

# NOTES

## THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 1998: IMPLEMENTING A NEW PARADIGM OF JUSTICE

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*The Alternative Dispute Resolution Act of 1998 provides broad authority for federal district courts to develop alternative dispute resolution programs for litigants. In this Note, Caroline Harris Crowne evaluates how such programs can be designed so that they complement adjudication and benefit disputants. She addresses concerns about justice and quality and urges courts to be sensitive to the differences between alternative dispute resolution and adjudication. She concludes by offering suggestions on how alternative dispute resolution administrators in the courts can foster customer service for disputants while maintaining a necessary amount of public accountability.*

### INTRODUCTION

After a decade of tentative experimentation with alternative dispute resolution (ADR) in the federal courts, Congress finally put its stamp of approval on ADR by passing the Alternative Dispute Resolution Act of 1998 (the Act).<sup>1</sup> The Act requires all federal trial courts to implement ADR programs for litigants and allows courts to mandate participation in those programs. In order for court administra-

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<sup>1</sup> Pub. L. No. 105-315, 112 Stat. 2998 (codified at 28 U.S.C. §§ 651-658 (Supp. V 2000)). The Alternative Dispute Resolution Act of 1998 (the Act) passed by a vote of 405 to two in the House of Representatives, 144 Cong. Rec. H2076 (daily ed. Apr. 21, 1998), and unanimously in the Senate, 144 Cong. Rec. S11,810 (daily ed. Oct. 7, 1998). For a review of previous alternative dispute resolution (ADR) legislation, see *infra* Part II.

tors to implement the Act successfully, they must reconcile the new paradigm of justice inherent in ADR with the traditional adjudicative paradigm of justice that currently guides the courts. Furthermore, they must sift through the many varieties of ADR to design programs that are compatible with the court system and that provide benefits to litigants. This Note explores how court administrators, by understanding and respecting differences among ADR processes, and between ADR and adjudication, may integrate ADR into the court system without compromising either justice or the effectiveness of ADR.

Addressing concerns about justice is tricky, because standard notions of justice are tied up inextricably with the principles and processes of traditional adjudication. ADR processes represent a different paradigm of justice. Whereas adjudication is concerned primarily with serving the interests of the public (the "public-service" paradigm), ADR is concerned primarily with serving the interests of disputants (the "customer-service" paradigm).<sup>2</sup> Given that ADR has been embraced *because* it is different from adjudication,<sup>3</sup> courts and commentators should not demand that ADR conform to traditional notions of justice. Rather, awareness of the ADR paradigm should inform evaluations of the quality and success of court ADR programs, allowing for an effective integration of ADR into the court system.<sup>4</sup>

Furthermore, court administrators should be aware of the differences among various forms of ADR when deciding how to make use of these processes.<sup>5</sup> Facilitative processes, such as mediation, raise different issues and call for different approaches than determinative processes such as arbitration.<sup>6</sup> The desired benefits of ADR, such as speedy and amicable resolution and party control, accrue in varying degrees from different procedures and easily can be forfeited if essen-

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<sup>2</sup> Certainly, adjudication also serves some interests of parties, and ADR also serves some public interests. For an in-depth discussion of the differences between ADR and adjudication, see *infra* Part I.B.

<sup>3</sup> See *infra* note 124 (discussing reasons provided by Congress for adoption of ADR Act).

<sup>4</sup> See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem-Solving: Mediation*, 28 *Fordham Urb. L.J.* 935, 939-40 (2001) (noting that mediation and litigation "embrace very different paradigms for dispute resolution and problem solving," and urging courts to keep distinct goals in mind).

<sup>5</sup> See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 *Fla. St. U. L. Rev.* 1, 40 (1991) (noting tendency to "homogenize widely different approaches to dispute resolution" and urging attention to differences).

<sup>6</sup> See *infra* Part I.A (analyzing differences between determinative and facilitative processes).

tial characteristics of a process are altered.<sup>7</sup> The label "ADR" alone does not confer desired benefits, and poorly implemented programs could do more harm than good.

The Act provides no guidance as to the proper role of ADR in the court system and leaves district courts tremendous discretion to design ADR processes.<sup>8</sup> Hasty implementation of the Act could be disastrous. There is a danger that ADR programs could turn into a system of "second-class" justice, with "unimportant" cases being summarily disposed of through ADR,<sup>9</sup> or that ADR could become just another procedural hurdle on the path to trial, contributing nothing of substance to the disputants or society.<sup>10</sup> On the other hand, thoughtful incorporation of ADR into the courts could enrich our justice system and provide substantial benefits.<sup>11</sup>

This Note offers suggestions on how to delineate the role of ADR alongside traditional adjudication and to maintain the quality of ADR programs. Part I describes the basic types of ADR. It then explains and attempts to reconcile the paradigmatic differences between the ADR model of dispute resolution and the adjudicative model and then suggests how different forms of ADR should be evaluated. Part II provides an overview of the Act, points out its shortcomings, and raises some concerns about its implementation. Finally, Part III suggests how the Act may be implemented to uphold the integrity of ADR processes. In particular, it addresses the selection of different forms of ADR, whether ADR should be voluntary or mandatory, the imposition of limits on the use and confidentiality of ADR, and the development of quality control mechanisms that are consistent with the purposes of ADR.

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<sup>7</sup> See *infra* Part I.D.2.

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See Jerold S. Auerbach, *Justice Without Law?* 144 (1983) (expressing fear that institutionalization of ADR could "create a two-track justice system that dispenses informal 'justice' to poor people with 'small' claims and 'minor' disputes"); Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 *Alternatives to High Costs Litig.* 65, 76 (1998) ("[S]ome judges . . . could try to use ADR programs as dumping grounds for categories of cases that are deemed unpopular, unimportant, annoying, or difficult.").

<sup>10</sup> See Menkel-Meadow, *supra* note 5, at 3 (expressing concern that ADR may become "another weapon in the adversarial arsenal" rather than functioning as true alternative to adversary system); see also Brazil, *supra* note 9, at 76 ("[P]rograms that are designed by persons whose primary concern is docket reduction could pose serious threats to . . . values that ADR should be promoting.").

<sup>11</sup> Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *Harv. L. Rev.* 668, 669 (1986) ("My principal concern is that, in our enthusiasm over the ADR idea, we may fail to think hard about what we are trying to accomplish. It is time that we reflect on our goals and come to terms with both the promise and the danger of alternatives to traditional litigation.").

## I

## DIFFERENT MODELS OF DISPUTE RESOLUTION

A clear vision of successful court ADR should guide courts as they implement the Act. ADR has different goals and serves different interests than adjudication. In evaluating a proposed or existing ADR program, court administrators should begin with an understanding of the many varieties of ADR, some of which already exist in the court system.

*A. Varieties of ADR*

ADR developed in the private sector to provide individuals and businesses with a means to obtain final resolution of their disputes without going to court.<sup>12</sup> Proponents of ADR generally cite three primary benefits that disputants obtain by resolving disputes through ADR instead of litigation.<sup>13</sup> First, ADR can achieve efficient resolution of disputes, minimizing the time to final resolution and conserving the resources of the parties and public institutions.<sup>14</sup> Second, ADR can resolve disputes amicably, avoid protracted adversarial contests and encourage cooperation.<sup>15</sup> Third, ADR can promote disputants' control over their conflicts, encouraging them to take responsibility for the methods and terms of resolution.<sup>16</sup>

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<sup>12</sup> Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 424-27 (1986). But cf. Donna Stienstra & Thomas E. Willging, *Fed. Judicial Ctr., Alternatives to Litigation: Do They Have a Place in the Federal District Courts?* 3-7 (1995), <http://www.fjc.gov/ALTDISRES/altlitig/altlitig.pdf> (noting and describing development of ADR within federal courts).

<sup>13</sup> Courts may offer ADR programs for the benefit of disputants, for the benefit of society generally, or for the benefit of the court system. See *infra* note 124 (noting purposes expressed by Congress for passage of Act).

<sup>14</sup> See Lieberman & Henry, *supra* note 12, at 427-29 (noting streamlined, flexible procedural aspects of ADR processes); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211, 225-52 (1995) (citing praise for efficiency of ADR); Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 Fla. L. Rev. 1, 3 (1985) (noting goals of reducing cost and delay and providing more effective resolution); see also *infra* Part I.D.2 (analyzing capacity of ADR processes to provide efficient determination).

<sup>15</sup> See Lieberman & Henry, *supra* note 12, at 427-29 (discussing ways in which ADR processes can build trust); Resnik, *supra* note 14, at 246-50 (citing praise for congenial tone of ADR); see also *infra* Part I.D.2 (analyzing capacity of ADR processes to provide amicable resolution). See generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994) (exploring potential for stronger relationships between disputants through mediation); Lois Gold, *Influencing Unconscious Influences: The Healing Dimension of Mediation*, 11 Mediation Q. 55 (1993) (discussing personal satisfaction and reconciliation available through mediation).

<sup>16</sup> See Baruch Bush & Folger, *supra* note 15 (exploring potential for personal empowerment through mediation); Stienstra & Willging, *supra* note 12, at 16 (stating that one

Some forms of ADR, like arbitration, are determinative—a neutral third party (the “neutral”) imposes a binding decision on the disputants.<sup>17</sup> Other forms of ADR, like mediation, are facilitative—the neutral helps the disputants negotiate an agreement.<sup>18</sup> To illustrate the differences between determinative and facilitative forms of ADR and also to illustrate the variations that are possible within each form of ADR, it is helpful to focus on the two most common forms of ADR: arbitration and mediation.<sup>19</sup>

Arbitration is designed to achieve authoritative resolution, much like adjudication.<sup>20</sup> Arbitration has been used widely in the commercial setting<sup>21</sup> by parties who wish to avoid some aspect of litigation but

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purpose of court mediation would be to promote self-determination); Lieberman & Henry, *supra* note 12, at 429-30 (explaining that involvement of clients, rather than just lawyers, can aid resolution); see also Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 *Denv. U. L. Rev.* 437, 487 (1989) (citing arguments that ADR promotes integrity and responsibility); see also *infra* Part I.D.2 (analyzing capacity of ADR processes to provide disputant control).

<sup>17</sup> For overviews of arbitration, see Leonard L. Riskin & James E. Westbrook, *Dispute Resolution and Lawyers* 502-588 (2d ed. 1997); and Tom Arnold, *Vocabulary of ADR Procedures* (Part 3), *Disp. Resol. J.*, Oct. 1996, at 74. For a definition of arbitration as used in the federal court system, see Elizabeth Plapinger & Donna Stienstra, *Fed. Judicial Ctr. & CPR Inst. for Dispute Resolution, ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 61-63 (1996). For federal court rules defining arbitration procedures, see, for example, E.D.N.Y. Civ. R. 83.10(f), (g), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.7-5(d), 83.7-6, <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; and W.D.N.Y. Civ. R. 16.2(g), (h), <http://www.nywd.uscourts.gov/document/civil.pdf>.

<sup>18</sup> For overviews of mediation, see Riskin & Westbrook, *supra* note 17, at 313-501; Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy, Practice* (1994); Tom Arnold, *Vocabulary of ADR Procedures* (Part 2), *Disp. Resol. J.*, Jan.-Mar. 1996, at 60; and Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 *S. Cal. L. Rev.* 305 (1970-71). For a definition of mediation as used in the federal court system, see Plapinger & Stienstra, *supra* note 17, at 65-67. For federal court rules defining mediation, see, for example, E.D.N.Y. Civ. R. 83.11(a), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.11-1(2), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; and S.D.N.Y. Civ. R. 83.12(a), <http://www.nysd.uscourts.gov/rules/rules.pdf>.

Mediators commonly distinguish “evaluative” mediation, in which a mediator assesses the merits of the dispute and proposes a resolution, from purely “facilitative” mediation, in which the mediator does not express any opinion on the merits or terms of resolution. Even in evaluative mediation, the mediator’s assessments are not binding, and the parties decide whether or not to settle the dispute. Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *Harv. Negot. L. Rev.* 7, 23-24 (1996).

<sup>19</sup> Cf. Elizabeth Plapinger & Donna Stienstra, *Federal Court ADR: A Practitioner’s Update*, 14 *Alternatives to High Costs Litig.* 7, 7 (1996) (noting that mediation has surpassed arbitration as primary form of ADR in federal courts).

<sup>20</sup> See Sander, *supra* note 14, at 3; see also *supra* note 17 (listing local court rules providing for arbitrators’ awards to be entered as court judgments).

<sup>21</sup> See Jason C. Blackford, *Arbitration Provisions for Business Contracts*, *Arb. J.*, Sept. 1993, at 47 (noting that lawyers include arbitration provisions in many business contracts).

want a third party to make a binding decision.<sup>22</sup> Many varieties of arbitration are available. Disputants who wish to avoid the delays and expense of litigation may opt for a form of arbitration with simple procedures.<sup>23</sup> In procedurally simple arbitration, the arbitrator may have complete discretion to structure the process and to decide what standards should govern the determination.<sup>24</sup> Disputants who want a trial-like process but wish to control some particular feature, such as the location, the qualifications of the decisionmaker, or the nationality of the decisionmaker, may opt for a form of arbitration with complex procedures.<sup>25</sup> In procedurally complex arbitration, there may be strict

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Some notable uses of arbitration are in labor disputes and international disputes. See, e.g., Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 *Cath. U. L. Rev.* 919 (1998); Soia Mentschikoff, *Commercial Arbitration*, 61 *Colum. L. Rev.* 846, 849 (1961).

<sup>22</sup> Typically, parties to a contract include a clause requiring them to submit any disputes arising from their contract or business relationship to binding arbitration. See Blackford, *supra* note 21, at 47 (quoting American Arbitration Association model arbitration clause); see also Daniel J. Guttman, Note, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation*, 12 *Ohio St. J. on Disp. Resol.* 175 (1996). Dispute resolution organizations like the American Arbitration Association provide referrals for arbitrators or directly administer arbitrations. Mentschikoff, *supra* note 21, at 856-67.

While agreements to arbitrate and arbitration awards may be challenged in court, it is difficult to avoid enforcement. The Federal Arbitration Act, which deals with arbitration of disputes involving interstate commerce, provides that agreements to submit disputes to arbitration generally are irrevocable and enforceable. 9 U.S.C. § 2 (1994). Courts do not review determinations of arbitrators on their merits but generally look to see whether arbitrators acted within their proper authority. §§ 9-11; see also Riskin & Westbrook, *supra* note 17, at 556-69 (discussing judicial review of arbitration awards).

<sup>23</sup> Cf. Carrie J. Menkel-Meadow, *Judicial Referral to ADR: Issues and Problems Faced by Judges*, FJC Directions, Dec. 1994, at 8, 8 ("Arbitration is often seen as the preferred process in cases involving monetary damages and stakes that are so modest as to make high litigation costs particularly burdensome.").

<sup>24</sup> One commentator notes that in federal court arbitration programs, the rules of evidence do not apply, arbitrators have discretion whether to hear witnesses or not, and arbitrators are not required to issue written findings or conclusions. Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 *U. Pa. L. Rev.* 2169, 2181 (1993); see also W.D.N.Y. Civ. R. 16.2(g)(2), <http://www.nywd.uscourts.gov/document/civil.pdf> (providing for informal arbitration hearing except in special circumstances). The Northern and Eastern Districts of New York provide for the arbitrator to be *guided* by the Federal Rules of Evidence. N.D.N.Y. Civ. R. 83.7-5(d), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf> ("These rules however shall not preclude the arbitrator from receiving evidence which the arbitrator considers to be relevant and trustworthy and which is not privileged."); E.D.N.Y. Civ. R. 83.10(f)(5), <http://www.nyed.uscourts.gov/localrules.pdf>.

<sup>25</sup> See Riskin & Westbrook, *supra* note 17, at 569-89 (discussing reasons to opt for arbitration); Mentschikoff, *supra* note 21, at 850-52 (same).

rules for the presentation of evidence and argument,<sup>26</sup> and the arbitrator may be required to apply the law of a particular jurisdiction.<sup>27</sup>

Mediation is designed to optimize the negotiation process and relies on the self-determination and cooperation of the parties.<sup>28</sup> The mediator helps the parties to reach a final settlement<sup>29</sup> using a procedure that is preferable to other options, such as litigation.<sup>30</sup> Mediation is commonly used where the disputants have an ongoing relationship.<sup>31</sup> Control over the outcome is in the hands of the parties;

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<sup>26</sup> William L.D. Barrett, *Arbitration of a Complex Commercial Case: Practical Guidelines for Arbitrators and Counsel*, Arb. J., Dec. 1986, at 63, 63.

<sup>27</sup> See Blackford, *supra* note 21, at 47, 48, 50 (explaining how to customize contractual arbitration provisions to designate law that arbitrators must apply).

<sup>28</sup> See Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. S5, S7 (1989) (characterizing mediation as cooperative process); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. Tex. L. Rev. 575, 584 (1997) (referring to self-determination as “bedrock” of mediation process); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47, 90 (“The controlling principle of mediation is self-determination.”). While many mediators see self-determination and cooperation as foundations of practical solutions, others see them as foundations of moral development. In particular, Robert Baruch Bush and Joseph Folger have advocated the use of mediation as a personally transformative process for disputants, who can develop self-awareness and empathy through the process of seeking resolution. Baruch Bush & Folger, *supra* note 15, at 2.

<sup>29</sup> The final agreement is not limited to restitution or compensation but can also include provisions having to do with payment arrangements, future services, changes in behavior, apology, etc., and may not necessarily even be written down. See Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 429 (1986) (noting that parties to mediation are not limited to discussion of legal issues but can develop creative resolutions); see also Deborah L. Levi, *Note, The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165 (1997) (describing when and how apology plays role in dispute resolution). At a community dispute resolution center in Manhattan operated by the nonprofit group Safe Horizon, the parties frequently opt for verbal agreements instead of written ones. Telephone Interview with Elizabeth Clemants, Director of Manhattan Mediation Center, Safe Horizon (Oct. 1, 2001). The agreement generally is binding to the extent provided by contract law, but, in certain circumstances, may become enforceable as a judgment upon approval by the judge. See *infra* notes 86, 92. The federal courts in New York that have mediation programs only require the parties to file a stipulation of dismissal upon reaching a settlement; their written agreement need not be filed with the court. E.D.N.Y. Civ. R. 83.11(b)(6), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.11-6(2), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; S.D.N.Y. Civ. R. 83.12(j), <http://www.nysd.uscourts.gov/rules/rules.pdf>.

<sup>30</sup> The concept of a best alternative to a negotiated agreement (BATNA) may be used to encourage realistic settlement. Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 100 (Roger Fisher et al. eds., 2d ed. 1991). In using a BATNA, a party assesses the available options should negotiation fail, and then is better able to identify acceptable terms of settlement. *Id.*

<sup>31</sup> Mediation has been used for disputes that occur in businesses, communities, and personal contractual or professional dealings. Riskin & Westbrook, *supra* note 17, at 354-78 (presenting examples of mediation in personal injury cases, medical malpractice, shareholder lawsuit, Native American fishing rights, and regulatory negotiations); Allan Wolk, *Divorce Mediation: Today's Rational Alternative to Litigation*, Disp. Resol. J., Jan.-Mar.

mediators manage and facilitate the process.<sup>32</sup> Mediators have wide discretion to shape the process.<sup>33</sup> A mediation session typically will begin with opening statements by the mediator and by the parties,<sup>34</sup> but the rest of the process can vary greatly depending on the approach of the particular mediator and the type of case. The length and number of sessions, how much attention is given to background or related issues, whether the mediator meets with disputants individually for part or all of the process, and whether attorneys are involved, all may vary.<sup>35</sup>

There are many recognized forms of ADR that are based on either the determinative model, the facilitative model, or a combination of the two, and there are seemingly infinite variations on each form of ADR.<sup>36</sup> Some common forms of ADR are mini-trials,<sup>37</sup> summary jury

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1996, at 39, 39 (promoting use of divorce mediation). Mediation may be valuable for disputants who have an ongoing relationship because they have some experience communicating with each other or because they may wish to avoid hostility, create resolutions based on ongoing mutual-benefit arrangements, or deal with possible future conflicts. Fuller, *supra* note 18, at 311-12.

<sup>32</sup> During the mediation session, the mediator encourages the disputants to communicate openly, identify their shared interests, and work together to identify solutions. Kimberlee K. Kovach, *Mediation: Principles and Practice* 17 (1994); Riskin & Westbrook, *supra* note 17, at 337-41. The mediator is not supposed to give legal advice. Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 *Harv. Negot. L. Rev.* 87, 90 n.14 (1997); cf. S.D.N.Y. Civ. R. 83.12(a), <http://www.nysd.uscourts.gov/rules/rules.pdf> ("[The mediator] directs settlement discussions but does not evaluate the merits of either side's position or render any judgments.").

<sup>33</sup> Plapinger & Stienstra, *supra* note 17, at 61.

<sup>34</sup> Kovach, *supra* note 32, at 82-91.

<sup>35</sup> Plapinger & Stienstra, *supra* note 17, at 61; Suzanne J. Schmitz, *What Should We Teach in ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 *Harv. Negot. L. Rev.* 189, 203 (2001) (noting "division within the mediation community as to whether lawyers should participate in mediation"); see also E.D.N.Y. Civ. R. 83.11(a), (b)(5), (c), <http://www.nyed.uscourts.gov/localrules.pdf> (leaving room for variation in mediator techniques, attendance by parties, and conduct of mediation sessions); N.D.N.Y. Civ. R. 83.11-5(3), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf> (allowing for separate meetings with each party); S.D.N.Y. Civ. R. 83.12(a), (j), <http://www.nysd.uscourts.gov/rules/rules.pdf> (requiring presence of attorney at first meeting).

<sup>36</sup> For examples of some recognized forms of ADR, see *infra* notes 37-42 and accompanying text, and see generally Arnold, *supra* note 18; Arnold, *supra* note 17; 1 Edward A. Dauer, *A Manual of Dispute Resolution* § 5 (1994); and Riskin & Westbrook, *supra* note 17. For surveys of the forms of ADR used in federal and state court systems, see Plapinger & Stienstra, *supra* note 17, at 71-308; and Eileen Barkas Hoffman, *The Impact of the ADR Act of 1998*, *Trial*, June 1999, at 30, 32.

<sup>37</sup> During a mini-trial, lawyers for each side present a synopsis of their case, through argument and sometimes through key witnesses and documents. The parties, along with a neutral legal expert, listen to the presentation and then begin negotiations. Tom Arnold, *Vocabulary of ADR Procedures* (Part 4), *Disp. Resol. J.*, Summer 1997, at 81, 81-82; Riskin & Westbrook, *supra* note 17, at 647-56; see also Plapinger & Stienstra, *supra* note 17, at 63 (describing mini-trial in federal courts).



trials,<sup>38</sup> early neutral evaluation,<sup>39</sup> facilitation,<sup>40</sup> settlement conferences,<sup>41</sup> and "med-arb."<sup>42</sup> ADR organizations and practitioners continue to experiment and to design new procedures to accommodate particular needs.<sup>43</sup>

Since there exists such great flexibility in ADR processes, courts can design their programs in a wide variety of ways. It would be easy, and unfortunate, for court administrators to fall into the familiar habits of adjudicative procedure in designing ADR procedure. Instead, court administrators should understand the unique goals of ADR so that they thoughtfully may design ADR programs that provide unique benefits.

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<sup>38</sup> In a summary jury trial, lawyers for both sides present a particular aspect of the case, for example, key witnesses or the issue of damages, to a sample jury panel, which renders a decision. This device is intended to aid the lawyers in evaluating the likely outcome in court so that they can discuss settlement realistically. Tom Arnold, *Vocabulary of ADR Procedures* (Part 1), *Disp. Resol. J.*, Oct.-Dec. 1995, at 69, 72, 78; Riskin & Westbrook, *supra* note 17, at 610-21; see also Plapinger & Stienstra, *supra* note 17, at 67-69 (describing summary jury trial in federal courts).

<sup>39</sup> In early neutral evaluation, the lawyers present their cases to a legal expert, who predicts, based on other cases, what the outcome will be in court. The expert's prediction is supposed to focus subsequent settlement negotiations. Arnold, *supra* note 38, at 69, 71-72; see also N.D.N.Y. Civ. R. 83.12-1, <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf> (defining process of early neutral evaluation as used in Northern District of New York); Plapinger & Stienstra, *supra* note 17, at 63-65 (describing early neutral evaluation in federal courts).

<sup>40</sup> Facilitation provides a forum for discussion of disputes that involve an entire community, for example, a neighborhood or a school. The purpose of facilitation is to bring out the concerns of various groups, to generate ideas, and to encourage decisionmakers to commit to plans that accommodate the involved parties. Arnold, *supra* note 18, at 60, 60-61; see also Brett A. Williams, Comment, *Consensual Approaches to Resolving Public Policy Disputes*, 2000 *J. Disp. Resol.* 135 (exploring value of facilitation in resolving public disputes concerning, for example, construction of prison or municipal power plant).

<sup>41</sup> Judges conduct settlement conferences in court to encourage the parties to talk seriously about possible settlements. See generally Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 *Ohio St. J. on Disp. Resol.* 1 (1987); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 *UCLA L. Rev.* 485 (1985). For a description of settlement conferences in federal courts, see Plapinger & Stienstra, *supra* note 17, at 65.

<sup>42</sup> In "med-arb," mediation and arbitration are combined. The parties try to reach agreement through mediation, and if they fail, the mediator or another third party makes a binding decision. Arnold, *supra* note 18, at 62-63.

<sup>43</sup> See Plapinger & Stienstra, *supra* note 17, at 61 (noting "procedural flexibility inherent in many ADR processes"); Riskin & Westbrook, *supra* note 17, at 337-54 (describing diversity of mediation processes); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 *Harv. Negot. L. Rev.* 71, 72-75 (1998) (noting vigorous debate about whether mediation should be evaluative or facilitative); see also *infra* note 53 (mentioning arbitration procedures developed by American Arbitration Association, International Chamber of Commerce, and other organizations).

### *B. The Public-Service and the Customer-Service Paradigms*

The paradigms of alternative dispute resolution and adjudication are distinctly different.<sup>44</sup> These two paradigms of dispute resolution may be termed the “public-service model” and the “customer-service model.”<sup>45</sup> The procedural characteristics of adjudication and ADR demonstrate that they are designed to serve the interests of two different constituencies: the public and the customer respectively. The hallmarks of adjudication—uniformity and transparency—allow for the imposition of legal standards and appellate review. These characteristics in turn make judges responsive to public interests, by limiting individual discretion and requiring compliance with common norms and public laws. On the other hand, the hallmarks of ADR are flexibility and privacy. These characteristics make neutrals responsive primarily to customers—the disputants.<sup>46</sup>

Various formal procedures help adjudication serve public interests.<sup>47</sup> Court decisions are supposed to be consistent with objective legal standards that are applied consistently to individual cases.<sup>48</sup> Legal standards are announced publicly and reflect social values. Each judge’s discretion is limited; decisions that deviate from the law can be appealed and modified. Requirements of public access and publica-

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<sup>44</sup> Carrie Menkel-Meadow contends that the foundations of the adversary system—“objectivity, neutrality, argument by opposition and refutation, appeals to common and shared values and fairness”—reflect different notions of truth and justice than the postmodern, multicultural foundations of ADR. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. Inst. for Study Legal Ethics 49, 49-53 (1996).

<sup>45</sup> Although the conceptual difference between adjudication and ADR has not been characterized in precisely these terms before, scholars have noted that adjudication focuses on public interests, while ADR focuses on disputants’ interests. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663, 2669 (1995) (“[T]hose who privilege adjudication focus almost exclusively on structural and institutional values . . . . [Those who privilege ADR] care more about the people actually engaged in disputes . . . .”); Silbey & Sarat, *supra* note 16, at 472-96 (describing emphasis on publicly asserted “rights” in legal field and emphasis on parties’ “interests” and “needs” by ADR proponents); see also Kovach, *supra* note 4, at 939 (noting different objectives of mediation and litigation).

<sup>46</sup> This Section does not attempt to pinpoint what the interests of the public and the interests of disputants are; rather, it seeks to explain how adjudication and ADR are designed to be responsive to those respective interests, whatever they may be.

<sup>47</sup> See Owen M. Fiss, *Comment, Against Settlement*, 93 Yale L.J. 1073, 1085 (1984) (explaining that, in adjudication, public officials interpret public texts pursuant to publicly defined power); David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2621-40 (1995) (exploring public benefits of adjudication and explaining how public, objective adjudication expresses public values).

<sup>48</sup> See Fiss, *supra* note 47, at 1085 (arguing that adjudication serves to “bring reality into accord” with “the values embodied in authoritative texts”); Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 32-33 (1986) (explaining how adjudication compels individuals to adhere to general legal standards).

tion apply to many aspects of adjudication, from evidentiary hearings to legal decisions. In sum, adjudicative procedures assure public accountability by requiring judges' decisions to conform to public values and by ensuring compliance through public disclosure and rights of appeal.

By comparison, ADR's flexibility and privacy allow it to respond to disputants' varied interests. Disputants can consider a wide variety of ADR processes and choose one that best suits their needs,<sup>49</sup> and an ADR neutral often can modify the process to handle a particular dispute.<sup>50</sup> Outcomes reached through ADR may be tailored to particular circumstances<sup>51</sup> and may be based on personal conceptions of fairness (which frequently are influenced by the law).<sup>52</sup> Occasionally, the parties, or an ADR organization chosen by the parties, may indicate in advance what standards should apply.<sup>53</sup> ADR sessions are conducted in private, and disclosures made during the session, and even the resolution itself, often are confidential.<sup>54</sup> Privacy benefits disputants directly, by making them more comfortable and by protecting sensitive information, which in turn can facilitate frank, exploratory settlement discussions.<sup>55</sup> Privacy also makes flexibility possible,

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<sup>49</sup> See sources cited *supra* note 36 (discussing some recognized forms of ADR).

<sup>50</sup> See *supra* note 24 and accompanying text (discussing flexible process in simple arbitration); *supra* note 33 and accompanying text (discussing flexible process in mediation).

<sup>51</sup> See Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin*, 1993 J. Disp. Resol. 1, 4 ("ADR . . . allow[s] participants to express their underlying interests and tailor both process and outcome to their individual needs.").

<sup>52</sup> See Silbey & Sarat, *supra* note 16, at 487 ("In contrast to legal procedures which instantiate rights . . . ADR relies less upon well-defined rules [or] standards . . . and more explicitly upon the integrity and sense of responsibility of the participants."); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979) (proposing that law provides framework within which disputants construct settlements).

<sup>53</sup> Blackford, *supra* note 21, at 48, 50. The American Arbitration Association and other organizations have formulated standard procedures for the arbitration of various types of disputes. *Id.* at 48; Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 Wm. Mitchell L. Rev. 941, 962 (1996) (discussing rules of arbitration formulated by International Chamber of Commerce, International Arbitration Forum, and United Nations Commission on International Trade Law).

<sup>54</sup> Riskin & Westbrook, *supra* note 17, at 488-98; Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 1022-25 (1988) (discussing statutes that protect confidentiality of mediation); Hoffman, *supra* note 36, at 32, 34 n.17 (asserting that confidentiality is critical feature of ADR and noting emergence of case law recognizing confidentiality of ADR); see also 28 U.S.C. § 652(d) (Supp. V 2000) ("[E]ach district court shall, by local rule . . . , provide for the confidentiality of alternative dispute resolution processes . . .").

<sup>55</sup> Menkel-Meadow, *supra* note 45, at 2682-87 ("Free, open, and candid Search Term End assessments of claims and offers of settlement on both conventional and more creative 'problem-solving' bases are not likely to occur in the public eye for a number of reasons.").

by ensuring that the process is responsive to participants rather than outsiders and allowing for discretionary decisionmaking.<sup>56</sup> Possibilities for judicial review of ADR outcomes are limited.<sup>57</sup> Thus, neutrals in ADR are accountable only to the disputants.

This characterization of ADR as based on customer service, and of adjudication as based on public service, risks oversimplification. While ADR *primarily* serves disputants' interests, it also benefits society,<sup>58</sup> for example, by channeling conflict in a civil, ordered way; and while adjudication *primarily* serves public interests, it also benefits litigants,<sup>59</sup> for example, by providing resolution. The public-service paradigm and the customer-service paradigm are compatible, not hostile.<sup>60</sup> Therefore, ADR and adjudication are capable of working in tandem to serve the interests of both the public and disputants. The main point is that ADR and adjudication are designed primarily to be accountable to different groups, and their procedures reflect this distinction.

### C. *Reconciling Conflicting Notions of Justice*

The prioritization of disputant interests over public interests in ADR may cause concern that ADR provides its benefits at the cost of

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<sup>56</sup> If ADR processes were open to the public, then outsiders might pressure the neutral to handle the case in a certain way. Of course, there are important concerns about abuses of power by neutrals. For a discussion of these concerns and suggestions about how to deal with them in ways appropriate for ADR, see *infra* Part III.D.

Resolutions created through ADR are not designed to serve as public precedent. For a discussion of the inability of settlements to produce valuable precedent, see Jules Coleman & Charles Silver, *Justice in Settlements*, 4 Soc. Phil. & Pol'y 102, 114-19 (1986).

<sup>57</sup> See *supra* notes 22, 29 (discussing review of ADR outcomes).

<sup>58</sup> See Stienstra & Willging, *supra* note 12, at 16 (describing how court mediation would serve "critical public values" by teaching cooperative problem solving to litigants).

<sup>59</sup> See *id.* at 13 ("A core function of the courts as public institutions is to serve the needs of individual litigants and thereby to maintain public confidence in society's capacity for peaceful dispute resolution.").

<sup>60</sup> Apart from the question of whether these two paradigms are hostile or compatible is the question whether they will eventually be transformed by each other or will retain their distinct characteristics. See Menkel-Meadow, *supra* note 44, at 74 ("Adversarialism is so powerful a heuristic and organizing framework for our culture, that like a great whale, it seems to swallow up any effort to modify it or transform it."); Resnik, *supra* note 14, at 253-61 (contending that institutional acceptance of ADR is emblematic of changing attitudes about adjudication); *id.* at 262-63 ("As courts make ADR their own, that formalization may well undermine the very attributes of ADR that prompted its praise."); see also Auerbach, *supra* note 9, at 145-46 (expressing skepticism that ADR can gain acceptance as alternative mechanism to provide justice because American culture expresses values of individual self-interest which run contrary to communitarian ethic of ADR); Silbey & Sarat, *supra* note 16, at 438-39 (arguing that ADR perspective enriches, rather than displaces, traditional legal perspective).

justice.<sup>61</sup> Defining "justice" is a necessary first step toward evaluating this claim. Most definitions relate to the law and therefore to the adjudication paradigm.<sup>62</sup> For this reason, ADR might appear to be incapable of serving justice. A careful examination of what justice means in practice, however, shows that ADR can be as just as adjudication and that integration of ADR into the court system will not sacrifice justice. The following discussion will focus on three different meanings of justice expressed in arguments by proponents and critics of ADR.

First, justice can mean equal treatment of all parties to a dispute. Critics of ADR who are concerned with the effect of power and status on dispute resolution processes have argued that informality may disadvantage already powerless groups, such as minorities, women, and the poor.<sup>63</sup> They suggest that privacy and flexibility exacerbate power disparities by removing social inhibitions and institutional protections.<sup>64</sup>

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<sup>61</sup> Some commentators imply that there is a trade-off between efficiency and justice in ADR processes. See, e.g., Stienstra & Willging, *supra* note 12, at 10-11 (cautioning that efficiency should not be primary concern for courts when they consider implementing ADR programs and urging courts to ensure fair procedures in ADR); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *Fordham L. Rev.* 1, 10 (1990) (calling upon courts to make use of ADR to reduce cost and delay but cautioning that ADR programs should meet standards of justice).

<sup>62</sup> See *Black's Law Dictionary* 868 (7th ed. 1999) ("Just . . . Legally right; lawful; equitable."); Fiss, *supra* note 47, at 1085-87 (arguing that adjudication serves justice in way that settlement cannot). Of course, advocates of ADR do not contend that ADR does not serve justice. Rather, they attempt to reconceptualize justice, emphasizing the experience of individual disputants instead of objective, public standards. See Andrew W. McThenia & Thomas L. Shaffer, *Comment, For Reconciliation*, 94 *Yale L.J.* 1660, 1665 (1985) ("[Many advocates of ADR] assume not that justice is something people get from the government but that it is something people give to one another."). Carrie Menkel-Meadow challenges the notion that adjudication always serves justice better than settlement and points out how ADR can serve different justice interests, such as party choice and participation. Menkel-Meadow, *supra* note 44, at 2687-91.

<sup>63</sup> See Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *The Politics of Informal Justice: The American Experience* 267, 280-95 (Richard L. Abel ed. 1982) (arguing that informal processes disadvantage underprivileged); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *Wis. L. Rev.* 1359 (arguing that informality of ADR magnifies power imbalances and fosters prejudice); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1545 (1991) (warning that mediation can pose particular dangers to women); see also David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 *Phil. & Pub. Aff.* 397, 398, 407-10 (1985) (raising problem of ensuring fairness of outcomes reached through informal negotiation).

<sup>64</sup> See Delgado et al., *supra* note 63, at 1387-89 (arguing that prejudiced persons are least likely to express their racial attitudes in formal settings, where institutional traditions and rules of procedure govern interactions). But cf. Richard Delgado & Jean Stefaniec, *Failed Revolutions: Social Reform and the Limits of Legal Imagination* 105-11 (1994) (arguing that objectivity of courtroom settings tends to suppress minority viewpoints).

It is not at all clear that informal processes like ADR disadvantage weaker groups any more than formal processes like adjudication. While formality may encourage people to be on their "best" behavior and to play by the rules, it also poses its own barriers to "justice"—adjudication rewards those with expert knowledge of the law, or the means to hire attorneys, and those who are familiar with social etiquette in formal, professional settings.<sup>65</sup> Furthermore, much of litigation, such as discovery and settlement talks,<sup>66</sup> happens outside of the presence of a judge and therefore lacks the leveling influence of a neutral third party. Also, even when a judge is present, some parts of litigation still are informal and do not take place in the courtroom, or on the record, and thus are vulnerable to the criticisms leveled at ADR.<sup>67</sup> Finally, differences in power and status will warp any social structure or process,<sup>68</sup> including adjudication.<sup>69</sup> While both the neutral in ADR proceedings and the judge in adjudications should try to level the playing field, or at least overlook differences in power, it is questionable whether this effectively happens or whether it even is possible.<sup>70</sup> Whether informal ADR or formal adjudication is a better forum for the disadvantaged may depend primarily on the people who serve in the judiciary or as ADR neutrals.

Second, "justice" can mean satisfaction of public interests. Critics of ADR, who are concerned with the public interest in the resolution of disputes, have argued that disputant satisfaction may camouflage serious injustice from public view.<sup>71</sup> Social activists who want to ensure that "justice" is done may distrust individual disputants and ADR neutrals to uphold public standards. By contrast, a third mean-

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<sup>65</sup> See The Honorable Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 *Yale L. & Pol'y Rev.* 479, 484-88 (1998) (arguing that formality of adjudication and necessity of expertise in litigation give lawyers effective monopoly and deny access to many poor and middle class persons).

<sup>66</sup> See *infra* note 83 (discussing use of settlement in litigation).

<sup>67</sup> For example, in the Southern District of New York, conferences between the judge and the parties in civil cases typically are not transcribed and often take place in the judge's robing room or sometimes via teleconference from chambers. Interview With the Honorable Charles S. Haight, Senior District Judge for the Southern District of New York (Sept. 28, 2001).

<sup>68</sup> See Delgado & Stefancic, *supra* note 64, at 105-12 (exploring effects of power in social process); see also Steven L. Winter, *The "Power" Thing*, 82 *Va. L. Rev.* 721, 793-819 (1996) (analyzing conception of power as dynamic feature of social process).

<sup>69</sup> See Delgado & Stefancic, *supra* note 64, at 23-36 (discussing unjust treatment of minorities in some infamous court rulings).

<sup>70</sup> See Auerbach, *supra* note 9, at 144-45 (acknowledging that both ADR and adjudication "can be discretionary, arbitrary, domineering—and unjust").

<sup>71</sup> Fiss, *supra* note 47, at 1085 (arguing that settlements can secure "peace" without "justice"). In Fiss's view, adjudication implicates public, rather than exclusively private, interests. *Id.* at 1089.

ing of justice is the satisfaction of disputants' interests.<sup>72</sup> Advocates of this meaning of justice contend that the use of ADR poses no threat to the justice system.<sup>73</sup>

Concerns over public accountability go to the heart of whether ADR and, in particular, the customer-service model of dispute resolution, belong in the justice system at all.<sup>74</sup> The simplistic answer to this question is that Congress decided when it passed the Act that ADR, and the principles it stands for, should play a significant role in the courts.<sup>75</sup> The more nuanced answer is that the customer-service paradigm and the public-service paradigm are inherently compatible and that court programs must balance the two, rather than choose.<sup>76</sup>

This Note adopts the position that ADR, working within the court system, can do justice by serving both public and private interests. It is desirable for public institutions such as the courts to be accountable to individuals who use their services as well as to the general public.<sup>77</sup> ADR in the courts primarily should serve disputant interests, while accommodating public interests in certain respects. The public has an interest in knowing how courts are handling cases and in making sure that courts are resolving cases in accordance with certain standards.<sup>78</sup> Courts should be wary, however, of undermining the effectiveness of ADR through excessive accommodations.<sup>79</sup> To force ADR to submit to the public-service paradigm would, in effect,

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<sup>72</sup> See *supra* note 60. For the sake of clarity, this Note will use the term "fairness" to capture the first meaning of justice (equal treatment of all parties), will refer specifically to satisfaction of public interests when evoking the second meaning of justice, and will use the term "quality" to capture the third meaning of justice (satisfaction of disputant interests) and to describe ADR programs that successfully implement the customer-service paradigm.

<sup>73</sup> See *id.*

<sup>74</sup> See Nolan-Haley, *supra* note 28, at 49 (1996) ("When mediation occurs in court . . . What happens to law? To justice? Do they collapse in the experience of self-determination?"); see also Stienstra & Willging, *supra* note 12 (examining arguments for and against inclusion of ADR in federal court system).

<sup>75</sup> See *infra* Part II (discussing legislative history of ADR Act).

<sup>76</sup> See *supra* Part I.B (exploring tension between customer-service paradigm and public-service paradigm).

<sup>77</sup> See generally Michael K. Travers, ADR: Important Options for Municipal Government, 24 Colo. Law. 1279 (1995) (arguing that municipal governments should offer ADR in order to promote good community relations).

<sup>78</sup> See Andre R. Imbrogno, Note, Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument of Social Oppression?, 14 Ohio St. J. on Disp. Resol. 855, 871 (1999) (contending that public has strong interest in resolution of cases by courts, particularly domestic abuse cases).

<sup>79</sup> See Edward F. Sherman, Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?, 46 SMU L. Rev. 2079, 2087 (1993) ("[R]espect for the process objectives of ADR is a necessary principle of its integration into the litigation system. It may be necessary for courts, at times, to alter their usual procedures in order to insure that ADR objectives are not compromised.").

transform ADR into adjudication.<sup>80</sup> The challenge, then, is to delineate the role of ADR and to design ADR processes in ways that uphold the integrity of both ADR and adjudication, thus serving justice in all its forms.

Making a place for ADR in the court system will be facilitated by the ways the adjudicatory model already tempers its public-oriented justice with important elements of disputant control. The structure of litigation strikes a balance between public determination and disputant control, and ADR can operate within this framework to provide better service to disputants. In civil cases, individual disputants<sup>81</sup> have the power to decide whether or not to institute litigation, and therefore innumerable disputes are not even brought to court.<sup>82</sup> Also, because disputants have the power to settle their cases, most cases filed in court are not ultimately resolved through adjudication.<sup>83</sup> Settlement negotiations need not happen in public or even under court supervision.<sup>84</sup> While disputants' settlements often may be influenced by expected outcomes of adjudication,<sup>85</sup> the settlements can be valid even if they vary from expected legal outcomes.<sup>86</sup> Where the public interest in a case is especially strong, like in criminal cases and certain

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<sup>80</sup> Some commentators argue that essentially all the principal features of litigation must be imposed on ADR, such that it is difficult to imagine what unique qualities ADR would retain. See Delgado et al., *supra* note 63, at 1403 (suggesting that likelihood of unfairness in ADR could be reduced "by providing rules that clearly specify the scope of the proceedings and forbid irrelevant or intrusive inquiries, by requiring open proceedings, and by providing some form of higher review"); Leonidas Ralph Mecham, *Judicial Conference of the U.S., The Civil Justice Reform Act of 1990: Final Report*, 175 F.R.D. 62, 109 (1997) (citing as minimum requirements for quality justice: "a fair statement of the claim, reasonable notice to affected parties, discovery and development of evidence, skilled advocacy and presentation of the best legal position, and a principled decision after analysis and reflection").

<sup>81</sup> The government acts as an "individual disputant" when it institutes a civil suit.

<sup>82</sup> See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y Rev.* 631, 633-37 (1980-1981) (contending that vast numbers of grievances are never transformed into claims).

<sup>83</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. Rev.* 4, 26-28 (1983) (discussing empirical studies showing that "the vast majority [of disputes taken to court] are disposed of by abandonment, withdrawal, or settlement, without full-blown adjudication and often without any authoritative disposition by the court"); see generally Menkel-Meadow, *supra* note 45 (exploring role of settlement in party-initiated legal system).

<sup>84</sup> This aspect of adjudication has been criticized. See Luban, *supra* note 47, at 2648-58 (criticizing secrecy of settlements).

<sup>85</sup> Mnookin & Kornhauser, *supra* note 52 (proposing that law provides framework within which disputants construct settlements).

<sup>86</sup> Mediation agreements are enforceable not as approximations of legal judgment but rather as contracts. Riskin & Westbrook, *supra* note 17, at 4.



types of civil matters, the government has the authority to bring the case to court as a party, but even those cases need not be resolved through adjudication.<sup>87</sup>

ADR functions within the sphere of disputant self-determination that already exists in the court system. It gives litigants no measure of control that they do not have under adjudication. Therefore, ADR programs do not undermine the justice system's current commitment to serving public interests.

Some critics of ADR may protest that the public interest in conflict resolution is so strong that settlements should never be encouraged<sup>88</sup> and that incorporating ADR into the court system makes a bad situation even worse. This argument is divorced from reality.<sup>89</sup> First, private resolution of disputes is necessary. Full adjudication of all cases filed in court, let alone all conflicts that arise,<sup>90</sup> is not feasible given limited public resources.<sup>91</sup> Second, private resolution of disputes through court ADR may serve public interests *better* than resolution through unsupervised settlement. If parties are going to settle on their own, ADR can provide the courts a way of supervising that process and promoting fair dealing and justice.<sup>92</sup>

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<sup>87</sup> The government, like a private plaintiff, may settle a lawsuit. See generally George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857 (2000) (chronicling rise of plea bargaining in United States); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements With the Federal Government*, 40 Stan. L. Rev. 203 (1987) (addressing impact of government settlements of lawsuits on policymaking).

<sup>88</sup> Fiss, *supra* note 47, at 1075 (challenging advocates of ADR and proclaiming that "settlement . . . should be neither encouraged nor praised").

<sup>89</sup> See Luban, *supra* note 47, at 2619-20 (reviewing Fiss's arguments and finding them attractive but unrealistic).

<sup>90</sup> See Felstiner, Abel & Sarat, *supra* note 82, at 633-37 (describing stages of disputing, beginning with vast quantity of "unperceived injurious experience[s]" and proceeding to smaller number of articulated claims).

<sup>91</sup> The federal courts already are overburdened with mounting caseloads. See Kaufman, *supra* note 61, at 2-9 (discussing causes of increased judicial docket pressures). Any further increase in court dockets without increased resources would seem to result necessarily in either greater delays for litigants or a decrease in the quality of adjudication. See Luban, *supra* note 47, at 2642-46 (exploring how higher rates of adjudication could lead to poor decisional law).

<sup>92</sup> Furthermore, in circumstances where judges are required by law to approve parties' settlements, judges presumably also would have to approve agreements reached through ADR. In the federal courts, judges must approve settlements of bankruptcies, class actions, and shareholder derivative suits. Alyson M. Weiss, *Federal Jurisdiction to Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6)*, 10 Cardozo L. Rev. 2137, 2141 n.23 (1989). In state courts, judges typically must approve divorce settlements. See Timothy B. Walker & Linda H. Elrod, *Family Law in the Fifty States: An Overview*, 26 Fam. L.Q. 319, 417-19 (1993) (reviewing state cases dealing with separation agreements).

### *D. Evaluating ADR Programs*

Once administrators understand how ADR and the customer-service paradigm serve justice, they will be prepared to design successful ADR programs and accommodate public interests in sensible ways. In keeping with the customer-service paradigm of justice, court administrators should learn how to evaluate the quality of ADR programs from the perspective of disputants. Desired benefits of ADR are not available to the same extent in all forms of ADR, and different forms of ADR are susceptible to different pitfalls. This Section first will explore the notion of disputant satisfaction with dispute resolution processes generally and then will assess the capability of ADR processes to provide particular benefits to disputants.

#### *1. Disputant Satisfaction*

Because ADR and adjudication have different purposes, they call for different standards of success. The sign of successful adjudication, in the public-service paradigm, may be that the process and outcome satisfy social expectations. This is an objective standard: It is external and not individualized.<sup>93</sup> ADR should be evaluated primarily by a standard more appropriate to the customer-service paradigm—one that measures whether *disputants'* expectations as to process and outcome have been satisfied.<sup>94</sup>

Two considerations are paramount in assessing whether an ADR process serves disputants well: disputants' role in the process, and the behavior of the neutral. The importance of these considerations is demonstrated by research on disputants' perceptions of dispute resolution processes. Social psychologists have found that disputants consider certain factors to be equally or more important than the favorability of the outcome: their level of participation in the process, the trustworthiness of the third party, interpersonal respect between the disputants and the third party, and the neutrality of the third

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<sup>93</sup> See E. Allen Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 3-4 (1988) (defining objective procedural justice as capacity of process to conform to normative standards).

<sup>94</sup> The term "fairness" is frequently used in place of "justice" as a measure of successful process in studies of disputants' experiences, suggesting a subjective emphasis on personal attributes such as neutrality. See Lind & Tyler, *supra* note 93, at 3-4 (equating subjective procedural justice with perception of fairness); see also Black's Law Dictionary 615 (7th ed. 1999) ("Fair . . . 1. Impartial; just; equitable; disinterested. . . . 2. Free of bias or prejudice . . ."). One social scientist, drawing from studies of disputant satisfaction in ADR and in adjudication, has argued that courts could be more effective and improve their public image if they paid attention to fairness as well as justice. Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 *Am. J. Comp. L.* 871 (1997).

party.<sup>95</sup> Court administrators should consider these factors carefully when they design and evaluate ADR programs.

Levels of disputant satisfaction with dispute resolution processes correlate with how much of a participatory role disputants are given. Studies have shown that disputants are highly satisfied with mediation (where parties present their positions and engage in negotiation),<sup>96</sup> moderately satisfied with adversarial processes (where lawyers present the parties' positions and the parties testify),<sup>97</sup> minimally satisfied with inquisitorial processes (where the presiding official solicits information),<sup>98</sup> and unsatisfied with processes such as settlement conferences (where disputants' lawyers negotiate before the judge without the disputants being present).<sup>99</sup> These results are not surprising given the characteristics of each of the processes. Mediation is designed to encourage free expression and self-determination by the parties.<sup>100</sup> In an adversarial process (adjudication and some arbitrations), the disputants can testify and observe the whole process, and they or their lawyers can present evidence and cross-examine the opposing side, but they have no control over the outcome.<sup>101</sup> In an inquisitorial process (some arbitrations and trials in civil law countries), disputants have no right to present their cases or to cross-examine, but rather must respond to the neutral's requests.<sup>102</sup> Finally, in a settlement conference, the parties have no direct role in the process.<sup>103</sup> Court administrators can provide meaningful disputant participation when they select

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<sup>95</sup> Tyler, *supra* note 94, at 887-92; see also Lind & Tyler, *supra* note 93 (exploring how factors other than outcome influence perceptions of justice in social process); Tyler, *supra* note 94, at 878-92 (surveying several studies of disputant satisfaction and procedural fairness).

The first of these factors has to do with disputants' role in the process. The other factors have to do with the behavior of the neutral—both how she presents herself and the tone she establishes in the process. It also could be said that interpersonal respect has to do with the disputants' role in the process, but insofar as disputants' respect for each other is not the result of the ADR process, it can be disregarded for purposes of evaluating the ADR process. The neutral's demonstration of respect for the parties, and her efforts to encourage the parties to treat each other with greater respect, are the important considerations.

<sup>96</sup> Tyler, *supra* note 94, at 879, 888-89.

<sup>97</sup> *Id.* at 888.

<sup>98</sup> *Id.* at 889.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 888.

<sup>101</sup> See generally Hyun Song Shin, *Adversarial and Inquisitorial Procedures in Arbitration*, 29 *Rand J. Econ.* 378 (1998) (comparing inquisitorial process with adversarial process using game-theory model).

<sup>102</sup> Tyler, *supra* note 94, at 889 (discussing civil-justice system in France as example of inquisitorial process). See generally Shin, *supra* note 101.

<sup>103</sup> Tyler, *supra* note 94, at 889.

processes to include in the court ADR program, and when they set standards for the conduct of those processes.

Factors related to the behavior of the neutral may seem harder to control than the level of disputant participation afforded in an ADR process, but they can and should be addressed in court-administered ADR programs as well. ADR neutrals must be capable of establishing an atmosphere of respect and of convincing the parties of their trustworthiness and neutrality. Furthermore, neutrals must foster disputant participation within any given process.<sup>104</sup> In the private sector, the neutral's desire to gain further business and earn the respect of partners and colleagues motivates her to serve disputants' interests well and guards against the abuse of authority. Furthermore, disputants who seek out ADR in the private sector are likely to be informed about the process and able to assert their interests. On the other hand, when neutrals are appointed by a court,<sup>105</sup> disputants may be less informed about ADR processes; therefore, special safeguards are necessary in court programs.<sup>106</sup> In order for court ADR programs to serve disputants well, administrators must be able to ensure that neutrals are performing their roles effectively.

## 2. *Desired Benefits*

Merely calling a program ADR does not provide any benefits to disputants. Arbitration is geared primarily toward authoritative determination, whereas mediation relies primarily on self-determination and cooperation,<sup>107</sup> the two processes provide different benefits to different extents. Furthermore, variations on each form of ADR and the

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<sup>104</sup> An arbitrator can give the disputants wide latitude to present their cases or can take an inquisitorial approach. Shin, *supra* note 101, at 379. A mediator may adopt an inquisitorial style, may effectively eliminate issues from discussion by ignoring them, or may push her own suggestions rather than soliciting the parties' ideas. Even though mediators do not make binding determinations, they can coerce agreements, although such behavior is discouraged. See Sherman, *supra* note 79, at 2085-86 (indicating that judges, as mediators, can "coerce" settlements); see also Auerbach, *supra* note 9, at 144-45 (recognizing that both ADR neutrals and judges can be "discretionary, arbitrary, domineering—and unjust"); cf. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 *Wis. L. Rev.* 631, 631-32 (suggesting that increases in pretrial process have diminished ability of appellate courts to review cases and warning of danger of "petty local judicial Caesars . . . operating beyond the bounds of accountability").

<sup>105</sup> See Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 *Ohio St. J. on Disp. Resol.* 715, 747-50 (1999) (describing methods for appointment of neutrals by courts).

<sup>106</sup> Cf. Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, *Disp. Resol. Mag.*, Spring 2001, at 18 (noting that agreements to arbitrate imposed by large corporations in adhesion contracts destroy "free market mechanism that ensured fairness and neutrality").

<sup>107</sup> See *supra* Part I.A (describing arbitration and mediation).

risks to which each process is susceptible can affect the benefits that parties can obtain. Court administrators should be aware of the relationship between desired benefits and procedural features so that they may ensure that ADR programs offer a real alternative to litigation. The following analysis will focus on the three desired benefits identified previously—efficient determination, amicable resolution, and disputant control—and will attempt to link those benefits to various procedural features of ADR processes.<sup>108</sup>

First, procedural features that advance the goal of efficient determination<sup>109</sup> are simplified process, speedy determination, finality (no appeals), and pragmatic solutions. Each of these features should decrease the time to final resolution, decrease the expense of the process, or increase the value of the resolution to the parties. Mediation can be fast and simple, and can permit pragmatic solutions, but it also can result in no resolution at all. Simple arbitration guarantees speedy, final determination, while procedurally complex arbitration may not be any simpler or faster than litigation. Finally, if disputants do not respect the final determinations reached through ADR, then enforcement proceedings<sup>110</sup> may reduce any efficiency gains.

Second, features of ADR that encourage cooperation and avoid long, drawn-out battles advance the goal of decreased antagonism.<sup>111</sup> Mediation's collaborative approach can decrease antagonism and foster cooperation and mutual understanding. On the other hand, it is questionable whether arbitration is any less adversarial than litigation. It may be that questioning by the arbitrator, in place of objections and cross-examination by attorneys, does limit antagonism; but promoting amicable resolution is certainly not a goal of the process.<sup>112</sup> In the case of both mediation and arbitration, speedy final resolution can reduce the time that the parties spend in active conflict, thus decreasing the amount of antagonism they experience.

Third, features of ADR that give parties control over their disputes with respect to either procedure or outcome advance the goal of promoting responsibility and self-determination. Parties exercise control over their disputes when they choose to submit to arbitration or mediation, select a neutral to conduct the process, or decide how they

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<sup>108</sup> See *supra* notes 14-16 and accompanying text.

<sup>109</sup> For an explanation of the claim that ADR is more efficient than litigation, see Resnik, *supra* note 14, at 250-52.

<sup>110</sup> Parties to arbitration can sue in federal court for confirmation and enforcement of the award. 9 U.S.C. § 9 (1994). Parties to a mediation that resulted in an agreement can sue for breach of contract. Riskin & Westbrook, *supra* note 17, at 4.

<sup>111</sup> For an explanation of the claim that ADR is more congenial than litigation, see Resnik, *supra* note 14, at 246-50.

<sup>112</sup> See *supra* Part I.A for a discussion of the goals and procedures of arbitration.

want the process to be conducted. Some or all of these opportunities for choice may not exist in ADR processes designed as part of a court's program. Mediation also gives disputants ultimate control over the outcome of the process, whereas arbitration does not. Disputants lose control when supposedly "voluntary" choices are in fact coerced,<sup>113</sup> for example, when individuals are unaware of arbitration provisions in contracts,<sup>114</sup> when courts penalize parties for failing to cooperate or reach agreements in mediation,<sup>115</sup> or when one party is intimidated by another party.<sup>116</sup> The term "coerced" will be used in this Note to refer to processes and situations that produce agreements that are not voluntary.

In addition, court administrators must recognize that the extent to which an ADR process can produce efficient resolution, decrease hostility, or give disputants control depends greatly on factors other than procedural characteristics. The performance of the neutral is an important factor,<sup>117</sup> as is good administrative support for the ADR program.<sup>118</sup> Finally, the behavior of the disputants can have a significant effect.<sup>119</sup>

A deep understanding of ADR and the customer-service paradigm will enable court administrators to design high-quality programs and ensure that disputants are treated fairly and truly benefit from

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<sup>113</sup> Laura Nader argues that agreement-oriented ADR processes pressure disputants to resolve conflict harmoniously even when the disputants and society would benefit more from an active conflict. Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 *Ohio St. J. on Disp. Resol.* 1 (1993).

<sup>114</sup> Cf. Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 *Ohio St. J. on Disp. Resol.* 267, 333-35 (1995) (suggesting ways to help consumers understand and decide whether to consent to arbitration provisions in contracts).

<sup>115</sup> See generally Katz, *supra* note 51 (exploring erosion of voluntary participation in mediation).

<sup>116</sup> See Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 *Geo. J. Legal Ethics* 553, 569-71, 574-81 (1995) (explaining how dynamics of abusive relationship distorted mediation process).

<sup>117</sup> See Plapinger & Stienstra, *supra* note 17, at 61 (commenting on "art of settlement" practiced by skillful neutral); Genevra Kay Loveland, *Two ADR Administrators Reflect on Developing and Implementing Court-Annexed Programs*, *FJC Directions*, Dec. 1994, at 18, 21 (reporting statements by ADR administrators that success or failure of program depends on quality of neutrals).

<sup>118</sup> Court ADR programs must have sufficient resources and oversight. See Plapinger & Stienstra, *supra* note 17, at 12 (stressing importance of "dedicated management" and adequate court resources to ensure quality ADR programs); Donna Stienstra, *Judicial Perceptions of DCM and ADR in Five Court Demonstration Programs Under the CJRA*, *Judges' J.*, Spring 1998, at 16, 21, 63 (conveying opinion of district judges that good administration is critical to success of ADR program); see also Kay Loveland, *supra* note 117, at 23 (surveying roles of ADR administrators in various federal district courts).

<sup>119</sup> See *infra* note 182.

their participation in ADR programs. Furthermore, administrators who respect the unique attributes of ADR will be able to accommodate public interests in ways that have minimal impact on the essential dynamics of ADR processes. If the Act is successfully implemented, disputants will find that the federal courts are more responsive to their interests and are better equipped to help them resolve their disputes efficiently, amicably, and on their own terms.

## II

### THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 1998

The Alternative Dispute Resolution Act of 1998 proclaims a permanent role for ADR in the federal courts. The Act was passed in the wake of two earlier pieces of legislation, the Civil Justice Reform Act of 1990 (CJRA)<sup>120</sup> and the Judicial Improvements and Access to Justice Act of 1998.<sup>121</sup> These earlier acts had provided for some experimentation with ADR within the federal courts for the purposes of

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<sup>120</sup> Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1994 & Supp. V 2000)). The Civil Justice Reform Act (CJRA) was passed to eliminate expense and delay in the federal courts by promoting more effective judicial management. § 471 ("The purposes . . . are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."); see also § 471 note (setting forth congressional findings regarding "problems of cost and delay in civil litigation"). The CJRA set forth six principles and six techniques of litigation management, two of which specifically dealt with ADR: principle six ("authorization to refer appropriate cases to alternative dispute resolution programs . . . including mediation, minitrial, and summary jury trial") and technique four ("a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative . . . at a nonbinding conference conducted early in the litigation"). § 473; see also § 471 note (setting forth congressional finding that "utilization of alternative dispute resolution programs in appropriate cases" should be component of effective litigation management program). It required every district court to adopt and implement an "expense and delay reduction plan." §§ 471-472. In addition to imposing this general requirement on all district courts, the CJRA required ten pilot districts specifically to adopt the six principles and six techniques of litigation management. § 471 note. Furthermore, the CJRA designated two demonstration districts to experiment with "differentiated case management" (DCM) and three demonstration districts to experiment with ADR. § 471 note.

<sup>121</sup> Pub. L. No. 100-702, 102 Stat. 4642 (1988). The Judicial Improvements and Access to Justice Act was superseded by the ADR Act. §§ 651-658. The Judicial Improvements and Access to Justice Act was passed in 1988 to authorize experiments with arbitration in some district courts. Pub. L. No. 100-702, § 901(a), 102 Stat. at 4659. The Act permitted twenty districts to experiment with arbitration. *Id.* at 4662. Arbitration awards were not truly binding; any party who was dissatisfied with the award could demand a trial de novo. *Id.* at 4660-61. A party who demanded a trial de novo and who did not obtain a judgment more favorable than the arbitration award, however, could be compelled to pay the arbitrator's fees (if the demand for trial de novo was not made for good cause) and the other party's attorney fees (if the demand for trial de novo was made in bad faith). *Id.* at 4661-62. The Act exempted from mandatory arbitration cases in which more than \$100,000 was at stake, constitutional cases, and civil rights cases. *Id.* at 4659-60. The Act also directed district

study and demonstration but were set to expire after a limited time.<sup>122</sup> The Act salvages the ADR reforms authorized under the two previous acts, permitting courts to continue their experiments permanently and requiring courts that had not participated in those experiments to adopt ADR programs of their own.<sup>123</sup> The legislative history of the Act reveals a desire both to alleviate courts' case burdens and to serve disputants better by offering ADR processes that are efficient and that promote amicable resolution.<sup>124</sup>

The nearly uniform approval of the ADR Act<sup>125</sup> and praise for the benefits of court-sponsored ADR<sup>126</sup> may seem surprising in light of commentators' strong criticism of the CJRA and the Judicial Improvements Act<sup>127</sup> and studies conducted pursuant to those acts<sup>128</sup>

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courts to formulate rules or procedures to exempt cases involving legal issues that should be resolved by a court. *Id.* at 4660.

<sup>122</sup> The CJRA had a sunset provision for December 1, 1997. 28 U.S.C. § 471 note (1994). The Judicial Improvements and Access to Justice Act had a sunset provision to take effect in 1994, Pub. L. No. 100-702, § 906, 102 Stat. at 4645, 4664, but that provision was repealed, extending the arbitration experimentation in twenty districts, Judicial Amendments Act of 1994, Pub. L. No. 103-420, § 3(b), 108 Stat. 4343, 4345.

<sup>123</sup> § 651(b). After December 1997, when the CJRA was supposed to expire, and before enactment of the ADR Act of 1998, there was uncertainty about whether courts were authorized to continue their reforms. See Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. Mich. J.L. Reform 887 (1998) (urging Congress or Judicial Conference to clarify current law by declaring that CJRA had expired).

<sup>124</sup> The statement of purpose in the House Committee Report says the legislation "is designed to address the problem of the high caseloads burdening the federal courts" and cites the efficiency benefits of ADR. H.R. Rep. No. 105-487, at 5 (1998). A statement of findings and policy acknowledges these concerns and also emphasizes other benefits of ADR, including "greater satisfaction of the parties [and] innovative methods of resolving disputes . . ." § 651 note. The goals of reducing court backlogs and promoting amicable resolution were frequently invoked by the members of Congress who commented on the legislation. Representative Coble, the Chair of the Committee on the Judiciary, stated that the Act "will provide the Federal courts with the tools necessary to present quality alternatives to intensive Federal litigation. . . while at the same time still guaranteeing their right to have their day in court." 144 Cong. Rec. H10,458 (daily ed. Oct. 10, 1998) (statement of Rep. Coble). Several members of Congress spoke about mediation in particular, emphasizing its practical utility and its social benefits. 144 Cong. Rec. H10,458 (daily ed. Oct. 10, 1998) (statement of Rep. Clayton) ("[I]t is virtually impossible to maintain a civil relationship once people have confronted one another across a courtroom."); 144 Cong. Rec. S9433 (daily ed. July 30, 1998) (statement of Sen. Grassley) (citing study of time and cost savings in state court mediation programs); 144 Cong. Rec. H2069 (daily ed. Apr. 21, 1998) (statement of Rep. Filner) (recounting success of San Diego Mediation Center in promoting peaceful resolution, fostering community goodwill, and reducing burdens on courts).

<sup>125</sup> The ADR Act was supported by the Department of Justice, the Judicial Conference of the federal courts, and the American Bar Association and had "no known opposition." 144 Cong. Rec. H10,458 (daily ed. Oct. 10, 1998) (statement of Rep. Coble). Only two members of Congress voted against the Act. See *supra* note 1.

<sup>126</sup> See *supra* note 124.

<sup>127</sup> See, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 Minn. L. Rev. 375, 379-82 (1992) (characterizing CJRA as authorizing unconstitutional rulemaking); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform*



that yielded lukewarm results. The studies failed to produce clear evidence of greater efficiency,<sup>129</sup> although they did find high levels of satisfaction among those involved with the ADR programs.<sup>130</sup> These findings, however, may say little about the potential of court ADR programs. Under the CJRA and the Judicial Improvements Act,

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Act and Separation of Powers, 77 Minn. L. Rev. 1283, 1286 (1993) (arguing that Congress violated separation of powers in enacting CJRA); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 Stan. L. Rev. 1447, 1449 (1994) (noting persuasive arguments against wisdom of CJRA); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 Ariz. St. L.J. 1393, 1393 (1992) (contending that CJRA eroded simplicity and uniformity achieved by Federal Rules of Civil Procedure).

<sup>128</sup> Pursuant to the CJRA, see § 471 note, the Judicial Conference, in conjunction with the RAND Institute, submitted a report to Congress in 1997 evaluating the results of the demonstration program and the pilot program. Judicial Conference of the U.S., *supra* note 80 (detailing final report by Judicial Conference). See generally James S. Kakalik, Just, Speedy, and Inexpensive?: Judicial Case Management Under the Civil Justice Reform Act, 80 Judicature 184 (1997) (summarizing RAND research).

The Federal Judicial Center reported on the experiments with arbitration under the Judicial Improvements and Access to Justice Act. Pub. L. No. 100-702, § 903(b), 102 Stat. 4642, 4663 (1988) (requiring that Federal Judicial Center report on participant satisfaction relating to arbitration programs and their costs); Barbara S. Meierhoefer, *Fed. Judicial Ctr., Court-Annexed Arbitration in Ten District Courts 123-30* (1990), [http://www.fjc.gov/newweb/jnetweb.nsf/ism\\_recent\\_publications](http://www.fjc.gov/newweb/jnetweb.nsf/ism_recent_publications) (reporting on implementation of pilot programs and assessing whether programs have met their goals); David Rauma & Carol Krafka, *Fed. Judicial Ctr., Voluntary Arbitration in Eight Federal District Courts: An Evaluation 6* (1994), [http://www.fjc.gov/newweb/jnetweb.nsf/ism\\_recent\\_publications](http://www.fjc.gov/newweb/jnetweb.nsf/ism_recent_publications) (summarizing evaluation of voluntary arbitration in eight federal district courts).

<sup>129</sup> One statistical study of the ten pilot districts under the CJRA found no discernable impact on cost or delay due to the use of ADR. Judicial Conference of the U.S., *supra* note 80, at 67, 71, 100-01; Kakalik, *supra* note 128, at 184. Another study under the Judicial Improvements Act failed to find significant reductions in cost or delay. This study found that the reforms did not reduce overall disposition times, and, as could be expected, that mandatory arbitration reduced costs more often when there was no demand for a trial *de novo*. Rauma & Krafka, *supra* note 128, at 6. The voluntary arbitration programs had so few participants that studies did not produce comprehensive data on cost and delay. *Id.* at 15, 24.

A third study of the three demonstration districts, however, produced some evidence, mostly indirect, that ADR resulted in greater efficiency. A majority of attorneys who participated in ADR in the three districts *believed* that the procedures reduced litigation costs. Judicial Conference of the U.S., *supra* note 80, at 101. In one of the three demonstration districts, the use of ADR actually did substantially reduce disposition time, and in another district, a majority of attorneys estimated that the use of ADR reduced disposition time. *Id.*

<sup>130</sup> The judges in the ADR demonstration districts were enthusiastic about their programs. Stienstra, *supra* note 118, at 21, 64. Participants in mediation and early neutral evaluation programs in the pilot districts found the procedures to be worthwhile. Judicial Conference of the U.S., *supra* note 80, at 100-01. Participants in the arbitration programs overwhelmingly approved of the process; even when they requested a trial *de novo*, they found the arbitral awards to be useful for negotiations. Rauma & Krafka, *supra* note 128, at 6.

some courts did not have substantial ADR programs, and some of the programs were rarely used.<sup>131</sup>

Whether the programs under the Act will fulfill its promise depends on whether courts respect the integrity of ADR and its specific forms in implementation. The drafters of the Act spoke of efficient determination and amicable resolution<sup>132</sup> but failed to acknowledge the different capacities of various forms of ADR for delivering those benefits. Likewise, the Act itself does not provide either meaningful distinctions among different forms of ADR or guidance on the proper role of various forms in the courts. Its broad mandate, however, clears the path for courts to develop ADR programs that provide real benefits to disputants.

### *A. Provisions*

The Act calls upon every federal district court to develop an ADR program. Under the Act, courts must require litigants in civil cases to consider ADR, and courts may choose to require litigants to participate in some forms of ADR.<sup>133</sup> The Act defines alternative dispute resolution as “any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration.”<sup>134</sup> There are no requirements as to the structure of these processes, and the Act allows courts to adopt or devise additional forms of ADR.<sup>135</sup>

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<sup>131</sup> Under the CJRA, ADR was but one of several “principles and techniques” that the ten pilot districts were required to adopt, and courts had complete discretion in their selection of ADR programs and could even find that their pre-existing programs were sufficient; observers concluded that courts were already following most of the guidelines in the CJRA. Judicial Conference of the U.S., *supra* note 80, at 67, 79-80, 105. The most common form of ADR in the courts’ plans was the settlement conference, which in some courts was mandatory but in others was only scheduled upon a party’s request. *Id.* at 100. The three districts that demonstrated the use of ADR implemented widely different programs. One offered a “multioption” program consisting of arbitration, early neutral evaluation, and mediation; one offered an “early assessment” program featuring mediation but offering other ADR as well; and the third instituted a “settlement week” program, in which mediators, three weeks a year, held sessions at the courthouse with litigants and attorneys in an attempt to settle cases. Stienstra, *supra* note 118, at 18-19. Under the Judicial Improvements Act, there was low participation in both mandatory arbitration and opt-out voluntary arbitration, and virtually no participation in opt-in voluntary arbitration. Rauma & Krafka, *supra* note 128, at 15, 23.

<sup>132</sup> See *supra* note 124.

<sup>133</sup> 28 U.S.C. § 652(a) (Supp. V 2000).

<sup>134</sup> § 651(a).

<sup>135</sup> § 651(a)-(c).

The Act's arbitration provisions<sup>136</sup> do include some concrete requirements and restrictions. Courts may not mandate participation in arbitration.<sup>137</sup> Furthermore, the Act specifically exempts from arbitration constitutional cases, civil rights cases, and cases with more than \$150,000 in controversy.<sup>138</sup> It also restricts the binding effect of arbitrations—either party may request a trial *de novo* for any reason.<sup>139</sup> Unlike prior legislation,<sup>140</sup> the Act does not allow the imposition of arbitration costs or attorney fees on parties who request a trial *de novo*.<sup>141</sup> If neither party requests a trial within thirty days of the arbitration, the arbitration award becomes binding as a court judgment and is not appealable.<sup>142</sup> The Act does not state whether parties may waive the right to trial *de novo* prior to arbitration.

Although the Act sets out some definite procedures with respect to arbitration, it leaves much in the hands of the courts.<sup>143</sup> Courts

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<sup>136</sup> § 654 (Arbitration), § 655 (Arbitrators), § 656 (Subpoenas), § 657 (Arbitration Award and Judgment). These provisions are based largely on the arbitration provisions in the Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, § 901, 102 Stat. 4642, 4659-62 (1988).

<sup>137</sup> The Act has a cryptic provision on the mandatory imposition of arbitration. It says that courts may *require* participation in arbitration, "if the parties consent." § 652(a) (Supp. V 2000). The Committee Report accompanying the bill put it differently: "Under no circumstances shall a court be able to mandate a party to participate in arbitration. . . . If a court requires the use of ADR by local rule, it may only do so with respect to mediation or early neutral evaluation." H.R. Rep. No. 105-487, at 8 (1998). One possible interpretation of the provision is that courts may refer cases automatically to arbitration, rather than waiting for parties to request arbitration, but then parties can either consent or decline to participate. Another possible interpretation is that a court may require disputants to choose from a list of ADR processes, and arbitration may be on that list, along with facilitative processes. The local rules of the Eastern District of New York appear to be in violation of this provision, in that they call for the automatic referral of cases to arbitration without the parties' consent. E.D.N.Y. Civ. R. 83.10(d), <http://www.nyed.uscourts.gov/localrules.pdf>. This deviation is permissible, however, because the Act authorizes courts to continue arbitration programs that were created pursuant to the Judicial Improvements and Access to Justice Act. § 654(d).

<sup>138</sup> § 654(a). In the Judicial Improvements and Access to Justice Act, exemptions such as these applied only to mandated arbitration, not consensual arbitration. Pub. L. 100-702, § 901(a), 102 Stat. 4642, 4659 (1988).

<sup>139</sup> § 657(c)(1). During the subsequent trial, the judge or jury may not consider the fact that there has been an arbitration or the amount of the award. § 657(c)(3).

<sup>140</sup> See *supra* note 121 (describing provisions of Judicial Improvements and Access to Justice Act).

<sup>141</sup> § 657. The ADR Act, however, permits courts to continue arbitration programs pursuant to the Judicial Improvements and Access to Justice Act. See *supra* note 137. Examples of court rules providing for the imposition of costs are E.D.N.Y. Civ. R. 83.10(h)(4), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.7-7(d)-(e), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; and W.D.N.Y. Civ. R. 16.2(i)(5), <http://www.nywd.uscourts.gov/document/civil.pdf>.

<sup>142</sup> § 657(a).

<sup>143</sup> The next steps in the institutionalization of ADR in the federal courts will be the promulgation of local rules by district courts, which may be followed by the promulgation

must determine which ADR procedures are suitable for the court system, how to structure ADR procedures, and whether facilitative forms of ADR should be voluntary or mandatory.<sup>144</sup> The Act also delegates to courts the responsibility to provide for the confidentiality of ADR processes and communications,<sup>145</sup> to determine which cases to exempt from ADR,<sup>146</sup> and to ensure that parties freely consent to arbitration and that parties are not penalized for refusing to submit to arbitration.<sup>147</sup> Courts will need to determine at what point during litigation to refer cases to ADR and whether referral to ADR puts trial preparation on hold. The Act does not provide any substantive requirements as to the training, qualification, or compensation of neutrals.<sup>148</sup> Finally, courts are left on their own to oversee ADR programs and to craft mechanisms for maintaining quality and ensuring that ADR truly benefits disputants.<sup>149</sup>

### *B. Implementation Hazards*

It may have been wise for Congress to delegate broad implementation power to the courts. Court administrators—both judges and the professional staff of individual courts and the Judicial Conference—are in a better position than legislators to see and understand

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of uniform rules of procedure by the Judicial Conference. § 651(b) (“Each United States district court shall devise and implement its own alternative dispute resolution program by local rule . . . .”); § 652(d) (“Until such time as rules are adopted pursuant to chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall by local rule provide for the confidentiality of the alternative dispute resolution processes . . . .”); § 653(b) (“Until such time as rules are adopted pursuant to chapter 131 of this title relating to the disqualification of neutrals, each district court shall issue rules relating to the disqualification of neutrals . . . .”); Rules Enabling Act, §§ 2071-2077 (1994). For examples of some local court rules on ADR, see E.D.N.Y. Civ. R. 83.10-11, <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.7 to 86.1, <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; S.D.N.Y. Civ. R. 83.12, <http://www.nysd.uscourts.gov/rules/rules.pdf>; and W.D.N.Y. Civ. R. 16.1-2, <http://www.nywd.uscourts.gov/document/civil.pdf>.

<sup>144</sup> The Act defines ADR so broadly that it covers virtually any variation. § 651(a). The Act does not address whether ADR processes may be voluntary or mandatory except to state that consent to arbitration must be freely obtained. § 654(b). See *supra* note 137 on the requirement that courts offer arbitration, and presumably other variations on this determinative process, only on a voluntary basis.

<sup>145</sup> § 652(d).

<sup>146</sup> § 652(b).

<sup>147</sup> § 654(b).

<sup>148</sup> The Act permits magistrate judges, professional neutrals, and any other “trained” persons to serve as neutrals, see § 653(b), leaving courts to define the requisite level of training, and commands district courts to set standards for arbitrator certification, see § 655(b).

<sup>149</sup> The Act requires each district court to have an employee who is knowledgeable in ADR practices be responsible for overseeing the ADR program but does not provide further guidance. § 651(d).

how ADR operates. Allowing for flexibility by leaving discretion for specific implementation in the hands of local administrators is in keeping with the spirit of ADR.<sup>150</sup> Nonetheless, as this Section shows, the lack of guidance in the Act as to the proper role of ADR in the courts leaves room for misdirection and error. Furthermore, several specific provisions of the Act effectively eliminate certain beneficial features of ADR.

Hasty, unguided implementation may jeopardize the potential benefits of the legislation. The provision of poor-quality ADR programs, with uninformed administrators and poorly trained neutrals, could undermine faith both in the courts and in ADR generally.<sup>151</sup> Furthermore, the use of poor-quality programs to dispose quickly of "unimportant" cases could result in a system of second-class justice, with disputants receiving neither justice nor any of the benefits attributed to ADR.<sup>152</sup> On the other hand, a fear that ADR programs will be of poor quality, or cannot do "justice," could lead to the creation of numerous exemptions, denying many disputants the benefits of ADR. Even with sufficient funding, ineffective quality control could result in the unfair treatment of many disputants at the hands of neutrals who ignore their training or abuse their power. Conversely, hasty creation of safeguards, based on the adjudicative model, could interfere with essential attributes of ADR processes, like flexibility and privacy, depriving disputants of the potential benefits of those processes, or at the very least could encumber ADR processes unnecessarily.<sup>153</sup> In this way, disputants could come to see ADR as a waste of time—merely a procedural hurdle on the path to trial.<sup>154</sup>

Not only does the Act leave wide latitude for misdirection, but it also hinders implementation of effective arbitration. First, the Act gives any party to arbitration the right to request a trial *de novo*,<sup>155</sup> which effectively amputates the one feature of arbitration that promotes speedy determination—its finality.<sup>156</sup> Studies under previous legislation found that nonbinding arbitration (that is, arbitration that

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<sup>150</sup> See *supra* Part I.B (discussing importance of flexibility in ADR).

<sup>151</sup> See Hoffman, *supra* note 36, at 32-33 (questioning whether ADR programs will be able to operate effectively without adequate funding).

<sup>152</sup> Menkel-Meadow, *supra* note 5, at 39 (warning that ADR processes could be transformed into watered-down adjudication that violates legal rights); see also Stienstra & Willging, *supra* note 12, at 11 (cautioning that efficiency should not be overriding principle in court ADR programs).

<sup>153</sup> Menkel-Meadow, *supra* note 5, at 39-40.

<sup>154</sup> See William W. Schwarzer, ADR and the Federal Courts: Questions and Decisions for the Future, FJC Directions, Dec. 1994, at 2, 3 (questioning whether court ADR merely might create an additional layer of litigation and obstruct access to trial).

<sup>155</sup> 28 U.S.C. § 657(c) (Supp. V 2000).

<sup>156</sup> See *supra* Part I.D.2 (discussing potential benefits of ADR).

is "binding" but also entails the right to trial de novo) does not decrease average cost or time to final disposition.<sup>157</sup> Participants in those programs did say, however, that they found the arbitration award useful as a starting point for negotiations.<sup>158</sup> Facilitative processes such as mediation are designed to aid negotiation and therefore would be more effective than arbitration to that end.<sup>159</sup> Arbitration is a determinative process and must be binding to be effective.

The second flawed feature of the Act is the provision on exemptions from arbitration.<sup>160</sup> The Act exempts constitutional cases, civil rights cases, and cases with a lot of money at stake.<sup>161</sup> Unfortunately, the exemption is not expressed with reference to any well-considered rationale about the appropriate roles of adjudication and ADR in the court system. District courts are authorized by the Act to enact additional exemptions from their local ADR programs but are given no guidance on creating principled criteria for choosing what sorts of cases to exempt.<sup>162</sup> One possible rationale for the first two exemptions is that the public interest in cases involving a challenge to government power argues against removing these cases from the public adjudicative process into private processes that are not open or otherwise accountable to the public. This is a reasonable rationale for exempting these cases from arbitration, but it is inconsistent with the fact that settlement through ADR in cases involving the government is permitted, even encouraged.<sup>163</sup> Also, this rationale does not account for the exemption for cases involving large sums of money. A possible rationale for this monetary exemption is that courts will not provide sufficient resources to support arbitration programs capable of handling complex cases. Such an assumption should not be made in advance, because it prevents courts from developing arbitration programs that can handle such cases. Arbitration in the private sector frequently handles complex commercial cases.<sup>164</sup> A better approach would be for individual courts to draft exemptions in light of the type of ADR programs they offer. Exempting high-stakes cases could de-

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<sup>157</sup> See *supra* note 129.

<sup>158</sup> See *supra* note 130.

<sup>159</sup> Another process, early neutral evaluation, is designed specially to jump-start negotiations. In that process, a neutral gives her opinion on the strengths and weaknesses of the parties' cases and the likely outcome, which the parties can use as a bargaining point. See *supra* note 39.

<sup>160</sup> 28 U.S.C. §§ 652(b), 654(a) (Supp. V 2000).

<sup>161</sup> § 654(a).

<sup>162</sup> § 652(b).

<sup>163</sup> Congress has authorized federal agencies to make use of ADR to settle disputes, see Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-583 (1994), and the President has encouraged them to do so, see Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

<sup>164</sup> See *supra* note 21.

crease political pressure for quality ADR programs. Another possible rationale for the Act's three exemptions is that arbitration cannot be trusted to resolve "important" cases. Exemptions should not, however, be based on the premise that ADR is only acceptable for "unimportant" cases, because that premise could become a self-fulfilling prophecy and result in a system of second-class justice.<sup>165</sup> If there are problems with using determinative processes like arbitration in the court system, they should be confronted directly and resolved so that no cases are given inferior treatment. Regardless of their merits, these rationales are only surmises. Courts are left without a real framework for crafting further exemptions.

The Act illustrates how fears about the capacity of ADR to deliver justice can lead to limitations that deprive disputants of the benefits of ADR. While it gives courts broad power to develop ADR programs, it provides little guidance and imposes several handicaps. Such responses are bound to increase the probability that ADR programs will be ineffective and of low quality. Courts implementing the Act should strive to treat ADR as a distinct, independently valid means of resolving disputes. Concerns about justice should be addressed by carefully selecting among and further modifying ADR processes to achieve certain goals, by identifying ways of accommodating public interests without interfering with essential characteristics of ADR, and by adopting quality-control mechanisms that are consistent with the purposes and paradigms of ADR.

### III

#### RECOMMENDATIONS

Court administrators who understand the relationship between adjudication and ADR, and the differences among the forms of ADR, will be well prepared to make various implementation decisions. A comprehensive and authoritative review of ADR techniques, their uses, and their potential benefits could serve as the foundation for policy statements, by individual courts or the Judicial Conference,<sup>166</sup> which would articulate a consistent theory of ADR's role in the federal court system.<sup>167</sup> An ADR policy statement might be drafted as follows:

The purpose of ADR in the court system is to encourage parties to take responsibility for their dispute and thereby to achieve amicable

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<sup>165</sup> See Schwarzer, *supra* note 154, at 3 (expressing concern that courts may send only unimportant cases to ADR).

<sup>166</sup> See *supra* note 143 (discussing Act's provision for local and uniform rules).

<sup>167</sup> See Menkel-Meadow, *supra* note 5, at 40 (urging that courts clarify whether they are using ADR for purposes of docket reduction or to improve solutions).

and/or speedy resolution. The use of ADR in court cases is appropriate where the parties have complete settlement power and where suitable ADR is available. Adjudication provides resolution in accordance with the law in cases when the parties are unable to achieve resolution, on their own or through ADR, and when suitable ADR is unavailable.<sup>168</sup>

Such a statement would provide a consistent theory to guide court administrators dealing with specific issues of implementation.

This Part will address how courts might effectively integrate ADR into the already-existing adjudicative system. First, it will deal with process selection and design. Section A will address the selection of ADR processes and in particular will deal with concerns about arbitration. Section B will discuss whether and to what extent ADR processes, in particular facilitative processes like mediation, should be voluntary or mandatory. Second, this Part will deal with setting standards and promoting accountability. Section C will address the limitations that may be placed on ADR to accommodate the public interest. Finally, Section D will explore methods for ensuring the quality of ADR that are consistent with the customer-service paradigm.

### *A. Selection of ADR Processes*

Perhaps the biggest question in the implementation of the Act is which processes to offer. Courts must decide whether to offer determinative or facilitative processes.<sup>169</sup> The limitations placed on arbitra-

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<sup>168</sup> For another model of an ADR mission statement, see Stienstra & Willging, *supra* note 12, at 9 (presenting "proposition" that federal district courts should help litigants identify alternatives to traditional litigation that use resources wisely). Some courts have implemented statements of purpose for the use of particular ADR processes. N.D.N.Y. Civ. R. 83.11-1(1), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf> (mediation) (

The purpose of this Rule is to provide . . . for an earlier resolution of civil disputes resulting in savings of time and cost to litigants and the court without sacrificing the quality of justice rendered or the right of litigants to a full trial on all issues not resolved through mediation.);

W.D.N.Y. Civ. R. 16.2(a), <http://www.nywd.uscourts.gov/document/civil.pdf> (arbitration) ("Its purpose is to promote the speedy, fair and economical resolution of controversies by informal procedures."). Some court rules include extensive descriptions of ADR processes and their benefits, which serve the same function as a mission statement. E.g., E.D.N.Y. Civ. R. 83.11(a), <http://www.nyed.uscourts.gov/localrules.pdf> (mediation); N.D.N.Y. Civ. R. 83.12-1(1), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf> (early neutral evaluation); S.D.N.Y. Civ. R. 83.12(a), <http://www.nysd.uscourts.gov/rules/rules.pdf> (mediation).

<sup>169</sup> After determining whether to offer determinative or facilitative processes, or both, administrators must select from among the variations on those basic forms and then may tailor each process further. See *supra* notes 37-42 and accompanying text (describing some varieties of ADR).

The Eastern District of New York has authorized mediation and arbitration, E.D.N.Y. Civ. R. 83.10-11, <http://www.nyed.uscourts.gov/localrules.pdf>; the Northern District has authorized arbitration, mediation, and early neutral evaluation, N.D.N.Y. Civ. R. 83.7 to



tion by the Act indicate some discomfort by Congress with arbitration in the court system. In a court program, arbitration presents concerns that mediation does not. Furthermore, the limitations imposed by the Act curtail the ability of court arbitration programs to provide benefits to disputants.<sup>170</sup> For these reasons, court ADR programs should include only facilitative ADR processes.

Arbitration is problematic as a feature of a court ADR program because it resembles adjudication too much, while differing from adjudication in an important respect. Both adjudication and arbitration are designed to produce binding judgment; but arbitration does not deliver judgment in accordance with the law. In court arbitration, a representative of the government potentially is making a binding decision based on values apart from the law.<sup>171</sup> Insofar as the arbitrator is perceived as speaking on behalf of the government,<sup>172</sup> it is troubling when an arbitrator decides cases in ways contrary to the public interest.

One argument in favor of court arbitration as a useful alternative to adjudication may be that the legal process is prohibitively expensive for some disputants<sup>173</sup> and that providing final judgment is desirable even when litigation is not feasible. If that is the case, however, would it not be better to improve adjudication to make it less costly,

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.12, <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; the Southern District has authorized mediation, S.D.N.Y. Civ. R. 83.12, <http://www.nysd.uscourts.gov/rules/rules.pdf>; and the Western District has authorized arbitration and made extensive provisions for settlement conferences with judges, W.D.N.Y. Civ. R. 16.1-2, <http://www.nywd.uscourts.gov/document/civil.pdf>.

<sup>170</sup> See *supra* Part II.B.

<sup>171</sup> See Bernstein, *supra* note 24, at 2181 (explaining lack of evidentiary rules and any requirement for written findings or conclusions in court arbitration). In procedurally complex arbitration, however, arbitrators may be required to render decisions based on a particular law. See *supra* text accompanying note 27. Such a requirement likely would not be enforceable without some kind of appeal mechanism. A procedurally complex form of arbitration with rights of appeal would not serve as a meaningful alternative to trial and therefore would not be a useful addition to a court ADR program. For this reason, it is more useful to focus on a procedurally simple form of arbitration in which the arbitrator has total discretion in her decisionmaking.

<sup>172</sup> See 28 U.S.C. § 655(c) (Supp. V 2000) ("All individuals serving as arbitrators . . . are performing quasi-judicial functions . . ."); Jack B. Weinstein, Some Benefits and Risks of Privatization of Justice Through ADR, 11 Ohio St. J. Disp. Resol. 241, 287-88 (1996) ("Arbitrators in significant cases should not look at themselves as nuts-and-bolts technicians, but rather as public servants with broad social responsibilities—in practical effect, as judges."); see also Menkel-Meadow, *supra* note 23, at 9 (noting that courts must determine to what extent arbitrators are serving in judicial capacity).

<sup>173</sup> Disputants may lack the resources to afford legal assistance or other expenses, or the amount of the claim may be less than the expected litigation costs. See Victor Marrero et al., Committee to Improve the Availability of Legal Services—Final Report to the Chief Judge of the State of New York, 19 Hofstra L. Rev. 755, 756 (1991) (stating that "vast numbers of poor people" are "effectively denied access to the legal system").

rather than to replace it with arbitration? Measures such as legal aid for the poor, small-claims court, waiver of costs, and certain fee-shifting rules would make litigation less burdensome without dispensing with the legal process.<sup>174</sup>

By contrast, court mediation does not raise the problem of extra-judicial judgment, because the mediator merely is supervising the parties' negotiation. It is ultimately the role of the parties to evaluate the disputed claims. Thus, as long as the mediator does not improperly try to impose her judgment, the mediation agreement is not a determination by a government agent.

Not only does court arbitration pose a serious threat to public interests, it also has a limited capability to serve disputants' interests. Given that the Act prohibits binding arbitration, the capability of court arbitration programs to provide cheap, speedy, final resolution is sharply limited.<sup>175</sup> On the other hand, the Act does not impose fundamental limitations on other forms of ADR. Court ADR programs composed entirely of facilitative processes would serve disputants better without conflicting with important public interests.

### *B. Voluntary or Mandatory?*

Court-sponsored ADR should preserve a great amount of party control, in order to promote self-determination, ensure that ADR processes do not become meaningless rituals, and preserve the right to trial.<sup>176</sup> Those courts that decide to include arbitration in their ADR programs despite the problems identified above must do so on a completely voluntary basis. The Act provides that arbitration may not be mandatory or absolutely binding.<sup>177</sup> Courts have discretion, however,

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<sup>174</sup> Several commentators have discussed the above means of making adjudication more affordable. See Marrero et al., *supra* note 173 (advocating mandatory pro bono system); Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. Rev. 269, 272-73 (1994) (noting that small-claims court can be effective dispute resolution resource in appropriately selected cases); Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 Fordham L. Rev. 413 (1985) (discussing waiver of court costs for indigents); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 Harv. L. Rev. 1231 (1988) (arguing that fee shifting would increase access by indigents to judicial system).

<sup>175</sup> See *supra* Part II.B.

<sup>176</sup> See Stienstra & Willging, *supra* note 12, at 11 (stating that outcomes of mandatory court ADR procedures must be nonbinding, unless parties agree otherwise, to preserve access to trial); Sherman, *supra* note 79, at 2085, 2087-89 (discussing importance of litigant autonomy and insisting that right to trial not be abrogated); *supra* Part I.D.2 (analyzing relationship between procedural features of ADR and desired benefits). For a discussion of arguments for and against mandatory ADR, see generally Stienstra & Willging, *supra* note 12, at 51-59.

<sup>177</sup> 28 U.S.C. §§ 654(a)-(b), 657(c) (Supp. V 2000). But see *supra* note 137 (explaining that provision of ADR Act permits some courts to continue to impose mandatory arbitra-

to make other forms of ADR voluntary or mandatory. Facilitative processes, such as mediation, in which parties retain control over the final resolution, may be offered on a mandatory basis,<sup>178</sup> but disputants should not be penalized for failing to achieve resolution through a facilitative process.<sup>179</sup> Beyond this simple generalization there lie several difficult issues of party control in facilitative processes.

To declare simply that participation in a facilitative process is mandatory but that resolution is voluntary is to overlook the multiple phases in the process that may be either mandatory or voluntary.<sup>180</sup> At one end of the spectrum, the parties voluntarily attend, voluntarily go forward with the session, voluntarily participate, voluntarily continue with the session, and voluntarily resolve the dispute.<sup>181</sup> At the other end of the spectrum, the parties are required to attend, are required to make a good-faith effort, are required to stay for a certain period of time, and are penalized for failing to reach agreement.<sup>182</sup>

In mandatory court mediation, parties should be required to show up for a session and listen to the mediator's opening statement and then should be permitted to terminate the session when they believe that it is no longer useful.<sup>183</sup> Requiring this minimal attendance gives disputants a chance to see what mediation will be like so that they can make an informed, considered decision whether to participate. Studies show that few disputants voluntarily choose to go to mediation, but that when disputants do attend mediation, the overwhelming majority are glad they went.<sup>184</sup> It would not be a good idea,

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tion, and impose costs upon trial de novo in certain cases, pursuant to Judicial Improvements and Access to Justice Act).

<sup>178</sup> § 652(a).

<sup>179</sup> See Sherman, *supra* note 79, at 2085 ("If a nonbinding ADR proceeding is not to undermine the ultimate right to a trial, parties obviously should not be 'coerced' into settling.").

<sup>180</sup> See Sherman, *supra* note 79, at 2089-111 (identifying various ADR activities that courts may mandate).

<sup>181</sup> See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 *Notre Dame L. Rev.* 775, 819-20 (discussing stages of mediation that may be voluntary or mandatory).

<sup>182</sup> Parties who refuse to participate to the extent required conceivably could be held in contempt of court or be prevented from proceeding with their claim or defense. See, e.g., Sherman, *supra* note 79, at 2107 (discussing case in which judge struck defendant's pleadings and held contempt hearing in response to defendant's failure to participate adequately in settlement efforts). Lesser penalties could include the imposition of costs or notification to the judge presiding over the case. Cf. Fed. R. Civ. P. 11(c) (regarding sanctions that court may impose for improper motions or unwarranted contentions represented therein).

<sup>183</sup> The Eastern District of New York requires that the parties submit a statement and attend an initial session—attendance at additional sessions is optional. E.D.N.Y. Civ. R. 83.11(b)(4), (b)(5), (c), <http://www.nyed.uscourts.gov/localrules.pdf>.

<sup>184</sup> A study of two mediation programs found that despite low voluntary usage of mediation, ninety-two percent and sixty-three percent of disputants who participated in media-

however, to compel parties to stay for a certain period of time or make a good-faith effort to resolve the dispute. If a disputant is strongly resistant to negotiation, the court should not compel the disputants to participate in mediation, so as not to jeopardize important benefits like efficiency and party control.<sup>185</sup> Mediation requires genuine good faith to be effective; court-ordered good faith would make a farce of the process.<sup>186</sup>

In addition to these procedural controls, the behavior of individual mediators can affect the voluntary nature of participation in mediation and the voluntary nature of the final agreement. Programs that permit mediators to make recommendations to the court when the parties do not reach agreement give the mediators tremendous power to coerce settlement.<sup>187</sup> Even when mediators cannot make recommendations to the court, they can suggest to the parties that the judge will react negatively if they fail to reach agreement, or they improperly can manipulate the process in other ways in order to obtain settlement.<sup>188</sup> Issues of appropriate mediator behavior can be dealt with through quality controls, discussed below in Section D.

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tion thought that it was a good process. Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 *Just. Sys. J.* 151, 151-55 (1984) (questioning low voluntary usage of mediation); cf. Menkel-Meadow, *supra* note 5, at 42 (suggesting that parties are likely to underestimate probability that negotiation will result in good settlement).

<sup>185</sup> See Stienstra & Willging, *supra* note 12, at 56-59 (citing arguments against mandatory ADR). But cf. Sherman, *supra* note 79, at 2089-94, 2096-103 (disapproving "good faith participation" requirement but approving "minimum meaningful participation" standard). The Northern and Southern Districts of New York go so far as to require good-faith participation in a mandatory mediation session and give the mediator the sole power to conclude the session for failure to reach resolution. N.D.N.Y. Civ. R. 83.11-3, -5(3), -6, <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; S.D.N.Y. Civ. R. 83.12(e), (j), <http://www.nysd.uscourts.gov/rules/rules.pdf>.

<sup>186</sup> See Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View From the Courts*, 2000 *J. Disp. Resol.* 11, 30-33 (describing problems resulting from good-faith requirement, such as difficulty of defining good faith and risk that parties will be compelled to disclose sensitive information); cf. David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water . . ."*, 11 *Ohio St. J. on Disp. Resol.* 187, 201 (1996) (proposing objective rather than subjective standard of participation in mandatory mediation programs). But see Kovach, *supra* note 28, at 580-81, 620 (concluding that good faith must be required because it is so important in mediation); Charles J. McPheeters, Note, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 *J. Disp. Resol.* 377, 393 (approving of good-faith requirements).

<sup>187</sup> See Grillo, *supra* note 63, at 1551-55 (criticizing California provisions allowing mediators in custody and visitation disputes to make recommendations to court).

<sup>188</sup> See Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 *Neb. L. Rev.* 712, 726-30 (1994) (cautioning that mediators in private practice and in court programs may have incentives to coerce settlement for personal financial reasons).

Equally important, the disputants themselves can behave in coercive ways that undermine the voluntariness of the process. Because mediation calls on the parties to engage directly, their relationship will affect the process.<sup>189</sup> For example, in cases where a victim of abuse is suing her abuser, the victim may be intimidated and unable to assert her interests. Not only may the process not function well, it also may be traumatic for the victim to deal directly with the abuser after having terminated the relationship.<sup>190</sup> In these cases, it makes sense to allow the disputant to opt out of mediation without appearing at even an initial session.

Some commentators counsel against the use of mediation (and ADR in general) not just when there is an abusive relationship between the parties, but whenever there is a power imbalance between them.<sup>191</sup> This characterization could apply to virtually any set of parties—consumer and business, landlord and tenant, manufacturer and retailer, etc. Such an extreme approach is not necessary. Differences in power likely will affect the outcome of not only mediation but also adjudication and ordinary negotiation.<sup>192</sup> Limiting the use of mediation to solve a universal problem does not make sense.<sup>193</sup> Courts should not draft exemptions from mediation broadly to exclude all parties needing “protection,” but should tailor exemptions to exclude cases where the particular characteristics of the mediation process, such as its reliance on interaction between the disputants, will be ineffective or harmful. Concerns about differential treatment of parties

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<sup>189</sup> See Hughes, *supra* note 116 (explaining how dynamics of abusive relationship distort mediation process).

<sup>190</sup> See *id.* The use of mediation in civil cases between victims of domestic violence and their abusers raise similar concerns about personal violation as mediation in criminal cases. For a discussion of victim-offender mediation in criminal cases, see generally Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 *Emory L.J.* 1247 (1994).

<sup>191</sup> E.g., Delgado et al., *supra* note 63, at 1402-03 (“ADR should be reserved for cases in which parties of comparable power and status confront each other.”).

<sup>192</sup> See *supra* Part I.C. Some commentators believe that lawyers act to counteract power imbalances and therefore criticize the exclusion of lawyers from mediation. Grillo, *supra* note 63, at 1597. Most federal courts in New York require attorney attendance at mediation sessions. E.D.N.Y. Civ. R. 83.11(c), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.11-5(2), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; S.D.N.Y. Civ. R. 83.12(j), <http://www.nysd.uscourts.gov/rules/rules.pdf>. The Southern District even exempts pro se matters from mediation. S.D.N.Y. Civ. R. 83.12(e), <http://www.nysd.uscourts.gov/rules/rules.pdf>. By contrast, New York State Civil Court in Manhattan has a special mediation program for pro se cases. Telephone Interview with Elizabeth Clemants, *supra* note 29.

<sup>193</sup> A better way to protect less powerful parties both in ADR and in adjudication would be to increase access to free legal services in civil cases. See Marrero et al., *supra* note 173 (setting forth plan to improve legal services for poor). But see Fiss, *supra* note 47, at 1077 (expressing doubt that provision of legal services for poor can equalize resources).

should be addressed by studying outcomes of mediation and requesting evaluations of the process by participants. Courts should incorporate the results of these studies into mediator training and supervision.<sup>194</sup>

### *C. Accommodating the Public Interest*

Since a public court system is administering ADR, the public should have some information about the disposition of cases through ADR and should have some assurance that the courts are not sanctioning grave injustices.<sup>195</sup> Some accommodation may be made for the public interest in ways that do not interfere with the effectiveness of ADR processes. Courts generally are accountable to the public through public access and the imposition of legal standards.<sup>196</sup> A modified or limited form of each of these two mechanisms may be introduced into ADR to serve the public interest, but a careful balance must be struck. One must be cautious to avoid hampering the effectiveness of ADR through constant public scrutiny and complex legal rules. ADR processes should continue to be responsive to the particular circumstances of each case and capable of achieving final resolution. The customer-service paradigm primarily should govern the use of ADR.<sup>197</sup>

It is possible to allow for public access in a limited way that does not undermine the success of court ADR. While confidential process at certain stages is critical so that ADR may be informal and flexible,<sup>198</sup> an entire case need not be private for ADR to function effectively. There are several aspects of a case which may be open to the public or kept confidential: the identity of the parties to a dispute, the nature of the claim, the "live" process, the record of the process, and the terms of resolution.<sup>199</sup>

One way to grant some public access while preserving a critical amount of confidentiality would be to reveal publicly the identity of

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<sup>194</sup> See *infra* Part III.D.

<sup>195</sup> See *supra* Part I.C (explaining desirable balance between accountability to public and accountability to disputants in court ADR).

<sup>196</sup> See *supra* Part I.B (discussing how adjudication serves public interests).

<sup>197</sup> See *id.* (discussing accountability to public and to disputants).

<sup>198</sup> See *id.* (explaining how ADR relies on flexibility and privacy).

<sup>199</sup> One commentator has identified the following subissues of confidentiality in mediation: what types of disclosure are prohibited, what information is confidential, who can enforce confidentiality against whom, and whether there are any exceptions to confidentiality. Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 *Ohio St. J. on Disp. Resol.* 1, 5-11 (1986). Furthermore, a final resolution is "private" in another sense if it applies only between the parties and is not binding (legally or factually) on other disputants. See *supra* note 56 (noting that resolutions achieved through ADR are not designed to serve as precedent).

the parties, the nature of the claim, and the terms of the resolution, while keeping the process itself private and unrecorded.<sup>200</sup> By going to court, parties have already made their dispute and their claim public. Disputants who want total privacy in dispute resolution can seek out private dispute resolution providers.<sup>201</sup> It seems reasonable, therefore, to demand that the terms of resolutions achieved through court ADR be made public.<sup>202</sup> Making resolutions public would allow interested persons to know when wrongdoers were held accountable for their actions. It also would allow for research on the factors that influence ADR outcomes as well as on the differences between resolutions through ADR and resolutions through adjudication. Public access should not, however, be granted for ADR processes, either "live" or in recorded form. That much public scrutiny would create public accountability at the expense of responsiveness to disputants.

Second, some minimal standards may be introduced in ADR to satisfy the public's interest that parties be treated fairly. Program administrators can train ADR neutrals in basic procedures to ensure that disputants understand the process, have a fair opportunity to participate, and, in facilitative processes, truly consent to any final resolution. For example, administrators could require mediators to cover particular topics, such as the mediator's neutrality and the parties' roles in the process, in an opening statement. ADR neutrals should

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<sup>200</sup> The ADR Act requires courts to provide for the confidentiality of ADR processes and communications. 28 U.S.C. § 652(d) (Supp. V 2000). Federal district courts in New York have provided that mediation communications are confidential and have not required any details of the settlements achieved through mediation to be filed with the court. E.D.N.Y. Civ. R. 83.11(d), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.11-5(4), -6(1), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; S.D.N.Y. Civ. R. 83.12(k), <http://www.nysd.uscourts.gov/rules/rules.pdf>. In fact, the Southern District specifically provides for the confidentiality of mediation settlements. S.D.N.Y. Civ. R. 83.12(k), <http://www.nysd.uscourts.gov/rules/rules.pdf>. Furthermore, the Northern District provides that mediation sessions will not be recorded. N.D.N.Y. Civ. R. 83.11-5(4), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>. As for arbitration, district courts in New York do not provide for confidentiality and specifically permit the recording of hearings. E.D.N.Y. Civ. R. 83.10(f), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.7-5(e), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; W.D.N.Y. Civ. R. 16.2(g)(7), <http://www.nywd.uscourts.gov/document/civil.pdf>. An award, however, shall not be communicated to a judge prior to final judgment, except under limited circumstances, and evidence of the arbitration typically is not admissible at a trial de novo. E.D.N.Y. Civ. R. 83.10(g)(2), (h)(3), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.7-6(d), -7(c), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; W.D.N.Y. Civ. R. 16.2(h)(3), (i)(4), <http://www.nywd.uscourts.gov/document/civil.pdf>.

<sup>201</sup> But see Menkel-Meadow, *supra* note 45, at 2683-84 (urging courts to provide some privacy in their ADR programs so that disputants seeking privacy do not abandon courts).

<sup>202</sup> See Luban, *supra* note 47, at 2620 (advocating degree of public disclosure in out-of-court settlements); Menkel-Meadow, *supra* note 45, at 2695 ("[W]hen the parties themselves seek court imprimatur and approval of a settlement, then secrecy, at least of the terms of the settlement, must be presumed to be waived . . .").

have a great deal of flexibility, however, to adapt their procedures for each dispute. Furthermore, parties should not be allowed to appeal for procedural error, because that could convert ADR into an adjudicative proceeding. ADR processes are not designed to produce the extensive record and legal decisionmaking that is a prerequisite to appellate review.<sup>203</sup> Legal checks on the results of ADR processes, however, do exist. To begin with, the parties or the court can specify the issues to be resolved in ADR, possibly leaving some issues for judicial resolution. Furthermore, in mediation, agreements are enforceable to the extent permitted by contract law.<sup>204</sup>

It might seem that another way to accommodate the public interest would be to exempt from ADR those cases in which the public has a particularly strong interest,<sup>205</sup> for example, cases where the government is a party or is closely involved,<sup>206</sup> like constitutional and civil rights cases, or cases that affect a great number of people, like environmental cases and class actions. This approach is misguided. In such cases, a public hearing and judgment in accordance with public standards certainly may be desirable. Prohibiting the use of ADR in certain cases, however, does not mandate adjudication if private set-

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<sup>203</sup> See *supra* Part I.B (discussing ADR's focus on tailoring resolutions to particular situations rather than on creating record for subsequent review).

<sup>204</sup> Riskin & Westbrook, *supra* note 17, at 4. The local rules for district courts in New York provide that parties who reach agreement through mediation file a stipulation of dismissal with the court but do not require the parties to file their agreement. See *supra* note 29. The court rules do not address whether parties may stipulate to the entry of their mediation as a judgment of the court. If parties may do so, then perhaps the court would have the opportunity to question them about the agreement and withhold the court's stamp of approval for terms that are manifestly illegal or unjust. Cf. Weinstein, *supra* note 172, at 287 (asserting that courts should review any settlements or agreements to seal documents reached through out-of-court ADR processes).

As for arbitration, under the ADR Act, if parties do not request a trial *de novo* within a certain time period, judgment is automatically entered in the amount of the award. 28 U.S.C. § 657(a) (Supp. V 2000). In contrast, for private-sector arbitrations involving interstate commerce disputes, if the parties have agreed that a judgment of the court shall be entered, courts have the power to review arbitrators' decisions. Federal Arbitration Act, 9 U.S.C. §§ 9-11 (1994).

<sup>205</sup> The Southern District of New York exempts from mediation Social Security, tax, and prisoner civil rights cases in addition to pro se cases. S.D.N.Y. Civ. R. 83.12(e), <http://www.nysd.uscourts.gov/rules/rules.pdf>. The Eastern and Northern Districts do not exempt any categories of cases from mediation. E.D.N.Y. Civ. R. 83.11(b)(1), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.11-3(1), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>.

<sup>206</sup> See Jane E. Kirtley, No Place for Secrecy, *Disp. Resol. Mag.*, Winter 1998, at 21, 22 (warning that in mediation, government actors free from public scrutiny may pursue personal interests rather than public good). Where one party is the government, disputant interests encompass public interests.



tlements are still permissible.<sup>207</sup> If the public has a strong interest in adjudication of certain cases, then there should be limits on the power of the disputants to settle; for example, the parties could be required to conduct settlement negotiations in public.<sup>208</sup> As long as individual disputants have the power to bring such cases and to terminate them through private settlement outside the courtroom, then it does not make sense to forbid the parties from taking advantage of court ADR programs.<sup>209</sup> Court administrators should design ADR programs and train neutrals so that they can handle the full range of the court's cases.<sup>210</sup>

Setting basic standards that would govern ADR procedure, and making public the identities of parties, their claims, and final resolutions would satisfy minimum public interests without substantially interfering with the informality and privacy of ADR. These accommodations may not satisfy those who distrust any process that elevates disputants' interests over public interests, but additional constraints could deprive disputants of the potential benefits of ADR. For ADR processes to be effective, they ultimately must be accountable, not to the public, but to disputants. Courts with ADR programs should concern themselves primarily with improving the quality of ADR processes through procedures that reflect the customer-service paradigm and protect the benefits of ADR.

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<sup>207</sup> See *supra* Part I.C. Presumably if judges must approve private settlements in certain cases, then judges should also approve resolutions achieved through ADR.

<sup>208</sup> See Menkel-Meadow, *supra* note 45, at 2695 ("[C]ertain settlements so implicate the interests of those beyond the dispute that some 'public' exposure of such cases may be a necessary part of our democratic process."). Alternatively, expanding government authority to bring suit in cases implicating public interests, like civil rights cases, could give the public a greater role in resolution of the dispute whether it is reached through ADR or adjudication.

<sup>209</sup> Use of court ADR programs to resolve cases in which the public has an interest may actually be preferable to settlement of these cases outside the court system. See *supra* text accompanying note 92.

<sup>210</sup> In designing ADR programs, it is critical that court administrators consider what qualifications and training will be necessary for the neutrals. For example, a mediation program in which mediators are trained to conduct one- to three-hour sessions probably would not be capable of handling a large, complex case. Cases involving certain specialized fields, for example child visitation cases, should be handled by neutrals with knowledge of those fields. Where a court's ADR processes or its neutrals are not yet capable of effectively handling a certain type of case, such cases should be exempted only on a temporary basis as administrators work on developing ADR programs that can serve all disputants. See Kay Loveland, *supra* note 117, at 20, 22 (reporting ADR administrator's perspective that complex cases are often good candidates for ADR).

### *D. Quality Control*

Because ADR is fundamentally different from adjudication, courts should take a different approach to ensure quality in their ADR programs than they do in adjudication.<sup>211</sup> In keeping with the customer-service paradigm, the touchstones of quality in ADR should be fairness and professionalism; courts should institute procedures to develop the accountability of ADR neutrals to disputants and program managers.<sup>212</sup> Two methods of promoting accountability are active evaluation of neutrals by disputants, and supervision of neutrals by program managers.<sup>213</sup> Such forms of quality control can prevent ADR neutrals from abusing their positions of power and can compel them to adhere to professional standards and respect disputant interests.

In the private sector, neutrals have an incentive to treat parties fairly: They want to establish good reputations and get more case referrals from satisfied clients. This incentive does not apply in court-annexed ADR, where parties do not choose but rather are assigned to a neutral. Courts could, however, create incentives equivalent to those in the private sector by requiring all participants in ADR to fill out evaluations afterward and by retaining only those neutrals who receive positive evaluations.<sup>214</sup> In the private sector, neutrals also have an incentive to build good professional reputations in the eyes of other neutrals. Courts can reproduce this incentive if program managers regularly observe mediators and arbitrators.<sup>215</sup> The managers then

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<sup>211</sup> See Menkel-Meadow, *supra* note 5, at 44 (stating that important issue is not whether ADR processes "violate our procedural rules or jurisprudential norms" but rather whether they are "carried out sensitively or 'coercively'"). For a compilation of articles on quality and dispute processing, see Symposium, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 *Denv. U. L. Rev.* 336 (1989).

<sup>212</sup> For another discussion of how courts can ensure the quality of neutrals, see Menkel-Meadow, *supra* note 23, at 9.

<sup>213</sup> See Menkel-Meadow, *supra* note 5, at 43 (recommending systematic evaluation of ADR programs, including party-satisfaction measures, for purposes of improving program design); see also Kay Loveland, *supra* note 117, at 23 (reporting on role of ADR administrators in monitoring neutrals).

<sup>214</sup> The Manhattan Mediation Center, operated by Safe Horizon, has utilized this approach. Telephone Interview with Elizabeth Clemants, *supra* note 29. The local rules of district courts in New York anticipate that courts will institute a system of disputant evaluation. The rules provide for a limited exception to confidentiality to allow for such evaluations. E.D.N.Y. Civ. R. 83.11(d)(2), <http://www.nyed.uscourts.gov/localrules.pdf>; N.D.N.Y. Civ. R. 83.11-5(4)(d), <http://www.nynd.uscourts.gov/pdf/nyndlr.pdf>; S.D.N.Y. Civ. R. 83.12(k), <http://www.nysd.uscourts.gov/rules/rules.pdf>.

<sup>215</sup> See Kay Loveland, *supra* note 117, at 21 (reporting statements by ADR administrators on necessity of continuous monitoring of neutrals for quality control). The Manhattan Mediation Center also requires that mediators observe and evaluate each other regularly. Telephone Interview with Elizabeth Clemants, *supra* note 29. Observers of mediation sessions would need to be bound by the same duty of confidentiality as the mediator.

can let ADR practitioners know when they are failing to achieve particular professional standards and can stop referring cases to those who consistently fail to meet standards.<sup>216</sup> Furthermore, managers who regularly observe ADR sessions will be able to identify common weaknesses in the performance of neutrals in the program and will be able to address these weaknesses by implementing advanced training. Evaluations and monitoring would be consistent with the customer-service model of ADR. While these methods would not benefit current disputants who were mistreated, except by allowing them to express their grievances, it would ensure that overall quality would be high and that consistently poor neutrals would not serve in the program.<sup>217</sup>

In mediation, there is the additional problem of how to ensure that the process is entirely voluntary and the mediator is not coercing agreement.<sup>218</sup> One method of minimizing abuses of power by mediators is to have court personnel inform parties of their rights in mediation and the mediator's role, rather than leaving this responsibility to the mediator. The court ADR representative could tell the parties that they are not required to continue with the mediation session after opening statements, that they do not have to follow any suggestions made by the mediator, that the mediator cannot make recommendations to the judge, and that there will be no negative consequences if the parties fail to reach agreement. An additional way of preventing abuses by the mediator is to allow parties to have lawyers present as observers and counselors.<sup>219</sup> Lawyers can tell their clients when a mediator is stepping out-of-bounds, can remind their clients that they are not obligated to settle, and can help their clients compare proposed settlements to probable outcomes in adjudication.

These proposals uphold the integrity of ADR, because they ensure quality while conforming to the purposes of the process. Tradi-

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<sup>216</sup> The American Arbitration Association has published ethical rules for arbitrators and mediators. Am. Arb. Ass'n & A.B.A., Model Standards of Conduct for Mediators (1994), available at <http://www.adr.org/rules/ethics/standard.html>; Am. Arb. Ass'n et al., The Code of Ethics for Arbitrators in Commercial Disputes, available at <http://www.adr.org/rules/ethics/code.html>.

<sup>217</sup> While one might object that arbitrators would give high awards to receive good evaluations, that conclusion is wrong for two reasons. First, a high award for one party is a great loss for the other party—if parties' evaluations reflect how favorable the outcome is to them, then the good evaluation from the "winner" and the poor evaluation from the "loser" would average out to a neutral evaluation. Second, studies have shown that when disputants evaluate the fairness of a process, the outcome is only one of several factors they take into account. See *supra* text accompanying note 95.

<sup>218</sup> See *supra* Part I.D.2 (discussing concerns about mediator coercion).

<sup>219</sup> District courts in New York require the attendance of lawyers at mediation sessions. *Supra* note 192.

tional mechanisms for preventing injustice, such as public access and legal standards, are not the only means of ensuring fairness and curbing abuses. Considering that ADR is designed to serve disputants, it is important that the disputants themselves play a large role in monitoring the performance of neutrals. The fairness of processes should be assessed from the disputants' point of view, not only from an "objective" outside point of view. Only if ADR programs are assessed in the spirit of the ADR paradigm will these programs be able to provide their unique benefits to disputants.

### CONCLUSION

ADR is appealing precisely because it is different than adjudication. The Act calls upon courts to take advantage of the unique qualities of ADR for the benefit of disputants and the public. Now, court administrators are faced with the challenge of designing ADR programs in ways that are compatible with adjudication. To encumber ADR with legal process or to eliminate aspects that are impermissible in adjudication effectively would deprive court ADR of the ability to provide a valuable service to disputants. The end result would be that ADR would add nothing of value to, and could needlessly complicate, the current system of pretrial procedure. Adopting ADR in the courts entails adopting a different paradigm of justice than that which has governed the courts. Fairness in ADR is measured by a different standard and is safeguarded through different means. If courts are mindful of the differences of process and purpose between ADR and adjudication, however, they and the public stand to benefit from a richer justice system, with the capacity and flexibility to balance both service to disputants and service to the public.