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The ABCs of ADR: Making ADR Work in Your Court System

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The ABCs of ADR: Making ADR Work in Your Court System

By Nancy Welsh and Barbara McAdoo

So you are thinking about making Alternative Dispute Resolution (ADR) a part of your existing statewide judicial process—but you don’t know how. You want to provide litigants with alternative ways to resolve their disputes, through processes such as mediation, arbitration, and summary jury trials. In fact, you have been experimenting with these processes on an ad hoc basis and have had quite a few successes. You think you could accomplish even more if you made ADR a routine part of the judicial process. But you are cautious about the role that your state court system should take in promoting and providing ADR.

The decision to incorporate ADR into the judicial process can be an exciting, yet daunting task. In many years of working with Minnesota’s state court system,1 we have struggled with these very issues. We hope with this article (1) to share information with you about what has worked and not worked in our experience, and (2) to give you the benefit of insights we have gained in our efforts to broaden the legal and judicial landscape. We will try to provide you with very practical advice and, where possible, reference other resources you can consult for more in-depth information.2 Sometimes, it may seem that there are more questions than answers. This simply is because we know that each state court system is unique—the specific culture of each court system determines the most appropriate answers.

The ultimate goal of this article is to provide you with enough information to lead you to the ADR program that will be appropriate to the needs of your court system.

A STATEWIDE PROGRAM

There are several basic elements that must be in place before a statewide program will succeed. These elements are: (1) identification of the real reasons pushing attorneys and judges to use ADR; (2) adequate authorization for ADR; (3) informed attorneys; (4) informed judges and court administrators with a supportive state court infrastructure; and (5) an adequate number of well-trained ADR neutrals. We will discuss each of these in turn.

1. Reasons to Use ADR. Politicians and judges have decided to incorporate ADR into courts for many reasons, sometimes with empirical support and sometimes without. As you think through the reasons your state should develop a statewide ADR program, you may want to consider the primary justifications used in other states.

(a) To reduce backlogs and/or free up judicial resources. In court systems increasingly burdened by criminal and juvenile caseloads, ADR can enable judges to be more efficient in the use of their time and provides an alternative means for diverting and resolving civil cases.

(b) To speed up case resolutions. When parties and counsel, often with some judicial nudging, use ADR processes wisely and strategically, cases can be settled earlier than in the traditional litigation process.

(c) To reduce costs. Although there is little empirical support for cost savings in the aggregate, it is clear that in a given case, when the parties and counsel clearly desire to achieve cost savings, they can.

(d) To promote litigant satisfaction. Research has shown consistently that litigants are more satisfied with ADR processes, particularly mediation, than with traditional litigation. As you work to implement quality management, you may decide that litigant satisfaction is the only reason you need to set up an ADR program for the citizens of your state.

Your assessment of the reasons for ADR and their applicability to your state should be used to help identify and shape the type of program that is best for your state.3

2. Authorization for ADR. You will need to decide whether you wish to establish a purely voluntary ADR program or one in which the parties’ participation is mandatory. In general, ADR is used very little in purely voluntary programs. On the other hand, purely mandatory programs, if they are not structured carefully, can result in inappropriate use of ADR. Minnesota, like most other states that have established statewide ADR programs, elected an ADR program with key mandatory elements.4 Once this mandatory element is introduced, it is essential to consider the courts’ authority to order parties into ADR.

For several years, trial courts have looked to Rule 16 of the Federal Rules of Civil Procedure for the discretion to order parties, against their will, into
nonbinding ADR to encourage or facilitate settlement (e.g., mediation, early neutral evaluation, summary jury trial, nonbinding arbitration; for greater detail, see the sidebar on p. 14). Courts have upheld such discretion in many cases. However, there are some cases in which the courts have ruled that Rule 16 does not provide the authority to require the use of ADR. Recent revisions to the Advisory Committee Notes for Rule 16 make it fairly clear that judges possess the authority to order parties into nonbinding ADR but, importantly, the notes reference “the presence of statutes and local rules or plans” that specifically authorize use of ADR. Due to the somewhat qualified language contained in the notes to Rule 16 and the split in opinions discussed above, we believe that you will be

inviting challenges from unhappy attorneys if you rely solely on Rule 16 for a statewide ADR program. We recommend that you seek statutory authorization for your ADR program. Such authorization should specifically provide that trial court judges have the discretion to order parties into nonbinding ADR. The authorization may take several forms:

- Authorization for pilot projects in the judicial districts which are experiencing the greatest backlogs and/or are most interested in the use of ADR. (If the pilot projects are successful, they can serve as the first step in the establishment of a statewide program);
- Broad enabling legislation that establishes a statewide program and specifically provides that judges have the authority to order parties into nonbinding ADR; or
- Detailed enabling legislation establishing a statewide program. Such legislation will include definitions of the ADR processes that are incorporated within the ADR program, requirements for persons serving as neutrals, and types (or values) of the cases which are subject to the ADR program.

Any of these forms of statutory authority will ensure that your judges clearly have the discretion to order the use of ADR.

Once statutory authority is in place, you will need court rules to enforce responsible implementation. To the extent that you wish to ensure some uniformity in a statewide program, it is useful to develop rules that apply to all district/trial courts, rather than relying on local rules for individual judicial districts. Unless detail is provided in the statute, the rules need to answer at least the following questions:

- Which cases will be eligible for ADR?
- What ADR processes will be part of the program?
- At what stage(s), if any, will a judge be able to order the parties into ADR?
- Will the parties be involved in the selection of an ADR process and/or the ADR neutral? In what way?
- Who will be required to attend ADR processes?
- What requirements will ADR neutrals have to meet in order to be authorized to provide services in the program?
- Will the neutrals be paid? If so, how will they be paid?
- Will the parties be assured of confidentiality in any of the processes? How?
- What will be the relationship between the judges and ADR neutrals?
- How will you ensure that ADR neutrals provide quality services and behave ethically?

3. Informed Attorneys. Since lawyers are essentially gatekeepers to the legal system, their early involvement can be critical to the development of the ADR program.

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attorneys and their clients to enter into ADR voluntarily. They are required to consider whether ADR is appropriate and, to advise the court of their conclusions. If they believe ADR is appropriate, they also have the discretion to select the ADR process and ADR neutral. Deference to attorneys’ knowledge of their cases is built into Minnesota’s ADR program.

In areas of the state where there is no serious backlog of cases, we have found that judges rarely order the use of ADR in opposition to the wishes of attorneys. These judges likely have more time to spend on settlement and do not feel the pressure to order parties into ADR. In addition, many judges express a reluctance to order parties to use an ADR process against their will.

Since lawyers play such a pivotal role in the use of ADR, the growth and use of the program necessitates their widespread education. This education needs to include, at a minimum:

(a) The basic elements of the major ADR processes. We believe that the initial focus should be on mediation, arbitration (binding and nonbinding), early neutral evaluation, and summary jury trial. These four processes currently receive the most use. Specifically, lawyers need to understand how each process works; the result(s) that are possible with each; the specific role of the neutral and his/her power or lack thereof to make decisions for the parties; and when the process is most likely to be useful and when it is not (see sidebar on p.14).

Training of this sort should fit the CLE requirements for the state, and at a minimum, will require 1/2 day. Ideally, the training should be accomplished in 1-2 days. The longer time is useful for incorporating more experiential examples of the processes through simulations (in which the lawyers participate), role plays (which the lawyers watch live), or videos.

(b) Screening tools for selecting an ADR process. Lawyers need to understand that all ADR processes are either adjudicative (e.g., arbitration), evaluative (e.g., early neutral evaluation and summary jury trial), or facilitative (e.g., mediation) (see sidebar on p.14). A threshold question for selecting any ADR process is then, “Which of these three is needed for the specific case?” Factors that suggest the need for a more facilitative process include the possibility and desirability of a future relationship; the parties’ need to participate in and control the outcome; the opportunity for emotional venting; and the value of a creative (not just monetary) result. Factors that suggest the need for a more adjudicative process include the need for a final decision; the need for precedent to guide the disposition of future disputes; and the desire for some objective standard of fairness. Beyond these basic principles, several ADR programs have developed various screening devices to help parties and counsel select the “right” ADR process for the particular case. For example, Professors Frank Sander and Stephen Goldberg assess two groups of information for a specific case—client objectives and impediments to settlement—to devise a “score” for each ADR process for that case. Although not objectively proven, the tool provides an analytical framework to help lawyers and judges realize the type of information that can help them make strategic ADR decisions. Training in this area should be participatory, with adequate time for discussion about the appropriate ADR processes for specific case hypotheticals.

(c) How to select the “right” neutral. It is critical that lawyers understand that different neutrals may conduct the same ADR process in very different ways, with very different results. Lawyers should help design the ADR process to fit their case, and they should definitely communicate with neutrals about their expectations for the process. For example, in the mediation area, neutrals generally operate on a continuum of practice, from mediators who evaluate in mediation sessions to mediators who facilitate. If a lawyer wants to be sure that the mediator will or will not give an opinion about the value of the case being mediated, he or she should discuss this with opposing counsel and the mediator ahead of time. It may be, for example, that the lawyer who wants a very evaluative mediator actually should use the early neutral evaluation process for his or her case.

4. Informed Judges and Court Administrators with a Supportive State Court Infrastructure. As we discovered in Minnesota, developing the overall design of a statewide ADR program is very difficult and time-consuming work. Moreover, once the overall design is in place, you cannot assume that all of the implementation details will fall into place. Attention to implementation is essential if ADR is to be institutionalized successfully within the existing judicial system. It is often difficult to address these details, due to the competing demands on time and resources, as well as the complexities in the state court infrastructure.

Based on our experience in Minnesota, we have concluded that the following need to be in place in order to ensure a state court infrastructure that will support the institutionalization of ADR:

(a) Informed judges. Unless judges (along with attorneys) understand and support changes in the judicial system, the changes will not succeed. Unpopular reforms may be repealed outright or undermined into irrelevance. In Minnesota, the Chief Justice of the Supreme Court and the State Court Administrator recognized that it was essential for judges to be directly involved in the development of the ADR program and to understand the various ADR processes, the roles of the various ADR neutrals, and how to select appropriate ADR processes for cases. Judges served on (and in some cases, chaired) all of the task forces and committees that were the catalysts for the promulgation of Rule 114. In addition, Minnesota provided customized training in ADR for all district court judges. Earlier, we presented our
recommendations regarding the involvement and education of attorneys. These same recommendations (and, specifically, the suggestions regarding the content of training) apply to judges, as well.

We have learned how important it is to be able to provide judges with up-to-date information regarding the success (or failure) of the statewide ADR program. For example, we found in Minnesota that some judges believe that ADR slows down the litigation process. Therefore, they do not require parties to use ADR. Are these judges correct? Unfortunately, we do not know. There was no data collection or evaluation process in place when we commenced our statewide ADR program. We are now trying to correct this oversight.

In developing the data collection or evaluation process, it is wise to determine what key factors will signal success or failure to judges—and put the data collection or evaluation process in place from the very beginning. Ultimately, this data will enable you and your key constituencies to evaluate how the program is faring. In addition, the mere fact of recording and evaluating information regarding ADR will give the ADR program more legitimacy.

(b) Informed court administrators. In some districts, court administrators

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**Key ADR Processes**

<table>
<thead>
<tr>
<th>PROCESS</th>
<th>HOW IT WORKS</th>
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<tr>
<td><strong>FACILITATE</strong></td>
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<tr>
<td>Mediation</td>
<td>A mediator assists parties to reach a mutually acceptable agreement by facilitating discussion of parties' interests and priorities. The mediator has no decision-making power, but focuses on the clarification of communications, risk analysis, and the development of viable options for settlement. Mediation is especially helpful when: the parties have an ongoing relationship worth preserving; a creative solution is desirable; parties need to express emotions; reality testing from outside will help; and the court outcome is uncertain.</td>
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<tr>
<td><strong>EVALUATE</strong></td>
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<tr>
<td>Early Neutral Evaluation</td>
<td>The neutral evaluator hears the core of the evidence from the attorneys, in the presence of the parties, and gives a candid assessment of the strengths and weaknesses of the case. If settlement does not result, the evaluator helps position the case for resolution by motion or trial. Early Neutral Evaluation is especially helpful when: technical and/or complex issues require untangling; counsel or parties are far apart on their view of the law and/or value of the case; counsel or parties are unrealistic about the weaknesses of their case; and early case planning assistance will be useful.</td>
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<tr>
<td>Summary Jury Trial</td>
<td>An advisory jury and judge hear an expedited presentation of evidence that would be admissible at trial and the jury renders a verdict regarding liability, damages, or both. Attorneys can poll jurors regarding the decision, and the judge often meets with parties and counsel to encourage settlement based on the advisory verdict. Summary Jury Trial is especially helpful when: the trial of a complex case will be very long and costly; the opinion of “typical jurors” will be helpful because counsel or parties have very different views of the facts and value of the case; and settlement is more likely after a “day in court.”</td>
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<tr>
<td>Arbitration</td>
<td>An arbitrator provides parties with an adjudication that is earlier, faster, less formal and less expensive than trial. The award is nonbinding but can be the basis for settlement discussions or, if the parties agree, the award can be binding. Arbitration is especially helpful when: a decision maker with specific expertise is desired; there is a definite need for closure (binding arbitration); a “day in court” will be helpful; and confidentiality is a high priority.</td>
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have the responsibility for screening cases in order to determine which cases will go to ADR. If this is the case, court administrators should be educated in the same manner as judges and attorneys. In addition, court administrators are likely to be the persons responsible for sending out applicable forms, monitoring cases once they have been sent out to ADR neutrals, and entering data into the state data collection system. We have found that court administrators are more likely to be allies in administering an ADR program if you avoid adding too much to their already heavy workload.

In Minnesota, we solicited input from court administrators before designing the ADR data collection pieces. Consider providing administrators with sample forms (e.g., scheduling orders incorporating ADR, arbitration award forms, sample letters needed to monitor the timely scheduling of ADR, etc.) and guidelines for some ADR processes (e.g., summary jury trial).

(c) State policies and practices.

First, to the extent possible, it is useful to fit ADR within existing court rules and practices. Two examples illustrate this point. In Minnesota, attorneys now are required to advise the court regarding the appropriateness of ADR in individual cases. Rather than establishing a new deadline and requiring attorneys to file a new form, Minnesota's Rule 114 directs attorneys to provide this information in their Informational Statement, which they already were required to submit to the court for case management purposes. The form of the Informational Statement was amended in order to incorporate several questions about ADR. Similarly, Rule 114 directs judges to include ADR in their scheduling orders, which judges also routinely use as a case management tool.

We encourage you to be mindful of statewide policies and practices that will either encourage or inhibit the institutionalization of ADR. In Minnesota, for example, all judges inevitably are influenced to some degree by the state's system for reporting data regarding cases, as well as the state's policy of statewide weighted case averaging, which is used to allocate judgeships. We certainly do not advocate the use of ADR in every case. But we are concerned that the latter policy in Minnesota may tend to deter judges from making appropriate use of ADR in districts which do not have heavy caseloads.

(d) The policies and practices of each district court. The different cultures, personalities, and practices of each district court have a huge impact on the ease or difficulty of institutionalizing ADR. In Minnesota, we found that the roles and relationships between court administrators and judges vary dramatically from district to district. Even more importantly, each district court has its own approach to allocating cases. Some use an individualized calendar; others use the master calendar. For those who use the master calendar, some courts use differentiated case management; while others use a little of everything.

In Minnesota, we proposed our ADR program on the assumption that judges would review each of their cases in order to determine whether to order the use of ADR. However, there are some districts using a master calendar and thus no one judge "owns" a case. In these districts, a series of judges may rule on motions, issue subpoenas, and finally hear the case.

These districts present a challenge. Who will be responsible for reviewing a case to determine its potential for ADR? In one busy district in Minnesota, a self-selected group of judges initially met monthly with a trusted, extremely competent ADR coordinator. Together, they reviewed all of the cases in which attorneys differed over whether ADR was appropriate. Based on this review, they would determine whether to order the use of an ADR process. Now, the coordinator handles the review process herself and seeks input only in unusual cases. In most other master calendar districts in Minnesota, however, no one has taken (or been given) responsibility for reviewing the cases. Not surprisingly, very little ADR occurs in these districts.

There is not one right answer regarding allocation of the responsibility for reviewing cases for their ADR potential. However, it is important that each district court develop and adhere to a plan for such review. You may wish to provide knowledgeable staff to facilitate the planning session for judges and court administrators as they assess the work involved in the implementation of an ADR program. You also may wish to create an "ADR expert" in each district. If this expert is a respected judge in that district, it is likely that other judges will turn to him or her for advice and generally will give ADR more credence.

5. An Adequate Number of ADR Neutrals. There can be no ADR without ADR neutrals. There are several key decisions to make in establishing the necessary infrastructure of neutrals:

(a) Eligibility standards. Your decision regarding what to require of those who wish to serve as neutrals will be influenced by your other decisions. For example, if you opt for an ADR program that is administered directly by the courts and that does not permit parties to select their own neutrals, you will need to establish stringent eligibility standards for those serving as neutrals. Some courts have adopted a screening process for neutrals which involves a written application process, extensive training, apprenticeship, and even evaluation based on performance in real or mock mediations. Clearly, this approach has enormous implications for the court, in terms of administration, financial support, and ultimate responsibility. It also has implications for the success of ADR.

Frankly, we have found that attorneys and parties have greater respect for ADR and are more willing to participate in meaningful settlement negotia-
Making ADR Work  
(continued from page 15)

tions (either during or after the ADR process) if they participate in selecting the ADR neutral.

In Minnesota, the parties have several opportunities to select their own neutral. Therefore, we felt relatively comfortable opting for a "market" approach. The eligibility standards are quite low. For example, in order to serve as a mediator in a nonfamily civil case, an individual must only receive 30 hours of certified mediation training. However, before serving as a mediator in a case, a mediator must provide the parties with a written disclosure regarding his or her qualifications—education, experience, etc. It is assumed—and hoped—that informed consumers will make the choice that is best for them.

(b) Statewide availability of ADR neutrals. If you develop a statewide ADR program, you need a statewide pool of ADR neutrals. Even in Minnesota, which had an active community of mediators and arbitrators prior to the implementation of Rule 114, this presented a challenge. For the most part, the state's ADR neutrals were clustered in the Twin Cities area. Minnesota's State Court Administrator was concerned about the lack of qualified mediators in Greater Minnesota and found funding to sponsor four mediation skills training programs outside the Twin Cities area. In addition, many neutrals located in the Twin Cities area indicated their willingness to travel statewide. Under the circumstances, it appears that the supply of neutrals for nonfamily, civil cases is adequate to meet the needs throughout the state.

(c) Quality of ADR neutrals. Once you have a statewide pool of ADR neutrals, how will you ensure that the ADR neutrals understand and are providing quality service? This is a very important issue. As noted above, Minnesota has opted for the market model in its ADR program. This approach assumes that the market will weed out the good ADR neutrals from the bad. But there are problems inherent in this approach.

• Some parties—particularly unsophisticated clients represented by less experienced attorneys or not represented at all—will suffer at the hands of bad ADR neutrals as the market goes through its weeding process.
• If an attorney's or judge's or party's first introduction to ADR involves a bad ADR neutral, they are likely to be soured on ADR for the future.
• The market's definition of a good neutral may be inconsistent with the court's definition or the ADR community's definition. This issue is most striking for mediators. In Minnesota, we are discovering that the market (i.e., attorneys) prefers mediators who behave more like judges in settlement conferences (e.g., reducing the opportunity for joint discussion between the parties, quickly focusing on the legal issues, and providing an evaluation of the case in terms of liability and damages). There is nothing wrong with this approach to settling a dispute, but perhaps it should not be considered mediation. This approach is inconsistent with key characteristics of mediation—directly involving clients in the resolution of their dispute, looking more broadly at the real issues involved in the dispute, and encouraging creative solutions.

Regardless of whether you opt for the market approach or direct court administration, we urge you to put into place several mechanisms to ensure the quality of your ADR neutrals: a statewide data collection and evaluation process, post-ADR process evaluations completed by the parties and attorneys (provided at least to the ADR neutrals for their own information), a code of ethics for ADR neutrals, and a mechanism for enforcing the code of ethics.

(d) Access to ADR neutrals. You need to be sure judges, attorneys, and parties have meaningful access to your pool of qualified ADR neutrals. But you need to decide how much responsibility the court will bear in providing such access. Will you take responsibility for compiling and distributing information regarding the neutrals? What information will you compile and distribute? How will you distribute it? How often? In Minnesota, we opted to develop a written directory of ADR neutrals, which is published periodically and distributed to each district court. Frankly, this directory has not proved very useful to consumers, which has led neutrals to publicize their services through the private marketplace. Of course, this favors those neutrals who are able to afford to advertise their services or who have strong preexisting ties within the legal community.

CONCLUSION

As you can see, there are many issues to consider when establishing an ADR program. We have provided you with an agenda that contains the questions you need to ask as you institutionalize ADR. And, we hope we have alerted you to some of the more important implications that can follow from your answers to these questions.

ADR has great potential to benefit your courts and enhance the service you provide to the citizens of your state. To achieve this potential, ADR must be institutionalized thoughtfully and thoroughly.

NOTES

1. We have been on the Minnesota Supreme Court and State Bar Association Task Forces with responsibility to advise the court on statewide ADR since 1987. We both presently serve on the ADR Review Board for Minnesota. In addition, we have directed a program to provide mediation skills training for more than 2,000 neutrals (mostly lawyers) since 1993, and in 1996 we provided ADR training for state court judges under a grant funded by the State Justice Institute (SJI). Of course, the opinions expressed in this memorandum are solely our own.

2. SJI has supported many ADR projects and publications that are very helpful. These include: a manual developed by the Center for Dispute Settlement and the Institute of Judicial Administration, National Standards for Court-Connected Mediation Programs; and a series of papers prepared in 1994 in collaboration with the National Center for State Courts (NCSC), "National Symposium on Court-Connected Dispute Resolution Research." The NCSC also has a grant from SJI for a National ADR Resource Center. The Institute for Civil Justice at the Rand Corporation has published several evaluation studies on ADR programs and/or issues, and the CPR Institute for Dispute Resolution in New York has published several excellent resources, among them

Court ADR, Elements of Program Design by
tors' Orientations, Strategies, and Techniques: A
ATION JoURNAL, Jan.
Guide to Selecting an ADR
Fitting the Forum to the Fuss: A User-Friendly
FAMILIES
was established in 1987 and released its recom-
Court/State Bar Association ADR Task Force
in Minnesota. The Minnesota Supreme
dictions a court
upheld court's authority to order participation in
154 (6th Cir. 1993).
18. See, e.g., Ashland Oil, Inc., 120
v. Scar-
13. Leonard Riskin, Understanding Medi-
ators' Orientations, Strategies, and Techniques: A
Grid for the Perplexed, 1 HARVARD NEGOTIATION
L. REV. 7 (1996)
14. Other areas that lawyers need to think
about and should be discussed with any neutral
before retaining him or her include: experience
both as a neutral and as an advocate with similar
cases, the neutral's training, the costs of the
process, the location where the process will take
place, the neutral's responsibility for preparing
case summaries, etc.
15. In Minnesota, it took more than five
years to move from initial discussions of court-annexed ADR to the promulgation of Rule 114.
16. It is worthwhile to note here that a
person in state court administration who is knowl-
edgeable regarding ADR can help significantly
to navigate the complexities of the system.
17. Mediation Center and the Dispute Reso-
olution Institute of Hamline University School of
Law, under contract with the Office of the State
Court Administrator, conducted workshops in
every judicial district for district court judges, as
well as court administrators. The workshops
covered the most used ADR processes, screening
cases for the most appropriate ADR process,
and implementation issues. Funding for the
workshops came from the SJ. The workshops
occurred nearly a year after the effective date of
Rule 114. In evaluations of the workshops,
judges and administrators indicated that the
workshops could and should have been con-
ducted earlier.
18. Indeed, if you wish to be able to make
valid comparisons regarding the impact of ADR
on the operations of the courts (e.g., reductions in
backlogs, judicial efficiency, etc.), it is essen-
tial to begin collecting data even before the
commencement of the ADR program.
19. Specifically, the chairperson of the
Minnesota Supreme Court's ADR Review Board,
beside a court administrator, held a meeting
with court administrators to discuss ADR issues
and solicit ideas for program implementation.
Second, every district court was surveyed by
telephone to get information on the type of ADR
invited to submit their cases to ADR voluntarily.
4. The Minnesota Supreme Court promul-
gated Rule 114 of the General Rules of Practice
that requires attorneys to advise the court
whether they believe a case is appropriate for
ADR and, if it is, which ADR process they believe
is most appropriate. Thus, the attorneys are
invited to submit their cases to ADR voluntarily.
However, if the parties cannot agree on an ADR
process or fail to consider ADR, the district
court judges possess discretion to order the
parties into nonbinding ADR against their will.
5. Rule 16 does not provide the courts with
the authority to order parties into processes that
are binding (e.g., binding arbitration, private
judging). Such processes are "outcome-determi-
native" and, thus, a court order requiring par-
ties' participation in these processes would va-
late the Seventh Amendment's guarantee of a
right to a jury trial.
6. See, e.g., Arabian American Oil v. Scar-
fone, 119 F.R.D. 448 (M.D. Fla. 1988), McKay
1988), Federal Reserve Bank v. Caley-Canada,
7. See, e.g., Strandell v. Jackson County, 838
F.2d 884 (7th Cir. 1987), In re NLO, Inc., 5 F.3d
154 (6th Cir. 1993).
8. See State of Ohio v. Louis Trauth Dairy,
upheld court's authority to order participation in
summary jury trial based on Rule 16 as
amended and local rule).
9. Please note, however, that in some juris-
dictions a court rule will suffice.
10. This was the mechanism that was used
in Minnesota. The Minnesota Supreme
Court/State Bar Association ADR Task Force
was established in 1987 and released its recom-
mendations in 1989.
11. See generally, LINDA SINGER, SETTLING
DISPUTES: CONFLICT RESOLUTION IN BUSINESS,
12. Frank Sander and Stephen Goldberg,
Fitting the Forum to the Fuss: A User-Friendly
Guide to Selecting an ADR Procedure, NEGOTI-
ATION JOURNAL, Jan. 1994, 49-68.
13. Leonard Riskin, Understanding Medi-
ators' Orientations, Strategies, and Techniques: A
Grid for the Perplexed, 1 HARVARD NEGOTIATION
L. REV. 7 (1996)
22. We have more concern about the ade-
quacy of this market approach in family law
cases. In an increasing number of these cases, lit-
guants are not represented by counsel and are ba-
sically unsophisticated consumers. Thus, there
may be a need to establish higher eligibility and
quality standards for family mediators.
23. Mediation Center and the Dispute Reso-
lution Institute of Hamline University School of
Law conducted the training and worked with the
court to determine the locations of the training
and eligibility requirements for the trainees.
24. This is not necessarily true for family
cases, especially those involving low-income or
"working poor" litigants.
25. For example, this process may be better
understood as "early neutral evaluation" or an
informal version of "moderated settlement con-
ter." The evolving definition of mediation is
the subject of much debate in the ADR commu-
nity. See, e.g., Leonard Riskin, Understanding
Mediators' Orientations, Strategies, and Tech-
niques: A Grid for the Perplexed, 1 HARVARD
NEGOTIATION L. REV. 7 (1996) and Kimberlee
Kovach and Lela Love, Evaluative Mediation is
an Oxymoron, ALTERNATIVES TO THE HIGH COST
26. The Minnesota Supreme Court adapted
the Code of Ethics to Rule 114 in September,
1997. It was the result of more than a year's
worth of work and review of other codes de-
developed by other states, as well as a code devel-
oped jointly by the Society of Professionals in Dispute
Resolution, the American Bar Association, and
the American Arbitration Association. The ADR
Review Board also solicited and received exten-
sive feedback to drafts of the code from attor-
neys, judges, and ADR neutrals in Minnesota. As
noted earlier regarding implementation issues,
we feel that it would have been useful to adopt a
Code of Ethics simultaneously with Rule 114, in
order to ensure quality ADR practice from the
inception of the statewide ADR program.
27. The directory—patterned after a tele-
phone book—provides very basic information
about neutrals: name, address, telephone number,
types of ADR processes the neutral can provide,
and substantive areas of expertise.

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