

# A TRADITIONALIST LOOKS AT MEDIATION: IT'S HERE TO STAY AND MUCH BETTER THAN I THOUGHT

Stephen N. Subrin\*

## I. INTRODUCTION: A NEW ERA IN AMERICAN CIVIL PROCEDURE

About twenty years ago, on the occasion of the circulation of the draft amendments to the Federal Rules of Civil Procedure that became law in 1983, I wrote that we were entering a new era of civil procedure.<sup>1</sup> I was unsure exactly where we were heading; it was clear, though, that the wide-open nature of the 1938 Rules, with their ease of pleading and amendment, broad joinder and expansive discovery, and implicit encouragement of creative lawyering, was resulting in a backlash. The 1983 amendments attempted to curtail some of the permissiveness of the Federal Rules, acknowledging<sup>2</sup> an expanded scope for pretrial conferences, including “establishing early and continuing control so that the case will not be protracted because of lack of management” and “facilitating the settlement of the case.”<sup>3</sup> The amended Rule 16 required scheduling and planning conferences, and added the need to consider “the possibility of settlement or the use of” (it now sounds so quaint) “extrajudicial procedures to

---

\* Professor, Northeastern University School of Law. My thanks to the participants at the William S. Boyd School of Law, University of Nevada, Las Vegas, and the *Nevada Law Journal* conference on “Perspectives on Dispute Resolution in the 21st Century” for their comments on this paper, as well as to Matt Belanger, Steve Burbank, Brad Honoroff, and David Matz, for their helpful suggestions. I am grateful to the lawyers at Sullivan Weinstein & McQuay, Boston, who invited me to speak to them about this paper and provided comments, and to Brad Honoroff, a friend and skilled mediator, who agreed to teach an ADR course with me, and permitted me (with the consent of the participants) to witness some of his mediations. Special thanks to Michele Pearce, research librarian at the Northeastern University School of Law Library, who spent countless hours on the computer trying to discover the extent that mediation is used in our country, and to my friend, Judy Brown, who even in retirement has once again fought valiantly (often failing) to save me from myself. The mistakes are, of course, my own.

<sup>1</sup> Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981).

<sup>2</sup> I write “acknowledged” because I think David Shapiro was convincing when he pointed out that many federal judges were already engaged in the case management and settlement activity that the new rule now explicitly allows. Shapiro’s quote (which he evidently got from Lon Fuller) has stuck in my mind: “At best, the argument might run, the task of rulemakers is like the task of those who lay out the walks in the Cambridge Common: Figure out where people go and cover up the grass with cement on those routes.” (footnotes omitted). David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1992 (1989).

<sup>3</sup> FED. R. CIV. P. 16(a)(2); 16(a)(5).

resolve the dispute.”<sup>4</sup> At the same time, we were given the new, teeth-sharpened (and later maligned) Rule 11, with its objective standard and mandatory sanctions. Additionally, the amended Rule 26 encouraged judicial curtailment of discovery and the application of new Rule 11-like provisions to discovery requests, responses, and objections.<sup>5</sup>

The unraveling of the Federal Rules regime did not surprise me. My favorite procedural quote then, as now, was Maitland’s observation that equity, without common law, was a “castle in the air,” an unsupported and insupportable structure.<sup>6</sup> It has seemed to me for at least three decades that an all-equity procedural system, with virtually unconstrained pleading, joinder, and discovery, cries out for containment and focus. I have consistently contended that our civil litigation system requires a balance between equity’s flexibility and the more rule-bound, circumscribed, focused common law process. I have defended David Dudley Field’s attempt to achieve predictability and to limit arbitrary judicial behavior through defining procedural rules.<sup>7</sup> I have urged – with little success<sup>8</sup> – that we should experiment with some subject-specific procedural rules in an attempt to add predictability and efficiency,<sup>9</sup> and have applauded numeric and temporal limits on discovery and length of trial.<sup>10</sup>

Lest I still have not established my formalist and pro-adjudication credentials before defecting to the other side, I want to add that much of what I have previously written has lauded the American jury trial and exhorted American judges to return to presiding over trials instead of expending time and energy on ad hoc case management and luring litigants to settlement.<sup>11</sup> In the summer of 2000, a colleague and I spent two weeks teaching civil procedure to twenty-

<sup>4</sup> FED. R. CIV. P. 16(c)(7).

<sup>5</sup> About a decade later, I wrote about teaching civil procedure while one is watching it disintegrate, still not knowing the contours of the new era, but quite sure that great change was in the works. Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993).

<sup>6</sup> F. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES* 19 (A. H. Chaytor & W. Whittaker eds., 1920), cited in Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 983 (1987). I apologize for the self-referential nature of these initial pages. It seems important to me to show that I do not come easily to the pro-mediation position contained in this essay.

<sup>7</sup> Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 338-45 (1988).

<sup>8</sup> See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) and Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989). Cf. Jeff Stempel’s cautious embrace some years later. Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin’s New-Old Procedure as a Possible Antidote to Dreyfuss’s “Tolstoy Problem.”* 46 FLA. L. REV. 57 (1994).

<sup>9</sup> Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).

<sup>10</sup> Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79 (1997).

<sup>11</sup> See, e.g., Subrin, *supra* note 10, at 99-103; Subrin, *supra* note 7, at 344-45; Subrin, *supra* note 6, at 999.

five Chinese civil procedure teachers in Beijing. I urged them to consider the virtues of a brave, independent judiciary that heard and decided cases in open court in conjunction with jurors who represented a broad spectrum of society.<sup>12</sup>

Through these many years, I have expressed grave concerns about ADR. In 1985, for example, I wrote Frank Sander, one of the founders of the contemporary ADR movement, that the “effort to defeat formalism so that society could move forward on the social justice front neglected the benefits of formalism once new rights had been created . . . .”<sup>13</sup> “Now perhaps,” I wrote Frank, “you see why I keep asking you what position your alternative dispute mechanisms (or your view of them) take on law application and rights vindication.”

This past year marked my 65th birthday, my 40th wedding anniversary, and my 31st year of teaching civil procedure. Although I am sensitive to the recent convert’s clichéd lack of objectivity, I think I now realize that mediation is a major portion of the new era of civil procedure. Moreover, I have come to believe that, despite some lingering reservations, this is a positive development in the evolution of American civil procedure. But, mediation cannot function effectively without a judicial recommitment to the trying of cases. It is critical that judges do more judging and less managing.<sup>14</sup> “Judge,” as Judith Resnik has recently pointed out, “is a verb as well as a noun.”<sup>15</sup> Ironically, as mediation becomes increasingly the norm, it should become easier and more desirable for judges to judge.

By mediation, I mean “a process in which a person not involved in a dispute helps the disputing parties negotiate a settlement.”<sup>16</sup> I believe that process will continue to thrive for four reasons. First (Part II), there is much evidence of growth. Second (Part III), lawyers largely drive a litigation system, and there are powerful reasons why they are drawn to settlement and, in turn, to mediation. Third (Part IV), there are strong historical forces, including the agendas of influential actors, pushing mediation as a major component of civil litigation. Fourth (Part V), the increased use of mediation is salutary for many

---

<sup>12</sup> STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *THE NATURE OF AMERICAN CIVIL LITIGATION IN HISTORICAL, CULTURAL AND PRACTICAL PERSPECTIVES* (2002) (published only in Chinese by Falu Chaba She). This was all as a means of injecting the rule of law into the society and inculcating a respect for law in the citizenry.

<sup>13</sup> Letter from Stephen N. Subrin to Professor Frank E.A. Sander, Harvard Law School (Nov. 27, 1985) (on file with author).

<sup>14</sup> This is not an argument against judges mediating cases or engaging in settlement conferences in cases that are not their own. Some judges are likely to be superb mediators, and some litigants and their lawyers may want the advice and authority of a judge in settlement negotiations.

<sup>15</sup> Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1035 (2000), quoting Hon. William R. Wilson, Jr., *Where Has All the Civility Gone?*, ARK. TRIAL LAW DOCKET, Summer 1990, at 5.

<sup>16</sup> Craig A. McEwen, Nancy H. Rogers, & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1319 n.1 (1995), citing JAY FOLBERG & ALISON TAYLOR, *MEDIATION* 7-9 (1984) and NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT’S GUIDE TO MEDIATION AND THE LAW* 3 (1987) [hereinafter McEwen] (“Commentators define mediation as a process in which a person not involved in a dispute helps the disputing parties negotiate a settlement. The mediator has no authority to issue a binding award in the event that the parties do not reach a settlement.”). Mediation can involve matters other than helping resolve a specific dispute. See *infra* note 33.

reasons and the critiques of mediation are overstated. I will end (Part VI) with a plea for judges to spend an increased portion of their time in their more traditional role.

I want to offer a few caveats at the beginning. ADR is not my field. I have never mediated a case. I have not written in the field. I have taught an ADR course only once, and that with the help of an experienced mediator. Writing about a new field is always risky business; you may think you are writing about a clear meadow, when in fact you have entered a dense forest. The risks are magnified when the field is ADR, for there is a paucity of normal trail markings as there are few statutes or rules and little case law to guide our musings. There are no obvious original documents to draw upon. The growth of mediation has largely been helter-skelter, without clear delineated characters in the plot, such as Field, Pound, Shelton, Taft, Walsh, or Clark (discussed later in the article). The politics, as I will discuss later, are hazy, with a baffling array of proponents. As many have pointed out, we need a good deal more convincing empirical data both of a quantitative and a qualitative nature.<sup>17</sup> Moreover, much of the writing in the field draws on anecdotal stories and disciplines in which many of us lack expertise, such as economics, game theory, anthropology, and psychology.<sup>18</sup> When one writes about mediation, therefore, she lacks the normal scaffolding of more traditional legal scholarship.

## II. THE GROWTH OF MEDIATION

Notwithstanding extensive research efforts, I have been unable to find concrete data on the extent of mediation's use in our country. This is not surprising. ADR, at least in its modern state, is relatively young. The National Center for State Courts reports on its website that "because programs, rules, etc. vary so much from state to state, and even within a single state, national data [about ADR] is nearly impossible to come by and even more difficult to analyze."<sup>19</sup> Settlement data is always difficult to ascertain "because settlements are often kept confidential and the settling parties must agree to disclosure."<sup>20</sup> Notwithstanding the dearth of hard data, I think the anecdotal evidence is overwhelming that mediation is growing exponentially.

Here are but a few of my own anecdotes. Two of my friends started The Mediation Group in Brookline, Massachusetts in 1986, along with one of their wives, a psychiatric case worker. One of these friends, a lawyer and former professor at the University of Massachusetts, Boston, had so many clients seek-

---

<sup>17</sup> Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71; Elizabeth Plapinger & Donna Stienstra, *Federal Court ADR: A Practitioner's Update*, 14 ALTERNATIVES TO HIGH COST LITIG. 7 (1996). On the many open questions regarding settlement generally, see Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

<sup>18</sup> See, e.g., Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1614 (1997) (on the interdisciplinary work done regarding negotiation).

<sup>19</sup> See <http://www.ncsc.dni.us/KMO/Topics/ADR/FAQs/ADRFAQ2.htm> (last visited Dec. 22, 2002).

<sup>20</sup> Thomas D. Rowe, Jr., *Repealing the Law of Unintended Consequences? Comment on Walker* (2), 23 J. LEGAL STUD. 595, 610 (1994) (writing about data on settlement amounts).

ing mediation that he relinquished his tenured position in order to mediate full time. A former student of mine, practicing in upstate New York, reports that many of his firm's federal cases are mediated by a magistrate. A well-known construction lawyer, who was a partner in my former firm (full of very hard-nosed litigators), mediates virtually all of his construction cases. Another mediator friend of mine, whose firm is also known for its trial work, estimates that mediation represents twenty-five to thirty-three percent of his practice.

There is increasing evidence that supports these anecdotes.<sup>21</sup> We know that the Federal Rules of Civil Procedure invite judges and parties to explore settlement and, depending on statutes and local rules, various methods of ADR.<sup>22</sup> The Civil Justice Reform Act of 1990 requires all federal district courts to consider a variety of ADR mechanisms.<sup>23</sup> The Administrative Dispute Resolution Act of 1990 requires federal agencies to consider using ADR at all phases of their work, including adjudication.<sup>24</sup> A 1992 Executive Order calls for increased use of ADR in the executive branch.<sup>25</sup> The Alternative Dispute Resolution Act of 1998 states that ADR "has the potential to provide . . . greater satisfaction [for] the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements."<sup>26</sup> The Act also requires each federal district court to provide litigants with at least one ADR process. Moreover, each district court must, by local rule, require litigants in all civil cases to consider using ADR at an appropriate stage in the case.

In 1996, a joint project of the Federal Judicial Center and the CPR Institute for Dispute Resolution reported that "[m]ediation has emerged as the primary ADR process in the federal district courts. . . . In marked contrast to five years ago when only a few courts had court-based programs for mediation, over half of the ninety-four districts now offer – and, in several instances, require –

---

<sup>21</sup> I have not attempted in this article to ascertain the statistics on the aggregate amount of arbitration taking place in this country. Given the imprimatur of Congress on arbitration results, and the United States Supreme Court's embrace of compelled binding arbitration, arbitration has probably also shown enormous growth. In binding arbitration, however, a third party renders the decision, in a manner similar in many respects to judicial dispute resolution. If I had the time and inclination, I would compare arbitration and mediation in much the same way that I am comparing traditional litigation and mediation in this article. One bit of data I would like to know is the extent to which arbitrations are now being settled and to what extent such settlements are accomplished through mediations. My suspicion is that mediation is entering the arbitration arena and that this, too, will continue to increase. Perhaps, however, the arbitrators are more apt to act like mediators in the first instance, prior to taking testimony.

<sup>22</sup> FED. R. CIV. P. 16(a)(5), 16(c)(9).

<sup>23</sup> 28 U.S.C. §§ 473(a)(3)(A), 473(a)(6)(B) (1994). The expense and delay reduction plans required by each district court were to authorize courts "to refer appropriate cases to alternative dispute resolution programs." 28 U.S.C. § 473(a)(6).

<sup>24</sup> 5 U.S.C. § 571 cmt. (1994) (Promotion of Alternative Means of Dispute Resolution, sec. (a)) (original version at 5 U.S.C. § 581 (1990)).

<sup>25</sup> Exec. Order No. 12778, 56 Fed. Reg. 55195 (Oct. 23, 1991).

<sup>26</sup> Alternative Dispute Resolution Act of 1998 at § 2(1) (codified at 28 U.S.C. § 652(a)). For a district-by-district description of ADR and settlement programs in the federal district courts, see ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center 1996).

mediation.”<sup>27</sup> In 2000, Professor Deborah R. Hensler noted that “state and federal courts have turned away from non-binding arbitration and towards mediation.”<sup>28</sup>

Mediation seems to have become the ADR method of choice at the state level, just as it has at the federal. Forty-four states have mediation programs in one or more of their state courts.<sup>29</sup> Here is one author’s exuberant conclusion:

A review of the mediation data received from the survey indicates that the trend today is definitely mediation. Approximately half of the states have partial or total court-ordered mediation programs in effect . . . . Most states utilize mediation in various forms, whether it is on a voluntary basis through the court, a mutual agreement made by the attorneys to facilitate settlement, or as a tool to resolve conflicts in non-court-related areas . . . . The use of mediation to resolve disputes is so prevalent that the Author is reminded of Roger Fisher’s comment at the Harvard Negotiation Workshop “that litigation is an alternative way to resolve a dispute.”. . . It is clear that the trend toward mediation is here to stay.<sup>30</sup>

Mediation has had a meteoric rise and is apparently still on the upswing, although this is less clear.<sup>31</sup> If we are, in fact, now in a new era of American civil procedure and civil litigation, mediation helps define this era. How and why did this happen?

### III. THE LAWYER’S PERSPECTIVE AND INFLUENCE

There is even less data on why mediation has become the ADR mechanism of choice. Although there is some discussion of the attraction,<sup>32</sup> I do not

<sup>27</sup> PLAPINGER & STIENSTRA, *supra* note 26, at 4.

<sup>28</sup> Hensler, *supra* note 17, at 77.

<sup>29</sup> Mary Wisniewski Holden, *As Courts Overflow, Mediation Flourishes*, CHI. LAWYER, Mar. 1997, at 1 (citing a Summer 1996 ABA poll).

<sup>30</sup> Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033-34 (1996). I have placed in an Appendix at the end of this article additional evidence that I have accumulated about the increased use of mediation at both the state and federal levels, as well as a summary of the dozens of different areas of law in which mediation has been used. Notwithstanding the lack of national statistics on the use of mediation in the aggregate throughout the United States, all methods of proof I have been able to think of – anecdotal, federal statistics, reports from individual states, articles on areas of law in which mediation is being used, bibliographies – point in the same direction.

<sup>31</sup> “The Price-Waterhouse Cornell 1997 survey . . . indicates that 89% of U.S. Corporations have used mediation in the last three years and that 79% have used arbitration.” Gina Viola Brown, *ADR Statistics Report*, A.B.A. Sec. Disp. Resol. (Jan. 7, 2002), citing C:\TEMP\c.lotus.notes.data\STATSADR.doc. My friend, David Matz, is skeptical about whether mediation is continuing to grow. He notes that enrollment in law school mediation courses, mediator demand in courts, and the number of people seeking mediation training is up some places and down in others; he states that “which way the wind is blowing seems to me to be less certain than it was three years ago.” E-mail from David Matz, Mediator and Scholar on ADR, to Stephen N. Subrin (Feb. 24, 2002) (on file with author).

<sup>32</sup> See, e.g., McEwen et al, *supra* note 16; *Focus on the Future: ADR in the New Century*, 51 DISP. RESOL. J. 10 (1996); Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649 (1997); Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224 (1999); CARRIE MENKEL-MEADOW, *Introduction to MEDIATION: THEORY, POLICY AND PRACTICE* xiii (The International Library of Essays in Law & Legal Theory, 2d Series, 2001). A very large number of lawyers have been exposed to mediation and decided they want to use it for their civil litigation. Although I wish I had

think the analysis is as comprehensive as is justified. Nevertheless, I think I can paint an accurate picture of its attractiveness to lawyers. I start with lawyers because: (1) so much mediation relates to cases that are either in litigation or may soon be; (2) this article explores relationships between litigation and mediation; and (3) I think I know a lot about trial lawyers, litigators, and civil litigation.

Mediation is a subset of a negotiated settlement. It usually involves a neutral person aiding parties to a dispute to reach a settlement.<sup>33</sup> In order to understand why lawyers use mediators, I think it is useful to consider why most cases settle in the first place, whether there is a mediator or not. Only about two to four percent of cases reach trial – an ever dwindling figure – and the vast majority of all civil litigations, probably in the neighborhood of seventy percent, are resolved through settlement.<sup>34</sup>

## A. *Why Lawyers Settle Cases*

### 1. *Uncertainty*

Can you guess who wrote the following?

The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humor, that he who would attempt to refute it would be looked upon as a man who was either incapable of discernment himself, or else meant to impose on others.<sup>35</sup>

---

still more data, I think I could achieve judgment as a matter of law at this point on the proposition that mediation is now an essential element of American civil litigation.

<sup>33</sup> Mediation does not always involve an attempt to resolve a dispute. “In its simplest and purest form, mediation is a process of facilitated negotiation among two or more parties, assisted by a third-party neutral, to resolve disputes, manage conflict, plan future transactions, or reconcile interpersonal relations and improve communications.” MENKEL-MEADOW, *supra* note 32.

<sup>34</sup> “For example, in the federal courts, the portion of cases that terminated in trials dropped from 11 percent in 1961 to 4 percent in 1991. Earlier there was a similar decline in state courts.” (Footnotes omitted.) Galanter & Cahill, *supra* note 17, at 1342. According to one study, about two-thirds of the cases settle without a definitive judicial ruling. *Id.* at 1340, *citing* the Herbert Kritzer analysis of 1649 cases in five federal judicial districts and seven state courts. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986). Default judgments were omitted from this computation. The Department of Justice conducted a study, Federal Tort Trials and Verdicts, for fiscal years 1996-97. The tort cases terminated in those years represented about nineteen percent of all civil cases terminated. Three percent of them were either jury or bench trials, while ninety-seven percent were non-trial cases. *Federal Tort Trials and Verdicts, 1996-97*, at [www.ojp.usdoj.gov/bjs/pub/pdf/fttv97.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv97.pdf). The overall completed state trial rate was estimated at 2.9% of all terminations for 1991-92; the federal rate was 3.7%. Theodore Eisenberg, John Goerdt, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 440-42 tbl. 3 (1996). In 2000, only 2.2% of federal civil cases reached trial (5,780 trials of 259, 234 total civil cases terminated). *Annual Report of the Director of the Administrative Office of the United States Courts* 159 tbl. C-4. From 1996 to 2000, there was a sixteen percent decrease in the total number of federal trials completed. Civil trials overall decreased twenty-three percent, civil nonjury trials decreased twenty-four percent, and civil jury trials decreased twenty-three percent. *Id.* at 24-25.

<sup>35</sup> WILLIAM BLACKSTONE, COMMENTARIES OF THE LAW OF ENGLAND, BOOK III, CHAPTER XXII 1098 (4th ed. James Dewitt Andrews, 1898). For a thoughtful description of what one Critical Legal Studies scholar has to say about the indeterminacy of law, see Duncan Ken-

This uncertainty has, I think, been exacerbated by modern procedure, which raises wide-open questions at every turn: what is the scope of a claim, transaction, or occurrence; what is a common question of law or fact; what is a sufficient statement of a claim; when does justice require an amendment; what is the subject matter of the claim for cross claim and impleader purposes; what is relevant for discovery purposes; does one have enough potential evidence to survive a summary judgment motion or enough actual evidence to survive directed verdict (now judgment as a matter of law).<sup>36</sup>

As Professor Burbank has pointed out many times, the Federal Rules are uniform in name only; they constantly hide ad hoc discretionary trial judge decisions.<sup>37</sup> Uncertainty also arises in connection with procedural issues not covered by a rule. Consider, for example, the complexities of applying the multivariable test brought to us in *World-Wide Volkswagen*, *Burger King*, and then *Asahi* to close personal jurisdiction cases.<sup>38</sup>

There is also evidentiary uncertainty: the Federal Rules of Evidence are replete with textual uncertainties. How does one decide, for example, whether a prior event or happening is too remote in time to be relevant? The exceptions to the rules are legion and often perplexing. And then there is the uncertainty of substantive law.<sup>39</sup>

For many, the legal uncertainties pale next to the factual ones. Blackstone put it this way:

But, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and willfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty, and disingenuity of the parties . . . . And experience will abundantly show, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted.<sup>40</sup>

The lawyer must deal with witnesses (including one's own) who forget, lie, misperceive, or are otherwise mistaken. Much behavior is ambiguous, as

---

nedly, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

<sup>36</sup> See, e.g., Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 655 (1971) ("Of the eighty-six rules that comprise the Federal Rules of Civil Procedure, the term 'discretion' appears in ten or so. Nevertheless, appellate courts have held that review-restraining discretion is implicitly present in thirty other provisions of the rules.")

<sup>37</sup> See, e.g., Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987), reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *TEACHERS MANUAL FOR COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985).

<sup>38</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987).

<sup>39</sup> For an example of the uncertainty in a substantive law matter, see Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 148-49 (1999), in which the author lists seven important unanswered questions by the U.S. Supreme Court with respect to workplace sexual harassment disputes "[d]espite its recent attempts at clarification." And consider the vagueness of definitions applying to mixed questions of law and fact: unreasonable care, proximate cause, defect, discriminatory intent, unfair competition, the amount of pain and suffering, yet alone the multiple variables in choice of law doctrine.

<sup>40</sup> BLACKSTONE, *supra* note 35, at 1101.



are many documents. One does not know in advance which evidence will be admitted, yet alone which evidence will be believed, or which tiny shred of evidence the fact finder might latch on to as the most important. With the increasing use of experts, one has the added uncertainty of whether one's experts will survive the *Daubert* test,<sup>41</sup> let alone whether the expert will be believed.

In some courts, one does not know in advance who the trial judge will be, and even known, she is uncertain as to the judge's mood. Judicial rulings are often unpredictable, and the politicalization of the judicial appointments process exacerbates the problem.<sup>42</sup> If there is a jury, one is uncertain of its composition and ultimate decisions.<sup>43</sup> And even after verdict, one is unsure of remittiturs and additurs, new trial motions, judgment n.o.v., and the ability to collect a judgment, not to mention the growing number of appeals.<sup>44</sup>

Lawyers represent clients who want to know what the result will be if the case reaches final judgment. Given the multiple points of uncertainty, it is very difficult to advise the client with any degree of precision. At best, the attorney can advise as to a range of possible results, some of them extremely unpleasant to the client. Settlement is a rational means of avoiding the risk of the possible results that would be worse than settlement.

## 2. *Efficiency, Time, and Money*

Each step of litigation consumes time and money.<sup>45</sup> Clients in overwhelming numbers are doing more attorney-shopping than before, and seeking

<sup>41</sup> *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

<sup>42</sup> For a discussion of the issues at the highest state court levels, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *LAW & CONTEMP. PROBS.* 79 (Summer 1998). For an entire issue on political attacks on the judiciary, see 80 *JUDICATURE* 152 (1997). I realize the fact that judges are accused of making "political" decisions does not prove that they are motivated by political considerations. After reading enough appellate decisions that are split along political lines, however, it is difficult not to believe that politics plays a role in how judges perceive cases. Benjamin Cardozo put it this way:

Of the power of favor or prejudice in any sordid or vulgar or evil sense, I have found no trace, not even the faintest, among the judges whom I have known. But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 174, 175 (Yale Univ. Press, 1998).

<sup>43</sup> Empiricists tell us that juries of six, now the norm in some courts, are less predictable than juries of twelve, and more apt to arrive at aberrant verdicts. See, e.g., Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 *JUDICATURE* 263 (1996).

<sup>44</sup> "The number of appeals filed in the courts of appeals rose from 3,899 in 1960, to 11,662 in 1970, to 34,292 in 1986, and to 48,322 in 1994." (Footnote omitted.) RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 54 (4th ed. 1996).

<sup>45</sup> In the contingent fee case, it is the plaintiff's lawyer who knows that the longer it takes, the more time – and the potential to be earning money elsewhere – is consumed. It is true that most defense lawyers, and sometimes plaintiffs' lawyers, are paid by the hour, and

economies in litigation and litigation-avoidance.<sup>46</sup> Consequently, client pressure for efficiency and savings pushes in the same direction as uncertainty toward settlement, and early settlement at that. It is true that the defendant often has the use of his money during a delayed suit. That the defendant also experiences the interest that will be attached to a verdict, increased legal fees, the desire to do business rather than engage in a legal battle, and the risk of great monetary loss point to settlement, however.

### 3. *More Level Playing Field and Lower Expectations*

Uncertainty and expense might not lead to settlement at such a high rate if in any given case either lawyer thought that she had advantages that would make it worth risking trial. A recent article by Steve Yeazell, *Re-Financing Civil Litigation*, explains how changes in the composition of the bar, and how lawyers finance cases, have reduced advantages that defendants' lawyers had historically held by virtue of the size of their firms, their expertise, and their ability to sustain losses.<sup>47</sup> Specialization in the plaintiffs' bar, the sharing of information, and the ability of plaintiffs' lawyers to get loans and to advertise have resulted in a much more level litigation playing field than before.<sup>48</sup> On top of this, as already mentioned, corporate defendants, particularly insurance companies, are now less willing to give the defense bar free reign on extensive and expensive trial preparation.<sup>49</sup>

On the other hand, experience and data have now made clear to plaintiffs' lawyers, particularly in personal injury cases, how infrequently and how little they win as a result of trials.<sup>50</sup> A former student of mine, a plaintiff's torts lawyer in upstate New York, has explained to me why jury trials have become considerably less attractive to the plaintiff's bar in personal injury cases.<sup>51</sup> Media reports of cases in the popular press, as well as insurance anti-plaintiff advertising and plaintiffs' lawyer mass advertising, have made many jurors

---

therefore, hypothetically and often realistically, the more time spent, the more the fee. But there is accumulating evidence that clients are increasingly monitoring the time spent by lawyers, the tasks performed by lawyers, the number of lawyers assigned to tasks, the hourly rates, and the ultimate bills. See, e.g., Darlene Ricker, *Greed, Ignorance and Overbilling*, 80 A.B.A. J. 62 (1994).

<sup>46</sup> See, e.g., Robert I. Weil, *Insurance Companies and Their Lawyers – The Cost Squeeze*, 32 DEF. L.J. 391, 396-97 (1983); Andrew Blum, *Insurers' Cutbacks Hit Firms*, NAT'L L.J., Nov. 22, 1993, at 1; Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 950-53 (1993) (describing the sources of increased competition in attracting large corporate clients, including greater stakes of legal actions and a more sophisticated clientele).

<sup>47</sup> Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001). See also Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiff's Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219 (2001).

<sup>48</sup> Yeazell, *supra* note 47.

<sup>49</sup> See *supra* text accompanying notes 45-46.

<sup>50</sup> Yeazell, *supra* note 47, at 207; Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 384 (1991).

<sup>51</sup> Letter from Matthew F. Belanger, to Stephen N. Subrin (May 10, 2002) (on file with author).

skeptical of any plaintiff seeking personal injury damages. The reduced opportunity for extensive voir dire has also made it harder to get a sympathetic or even unbiased jury. Hence, in many cases, neither side may see an advantage in going to trial.

#### 4. *Hassle*

Consider the hassles that come with litigation. Court clerks are not always the easiest people to deal with, nor are judges. One can get enmeshed in a myriad of motions, some undecided for long periods. Trial dates change and continuances, in some courts, are the norm. Witnesses fail to show. To cope with the wide-open nature of modern procedure, courts – and the rules – have added additional steps, such as mandatory disclosure, scheduling and discovery conferences, pretrial conferences, lists of documents and witnesses, summaries of expert opinions, summaries of testimony, and lists of potential evidentiary objections. I have not even mentioned dealing with one's own client and opposing lawyers. Add to this the constant availability created by fax, voicemail, e-mail, and cell phones, and these hassles are never ending.

The hassles are by no means limited to lawyers. Multiple discovery, uncertain trial dates, and the trial itself create enormous interference in the client's normal life. The entire litigation process is anxiety-provoking and privacy-invading.

#### 5. *Fear and anxiety*

Today, fewer lawyers have a great deal of actual trial experience. Some litigators have never tried a case to completion; many have never participated in a jury trial. As one practicing lawyer put it, "make no mistake; it is not trials, but discovery, that is the work of today's litigator (yesterday's 'trial lawyer')." <sup>52</sup> The cliché that associates in large firms gain litigation experience only through mock trials held within the firm is sadly true. Moreover, in many jurisdictions, motions are decided on the basis of legal memoranda without oral argument. If you add this lack of hands-on or practical experience to the uncertainties of trial, it is not surprising that many lawyers in litigation departments are fearful, or at least highly anxious, about trying cases. This phenomenon is a powerful incentive to settle.

#### 6. *Lawyer Perception of Client's Needs and Reactions*

Losses are bad for a lawyer's reputation and client relations. Such losses are exacerbated when one does not try many cases as clients cannot see that one's winning percentage is still high. There are other client needs, such as preserving business relationships with opposing parties and confidentiality of business practices, which are only peripherally related to the dispute at bar. Each of these reasons adds to the impetus to settle.

Notice that there are exponential effects resulting from the settlement-suggestive variables I have outlined. When the variables are multiplied, there is a statistically mounting degree of uncertainty. These variables lead to additional settlements that in turn lead to fewer cases tried, leading to lawyers without

---

<sup>52</sup> American Bar Association, *Discovery*, LITIGATION (Winter 1997).

trial experience.<sup>53</sup> Despite individual exceptions, fewer and fewer cases are being tried.<sup>54</sup>

### B. *Why Lawyers Engage Mediators*

We have seen why lawyers settle. But that does not answer the question why they want or need a third party neutral to help them achieve a settlement. Some of the drive toward mediation, and perhaps even most of it in the first instance, came from court rules or individual judges suggesting or mandating mediation.<sup>55</sup> Today, however, there is a growing body of evidence that lawyers are content with their mediation experiences, as are their clients.<sup>56</sup> And lawyers, once exposed to mediation, say that they would choose to do it on their own in the future.<sup>57</sup>

In trying to understand why and how this has happened, I think it is important to consider changes in the legal profession. First, there is the enormous growth in the number of lawyers: from 200,000 lawyers at the end of World War II, to just over 850,000 in 1995, to an estimated 1,000,000 at this time.<sup>58</sup> More and more, women are entering the profession: the percentage of women in law schools increased almost nine fold during the period of 1963 to 1973,

---

<sup>53</sup> This is not to say that there are not lawyers who are very willing to try cases and enjoy it. See, e.g., W. Reece Bader, *A Litigator's Perspective: ADR is Fine, but Not Always Welcome as an Alternative to Battle in Court*, DISP. RESOL. MAG., Spring 2000, at 21 ("The trial lawyer is trained as a warrior, not as a peacemaker.").

<sup>54</sup> Yeazell, *supra* note 47, at 184, 185; *supra* text accompanying note 34. Once again, not all lawyers are plagued by the uncertainty of result, or hassles, or other variables leading to settlement. And, of course, there are individual cases in which one side or the other thinks the result is quite certain, and in which the client and lawyer will try the case, rather than take an unsatisfactory settlement. Nonetheless, it is true that there are fewer cases tried – for instance, down from nineteen percent to two or three percent in federal court during the last sixty-five years – and that many attorneys in litigation departments spend most of their professional life in discovery and other pre-trial procedures, and very little in trial.

<sup>55</sup> See, e.g., Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLIAMETTE L. REV. 565 (1997); Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224 (1999); The Cardozo Online Journal of Conflict Resolution; The National Center for State Courts (NCSC) & The Policy Consensus Initiative (PCI), *The State of the States: Dispute Resolution in the Courts* (Sept. 22, 1999) [hereinafter Cardozo Symposium]. According to one National Law Journal and American Arbitrator's Association survey, fifty-eight percent of the litigators surveyed used mediation because it was court mandated. In 1998, as we have seen, Congress passed legislation requiring mandatory ADR programs in all ninety-four federal courts. The state courts of California, Florida and Texas also have similar mandated mediation programs. Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., Nov. 15, 1999, at A1.

<sup>56</sup> Wissler, *supra* note 55; Gordon, *supra* note 55. See also Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885, espec. n.7 (1998) (summarizing the research to date).

<sup>57</sup> Cardozo Symposium, *supra* note 55.

<sup>58</sup> *Lawyers in Profile, A Statistical Portrait of the U.S. Legal Profession*, 10 RESEARCHING LAW 1, 7 (1999). The big increase in law school admissions commenced in the 1970s, when new admissions to the bar reached more than 20,000 annually, and an average of 30,000 in the 1980s; these were the years that the ADR movement took off. Bar admission increases far outpaced population growth. There was one lawyer per 695 in 1951, and one per 303 in 1995.

from 3.8% to 15.6%, with females in law school classes reaching forty-seven percent in 2001.<sup>59</sup> The proportion of firms with women lawyers increased from seventeen percent in 1980 to forty-six percent in 1995; thirty-three percent of the firms had women partners in 1995, rising from twenty-six percent in 1991.<sup>60</sup> The number of people of color has also increased, albeit less dramatically, representing twenty percent of law school enrollment in the fall of 1998, "up from 16% in 1992-93, 11% in 1986-87 and 8% in 1975-76."<sup>61</sup> The size of law firms has grown, as has the number of solo practitioners, rising to forty-seven percent of lawyers in the private sector in 1995.<sup>62</sup> Today, a lawyer may have never met the opposing lawyer, may not have gone to the same schools, belonged to the same clubs, or been in the same professional or social circles as the opposing lawyer.<sup>63</sup> All of this makes it more difficult to build up the trust or experience with the other side sufficient to engage in negotiation without outside help. Lawyer incivility also makes it harder to commence a negotiation or sustain one.<sup>64</sup>

There is evidence that lawyers have trouble focusing on the most essential issues in a case,<sup>65</sup> a problem exacerbated by multiple joinder of claims, issues, and parties. These reasons, plus the lack of trial experience discussed earlier,

---

<sup>59</sup> Terry Carter, *It's Not Just a "Guy Thing" Anymore: Law School Programs will be Different because of Who's Attending, Teaching*, 85 A.B.A. J. 18 (Apr. 1999).

<sup>60</sup> American Bar Foundation Update, 1999. As firm size increases, so does the proportion of firms with at least one female partner. While less than one-third of firms with five or fewer lawyers had a women partner, almost eighty-seven percent of firms with twenty-one to fifty lawyers had women partners. *Id.*

<sup>61</sup> Carter, *supra* note 59.

<sup>62</sup> In 1998, Jones Day Reavis & Pogue had 1,074 lawyers; Skadden Arps Slate had 1,048. Market Share Report of Largest Law Firms, 8th ed. 1, 1998; Source: FORTUNE, Oct. 13, 1997, from U.S. BUSINESS LITIGATION. For solo practitioner figures, see American Bar Foundation Update, 1995.

<sup>63</sup> For a picture of the former homogeneous nature of the American bar, read JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, espec. Chapters One and Two (1976).

<sup>64</sup> See, e.g., Mark Hansen, *Incivility a Problem, Survey Says*, 77 A.B.A. J. 22 (1991) (reporting on a survey of Seventh Circuit judges and lawyers); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994); and the influential articles on discovery abuse by Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 [hereinafter Brazil, *Chicago Lawyers*]; Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

<sup>65</sup> In Wayne Brazil's study of Chicago lawyers, several indicated that they started cases and engaged in discovery before they did much analysis. Brazil, *Chicago Lawyers*, *supra* note 64, at 227-30. The Federal Judicial Center study on the Quality of Advocacy in the Federal Courts suggests lawyer aimlessness. Judges and lawyers found "planning and management of litigation" severely lacking among each type of civil litigator. The areas of "planning and management" said to be most needing improvement were "skill and judgment in developing a strategy for the conduct of a case" and "recognizing and reacting to critical issues as they arise." Anthony Partridge & Gordon Bermant, *The Quality of Advocacy in the Federal Courts* 6, 164-183 (Federal Judicial Center, 1978). On the failure of lawyers to focus their cases until they have to, and on the mediation event speeding up that process, see McEwen et al, *supra* note 16, at 1387.

highlight the need for an experienced mediator who may, in effect, bridge the gap created by a lack of trial and/or negotiating experience.

Another reason for using a mediator is related to the "prisoner's dilemma" problem.<sup>66</sup> To put it briefly, there are occasions where, if one party acts competitively while the other acts cooperatively, then the competitive one can win a great deal. If both act in an aggressively competitive way, however, then neither will do as well as she would have if each cooperated with the other. But, both will be reluctant to be cooperative, lacking trust that the other will do the same. Lawyers, less apt to trust one another, can easily get into a situation where each acts in an aggressively adversarial or competitive way, to the ultimate disadvantage of both. An outsider can help in such a situation.

There are, of course, many other reasons why lawyers, and in turn their clients, may find it beneficial to use a mediator. The parties may have information that they are afraid to share with the other; but, if each knew the other's information, they might both gain from settlement (a problem called "information asymmetry" by game theorists).<sup>67</sup> Emotions may make it difficult to commence or engage in non-assisted negotiation. When there are multiple parties, the lawyers, unaided by a neutral expert, may have trouble figuring out how to include everyone in the settlement, or deciding when it is best to accept a partial settlement.

There are a whole range of problems arising from the agency relationship of lawyer and client that may make negotiation with the aid of a mediator more successful than going it alone. Most lawyers understand or face the problem of trying to keep the client's confidence, while at the same time delivering bad news about the weaknesses in the case. This problem may deepen when clients more frequently shift their business from firm to firm. Sometimes lawyers oversell a case to a client in the first instance, perhaps seeking to secure the client, and then need the help of an outsider to reduce the client's expectations. When the client and the lawyer have slightly different agendas, an outsider's viewpoint may be helpful.

Moreover, lawyers and clients may benefit from an airing in front of a neutral who asks probing questions, enabling them to test their own sense of the value of a case and the likelihood of potential results. The client may be more comfortable with a settlement when she has heard the competing arguments and participated in the dialogue and the decision-making.<sup>68</sup> There is accumulating data that negotiators tend to discount or reject settlement options when presented by an opposing side, but that the same options become more palatable when suggested by a trusted neutral.<sup>69</sup> The attorney may want the media-

---

<sup>66</sup> The best succinct summary I have read on problems of negotiation, including "the prisoner's dilemma," that mediators can help overcome, is Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

<sup>67</sup> Mnookin, *supra* note 66, at 240.

<sup>68</sup> The work and research of Allan Lind and Tom Tyler come to mind, suggesting that parties value a chance to have their voices heard and to participate meaningfully in dispute resolution processes. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>69</sup> Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* (Kenneth J. Arrow et al. eds., 1995).

tor's approval, or at least assistance in arriving at settlement, as a way of insulating herself from the client's criticism or disapproval.<sup>70</sup>

The data on timesaving and expense reduction through mediation is mixed.<sup>71</sup> But, it seems to me, that in some instances it is likely that mediation will decrease both delay and litigation costs. It is true that if the mediation takes place late in the litigation cycle, one may be adding an expense that would not be incurred if the parties settled on their own, particularly if the mediation fails. But if the mediation takes place at an earlier stage, before total discovery and motion practice are completed, and if the mediation is successful, then there has to be a significant savings in time and expense.<sup>72</sup>

Let's say that there are two lawyers, each charging \$300 an hour. Assume that each takes an eight-hour day to prepare for mediation, totaling \$4,800. The mediation takes half a day, or an additional \$3,000 for the lawyers (five hours times \$300 an hour per lawyer). The mediator, we'll say, charges a flat \$500 to each side for the half day; that's another \$1,000, for a total of \$8,800. Thirty hours of combined attorney time would cost clients \$9,000 (thirty hours times \$300 an hour). Any amount of work that would have been in excess of that had the mediation not settled the case would lead to a monetary savings.<sup>73</sup> If one adds to the calculation the time saved for the clients by avoiding prolonged discovery (and the money they could have lost), then the savings are even more dramatic. The savings are even more substantial in that subset of cases that would not have settled at all absent mediation.

There is some evidence that lawyers are beginning to see that even their discovery may become more focused and less expensive through the use of earlier mediation. The mediation itself will often provide some new information to the parties. By discussing the case in front of a neutral and determining what each side thinks it needs to know prior to settlement, the discovery itself can be focused, and limited discovery or voluntary disclosure even agreed

---

<sup>70</sup> In these respects, it helps in achieving the trust that a mediator needs to be effective that the lawyers and their clients agree on the mediator and feel free to leave the mediation at any time.

<sup>71</sup> Cf., e.g., the Rand study results in 1996, in JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996), described in Hensler, *supra* note 17, and Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000); with more positive results with respect to cost savings, based on lawyer estimates, from the Northern District of West Virginia and Western District of Missouri, reported at Cardozo Symposium, *supra* note 55, at 47, 48, and time savings in the Western District of Missouri. *Id.* at 47, 48. Some studies do not show a lessening of delay or expense, while others do.

<sup>72</sup> There is some evidence that mediations can successfully take place very early in a litigation. See, e.g., Cardozo Symposium, *supra* note 55, at 35, 45. For example, in the Western District of Missouri, cases were referred to ADR thirty days after answer; only eleven percent of the attorneys thought that was too early. But in the Northern District of West Virginia, where cases are referred to ADR after discovery is complete and just before trial, twenty-one percent of the attorneys said ADR occurred too early. *Id.* at 46. On varying views of lawyers on when mediation should take place in relationship to discovery, see John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 886 (1997).

<sup>73</sup> I realize that there will be some paperwork involved with officially ending the case and effectuating the settlement. One could either add a few hours and money to the calculation, or assume that the client is saving money because they will have more time to work.

upon.<sup>74</sup> The number and type of experts needed by both sides, and use of those opinions, can also be hammered out with the aid of a mediator.

Notice how many of the reasons that lead to settlement are also met by mediation. The unpredictability of the result is obviated by the mediated settlement, just as it is by the unassisted settlement. Having a firm and reliable date for the mediation, which takes place in a conference room rather than a courtroom, reduces the hassles of litigation.<sup>75</sup> It is more difficult for lawyers or their clients to be uncivil when they are sitting around a table, often drinking coffee or tea, in front of a third party neutral with whom they are trying to figure out ways to dispose of a controversy.<sup>76</sup> In short, the benefits of settlement overall are largely subsumed within a mediated settlement.

Much of the literature heralding mediation speaks to the ability to craft creative settlements, or settlements that add value to each side that would not otherwise be available.<sup>77</sup> I find it difficult to evaluate this claim. Skilled lawyers can also negotiate creative settlements that would not be forthcoming from a judicial order or a jury verdict without the aid of a neutral. As lawyers, well before mediation came into vogue, my partners and I frequently sought, and often achieved, creative settlements.<sup>78</sup> As mediators gain more experience, and as lawyers and clients gain more experience with mediators, perhaps a wider range of options will be considered.

I will later address other positive attributes of mediation when I deal with the critiques that have been levied at ADR, and at mediation in particular. Before that, however, I want to look at some of the other currents feeding the mediation phenomenon.

#### IV. THE MEDIATION BOOM IN CONTEXT

I do not know enough, nor do I think we have enough distance, to attempt to unravel all of the strands that have led to the meteoric rise in mediation; but I cannot resist sketching out some of the things I think such an extensive inquiry would likely reveal. In the past, I have written about two major procedural reform movements: the movement that led to the Field Code, and the historical background of the Federal Rules of Civil Procedure.<sup>79</sup> In each instance, four

---

<sup>74</sup> On how mediators sometimes act to mediate discovery, see Tom Arnold, *A Practical How-To Guide for Mediators and Attorneys*, ALI-ABA COURSE OF STUDY 436 (Jan. 25, 1996).

<sup>75</sup> It may not always be more comfortable for the clients, as in the example of a wife having to sit in the room with her husband who has abused her. This is one potential downside of mediation; I will discuss others in Part V of this paper.

<sup>76</sup> McEwen et al, *supra* note 16, at 1368.

<sup>77</sup> See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 24-25 (1996).

<sup>78</sup> Some believe, however, that our very education as lawyers, with its concentration on legal issues, combined with our adversarialness, may constrain our ability to see creative options for settlement. It seems likely that if the parties and their clients are talking with one another in one room, or if a mediator is suggesting different ideas to each side in caucuses and trying out different approaches with each side, then there will be occasions that a settlement will be reached that is more beneficial than could be achieved without the help of the mediator. *Id.* at 25.

<sup>79</sup> See *supra* text accompanying notes 6-7.



currents led to the reform: (1) obvious defects in the existing procedural systems; (2) agendas of the legal profession; (3) conservative ideology; and (4) liberal ideology. I analyze the last two factors together. In each case, there was also a supportive intellectual climate. Since the 1970s, all of these elements have acted, and interacted, as incentives for the use of mediation.

### A. *Defects of Pre-Reform Procedure*

Defects in the common law procedural system helped lead to the Field Code.<sup>80</sup> Similarly, criticisms of that code helped propel the movement toward the Federal Rules reform.<sup>81</sup>

Extreme criticisms of the Federal Rules, and practice under them, became noticeable by the mid-1970s.<sup>82</sup> The litany is well-known: discovery out of control, frivolous litigation, runaway juries, unjustified punitive damages, congested dockets, overaggressive lawyers, excessive costs, and delays. Much of the criticism was quite overstated.<sup>83</sup> Propaganda led by the business community and a conservative movement that disapproved of the results of litigation brought by progressive advocacy groups (such as legal services offices, the civil rights, consumer protection, and environmental movements) created criticism.<sup>84</sup> Nonetheless, the critique had many elements of truth. Who can deny

<sup>80</sup> For a detailed analysis, see Subrin, *supra* note 7, at 318, 328-34.

<sup>81</sup> Again, for details, see Subrin, *supra* note 6, at 939-61.

<sup>82</sup> See, e.g., THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell Wheeler eds., 1979) (although the conference, the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, was held in 1976). Especially note the addresses by Burger, Kirkham, and Rifkind. See also Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

<sup>83</sup> Respectable empiricism supports my view. See, e.g., STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM (1994); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986); Brian J. Ostrom, David B. Rottman, & John A. Goerd, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 (1996); Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221 (1998); Paula L. Hannaford, B. Michael Dann, & G. Thomas Munsterman, *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247 (1998); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327 (1998); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); Elizabeth G. Thornburg, *Giving the "Haves" A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999).

<sup>84</sup> By the time of the fiftieth anniversary of the Federal Rules in 1988, it had become obvious to many that conservatives were attacking the then current civil litigation system and the liberal Federal Rules regime. At a conference held at my law school, Northeastern University School of Law, such speakers as Judge Jack B. Weinstein, Judge Robert L. Carter, and Judith Resnik commented on the political nature of the attack. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179 (1989); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989). Two colleagues and I tried to demonstrate the attack in the employment discrimination area. Phyllis Tropper Baumann, Judith Olans Brown, & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992). For an

that there were some frivolous suits, and some excessive and oppressive discovery? There was sufficient criticism<sup>85</sup> that some “reform” would take place, and mediation, along with other ADR techniques, looked attractive.

### B. Professional Agendas

In both the Field Code and Federal Rules reform, the profession itself wanted change for reasons relating to lawyer well being. Before the Field Code, for example, trial lawyers in New York were highly regulated in the fees they could charge, which were largely dependent upon the length of documents filed in court. A little known feature of the Field Code liberated lawyers to charge whatever their clients were willing to pay, much to the benefit of the elite bar as demonstrated by David Dudley Field.<sup>86</sup> Moreover, accompanying the drafted procedural rules were substantive codifications of law that benefited the emerging commercial and industrialist class.<sup>87</sup> A major purpose of these efforts was to limit the discretion of judges.<sup>88</sup> Such discretion could be used to alter the business-supportive substantive law.

In the case of Federal Rules reform, Charles Clark, the major draftsman, made it quite clear that the new flexible rules would permit the practicing bar to reap the benefits of participating in the emerging New Deal regulatory regime.<sup>89</sup> Perhaps one of the most amazing eulogies of a legal figure was that given by Whitney North Seymour, on behalf of the organized bar, thanking Charles Clark for giving lawyers the gift of the Federal Rules of Civil Procedure.<sup>90</sup>

Judges, too, have professional agendas. An early argument of those favoring the Enabling Act, and subsequently the uniform federal rules, was that judges had to be liberated from stringent code procedure that did not permit them the discretion they needed to do justice.<sup>91</sup> A major impetus to the ADR movement generally, and to mediation in particular, was judicial concern over growing caseloads,<sup>92</sup> particularly on criminal dockets. Also, critiques of the litigation system relating to frivolous suits, delays, and costs added to this movement.

Corporate and defense lawyers have come to embrace mediation<sup>93</sup> as a method of cutting client costs and reducing friction among companies that

---

account of the conservative/business/defense bar sponsored recent revision of FED. R. CIV. P. 26(B)(1), see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

<sup>85</sup> I summarized this paper in December 2001, in a talk I gave at a Boston litigation firm. One of the senior lawyers stressed the relationship of the growth of mediation in Massachusetts and the inability of lawyers to get trial dates in a timely fashion for their civil cases.

<sup>86</sup> Subrin, *supra* note 7, at 320-22.

<sup>87</sup> *Id.* at 322-23, 334-35.

<sup>88</sup> *Id.* at 323.

<sup>89</sup> Subrin, *supra* note 6, at 966-67.

<sup>90</sup> *Proceedings in Memoriam*, 328 F.2d 5, 20 (Whitney North Seymour) (Seymour put his eulogy in terms of the “simplification that was brought about by the Federal rules.”).

<sup>91</sup> Subrin, *supra* note 6, at 944-56.

<sup>92</sup> See, e.g., POUND CONFERENCE, *supra* note 82, espec. at 23-35.

<sup>93</sup> See, e.g., Holden, *supra* note 29, at 3 (drawing the connection between the growth of mediation and litigation costs, overcrowded courts, and the number of criminal cases).

desire to keep doing business with each other.<sup>94</sup> Some plaintiffs' lawyers undoubtedly see the advantages to themselves, as well as to their clients, from having a neutral mediator point out the strengths and weaknesses of their case, and from achieving settlement and the payment of money at an earlier point in the process. I think it is fair to say that, by now, members of the practicing bar have in large measure embraced mediation for their own benefit, as well as that of their clients, both as mediators and consumers of mediation. Many lawyers seem to enjoy mediating and engaging in mediation more than they enjoy aggressive adversarial behavior.<sup>95</sup>

### C. *Coalescence of Agendas From Both Right and Left*

The movements leading to both the Field Code and the Federal Rules had both liberal and conservative strands. As noted earlier, the Field Code liberalized procedure to some extent and facilitated the emerging laissez-faire economy. Field was a classical Jeffersonian liberal, an abolitionist and advocate of women's rights, who at the same time fought vigorously for business power and anti-government regulation.<sup>96</sup> In a similar manner, the initially conservative Enabling Act movement, opposed vigorously by progressives such as Senator Thomas Walsh, was later joined by legal realists and New Dealers, such as Charles Clark and Homer Cummings, FDR's first Attorney General. What had been a William Howard Taft reform was passed as New Deal legislation.<sup>97</sup>

Chief Justice Burger, hardly a progressive, at the influential Pound Conference of 1976, sounded one of the first bugle calls for ADR.<sup>98</sup> But many early proponents of mediation came from the progressive and feminist movements of the late 1960s and early 1970s, whose writings spoke of community, cooperation, and listening to excluded voices. Mediation was to be a gentler, more giving process than soul-destructive adversarialness, designed to empower communities, particularly those inhabited by the poor, to participate in solutions to their own disputes and needs.<sup>99</sup> Chief Justice Burger, the business community, and defense lawyers, indeed, make strange bedfellows with these social reformers!<sup>100</sup>

---

<sup>94</sup> In reviewing recent changes in the profession, a January 2002 article in the ABA Journal reported how corporations and auditors hired by them started "poring over the bills that law firms send out. And they began to pressure general counsel to cut spending, increasing the power and prestige of in-house legal departments. . . . The same concerns pushed the greater use of alternative dispute resolution. Businesses themselves were being scorched by scorched-earth litigation and wanted a way to sometimes save both money and relationships." Terry Carter, *Law at the Crossroads*, 88 A.B.A. J. 28, 33-34 (2002).

<sup>95</sup> McEwen et al, *supra* note 16.

<sup>96</sup> Subrin, *supra* note 7, at 316-27.

<sup>97</sup> Subrin, *supra* note 6, at 943-73, 1000.

<sup>98</sup> POUND CONFERENCE, *supra* note 82, at 23-35.

<sup>99</sup> See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 15-32 (1994) (giving four divergent stories of the mediation movement); Linda R. Singer, *A Pioneer's Perspective: Future Looks Bright, but Challenges Include Retaining Our Core Values*, *DISP. RESOL. MAG.*, Spring 2000, at 26.

<sup>100</sup> Linda Singer makes a similar point:

The [Pound] conference coalesced the interests of those who focused on access and participation or voice with those who focused on costs and efficiency. Those interests have coexisted, some-

I believe that a historian of the ADR movement is apt to find that it is also being carried, or reinforced, by contemporary intellectual thought that goes beyond easy labeling as liberal or conservative. The classical liberal thought of the mid-nineteenth century helped support Field and his reform. Legal realism was part and parcel of the Enabling Act/Federal Rules reform. As others and I have written, an important aspect of the current civil litigation predicament is the almost universal acceptance in intellectual circles that "reality" is subject to multiple perspectives.<sup>101</sup> Indeed, this is the hallmark of modern and post-modern scientific and intellectual thought. We have become distrustful of unified stories, and increasingly look to context and complexity. This, of course, is precisely how mediators tend to view disputes.

One should also consider the attraction of the free market theories that have dominated the ideological landscape for the past twenty-five years, and their emphasis on individual agency and choice. Part of the attraction of mediation to lawyers and their clients is that they help choose the mediator, as opposed to being assigned randomly to a judge; they retain power over the final disposition of the dispute; and can leave the mediation at will.

## V. MEDIATION IS A GOOD THING: ENGAGING THE CRITIQUES

My analysis of the major critiques of mediation has been instrumental in my evolution from opponent to proponent of ADR. I begin with the criticisms that I, and others, have levied,<sup>102</sup> much of which I wrote in a long letter to Frank Sander in 1986.<sup>103</sup> Although aspects of the criticisms overlap, the overall critique falls into four general categories: (1) a failure of rights vindication and law application; (2) a process particularly detrimental to those most vulnerable in society, depriving them of legal protections; (3) a failure of the dignity-

---

what uneasily, in the field ever since and have helped to shape the dispute resolution profession that has grown up as a result.

Singer, *supra* note 99, at 26-27. It is true that some of the opponents of ADR and mediation were also making progressive arguments, but the opposition of those like Owen Fiss, and feminists who saw mandatory mediation in domestic cases as disempowering to women, did not stop the momentum towards mediation. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992).

<sup>101</sup> See, e.g., Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 144-45 (1999); Menkel-Meadow, *supra* note 77.

<sup>102</sup> See, e.g., Fiss, *supra* note 100; Edwards, *supra* note 100; Grillo, *supra* note 100; Bryan, *supra* note 100; as well as, Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (Oct. 2002); G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183 (2000); Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POL. & SOC'Y 367 (1992); Robert G. Bone, *From Judgment to Settlement: The Changing Character of American Courts*, Address at Boston University (Oct. 16, 2000).

<sup>103</sup> Letter from Stephen Subrin to Frank Sander, *supra* note 13.

enhancing right to be heard in open court; and (4) losses to the community at large as a result of the privatization of the judicial function.

### A. *The Critiques*

#### 1. *A Failure of Rights Vindication and Law Application*

To me, ADR looked like an unfortunate attempt to escape law and the enforcement of rights. The very term "dispute resolution" has bothered me through the years because it implies that the central reason for adjudication is to get rid of disputes, rather than concentrating on the application of law and vindication of rights.

In a democracy, elected representatives pass laws that grant entitlements, rights, and legitimate expectations to its citizens; the common law developed to do much the same. "The rule of law" adds a degree of predictability and non-arbitrariness to everyday life.<sup>104</sup> Facts trigger legal consequences. I have not been so naïve as to think that we always know the events underlying a lawsuit, or that the application of law is consistent and predictable. Yet it seems to me that this aspiration of legal consistency was critical to our well-being. To the extent that ADR and mediation disregard the events (facts) that engendered a dispute and the relevant legal doctrine, then the goals of rights-vindication, law application, and predictability are diminished.

#### 2. *Harming the Most Vulnerable*

The application of known rules is particularly important for the most vulnerable in our society, who cannot rely on more powerful people to treat them fairly. Instead, they must rely on defined entitlements that are legally protected. It is important to have judges who will help ensure that citizens are given that to which the law entitles them. Much of the ADR literature brags about not being tied to the law, and this very flexibility may penalize litigants, particularly the poor or vulnerable. For years I have pointed out to my ADR friends that the conservative support of ADR occurred just at the time when legal services offices, civil rights lawyers, and the Warren Court decisions had begun to successfully confront social injustice.

#### 3. *The Right to Be Heard*

Moreover, it may be important for litigants to tell their stories in open court, so that the world might hear of the unfair treatment to which they have been subjected. Due process has always had a human dignity element. "Notice and the right to be heard" means that we enhance the dignity and autonomy of those who have been harmed by letting them tell their stories in public, and having the law applied in a predictable way to their situation. As Justice Frankfurter noted, it is not just important to have the correct result (law applied to found facts); it is critical that litigants feel that they have been treated fairly.<sup>105</sup>

<sup>104</sup> I have spelled out this "rule of law" of predictability, importance of enforcing rights arguments, throughout my career as an academic. See, e.g., Subrin, *supra* note 6, 985-1000; Subrin, *supra* note 7, at 338-45.

<sup>105</sup> *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-74 (1951) (Frankfurter, J., concurring). Justice Felix Frankfurter suggested two reasons for notice and hear-

#### 4. Losses to the Community Resulting from Privatization

The “privatization” of civil lawsuits through mediation detracts from the public good in a number of ways that go beyond fairness to the individual litigants. Some have feared that arbitration and mediation deprive the public of precedents, endangering the benefits of *stare decisis*.<sup>106</sup> As Owen Fiss has passionately written, a major purpose of courts is to articulate and effectuate public values and rights, particularly constitutional ones.<sup>107</sup> This is not a goal of ADR or mediation.

Also, mediations rob us of jury trials. The framers believed in the jury, in large measure, for political reasons, to control the potential arbitrariness of judges and others with power, and to permit lay citizens to partake in the governance of their country. As de Tocqueville noted, jury participation was a primary means of educating the population about law and about living in a democracy.<sup>108</sup> Except for voting, most of us as citizens never have the opportunity to be a direct participant in democracy but for serving as a juror.

Confidential mediations rob the public at large of knowledge of wrongdoing. Much of what we know about the evils of asbestos, tobacco, and impure drugs are the result of the dogged work of civil litigators who pressed their cases in open court, slowly prying out the knowledge hidden by acquisitive (and sometimes dishonest) defendants.<sup>109</sup> A trial in open court is a forum for citizens to find out about illegal actions, to discover how to protect themselves, and to disgrace wrongdoers.<sup>110</sup>

The use of private mediators by those who can afford them also draws influential and affluent lawyers and their clients away from the courts. This may, over time, result in less pressure on legislatures, at both state and federal levels, to fund or otherwise support the third branch. In turn, this may lessen the prestige and importance of courts.

I hope I have captured the many strands of the critique. I now think, though, that it is considerably less powerful than it first appeared to me.

---

ing: “No better instrument has been devised for *arriving at truth* than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for *generating the feeling*, so important to a popular government, *that justice has been done*.” *Id.* at 171-72 (emphasis added). He continued: “The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.” *Id.* at 170. For a review of the procedural justice literature, see Welsh, *infra* note 124.

<sup>106</sup> Samborn, *supra* note 102, at 26.

<sup>107</sup> Fiss, *supra* note 100.

<sup>108</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 303-07 (Henry Reeve trans., 1904). For a discussion of the many reasons our founders embraced the jury, see Subrin, *supra* note 6, at 926-29.

<sup>109</sup> See, e.g., THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001).

<sup>110</sup> Carr & Jencks, *supra* note 102. Settlement has become so much the norm that some claim that our adjudication system is not supplying legal opinions that are needed to permit the common law to evolve to meet new needs; this is detrimental, particularly to the business community that needs the guidance of written legal opinions.

## B. Responding to the Critiques

### 1. A Failure of Rights Vindication and Law Application

One of the many things I have learned from Deborah Hensler is the importance of looking at what is, rather than, or in addition to, what one wants.<sup>111</sup> So before one gets carried away with how mediation is depriving folks of rights vindication and law application, one must first confront her sobering data on how little lawyers consult with their clients, and how infrequently clients receive full vindication of their rights, or even a realistic opportunity to be heard.

How much careful delineation of law and fact actually enters into non-mediated settlements? The client ordinarily does not directly take part in the bargaining, and although consulted, is in large measure influenced by what his or her lawyer says the case is worth and what the range of possible trial results are. Neither side may have actually enmeshed the law and facts in ways that we, as law professors, would like to see our students perform in an exam. There is little indication that pleadings ordinarily tell each side a good deal about the most critical factual and legal points. Absent summary judgment motions, there may be few occasions for any side to focus on what is most important to their case and to share that information with opponents.

When I reviewed the literature for a speech about ten years ago, I discovered some evidence that lawyers, in fact, had difficulty focusing their cases on the essential factual and legal points.<sup>112</sup> This did not surprise me, since law schools have historically rewarded prospective lawyers who see the largest number of potential issues and widest range of potential arguments. Moreover, discovery, when the case warrants it, is geared to covering an expanded number of possible paths. There is some empirical evidence, although gathered in the 1960s, that discovery added almost as many issues as it reduced, and that the pretrial conference had a slight tendency to increase the number of issues rather than narrow them.<sup>113</sup>

Ironically, mediation, which is accused of, or applauded for, being lawless, frequently does much more to bring law to bear on facts than traditional litigation. I have not found any literature discussing in much detail the written and oral overviews that many mediators suggest participants provide. From what I have seen, however, these overviews permit the lawyers to present their

---

<sup>111</sup> See Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69; Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89. Although I am largely sympathetic to Roger Transgrud's fear of what is lost for individual litigants as a result of massive joinder of parties, and how judges change their behavior when confronted with that joinder, I admire Professor Hensler's insistence that ordinary clients probably are not getting what we think or want them to get in ordinary, bipolar litigation.

<sup>112</sup> Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure be Made More Equitable*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 761, 778-80 (Stephen Goldstein ed., 1992).

<sup>113</sup> *Id.* at 778, drawing on WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 92, 97 (1968). This study was criticized in Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1305-11 (1978); and MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION 45-58, 67-70 (1964).

positions; this means that all sides often relate the essentials of what they believe happened to occasion the dispute, and why they think the law is in their favor on the critical points. In fact, such an overview is often much more helpful to understanding the legal positions involved in a case than the pleadings or even a summary judgment memo.<sup>114</sup> The oral overview given by lawyers, the parties, or both, at the beginning of many mediations also offers an interweaving of law and fact not normally found in civil litigation, absent the now rare trial.

In addition, the mediator often seeks to further narrow and clarify the mixed issues of law and fact in ways that may never happen during litigation.<sup>115</sup> These occasions for focusing the controversy remind me that pre-Federal Rules procedure was designed to provide such focus and clarification. Some historians believe that, prior to the written common law pleading system, judges helped lawyers go back and forth orally before arriving at the single issue through a traverse or demurrer.<sup>116</sup>

When pleadings became written, the combination of the writ system and single issue pleading aided in the focus, perhaps excessive focus, of lawsuits. The jury trial in the county at assize tended to be narrowly focused on the single factual issue emanating from the traverse. When jury trials were more in vogue for resolving civil disputes in this country, lawyers gained experience through opening and closing arguments by focusing cases on the underlying facts that were most important to a given legal consequence. In the mid-nineteenth century, David Dudley Field hoped that the requirement of verified pleadings, with specific facts constituting the cause of action, would focus cases on the most important matters in dispute.<sup>117</sup> Helping the lawyers sift through the entirety of potential factual and legal issues trying to find the most significant ones is one role of today's mediators.

I am quite sure an empirical study would show far more law application takes place in a mediated settlement than a non-mediated one. Descriptions of mediations show that mediators talk about what happened to precipitate the dispute and the law that would apply.<sup>118</sup> Since the parties and their lawyers are

---

<sup>114</sup> Such integration of law and fact does, sometimes, take place in demand letters sent from plaintiffs to defendants. Matt Belanger tells me that some mediators require such demand letters prior to the mediation. Belanger, *supra* note 51. Short of a pretrial memo, most adjudication procedures do not supply a document that carefully integrates the most important of the facts and legal points.

<sup>115</sup> For a description of how mediators go back and forth among the parties, see, e.g., Bruce A. Coane & Ross W. Wooten, *Successful Strategies in Mediating Employment Cases*, 23 WM. MITCHELL L. REV. 901, 916 (1997).

<sup>116</sup> See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 399-405 (2001). I especially like this description of the relationship of the judge and the lawyers: "[T]here was the substantial advantage that the court joined in the discussion, which thus sometimes became a round-table conference of judges and counsel who joined in trying to find a way of pleading a case which would bring out the real points." *Id.* at 405.

<sup>117</sup> Subrin, *supra* note 7, at 328-31. It was hoped that discovery might do the same under the Federal Rules, but I believe that most of us who have litigated under the Federal Rules, or teach them, think that discovery has at least as much potential to diffuse and proliferate as it does to focus.

<sup>118</sup> See, e.g., the descriptions of mediators and how they act in DEBORAH M. KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS (1994).



trying to do at least as well as they would if the litigation commenced or continued, it is hard to think how they could avoid such discussion.<sup>119</sup>

Much mediation happens as a result of litigation and because judges mandate or encourage it; increasingly, however, mediation happens because lawyers suggest it.<sup>120</sup> So long as lawyers are involved, they will do what they were trained to do – discuss the facts that precipitated the dispute and the law that should be applied to it. Deborah M. Kolb demonstrates,<sup>121</sup> and Jeff Stempel points out<sup>122</sup> – and I agree – that mediators do a lot of talking about law and potential legal results, and relevant fact and law application play an important role in many, if not most, mediations.<sup>123</sup> In summary, I think far more law

<sup>119</sup> I have read some of the literature about facilitative and evaluative mediation, as well as about transformative mediation. I am quite sure that if transformative mediators told clients and lawyers engaged in litigation that the purpose of the mediation, for which the clients were to pay, was to empower the clients and make them recognize the humanity of their opposing side, they would lose a good deal of business. The idea that empowerment and recognition is why most folks want to enter mediation does not ring true. If transformative mediators do not tell their clients what their, the mediators', agenda is, I believe it is unfair to those who come to them and pay them. Moreover, the likelihood that most human beings will substantially change, be transformed, by some hours of mediation is most unlikely. Talk to analysts or other mental health professionals. Think about how easy it is to alter your own thoughts and behavior. It is a positive feature of mediation that clients may, in fact, get more power than they do in non-mediated litigation. It is also positive that clients and their attorneys may gain some experience through mediation in recognizing the needs and humanity of opponents. It is surely a plus for mediation that it may help improve the relationship of disputants for the future in ways that may not happen through trial or non-mediated settlement. But for most people engaged in litigation, or its distinct possibility, the central purpose of mediation is, and will remain, to dispose of disputes. This will usually make the facts and law important to them.

<sup>120</sup> See *supra* text accompanying Cardozo Symposium notes 55-56.

<sup>121</sup> KOLB, *supra* note 118.

<sup>122</sup> Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 263-71.

<sup>123</sup> Although the underlying facts and the applicable law will play an important part in the mediation of disputes that are in litigation, I think mediators should be extremely hesitant about ever saying what they think the correct result of a mediation should be or what they think a judge or jury would determine. The mediators will almost always lack information. Even when one is dealing with her own client, a lawyer is not quite sure she has the whole story of what the client knows, let alone what the other clients and witnesses know. It is foolish to assume that parties and lawyers tell the mediator everything they know that is relevant to a settlement. So far as I have been able to determine, the skillful lawyer at a mediation, as well as the skillful client or party without a lawyer, is doing two things simultaneously: she is being an advocate trying to convince the mediator of her position and to convince, or soften, the previous convictions of the opposing parties and lawyers, and she is being cooperative and sharing (or at least giving that appearance) in an attempt to gain a settlement, and perhaps even increase the combined value of what can be achieved through settlement. The advocacy part of the performance will not permit all information to be placed either on the table or communicated to the mediator confidentially. Even if the mediator knew everything, she would be plagued with the uncertainties about litigation that I have previously discussed. Consequently, I think the mediator is probably most useful and most honest in trying to help all sides to see the pros and cons of their positions, both factually and legally; the range of possible litigation results; and the range of extra-litigation options. This way, it is left to the clients and their lawyers to decide what is best for them based upon their knowledge, expanded by what the mediator has suggested they might consider. I suppose I am concluding that "facilitating" includes, and should include, assisting others to evaluate. Ironically, mediating lawyers may begin to look more like trial lawyers –

application and integration of law and fact goes on in mediation than I had previously assumed.

## 2. *Harming the Most Vulnerable*

The critique that mediation can disempower the weaker party has bite to it. There is inherent pressure to settle in mediation. But there is also pressure to settle absent mediation. Frequently, the more powerful side can afford litigation and its preparation in ways that the weaker side cannot. To the extent that the law does not aid the weak, it is unlikely that trial, non-mediated settlement, or mediation will supply the lacking power; although there are occasions when moral persuasion can be brought to bear at a mediation or trial. However, having lawyers present at the mediation, and encouraging mediators to explore the law with the litigants, makes it more likely that the vulnerable will gain whatever advantage the law allows. Much of the critique of mediation emanates from the experience of women in domestic cases in which the mediation takes place without legal representation, and in some cases, without legal representation even after a potential settlement has been reached. Mediation in which the specific mediator is imposed by others is also problematic; the prejudices of any mediator will impact the enterprise. These criticisms are well-taken, but having a choice of mediators and being permitted to bring one's lawyer takes some of the bite from the critique.

If a litigant wants to stand on her rights, and seeks more total rights vindication than settlement permits, then the courts and judges should make that possible and not discourage it. More on that at the end of this article, but in a nutshell, having the threat of a rights-vindicating trial more easily available should result in more protective settlements for the vulnerable, whether through mediated or non-mediated settlements. The realistic threat of trial will cast a firmer shadow of the law than when judges actively encourage settlement and disparage those who wish to try their cases.

## 3. *The Right to be Heard*

We are beginning to understand from the procedural justice literature more about why it is so important to litigants to have a realistic opportunity to have their stories and positions told to a third party.<sup>124</sup> Litigants want to convince the third party that their position is correct by having the opportunity to describe their version of what happened, and why that should entitle them to a favorable decision; it is also important to them, however, to feel that they have been treated with dignity, and that the third party is listening to their story and taking it into consideration in arriving at a decision. This is true even if the third party ultimately does not agree with them. The literature suggests, though, that litigants also feel fairly treated if they hear a representative whom

---

putting facts and law together in a cogent, convincing way and advocating with the use of a coherent story – than discovery litigators.

<sup>124</sup> For a review of the procedural justice literature, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 820-30 (2001).

they trust, such as their lawyer, tell their story to a third party in their presence.<sup>125</sup>

Since mediators are third parties, and in court-sponsored mediation have the imprimatur of the official court on the process, one should by no means assume that mediation reduces the opportunity for litigants to be meaningfully heard. Once again, it is important to be clear about the reality of the litigation process. With or without mediation, most clients never have their voices heard in a courtroom. As we have seen, most cases settle or are otherwise terminated without trial. Although parties often tell their stories during discovery, oral depositions take place before, or as a result of, mediations, and are controlled by the attorneys. Even in the rare civil case where there is a trial, the question and answer method, cross-examination, and evidence rules, hinder the client from telling the story as she sees and feels it.

So far as I have been able to ascertain, clients play a much more active role in mediations, and have enhanced odds that their story will be told in a narrative manner by their lawyer or themselves. Although there may be an unfortunate trend developing in the opposite direction,<sup>126</sup> mediators have historically wanted the clients present at the mediation. At mediation, a client can frequently tell her side of things without the interruption of the formal question-answer, evidence objections mode of trial.<sup>127</sup> Clients hearing their own lawyer tell their position in a joint session at mediation can be as meaningful as telling their own stories.<sup>128</sup> The joint sessions with lawyers and parties present at the beginning of a mediation are perhaps far more significant to client satisfaction than some mediators have realized.<sup>129</sup>

To the extent that dignity in litigation includes "being heard," it seems to me that clients are hearing and being heard significantly more in mediation than in most non-mediated settlements. And the comparison of being heard in a mediation, as opposed to a trial, is not nearly so stark (or weighed negatively against mediation) as one might at first imagine.

#### 4. *Losses to the Community Resulting from Privatization*

The allegation that ADR has prevented enough precedential case law from being made is not borne out by the numbers. Although there are fewer trials, the National Center for State Courts reports that the number of appeals rose

---

<sup>125</sup> *Id.* at 841. In fact, some of the literature suggests that if the lawyers do a good job telling the client's story, some litigants are even more content with the process than had they told the story themselves.

<sup>126</sup> *Id.* at 801-02. Welsh also notes that evaluative mediation has tended to move mediators away from seeking creative settlements that are not solely monetary. *Id.* at 813.

<sup>127</sup> Clients can tell their story to the mediator, even when the lawyer does not want the client to talk in front of the other side. *See, e.g.,* Coane & Wooten, *supra* note 115. Even when the lawyer does all or most of the talking at the mediation, the client usually hears what is going on, can make suggestions to the lawyer, and participates directly in the decision to settle. Unlike the non-mediated settlement, each client hears the position of the opponent and hears the comments and suggestions of a neutral.

<sup>128</sup> Welsh, *supra* note 124, at 801-02.

<sup>129</sup> *Id.* at 844, 846, 851-55. There are also opportunities at separate caucuses with the mediator for the client or her attorney to tell the client's story. Client participation may also aid mediators in the search for creative settlements that are not solely monetary. *Id.* at 814-16.

substantially in our country during the 1970s and 1980s, subsiding in the 1990s with civil appeals growing only slightly in the last decade.<sup>130</sup> The judicial caseload in the U.S. Courts of Appeals rose 9.2% between 1995 and 2000, with appeals of non-prisoner, non-criminal, and non-administrative cases rising from 11,293 cases to 13,497 in the same period.<sup>131</sup>

There is also no evidence that mediation has substantially reduced the public airing of societal problems in court. Let us examine the data concerning civil rights cases.<sup>132</sup> Civil rights complaints related to employment, housing, welfare, voting, and other civil rights-related issues more than doubled from 18,793 filings in 1990 to 42,354 in 1998.<sup>133</sup> The proportion of all civil cases that had civil rights-related complaints increased from nine percent in 1990 to seventeen percent in 1998. About sixty-five percent of the increase is attributed to the rise in complaints related to employment issues, which nearly tripled, from 8,413 to 23,735, in 1998. Of the civil rights-related complaints terminated by trial verdict between 1990 and 1998, the percentage decided by a jury increased from forty-eight percent to seventy-seven percent. Judgments decreased from thirty-four to twenty-nine percent during this period, but there are still many more trial judgments than result from the average civil litigation (which is less than four percent).

Civil rights complaints filed in U.S. Courts of Appeals increased by about eighty percent, from 4,729 cases in 1990 to 8,466 cases in 1998.<sup>134</sup> Civil rights-related appeals as a proportion of all civil cases filed in U.S. Courts of Appeals increased from seventeen percent in 1990 to twenty percent in 1998.<sup>135</sup> The data, then, at the trial and appellate levels, does not indicate that mediation has prevented federal courts from hearing public law cases, nor has it prevented them from articulating public law on appeal.

And yet, one must take seriously the accusations that mediated settlements are a far cry from court orders that seek to make systemic change, and that mediation does not create new rights that will help other litigants or disseminate knowledge about wrongdoing that will help others. In fact, confidentiality makes it possible for private parties to keep their public-damaging activities secret. Most painful to me, the total number of civil jury trials – and consequently, the number of citizens who are privileged to become jurors – is diminishing. Perhaps mediation is the cause of some of this.<sup>136</sup>

<sup>130</sup> National Center for State Courts, at <http://www.ncsc.dni.us/divisions/research/csp-index.html> (last visited Dec. 22, 2002).

<sup>131</sup> U.S. Court of Appeals, Federal Judicial Caseload Statistics, Judicial Caseload Indicators, available at <http://www.uscourts.gov> (last visited Jan. 22, 2003).

<sup>132</sup> Civil rights cases are what Owen Fiss was most concerned about in his famous article arguing against settlement. Fiss, *supra* note 100.

<sup>133</sup> These and the following statistics on federal court civil rights cases are taken from Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 1990-98* (2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/crcusdc.htm> (last visited Jan. 22, 2003).

<sup>134</sup> *Id.* The data on civil rights appeals comes from the same source as the district court data.

<sup>135</sup> I would like to know more about the data. For instance, how much of the civil rights litigation is related to prisoners?

<sup>136</sup> David Azar, *Conflict Resolution Reduces Number of Federal Cases Decided by Juries* (Apr. 6, 2001), available at <http://www.acresolution.org/research.nsf/articles/8010b831abb0457685256a2600751ab> (last visited on Jan. 22, 2003).

Once again, however, a closer look at what is going on takes some of the sting out of the critique. One of the advantages of mediation is that it can help the parties to a dispute work out methods for operating prospectively that are more beneficial to both. For example, a mediated settlement of an employment discrimination case that requires the employer to alter its future behavior may, in fact, have more positive systemic impact than would be achieved through litigation.<sup>137</sup>

For a number of reasons, I am having difficulty figuring out the impact of confidential settlements, arising from mediations, on the public good. First, whether or not there is mediation, we know that most cases settle. Such settlements have been, and can be, as secret as those achieved through mediation. If the manufacturer of a faulty product wants to settle with a single plaintiff, and has the power to impose secrecy on the settlement, it can achieve this in or out of mediation. If a plaintiff's goal is to broadcast the wrongdoing, she can insist on this as part of a mediated or non-mediated settlement.

I suspect that confidentiality is a much more complicated issue in mediation than is sometimes assumed.<sup>138</sup> If I, as a lawyer, am told something about a product in mediation that I must treat as confidential, in a subsequent case I can do discovery with respect to the "confidential" topic. Even in the case in which I got the confidential information, I can seek witnesses or documents that will provide the same information.

Assume that a mediated case with respect to an allegedly defective product settles with a confidentiality agreement. If the case was already in litigation, then some document will be filed with the court that terminates the case. A dismissal with prejudice or an agreement for judgment for one dollar, judgment satisfied, may be filed. Anyone can then learn that the plaintiff and defendant settled the case from the public docket. The assumption would be that the plaintiff got something that she wanted. If there are several such "secret" settlements, the plaintiffs' bar will know that there is gold to be mined in this field.

Finally, if there is a plaintiff and plaintiff's lawyer who cannot achieve what the plaintiff wants through settlement, and/or wants the public to know about the defendant's untoward activity, then they can refuse to settle or refuse to settle with confidentiality. Again, this can happen with or without mediation.

I have left for the end what, for me, are the most troubling aspects of the mediation critique as it relates to privatization and the resultant harm to the community at large: the reduced number of civil jury trials in open court and the potential diminution of public support for courts as a result of the siphoning off of cases in which litigants, who can afford it, hire private mediators. As I have written earlier in this paper, I look at the American jury as an integral part

---

<sup>137</sup> Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583. Some have suggested that by joining vulnerable parties at a mediation, through the use of caucus representatives or otherwise, there can be increased power for those who are otherwise vulnerable.

<sup>138</sup> For some of the complex questions regarding the confidentiality of mediations, see Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

of our democracy, and think it is a mistake to consider the jury trial as merely a mode of dispute resolution. Since less than three percent of cases are tried, and only half or so of those are jury trials, then the privatization of justice – whether through ordinary settlement, arbitration, mediation or some other non-courtroom method – has deprived ordinary citizens of the opportunity to partake in governing, and in the society at large of the public airing of important issues.

Once again, the questions are more complicated. One reason the civil jury is so important is that it empowers citizens to participate in the important public function of resolving disputes. As I have already pointed out, in mediation, the parties themselves are participating in ways that ordinarily do not happen at trial or in non-mediated settlement. Statistically, mediation may actually provide more private citizens experience hearing about the law and actively resolving disputes than the jury system.<sup>139</sup>

I am not arguing that a client who has more enhanced control, autonomy and dignity through mediation is akin to serving as a juror, nor am I arguing that mediation fulfills the same public function as a jury trial. I am only pointing out that some of the values of jury trials – educating lay people about law and permitting them to partake in the important civil function of resolving disputes – may also be fulfilled at mediation.

I have not yet heard or found a convincing refutation to the criticism that privatization through ADR will, over time, propel the more wealthy and powerful litigants and their lawyers away from public adjudication, and will in turn reduce the prestige and the public support for the judiciary and the court system. As one lawyer told me, the contrasts between the relatively luxurious and comfortable accommodations at a private mediation office and those found in the all too familiar tattered and under-funded state courthouses are stark and depressing.<sup>140</sup>

I continue to be troubled by some aspects of the privatization of the public function of judging, particularly the diminished support for the court system by those with money and influence, which may well result in a second-class brand of justice for the poor.<sup>141</sup>

---

<sup>139</sup> Also, a huge number of hours of real trials are now televised, some of them viewed by millions (such as the O. J. Simpson cases), and have increased many fold the amount of education about law acquired by the average citizen. Conversation with Brad Honoroff (June 26, 2002).

<sup>140</sup> See *supra* note 85, from the same lawyer. Perhaps one can soften the critique a little, while regrettably not truly undermining it. Some mediations before private mediators do take place in courthouses, thus continuing to expose the clients and lawyers in such cases to the need for additional judicial funding. Moreover, judges and court personnel may learn from private mediators the virtues of being more accommodating to the public. If trials could be achieved quicker and take less time, this would make them more attractive. In addition, courts could offer mediations to the parties at no charge, just as they offer trials.

<sup>141</sup> There is a large additional topic, not addressed in this paper, of what it means to put a public imprimatur on the results of private mediations.

## VI. JUDGES WHO JUDGE

Although there is danger to the judiciary from mediation due to the potential for reduced support, there is also self-inflicted danger stemming from judicial attitudes about the desirability of conducting trials. It is to this problem that I briefly turn. The growth of mediation invites consideration of the appropriate relationship of adjudication to mediation. In general, at least one party to a dispute will not come to the bargaining table absent the threat of a legal sanction. Cases settle because parties fear that the result will be worse if there is a formal judgment. To the extent that the potential judgment is too expensive to achieve in terms of time, money, and overall hassle, a party who could otherwise count on a legitimate right has lost a good deal of bargaining power.

The civil adjudicatory process is critical in our country: it helps to ensure the law is applied evenly; it permits people to have legitimate expectations; it permits citizens to partake in governance; it checks arbitrary power; it permits law to grow to meet new needs; it grants dignity and autonomy to citizens; it educates jurors; it provides a safety valve for citizen anger; and it is a substitute for armed conflict. The conference at which this paper was given was one largely composed of civil procedure teachers. I did not think I had to lecture them on the importance of the third branch.

But perhaps we do have to lecture the third branch. Twenty-five years ago, at the time of the Pound Conference, it may have been important for the judiciary to confront some of the abuses resulting, in part, from the wide-open, liberal Federal Rules regime. For a variety of reasons, perhaps including lawyer incivility, frivolous litigation, and overly aggressive and expensive discovery practices, maybe more judicial control made sense. Perhaps it had become important for judges to emphasize managing litigation and encouraging settlement.

If I am correct in this paper, however, mediation is now firmly entrenched. Moreover, we now have a good deal of data that the best management technique for judges is to set early trial dates, accompanied by discovery control in those cases in which the stakes drive lawyers to extensive discovery.<sup>142</sup> There is data that judges who engage in active judicial management do not settle more cases than those who spend most of their time trying cases.<sup>143</sup> Also, to the extent that judges engage in settlement discussions, receive information from those who are so engaged, and are told about failed mediations, they cannot help but hear inadmissible evidence. The management and settlement functions are somewhat different from, and can detract from, the judicial function.<sup>144</sup>

---

<sup>142</sup> Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79 (1997) (discussing and summarizing some of the findings of JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996)).

<sup>143</sup> Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure be Made More Equitable?*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 761, 787-88, nn.111, 117-19 (Stephen Goldstein ed., 1992).

<sup>144</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

The results of mediation are frequently – I actually believe usually – dependent upon the range of potential results that would come from formal adjudication. For this reason, in some cases, the parties and their lawyers want to hear the trial judge's preliminary views of the case. And there are other instances when a trial judge or magistrate who is not assigned to the particular case may be in a good position to mediate. Lawyers have told me that clients like the formality of discussing settlement before one in a black robe; it makes them feel more like they are receiving official justice. Nonetheless, in my view, the best way that judges can relate to mediation is to make themselves available to try cases, and to decide pre-trial motions expeditiously and fairly. There are increasing numbers of capable mediators available whom lawyers increasingly know of. Judges do not ordinarily have to fill that role.<sup>145</sup>

To the extent judges complain that ADR has robbed them of hearing important cases, they often have themselves to blame. Some judges apparently think that if they can make clear to the lawyers and their clients all of the burdens that formal adjudication entails, including its expense, time, delays, unpredictability, and general obnoxiousness, then most cases will settle. They are right.

One lesson that judges and court personnel can take from mediation is that if the process is more accommodating to the needs of lawyers and clients, it will be used. One lesson that I take from mediation is that the skilled mediator needs judges to judge. To the extent that the judiciary can provide firmer shadows, firmer predictions of legal results through adjudicated cases, mediated settlements will more accurately reflect what a fair result should be. It is disturbing in a democracy that rights are lost because the formal system is ineffective or because judges give the message, overtly or covertly, that they do not want to preside over trials.

## VII. CONCLUSION

The increased use of mediation in our country has forced me, a skeptic of the process through the years, to think more seriously about the extent of its use, why this has come about, and whether the phenomenon bodes well or ill for achieving a just and efficient civil litigation system. As the title of my paper suggests, I am convinced that mediation will continue to prosper. The reasons why lawyers and their clients are drawn to it are not likely to decrease, and there are strong historical currents propelling its growth. Because of the attention to fact and law in most mediations, and the opportunities for client participation, it is a considerably better method of dispute resolution than I had assumed.

Mediation, though, forces students of civil adjudication to begin thinking more seriously about what would be the most beneficial relationship between mediation and formal adjudication toward the end of achieving a sound civil litigation system. I have become more comfortable with mediation, in large measure, because its attention to underlying facts and law application is more

---

<sup>145</sup> When judges do act as mediators, they should consider the procedural justice advantages of client participation. See Welsh, *supra* note 124.



pronounced than I had thought. Ironically, however, this very attention to law application can, particularly in court-annexed mediation, lead to a dilution of some of mediation's benefits. The push to have mediators evaluate the legal merits of a case has often resulted in eliminating the opportunities for clients or their lawyers, in the presence of all parties, to tell their stories to the third-party neutral. At the same time that mediation begins to look more like adjudication in its attention to law application, judges, who eschew the actual trial of cases, have become more like mediators; but often they do not appreciate the benefits of mediation that relate to clients meaningfully participating and being heard.

Fortunately, this is not a zero-sum game. Mediators can permit mediation to be fact and law infused at the same time they take advantage of the opportunities to invite meaningful client participation. Judges can take advantage of their unique role in two distinct ways: by willingly presiding over trials, and, when they do act as mediators, embracing the dignity-enhancing values of client participation. I fear that the attractiveness of mediation may, over time, draw the needed support of influential lawyers and clients away from the courts. Judges can, perhaps, forestall this unfortunate development by making the courthouse a more welcoming venue for trials and for mediation.

## APPENDIX – ADDITIONAL MATERIAL ON THE UTILIZATION OF MEDIATION

The Administrative Office of the United States Courts reports that of the 25,961 cases referred to an ADR process during July 1, 2000 to June 30, 2001, 15,379, or sixty percent (in 39 different federal district courts), were sent to mediation; the next closest ADR category was arbitration, at 4,594 cases.<sup>146</sup> In 1999, Peter R. Steenland, Jr., senior counsel at the Office of Dispute Resolution in the U.S. Department of Justice, reported that during the previous four years:

[T]he use of dispute resolution by the Department of Justice has increased four-fold. A form of dispute resolution – usually mediation – is used in some 2,000 cases per year to help find solutions to problems that are acceptable to all parties. . . . [A] growing number of parties in civil lawsuits are turning to dispute resolution, and especially to mediation, to assist them in obtaining an early and acceptable solution for civil litigation. Although there are many processes associated with dispute resolution, such as arbitration, early neutral evaluation, mini-trials and summary jury trials, the clearly preferred process is mediation.<sup>147</sup>

At a 1999 conference on “The State of the States: Dispute Resolution in the Courts,” sponsored by The National Center for State Courts and The Policy Consensus Initiative, representatives of ADR offices from several states reported on ADR activity.<sup>148</sup> Here are some examples. The Coordinator for Dispute Resolution Programs at the Supreme Court of Ohio reported that a survey of 2,300 Ohio attorneys showed that “mediation would be useful in a broad range of cases including business disputes, personal injury litigation and family disputes. . . . They favored mediation over arbitration.”<sup>149</sup> The Director of the Office of Dispute Resolution for the Colorado Judicial Branch in Denver reported that they were now mediating “over 2,000 civil and domestic cases a year.”<sup>150</sup> The New York Community Dispute Resolution Centers program was consistently handling “over 40,000 cases screened as appropriate for ADR each year. Of these cases, over 22,000 mediations, conciliations, or arbitrations are conducted.”<sup>151</sup>

At the conference, a researcher on ADR in Minnesota reported that a new rule became effective in 1994. It required lawyers, within sixty days of the filing of an action, to consult with their clients about the appropriateness of using ADR.<sup>152</sup> Forty-eight percent of lawyers reported that they had used mediation prior to Rule 114; after the advent of Rule 114, the figure rose to eighty-four percent. Ninety-two percent of the lawyers responding to a survey said “they would continue to use ADR, even if Rule 114, was repealed.” She

---

<sup>146</sup> ADR Staffing Credit, fax provided by David Williams, District Court Administration Division, Administrative Office of the United States Courts to Michele Pearson, Northeastern U. School of Law librarian (Dec. 18, 2001) (on file with author).

<sup>147</sup> Peter R. Steenland, Jr., *The Role of Dispute Resolution in U.S. Federal Courts?*, at <http://usinfo.state.gov/journals/itdhr/1299/ijde/steenlan.htm> (last visited Jan. 22, 2003).

<sup>148</sup> Cardozo Symposium, *supra* note 55.

<sup>149</sup> *Id.* at 7 (Eileen Pruett).

<sup>150</sup> *Id.* at 13 (Cindy Savage).

<sup>151</sup> *Id.* at 19 (Dan Weitz).

<sup>152</sup> Codified as MINN. STAT. ANN. § 484.74 (West 2002).

added: "Importantly, though, I have not said ADR has been institutionalized. It's mediation that has been institutionalized."<sup>153</sup>

One can access reports on ADR activity within most states through web-sites. Here, for example, is information from Florida as of August, 2000:

In 1997 alone, approximately 125,000 cases were diverted from Florida's court system to mediation. Florida's court-sponsored mediation and arbitration services deal with a full range of disputes from family law to small claims to large circuit matters. As of July 1999, more than 12,000 individuals have completed Florida Supreme Court-certified mediation training programs. The Supreme Court has certified 2,296 county mediators, 1,871 family mediators, 2,298 circuit mediators, and 80 dependency mediators.<sup>154</sup>

The following is from the annual report of the Hawaii State Judiciary: "There are six community mediation centers on five islands . . . . The community mediation centers handle neighbor disputes, landlord/tenant, restitution cases, condominium disputes, health conflicts, real estate disagreements, and domestic cases."<sup>155</sup> A 1997 Texas ADR Legislative Report states:

The use of ADR processes in employment disputes increased 41% since 1996. Over one-third of the responding agencies use ADR in attempting to resolve employment disputes. Most significantly, 100% of reporting agencies that employ at least 1500 people utilize one or more ADR processes in this area. The overwhelming ADR process of choice was mediation.<sup>156</sup>

We see the same theme emerging in an article summarizing the Indiana quarterly reports submitted by every court throughout the state:

What can be gleaned about mediation in Indiana from these reports? First of all and most strikingly is the dramatic fashion in which mediation referrals have increased over the years. In 1992 only 647 cases were referred to mediation. By 1997, that number had increased to 5,917, an increase of more than 814 percent. . . . By 1997, . . . [the percentage of new court case filings referred to mediation] reached 4.8 percent. The rise of mediation is even more dramatic than is reflected in the quarterly reports when you consider that a large number of cases are being mediated either pre-suit or simply by agreement of the parties (without court order) after litigation has begun.<sup>157</sup>

Such cases are not reported in the quarterly reports as cases referred to mediation.

A second fact which can be gleaned from the courts' quarterly reports and which bears out what most practicing mediators in Indiana already intuitively know is that the vast majority of cases referred to mediation by Indiana courts are not domestic in nature. . . . Even a cursory examination of the facts laid out in this article reveals the spectacular growth and impact that mediation has had on the resolution of disputes in Indiana. That impact continues to grow.<sup>158</sup>

The ADR Clearinghouse, including the National Center for State Courts Holdings on Mediation, lists 138 titles; the books cover mediation in at least 17

<sup>153</sup> Cardozo Symposium, *supra* note 55, at 41-42 (Nancy Welsh).

<sup>154</sup> FLABAR ONLINE, Alternative Dispute Resolution (ADR), August 2000.

<sup>155</sup> Hawaii State Judiciary Annual Report for the Period July 1, 1997 – June 30, 1998, at 10.

<sup>156</sup> Center for Public Policy Dispute Resolution, 1997 Texas ADR Legislative Report 3.

<sup>157</sup> Steven A. Spence, *Mediation Around Indiana: Boom or Bust?*, 42 RES GESTAE 36 (July 1998).

<sup>158</sup> *Id.* at 36, 38.

states.<sup>159</sup> The NCSC gives contacts for ADR, usually including telephone numbers, fax, and e-mails, for all 50 states.<sup>160</sup> Most of the contacts are within court systems; many of the notes include links to lists of mediators. The Knowledge Management Office has information on fees and costs associated with court-connected mediation that includes thirty-four states, covering every region of the country, Alaska and Hawaii.<sup>161</sup> A 2001 bibliography of recent ADR articles shows the use of mediation in a startling multiplicity of fields, including trusts and estates, estate planning in advance, visitation rights, neonatal birth, libel, tax, mass tort claims, environmental, personal injury, and damages severed from liability.<sup>162</sup> We know from other sources (articles, books, discussions with lawyers, and mediators) that mediation has been used in all kinds of tort cases and disputes involving patents, discrimination, bankruptcy, attorneys' fees, divorce, custody, employment, appeals, construction, technology, health care, schools, commerce, contract, neighborhoods, and malpractice. And, it is used when law firms and family businesses break up. It is also used in accusations of workplace sexual harassment.<sup>163</sup>

---

<sup>159</sup> <http://www.ncsc.dni.us/is/clrhouse/bks-med.htm> (last visited Dec. 22, 2002).

<sup>160</sup> Information Resource Center, Court Links, Alternative Dispute Resolution (ADR): "Contact Information and Web-sites that provide Alternative Dispute Resolution materials on-line listed alphabetically by state," available at <http://www.ncsc.dni.us/KMO/Topics/ADR/States/ADRALGA.htm> (last visited Dec. 22, 2002). After the word "state," one may also place ADRHIMD and ADRMANJ and ADRNMSC and ADRSDWY in order to cover all of the states.

<sup>161</sup> Information Resource Center, Alternative Dispute Resolution (ADR), *Fees and Costs Associated with Court-Connected Mediation*, (May, 1998), available at [http://www.ncsc.dni.us/KMO/Topics/ADR/FAQs/Fees\\_and\\_costs.htm](http://www.ncsc.dni.us/KMO/Topics/ADR/FAQs/Fees_and_costs.htm) (last visited Dec. 22, 2002).

<sup>162</sup> *A Selected Biography*, 16 OHIO ST. J. ON DISP. RESOL. 855 (2001).

<sup>163</sup> Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999).