The Cardozo Online Journal of Conflict Resolution, in conjunction with The National Center for State Courts (NCSC) & The Policy Consensus Initiative (PCI), presents: The State of the States: Dispute Resolution in the Courts

PROFESSOR LELA LOVE: While recognizing that some states are ahead of others in terms of While recognizing that some states are ahead of others in terms of bringing ADR into the courts, part of the momentum behind this event was a belief that the movement to bring dispute resolution into state court systems is like a wave ready to break, gaining momentum and force. [1] Thus, a gathering of leaders in the state court arena seemed most timely.

If from this symposium we can learn something from each other, so that we can affect, however slightly, how that wave breaks in our individual states, then we will have had a very worthwhile afternoon.

If you will indulge me for a moment, I have, for the last month or so, thought of this event every time I have heard a certain song played by my teenage daughter. The song is a mixed version of "Fantasy" by Mariah Carey. I want to imitate how the rap singer gets a feel for the audience. Part of our fantasy today is that we have states from across the country. So, let's see what states are here...

Since I am not a rap singer, I need your help! If I ask, "Are there ladies in the house?" and you are a lady, please make a commotion. Are there ladies in the house? (page 2)

FEMALE GROUP: Yes!

MS. LOVE: Are there gentlemen in the house?

MALE GROUP: Yeah. [not as loud]

MS. LOVE: Good for the ladies. Okay. Here we go. Yo, is west coast in the house?

AUDIENCE: Yeah!

MS. LOVE: A little louder. Is east coast in the house?

AUDIENCE: Yeah!

MS. LOVE: Is Florida in the house? Any Florida here? Is Maine in the house?

FEMALE VOICE: Yeah!

MS. LOVE: Is Hawaii in the house?

AUDIENCE: Yeah!

MS. LOVE: We have realized the fantasy of having "sea to shining sea" here! Let me add one more category from the song. Is Boogie Down in the house?

AUDIENCE: Yes!

MS. LOVE: Good. I would like to turn the microphone over to Leila Zubi, Editor-in-Chief of Cardozo's new Online Journal of Conflict Resolution. [www.cardozo.yu.edu/cojcr/index.html]

MS. ZUBI: Welcome to the "State of the States." I hope you enjoy today's program. I would like to thank Professor Love and Tiiu Gennert, our Symposium Editor, for organizing this event. I am sorry to announce that Margaret Shaw will not be able to join us this afternoon. However, the good news is that we will bring her remarks to you via our Journal. In fact, you will not need to take any notes this afternoon because the Cardozo Online Journal of Conflict Resolution will feature the symposium transcribed, edited, and footnoted, with hyperlinks, shortly. All you have to do is click on our website.

At this time, I would like to introduce Anne Skove from the National Center for State Courts.

MS. SKOVE: Hi, I am Anne Skove from the National Center for State Courts Knowledge Management Office. [2] My colleague from the Knowledge Management Office, Madelynn Herman, has been detained but will be joining us soon.

I have probably connected with almost everyone here via phone, e-mail, or other means, but not in "real life." It is wonderful to be here and meet everyone in person. I do not have much to say other than "welcome." They did not tell me I had to sing, so I do not have (page 3) a song prepared like Professor Love did! I just want to welcome everybody.

I also want to tell you about the information we brought with us. This is exactly what we do in the Knowledge Management Office -- link people with resources. Again, it is nice to be able to do this face-to-face. Several brochures and other materials are available in the back from a variety of National Center functions and divisions, including the Knowledge Management Office; the ADR Clearinghouse; the Institute for Court Management, which offers courses in ADR, pro se, caseflow, and other topics of interest to judges, court managers, and others; and our Court Services Division, located in Denver, which can come to a court and perform on-site evaluations on dispute resolution or other court-connected programs. In fact, Court Services is now working with Cindy Savage in Colorado to evaluate court-connected programs in that state.

Sample books are also available, including Susan Keilitz, Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers [3], which has a chapter on mediation available online; Susan Keilitz and Melinda Ostermeyer, Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers [4]; and the annual Report on Trends in the State Courts.

Thanks to Chris Carlson at the Policy Consensus Initiative for asking the National Center to be a co-sponsor and presence at this symposium. I am excited to be here and look forward to meeting everybody.

MS. CARLSON: I am Chris Carlson, the Co-Director of the Policy Consensus Initiative. Dick Gross, the other Co-Director, is at the back of the room.

We work with leaders in states to establish and strengthen the use of conflict resolution and consensus building. PCI is two years old, and has just received a grant from the Hewlett Foundation for two more years of activity.

While we work primarily on enhancing programs on the government side of things, we are very pleased to provide opportunities for state court programs to meet, network, and communicate. In many ways, there are real links between the things that are done on the administration's public policy side of government and the things on the other side.

In your materials is a little study.[5]

I want to give some history to lay the ground-work for the discussion today. It was in the early 1980s that a few

state courts began to create the first dispute resolution programs at the state level. That movement has grown steadily since that time. Today, more than half the states have some kind of a dispute resolution program. The greatest number of them are located in the courts. It seemed particularly appropriate to have someone who was the founding director of one of the first state court dispute resolution programs moderate this panel.(page 4)

It is my pleasure to introduce Peter Adler, who many of you know as a leader in the dispute resolution field. In preparing to introduce Peter, I thought of all the things Peter used to do. He used to run the Hawaii Outward Bound program. He was the first Director of the Hawaii Center for Dispute Resolution. He used to be the President of SPIDR. Peter has a great sense of humor, and is guaranteed to keep things moving for us.

MR. ADLER: He used to have a lot more hair on his head too. It is really a pleasure for me to be here. Lela, I want to thank you, Chris and everybody else who got me involved in this because this really is like coming home.

I did work for seven years in the Hawaii Judiciary. I was Elizabeth Kent's predecessor -- one of the predecessors. And so this really is a homecoming for me -- to be back in a setting where people are talking about courts and public institutions and responsibilities and thinking about where all this has been -- and where all of it will take us.

Part of the job, I was told, was to make sure that we have a little fun here today and liven it up. And Lela already did a great job of it. I think we ought to just bring her back and let her sing some more.

But I did come across something on the Internet that I thought was so good I had to share it with you. It really is about working together and finding ways to bring people together and collaborating.

This particular one is about partnerships. It is about mergers, in particular --mediated mergers.

So, let me just read these to you. "Dateline, New York, April 20th. In a move that rocked the street today, Bert and Ernie announced that they had merged to form Bernie, a giant conglomeration of felt, that will move them into the number two spot, past Big Bird and just behind Barney. In recent years, the two had lost sponsorship from the letter P and the number five. And analysts say the merger will help solidify their market share.

'This is a logical move for us,' Bert said. 'Share is our favorite word.'"

And here's another: "Concord, New Hampshire. Continuing the wave of consolidation that saw Alabama, Mississippi and Georgia join to form nations south, Vermont and New Hampshire signed a deal today that will combine the two into one state with the motto "Live Free or Whatever." The deal involves a stock swap in which cows from Vermont and chickens from New Hampshire will be exchanged one for one."

And the last one is - this is an announcement from Paris: "In what is thought to be the biggest merger of all time, men and women have agreed to join forces into one sex to be called humanicorp(s). The details of the arrangement are still being hammered out, but in early negotiations, women have agreed in principle to watch ESPN but have refused to give up self-respect. There are also serious anti-trust issues that will need to be resolved. A spokesman for men, Bob, said that men had been trying for years to merge with women.(page 5) And that this was the culmination of a long held dream for them. Women were unavailable for comment."

Okay. So much for all of that. Now, Lela was talking about how you get people together, and thinking about partnerships, and thinking about resolving lawsuits through mediation or other forms of ADR. And that really is our purpose today.

We have three things we want to do today. The first is to examine the state and condition of court-related ADR programs. We are kind of taking stock of where we have come from and where we are today.

And the second part is to think hard about where all of these court-connected ADR programs are headed in the

future. And one of the things that I am hoping we'll do before we end the day is literally try to capture some of our predictions for the next ten years. So that ten years from now, when we have our class reunion, we can say, "Well, did we get it right or did we get it wrong?" And I think the last piece of what we're about today is to try to explore the potential for really pushing ADR to the limits, recognizing that we have reached a certain level of maturity. We're way beyond the missionary stage now, and we know that it's not appropriate for everything.

It's not a panacea. What is the full potential starting to look like? So, that's kind of our business for today.

A few ground rules: We're going to do this in two panels. The first one is a very distinguished group of folks who work in courts and have extensive experience as program administrators, mediators, arbitrators, Hearings Officers who have all been in the front line of the courts, trying to make these programs work, and to find their appropriate place.

So, they are going to be the panel and I'm going to be ruthless as a time keeper. I've actually engaged a friend of mine who used to work as a time keeper for a Swiss watch company, Dick Gross, back there from PCI.

We're going to give each panelist eight minutes. After that, I'm going to start to walk around here and get fidgety and, finally, I'm going to gong them off the stage.

Panelists, beware. Eight minutes. And I'll try to give you a heads up before that -- before you hit that. So --

MS. LOVE: I thought we negotiated ten, Peter.

MR. ADLER: No. Eight. The second thing is that it's important that we also establish a kind of a tone here today, of ideas that are open to challenge. We really want to have that kind of collegial discussion.

It's actually the start of a conversation, not the completion of a conversation. So there are no sacred cows. There are no taboos and there are no off-limits. I think it will be lively if we are able to challenge some of the things that we assume are articles of faith.(page 6)

The third thing is that I'm not going to be neutral. Usually, moderators and mediators are neutral. But I'm surrounded by attorneys today and I'm not an attorney. I'm a sociologist. So, I'm going to be paying particular attention to your assertions and seeing if I can catch you in the unauthorized practice of sociology today.

And now I'm going to ask the panelists to introduce themselves very quickly, name and affiliation, where you are from. Let's go right down the panel, and we'll start with Eileen--

MS. PRUETT: Eileen Pruett. I'm the Coordinator for Dispute Resolution Programs at the Supreme Court of Ohio.

MS. KENT: Elizabeth Kent from the Hawaii State Judiciary, also sometimes called Peter III.

MS. SAVAGE: Cindy Savage, Director of the Office of Dispute Resolution for the Colorado Judicial Branch in Denver.

MR. WEITZ: Dan Weitz, the coordinator of ADR Programs for the New York State Unified Court System.

MR. VAN EPPS: Doug Van Epps with the Michigan Supreme Court, State Court Administrative Office. I direct the Community Dispute Resolution Program and will soon serve as Director of our Office of Dispute Resolution.

MS. WOHL: Rachel Wohl, Executive Director of the Maryland ADR Commission.

MR. ADLER: Just one more quick thing. You've got their biographies in the packet, and you've just heard who

they are. I was reading through their credentials and one thing is that they're all attorneys. They all have a career in practice, mediation, arbitration, and service as hearing officers. I think every one of them has had some kind of teaching experience as well. They've been involved with universities and colleges and law schools. All of them have been in private practice as litigators, as former prosecutors, as members of an Attorney General's department. So, there's lots of experience. All of them are working with Chief Justices or with commissions that are court related, moving ADR along. And all of them have many years of experience.

Now, I'm going to ask each of them to speak. Then, we'll stop, take some questions. Really, more informational questions.

We'll take a break, and then we'll bring the researchers up for the second panel. I'm hoping we can go through the formalities pretty fast and get ourselves into the open discussion.

So with that, Eileen.

MS. PRUETT: Court-staffed mediation in Ohio strikes me as being much like the storybook character created by Hugh Lofting in Dr. Dolittle[6] the Push-Me-Pull-You.(page 7)

The Push-Me-Pull-You didn't have a head or a tail. It didn't have a tail, but a head at each end with sharp horns on each head. They were very shy and terribly hard to catch. "Lord save us", cried the duck. "How does it make up its mind?" "It doesn't look as though it has any," said Jip the dog.[7]

The use of this image, I think, aptly describes the tensions created when judges consider implementation of a mediation program. Judges achieve a position of leadership in the court and in the community by virtue of their decision-making capabilities. Courts must change to accommodate a consensual, private case resolution process that does not rely on judicial decisions as its focal point. These changes, I believe, constitute a fundamental change in court culture. Significant questions and concerns for courts arise during the process of this change. I hope to briefly explore those concerns and the ways in which we address them in court-connected mediation program design and implementation in Ohio.

My first encounter with the Push-Me-Pull-You tensions occurred when I helped evaluate the local Settlement Week Program.[8] The program manager and I met with social scientists to try to answer some of the questions that might help us meet a simple goal -- to increase the use of mediation in courts. Initially, the Supreme Court Committee on Dispute Resolution ("Committee")[9] wanted to know if our local Settlement Week Program was "successful." After many sessions where we sought to design the research and develop survey instruments, I finally realized that it really was impossible to answer the question in terms of program success. The researchers made it clear that they could look at all kinds of aspects of the program and analyze all the various data in different ways, but no measure that defined and described success was possible.[10]

At the same time we were developing the exit surveys we decided to seek answers to our questions about how attorneys perceived mediation. Responses from 2300 Ohio attorneys provided baseline data to support court-based mediation.[11] Attorneys saw that mediation would be useful in a broad range of cases including business disputes, personal injury litigation and family disputes. And to my surprise the attorneys who responded didn't say that mediation would only be helpful in the "other guy's" practice areas. They favored mediation over arbitration. Attorneys who practiced in counties that had a Settlement Week program were more likely to advise their clients to try ADR procedures,[12] and one very significant finding was that attorneys were more likely to refer cases to mediation if they had participated in mediation with a client.13

Finally, we developed forms to track the length of time each case was in the system and developed an experimental design where we could track both mediated and non-mediated cases.[14] All of this seemed to be going well until I actually began to receive exit surveys and forms used to track the mediated cases. The boxes were overwhelming. We have exit surveys going back to 1990.[15] Sometimes I'd like to burn them, but we have learned a lot from them.

We used this information and other data to establish a pilot project in the first three civil mediation projects in general jurisdiction courts.[16] Key components of the initial pilots included the following:

1. Attorneys would participate in mediation with their clients.[17] (Page 8)

2. Court staff mediators would mediate the entire range of cases presented in the common pleas court.[18]

3. The mediation sessions would be mandatory.[19]

4. Continuances would be discouraged.

5. Mediations would be scheduled as early as practical in each case.[20]

6. Participation in mediation would not increase case processing time.

Reliance on empirical data to support program design made the Committee and staff feel secure. I'm not sure that it either encouraged or discouraged interest from the trial courts. But three courts did come forward to participate in the pilot.[21]

Then we began asking parties and their attorneys about their perceptions of the mediation process at the same time we began a project to ask the same questions in parenting mediation programs in domestic relations and juvenile courts.[22]

We are now convinced, after almost ten years of asking, that people really do like mediation and are satisfied with it.[23] We've asked about satisfaction, perceptions of fairness, and neutrality of the mediator. We also ask parties if they get enough time and opportunity to speak and control the outcome in different mediation settings. The answers from small claims, family, general civil and appellate programs consistently support that litigants and attorneys are satisfied with mediation as a process even when they don't reach full agreement. They overwhelmingly feel that the process is fair and that the mediators are neutral.[24] Of course, we've known this intuitively and through experiences with Night Prosecutor Programs and other community mediation models that began in Ohio in the early 1970's.[25] But it has been nice to have the intuition documented.

We'd like to stop asking the questions (and thus eliminate some of the clutter), but I fear that we need to ask even more questions. For example, we don't have a clear picture of the comparison people have in mind when they respond positively about their experience with mediation. What are factors that cause people to be only "somewhat satisfied"? Are there factors that tie satisfaction to settlement on some but not all issues?[26]

In addition to our reliance on empirical data and our commitment to collect and analyze data as programs develop, we've used several other strategies to ease the tensions of imposing a mediation program into the existing trial court culture. The program design process allows local control and creativity. It is a "grow your own" model. There are few statutes or rules that limit the use and design of a mediation program.[27] The Office of Dispute Resolution presents guidelines for best practice and they are usually adopted. We also serve as a resource to deal with problems presented by the mediators, judges and advisory committees. As the staff and Committee have worked with new courts each year, we have gained experience and knowledge that supplement the research findings. We now have the practical experiences of twenty-seven different projects to rely on as we develop new projects.[28] (page 9)

The brainstorming and thoughtful policy recommendations from the Committee have also been important. All of this knowledge has contributed to additional requirements for courts seeking to receive funding and implement a staff mediation project. These requirements may seem burdensome, but courts have been willing to do a great deal in order to implement high quality programs.

1. Participating courts send a team consisting of a judge, administrator, bar leader and/or mediator to an orientation meeting at the beginning of the grant. They also send appropriate court staff to basic mediation

training. We also provide specialized and advance mediation training to mediators and seminars on the role of the attorney in mediation with the local bar.

2. Each court must establish a multi-disciplinary advisory committee. This group serves as a resource to the mediator and court in the area of education, lobbying for future funding and dealing with concerns or complaints about the mediation program.

3. Mediators and judges must strictly adhere to the confidentiality constraints set forth in statute.

4. Each mediator is expected to mediate no more than 200 cases per year.

5. Mediation services are provided at no charge to the parties.

6. Courts are expected to develop funding to continue the mediation program after the grant period ends. Grants have been awarded for two or three years.

Sometimes the Push-Me-Pull-You tensions overwhelm me as I try to clearly articulate our goals and implementation strategies for mediation in Ohio Courts. We don't want to force courts to adopt any particular kind of dispute resolution process; we want them to make informed choices and select mediation as their primary dispute resolution service. The pilot evaluate and expand model has served us well. Our staff has worked with the smallest county courts, with our Supreme Court, and many of the courts in between to assist in the development and maintenance of high quality mediation programs. I think we will meet our goal to offer mediation as a court service in every county by 2005.

MR. ADLER: There you go. Bingo. I won't interject between the other panelists, but I'm really reminded of meeting Chief Justice Moyer in Ohio. And 10 years ago, 15 years ago, Chris introduced me to him. I remember him saying in these early days of ADR that the reason why he was interested in ADR was because he was driving through a small town in Ohio, where he came across a sign that said something like Homer Smith, taxidermist and veterinarian. Either way, you get your dog back. He said the whole idea of ADR was to get some live dogs coming out of the shop. Elizabeth.

MS. KENT: They gave us a list of five areas that we could touch upon. I'm going to talk briefly about three of them. The first area will be my idea of some features of an ideal model for a court-connected program. Then, I'll talk very briefly about feedback and evaluation. Finally, I will give one piece of advice for starting a program. (Page 10)

Before I start, I don't know if any of you have read the book, The Alienist, by Caleb Carr.[29] In his book, the fictional hero talks about the importance of knowing someone's context. I think you need to know a little bit about my context, because what's ideal in my world might not be ideal in yours.

In Hawaii, we're very geographically isolated. That means that if there is a service that we need that's not available, then it's difficult to get because it's a five-hour plane ride away, and expensive.

We're very small, both in geographic size and in population. That's important because it's easier to get things done in a place that's small. Hawaii has a very centralized government and a unified court system. We don't have municipal courts or local courts. That's important because people in Hawaii are used to having the state government provide services. They don't look for a local or municipal government to do that. And, since statehood, almost all of our elected politicians have been from the same party, democratic. The Governor appoints most of the sitting justices and judges. Then, finally, we're a very heavily unionized state. Almost 30% of the employees in Hawaii are covered by collective bargaining.

That's my context. If some factor is different in your state, then what makes a program or a component of a program ideal in my state might not work in yours. So with that, let me start.

The first thing I'll talk about is structure and governance. An effective program needs to have a good statute. The statute should be general and not too specific. It should provide a direction for the office. The statute needs to have a statement that talks about state policies supporting ADR and the fair, efficient, party-driven resolution of cases. It should be clear that ADR is not a substitute for the courts, but a complement to the court system.

There should be committed funding for the office. And it should be from general funds, not from special funds. The office should not be dependent on a surcharge or a filing fee, because you're not quite sure what your funding is going to be from year to year.

Also, in terms of governance, there should be clear support from the Judiciary for the office. That means that the office should be placed either in the Supreme Court or in the office of the administrative director of courts. Now you have the structure and governance.

What should the office do? There are three long-term goals that the office should look toward. The first is a systemic use of ADR in the state and throughout state government. The second is developing an infrastructure for ADR use in the state and in the government. The third should be promoting the private and the not-for-profit provider sectors, so that there is a strong base for providing ADR.

How does an office achieve those goals? There are a number of different functions for the office. One, and most obvious, it can resolve cases that are pending in the courts. But the office should not be limited to that service. The office can also resolve cases that are outside the courts.(page 11) It should probably look for high profile cases that affect the public policy, cases that affect large numbers of people.[30]

The office should look at training, research, evaluation and education. It should work with and provide funding for other ADR providers, especially in the not-for-profit sector.

The office should promote ADR in the state. It can do that in a variety of ways: through the media, in commercials, in advertisements, in public notices. It can work with the schools[31] to provide ADR. And it can work with community organizations to provide ADR. The office should recommend statutes and rules that call for ADR, and promote needs for ADR in the field. For example, the statutes can relate to quality control and confidentiality. Each state needs to look at the different possible functions and decide the best way to use the functions to meet its long-term goals.

Before I leave this topic, though, I want to talk about an ideal court program. It would have appropriate mandatory programs at each level of court. "Mandatory" is an important word to stress here because mandatory programs get used more than voluntary programs.

The ideal program would have appropriate rules of court at each level of court that relate to ADR. Case reduction should not be the goal. Instead the intent would be to provide alternatives for the parties to the litigation, to meet the consumers' needs.

Often, outsiders perceive courts as caring a little bit too much about case reduction, rather than providing alternatives.

All of the programs should be high quality programs and well regarded. And my advice is that if you don't think you can do it well, it's better not to do it. ADR is set-back by poor programs.

An important point is that all of the programs should be individualized. They should not be approached with a cookie-cutter kind of mentality. And to quote Professors Sander and Goldberg, you need to "fit the forum to the fuss." That means, for instance, that what is done in a small claims court is going to be very different from a program in a court of general jurisdiction for personal injury types of cases.

So, in closing on this part, I think that the ideal ADR office wouldn't be constrained to just working in the court. It would also work in the executive branches and the legislative branches. I do think that having the ideal

program placed in the Judiciary provides for a lot of good alternatives and opportunities. In my experience with Hawaii's program, the Judiciary has been a very good home for our program.

Now, I want to spend one minute on evaluation. Dick, I think I have 52 seconds left. And I agree with Eileen. We found that a large number of people are satisfied with mediation, and they like mediation. But we need more partnerships with the academics and the professionals for their evaluation. I'm not sure that we know exactly what works, why it works, and when it works. And I'd like to know more about that. I do know that people appreciate courtesy and education about alternatives. This goes to the quality control that I was talking about. (page 12)

We need to have the right expectations by counsel, by parties and by the neutrals, about the process that will be used. For instance, you don't want somebody going to a non-binding arbitration program and expecting that there's going to be a creative facilitative result. That's just not going to happen. Sometimes, parties don't have the proper education about what expectations are. So, quality control issues arise.

My final piece of advice can be summed up in one key word -- commitment. The person who is starting a program needs a commitment from the Chief Justice[32] and other Justices and administration that they will support the program. The office needs a committed staff, because the staff is the backbone of any program. The program will not succeed if you don't have good staff. You need to have commitment from others in the system, such as judges, legislators, the executive branch, and especially from the community.

Then, finally, I think you need a committed mentor. And I've been lucky. I've had Peter. But you need to have someone who you can turn to. The final bit of advice related to that is, don't be afraid to ask for help. Give them an opportunity to say no.

MR. ADLER: Terrific. I'm just going to go right on down the line, unless there's some compelling reason not to do that. So, on we go.

MS. SAVAGE: Well, I'd like to hire Elizabeth as a consultant to come out to Colorado and talk to our legislature about getting us some general funds, and I agree with much of what she said about the ideal program. We don't have that yet in Colorado. But Colorado is moving in that direction. So what I'm going to talk about today is also the features of an ideal program.

The features are defined at least in part by the answer to another of the topics we were given to choose from, which is, should courts be thinking "outside the box." It seems to me the answer is "yes," very much so. I'll also close with a couple of pieces of advice. And I also want to start by talking about context.

The Colorado Office of Dispute Resolution began in 1983.[33] In its first year, the Office mediated 54 domestic relations cases. The mediators at that time would pull files from the courts. Just go down, pull files at random and call the attorneys or the parties, and see if they could persuade them to come in for mediation.

So, that was our beginning. Courts were given the authority to refer cases to mediation by the statute,[34] but didn't start out doing it that way. We've come a long way since then.[35]We now mediate over 2,000 civil and domestic cases a year. And it's not just the Office of Dispute Resolution that's grown, it's the whole field of ADR in Colorado.

The statute was later expanded to allow judges to refer cases to other forms of ADR in addition to mediation. [36] So, the focus has broadened. In addition to mediation, ODR now provides ADR settlement conferences by senior judges, parenting coordination, and close to 1,000 cases per year are screened in our four multi-door courthouse programs.[37] It has been estimated that courts in Colorado referred well over 8,000 cases to ADR in 1999. We have 22 judicial districts, 22 different ways of doing things. And that's both good and bad. The (page 13) "Push-Me-Pull-You" metaphor applies not just within the judicial branch, but to ADR as a whole in Colorado.

Let me give you a couple of examples. A group of us representing five different organizations -- the Colorado Bar Association, the Colorado Judicial Institute, the Department of Law, the Colorado Council of Mediators and Mediation Organizations and my office -- spent several years looking at the issue of qualifications and certification, and came up with a draft proposal, which was then voted down by a couple of the organizations we represented.[38]

So, we have just abandoned that effort, although we subsequently developed the voluntary Colorado Model Standards of Conduct for Mediators.[39] There's a lot of disagreement about what to do about the certification issue, and whether to go forward with that.

I've also been participating on a committee called the Domestic Relations Multi-Disciplinary Committee, which is looking at family cases in the courts and how we can treat those cases in a better manner.

The topic of mediation, of course, came up, and the topic of mandatory mediation came up. That was very controversial. And there was not clear support. There were people on both sides. So, there's a lot of the "Push-Me-Pull-You" in Colorado.

Another part of the context you need to know about is that there is no funding for the Office of Dispute Resolution from the courts or from the legislature. ODR is a cash-funded program. Our funding comes from the parties, and the fees that they pay for our services. So, if you think it's difficult to predict your budget under general funds or under filing fees, it's even more difficult when you're relying on caseload projections. But we've managed. It proves that wherever you start from, you can still work to create the ideal program from that place. That's what I've been doing in Colorado, and I've found a lot of support for doing this.

One of the reasons I chose to speak on this topic was that we were asked to comply with a new budget system this year, called "zero based budgeting."40 I don't know if any of you have experience with this. I don't particularly recommend it, but there were some advantages. One of those advantages was that we were to draft a mission statement and a vision statement.41 In doing so, I really got to thinking about what would be the ideal program. So I'll just read a few of the things I put in the mission and vision statements. I would guess these are very similar to things that Elizabeth said. I know Dan and Rachel will also be talking on the ideal dispute resolution program.

So, I would guess that we're all in some agreement about what the future should be how you get there, how you implement it, and are there differences.

There are six areas I would want the office to be engaged in. And these are areas we are engaged in presently. First, assisting the courts in designing, implementing, and administering dispute resolution programs. These are customized to each district. Even if there were a mandatory ADR requirement, it would need to be customized to the district to be effective. (page 14)

Secondly, consulting with state and local government regarding the design, implementation, and administration of dispute resolution programs. We are now working with state government through a committee of the Bar Association. We're planning our second training this year for state agencies to educate them about mediation and about ADR systems design. We are also meeting with the individual agencies to work with them to customize programs.

It seems to me, that's an ideal role that an office of dispute resolution can play as a center of expertise and credibility about dispute resolution. That effort has been supported by the Governor, the Chief Justice, and the Attorney General, which helps make it happen.

Third, providing dispute resolution services to citizens. We provide services now, not only for domestic relations cases, but also for civil, probate, dependency and neglect, and juvenile cases. As I mentioned earlier, we also provide parenting coordination, ADR settlement conferences, and case screening. We also provide occasional arbitration and neutral evaluation services. And, we handled our first public policy dispute just a few weeks

ago.42 So, I'm happy to let Chris know that her and Dick's efforts have not been in vain and, hopefully, will continue in that direction as well.

Fourth, providing information to the public regarding dispute resolution and, of course, Colorado's dispute resolution programs. I get many calls every day, as I'm sure all of you in the state offices get. Questions from local citizens who want to become mediators. Questions from parties who want help filling out their divorce papers. Questions from lawyers about our services. Questions from people from other states who are developing mediation programs in state offices. Research questions.

We are a valuable source of and a logical place to provide that information.

Fifth, we are collaborating with other individuals and organizations, including governmental units, such as bar associations, community mediation centers, schools, private and other public dispute resolution programs, and others, to increase access to dispute resolution services. One of the most exciting projects I've been working on this year is working with community mediation centers to develop a proposal to get funding for community mediation centers in Colorado. That's a way that I think the courts can work "outside the box" and support mediation in the schools, support mediation in the communities, as well as providing a source of low-cost mediation for court-referred cases, thus making dispute resolution more accessible to people. The proposal will not come from our office but from the centers themselves. And they're out looking for a sponsor. So, I'm very hopeful that that will expand our efforts. And I think I'm getting a signal here.

MR. ADLER: Finish your thought.

MS. SAVAGE: Okay. And sixth, providing dispute resolution education and training. This can include everything from speaking at Bar Association functions to judicial education and training for state agencies. In closing, in terms of advice, I have two suggestions. First, network. There are a lot of people who can share their knowledge about what's been tried and how it has worked. And second, use collaborative processes to resolve the disputes that(page 15) will inevitably arise in the course of doing this work. Walking our talk is key to our credibility and ultimate effectiveness in doing this work.

MR. ADLER: Great. I noticed after you said you worked on the public policy case, people broke into applause next door. It's just terrific how sensitive they are to what we're doing in this room.

MR. WEITZ: May I?

MR. ADLER: Sure.

MR. WEITZ: I've decided not to be as ambitious as some of my colleagues and picked something that I thought would be easy. Should courts be thinking "outside the box"- that is working with schools, community dispute resolution centers, and other institutions? Furthermore, I did not think it would be possible for me to get away with justifying "no" as an answer here, so I thought I'd say "yes."

Then, I bumped into Lela Love the other day, and she told me that we did not have ten minutes but rather that we would have only eight minutes to speak. At that point I thought I should hedge and answer "maybe." To be safe I should tell Peter that prior to coming to the courts I did work for a sociologist so maybe he'll be a little lax with me if I am unable to get through it all.

Obviously though, the answer is "Yes!" It is the only way for ADR to serve the courts to its fullest potential.

To me, it comes down to certain values. Values such as "quality of justice," "access to justice," "fairness," and "efficiency."43

In the next eight to ten minutes, I will discuss the way these values translate into practice, both to court initiatives in general and to the practice of ADR within the courts. I will argue that there is a tension created

among these values when applying them to general court initiatives and then by extension to ADR. To put it another way, while the courts' values and those of ADR are substantially similar in theory, they have the potential to compete when put into practice.

Elizabeth talked about context being important. In order for us to understand why ADR is practiced the way it is in the courts, we must always look at the context. I will provide several examples of "inside the box" thinking within the courts placing emphasis on both court initiatives in general as well as ADR. Finally, I will offer several examples of what can happen when the courts do think outside the box, within the meaning of the question here.

In New York, there are 3.8 million new case filings each year. The court system is constantly developing new initiatives to keep up with burgeoning caseloads. In developing new initiatives, the court is always looking to promote the values of quality of justice, access to justice, fairness, and efficiency. These values are often quantified by costs to the parties and costs to the system both in terms of speed as well as the degree to which one has had his(page 16)"day in court." Due to the pressures within the court system to provide fair and efficient case resolution, efficiency often means settlements. You see this in many court initiatives.

Take a look at standards and goals for example. Judges are often measured, reviewed, and critiqued by the degree to which they can move cases along within certain time frames. A certain "judicial badge of honor" has even evolved for those judges who have developed a reputation for being "great settlers."

In New York, we recently released our Comprehensive Civil Justice Reform Program.44 In general, this program is about enhancing the quality and efficiency of the court system. While an entire section of the program is devoted to ADR, one of the central initiatives is the use of differentiated case management (DCM). DCM procedures require screening of cases when they are filed and tracking them based on their complexity (standard, complex, or expedited). This sort of triage probably sounds familiar to many of us in the room, especially if your last name is Sander.45

It follows that ADR, when it is conducted within the box (in the courts), is vulnerable to being driven, if not in whole, certainly in large part by settlement rates.

This presents a problem when you consider the prevailing values behind ADR. While ADR is driven by quality of justice, access to justice, efficiency, and fairness, these values are usually quantified by the degree to which the process also adheres to consent, free-choice or self-determination. This is particularly true when referring to mediation, the most widely used form of ADR.

For example, fairness in mediation is often measured by the degree to which the parties settled without the presence of coercion. Quality may be measured more by the preservation of a relationship rather than simply whether or not the case settled.

Mediation certainly has the ability to save time and money for the courts and litigants. Yet, the values of quality and fairness (lack of settlement coercion) have the potential to suffer the more closely tied to the court system they are.

Let me sum this conflict up in a way that many others have. In responding to the question, "what does ADR have to offer the courts?" court administrators generally argue the following:

(1) ADR has the ability to provide relief to the courts caseload and;

(2) ADR has the ability to offer litigants a quality of justice that may potentially exceed that which they could have obtained in litigation.

Number one is easy. Courts can settle cases whether ADR is used or not. I think we can probably even agree that ADR has more of an impact on the timing of settlements rather than on settling cases that would not have

otherwise settled.(page 17)

Number two is a lot more difficult. The values are potentially compromised. For example, as a result of the pressures to generate settlements, court-annexed ADR tends to be more evaluative when conducted solely within the confines of the court. This emphasis on evaluation is of particular concern in mediation because it likely reduces the degree of collaborative problem-solving and arguably threatens the values of self-determination. Space, atmosphere, lack of resources, and time pressures also tend to put a strain on ADR processes.

So when offering ADR to the courts, providing relief is a much easier sell than the quality of justice argument. Furthermore, efficiency, in terms of providing relief tends to dominate both the general innovations going on within the courts and, by extension, the use of ADR as well.

This creates a tension between courts' focus on "efficiency" and some of those driving principals of ADR and mediation (consent, free-choice, self-determination), as well as the courts' own stated goals of fairness, quality and even preservation of relationships or prevention (lack of a need to return to court).

With all of these competing interests, it is extremely challenging for ADR and mediation in particular to fulfill the values of quality of justice, access to justice, efficiency, and fairness. ADR can only serve the courts to its fullest ability if the courts are utilizing all potential ADR resources. To do this, courts must be thinking "outside the box" in the form of working with schools, community dispute resolution centers (CDRCs), and other institutions.

Let me provide some examples of what we have done in New York to support the argument that the courts should be thinking "outside the box." The irony in New York, however, is that the courts' utilization of ADR began first and only with thinking "outside the box" as it is meant here.

In 1981, the New York State Legislature established the Community Dispute Resolution Centers Program (CDRCP) which serves as a joint local and state effort to provide community forums for the resolution of disputes as an alternative to criminal, civil, and family court litigation. Through the CDRCP, the New York State Unified Court System (UCS) provides funding for non-profit Community Dispute Resolution Centers (CDRCs) to provide dispute resolution services in each of the state's sixty-two counties. The central premise behind the creation of the CDRCP began as a result of burgeoning caseloads in criminal court. Cases including interpersonal disputes between neighbors, landlords, tenants, and acquaintances were being handled by traditional means in the criminal court. Drafters of the legislation reasoned that individuals should be provided a forum in which to resolve their differences on their own, "free from intimidation or restraint."

The court system has clearly benefited from thinking outside the box and supporting the CDRCP. The CDRCs consistently handle over 40,000 cases screened as appropriate for ADR each year. Of these cases, over 22,000 mediations, conciliations, or arbitrations are conducted.(page 18)

Since 1991, the average cost per case screened, as appropriate for dispute resolution, has ranged from $56 in 1991 to $85 in 1998. The average cost per person served has ranged from $25 in 1991 to $38 in 1998. The total cost per case conciliated, mediated, or arbitrated ranged from $114 in 1991 to $149 in 1998.46

I should also add that in these centers, we strongly encourage the use of facilitative mediation. Furthermore, the training standards are geared toward obtaining the kind of quality that many of us in the ADR community think of as preservation of relationships as opposed to resolution rates. These centers clearly help the courts to use ADR in a way that fulfills its potential.

The CDRCs in New York have also helped the courts to work with schools, in the form of school based peer mediation and conflict resolution services. Most of these services are provided with separate funds obtained by the CDRCs. However, the funding that the court system offers provides the foundation from which many centers receive other funds.

The State ADR Office, recently conducted a survey of our CDRCs to find out what types of services were offered to the schools during the past fiscal year (April 1, 1998 to March 31, 1999). The survey sought information on the following types of services: peer mediation training for students and staff; conflict resolution training for students and staff; informational presentations to students and staff; and the number of peer mediations conducted. The information was also broken down by elementary, middle, high school, and college.

The following are some of the highlights of what we found: Over 2,000 students and staff received peer mediation training and more than 4,000 peer mediations were conducted. Over 11,000 students and staff received conflict resolution training and nearly 10,000 attended general information sessions.

Now, I don't have the studies that prove that this kind of exposure to dispute resolution at an early age comes back to help the courts with regard to the number of civil cases and, more importantly, in promoting non-violence. I'll leave it to other people to do those studies. However, I'll take it to my grave that its worth doing and that the courts should be involved in it.

Another program that exemplifies the kind of creativity that only occurs through collaboration between the courts and community dispute resolution centers is our Family Court Mediation Project.

During fiscal year 1997-98, in 55 of New York State's 62 counties, CDRCs mediated custody, visitation, support, PINS, and juvenile delinquency cases that originated in Family Court. These centers rely on volunteers, some of whom are attorneys, who have completed a 25-hour basic mediation training and a 12-hour advanced training that focuses on Family Court issues. The training component is followed by apprenticeships with skilled mentors.

Funding is made available for the centers to hire a family court coordinator who performs the following functions: screen cases to determine whether mediation is appropriate on a (page 19) case-by-case basis; screen out cases involving domestic violence, substance abuse and other forms of abuse; educate parties about mediation and ensure that parties are voluntarily choosing to proceed to mediation; administer and schedule mediation sessions; and maintain records and statistics.

Over four thousand family cases were referred last year alone. Over two thousand of them were either mediated or conciliated and the resolution rate for those cases was 80%.

The natural extension of the Family Court Mediation Project is to provide mediation services in Supreme Court where the entire matrimonial action can be handled, rather than being limited to issues of custody and visitation. A wonderful example of this expansion is taking place in Orange County, New York, through a collaboration between the existing CDRC and the court. This program uses a co-mediation model involving an experienced non-lawyer mediator and an attorney mediator with experience in matrimonial law. This co-mediation model emphasizes the facilitative style of the non-lawyer mediator who has experience mediating the interpersonal issues often found in family cases, while the lawyer mediator ensures that significant legal issues are not ignored. This program is a perfect example of the kinds of programs the courts can develop when they begin to think outside the box.

Court initiatives are filled with pressures to settle cases. While extremely creative and successful work is being done, these pressures have a negative impact on the ability of ADR to realize its full potential in enhancing the quality of justice, access to justice, fairness, and efficiency of service by the courts. The result is a compromise. And compromise is a good form of problem solving, but we know we can do even better.

MR. ADLER: Thank you, Dan. Take a breath. Take a glass of water. We'll come back. But it's really a point that we ought to hear the essence of and I really do appreciate your brevity on this. Doug?

MR. VAN EPPS: Can I ask for a couple of volunteers to pass out some materials here? I'm very glad to be here among colleagues I've worked with for years, and to meet new colleagues as well.

There's a lot going on in Michigan. We have an extensive history of working in ADR, including operating 25 community mediation centers for ten years.

We have a dispute resolution task force convened by the Supreme Court to create new court rules. And I have a couple copies of those rule proposals with me, if anyone would like a copy after the session.

We have a lot of activity going on in state and federal offices in designing ADR processes into their hearings and complaints processes. I'm more than happy to talk after the session with anyone interested in these initiatives, but I really wanted to pick up on the theme of not only thinking out of the box, but thinking out of the building and thinking out of the county. (page 20)

I'm getting to the point of wondering whether "court-connected cases" is an appropriate focal point for us, or whether the tight focus that we place on this limited domain of disputes gets us into more trouble and creates more obstacles in assessing ADR processes than we'd like.

First, just for fun, flip to the back of the handout. You should see a court user survey. This is something I've been playing with for a couple of years, and it's loosely based on a survey I was handed at an American Airlines counter one day. I changed the airline waiting areas to courtrooms, and clerks to ticket officers and so on. When you cross an airline with a courtroom, this is what you get. We have not implemented this in Michigan courts yet, but that day is coming soon, I hope.

Another "out of the box tool" included in your materials which I would be interested in testing is called a "case information notice." It may be most helpful in states that have statewide information systems.

We're getting to the point with collecting data that we should be able to tell people what your expectation is when you come into the court. It is kind of like an informed consent document that you get at the hospital.

If we know litigants are only going to have a 2% chance of having a trial in the kind of matter that they have filed, why not just tell them in a notice?

In short, consider this a possible means of candidly telling people what we, particularly the court administrators among us, know based on all the data that courts collect.

In Michigan, I'm told by our information technologists that we would be able to actually compile the data and send a notice like this, with very sharp accuracy, within about two years.

In terms of "access to justice" considerations, let's just tell people what we know about the litigation and ADR experience they're likely to have in court-connected processes.

Back to my questions about the focus we bring to examining ADR in the court environment. I'm generalizing here, but let me suggest that court administrators will want to know whether ADR expedites case processing. Do ADR processes resolve cases within states' time guidelines for case processing? Litigants have an expectation of going to trial and, I take it, of "winning." That expectation is only addressed once in mediation, in that they enter the process still thinking there will be a clear winner. The expectation shifts when they arrive at resolution they can "live with." Mediators want to know whether they can grow a practice out of this. County administrators have a keen focus on the cost of the judiciary and wonder whether ADR will be yet another layer of bureaucracy.

Working closely with legislators in the past few years, their ADR focus is whether ADR, and particularly mediation, is saving anybody any money? These are just meant to be brief sets of expectations I typically run across. And really, part of my role in the Supreme Court has been to try to figure out how to create a common focus. (page 21)

Is there some kind of lens that we can share with everybody, that maybe we can all view the same picture through?

Recently, I've been very impressed with a new nomenclature your judges are going to be returning home with from conferences over the next couple of years. It's a concept or judicial practice called "therapeutic jurisprudence," which is very much in the social sciences kind of initiative.

Briefly stated, therapeutic jurisprudence is the notion that people should come out of the judicial system no worse than when they went in. Even the Department of Justice, through its Balanced & Restorative Justice initiative, posits that kids ought to come out of the criminal justice system with more abilities or capabilities than when they entered the system. They certainly should not come out worse.

This concept, that the court has a therapeutic role in the administration of justice, is initially being applied in courts' family divisions and in drug courts.

From my perspective, I think that courts' offering litigants ADR processes is part of this "therapeutic" construct. Viewing a conflict from an advantage point, the essential question may be how best to find a healthy resolution of the matter in dispute? Traditionally, in evaluating ADR we're looking just at the moment a dispute is in court.

Traditionally, we have offered only the adversarial litigation process. All the tools we've applied in court relate more to moving "the case" expeditiously along. But we're back to looking at the dispute through just one lens: moving the case along. We're not looking at parties' expectations, legislators' interests and so on. We're not asking where did that case come from before its court moment and where will it go after it leaves the court. Disputes start somewhere: let's say one came from 121 Elm Street at some point. Then it went to the school. Then it went to the prosecutor. Then it went to the township supervisor, then it went to court to get a protection order and then it went back to school. The kids are involved.

So the larger picture really shows a complex trail that the dispute has created. The court piece is only one segment of the trail, a conflict. It's that segment that we are generally discussing with evaluators, legislators, county commissioners, court administrators and dispute resolution program administrators. We're not, however, looking at the larger picture and incorporating all the costs associated with the entire life of the conflict. To date, we're not measuring costs avoided if disputes are actually resolved to the point that no public official need respond again. We've not yet developed good ADR evaluation models for testing the benefits to the community if, for example, disputes are resolved in the court environment and require no further collection or enforcement action or whether counties require less expenditures on law enforcement as a result of effective youth mediation programs.

We need to begin identifying the broader picture of a dispute: Where did it come from? (page 22) How many public interventions have been provided? What were their costs? How many people have become involved in some way in the dispute? How many people were helped through the public interventions? How many private attorneys or advocates or social workers were involved? Can we create some type of "conflict management barometer" which helps us gauge whether our public responses to conflict add a measure of quality of life to our neighborhoods and communities? Or, in the terms of the political rhetoric, do we feel healthier (from a conflict management perspective) than we did four years ago?

We look beyond just measuring case disposition times, where resources are managed to get everybody out of the system as quickly as possible with all too little focus on the quality of the result. Let's look more at the dynamic of the trail or wave of the conflict and see how that affects our designing dispute resolution systems, whether within or outside of the court environment.

In thinking "outside the box," maybe a court mediation program is just one possible response to a conflict in what might be called an "integral dispute resolution system," borrowing from health field terminology. And fitting squarely within the emerging view of therapeutic jurisprudence.

Let me conclude with an example. When kids are in court in abuse and neglect matters, the "conflict" is traditionally viewed from the standpoint of many court constituents each having "files." The prosecutor has the

case and looks at it through his or her own lens. The Family Independence Agency caseworker has the case and looks at it through his or her own lens. There are family members, friends, attorneys, and so on.

Is there, however, something that can bring us all together to more "therapeutically" manage this conflict and find a resolution? In permanency planning mediation, we do bring together all the many parties, these people with different lenses, in a mediation atmosphere. And once the parties remove their focus from the "case" to examining the history and assessing the future of the conflict, the proverbial light bulbs go off. Parties look at how to manage that dispute for as long as it's going to be in the court system and maybe even after. Many people, particularly lawyers, appear amazed that they can do this. At this mediation event, it's the first time that they have come together to look at this community problem of a family in need of care. It's a holistic response, an integral response and a therapeutic response.

As the concept and practice of "therapeutic jurisprudence" continues to emerge, I invite you to consider how ADR, particularly mediation, fits into our collective response to conflict and in our proactively creating dispute resolution systems. My own belief is that for courts evolving into the "therapeutic" or "holistic" model, mediation in particular is a health-oriented process easily integrated into the court's continuum of services.

Thanks very much.

MR. ADLER: Thank you, Doug. Rachel?

MS. WOHL: (Rapping) The courts know their reputation is on the rocks, so they decided to move out of the box. (page 23)

Now, I notice that my boss, the Honorable Chief Judge Robert M. Bell, just walked when I began rapping, having missed Lela's earlier rap, and he thinks I'm insane right now, so --

We're very fortunate in Maryland to have a very forward thinking Chief Judge. If you would just stand up for a second, Chief Judge Bell. Everyone introduced themselves earlier. Thank you.

I thought I would just talk to you about what's going on in Maryland. Because in a way, we are a living laboratory for the court leading a process that is out of the box, and that is working to develop a statewide plan.

In Maryland, the thought was that an ideal plan really is a collaboratively developed plan. And Chief Judge Bell, a little over a year ago, put together a 40-member ADR Commission that very consciously included high level representatives of all the stakeholder interests in the future of ADR in Maryland.

So, members include the Governor's Chief of Staff, the Attorney General, a state Senator, a state Delegate, the President of the State Bar Association, the Chief Judges from each level of the court system, community representatives, business representatives, mediation professionals and others.

It's a very multi-disciplinary board, and the idea was to come together on plans to move ADR forward in the state, not just in the courts, but also in the schools, in neighborhoods, in the business community, in state government, in local government, in the criminal justice arena and in the juvenile justice arena.

There are many members of the commission in the audience here. If I leave something out, let me know. We're working on all fronts, very much out of the box.

We conducted a consensus building process around the state that started out with six committees involving about 135 people. The members of the commission worked in committees and recruited others to work with them. Then, we developed regional advisory boards of several hundred people each in Western Maryland, on the Eastern Shore, in Southern Maryland and in Central Maryland.

So, we've had approximately 700 people involved in the process of developing our Practical Action Plan. A final

draft Action Plan is on the table in the back. If you want to take a look at it, we would love to hear your feedback.

There is also a pink sheet back there we are calling a "Plan-At-A-Glance," which summarizes the activities that we're going to do.

So, we have spent a year and a half looking at what is already going on in Maryland, and with Nancy Rogers' help, looking at what is going on around the country.

Then, we began developing plans to take action in all of these different arenas (schools, communities, courts, businesses, state and local governments and the criminal and juvenile (page 24) justice systems). We are very fortunate that we have been funded by the state to start projects in each of these arenas.[47]

We are now at that turning point where we are moving from developing this Plan into the implementation phase of our work. It is a very exciting point of time for the Commission.

One of the big challenges that we heard about all over the state was public awareness. People do not know what ADR is. If they do, they may well have some misconceptions about it and may not understand how it benefits them.

So, one of the big priorities to come out of this process is a public awareness campaign which we are working with ad agencies to develop. And one of the terrific ideas, which was actually Lou Gieszl's[48] idea, who is in the audience, is to produce a segment with Arnold Schwarzenegger in which you see this horribly violent scene from "The Terminator," or some such movie.

Then, Arnold Schwarzenegger steps out of the movie and says to the audience, imitating Arnold's accent, "This only happens in the movies. Or this only works in the movies. You know, in real life, we need to mediate."

And so, we're going to try and make that commercial. But to do also a very big educational campaign to communicate on what this whole field is about.

We're working with the school system; and the State Superintendent of Schools, Dr. Nancy Grasmick, is very much in favor of moving conflict resolution education and peer mediation forward in the state.

She's agreed to co-sponsor a conference on ADR education with us. She also had us make a presentation to the state's Higher Education Commission about the importance of having teachers learn these skills. Teachers should be using conflict resolution skills in the classroom, modeling them for students.

Another one of the big challenges that we know we face is creating an attitude shift. Many teachers now rule the classroom by exercising their authority. One might even say by intimidation, in some circumstances.

Shifting them into the idea of sharing power with the students, by making the students responsible for resolving disruptions and disputes in the classroom requires an enormous attitude shift for some teachers. So, it is very important to train future teachers in conflict resolution. We received a great response from the Higher Education Commission.

We are also conducting evaluation projects in the schools. We are evaluating an elementary/middle/high school feeder system that already has conflict resolution curricula and peer mediation programs, and are starting pilot programs in a feeder system that doesn't have either of these programs. (page 25)

That has been a basic strategy of the Commission to start in each of these fields: To evaluate projects that appear successful pilot projects with built-in evaluation components.

In the courts, we are evaluating some successful ADR programs in the courts and we are creating pilot projects.

We will be using collaborative processes in three courts of general jurisdiction to design civil ADR programs currently. And, we're modeling them after Ohio's circuit rider project, which was very successful. The idea is to send a circuit rider, a facilitator, to three different jurisdictions to convene the bench, the bar, the practitioner community, the community leaders and others to help design a system that will really work in that location, serving the need of the local bench and the community at large.

So, we're working on that, and we've gotten many requests from every region of the state, and from more courts than we can handle, to participate in pilot programs.

There's been an amazing level of energy around this whole process, and a great desire to participate in the projects that we've come up with.

In the criminal justice arena, for example, we have had requests from five States Attorneys, which I believe are called District Attorneys in other states. They are elected officials in Maryland. Five, who have no ADR programs at all, have contacted us, wanting to participate in pilot projects with us to develop mediation programs in their offices. Our Plan and our funding only contemplate on state's attorney pilot project.

We also have a lot of desire to participate in juvenile mediation programs, and we are working on one, collaboratively, with our Governor's Office of Crime Control and Prevention. That office supports the "Hot Spots" strategy,[49] funds community crime control teams in high crime areas, and is interested in supporting the use of mediation in these "Hot Spots."

Am I running out of time, Peter?

MR. ADLER: Yes.

MS. WOHL: Okay. I could go on and on about this forever. The ADR Commission is at an amazing point; starting things in many different directions under the leadership of the court. It's very exciting.

MR. ADLER: Rachel, take another 20 seconds to tell us what that larger color picture is sitting, on the easel.

MS. WOHL: This is our process map. The process that we have been through is a complicated, consensus-building process, which some people had trouble visualizing. They would scratch their heads and say, "Now, can you tell me again what we are doing?" So, we had a process map drawn to illustrate the Commission's process. The fact-finding process, the consensus building collaborative decision making process, the Action Plan development, and our current expansion into action all are illustrated here. And I can't go over all of the details, because I don't have time. (page 26)

MR. ADLER: Right.

MS. WOHL: But please, come and look at it when you get a chance.

MR. ADLER: Terrific. Thank you.

Okay. Here's our plan. We're at about 3:00. And we're going to go for about the next half-hour with some discussion. Then, we'll take a break and bring our second panel up. I really want to thank all of you for sticking with the time limits.

I want to start this by posing something to you. Most of what you described were various centrifugal forces that are pulling you outside the courts, outside of where your starting points were, however small or big those were.

Some of you described those centrifugal forces, as in Elizabeth's case, the need to build public support for ADR and the desire to be working outside the courts to build support, understanding and comprehension.

Or, another example is out of the box requests that come in from a school superintendent or a systems superintendent. Or, the desire, naturally, to try and help outside the court system.

Let's talk about the other side. One of the centripetal forces would be the obvious one -- money. You don't have enough time or resources. What are the other constraints that are saying, "No, don't do that? Stay inside the judiciary. Stay inside the court system."

So, quick comments from each of you?

MS. WOHL: I guess, you know that our Commission has tremendous support, including the Chief Judge's leadership, to work in all of these areas. He sees it as a part of the court's role to promote justice in the community and to help prevent things from ever getting to court.

So, we have tremendous support to do that. But there are monetary constraints. And there may be factions within each field that would sooner maintain the status quo.

MR. ADLER: Can we talk about those? There are obviously political constraints that happen. Some are within the judiciary, some are outside.

What are the constraining forces that are saying, "No. Don't go outside the box?"

MS. WOHL: We really have not heard them.

MR. ADLER: Go ahead.

MR. VAN EPPS: I think one is fear. Fear of change. Fear of really talking to people in the community. Judges are used to being all by themselves, making decisions all by themselves. (page 27)

Lots of judges will, also, still maintain that I was elected to decide cases. You know, that's it.

MR. ADLER: Eileen, then Dan.

MS. PRUETT: I think that's true. But I also think that we're seeing some really legitimate questions. And this is what I meant when I said that every experiment, every monitoring project, every evaluation leads to something else.

What happens - I don't know what's going to happen. But we have child protection cases. The same multi-disciplinary, collaborative processes that everybody else is experimenting with.

We've been doing these cases for two years. The push that's coming to shove is that the agreements begin to look very non-legal. What happens in a closed adoption state, when there are open adoption provisions in the mediated agreement? The mediator is okay with it, because they don't have any control or authority. The parties are okay with it. The lawyers are okay with it. You have this multi-disciplinary collaborative process with this terrific agreement. And you have a judicial officer who says, "This is unenforceable. I'm really sorry, but I can't put that on the record. You're going to take me, me personally, my court, straight to the Court of Appeals on this when it doesn't work out."

And we're exploring the ways to deal with that. But it's raised a whole host of questions about what is the appropriate role of the decision-maker? And is the culture of going to court going to change that much? I mean, this is really it for me.

MR. ADLER: Okay. Everyone in the panel wants to jump in. Dan, you're next. Then Cindy. Then Elizabeth.

MR. WEITZ: We get ten minutes, Peter?

MR. ADLER: No way, brother. No way.

MR. WEITZ: Just kidding. Actually, as I mentioned before, part of the irony in New York is that we're doing a lot of thinking "outside the box." It's more of stay out -- stay "out of the box" -- that is really what had gone on in New York up until now.

Again, to highlight some of the things that I have already said. In our Family Court programs, for example, mediated custody and visitation disputes, the agreements would come back to a judge to review it, to approve parenting arrangements. I have heard stories that early on, an occasional agreement would get "thrown out" because the mediated language was unfamiliar to the court. It takes a huge educational investment to create an understanding of what the processes are about, for the bench, the bar and anyone who uses the programs.

You have to invest resources into training people and getting them to experience it before you can really get to doing it -- to doing it right. (page 28)

MR. ADLER: Cindy, then Elizabeth.

MS. SAVAGE: I think the constraints come from two areas. One is narrow thinking on the part of some of the judiciary -- not all. There are some constraints from the response of the private sector that provides ADR services. And the resources are kind of a mixed bag. So, let me go back to the judicial thinking. There are two schools of thought that I have encountered among judges.

One constraint response is, of course, judges should not be social workers. They should not engage in the unauthorized practice of social work, and should stick within the boundaries of just resolving cases.

And that's really the biggest constraint that I see. I wouldn't say that's the majority in Colorado, but it does limit our ability to promote ADR in some of the judicial districts.

The way Colorado's statute is set up, the parties have a choice between private sector providers or public sector providers, or my office. So, the field is wide open in terms of ADR providers. There is a fair amount of competition. And some people see the office of dispute resolution and think it should be limited, not only to court-connected cases, but to indigent cases as well.

So, there's a force from the private sector that doesn't want to see us expand. And I've dealt with that by trying to work collaboratively with them. And I think that's been largely successful.

But there's still that pressure there. The resources are a mixed bag because there are limited resources. In my opinion, that's a pressure. That can be as much of a pressure to expand outside of the box, as it is to stay inside the box.

Because we have limited resources, it's important to maximize the resources we have. And why duplicate what my office does somewhere else?

For example, with the community mediation centers, it makes more sense to join forces than to create some entirely separate area. So, I think the resources are kind of a mixed bag.

MR. ADLER: Elizabeth?

MS. KENT: I think that the constraining force is that there's so much to be done all over. Not just in the executive branch, but in the judiciary. We approached it in three phases. The first phase was start-up and implementation. The second phase was work in the judiciary, with the idea that you have to fix your home before you can go outside (and "preach" to other people). Now we're in the third phase, which is taking it outside of the judiciary. So, we're ready to move on.

MR. ADLER: One more comment? (page 29)

MS. SAVAGE: I just want to say that one of the constraints we face is the amount of sleep we need as ADR directors.

MS. WOHL: I would also like to mention the bar. While there are many proponents of ADR within the bar, there's also still some resistance and a misunderstanding that ADR means cutting the baby. That is a very limited view of the process as compromise, rather than a creative win-win process.

MR. ADLER: At this point, let's open it up. What I'd like to do is, see if we can get important questions posed to the panel. I want to especially begin with questions that will give you more information, as opposed to a comment that you want to make. The only ground rule in this is: please don't sneak a great big comment inside a small question. If there is a question here, now is the moment.

Oh, state your name, please.

MS. POPRICH: Ann Poprich. One person made mention that there is a very strong focus in their state not to look at the numbers resolution rates. For example, Dan, I believe you said that New York has a very heavy focus on that. I'd be interested in the panelists' comments about the dichotomy there and how you're looking at that and where you think that may go.

MS. PRUETT: Well, even in our largest jurisdictions in Ohio, fortunately, we've had those awards and punishment for not having your numbers in order. For good or bad, our judges aren't interested in differentiated case management in Ohio. So, you don't have to worry about differentiated case management, when your population is only 30,000 in a given county, and you're not moving judges around and assigning judges, as I think New York is.

So, that's not been a priority. I have found, and I can tell you that in very high volume courts, our programs do very well when I have followed the case flow management coordinator. We identify places in the court where mediation is appropriate. It wasn't a wholesale, take mediation and make it be your case management program. The approach was -- mediation may work here or here. Or, let's look at mediation as an "early and often" opportunity, particularly, for example, in high volume juvenile courts, where I believe there is not a single kind of conflict that can't benefit from some mediation.

So, we partnered with the case flow people. Then, we lost our case flow management person. And we just hired another one. So, we've had four or five years where we've been going to well run courts and saying, we can give you 150 mediated cases a year. Let's see if they change the culture. And the way they're going to change the culture is for them not to be settlement conferences. For them not to be judicially conducted pre-trials. And that seems to be working.

We see attorneys doing a better job of preparing for the mediation. The court treats the mediation as an important event. And as a trial lawyer, I know -- those of you who have been trial lawyers know -- events are what make cases move. But that doesn't mean that the nature of the event can't be facilitative. Now, does that also mean that they don't move to an (page 30) evaluative aspect on a straight dollars case? Maybe. But it also means that some of the evaluation data shows that even in "dollars only" cases, parties benefit from a facilitation process.

MR. NURICK: Herbert Nurick. Can you elaborate on one quick point? You said something very intriguing. When you see settlement rates that start getting too high, do you have a sense that agreements are being coerced?

MS. PRUETT: Did I say that?

MR. ADLER: Something like that.

MS. PRUETT: How am I going to deal with that when that's on the web? I would be concerned if that would ever happen. But of course, it never has.

MR. ADLER: If it did happen, what would you do about it?

MS. PRUETT: The concern is that when agreement rates get really high, attorneys and the mediator may be forcing agreements on the parties. There may not be enough input from the parties. There may not be enough party control. There may be too much judicial control. Is there a word being said in the hallway, or across a lunch table, that says, "Boy, this is a really crappy one? Let's get this one off the docket."

What we do is look at the exit surveys. And we have a question that says: Did you get enough opportunity to participate in the decision making process? Did you get to say what you wanted to say? And where we've asked those questions and people felt that they haven't had enough opportunity to say what they wanted to say, we've been able to go back to the mediator. And we deal with it that way.

MR. ADLER: I want to see if anybody's got the opposite kind of concern or point of view. Dan, you talked about the conflict between the need for speed and the theology of ADR?

MR. WEITZ: I'm going to try.

MR. ADLER: Any comments on the New York experience?

MR. WEITZ: Sure.

MR. ADLER: Please.

MR. WEITZ: I think that the emphasis on settlement rates in the court-annexed programs in New York is not there by design. It's certainly not a policy. You have to remember that while we have had community mediation programs since 1981 and an office to oversee that, my office was just created in January of 1998. We don't necessarily do things, at least not with regard to ADR in New York, from the top down. It's been developed on a thousand flowers-boom approach, in many ways. The irony, again, was that ADR and the value of utility of mediation was sort of put in a box.(page 31)

It's good, and it works for those kinds of cases. For example, it works in cases where people are without money or for inter-personal disputes. In order for ADR to prove itself, to be used for big commercial cases, personal injury cases and even matrimonial cases, it had to settle cases first, before it would be given the opportunity. So, I think it sort of grew out of proving itself.

Fortunately, we're at the point now where we've proven that. We all knew we would. Instead, we can focus more on quality programs.

MR. FARRELL: Tom Farrell. Several speakers have alluded to the conflict between values of court mediation and values of mediation that we might all hold dear. I'm interested in the panel's thoughts on this. I'm always, frankly, surprised when I hear or read references to that and to references of people who are worrying about whether court mediation distorts mediation. I frankly resist that notion. I know that's a comment. I'd be interested in hearing the panelists' thoughts on whether in their experience, or whether the perception in their state is that court mediation is somehow a different animal, is somehow incompatible with the goals of mediation.

MR. ADLER: Let's find out. Rachel and Doug, I want to start with you. Does court mediation, as it gets practiced and inserted in the court system, distort the kind of values that we think are implicit in mediation?

MS. WOHL: Well, there's been a tremendous amount of discussion around this. On our Commission, there are people who practice what they call "transformative" mediation.

There are people who practice "facilitative" mediation and there are people who are "evaluative" mediators. There are court programs in the state that do a high volume of settlement conferences, which are very evaluative processes. The professional community complained about using the term mediation to describe settlement conferences. In response, the court changed its language to simply call it an "ADR" program.

People there who were called mediators are now called "ADR facilitators" because the process is so highly evaluative.

There are real concerns about how the term "mediation" is used, and about how the Commission proceeds in its projects with the courts to develop mediation programs with high quality practice.

MR. ADLER: Doug, what is the Michigan experience on this?

MR. VAN EPPS: I think if anything, it's been very positive. We have not had a long history of holistic or facilitative mediation in Michigan, and a lot of the expertise going into the courts is through the community mediation program. We've also had a long history of evaluative processes. It's actually non-binding case evaluation with penalties; it's called Michigan Mediation.50 (page 32)

The Michigan Supreme Court Dispute Resolution Task Force has recommended that the name of the process be changed to "case evaluation," and I expect that this will happen in the near future. I think if anything, the fact that we've implemented quality community mediation has helped educate constituents that there is a good process in place and that will be spread throughout the courts.

MR. ADLER: Cindy and Elizabeth? Any different views on this?

MS. SAVAGE: I don't think that court-annexed mediation has distorted the processing in Colorado. I do think there are pressures from lack of resources that make it less distorted - people can't take as much advantage of the process, because they have to pay for the mediation.

If they can't afford it, they have to worry about how much it's going to cost. And they may spend - they may end up spending less time in mediation than would be useful, particularly if it's mandated.

Some of them come in - the parties come in with some resistance sometimes. But I don't think that the court annexation in itself distorts the process. Part of the reason for that is that we select all of the mediators either through the central office, or through our outlying offices.

And so we have some quality control over the choice of mediators. This ties into the issue, of course, as Diane said, of how you measure.

Do you look at settlement rates or not? I don't think it's any different for the court than any other mediation program. Almost everybody looks at settlement rates, because their funders look at settlement rates.

So, you're forced to do that to some extent. And the trick is to try to also build in quality and emphasize quality. We're trying to do that in Colorado.

The new budget process I mentioned has this - set performance measures. And we had to look at the dispute resolution program. How are we going to do this?

The obvious one is settlement rates. Or one obvious one, because it's something you can quantify. But we're also looking at building in a measure of customer satisfaction, which we'll get from customer surveys. So, hopefully, this will help us build in the quality aspect as well.

MR. ADLER: Elizabeth, do you want to comment on this?

MS. KENT: Following up on Cindy's comments, it goes to program goals.

That ties in with your question about settlement rates and the tension there. If your program's goal is to provide a quality alternative so that people can consider an alternative to (page 33) going to litigation, then the settlement rate isn't as important as it is if the program goal is settlement of cases.

Your question ties in with my concern about education about expectations for the process. If parties have the right expectations about what they're going into, then I don't think that court-annexed mediation processes really change the mediation values or mediation processes.

But parties can't go to a small claims mediation where they will have a 20 minute process before small claims court starts, and expect that they're going to have a facilitative mediation that is interest-based. You just can't get that in 20 minutes! As long as the parties know that, and they know what to expect, then I think it's not problematic.

MR. ADLER: Let's pick up some other questions. Lisa and Lee?

MS. BINGHAM: Sorry.

MR. ADLER: Read your name into the record.

MS. BINGHAM: Hi. Lisa Bingham from Indiana. My question is on the subject of settlement rates. Have any of the folks at the front of the room tried to measure recurrence? In other words, looking at people coming into the court system repeatedly when they go into the ADR versus people going into the traditional litigation path.

MS. PRUETT: Yes, we've looked at that. And I think that's one of the reasons that we're putting our institutional dollars into civil cases. That is because cases that do settle in the civil context have a certain amount of finality. So, you can look at scrunching it. If you're doing it quickly and you're saving resources that way, then you're saving on other things.

And we've looked at motions. We've looked at how much discovery has been done when the case goes to mediation. And we need to refine those questions.

But what we think we see is that civil cases do well if some, but not all, discovery is done. We see as the change in the culture monitoring component that the mediators are telling us that the attorneys are actually scheduling second sessions in order to save their clients' money by completing final depositions of experts or finalizing accident reconstruction models.

And in the family area, one of the strongest arguments for child protection mediation is that mediated agreements, even if they're only partial agreements, send limited issues to trial and seem to forestall appeals, which are the exact opposite of permanency.

These were, in some of our larger juvenile courts, cases that had high rates of appeal. And that seems to be a very big and telling piece in the research. So, yes, we've looked at it.

MR. ADLER: I presume you're using "scrunching" in its legal and sociological sense. Cindy? (page 34)

MS. SAVAGE: Just briefly. The National Center for State Courts is conducting an evaluation of our multi-courthouse program in our 18th judicial district. And they're still in the process of designing the actual evaluation, but I'm hoping to get some data on that.

MR. ADLER: We're going to be hearing from the researchers in a few minutes. They may be able to shed some light on this too. Other questions? Yes.

MS. SNEFT: I'm Louise Phipps Sneft[51]. Welcome to Baltimore. It's my home.

I have a question for the panelists. Those of you who mentioned that you're experiencing or honoring the shift from looking at just settlement rates to something that's more relational, I'm wondering if you've given any thought with your programs as to how to produce those kinds of outcomes that are more relational or qualitative, rather than just settlement?

MR. ADLER: So, how do you actually go about implementing that?

MS. SNEFT: Yes.

MR. ADLER: And achieving that?

MS. SNEFT: Yes.

MR. ADLER: Comments? Yes. Dan, then Doug.

MR. WEITZ: In New York, we have recently started to talk about -- I think its what Cindy mentioned - performance-based criteria for funding in some of our programs. Many of us in the field certainly worry about whether this works very well, particularly with mediation. What we have tried to emphasize is tying these performance-based criteria to getting parties to the table rather than settlement rates. We trust that if you get people the table, you will get the by-product of a settlement.

MR. ADLER: Doug?

MR. VAN EPPS: I guess using my prior jargon in terms of looking for a lens, we try to identify everybody's interests. In the case type earlier mentioned - permanency planning - what interests do the family and dependent's agency have? What is the prosecutor's interest? What is the guardian's interest?

It's identifying those common interests that brings people to the table. Is it saving time? Is it saving money? Is it finding a more permanent solution for the child? Is it finding a case management plan? We're finding that this works in our special education mediation as well as just identifying what all these different stakeholders in the conflict have, this gives them something common to talk about and look at.

MR. ADLER: Elizabeth?

MS. KENT: Just briefly. It's also a question of training the neutral. (page 35)

MS. PRUETT: I want to acknowledge, first of all, the Ohio Commission on Dispute Resolution, because I have the easiest job of anybody on the panel. I have a commission that also has a staff, and they work with the schools. And although we get into the schools, my job is easier. I think it's not just education of the neutrals. I think that one of the reasons we're where we are in Ohio is that from 1990 to 1994 or 1995, we had very limited funds. And we were able to call on neutrals and academics and people in the field from around the state, to train, train, train. And that was our motto.

If you feed them, they will come. We fed the lawyers lunches. We fed the social workers breakfast. We did 40-hour trainings. We did 16-hour trainings. We trained, trained, trained. And we continue to do that. And I think we don't have the tension between the private practice. In fact, I think it would be closer for Diane to say that in Ohio, if you want an evaluative mediator, you're prepared to pay big bucks to a retired Judge. Because they're only good at that.

So, the tension with the bar is not there, because they've been coming to the table to be trained and fed for years.

MR. ADLER: Other questions?

MR. FARRELL: Tom Farrell from New Jersey. Are any of you from states that utilize approved rosters with mediators? Approved by the court? My question is, do you allow for them to charge a market rate or are they required to only charge a specific fee set by the court? Also, are they required, if they're on a roster, to provide pro bono hours? Any particular number of pro bono hours before they then start to charge?

MR. ADLER: Dan, then Elizabeth, then Cindy. Go ahead.

MR. WEITZ: In New York, the court-approved rosters outside the community programs are assembled at the local level. The answer to your question is easy. We don't allow them to charge at all.

Right now, in court annexed ADR in New York, all the mediators serve voluntarily. In exchange for their pro bono service, we often conduct the necessary training at no cost to them. They just have to agree to serve at least two or three times a year. We allow the possibility of charging after that but it rarely happens since the parties can always select another neutral from the roster who has not already satisfied the pro bono requirement.

MR. ADLER: Elizabeth, I wanted you to say something about why you've abandoned the rostering process, at least for some kind of cases. I think that would be valuable for this meeting.

MS. KENT: Because we don't like them (joke!). Because they cause a lot of problems. I said I was from a small state. That makes it much easier. We have a pretty sophisticated bar. We have a pretty sophisticated population. (page 36)

When the office started, we did have a panel, even though we didn't have a big private ADR provider sector. When we needed to build it up, having a panel was the first phase of the program.

Later there wasn't as much of a need for it, but it was a burden on our office to run the panel. In addition to that, there are all sorts of policy questions and problems about who is on the roster, and how you get on. As we looked at it, and we looked at the change in the market, we thought this is better because we have very limited resources to concentrate on building the infrastructure.

Since we have the sophisticated population, I think that parties' needs are met without our office maintaining a roster or panel.

MR. ADLER: Cindy, then Eileen. Then we're going to bring this to a close.

MS. SAVAGE: I don't call it a roster. I suppose it's more like a panel. What we do in Colorado is contract with a limited number of private mediators to offer their services on behalf of our office.

People are constantly calling me to try to get on the roster. They call it a roster. They call it a list. And there's a perception that you just have to meet minimum qualifications to get on a list. But that's not how it works. We put our mediators through an interview process and role-playing. And so we just have a limited number.

But we have a lot of the problems that Elizabeth mentioned. We do require parties -- or require the mediators -- to charge our rates. And basically the parties pay us, and we then pay the mediator, because our funding comes from those fees also. So, they are required to follow our fee structure. And the statute provides that parties pay a fee that's approved by the Chief Justice, and that's set at a reasonable level to run the program.

MS. KENT: Can I just say one more thing? When we had a panel, there was fee structure. I thought it was strange that if they came to our program, parties would pay the neutral, let's say $150 an hour. Yet, if they had not gone through the program and instead directly contracted with the same neutral, the neutral might charge $200 an hour. It seems like a conflict with the private sector.

Going back to my first point. I trust the parties and I trust that they're going to choose the right person. I think putting the responsibility on them to find the person and to make sure that that person is going to meet their needs is useful. It goes back to expectations. It empowers them to choose the type of process and the type of neutral that's going to work for them when the parties work together to make the process decisions. They are then more likely to get an agreement about what type of process to use.

MR. ADLER: Okay. Great discussion.

MS. PRUETT: Very quickly. We were asked about a roster early on. And there were two reasons that the Supreme Court didn't participate in developing a roster system. One is that (page 37) we didn't want to limit who could mediate. We knew we were getting great services from non-lawyers. And our Supreme Court doesn't have the authority to regulate anybody but lawyers.

Secondly, we didn't know what made a good mediator, so how would we make any decisions? We review that regularly. We still don't know that any academic credential or something else will get us a better outcome. So, we're not going to touch it. We do have local rostering because of the way our domestic relations mediation statute was set up. It limits what the court mediators on the roster can do. They can mediate parenting agreements. So, there's not a huge rush for people to make tons of money by being on a local court roster. And almost all of the juvenile and family court mediation that occurs in our state, where people aren't paying big bucks for a whole divorce mediation outside of the court context, is parenting mediation in the juvenile, unmarried parent context, or the divorcing parent context. They're paying sliding fee scale. People are doing it for a stipend, via a contract, or as pro bono service.

MS. SAVAGE: Just to clarify that Colorado's panel is not an exclusive panel, parties have a choice between the private sector and our panel. And I do think there's one advantage of having a panel of some sort. There is some provision of low fee mediation. So, some low fee mediation is assured.

MR. ADLER: Thanks.

MS. WOHL: Under the Maryland ADR Circuit Court Rules,[52] which were effective as of January 1, 1999, the local courts do keep rosters of approved mediators. If you use a mediator from the list, they're limited by and large to $150 per hour typically split by the parties. People also have the option to choose whomever they would like if both parties agree.

MR. ADLER: Okay. We are at break point. Let's come back in 20 minutes, and then we'll hear from the researchers.

SECOND PANEL:

MR. ADLER: Our second panel will feature Nancy Welsh, Donna Stienstra and Josh Stulberg. Margaret Shaw was not able to make it today but her remarks will be published by the Cardozo Online Journal of Conflict Resolution after the last panelist's presentation.

We've had some very interesting negotiations going on up here. It started with Josh, who wanted to go last and one of the other panelists who wanted to go first. And since Margaret isn't here, Josh asked, "Well, do I get her ten minutes." The answer is "no."

The same ground rules are in effect. I'm going to ask each of you to take eight minutes. We'll let it slip over a little bit. Dick Gross is going to be our clock keeper on this. Let me just say one other thing. Each of the panelists came today with some prepared comments. The questions are about the program and relate to what we have learned out of the first, and in some cases, second generations of court programs. What works and doesn't work? How (page 38) has a multi-door courthouse model fared? What are the incentives to engage parties and judges in ADR processes? What does the research tell us about what state and federal court systems should be doing?

So, that's what our second panel is going to discuss. But before we do that, I want to really see questions to researchers rising to the top. I want to hear the audience ask the following types of questions to the researchers: Does it save money? What else would you love to hear as responses from the researchers?

For example, mandated versus voluntary coming to the table is one important issue.

Research programs? Expectations versus results. Delivery and the outcomes.

Nancy's going to lead off. She's going to use the overhead. And Nancy, you have ten minutes. And then, we'll hear from Donna, and then Josh.

MS. WELSH: There's a certain irony in the fact that I am presenting. I am now in Pennsylvania, but I'm going to present on research that was done in Minnesota.

And I want to add that I was not the researcher. Professor Bobbi McAdoo, at the University of Missouri at Columbia, was really the primary researcher who generated this data. The research was undertaken in order to allow the ADR Review Board of Minnesota, of which I was a member, to evaluate the effect of Rule 11453 on the practice of law in Minnesota, and the effect of that rule on the practice of mediation, within the courts in Minnesota.

I think in order to be able to share the data, I need to give you a little bit of background about Minnesota's system.

There is a key rule[54] and a key statute[55] involved in Minnesota's approach. And I need you to think in terms of carrot and stick. The statute enabled judges to order civil cases into non-binding ADR processes. This is the stick in the carrot and the stick approach.

The rule was adopted after the deliberations of many committees, task forces, et cetera. And those committees and task forces recommended that rather than just having the judge order parties into a process, attorneys and clients should be given a chance to advise the judge on whether ADR was appropriate, in a particular case, which ADR process was appropriate and who should serve as the neutral. In response, Rule 114 was promulgated by the Minnesota Supreme Court. It became effective in 1994. It required that within 60 days of the filing of an action, the attorneys would be required to inform their clients about ADR options, consult with opposing counsel on the appropriateness of ADR, and report to the court on whether or not they thought ADR would be appropriate, which process would be appropriate, and within what time frame.

That was the carrot in the carrot and stick approach. This was the period where the attorneys and clients had the opportunity to be creative and to determine whether ADR would be used, and how it would be used. This is neither a voluntary ADR system, nor a mandatory ADR system. It's a mandatory consideration system. In addition, in Minnesota's (page 39)system, there were nine different processes that were available to attorneys and clients. Mediation certainly was among them. But also listed were mini-trial, early neutral evaluation, moderated settlement conference, non-binding arbitration, binding arbitration, private trial, and of course, the catch all category, other. That was also part of the carrot, the creative part of the rule. In terms of background regarding mediation, the kind of training that was received by people who served as mediators was facilitative mediation training. It was also decided that people didn't have to be attorneys in order to be mediators within Minnesota's system. Non attorneys - people of other professions - besides attorneys - were able to be mediators, as well.

Finally, it was decided that the courts were not going to be paying for these ADR neutrals. Instead, it would be up to the parties to pay for the neutrals. The neutrals would be permitted to charge market rates. The rule now says that those rates have to be reasonable. But I have no evidence that anyone has ever claimed that a rate was not reasonable. And they vary dramatically.

If any of you are interested in more details about Minnesota's system, I do have some copies of an article that Bobbi McAdoo and I wrote.[56] And I'd be happy to share that with you.

Okay, now. About two years ago, Professor McAdoo, who I will probably call Bobbi throughout this presentation, began research looking at the effect of Rule 114 on the practice of law, and on the practice of mediation. She conducted qualitative interviews with many attorneys around the state. And she also collected quantitative date. A survey was sent to a thousand attorneys around the state who are litigators of civil cases. The numbers of attorneys receiving this survey was proportional to the civil caseload in each district.

There was an incredible response rate. Nearly 75% of the attorneys who received this survey sent it back in. So, the data is substantiated.

I have brought the overheads showing, I think, the successes in Minnesota, and areas for improvement, based on the data that was gathered in this research and on the recommendations that were reached by the ADR Review Board.

So, what were the successes?

First: Mandatory consideration works. Minnesota learned from the experience in other states, which had found that voluntary systems, although they were loved, were not used and that mandatory systems, although they were used, weren't necessarily customized to the needs of particular cases.

We found that in Minnesota, if the attorneys met and agreed that ADR was not appropriate, for the vast majority of cases, a judge did not then order the parties into ADR. Even though the judge had that authority under statute, only 11% of the attorneys responding to the survey indicated a judge used it. The judges listened to the input provided by the attorneys.

If the attorneys disagreed about whether ADR was appropriate, one of them thought it was appropriate and one thought it wasn't, the judge listened to the attorneys who thought (page 40) ADR was appropriate. And 51% of the attorneys reported that in this situation, the court would order them into ADR. This result was much more pronounced in the metropolitan areas, Minneapolis and St. Paul, than in the rural areas, probably because of docket concerns.

Second: The use of ADR increased very substantially as a result of Rule 114. Seventy-eight percent of the responding attorneys estimated that they were using ADR more in their civil -- and that's non-family cases -- once Rule 114 became effective.

The data also suggests that among the various processes that were available under Rule 114, mediation certainly had been institutionalized. Eighty-four percent of the responding attorneys replied that they used mediation often, or sometimes in their civil practice after the advent of Rule 114. Only 48% reported that they had ever used mediation often or sometimes prior to rule 114.

Importantly, though, I have not said ADR has been institutionalized. It's mediation that has been institutionalized.

The mandatory consideration approach has led to tremendous lawyer support for continued use of ADR, with 92% of the attorneys saying that they would continue to use ADR, even if Rule 114 was repealed. So, these are tremendous successes.

Let's go to the next overhead. The data also suggests that the mediation process that is being used in the courts in Minnesota does include facilitative, client-oriented elements, with 79% of the responding attorneys indicating that mediators always or frequently encourage clients to participate, and very frequently or always help parties to communicate effectively. This is the good news. Mandatory consideration works. What I think of as coerced education of attorneys works. As a result of this coerced education, attorneys have institutionalized an

alternative. And this process permits customization to the needs of each particular case.

Now, to the areas for improvement.

We talked earlier today about the time and cost savings that can be achieved through the use of ADR. In the data that Professor McAdoo received, lawyers, who were asked their perceptions about whether they had been able to achieve time and cost savings, generally indicated that they thought that ADR did save litigation expenses.

It saved time, saved money, and caused earlier settlements. But, lawyers' discovery practices -- the place where most of the time and money is spent in litigation -- remained virtually unchanged.

Because of the limits of time, I'm not going to spend any time talking about another area of concern regarding the timing of lawyers' input ADR. Perhaps we scheduled the time to make the choice of ADR too early, based on the data results.

Let's go to the next overhead. This is the overhead that concerns me the most. The successful institutionalization of mediation may have come at a price. Although I've said that elements of the facilitative model appear to be institutionalized, elements of the evaluative,(page 41) settlement-oriented model of mediation also are being institutionalized. Notice that the most important qualification for mediators according to the attorneys -- who for the most part, are selecting them -- is that the mediator have substantive experience in the field of law, related to the case. They also thought --although not in as substantial numbers -- that the mediator ought to be a lawyer and ought to be a litigator. They also were asked whether training made any difference at all in the mediator, and the answer was, "no."

The top factors motivating lawyers' choice of mediation are settlement-oriented. When the lawyers are thinking about whether to choose mediation, they choose it because they believe it saves expenses, makes settlement more likely, and is a reality check for opposing counsel's client and their own client.

Lawyers rarely appear to be motivated by the sorts of elements of mediation that led many of us to get into it in the first place. They're rarely motivated by the increased potential for creative solutions, preservation of parties' relationships, or evidence that their clients like mediation. Also, few attorneys reported that mediation had the effect of either providing greater client satisfaction or providing greater client control. It doesn't mean it didn't happen. It's just that they didn't perceive it.

You can also see that it appears that other potentially more appropriate ADR processes are not being institutionalized. Mediation was the big winner in Rule 114. Although other processes are being used more too, not nearly as much.

I have one last overhead. We're not going to talk about the top item. Only the bottom item. The data -- or I should say, the lack of data -- led the ADR Review Board to recommend that Minnesota regularly collect and analyze data, which is not regularly being collected and analyzed now. Evaluation is difficult without data.

The last thing I want to say relates to the question, "How do you institutionalize a quality program?" In answering this question, I think you have to decide what is quality, particularly as to mediation. Do you care whether it includes the facilitative elements? If you do, then there's a need to foster that, because otherwise, the evaluative elements will be those that come to the fore as the process adapts to the courts.

MR. ADLER: Terrific. Thank you, Nancy. Now, I noticed that you were about three minutes over, so we'll take it off Josh's time.

MS. WELSH: I'm sorry. See, I was turning this way on purpose.

MR. ADLER: It's a constant negotiation with Josh.

MS. STIENSTRA: Okay. I want to do two things. And given the time constraints, I'm probably going to do only one.

I'd like to talk first about findings from some research I conducted in the federal courts. And then, I'd like to talk a little bit about where research should go, might go, maybe sometimes (page 42)can't go, now that we have several years of ADR experience in the courts and a number of research projects behind us.

Let me set the context, just a little bit, for what I'm going to say. First of all, I am talking about research that was done in the federal courts.

Not always can federal court ADR research be extrapolated directly to the state courts. But in this case, the research was done in civil litigation, so to the extent that it can be generalized to the state courts, it's not the family courts and it's not the small claims courts. It would be general civil litigation.

There was some research in the 1980's on arbitration programs.[57] Those were the first kinds of ADR programs established in the federal courts, and some of the early research done on ADR in court settings was done in arbitration. In both the state courts and in the federal courts, that research tended to show that there were no cost savings. There were no time savings. But there was high litigant satisfaction in using arbitration programs.

Then, in 1990, Congress passed an act requiring all the federal district courts, the trial courts, to design cost and delay reduction plans.58 Congress' concern was that litigation in federal courts was too costly and that it took too long. So all the district courts were instructed to design and create cost and delay reduction plans, and to consider using six case management principles to reduce cost and delay in litigation.

The sixth of those principles was ADR, and it was with this statute that we really saw the use of ADR take off in the federal courts. This development came, really, through advisory boards of attorneys and other users of the federal courts. In creating the cost and delay reduction plans, the courts were instructed to work with advisory groups. And it is really from the reports of those advisory groups that the push came to use ADR in the federal courts, and to use mediation in particular.

The statute also created five courts as demonstration projects and ten courts as pilot projects.[59] Many of you have heard of the study done by the Rand Corporation of the ten pilot courts.60 That was done under the Civil Justice Reform Act.61 Less known are the five courts that served as demonstration districts under that act. Three of them were demonstration projects for ADR.

Stephanie Smith is here from California. At that time, she was the director of the ADR program of the Northern District of California, one of the three ADR demonstration districts.

I want to talk about the research we did at the Federal Judicial Center of the three ADR demonstration districts.[62] They were the Northern District of California, where the court adopted a multi-option ADR program, offering a variety of ADR options to litigants in that court. The use of ADR was "presumptively mandatory," in other words, not quite mandatory and not quite voluntary. The court presumes that litigants in civil cases in that court will use ADR. The choice of what form of ADR they use is at the discretion of the litigants. (page 43)

The second court was the Western District of Missouri in Kansas City. That court adopted an Early Assessment Program where all litigants in a randomly selected group of cases were required to come to the court 30 days after answer was filed to talk with the Early Assessment Program director, who would help them determine what type of ADR would be most suitable for their case.

As it turns out, the ADR program administrator, or the Early Assessment Program administrator, was a very experienced litigator and mediator in Kansas City, who the court had wisely hired because he was very experienced and respected.63 And almost all parties ended up mediating with him on the spot when they came in for that first conference.

The third court, a much, much smaller court than the first two - the Northern District of West Virginia - has a long standing settlement week program. It takes place three times a year. Cases that are ready for trial are mandatorily referred to the settlement week program, which occurs over a week or two of time, and mediators from the community assist the parties in trying to resolve the cases.

Okay. What findings stand out for me from our study of these three districts? The first is that the culture within which a court designs and enacts its ADR programs matters a great deal for its success. And that's not a surprise. Ever since Frank Church coined the term "local legal culture," we have known - and perhaps even before the words existed - that, indeed, the culture matters a lot.64

I want to illustrate it, though, with a particular finding from two of the demonstration districts. We asked in all of the courts, "Was ADR used at an appropriate time in this case?" In the Western District of Missouri, where cases were referred to ADR 30 days after answer, very early in the case, 11% of the attorneys said, in response to that question, that ADR occurred too early. That's very early in the litigation. And only 11% said it occurred too early in the case.

In the Northern District of West Virginia, where cases are referred to ADR after discovery is complete and just before trial, 21% of the attorneys said ADR occurred too early in the litigation. Perhaps they were saying it's never appropriate. But in any case, 21% of the attorneys, before they thought it was useful for them to have gone to ADR or to mediation in this court, were clearly waiting for something else to happen.

We can see from these findings that what the expectations are and what the culture is, matters a lot for the success of an ADR program. And when designing an ADR program, that culture needs to be known and understood.

A second important finding from our study is that mandatory referral is not an issue - at least it wasn't in these three districts. In all three districts, cases were mandatorily referred to the court's ADR programs. Yet, the great majority of the attorneys -- I should clarify that we surveyed attorneys using questionnaires. We ended up not surveying litigants, though we intended to, because their names, but not their addresses, are recorded on court dockets. We needed to go through the attorneys to get the litigant names and addresses, and only about (page 44) 1% of the attorneys completed the forms to give us addresses. So, we did not survey the litigants.

The great majority of the attorneys who responded said that the programs were fair, that they were satisfied, and that the programs should continue. And these were in mandatory referral ADR programs. So, mandatory referral seems not to affect how the attorneys valued these programs.

We did find, though, in the Northern District of California, an interesting result. That is, that attorneys were more satisfied if they could choose their ADR process. As I said, the court set up a multi-option ADR program: the attorneys were expected to use ADR, but they could choose the form they were going to use. We found that when attorneys were permitted to make that choice, they evaluated the program more positively. They were more likely to say they were satisfied. They were more likely to settle. There were fewer motions. There was less discovery and lower estimates of cost when the attorneys could choose their ADR process.

I should make it clear that in this court there were some attorneys who were not permitted to choose, but rather had to use the ADR process assigned by the court. So we had sort of a control group to test this against.

We also asked in our study, "In what way did ADR help?" We found that the majority of attorneys said - and I'm talking about 2/3 to 3/4 of the attorneys - that the way in which the program was most helpful was in moving the case towards settlement. We see here an orientation on the part of attorneys toward court-based ADR. I think their expectation is that the purpose of these programs is settlement. And the programs are given higher marks when, in fact, they have that result.

We found that where a case settles, attorneys are more likely to see positive effects from the program. They are more likely to say it reduced time and cost. They're more likely to be satisfied with the outcome. So, settlement

seems to be a key factor here that divides between satisfaction and less satisfaction with the ADR programs.

The attorneys also value these programs for encouraging the parties to be more realistic about their case, for allowing parties to become more involved in resolving the case, and for allowing the parties to tell their story.

We also found that the quality of the neutral is related to perceptions of ADR's effectiveness. Where the attorneys rated the neutral as fair, highly qualified, not forcing settlement, and so forth, they were more likely to say that disposition time was reduced, that litigation costs were reduced, that they were satisfied, and that the process was fair.

Cost and time, of course, were the issues in this legislation. Reducing both cost and delay is what Congress was trying to seek through the Civil Justice Reform Act.65 As we all know, cost and time are very difficult to measure. And we know from previous research, that there has not been much evidence of savings in cost and time.66 (Page 45)

We asked the attorneys to estimate whether they thought the ADR programs had reduced cost. I want to qualify what I'm saying right away, by acknowledging that our findings are attorney estimates. We didn't look at billings or any other kind of hard data. We asked them to estimate the savings, if any, from ADR. And we found a nice sort of progression from the court where costs would be considered lowest to the court where costs would be the highest. In the Northern District of West Virginia, the attorneys estimated a savings of $10,000 per side. That's the median estimated savings per side. In Kansas City, the estimate was $15,000 per side. And in California, Northern -- in other words, in the San Francisco area -- median cost savings was $25,000 per side.

Now, those are pretty impressive figures, but I think they're probably over-estimates. We've done other research in the courts that showed that the median cost for a federal case is $13,000. We have a comparison in Kansas City, the Western District of Missouri, because we asked the attorneys not only to estimate how much they saved, but how much the case would have cost. And we have an estimate of total cost: a median of $12,500, compared to estimated savings of $15,000. That gives us some idea of the imprecision in their estimate. I think what they're telling us this: they think they saved some money. But I wouldn't put too much stock in the actual dollar figures, except I think the progression in the size of the savings -- $10,000, $15,000, and $25,000 -- tells us that there's some grounding in reality here, because you would expect that kind of progression across the three districts.

Turning to the question of delay, in one program we found a clear reduction in time from filing to termination. In the Western District of Missouri, the court randomly assigned cases to ADR and not ADR. The cases that were not assigned to ADR were not permitted to use it. We found a difference of 2.7 months in disposition time between the ADR and the non-ADR group of cases -- 7 months to disposition for ADR cases, 9.7 months to disposition for non-ADR cases.

What have we learned from this? First of all, I want to make the point again. We cannot generalize from this study to all courts. The demonstration districts are not representative. They are each different and unique in their own way. I think, though, that they provide us some models of how ADR works under certain conditions. What were the conditions in these courts?

First of all, all three courts were very committed to their programs, the judges, the bar, the advisory groups, the staff. Second, these were courts that were willing to experiment. And third, these programs were very faithfully executed. In the Western District of Missouri, for example, where cases were randomly assigned, the court employed a very skilled staff to manage the program, so the assignment of cases to ADR and non-ADR groups was very faithfully carried out to permit the kind of study we did. The courts were just very committed and very careful about these programs. They also had a lot of funding -- at least two of the three did. Because of the Civil Justice Reform Act,67 there were special allocations for these programs. In two of them, the costs were over $200,000 a year. That's a lot of money, and many courts cannot look to those kinds of resources.

With the sunset of the Civil Justice Reform Act,68 those resources have decreased, but the courts have continued

their programs, and have found a way to maintain them. (page 46)

Finally, all three courts had very skilled mediators. They brought in the best trainers to train the mediators in their programs.

I think I'm probably at the end of my time. There's a whole set of research questions, I think, that lay out there in front of us. We can talk about those when we get to the discussion session.

MR. ADLER: And one of the questions I'm going to ask you is, what lessons, if any, do you think may relate to the state courts? Because I know there's a major bridge here.

MS. STIENSTRA: Right.

MR. ADLER: Josh, I'm sorry. We're out of time. Sorry. Go ahead, Josh.

MR. STULBERG: I want to discuss democracy and dispute resolution education.

I will begin by examining a component of the question: "What would your ideal comprehensive state court ADR program look like?" Specifically, I want to propose an ideal way in which to construct and execute a public education project about mediation.

The methodology I used here is a thought experiment. I want to advance an image of an educational enterprise that captures our imagination about educating citizens in ADR processes and then explore two practical consequences of that scenario. I do not approach this as a social scientist who properly gathers data that demonstrates the degree to which stated program goals are achieved. Rather, I want to articulate a vision of an initiative that does not yet exist, but whose design and thrust is shaped and tempered by lessons learned in more than a quarter-century's work in designing mediation programs and training persons in their use. If the proposal is compelling, then the appropriate next question is simply: "why not try it?"

I want to engage in the following thought experiment. We have constructed a high technology institute that bears a physical resemblance to the recently opened Rock and Roll Museum in Cleveland, Ohio. We call it the Institute of Dialogue and Justice.

It is a breathtakingly beautiful glass building, situated on a lovely waterfront, with sunrays and light glistening through its walls. Inside are multiple interactive exhibits and attractions that feature different components of a public justice system. The first thing a visitor notes is that there is no entrance fee. The Justice Institute tout court is accessible to everyone and supported with public tax revenues. We walk to the Institute's wing designated "Mediation." As we enter, there is a sign announcing: "minimum tour: 50 minutes."69

There are two features that structure the mediation exhibition. First, there is background music playing throughout the visitor's experience. Second, visitors observe or interact with "alive" persons, all of whom are actors playing the roles of disputing parties or mediators; the actors, incidentally, are paid for their work in a manner comparable to the Federal Theater Project of the Work Projects Administration. (page 47)

As we enter the "mediation reception" area, we hear John Lennon's voice in the background singing: "Imagine no possessions. I wonder if you can. No need for greed and hunger. A brotherhood of man." Our tour guide welcomes us and leads us into an observation room from which we will observe a simulated mediation of a typical dispute; as we sit down at our computer terminal, we hear the strains of Disney's: "It's a small, small world."

The computer terminals enable the guide and visitors to participate and interact with the actors in the following way: When the mediator uses language that is exemplary for being non-judgmental and non-partisan, the guide can "circle" the language on the monitor to emphasize what has just been said; if the mediator asks leading questions, the guide can note that, ask the visitors how they might restate the question, and then ask the mediator

to "restart" that segment with the newly rephrased question. When a party states something that indicates that he has not accurately heard or understood the point made by her counterpart, the guide highlights it on the monitor. If a visitor desires, she can ask the "actors" to replay the scene so that parties operate with a correct understanding of the situation. Otherwise, the visitors simply let the scene continue and observe how that misunderstanding shapes or sabotages future settlement-building efforts. If the parties or their counsel present their concerns in a rancorous, hostile manner, the visitors can observe how the mediator handles the emotions. Alternatively, they could "back up the scene" and ask the mediator to engage in alternative interventions to better handle how a party "vents his or her feelings." When the mediator summarizes the parties' statements and sharply crystallizes them into negotiating issues, the guide highlights them on the screen with the tag, "this is good mediation!" When the mediator selects which issue to address first, the guide tells the visitor about the range of choices a mediator makes when structuring the agenda; after observing the discussion for some time, a visitor could "buzz" and ask the mediator to "restart the discussion" by beginning with an alternative issue first, and this pattern would hold for the remainder of the mediation demonstration.70

This interactive capacity could also be augmented in remarkable ways. For instance, when one party or counsel states something that displays an increased understanding of the other person's situation, that latter comment is electronically sent to a "green box" on the computer screen that is labeled: "accumulated information." The box's entries reflect what has been learned, not just stated, by everyone participating in the mediation. If one client seems particularly silent during the mediation, a visitor might ask to "see" how the lawyer had prepared her client for the mediation. The mediation simulation would then "stop" while the lawyer and her client portrayed how they prepared for mediation; if the visitor wants the lawyer/client preparation to change and then observe its impact on the process, she can ask that that be done. If the lawyer and client are negotiating from a posture that might be characterized as problem-solving, the visitor might ask them to reframe their approach into a competitive style and examine how that influences the subsequent bargaining process.

There are other engaging features as well. When parties advance various solutions to particular issues, the guide places an asterisk by them. The guide can stop the action and ask the visitors to identify various party interests that would be promoted or secured by each proposal. When the mediator caucuses with the parties, the information learned in each one is color-coded and displayed on the monitor. As the mediator moves from caucus to caucus,(page 48) the visitor knows what information learned in prior caucuses is being used and what remains confidential. If the parties reach agreement and commit tentative settlement terms to a written document, the actual document is displayed on the screen; if visitors want to suggest alternative language, they can do so and then observe how the parties react to it.

Finally, the exhibit is equipped with the capacity to change the assigned profile of the given characters. For instance, assume we are observing the mediation of a medical malpractice claim. We are interested in observing what difference, if any, it would make if the defendant doctor were a young surgeon just beginning her practice rather than an established surgeon who has practiced for thirty-five years. Alternatively, would it make a difference if the plaintiff were bringing charges against a male doctor rather than a female doctor? If the plaintiff were male or female? In a landlord-tenant case, a visitor could request that the landlord's profile change to being that of an owner of 35 buildings with 10 units in each building rather than the owner of only one building. We would then observe the impact, if any, of these differing facts on how parties interacted with one another and with the mediator. And, of course, as the visitors leave the observation area, they would have an opportunity to talk individually with the "actors" who, while remaining in role, could "debrief" the simulation by describing to the visitors how they felt when various approaches were adopted.

This capacity to identify particular developments, "red circle" them, and then reenact alternative action enables each visitor to observe the distinctive impact that results when a mediator deploys one intervention technique rather than another. The minimum 50-minute tour can, quite easily, become a 3 or 4 hour learning experience for a visitor. But, of course, it is much more than that.

Some visitors will be individuals who just want to observe how the mediation process works. These visitors can observe the process from beginning to end and, with comments and observations from the guide, be alerted to the skills and values that structure the process. Other visitors will be interested in experimenting with alternative

approaches to conducting conversations, so they will be more interactive in suggesting "retakes." But some visitors will be experienced mediators who will use the Institute to sharpen or expand their own skills. Such experienced individuals, for instance, might quickly learn from the mediator's opening statement that, at the mediator's request, each party's lawyer had submitted to her a "pre-mediation statement" describing their perspective and suggesting the types of resolution they would find acceptable. The "experienced mediator" visitor might quickly buzz her computer and request the actors to replay the scene but with the mediator requiring counsel to simultaneously exchange such statements among themselves, or, alternatively, begin the mediation with no pre-conference submissions of substantive information.

Does this reflect a fantasy? What does this thought-experiment -- or flight of fantasy -- expose about current or ideal efforts to educate the public about the mediation process?

First, I think it displays that our historical efforts in education have been decidedly narrow in terms of focusing on our public. There have been significant educational initiatives and mediator training programs developed over the past quarter century. With some notable exceptions, most of those efforts (and resources) have focused on educating policy makers,(page 49) judges, and lawyers about dispute resolution. Particularly as the concept of "court-annexed" programs has gained momentum, the target audience of our educational efforts have focused on stakeholders in that system.

Focusing on stakeholders has also shaped another aspect of our educational approach: in trying to cultivate supporters, we end up speaking to those who are sympathetic to us. We are remiss in not addressing two important audiences: the first consists of those social critics who worry that mediation's use is not consistent with a strong affirmation of deeply-held democratic values. These critics view mediation as requiring compromise but would prefer that vindication of fundamental rights be the goal; they view mediation advocates as persons who are constitutionally committed to reducing confrontation, shouting and emotionally-charged engagement rather than as persons who are comfortable with conflict.71 The concerns of that audience must be met at both a conceptual and practical level.

The second audience is larger, less cohesive, but more powerful. It consists, quite frankly, of all of us who are engaged in multiple roles in institutional life in our society. As Doug Van Epps noted in the first panel, if one relaxes or jettisons the blinders of categorizing human interactions as "cases," then we immediately observe that there are multiple "justice-making" institutions and settings throughout our communities. We quickly discern how a fourth-grade teacher models or handles conflict, how workplace supervisors deploy the principles and strategies ingredient to third-party intervention, and, quite significantly, how media personnel describe, report, or practice conversational processes. The generous observation is that participants in these multiple settings show modest command or understanding of intervener values, strategies and tactics. We must assume our share of responsibility for not having a more informed citizenry.

Why have we not been successful? Multiple reasons exist. First, we have not built upon the most significant pedagogical lesson we have learned in twenty-five years of teaching mediation: participatory, interactive engagement is the most effective way in which to communicate the values and ideals lacing mediation. Instead, we revert to old habits: we regale our luncheon audiences with mediator war stories; we describe the development and implementation of mediation programs in such general terms that no audience member can appreciate what we are saying. Videotapes portraying the mediation process are understandably self-promoting72 but, more significantly, require a commentator to crystallize the skills and challenges attending to the intervener's role rather than being independent learning vehicles. And, deploying perhaps the oldest of all educational habits, we still try to look for valuable lecture materials to discuss the topic of the value of participation.73

The Institute of Dialogue and Justice, sketched above, blends several principles and insights about teaching dispute resolution values and skills. These include: (1) A person's learning environment makes a difference. If one teaches conflict resolution in a dilapidated building, participants' visions of possibilities are significantly affected. Adequate space, pleasant surroundings, and current technology make a difference. If one believes that the public justice system, in general, and that mediation, in particular, are important institutions in the life of a

free people, then its physical surroundings and support structure should reflect that commitment; (2) Learning about resolving disputes in a democratic society is perfectly done by blending practice and theory and how we resolve disagreements. Having visitors to the (page 50) museum have opportunities to "play out" different scenarios in problem-solving processes importantly underscores both desirable strategies and common values that lace constructive dialogue and problem-solving within one's community; and (3) Learning effectively is enhanced when it is both individualized and connected to that person's experiences; enabling persons to test interventions to multiple settings builds on that principle.

The presumptive goal of the Institute's approach to education is to take seriously the idea of informing, educating, and training each of us in the values of a particular way of resolving differences. This is best achieved through a conversational process that is designed to enhance one's understanding of one another's perspectives, experiences, and points of view as a predicate for then engaging in effective problem-solving. If we succeeded in our task, every school child in America -- indeed, every citizen -- could quickly describe why the dynamics of such television "talk show" programs like Hard Ball or Cross Fire constitute a fundamentally bankrupt approach for conducting conversations whose goals are to enhance understanding and problem-solving.

Constructing the Institute is probably a pipe-dream, but its features crystallize how little imagination we have employed in waging our education campaigns. I will close by suggesting two "practical" approaches to educating our public that embody the Institute's spirit. First, we need to create presentation and educational materials about mediation that are engaging, electrifying, fun, and informative. Movies are especially useful tools in this area. We need to develop a series of movies that elegantly display the mediation process and its constitutive skills, strategies, and values. We need public monies -- substantial monies -- to do this. This is a public responsibility that is an important component for sustaining citizenship skills in a democracy; it should be supported in no less generous or urgent a manner as we adopt in developing training movies for our armed-forces.74

Second, we need to open up court-annexed mediation sessions to public viewing. That is, we need to construct the equivalent of "court watchers" for mediation conferences. We can create a framework so that those observing must respect important confidentiality guidelines, but with those features in place, we should then educate the public about mediation by letting them observe what transpires in such sessions and then establish a forum in which those observers can "process" their observations. For example, the observes should be able to ask questions of experts or participants once the mediation session has concluded. Continuing to conduct a mediation conference as a behind-the-scene, closed door dialogue creates dangerous images and concerns regarding a process that we have no reason to hide.

In closing, as we all know, the most compelling lesson we have learned about teaching mediation is that the teacher, to be effective, must model the very values of openness, dialogue, respect, and precision that the mediation process embraces. In our efforts to educate multiple public constituencies about a process we cherish, we should be no less imaginative, energetic, and vital than the process itself.

MR. ADLER: Thank you, Josh. Terrific. I had this vision as you were talking about this museum of mediation, that it was going to be co-located down here at Johns Hopkins University with the Museum of Dentistry. (page 51)

Although Margaret Shaw was not able to join us today, the Cardozo Online Journal of Conflict Resolution is pleased to present her remarks.

MS. SHAW: I am pleased to be able to participate in the "State of the States" discussion, however belatedly. In reading through the transcript, I am struck by recurrent themes - themes that both resonate now among the speakers present and that have been with us since we all began working with courts to implement ADR programs some fifteen years ago. The importance of taking account of local culture, for example; the worries about quality and whether we can get courts to think outside the box; and the paucity of good research, although the panelists here have educated us about some interesting new findings. My own experience over this past year working with the courts in New York also reminds me that no matter how long we may have been at this effort

on a national level in both the state and federal courts, every new initiative needs to begin at the beginning in developing a collaborative plan with all the relevant stakeholder interests. While we can pull together the learnings, and this issue of the Online Journal will help, the stakeholders involved will still need to work through the issues and experience the learnings for themselves. However frustrating that may be at times, it seems like an important point for all of us to remember.

I want to raise a different issue, and one that seems to me to be increasingly important as ADR becomes institutionalized in our courts. As mediation, case evaluation, and other processes take hold in our courts, judges are beginning to focus much more on their own settlement efforts. Whether out of their own pressures or inclinations to diminish caseloads, or out of their professional curiosity or desire to learn new skills and techniques, both Article III and Magistrate judges are asserting themselves more actively in settlement conferences as well as asking for more training in interest-based and other negotiation approaches. What does this mean for court programs for the private sector? While that is a hard question to answer, at the very least I think we can say that now, in the courts as in the private sector, ADR is increasingly going "in house."

The other question to ask, of course, is the normative one: is judicial "mediation" a good thing? Like any other development, it probably has its pros and cons. In a recent issue of the ABA Section of Dispute Resolutions Magazine, Jim Alfini, the section's current Chair worries about coercion, particularly when judges "mediate" cases assigned to them for trial. Frank Sander, one of Jim's predecessors and a thoughtful grandfather of the ADR movement, worries as well about role confusion, competence and training, and the appearance of impropriety.

Recognizing that from a practical perspective the issue is not likely to be "whether" judges will "mediate" cases assigned to them for trial, but rather "how" and "when" they might do so, Elizabeth Plapinger and I set out a few years back to try to develop guidelines for judges regarding appropriate settlement behaviors. Working with the Advisory Board of CPR's Judicial Project, composed of prominent judges, court administrators, academics, and legal practitioners, we drafted a draft document for comment. Although consensus was not reached across the board at that time, we hope that the document will serve as the starting point for a new joint initiative on the subject by the ABA Dispute Resolution Section Committee on Ethics, the CPR-Georgetown Commission on Ethics and Standards in ADR, and the CPR Judicial Project. (page 52)

I cite some of the salient sections of that document below, in hopes that the subject of court ADR will henceforth include consideration of judges' roles in settlement, a topic I believe to be of increasing importance and one that deserves a great deal more discussion and research.

Judicial Settlement Activity

Absent clear and informed agreement by both parties, trial judges should not mediate non-jury cases. Judges should meet in private session with each litigant and counsel only in jury cases and only when the parties have agreed to such ex-parte procedures. Judges should predict outcomes only with extreme care and caution, and only when the parties freely consent to this procedure. Finally, judges should never exert undue pressure on parties or counsel to settle.

Along with increased use by courts of ADR procedures has come an evolution in our understanding of a judge's role in litigation. Once viewed simply as adjudicators, judges are now more than ever expected to be case managers, and indeed are more inclined to help parties settle their cases. More often than not, this occurs during traditional settlement conferences. Judicial behavior during settlement conferences varies, ranging from behavior some would characterize as encouragement to behavior some might characterize as coercion.

Some believe that a judge who will serve as a trier of fact should never become involved in settlement negotiations beyond suggesting that the parties themselves pursue settlement and arranging for settlement assistance by someone else. In this view, the role of the mediator and the role of the decision-maker are incompatible. The risk is that the judge will learn something during settlement discussion that would not be admissible at trial, thus compromising justice or, at least, appearance of justice. There is also a risk that parties

will fear judicial retaliation if they do not agree to settle, or that they will be intimidated into accepting terms they otherwise would never accept.

Some members of the CPR Judicial Project Advisory Council believe there should be no blanket prohibition against a trial judge "mediating"[75] a case, arguing that trial judges should mediate their own cases under any circumstances, regardless of the jury or non-jury nature of the action. Others have concerns, particularly about cases that may be politically sensitive such as civil rights cases involving institutional players or cases involving novel constitutional or statutory issues. All members agree that absent clear and informed agreement by both parties, trial judges should not mediate non-jury cases.

Even in cases where judicial involvement in settlement discussions may be appropriate, however, there are limits on acceptable judicial behavior. For example, judges should meet in private sessions with each litigant only in jury cases and only when the parties have agreed to such ex-parte procedures.76 While private caucusing may be an essential tool for an effective mediator, the judge may learn confidential information that will only erode confidence in his or her ability to be an impartial decision-maker.

Whether it is acceptable for a judge to give his or her view of the expected outcome at trial is a more controversial issue. Some believe that this behavior should not be condoned because the risks to the integrity of the court process and perceptions of fairness are too high. Others(page 53) believe that at least in jury cases this behavior may serve the parties and the judicial system, particularly if the parties ask the judge to express a view and the judge is well-informed about the facts and law in the case. Still others would distinguish between an opinion about the strengths and weaknesses of each party's position, condoning the latter but not the former. At best, judges should predict outcomes only with extreme caution and care, and only have authorized them to settle for is a practice many believe to be unduly coercive and an invasion of the attorney-client privilege.77

Other judicial behaviors are, similarly, unacceptable. A judge should never exert undue pressure on parties to settle. For example, threatening explicit or implicit reprisals if a party is unresponsive to settlement, or using his or her power to change commitments to increase pressure on parties to settle. Nor should a judge intentionally give different impressions of the merits or value of a case to different sides in order to create fear or capitalize on risk aversion. Finally, a judge should never put an exact settlement figure on a case and suggest to the parties that the case be settled for the amount.

MR. ADLER: I'd like to propose one question to each of you, and then we're going to open it up. As you think about the research, both that you've done, as well as the inventory of research that we've now acquired over the last 15 to 20 years -- because there's been a lot going on -- what are the salient lessons to be learned? And Josh, you've hit a couple of those. Donna, could I start with you? What might be applicable to the states from the federal courts?

MS. STIENSTRA: I think we've spent a lot of time in both court systems trying to determine whether ADR reduces time of disposition and litigation. And we have found very inconclusive answers. We don't know. But we have found that people like it. I think we're probably asking the wrong questions. We ought to be asking a lot more about what happens in the ADR process that leads to the judgment that it has worked for them, that it has been a satisfying and fair experience.

We don't know what is going on before they get to the process that creates their expectations or that leads them to have certain judgments about it. We don't know what's going on during the process. What are the mediators doing, for example?

We don't know how attorneys are using the process. Are they using it strategically? We don't know how parties are being advised by their attorneys about what ADR is and how to use it. There's just a lot we don't know about what's going on in the process that I think would help in designing better programs. There are institutional questions, too, that I think are important, like what's happening to courts and what's happening to professions. And we can get really big and talk about what's happening to society.

But if we just keep it at the level of people who have to run court programs, and design and implement these programs, we really don't know what's going on in the process.

MR. ADLER: We know from the years of research, there's a lot of satisfaction. Comparative satisfaction. But it's kind of like aspirin and vitamin C. We don't quite know how it works. And why it works. And why is it that people are satisfied. (page 54)

MS. STIENSTRA: Right.

MR. ADLER: We need to burrow in on that.

MS. STIENSTRA: Right. We don't know why. And because we don't know why, we don't know how to step in and make change.

MR. ADLER: Great. Nancy?

MS. WELSH: And we know it. In this room, we know that there's more client satisfaction. But I think what's interesting from the data I presented, and also from other data, is that often the lawyers, who are representing their clients in mediation, claim satisfaction or that their clients like the process.

It doesn't even appear on the radar screen. And so, one of the recommendations in Minnesota was that, although there is all this data that shows that clients are satisfied in mediation, Minnesota ought to return to its past practice of collecting data from clients about their level of satisfaction partly so that we have that data to be able to show the attorneys. You have the data, then maybe there can be a conversation between the attorney and client on the question of client satisfaction.

Eighteen months ago, I was heading a mediation program. And now, I'm at a law school. And one of the reasons is because I think that we need to train our lawyers to be client-centered, and to acknowledge the kinds of concerns and interests that led many of us into the mediation field.

And that's a job. It's a challenge.

MR. ADLER: Great. Josh? Again, the question is, what are we distilling out of this last generation of research? What do we think we've learned?

MR. STULBERG: I am interested in how we train mediators. Although there are mixed findings as to whether training makes a difference,78 it strikes me intuitively as highly implausible that mediator training does not have an impact; indeed, the only reported findings suggest that training is not important come from a study in which the cadre of individuals serving as mediators are persons who have already received substantial formal educational training -- that is, they were lawyers. But we clearly need to sort out the competing claims about the effectiveness of mediator training programs.

There are multiple approaches to training. Participants are monitored differently, and the nature of the information, exercises, and performance measures used by various trainers are not uniform.[79] There is no uniformity of background or training among the trainers themselves. And, of course, the participants who enroll in these programs come with substantially different backgrounds, and that is even before we examine the question of what difference, if any, it should make to our training to have trainees who served as peer mediators during their high school days. (page 55)

I think we have clearly learned a great deal about what types of training materials are relevant and which ones are not.[80] But the challenge is how to improve their quality, our method of delivery, and, perhaps most important, the continued monitoring of performance.

MS. ADLER: Okay. I want to open it up for questions again. And again, I'm going to ask for informational

questions first about the research. Then, we'll open it up for comments as a second pass. Yes?

MR. NURICK: My name is Herb Nurick from Pennsylvania. And my question is to Josh. How do you maintain the integrity of confidentiality, and even maybe the comfort level of the parties, if you have observers in the mediation?

MR. ADLER: Yeah, Josh, how do you do that?

MR. STULBERG: That is a very interesting and important question. It assumes two things that mediators assume as an article of faith but which may not be in fact true. First, that parties in a mediation conference believe they are operating in an environment of confidentiality. And, second, the guidelines surrounding confidentiality make a difference to the way in which parties participate. I believe that there is substantial evidence that suggests that parties frequently do not understand that their conversations are governed by confidentiality provisions and, more important, that they willingly share concerns irrespective of that guideline. However, for purposes of answering this question, and the assumption governing my proposal about "mediation watchers," I will assume affirmative answers to both propositions.

I believe that we could construct a forum in which persons are invited or allowed to observe a mediation conference but be bound by the general constraints of confidentiality. These persons would enter the room, observe the case, and then be bound by the same constraints of confidentiality as those imposed on the mediator. In the same way that mediators frequently discuss their case with program administrators, these mediation watchers could discuss their perceptions with both the mediator and court administrators. If they wanted to develop formal "statistics" regarding such matters as the number of times a mediator asked a leading question, the length of particular caucuses, the nature of the mediated results as compared with those of a control group in the litigation process, or the like, those comments or inquiries could be protected in a manner consistent with the goals of any confidentiality provision.

My hope and belief is that, in the process of such participation, many persons would observe effective mediation, come to understand its strengths and weaknesses, and, as a result, become confident in mediation being an important, significant part of our justice-making institutions. Plus, if by virtue of their questions or concerns we are led as practitioners or policy-makers to improve the system, so much the better.

MR. ADLER: I'd like to just inject one editorial piece that goes with the musical themes we're developing today. (page 56)

I obviously shed no light on that question. I just want to add a tag line personal piece. Donna, Lisa and I, as well as others, have been meeting this last week, trying to figure out some evaluation strategies for certain public policy cases. And one of the things that comes up over and over is the need to do research on what I would call the "articles of faith" in our profession. And this is one of those. Confidentiality -- we assume confidentiality leads you to better outcomes. We don't know that. We really don't know that for sure. We assume it.

And it may be one of those interesting things that we need to reconsider and look at some core assumptions in the next generation of research.

MS. PRUETT: I wanted to clarify with Donna that when you surveyed the attorneys in the three demonstration projects, you did that as a follow up after the mediation by mail? Because at the state court level, you know that we struggle with this, we use out the door exit surveys.

MS. STIENSTRA: Yes. We did it after the case had closed, actually, because we wanted to be able to measure the full impact of the ADR process. So, it was not only a question about whether the case had settled at the time of the process, but was anything that happened subsequent to the process affected by having been in the process.

MS. PRUETT: Well, and that reassures me that in the scene exit responses from the attorneys, the issue, then, is when we get to your next questions about asking what goes on in the process. Our experience now is that the

mediators, the attorneys, and the parties all check different things. And we don't have a clarity of terms, because we're not meeting Josh's requirement of educating everybody.

MS. STIENSTRA: Right, right. Have you been able to do any analysis that looks at why their answers may differ?

MS. PRUETT: Well, you know that's the next set of questions. Are you going to write those for me?

MS. STIENSTRA: Can I just say something really quickly in response to this question? We observed mediations in some of our federal court programs. We have gone in as researchers and have had prior consent from the participants to sit there in the room and watch the process. We've done it in far too limited a number of cases to be able to draw any conclusions, but it is the kind of research, I think, that would tell us a whole lot more than sending surveys. Surveys have their place, but we really need to move beyond that methodology.

MR. ABBOTT: Richard Abbott in Baltimore County. Has anybody done any kind of evaluation or what would be an objective evaluation of a mediator? What would be the objective? Maybe that's the reason why we don't get to it, because we don't know what good mediation is. Maybe once we structure what good mediation is, we can kind of get some ideas of assessment.

But I'd like to hear what you think would be an objective means of evaluating a mediator.(page 57)

MR. ADLER: So, let me just see if I understand the question, which is, is there a model of good mediation that is grounded in data or research. That's kind of what you're asking?

MR. ABBOTT: Yes.

MR. ADLER: Does that exist?

MS. WELSH: Many of you in the room know that test design project that tried to develop some ways to measure the quality of mediator behavior.81 But there were even three different models within the test design project. And if anyone wants to learn more about that, Chris Honeyman, who is principally in charge of putting that together, is here. I can say when I was director of a program, we went through a process where we tried to decide for ourselves what was quality mediation and built some evaluation instruments around that. Again, I think that data from Minnesota suggests that if you want to promote a certain form of mediation, there's a need to identify its components rather than just assume we all mean the same thing by mediation.

MR. ADLER: Good. Anybody else want to comment? Josh?

MR. STULBERG: No. I wanted to ask a question.

MR. ADLER: Well, Donna, you wanted to comment on that?

MS. STIENSTRA: Yes, I do. It's very standard, of course, to survey either the litigants or the attorneys, to ask them about the mediators. Programs try to get some measure of mediator quality, but the questions need to be improved substantially. I think it might be useful for us to do more intensive work with the minority of people who respond very negatively on their surveys.

Maybe that's a manageable kind of research we could do - get back to the people who are clearly in the minority on a number of the measures. But this might be the time to bring in some of the findings from Ohio and Maine82 regarding mediator effects and your research. If either Eileen or Diane would like to say something about that, I think it's really important.

MS. PRUETT: Okay. I'll take it, because I was on board when we started, and we had three things we thought we'd look at and got startling answers. Mediators in Maine had been doing mediation in domestic relations cases

under a mandatory rule for parties to appear with their lawyers. Well, the lawyers weren't mandated to appear, but they did appear, and they were mediating all issues.

In Ohio, we had a voluntary program where the attorneys generally didn't come, and they were all supposed to be limited to parenting issues. We asked all kinds of questions from the mediators and the parties, and the attorneys, about mediator training, mediator qualifications, experience. (page 58)

The mediators in Maine had had less formal training, but a lot more experience. At the time we did the surveys and collected the data, our mediators all had fewer than five years of experience as mediators.

And I think Donna, it's fair to say that the analyses of the data was really inconclusive. I mean, it just didn't seem to show that training had any effect; it showed more experience was good, but it also showed that higher levels of education led to lower rates of satisfaction and fewer settlements. It seemed to show that having more training made people feel better about you, how you conducted the process. This finding suggested that more training helps mediators be aware of the parties' needs.

But it didn't have a whole lot to do with settlements. There was a third area that seemed to strike me. Diane, what am I forgetting?

MS. KENTY: Diane Kenty from Maine. The training seemed to affect the niceties. The educational level was not critical. Whether they were lawyers or not was not critical. Whether they were men, women, ethnic background - didn't seem to make too much difference.

MS. PRUETT: Yes, we - Diane is pointing out that the next set of questions, which all the researchers have noted -- we have to be looking more at what the case and the parties look like when they come into the mediation. What the mediator does or doesn't do, what background or training they have or don't have doesn't seem important. Even if the mediators' behaviors and training are important, it just seems that that's only a small piece of the puzzle.

MS. STIENSTRA: Right. And another part of the analysis was to look at what the mediator did in the session. There were not very many measures of that, but one of the strongest findings was that if the mediator suggested a specific settlement and the case did not settle, the parties were then not satisfied with the process and didn't view it as fair. Have I stated that correctly?

MS. PRUETT: Yes. And that was consistent.

MS. STIENSTRA: So, not having a settlement when a specific one had been suggested led to dissatisfaction with the process.

MS. PRUETT: And that was consistent with some earlier civil work that we had done in Ohio, again, where the non-resolution related to recommendations led to fewer good perceptions about the process.

MR. ADLER: Josh, do you want to make a point on this, or take us on a different direction, which is quite okay?

MR. STULBERG: I want to ask a question of Nancy.

MR. ADLER: Please. (page 59)

MR. STULBERG: When you presented the Minnesota study, you indicated that it was designed to assess the impact of Rule 114 on the behavior of two groups: attorneys and mediators. I am interested in your elaborating on the rule's impact on mediator behaviors, and let me ask this in a more provocative manner: is the lesson for mediators that they should practice their profession with what Riskin labels an "evaluative" orientation if they want to have a thriving practice?

MS. WELSH: I'm not sure I'd put it quite that way. I thought you were going to ask me to name a song or something. This is a much easier question than that. I'm not sure I'd put it quite that way. But again, I'm going to speak personally.

When Rule 114 was promulgated in Minnesota, I felt tremendous success and vindication that finally, the mainstream had acknowledged the importance of mediation. But looking at this data, it suggests that in writing the statute, in writing the rules, we assumed that everyone would mean the same thing by mediation. And, instead, as mediation entered the court house, attorneys selected as mediators people who they had come to respect. They chose people who had expertise in the substantive area of law, whose judgment they trusted. That's good. It's good that those people are serving as mediators. But it also meant that often what was being done in a mediation process was different from what we had originally anticipated would be done.

So, I think that the practice had adapted to become more evaluative.

MR. ADLER: I'm reminded of a piece of research that a colleague of mine did in Hawaii. A guy named Ken Lowry.

He studied about 30 complex litigation cases that had been to mediation, and most of them had resolved. And he talked to the parties, and he said, "What was it the mediators did?" And no one could remember anything.

And he said, "Oh, yeah, yeah. They kind of made the coffee and turned on the lights and that kind of stuff." Okay. Yes?

MR. FARRELL: Tom Farrell from New Jersey. Josh, you spoke to us about 20 years ago. And I can tell you, you still have it. But this question is not for you.

Nancy, you mentioned that 84% of the respondents from the survey you were doing responded that an important qualification of the mediators was substantial experience. Was this question posed to attorneys, the parties or both?

MS. WELSH: It was posed only to attorneys. And I think it's significant that only attorneys were asked this question. We didn't get data from clients. So one of the recommendations of the ADR review board is to get evaluation data from clients, because there is this gap in perception between attorneys and clients about what's important in the mediation process and in the mediator. And can I add one other thing?

MR. ADLER: Sure. (page 60)

MS. WELSH: We've been talking about going outside the box. And what I'm concerned about is that we think outside the box while we're in the box, the courthouse.

One of the presenters earlier said, let's make our home the place we want it to be. And that's really my focus. What are the ways in which we can either change the context within which court-annexed mediations are occurring, or, what are the ways in which we can change the expectations of attorneys and clients about the mediation process? How can we change it so that we foster client participation, client communication, the probing for underlying interests?

That's, I think, the challenge for all of us working within the courts.

MR. ADLER: Chris?

MS. ELLIOTT: Chris Elliott. I'd like to pick up on something different. Something that Donna said. You referred to one court which had assigned cases randomly to ADR or to not ADR, and then banned the not ADR from using ADR. This really caught my ear because I think it's so rare. And it seems to me to be an over-arching

problem that affects many of the questions that we are trying to address. It seems to me a standard tool in reaching valid research results, that you have some randomization and some control groups in all sorts of studies and fields.

I think this is a real problem for us collectively, that we have accepted as a moral imperative, that we have a duty to provide service to all comers. And that has become embedded in many program designs, and many evaluators have apparently given up on the expectation that would be routine in other fields; that it is proper and even morally necessary to have control groups.

I think a number of the questions that we face will never be satisfactorily answered, unless we can assert a moral basis for randomization and control groups. And I would like to hear people's opinions as to how that might be done. Other professions also have a duty of public service, but have grappled with this.

MR. ADLER: What issues has that raised? Issues of control groups? Using control groups for mediation, non-mediation, if any?

MR. STULBERG: Well, I would actually like to ask Donna to clarify something first. Donna, when you stated that ADR was banned, did that mean that the case had to go to trial? Through trial? Were parties in those cases permitted to resolve it before trial, such as in negotiating a settlement?

MS. STIENSTRA: No. It just meant that they couldn't use the court's ADR program.

MS. WELSH: In Hennapin County, when mediation was first being experimented with, there was randomization. And so, it may be more of a political question than anything else. That was a pilot project. So, it was okay not to permit some parties to go to mediation. I'm not sure it would be okay in other contexts.(page 61)

MR. ADLER: Yes? Oh, I'm sorry.

MS. STIENSTRA: It's clearly a very important question in a justice setting, whether cases can be treated differently. In 1978, the center where I work convened a group of judges, lawyers, philosophers, and experimental psychologists to deal with the issue of experimentation and the law. Their report and recommendations, entitled "Experimentation in the Law," was published in 1981.83 It goes through a sort of weighing process to help courts and judges make a decision about whether to use experimental research designs when they're adopting new programs. It's a publication I'd be glad to give to anybody who wants to have a copy of it.

MR. ADLER: Donna, this goes to some of the ethical questions involved?

MS. STIENSTRA: It goes to the ethical questions. In the Western District of Missouri, the judges were very divided on the value of ADR. They decided the only way they could resolve the question, and the differences between them, would be through an experimental design. They wanted a definite answer on which to base policy decisions.[84]

MS. PRUETT: Yes, for those of us in State Supreme Court offices, and my colleagues who are on the panel, when you have limited resources, it's really easy to justify random assignment. I mean, you're not going to be able to mediate every case. And we find even in a family context, that the courts in my state, at least, have not been as resistant as you would think they would, to going with a random sample. Though the bigger issue is finding the resources to analyze the data that you collect from the randomly assigned cases.

MS. SAVAGE: The problem with the random sample, though, is the - the problem with the limitation is: can you prohibit people from using private ADR, which is part of what often goes now?

So, even if we can do a random assignment of the court cases, so many of them are now going through the private sector, I'm not sure that we'll get the kinds of results or the kinds of clarity that we really want.

MS. STIENSTRA: Right. The only thing you can do is, in surveys of the cases you can ask whether they've used a private provider. You can then separate that group out from the group that didn't use a private provider and do your analysis that way.

MS. PRUETT: I don't mean to keep jumping in, but I wanted to go back to Nancy's question about substantive expertise on the part of a neutral matters.

When we looked at about 600 cases out of our settlement week programs, where we had matched, the mediator -- the mediation kind of case and the party attorney answer -- we had case complements. It wasn't quite case sets.

Satisfaction and outcome figures were not influenced by the substantive expertise of the mediator. But the attorneys thought they were. So, we used that evidence to create the (page 62)foundational element that said we would hire non-attorneys, non-litigators, other kinds of folks in our civil programs.

And as we're looking at that exit survey data, that doesn't seem to be making any difference in the attorneys' and the parties' perceptions. I mean, again, it's how you set it up in your house.

You know, when we had the ability to look and say, they think it makes a difference, but we know empirically that it doesn't, you know, it's right. It's how it looks at home.

MS. WELSH: Can I respond? I do think that one of the reasons that Minnesota's ADR system has been institutionalized, and is now really strongly supported by the attorneys, is the fact that they are involved in the selection of the process and in the selection of the mediator. And there's other data suggesting that mediations are more likely to result in settlement, to the extent that the parties trust the mediator. So, I think that we've gotten mixed messages here. That some of the success comes with a price.

MS. VAUGHN: I would like to make a comment.

MR. ADLER: Yes.

MS. VAUGHN: If it's open for comments at this time.

MR. ADLER: It is. Please.

MS. VAUGHN: Actually, there are three comments that I would like to make.

MR. ADLER: One became three.

MS. VAUGHN: Yes. I really would like to make ten. If you'd let me, that would be all right. But one of the things that the Baltimore County Circuit Court did when it opened its mediation program was to make sure that people had a certain amount of training. That was 40 hours training. And then, to assign them cases, not really based on subject matter expertise, but more based on the experience they had in mediation. So that people who were not experienced mediators did not get very complicated cases, and people who were more experienced, did get more complicated cases.

I think it was a sort of forced educational process for the attorneys, because if the attorneys had been selecting mediators, they probably would have chosen people with subject matter expertise. They didn't get people with subject matter expertise, usually, but what they did get is great settlement figures and great client satisfaction, if not attorney satisfaction. There have been very few complaints about the program. And so now, the expectation of the lawyers in that community, at least, is not that you need to have subject matter expertise. Although if you ask them, they might even say that you still do. They're using mediators who don't have subject matter expertise. (page 63)

The other thing that was interesting, in terms of lawyer perception, is that I just mediated a case where all the clients were lawyers. And I think that their lawyers weren't concerned about how they felt about the process. But at the end, to a number, and they were very aggressive, outspoken gentlemen. The clients who were lawyers, were very satisfied with what they accomplished in four hours. And to a number, they all said independently of each other, "we thought we would be out of here in ten minutes." It would be a colossal waste of time. So, the client satisfaction with the lawyer client was similar to what you're reporting about client satisfaction generally.

The third thing I wanted to comment on is observations. I teach as adjunct faculty at the University of Baltimore School of Law. And I teach a variety of dispute resolution courses. And I train lawyer mediators in Maryland, as well as law students in a semester long mediation program.

So, I take a lot of observers around with me, because I have a private mediation practice. And what I've found is that it's sort of like moot court: once people get started, they don't remember that anyone is there. In fact, I had, in a criminal mediation in one of the counties here in Maryland, four disputants and myself. And I had a States Attorney, a criminal attorney, and five lawyers who had been trained. So, there were really more observers in the room than mediation participants.

They become wallflowers. People don't even notice that they're there. I only once had anyone object. And then, of course, we didn't have an observer. I take them along and tell them why I've got them there, and ask them if it's all right for them to observe.

Even in family mediations, people reveal very intimate details about their lives with a wallflower in the room, and don't really seem to have a problem with that. I have found it's also been really educational for the people that go. That trained mediators come out, who are not experienced, saying, "I would never have thought of doing what you did there."

So, it really is a wonderful thing to open it up to observers. And I was glad to hear your comments about that, Josh.

MR. ADLER: I'd like to, with your permission, just do a little shift. I think those are really interesting comments. And they give us insights into kind of the interplay of research and practice and what seems to be satisfying, what's not and what some of our assumptions are about confidentiality.

But I want to have one last piece of conversation, because we haven't accomplished our agenda today. We've talked a little bit about taking stock of kind of what we are learning about in first, and in some cases second, in some cases, third generations of state court programs.

We've talked a little bit about some of the forces that are constraining it, and some of the things that might be driving it, and some of the trends. But one of our tasks today was to sort of say where we think it should be going. And I'd like to engage your thinking, just for a (page 64)little bit of time that we have remaining, in asking ourselves this question. Imagine that it's not really ten years out. It's 2009. And we're gathered here for a class reunion.

And what is it that we think the state of the states program is going to be, ten years out? In other words, if we could begin to make some guesses. Where do we think we're going to be ten years out? I'd like to hear your thoughts on that, on our guesses about what state court programs might look like. And if ten is too far out, take it back a little bit.

Once again, for the record, please introduce yourselves.

MR. NURICK: Herb Nurick from Pennsylvania.

MR. ADLER: Thanks, Herb.

MR. NURICK: A report was given by a commission which I guess was appointed by the Supreme Court. This is close to what happened.

Nancy, you may be familiar with it. But it is a report, I think, on the 21st century. And it had to do with what the court system will look like. And some of the things that they mention in that report were that the unusual event happened that a practicing lawyer got elected a judge, as opposed to a lawyer who happened to be a mediator. That it will no longer be L.A. Law. It will be L.A. Mediation. That's not very exciting. I haven't looked at it for maybe a year and a half. But the thought was that mediation is going to be a big thing, and we'd better keep looking at it.

MR. ADLER: Okay. Where else do we think we're going to be? Yeah. Lee, you're going to have to run now, because everybody is going to have an idea on this.

MS. KENTY: Diane Kenty from Maine. I really do sense that courts are at a period of transformation. I don't think that ADR is just going to continue to be grafted onto a particular court, or a particular area of cases. I do see that what the court system offers, or what it delivers, is qualitatively changing. And I sense that, certainly, in the court. I'm familiar with it. There is a great impetus from within the court to change what we offer to citizens. How they can resolve disputes, and how we try to provide justice.

MR. ADLER: Other thoughts? Rachel.

MS. WOHL: Rachel Wohl from Maryland. To pick up on what Diane was saying, I feel like a lot of us are committed to this field because of a belief that we can change the culture. That the culture can shift. That we can have a more civil, a more peaceful and a more sane society.

I am really interested in the research in this realm. I think there was research out of Maine, Diane, about the domestic lawyers in Maine who had been using mediation, versus the domestic lawyers in New Hampshire who had not. Both were asked about their goals for their clients. (page 65)

The Maine lawyers talked about finding long lasting solutions for the families and meeting their best interests. The New Hampshire lawyers talked about getting the most money they could for their clients.

That was some indication to me about the capacity to change the legal culture. Doug Yarn does fascinating research with monkeys. He raises aggressive Rhesus monkeys with peaceful Ring Tail monkeys. The Rhesus babies, who are naturally very aggressive, become much more peaceful when they are raised by the Ring Tails. Not as peaceful as the other Ring Tails, but much more so than your average Rhesus. So, I predict more research on how we shift the culture, and how we can focus on that and move things in that direction.

MR. ADLER: I've got to do some research at my house. Yes. Other predictions?

MS. SEVERNS: Kathleen Severns from the Department of Justice. I really believe that there will be a decentralization of justice. And it's going to be going much more down into the community level. And the courts will be important. And this partnership between the public and the private, I think will be much more real. Part of the way I think it's going to happen is that there will be a kind of a mandatory conflict resolution education for teachers, for law enforcement, for law students, and for judges. And through that kind of education, I think we will find there will be much more responsibility on individual citizens of the decision making process.

MR. ADLER: Great. We've got some hands in the back. Cynthia? Doug?

MS. SAVAGE: Two things. I think we'll see more state offices of dispute resolution. The focus will not just be mediation, but with other forms of alternatives, in that we'll be seeing some redesign of the litigation process itself, as it's conducted today.

There will be more examination, for example, of whether some cases - like family cases - can be handled in an

appropriate administrative approach, rather than the present litigation approach.

So, I think we'll see more forms of ADR developing.

MR. ADLER: And one of the interesting observations from some folks in the National Center for State Courts, has been that whatever happens with ADR, it's blowing some fresh winds of thinking through the court house, and may actually influence the way litigation unfolds over the long run, even if the forms of ADR change. A couple other predictions, and then we'll bring it to a close.

MR. VAN EPPS: As we talked about redistributing resources that currently go to support a massive system of courts, that lead people toward an event that hardly ever happens, a trial, how does that reorganization take place, both within the court house and outside the court house?

And how does the money flow to support conflict management at a lot of different levels, such as the kind that Kathleen was mentioning? (page 66)

MR. ADLER: Very interesting question. Right in front of you.

MS. PRUETT: I think mine, I hope, follows everybody else's. This is Eileen Pruett from Ohio again. We will have done such a good job at training lawyers and our citizenry at problem-solving skills, that we hope much more, as Kathleen said, will be done outside the court system - pre-filing. That probably means that legal education as well as general education has to shift away from case law study to problem-solving; collaborative processes will broaden the playing field. We will have spent our resources in the courts to begin to make the cultural change among the lawyers. And that should help back it out of the court system, as everybody else says.

MR. ADLER: And you're optimistic that that's going to happen?

MS. PRUETT: It's my ten-year plan. If I do my job right in my state, with all the support that I have.

MR. ADLER: Okay. Good. I know other states where people have looked in the crystal ball, and we're not in it. So - yes.

MS. VAUGHN: I just would like to put a plug in for peer mediation in the schools. And maybe it's not a ten-year vision, but maybe it's a 25-year vision.

Children in nursery school will begin to problem-solve in a different way, because their teachers do. As they go through school, they'll begin to solve many more problems. They won't need to take those problems to lawyers.

But when they do need to take problems to lawyers, they will have lawyers who also have learned to solve problems in a more collaborative way. They'll be able to help them resolve the problems differently. And the courts will have fewer -- not necessarily wiser, but perhaps wiser -- judges in them.

MR. ADLER: Okay. Terrific. A couple over here.

MS. TATE: Sue Tate from Oklahoma. I just wanted to build on a thought that you just had because we worked so hard in Oklahoma in a collaborative project between the law related education program of the bar and the Supreme Court sponsored community based mediation programs.

And I envision in Oklahoma, a time when we will have made that shift, especially through the children. The children will carry the message home to their families, to their communities.

Hopefully, we'll see a set of life skills embedded in the citizenry, so that disputes within housing authorities, within police departments in our communities -- all of the institutions that touch our lives -- we will see this understanding of how to deal with conflict that's socially appropriate and acceptable. (page 67)

But that will start to be a new vision of what our society can be overall. And I think it is coming very, very quickly. As the children grow up, as they carry the message home, the school based peer mediation effort becomes a very powerful move.

MR. ADLER: Great. Okay. We've come a long way. Sorry, was there one more? Josh, go ahead.

MR. STULBERG: Where do we think we should be going? It strikes me that the Maryland Commission, whether its formula is right or not, represents a model with an extraordinary potential and opportunity to energize, revitalize, and secure our democracy. I realize that sounds like a Law Day speech extolling Motherhood and Apple Pie, but I firmly believe that that is precisely what is at stake in our education efforts and why they are so important. The approach that the Maryland Commission has adopted is unusual, if not unprecedented, because it represents an important opportunity for our public justice system to assume a permanent leadership role in educating people about how to be citizens in a democratic society. To be charitable, while the justice system has contributed to such educational endeavors in the past, it has never taken them on as vital responsibilities. Whether the justice system can deliver will be the test of the next decade. Let me end by stating my concern.

My concern is that when we reconvene in ten years, we will discover that as each of us participates wholeheartedly to meet the daily challenges and compromises required to transform various ADR programs from experimental projects to permanent features of our system, we will have depleted the reservoir of passion and energy that is required to move these ideas and processes beyond the court's walls. My concern is that our hopes and dreams will have become anesthetized and "downsized," and that we will be brain dead.

MR. ADLER: I see a lot of nods over here and all around.

MS. STIENSTRA: Yes.

MR. ADLER: Donna, last comment.

MS. STIENSTRA: Yes. I share Josh's concern. I wasn't going to say anything, because I really hate for this to end on a negative note, but in a justice setting it is obviously important to protect due process and fairness of outcomes. And I do think we're seeing increasing regulation of ADR, and a call for it and a need for it, at least in the federal court setting. I wonder whether this will cause a back lash, whether judges will say, "This is too much work. It's too much trouble to run these programs. I don't think we should be doing this."

MR. ADLER: I want to bring this to a close. We really have covered a lot of territory today. And it's been a fun and interesting forum. A terrific collection of people. I congratulate all of you. I want to thank our panel. Both the first one and the second one. Thank you so much. I didn't know that we had all these questions. Whatever the questions were, we haven't answered all these questions. Most of the questions we have raised have simply raised new problems, some of which we didn't even know were problems beforehand. In short, we seem to be as confused as ever. But I know that we're confused at a higher level, and about more important things. (page 68)

Thank you again to all the panelists. Tiiu?

MS. GENNERT: On behalf of the Cardozo Online Journal of Conflict Resolution, Policy Consensus Initiative, and the National Center for State Courts, I would like to extend our appreciation to the panelists and to all of you for attending our symposium today.

In your gray folder, there is information on how to contact the Cardozo Online Journal of Conflict Resolution directly. We welcome any feedback on today's symposium, and ideas for future symposia.

In closing, just a reminder to all panelists. Please be on the look out for the transcription of this event. It will be arriving shortly for your comments and edits. Thank you. Professor Love?

MS. LOVE: This event grew out of a conversation early this summer. And it has been truly exciting working to bring it together.

Thanks to Peter, for his services as moderator, and to Chris Carlson and Lee Moore, along with their staff. And also to Ann Skove. Thanks to Leila Zubi and Cardozo's wonderful students, for all of the work they did in putting this together.

It seems like we have some answers. But, as Peter points out, more and more questions. Questions about training, technology, research, research design.

What I believe motivates most of us here is that we've got our hands on processes that we know are very powerful and we've got momentum - a wave. It's hard to influence a wave. Waves are powerful, but still, small things can influence them.

And I think we have that responsibility to do whatever we can not to go brain dead, as Josh said. But rather, to keep up that initial dynamic force and momentum.

I'm hoping that the Ring Tail monkeys Rachel mentioned will keep influencing the Rhesus monkeys.

I thought we might end with a verse to carry on the rap theme that I began and Rachel advanced. Rachel carried it on.

Yo. Yo -- here we are from far and wide, charged with guiding a wave we're privileged to ride. Let the wave break on a sunny shore, and let's surf on forevermore.

Thanks, everybody. Please come to the reception next door.

Footnotes (page 69)

1 John Lande, Getting the Faith: Why Business Lawyers and Executives Believe in Mediation, 5 Harv. Negotiation L. Rev. 137 (Spring 2000) (manuscript at 11, on file with Professor Lela Love, demonstrating surge in state legislation regarding ADR).

2 As of January 1, 2000, the NATIONAL CENTER FOR STATE COURTS has combined three individual units (Information Service, Library, and Technology Information Service) into a single Knowledge Management Office. Clarification by Anne Skove.

3 SUSAN KEILITZ, DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS (1997).

4 SUSAN KEILITZ & MELINDA OSTERMEYER, MONITORING AND EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND COURT MANAGERS (1997).

5 POLICY CONSENSUS INITIATIVE, STATE OFFICES OF DISPUTE RESOLUTION: A BRIEF OVERVIEW (September 1998).

6 HUGH LOFTING, THE STORY OF DOCTOR DOOLITTLE (1920).

7 Id. at 77.

8 Settlement Week (Chapter II, Article 5) began in Columbus, Ohio, in 1985. It involves setting aside several days or a week once or twice a year to mediate cases. Regular court dockets may be cancelled; attorneys volunteer as mediators. The use of trained volunteer neutrals has expanded and 16 courts currently use this model. Clarification by Eileen Pruett.

9 Chief Justice Thomas J. Moyer established the Supreme Court Committee on Dispute Resolution in 1988. In 1989, 1990 and 1991, the Committee set goals, heard public testimony and worked with the Ohio Commission on Dispute Resolution and Conflict Management on several projects. These included a project to implement mediation in municipal courts, study the impact of parenting mediation on couples and their children, establish a model education program for divorcing parents, and support the expansion of Settlement Week. In 1993 and 1994, the Committee and Staff of the Office of Dispute Resolution worked with consultants to evaluate Settlement Week and survey Ohio attorneys about their perceptions of and experience with dispute resolution processes. Clarification by Eileen Pruett.

10 See, e.g., ROSELLE L. WISSLER, SUPREME COURT OF OHIO COMMITTEE ON DISPUTE RESOLUTION, EVALUATION OF SETTLEMENT WEEK MEDIATION (October 1997).

11 ROSELLE L. WISSLER, OHIO ATTORNEYS' EXPERIENCE WITH AND VIEWS OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES, SUPREME COURT OF OHIO COMMITTEE ON DISPUTE RESOLUTION (1996).

12 Id. at 2. (page 70)

13 Id. at 2("The factor that has by far the strongest effect on whether an attorney advises clients to try mediation, arbitration or neutral evaluation is whether the attorney has been involved as counsel in a case that used that particular process.").

14 Development of useful tools for tracking time-in-system for each case and valid research design regarding random assignment have been and continue to be one of the great challenges in monitoring and evaluating mediation programs. We are in the process of simplifying exit surveys and evaluating the value of case tracking data that does not accurately reflect the same events in different programs or the actual dates of certain events. Clarification by Eileen Pruett.

15 Craig McEwen, Fairweather Professor of Sociology at Bowdoin College, helped develop the exit surveys used in the Committee's first court mediation pilot project. The Circuit Rider Project used a mediator/program consultant who provided training and technical assistance to six small and medium sized courts. Each court developed a volunteer-staffed, pre-filing small claims and misdemeanor mediation program. The project lasted 18 months and resulted in a Manual that courts can use to develop their own programs. (The Circuit Rider Project, Dispute Resolution Program Manual for Ohio's Small and Medium-sized Municipal Courts (Second Edition, 1994)). There are currently 25 volunteer or staff mediation programs in the municipal courts. Three other courts contract with community mediation programs to provide these services. Clarification by Eileen Pruett.

16 The Committee received a Department of Justice Court Delay Reduction Grant (Byrne Memorial Grant) through the Ohio Office of Criminal Justice Services to fund the first three civil mediation pilot programs in the Clinton, Montgomery and Stark County Courts of Common Pleas. The initial grant paid for a part-time mediator, ten hours of clerical support per week and a technical assistance consultant. In the second year, two of the three courts increased their mediators to full-time or full-time equivalent positions and made their clerical support positions full-time. The Supreme Court provided supplemental funding for years two and three. In the fourth year of the grant the funding was used for preparation of the evaluation report, AN EVALUATION OF THE COMMON PLEAS COURT CIVIL PILOT MEDIATION PROJECT, prepared by Roselle L. Wissler, Ph.D. (February 2000). Fourth year funding also supported development of IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION, copyright 1999, The Supreme Court of Ohio and PLANNING MEDIATION PROGRAMS: A DESKBOOK FOR COMMON PLEAS JUDGES, Copyright 1999, The Ohio State University College of Law and The Supreme Court of Ohio. See also, ROSELLE L. WISSLER, EVALUATION OF THE PILOT MEDIATION PROGRAMS IN CLINTON AND STARK COUNTIES (August 1996 through March 1997) Supreme Court of Ohio. Clarification by Eileen Pruett.

17 See Wissler, supra note 11.

18 See Wissler, supra note 11.

19 The Committee reviewed the literature [see SUSAN KEILITZ, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS' IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS,(page 71) NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE, 110 (1994) (deciding that positive benefits of mediating more cases outweighed any detriment made from mandatory participation)]. We have not had reports of any party or attorney refusing to participate in mediation. There have been occasions when cases have been removed from the mediation program upon review by the mediator. Clarification by Eileen Pruett.

20 These factors are consistent with the guidelines we encourage the courts to follow. See MARGARET SHAW, LINDA SINGER & EDNA POVICH, NATIONAL STANDARDS FOR COURT CONNECTED MEDIATION, INSTITUTE FOR JUDICIAL ADMINISTRATION (1992) (intending to help reduce case processing time, the Committee hoped to demonstrate shorter times in the system for mediated cases. Preliminary review of the assessment of the data from the 3-court project suggests that we have not met that goal). Clarification by Eileen Pruett.

21 See WISSLER, supra note 16.

22 See WISSLER, supra note 16, at 2.

Attorneys and Parties Assessments of Mediation

The vast majority of parties and attorneys viewed mediation as fair and the mediator as neutral and effective. Most of the parties felt that they had enough of a chance to tell their views of the dispute that the mediator understood their views, and that mediation helped them to understand the other side's views better. The majority of attorneys and parties were willing to use mediation again and to recommend it to others. The majority of the parties in all cases, and virtually all parties in cases that settled, were at least somewhat satisfied with the final outcome of mediation.

A majority of attorneys felt that mediation was helpful in allowing the parties to become more involved in the resolution of the case, in allowing them to better understand and evaluate the other side's position, in enabling them to meet and talk with the opposing attorney, and in allowing them to identify the strengths and weakness of their client's case. Fewer than half of the attorneys thought mediation were helpful in prompting early definition of the issues and in improving relations between the parties. Relatively few attorneys said mediation encouraged earlier discovery.

Attorneys valued the opportunity to have all the parties together, to hear each side present its case, to focus on the critical issues and to discuss settlement options. Parties valued the opportunity to speak, and be heard, as well as to hear the other side, and to be able to discuss the case together and confront the issues in an effort to reach an agreement. Both attorneys and parties said that the atmosphere was informal, open, relaxed, unhurried, and personal, and that it put everyone at ease and facilitated communication. Both attorneys and parties said an unfavorable aspect of the Mediation Program was that the case did not settle or that the other side was not(page 72) present or was unreasonable, unrealistic, unprepared, or uninterested in resolution.

23 ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS (July 1999); See also JAYNE ZUBERBUHLER, EARLY INTERVENTION MEDIATION: THE USE OF COURT ORDERED MEDIATION IN THE INITIAL STAGES OF DIVORCE LITIGATION TO RESOLVE PARENTING ISSUES, HAMILTON COUNTY COURT OF DOMESTIC RELATIONS (1999); See also EVALUATION REPORT, UNIVERSITY OF CINCINNATI COLLEGE OF EDUCATION (September 1999). Funded by a grant from the State Justice Institute Bill reports.

24 See POLICY CONSENSUS INITIATIVE, supra note 5; See supra note 14.

25 See, e.g., R. COOK ET AL., U.S. DEP'T OF JUSTICE, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: EXECUTIVE SUMMARY FINAL EVALUATION REPORT (1980); B. SLOCUM & B. RICKERICH, MEDIATION COMES TO THE PROSECUTOR'S OFFICE: EXAMINING PROBLEMS OF CONFIDENTIALITY, WAIVER OF COMPULSORY PROCESS AND ABUSE OF PROCESS IN THE NEWARK OHIO NIGHT PROSECUTOR PROGRAM (1979).

26 WISSLER, supra note 14, at 122.

27 See 23 Ohio Rev. Code Ann. 2317.023 (West 1999) (mediator privilege); See also 31 Ohio Rev. Code Ann. 3109.052 (West 1999) (parenting mediation).

28 E.g., Clinton County Common Pleas Court Pilot Civil Mediation Project; Montgomery County Common Pleas Court Pilot Civil and Victim Offender Mediation Project; Stark County Common Pleas Court Civil Mediation Project; Ashtabula County Joint Court Mediation Institutionalization Project; Clark County Domestic Relations and Juvenile Court Mediation Institutionalization Project (includes child protection mediation); Cuyahoga County Domestic Relations and Juvenile Court Mediation Institutionalization Project (includes child protection mediation); Franklin County Domestic Relations and Juvenile Court Mediation Institutionalization Project (child protection mediation); Fulton, Henry and Defiance County Joint Court Mediation Institutionalization Project; Hamilton County Common Pleas Court Mediation Institutionalization Project; Lucas County Juvenile Court Mediation Institutionalization Project (includes child protection mediation); Main Street Mediation/Perry County Courts Mediation Institutionalization Project; Montgomery County Juvenile Court Mediation Institutionalization Project (child protection mediation); Richland County Common Pleas and Family Court Mediation Institutionalization Project; Toledo Municipal Court Civil Mediation Institutionalization Project; Ashland County Common Pleas Court Mediation Project; Champaign County Common Pleas, Domestic Relations and Juvenile Court Mediation Project (includes child protection mediation); Clermont County Common Pleas Court Mediation Project; Lawrence County Common Pleas Court Mediation Project; Lorain County Common Pleas Court Mediation Project; Lucas County Common Pleas Court Mediation Project; Portage County Common Pleas Court Mediation Project; Sandusky, Huron, Ottowa, Seneca County Common Pleas Court Mediation Project; Tuscarawas County Common Pleas Court Mediation Project; Union County Common Pleas Court Mediation Project; Lawrence County Juvenile Court Mediation Staffing Project; Ross(page 73) County Juvenile Court Mediation Staffing Project; Scioto County Juvenile Court Mediation Staffing Project

29 CALEB CARR, The Alienist (1995).

30 The Center recently assisted the Domestic Violence Working Group, which included representatives from the Judiciary, Office of the Attorney General, Office of the Prosecuting Attorney (Honolulu), Department of Public Safety, Parole Board, and numerous organizations that provide domestic violence services to victims and abusers. The Center designed and facilitated a series of meetings to look at domestic violence policies and procedures of the criminal justice system in Oahu. The Group identified gaps in the system, and made recommendations to fill the gaps. A final report was presented to the Hawaii State Legislature in December 1999. In 1995, the Center assisted the Corporation Council, Department of Transportation and Waikiki community representatives with the development of a consensus plan regarding noise, safety, and the impact bus routes have on traffic. An agreement was reached on alternate staging areas, returning Kalialani to a 2-way street, and new employee pick-up and drop-off areas and other voluntary measures. Clarification by Elizabeth Kent.

31 In 1996, the Center participated in the development and implementation of the Mediator-Mentor Program (MMP). The MMP was created to provide support for peer mediation programs, and to extend the availability of conflict resolution services in the schools. Under the MMP, attorneys and community mediators volunteer to assist schools to mediate disputes (e.g., teacher/administration, parent/teacher, student/parent, etc.). Volunteers are also available to provide presentations, and may participate in peer mediation meetings. Clarification by Elizabeth Kent.

32 ADR and the Center enjoy support from Chief Justice Ronald T.Y. Moon, Administrative Director Michael F. Broderick, and the rest of the Judiciary. "We have committed substantial resources to our ADR programs because we are confident that litigants who will use them conscientiously can save significant time and money and will often obtain more satisfying results." --Chief Justice Ronald T.Y. Moon. Clarification by Elizabeth Kent.

33 See COLO. REV. STAT. 13-22-301 (1999).

34 See COLO. REV. STAT. 13-22-311 (1999). Parties have their choice of ODR or any other provider. See COLO. REV. STAT. 13-22-311(1) (1999).

35 See Steve C. Briggs, Alternative Dispute Resolution: ADR in Colorado: Past and Present, 26 COLO. LAW. 103 (1997). See also William H. Erickson and Cynthia A. Savage, ADR in Colorado, DISP. RESOL. J. 60(August 1999), reprinted in 28 COLO. LAW. 67 (September 1999).

36 See COLO. REV. STAT. 12-22-313 (1999).(page 74)

37 See, e.g., Kenneth K. Stuart & Cynthia A. Savage, The Multi-Door Courthouse: How It's Working, 26 COLO. LAW. 13 (1997); See also Cynthia A. Savage, Post-Decree Multi-Door Courthouse: A Pilot Program for the State, 27 COLO. LAW. 109 (1998).

38 See Sally K. Ortner and Merrill Shields, A Report on the Development of Qualifications and Standards of Conduct for ADR Professionals, 26 COLO. LAW. 49 (1997) (giving a summary of the early efforts of the ADR Professionals Qualifications Project).

39 Sally K. Ortner and Merrill Shields, Colorado Now Has Model Standards of Conduct for Mediators, 29 COLO. LAW. 45 (June 2000).

40 The fundamental premise of the zero based budgeting process is that "funding of existing programs at a current, increased or lower level is justified by the benefits to be realized or by the need for increased or reduced services?" "Strategic Plan and Budget Request Instructions," Office of State Planning and Budgeting. Seven essential components of the process are listed in the statute. See Colo. Rev. Stat. 2-3-207 (1999). Clarification by Cynthia Savage.

41 ODR's draft mission and vision statements will be finalized and included in the next revision of the Colorado Judicial Branch Office of Dispute Resolution Mediation Policies and Procedures Manual (May 1, 1996), anticipated by the end of 2000. Clarification by Cynthia Savage.

42 The dispute among state agencies and a private development group included issues concerning environmental remediation efforts, building occupancy, and funding options. Clarification by Cynthia Savage.

43 See ROGERS & MCEWEN, MEDIATION: LAW, POLICY & PRACTICE (2nd ed. ch. 2, 1994).

44 NEW YORK STATE OFFICE OF COURT ADMINISTRATION, COMPREHENSIVE CIVIL JUSTICE REFORM PROGRAM (1999).

45 Professor Frank Sander introduced the concept of a Multi-Door Courthouse at the1976 Pound Conference. In a Multi-Door Courthouse, disputes are screened and referred to the most appropriate dispute resolution process including mediation, arbitration and adjudication.

46 Not all cases screened as appropriate for ADR reach conciliation, mediation or arbitration since the services offered by the centers are all voluntary. Clarification by Dan Weitz.

47 The Maryland ADR Commission received $500,000 in state general funds to implement its Action Plan in the State generally during state fiscal year 2000. These funds are over and above salaries for the Commissions staff and other operational expenses. Clarification by Rachel Wohl.

48 Lou Gieszl is the Assistant Director of the ADR Commission. Clarification by Rachel Wohl.

49 A public safety initiative that focuses resources and creates new community based programs in high crime neighborhoods. Clarification by Rachel Wohl.(page 75)

50 MICH. CT. R. 2.403(West 1999).

51 Ms. Sneft is a mediator and mediation trainer who founded and directs the Baltimore Mediation Center.

52 See MD. CODE ANN., ALTERNATIVE DISPUTE RESOLUTION 17-101 (1999).

53 See MINN. STAT. ANN. 114.01 (West 1999), MINN. STAT. ANN. 114.02 (West 1999).

54 Id.

55 See MINN. STAT. 484.76(1) (1999).

56 See also, BOBBI MCADOO, A REPORT TO THE MINNESOTA SUPREME COURT: THE IMPACT OF RULE 114 ON CIVIL LITIGATION PRACTICE IN MINNESOTA (1997).

57 See, e.g., BARBARA MEIERHOETER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990); E. ALLAN LIND, RAND INSTITUTE FOR CIVIL JUSTICE, ARBITRATING HIGH STAKE CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT (1990); SUSAN KEILITZ, NATIONAL CENTER FOR STATE COURTS, COURT-ANNEXED ARBITRATION IN NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (1994).

58 See CIVIL JUSTICE REFORM ACT 1, 28 U.S.C. 471-482 (1990).

59 See Pub. L. No. 101-650, 104-105, 109 Stat. 292 (1995)(amended 1995)(current version at Pub. L. 104-33, 109 Stat. 292 (1995).

60 JAMES KAKALIK, ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996).

61 CIVIL JUSTICE REFORM ACT 1, 28 U.S.C. 471-482 (1990).

62 DONNA STIENSTRA, ET AL., Federal Judicial Center, REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997).(page 76)

63 The Early Assessment Program administrator is Mr. Kent Snapps. Clarification by Donna Stienstra.

64 THOMAS CHURCH, JR., ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS, 54 (1978).

65 CIVIL JUSTICE REFORM ACT, supra note 61.

66 See, e.g., NATIONAL CENTER FOR STATE COURTS, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (1997) (summarizing ADR research).

67 CIVIL JUSTICE REFORM ACT, supra note 61.

68 CIVIL JUSTICE REFORM ACT, supra note 61.

69 The subliminal message should be clear; we want persons to realize that conducting constructive conversations aimed at problem-solving takes time and effort. Clarification by Joseph B. Stulberg.

70 I leave it to audience members to suggest various musical offerings and lyrics for background music. My own nominations, though embarrassing to my teen-age children because of the dated, "corny" nature of my choices, include: "We Shall Overcome" as the mediator makes her opening statement; "River City" ("We've got trouble. Right here in River City...") from the Music Man would play as the complaining party articulates its perspective. As the Respondent begins, the visitor would hear the resounding lyrics from Les Miserables: "Do you hear the people shout? Those are the songs of angry men. It is the music of a people who will not be slaves again." As the conversation among the parties takes center stage, I prefer to move to classical music selections, ranging from such chamber music offerings as Shubert's Trout Quintet to the standard orchestral repertoire. I, of course, would prefer that the final melodies, following a positive settlement, be something like the triumphal march from Aida, the final movement of Beethoven's Ninth Symphony, or the theme song from the movies Chariots of Fire or Rocky. The principles guiding the selection include subtly of instrumental interplay, elegance of melodic line, strength of harmonies, and its fundamental energy. The overall goal, quite seriously, is to reinforce the physical environment in which the parties operate with sounds and rhythms that are fundamentally reaffirming to the participants. Clarification by Joseph B. Stulberg.(page 77)

71 See, e.g., Owen Fiss, Against Settlement, 93 YALE L. J. 1072 (1984); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L. J. 1545 (1991); and Delgado, et al, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, WIS. L. REV. 1359 (1985).

72 See, e.g., Videotape: Mediation in Action (Center for Public Resource).

73 In solicitation for presentations at annual meetings of such organizations as SPIDR, conference organizers plea with presenters to make at least some of their presentation "interactive." Clarification by Joseph B. Stulberg.

74 The arguments for why this should be assumed as a public responsibility rather than letting the private market develop it clearly need to be stated and defended. One fundamental reason is that there is no necessary correlation between entertainment value (and recouping private investment) and the publics benefit from learning about these problem-solving skills. Developing a television show in which the heroes are mediators in a manner akin to lawyer shows becomes effective because it builds on a public understanding of the basic institution; the format, however, does not contribute effectively to establishing that basic understanding. Clarification by Joseph B. Stulberg.

75 "Mediation" may entail different kinds of activities, including exploration of the parties' real concerns and interests (information that might not be admissible at trial), to inquiries about the parties' weaknesses and final positions. In practice, judges managing cases often, of necessity, facilitate settlement. The discussion assumes efforts by the trial judge that go beyond eliciting information from the parties that would not be heard by the judge at trial including, for example, meeting with the parties ex parte. Clarification by Margaret Shaw.

76 Some would question whether in these circumstances a party's consent can be truly voluntary. Indeed, at least one member of the CPR Judicial Project Advisory Council believes that ex-parte meetings should occur only when sophisticated parties themselves affirmatively ask the trial judge to help in this manner. Clarification by Margaret Shaw.

77 It should be noted that some judges believe this behavior to be appropriate so long as confidentiality is assured and so long as the lawyers feel free to decline to answer. If a judge has this information, he or she is in a better position to help the parties overcome a gap, particularly when they are closer than they think. Others, more cynically, view the issue from a more practical than ethical perspective, and are convinced that if questioned, lawyers will not be entirely candid anyway. Clarification by Margaret Shaw.

78 ROSELLE L. WISSLER, SUPREME COURT OF OHIO COMMITTEE ON DISPUTE RESOLUTION, EVALUATION OF SETTLEMENT WEEK MEDIATION (October 1997).

79 See Joseph B. Stulberg, Trainer Accountability, 38 FAM. & CONCIL. CTS. REV. 77 (2000).

80 Id. at 79.

81 NATIONAL INSTITUTE FOR DISPUTE RESOLUTION PERFORMANCE BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS (1995).

82 Ohio/Maine study.

83 Federal Judicial Center, EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981).

84 See DEMONSTRATION DISTRICT REPORTS, supra note 62, at 222.(page 78)

Benjamin N. Cardozo School of Law

55 Fifth Avenue Suite 527
New York, NY 10003

212.790.0443

EIC@cocjr.org