

JDR/ADR Bibliography

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General ADR

“ABCs of ADR: A Dispute Resolution Glossary,” 13:11 *CPR Alternatives* (November 1995).

Bowling, Daniel and David Hoffman. “Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation,” 16:1 *Negotiation Journal* (January 2000) 5.

This article looks at the impact of personal qualities of mediators on the outcome of mediation and finds that there is a direct and potent connection. The authors look at analogies from research in the physical and social sciences (such as quantum physics, systems analysis, self-organization theory and chaos theory) to consider why the personal qualities of mediators have such a great impact. The authors find that the implications of these thoughts and questions for mediation practice are that it must be remembered that very subtle phenomena are at work in mediation, that mediators should act as a positive role model for the parties, and that personal development by a mediator can assist their practice.

Delgado, Richard, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert. “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution” (1985) *Wis. L. Rev.* 1359.

Edwards, Harry T. “Alternative Dispute Resolution: Panacea or Anathema?” (1986) 99 *Harv. L. Rev.* 668.

Folger, Joseph P. & Baruch Bush Robert A. “Transformative Mediation and Third-Party Intervention; Ten Hallmarks of a Transformative Approach to Mediation” (1996) 13 *Mediation Q.* 263.

Gislason, Adam Furlan. “Demystifying ADR Neutral Regulation in Minnesota: The Need for Uniformity and Public Trust in the Twenty-First Century ADR System” (June, 1999) 83 *Minn. L. Rev.* 1839.

Harrington, Christine. *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (1985) 15-16

Kovach, Kimberlee K. & Lela P. Love, “Mapping **Mediation**: The Risks of Riskin's Grid” (Spring 1998) 3 *Harv. Negotiation L. Rev.* 71

Menkel-Meadow, Carrie. “When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals” (August, 1997) 44 *UCLA L. Rev.* 1871.

Note: This issue of the *UCLA Law Review* centres around a symposium titled: *What will we do when Adjudication Ends: The Present and Future of Alternative Dispute Resolution*

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A very good comprehensive article with extensive footnotes that contemplates many questions regarding the practice of ADR. . The author considers the purposes of ADR, who the actors in ADR should be, what processes constitute ADR, to what uses ADR should be put, how ADR should be regulated, and the disputes among ADR professionals. Overall the author sees ADR as supplement adjudication rather than supplanting it.

Ohio State Journal on **Dispute** Resolution. "A Selected Bibliography" (1998) 14 *Ohio St. J. on Disp. Resol.* 967.

Parker Robert M. & Hagin Leslie J. " 'ADR' Techniques in the Reformation Model of Civil Dispute Resolution" (1993) 46 *SMU L. Rev.* 1905 (Special Edition; Alternative Dispute Resolution and Procedural Justice).

Pryles, Michael. "Assessing Dispute Resolution Procedures" (1996) 7 *Am. Rev. Int'l Arb.* 267.

Silver, Carole "Models of Quality for Third-Parties in Alternative Dispute Resolution" (1996) 12 *Ohio St. J. on Disp. Resol.* 37.

This article considers the general question of what a 'good' Third Party (TP) in ADR looks like, i.e., what qualities are necessary for a TP to be acceptable to the parties and effective generally in resolving disputes.

The author first considers the need for the TP to have authority, both personal (status and respect) and contextual (special ability relevant to the dispute), to act in a dispute. The author then considers the importance of impartiality, which will ensure that the TP's actions are based on the merits of the dispute rather than the personal influence of identity of the disputants. In order to promote impartiality, the article suggests imposing restrictions (i.e., eliminating or restricting relationships which might give rise to bias) and disclosure requirements (informing the parties of possible sources of bias).

The article then looks at the following models of TPs: QCs of the Commercial Bar, the Core Senior International Commercial Arbitrators, the Notable Model (i.e., someone with personal reputation), the Judicial Model, the Substantive Expertise Model, and Expertise in Method. The author presents these models as a basis for analyzing the quality of TPs, comparing the approaches between them, and ultimately creating an analytical approach to the regulation of TPs. The article finishes with a discussion of the need to regulate TPs and the ways in which this could be carried out.

Thensted, Charles S., "Litigation and Less; The Negotiation Alternative" (1984) 59 *Tul. L. Rev.* 76.

Wellington, Alex. "Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism" (July, 1999) 12 *Can. J.L. & Juris.* 297.

This article focuses on the potential for ADR to offer both theoretical and practical support for liberal political theory. The author touts pluralism as the major connection between liberalism and ADR, finding that what people want from litigation is often not what it is designed to achieve, thereby necessitating other forms of dispute resolution. Both liberalism and ADR are found to centre on people – their agency, freedoms and capabilities. The article broadly discusses ethics and ADR and responds to criticisms of ADR.

ADR and Law

Dispute Resolution Magazine Fall '99 vol 6 no 1. 6 Articles on ADRA '98 and the Expansion of Court Related ADR.

John Bickerman, "Great Potential: New federal law provides the vehicle is local courts have the will." p.3.

This article centres on an analysis of the ADR Act (ADRA) and determines that while the Act doesn't revolutionize court ADR, it does provide for greater visibility of and options regarding ADR. The author provides a brief history of coming into being of ADRA and the major thrust of the Act is summarized. The Act provides that courts may compel mediation or early neutral evaluation (no other kinds of ADR though), and may exempt specific categories or cases from ADR. The author finds that the greatest push of ADRA will be to force courts to confront the ethical and procedural issues regarding their use of ADR. The ADRA was not, however, accompanied with any funding which minimizes the impact of legislation. It is entirely up to courts to implement it in whatever way they can. The success of the ADRA, according to Bickerman, will depend on who pushes for it, as it is now up to local district courts and bars to decide how to design their programs. The author stresses the need to think carefully about who will design these ADR programs and offers suggestions regarding collaboration between court staff and judges.

Ellen Deason, "State Court ADR: Specialized courts remain key sources of innovation", p. 6.

This article looks at dispute resolution programs being developed by State courts. The author finds that State courts have long been fertile ground for the development of such programs and that specialized courts, in particular, sponsor some of the latest innovations. Noted examples are probate courts, adult guardianship mediation, and Family Group Conferencing. The article supports the continued adaptation and refinement of dispute resolution programs by State courts and upholds that there needs to be greater communication and coordination between these programs.

The Hon. Wayne D. Brazil and Jennifer Smith, "Choice of Structures: Critical values and concerns should guide formal of court ADR programs", p.8.

This strong article identifies key values and concerns that arise when deciding how to structure court-connected ADR. The article also looks at the most common ways that court-connected mediation programs are structured. The authors find that the specific purposes and priorities of the program at hand must be identified, as they are central to shaping the structure. The underlying goal of court-annexed ADR should, the authors posit, be in line with the goals of the court system - to achieve justice, and to engender public respect for the judicial system as a whole.

The article outlines 5 major models for delivering court-annexed ADR services

1. court employs a full-time in-house neutral
2. court contracts with a non-profit which provides the neutral and administers the program
3. court pays private individuals or firm
4. court orchestrates private individuals who serve as neutrals without pay
5. court refers parties to private neutrals who charge parties fee (court can direct to particular neutral, give list of neutrals, or leave choice up to parties)

The authors suggest that most important variable is whether the neutral is an employee of the court or not, and find that the neutral as an employee of the court is preferred, because this would assure the greatest level of public trust. There are, however, a number of disadvantages with an in-house neutral, including: the number of cases that can be referred will be limited, there will be no variety in neutrals, and linking the ADR program so closely with the court may limit the approaches taken. Overall, the authors express that courts must remain flexible and should not narrow down too quickly or rigidly on one model

James Alfini "Risk of Coercion Too great: Judges should not mediate cases assigned to them for trial", p. 11.

The article expresses that the role of judges has undergone significant changes over last few decades, but that the ethical structure necessary to support judicial involvement in ADR has not been adequately explored. The author takes the view that judges should adopt a mediator or case evaluator's role in attempting to reach settlement, but that they should not mediate cases that have been assigned to them for trial because of the conflicting roles of adjudicator and settlement agent, and the risk of coercion. Alfini also questions whether judges have the competence to mediate and suggests that they should certainly have meditation training.

Frank E. A. Sander, "A Friendly Amendment", p. 11.

The author points out four concerns with judges doing mediation: undue coercion, role confusion, appearance of impropriety and competence/training. Sander concurs with Alfini that judges should not mediate the cases they will later try due to both the goals of the judge (clearing docket) and the ability of the parties to be candid which the neutral. Sander emphasizes that settlement is not the same as mediation, and this distinction must be maintained. The article concludes that dialogue must continue on the appropriate role of judges in mediation. The author puts forward that mediation and adjudication should possibly be kept two distinct tracks with judicial settlement efforts limited to procedural efforts to get parties and their lawyers to explore ADR options.

Deborah Hensler, "A Research Agenda: What we need to know about court-connected ADR", p.15

The author suggests that there is a potential gap between the ADR movement (transformative ideology) and the way that ADR is happening in courts (business as usual - just a different way to reach settlements). The article states that very little is known about most important aspects of court-connected ADR. Hensler outlines an agenda for research, with particular emphasis on qualitative research that would draw out "thick descriptions" of how ADR is carried out by courts. More information must be collected on when and under what circumstances ADR reduces time and costs versus traditional litigation. The author finds that it would be interesting to consider why it is perceived that ADR cuts time and costs even when it may not. The role that expectations play in shaping evaluations of ADR should also be explored. Finally, the author finds it important to look at what ADR processes are preferred by parties and lawyers and why. The article concludes that we may come up with some undesirable results by looking into these questions - the perfect bubble of ADR may break - but that we very much need to look seriously and comprehensively at these issues.

Gross Samuel R. & Syverud Kent D. "Getting To No: A Study of Settlement Negotiations and the Selection of Cases for Trial (1991) 90 *Mich. Law Rev.* 319.

Hyman, Michael B., "Rent-a-Judge Advocates Garner Support: Committee Vice-Chairman who Drafted New Jersey Alternative Procedures for Dispute Resolution Act Calls for Federal Alternative Dispute Resolution Legislation" (1988) 13 *Litigation News* 1.

McKay, Robert B., "Rule 16 and Alternative Dispute Resolution" (1988) 63 *Notre Dame Law Review* 818.

Menkel-Meadow, Carrie. "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR,'" (1991) 19 *Fla. St. U. L. Rev.* 1.

This interesting article presents the view that ADR's philosophy and attempt at legal reform have been co-opted by the traditional adversary system. The author posits that ADR was developed, at least in part, to move away from the rigidities of law and formal institutions, but that it has now become formalized and rigid itself. The article considers diverging motives for using ADR, and suggests that courts use ADR to increase efficiency and reduce caseloads, rather than to achieve 'better' justice. The author questions whether adapting ADR to legal culture is counterproductive to the transformative goals of ADR.

A number of important issues underlying the use of ADR by courts are raised, and cases examining ADR are discussed. The author then looks at the implications of 'mandatory' ADR and notes the problems with privatizing justice through ADR that is not accessible to the broad public. Menkel-Meadows presents a list of important issues that need further attention, discussion and research regarding ADR in the Courts.

The author concludes that the use of ADR in courts is a mixed blessing. While ADR will get more use and exposure if used by courts, and while court-mandated ADR continues to have advantages over adjudication in some cases, ADR must conform to legal values and structures and is losing much of its reformative power. The author calls for increased evaluation of and increased innovation in the use of ADR in courts.

Mester, Jonathan D. "The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?" (1997) 13 *Ohio St. J. on Disp. Resol.* 167.

- The author argues that the exemption of federal **arbitration** from the Freedom of Information Act undermines public accountability

Nader Laura, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology," (1993), 9 *Ohio St. J. on Disp. Resol.* 1.

- Nader argues that "harmony ideology" was a response to the law reform discourse of the 1960s and that ADR placates its participants without vindicating their legal rights.

Newhouse, Martin J. "Some Reflections on ADR and the Changing Role of the Courts" (March/April, 1995) 39 *B.B.J.* 15.

Reuben, Richard C. "Public Justice: Toward a State Action Theory of Alternative Dispute Resolution" (1997) 85 *Cal. L. Rev.* 579.

Plapinger, Elizabeth & Stienstra, Donna, "ADR and Settlement in the Federal District Courts; a Sourcebook for Judges & Lawyers" (1997) 172 *West's Federal Rules Decisions* 550.

Sabatino, Jack M. "ADR as 'Litigation Lite': Procedural and Evidentiary Norms Embedded Within Alternative **Dispute** Resolution" (1998) 47 *Emory L.J.* no.4 1289.

This article typifies ADR as a 'lite' version of adjudication, to which disputants turn to secure justice because of the excessive costs, lengthy time lines and other disadvantages of litigation. It questions whether ADR processes (listed as arbitration, mediation, summary jury trials, early neutral evaluations, mini-trials, and med-arbs) are vastly different from litigation. The author puts forward that the ADR programs connected with courts, as well as those offered privately abide by evidentiary and procedural norms that underlie traditional adjudication.

With regard to the growing connection between ADR and the court, the author notes that adjudicative-minded writers lament the dismantling of the important values and principles of the legal system, while ADR proponents are not pleased with the growing formalization of ADR. The author's perspective is that privatization of justice can exert competitive pressures, which benefit the public, but also raise concerns about quality and accountability.

The first part of article describes the modes of ADR and its rising trend. The article then gives an overview of the court-annexed ADR programs at the state and federal levels and looks at the most prominent ADR service providers in the private sector. An analysis of several court-oriented procedural norms that emerge in ADR processes such as notice provisions, information exchanges, submissions to the neutral, and even the structuring and characteristics of the proceedings is then provided. The evidentiary norms of litigation and ADR are then considered and compared.

The article concludes by recommending that the user-friendly features of ADR should perhaps be adopted into courts, but that basic procedural and evidentiary values must not be sacrificed. ADR can be used to improve the quality of settlements pending court, client involvement should be increased and the expertise of individual judges should be drawn upon. The author holds that the market will ensure that ADR stays broad and diverse, and that efforts must be made to ensure that fairness and adequate process are the norms.

Smith, Diane R. "Mediation: New Rules and New Rights" (April, 1998) 40 *Orange County Lawyer* 16.

Stewart, Kenneth P., "Take the 'Alternative' out of Alternative Dispute Resolution; Results of an ADR Survey of Administrative Judges" (1993) 62 *Journal of the Kansas Bar Association* 14.

General JDR

Adams William L. "Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts" (1993) 72 *Ore L. Rev.* 427.

This article looks at upcoming developments such as the Civil Justice Reform Act and Court Initiated Reforms of their procedures. The author suggests that courts should be diversifying their approach to cases according to general categories, the individual features of the case and by their settlement propensities. It suggests establishing guidelines regarding settlement procedures and practices that judges can utilize. Such guidelines would allow for flexibility while ensuring that there is consistency in approach. The article concludes that effective utilization of judicial settlement conferences can increase client satisfaction and provide timely case management.

"ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives" (May, 2000) 113 *Harv. L. Rev.* 1851.

This discussion of ADR is the final chapter in a look at "Developments in the Law- The Paths of Civil Litigation." It looks at the judicial embrace of ADR (court-annexed arbitration, mediation, summary jury trials, early neutral evaluation, judicial settlement conferences) and finds that a balance must be struck between procedural norms to satisfy fairness and flexibility that gives ADR force.

The article takes a brief look at the birth of the modern ADR movement (1970s-80s), raises major criticisms and issues of the field, lists areas in which ADR is being used, and notes the evolution of ADR mechanisms. Next the article turns to the use of ADR by the court system and then to ADR carried out by the judiciary. The authors find that as ADR becomes more compulsory and less 'alternative' there is a clear need to address issues of: confidentiality, evidence, public accountability, ethical issues, and quality control. The article takes the view that ADR has the potential to significantly undermine judicial traditions and that these approaches need to be kept distinct.

Agrios, Justice John A. and Marvin J. Huberman. *The Puishe Judges' Guide to Alternative Dispute Resolution: A Handbook for Canadian Judges on ADR in the Courts, Version 1.3* 1. March 30, 1997. Electronic Book.

Barr, Capers G. "Prepare for the Peacemakers" (July/August, 1995) 7 *S. Carolina Lawyer* 22.

Barton, Thomas, "Justiciability: a Theory of Judicial Problem Solving" (1983) 24 *Boston College Law Review* 505.

'Justiciability' is defined as "the many relationships between adjudicative procedures, and the problems such procedures are asked to resolve." This article creates a theoretical framework for understanding the structure of problems in general, of procedures in general and of the links between the two. The article then describes and evaluates adjudicative procedures. The analysis of variables of problems, of procedures and of the nature of decisions made, provide an interesting framework that some might find useful in analyzing differences between adjudication and ADR. The author uses the framework that he creates to analyze adjudication's approach to different types of problems and whether these problems are suitable for adjudication.

Brazil, Wayne D. "Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts" (2000) 1 J. Disp. Resol. 11

The author makes observations about the current status of ADR in the courts the author describes his vision of ADR in the near-term future. Values that must be upheld in court-sponsored ADR programs and dangers that courts must try to avoid are highlighted.

While there has been a great deal of innovation in the use of ADR by the courts, the author finds that there is a lot more work to do. Some of this can be attributed to the constant change in the field of ADR - courts can barely attempt to keep up. Also, there is often a sizable gap between the impressive appearances of court-sponsored ADR programs and their reality. Finally, there are a huge variety of court-sponsored ADR programs, which, although positive in terms of diversity, makes quality control and development very difficult. ... all vary widely. The variability in levels of funding, cost to parties, role of the neutral, format, and access etc. raises many policy concerns.

The author supports the flexible approach taken by Congress with the ADR Act of 1998, which makes ADR an integral part of the judicial system, but provides great local control and variability. Brazil highlights the need to preserve the public trust in the court, and the confidence that the courts are carrying out justice. The author also points to the need to protect neutrals from pressure from the courts, to democratize access to ADR and to avoid blurring all ADR processes into one.

Finally, the article raises that we can't just pursue faster more efficient settlement through ADR. Courts should see ADR as a way to serve litigants in terms of economic, emotional, philosophic and sociological benefits to long-range health of society.

Colatrella, Jr., Michael T. "Court-Performed" Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs (2000) 15 Ohio St. J. on Disp. Resol. 391

This interesting article looks at the cultural context of court-performed mediation in China and in the United States. The author believes that before implementing ADR across the board in the US it is important to consider whether it is consistent with the values of the culture, especially regarding whether participants feel that ADR compromises and forfeits their rights. It is useful to examine the Chinese experience, where voluntary mediation, carried out by judges, has long been accepted as part of the legal system. Article looks at court-annexed mediation in US, stating that the mediation carried out by judges is far more limited. The author puts forward that by adopting a more court-performed mediation model like that of China, the courts will enhance the credibility of mediation, will inspire greater use of it and will help transform the way society resolved disputes.

Mediation has a very long history in China, which is based largely on Confucian philosophy, Maoist thought. In modern China, the inadequate and under-developed court system, as well as the lack of independence of the courts and an inability to enforce judgments means that the voluntary nature of mediation, leading to resolutions that the parties agree to and cannot appeal, carries great force. The cultural roots of the US are founded on individualism and rights. The author looks at the history of ADR and the modern ADR movement and the growing relation between ADR and the courts in the US. It is interesting to note that both the Chinese and American court systems seem to be trying to adopt more characteristics of the other. The author finds that while China and the US are culturally very different, both benefit from court-performed mediation that is suitable to their respective cultures.

Fiss, Owen M. "Against Settlement" (1984) 93 *Yale L.J.* 1073.

This oft referred to article looks at the growing field of ADR and at the changes to court rules that allowed judges more discretion regarding and power over settlements. Fiss sees dispute resolution as establishing truces, rather than achieving real reconciliation. The author holds that people flock to ADR because it rests on consent of parties and avoids the cost of lengthy trial.

The author does not see settlement as generically better than adjudication and believes that settlement is often based on questionable premises that may not lead to justice. The article questions the appropriateness and effectiveness of ADR in many disputes because of imbalances in power in many disputes, the absence of authoritative consent in ADR, and the lack of foundation for continuing judicial involvement. Fiss argues ADR may be a way to achieve peace, but potentially without justice.

Gang, Bill. "Passing the Gavel" (January, 2001) 9 *Nevada Lawyer* 13.

Gove, The Honourable Judge T.J., "Judge-Mediated Case Conferences in Family Law: Looking for the Best Attainable Outcome" (1999) 57 *Advocate* 855.

This article discusses recent legislation and practices that recognize the legal rights of children in child custody and access cases. The article also looks at the increasing use of alternatives to the adversarial court system in addressing child custody disputes. The author notes that one significant advantage in these alternate approaches is that children can participate in a more meaningful way. The article discusses that the idea of involving judges in the mediation of child protection and custody disputes was developed in New Zealand. In BC the *Child, Family and Community Services Act* provides for judges to be involved in mediation as an alternative to conducting trials.

The article provides a very good, detailed look at how judge mediated case conferences is carried out, from the first hand experience of the author. The author discusses details such as seating arrangements and logistics, and gives a list of questions often asked of the parents or children in these conferences. The author sees clear benefits of case conferencing in custody disputes, but warns that we should be careful that case conferences do not become a vehicle for 'plea bargaining' to compensate for too few judges or too little court time.

Harris, Resa L. & Larry Ray, "What Judges Need to Know About ADR" (1991) 30 *Judges Journal* 30.

This article provides a very basic introduction to ADR. In a question and answer format, it looks at the relationship between ADR programs and the courts, the authority under which judges or courts refer cases to ADR, the distinctions between different forms of ADR, how to choose between ADR approaches, and the potential of ADR to reduce backlog and caseload.

Henry James F. "No Longer a Rarity, Judicial ADR is Preparing for Great Growth- But Much Care is Needed" (1991) 9 *Alternatives to the High Cost of Litigation* 95.

Hogan Michael R. "Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation" (1991) 27 *Willamette L. J.* 429.

This article looks at settlement conferences and the role that judges play within them. The author looks at the traditional (passive, aloof, stoic umpire) and contemporary (manager of cases, responsible for clearing docket) roles of judges and notes the difficulty of trying to reconcile them. The author notes that critics of judicial intervention believe that activism conflicts with

judge's traditional role and poses and threat to the judicial process, but the author finds a purely traditional approach to judging unrealistic.

The article puts forward that the issue at hand is not whether there is a place in the adversarial process for negotiation, but how to define that place in relation to other aspects of the litigation process. The article provides an overview of the process that unfolds when a judge is mediating, and highlights particular skills and approaches that can be used to help parties reach a settlement. The article then looks at some interesting case law, which has helped define judges' procedural power in settlement conferences in the US.

In sum the author sees the process of judicial intervention in negotiations as an individual endeavour, bound up with the temperament, personality, and style of the individual judge. There are certain practices and skills that are common to successful intervention such as listening, maintaining the parties confidentiality. The author believes that while not all conflicts should be resolved through negotiation, all litigants should have the opportunity to meaningfully negotiate and settle.

Jolson, Henry, "Judicial Determination: is it Becoming the Alternative Method of Dispute Resolution?" (1997) 8 *Australian Dispute Resolution Journal* 103.

Lawton, R. Hanson, "ADR as an Alternative to Postponement" (Winter 1991) 30 *Judges Journal* 35.

This brief article provides an introduction to the uses of ADR in the context of modernizing (circa 1991) trial techniques and procedures, and presents the benefits of these ADR approaches over trial.

Lehrman, Ronald & Wilson, Jennifer, "Enforcement/Dispute Resolution (Judicial and Non-Judicial)" (1992) 82 *Trademark Reporter* 925.

MacCoun, Robert J., Lind, E. Allen & Tyler, Tom R., "Alternative Dispute Resolution in Trial and Appellate Courts" in Kagehiro, D.K. & Laufer, W.S., eds. *Handbook of Psychology & Law* (1992) at 95.

Sander Frank E. et al. "Judicial (Mis)Use of ADR? A Debate" (1996) 27 *U. Tol. L Rev.* 885.

This article is an edited transcript of a debate that took place at the AALS meeting in Texas in 1996. The question put to the panel was 'Should ADR be a mandatory part of the judicial system?' The participants were Frank Sander, professor at Harvard Law School and nationally recognized expert in ADR, H. William Allen, founder of the Allen Law Firm and past president of the American Bar Foundation, and Debra Hensler, professor at University of Southern California and Directory of the Institute for Civil Justice at the Rand Corporation.

Professor Sander raises the importance of clarifying what mandatory ADR is. He then puts forward the key issue as: Who should decide what judicial and public resources are devoted to resolving disputes? disputants? lawyers? judges? Sander thinks that judges should be paramount in these decisions because they are the representatives of the public justice system.

Sander thinks that overall, courts should be given the power, as part of case management tools, to send a case to an appropriate form of ADR under a regime that has precise description of what is required and what the sanctions are for violation. There could, however, be an opt-out provision upon motion to the judge that a case is inappropriate for any kind of ADR. Ideally Sander holds that this should be at public expense.

Mr. Allen holds that ADR is an 'inferior brand of justice compared to traditional trial', and that it should be only an adjunct to the justice system, rather than integrated into it in any way. Allen holds that many of the reasons touted in promotion of ADR are unfounded because most cases settle before trial already without ADR, there is no caseload crisis in the federal courts requiring a reduction in cases tried, and the little research that has been conducted on ADR shows no cost saving to the justice system.

Professor Hensler sees ADR as an alternative to settlement, not to trial. Hensler highlights the need to look at and conduct more empirical research on different types of ADR, their uses and effects.

Senger, Jeffrey M. "Turning the Ship of State" (2000) 1 *J. Disp. Resol.* 79

On the use of ADR by US Federal Government – law, policy and barriers to the use of ADR.

Smith, Jeffery, "Can the Advantages of ADR Procedures be Transposed to a Judicial Forum?" (1993) 4 *Australian Dispute Resolution Journal* 298.

Sourdin, Tania, "Judicial Management and Alternative Dispute Resolution Process Trends" (1996) 14 *Australian Bar Review* 185.

This article examines processes in the Commercial Division of the Supreme Court of New South Wales. The author finds that two recent trends have had a big impact on litigation, the change in judicial management approaches adopted by Australian courts and the growth in ADR. The article examines both trends.

The author finds that the current role of the court and its judges is more that of 'judicial manager' than even before. The author acknowledges that some criticize that managerial responsibilities give judges great power that is less visible, goes unreviewed and provides litigants with fewer procedural safeguards to protect them from abuse of authority. The article notes that the differing natures of the jurisdictions of Australian courts and factors such as budget and openness to change have led to the evolution of very different approaches and to a great range in the managerial role that judges assume.

The article comments that while in the US judicial mediation has been viewed as a natural progression in the judge's role, in Australia the role of judges in conducting mediations or using formal mediation techniques has been far more limited. ADR has largely been perceived as a non-judicial function, and as a separate and distinct movement

The benefits of ADR (flexibility of outcome, use satisfaction and perception of fairness, empowerment of parties, a warmer approach...) have been acknowledged and many courts provide ADR processes by referral. There is, however, a lack of empirical data on whether ADR is achieving its objectives and what some of the detriments of ADR are.

Stamato, Linda, "Dispute Resolution Options: How Judges Can Use Them" (Fall 1988) 27 *Judges Journal* 38.

This article finds that dispute resolution should not replace courts, but should seek to complement court processes and provide more choice. This very short article gives an introduction to dispute resolution courses offered to judges and provides a brief history of the dispute resolution movement in America. The article also provides a list of reading materials on dispute resolution

and courts (articles are from 1978-1987), and provides a cursory day-by-day overview of a dispute resolution course offered for judges.

Vann Owens, R., "Alternative Dispute Resolution: a Judge's Viewpoint" (1993) 29 *Tennessee Bar Journal* 38.

Von Kann, Curtis Emery, "Leaving the Bench for ADR" *Legal Times* (11 September 1995) S31.

Weiskopf, Nicholas R., "Hints of Greater Judicial Activism in Resolving Contractual Disputes" *New York Law Journal* (7 October 1996) S4.

Winikow, Jeffrey K., "State Judges who Protect Arbitration have Future Profit in Mind" *The Los Angeles Daily Journal* (17 September 1999) 6.

Woolpert, Wickson R., "The Honor System; Most Judges Retiring into ADR Place Justice Above Personal Gain" *The Los Angeles Daily Journal* (20 November 1996) 6.

Courts and Options

Adams, The Honourable Mr. Justice George & Bussinn, Naomi, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (Cornell Lectures, July 11, 1994) 1.

Bailey, David, "New Supervising Judge to make Pretrial Mediation Voluntary" *Chicago Daily Law Bulletin* (11 January 1995) 1.

Becker Willam T. "Efficient Use of Judicial Resources" (1967) 43 F.R.D. 421.

Bivins, Robert W. & McDonald, Parker Lee, "Alternative Dispute Resolution and the Courts" (1987) 42 *Arbitration Journal* 58.

A very short article looking generally at arbitration as one form of ADR.

Brazil Wayne D. "Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns" (1999) 14:3 *Ohio State Journal on Dispute Resolution* 715.

This article compares and evaluates five of the most common ways of structuring court-connected mediation programs. The author makes these comparisons based on values and concerns that he believes should be integral to these programs.

The author notes that it is very important to consider the goals and purposes of the program, as they will dramatically affect the choice of model by the courts. The overriding values that the author upholds are providing quality service, over quantity, and ensuring public trust and respect through fairness, quality of neutrals and ensuring that the motives and purposes of the program are positive.

The article provides a detailed description and evaluation of the following court-connected mediation structures:

- Full-Time In-House Neutrals
- Court Contracts with a Non-Profit that Provides Neutrals and Administers the Program
- Court Directly Pays Private Individuals or Firms
- Court Orchestrates Services by Private Individuals who serve as Neutrals without pay
- Court refers parties to neutrals who charge market rate

The author concludes that while no one model is superior on all accounts, the staff neutral model is the most reliable, least expensive, and provides the greatest ability to keep quality control.

DeGaris, Annesley H., "The Summary Jury Trial: Judicial Alternative Dispute Resolution" (1991) 2 *Australian Dispute Resolution Journal* 51.

Kaufman Irving R. "Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts" (1990) 59 *Fordham L. Rev.* 1.

The author sees the need for increased flexibility, experimentation and willingness to innovate in the administration of justice to keep up with society. The article looks at the proposed changes in judicial administration, stressing those that hold the greatest promise to reduce major costs of justice, expense and delay.

The article first looks at the scope of backlog and delay in the legal system and some causes of these problems. The article then moves to a discussion of the use of ADR (Civil Appeals Management Plan, early neutral evaluation, summary jury trial, and court-annexed arbitration) in the courthouse implemented to address backlog and delay. Next, problems and complaints relating to ADR are raised and discussed, including: Do ADR processes work? Are they constitutional (access to courts and right to jury trial)? Are they fair? Under what authority are ADR programs created? What about privileged information? Will the press have access?

The author concludes that while ADR is not a panacea, it can certainly make a valuable contribution to the legal system. The use of ADR by the courts should be expanded in order to increase efficiency and maintain fairness.

Kessler, The Honorable Gladys and Linda J. Finkelstein. "The Evolution of a Multi-door Courthouse" (Spring 1988) *37 Cath. U.L. Rev.* 577.

This article looks at the 'multi-door courthouse' program established in Washington DC in 1985. The principles underlying the program are considered, descriptions of the 'multi-door programs' are presented, and the success of the program is analysed. The authors conclude that it will take more time to see the impact of this 'multi-door program', and that the program has only had broad experimentation with ADR techniques making it difficult at this stage to speak definitively of the efficacy of these techniques.

Kloppenborg, C., "Criteria for Evaluating Settlement Pre-Trial Conferences," Bar Notes (March 1990) at 3.

Page, Robert W., "Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes" (1993) vol 44 no 1 *Juvenile & Family Court Journal* 3.

This edition of the *Juvenile and Family Court Journal* presents one extensive article on the judicial approach to the resolution of family disputes in family courts. The author looks at the history of family disputes in court and the family court movement, explores the make-up of a family court, presents justifications for and outlines the establishment of family court. The article takes an overarching look at family court rather than focusing specifically on the role of the presiding judge.

Peckham, Robert F., "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution" (1985) *37 Rutgers Law Review* 253.

The author raises the cost of litigation as a significant impetus for the increased involvement of federal court judges in judicial case management of the pretrial process. These judicial functions have radically transformed the federal judge from passive umpire to a managerial activist. The article finds that state courts are following suit and that ADR has become an important part of this movement as well.

The article outlines the development of case management (from the 1940s) as a cost-cutting device and presents the most salient criticisms of this movement. The criticisms of judicial case management are drawn from the writings of Judith Resnick and include:

- (1) Lack of judicial impartiality - exposure to evidence that would be inadmissible at trial, extensive dealings with counsel, process is shielded from review, judges are overly concerned with the quantity, rather than quality of dispositions

(2) Lack of judicial accountability – unreviewable discretion of judges

(3) Preservation of the adversary system - ADR will preclude adjudication on merits - the author disagrees

(4) Cost-effectiveness - Resnick says that judicial intervention is costly, but the author says this is unfounded

The article provides a summary of arbitration, mini-trials, summary jury trial, and mediation. The author concludes that judicial case management is an important and useful approach and can help contain litigation costs.

Posner, Richard A. "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations" (1986) 53 *U. Chi. L. Rev.* 336, 386-87.

This article gives a description of summary jury trials and then undertakes a statistical and formulaic evaluation of factors including how many cases settle, and the potential savings to the parties and to the court system. The author argues that this kind of analytical framework should be used to evaluate other forms of settlement promoted by the courts such as court-annexed arbitration and private ADR.

Resnik, Judith. "History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination" (Fall, 1995) 98 *W. Va L. Rev.* 171.

The author's purpose in this article is to look at the broad issue of how theories and aspirations for federalism affect the deployment of judges. The article looks at discussion around the need to reform the courts, aspects of federal judicial authority... but does not look at JDR.

Resnick, Judith, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 *Ohio State Journal on Dispute Resolution* 211.

The author maps the changing attitudes toward ADR and adjudication and the claims made on behalf of ADR. The author thinks that although Sander's 'multi-door court-house' is becoming a reality, if we look at the way ADR is being applied in courts, we find that options for litigants are not increasing.

Although the author acknowledges that there are many different types of ADR, and even breaks ADR into three categories [(1) quasi-adjudicatory – truncated abbreviated fact-finding that yields an outcome decided by 3rd party; (2) 3rd party informs disputants outsider's view and how outsiders would decide (summary jury, mini trial); (3) 3rd party helps to narrow dispute, but agreement comes from parties], she is primarily interested in the relationship between the generic form of ADR & adjudication. In particular, she is interested in the interrelationship between claims made for ADR and views of adjudication, and seems to suggest that improvements could and should be made in adjudication without turning to ADR. The author holds that ADR and adjudication are more competitive than complementary and despite the friendly façade, claims for ADR (more congenial, more efficient, fairer) are criticisms of the court. Overall, the author sees the melding of ADR and adjudication, which is detrimental to both, and limits choices rather than providing more options.

Sander, Frank A. E., "Varieties of Dispute Processing" (1976) 70 *F.R.D.* 111.

Sander, Frank E.A. & Stephen Goldberg. "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 *Negotiation J.* 49.

This article provides a very good introduction to different types of ADR and to how to choose between them. A brief fact scenario is laid out and the authors put the reader in the position of counsel who is assessing whether this issue is suitable for ADR. The article questions, what needs to be considered in making this determination?

The authors examine the suitability of various dispute resolution processes from the perspective of the parties in dispute, and then from the public interest perspective, which, they believe, provides a realistic look at the way ADR fora are chosen. The authors put forward that the client's goals must be the first consideration. The article then looks at the likelihood that a particular ADR procedure will overcome various impediments to settlement (such as multiple parties, the need to express emotion, different lawyer-client interests...)

In looking at the public perspective, the article considers how the goals of both parties can best be addressed. The authors also look at instances when litigation may be preferable to ADR (e.g. establishing precedent, need for sanctioning...).

The article then looks at three case examples and evaluates which types of ADR would be best (if at all). The authors conclude that their approach is useful for weighing factors. Key factors in choosing an approach are disputants' goals and the best way to overcome the anticipated barriers to settlement.

Sinclair, Gavin. "The Courts Under Siege: How the New Charter Politics are Affecting the Judiciary." (1999) 5 *Appeal* 6.

Solum, Lawrence B. "Alternative Court Structures in the Future of the California Judiciary: 2020 Vision" (July, 1993) 66 *S. Cal. L. Rev.* 2121.

This article examines the role of alternative court structures in the future of California's judicial system. 'Alternative court structures' are defined as ADR, private judging, administrative adjudication, and informal community-based dispute resolution.

The article looks at litigation explosion since 1960s, then considers how five different scenarios may play out in the year 2020 and evaluates them. These five scenarios are: traditional justice, privatization of justice, multi-door courthouse, administrative justice, and community justice.

The author concludes that no one of these options will prevail over the others and no one of them provides all the answers. Dispute resolution resources must clearly be rationed in a way that is fair and efficient. There can't be total and unlimited access, so the way that dispute resolution is rationed must be considered and evaluated

Stempel, Jeffrey W., "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?" (1996) 11 *Ohio State Journal on Dispute Resolution* 297.

The author raises many questions regarding the integration of courts and ADR, including: What types of ADR mechanisms or approaches are appropriate for judicial incorporation? What ADR techniques are best left to privatization? What degree of supervision should courts exercise over private ADR? What ADR methods should be tightly regulated discouraged or even prohibited by the court?

The author emphasizes that the nature of judicially embraced ADR is important, not just its presence. The article briefly reviews the history of ADR, then outlines a proposed second-generation multi-door courthouse program that applies a mix of publicly administered ADR methods as adjuncts to the core of adjudication. The author thinks that there should be greater emphasis on and use of semi-adjudicatory models, rather than just promoting settlement in any form.

The author posits that the following factors should be considered in determining the appropriate venue for a dispute: the nature of the dispute, the relationship between the parties, the amount in dispute, the cost, and the speed.

Judicial incorporation of ADR is seen as a way to level the playing field between disputants. The author thinks that firm scheduling, clearer decision-maker control, more reasoning and documentation of rationale, and greater public reporting should be part of judicial ADR. The author concludes that the proper role for courts is to have more involvement in ADR rather than less, but that courts should uphold justice over expediency.

Stienstra, D. & Willging, T.E., *Alternatives to Litigation: Do They Have a Place in the Federal District Courts?* (Washington, D.C.: Federal Judicial Center, 1995).

Whalen, G. "Evaluating Settlement Pre-Trial Conferences" *Bar Notes* (March 1990) 1.

Zimmerman, Chief Justice Michael D. "Views from the Bench: The State of the Judiciary" (March, 1997) 10 *Utah Bar J.* 35.

Court Ordered ADR

Bennett, Steven C. "Court-Ordered ADR: Promises and Pitfalls" (January, 2000) 71 *PA Bar Assn. Quarterly* 23.

Feinberg, Kenneth R. "Creative Use of ADR: The Court-Appointed Special Settlement Master" (1996) 59 *Alb. L. Rev.* 881.

Glass, Amy J., Dale Ann Iverson, and Deborah Boersma Zondervan. "Proposed Court Rules Introduce Mediation-Specific Qualifications for Neutrals Serving in Court-Annexed ADR Programs" (May, 2000) 79 *MI Bar Jnl.* 510.

Rogers, Nancy H. & Craig A. McEwen "Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations" (1998) 13 *Ohio St. J. on Disp. Resol.* 831.

This article examines the effects that a change in law could have on expanding or eroding mediation. The authors argue that provisions authorizing courts and agencies to require mediation represent promising means to encourage greater use of mediation and more frequent early settlement. The article considers what types and forms of laws could be used to implement these changes, and the effect of these efforts on mediation and settlement.

Ross, C. Lewis. "Ninth Circuit Mediation: How to Use it Effectively...and Participate in other Court-Sponsored ADR Programs" (December, 1999) 25 *Montana Lawyer* 21.

Privatization of Justice

Garth, Bryant G., "Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment" (1992) 12B *Stud. In Law Pol. & Soc'y* 367.

Green, E., "Avoiding the Legal Log Jam -- Private Justice, California Style" (1981) *Corporate Dispute Management* 65.

Green, Eric D., "Private Judging; A New Variation of Alternative Dispute Resolution" (1985) 21 *Trial* 36.

Jaffe, Sanford M., "Private Judging - Proceed with Caution" *New Jersey Law Journal* (20 July 1989) 7.

Janojksy, L.S., "The 'Big Case': A 'Big Burden' on our Courts" (1980) *Utah L. Rev.* 719.

Loncke, Rudolph, "The Trouble With Rent-A-Judging; the Thriving Private System is Eroding Faith in the Public Courts" *The Los Angeles Daily Journal* (4 April 1991) 6.

Robel, Lauren K., "Private Justice and the Federal Bench" (1993) 68 *Ind. Law Rev.* 891.

Vangel, T.S., "Private Judging in California: Ethical Concerns and Constitutional Considerations" (1988) 23 *New England L. Rev.* 363.

Weinstein, Jack B. "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11 *Ohio St. J. Disp. Resol.* 241.

This article warns of judicial "white flight," whereby the rich opt for private ADR and leave an under funded judiciary for the poor.

The Role of Judges

Berman, Greg, "What is a Traditional Judge Anyway? Problem Solving in the State Courts" (2000) 84 *Judicature* 78.

This casual article is an edited transcript of a discussion among judges, attorneys, policy makers and scholars regarding the role of judges in 'experimental', 'problem-solving' courts that utilize new approaches to address such issues as drugs, domestic violence, mental health, etc. The article looks at the creation of problem-solving courts, the new roles that judges are playing within them, the role of attorneys in these courts, and how to integrate problem solving courts into the state court system. This article does not directly address JDR.

Bossert, Rex, "Case Management gets Judicial Nod; Rand ADR Study Fails to Deter Judges, Who Say More Experiment is Warranted" *The National Law Journal* (9 June 1997) A11.

Brazil Wayne D. *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* (1985)

Brazil Wayne D. "Hosting Settlement Conferences: Effectiveness in the Judicial Role" (1987) 3 Ohio ST. J. on Disp. Resol. 1.

This extensive article offers suggestions as to how a judge can ensure that settlement conferences function effectively. The article first discusses the attitudes or mindsets that are most appropriate for judges to approach settlement conferences with. The author upholds that judges must blend self-assuredness and humility, and notes the difficulty of shifting from presiding over litigation to assisting with settlement.

Factors that judges should consider when identifying the points in a pretrial conference when a settlement conference is likely to be productive are noted. Next, the ways that judges might format or structure settlement conferences are outlined. The author evaluates the usefulness of different settlement conference formats, including private caucusing, group meetings and hybrid group sessions and private caucusing. The article also outlines ways to respond constructively to problematic behaviour by lawyers or clients. The article provides a very useful detailed roadmap of conducting settlement conference using private caucusing.

Brazil Wayne D. *Effective Approaches to Settlement: A Handbook for Lawyers and Judges* (Clifton, N.J.: Prentice Hall, 1988)

Brazil, Wayne D., "For Judges: Suggestions about what to say about ADR at Case Management Conferences, and how to Respond to Concerns over Objections Raised by Counsel" (2000) 16 *Ohio State Journal on Dispute Resolution* 165.

Breen, J. Daniel, "Mediation and the Magistrate Judge" (1996) 26 *The University of Memphis Law Review* 1007.

This article focuses on the Magistrate Judge as mediator. First, the Federal Rule of Civil Procedure 16, supporting Pretrial Settlement Conferences that came into effect in 1983, is considered. Then the Civil Justice Reform Act of 1990, and amendments to the Federal Rule of Civil Procedure 16(c) in 1993 are discussed. The article continues with a consideration of the common methods of ADR used by Magistrate Judges and comments that the appropriateness of the measures depends on the type of lawsuit. Descriptions of and commentary on mediation, arbitration, early neutral evaluation, summary jury trial, 'other' settlement techniques are

presented. Lastly, the article looks at the pretrial settlement process. Basic summaries of the processes are provided, but the article fails to delve into deeper issues.

Brown, Melinda, "Retired Judges for Rent" (2000) 74 *Law Institute Journal* 21.

Cahill, Stephanie Francis, "Database Aids Judges in Spurring Settlements" *Chicago Daily Law Bulletin* (3 January 2001) 1.

DeGaris, Annesley H., "The Role of Federal Court Judges in the Settlement of Disputes" (1994) 13 *University of Tasmania Law Review* 217.

The author raises that while a judge's role in litigation is specifically defined, in the settlement of disputes it is often determined by the judge's own perception. This article examines judges' perceptions of their role in settlements based on a survey of judges in Australia, US, England, Brazil and Germany. The questionnaires cover: background, judicial attitude toward settlement, judge's role, techniques for participation, and propriety of participation.

This interesting article discusses the results of the survey. Generally judges have a positive attitude towards settlement, but aren't settlement activists. A major concern of judges is the propriety of their actions. The questionnaire and the tabulation of responses are included in the article.

DeGaris, Annesley H., "The Role of United States District Court Judges in the Settlement of Disputes" (1998) 176 *West's Federal Rules Decisions* 601.

Dell 'Omo, Gregory G. & Yu, Gyu-Chang, "Differences in Decision Making Between Experienced Judges and Inexperienced Judges in Dispute Resolution: the Case of Final-Offer Interest Arbitration" (1996) 25 *Journal of Collective Negotiations in the Public Sector* 137.

This article provides the results from a study comparing the decision-making patterns of professional arbitrators and nonprofessionals. The results showed no individual differences among professional arbitrators, while their counterparts showed individual differences. Nonprofessionals also placed more emphasis on the comparability standards in decisions than professional arbitrators. This article is not particularly useful to studying JDR.

Denlow, Morton. "Breaking Impasses in Settlement Conferences: Five Techniques for Resolution" *Judges Journal* Fall 2000, Vol 39, No.4, 4.

This is a short and useful article for judges on reaching resolution in settlement conferences. The author upholds that judge should not be afraid to adopt an active role. The article suggests five specific techniques that may assist parties in breaking a deadlock.

First is creating a range (i.e. \$ settlement amount) large enough to attract both sides, but small enough to make settlement possible. Second is recommending a specific number - although the author always starts his settlement conferences in a facilitative manner, he is not reluctant to make specific suggestions either. Third, the author suggests splitting the difference when parties reach a stalemate relatively close to settlement. Next, the article looks at the need to clarify objective facts in order to reach settlement. Finally, the author suggests settling firm deadlines as a way to accelerate settlement.

The author concludes that judiciously taking advantage of impasse-breaking techniques can only help result in mutually satisfactory settlements for all parties.

Epp, J.A., "The Role of the Judiciary in the Settlement of Civil Actions: a Survey of Vancouver Lawyers" (1996) 15 *Windsor Yearb. Access Justice* 82.

This article looks at the opinions of lawyers on the role of judges in settlement of civil actions before trial. The article focuses on whether judges should be involved in settling issues, the relative effectiveness of judicial approaches to settlement conferences, and the effectiveness and propriety of techniques used by judges. The article is based on a survey of Vancouver lawyers, UK and US studies are mentioned throughout.

Statistical information is provided on whether judges should get involved in settlement, whether judges should wait for an invitation to assist, the effectiveness of judicial approaches to settlement, and the perceived fairness of these approaches. The logistics of judicial involvement are also discussed. The article concludes that lawyers want judges to be involved in settling issues before trial, that the direct and indirect contributions of judges are very valuable. The preferred judicial approach is one that is analytical, logical, and polite.

Eveleth, Janet Stidman, "Settling Disputes Without Litigation; Retired Judges Serve as Mediators" (2001) 34 *The Maryland Bar Journal* 2.

French, R.S., "Hands-On Judges and User-Friendly Justice" (1991) 2 *Australian Dispute Resolution Journal* 73.

Gabriel, Susan M., "Judicial Participation in Settlement: Pattern, Practice, and Ethics" (1988) 4 *Ohio State Journal on Dispute Resolution* 81.

The role of judges when participating in ADR is a contentious and criticized area. This article looks at the degree of involvement and intervention in litigation demonstrated by judges historically, the extent to which the Federal Rules of Civil Procedure in 1938 broadened the scope of permissive intervention, the extent to which judges have increased their participation in the resolution of disputes after these Rules, and the degree to which practices and methods currently employed by judges in the promotion of settlement violate the ethical considerations embodied in the Code of Judicial Conduct.

In terms of ethics, the author finds that while judicial participation in and promotion of settlement negotiations can be beneficial, it is often carried out through judicial behaviour that is considered contrary to the ethical considerations underlying the Code of Judicial Conduct. The author suggests that Rule 16 should be amended to make a judge who participates in a pretrial settlement ineligible to hear the case if settlement fails, which would alleviate concerns of impartiality and personal familiarity.

Galanter, M., "The Emergence of the Judge as Mediator in Civil Cases" (1986) 69 *Judicature* 257.

This early article looks at judges playing a mediating role in the settlement of cases and traces the change in judicial views over the past 50 years, looking at the causes and effects of this change. The author finds that the shifting role is not entirely driven by managerial efficiency, but also by broad changes in common adjudication. It is noted that research has not confirmed that judicial intervention produces more settlements, and that further studies on the effects of judicial participation need to be conducted.

Galanter, Marc & Mia Cahill. "Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *Stan. L. Rev.* 1339.

In this article the authors question and discuss settlement as the preferred alternative to trial. They critique existing methods for measuring the benefits of settlement, examine factors that contribute to a party's decision to settle, and explore the merits of judicial promotion of settlement. The authors argue that settlement should be critiqued more carefully and that good settlements should be distinguished from less desirable ones. Why the promotion of settlements is considered so central to judicial duties and enacting rules to encourage settlement (an area the authors dub 'litigotiation') are considered.

The article looks at how active judges are in promoting settlement, and how other actors receive this in the system. The results of a survey show that, 70% of judges said they intervene subtly, 10% said they intervene aggressively, 20% said they are non-interventionist. A variety of factors are found to influence judicial intervention in settlement: judges' perception of their own negotiating skills, the skills of attorneys, whether there is a jury or not. Lawyers generally approve of judicial intervention; in fact lawyers seem to approve of judicial mediation even more than judges themselves.

The article continues with an analysis of the specific advantages and disadvantages of settlement and wrestles with judging the quality of settlements.

Gilbert, Michelle L. & Joseph, Daniel, "Breaking the Settlement Ice: the use of Settlement Judges in Administrative Proceedings" (1989) 3 *The Administrative Law Journal* 571.

Goldsmith, Richard N. & Latz, Martin E., "Can You Lie to a Judge if he is a Mediator?" (1994) 31 *Arizona Attorney* 44.

Gottlieb, Henry, "Making the Golden Years Golden; Retired Judges are in Demand as Law-Firm ADR Practice Grows" *New Jersey Law Journal* (18 May 1998) 1.

Iwai, Nobuaki, "The Judge as Mediator: the Japanese Experience" (1991) 10 *Civil Justice Quarterly* 108.

This article discusses that in the English system the judge is largely confined to role of formal decision-maker, whereas in Japan, judicial involvement in court settlement is commonplace. The article presents the Japanese approach.

The author first looks at Wakai, settlement in court, which is part of Japan's formal legal system, The article looks at the statutory basis for Wakai, the binding nature of settlements, procedure, standards, and assessment of settlements. The author then moves to a consideration of Benron-ken-Wakai, which is the process for 'pleading and settlement', a flexible, fast and less formal approach.

The author notes that judges in Japan play roles of judge of the trial, director of the settlement procedure, and is able to switch, at their discretion, from one to the other.

Lambros, Thomas D., "The Judge's Role in Fostering Voluntary Settlements" (1984) 29 *Villanova Law Review* 1363.

The author supports judge-guided methods of dispute resolution as an important means of settling cases fairly and efficiently. The article takes the viewpoint that there is a significant difference between private party ADR and judicially managed court alternatives and explores judicially managed alternatives to the traditional procedures of civil litigation. Some of the factors that have motivated judges and litigants to seek alternatives are analysed and two judicially managed

methods of ADR, appointment of neutral experts/special masters and the summary jury trial are described.

The authors emphasize that the credibility that disputants place in the result of the process correlates with the confidence that they have in the person administering the process. The author concludes that judges should put effort towards supporting the current judicial system, rather than replacing it. Judge managed alternative dispute resolution is seen as a way to provide settlement with efficiency, and due process.

Lavorato, Louis A., "Alternative Dispute Resolution: One Judge's Experience" (1987) 42 *Arbitration Journal* 64.

An extremely short article in which the author communicates his support for increased mediation in divorce and other cases.

McNaughton, Valerie. "Active Listening: Applying Mediation Skills in the Courtroom." *Judges Journal*. Spring 1999 38(2) 23-28.

A short casual article on the need for judges to practice 'active listening' and the ability of mediation training and exposure to mediation to assist with developing active listening skills. The article provides some good solid suggestions for developing active listening skills, including: resist the impulse to control the pace or content of comments made in the courtroom, resist the urge to interpret what is said by parties as a challenge to authority, ask for clarification of any remarks that you are not sure you understood, rephrase parties' statements to demonstrate that you are listening and that you understand, give the parties an opportunity to talk about their concerns. The author is confident that using these techniques does not take longer.

Meisel, Frank, "Judicial Techniques in Arbitration and Litigation" [1988] *Civil Justice Quarterly* 204.

This is a short review of a series of lectures published under the above title. Themes of the lectures are briefly discussed: arbitrator is, but judge is not, master of the proceeding; comparing and contrasting the roles of arbitrator and judge

Plowden, Evans J., "The Judge's Role in Resolving Disputes" (1993) 29 *Georgia State Bar Journal* 243.

Provine Marie D. *Settlement Strategies for Federal District Judges* (Washington DC: Fed. Jud. Center, 1986).

Ratliff, Leslie C., "Civil Mediation in Palm Beach: a "Retired" Massachusetts Judge Pioneers a Successful New Program" (1989) 73 *Judicature* 51.

This article tells the story of a retired judge who becomes a circuit court mediator after retirement and developed the Palm Beach County Circuit Civil Mediation Program. The program, the cases that it is assigned, its evolution and successes are described.

Resnick Judith "Managerial Judges" (1982) 96 *Harv. L. Rev.* 374.

The author looks at the (at the time) new role of judges as case managers. The classical view of the judges' role is contrasted with the new duties and powers that judges have undertaken. The effects of case management on the role of judges (judges learn about details of case earlier, have more power, previous restraints on judicial authority are absent) are discussed. Aspects and techniques of judges in pre- and post-trial management are listed.

The author concludes that post-trial management is a less striking break from the American judicial tradition, whereas pre-trial management (judge initiated, invisible, and unreviewable) breaks significantly from norms of adjudication. As a result of case management, judges have vast new powers without the traditional checks and constraints. Resnick argues for reflection before plunging into judicial management and suggests that safeguards be imposed and non-judicial management of cases also takes place.

Resnick Judith "Judging Consent" 1987 U. Chi. Legal F. 43.

This article looks at judicial involvement in consent decrees. The author's primary interest is in the role of federal judges during the negotiation and entry phases of the consent decree. The article concludes that judges cannot, absent conflict, determine much about the legality or the quality of the compromises made. Furthermore, judges are ill equipped to do much more than agree when disputants agree. Overall, the author concludes that the legitimacy of consent decrees must come from a real look into whether they are efficient, economic, and reliable, not from the quality of judicial involvement when they were entered.

Rooney, John Flynn, "Judge can't Usurp Role of Arbitrators: Appeals Court" *Chicago Daily Law Bulletin* (13 August 1998) 1.

Rude, Dale E., Schiller, Lawrence F. & Wall, James A., "Judicial Participation in Settlement" [1984] *Missouri Journal of Dispute Resolution* 25.

The article looks at techniques used by judges in settlement, based on a survey of Missouri judges and lawyers. The authors find that judges promote settlement, but that the specific steps they take are unclear. The analysis of judicial techniques in settlement is divided into their targets: inter-lawyer relationship, lawyers themselves, lawyer client relationship, and clients. The majority of techniques are directed at the inter-lawyer relationship. The article looks at each of these categories in detail.

Factors that effect judicial use of particular settlement techniques include whether the techniques are considered ethical, the perceived effectiveness of the technique, and the cost (time and resources) of its application. The authors hope that this analysis of judges' techniques will contribute to improving effectiveness.

Rude, Dale E. & Wall, James A., "The Judge's Role in Settlement: Opinions from Missouri Judges and Attorneys" [1988] *Journal of Dispute Resolution* 163.

This article communicates the results from a study looking at judges' involvement in settlement and the opinion of Missouri lawyers and judges regarding this involvement. Significant differences were found between the opinions of lawyers and judges, with judges preferring less judicial involvement, and Missouri and other judges. The article focuses on this latter difference and in its conclusions considers reasons for it.

Schuck Peter H. "The Role of Judges in Settling Complex Cases: The Agent Orange Example" (1986) 53 *U. Chi. L. Rev.* 337.

This very interesting article looks at the role of judges in assisting with the settlement of a very complex civil case, the Agent Orange class action suit. The article provides observations on the way that this settlement was carried out, makes useful and interesting comments and highlights important issues. The author notes that the role of judges in settling civil cases receives very little attention, which is amazing considering the number of cases in which judges are integrally

involved. He further comments that the legal, philosophical, and policy issues regarding judge contrived/approved settlements are difficult and profound.

The article looks at background info about the Agent Orange example and then moves to features of the settlement negotiation and the judges' roles within it that were key to generating a settlement. The author puts forward that judges play such an important role in settlement because of their disposition over certain issues, knowledge about other factors relevant to settlement, their reputation for fairness, and their control over certain inducements and administrative supports.

Risks of judicial involvement are pointed out as well, particularly judicial coercion, over-commitment and procedural unfairness. The authors posit that procedural reforms may be implemented to reduce this risk.

Tornquist, Leroy J., "The Active Judge in Pre-trial Settlement: Inherent Authority Gone Awry" (1990) 39 Defense Law Journal 307.

Walther, Robert G., "The Judge's Role in Resolving Disputes" (1993) 29 Georgia State Bar Journal 244.

Will Herbert L., Merhige Robert & Robin Alvin "The Role of the Judge in the Settlement Process" (1977) 75 F.R.D. 203.

JDR/ADR Case Studies

Canada

Bowal, Peter, "The New Ontario Judicial Alternative Dispute Resolution Model" (1995) 34 Alta. L. Rev. 206.

This short article introduces the new ADR Pilot Project currently being tried in the Ontario Court of Justice. The Project is aimed at avoiding civil litigation and involves ADR referral and management after filing of the Statement of Defense. First, the parties must meet, and then statements are submitted by the parties after which counsel and the parties attend an ADR session (mediation, mini-trial, or neutral evaluation). The article outlines the advantages and disadvantages of the project for the parties and the public interest.

The author outlines the following advantages: the parties get to deal with their dispute much sooner and faster; ADR agreements are less costly; there is flexibility in resolving the dispute; the setting of ADR is informal and non-intimidating; the parties play a major role in the outcome; there is less cost to society and to the court system; the number of cases that do go to trial is reduced; judges and dispute resolution officers are being trained in ADR techniques which increases the validity, quality and consistency of ADR; ADR offers choice of process.

Disadvantages highlighted are: there is no guarantee of resolution; if the dispute does end up going to trial, nothing that came out of the ADR process can be used at trial; ADR processes do not provide for cross-examination, testifying under oath, and other formal procedures of court.

The author concludes that time will best indicate whether this program is a success, but seems, overall, to be impressed with the route that it is taking.

Dickson, The Right Honourable Brian, Chief Justice of Canada (retired), "ADR, The Courts and the Judicial System: The Canadian Context" [1994] The Cornell Lectures.

Epp, J.A., "Saskatchewan Pre-Trials: An Empirical Record and Proposed Amendments" (1991) 55 Sask. L. Rev. 43.

This article looks at Saskatchewan's Rule 191 and 192 pre-trial conferences. The author first looks at the evolution of the pre-trial conference rules in the province, and then presents the results of a survey of the Justices of the Court of Queen's Bench for Saskatchewan regarding the actual use and value of the pretrial rules.

The overview of history provides a good foundation for understanding the development of pre-trial conferences in Canada and particularly Saskatchewan.

The survey comprised of a lengthy questionnaire sent to all Saskatchewan Queen's Bench judges on pre-trial conferences in general and on settlement pre-trials.

The article provides statistical data on pre-trials in Saskatchewan. Overall, the use of these procedures was found to be consistent, and judges believe that they result in more settlements, reduce judicial time, reduce the lengths of trials and generally improve the quality of trials. Pre-trial rules are seen as a valuable tool.

The author then explores expanding the pre-trial rules, and questions whether pre-trial conferences should be mandatory in all cases. The author then looks at whether there is a need to add rules of judicial conduct to the pre-trial rules. The author then proposes specific amendments to Rule 191 that address concerns and issues discussed in this article.

The author concludes that pre-trial conferences should not be expanded to include all cases, and that mandatory expansion of the use of pre-trial conferences would not be a good idea. The author does see the need, however, to come up with rules of judicial conduct and appellate review to guide judges and lawyers in pre-trial conferences. Overall an interesting and useful article, particularly regarding enacting rules for judicial conduct.

Holland, The Honourable Mr. Justice R.E., "Pre-Trial Conferences in Canada" (1987) 7 Adv. Q. 416.

Landerkin, Hugh F., "Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model" (1997) 35 Alta. L. Rev. 627.

The author suggests a three-stage model for custody dispute resolution: first, details of how the child is functioning in his or her home, neighbourhood and school should be outlined, next judicial dispute resolution will take place and finally, if JDR fails the presiding judge must step aside in favour of an independent judge and a regular trial will commence. In this summary I will focus on the judicial dispute resolution aspects of the article.

The article presents a broad view of how custody disputes are currently handled in Provincial Court, also providing a historical perspective, a constitutional perspective, looking at the best interests of the child standard, historically and contemporarily, and considering a jurisprudential framework for this standard. The author then moves to suggest a new model for judicial decision-making.

The article upholds the importance of procedural fairness, and particularly for the need for normative standards to be applied and for parties to participate fully in the process. The author sees the judicial dispute resolution process presented as a good balance between the rights of guardians to private ordering and the inherent checks afforded by public ordering of a court-system.

The article then moves to a detailed look at the three stages of this process, providing key information on case management and the mediation process. The author concludes that this model would provide earlier settlements of custody issues that are more satisfactory to the parties.

U.S.

American Bar Association, Sub-committee on Alternative Means of Dispute Resolution, Committee on Corporate Counsel, "Effectiveness of the Mini-trial in Resolving Complex Commercial Disputes: A Survey" (1986) 6.

Connor, Laurence D. "The Proposed New Court Rules- Modern Dispute Resolution for Michigan" (May, 2000) 79 MI Bar Jnl. 482.

Dayton, Kim. "The Myth of Alternative **Dispute** Resolution in the Federal Courts" (1991) 76 Iowa L. Rev 889.

Edgar, R. Allan, "A Judge's View - ADR and the Federal Courts - the Eastern District of Tennessee" (1996) 26 The University of Memphis Law Review 995.

Etheridge, Jack P. "Establishing a Joint State Bar Association and Supreme Court Commission on Alternative **Dispute** Resolution" (1993) 81 Ky. L.J. 1085.

Flanders, S., *Case Management and Court Management in United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977).

Folberg Jay, Rosenberg Joshua & Barret Robert "Use of ADR in California Courts: Findings and Proposals" (1992) 26 U.S.F. L. Rev. 343.

Fryling, Robert G. & Edward J. Hoffman. "Step by Step: How the U.S. Government Adopted the ADR Idea" *Disp. Resol. J.*, May 1998, at 80, 80.

Kakalik, J.S. et al., "Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act: a Summary" (1997) *Pitblado Lect* 117.

Lauer, Edgar J., "Conciliation and Arbitration in the Municipal Court of the City of New York" (1918) *American Judicature Society* 153.

Norman, Keith B. "Executive Director's Report: Looking Back on ADR at the Alabama State Bar" (July, 1998) 59 *Ala. Law*. 202.

Rauma, David & Krafka, Carol, *Voluntary Arbitration in eight Federal District Courts: An Evaluation* (Washington D.C.: Federal Judicial Centre, 1994).

Resnik, Judith. "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III" (2000) 113 *Harv. L. Rev.* 924, 1001.

Discussing the RAND Institute for Civil Justice's findings that many judicial settlement efforts are "resource-consumptive."

Scheiber, Harry N., "Innovation, Resistance and Change: A History of Judicial Reform and the California Courts" (1993) 66 *S. Cal. Law Rev.* 2049.

Sternlight, Jean R. "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration." (1996) 74 *Wash. U. L.Q.* 637.

Wall J.A., Schiller, L.F. & Ebert R.J., "Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques" (1984) 8 *Am. J. Trial Advocacy* 83.

Zimmerman, Chief Justice. "Alternative Dispute Resolution and the Utah Courts" (April, 1996) 9 *Utah Bar J.* 11.

International

Ponte, Lucille M. "Reassessing the Australian Adversarial System: An Overview of Issues in Court Reform and Federal ADR Practice in the Land Down Under." (Summer, 2000) 27 *Syracuse J. Int'l L. & Com.* 335.

Attorneys and ADR/JDR

Breger, Marshall J. "Should an Attorney be Required to Advise a Client of ADR Options?" (Spring, 2000) 13 *Geo. J. Legal Ethics* 427

Keet, Michaela and Teresa B. Salamone. "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64 *Sask. L. Rev.* 57.

This article posits that the adoption of court-connected mediation programs is a hugely significant development regarding access to justice and pursuit of civil process reform. Early statistics on these programs show high settlement rates and client satisfaction. The article explores the expanding role of the litigation lawyer to mediation advocate. The article reviews the extent to which mediation programs have been integrated into the civil court system with examples and a discussion of result. The article also gives suggestions to guide litigators regarding the practice of mediation advocacy.

The article gives a short review of mediation programs at the Superior Court level in Saskatchewan, Ontario and Quebec. It also describes two narrower programs in BC. The article notes common features of the programs and finds that all have significant rates of settlement.

The article then looks at challenges to and the role of lawyers in carrying out mediation, and gives suggestions regarding mediation advocacy and management of the mediation process. Judges may find this article useful in terms of being aware of the advice that lawyers are getting.

Menkel-Meadow, Carrie. "Ethics in Alternative **Dispute** Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities" (1997) 38 *S. Tex. L. Rev.* 407, 421.

- discussing the failure of legal ethics to address the complex relationships managed in ADR

Orewyler, Tom, "Lawyers Decry Air of Cronyism in ADR practice; Private Neutrals can get Repeat Business from Sitting Judges; Task Force Hearing" *The Los Angeles Daily Journal* (5 October 1998) 1.

Plapinger, Elizabeth & Carrie Menkel-Meadow. "ADR Ethics: Model Rules Would Clarify Lawyer Conduct When Serving as a Neutral" *Disp. Resol. Mag.*, (Summer 1999), 20.

The authors submit a proposed ethical rule governing lawyer-neutrals. The proposed Model Rule is a general rule drafted to govern lawyers serving in the full variety of ADR neutral roles, as arbitrators, mediators, evaluators, transactional neutrals and in other hybrid processes. The Rule includes six sections: (1) diligence and competence; (2) confidentiality; (3) impartiality; (4) conflicts of interest; (5) fees; and (6) fairness and integrity of the process. Full text of the rule is available at www.cpradr.org/cpr-george.html. The article requests comments.

Riskin, Leonard L. "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1 *Harv. Negotiation L. Rev.* 7.

Cases dealing with JDR

Johnston v. Mainwaring 1997 CarswellAlta 706, 31 R.F.L. (4th) 261, (*sub nom.* Mainwaring v. Mainwaring) 207 A.R. 241, [1997] 10 W.W.R. 599, 52 Alta. L.R. (3d) 223

Varga v. Sihvon 2001 Carswell Alta 468, 2001 ABQB 276

Wagshal v. Foster, 28 F.3d 1249, 1250 (D.C. Cir. 1994)

Granting immunity to a court-appointed mediator sued for an alleged breach of his confidentiality obligation.

Teaching JDR

16:4 *Negotiation Journal* (October 2000) is all about Teaching

Lowenstein, Jeffrey and Leigh Thompson. "The Challenge of Learning" 16:4 *Negotiation Journal* (October 2000) 399.

This article looks at key reasons why learning negotiation is difficult and examines how professional schools typically teach negotiation, providing suggestions for improving this instruction. The key recommendations offered are that teachers of negotiation must learn more about teaching and learning in general. Analogical learning is pointed out as being particularly important to students feeling confident applying what they are learning to a wide variety of circumstances.