Kristin Watnemo for her assistance in the preparation of this article.

3. In 1906, Roscoe Pound, later Dean of Harvard Law School, addressed a very cool audience at the ABA Conference in St. Paul, Minnesota on the topic of “Popular Dissatisfaction with the Administration of Justice.” Seventy years later a conference to focus on the “unfinished business” of Pound’s talk was planned and implemented under the direction of Chief Justice Warren Burger. See Addresses Delivered at the Pound Conference, 70 F.R.D. 79 (1976). Professor Frank Sander spoke at that conference about his vision of a courthouse with different “doors” (litigation, mediation, arbitration, etc.) and an intake process that would guide individuals with disputes to the right “door” for the most appropriate dispute resolution process. See Frank E. Sander, Varieties of Dispute Processing, 70 F.R.D. 79, 111 (1976); see also Larry Ray & Anne L. Clare, The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today, 1 OHIO ST. J. ON DISP. RESOL. 7 (1985); Barbara McAdoo, The Minnesota ADR Experience: Exploration to Institutionalization, 12 HAMLIN J. PUB. L. & POL’Y, 65, 68-72 (1991).
promulgation of Rule 114 of the Minnesota General Rules of Practice, the Minnesota Supreme Court has chosen to institutionalize ADR in district courts throughout the state.6

Is ADR delivering all of its intended benefits in these court-annexed programs? It appears that ADR processes, especially mediation, do consistently result in increased litigant satisfaction.7 Recent studies, however, do not always appear to support the claims that ADR produces substantially quicker settlements or reduced expenses for litigants or the courts.8

What is happening? One commentator focused upon the perceptions and behavior of attorneys and their clients, noting: "If the parties


6. MINN. GEN. R. PRAC. 114; see infra, pp. 379-82.

7. See e.g., MICHAEL FIX & PHILLIP HARTER, HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (1992) (in cases that did not settle, parties rated mediation more highly than parties who were involved in non-mediated negotiations); SUSAN KEILITZ, ET AL., MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING (1988-1990), NAT’L CENTER FOR STATE COURTS (1992) (in study of divorcing litigants who participated in mediation or conventional court program, those involved in mediation related the process more favorable on most measures of quality and fairness of process); Wayne Kobbervig, Mediation of Civil Cases in Hennepin County: An Evaluation, Office of the Minnesota State Court Administrator (1991) (litigants in mediation rated it more favorably than did litigants in the judicial process; attorneys rated the judicial process more highly); Kenneth Kressel, et al., Final Report of the Essex County Custody Mediation Project: Obstacles to Intervention, Effective Mediator Strategies and Recommendations, Rutgers Univ. (1991) (90% of those who reached agreement in family mediation were very satisfied with the process; 33% of those who failed to reach agreement were very satisfied); Jessica Pearson & Nancy Thoennes, Denver Custody Mediation Project: 1979-1991, Center for Policy Research/Piton Foundation (1991) (in three-year study of divorcing couples with child custody and visitation disputes, 77% of mediation users who were interviewed expressed extreme satisfaction with mediation). See generally Susan Keilitz, et al., National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings, Implications for Courts and Future Research Needs, Nat’l Center for State Courts and State Justice Inst. (1994).

8. See e.g., An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act, RAND INSTITUTE FOR CIVIL JUSTICE (1996) (finding that federal courts’ use of mediation and early neutral evaluation, as mandated by the Civil Justice Reform Act of 1990, has not resulted in quicker settlements or reduced expenses for litigants); Kobbervig, supra note 7 (median disposition times in cases referred to mediation and cases disposed of in the judicial process were identical). But see STEVENS H. CLARKE, ET. AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS 55-56 (1996) (program of court-ordered mediated settlement conferences reduced the median filing-to-disposition time in contested cases by about seven weeks and, although data was not conclusive, it suggested that the program produced savings for litigants).
want to reduce litigation expenses, they will have to shoulder the main burden themselves. They can’t look to judges to do it for them [because] judicial case management procedures explain only about five percent of the variation in litigation costs.” The Administrative Office of the United States Courts also has observed, “[A]ttorney perceptions, rather than case management procedures, drive most litigation costs....” Because the effectiveness of ADR is so dependent upon attorneys' perceptions and use of ADR, it should be useful to examine the current status of those perceptions in a state district court which has substantial experience with ADR in non-family civil cases. Hennepin County District Court, which primarily serves Minneapolis, Minnesota and its suburbs, is such a court. Hennepin County District Court has had a non-binding arbitration program since 1984, as well as a mediation program since 1988. In 1993, the Minnesota Supreme Court promulgated Rule 114 of the General Rules of Civil Practice. This rule requires attorneys throughout Minnesota to become more familiar with ADR and more proactive in considering and using ADR. This rule also further expanded the use of ADR in Hennepin County.

II. A BRIEF HISTORY OF RULE 114

How did Minnesota get Rule 114 in the first place? In 1984, the Minnesota Legislature authorized a majority of judges in a district to establish a mandatory, non-binding arbitration program to dispose of civil cases. Hennepin County District Court established a program to provide non-binding arbitration for civil cases involving claims of less than $50,000. Then, in 1987, legislators raised concerns about the
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amount of judicial time and energy consumed by larger, civil matters. They feared that “regular citizens” were losing meaningful and timely access to the courts. To deal with these concerns, the Legislature passed legislation enabling Hennepin County District Court to order parties into non-binding ADR for cases involving claims of more than $50,000.13

Hennepin County District Court decided to focus on mediation of these claims. Why mediation? Most importantly, Hennepin County District Court was impressed with Florida courts’ successful use of mediation in civil cases. Simply put, mediation disposed of many cases. In addition, mediation proponents quickly and repeatedly argued that mediation held special promise as a process that directly involved the disputing parties in resolving cases. Mediation had the potential to increase parties’ satisfaction with both the dispute resolution process itself and with the resulting settlement. Mediation even could “transform” the parties’ perceptions of each other—from despised opponents to people with legitimate interests and a shared problem.14 Finally, mediation allowed and even encouraged solutions which were tailored to the needs of the parties and more creative than what courts could order.

Additionally, in 1987, the Minnesota Supreme Court and the Minnesota State Bar Association jointly established an ADR Task Force to “explore alternative methods by which the burden of the caseload upon the courts might be eased and the resolution of the legal problems of the citizens facilitated.”15 After two years of deliberations, the ADR

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While empowerment and recognition have been given only partial attention in the mediation movement thus far, a consistent and wider emphasis on these dimensions would contribute powerfully, incrementally and over time to the transformation of individuals from fearful, defensive, and self-centered beings into confident, empathetic, and considerate beings, and to the transformation of society from a shaky truce between enemies into a strong network of allies.

15. MINNESOTA SUPREME COURT MINNESOTA STATE BAR ASSOCIATION TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION, FINAL REPORT (1990) [hereinafter ADR TASK FORCE REPORT].
Task Force issued its final report finding that ADR held "substantial promise" for earlier, less costly, and more satisfactory disposition of many civil cases. As a result, the Task Force recommended enactment of statewide legislation to authorize and encourage early use of ADR in civil cases filed with the trial courts.

Legislators took the recommendations of the Task Force seriously. In 1991, the Legislature required the Minnesota Supreme Court to establish a statewide ADR program for the resolution of most civil cases filed with the courts and required the Minnesota Supreme Court to adopt rules governing practice, procedures, and jurisdiction for ADR programs adopted under the statute. In response, the supreme court established the ADR Implementation Committee to advise the court regarding rules to implement the recommendations of the ADR Task Force.

In 1993, the ADR Implementation Committee submitted its recommendations to the Minnesota Supreme Court, and, late in the year, the Minnesota Supreme Court promulgated Rule 114.

III. MANDATORY CONSIDERATION OF ADR

One particularly striking feature of Rule 114 is its approach to encouraging the use of ADR. During its deliberations from 1987 to 1989, the ADR Task Force struggled mightily with the question of whether or not to make ADR mandatory in all civil cases. The experience of other jurisdictions was instructive. In those jurisdictions where ADR was totally voluntary, parties used ADR rarely or not at all. In jurisdictions that made ADR mandatory for certain classes of cases, there was not always a good "match" between a case and the ADR process used to attempt resolution of the case. Therefore, the ADR Task Force recommended a rule which would require attorneys to consider ADR in every civil case, discuss ADR with their client(s) and opposing counsel, and advise the court regarding their conclusions about ADR, including the selection of a process, a neutral and the timing of an ADR process.

16. Id. at 7.
17. Id.
18. MINN. STAT. § 484.76(1) (1996).
The ADR Task Force recommended that attorneys and clients have great discretion and creative freedom in selecting an ADR process. Also, in order to ensure that attorneys and clients considered ADR seriously, the ADR Task Force also recommended that judges be given the ultimate discretion to order parties into non-binding ADR against their will. These recommendations of the ADR Task Force ultimately became part of the enabling legislation and Rule 114.

The ADR Task Force (and the subsequent ADR Implementation Committee) also recognized that Minnesota required an infrastructure to support the creative and appropriate application of Rule 114: a statewide pool of qualified ADR neutrals who understood and could provide the ADR processes listed in the rule; an informed bar which had access to the pool of ADR neutrals; and an informed and pro-active judiciary.

Thus, Rule 114 ultimately established specific training and continuing education requirements for ADR neutrals providing services under Rule 114; a written “Roster of Qualified Neutrals,” to be distributed to all courts and available to all attorneys; and a “grandparenting” provision for ADR neutrals who already had substantial experience.


Similarly, when we compare the number of mediations in the various mandatory court-annexed mediation programs with those in which participation is voluntary, we find that only a small percentage of disputants voluntarily enter the mediation process after the dispute arises. Although mediation works best when both parties choose the process voluntarily, the 80% or higher success rate being achieved in our various court mandated mediation programs suggests that the process fosters early settlements even where it is mandatory.

20. Much has been written about ways to “match” a given case with the “right” ADR process. See e.g., Frank E. A. Sander & Stephen B. Goldberg, Fitting the Form to the Fuss: A User Friendly Guide to Selecting an ADR Procedure, 10 NEGOTIATION J., Jan. 1994, at 49.


22. Id. at 8, 14.

23. MINN. GEN. R. PRAC. 114.03-.04.


26. Id. at 114.12.
with ADR. The rule also established a seven-person ADR Review Board, which was given the responsibility to develop the exact format of the written roster and determine the criteria to be used in deciding whether an individual could be "grandparented" onto the roster, without meeting the training requirements specified in the rule.

In December of 1994, the Minnesota Supreme Court expanded the authority of the ADR Review Board, in part to address evaluation issues (i.e., Is ADR being used? Is it saving costs and/or time? Are parties satisfied?). In turn, the ADR Review Board engaged a consultant to help develop a work plan and identify a number of possible evaluation projects. This article reports on the data gathered from Hennepin County lawyers in one of these evaluative research projects. The research involved in-depth interviews with twenty-three civil litigators throughout Minnesota to collect data about how lawyers use ADR in relation to discovery, negotiation and trial; how lawyers decide which ADR process to use for a given case; and what kinds and numbers of settlements are occurring in ADR processes. This data was used to develop a questionnaire ("the Rule 114 questionnaire") to gather quantitative data specifically about whether the practice of law in Minnesota has changed under Rule 114 and to give the Minnesota Supreme Court basic information regarding the effect of Rule 114. To date, the questionnaire responses have been tabulated by region, but only preliminarily analyzed. At this early stage of the analysis, Hennepin County attor-

27. Id. at 114.14.
28. Id.
29. The Minnesota Supreme Court also expanded the ADR Review Board's authority to address: ethical issues (i.e., What ethical considerations regarding neutrals should be addressed? What standards will ensure high quality?); whether the program should be expanded to the family law area; and whether education efforts were needed for judges, lawyers and court administrators.
30. The interviews were conducted by Professor McAdoo, Project Director of the study and Karen Cody-Hopkins, Research Associate. Seventeen of the interviews involved lawyers from the greater metropolitan area; six involved lawyers from other parts of Minnesota. The lawyers were asked to serve as "informants" about the use of ADR by lawyers in general. See Craig McEwen et al., Lawyers, Mediation and the Management of Divorce Practice, 28 Law & Soc'y Rev. 194 (1994) (for a fuller description of a research project using the "informants" format). Professor McAdoo is indebted to Craig McEwen, Professor at Bowdoin College, for advice and direction about this evaluation work.
31. RULE 114 QUESTIONNAIRE (on file with author). The questionnaire was developed by Professor McAdoo, Ms. Cody-Hopkins and Heidi Green from the Supreme Court Office of Research and Evaluation, with generous help from ADR Review Board Members Lynae Olson, Dan Gislason and Nancy Welsh, and Staff to the ADR Review Board, Alanna Moravetz.
neys have been aggregated separately from responses of attorneys from the rest of the state for the purpose of regional comparison. Although the responses will be analyzed in more depth, this preliminary review of the attorney questionnaire responses provides useful insight into Hennepin County lawyers’ general perceptions of ADR.

IV. **INFLUENCE OF RULE 114 ON THE WAY LAW IS PRACTICED IN HENNEPIN COUNTY**

The Rule 114 questionnaire was sent to 1000 lawyers in Minnesota and the response rate was 74.8%. Hennepin County accounted for 446 responses or 59.6% of those responding. The vast majority of the Hennepin County respondents reported their “type of practice” in the past two years to be private practice with almost equal representation of plaintiffs, defendants, or both. Law firms with 2-15 attorneys

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32. The questionnaire tabulations show how many respondents answered a particular question, given the choices in the question. Responses to open-ended questions have not yet been analyzed, other than to note that a write-in response was given. An in-depth report on the Rule 114 questionnaire is forthcoming and will include a comprehensive analysis of the attorney responses.

33. Although the focus of this article is Hennepin County, the questionnaire tabulations for Hennepin County are generally (but not always) similar to statewide. Although we assume that differences may be attributed to the more extensive ADR experience which Hennepin County attorneys have had, more in depth analysis of the data may point to other reasons for differences. For example, differences may actually reflect a difference in opinions of ADR between attorneys from large firms and small firms, or personal injury attorneys versus employment attorneys. Further analysis of the data will provide greater understanding as to what factors influenced attorney opinions of ADR. "RULE 114 QUESTIONNAIRE," supra note 31.

34. *Id.* A pseudo-random sample was drawn, stratified by judicial district, of attorneys named on 1996 court cases. An equal number of plaintiff and defense attorneys were chosen. Names of 280 attorneys were pulled from court case filings in Judicial District 4, the district court in Hennepin County. The number of cases pulled was proportionate to the total civil caseload of Judicial District 4 in the state.

35. *Id.* By most social science research standards, a 75% response rate may be considered to be a high response rate, sufficient to generalize results to the population of attorneys without undue bias from response selection. This high response rate was probably due in part to a cover letter from Chief Justice Sandy Keith asking for “help in the effort of the Supreme Court to gather data about the effect of Alternative Dispute Resolution (ADR) on your practice of law.” (Sept. 6, 1996) (on file with author).

36. *Id.* Although names of attorneys were drawn from 280 case files in Judicial District 4 or approximately 28 percent of the case files sampled, 446 attorneys with business addresses in Hennepin County, responded to the questionnaire. This apparent “over-sampling” of Hennepin County attorneys occurred because Hennepin County attorneys were named on cases that were sampled from judicial districts outside Judicial District 4. In this manner, the proportion of Hennepin County attorneys in the study reflects the prevalence of Hennepin County attorneys in civil litigation throughout the state.

37. *Id.* 88.9% of those responding.
predominated, although 22.7% of respondents reported working in firms with 16-75 attorneys. Responding attorneys reported the types of civil cases handled in their practice as primarily personal injury/wrongful death, contracts, commercial/business/securities, and employment. One third of the respondents reported having served as an ADR neutral in the past two years.

The overwhelming majority of Hennepin County attorneys—87.8%—indicated they had used an ADR process for their civil cases in Minnesota State Court in the past two years. When asked to compare the use of ADR in the past two years to the time period before Rule 114 became effective, “more” use of ADR was reported by 76.9% of respondents and “no change” was reported by 19.4%. The responses to a more specific set of questions about the use of different ADR processes before and after the effective date of Rule 114 reported a striking increase in the use of mediation, but this was not true for other ADR processes. A specific question, “If Rule 114 were repealed, would YOU choose to use an ADR process as a part of your litigation strategy” yielded very interesting responses. Only 5.7% of Hennepin County lawyers answered “never” or “rarely,” “sometimes” was the response of 51.7% of respondents; 34.5% answered “usually;” and 7.6% answered “always.”

In a court system in which ADR was introduced a little over a decade ago, over 90% of its lawyers now would, at a minimum, “sometimes” use ADR! This can not all be attributed directly to Rule 114, but it does suggest that the forced introduction to ADR in Hennepin County—culminating in the Rule 114 requirements—has led to a change in the way law is practiced.

What follows are some preliminary conclusions, drawn from attorney perceptions of ADR, based on the lawyer interviews and the Rule 114 questionnaire, with editorial comments from the authors.

38. Id. 43.4% of those responding.
39. Id. Respondents could check all that applied.
40. Id. 53.8% of those responding.
41. Id. 38.8% of those responding.
42. Id. 31.4% of those responding.
43. Id. 28.3% of those responding.
44. Id. Serving as an arbitrator was noted by 115 respondents; serving as a mediator was noted by 74 respondents. Id.
1. Although Hennepin County attorneys have indicated increased willingness to use ADR, a significant number still use ADR because they feel coerced into it. In the lawyer interviews, many opined that if the process and/or neutral is not picked by the parties, it will be ordered by the court, sometimes without any case review or discussions with the attorneys. In the Rule 114 questionnaire, in a question that asks about factors motivating lawyers to voluntarily choose mediation,

45. Id. The frequency of Mediation use:

Before Rule 114 / After Rule 114
- 15.6% never 3.4%
- 31.2% rarely 10.5%
- 37.3% sometimes 34.6%
- 13.2% often 51.0%
- 2.6% unknown .5%

46. Id. For the rest of the state, 10.6% answered "never" or "rarely;" 59.8% answered "sometimes;" 26.3% answered "usually;" and 2.8% answered "always."

47. Id. Hennepin County lawyers find ADR generally to be a helpful tool for civil cases: "sometimes" (43.4%), "usually" (42.1%) and "always" (6.2%).
42.2% of respondents answered "anticipate court will order ADR."\textsuperscript{49} For non-binding arbitration, 47.6% of Hennepin County respondents answered in the same way.\textsuperscript{50} How do judges respond when the lawyers agree that ADR is not appropriate in a case and communicate this to the court? Some Hennepin County lawyers indicated that the judges nonetheless "selected an ADR process" themselves or "ordered [the] parties to find an ADR process."\textsuperscript{51}

**Comment:** Rule 114 is a mandatory consideration rule, not a mandatory ADR rule. Many judges defer to attorney choice regarding the use of ADR. Although the questionnaire data is not conclusive, it appears that at least some judges do not. There are legitimate and important reasons why some cases should not be ordered to ADR. With individual case review and discussion with attorneys, judges can make informed determinations on whether mediation, or any other ADR process, is truly appropriate. If some judges are ordering ADR without this discussion, or with little regard for reasoned attorney input, there is a danger that Rule 114 will become a *de facto* mandatory ADR rule.\textsuperscript{52}

2. Discovery on cases sent to mediation is generally conducted about the same way as before Rule 114 was enacted. In the Rule 114 questionnaire, 63.8% of Hennepin County respondents stated that there was no change in the *timing* of discovery, and 67.2% stated that there was no change in the *volume* of discovery and pre-trial preparation done on a case. When asked why mediation is not reducing the vol-

\textsuperscript{48} Id. Because of the court-annexed non-binding arbitration program in Hennepin County, the lawyers interviewed expressed the need to "choose" mediation because they did not want to be "sent" to non-binding arbitration. Id.

\textsuperscript{49} Id. 49.4% of the rest of the state chose this answer.

\textsuperscript{50} Id. Only 29.6% of the rest of the state chose this answer.

\textsuperscript{51} Id. Hennepin County attorneys were responding to a question that asked about action taken by the court when both parties agree that no ADR process is appropriate. The respondents could choose all answers that applied. The specific answers, together with the percentages of Hennepin County respondents, included: "court does not get involved" (56.3%), "court scheduled in phone conference" (15.4%), "court scheduled in court conference" (12.5%), "court selected an ADR process" (13.6%), "court ordered parties to find an ADR process" (8.8%). Id. The questionnaire data does not provide an answer to the question of what happened when the court did intervene in some way, i.e., did the court ultimately defer to attorney choice regarding ADR? Or, were parties ordered to attend an ADR process when they did not want to do this?

\textsuperscript{52} Id. Since almost half of the 12.2% of the Hennepin lawyers who have not used ADR in the last two years gave as their reason, "I haven't had a case that I thought was appropriate for ADR," directing cases to ADR by a judge when/if it can be helpful is undoubtedly sometimes necessary. Id.
ume of discovery, 67.2% of those responding answered, "case circumstances usually require full discovery before the case is ready for mediation."

Comment: If discovery practices are barely changing, it is hard to claim that Rule 114 really has changed the way lawyers practice law. It was assumed that costs for litigation could be substantially lowered through the use of ADR, and sometimes, this occurs. Indeed, 70.0% of Hennepin County lawyers indicated that "save litigation expenses" motivates them to choose mediation. It seems, however, that many lawyers are missing the potential to think strategically about the interplay between the mediation and crucial discovery. To paraphrase one lawyer's opinion from the interviews: "Eighty percent of the information needed for trial comes from twenty percent of the discovery. If mediation can settle the case after this twenty percent is completed, there is tremendous savings for the client."

3. Attorneys' primary motivation for the use of ADR is to "save litigation expenses." As was noted, 70.0% of the Hennepin County lawyers responded that they choose mediation to "save litigation expenses" and 54.0% choose binding arbitration for the same reason. Moreover, almost half of respondents reported that mediation and binding arbitration decrease client expenses and that lawyer and client "time" also is saved. Just over 60.0% of the Hennepin County sample also noted that they obtained "earlier settlements" in mediation. Significantly, lawyers largely overlooked some of the most salient, non monetary benefits of mediation. Only 33.6% of the Hennepin County

53. ADR TASK FORCE REPORT, supra note 15, at 7. Lower costs was a motivating factor leading to Rule 114. RULE 114 QUESTIONNAIRE, supra note 31.

54. The lawyer interviews strongly suggest that settlements in mediation happen well before the proverbial courthouse steps and result in client savings because intensive trial preparation is not needed. See also, CLARKE, supra note 8; DELoitTE & Touche TohNAtSO InTerNAItIONAL, DELoITte & TouChe LITIgAtION SErvICes 1993 SuRVEY OF gEnERAL AND OuTSIDE CoUNSELs: ALTERNATIVE DISPUTE RESOLUTION (ADR) (1993) (Corporate users of ADR have estimated savings of 11 to 50 percent of anticipated litigation costs).

55. RULE 114 QUESTIONNAIRE, supra note 31. Only 29.3% choose non-binding arbitration to save litigation expenses; there was no question on the motivating factors for the other processes.

56. Id. 46.4% for mediation and 44.5% for arbitration.

57. Id. Mediation: "saves my time" (47.5%) and "saves client time" (45.6%); binding arbitration: "saves my time" (43.9%) and "saves client time" (43.9%).
lawyers reported that they choose mediation because of the "increased potential for creative solutions." An even smaller percentage—26.7%—choose it because "clients like mediation." Finally, a dismal 13.3% of attorneys recognized "preserves parties' relationships" as a reason to choose mediation.58

Comment: Hennepin County attorneys value ADR, and mediation in particular, because they perceive that it fosters earlier settlements which, in turn, reduce litigation expenses. However, as was noted in the discussion of discovery, it appears that lawyers' perceptions and behavior may keep ADR from having as positive an effect in this area as it could. As a result, lawyers themselves may keep ADR from delivering on the benefit—reduced expenses—that they value the most. Their focus on the bottom line misses some of the potential qualitative benefits of ADR, particularly mediation, such as increased client satisfaction, increased creativity, and preserved relationships. In a sense, attorneys may be missing ADR's potential to help them provide more responsive "customer service" to their clients which should result in "better" results as well as increased client loyalty and referrals.

4. One-third of Hennepin County attorneys reported that civil settlement rates increased during the past two years; almost two-thirds of those attributed this to "clients more interested in settling and staying out of court" or "increased use of ADR." Terms of settlement (i.e., money), however, were relatively unchanged.59

Comment: Early settlement is one of the important anticipated benefits of ADR, and we recognize that many case settlements really are only about money. Sometimes, however, lawyers and ADR neutrals need to get off the "lawyer's philosophical map"60 to recognize that clients value other things in settlement as well.61 As noted earlier, it is striking that lawyers seem to have overlooked non-monetary reasons

58. Id. The question format allowed attorneys to choose "all that apply."
59. Id. To a question about whether non-monetary elements were included in settlements reached in ADR, only 7.6% total answered "frequently" or "always" and 33.9% answered "never." The balance answered "occasionally" (35.8%) or "no opinion" (22.6). It will be particularly interesting to analyze these answers by case type and type of practice. See supra note 33.
60. See Riskin, supra note 1.
61. RULE 114 QUESTIONNAIRE, supra note 31. The Rule 114 questionnaire itself suggested alternatives such as apologies, change in practices, and new job assignments.
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V. INFLUENCE OF RULE 114 ON THE WAY ADR/MEDIATION IS PRACTICED

Arguments about the "right" way to practice ADR usually focus on mediation. Those discussions are generally a topic reserved for academics and mediators who espouse the philosophy of "empowerment." Professors Robert Baruch Bush and Joseph Folger write about "transformative mediation," a process in which the primary concern in mediation is not whether the dispute is resolved, but how the parties act and interact in handling the conflict. In their view, mediation supports party self-determination and the capacity to consider the concerns and perspectives of others in the conflict.

Professor Leonard Riskin writes about a continuum of mediation practices. First, he writes about the very "facilitative" process which incorporates elements of the Bush/Folger model and focuses on a broad definition of the dispute, with the mediator facilitating communication between the parties. At the other end of the continuum is the very "evaluative" mediation process in which a mediator focuses almost exclusively on the legal claims, assesses the strengths and weaknesses of those claims, predicts the impact of not settling and pushes the parties toward his/her evaluation of the appropriate settlement. Professors Kimberlee Kovach and Lela Love argue that "evaluative"

62. Id. As contrasted with the 60.8% who noted "causes earlier settlement." See also Rueben, supra note 5, at 54-62 (attorneys underestimate the satisfaction clients feel towards mediation); Kobbervig, supra note 7, at 2 (attorneys' perceptions of traditional adjudication and mediation differed dramatically from the perceptions expressed by their clients; for example, clients gave mediation higher ratings than traditional adjudication for fairness, efficiency and level of satisfaction; attorneys presented an opposite point of view, rating adjudication as fairer than mediation, just as efficient as mediation and more satisfactory than mediation).


65. Id. at 23-24.

66. Id.
mediation is an "oxymoron" which jeopardizes the mediator's neutrality in the whole process.\textsuperscript{67}

Most practicing lawyers in Hennepin County find this debate irrelevant to their deliberations under Rule 114. The preliminary data from the lawyer interviews as well as data from the Rule 114 questionnaire supports the view that lawyers choose mediators who fit the more "evaluative" profile. In particular:

1. Lawyers want lawyers as mediators.\textsuperscript{68}
2. Lawyers want litigators as mediators.\textsuperscript{69}
3. Most importantly, lawyers want mediators to have substantive experience in the field of law related to the case.\textsuperscript{70}

Most of the lawyers interviewed want mediators to give their view of settlement ranges at some point, although usually not unless or until impasse has occurred. Mediators who do this too early are often seen as ineffective. But to refuse to use a tool that could settle the case at impasse is viewed as ridiculous—"That is why we hired a mediator—to get the case settled."\textsuperscript{71}

\textbf{Comment:} The preliminary data from the lawyer interviews and the Rule 114 questionnaire suggest that the values and preferences of attorneys have influenced the mediation process model. Some process elements correspond to the mediation model which promotes client empowerment and direct client involvement in the resolution of disputes. For example, Hennepin County attorneys reported that mediators in


\textsuperscript{68} RULE 114 QUESTIONNAIRE, \textit{supra} note 31. 63.3\% of those responding.

\textsuperscript{69} \textit{Id.} 66.7\% of those responding.

\textsuperscript{70} \textit{Id.} 83.1\% of those responding.

\textsuperscript{71} The Rule 114 questionnaire indicates that lawyers perceive mediators to frequently or always "predict court outcomes" about one-third of the time and "propose realistic settlement ranges" about two-thirds of the time. After a great deal of internal debate about the ethical propriety of mediators being too directive, the ADR Review Board adopted the following language in a proposed Ethics Code sent to the Minnesota Supreme Court: "It is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option." \textit{Orders in the Court}, BENCH & BAR OF MINN. 38 (Mar. 1997).
Rule 114 cases encourage clients to participate and help parties to communicate effectively. However, other process elements reflect the traditional settlement conference model. For example, Hennepin County attorneys reported that mediators use caucuses effectively and do not always commence a mediation with opening statements. In the lawyer interviews, several lawyers observed that opening statements could promote unproductive adversarial posturing and thus should not be part of the typical mediation. This mediation model—with little direct communication between the clients and the dominance of the mediator as interpreter, intermediary and deal-maker—values the accomplishment of a settlement above all else.

VI. CONCLUSION

For most people, attorneys are the gatekeepers to the litigation process. In Hennepin County District Court and most court-annexed ADR programs around the country, attorneys increasingly are the gatekeepers to ADR processes. Based on the data described here, attorneys’ perceptions and values influence the ability of ADR to deliver on its potential benefits.

Does ADR result in earlier, less costly and more satisfactory disposition of civil cases? Possibly yes, especially when the ADR process is mediation. Attorneys perceive that settlements can occur earlier as a result of mediation, that attorney and client time can be saved, and that client expenses can be decreased. But how much earlier do settlements occur? How much time is saved? And to what extent are litigation expenses reduced?

The availability of ADR does not seem to have influenced attorneys’ discovery practices. As the ADR Review Board’s evaluation pro-

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72. RULE 114 QUESTIONNAIRE, supra note 31. 79.5% “frequently” or “always.”
73. Id. 69.7% “frequently” or “always.”
74. Id. 74.7% “frequently” or “always.”
75. Id. 5.1% “never,” 41.5% “occasionally.”
76. In this model, the transformational potential is not acknowledged as being on the lawyer’s philosophical map. But see Baruch Bush & Folger, supra note 67. See also John Lande, How Will Lawyering and Mediation Practices Transform Each Other?, 24 FLA. ST. U. L. REV. (forthcoming 1997).
ceeds, we expect to confirm that settlements occur before attorneys and their clients reach the courthouse steps. Certainly, this is an improvement over prior practice, but ADR could be so much more helpful. Discovery practices could be curtailed; attorneys could negotiate to conduct only crucial discovery before the ADR event. Attorneys could plan more carefully with their clients in order to discern viable settlement options, including non-monetary elements. In short, attorneys could enlarge their "philosophical map."

Will ADR continue to result in greater litigant satisfaction with both the process and the outcome? As noted earlier, research consistently shows such increased satisfaction, particularly when litigants use the mediation process. It is worrisome, however, that so few attorneys seem to value increased client satisfaction, increased client control of the outcome, and improved party relationships. If these potential benefits do not find their places on the lawyers' philosophical map, it is likely that the mediation model will continue to adapt to fit within the traditional legal culture and will look more and more like the traditional settlement conference mode. This presents challenges for ADR proponents as well as law schools.\textsuperscript{77} Attorneys need to understand that providing responsive, quality service to their clients can mean more than applying the law to the facts and getting a settlement. Clients also have underlying interests that need to be acknowledged, as well as a need for involvement and control within the dispute resolution process. If lawyers permit it, ADR can help with this.

For now, lawyers are predominantly invested in legal outcomes. The lawyer interviews and the Rule 114 Questionnaire are consistent with a view of the self-confident lawyer who has taken a "new" settlement tool and adapted it to a legal outcome-based philosophy. In Minnesota, Rule 114 has slightly changed the road to settlement, and this, we submit, is good. However, if the lawyer's philosophical map fails to

\textsuperscript{77} In December of 1996, Hamline Law School participated in a meeting at the University of Missouri-Columbia with six other law schools working on ways to incorporate more ADR into the first year curriculum. The consensus of the group was that a new paradigm for law school teaching was needed. The traditional IRAC case analysis method needed another "I" added to it. The new "IRACI" method would insure that client "interests" always be considered and discussed to enable law students to more carefully analyze appropriate dispute resolution processes (including litigation).
embrace a *client-centered* dispute resolution process, neither lawyers nor their clients will ever benefit fully from ADR.