

A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values

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This article has two primary purposes. The first is to describe in detail the history, operation and effects of the three most intensely used alternative dispute resolution (“ADR”) procedures sponsored by the United States District Court for the Northern District of California: settlement conferences hosted by magistrates, early neutral evaluation, and mandatory, nonbinding arbitration.¹ The second purpose is to consider whether these programs pose serious threats to or actually trench upon important values. The discussion of the three ADR programs is organized around four questions: (1) *why* was the program established—that is, to

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I would like to gratefully acknowledge several contributions to this article. As numerous citations to their work will show, I have drawn heavily on the important research completed by Professor David Levine of Hastings College of the Law on early neutral evaluation, and by Barbara Meierhoefer, Carroll Seron, E. Allan Lind and John E. Shapard of the Federal Judicial Center, on arbitration programs sponsored by federal district courts. Statistical information about programs in the Northern District that is not attributed to a published source has been developed for me by the dedicated professionals in the office of the Clerk of Court, United States District Court for the Northern District of California, who monitor aspects of civil case processing and who administer the early neutral evaluation and arbitration programs: Lee Derin, Keely Kirkpatrick, Martha Soeldner, Pauline Barr, Gloria Acevedo and Becky Tatlonghari. James Gilmore, systems administrator in the Clerk’s office, has lent valuable computer support. As with so many projects, Lynn E. Lundstrom and Jonathan D. Fernald, librarians in the District Court, have generously helped find important resource material. My extern for the summer of 1989, Dawn D. Shirlaw, produced a very helpful annotated bibliography of writings about the jury system. Finally, it is imperative to acknowledge a fact that the discussion in the text may not make sufficiently clear: none of the innovative programs sponsored by the Northern District would exist without the leadership of former Chief Judge Robert F. Peckham, whose vision, open-mindedness and deep concern for the people who use the courts serves as the foundation for all the work that is described in these pages.

¹ These are not the only ADR services that the Northern District provides. Other services include nonbinding summary jury or bench trials, special masters (for settlement negotiations or an array or pre- and post-trial purposes), and consent trials (jury or non-jury) presided over by magistrates. All six of these special procedures are described in a pamphlet, entitled *Dispute Resolution Procedures in the Northern District of California*, that is available from the clerk of the court.

which needs was it designed to be responsive?; (2) *what* does the program consist of?; (3) *does it work*—that is, does it achieve the ends for which it was designed, and what do the lawyers and clients who have participated in the program think of it?; and (4) is the program *vulnerable to criticisms* that have been voiced *about court-sponsored ADR programs generally*? Because I will be discussing the same criticisms with respect to each of the three programs, it will be helpful to summarize briefly those criticisms here, before beginning the detailed consideration of the alternative procedures themselves.

It is important to emphasize at the outset that the focus of this article is on ADR procedures that are sponsored by courts, not on ADR services that are designed and provided entirely within the private sector. While there is some overlap, the concerns and criticisms that attach to private and to court-sponsored ADR are not the same. It also is important to acknowledge that I can speak with confidence only about the programs in the Northern District of California. Whether other programs, sponsored by other courts, are more vulnerable to the criticisms I address here is a subject I necessarily leave to other people.

It will facilitate my presentation to group the pertinent criticisms of court-sponsored ADR programs into five categories, even though doing so results in some strains in conceptual tidiness.² The first category involves fears that courts abdicate their judicial func-

² Not all critics share identical concerns. Rather than parse each writing into categories of criticism, what follows is a list of articles that raise, in the aggregate, most of the points to which responses will be made in subsequent sections of this article. See, generally, James L. Guill and Edward A. Slavin, *Rush to Unfairness: The Downside of ADR*, 28 *Judges' J* 8 (1989); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 *UCLA L Rev* 833 (1990); Owen M. Fiss, *Against Settlement*, 93 *Yale L J* 1073 (1984); Judith Resnik, *Managerial Judges*, 96 *Harv L Rev* 376 (1982); Marc Galanter, *The Quality of Settlements*, 1988 *J Dispute Res* 55; Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 *Tulane L Rev* 1 (1987); Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 *Just Sys J* 134 (1984); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 *Harv L Rev* 1808 (1986); Dale A. Oesterle, *Dangers of Judge-Imposed Settlements*, 9 *Litigation* 29 (1983); Linda I. Hay, Carol M. Carnevale and Anthony V. Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 *Just Sys J* 228 (1984); and Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *Harv L Rev* 668 (1986).

This Article does not address any Constitutional (Seventh Amendment) concerns about the Northern District's court-sponsored ADR programs, in part because the results of each process are not binding and right to trial de novo is preserved, and in part because Professor Dwight Golann has devoted considerable scholarly attention to such concerns in his article, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 *Or L Rev* 487 (1989).

tion through ADR programs. Some critics have suggested, for example, that courts set up ADR programs in order to make it more difficult and more expensive for parties to get to trial. Under this theory, lazy or overworked judges use ADR programs to intensify the pressure on parties to settle before trial and thus to reduce the judges' workloads. Another criticism in this category charges that through ADR programs judges delegate their responsibilities to private citizens who are not publicly screened or publicly accountable. The lack of meaningful screening and real accountability, the argument runs, means that the risk of incompetence, bias or corruption is much greater with respect to these private neutrals than it is with respect to judges.

A second group of criticisms is rooted in the fear that ADR is promoted by people whose real objective is to reduce the role of government in defining and enforcing the basic rules of the social order. The concern is that ADR will be used to cut back the role of the "public" in dispute resolution, so that "natural" social forces and less-restrained competition can play larger roles in determining the character of our society and who gets what in it. Some thoughtful commentators, like recent American Bar Association president Robert Raven, worry that ADR programs will dangerously reduce pressure on legislatures to fund public courts at adequate levels. Similarly, critics worry that court-sponsored ADR programs will increase the likelihood that both the outcomes of disputes, and the procedures used to achieve those outcomes, will remain secret. Such increased "privatization" of dispute resolution could, it is argued, deprive us of important sources of information about what is happening in our society, impair the ability of similarly situated people to perceive their rights, and imperil the law's capacity to evolve and adapt to changing social conditions.

A third set of concerns revolves around the notions that ADR programs are changing the traditional character of judicial institutions and the role of judges. Some critics fear that, through ADR, courts might use private lawyers who are serving as "neutrals" to reach deeper into the disputing process than the public might permit judges to reach directly, thus transforming the role of the neutral (so that it approaches the continental European model) and significantly changing the balance of power that exists between parties in a traditional litigation environment. At another level, critics fear that the establishment of ADR programs threatens to convert courts into dispute resolution smorgasbords where large percentages of the institution's resources are spent administering ADR programs, leaving fewer resources for traditional adjudicatory

functions. Some worry that significant numbers of judges could be converted into or replaced by ADR program administrators or mediators.

The fourth set of criticisms builds from a fear that many judges are biased against certain kinds of claims or claimants and that such judges might vent these biases by shunting the categories of disputes that they dislike out of the adjudicatory mainstream and into ADR programs, perhaps thus discouraging the filing of unpopular claims, but at least assuring that they receive fewer public resources and less public attention than more favored kinds of claims or claimants.

This fear is closely related to the fifth and arguably the most important constellation of criticisms: that ADR procedures deliver second-class justice. Defining "second-class" justice in this setting turns out to be a most subtle and elusive task. Because constructive thinking about this important idea requires considerable specificity, I will not address it here, in the abstract, but later, in the context of specific factual information about each of the three programs covered in this article.

We turn now to a detailed consideration of judicially hosted settlement conferences, early neutral evaluation, and mandatory, nonbinding arbitration.

I. SETTLEMENT CONFERENCES HOSTED BY MAGISTRATES

A. Why Did the Court Establish A Program That Offers Judicially Hosted Settlement Conferences?

Making judges or commissioners available for settlement conferences is a well-established tradition in the metropolitan state courts in northern California. This practice was not as well developed in the United States District Court prior to 1984, even though one magistrate, the late Richard R. Goldsmith, hosted a great many settlement negotiations in the late 1970s and early 1980s, and even though one of the district judges, Eugene F. Lynch, brought with him a formidable reputation as a settlement judge when he moved from state court to the federal bench in 1982.

Intensification of the federal court's commitment to settlement work began evolving in late 1982, when the Honorable Robert F. Peckham, then Chief Judge of the Northern District of California, appointed a task force and charged it with one overriding responsibility: to determine if there were programs or procedures that the court could adopt that would enable litigants to dispose of

civil cases at substantially less cost. Chief Judge Peckham's principal concern was not about the court itself. His focus was not on the size of the court's docket or on the cost to the taxpayers of supporting the court. Instead, he was primarily concerned about how expensive it had become for litigants to process their cases through the formal adjudicatory system. Thus he asked the task force to look for ways to save litigants money.

Judge Peckham appointed some 20 lawyers, representing a wide variety of practices and perspectives, and one law professor, who was to serve as reporter, to the task force. He also appointed a committee of five judges to serve as a liaison between the task force and the court. At its first meeting, the task force divided itself into four committees: one would explore the emerging world of alternative dispute resolution in search of ideas that might be adapted to court programs, one would re-examine the court's arbitration program to determine whether it could be improved, one would determine if there were ways to gather more useful statistical information about how the court and litigants were spending their resources in civil matters, and one would study whether it would be a wise policy to increase direct judicial participation in the settlement process.

B. The Settlement Symposium

The "settlement committee" of the task force undertook two major projects. One consisted of sponsoring an all-day symposium on the topic of settlement, attended by some 75 members of the bar (again representing a wide range of practices) and most of the judges and magistrates of the court. The symposium was designed to encourage a frank exchange of views about what roles, if any, judges should play in the settlement arena. It was launched by a series of speeches to the entire group of lawyers and judges, after which the participants were divided into four working groups, each of about 20 members. Each group discussed and debated a series of topics that had been suggested by the task force. At the end of the day, all participants in the symposium returned to the ceremonial courtroom to review the ideas and insights generated in the working groups. This final session permitted participants to identify areas of consensus and areas of significant disagreement.

Consensus was clear on several points. Virtually all the lawyers in attendance agreed that there was a need for greater uniformity and predictability in the way the judges of the court dealt with settlement. An overwhelming majority expressed their belief that in most civil cases the judges should become actively involved

in settlement matters and that, early in the pretrial period, they should set in motion procedures that would prepare the cases expeditiously for serious settlement negotiations. Most of the lawyers favored a policy of making a judicially hosted settlement conference presumptively mandatory in most civil cases. Most of the lawyers also felt that clients should be required to attend such conferences unless it could be shown in a given case that enforcing this requirement was not justified.

Significantly, most of the lawyers at the symposium felt strongly that the judges should make much more meaningful use of the initial status conferences mandated by Federal Rule of Civil Procedure 16. In particular, the lawyers felt that judges should take the initiative to raise the subject of settlement at these early pretrial conferences, thus relieving counsel of the fear of being perceived by an opponent as having been "the first to blink," as one participant phrased it. Moreover, the lawyers clearly indicated that they wanted the judges not simply to ask tepidly about prospects for settlement, or whether settlement had been considered, but to pursue the matter actively and to work with counsel to set up a discovery or motion practice plan that would posture the case as efficiently as possible for meaningful settlement negotiations, if there were real informational obstacles to such negotiations at the outset of the pretrial period. Many of the lawyers at the symposium also endorsed the notion that, as a general rule, the judicial officer who hosted settlement negotiations should not be the judge who was assigned to preside at trial, should the case reach that stage.

C. The Survey of Lawyers' Views

While planning the symposium described above, the members of the settlement committee, not wanting to make proposals to the court that did not reflect the views of the bar generally, decided to sponsor an opinion survey that would reach a large and diverse group of attorneys who practiced in the Northern District of California. With the active support of Chief Judge Peckham and of attorney Theodore A. Kolb, the committee secured the financial and administrative support of both the Lawyers Conference and the National Conference of Federal Trial Judges of the Judicial Administration Division of the ABA. With ABA sponsorship, the committee was able to expand its survey so that the views of attor-

neys in four different parts of the country could be explored.³ Because this paper focuses on the settlement program in the Northern District of California, for the most part I will limit my discussion here to results from the polling of lawyers in that jurisdiction.

The survey yielded completed questionnaires—most returned by mail, some developed through telephone interviews—from about 800 litigators from a wide range of practice situations in the Northern District of California. Because the group of responding attorneys was so large and so well balanced as between plaintiffs' lawyers and defense counsel, and between lawyers who practiced in small firms and those who practiced in large firms, the court had considerable confidence that the views generated through the survey were truly representative of the litigating bar in the Northern District.

The principal messages the bar sent to the court through the responses to the questionnaire were supported by dramatic majorities and were consistent with the views expressed at the symposium. Ninety-two percent of the Northern District respondents shared the view that involvement by federal judges in settlement discussion was "likely to improve significantly the prospects for achieving settlement." Eighty-seven percent endorsed the notion that "a settlement conference hosted by a judge should be mandatory in most cases in federal court." And 90 percent indicated that they would "*prefer a settlement judge who actively offers suggestions and observations [to] one who simply facilitates communication between the parties.*"⁴

The pattern of responses was not as dramatically one-sided when the litigators were asked whether "involvement by federal

³ Clerks of court in the Northern District of Florida, the Western District of Texas, the Western District of Missouri, and the Northern District of California generated long lists of attorneys who recently had made appearances. Then the American Bar Association funded production, mailing and computer analysis of a substantial questionnaire that was sent to hundreds of attorneys in each of the four participating jurisdictions. To make sure that there were not significant differences between the views of the attorneys who returned the mailed questionnaire and those who did not, researchers telephoned a random sampling of attorneys from the latter group and asked them to answer the questions posed in the written instrument. A comparison of results revealed no significant differences between these two groups. There were, however, significant differences of opinion between lawyers in different districts with respect to some of the questions. For a complete description of the results from all four districts, see Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* (American Bar Association, 1985). For a focused summary of the results from all four districts, see Wayne D. Brazil, *What Lawyers Want from Judges in the Settlement Arena*, 106 FRD 85 (1985).

⁴ Brazil, *Settling Civil Suits* at 137-42 (cited in note 3) (emphasis in original).

judges in the settlement process significantly increase[s] the likelihood that settlements will be fair to all concerned." Given the difficulty of determining what the effect of judicial help would have been in cases where none was provided, coupled with the elusiveness of the concept of "fairness," it is not surprising that 30 percent of the California lawyers responding to this question indicated that they were "not sure." But of the litigators who were confident enough to venture a "yes" or "no" response, 78 percent opined that involvement by a federal judge significantly increases the likelihood that settlements will be fair.⁵ Thus there is substantial support in the bar for the view that judicial involvement in negotiations can enhance the quality of settlement agreements. This data, along with other results from the survey, helped persuade the judges of the Northern District that active participation in settlement negotiations is an important part of the service the court should provide to the bar.

Responses to other questions helped the court determine what form that service should take. For example, 71 percent of the Northern District's litigators indicated that settlement conferences are "significantly more likely to be productive if the clients are required to attend."⁶ In part as a result of that expression of opinion, most judges of the court have adopted a policy requiring clients to attend settlement conferences unless they reside more than 50 miles from the courthouse or can show why it would be unfair to compel them to appear in person for the conference. Clients who are not required to appear in person are almost always ordered to be available by telephone during the negotiations.

The lawyers also indicated that in most cases they would prefer that the host of their settlement negotiations not be the judge who would preside at trial if the case could not be resolved consensually. In cases where the finder of fact would be a judge, two-thirds of the responding litigators took the position that it would be "improper for the judge slated to preside at trial to become involved in settlement discussions." Almost half (48 percent) held the same view even in cases that would be tried to a jury. And 80 percent of the Northern District attorneys reported that they were "likely to be more open in settlement discussions with a judge who will not preside at trial than with the judge slated to preside at trial." Similarly, 80 percent of the lawyers believed that the court should "channel most settlement conference work to those judges

⁵ *Id.* at 138.

⁶ *Id.*

who are most successful as settlement facilitators.”⁷ Sensitive to these views, the court developed a policy, reflected in Local Rule 240-1, that settlement conferences are to be hosted by a judge or magistrate “other than the assigned judge unless all parties stipulate otherwise.” Moreover, in order to develop a group of judicial officers with special expertise in settlement work, and in order to assure that the settlement host will not be the judge assigned for trial, the court channels most settlement work to its full-time magistrates, each of whom conducts scores of settlement conferences annually.

The survey responses also made it abundantly clear that Northern District attorneys want settlement judges to develop independent analyses of the cases and then to explain those analyses in a series of private meetings with only one lawyer or one side present at a time. In short, they want their judicial settlement host to be analytically active; they do not want the judge simply to serve as a vehicle by which parties exchange offers and demands. These preferences by the local bar have played a major role in shaping the settlement program the court now offers.

D. What Is the Northern District’s Settlement Program?

The content of the court’s settlement program, as it has evolved over the past several years, is very largely responsive to the desires of the bar as expressed during the settlement symposium and through the survey. While the program is the least formally defined of the three ADR procedures that are sponsored by the court,⁸ it is substantial and robust. The court is committed to providing a judicial host for settlement negotiations in every civil action where a request is made. Moreover, even when no request is made, many of the judges of our court will order counsel to attend a settlement conference hosted by a magistrate. The range of practices among the judges in this regard is considerable: some order settlement conferences in a substantial percentage of their cases,

⁷ *Id.* at 138-40.

⁸ The settlement program is not the subject of a General Order and the only paragraph in the Local Rules that relates to the program gives no real sense of how it operates. Local Rule 240-1 provides that any party may request a judicially hosted settlement conference and that if such a request is granted the conference shall not be hosted by the judge who would preside at trial unless all parties so stipulate. The same rule permits parties to submit written settlement conference statements directly to the host of their negotiations (and not to file them), thus preserving a measure of confidentiality. The only other provision of the rule requires each party to be represented at such a conference by a lawyer “authorized to participate in settlement negotiations.” ND Cal LR 240-1.

others rarely do. While precise figures are not available, it appears that at least one judicially hosted settlement conference is held in about 40 percent of the kinds of civil cases that generate the vast majority of the court's work and in which issues are joined on the merits.⁹ The six full-time magistrates host some 750 to 800 settlement conferences per year. And while a few of the district judges devote significant time to hosting settlement negotiations, most of the work the court does in this arena is performed by magistrates. Thus, the court hosts about 900 settlement conferences per year, the vast majority of which are not conducted by the judge assigned to preside at trial. Perhaps 20 percent of these are follow-up sessions—the second or third settlement conference in the same case.

What the judicially-hosted settlement conference consists of can vary substantially from case to case and among the judges and magistrates. Most such conferences, however, have a common core, which consists of the judicial officer meeting first with all the lawyers and parties in a group and discussing the procedures that will be used in the negotiations. Sometimes in these initial group sessions the judicial host and counsel discuss, at least in general terms, the merits of the case. Thereafter, it is common for the judge to meet privately with one lawyer at a time in order to explore the evidence and the party's posture toward settlement in greater depth. The process usually is dialectical, with the host both facilitating the exchange of views between the parties and offering his or her own analysis and opinions. The judicial officer has no power, and is prohibited, by unwritten local convention, from communicating with the assigned judge about what transpired in the negotiations, except to the extent of reporting whether the case settled or whether follow-up sessions are contemplated. Thus, if settlement is reached, it is not because of pressure imposed by the host, but because the parties' analyses of their situations and perceptions of their own best interests, considered in the context of the judicial host's views, have led them to conclude that terms that are available are acceptable.

The role played by clients in judicially hosted settlement conferences also varies from case to case and from host to host. As noted earlier, many judges routinely order clients who live or work less than 50 miles from the courthouse to be present in the build-

⁹ In estimating this percentage, I did not take into account routine government collection cases, reviews, of administrative determinations, prisoner petitions, forfeiture/penalty matters, bankruptcy actions, social security actions, tax suits, or actions under specialized statutes, for example, agricultural acts or the energy allocation act.

ing when the conference is taking place. Most judges require clients to be available on telephone standby, so they can respond to offers or demands or to other developments during the conference. Even in those conferences where the client is present in the building, however, it is unusual for the client to participate directly in the negotiations to the same extent as his or her lawyer. When the judges hold the one-on-one sessions with counsel, usually the clients do not participate—at least until after the first round of private sessions have been concluded. Occasionally, however, clients participate fully in every dimension of the process. More commonly, but still probably in appreciably less than half of the conferences, the judicial host involves the clients directly in the discussions after the first round or two of private seriatim discussions with the lawyers. When the clients are invited to participate directly, the purpose usually is to get information from them—for example, about events underlying the case—to explore factors that might affect terms of settlement but that are unrelated to the merits of the case—for example, business or “political” considerations—or to give the magistrate an opportunity to share directly with them his or her views about the case or possible settlement proposals.

E. Do the Judicially Hosted Settlement Conferences “Work”?

As the discussion in the next section will help demonstrate, determining how to go about answering this deceptively simple question is a subtle and complex task. One obvious but inadequate measure of whether a program like this “works” is whether the program increases the settlement rate. Are settlements reached in a higher percentage of cases because of this program than they would be without it? It is embarrassing to admit that we do not know. The systems for preserving data about case histories that have been developed by the Administrative Office of the United States courts and by the clerk’s office in the Northern District simply do not include the information that is necessary to determine whether the settlement program has an overall positive effect on the settlement rate. And while common sense would suggest that the commitment of judicial resources to this process would result in more settlements, the limited empirical work that has been done on this subject in other courts has not demonstrated this result.¹⁰

¹⁰ See discussion of empirical research in Brazil, *Settling Civil Suits* at 8-14 (cited in note 3).

There are several other values, however, by which to assess whether a program like this "works." The commitment of judicial resources might make settlements occur earlier in the pretrial period than they otherwise would. Since many lawyers seem to fear being the first to raise the question of settlement, judicial intervention might cause serious negotiations to commence earlier than they otherwise would. Judicial settlement conferences also might enable parties to reach agreements with an expenditure of fewer resources; for example, the conferences might have a crucible effect that encourages parties to make decisions in fewer negotiations than otherwise would be required. Judicial participation in settlement negotiations also might improve the *quality* both of the process—thinking, communicating, and bargaining—and of the products that emerge from it, for example, the fairness of the terms and the likelihood that parties will abide by them. Judges or magistrates who host settlement negotiations can help improve the quality of communication across party lines, the quality of the parties' analysis of the case, and the breadth and creativity of their thinking about solution options. These and other ways in which judicial participation can contribute to the quality and efficiency of the settlement dynamic will be discussed in the next section.

F. How Does the Northern District's Settlement Program Measure Up against Criticisms of Court-Sponsored ADR?

1. *Does the Settlement Program Represent an Abdication of the Judicial Function?*

Since judicial officers, primarily magistrates, serve as the "neutrals" in this program, it is not clear how one could argue that the court's settlement work represents an abdication of the judicial function. There is no evidence that the local bar would prefer magistrates to preside over trials or to perform other formal adjudicatory duties. While in theory magistrates could devote to trial work the time they are now devoting to settlement, cases may be tried to a magistrate only with the consent of all parties, and, to date, litigants have not filled the magistrate's dockets with consent cases. Given the great demand by the bar on the magistrates for help with settlement negotiations, and the relatively small percentage of cases where all parties consent to magistrate's jurisdiction for trial, there is no reason to conclude that the settlement conference program represents a wasteful diversion of precious judicial resources out of the formal adjudicatory mode.

Moreover, the Northern District's settlement program was not intended to serve as a barrier to trial or as a vehicle for pressuring

litigants to settle. Rather, as the history of the program's development shows, it was built in response to the wishes of the bar and is designed to provide litigants with a tool for exploring settlement possibilities more carefully than they otherwise might. One very significant fact that contradicts the suggestion that the court would set up a settlement conference program to serve as a barrier to trial should be emphasized here: as the judges of this court are quite well aware, only a tiny percentage of cases reach the trial stage, and the vast majority will settle whether the judiciary helps with the process or not.¹¹ Knowing these basic facts of litigation life, it would make no sense for a court that wanted to use settlement conferences as barriers to trial to provide for them in upwards of half of its cases. Such a commitment of precious judicial resources would be wholly unnecessary for that purpose.

Moreover, most settlement conferences impose relatively little expense on the litigants; the principal expense, in the normal case, would be a lawyer's time of about four hours: two to prepare and two to participate. In addition, there is absolutely no penalty, financial or procedural, imposed on any party for refusing to settle and demanding a trial.

Because most of the settlement work is done not by judges, but by magistrates who have no power over disposition and who are prohibited from disclosing to the judge the substance of any communication made during settlement negotiations, there is little risk that the judicial host of the settlement conference could coerce parties into agreeing to terms that they otherwise would not accept. In settlement conferences, magistrates possess only such informal powers as might be associated with the judicial office, and I have never heard of a magistrate in the Northern District attempting to use such informal power to coerce a litigant or lawyer into accepting a settlement.

While the judge who would preside at trial certainly would be in a position to impose pressures on parties during settlement negotiations, the local rule's provision that the assigned judge may conduct a settlement conference only with the consent of all the parties reduces dramatically the likelihood that trial judges would abuse the power they might have in this arena. And while stories may circulate about judges ordering counsel to stay at the bargaining table for hours, attempting simply to exhaust parties into compromising, in the six years I have been a magistrate I do not know

¹¹ Galanter, 1988 J Dispute Res at 56 (cited in note 2).

of a single instance of this kind of tactic being used by a magistrate or judge of this court.¹² All the settlement conferences I have seen have lasted only as long as the parties have seemed interested in continuing the process. In fact, because the magistrates of this court host so many settlement conferences, the pressure really cuts in the opposite direction: we often feel that we do not have as much time to help counsel with settlement as they would like. Occasionally we must turn away parties who want settlement conferences, or follow-up sessions, simply because the other demands on our time leave us with no choice. Thus, rather than settlement conferences being imposed as roadblocks in the march toward trial, they are a service provided by the court in response to a demand by the bar that cannot be fully satisfied.

2. *Is the Underlying Purpose of the Settlement Program to Reduce Governmental Involvement in Defining and Enforcing the Basic Rules of the Social Order?*

This concern would be triggered by the settlement program if its principal purpose and effect were to increase significantly the overall settlement rate and thus to reduce appreciably the opportunities for judges and juries to contribute to the evolution of legal norms, to determine what the facts underlying given disputes are, and to apply the relevant norms to those facts. I am aware of no evidence, however, that the court's settlement program has a significant impact on overall settlement rates or that it is maintained in the hope that it will have such an effect. Even if the settlement program increased the overall settlement rate substantially, however, a rather large philosophical question would remain: assuming that the settlements were truly voluntary, should government refuse to facilitate them, against the wishes of the parties, so as to preserve a given level of "public" participation in the dispute resolution process? This is a serious question that is anything but self-answering. Unfortunately, it is beyond the scope of this paper to assay all the issues raised here in a meaningful way.

There are at least two points, however, that should be made in response to this concern. One is that a substantial percentage of the cases in which a judge or magistrate participates in settlement negotiations do not involve novel legal questions and do not raise

¹² Of course, I do not have information about every judicially hosted settlement conference in this court. I also acknowledge a few reports, none of which I have attempted to verify, about judges who no longer carry full case loads, attempting in the past to at least indirectly pressure lawyers into adopting more flexible postures toward settlement.

significant issues of public policy. Much of the litigation in our court is about only one thing: money. Much of it pits two commercial entities against one another. And a very significant percentage of the cases turn in large measure on factual issues that are not of any general significance, but are unique to the individual disputes. It is not obvious that it is important to encourage a high level of public participation in the resolution of disputes of this kind.

There are, of course, other kinds of cases that clearly implicate important societal values, that raise issues of considerable public moment, or that involve issues of fact that could affect the lives of a great many people. Court policies that promoted secret resolution of large percentages of such cases would cause concern. But I know of no evidence that our court's settlement program has the effect of increasing the percentage of such cases that are terminated by confidential settlement agreements.

Nor is there any necessary connection between the act of settlement and confidentiality. The fact that the court helps parties to reach settlement agreements does not mean that the court also encourages parties to keep the terms of such agreements confidential. Parties are free to decide for themselves whether to keep the terms of their deals secret. I know of no evidence that the judges or magistrates of our court pressure or try to persuade parties to keep settlement terms confidential. Moreover, many of the cases that implicate socially significant values, or that affect the interests of large numbers of people, are prosecuted in forms, like class actions, that require court approval of settlement agreements after a public debate about the appropriateness of their terms.

The second major point that needs to be made here is that overall settlement rates probably would remain about the same if there were no judicial participation in the process, even for cases that involve socially important issues. So the choice, realistically, is not between judicially assisted settlements and full public trials, but between judicially assisted settlements and settlements reached without judicial help. If those are the real alternatives in the vast majority of cases, then a significant commitment of judicial resources to the settlement process represents a greater rather than a lesser involvement by the public in the process by which disputes are resolved and in the enforcement of the basic rules of our society. There is no "public" involvement in or influence over settlements that are reached as a result of negotiations in which only private litigants are involved. In a judicially hosted settlement conference, by contrast, there is at least an opportunity for a judge or magistrate to make dispassionate contributions to the analysis

of the parties' situations and to encourage the litigants to consider social values and the implications for others of their settlement decisions.

Does the settlement program reduce pressure on legislatures to fund public courts at adequate levels? This concern appears to be triggered primarily by programs in which the role of the neutral is played by private attorneys or by retired judges, and thus does not seem especially significant with respect to judicially hosted settlement conferences. The fact that the Northern District uses magistrates, however, instead of Article III judges, to perform the vast majority of the settlement work may give rise to some concerns about levels of public funding for "full" judges. It is clear that a magistrate is less expensive than a judge to maintain, and that one reason Congress has turned relatively enthusiastically to the magistrate system is to save the taxpayers' money. But the use of less prestigious judicial officers to perform settlement work seems substantially less threatening than the use of such officers to perform adjudicatory functions. In contrast to adjudicatory functions, which must be performed, settlement services are essentially gratuitous. Having magistrates perform a service that leaves intact all of the courts' obligations in the formal adjudicatory arena is not likely to relieve significantly pressure on the legislature to maintain the adjudicatory machinery at an appropriate level. And if less prestigious, and less expensive, judicial officers were to succeed in increasing the overall settlement rate, the real need for public support of formal adjudicatory processes would decrease.

3. *Is the Settlement Program Changing the Role of Judges or the Character of the Court?*

Is the settlement program changing the role of the judge from passive/reactive referee to active participant or even dominant player in the dispute resolution process? It is arguable that the image of the "passive/reactive referee" has not fit the reality of federal judicial behavior for some time, and that increased involvement in settlement work is a relatively recent extension of a trend toward activism that began decades ago and that was inspired by a myriad of forces, not the least of which were increasing docket pressures accompanied by decreasing legislative support for the judicial branch. For reasons wholly independent of any interest in settlement, federal judges have been encouraged for quite some

time to become active "case managers,"¹³ and thus to become more significant forces in the unfolding of the litigation drama. It is also arguable, of course, that the trend toward judicial activism in trial courts is unhealthy, but it does not seem true that settlement programs of the kind sponsored in the Northern District are a cause of a broad transformation of the judicial role.

Nor can it be said that the court's settlement program is changing the role of the judge into the dominating player in the dispute resolution game. Since the vast majority of the settlement work is performed by magistrates who have no case-dispositive powers, in most settlement conferences in our court the judicial host has virtually no power to abuse. Moreover, the magistrates uniformly avoid any appearance of trying to coerce litigants into accepting any proposed terms; instead, the principal means by which the magistrates facilitate negotiations is by helping the lawyers analyze their clients' situations and by improving lines of communication between adversaries.

It also is significant that the Northern District's settlement program is much more the product of responsiveness to demands by lawyers and litigants than of initiatives undertaken by the judges themselves. As pointed out above, the court's decision to increase substantially its commitment to settlement work was directly inspired by the results of the symposium that the court sponsored and of the ABA survey of lawyer preferences. And even though 87 percent of the 800 lawyers polled in Northern California believe that a judicially hosted settlement conference should be mandatory in most cases in federal court, our judges have declined to adopt a rule that would compel such conferences in all cases, or even in all cases that fall into specified categories.

Finally, it is important to point out that, by assigning most of the settlement work to magistrates, the court has preserved the capacity of its Article III judges to continue to commit the vast majority of their resources to traditional adjudicative work—motions and trials—and to case management. So the changes in the judicial role have taken place primarily among the ranks of the magistrates, not among the judges, and since there are more than twice

¹³ See, for example, Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just Sys J 135 (1978); William W Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 *Judicature* 400 (1978); William W Schwarzer, *Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges* (Michie, 1982); and Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 *Cal L Rev* 770 (1981).

as many judges as magistrates, it cannot be fairly said that the settlement program is changing the character of the court as an institution.

If the work of the magistrates is included in the calculation, there has been an increase in the amount of judicial resources devoted to settlement and a change in the nature of the judicial role toward more analytical activism. Again, however, that change in our court is in large measure a result of the court trying to provide the kind of service that the bar has sought. The ABA survey showed that 90 percent of Northern District litigators "prefer a settlement judge who actively offers suggestions and observations [to] one who simply facilitates communication between the parties." Moreover, when asked to characterize the most successful settlement facilitator that they had encountered, more of the surveyed lawyers cited the judge's "willingness to express an opinion" or to offer an analysis of the case than any other factor. It is to these mandates that the court has responded in evolving its settlement program.

4. *Is There Bias or Discrimination in Determining Which Cases Are Sent to Settlement Conferences?*

The judges of this court strive to provide a judicial host for a settlement conference in every case where a request is made, regardless of subject matter or size. I am not aware of any evidence that the court is more likely to compel certain kinds of cases to participate in settlement conferences. The magistrates host settlement conferences in every type of case on the court's docket, from civil rights to RICO. I have detected no bias in favor of or against any class of case. Nor do I know of any reason to believe that a disproportionate percentage of any kind of case is compelled to participate in the settlement program.¹⁴

Certainly the court has comparably strong incentives to encourage settlement in both large and small cases. The incentive to help large cases reach settlement is obvious: trying them consumes painful percentages of the court's resources. The incentives to help small cases reach settlement are less obvious, but, in my view, no less real: judges have a strong sense that to go through the entire

¹⁴ Unfortunately, the recordkeeping systems established by the Administrative Office of the United States Courts do not yield statistics that would show the percentage of cases, by subject matter or type of claimant, in which a settlement conference is conducted. Thus, I must rely on personal experience and impressions of work done by other judicial officers to rebut the suggestion that bias against certain kinds of cases or claimants infects determinations about which cases are assigned to the settlement program.

pretrial ritual—discovery, motions, pretrial conferences—in a small case, and to litigate it to judgment, often wastes the resources of both the litigants and the court. In cases where the only significant interest involved is money, and such cases represent a very substantial portion of this court's docket, judges want economic common sense to play a major role in the disposition. At least in cases where the amount realistically in controversy is not large, economic common sense often requires resolution by settlement rather than by full adjudication, which involves such huge transaction costs. Moreover, trying a small case that involves only money offers a judge much less of the sense of drama and importance that can attend presiding at the trial of a large matter. This factor tends in some measure to counterbalance the incentive that derives from the huge consumption of resources that a long trial entails to encourage the parties to a large case to settle. Thus, for different reasons, the court has a substantial incentive to provide settlement conference services to both large and small cases.

Given the character of the settlement conferences hosted by magistrates in this court, it is not likely that if a judge were biased against a particular type of claim or claimant, for example, civil rights claims or pro se claimants, that he or she would give vent to that bias by compelling the parties to participate in a judicially hosted settlement conference. Such fears build on an assumption that is misplaced. The assumption is that settlement conferences are perceived as wasteful burdens rather than important services. In fact, as the results of the ABA survey showed, most lawyers greet settlement conferences gratefully and with open arms. Thus, in most cases, "compelling" counsel to participate in a settlement conference hardly represents a form of punishment. Moreover, magistrate-hosted conferences are not *in terrorem* events. They are informal and relatively low-stress sessions, almost always lasting only as long as the parties evince some interest in continuing them. Moreover, cases that might be perceived as difficult to try, for example, cases involving parties proceeding in pro se, probably are also perceived as difficult to settle, thus reducing the incentive the court might feel to expend valuable institutional resources on the settlement process. In sum, the fear that judicial bias might result in some kinds of cases being either benefitted or harmed by the settlement conference program seems unfounded.

5. *Does the Court's Settlement Program Deliver Second-Class Justice?*

To consider this question thoughtfully we must make two separate comparisons: the first between judicially hosted settlement conferences and trials, and the second between judicially hosted settlement conferences and private settlement negotiations that involve only counsel for the parties. Since many more civil cases are resolved by private settlement than by trial, the latter of these two comparisons will be the more significant.

In making the comparison between judicially hosted settlement conferences and trials, we must subdivide our inquiry yet another time so that we focus separately on (1) jury trials and (2) trials in which a judge is the finder of fact. There is a massive amount of literature about civil juries, some relatively flattering, some not. This is not the place to attempt either a systematic review or an independent analysis of that literature. For present purposes it will suffice to note that there is not insubstantial support for the view that in some juries the deliberative process is something less than tightly rational and that results reached by different juries in at least arguably similar cases can vary widely. There also is significant evidence that confidence among lawyers in the quality of the deliberative process by juries is quite low.¹⁵ There are, of course, weighty political values that support retention of the jury system, but some observers would not list among those values rationality of deliberative process, reliability, and predictability of result. Thus, when we consider whether judicially facilitated settlement is "second class" in comparison to jury trials, we must acknowledge that there is some possibility that at least some of the time there are serious shortfalls in the rationality of the process by which juries reach verdicts.

For some litigants, two very important measures of the value of any dispute resolution process are the extent to which it (1) permits catharsis, or ventilation of feelings in the direction of an adversary, and (2) creates an opportunity for public vindication. In most circumstances a jury trial delivers more of each of these values than does a judicially hosted settlement process. It is worth noting, however, that settlement procedures are not necessarily incapable of servicing these values. In many of the settlement conferences I host, I meet in private with the parties individually, almost always accompanied by their counsel. Often, one purpose of such

¹⁵ See, for example, Barbara Meierhoefer and Carroll Seron, *Court-Annexed Arbitration in the Northern District of California* 22-23 (Federal Judicial Center, 1988).

meetings is to give the parties a chance to tell their side of the story to a neutral representative of the public. While not the same as a full public airing of their views, such sessions can offer two advantages to parties that are not usually attainable in jury trials. One is that they can tell their story in a substantially less constrained and intimidating environment than a public courtroom, where the rules of evidence and the other rigidities of trial procedure can significantly compromise their freedom to speak. In sharp contrast, my conversations with clients in settlement negotiations take place in chambers; I wear neither robes nor suit jacket; we sit at the same table, in the same kinds of chairs; and I permit them to make narrative presentations that include matters wholly inadmissible under the rules of evidence.

The second significant difference for clients is that my settlement procedure offers them an opportunity for direct, forthright, dialectical feedback on their stories, a kind of feedback that has no equivalent in a jury trial. After listening to clients tell their side of the story, I often ask questions to explicate matters left uncovered or to expose different perspectives from which the same matters might be considered. I also offer comments on and reactions to the stories they have told. Sometimes part of my reaction is supportive and sympathetic. Sometimes part of my reaction is skeptical. After hearing my reactions and responding to my questions, parties often have an opportunity to ask questions of me and to make additional comments of their own. The process is informal, conversational, and dialectic. It sometimes includes discussion of rules of law and evidence as well, the goal being to maximize the party's understanding of the factors that affect his or her case and that might play roles in the settlement decision. I believe that many clients appreciate this kind of opportunity for catharsis and dialectical feedback from a neutral representative of the public. A jury trial would present them with a much different, more constrained, less analytically rich opportunity for self-expression.

Comparing a judicially facilitated settlement to a bench trial presents a different set of problems. When we consider the question of whether judicially facilitated settlement negotiations represent a "second-class" form of justice in comparison with bench trials, we should focus separately on "process" issues and "product" issues.

I consider first process issues. While judges are by no means immune to criticisms for political bias, laziness, and shortfalls of intelligence or knowledge, there appears to be substantially less concern about unpredictability, irrationality and unreliability in

bench trials than in jury trials.¹⁶ For present purposes, I will proceed on the assumption that the deliberative process in most bench trials is pretty much as careful, rational and neutral as a non-specialized human institution is likely to produce. Moreover, the process by which information is presented to the decisionmaker in bench trials is more systematic and more thorough than the process in settlement conferences. Furthermore, settlement conferences provide very limited means for assessing the credibility of percipient witnesses and only modest means for testing the details of the reasoning process that supports the views of expert witnesses. Even though this limitation is not inherent in the settlement process, I only occasionally have an opportunity in settlement conferences to question, in private, key percipient or expert witnesses and to compare their persuasive power. Thus, in the normal course, the bench trial is likely to present a significantly richer and more reliable data base than a settlement conference. On the other hand, many settlement conferences are preceded by substantial discovery, in which counsel have explored the arguably relevant evidence, including testimony by percipient and expert witnesses, at much greater length than they could at trial. At least in some instances it may be that lawyers in settlement conferences have an even better information base for making rational assessments of legal merits of the case than would a judge at a bench trial.

Even more important, settlement conferences permit the decisionmakers to explore considerations and evaluate materials that would not be admissible at a bench trial on relevance or other grounds.¹⁷ Such considerations or materials might be very important, in the eyes of the parties and counsel, to fashioning a fair or sensible solution to a particular dispute, even though they have little or nothing to do with its legal merits. For example, a party's arguable breach of a contract may have been caused by cash flow problems that also raise the specter of bankruptcy. Such problems may persuade both sides that the fairest and most productive solution to their dispute would involve restructuring their business relationship, arranging for short-term infusions of capital, and extending the period in which the original contractual obligations could be satisfied.

¹⁶ Id.

¹⁷ See, for example, Galanter, 1988 J Dispute Res at 58 (cited in note 2), discussing Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv L Rev 637, 655-57 (1976).

This example suggests another respect in which settlement can be superior to trial. If we focus on "product" rather than "process," the advantages of settlement loom larger. Simply stated, the range of solution options is much greater in a settlement process than in a trial. In most cases a judge has very little room for creativity when issuing a judgment. Most judgments simply announce who won and how much money, if any, will change hands. In sharp contrast, there is a wide range of "products" that can emerge from settlement processes. Even in simple cases, settlements might include structured payouts over time, new contractual relations (for example, terms of insurance), or new jobs for plaintiffs. And in more complex cases, or in cases where the relations between the parties outside the litigation could have many dimensions, there are almost innumerable potential components of settlement contracts. Joint ventures can be formed, product lines reshaped, licenses granted, payments made through shares of stock or future business, press releases drafted and public relations campaigns launched, and so on.

Are imbalances between the skills and resources of litigants and lawyers more likely to distort processes or results in judicially hosted settlement negotiations than in trials? The answer to this difficult question is likely to remain elusive. Moreover, the answer may well not be the same for jury trials and bench trials. In bench trials, at least in federal court, judges are likely to be relatively active, both in containing excesses by counsel and in probing for relevant data that the parties' presentations might leave obscure. Such judicial activism, which can in some measure compensate for imbalances between the resources of counsel or litigants, is likely to be less pronounced in jury trials. It also is arguable that jurors are more vulnerable to manipulation or deception by artful lawyers than are judges.

When we shift focus to judicially facilitated settlements, we find it difficult to generalize because there is a huge range of behavior relevant to this issue by judicial hosts of settlement negotiations. Some magistrates and judges remain relatively passive in settlement negotiations and permit a great deal of direct interaction between opposing counsel. There is a greater risk that imbalances between the skills and resources of counsel or litigants will distort the rationality and fairness of the process in such settings than in conferences where the judge plays an analytically assertive and independent role and requires most of the communication across party lines to be made indirectly, through the host of the conference. An analytically active judge is more likely than his or

her passive counterpart to prevent abuses of power. For example, by offering frank, thoughtful comments about the strengths and weaknesses of competing positions, an active settlement host may in some measure protect an outgunned party or lawyer. The articulation by judges of independent opinions about the fairness or wisdom of proposed terms of settlement may have a similar effect. But settlement hosts often may be reluctant to articulate such views. Moreover, in forming such opinions, judges and magistrates who participate in settlement negotiations often rely heavily on what the lawyers tell them about the nature of the evidence and other real-world factors that could affect the settlement value of the case, for example, the financial situations of the parties. Such extensive reliance might compromise the independence of the judicial host's opinions and render the negotiation process vulnerable to abuse by the more artful lawyer. Given all of these considerations, my guess would be that the danger that imbalances in lawyer or litigant skills or resources will distort results is smaller in bench trials than in either jury trials or judicially hosted settlement conferences. As between jury trials and settlement conferences, however, it simply is not clear where this particular threat to the quality of dispute resolution is greater.

Results of comparisons are clearer with respect to other values by which the quality of dispute resolution systems might be measured. The cost and the speed of achieving resolution, two extremely important values in many cases, clearly favor settlement over either jury or bench trial. Settlement processes encourage a less combative, more positive, forward-looking, and creative dynamic between the parties than does a trial. Settlement offers opportunities to communicate across party lines about subjects and in ways that would never be permitted in trial. Settlement also offers opportunities to fashion new relationships between former adversaries. Compared to trials, settlement processes also expose parties and counsel to substantially less stress over a shorter period of time in a less public setting. For parties who want to protect their privacy, or to avoid disclosure of certain especially sensitive information, settlement processes offer obvious advantages.

There is another constellation of values, however, with respect to which the comparison between settlement and trial processes yields much less obvious answers. These values include the extent to which the process empowers, includes, or alienates the parties, as opposed to their lawyers. In this connection, we also should examine the extent to which the process permits either control or participation by the parties, the opportunities the process provides

for catharsis, and the feelings of *procedural*, as opposed to *outcome*, satisfaction that the process engenders.

How well judicially hosted settlement conferences service these values varies dramatically between judges and courts. There are huge ranges of settlement conference styles, some of which permit no participation at all by clients.¹⁸ Settlement processes that permit no participation by clients must be alienating and presumably offer little or no procedural satisfaction. Compared to these kinds of settlement conferences, where only the judge and the lawyers are present, any trial would offer more to client interests in participation. On the other hand, as indicated above, some magistrates and judges in our court sometimes permit clients to participate directly and play a meaningful role in settlement conferences. In some instances, clients also have significant input into decisions about the nature of the procedure that will be used in settlement negotiations, for example, whether there should be discussions in a group setting, with all counsel and all parties present, or whether certain expert or percipient witnesses should be brought in to give narrative statements and be questioned by the judge. And in some instances, clients participate more fully and have a richer opportunity for catharsis in settlement procedures than they would in a trial. For example, in some settlement negotiations, I spend a great deal of time with parties permitting them to vent their anger over some policy or some person's behavior, and in some conferences I work closely with clients analyzing aspects of their financial condition that are important to assessing the kinds of contributions they might make to a settlement but that would be wholly irrelevant at trial.

But the percentage of cases in which the clients participate more significantly in settlement conferences than they would at trial probably is small, even in a court like ours, which has tried to be responsive to the kinds of values being considered here. Trials virtually always offer clients an opportunity to testify in public, which can be an important vehicle for catharsis. And clients always can watch the entire trial process as it unfolds—except, of course, the deliberative process of the jury. In settlement conferences, by contrast, much of the process takes place behind doors that are closed to the clients: most of the analysis and negotiating are conducted in secret, seriatim meetings between the magistrate and the

¹⁸ E. Allen Lind, et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* 13-14 (RAND Corporation Institute For Civil Justice, 1989).

attorneys. Thus, even though the parties have little real control over procedures at trial, and may feel alienated by the rigidities and austerities of the trial process, it is not clear that values associated with party participation and catharsis are better served in most settlement conferences than in most trials. It is worth noting, however, that the structure and character of settlement conferences are not fixed by the kinds of rigid rules that dictate the shape of a trial. Since there is much more room for creativity and flexibility in designing settlement conference formats, there is no reason why procedures could not be devised that would appreciably increase participation by clients in the settlement dynamic.

In sum, there are some measures of value by which the settlement process is clearly inferior to the trial process, whether jury or non-jury. There are other measures of value, by contrast, by which a judicially facilitated settlement negotiation is clearly superior. With respect to yet other values, there is no clear superiority in either process. What should be evident from this discussion, however, is that judicially hosted settlement processes contribute a great deal more to some important values than do trials, and that for some parties in some circumstances it will be clear that settlement facilitated by a judge is in no sense "second class."

While it is important as a theoretical matter to compare judicially facilitated settlement negotiations to trial processes, the comparison that is far more significant in the real world is between judicially hosted settlement conferences and negotiations in which no neutral person participates at all, for it is the latter that is the dominant mode of dispute resolution in this country today and that is by far the more likely real alternative to the judicially facilitated process. I submit that the purely private negotiation process often is compromised by serious shortcomings that make it clearly inferior, in most instances, to the judicially facilitated alternative. At the outset, however, I must acknowledge that reliable empirical data about the quality of purely private negotiating is virtually non-existent, and that my comparisons are based on personal experience—which was not substantial before coming on the bench—*anecdotes* shared with me by other lawyers, and speculation. This obviously is a thin data base.

I suspect, however, that the quality of the intellectual process in many private negotiations, especially in smaller cases, leaves a great deal to be desired. Lawyers are frequently the only players in purely private negotiations. Direct negotiations between lawyers can be extremely indirect. Litigators bring deeply suspicious and self-protective instincts to the negotiation process. They are not

trained to be forthcoming. They worry about protecting their client's confidences, their own work product, their informational advantages, and their trial strategy. They are terrified of exposing vulnerabilities in their case, weaknesses in their personality, or any suggestion of infirmity in their resolve to take their opponent to the proverbial mat. Negotiations between two or more people encumbered with this kind of psychological baggage are not likely to consist of systematic examinations of all the relevant evidence and law, to say nothing of the extra-litigation considerations that might play major roles in identifying sensible solutions to problems. Rather, communication between adversaries is likely to be extremely guarded and highly postured, with key cards played very close to the vest, important evidence concealed or overlooked, possible terms of agreement not disclosed, and the quality of the dialectical analysis of the case seriously compromised. Fear or suspicion may discourage lawyers even from putting possible solution options on the table. The process of negotiating often may consist of nothing more than ritualistic exchanges of numbers. Thus, there is real reason to be concerned about the quality of the information and the reliability of the reasoning that inform settlement decisions in this setting.

There also is reason to be concerned about the efficiency of purely private negotiations. One source of inefficiency is suggested in the preceding paragraph: exaggerated fears can inspire the most oblique, circuitous, and time consuming exchanges of information. Another source of inefficiency is the feeling, apparently widespread among litigators, that being the first to raise the question of settlement is likely to be perceived by opposing counsel and his or her client as a sign of weakness. This fear of being "the first to blink" can mean that settlement simply is not discussed until near the end of the pretrial period, after large amounts of client money has been spent on marginally productive discovery and motion work. A more cynical view would posit that lawyers sometimes are reluctant to raise the question of settlement until they have milked the case of as many billable hours as possible. In any event, I have been surprised by the number of cases that come to me for a settlement conference late in the pretrial period in which there have been *no* discussions of settlement by counsel. I also have been dispirited by the number of lawyers who say they simply cannot talk to opposing counsel. Their inability to communicate with their opponent has made them grateful to the court for compelling them to participate in a judicially hosted settlement conference. Since a great many cases settle without judicial help, the obstacles to com-

munication I have described here obviously do not block all negotiations in most cases. But they may increase the cost, delay the initiation and completion, and compromise the reliability of the discussions in a great many cases.

There are additional significant shortcomings of purely private negotiations. There is no external check on abuses of power by attorneys or parties in such negotiations. There is no neutral participant who would be in a position to compensate for imbalances between the skills or resources of opponents, or to raise issues that might expose the patent unfairness of proposed terms. Nor is there any external check on breaches of duties owed by lawyers to their own clients, as would occur, for example, if a negotiating lawyer elevated his or her interest in the fee above the interests of the client.

Moreover, there are a great many private negotiations from which the parties themselves are entirely excluded. Some negotiations occur between lawyers over the telephone. Obviously in such cases the process of resolving the dispute offers clients no opportunity for catharsis, no equivalent to having their day in court. They have no control over how terms are negotiated and cannot derive any satisfaction from the character of the process, even if they are fully satisfied with the result. More subtly, clients whose cases are resolved by private negotiations can have no sense that a *societal process* solved their problem. They cannot feel that society set up machinery that they were able to use to repair a social tear. It is arguable that every time a dispute is resolved solely through private negotiations we have lost an opportunity to use the dispute resolution process as a means to help people feel more connected to and respectful of our society.

Judicially hosted settlement negotiations, by contrast, directly involve a neutral representative of the public in the dispute resolution process. If conducted with sensitivity, they can provide opportunities for some catharsis and some feeling of having had a day in court. They can encourage respect for the law and a deeper sense of connection to our society. Moreover, a judicial host is likely to improve substantially the efficiency and the quality of communication, the character of the litigants' analysis of their case, and the thoroughness of their exploration of solution options. The judicial host also is likely to keep the parties talking longer than they otherwise might, thus improving the likelihood that they will not fail for want of trying or by inadvertent neglect of some possible terms. These advantages leave me with little doubt that judicially hosted settlement negotiations are, in a great many instances, superior to

the most common alternative: purely private discussions between opposing counsel.

II. EARLY NEUTRAL EVALUATION

A. Why Did the Court Establish the Early Neutral Evaluation Program?

Early neutral evaluation ("ENE") is a unique program that was designed by the subcommittee of former Chief Judge Peckham's task force whose mandate was to explore the blossoming world of alternative dispute resolution and determine whether ideas or procedures being developed there could be adapted to or incorporated in court-sponsored programs.¹⁹ The members of the subcommittee launched their work in 1983 by conducting an intensive study of the literature about various forms of ADR, contacting local and national providers of ADR services, and interviewing professionals with substantial ADR experience, for example, in labor arbitration and mediation. In the same time frame, the subcommittee, most of whose members were practicing lawyers, set out to identify the principal sources of pretrial expense and delay in civil litigation.²⁰ The subcommittee's plan was to isolate and analyze the kinds of problems that generated most of the cost and delay, then determine whether there were new procedures being developed in the alternative dispute resolution movement that might be used to attack those problems. The directive from Chief Judge Peckham to the subcommittee focused on the users of the adjudicatory process—the litigants—not on the court as an institution. Judge Peckham made it clear that the goal was to save the litigants money and time, not to reduce pressures on the court's docket.

The subcommittee identified several major sources of pretrial cost and delay that it wanted to try to attack through procedural innovation. The first was pleading practice. The subcommittee believed that pleadings in federal court too often simultaneously overstate and undercommunicate, leaving parties without a clear

¹⁹ See Wayne D. Brazil, Michael A. Kahn, Jeffrey P. Newman and Judith Z. Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 *Judicature* 279 (1986). Important contributions to the evolution of early neutral evaluation also have been made by Melvin R. Goldman, James P. Kleinberg, Charles R. Ragan and William A. Robinson, lawyers who have served for seven years on Judge Peckham's task force.

²⁰ See, for example, David M. Trubek, et al. *The Costs of Ordinary Litigation*, 31 *UCLA L Rev* 72 (1983).

understanding of the content or dimensions of their dispute. Pleadings too often disguise the real center of the dispute. They do not equip opponents to identify the areas in which they really disagree or even to isolate the contentions that will be pursued seriously. Defendants often cannot tell, from the pleadings, which of many causes of action plaintiffs are serious about, and plaintiffs cannot be sure which of the many affirmative defenses the defendants really intend to push. Moreover, the communication across party lines that begins so badly with pleadings often remains poor. Thus, parties feel constrained to resort to the expensive and slow formal procedures of the adjudicatory process, motion work and discovery, to find out what the center of their dispute is.

A second source of expense and delay is the difficulty parties and lawyers sometimes have bringing themselves to do their core investigative homework, and to conduct a thorough and dispassionate assessment of their situation *early* in the life of the case. The lawyers on the subcommittee recognized that the economics of litigation practice and certain psychological facts of life often conspire to delay the case development process. Lawyers are forced to accept more work than they can comfortably handle. They put out the hottest fires first. And like other people, they put off the toughest decisions and the most demanding analyses as long as they can. Moreover, early in the case, clients' emotions are especially likely to run strong, and lawyers are especially likely to feel the need to impress their clients with the vigor of their advocacy. Filing motions and conducting discovery are convenient and remunerative arenas for displaying mettle as an advocate. And since discovery in particular is relatively easy intellectually, a momentum develops in many cases that seems to make extensive formal discovery inevitable.

Systematic and objective analysis of a case, by contrast, is not easy and does not lend itself to display of adversarial muscle. The result is that lawyers and clients often find it difficult, early in the pretrial period, to muster the discipline to confront systematically and objectively their situation in the litigation. They have trouble developing a holistic perspective and seeing the case through their opponent's eyes, appreciating the strengths of his or her position.

The lawyers on the subcommittee felt that unrealistic expectations by clients also can be a significant source of cost and delay. More than occasionally, the lawyers felt, clients need a reality check. Sometimes that need for a reality check cannot be satisfied by a client's own lawyer because sometimes clients lack confidence, especially early in the pretrial period, in their own lawyer's assess-

ment of the case. Unrealistic expectations can inspire unwise decisions about how much money to spend on litigation and how long to hold out for more attractive settlement offers.

Members of the subcommittee also believed that the alienation from the litigation process that some clients feel can increase pretrial costs and delay settlement. The alienation some clients feel seems to have two principal sources: they do not understand the litigation process and they feel powerless in it. Some clients who have such feelings may not become realistic until they are included more directly in the process and until they have more confidence in their understanding of how the system works and what is likely to happen if the case goes to trial. Fear and distrust can block sensible decisionmaking. The subcommittee made reducing client alienation one of the goals of the new procedure it was designing. Toward that end, the subcommittee searched for ways to increase clients' direct participation in the early pretrial period and to expand clients' knowledge not only of procedures but also of the content and evidentiary underpinnings of their opponent's position.

The subcommittee believed that clients were not the only participants in the pretrial process whose decisions might be adversely affected by unrealistic expectations or lack of confidence. Litigators also have been known either to have inflated estimates of a case's value or to feel considerable insecurity about their ability to assess their client's position and predict the outcome at trial. Either condition can cause lawyers to make, or fail to make, pretrial decisions that impose needless costs on clients. For example, a lawyer who lacks confidence in his or her assessment of a case might reject reasonable settlement proposals until he or she has completed much more discovery than is really necessary in order to value the case reliably for settlement purposes. The subcommittee sought to attack these problems by designing a procedure that would move information across party lines faster and more directly than motions and formal discovery, and that would provide both counsel and their clients with early neutral assessments of the case from an independent and highly credible source.

One additional source of cost and delay that the subcommittee sought to attack through the procedure it was designing warrants mention here. Like other members of the task force, the lawyers on this subcommittee felt that some lawyers and clients were needlessly reluctant to raise the subject of settlement, especially early in the pretrial period. Afraid that being the first to bring up the question of settlement will be perceived as a sign of weakness,

some lawyers plow through the pretrial ritual waiting for their opponent to raise the issue, even though there is ample information available to value the case reliably for settlement purposes. In a variation on this theme, some lawyers feel the need to "teach" an opposing lawyer or client about the value of the case before launching settlement negotiations, but instead of trying to accomplish the "teaching" objective by directly providing information about the case, they resort to expensive, time-consuming processes like formal discovery and motions.

The subcommittee believed that, in all too many cases, the result of the confluence of some or all of the forces described above is that case development meanders, discovery and motion work is not well-focused or is postponed until some deadline forces counsel to turn to it, and serious consideration of settlement is left until the end of the pretrial period, after very substantial sums have been expended in only marginally fruitful pretrial rituals.

Having decided that these are the principal sources of cost and delay in the pretrial period that might be vulnerable to some kind of innovative procedural attack, the subcommittee returned to the information it had gathered from the world of alternative dispute resolution. Unfortunately, it could find no one procedure that fit the environment and that held sufficient promise of meeting most of the needs the subcommittee had identified. So, borrowing pieces of procedures from many different sources, and generating some fresh ideas of its own, the subcommittee forged a truly unique, hybrid process that it labeled "early neutral evaluation."

B. What Is Early Neutral Evaluation?

At the center of the early neutral evaluation procedure is a confidential, non-binding case evaluation conference, attended by all counsel *and their clients*, hosted by a neutral member of the private bar who has very substantial litigation experience and who is an expert in the principal subject matter of the lawsuit. This conference, also called an ENE session, takes place *early* in the pretrial period so that the parties will be in a position to use what they learn and accomplish during the proceeding to make the case development and settlement processes more rational, less expensive and less time-consuming. General Order Number 26, which governs the program, requires the conference to be held within 150 days of the filing of the complaint unless the court orders otherwise.

The typical ENE session, which lasts for more than two hours, begins with the evaluator, who has been selected and trained by

the court, making an opening statement that explains the purposes of the program and outlines the procedures that will be followed at the meeting. She also uses her opening statement to set an appropriate tone, which is analytical, informal and constructive. She emphasizes that one of her primary goals is to help the parties better understand one another's positions and to search for the most sensible, cost effective ways to set up their case for disposition. She explains that she has no power over their behavior or the way they conduct their case, and that she will not communicate with the assigned judge about what transpires at the ENE conference. She points out that the court has set up this procedure, and asked her to commit several hours of her time to it, without compensation, in order to provide parties who are proceeding in good faith with a flexible, efficient vehicle for containing the costs and improving the quality of the process by which they resolve their dispute. She also explains that the court required the parties to be present in order to give them an opportunity to communicate more directly about their positions, to see how their case looks in the context of their opponent's situation, to hear a neutral assessment of the matter by the evaluator, and to participate in decisionmaking about how the case should be developed for motions, settlement or trial.

After completing her opening statement, the evaluator asks the plaintiff to make a brief, perhaps 15 minute, presentation of his case, explaining the legal theories on which he is relying and describing the evidence that supports each major element of each theory. Such presentations may be made by counsel, client or both. They are narrative in form; interruptions or objections by the opposition are not permitted. The side making such a presentation is encouraged to point whenever feasible to specific documents, witnesses, or other evidence that supports important factual contentions. The evaluator permits parties to bring percipient or expert witnesses to these conferences and to include statements by them in the presentation of the case, but testimony is not taken—there is no direct or cross-examination of witnesses—and statements are not made under oath. Thus far in the history of this program, most parties have chosen not to bring witnesses to the evaluation session.

After plaintiff completes this initial account of the case, defendant makes a similar presentation from its vantage. Thereafter, the evaluator may permit each side to make a brief responsive presentation and/or to ask questions of the other. Then the evaluator asks questions of both sides, attempting to clarify arguments and evidence, fill in evidentiary gaps, and probe for strengths and

weaknesses. After a substantial period of this kind of dialectic, the evaluator is ready to proceed to the next stage.

Her first task is to try to identify common ground, that is, matters as to which the parties agree. At this juncture one of her objectives is to encourage the parties to enter stipulations as to as much of the relevant facts and law as possible, thus reducing the arenas in which discovery, motion work and trial are necessary. Then the evaluator attempts to articulate, concisely, the key disputed issues in the case, factual and/or legal. This is a very important component of her work, because a principal purpose of the ENE process is to help the parties understand more clearly what it is, exactly, that they disagree about, and then to appreciate what the legal significance might be of the different possible resolutions of these key points. After completing this "issue identification" process, the evaluator retires to another room where she prepares her written case evaluation. In this informal document, which never becomes part of the record of the case and is not shared with the assigned judge, the evaluator sets forth, briefly, her assessment of the relative strengths and weaknesses of each side's case, articulates her best judgment as to which side is likely to prevail on the merits and, if it is the plaintiff, what the range of damages is likely to be. As important, she sets forth as specifically as possible the reasons that support her conclusions.

After preparing this brief written evaluation, she returns to the ENE conference room. She announces that she has drafted an informal evaluation of the case, but then asks if the parties would like to try to explore settlement possibilities before she discloses her written assessment to them. If either party resists the idea of launching settlement negotiations, the evaluator promptly discloses her evaluation to both sides. But if both sides are interested in working on settlement first, the evaluator begins settlement discussions. She is given considerable discretion in deciding how to conduct negotiations in this environment, and she is to take into account the parties' procedural preferences. She may decide that all settlement negotiations should take place in the group setting, or that some would be more productive if she met in private with one side at a time. If the parties reach an agreement as a result of the negotiations, the evaluator encourages them to commit it to writing.

If the parties are not able to reach a settlement, the evaluator reconvenes the conference and turns to the next task: helping the parties develop a plan that will position the case as efficiently as possible for disposition by further settlement negotiations, by mo-

tion or by trial. If she has not already done so, she shares her written case evaluation with both sides. She then uses that evaluation, along with anything she has learned in the settlement negotiations that she is free to share across party lines, to identify what separates the parties and to suggest the most sensible, cost-effective way to attack that separation. If lack of information or evidence about key issues is what separates the parties, the evaluator suggests a plan for sharing that information informally—less expensively than through the formal discovery process—or for discovering it—for example, from non-parties. If a significant source of separation between the parties is a disagreement about what the law is, the evaluator suggests an expedited motion plan. If it is clear that what separates the parties cannot be attacked by more information (evidence or legal rulings), because, for example, they disagree fundamentally about who is telling the truth, or about some matter of principle, then the evaluator's job is to suggest a focused plan for getting the case ready for trial. She makes it clear that her case development suggestions are not binding and will not be shared with the assigned judge; rather, she offers them only as a service to help parties who might find the ideas useful.

To capitalize fully on the learning that occurs at the ENE session and the momentum that can be generated there, the evaluator tries to schedule some kind of follow-up after the initial conference. Often that follow-up will take the form of settlement negotiations that the evaluator offers to host, perhaps after the parties have shared informally or developed through discovery the key information they feel they need to value reliably the case. In the alternative, the follow-up might be limited to a party responding, by a date stipulated, to a request for certain information about the merits of the case or to an offer or demand that was made at the initial ENE session. Occasionally, all participants will agree that another full ENE session is warranted. Or the parties might agree to another meeting devoted solely to discovery or motion practice planning after a ruling by the court on a pending motion. Any potentially time-consuming or expensive follow-up commitments are purely voluntary; the evaluator is not empowered to impose them. The evaluator simply makes suggestions and encourages the parties to use her services in any manner that they believe promises to be productive.

In the vast majority of cases, the parties are charged no fee for the service that the ENE program delivers to them. The rare exception to this rule arises when *both* sides of a very large and complex case have ample resources *and* when the evaluator is required

to commit substantially more than five hours to the matter. In such circumstances, the court may order the parties to pay the evaluator a reasonable fee for the time he or she had to spend in excess of the five hours. Moreover, even though the indirect expenses of participating in the session may be substantial, for example, travel to the session, time spent in it, and fees charged by their own attorneys for the time they commit to preparing for and participating in the ENE session, the court believes that in the vast majority of cases the net economic effect of the program is to save litigants money and time.

Cases enter the ENE program in one of three ways. The parties may stipulate to inclusion of their case in the program, or a party may ask the assigned judge to order the matter referred to ENE over an opponent's objection. At the time of this writing, however, the vast majority of cases that are in the ENE program have been designated automatically for it by virtue of the administrative application of criteria set forth in General Order Number 26. Relying in part on what it learned during two stages of experiments, described below, the court has developed criteria for identifying the kinds of cases that it believes are likely to benefit most from the ENE procedure. Class actions are not designated for the program, in part because of the unusual procedural constraints on such actions and in part because the assigned judge is compelled to play such an active role in the case development process from the outset. Cases in which the principal relief sought is equitable, other than declaratory relief actions involving disputes between claimants competing for insurance proceeds, or in which one or more of the parties are proceeding *in pro se*, also are not designated for ENE. Similarly, cases that are compelled to participate in the court's nonbinding arbitration program are almost never designated for ENE.²¹ The arbitration program reaches contract and personal injury matters in which damages do not exceed \$150,000, exclusive of any punitive award that might be entered and of interest and costs. After disqualifying the cases to which any of the foregoing criteria apply, the court automatically orders into ENE *every other case* that falls within any one of the following subject matter categories, as identified by counsel on the Civil Cover Sheet

²¹ Judicially hosted settlement conferences are conducted in some cases that have been designated for ENE. In some cases, the parties who have been through the ENE program ask the court to provide a settlement conference, and in some cases the assigned judge orders such parties to participate in a settlement conference, usually hosted by a magistrate.

that must be filed with every complaint: insurance, Miller Act,²² negotiable instrument, stockholders suits, "other contract," contract product liability, motor vehicle, motor vehicle product liability, "other personal injury," personal injury product liability, "other fraud," employment civil rights, copyrights, patent, trademark, antitrust, RICO, and securities/commodities/exchange.

In deciding not to compel cases that fall into other subject matter categories to participate in ENE, the court took into account not only its judgments about the types of cases likely to benefit most from ENE, but also the administrative burdens that trying to service additional categories of cases would impose on court staff, the difficulty of establishing a sufficiently large pool of evaluators who could qualify as experts in the subject area—this could be an almost insurmountable problem with respect to esoteric subject areas in which only a few cases are filed annually, and the projected difficulty of finding evaluators without conflicts of interest.²³

Applying the criteria set forth in General Order Number 26 results in between 20 and 40 civil cases per month being designated for ENE. This represents some five to 12 percent of all monthly civil filings.²⁴ It appears that an ENE conference will be held in no more than about half of the matters so designated. This substantial attrition rate is a result of many factors: some cases are voluntarily dismissed or settled prior to the ENE conference; some matters are removed from the program on motion of one or more parties, for example, because resolution of the matter cannot be achieved until disposition of a closely related case that is pending in another jurisdiction, some matters are removed from the program administratively because the clerk's office erred in applying the criteria of General Order Number 26, and yet other matters leave our court pursuant to remand orders. Given the high rate of attrition, we expect ENE sessions to be held in about ten to 15 cases per month.

²² 40 USC § 270(b) (1988).

²³ Disqualifying conflicts of interest could arise, for example, if the proposed evaluator were currently in litigation involving a lawyer who would appear before him at the ENE conference. Conflicts of interest are especially likely to surface with respect to subject areas where there is a significant amount of litigation but where such specialized knowledge is required that there are only a limited number of local lawyers or firms who actively practice in the field, for example, tax litigation.

²⁴ These figures do not include certain categories of cases that tend to be handled outside the adjudicatory mainstream, like government efforts to collect student loans, reviews of administrative dispositions of social security matters, and habeas corpus petitions.

C. Does ENE Work? On Balance, Does the ENE Procedure Deliver Benefits to the Parties That Are Sufficient to Justify the Resources That They, The Evaluators and the Court Commit to This Program?

Given the relatively modest number of cases per month in which ENE conferences are held, this program is not likely to become a major force in docket reduction, although its contribution to that end may be larger than might at first blush appear because some of the dismissals and settlements that occur prior to ENE sessions may be caused by the imminence of such a substantial external event. Docket reduction, however, never has been a primary purpose of ENE. From the outset, this program has been designed to deliver service to the users of our court: the litigants themselves. Our primary goal has been to provide litigants of good faith with a means for reducing the cost and improving the rationality of the process by which their cases are resolved. And while we cannot measure precisely how much ENE contributes toward these ends, we have substantial reason to believe that in most cases what the procedure delivers to litigants is clearly sufficient to justify the resources committed to it.

From the time the task force first began evolving the ENE idea, the court has insisted on careful experimentation accompanied by substantial efforts to collect and analyze data about the effects of the ENE procedure. After reviewing the task force's initial design of the procedure, the court decided to launch a very modest experiment, called a pilot program, to determine whether there was any real world promise in ENE and, if so, to identify any significant bugs in the system. In 1985, the court selected about a dozen cases, representing a broad range of civil matters, for participation in the pilot program. The court also arranged to have Professor David I. Levine of the University of California, Hastings College of the Law, monitor the progress of the assigned cases and analyze the effect of ENE on them. Professor Levine attended six ENE sessions. Then, for all of the cases that had been designated for this initial experimental stage, he conducted in-depth interviews of the participants, lawyers, clients and evaluators, learning in this way the views of 50 of the 57 people who had direct contact with the procedure.²⁵

²⁵ See David I. Levine, *Early Neutral Evaluation: A Follow-up Report*, 70 *Judicature* 236 (1987).

Professor Levine's findings about the effects of the program, and his report about the opinions of the lawyers and clients who participated, were sufficiently promising to persuade the court to launch a second, much more ambitious experimental stage of the new program. After making adjustments based on what was learned in the initial pilot phase, the court launched what came to be called the "100 case experiment" in mid-1986. In this second stage of experimentation, the court designated for inclusion in the ENE program about 150 lawsuits, but attrition resulted in ENE sessions being held in only 67 cases.

Supported by a grant from the National Institute for Dispute Resolution, Professor Levine conducted a more elaborate analysis of this second experimental stage. In addition to tracking what happened to the cases, he and his research assistants collected, through both written questionnaires and substantial telephone interviews, data and opinions from evaluators, litigators, and clients. He has reported the results of his research much more fully in other publications than is feasible here.²⁶ For present purposes, it will suffice to highlight the data by which the court was most impressed when it voted, in 1988, to make ENE a permanent program.

Among the data and opinions Professor Levine reported, probably the most significant was the fact that almost 90 percent of the lawyers whose cases had been compelled to participate in ENE expressed the view that the program should be expanded to more cases in the federal court. Thus, it appears that nine out of every ten of these lawyers believe that ENE can be a productive, useful procedure. Responses to other questions posed by Professor Levine and his associates exposed the lawyers' opinions about the ways that ENE contributed most: 77 percent felt that the evaluators made useful contributions to the parties' understanding of the case, 75 percent felt that the evaluators helped counsel identify the key issues, 68 percent felt that the ENE procedure contributed to settlement negotiations,²⁷ and 60 percent felt that ENE improved communications across party lines.

²⁶ David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J Dispute Res 1; David I. Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 *Judicature* 235 (1989); David I. Levine, *Early Neutral Evaluation Works*, 2 ADR Report 278 (Part One) and 294 (Part Two) (BNA, 1988).

²⁷ Responding to the mailed questionnaire, to a different question, and when less time had elapsed since the ENE session, 58 percent of lawyer respondents opined that ENE improved "prospects for settlement." Levine, 1989 J Dispute Res at 9.

Professor Levine's data also indicated that the ENE procedure was likely to contribute a great deal more to certain important pretrial goals than the judges' initial status conferences. Comparing their ENE session to the way they have experienced initial status conferences in the Northern District,²⁸ 95 percent of the surveyed lawyers felt that ENE contributed more to communication across party lines, 83 percent felt that ENE contributed more to issue clarification, 88 percent felt that ENE contributed more to prospects for settlement, and 73 percent felt that ENE contributed more to setting the groundwork for cost effective discovery. These assessments suggest that much that could be accomplished early in the pretrial period is not being accomplished at the typical initial conference that Federal Rule of Civil Procedure 16 requires the judges to conduct. While I will explore the several factors that might explain why ENE might be so much more productive than the typical Rule 16 conference in a subsequent section, it is sufficient to note here that the evaluators devote much more time per case to their conferences than the resources of the judges would permit.

While promoting settlement never has been the primary objective of the ENE program, in part because it seems unrealistic, in many cases, to expect settlement at a conference that takes place *early* in the pretrial period, it is noteworthy that 25 of the 67 cases (37 percent) in which an ENE session was held during the second experimental stage of the program settled either at the ENE conference or as a direct result of it. The court also is confident that some of the additional settlements or dismissals that occurred after cases were assigned to ENE but before the conference was held were attributable, at least in some measure, to the imminence of the ENE session and to the pressure to come to terms with the case that preparing for such an event entails. And while very preliminary data from the cases assigned to ENE since November of 1988 suggests that it is quite unlikely that more than 20 to 25 percent of the cases will settle at the ENE session itself, it is clear that litigators believe that the ENE process can make many significant contributions indirectly to prospects for achieving settlement,

²⁸ What happens at the initial status conference can vary dramatically from judge to judge and case to case. In some instances, the judge's courtroom deputy simply announces dates for completion of discovery, filing motions, conducting the final pretrial conference and commencing the trial. In other instances, the judge conducts extensive conversations with counsel aimed at eliminating unimportant or uncontested issues and developing a plan for streamlined preparation of the case for disposition by motion, settlement or trial.

for example, by clarifying the issues, improving communication across party lines, and assuring that the question of settlement is raised early in the pretrial period, when cost effective plans can be made to develop the information counsel need to set the case up for productive negotiations.

Just under half (47 percent) of the litigators polled in Professor Levine's study believed that the ENE process, as implemented during the second experimental stage, reduced the overall cost of litigating their case. The accuracy and utility of these opinions is subject to considerable doubt. The reliability of judgments on this matter is seriously threatened by, among other things, lawyers not being able to compare the expenses that were actually incurred in the case to the expenses that would have been incurred if there had been no ENE program. Since the dynamic that determines the course of each federal civil suit is the product of such a complex set of variables, many of which are unique to particular cases, for example, the personalities and extra-litigation agendas of the parties, it is impossible to compare with confidence the route to disposition of any two matters. Thus, the opinions expressed by the litigators in Professor Levine's study are of only marginal utility in determining whether, in most cases, ENE helps litigants save money.

Even if the court were to take these opinions about cost at face value, it is not clear what conclusion they would support. Should the glass be viewed as half-empty or half-full? From one perspective, having only 47 percent of the lawyers report that the net effect of the ENE procedure was to save their clients money is evidence that the program is not achieving in a sufficient number of cases one of its primary goals. From a different perspective, however, one could argue that a program that reduces the cost of litigation in almost half the cases is quite successful.

Perhaps what is most significant is that Professor Levine's research team did not uncover any substantial support for the view that the burdens of participating in the ENE program outweighed the benefits it delivered. Similar positive inferences about the net value of the program to its users are supported by the reports from the evaluators who conducted ENE conferences between November 1988 and February 1990. These reports, which are completed on standardized forms, ask the evaluators whether "[o]n balance, [they] believe that the ENE procedure resulted in benefits to the parties sufficient to justify the resources that the parties and [the evaluator] devoted to the ENE process?" Of the 150 reports received from evaluators by late March 1990, only ten (about seven

percent) indicated that ENE had not delivered enough to the litigants to justify the resources it had consumed. Thus, in over 90 percent of the cases, the evaluator, who devoted at least several hours to the process without compensation, emerged feeling that it was worthwhile. Of course, evaluators have some interest in assessing the value of their own work positively, but since doing this work imposes on their time substantially, it is not likely that they would in essence endorse continuation of the program unless they believed it was delivering something of real value. Taken together, the results of Professor Levine's surveys and the reports from the evaluators suggest that ENE is making significant contributions to the *quality* of the dispute resolution process, especially to the clarity of understanding of issues and to communication across party lines, even if we cannot be confident that it is causing significant cost savings in a majority of cases.

The data that Professor Levine generated suggested two areas in which the ENE process, as conducted during the second experimental stage, was falling appreciably short of the designers' goals. In cases that did not settle as a direct result of the ENE session, it appears that the evaluator helped the parties fashion a discovery plan only in about 40 percent of the cases. The percentage of unsettled cases that emerged from the ENE session with formal stipulations of fact or law was even lower. These disappointing results may be attributable to two factors: (1) inadequate emphasis during the training of the evaluators on these important objectives and (2) the psychological fact that there is a strong sense of anti-climax and a false sense of completion or closure after the evaluator presents his or her ultimate judgment about the likelihood of liability and the probable range of damages. After the second experimental stage exposed these problems, the court revised its training of evaluators to alert them to these dangers and to stress the importance of helping the litigants produce a discovery plan and to hammer out stipulations before concluding the ENE conference.

Finally, it is important to note that the most important contribution ENE makes may well vary with different kinds of cases. Large, complex cases are not likely to settle at the first ENE session. Rather, in these kinds of cases we would expect ENE to contribute most to communication across party lines, issue clarification, and case development planning. In smaller, less complex matters, by contrast, ENE's greatest contribution likely will be to helping achieve, or at least laying the groundwork for, an early settlement.

D. How Does the ENE Program Measure Up against Criticisms of Court-Sponsored ADR?

1. *Does ENE Represent an Abdication of the Judicial Function?*

Is ENE promoted by lazy judges whose real objective is to avoid work that they should be doing? ENE is not the brainchild of judges but of lawyers. While former Chief Judge Peckham appointed the task force to look for ways to reduce the cost burdens that federal litigation has imposed on litigants, he played no role at all in designing ENE itself. Nor did any other judge. The concepts at the center of the program, and all of its principal rationales, were conceived by a subcommittee composed of lawyers and one law professor, who subsequently became a magistrate. It also is worth noting that when the court decided to make ENE a permanent program there was no solid basis for assuming that this procedure would significantly reduce docket pressures. While the experimental stages had shown that ENE could deliver valuable services to litigants, they had not shown that the program had the capacity to increase overall settlement rates or to reduce the resources the court committed to cases before they were terminated. Moreover, limits in the pool of qualified evaluators and in the court's administrative resources meant that only a modest number of cases could be designated for ENE annually. The court expected evaluation sessions to be held in about 250 cases per year. That figure represents a small percentage of the annual civil filings in the Northern District.

Moreover, the lawyers who designed ENE considered at some length, and at various stages in the evolution of the program, whether the role that the evaluators were being asked to play should be played by judges or magistrates instead of by private lawyers serving in effect as special masters. Several considerations supported the subcommittee's conclusion that this role should be played by private lawyers. First, the subcommittee recognized that neither judges nor magistrates were likely to be in a position to devote the substantial time to this role that would be required. It was expected that the evaluators would devote about five hours to each ENE assignment, divided among preparation for the first session, hosting that session, and completing any follow-up to which the parties might agree. As the program has evolved, many evaluators devote substantially more than five hours to cases in which they serve. The lawyers on the subcommittee felt that judges and magistrates, whose resources already were strained by the tradi-

tional demands of their jobs, could not reasonably be expected to devote this amount of time to the ENE program. The committee also felt that private lawyers might be specially energized by the opportunity to step out of their day-to-day adversarial shoes and to play this obviously constructive, quasi-judicial role. Thus, members of the bar, serving as evaluators in no more than two cases per year, might bring a level of enthusiasm and commitment to this special role that at least some judges might have trouble mustering.

Independent of these practical problems, which might be surmountable by making adjustments in kinds of work allocated among judicial officers, there were several additional substantive considerations that pointed toward the same conclusion. The subcommittee felt, for example, that it often would be inappropriate for the assigned judge, in an off-the-record proceeding early in the pretrial period, to be as candid with the parties about the strengths and weaknesses of their positions as would be useful in an ENE session. It obviously is important that the parties have confidence in the impartiality and open-mindedness of any judicial officer who is compelled to rule on contested matters or preside at trial. That confidence could be jeopardized if a judge rolled up his or her sleeves early in the pretrial period and offered frank assessments of the merits.

A closely related consideration focused not on the parties' perceptions, but on the fear that in some cases the ENE process might in fact adversely affect the impartiality and open-mindedness of the judge. The host of an ENE conference might learn emotionally charged or otherwise significant things about the parties that would be wholly irrelevant at trial, or might be exposed to evidence that would never be admissible. There also is a chance, of course, that the neutral person at the ENE session would form opinions about the merits of the case based on incomplete information or a seriously underdeveloped record and would become unreasonably wedded to premature views. The consequences of thus contaminating, or appearing to contaminate, a judge, are substantially greater than are the consequences of contaminating or appearing to contaminate a private lawyer who will have no power to affect the outcome of the case.

The subcommittee also was concerned that if a judicial officer hosted the ENE session, the parties and lawyers would be much more likely to fear some form of retaliation by the court if they did not agree with the evaluator's assessments and accept his or her recommendations. The subcommittee did not want to risk any ap-

pearance of coercion in a program whose goals were to create opportunities for the forces of reason, communication and good faith to play the determinative roles. Similarly, there was a concern that parties and lawyers might be less forthcoming with a judge or magistrate serving as the evaluator than with a private attorney. The concern was not that people were more likely to lie to a judge or magistrate—in fact, people may be less likely to lie to a judicial officer—but that they would play their evidentiary and settlement cards closer to their chest, thus reducing the value of the ENE session. Several factors might converge to make people less forthcoming with a judicial host. One is fear of the judge or magistrate's power to affect the outcome of the case. Not knowing how the judge might react to different kinds of argument and evidence, and apprehension about how he or she might wield power at subsequent stages of the litigation, could inspire parties and lawyers to be very cautious about what information they put on the table at an ENE session. The formality and intimidation of the courthouse environment, as compared to the relative informality of a private law office, might have a similar effect. It also was felt that lawyers might be more likely to posture before a judicial officer than a neutral attorney, simply because posturing seems to be a conditioned response of some lawyers to judges.

A final consideration supporting the decision that it would be wiser to have private lawyers play the role of evaluator in the ENE program was the expectation that, in some cases, private lawyers might be able to bring considerably greater subject matter expertise to the conference table. Judges are generalists. Some private lawyers, by contrast, devote large percentages of their time to specialized areas of practice and develop expertise in esoteric fields. One of the distinguishing features of the ENE program is its insistence on matching each case with an evaluator who has substantial expertise in the subject matter at the center of the suit. For example, only experienced patent attorneys serve as evaluators in patent cases. For cases not based on relatively straightforward contract or tort theories, an evaluator with subject matter expertise might be able to contribute more at the ENE session than some generalist judges. All of the factors described here supported the committee's decision to recommend that experienced, highly regarded private attorneys, rather than judicial officers, host the ENE sessions.

Thus, one argument against the contention that the ENE program represents an abdication of the judicial function is that many of the functions performed by evaluators are not appropriately cat-

egorized as "judicial." Among other things, there is an avuncular, advice-giving, assistance-offering dimension to the evaluator's role that does not fit traditional conceptions of judicial behavior. On the other hand, it is obvious that evaluators address many matters that also are addressed by judges in the formal adjudicatory setting. Thus, it is fair to ask whether, through the ENE program, judges abdicate some of their responsibilities by delegating them to the evaluators.

At one level, the answer to this question clearly is "no." This answer is based on the fact that none of the evaluators' recommendations for case development planning and none of their opinions about the merits of the parties' positions are to be communicated to the assigned judge. Thus, the judge cannot expect to use the evaluator's work. Instead, the judge retains the full scope of case management responsibilities that he or she would have even if no ENE program existed. The evaluator's suggestions can be incorporated formally into a pretrial order governing a particular case only if all parties agree with them, join in a request (through written stipulation) that the court adopt them, and the judge decides to accept them. Thus far, in the history of the ENE program, we have not seen evidence that this scenario is being played out in even a modest percentage of the cases. It does appear that ENE leads some parties to agree informally on means of sharing information and on discovery and motion schedules, but these off-the-record agreements seem to remain largely invisible to the assigned judge. Thus, in fact as well as in theory, the existence of the ENE program does not relieve judges of their case management responsibilities.

On the other hand, it is disturbing to note that so many lawyers believe that the judges' initial status conferences, as typically conducted, are likely to contribute less than ENE sessions to communication across party lines, issue clarification, prospects for settlement, and laying the groundwork for cost-effective discovery. During its experimental stages the ENE program reached such a small percentage of the cases on the court's docket that one could not plausibly argue that shortcomings in initial status conferences were attributable to the existence of the ENE program, for example, to expectations by judges that evaluation sessions would take care of matters not adequately covered at the status conferences. It is arguable, however, that we should proceed circumspectly when adopting programs that, over time, might have the effect of reducing pressure on judges to make their initial status conferences events that contribute significantly to the case development pro-

cess. While it is by no means clear that even a substantially expanded ENE program would affect the way Article III judges perform their jobs, policy makers should keep the concern raised here in mind as they monitor the way ENE works into the court's system over the years.

There is an additional dimension to the concern about abdication of the judicial function that warrants discussion here. In theory, the public appointment processes by which judges and magistrates get their jobs provide some assurances about the qualifications of these judicial officers. The appointment process is supposed to include examination into the experience, intellect and character of prospective judicial officers. Reviews by bar association committees and/or merit selection panels, as well as investigations by the FBI and IRS, normally precede judicial appointments. These processes offer at least an appearance of "quality control" that is an important part of maintaining public confidence in the Third Branch. Thus, it would threaten important social values if a court-sponsored ADR program did not include meaningful measures designed to assure that the people playing the neutral roles were well-qualified.

There are several ways in which the ENE program tries to assure quality control in evaluators. The court began the process of building the pool of evaluators by asking each judge and magistrate to nominate experienced lawyers who had appeared before them, performed ably, and seemed to possess the requisite qualities of temperament and judgment. The memoranda that asked for nominees emphasized the need for lawyers from a wide range of backgrounds and listed the many separate subject areas in which the program would need attorneys with expertise. Many judges and magistrates responded by submitting the names of lawyers whom they believed to be well-qualified. Nominees also were solicited from the members of the court's task force. After the program became more visible in the community, the court began receiving unsolicited applications from lawyers who wanted to serve, without compensation, as evaluators. When a substantial list of nominees was developed, it was circulated to all of the judges of the court, giving each an opportunity to suggest that any nominee might not be appropriate for the envisioned role. This process produced a list of experienced lawyers in whom the court had reason to have confidence. The Chief Judge then wrote to each nominee, explaining

the program and the demands it would impose,²⁹ then asking if the person was in a position to volunteer to serve. The vast majority of the almost two hundred lawyers so approached agreed to join the evaluator pool.³⁰

A commitment to serve as an evaluator included a commitment to be trained for the role. For the first two experimental stages of the program, all the evaluators came to the courthouse in person for several hours of instruction about the program and how to handle the evaluator role. The first group of about ten evaluators also attended a lengthy debriefing session in which each attorney shared his experiences with the others and the court, describing successes and problems and suggesting better ways to approach the process. The court used the learning of these experienced lawyers not only to make changes in the content of the ENE program, but also to design a training module that would anticipate the mistakes most commonly made by evaluators and that would identify the problems that were most likely to surface at ENE sessions and suggest appropriate responses. During the second stage of the experiment, the court actively solicited additional suggestions from lawyers who had completed ENE sessions. Armed with all this information, the court refined the training program into its current form, which has been recorded on videotape so that lawyers who are unable to attend the course in person may nevertheless complete the training prerequisite.

The court also provides each evaluator with a packet of written materials about the program, how to perform their roles effectively, and how to approach possible conflicts of interest. The packet also includes forms the evaluators may use in scheduling and structuring their sessions, as well as a questionnaire they are asked to complete and return to the court after the ENE conference has been completed. In sum, the court has in place systems for (1) training evaluators, (2) monitoring the progress of cases designated for ENE, (3) learning the results of the ENE sessions, and (4) generating feedback from evaluators, on a continuing basis, about how the system is working and how it might be improved.

Even with these systems, the court acknowledges that its system of "quality control" is imperfect. We have not built into the program, for example, an ongoing mechanism through which litigants and lawyers whose cases are compelled to participate in ENE

²⁹ The court promised that it would not ask lawyers to host evaluation sessions in more than two cases per year.

³⁰ As of this writing, there are about 155 evaluators in the pool.

can express their views about it. The court has established no direct means to learn if an evaluator inappropriately handles some aspect of an ENE conference. It is a virtual certainty that different evaluators set different tones and follow somewhat different formats in hosting sessions. Similarly, it is a virtual certainty that some evaluators will make errors of judgment in analyzing cases and in handling lawyers and parties—even with the public appointment process, of course, judges and magistrates make the same kinds of errors. Because there are real limits on the resources the court can devote to selecting, training and monitoring the performances of the evaluators, and because there are about 155 different human beings functioning in this capacity, there is more than a *de minimis* risk that, in some instances, the quality of evaluators' performances will be wanting. There may even be cases where, because of mistakes they make, ENE does more harm than good. Given the constraints within which a program like this must operate, the question is not whether quality control will be perfect, but whether its inevitable imperfections create risks that outweigh the benefits the program delivers. Based on the extensive feedback that Professor Levine acquired from the lawyers and litigants whose cases were ordered into the ENE program during its two experimental stages, the court has answered this important question in favor of ENE. Nonetheless, the court is committed to continuing to monitor the program, to sponsoring periodic studies by independent observers, and to modifying or abandoning ENE should significant negative evidence begin surfacing.

Is the purpose or effect of ENE to make it more difficult and more expensive for parties to get to trial or to pressure them to settle? It is absolutely clear that the court did not adopt the ENE program in order to pressure clients to settle their cases or to make access to a trial more expensive. While one of the purposes of the program is to provide litigants with a means for exploring settlement early in the case, evaluators are taught that they should work on settlement only if all the parties are interested in doing so and that they (the evaluators) have no power to compel negotiations. Evaluators also are taught that the center of the program is not settlement, but revolves around issue clarification, dispassionate analysis of the parties' positions, and case development planning.

Nor has any purpose of ENE ever been to make access to a trial more expensive. As emphasized earlier, the principal directive from former Chief Judge Peckham to the architects of ENE was to fashion a procedure that litigants could use to reduce the cost of resolving their disputes. Having participated intimately in every

stage of the design and implementation of ENE, I can affirm without qualification that reducing parties' costs, not increasing them, always has been a primary goal.

Nor are there other ways in which ENE serves as a barrier to trial. Unlike some arbitration programs in some courts, no penalties can be imposed on any party for proceeding to trial after an ENE session, regardless of the outcome at trial. Moreover, since the assigned judge is prohibited from learning either the evaluator's assessment of the merits of the case or his or her recommendations about discovery and motions, there is no opportunity for judicial retribution for a party's or lawyer's failure to accept an evaluator's opinion or recommendation.

2. *Is the Underlying Purpose of ENE to Reduce Governmental Involvement in Defining and Enforcing the Basic Rules of the Social Order?*

A response to this concern should begin by repeating two points made earlier: (1) the criteria that determine which cases are eligible for ENE assure the court and the public that the cases that are most politically sensitive or controversial, or that implicate values that are most obviously of general social concern, are not designated for ENE, and (2) the program is relatively modest in size, touching only five to 15 percent of the court's civil docket, and leaving completely untouched every other case in each subject matter category from which cases are designated for the program. Thus, even in the affected categories, every other suit proceeds toward disposition in the traditional manner. Moreover, class actions, most civil rights suits, cases that revolve around equitable relief, and most actions involving labor relations are not designated for ENE. And parties to actions that *are* designated for the program are free to ask the court to have their case removed from it. Thus, even with a robust ENE program, the court remains thoroughly involved in the process by which the rules of our society are refined and enforced.

Does ENE reduce pressure on Congress to fund federal courts at adequate levels? This might be a real concern if ENE were expanded so that it reached a larger percentage of the cases on the court's docket, and if it developed that the effects of ENE include an increase in the overall settlement rate or a reduction of the judicial resources expended on civil actions prior to their termination. ENE certainly involves an element of reliance on the private sector and could be perceived by policy makers as a means to cut crowded dockets without expending significant public funds. It re-

mains unclear, however, what effects ENE will have on settlement rates or on the amount of attention judges must devote to their cases before they are resolved.

In this connection, it is important to note that there may be significant limits on how large ENE programs can become. The success of ENE depends centrally on the quality and dedication of the lawyers who serve, without compensation, as evaluators. Even in major metropolitan areas, there are likely to be real limits on the number of litigators who are qualified—by experience, subject matter expertise, analytical ability and temperament—willing, and available to serve as evaluators. In smaller communities, by contrast, the growth of ENE programs may be limited by greater difficulty finding lawyers who would not be disqualified from serving by conflicts of interest.

Does the ENE program increase the likelihood that both the outcomes of disputes, and the processes by which they are resolved, will remain secret? The procedures that evaluators are taught to follow at ENE sessions are, of course, public knowledge. It is likely, however, that individual evaluators depart from the script more than occasionally. It is especially likely that there is a range of approaches to the settlement negotiations that occur in connection with some ENE conferences. Since the public is not invited to ENE sessions, it has no way of knowing what specific process was used in any given case. Similarly, if a settlement is reached that the parties decide not to put into the court record, it is not clear how the public could learn its terms. As noted in discussing the court's settlement program, however, the important question is whether ENE significantly increases the settlement rate in the categories of cases it reaches. As of this writing, we simply do not know.

At the risk of belaboring the obvious, however, I repeat that in the vast majority of civil cases the question is not whether settlement will occur, but how and when. The forces that determine *whether* a case will settle are quite powerful and probably operate in substantial measure independently of the procedures used to pursue an agreement. If that is true, the choice is not between public trial and private settlement, but between settlement through negotiations in which no neutral takes part and negotiations that are assisted by a neutral. If the neutral is experienced, bright, and has good interpersonal skills, I would argue that a process that is assisted by the neutral is likely to be superior.

How much concern we feel about the "privatization" of the dispute resolution process also should depend, in part, on the

kinds of cases we are talking about. The bulk of the cases ENE reaches involve fights between private citizens or corporations over money. While such disputes certainly have indirect implications that may be of some social significance, they usually neither implicate directly nor explicate meaningfully any important public policy issues. Moreover, even in the categories of cases that ENE reaches, every other lawsuit is excluded from the program and thus is left to be resolved under the traditional rules of litigation. And, as noted above, ENE simply does not reach many of the categories of cases in which the public interest is likely to be most acute. Thus, even if ENE does increase the settlement rate for the cases it touches, it leaves untouched the bulk of the most socially sensitive suits.

3. *Is the ENE Program Changing the Role of Judges or the Character of the Court?*

There is no evidence that the existence of ENE substantially affects how the judges spend their time or run their dockets. General Order Number 26 specifically commands the clerk of the court and the evaluators to "schedule E.N.E. events and administer the program in a manner that does not interfere in any way with the management of the action by the assigned judge." The General Order goes on to provide that "[n]o party may seek to avoid or postpone any obligations imposed by the assigned judge on any ground related to the E.N.E. program."³¹ Moreover, responsibility for all aspects of administration of the program is concentrated in one designated magistrate and a separate small unit of the clerk's office, with whom he works closely. That magistrate also hears in the first instance all requests for relief from any aspect of the rules that govern the program and is charged with responsibility for assuring compliance with the ENE rules. In the rare instances where compliance has been a problem, it is this magistrate who issues the order to show cause and recommends the appropriate response by the court. Thus, it is a rare day that any judge is called upon to take any action at all with respect to the ENE program. Clearly, ENE does not reduce the judicial resources that are available to perform traditional adjudicatory functions. If anything, ENE frees up such resources by encouraging better communication between adverse parties, clearer understanding of issues, cooperation in dis-

³¹ General Order No. 26, as amended January 1, 1990.

covery and motion practice, and serious consideration of settlement earlier in the pretrial period.

At a more subtle level, however, the existence of programs like ENE and nonbinding arbitration do affect the character of the court as an institution. It certainly is a departure from the traditional image of the passive/reactive judicial institution for the court to set up, administer and compel parties to participate in procedures where members of the private bar play key roles as neutrals, providing case evaluation and consulting services that substantially supplement the formal processes in which the judges directly participate. While members of the private bar have played significant roles in the judicial system for a long time—for example, as special masters, court appointed experts, and judges *pro tempore*—the Northern District's programs represent a degree of institutionalization of this basic idea that is new.³² By adopting several different programs, each substantial in character and each affecting a meaningful number of cases, the Northern District has converted itself from an essentially one-dimensional institution, where one formalistic process was applied routinely to the vast majority of civil actions, to a multi-dimensional institution that delivers several different packages of procedural services.

Moreover, by permitting litigants to volunteer their cases into any of its programs, the court has taken at least a small step toward a system in which parties and counsel can play meaningful roles in determining what kind of process is best suited to resolving their particular dispute. The court is encouraging counsel and client to acknowledge a greater range of procedural choice and, with that, to accept more responsibility for thinking, actively, about how best to work toward disposition of their actions. The court is encouraging lawyers and litigants to perceive themselves less as helpless procedural drones and more as active partners, sharing with the court responsibility to shape or select dispute resolution procedures that make sense. In short, the court is beginning to move away from procedural authoritarianism, sincerely inviting lawyers and clients to join in a cooperative search for the

³² Prior to reforms that took effect in 1912, the use of special masters in equity proceedings in federal courts was extensive and controversial. One important difference, however, between that use of masters and the Northern District's programs is that to a troublesome degree masters in the old equity system supplanted, rather than supplemented, the judicial role. See Wayne D. Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule in Managing Complex Litigation: A Practical Guide to the Use of Special Masters* 336-44 (American Bar Foundation, 1983).

fairest and most efficient ways to move cases toward disposition. A substantial and permanent change in this direction would represent a marked change in the judicial institution. It is not obvious, however, that changes in this direction are lamentable.

There is another, more controversial way in which the ENE program represents a departure from traditional ideas about the roles that judicial officers and their agents should play in litigation. It is arguable that evaluators are likely to penetrate earlier and deeper than most judges into (1) decisions by counsel and client about the pacing of case development, (2) the relationship between counsel and client, and (3) the dynamic across party lines between opponents. Among these three areas, the gap separating judges from evaluators is smallest with respect to interference with private decisions about the pacing of case development. Fixing schedules and deadlines, and pressing parties to quicken the pace of preparing matters for trial, is probably the area in which most federal judges are most active as case managers. Even so, ENE usually adds significant case development pressures. General Order Number 26 compels parties to effect service within 40 days, requires court approval for any stipulation that would extend the time to respond to pleadings, and commands that the evaluation session be held within 150 days of the filing of the complaint. While parties more than occasionally petition for relief from these constraints, it is clear that ENE forces on most litigants a faster pace for case development than they otherwise would adopt. Further, the nature of the ENE conference generates considerably more pressure on counsel than a typical initial status conference. Counsel know that at the ENE session they will be required to explain, in English rather than in "pleading-ese," their clients' positions and to present evidence in support of them. They know that their client, opposing counsel and the opposing party will be there, watching them perform. They know that their presentation will be compared, by everyone present, to opposing counsel's presentation. They know that the evaluator will ask probing questions and will articulate an assessment of the relative strengths and weaknesses of the parties' positions. They know that these assessments will become significant factors in subsequent efforts to settle the case. They also know that the evaluator will make recommendations about discovery and motion practice that could affect positions their opponents take on these important matters. Knowing all this, counsel are likely to feel considerable pressure to prepare well for the ENE conference. And since that conference is likely to occur relatively early in the pretrial period, the ENE program may well

interfere substantially with counsel's freedom to fix the pace of case development. The reasoning that persuaded the task force and the court that this kind of interference is justified is set forth in the section describing why the court adopted the ENE program. It will suffice here to note that the court felt delays and expenses that could be avoided would continue to plague the system if control of the pace of case development was left in the hands of overcommitted lawyers and their clients, some of whom have been known to look for ways to put off the day of reckoning.

An even more controversial aspect of ENE is the opportunity it creates for evaluators to penetrate and interfere with the relation between a lawyer and his client. Evaluators may ask probing questions, expose holes in arguments and deficiencies in evidence, frankly compare the strengths and weaknesses of the parties' positions, suggest new perspectives from which to view the evidence or new theories on which to prosecute or defend the case, predict outcomes at trial, and urge the parties to consider terms of settlement that neither had put on the table. There is more than a slight risk in all of this that a client will hear important things for the first time from the evaluator, or that the evaluator, who is presented by the court as an expert in the subject matter of the litigation, will offer opinions or make suggestions that contradict advice a lawyer has given his client in private, or that a lawyer will be embarrassed in front of his client because he is not able to respond adequately to questions the evaluator asks or to negative comments the evaluator makes about his client's case. There is a risk that in crucial capacities the evaluator will displace the lawyer in the client's eyes. These are potentially serious intrusions into the lawyer-client relationship. We have no evidence that they occur often in ENE sessions. And the fact that we have heard no complaints about such matters from the bar suggests that these issues may be more theoretical than real. If it developed, however, that intrusions of this kind occurred often in ENE conferences, deciding whether they could be justified would be a difficult task. The court and the members of the bar who advise it would be forced to balance quite different competing values. The result of any such balancing would depend, in part, on the severity of the intrusion problem, on the one hand, and, on the other, the magnitude of the benefits ENE delivered to fairness and efficiency.

The third arena that evaluators might penetrate more than judges is the relationship across party lines, between the opposing sides. An evaluator who performs all the tasks the court asks of him in an intellectually active manner might well alter the balance

of power that would exist between the parties in the traditional litigation environment. By examining the two most difficult ethical questions an evaluator might face we can expose some of the dimensions of this issue. In the training program, we ask evaluators to consider what they should do if, during an ENE conference, they perceive a legal theory, a line of argument, a defense, or a possible source of evidence that none of the lawyers or clients have mentioned. An evaluator who takes the initiative to interject any such matter might dramatically affect the course of the litigation, or might deprive one of the parties of an advantage that it would have kept but for the ENE session.

While the court as a whole has taken no position with respect to whether an evaluator should take this kind of initiative, the magistrate who conducts the training sessions suggests that an evaluator should point out the undisclosed theory or source of evidence if he or she firmly believes that justice would not be done if that theory or evidence were not interjected into the case. This suggestion is inspired by the belief that courts are ultimately in the business of doing justice and that, on the civil side of the docket, justice is more likely to be done if all of the important legal and evidentiary avenues are followed. It would be unseemly for an agent of the court to purport to offer a candid and systematic assessment of a case but not disclose a theory or a source of evidence that he or she thought should play a significant role in determining its outcome. By making this suggestion, the magistrate elevates the value of achieving the legally correct outcome over the values of punishing lawyers who are inept or who have not fully understood their case and over any value that might attach to preserving advantages that "naturally" more clever or better prepared lawyers might enjoy. The magistrate's recommendation also is inspired by a recognition that even diligent, bright lawyers cannot be expected to think of every legal angle or every source of evidence in every case. Full, reliable thinking about legal problems can be an immensely complex task. It is almost always best done when more than one person thinks hard about the same set of issues and when there is an active dialogue between minds with strong incentives to make the explication complete. It follows that an evaluator who decided not to expose an important theory or source of evidence would not necessarily be punishing a lawyer who was inept or underprepared, but would be damaging the quality of the adjudicative process.

The second difficult ethical dilemma an evaluator might face would arise if a party and his lawyer appeared to be prepared to

accept terms of settlement that the evaluator firmly believed were quite unfair. This is a dilemma that any neutral host of settlement negotiations might confront, including judges. The ENE training program, as conducted in the past, has not directly discussed this issue. Clues about how the bar is likely to feel about this topic are available in responses to the ABA survey of litigators' views about the roles judges should play in settlement negotiations. By upwards of a two-to-one margin, most litigators indicated that it would be improper for a judge who was hosting a settlement conference to take steps to encourage a party to reconsider its position if that party was about to accept a settlement that the judge believed was clearly unreasonable.³³ The court has taken no position with respect to whether this majority view should determine how evaluators handle this difficult dilemma. The court's inaction results from the fact that it has no evidence that evaluators have actually confronted this situation or, if they have, that lawyers or litigants have been upset by the way they have handled it.

The fact that the court has not received complaints that evaluators are intruding into lawyer-client relationships or are upsetting the balance of power between opponents does not mean that the issues raised here can be ignored. The ENE program clearly creates risks to values to which some members of the bar ascribe great weight, values centering on the autonomy of lawyers and on holding to a minimum the role neutral or public forces should play in determining the results of lawsuits or settlement negotiations. It is significant, however, that ENE was designed by litigators, not judges, and that it was at the behest of members of the private bar, not government officials or judicial administrators, that the court adopted this program. It also is significant that upwards of 90 percent of the lawyers whose cases were forced into the program during its second experimental stage favored expanding it to more cases in federal court. Thus, it appears that a significant segment of the bar either is not as enamored of autonomy values as we might have assumed or has concluded that ENE poses only a modest threat to these values, a threat that is clearly outweighed by the benefits the program is capable of delivering.

³³ Brazil, *Settling Civil Suits* at 139 (cited in note 3).

4. *Is There Bias or Discrimination in Determining Which Cases are Designated for ENE?*

Political considerations played no role whatsoever in the process by which the task force and the court developed the criteria for designating cases for ENE. Instead, these criteria are based largely on lessons learned during the experimental stages of the program and limitations in the program's resources.

The task force recommended, and the court decided, to exclude cases involving *pro se* litigants because, during the experimental stages, parties who were not represented by lawyers seemed to have a great deal of difficulty understanding the purpose of the ENE session and how it fit into the overall litigation scheme, appeared not to understand the case assessments offered by the evaluators, and seemed to feel a greater need than represented parties to appear before a "real judge" in a "real courtroom," either for cathartic purposes or to feel some confidence that their rights were not being compromised.

The court decided to exclude cases in which the principal relief sought is equitable, except certain declaratory relief actions arising out of disputes over insurance coverage, on the theory that such cases were more likely than others to require decisions of law by the court and that they often would receive, early in the pretrial period, closer judicial attention and management than other civil matters. It seemed to follow that in such cases there would be less need for the kinds of services ENE could provide and a greater risk that the program could not deliver sufficient benefits to justify the burdens that participation would entail. These considerations also contributed to the court's decision to exclude from ENE most matters arising under labor laws.

Similarly, the task force recommended excluding many kinds of civil rights actions based on (1) a judgment that the parties are more likely in these cases than in others to need or want a formal pronouncement from the judiciary on a legal issue or matter of public policy, and (2) a belief that there is an especially acute need to preserve public confidence in the judicial process in such matters. ENE could pose some threat to these values because private lawyers, rather than judges, play the neutral role and because of the confidentiality that accompanies the ENE conference. The court's decision not to exclude employment-based civil rights cases was predicated in part on experience with such matters in the experimental stages of the program, where ENE made significant contributions in some actions of this kind, and in part on the fact that in many instances plaintiffs in such cases also rely extensively

on common law contract and tort causes of action, matters to which ENE has proved well suited.

In selecting categories of cases to presumptively include in ENE, the court sought to assure that the program serviced a substantial number of the kinds of cases that are most common on the court's docket and in which traditional litigation processes seem to consume a great deal of the parties' resources. Thus, the court decided that most cases based on contracts or personal injuries should be eligible, unless they involved less than \$150,000 in damages and therefore qualified for inclusion in the arbitration program. The court also decided to make eligible cases sounding in antitrust, securities, common law fraud, patent, copyright, or trademark. Most of the larger cases on the court's docket fall in these categories. The court felt that containing litigation expenses can be especially difficult and important in larger cases, and, therefore, that contributions ENE might make to streamlining or rationalizing the case development process might be especially significant in such matters.

The preceding paragraphs should make it clear that the court is not channeling unpopular or politically controversial categories of cases into ENE. Given concerns that inspire some critics of ADR generally, it is significant that the court does not designate for the ENE program prisoner petitions, cases arising under 42 USC § 1983, other civil rights cases that challenge governmental conduct based on constitutional or statutory norms, cases involving *pro se* litigants, social security actions, or government collection matters, for example, student or veterans administration loans. The ENE program simply is not vulnerable to charges that it is designed to discourage the filing of unpopular kinds of cases, or to push them out of the judicial mainstream, or to assure that they receive less public attention and fewer public resources than commercial disputes. If anything, ENE has the effect of freeing up more public judicial resources to devote to the non-commercial cases. Ironically, a criticism that might be more apt is that the case selection criteria deprive some of the controversial or politically sensitive cases of benefits that the court confers, through ENE, on the mainstream cases that involve only money.

5. *Is ENE a Second-Class Procedural Device, Promoting Second-Class Justice?*

I will not repeat here the comparison between disposition by settlement and disposition by trial that I offered in the discussion of the court's settlement program. Nor is it necessary to repeat the

comparison between settlements reached with the aid of an experienced neutral with those reached without such assistance. It will suffice here to point out that the principal purposes and the apparent effects of ENE are to improve the quality of the communication, information and analysis on which the parties base their litigation decisions. The surveys Professor Levine conducted showed that most lawyers who had been exposed to ENE believed that the process added to their information supply, improved their understanding of the issues, provided them with new insights and a fresh perspective, and enhanced communication across party lines. Moreover, 79 percent reported being either very satisfied (40 percent) or somewhat satisfied (39 percent) with the procedure. Eleven percent were somewhat dissatisfied and ten percent were very dissatisfied. More significantly, 79 percent felt that the procedure was "very fair", another 11 percent felt that it was somewhat fair, and only six percent felt it was either somewhat unfair or very unfair. Ninety percent reported that there was no bias at all on the part of the evaluator, and 93 percent felt that the evaluator had been either well prepared (54 percent) or adequately prepared (39 percent). It also is significant that almost 90 percent of Professor Levine's lawyer-respondents felt that the ENE program ought to be expanded to more cases. In the face of these figures it is difficult to take seriously an argument that ENE is a second-class procedural device to which parties feel relegated by an insensitive court.

In assessing concerns about "second-class" procedures it also is important to bear in mind that no one is bound by any of the results of any ENE conference, and that the court charges no fee for the service that ENE represents.

While an evaluator's opinions about likelihood of liability and probable range of damages are less likely to be reliable than the findings of a judge or jury after a full trial, those opinions, and the other information generated during an ENE conference, should increase the reliability of judgments about the case made by the litigators and clients. Since it is those judgments that play the decisive roles in the disposition of most cases, ENE sessions should have the effect of increasing the reliability of results in that vast majority of cases that are disposed of without trial. Similarly, if the alternative is a private negotiation without input from a neutral person, the ENE procedure offers substantially better protection against the distortion of results that can be caused by imbalances in the resources or skills of the lawyers or parties.

ENE also fares well when assessed in terms of other measures of the value of dispute resolution procedures. It can reduce the

cost and speed the pace of disposition. It tends to expand the range of solution options for the parties to consider. It empowers clients by insisting that they be present during the proceedings and by permitting them to play major roles in the presentation of their cases. It encourages counsel and parties to adopt a more openly communicative, cooperative posture, both during the litigation and after its conclusion. It gives litigants and lawyers increased opportunities to use the creative and constructive sides of their personalities. It emphasizes reason as a predominant value in resolving disputes. It exposes litigants and lawyers to much less stress than a trial, perhaps even to less stress than private settlement negotiations, where indirection, posturing and "power plays" are more likely because of the absence of a knowledgeable neutral. In the settlement component of the ENE program, litigants may take into account many factors that would not play a role in determining outcome at a trial, like a defendant's cash flow problems. Thus, by all of these measures of value, ENE arguably is superior to disposition by trial or by private settlement negotiations.

III. NON-BINDING ARBITRATION UNDER LOCAL RULE 500

A. Why Was This Program Set Up?

The Northern District was one of three federal trial courts³⁴ that adopted similar experimental arbitration programs in 1978 in response to an initiative by the Office for Improvements in the Administration of Justice ("OIAJ"), a special unit of the Department of Justice that Attorney General Griffin Bell created in 1977. Attorney General Bell had been inspired by proceedings at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference") and by the work of its follow-up task force, which he chaired.³⁵ He directed the OIAJ, headed by Assistant Attorney General Daniel J. Meador, to develop plans that interested district courts could follow in adopting arbitration programs. Meador assigned Deputy As-

³⁴ The other two courts were the Eastern District of Pennsylvania, whose robust program continues into the present, and the District of Connecticut, which replaced its program in the early 1980s with other procedures designed to streamline dispute resolution and encourage settlement in a broad range of cases. See E. Allan Lind and John E. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (Federal Judicial Center, 1981).

³⁵ *Id.* at 1-2.

sistant Attorney General Paul Nejelski to serve as the chief staff person involved in the arbitration project.³⁶

In initiating and carrying out the work on this project, Attorney General Bell and his staff at the Department of Justice were motivated by two different but complementary purposes: (1) to provide litigants with procedural means that would enable them to resolve smaller, less complex cases faster and at less expense than would be entailed if the matters were fully litigated to judgment, and (2) to reduce docket pressures on federal district courts.³⁷

Of these two purposes, it appears that the first was by far the more important. According to the first in a series of Federal Judicial Center studies of the programs that were established as a result of the Justice Department initiative, the "goals of court-annexed arbitration are to decrease the time and expense required to dispose of civil litigation, without diminishing the actual or apparent quality of justice."³⁸ That same study states that the "three federal district courts implemented these rules in the belief that it might be possible to improve upon the conventional procedures of civil litigation for substantial numbers of lawsuits, in order to reduce delay, expense, and procedural complexity not warranted by the matter in dispute."³⁹

In speeches delivered during 1977 and 1978, while the Justice Department was developing plans for arbitration programs and supporting legislation to extend their experimental adoption beyond the three original district courts, Mr. Nejelski declared that the OIAJ was "attempting to develop means of expediting the resolution of all disputes—major and minor—without reducing the quality of justice provided. . . . The organizing goal is 'to assure access to effective justice for all citizens.'"⁴⁰ In the same remarks, Mr. Nejelski urged that it was time to "stop calling the people's business junk and start realizing that 'minor' disputes are major disputes to the parties involved and, when taken collectively, constitute a major portion of the total workload. We need to devise

³⁶ Letter to the author from Professor Meador, May 8, 1989.

³⁷ Letter from Professor Meador and Letter to the author from Paul Nejelski, August 4, 1989.

³⁸ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at viii, 1, 5 (cited in note 34).

³⁹ *Id.* at 1.

⁴⁰ Text of Speech by Paul Nejelski at the National Conference on Minor Disputes Resolution at Columbia University in New York City, May 26, 1977, page 10 (copy in author's possession), reprinted in part in Paul Nejelski, *No More Second Class Courts*, 16 *Judges' Journal* 34 (1977), and in part in Paul Nejelski, *Do Minor Disputes Deserve Second-Class Justice?*, 61 *Judicature* 102 (1977).

ways to give them visibility and for the system to treat them seriously."⁴¹ These are not the sentiments of a person who wants to relegate smaller disputes to a "second-class" system of justice. Rather, Mr. Nejelski believed that a pivotal objective of the OIAJ was to rescue smaller disputes from the second-class system to which they already were too often relegated.⁴²

The inference that the other purpose that inspired the arbitration programs, that is, reducing "the burden these cases place on court resources,"⁴³ was secondary to the primary purpose of delivering a better dispute resolution product to litigants in smaller cases is supported by the fact that "the potential influence of arbitration on federal pilot court backlogs is necessarily slight, because the cases to which the rules apply represent a small proportion of case load. And . . . access to trial in the pilot districts does not appear to be impeded by congestion."⁴⁴ Thus, at least in the three courts that agreed to sponsor pilot programs in 1978, even the goal of reducing delay was not likely to prove significant. In these courts the principal promise of the court-annexed nonbinding arbitration programs was that they might enable litigants to resolve their cases at less expense than they would incur if the matters were fully litigated.

The Justice Department and the three district courts decided that it was appropriate to launch these programs only on a limited and experimental basis because they recognized the possibility that these programs could have negative effects that might outweigh the benefits they actually delivered. The earliest Federal Judicial Center study noted that the arbitration programs might "result in dissatisfaction with the quality of justice or severe increases in litigation expense for some cases, that the arbitration hearings [might] be used only as devices for discovery, or simply that the rules [might] be ineffectual and thus add a new layer of complexity and inconvenience to the litigation process."⁴⁵ Because no one could be positive whether, on balance, these new procedures would be beneficial to litigants, the Justice Department and the courts asked the Federal Judicial Center to analyze, independently, as many of the effects of the arbitration programs as possible. The

⁴¹ Nejelski Speech at 17-18 (cited in note 40).

⁴² For additional information about OIAJ's contribution to the design of the arbitration experiments, see Paul Nejelski, *Court-Annexed Arbitration*, 14 *The Forum* 215 (1978).

⁴³ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 5 (cited in note 34).

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 5.

Center's commitment to this work is reflected in a series of reports, three of which have included substantial data about the program in northern California. The results of these studies are discussed in a subsequent section.

The OIAJ developed model arbitration rules. Each of the three district courts that participated in the pilot program modified the model to fit local conditions and preferences.⁴⁶ The first section of the current version of Local Rule 500, which governs the program in the Northern District of California, declares that its purpose "is to establish a less formal procedure for the just, efficient and economical resolution of controversies involving moderate amounts of money damages while preserving the right to a full trial."⁴⁷

B. How Does the Northern District's Nonbinding Arbitration Program Operate?

The court's arbitration program (1) is mandatory for certain kinds of cases, (2) yields awards that are not binding, and (3) is free, meaning that the court charges no fee to litigants whose cases go through the program. The arbitrators are paid modest fees with funds provided by Congress.⁴⁸

By written stipulation, parties may voluntarily submit their case to the court's arbitration program, regardless of the subject matter of the action, nature of the relief sought, or amount in controversy.⁴⁹ Such stipulations are reached in relatively few cases, however, so the vast majority of suits that enter the arbitration track do so under the compulsion of Local Rule 500. Under the criteria set forth in that rule, actions are automatically designated for arbitration if they sound in contract, personal injury or property damage, if the only relief sought is monetary damages, and if the amount in controversy does not exceed \$150,000, exclusive of any punitive or exemplary award that might be entered and of interest and costs. Matters in which the United States is plaintiff are not designated for arbitration, nor are actions predicated on constitutional norms or on statutes protecting civil rights. Between

⁴⁶ Id at 99-118.

⁴⁷ ND Cal LR 500-1.

⁴⁸ Pursuant to changes that became effective in mid-1989, arbitrators are paid \$250 for each day (or portion thereof) of hearing in which they serve as a single arbitrator, or \$150 for each day of hearing in which they serve as a member of a panel of three arbitrators. ND Cal LR 500-4(d).

⁴⁹ ND Cal LR 500-8.

July 1, 1989, and February 1, 1990, cases that met the criteria for inclusion in the arbitration program constituted 16.5 percent of the court's civil filings.⁵⁰ The mix of cases that meet the criteria for mandatory inclusion in the arbitration track varies over time, as the mix of cases filed varies, but contract actions generally account for a larger percentage of arbitration cases than personal injury actions, while suits based on property damage represent a very small percentage of these cases.⁵¹

A party may petition the assigned judge to remove a case from the arbitration track on the ground that the matter "involves novel or complex factual issues, that legal issues predominate over factual issues, or other . . . good cause." The assigned judge will remove the case if he or she concludes, after such a showing or *sua sponte*, that compelling the action to remain in the program "would not achieve the objectives of arbitration."⁵² Such petitions are filed relatively rarely. And while there undoubtedly is a range of attitudes toward such motions among the judges, it probably is fair to say that in most instances a party who is trying to have a case removed from the arbitration program faces an uphill fight.

Even though cases that meet Local Rule 500's criteria are "designated" for arbitration at the time the complaint is filed, administrative action by court staff to move the matter toward the hearing does not commence until the case is "at issue," meaning that all defendants have filed responsive pleadings. The Federal Judicial Center's most recent study, which covers cases filed between October 1, 1984, and December 31, 1985, indicates that the

⁵⁰ This percentage is higher by about five percent than was the case for many years. The change appears to be attributable to two relatively recent amendments to Local Rule 500: (1) in November 1988, the court raised the ceiling for the size of cases subject to mandatory arbitration from \$100,000 to \$150,000, and (2) in the late summer of 1989, the court wrote into the Local Rule a rebuttable presumption that the real amount in controversy in every civil case that falls within the subject matter jurisdiction of the arbitration program is \$150,000 or less.

In calculating the percentage of the court's civil docket that the arbitration program reaches we have excluded routine government collection actions, for example, those arising out of student loans, actions filed under the social security laws, forfeiture or penalty actions filed under specialized regulatory provisions, for example, of food and drug laws, and prisoner petitions. If all civil filings were included in the calculation, cases designated for arbitration would constitute about 12 percent of the court's current civil docket. See note 9.

⁵¹ Of cases designated for arbitration between October 1, 1984, and December 31, 1985, 74 percent sounded in contract, 24 percent sounded in personal injury, with the remainder falling into several different categories. Meierhoefer & Seron, *Arbitration in the Northern District* at 4-6 (cited in note 15). By comparison, on February 1, 1990, 55 percent of the pending arbitration cases sounded in contract and 40 percent sounded in tort. See note 9.

⁵² ND Cal LR 500-3(c).

median time between filing and at-issue for cases in the arbitration track is about four months. It is quite significant, however, that 59 percent of the cases that were designated for the arbitration track during the study period never reached the "at-issue" stage; they were terminated before all parties had filed responsive pleadings. The terminations were by voluntary dismissal, remand to state court, settlement, or following an order by the court, for example, finding no jurisdiction. Thus, only 41 percent of the cases that were designated for arbitration at the time of filing survived long enough to begin moving toward an arbitration hearing.⁶³ An equally significant statistic, that only about 15 percent of the cases originally designated for the arbitration track remain in the system long enough to have an arbitration hearing, will be discussed in subsequent sections.

Private lawyers make up the pool of arbitrators who serve in this program. Until mid-1989, the qualifications required of lawyers who sought to join the pool were not demanding. Under the former rule, a lawyer was eligible for selection by the court as long as he or she had been a member of the California bar for five years and had been admitted to practice in the District court. "When the program first began, arbitrators were solicited through both letters from the chief judge and public notice in the local legal newspaper."⁶⁴ This process generated a pool of about two hundred applicants. Apparently, the court did not conduct any additional inquiry into the background of applicants, or exercise independent judgment about their suitability to serve. When it launched the program, the court seems to have felt that clearly unqualified persons would be prevented from serving by the process, explained below, through which counsel and the court selected the arbitrators for particular cases. As new judges joined the court, however, some concern about quality control arose. That concern inspired the court to adopt more demanding requirements in mid-1989 and to launch plans for a substantial training program for arbitrators. Under the new requirements, lawyers are not added to the pool unless they have been admitted to practice for not less than ten years, have been admitted to practice in the District court, and "either (i) have committed for not less than five years 50 percent or more of [their] professional time to matters involving litigation, or (ii) have had substantial experience serving as a 'neutral' in dispute resolution proceedings, or (iii) have had substantial experi-

⁶³ Meierhoefer & Seron, *Arbitration in the Northern District* at 7, 8 (cited in note 15).

⁶⁴ *Id.* at 51.

ence negotiating consensual resolutions to complex problems.”⁶⁵ To assure compliance with these requirements, the court collects data on a questionnaire from all applicants for the evaluator pool. The collection of that data, and the implementation of the new training program, should go far toward alleviating concerns about quality control.

The process of selecting an arbitrator, or a panel of three arbitrators, begins when a case reaches the at-issue stage. Under the Local Rule, the court presumes that each case will be heard by a single arbitrator unless all parties to the action join in a written request for a panel of three arbitrators. Such joint requests are made in about one-third of the cases. The selection process in any given case begins by a staff person in the clerk’s office sending to all parties a list consisting of the names of the ten lawyers in the evaluator pool who are next in line to be called to serve. Each side is permitted to strike from this list two names: first plaintiff strikes one name, then defendant strikes one, then plaintiff strikes another, followed by defendant exercising its last strike. At this juncture, the parties rank the remaining names in descending order of preference. In constructing the ranking, the parties take turns adding one name at a time to the list, this time beginning with defendant. The parties are to submit the six-name list to the clerk’s office within ten days; if they fail to do so, the court staff selects the arbitrator or arbitrators, at random, from the list of ten names that was sent to the parties. If the parties have submitted a ranked list, as they do in most cases, the clerk’s office approaches the candidates in the order they are ranked, designating the first person, or first three persons, that agree to serve. More often than not, the first people asked agree to serve, but occasionally a candidate will not be available at the appropriate time or will have a conflict of interest.

Interestingly, the only objective evidence that has been gathered does not support an inference that either results of arbitration hearings or quality of deliberations are likely to vary with the number of arbitrators. Although precise data is not available, administrators of the program report that split decisions from three-arbitrator panels are a rarity. There may be sociological pressure on arbitrators working in a panel to arrive at a consensus finding, but one would expect split decisions with greater frequency if, for example, arbitrators whose private practices revolved primarily

⁶⁵ ND Cal LR 500-4(a).

around plaintiff's work tended to make appreciably different judgments about liability or damages than arbitrators whose private practices consisted largely of defense work. It also is noteworthy that the most recent study by the Federal Judicial Center found that "there was no difference in frequency of [demands for trial de novo after an arbitration hearing] based on the number of arbitrators. Likewise, for the de novo demand cases that have closed, the number of arbitrators did not affect the rate at which the cases reached trial."⁵⁶ There certainly is nothing in this data that would support an inference that parties whose cases are heard by only one arbitrator are more likely to feel dissatisfied with the procedure or the result than parties whose cases are heard by a panel of three arbitrators.

The court orders the arbitration hearing to be held within 120 days after receiving from the parties their ranked list of arbitrators.⁵⁷ This period is set aside to permit the parties to conduct additional investigations and complete at least the core discovery. Despite the rule that continuances of the hearing date are to be granted only for "extreme and unanticipated emergencies,"⁵⁸ the median time from at-issue to hearing date has been about five months.⁵⁹ Thus, the median time between the filing of the complaint and the arbitration hearing has been about nine months. By way of comparison, it appears that the median time between the filing of a complaint and the commencement of trial for *all* civil cases in the Northern District is at least 18 to 20 months.⁶⁰ This

⁵⁶ Meierhoefer & Seron, *Arbitration in the Northern District* at 10 (cited in note 15).

⁵⁷ ND Cal LR 500-5(a).

⁵⁸ *Id.*

⁵⁹ Meierhoefer & Seron, *Arbitration in the Northern District* at 9-10. A provision that was added to Local Rule 500 in mid-1989 in response to a Congressional mandate may have the effect of increasing the time between joinder of issues and hearing. As required by the Judicial Improvements and Access to Justice Act of 1988, 28 USC §§ 651-658 (1988), Local Rule 500-5(a) provides that "unless the parties consent, or unless the assigned judge orders otherwise for good cause, no arbitration hearing may commence until 30 days after disposition by the court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, provided such motion was filed and served within 30 days after the filing of the last responsive pleading."

⁶⁰ Administrative Office of the United States Courts, *Federal Court Management Statistics, 1988* 127. This source indicates that the median time from "issue to trial" was about 16 months for the fiscal year ending June 30, 1988. Although precise data is not available, it appears reasonable to assume that the median time from filing a complaint to receipt of an answer for all civil cases filed in the Northern District is at least two months and more likely between four and five months. See Meierhoefer & Seron, *Arbitration in the Northern District* at 8.

means that an arbitration is likely to occur almost a year earlier than a trial.

As noted above, only about 15 percent of the cases designated for arbitration at the time of filing ever reach the hearing stage. The others are either (1) removed from the program or consolidated with other matters (approximately ten percent of the cases originally designated for arbitration) or (2) disposed of prior to hearing (about 75 percent of the cases originally designated for arbitration).⁶¹ While the figure may be rising slightly because of recent increases in the program's jurisdictional ceiling, over the almost 12 years that the program has been in operation, the number of arbitration hearings per year has averaged only about 60. This represents two percent or less of pending civil cases in any given year.⁶² As these figures suggest, arbitration hearings play a direct role in the resolution of only a small portion of the cases on the court's docket.

Most arbitration hearings are conducted in the relatively informal setting of a private law office. The most recent Federal Judicial Center study indicates that a plaintiff is present in about 90 percent of the hearings, but that defendants are present only about 60 percent of the time.⁶³ The subpoena power may be used to compel the attendance of witnesses or the production of documentary evidence for these hearings. Testimony is taken under oath, through direct and cross-examination, but the rules of evidence serve only as guides and probably are not rigorously enforced. Witnesses testify at the vast majority of these hearings, but parties present documentary evidence less often, perhaps in about half of the sessions.⁶⁴ Parties are permitted to have the proceedings recorded and transcribed, but the circumstances under which such matter could be used at a subsequent trial are not fully predictable.⁶⁵

⁶¹ Meierhoefer & Seron, *Arbitration in the Northern District* at 7-8 (cited in note 15).

⁶² In making this calculation, we have excluded government collection actions, social security matters, and prisoner petitions. Because the profile of the court's civil caseload varies somewhat from year to year, percentages like the one presented in the text are approximations.

⁶³ Meierhoefer & Seron, *Arbitration in the Northern District* at 55.

⁶⁴ *Id.* at 54-55.

⁶⁵ Following the mandate of the Judicial Improvements and Access to Justice Act of 1988, 28 USC § 655(c), Local Rule 500-7(b), states that "[t]he court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless (i) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence, or (ii) the parties have otherwise stipulated." Until amended in mid-

The arbitrator's role is not to mediate or otherwise attempt to settle the case. Instead, arbitrators are to preside over proceedings that are essentially adversarial, even if less formal than a trial, to consider the evidence, then to render the functional equivalent of a judgment on the merits, applying legal principles to the admitted evidence just as such principles would be applied by a judge in a bench trial. The arbitrator's "award" reflects his or her view of the full entitlements of the parties under the law. An arbitrator may answer the question of liability only with a "yes" or "no." Any damage award is not to reflect a compromise and is not the same as the "settlement value" of the case—the latter would reflect not only guesses about the probability of particular results at trial, but also factors not relevant to the merits, for example, the ability of the defendant to make payments. An arbitrator's award is sealed and not made known to the assigned judge while the case remains pending. Unless a timely demand is made for trial *de novo*, the award becomes the final judgment in the case. The Local Rule does not contemplate arbitrators playing any role in any settlement negotiations that might occur after the hearing.

The outcome of the arbitration hearing is not binding, and has no formal effect on how the case is resolved,⁶⁶ if, within 30 days of entry of the award, any party to the arbitration proceeding files a demand for a trial *de novo*. Amendments to Local Rule 500 that took effect in mid-1989 eliminated even the remote possibility of a party suffering any court-imposed penalty for exercising its right to a trial *de novo*. Before the court adopted these recent amendments, Local Rule 500-7(c) permitted, but did not require, the assigned judge to assess costs, but not attorneys' fees, against a party who demanded a trial *de novo* but failed to secure a judgment that was more favorable than the arbitrator's award. This provision had been included in the rule in an attempt to discourage thoughtless demands for trial *de novo*. There was no evidence, however, that the specter of being penalized as the Rule provided had any such effect. Any power to deter that such a rule might otherwise have had was seriously compromised by at least three facts: (1) the items that fell within the definition of "costs" were not likely, in most cases, to add up to large sums, (2) imposition of the penalty

1989, the Local Rule permitted parties to use at trial testimony given at an earlier arbitration hearing only for purposes of impeachment, absent a stipulation permitting other uses.

⁶⁶ The arbitration award may have a significant informal affect on disposition of the case by playing a visible role in settlement negotiations that later occur directly between the parties.

was discretionary, and (3) at the time they filed their de novo demands, most counsel presumably knew that the odds of the case actually ending up in trial, as opposed to being settled after the arbitration but before trial, were extremely small. In deciding not to include any penalty provision in the amended Local Rule, the court also felt it was significant that the percentage of arbitrated cases in which a de novo demand is made is virtually identical in northern California and eastern Pennsylvania, even though in the latter court the potential penalty facing a litigant who does not improve his or her position at trial is clearly fixed and quite small.⁶⁷ Because it did not want to infringe upon constitutional rights to trial, the court did not even consider changing its rule in the direction of imposing more severe financial penalties, like attorneys' fees, on parties whose positions were not improved by judgment after trial.⁶⁸

The timely filing of a demand for a trial de novo returns the case to the assigned judge, who moves it toward trial in accordance with his or her own policies. While no rule of court gives such matters trial priority, a few of the judges attempt to give these cases earlier trial dates than they might otherwise be given. The priority generally given to criminal matters, however, and commitments already made to older civil suits, often mean that cases that have been through the arbitration track do not reach trial for many months after the de novo demand is filed.⁶⁹ It appears, nonetheless, that the median time from the filing of the complaint to the commencement of trial is a little shorter for cases that have gone through the arbitration track than for other civil matters.⁷⁰

⁶⁷ Barbara Meierhoefer, *Court-Annexed Arbitration in the Eastern District of Pennsylvania* 7, 52 (Federal Judicial Center, 1988).

⁶⁸ In any event, Congress foreclosed the possibility of using the specter of large financial penalties to deter pointless demands for trial de novo by strictly limiting both the amounts of any such penalties and the circumstances under which they could be imposed. See the Judicial Improvements and Access to Justice Act of 1988, 28 USC § 655(d) and (e).

⁶⁹ See Meierhoefer & Seron, *Arbitration in the Northern District* at 9 (cited in note 15).

⁷⁰ For arbitration cases, the median time from the filing of the *last* answer to commencement of trial has been about 14 months, *id* at 9, whereas for *all* civil cases in the Northern District the median time from the filing of the *first* answer to commencement of trial was about 16 months for the year ending June 30, 1988, *Federal Court Management Statistics, 1988* at 127 (cited in note 60), and 14 months for the year ending June 30, 1989, *Federal Court Management Statistics, 1989* 127. The figures for all civil cases include routine simple matters like student loan collection actions and review of social security decisions, so the median time for resolution probably understates the time periods required in the mainstream of cases.

Moreover, in assessing the significance of any such delays, it is important to bear in mind that most of the cases where a *de novo* demand is made are resolved by settlement negotiations in which the parties engage during the weeks following the arbitration hearing. In fact, only ten percent of the cases in which a *de novo* demand is made actually end up in trial.⁷¹ As significant, only one to two percent of the cases originally designated for the arbitration track end up in trial. This very low rate of going to trial reduces considerably the significance of the fact that the arbitrator's award formally becomes the final judgment only in about 40 percent of the matters that proceed through the hearing stage—a demand for a trial *de novo* is filed in more than half of the cases that are arbitrated.⁷²

Interestingly, tort cases are more likely than contract cases to reach the hearing stage, to have a *de novo* demand filed, and to actually go to trial.⁷³ At least two factors may help account for the fact that the tort cases are more difficult to resolve consensually: (1) it can be much more difficult to predict the damages value of a tort case than of a contract case, in part because ascribing value to “general damages,” like pain and suffering, is such an elusive exercise, and (2) plaintiffs in tort cases are more likely to be people who do not have experience in litigation and who may, therefore, be less realistic about possible outcomes than a business or institutional litigant, which is more likely to be a plaintiff in an action sounding in contract.

C. Does the Arbitration Program Work? Does It Achieve the Ends for Which It Was Designed?

The absence of any “control group” of cases against which to compare the cases that have been assigned to the court's arbitration program makes it impossible to know with confidence whether the arbitration system results in cases being resolved less expensively or more quickly than they otherwise would be. While considering, in the paragraphs that follow, the data that sheds some light on these difficult questions, however, we should not lose sight of the fact that it is almost indisputable that arbitration procedures can be used to achieve these ends when both sides of a case are proceeding in good faith and truly want to resolve their dispute as

⁷¹ Meierhoefer & Seron, *Arbitration in the Northern District* at 7, 10, 12 (cited in note 15).

⁷² *Id.* at 7, 10. See also note 9.

⁷³ *Id.* at 12-13.

quickly and as cost-effectively as possible. The arbitration procedure, just like early neutral evaluation, clearly provides the parties to any particular action with tools that they otherwise would not have and that they can use, if both sides are so inclined, to streamline and expedite disposition of their case.

While the Federal Judicial Center found, in studies conducted in the early 1980s, that the arbitration programs in the federal courts in Connecticut and in the Eastern District of Pennsylvania reduced the time that elapsed between filing and disposition, the researchers could find no clear support for a conclusion that the program in Northern California had a similarly positive effect.⁷⁴ On the other hand, most of the lawyers who responded to Federal Judicial Center questionnaires in these early studies believed that the fact that their cases had been assigned to the arbitration track resulted in earlier dispositions than otherwise would have occurred.⁷⁵ And in the surveys conducted later in the 1980s, only 21 percent of the responding lawyers in cases where a *de novo* demand had been made felt that arbitration delayed resolution of the case.⁷⁶

It appears that the principal reason that the arbitration program may speed disposition is that the date of the hearing is likely to be appreciably earlier than a firm trial date. The median time between the filing of the *last* answer and the date of an arbitration hearing is just over five months,⁷⁷ while the median time between the filing of the *first* answer and commencement of trial is about 16 months.⁷⁸ The earlier imminence of that arbitration event forces counsel to complete the core aspects of their investigative and discovery work earlier than they otherwise would, thus equipping

⁷⁴ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 47-50, 76-77 (cited in note 34).

⁷⁵ *Id.* at 61, 77.

⁷⁶ Meierhoefer & Seron, *Arbitration in the Northern District* at 29 (cited in note 15). Generalizing from these figures may not be safe, however, because only 43 lawyers responded to this particular question.

⁷⁷ *Id.* at 9.

⁷⁸ *Federal Court Management Statistics, 1988* at 127 (cited in note 60). See also Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 78-83 (cited in note 34). Differences in the way data has been collected by the Administrative Office and by the clerks in our court, as well as the Federal Judicial Center, force us to make this awkward comparison of time between filing the *last* answer and hearing (for arbitration cases) and between *first* answer and trial (for all cases). Data for the period July 1, 1988, to June 30, 1989, suggest that the time between first answer and trial for all civil cases decreased to about 14 months. *Federal Court Management Statistics, 1989* at 127 (cited in note 70). Because control over how such data is generated is far from perfect, such figures represent only rough approximations.

them to engage in meaningful settlement negotiations earlier. Moreover, the simple fact that the arbitration event is looming seems to move counsel to initiate settlement discussions that otherwise would not occur until the trial date looms.⁷⁹ Further, lawyers in cases that proceed through a hearing report that it tends to inspire settlement negotiations earlier than otherwise would occur and that the arbitrator's award tends to be a good starting point for settlement discussions.⁸⁰

Most lawyers whose cases have been sent to the arbitration program believe that it reduced both their time expenditures and the financial burdens of litigation on their clients.⁸¹ As the most recent of the Federal Judicial Center studies notes, "[o]ver 60 percent of the attorneys in arbitration cases indicated that they spent less time, their clients spent less time, and the cost to their clients was less than if the case had gone through normal steps to trial."⁸² While these opinion surveys cannot prove, in the way that a controlled experiment involving large numbers of cases might, that the net effect of the arbitration program on the cost of litigation is positive, they are the only evidence on point that is currently available and are consistent with the effects one would expect from a program that reduces overall time to disposition.

Since it seems fair to assume that the total cost of disposition to clients is greater for cases resolved through trial than for cases resolved short of trial, the effect that arbitration programs have on the trial rate, that is, the percentage of cases that proceed all the way through trial, is a matter of some significance. Because no controlled experiments have been conducted, however, we cannot answer this question with confidence. Nonetheless, there is some data in studies conducted by the Federal Judicial Center in the early 1980s that suggest, albeit guardedly, that the arbitration tracks in federal courts might reduce the trial rate for the kinds of cases that are subject to these programs by as much as 50 percent.⁸³ It is possible that figure could be even higher today, given the fact that the trial rate for arbitration cases declined even further after the first Federal Judicial Center study was completed, from 3.8 percent to 1.4 percent.⁸⁴ There are at least two complicating factors,

⁷⁹ Meierhoefer & Seron, *Arbitration in the Northern District* at 24-25.

⁸⁰ *Id.* at 25, 29.

⁸¹ *Id.* at 21, 24, 25. See also Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 61 (cited in note 34).

⁸² Meierhoefer & Seron, *Arbitration in the Northern District* at 21 (cited in note 15).

⁸³ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 138-40.

⁸⁴ Meierhoefer & Seron, *Arbitration in the Northern District* at 5.

however, that make it impossible to reach firm conclusions based on this data. One is that there appears to have been at least a slight decrease in the overall trial rate for all civil cases since the early 1980s. The second factor we must bear in mind is that tort cases, which tend to be more prone than contract cases to proceed all the way to trial, made up a larger percentage of the arbitration caseload during the early study period than during the more recent study period. Thus, the apparent dramatic reduction in the overall trial rate may be attributable, at least in part, to differences in the mix of cases in the arbitration track during the different periods. In this regard, it is noteworthy that the current mix of cases in the arbitration program is much closer to the mix that was the subject of the early Federal Judicial Center study than to the mix that was the subject of the more recent study. Currently, about 40 percent of the arbitration cases sound in tort. For the period covered by the first study, about 43 percent sounded in tort. For the period covered by the more recent study, in contrast, only 24 percent of the matters in the arbitration track sounded in tort.⁸⁵

Another purpose, even though secondary, of the arbitration programs was to reduce docket pressures in federal courts. To the extent that the arbitration system reduces the trial rate, it also reduces docket pressures. For several reasons, however, the arbitration program in the Northern District of California, at least as currently designed, is capable of relieving docket pressures only modestly. Figures for the latter half of 1989 and early 1990 indicate that we can expect about 15 percent of the civil cases filed in the Northern District to fall within the jurisdictional reach of Local Rule 500. Somewhere between 600 and 730 cases will be designated for arbitration annually. Ten to 15 percent of these will be removed from the program, leaving 500 to 620 cases to be affected annually by operation of Local Rule 500. While that is not an insignificant figure, there remain at any given time between 2500 and 3500⁸⁶ other civil cases pending on the court's docket. Moreover, the kinds of matters that the rule reaches tend to be smaller and less complex than many of the matters left unaffected by the rule. Smaller, less complex cases tend to consume less of the court's resources than their larger, more complex counterparts, and the

⁸⁵ Id at 4-6; Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 34.

⁸⁶ These figures change from time to time as the profile of matters filed moves. As indicated elsewhere, I exclude from such figures routine government collection actions, social security matters, and prisoner petitions.

smaller cases apparently are more likely to be resolved prior to trial.⁸⁷

As noted at the beginning of this section, the designers of the arbitration programs for federal courts wanted the new procedures to reduce delay and cost "without diminishing the actual or apparent quality of justice."⁸⁸ Since discussion of whether these court-annexed arbitration programs have succeeded by this measure overlaps so extensively with consideration of whether they represent a form of "second-class justice," I will take up these issues together in the next section.

D. Is the Arbitration Program Vulnerable to Criticisms That Have Been Voiced about Court-Sponsored ADR Generally?

1. *Does the Arbitration Program Represent an Abdication of the Judicial Function?*

Is the arbitration program promoted by lazy judges who hope it will enable them to avoid some of their work? The initiative for establishing the arbitration program did not come from judges. Instead, it came from lawyers and law professors working in the Justice Department during the Carter administration. After the basic design of the program had been developed, Justice Department officials searched out a few courts that were willing to volunteer to participate in a limited experiment. Thus, court-annexed arbitration in the federal system is not the brainchild of judicial officers, but of lawyers and law professors interested in procedural reform.

After being asked to sponsor the program on an experimental basis, the hope that arbitration would shorten the line of cases needing attention must have gone through more than one judge's mind, but no sensible judge could expect this program to have a dramatic impact on the number of hours he or she is required to work or the size of his or her docket. At any given time each active judge in the Northern District has between 250 and 450 cases on his or her civil docket, some 25 to 45 of which are likely to be in the arbitration track. In addition, each judge is assigned a substantial number of criminal matters, many of which require considerable attention. Thus, no matter what happens to the arbitration cases that have been assigned to any particular judge, the queue of

⁸⁷ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 138-140 (cited in note 34).

⁸⁸ *Id.* at xii.

cases will remain very long and he or she will have far more work to do than could be accomplished on any sensible schedule.

Through the arbitration program, do judges delegate judicial functions to private lawyers who do not have appropriate qualifications for this work? Arbitrators working under Local Rule 500 have no case-dispositive power. They cannot hear and decide motions on pleadings or for summary judgment. They cannot enter dismissals. They cannot impose a judgment on any litigant. Nor do they have power to control pretrial case development, to compel discovery, or to fix litigation schedules. They are empowered only to preside at the arbitration hearing, to order issuance of subpoenas to compel witnesses to appear or documents to be presented at the hearing, to determine which of the proffered evidence is considered there, and to enter an award that is, for all practical purposes, merely advisory. Because the results of arbitration under Local Rule 500 are not binding and are not communicated to the judge who would preside at trial, and because the parties' right to proceed to a de novo trial remains fully intact, it is clear that ultimate responsibility for any non-consensual disposition of cases assigned to the arbitration track remains with the judges. Thus, despite the fact that the role the arbitrators play at the hearing is judicial in character, it cannot be fairly said that the arbitrators displace the judges or wield the powers that our constitutional system envisions being wielded only by publicly-appointed judicial officers.

There is, however, one respect in which the court's arbitration program encourages some relaxation of judicial attention that cases otherwise would receive. While there is nothing in Local Rule 500 that compels judges to adjust in any way the case management rules and procedures they normally apply to civil matters, some of the judges sometimes do not hold some of the early status and case development planning conferences in cases that are designated for the arbitration track that they hold in other civil actions.⁸⁹ Thus,

⁸⁹ This statement is based primarily on information provided by clerk's office personnel in mid-1989. Data gathered by the Federal Judicial Center in 1985 and 1986 prompted the authors of the report that was published in 1988 to suggest that "judges in the Northern District of California involve themselves in arbitration cases as much as they do in other civil matters" and that the "level of involvement depends more on the judge than on the type of case." Meierhofer & Seron, *Arbitration in the Northern District* at 15-16 (cited in note 15). This conclusion is at odds, modestly, both with more current information gathered in the preparation of this article and with some of the data reported in the Federal Judicial Center study itself. For example, the authors of that study reported that two of the then active judges stated that they have no involvement with cases designated for the arbitration track until after the arbitration hearing. The requirements of Federal Rule of Civil Procedure 16, however, result in judges holding some kind of initial status or scheduling confer-

for arbitration-track cases, sometimes judges postpone their initial Rule 16 conferences until after the arbitration hearing. When no initial status conference is held, or when such a conference is completed perfunctorily, there is no occasion for the judge to offer guidance about discovery and motion practice, to fix cut-off dates, or to help with planning the case development process with an eye toward settlement. This lack of judicial guidance would be a potentially serious problem if the arbitration rules did not impose relatively firm deadlines for completing discovery (20 days prior to the date set for the hearing) and for commencing the arbitration itself (no more than 130 days after the matter is at-issue). These deadlines, coupled with the fact that most of the cases designated for arbitration are relatively small and straightforward, lead some judges to conclude that in some arbitration cases there is little need for active judicial intervention early in the pretrial period. On the other hand, it is probable that early judicial intervention, in the form of a Rule 16 conference, in some of the cases designated for the arbitration track would mobilize lawyers' energies and focus their attention in ways that would lead to early disposition, avoiding unnecessary discovery and the arbitration hearing. More careful judicial monitoring of arbitration cases also might result in fewer instances of postponement of the arbitration hearing well beyond the time frames contemplated in Local Rule 500.⁹⁰ It should be emphasized, however, that practices among the judges vary considerably, and that some arbitration cases get exactly the same amount of early pretrial attention as civil matters that do not qualify for the arbitration track.

Despite the fact that arbitrators have no case-dispositive power, it is important that the persons who work in this quasi-judicial capacity be well-qualified. Arbitrators in some measure represent the judicial system to the public. For limited purposes, they are agents of the court. Moreover, the way they perform their function, and the quality of the thinking that supports their advisory judgments, can have a real effect on the outcome of the cases

ence in most of their civil cases. Moreover, since only about 15 percent of the cases that are originally designated for the arbitration track ever reach the hearing stage, a policy of postponing all or most judicial involvement with a case until after an arbitration hearing would result in there being no judicial contact whatsoever with the vast majority of cases designated for arbitration.

⁹⁰ It is disquieting that 20 of the 75 arbitration hearings held during 1988 and the first half of 1989 occurred more than a year after the filing of the original complaint, according to data compiled for the author by the Office of the Clerk of the Northern District of California.

in which they serve. If they preside over a sloppy, disrespectful proceeding, they damage the credibility of the entire judicial process. If the award they enter after a hearing is way out of line with what is likely to occur at a trial, they can make prospects for sensible consensual disposition much worse than they would have been without the hearing. So it is important that the people who serve as arbitrators be well-qualified.

It is not clear, however, that the process the court used in the past to appoint arbitrators provided sufficient quality control. As noted earlier, until recently the only formal qualifications for admission to the pool of arbitrators were membership in the bar of the court and admission to practice for more than five years. During the first decade of the program's operation, the court apparently made no significant inquiry into other aspects of the applicant's background, reputation or temperament. Instead, the court chose to rely on the process by which members of the pool would be selected to serve in given cases: the clerk's office would select at random ten names from the pool, then the parties, through counsel, could eliminate up to four names from that list before submitting the remaining six names in an order of preference that they fixed. This system certainly provides some screening to eliminate the patently incompetent or biased members of the pool, but it is not clear that it is a sufficient substitute for more demanding examination of applicants' qualifications and for a meaningful training program. If the quality of the pool as a whole is not clear, the ability of litigants to screen out only some of the nominees may provide too little assurance that the people left to serve are qualified. Recognizing the need to address these concerns, the court recently up-graded the requirements that applicants must satisfy to join or remain in the pool⁹¹ and set in motion plans to conduct a substantial training program for all its arbitrators.

Despite the arguable deficiencies in the level of control the court has exercised in the past over the process by which lawyers enter the arbitrator pool, it appears that most users of the arbitration system have been satisfied with the quality of the arbitrators' performance. Most of the lawyers polled in the Federal Judicial Center's studies believe that the arbitrators were impartial and adequately prepared, that the parties were given ample opportunity to present their sides of the case, and that the results of the arbi-

⁹¹ ND Cal LR 500-4(a).

tration hearings were fair and reasonable.⁹² Thus, the system seems to have worked adequately even before the recent changes designed to improve quality control.

Is the purpose or effect of this program to make it more difficult or more expensive for parties to get to trial, or to pressure them to settle? The account, offered at the beginning of this section, of the design of these programs by Justice Department lawyers in the late 1970s should make it clear that the goal was to make disposition of modest sized cases faster and less expensive, not slower and more expensive. The objective was to streamline the process, to "reduce delay, expense, and procedural complexity not warranted by the matter in dispute."⁹³ Nor is there any reason to believe that the judges who played active roles in bringing these programs to the three pilot districts wanted to use them as barriers to trial. In fact, the judges most connected with innovative programs like these in the three pilot districts, Robert F. Peckham, Raymond J. Broderick, and Robert C. Zampano, are highly regarded for eschewing institutionally self-serving approaches and for making statesmanlike commitments to the development and support of procedures designed to serve the needs of clients and counsel.

Arguments that these programs were designed to pressure litigants to settle would be more persuasive if significant penalties were imposed on parties who exercised their right to trial de novo. Parties who exercise that right under the current version of Local Rule 500, however, face no penalty whatsoever. Moreover, the penalties such parties faced under older versions of the rule were quite modest in size, were discretionary in the trial judge, and could be triggered only if a party failed to obtain a more favorable result at trial. Furthermore, every party, whether they had been in arbitration or not, who did not prevail on the liability issue at trial was exposed to exactly the same "penalty" as a party who demanded a trial de novo after an arbitration but failed to improve his position; every loser on the liability issue was at risk of being assessed "costs" within the meaning of Local Rule 265-1. Finally, as noted above, there is no evidence that the possibility of being penalized so modestly had any influence on parties' decisions about whether to demand a trial de novo and take the case to judgment.

⁹² Meierhofer & Seron, *Arbitration in the Northern District* at 26-28 (cited in note 15); Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 58-69 (cited in note 34).

⁹³ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 1.

Whether the arbitration programs have unintentionally had the effect of increasing the cost of litigation is a more complex question to address. In the relatively small percentage of cases that only a trial will resolve, compulsory participation in arbitration prior to trial adds a layer of arguably unproductive costs. Even for such cases, however, there may be some cost-benefits from an arbitration hearing. The hearing may expose an opponent's trial strategy, serve as a substitute for some formal discovery, clarify issues, sharpen counsel's understanding of strengths and weaknesses of various elements of evidence, and/or serve as a rehearsal hall or testing ground for arguments. In these ways, the arbitration can reduce the cost of final trial preparation and can streamline the presentation of the case at trial. Given that most matters in the arbitration track are not overly complex, however, the economic value of benefits like these may not be great. Moreover, the surveys by the Federal Judicial Center show that the majority of the lawyers whose cases have proceeded all the way to trial *de novo* reported that they and their clients spent more time and money on the matter than they would have if they had not gone through arbitration.⁹⁴

It is imperative to recall, however, that only a tiny percentage—one to two percent—of the cases that are designated for the arbitration track end up in trial. The vast majority of the cases so designated never even reach the hearing stage. And, as noted above, most of the lawyers whose cases have been concluded prior to or at the hearing feel that assignment to the arbitration track reduced, rather than increased, the amount of time and money committed to the case.

2. *Is the Underlying Purpose of the Arbitration Program to Reduce Governmental Involvement in Defining and Enforcing the Basic Rules of the Social Order?*

There would be more substance to this concern if arbitration reached either many more cases than it does or different categories of actions. In the Northern District, however, arbitration reaches only actions in which \$150,000 or less is at issue. It does not reach class actions. It does not reach any category of case that is not based on contract, personal injury or property damage. Even cases in these categories are to be exempted on a showing that they involve novel or complex legal issues or significant and complex fac-

⁹⁴ *Id.* at 61; Meierhofer & Seron, *Arbitration in the Northern District* at 30.

tual issues, or that legal issues predominate over factual issues. The program does not reach any case in which equitable relief is sought.⁹⁵ Thus, arbitration does not reach any of the socially sensitive categories of cases that are based on the civil rights statutes or any other specialized federal legislation. Nor does it interfere with litigants' access to prompt judicial intervention based on exercise of equitable powers.

The very limited reach of the program's jurisdiction means that its capacity to remove the public courts from the process of setting and enforcing the rules of the social order is quite limited. It also is important to bear in mind here that, even if there were no arbitration program, only a very small percentage of the cases that fall within its jurisdiction would proceed all the way to trial. The vast majority would be dismissed or settled by action of the parties, in most instances without significant contact with the court in any form. Moreover, because the results of arbitration hearings are not binding, and because parties are not exposed to any penalty for requesting trial *de novo*, the few cases that meet the criteria for compelled participation in the program and that involve interests or feelings significant enough to warrant trial will reach the public adjudicative process.

Does the arbitration program increase the likelihood that both the outcome of disputes, and the procedures used to resolve them, will remain secret? An arbitration award that the parties permit to become the final judgment in the case becomes a public document just like judgments that follow trials. Awards that are not accepted by the parties remain in the court's file, but the assigned judge may not learn their content until after the case is terminated.⁹⁶ After termination of the case there is no rule-based obstacle to public access to the content of the award.⁹⁷ Thus, public access to the results of arbitration hearings may not be substantially dissimilar to public access to results of trials.

Local Rule 500 does not cloak in secrecy the proceedings at an arbitration. As a practical matter, however, it is less likely that members of the public will know that arbitration hearings are underway, since they take place for the most part in the private offices of the arbitrators and since no public notice announces the dates on which they will occur. Thus, arbitrations under the Local

⁹⁵ The arguable exception is that actions arising under insurance contracts where the relief sought is declaratory may be subject to arbitration.

⁹⁶ ND Cal LR 500-6(d), conforming to the requirements of 28 USC § 654(b).

⁹⁷ *Id.*

Rule are considerably more likely to take place in private than are trials. I am not aware of any instance, however, in which the press or an interested non-party has sought but been denied an opportunity to observe an arbitration under the Local Rule. I add quickly that I cannot predict with confidence how the court would resolve a dispute of this kind. Since there are only 60 to 65 arbitrations per year under the Local Rule, however, and since none of the matters arbitrated is based on civil rights or other socially sensitive statutes, it is not clear that the reduced visibility of arbitration proceedings is a matter of great consequence.

There is another way that the arbitration program might reduce public knowledge about how lawsuits are resolved. There would be less public knowledge of such matters if the effect of the program was to reduce the percentage of cases that are resolved by trial and to increase the percentage of cases that are resolved by private settlement, most often prior to the arbitration hearing. While data available at this time do not permit firm conclusions about the effect of the program on the trial rate, there is some "soft" evidence, as noted earlier, that suggests that Local Rule 500 might reduce the percentage of cases disposed of by trial.

Several considerations, however, suggest that any increase in the privatization of dispute resolution that accompanies the arbitration program does not seriously threaten important societal interests. Even if Local Rule 500 reduces the trial rate by 50 percent for the kinds of cases subject to its jurisdiction, there probably are only about 20 to 30 fewer trials per year in the Northern District, or approximately two per judge.⁹⁸ For a relatively large court, this is not a substantial reduction in trials.

Moreover, the trials that do not occur are in contract or tort cases of modest value, cases that, at least in the vast majority of instances, neither implicate sensitive political values nor raise novel legal questions. There is not likely to be much public interest in the trial of these kinds of cases, and not having them go to trial is not likely to harm the judicial system's capacity to refine precedents or to establish new rules of law. Not having these trials also is not likely to deprive society of important knowledge about itself, or to deprive other potential plaintiffs of information that would educate them about their rights and motivate them to attempt to

⁹⁸ This estimate is based on an assumption that 600 to 650 cases will be designated annually for the arbitration track and that the trial rate for cases of the kind subject to Local Rule 500 would be three to six percent if there were no arbitration program. See Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 138-40 (cited in note 34).

vindicate those rights through litigation. In considering the privatization issue, it also is important to bear in mind that the arbitration rule does not cover a great many contract and tort cases, for example, those where the amount in controversy exceeds \$150,000. Thus, there remain a large number of contract and tort cases that are not subject to arbitration and that are available for public adjudication and to serve as fodder for the evolution of social norms.⁹⁹

Does the arbitration program dangerously reduce pressure on taxpayers and legislators to fund public courts at adequate levels? This concern might be well-placed if arbitration programs reached much farther into the courts' dockets and had the effect of removing much larger numbers of cases from the trial calendar. As currently structured in the Northern District, however, arbitration reaches only about 15 percent of civil filings. And, as noted above, the cases designated for arbitration are modest in size and less likely than cases in categories not reached by the program to proceed all the way to trial. If the arbitration program did not exist, only a small percentage of the relatively small cases it covers would go to trial anyway, and trial of these smaller matters would not impose a huge burden on judicial resources. Thus, the existence of programs like the one in the Northern District cannot plausibly be used to argue that there is less need for public support of courts.

3. *Is the Arbitration Program Changing the Role of Judges or the Character of the Court?*

The existence of the arbitration program has little effect, directly or indirectly, on the roles judges play in the Northern District. Judges are not involved at all in the arbitration process. They rarely are called upon to rule on motions arising out of the application of arbitration rules. Some of the judges sometimes relax their early pretrial case management efforts in cases that have been designated for arbitration, but this fact has no appreciable impact on the way the judges handle the remaining 85 percent percent of their civil docket.

Nor can it be argued that judges are using the private lawyers who serve as arbitrators to make significant changes in the role

⁹⁹ In 1988, for example, available data suggest that there were approximately 1100 cases filed in the Northern District that satisfied the subject matter jurisdiction requirements of Local Rule 500, but only 447 of these cases were designated for arbitration (the amount in controversy in the other suits exceeded the jurisdictional limit of the arbitration program). See *Annual Report of the Director of the Administrative Office of the United States Courts, 1988 191-92* (Table C3), 180 (Table C2).

played by the "neutral" in the adjudicatory process. Arbitrators in the Local Rule 500 program play, if anything, slightly more passive roles than judges. Arbitrators have no case management powers or responsibilities. Nor are they empowered to define issues, compel discovery, or rule on motions. At the hearings they are expected to play a role akin to the model of the traditional passive/reactive referee. They are likely to set a less formal tone at arbitration hearings, and to enforce the rules of evidence less rigidly than a judge would at a trial, but they are not expected to initiate actions designed to generate evidence or encourage settlement negotiations. In part because they leave these responsibilities in the hands of counsel, arbitrators are likely to be less interventionist than many judges. Moreover, because of the limits on their power, their role, and their prestige, arbitrators are not in a position to alter as significantly as a judge could the "natural" balance of power between opposing parties and counsel.

Even though Local Rule 500 arbitration does not divert significant judicial resources from traditional adjudicative or settlement functions, the establishment of alternative dispute resolution programs can lead to changes in the institutional character of the courts. These kinds of changes should be sources of concern, however, only if either (1) the new programs, evaluated on their own, are undesirable, or (2) they interfere with the court's capacity to deliver the kind of litigation service it otherwise would be in a position to deliver. Because other parts of this article attempt to demonstrate that these programs, on balance, contribute enough to important ends to make them desirable, the only issue to be addressed here is whether they interfere with the court's capacity to deliver traditional litigation services.

While neither ENE nor arbitration divert the time of judges from other work, both programs consume administrative resources that the court might use for other purposes. The clerk's office in the Northern District devotes the equivalent of four full-time positions to administering these two programs. In addition, one magistrate devotes an average of about five hours per week to a set of responsibilities connected with these programs: (1) responding to requests to modify application of ENE rules to particular parties or cases, (2) responding to questions from administrative staff about whether particular cases meet the criteria for designation to ENE or arbitration, (3) planning for and conducting training programs for lawyers who serve as evaluators or arbitrators, (4) preparing and delivering presentations that explain the court's programs to bar groups and judges' associations, and (5) monitoring

feedback and preparing reports about how the programs are operating, then working with judges and members of the task force to draft proposed changes in the rules that govern ENE and arbitration. This commitment of time by the magistrate, however, does not relieve him of any responsibilities the court would impose on him in the normal course; he bears his full proportionate share of the traditional civil and criminal work that the court assigns to the magistrates as a body.

The administrative resources the court commits to the arbitration and ENE programs do not dilute resources available to the judges to meet their adjudicative responsibilities. Rather, additional budget slots have been provided to meet these special administrative needs. It seems quite likely that if the arbitration and ENE programs did not exist, the administrative funding for them simply would be withdrawn. The court would not be permitted to keep these staff people for use in traditional functions, in part because it has been decided that the court already is adequately staffed to perform those functions.

4. *Is There Bias or Discrimination in Determining Which Cases are Designated for the Arbitration Program?*

The arbitration program obviously is not a vehicle for shunting civil rights cases or habeas corpus petitions out of the judicial mainstream, since such matters have never been subject to Local Rule 500.¹⁰⁰ Moreover, given the fact that Local Rule 500 reaches only contract and tort matters, it is not persuasively arguable that the arbitration program is designed to divert out of the courts any politically unpopular or sensitive kinds of cases.

If there is any discrimination in the criteria that determine which cases are compelled to participate in the arbitration program it is against traditionally mainstream cases of modest economic value. While I acknowledge that many courts have decided to treat smaller cases differently than larger matters by channeling them into procedures that consume fewer public and private resources, I do not concede that such decisions, at least as reflected in the arbitration program in the Northern District, are inspired by bias or any other untoward motive. In the Northern District,

¹⁰⁰ Under the Judicial Improvements and Access to Justice Act of 1988, federal courts may not compel a case to participate in local-rule arbitration if the action is "(1) based on an alleged violation of a right secured by the Constitution of the United States, or (2) if jurisdiction is based in whole or in part on section 1343 of [title 28 of the U.S. Code]." 28 USC § 652(b) (cited in note 59). Section 1343 grants jurisdiction over cases predicated on claims arising under certain federal civil rights statutes. 28 USC § 1343 (1988).

the larger cases that meet the subject matter criteria for inclusion in the arbitration program but that are not designated for that program because the amount in controversy is too great are subject to the compulsory jurisdiction of another special program: early neutral evaluation. Thus, both large and small contract and tort cases are within the reach of special procedural programs that are compulsory but nonbinding.

Moreover, in deciding to limit the compulsory jurisdiction of arbitration under Local Rule 500 to smaller cases, the architects of the system were motivated not by any hostility toward or impatience with such matters, but by a desire to fashion procedures that would deliver a better service to them, considering all relevant measures of value, including quality of deliberative process, cost and speed. The designers of the arbitration track believed that the traditional litigation process, with the enormous costs and delays that accompany it in most urban courts, badly disserves the interests of litigants of good faith in most smaller cases. Thus, the goal was to treat smaller cases differently in order to treat them better. We note that even among lawyers whose clients file demands for trial *de novo* after a hearing, the majority view is that the arbitration program neither delays resolution of the case nor is a waste of time.¹⁰¹ Thus, it is difficult to argue that arbitration was designed to impose disproportionate burdens on the classes of cases it reaches as a means of discouraging the filing of these matters in the first instance.

5. *Does the Arbitration Program Represent a "Second-Class" Form of Justice?*

The results of arbitrations under Local Rule 500 are not binding, meaning that a party who chooses not to accept an arbitration award has an unconditional right to trial *de novo* and thus to the same class of justice as litigants in cases that are not assigned to the arbitration track. Moreover, if reliability of result is used as the primary measure of value, it is arguable that litigants in cases assigned to the arbitration track have access to a class of justice that is superior to litigants in cases not designated for arbitration. Litigants in the arbitration track can choose to take advantage of two different kinds of dispute resolution proceedings, thus improving the likelihood that results obtained will be reliable and fair.

¹⁰¹ Meierhofer & Seron, *Arbitration in the Northern District* at 29 (cited in note 15).

Since only ten percent of the cases that go through an arbitration hearing also go through trial, however, it is important to compare the quality of justice delivered by the arbitration track without a trial at the end to the quality of justice delivered by a system without an arbitration track. Making this comparison is a complex task. To begin, it is appropriate to ask: if there were no arbitration track, what would the process consist of by which these cases would most likely be resolved? Given that they are smaller contract and tort actions, they would most likely be resolved, in the absence of an arbitration process, through private settlement negotiations, unassisted by the court, after receiving only a modest amount of pretrial attention from a judge. Most of the cases that are designated for arbitration also are settled through private negotiations, and most of these settlements occur before an arbitration hearing is held.

The only arguably significant difference between the process that would lead to settlement if there were no arbitration program and the process for cases subject to Local Rule 500 is that in the arbitration track earlier deadlines pressure counsel to develop the information necessary to settle the case more promptly than they might if their case had to compete for scarce trial dates with criminal and other civil matters on the assigned judge's docket. That competition often means two things: (1) dates for trial are not "firm" (judges often set several matters for the same day, hoping all but one will settle) and (2) the trial of any given matter is likely to commence substantially later than an arbitration hearing would.¹⁰² The earlier and firmer dates for the arbitration can move counsel and parties to negotiate settlements earlier, thus reducing time to disposition and, presumably, some costs. Attorneys responding to the most recent federal judicial center questionnaires believe that in many arbitration cases these effects do in fact occur: they report that disposing of cases assigned to the arbitration track consumes less of their time, less of their client's time and money, and that the imminence of the arbitration event serves as an impetus to begin settlement discussions.¹⁰³

¹⁰² As noted earlier, the median time between the filing of the complaint and the commencement of an arbitration hearing is about nine months, whereas, for all civil cases, the median time between the filing of the complaint and the commencement of trial appears to be at least 18 to 20 months. See text accompanying notes 59-60.

¹⁰³ Meierhoefer & Seron, *Arbitration in the Northern District* at 24-25 (cited in note 15).

Given the pressure to develop the evidence faster for arbitration cases than for cases not subject to Local Rule 500, one might fear that the quality of the information base and the reasoning that supports the earlier settlements might be inferior to the quality of the information and reasoning that would support settlements reached later. It appears, however, that any such fear would be largely misplaced. The cases that are assigned to the arbitration track are not large, not likely to be conceptually dense, and not likely to turn on novel legal theories. Rather, they are modest-sized tort and contract cases, the kinds of matters that lawyers can be in a good position to evaluate reliably in fairly short order. In the Federal Judicial Center's first three-district survey of lawyers whose cases terminated prior to the arbitration hearing, only five percent felt that the "arbitration rule probably caused an overly hasty settlement of the case."¹⁰⁴ And in the more recent survey conducted by the Center, 86 percent of the lawyers whose cases had gone through the hearing stage agreed that there had been adequate time for discovery prior to the hearing.¹⁰⁵ Moreover, if the deadlines in the arbitration track had adverse effects on lawyers' ability to prepare their cases for disposition, by settlement or otherwise, one would not expect 80 percent of all the responding lawyers in that same survey to approve of court-annexed arbitration in general and to support the program as it has been developed in the Northern District in particular.¹⁰⁶

For the 15 percent of the cases assigned to the arbitration track that actually reach the hearing stage, questions about the quality of the arbitration process itself are indisputably significant. Here again the responses from lawyers who have gone through arbitration hearings in the Northern District are reassuring. Almost 95 percent report having been given adequate time at the hearing to present all necessary evidence.¹⁰⁷ Ninety-three percent agreed that the procedures were fair, 87 percent agreed that the arbitrators were fair and impartial, and 72 percent reported that the arbitrators were prepared for the substantive proceedings.¹⁰⁸ Among the parties themselves, support for the quality of the procedure was comparably solid. Of the parties who responded to the more

¹⁰⁴ Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 64, 80 (cited in note 34).

¹⁰⁵ Meierhoefer & Seron, *Arbitration in the Northern District* at 26.

¹⁰⁶ *Id.* at 22.

¹⁰⁷ *Id.* at 27. See also Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 62.

¹⁰⁸ Meierhoefer & Seron, *Arbitration in the Northern District* at 26-27 (cited in note 15).

recent Federal Judicial Center Study, about 90 percent reported understanding what was taking place, 85 percent felt that the entire process reflected in the arbitration track was fair, an identical percentage felt that the hearing itself was fair, 82 percent thought the arbitrators seemed well-prepared, 78 percent felt that the hearing provided a good chance for their side of the story to be told, and 70 percent believed that all of the important facts had been brought out at the hearing.¹⁰⁹ Only 15 percent felt that the hearing was a waste of time.¹¹⁰ While some of these percentages are not quite as high as one might hope, in the aggregate they represent a solid endorsement of the arbitration process.

While the Federal Judicial Center has not posed an identical set of questions to lawyers and litigants about jury and non-jury trials, its most recent survey did offer its respondents an opportunity to compare the trial and the arbitration processes in some limited but significant respects. The first set of questions focused on the perceived quality of decisionmaking. Given four possible responses—judge, jury, arbitrator, or “makes no difference”—lawyers were asked who they thought would be most likely to (1) understand their point of view in this case, (2) come up with a decision that was fair to everyone, and (3) apply the law correctly. In response to each of the three questions, more lawyers chose a judge than any other alternative. The disparity between the preference for a judge and for either other alternative was by far the most dramatic in response to the question about applying the law: 71.6 percent indicated that a judge is most likely to apply the law correctly, while only 4.6 percent and 4.1 percent selected a jury or arbitrator, respectively. The remaining respondents, 19.7 percent, opined that there was no difference between judge, jury, and arbitrator in this respect. The responses to the other two questions form a similar, though not identical, pattern: about 40 percent of the lawyers believed that judges were most likely to understand their point of view in the case and to come up with a decision that was fair to everyone, about 30 percent indicated that there was no difference between a judge, jury, or arbitrator in either respect, and the remaining respondents, about 29 percent, split roughly evenly between those who would have more confidence in a jury and those who would have more confidence in an arbitrator. Slightly more lawyers felt that a jury was more likely to understand their point of view—16.9 percent for a jury versus 11.6

¹⁰⁹ *Id.* at 35, 38.

¹¹⁰ *Id.* at 38.

percent for an arbitrator, while, by a very similar margin, slightly more lawyers believed that an arbitrator was more likely to render a decision that was fair to everyone—16.0 percent for an arbitrator versus 11.7 percent for a jury.¹¹¹

While the pattern in these responses clearly shows that lawyers have more confidence in the quality of decisionmaking by judges than by juries or arbitrators, the structure of the question does not permit us to determine how much greater that confidence is. If the perceived quality gap between judges and juries or arbitrators were quite large, permitting either of the other two kinds of decisionmakers to play significant roles could be justified only if it could be shown that using juries or arbitrators contributes much more than court trials to other significant values. While such showings are possible, the importance of making them is reduced by the pattern of lawyer responses to another very significant question posed in the most recent Federal Judicial Center survey. The question was: "Considering costs, time, and fairness, would you prefer to have your case decided by a judge, jury, arbitration, or makes no difference?" The most commonly made choice, by a considerable margin, was arbitration. The percentage of responding lawyers who voiced a preference for arbitration, when all three of these important values were considered, jumped to 47.9 percent, while the percentage who preferred a court trial fell to 28.5 percent, and the percentage who would choose a jury trial remained about the same, at 11.7 percent. The remaining 11.9 percent indicated that it made no difference which process was used.¹¹²

The pattern in the responses to all four of these questions suggests two intriguing inferences: (1) while there is a difference in perceived quality of decisionmaking by judges on the one hand and, on the other hand, by juries and arbitrators, that difference is not huge, and (2) the modest loss in decisionmaking quality that occurs when a case proceeds through arbitration instead of court trial is, in a great many cases, more than compensated for by significant savings in time and money. While the opinion data generated by the Federal Judicial Center are not sufficient to prove either of these inferences conclusively, they at least should give critics of arbitration some pause. Moreover, there is additional support for these inferences in the fact, already noted, that more than 80 percent of the surveyed lawyers expressed approval of

¹¹¹ Meierhoefer & Seron, *Arbitration in the Northern District* at 22-23 (cited in note 15).

¹¹² *Id.*

court-annexed arbitration in general and of the program as developed in the Northern District in particular.¹¹³ Presumably this approval would not be forthcoming if lawyers felt that the arbitration program, judged by the full range of values relevant to resolving disputes, was not at least competitive with the trial alternative.

Before considering some other values by which the arbitration program might be assessed, it is important to describe one additional set of data that sheds a little additional light on questions about whether there is a significant loss of decisionmaking quality when arbitration is used instead of trial. We are in a position to compare the result of the arbitration hearing to the result after trial for the 62 cases in the Northern District in which there has been, through August 1, 1989, both an arbitration hearing and a subsequent trial *de novo*. While this limited data base¹¹⁴ is not large enough to support any firm conclusions, it is sufficiently interesting to warrant a brief description here.

Of the parties who requested trial *de novo* after an arbitration hearing, slightly more than half, 33 out of 63, or 52 percent, secured a more favorable result at trial.¹¹⁵ Only 22 of these parties, 35 percent of those demanding trial, however, improved their position by more than \$10,000. If we assume that it was likely to cost \$10,000 or more to move the case from the arbitration through a final judgment after trial, it follows that approximately two-thirds of the parties who demanded trial *de novo* failed to improve their position by a sufficient margin to have made the trial worthwhile. It also is significant that only ten parties, 16 percent, improved their position by more than \$25,000. Moreover, for 13, 21 percent, of the parties who made *de novo* demands, the judgment after trial was *less favorable* than the arbitration award, and for five of these parties the result after trial was less favorable by a margin of \$25,000 or more.

Comparing results at trial to arbitration awards from a slightly different perspective yields interesting, even though inconclusive, data about the reliability of arbitrations under Local Rule 500 as predictors of likely outcome at trial. In 35 of the 62 cases—56 percent—the difference between the arbitration award and the result

¹¹³ *Id.* at 22.

¹¹⁴ The data discussed in this section have been developed by Lee Derin, Martha Soeldner and the author for this Article.

¹¹⁵ While 62 arbitration cases went to trial, 63 parties made demands for trial *de novo*; in one case two parties demanded trial, one of whom improved its position considerably and the other of whom ended up considerably worse off after trial.

after trial was less than \$10,000. In 49 of the 62 cases—79 percent—the difference between arbitration and trial was \$25,000 or less. Whether these figures are viewed as a glass half-full or half-empty may depend on the predilections of the observer, but I believe that the fact that a subsequent trial produced a significantly different result¹¹⁶ in only about one-third of these cases is positive evidence about the reliability of arbitration awards. The strength of this inference grows when we focus on the nature of the cases that make up the small group that goes all the way to judgment after trial. The one to two percent of the matters that survive through the trial stage obviously are the most resistant to consensual resolution; as such, they may be the most difficult to analyze or predict, and may include a disproportionate number of “close” evidentiary and legal questions. If the cases that survive to the trial stage have these characteristics, they represent a skewed sample from which it might not be fair to draw negative inferences about the relative reliability of the arbitration process.

On the other hand, it is important to acknowledge that in eight of the 62 cases—13 percent—the difference between the result after trial and the result after arbitration was \$50,000 or more, and that in three of these matters the difference exceeded \$130,000.¹¹⁷ Of the eight cases in which the difference between arbitration and trial exceeded \$50,000, six were tried to the court and two were tried to a jury. These figures are disquieting, but do not necessarily indict the arbitration process. We do not know enough about these cases to determine what accounts for these disparities; it is conceivable, for example, that the outcome at trial was less rational than the result of the arbitration hearing. Moreover, in these eight cases, the number of months that elapsed between the arbitration and the trial ranged from five to 53; in four of the cases the arbitration and the trial were separated by five or six months, but in the other four cases more than a year elapsed between the two events. The passage of time between the two proceedings obviously gives rise to the possibility that significant new

¹¹⁶ Defining “significant” in this context is an elusive exercise; in deciding whether to attach this label I have taken into account not only the absolute dollars separating the arbitration award from the judgment after trial, but also the size of the case. Thus, in two matters where the amounts in controversy were large, I deemed differences of about \$40,000 insignificant, whereas I deemed differences of less than \$25,000 “significant” in other cases where the amount in controversy was much less.

¹¹⁷ In one case the difference was \$135,000, in another the difference was \$150,000, and in the third the difference was \$352,000.

evidence was discovered after the arbitration hearing, or that the damages suffered by the plaintiff increased substantially.

It does not seem likely, however, that factors like the passage of time fully account for the large disparities in outcome in these eight cases. Rather, it is virtually inevitable that a program that draws arbitrators from a pool of more than two hundred private attorneys will produce some arbitration awards that are supported by clearly erroneous reasoning. The quality control in the process of selecting and training a large number of evaluators is not likely to be as good as it is in most processes that lead to judicial appointments, even though the latter are encumbered by political considerations that play no role in the former.

A pattern of great disparities between arbitration awards and results at trial, regardless of its cause, would seriously compromise one of the putative values of an arbitration: to equip parties to predict more reliably what is likely to happen if the case is tried to judgment. Thus, such disparities would provoke serious concern if they occurred in a significant percentage of cases. Fortunately, large variations between arbitration awards and results after trial are the exception rather than the rule.

As noted earlier, reliability of result is by no means the only measure of value by which the arbitration process should be assessed. In addition to saving clients money and expediting resolution of their cases, most lawyers believe that arbitrations under the Local Rule are useful for clarifying issues and for disclosing the relative strengths and weaknesses of the parties' positions in ways that contribute to the settlement dynamic.¹¹⁸ Moreover, most of the parties who responded to the recent Federal Judicial Center survey indicated that an arbitration would be a "more comfortable setting" than a trial, and that it would be less formal and easier to understand.¹¹⁹ Given these feelings about arbitration hearings, the parties are more likely to play a participatory role in them and less likely to feel alienated by them. In addition, the less formal, more comfortable setting is likely to cause parties less stress than a trial, is less likely to inspire them to assume confrontational postures toward one another, and is more likely to encourage parties to communicate constructively about their dispute. Finally, arbitrations under Local Rule 500 offer greater protection to the parties' privacy interests than trials. The arbitrations usually take place in

¹¹⁸ Meierhoefer & Seron, *Arbitration in the Northern District* at 29 (cited in note 15); Lind & Shapard, *Evaluation of Court-Annexed Arbitration* at 66 (cited in note 34).

¹¹⁹ Meierhoefer & Seron, *Arbitration in the Northern District* at 39.

the offices of the arbitrator, are not announced publicly, and are attended only by the parties, witnesses and counsel. And arbitration awards need not become public documents, even if the parties use them as a basis for settlement—the parties can demand trial *de novo*, thus leaving the award sealed, but agree to settle their case on terms identical to those in the award.

In sum, even if the results of arbitrations are not quite as reliable as the results of court trials, the fact that the arbitration process contributes more than the trial process to such a long list of important values makes it difficult to conclude that the arbitration program represents a “second class” form of justice.

CONCLUSION

This article has not shown that any one of these three court-sponsored ADR programs is perfect. No human institution is perfect. No one would argue that trials are perfect. Rather, what I have tried to show is that none of these imperfect programs is seriously vulnerable to criticisms that have been articulated of court-sponsored ADR programs in general, and that each of these programs offers significant benefits to litigants without causing serious harm to competing interests. In the vast majority of cases, the parties whose cases go through one of these programs are appreciably better off than they would be if the program did not exist. Measured by the full range of relevant values, each program is a genuinely constructive force in the dispute resolution process.

