SMU | Dedman School of Law

SMU Law Review

Volume 46 | Issue 5 Article 8

January 1993

Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required

Edward F. Sherman

COURT-MANDATED ALTERNATIVE DISPUTE RESOLUTION: WHAT FORM OF PARTICIPATION SHOULD BE REQUIRED?

*Edward F. Sherman**

I. THE SETTLEMENT FUNCTION OF COURT-MANDATED ADR 2081
II. VALUES AND OBJECTIVES OF ADR IN THE TRIAL BASED LITIGATION SYSTEM 2084
A. AVOIDANCE OF COERCING PARTIES INTO SETTLING 2085
B. A FAIR PROCEEDING THAT IS EQUIVALENT TO A DAY IN COURT 2086
C. A PROCEEDING CALCULATED TO ACHIEVE ITS PURPOSES 2087
D. RESPECT FOR LITIGANT AUTONOMY 2087
III. FORMS OF PARTICIPATION REQUIRED IN ADR 2089
A. GOOD FAITH PARTICIPATION 2089
1. Inadequacy of Case Precedents for Policy Guidance 2089
2. Inadequacy of the Collective Bargaining Analogy 2091
3. Incompatibility with Values and Objectives of Litigation 2094
B. EXCHANGE OF POSITION PAPERS AND OBJECTIVE INFORMATION 2094
C. MINIMAL MEANINGFUL PARTICIPATION 2096
1. Meaningful Participation Varies with Type of ADR 2096
2. Participation Should Not Interfere with Trial Strategy .. 2101
D. OBLIGATION TO ATTEND WITH SETTLEMENT AUTHORITY 2103
1. Mandatory Client Attendance 2104
2. Scope of Settlement Authority 2106
E. PARTIES' OBLIGATION TO PAY MEDIATOR'S FEE 2111
IV. CONCLUSION 2111

IN the past decade alternative dispute resolution has been transformed in many jurisdictions from a voluntary process independent of the courts to a mandatory, integral part of judicial procedure. Many state and federal courts have adopted rules requiring parties to go through some form of

* Edward Clark Centennial Professor of Law, University of Texas School of Law. A.B., Georgetown University, 1959; J.D., Harvard Law School, 1962; M.A., University of Texas, 1962, 1967; S.J.D., Harvard Law School, 1981.

ADR[1] as a prerequisite to a trial.[2] This annexation of ADR by courts raises questions both as to the wisdom of court-mandated ADR and, if it is mandated, as to what form of participation should be required in the ADR proceeding. The first of those questions is related to the long-standing debate over the virtues of adjudication versus settlement,[3] as well as more recent expressions of concern over the co-opting of ADR through integration into

1. "ADR" is used in this article to refer to all *non-binding* alternative dispute resolution processes utilizing third party neutrals that are invoked to encourage settlement. It does not include binding arbitration or private judging, which are essentially forms of extrajudicial "adjudication." Although their procedures differ, ADR processes share the common objective of aiding the parties to make an objective evaluation of their cases, to appreciate the positions and interests of the other side, and to explore mutually acceptable solutions. One criterion for differentiating ADR processes is the degree of directiveness of the third-party neutral. In "facilitative" ADR (such as traditional mediation), the neutral eschews directiveness and the giving of opinions, while "evaluative" or "trial run" ADR processes (such as early neutral evaluation, outcome determinative mediation, neutral fact finding, moderated settlement conference, court-annexed arbitration, summary jury trial, and mini-trial) involve evaluation or a non-binding ruling by the neutral or third parties. *See infra* text at accompanying notes 83-87, for descriptions of the particular processes. These categories are not mutually exclusive, and some hybrid processes fit into more than one category. For a detailed examination of the various ADR processes, see STEPHEN GOLDBERG, FRANK E. A. SANDER & NANCY ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 103-240 (2d ed. 1992); JOHN MURRAY, ALAN RAU & EDWARD SHERMAN, DISPUTE RESOLUTION: MATERIALS FOR CONTINUING LEGAL EDUCATION III-3-21 (Nat.Instit. for Dis. Resol. 1992); *ABCs of ADR: A Dispute Resolution Glossary*, 10 ALT. TO THE HIGH COST OF LIT. 115-118 (Aug. 1992).

2. The Civil Justice Reform Act of 1990 requires each U.S. district court to submit by the end of 1993, a civil justice "expense and delay reduction plan" which requires consideration of "authorization to refer appropriate cases to alternative dispute resolution programs." 28 U.S.C. § 473(a)(6) (West Supp. 1990). Most of the early-filed plans provide for some form of voluntary or mandatory ADR. REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT, 1992 A.B.A. SEC. ON LITIG. 32-53. Many state courts have annexed voluntary or mandatory ADR. COURT ADR: ELEMENTS OF PROGRAM DESIGN (Elizabeth Plapinger & Margaret Shaw eds.) (1992). *See* Robert Parker & Leslie Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution*, 46 S.M.U. L. REV. 1905, (1993), for a creative ADR management model.

3. This debate has taken a number of forms. Initially, concerns were expressed that judicial encouragement of settlement could deny parties the protection of courts, which are best suited to protecting constitutional and public law rights, and could undermine the rights-oriented litigation process which provides binding precedents applicable to others similarly situated. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-87 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 675-82 (1986). Judicial expansion of ADR has also been seen as a way for judges to impose greater managerial control over litigation and to limit opportunities for adjudication. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 497-98 (1986). Doubts have also been expressed as to the quality of ADR and its supposed efficiency. Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 31-47 (1987); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 914-29 (1991); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 366-93 (1986). The approach taken in the Civil Justice Reform Act, *supra* note 2, of encouraging ADR experimentation through district court rules has been criticized as undercutting the "trans-substantivity" of procedural rules and allocating judicial rulemaking to local amateur groups. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 376-82 (1992); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1503-04 (1992). Mediation has also been criticized as disadvantaging women and poor persons. Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Richard Delgado et al., *Fairness and Formality: Minimizing the Risks of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

the adversary litigation system.[4] This article will not attempt to resolve those debates,[5] focusing instead on the second question — given that a court does issue a mandatory ADR order, what are the responsibilities of the parties and their attorneys to participate in the ADR proceeding?

I. THE SETTLEMENT FUNCTION OF COURT-MANDATED ADR

In determining what should be required in a court-mandated ADR proceeding, it is useful to consider what its function and objectives are when it is annexed to the litigation system. The primary motivation of court rules and orders incorporating ADR has clearly been the hope of achieving settlement short of trial. Other benefits that ADR can have — such as exploring underlying interests, reconciling the parties, according them emotional closure, or permitting flexibility in the agreement[6] — have been secondary in

4. The argument is made that ADR has been co-opted through "institutionalization" and "legalization" in the adversary litigation system, resulting in the subordination of its problem-solving and relationship-building goals to cost-efficiency and docket-clearing objectives. 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, 13-46 (1991) [hereinafter Menkel-Meadow, "The Law of ADR"]. For comments on this critique, see Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 77-88 (1991); Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in An Adversary Culture*, 19 FLA. ST. U. L. REV. 89, 89-103 (1991). A related concern is raised on the other side of the Atlantic. *See* Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship*, 56 MOD. L. REV. 452, 462 (1993) (negotiating processes "which enjoy the authority of the court but which are stripped of the procedural safeguards of adjudication, carry the risk of unregulated coercion and manipulation of weaker parties by stronger ones, and of both parties by the intervener").

5. For views supportive of court-annexed ADR, see Wayne D. Brazil, *Institutionalizing ADR Programs in Courts*, *in* EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 52 (Frank E. A. Sander ed. 1991); Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303; Richard A. Enslen, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N. M. L. REV. 1 (1988); *Developments in "Alternative" Dispute Resolution: An Overview*, 115 F.R.D. 349, 361-74 (1987); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253-75 (1985). For generally favorable views of ADR, see Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335 (1989); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES (1989); Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985); Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111-34 (1976).

6. There are considerable differences in philosophy, procedure, and objectives among the various kinds of ADR which effect the benefits derived from it. The concern about co-optation, *see supra* note 4, is primarily focused on mediation. For perceptive accounts of the mediation process, see James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); Beryl Blaustone, *Training the Modern Lawyer: Incorporating the Study of Mediation Into Required Law School Courses*, 21 Sw. U. L. Rev. 1317 (1992); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982). "Evaluative" or "trial run" forms of ADR do not usually offer the same opportunity for the parties to communicate informally in the interests of reconciliation or emotional closure. The subject matter of the dispute also has a considerable impact on the objectives of the process. A

courts' motivation to institutionalize ADR. Of course, to the extent that such other benefits make for a better settlement — for example, by resolving a wider range of disputed issues, enhancing the quality of the settlement by exploring options for mutual gain, and improving the likelihood that the parties will comply with the agreement — ADR has special attraction as a settlement device. The function of court-mandated ADR, therefore, is efficient and effective settlement, and the procedures that govern its operation should be consistent with the values and objectives of settlement within the context of our trial-based litigation system.

This having been said, it is not to be assumed that court-annexation of an ADR process should transform it into a mirror image of an adversary trial. The very reason for believing that ADR might result in settlement is that it has unique features suited to getting an agreement that are lacking in a trial. These include the dynamics of assisted dialogue and cooperative problem-solving, reality-testing of perceptions and positions, neutral evaluation of strengths and weaknesses, empowering of parties to confront each other's values and the fairness of their positions, searching for mutually beneficial solutions, and flexibility of solutions outside the formal standards of legal rules[7] — all under the protective cloak of confidentiality.[8] These features are essential to the capacity of an ADR proceeding to achieve a settlement, and it would be counterproductive for a court to undermine those attributes and techniques when mandating ADR. The settlement objective of ADR as an integral part of the litigation process is best served by adopting those procedures governing its use that will preserve its settlement-enhancing features, as long as not inconsistent with the values and objectives of the litigation system as a whole.

The objection will undoubtedly be made that the essence of ADR cannot be reconciled with the objectives of the trial-based, adversary litigation system.[9] I think this view fails to appreciate that our litigation system and ADR have a great deal in common — indeed, they are but different points along a spectrum of dispute-resolution processes. Both place a high value on a rational approach to dispute resolution,[10] fairness of process, and the cen-

---

one-shot personal injury suit, for example, does not provide the same opportunity for restoration of relationships as does a divorce or child custody suit, although even in the case of an auto accident between strangers, the parties can have a need for interaction at a personal level in a mediation that has a salutary effect on settlement. *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 202-205 (1987).

7. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 61-77 (1986); NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE §§ 2.1-4.4; DONOVAN LEISURE NEWTON & IRVINE'S ADR PRACTICE BOOKS §§ 6.1-8.22 (John H. Wilkinson ed. 1990); Susan S. Silbey and Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y (1986); Sandra Kaufman & George T. Duncan, *A Formal Framework for Mediator Mechanisms and Motivations*, 36 J. CONFLICT RESOL. 688, 688-708 (1992).

8. See *infra* note 68.

9. *See* Menkel-Meadow, "The Law of ADR," *supra* note 4, at 32-45.

10. It is true that mediation places some importance on intuitive, as opposed to wholly cognitive, approaches to problem-solving. However, research in conflict resolution indicates that many phenomena assumed to be intuitive can be explained empirically as part of cognitive processes. *See* Daniel Kahneman & Amos Twersky, *Conflict Resolution: A Cognitive Perspec-*

trality of party autonomy. The claim that ADR is not adversary fails to appreciate that it is "fundamentally a process of assisted negotiation."[11] The extensive literature on negotiation theory and strategy[12] is central to ADR practice, reflecting the degree to which negotiation underlies ADR.[13] That does not mean that ADR does not utilize some very different approaches to dispute resolution that attempt to overcome dysfunctional adversariness,[14] but, on balance, those techniques can be reconciled with the litigation system.

Concern over a mismatch between ADR and litigation stems in part from the over-selling of ADR as a docket-clearing and cost-saving device. Some judges have embraced mandatory ADR as the solution to their crowded dockets with little sensitivity to the fact that obtaining a settlement is not necessarily a sign of successful ADR. Mediation, for example, seeks a solution through the voluntary cooperation of the parties, and mediator manipulation of the parties in order to achieve a settlement, without concern for the quality of the agreement and how it was achieved, would seriously undermine the objectives of the process.[15] Moreover, empirical evidence as to cost-savings of court-annexed ADR is far from clear.[16] Court-annexed

---

tive, in BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1993) (discussing optimistic overconfidence, the certainty effect, and loss aversion). Of course, intuitive insights also play an important role in presentation of a case to a jury.

11. Kathleen W. Marcell & Patrick Wiseman, *Why We Teach Law Students to Mediate*, 1987 MO. J. DISP. RESOLUTION 77, 84.

12. *See, e.g.*, Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281 (1956); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (2d ed. 1980); Melvin A. Eisenberg, *Private Ordering Through Negotiation Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982). For more popularized studies of negotiation theory and strategy, see ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981) [hereinafter FISHER & URY, GETTING TO YES]; GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983); ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES (1988); WILLIAM URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE (1991).

13. Negotiation theory is central to mediation and other "facilitative" forms of ADR. In an "evaluative" or "trial run" process, it is less central to the presentation of each side's case, but still plays an important role in the negotiation that is expected to take place afterwards. For discussion of the various types of ADR, see *infra* notes 83-87.

14. For example, mediation may have a transformative effect, persuading the parties through trust and aspiration to replace strategic with cooperative behavior. *See* MOORE, *supra* note 7, at 124-52; Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253, 269-73 (1989). Overcoming lawyers' traditional adversary training, however, is a challenge for ADR. *See* Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOTIATION J. 29 (1987); *cf.* Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487 (1980).

15. *See generally* JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); MOORE, *supra* note 7; NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE (1989); NANCY ROGERS & RICHARD SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW (1987).

16. *See* Dayton, *supra* note 3, at 894-96 (stating "claims concerning the success of ADR have not been subjected to close empirical scrutiny"); Posner, *supra* note 3 (limited study indicated no savings). *But see* Jay Folberg and Joshua Rosenberg, *Use of ADR in California Courts Findings & Proposals*, 3 U.S.F. L. REV. 343, 388-392 (1992) (Early Neutral Evaluation

ADR, therefore, should not be seen as simply another docket-control device. If its distinctive process is understood and respected when court-annexed, its values and objectives need not be compromised.

There are obviously procedural differences between a trial and ADR. For example, rules of evidence apply in a trial but not in ADR.[17] That difference does not, however, make ADR inconsistent with ultimate resort to trial unless a party's trial rights would be adversely affected by being forced to participate in ADR conducted without rules of evidence.[18] Sometimes a difference between ADR and trial procedure will require modifying the ADR procedure for greater compatibility with the litigation process. For example, discovery is generally available in litigation but not in ADR. It may be desirable in a particular case to permit discovery in court-mandated ADR, given that it will be allowed in the normal course of litigation and could offer greater efficiency and fairness in the ADR proceeding. There may be other situations when the trial procedure should be modified for greater compatibility with ADR. For example, time-tables established in scheduling conferences for performing various pretrial functions or the time for ruling on pre-trial motions might be modified to enhance the effectiveness and efficiency of a court-ordered ADR proceeding. Thus the integration of ADR into litigation should permit some adjustment of the procedures of either litigation or ADR to prevent incompatibility.

II. VALUES AND OBJECTIVES OF ADR IN THE TRIAL-BASED LITIGATION SYSTEM

Under our legal system, the trial is the paradigm for formal dispute resolution.[19] It is the ultimate legal mechanism to which parties may resort for resolving disputes. Even court-mandated ADR processes are performed "in

---

program in federal district court for N.D. Cal. resulted in cost savings); JOSHUA ROSENBERG & JAY FOLBERG, ALTERNATIVE DISPUTE RESOLUTION IN A CIVIL JUSTICE REFORM ACT DEMONSTRATION DISTRICT: FINDINGS, IMPLICATIONS, & RECOMMENDATIONS (unpublished manuscript 1993) (confirming ENE cost savings); BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 85-93 (1990) (about two-thirds of attorneys believed court-annexed arbitration saved time and money); Note, *Trial Techniques: A Discussion of Summary Jury Trials and the Use of Mock Juries*, 24 TORT & INSURANCE L.J. 563, 564 (1989) (high success rate in summary jury trials).

17. ADR processes also differ among themselves as to the role of rules of evidence. Rules of evidence only pertain in a mediation to the extent that the parties want to confine their consideration to what would be admissible at trial. However, in court-annexed arbitration, summary jury trial, or mini-trial, which seek to provide a realistic "trial run," questions of admissibility are much more important. For discussion of the various types of ADR, see *infra* notes 83-87.

18. See discussion *infra* text accompanying notes 93-101, concerning situations in which the right to trial might be adversely affected by certain ADR procedures.

19. Most of our disputes, of course, are resolved without filing suit at all or are settled short of trial. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 526-46, 561-64 (1980-81). Only 4.7% of the civil cases terminated in the federal courts in 1988 went to trial. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS Table C1 at 135, Table C8 at 165 (1990). *See* Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 838-39 (1990).

the shadow" of a trial in the sense that the likely trial result provides a bench-mark for the parties' expectations and demands in the ADR proceeding.[20]

It is fundamental in determining the appropriate role of court-mandated ADR that parties' constitutional rights to a trial by jury cannot be abrogated.[21] Thus binding forms of ADR (such as traditional arbitration) cannot be mandated, and the forms of ADR that courts have adopted are all nonbinding. A corollary of the principle that the ultimate right to trial cannot be abrogated is that if an ADR process is ordered, it must be accomplished in a manner that will not undermine the ultimate right to a trial.

Four basic principles can be distilled from applying the values and objectives of court-mandated ADR in the trial-based litigation system.

A. AVOIDANCE OF COERCING PARTIES INTO SETTLING

If a nonbinding ADR proceeding is not to undermine the ultimate right to a trial, parties obviously should not be "coerced" into settling. Judicial encouragement of settlement has long been practiced in federal and many state courts; until the advent of the ADR movement, this was primarily accomplished through a settlement conference with the judge who used a combina-

---

20. The metaphor "bargaining in the shadow of the law," used by Professors Mnookin and Kornhauser to describe the behavior of negotiating parties, seems equally applicable to behavior in ADR:

> Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips — an endowment of sorts.

Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950, 968 (1979).

21. The Seventh Amendment of the U.S. Constitution, applicable to federal courts, guarantees the right of trial by jury "in Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. State constitutions provide similar guarantees of a jury trial in state courts. Courts have held that mandatory ADR does not violate the right to jury trial, nor to due process, if it is nonbinding and does not materially interfere with a later jury trial. *See, e.g.*, In re Smith, 112 A.2d 625, 629 (Pa. 1955), *appeal dismissed*, Smith v. Wissler, 350 U.S. 858 (1955) (stating that "[a]ll that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable"); Kimbrough v. Holiday Inn, 478 F. Supp. 566, 571 (E.D. Pa. 1979) (upholding compulsory, nonbinding arbitration in cases under $50,000 as not "so burdensome or so onerous that it interferes with the rights guaranteed by the Seventh Amendment"); New England Merchants Nat'l Bank v. Hughes, 556 F.Supp. 712, 714 (E.D. Pa. 1983) (noting that the compulsory arbitration program for contract disputes under $50,000 mandated by local rule did not violate the right to trial by jury); Rhea v. Massey-Ferguson Inc., 767 F.2d 266, 268 (6th Cir. 1985) (stating federal courts have "repeatedly upheld" mandatory arbitration procedures from 7th Amendment challenges"). Seventh Amendment and due process challenges have been unsuccessful against statutes requiring that medical malpractice claims be submitted to a review panel prior to a jury trial, even where the panel's findings are presumptively valid in a *de novo* trial. *See* Davison v. Sinai Hospital of Baltimore, Inc., 464 F. Supp. 778, 781 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1988). Challenges also have failed when applied to statutes imposing sanctions, such as paying certain arbitration costs, on the party demanding a trial. *In re Smith*, 112 A.2d at 630.

tion of jaw-boning and veiled threats to move the parties towards settlement.[22] The courts have uniformly held that such settlement procedures must not have the effect of coercing the parties into settling.

In a typical case, *Kothe v. Smith,*[23] the Second Circuit reversed sanctions against the defendant after he refused to settle before trial (on the judge's recommendation of a $20,000 to $30,000 settlement figure), but settled for $20,000 after one day of trial.[24] The Second Circuit concluded that an "attorney should not be condemned for changing his evaluation of the case after listening to [the opponent's] testimony during the first day of trial."[25] The process used in *Kothe* was a judicial settlement conference, authorized by Federal Rule of Civil Procedure 16.[26] The appellate court viewed this rule as "designed to encourage pretrial settlement discussions," but not to "impose settlement negotiations on unwilling litigants."[27] "Pressure tactics to coerce settlement," it said, "simply are not permissible."[28]

Pressure tactics, of course, are often involved in settlement procedures — either in judicial conferences or ADR. The question is when they become so coercive that they are not permissible. The line between "coercion" and "encouragement" of settlement is sometimes difficult to draw, but this distinction is central to resolving the form of participation required of a party in a court-mandated ADR proceeding.

B. A Fair Proceeding That Is Equivalent to a Day in Court

If ADR is mandated as an integral part of litigation, the process used should be consistent with the parties' ultimate right to a trial. An ADR process that undermines the basic values of a trial should not be forced on a party even if it might result in settlement. For example, a requirement that parties participate in rolling dice, accompanied by a hard sell by the judge or a third-party neutral to get them to accept the results of that roll, would be contrary to the reasoned process that is inherent in our trial-based litigation system. Similarly, an ADR process should not materially affect a party's rights and legitimate strategies if a trial is ultimately held.[29]

Compatibility with the trial system does not, of course, require that an ADR proceeding possess all the attributes of a trial. A mediation, for exam-

22. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Paul Reidinger, *Then It's Settled*, A.B.A. J., July 1989, at 92. Some feel it is undesirable for the judge who will try the case to conduct settlement conferences. For an analysis of efficiency considerations relating to judicial intervention in settlement, *see* ROBERT E. KEETON, JUDGING 198-205 (1990).

23. 771 F.2d 667 (2d Cir. 1985).

24. *Id.* at 670.

25. *Id.*

26. *See* FED. R. CIV. P. 16 ("pretrial conferences; scheduling; management").

27. *Kothe*, 771 F.2d at 669.

28. *Id.* Similarly, under Rule 16 of the Federal Rules of Civil Procedure, a court cannot compel parties to stipulate to facts, although consideration of possible stipulations is a stated objective of the pretrial conference rule. J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1325 (7th Cir. 1976).

29. Situations arguably involving such a risk will be discussed *infra* text accompanying notes 93-101.

ple, encourages consideration of a much broader range of matters than would be admissible in a trial, but this creates no irreconcilable conflict with trial rules. A mediation simply allows the parties to determine their own standards of relevancy in choosing to settle rather than going to a trial where formal rules of evidence would pertain. But if the parties are required to participate in an ADR process, it should at least provide them with the sense of having had their "day in court." Studies indicate that litigants tend to judge the justness of dispute proceedings not so much on whether they win or lose, but on whether they view the process itself to have been fair.[30] Respect for our judicial system can only be maintained if parties who settle in ADR proceedings later feel that they had a fair opportunity to have their say and voluntarily choose to settle rather than going to trial. Therefore, a critical feature of the form of participation required in court-mandated ADR is that it enable the process to provide the parties a sense of having participated in a fair proceeding.

C. A Proceeding Calculated to Achieve Its Purposes

The imposition of any ADR procedures on the parties as a prerequisite to exercising their right to a trial must be calculated to aid in the resolution of the dispute. Parties should not be forced to participate in costly, time-consuming procedures that are futile. Mandatory ADR procedures, therefore, should be suited to developing the facts and law in a way that will enhance the fair and efficient resolution of the case without wasted effort. If court-annexed ADR is to be effective, it should be true to its own process goals and values. Thus, respect 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.[31] If, however, the underlying ADR process cannot be reconciled with the objectives of the trial-based litigation system through accommodations in either the court or ADR procedures that do not negate their basic values, then ADR should not be mandated.[32]

D. Respect for Litigant Autonomy

Our trial system accords considerable deference to litigant autonomy over the conduct of litigation. Litigant autonomy is respected in such matters as choice of forum, selection of the parties, shaping of claims and defenses, development of issues, utilization of discovery, preparation of cases, and ultimate presentation before judge or jury.[33] The policy underlying litigant autonomy derives from the conviction that the parties are in the best position to know the facts and appreciate their objectives and that courts are not

30. Laurens Walker, E. Allen Lind, & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1412-14 (1979).

31. *See* discussion of Decker v. Lindsey, *infra* text accompanying notes 98-101.

32. *See supra* text accompanying notes 10-11.

33. *See, e.g.*, 14 C. CHARLES A. WRIGHT, ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3637, at 90 (2d ed. 1985) (concerning forum choice).

well-suited to taking over the function of preparing, developing, and presenting cases.[34]

ADR also places a high value on individual autonomy, with special emphasis on the empowerment of the parties to shape their own cases and solutions.[35] ADR processes respect the rights of the parties to shape their arguments, articulate their interests and demands, and ultimately to agree or not to a settlement. The commanding role of the parties in determining their own resolution of the dispute under ADR is an important factor in explaining why there is a greater compliance rate with judgments resulting from settlement than from court-imposed decrees.[36]

ADR that is court-mandated, rather than voluntary, might appear to be inconsistent with litigant autonomy because the parties are forced to participate. However, participation in the process, as opposed to actual agreement, must sometimes be mandated.[37] Experience shows that parties often benefit from ADR even though their participation is not voluntary.[38] Most mediators have encountered the situation where parties announce at the beginning of the process that they are only there because they were ordered to participate by the court or other authority and that they will not compromise their positions in any way. Many of these situations still result in settlements, indicating that freedom of control over the content and presentation

34. *See* LON. L. FULLER, THE PROBLEMS OF JURISPRUDENCE 706-07 (1949) ("The judge must work within the framework of the parties' arguments and proof because if he goes beyond these he will lack the guidance given him by the parties and may not understand the interests that are affected by a decision rendered outside that framework.").

35. *See* FOLBERG & TAYLOR, *supra* note 15, at 10. ("By definition, a consensual agreement, whether reached through mediation or direct negotiation, reflects the participants' own preferences and will be more acceptable in the long run than one imposed by a court. In the process of mediation, participants formulate their own agreement and make an emotional investment in its success.").

36. *See* Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 MAINE L.REV. 237 (1981); McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984). *See also* Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. OF SOC. ISSUES 127 (1985); Craig A. McEwen and Richard J. Maiman, Note, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439 (1986); Neil Vidmar, Note, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987).

37. Participation in ADR is sometimes required by law. For example, mediation is required in cases involving contested child custody or visitation. CAL. CIV. CODE § 4607 (West Supp. 1993). Mediation is sometimes required in labor disputes. OHIO REV. CODE ANN. § 4117.14 (1990). It can also be required in cases involving employment discrimination. 42 U.S.C. § 2000e-4(g) (1981). It may be required by government agencies or persons in authority as a prerequisite to being allowed, for example, to continue to rent in low income housing; to receive welfare or other assistance; to avoid expulsion from school; to obtain enforcement of zoning, land use, or other governmental regulations; or to have a criminal complaint prosecuted. *See* MURRAY, RAU & SHERMAN, *supra* note 1, at III-1-3; ROGERS & SALEM, *supra* note 15, at 19-20.

38. *See* Jessica Pearson and Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451 (1985); James A. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27 (1982). *See also* Craig McEwen & Thomas Milburn, *Explaining a Paradox of Mediation*, 9 NEGO. J. 23 (1993) (discussing the reasons that "reluctant parties often use mediation effectively and evaluate their mediation experiences positively").

of their cases is often more important to the satisfactory operation of ADR than whether the parties were forced initially to participate.

Procedures governing the conduct of ADR generally accord the parties more autonomy as that is offered in a trial. In terms of what participation should be required of parties, therefore, party autonomy requires a level of participation consistent with the parties' freedom to present their cases, their interests, and their demands in the manner they choose.

III. FORMS OF PARTICIPATION REQUIRED IN ADR

The four principles just discussed provide guidelines for judging what forms of participation in ADR proceedings are compatible with the values and objectives of the litigation system. I will focus on five frequently encountered forms of participation that may be required to comply with court-ordered ADR: good faith participation; exchange of position papers and objective information; minimum meaningful participation; participation with settlement authority; and obligation to pay the third-party neutral's fee.

A. GOOD FAITH PARTICIPATION

Over the past several years some judges in ordering parties to participate in ADR proceedings have included a provision that they must participate in good faith.[39] A number of states have also adopted, by statute or rule, a good faith participation requirement for mediation or ADR.[40] A good faith participation requirement is obviously premised on the belief that since ADR is non-binding, it will be a futile exercise unless the parties engage in it with willingness to present their best arguments and to listen to those of the other side with an open mind.

1. Inadequacy of Case Precedents for Policy Guidance

There is remarkably little case law that examines policy issues as to the propriety of a requirement of good faith participation in ADR. A good faith standard first appeared in a 1983 amendment to Rule 16, the pretrial conference rule on which the authority for federal courts' annexation of ADR processes has been based. Rule 16(f) provides for sanctions, upon motion or a judge's own initiative, for a party's or its attorney's failing to obey a scheduling or pretrial order, being "substantially unprepared to participate in the conference," or failing "to participate in good faith."[41] There have been few reported cases on the application of the Rule 16 good faith participation

39. *See, e.g.*, discussion of cases, *infra* text accompanying notes 47-51.

40. *See, e.g.*, ME. REV. STAT. ANN. tit. 19 § 214 (West Supp. 1992) (requiring a good faith effort to mediate in mandatory domestic mediation); MINN. STAT. ANN. § 583.27 (West 1988 & Supp. 1992) (requiring good faith mediation in farm mortgage mediations with authority in mediator to determine that a party is "not participating in good faith").

41. FED. R. CIV. P. 16(f).

requirement. It is usually failure to appear[42] or lack of preparation,[43] rather than the quality of participation, that has resulted in sanctions. That is not surprising since a settlement conference with a judge is usually informal, leaving both the judge and attorneys considerable leeway in how they will participate.[44] Only recently has there been an emphasis on attendance and participation by the parties themselves, raising a host of new issues about participation.[45] Thus Rule 16 precedents offer little guidance as to the scope of the good faith participation requirement in ADR.

The recent court-annexation of ADR processes has resulted in few decisions in either federal or state courts concerning required participation in ADR, and such decisions provide little policy guidance as to what kind of participation is required. In most cases courts have relied on Rule 16 (or an equivalent in state courts) or on inherent judicial authority for their power to sanction for nonparticipation. The decisions that have addressed the issue tend to rely on narrow questions of a court's authority to make such an order or on the appropriateness of the sanctions imposed for noncompliance.[46] For example, in *Decker v. Lindsey*[47] a Texas appellate court upheld an order to mediate, reasoning that a court "can compel [the parties] to sit down with each other" in a mediation and "to come together in court-ordered ADR procedures."[48] It struck down, however, a part of the order that required participation in good faith, based on an interpretation of the Texas "open courts" statute as forbidding an order that requires negotiation when the parties prefer to go to trial.[49] In *Department of Transportation v. City of Atlanta*[50] the Georgia Supreme Court held that "a trial court has the

42. *See* Barsoumian v. Szozda, 108 F.R.D. 426 (S.D.N.Y. 1985) (sanction of $300 attorney fees and $200 court costs imposed on plaintiff's attorney for failure to appear at pre-trial conference); In re McDowell, 33 B.R. 323 (Bankr. N.D. Ohio 1983) (default judgment entered against defendant for failure of his lawyer to appear at pre-trial conference).

43. *See* Flaherty v. Dayton Elec. Mfg. Co., 109 F.R.D. 617, 618-19 (D. Mass. 1986) (sanction of payment of opposing counsel's fees and costs of preparation for pre-trial conference entered against plaintiff's attorney who was "substantially unprepared" in not knowing her client's injuries, medical expenses, lost earnings, or whether worker's compensation payments had been received).

44. *See* R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY AND PRACTICE 477-83 (1991).

45. *See infra* text accompanying notes 102-14.

46. Authority for imposing sanctions for noncompliance with an ADR order may come from court rules, or from a court's inherent judicial power. There is disagreement as to what sanctions are appropriate. In New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712 (E.D. Pa. 1983), the court denied a right to trial *de novo* to a defendant who offered no excuse for failing to appear at a court-annexed arbitration hearing. The arbitration hearing resulted in a final plaintiff's-judgment of approximately $31,000. The court observed that under those circumstances "the goals of the arbitration program and the authority of this Court would be seriously undermined" if the defendant were allowed to demand a trial. *Id.* at 714. *Cf.* Gilling v. Eastern Airlines, Inc., 680 F. Supp. 169 (D. N.J. 1988) (modifying the sanction for nonparticipation from denial of a *de novo* trial to an order to reimburse the opposing party for costs incurred in preparing for arbitration); Lyons v. Wickhorst, 727 P.2d 1019 (Cal. 1986) (finding no power under state statutes to dismiss action with prejudice because of plaintiff's failure to present evidence at arbitration proceeding).

47. 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, no writ).

48. *Id.* at 250-51.

49. *Id.* at 251.

50. 380 S.E.2d 265 (Ga. 1989).

authority to refer the parties to mediation," but that the order to engage in mediation in good faith would exceed the court's authority if construed as justifying contempt penalties if the mediation failed.[51]

Other cases have determined that the applicable statute did not, in fact, require "good faith participation." *Graham v. Baker*[52] involved an Iowa statute that required participation in a mediation session before a creditor can receive a "mediation release" to undertake forfeiture proceedings in farmer-creditor loan disputes. The creditors' attorney attended the mediation, but "refused to cooperate with the mediator," denied the debtors "any opportunity to put forward their proposals for resolving the situation," was "agitated and belligerent," and was "hostile to the [debtors], the mediator, and the mediation process."[53] The Iowa Supreme Court held that since the statute "does not give the mediation service the power to compel either debtor or creditor to negotiate," the creditor's attendance satisfied the minimal participation required by the statute, even though the creditor stated that his position was not negotiable.[54]

Some cases have simply found that the conduct did not amount to an absence of good faith. In *Halaby, McCrea & Cross v. Hoffman*,[55] the Colorado Supreme Court found that the trial judge had abused his discretion in imposing sanctions on a law firm for failure to participate in a court-ordered settlement conference in good faith.[56] Without questioning the propriety of the order, the court found that the defendant's failure to disclose that his settlement authority was limited to $300 was not acting in bad faith. This conclusion was based on the defendant having submitted a required confidential statement to the judge setting out his position that the plaintiff's claims were without merit and on the plaintiff having failed to ask him at the beginning of the conference about his settlement authority. Again, the decision is of little use in determining the appropriate level of good faith participation in other situations.

2. *Inadequacy of the Collective Bargaining Analogy*

A possible source for policy guidance in applying the "good faith participation" requirement is collective bargaining. Under the labor laws, unions and management that are required to engage in collective bargaining must bargain in good faith.[57] Is that an apt analogy for ADR? Both ADR and collective bargaining would undoubtedly benefit from the parties' good faith participation. But there are differences in ADR which suggest that such

51. *Id.* at 268.

52. 447 N.W.2d 397 (Iowa 1989).

53. *Id.* at 398.

54. *Id.* at 401; *see also* Avril v. Civilmar, 605 So.2d 988 (Fla. Dist. Ct. App. 1992) (sanctions not available under court-ordered mediation statute for failure to negotiate in good faith, but only for failure to appear).

55. 831 P.2d 902 (Colo. 1992).

56. *Id.* at 908.

57. 29 U.S.C. §§ 158(a)(5), (b)(3); (d) (1988).

participation is not as critical to the process as in collective bargaining and that the content of "good faith participation" is more difficult to determine.

First, the necessity for demanding good faith participation is less in ADR than in collective bargaining. The failure of an ADR proceeding simply means that the parties are relegated to their basic constitutional right to a trial. Failure of collective bargaining, on the other hand, can have severe social consequences — labor unrest, non-cooperation, and strikes. The fact that there is no reasonable fall-back process after unsuccessful collective bargaining underlines the importance of forcing the parties to meet a certain level of participation.

Second, the labor laws impose positive duties on management and labor to participate in collective bargaining that do not exist in the procedural context of ADR. Negotiation in good faith is viewed as critical to labor's rights to share in the determination of contract provisions.[58] The good faith participation duty in collective bargaining refers to "a *bilateral* procedure whereby the employer and the bargaining representative *jointly* attempt to set wages and working conditions for the employees."[59] In effect, the conduct of the collective bargaining process itself is a playing out of the substantive rights guaranteed in the labor laws.

There is no similar substantive entitlement of parties in an ADR proceeding. A party has no right to force another party to accept its participation in shaping a settlement agreement. The authority for ADR in court rules and orders is only procedural, with express limitations on enlarging or modifying substantive rights.[60] If the ADR is not successful, it will be followed by a trial where the parties' substantive rights can be vindicated.

The lack of a substantive entitlement in ADR makes it especially difficult to define the content of good faith participation. Court precedents have set out the parameters of good faith participation in collective bargaining. The parties have an obligation to "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."[61] This implies "an open mind and a sincere desire to reach an agreement" and "to reach a common ground."[62] Among those factors that may evidence bad faith bar-

58. The Supreme Court commented in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970):

> The object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.

Id. at 103.

59. CHARLES MORRIS, THE DEVELOPING LABOR LAW 574 (2d. ed. 1983) (referring to General Elec. Co., 150 NLRB 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) (emphasis in original).

60. *See* The Rules Enabling Act, 28 U.S.C. § 2072(b) (1988) (authorizing the Supreme Court to promulgate rules of practice and procedure for federal courts, which rules "shall not abridge, enlarge or modify any substantive right"); FED. R. CIV. P. 83 (authorizing federal district courts to make rules governing their practice, so long as "not inconsistent with these rules").

61. NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943).

62. *Id.*

gaining can be Boulwarism (adopting a "take-it-or-leave-it" position),[63] surface bargaining (as in rejecting a proposal and tendering one's own without attempting to reconcile the differences),[64] proposals that are predictably unacceptable,[65] failing to offer concessions of value,[66] and demands that are contrary to the spirit of the labor laws (for example, that the union cede most of its rights under the Act or give the management unilateral control of wages, hours, or working conditions).[67]

Many of these same factors are fairly conventional tactics used by negotiators in law suits. Negotiators are not obligated to demonstrate an intent to find a basis for agreement, or to display a sincere desire to reach common ground, or to respond to and counter meaningfully the offers of the other side. ADR offers a process of assisted negotiation where the parties should be able to choose to be forthcoming and make concessions or not. To deny them the right to take strong, or even extreme, positions (for example, that there is no liability or that a certain sum is the only basis on which a settlement is possible) would deprive them of litigant autonomy and the legitimate right to hold out and have those issues determined in a trial. The level of accommodation to the other side required in collective bargaining is clearly unsuitable for ADR.

One further consideration operating against the use of the good faith participation standard in ADR is its inherent ambiguity. Phrased in terms of subjective intent, it seems to require an examination into a party's motives rather than its objective conduct. Its subjectivity raises the spectre of courts having to make complex investigations into the bargaining process of an ADR proceeding upon any party's claim of bad faith participation by another. The possibility of satellite litigation seeking sanctions for bad faith participation could severely undermine its claim to economy and efficiency.

Sanction motions also raise difficult issues of confidentiality. Many jurisdictions accord confidentiality to ADR.[68] Proper determination of a sanction motion for bad faith participation could require the parties and the third party neutral to testify concerning communications made during the ADR

63. *General Elec. Co.*, 150 NLRB at 194. The name comes from a vice-president of General Electric who formulated the strategy of making of a "firm and fair offer" that was non-negotiable, which was held to constitute bad faith bargaining.

64. *See Neon Sign Corp.*, 229 NLRB 861 (1977), *enforcement denied*, 602 F.2d 1203 (5th Cir. 1979); MORRIS, *supra* note 59, at 579-83.

65. *See* MORRIS, *supra* note 59, at 587 n.229.

66. *See id.* at 584, n.206.

67. *See id.* at 592, n.253-255.

68. Almost all states have an evidentiary exclusion rule like FED. R. EVID. 408 that applies to offers to compromise a claim in a negotiation when offered "to prove liability for or invalidity of the claim or its amount." A number of states also grant some form of confidentiality in ADR by court precedent or statute. The scope of protection varies widely, ranging from those limited to certain kinds of ADR (*e.g*, labor disputes, visitation-rights mediations, dispute resolution center mediations, etc.) to a few broad statutes applicable to all ADR (*e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) & (b) (Vernon Supp. 1993) (making confidential any communication relating to the subject matter of a dispute made by a participant in an ADR procedure). Certain matters may be excluded from protection (*e.g.*, child abuse, mediator malpractice claims, non-cooperation, public health or safety). *See* MURRAY, RAU & SHERMAN *supra* note 1, at I-22-32; Plappinger & Shaw, COURT ADR, *supra* note 2, at 79-100.

proceeding. Courts would thus be faced with either rejecting confidentiality in bad faith participation cases (thereby undermining the need to encourage candor in ADR), or upholding confidentiality (thereby denying the parties access to crucial evidence on the participation issue). A broad good faith participation requirement increases the need for making this difficult confidentiality choice by multiplying the occasions when parties can seek sanctions based on their opponent's statements in the ADR proceeding.

3. *Incompatibility with Values and Objectives of Litigation*

If the ADR and collective-bargaining precedents provide little policy analysis, they do at least demonstrate that too expansive a "good faith participation" requirement may not be compatible with the four principles underlying the values and objectives of court-mandated ADR.[69] Although in a nonbinding ADR proceeding, a broad participation requirement may not be *coercive* in the *Kothe* sense in which a judge attempts to impose his settlement figure on the parties,[70] the higher the level of participation required, the greater the coercion by forcing a party to present its case in a manner not of its choosing. This shades into an invasion of *litigant autonomy* by interfering with the party's choice as to how to present its case. A legitimate claim of litigant autonomy can be made as to those matters of case presentation as to which the parties have superior expertise and can best perform in the interests of accuracy and efficiency.[71] Under the principle of providing the *equivalent of a day in court*, the good faith participation requirement could result in a freer exchange of information and views, but, by requiring the parties to participate as they might not have chosen to do in a trial, it does not necessarily enhance their feeling of having had a fair proceeding. For the equivalent of a day in court, no greater degree of participation should be required than is needed for fairness under the ADR process (which places a high value on litigant autonomy and lack of coercion). This shades into the fourth principle — *calculated to achieve its process purposes* — which insists that the parties not be required to perform unnecessary or futile acts that are not reasonably likely to result in settlement. Imposing collective-bargaining kinds of good faith requirements on the parties seems as likely to result in satellite litigation over sanctions as to improve the possibility of settlement.

B. Exchange of Position Papers and Objective Information

If a "good faith participation" requirement is undesirable in ADR, there are forms of participation that would enhance the likelihood of success that rely on objective conduct and therefore are more easily enforced by courts. For any form of ADR to succeed, there must be some indication of the parties' positions on the relevant issues and some exchange of basic factual information. Requiring the parties to provide each other and the third-party neutral with position papers and other relevant information lays a basis for

69. *See supra* notes 22-38 and accompanying text.
70. *See supra* notes 23-28 and accompanying text.
71. *See supra* notes 33-38 and accompanying text.

meaningful consideration of the case without mandating specific forms of presentation or interaction with the other party. It encourages further oral participation and interaction without having to specify its form, since once having submitted a position paper, parties and counsel are less likely to refuse to discuss their positions at the ADR proceeding.

A reasonable order would be that the parties provide a position paper in advance of the ADR proceeding which would include a plain and concise statement of: (l) the legal and factual issues in dispute, (2) the party's position on those issues, (3) the relief sought (including a particularized itemization of all elements of damage claimed), and (4) any offers and counter-offers previously made.[72] This is a shortened list of the kinds of items that are routinely required by federal courts in proposed pretrial orders under the authority of the Rule 16 pretrial conference rule.[73]

The order might also require the parties to provide to the other side in advance, or to bring to the ADR proceeding, certain documents, such as current medical reports or specific business records. It would thus also serve as a discovery or subpoena order. Such an order may not be necessary if discovery has already been conducted in the normal course of the litigation (although updating of documents, such as medical records, is still often necessary). Courts should be aware of the interplay between on-going discovery in the case and any production provisions contained in an ADR order. The two should be coordinated so as not to conflict. When ADR is ordered early in the litigation before discovery, some form of abbreviated discovery may be necessary if the ADR proceeding is to be meaningful.[74] On the other hand, there is a growing tendency for courts to stay ordinary discovery if a scheduled ADR proceeding could make full discovery unnecessary.[75] Courts should take care to insure that ADR not be used strategically as a vehicle to delay or frustrate normal discovery. If a stay of discovery is granted, the

---

72. FED. R. CIV. P. 16 (a), (b), & (c). These items are culled from a larger list required by Local Rule 235-7 of the U.S. District Court for the Northern District of California.

73. *See* John T. McDermott, *The Pretrial Order and McCargo v. Hedrick: Effective Management or Unproductive Formalism?*, 4 JUST. SYS. J. 245 (1978); Robert F. Peckham, *The Federal Judge as A Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

74. Abbreviated discovery may be accomplished by court order or agreement of the parties. Consider the following description of discovery in "fast track settlement" in automobile product liability cases:

> In a fast track settlement, the plaintiff and defendant agree shortly after the defendant has answered the lawsuit to forego formal discovery and court action for a specified period to pursue settlement. It usually involves the plaintiff voluntarily producing the vehicles to the defendant for inspection and voluntarily producing documents and other information requested by the defendant, which it needs for its settlement evaluation.

W. Douglas Matthews & Timothy F. Lee, *Identifying and Developing a Crashworthiness Case*, 26 TEXAS TRIAL LAWYERS FORUM No. 4, 17, at 21 (1992).

75. *See* Wagshal v. Foster, 1993 WL 86499 (D.D.C. 1993) (discovery stayed pending parties' resort to mandatory ADR procedure with "case evaluator"). Certain ADR processes are expected to take place before extensive discovery. *See* Plappinger & Shaw, COURT ADR, *supra* note 2, at 113-14 (local federal court rules ordering Early Neutral Evaluation range from 45 to 150-200 days after filing answer and ordering court-annexed arbitration from 120 to 200 days after filing answer). The timing of mediations is more variable. *Id.* at 114.

court should require the ADR proceeding to take place within a reasonably short time period.

C. MINIMAL MEANINGFUL PARTICIPATION

Although exchange of position papers and objective information often provides an alternative to mandating a specific level of participation in ADR, there can still be a need for a minimal level of oral participation by the parties if the process is to have a genuine hope of success. It is not easy to fashion a term to describe what that minimal level should be because the necessary degree of participation varies with the type of ADR process involved. For want of a better term, I have adopted the language used by some courts that require the parties to participate "in a meaningful manner."[76] Although hardly a model of certainty and precision, a "minimal meaningful participation" standard avoids the subjectivity of "good faith participation" by suggesting that the degree of participation required to be "meaningful" is related to the goal of the ADR procedure. Since the methodology and objectives of ADR processes vary a good deal, the "minimal meaningful participation" standard allows flexibility of participation depending on the particular process involved in each case.[77]

1. Meaningful Participation Varies with Type of ADR

The distinction between "facilitative ADR," on the one hand, and "evaluative" or "trial run" ADR on the other,[78] is useful for judging the degree of participation that is "meaningful" for achieving the ADR goals. "Facilitative ADR," such as mediation, is the least structured process and should require the least amount of formal participation. It is true that mediation works best when the parties interact on all levels, and it has been argued that "the client should be obliged respectfully to consider, and reconsider, with the other parties or the judicial host, the positions and the interests of both sides, and to think about ways to resolve the dispute."[79] The trouble with this definition of the participation requirement is that it trenches deeply on litigant autonomy and, because of its subjectivity, would be difficult for a court to enforce. That is not to say that parties should not be encouraged to undertake such interactive participation as would be conducive to good mediation results, but that courts should not require it of them.

The objective of mediation is to get the parties to communicate in the broad interests of settlement, and thus mediation requires at least briefly in-

76. *See, e.g.*, W.D. TEX. R. CV-87(f)(2) (providing for "appropriate sanctions" against a party who "fails to participate in the [court-annexed] arbitration process in a meaningful manner").

77. A "minimal meaningful participation" requirement need not necessarily be stated in a court's order of referral to ADR. Many courts simply order the parties to participate, and that should normally be sufficient to inform the parties of their duties. If a party objects to the inadequate participation of its opponent, the court may use a "minimal meaningful participation" standard to determine whether sanctions or other measures are necessary.

78. *See supra* note 1.

79. Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1114 (1991).

dicating one's positions as to the relevant issues, listening to the other side, and reacting to the other side's positions. Unlike "evaluative" and "trial run" ADR processes, a comprehensive presentation of the case is not necessarily required. Assuming that there is no serious disparity between the parties as to opportunity to obtain information,[80] they should be entitled to provide only that information that they choose to reveal. A failure to address or to disclose information as to all issues may suggest weakness to the other party and lower its willingness to make offers, but that is a strategic risk a party should be entitled to take. One objective of mediation is to identify the underlying interests of the parties in the hope of finding a solution that satisfies both sides. Nevertheless, as in any negotiation, disguising of true interests and bottom lines cannot be prohibited, for otherwise the courts would be enmeshed in judging subjective negotiation behavior that could severely abridge litigant autonomy.[81]

The anti-coercion and litigation-autonomy policies underlying court-annexed ADR would also contravene any requirement of affirmative offer behavior, such as collective bargaining-type requirements that a party make an offer or counteroffer, avoid making predictably unacceptable offers or surface bargaining, or refrain from extreme demands or inflexible positions. A proper minimal meaningful participation requirement should be restricted to what is essential for the mediation process, that is, that the parties state their position(s) and listen to the other side's position(s). This might be described in short as a requirement that the parties must "discuss settlement," although no specific content, other than stating and reacting to positions, should be mandated. Thus, a lack of minimal meaningful participation would seem to require something akin to refusal to state one's position as to

80. If one party has superior information as to critical matters, unfairness can result. This underscores the importance of an opportunity for adequate discovery before parties are forced to mediate. Of course, as in a trial, one side may fail to take advantage of investigative and discovery opportunities, and the mediation process can be expected to provide no more than a fair opportunity for advance preparation. But when parties lack key information, they should be wary about relying on the other side for such information during the mediation unless it can be verified. Providing misinformation (for example, a husband in a divorce mediation not revealing that he has $500,000 in a Swiss bank account when division of assets is being discussed) could be grounds for setting aside any mediated settlement for fraud. *See* MURRAY, RAU & SHERMAN, *supra* note 1, at 374-75 ("Assuming that the nature of a mediation agreement would admit of judicial enforcement, enforceability is determined by reference to contract law. . . . To establish the defense of misrepresentation, there must be an assertion or omission that is not in accord with the facts, that is either fraudulent or material, and that is justifiably relied on by the recipient in manifesting his assent."). However, confidentiality may prevent introducing evidence of a misrepresentation made in a mediation. *See supra* note 68. Thus parties and attorneys must be on guard when factual representations are made on matters as to which their information is inadequate.

81. Disguising one's true interests and bottom lines is central to negotiation. *See* CHESTER L. KARRASS, THE NEGOTIATING GAME 187-91 (1970). It would be improper to try to prohibit such behavior in ADR by court rule. Each side must recognize the possibility of disguise, and a highly valued skill in negotiation relates to acquiring and evaluating information from the other side. *See* BURLEY-ALLEN, LISTENING: THE FORGOTTEN SKILL 101-102 (1982); FOLBERG & TAYLOR, *supra* note 15, at 109-12. The techniques of Fisher and Ury's "principled negotiation" are directed at enabling the parties to share enough basic information as to interests to permit exploration of options for mutual gain. FISHER & URY, GETTING TO YES, *supra* note 12, 17-98.

critical issues (such as the central issues of liability and damages) or to listen to the opposing party's position as to those issues.[82] Imposing any stricter standard of participation would threaten the anti-coercion and litigant-autonomy principles so important to the voluntariness ideal of mediation.

In contrast to mediation, "evaluative" forms of ADR require more participation from a party. For a proper evaluation by a third-party neutral in evaluative processes such as "early neutral evaluation"[83] or "outcome determinative" or "evaluative" mediation,[84] there must be a fairly comprehensive presentation of the issues of fact and law. An evaluation based on a sketchy or incomplete exploration of the case risks inaccuracy and unreliability by the evaluator. It also does a disservice to the parties who might place weight on it, and, if they do appreciate its limitations due to inadequate presentation, it is a waste of their time and money.

Similarly, in a "trial run" ADR proceeding, a good deal more is expected of the parties than just to talk, listen, and respond. Trial run processes con-

---

82. Judge Manion, dissenting in G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 669 (7th Cir. 1989), argued that there is no meaningful distinction between requiring "discussion" rather than "negotiation" and that requiring either is inconsistent with Rule 16 which does not permit "any coercive settlement practices." *See infra* notes 108-114 and accompanying text, for discussion of this case. There is, however, a considerable difference between requiring minimal discussion of positions and mandating that parties negotiate according to certain content or stylistic standards.

83. The Early Neutral Evaluation (ENE) program was first created by the U.S. District Court for the Northern District of California. WAYNE D. BRAZIL, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986). It has now been adopted in other federal courts. Under it, a neutral — ideally a respected lawyer with expertise in the subject matter of the case — meets with parties and their lawyers for two hours early in the litigation:

> Typically, one of the clients begins a narrative presentation of the case, without being led by the lawyer. After both sides have presented, the evaluator asks questions. The evaluator tries to help the parties to identify common ground, and to convert this to stipulations or informal agreements. The effort during the process is to isolate the areas of disagreement most central to the case.

Lawyers Get Tips on Using Early Neutral Evaluation, 4 ADR REP. 124-25 (April 12, 1990). After the discussion, the evaluator leaves the room and writes her evaluation of the liability and damage issues in the case and two of three key analytical points. Before giving the parties her evaluation, she may ask if they wish to discuss settlement before they see the evaluation. Some 25% of cases settle at this point. *Id.* at 125. If the parties opt not to discuss settlement, the evaluator explains her evaluation. She then "outlines a case development plan, identifying key areas of disagreement and suggesting ways to posture the case and to conduct discovery as efficiently as possible. The evaluator is required to do case planning. The parties are required to listen, but not to agree. They may decide to come back for a follow-up settlement conference." *Id.*

84. "Outcome determinative mediation" is a recently-coined term for mediations in which the mediator provides a ruling on the issues, which the parties can reject, but with possible penalties if they do not do better at trial. *See* Proposed HB 595, Texas House of Representatives (1993) (a party who rejects the mediator's determination and does not obtain a final judgment at least 10% better than the award must pay the other party's attorney's fees and costs incurred after the rejection). This process was one of the proposals in the Report of the President's Council on Competitiveness, Model State Civil Multi-Door Courthouse Act § 2(a)(7) (1992). "Evaluative mediation" describes a mediation process in which the mediator is expected to provide a non-binding evaluation of the case, or of certain aspects of it, based on his experience and expertise. Mediators who have special expertise in the subject matter or who are selected for their insight into the litigation process (such as ex-judges) tend to lean towards a more evaluative form of mediation.

template a presentation of each side's case to various third parties so they can make a non-binding decision — to attorney or other expert arbitrators in court-annexed arbitration,[85] to a jury in a summary jury trial,[86] or to the parties' principal decision-makers in a mini-trial.[87] For each of these processes to provide a reasonably accurate picture of how the case might play out if it went to trial, the parties are expected accurately to summarize their evidence and present their best arguments. These objectives may be jeopardized if the two sides do not provide a minimal level of formal presentation.

The one reported decision that has considered the participation requirement in a "trial run" ADR process is unsatisfactory in its analysis of the policy issues. In *Gilling v. Eastern Airlines, Inc.*,[88] a suit by a passenger

85. Court-annexed arbitration has been adopted by rule in a number of state and federal courts. PATRICIA A. EBENER & DONNA R. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE 2-4 (1985). In 1985, pilot programs were established in ten federal district courts by local rule, and, in 1988, Congress authorized similar programs in ten more districts. *See* MEIERHOEFER, *supra* note 16, at 1. Under a typical local federal rule, cases that meet the criteria for mandatory arbitration are referred within 20 days after the answer is filed. It is an abbreviated proceeding, usually lasting only a couple of hours, in which counsel present a summary of their cases to an arbitrator (or three arbitrators under many of the federal court programs). The arbitrator(s) is usually a lawyer, although such experts as architects, engineers, accountants, or doctors could be put on an arbitration panel. Typically, counsel, their clients, and the arbitrator(s) sit around a table, and counsel make their presentations informally. The arbitrator's ruling is entered as a final judgment unless any party files a demand for a trial *de novo* within a prescribed period. Sanctions may be imposed against a party who rejects the arbitral finding, usually only the fee of the arbitrator(s) (under the federal court programs usually $75 or $100). The moderated settlement conference operates much like court-annexed arbitration. For a summary of this procedure, *see* Kimberlee K. Kovach, *Moderated Settlement Conference*, in HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 101-116 (State Bar of Tx., 2d ed. 1990).

86. In 1981, Judge Thomas Lambros, of the federal district court for the Northern District of Ohio, created the "summary jury trial," which has now been adopted by rule in a number of federal district courts. *See* Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984). A number of federal courts have local rules requiring parties to resort to a summary jury trial before going to trial. Each side presents a summary of its case in about half a day to a jury whose verdict is only advisory. A judge or magistrate presides. The jury is selected by the same procedures as regular juries and is not told that their verdict is advisory. After the jury renders its verdict, counsel meet with the judge to discuss the possibility of settlement in light of the verdict.

87. This term was attached by a newspaper story to a formal settlement device created in 1977 in connection with a corporate dispute. Ronald L. Olson, *Dispute Resolution: An Alternative for Large Case Litigation*, 6 LITIGATION, Winter 1980, at 22. The "mini-trial" was created for disputes involving corporate parties and has been conducted primarily by private organizations and governmental entities. It is not strictly speaking a trial at all, but a process that combines elements of adjudication with other processes such as negotiation and mediation. In the proceeding, usually presided over by a neutral advisor, each side presents its case in shortened form to the CEO's or policy makers of the parties as a prelude to settlement negotiations between them. Then the parties negotiate, often with the participation of the neutral advisor who may also be asked by the parties for his evaluation or opinion. *See*, CPR MODEL MINITRIAL PROCEDURE (1989); ERIC GREEN, THE CPR LEGAL PROGRAM MINI-TRIAL HANDBOOKS IN CORPORATE DISPUTE MANAGEMENT 111-14 (1981). The underlying philosophy is to shift the responsibility for the outcome back to the clients who will negotiate after hearing the "best case" presented by the attorneys. Some courts have annexed the process by ordering parties to go through a mini-trial. *See A Taxonomy of Judicial ADR*, 9 Alternatives to the High Cost of Litigation 97, 107-108 (July 1991).

88. 680 F. Supp. 169 (D. N.J. 1988).

against an airline, the parties were ordered to participate in a court-annexed arbitration. The defense counsel presented only summaries of her position and read a few passages from deposition testimony and answers to interrogatories. When asked by the arbitrator at the end of the proceeding whether she wanted any damage award that he might make to be broken down into compensatory and punitive damages, she said "Do what you want, or, we don't care what you do, we won't pay it anyway."[89] The arbitrator found that she merely "went through the motions," rendering the proceeding "a sham."[90] In awarding sanctions, the court deferred to the arbitrator's judgment in weighing "the earnestness of the defendants' presentation against the gravity of the plaintiffs' allegations and the defendants' potentially sizeable exposure to liability" and to "his overall assessment of the meaningfulness of their participation."[91]

The defense counsel's refusal to make any presentation as to damages would seem to violate a proper minimal meaningful participation requirement. Damages are central to a trial run form of ADR, and the arbitrator's evaluation could be severely crippled if a party refuses entirely to present its position or any information as to the damages issue. However, the imposition of sanctions because the defense counsel put on only summaries of her positions and read a few portions of depositions and interrogatories is troubling because it involves the court in judging just how much material must be presented. The arbitrator's finding that she merely "went through the motions" is a subjective commentary on the level of motivation behind her presentation. Litigant autonomy should allow counsel a fair degree of selective choice in what she presents. Unless the portions of depositions and interrogatories that she read were irrelevant or failed completely to address the issues in the case,[92] the court should not have determined, on that basis alone, that she did not satisfy the participation standard. Even in a trial run process, a party or his attorney should be allowed to sift and choose what is to be presented without risk of sanction.

It appears that the arbitrator was especially angered by the fact that the defense counsel was contemptuous of the process. However, sanctions based on the attitude of the participant seem highly undesirable. There may be some point at which a party or counsel is so abusive of the other party or the neutral third-party, or so contemptuous in its behavior, that a court's sanction power should be invoked. It does not appear that that point was reached here. Any attempt to tightly monitor the quality and spirit of counsel's participation ultimately undercuts the values and objectives of court-

89. *Id.* at 170.

90. *Id.*

91. *Id.* at 171.

92. They do not seem to have been so. The arbitrator stated: "While she may have read a few interrogatories and answers [sic] a few lines from one or more deposition transcripts, ninety five percent (95%) of her participation was in fact stating position summaries on behalf of Eastern, and stating fact summaries as to what Eastern's personnel may have said in their own depositions." *Gilling*, 680 F. Supp. at 170.

mandated ADR and presents an unsatisfactory prospect of satellite litigation.

2. *Required Participation Should Not Interfere with Trial Strategy*

Consistency with the objectives of court-mandated ADR requires that a minimal meaningful participation standard not materially interfere with the parties' ultimate ability to present their cases to a jury. Two prominent cases have wrestled with situations where parties refused to comply with ADR orders because they feared that they would jeopardize their strategic position in a trial. These cases demonstrate that such claims are easily made and must be carefully scrutinized by courts. They also indicate that courts can sometimes take procedural steps that will allay a party's strategic concerns with participation.

In *Strandell v. Jackson County, Illinois*,[93] the plaintiff's attorney, in a case involving arrest, strip search, imprisonment, and suicidal death, appeared as ordered for a summary jury trial, but refused to proceed with the selection of the jury. He argued that participation in the trial would force him to disclose privileged attorney work product. He had obtained statements from twenty-one witnesses, which had been denied to the defendants on a motion to compel after discovery had closed on the ground that they had failed to establish the substantial need and undue hardship required to overcome the qualified work product immunity.[94] The Sixth Circuit found that the plaintiff's participation in the summary jury trial would "affect seriously the well-established rules concerning discovery and work-product privilege" and vacated the lower court's judgment of contempt for refusal to participate.[95]

This reasoning does not hold up under scrutiny. The plaintiff's attorney was not required to put on any specific evidence in the summary jury trial. Given due regard for litigant autonomy, he would certainly have been entitled, for example, to hold back the work-product evidence for sole use at trial. Of course, that could mean that he would not do as well with the summary jury as he hoped he would do at trial. But that is a strategic choice he had to make — either hold back his work-product and possibly weaken

93. 838 F.2d 884 (7th Cir. 1988). For discussion of this case, *see* James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213 (1989); Gerald L. Maatman, Jr., *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455 (1988); Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 93 (1990); Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 490 (1988); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1090 (1990).

94. *See* FED. R. CIV. P. 26(b)(3).

95. *Strandell*, 838 F.2d at 888. The Seventh Circuit also found that Rule 16's provision for pretrial conferences "was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation" and did not authorize a mandatory summary jury trial. *Id.* at 887. However, lower courts in other jurisdictions have explicitly rejected *Strandell*, and federal legislation has now approved of mandatory summary jury trials in federal courts. *See* Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988); 28 U.S.C. § 473(a)(6) (West Supp. 1992).

his case in the summary jury trial, or risk all on the trial. Since the summary jury trial is non-binding, all he risked was an adverse summary jury trial verdict that might conceivably weaken his bargaining position for settlement before trial. Putting him to this choice would not seem unfair given the reasonable settlement objective of the summary jury trial.

The concern in *Strandell* of interfering with discovery privileges is more troubling but also seems misplaced. Because discovery had been closed, plaintiffs claimed a right not to have to disclose the statements prior to trial. But this was only a temporary strategic interest that would come to an end at the latest at trial.[96] Closure dates can be extended by the court, and, whether or not the court might have done so here, the plaintiff would still have had to reveal the statements if he wanted to use them at trial. Putting him to the choice of using them or not at the summary jury trial, depending on which strategic advantage he wanted to preserve, does not seem an undue interference with discovery privilege doctrine.[97]

Decker v. Lindsay[98] provides another example of a party's refusal to participate in ADR. Unlike *Strandell*, the appellate court upheld the mandatory order, a decision which, upon analysis, seems to be "the right thing for the wrong reason." The trial judge referred the case to mediation on her own motion. Plaintiff's counsel objected on a number of grounds,[99] including that he could not participate in the mediation because it would jeopardize his *Stowers* position.[100] The plaintiff had sent a "*Stowers* letter" to the defendant offering to settle within policy limits, which was refused. Plaintiff maintained that his *Stowers* position could be jeopardized if he were forced to participate in a mediation. This was apparently based on the concern that any willingness by plaintiff in a mediation to consider lesser offers

96. The work-product privilege only protects the form in which the evidence has been taken (in this case written statements from witnesses) and not the content. *See* Hickman v. Taylor, 329 U.S. 495, 512 (1947) (denial of statements under work product privilege "does not mean that any material, non-privileged facts can be hidden").

97. *See* Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 609 (1989) ("The disclosure of information at a summary jury trial in no way prejudices a participant, as the information would ultimately be disclosed at trial anyway."); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1017 (1st Cir. 1988) ("Requiring preidentification merely moves up the schedule, accelerating disclosures which would inevitably take place.").

98. 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, no writ); *see* discussion *supra* notes 47-49 and accompanying text.

99. The plaintiff argued that the Texas Alternative Dispute Resolution Procedures Act §§ 154.021 & .022 (allowing a court to refer a pending dispute to an ADR procedure, but not permitting referral if the court finds "a reasonable basis" for a party's objection,which must be filed within 10 days after referral to ADR) did not allow referral without consent of all parties. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.021 &.022. The court rejected this argument.

100. Under the Texas *Stowers* decision, a plaintiff may make an offer to settle within policy limits and if the insurer (which has control over the conduct of the defense) refuses to do so, and an eventual jury verdict against defendant exceeds policy limits, the insurer may be liable to pay the insured the excess of the judgment over policy limits, if an ordinarily prudent person would have settled it. G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). The insured frequently assigns his rights against the insurance company to the plaintiff after a judgment in excess of policy limits.

than his previous policy-limits offer might be used by the insurer to show that its refusal of the policy-limits offer was not unreasonable.

The appellate court rejected this argument on the ground that there had not yet been a trial and plaintiff had not yet established *Stowers* rights. This is a formalistic explanation that ignored the fact that plaintiff did have a genuine legal interest, although future and contingent, that might entitle him to recover above policy limits against the defendant's insurance company. A better justification would have been that although plaintiff had established a potential *Stowers* position (if defendant continued in the future to reject settlement offers within policy limits), this gave him no right to refuse to try to settle the case short of trial. The "*Stowers* doctrine" was directed at an insurance company's failure to settle in good faith, but would not seem to entitle a plaintiff to lock in for all time an early refusal to settle within policy limits as bad faith, with no obligation on plaintiff's part to engage in further negotiations to try to achieve a settlement. Thus a balancing of the policy underlying the *Stowers* doctrine with the ADR policy of encouraging settlement would justify requiring plaintiff to participate in this case.

One problem with this conclusion is that plaintiff, being forced to attend the mediation, might still be unwilling to make any offers for fear of jeopardizing his *Stowers* position. If, however, the trial court had been sensitive to the problem, there are procedural steps it might have taken to allay the plaintiff's concerns. First, it could have conditioned its mediation order on the defendant's waiving any objection to plaintiff's *Stowers* position that could result from participation in the mediation. This would have given the plaintiff the incentive to participate freely, without fear of losing his *Stowers* position. Second, the court might have made a determination that plaintiff's *Stowers* rights would not be at risk because of mediation confidentiality. The broad Texas ADR confidentiality provision forbids disclosure of any communication made in an ADR proceeding,[101] and thus defendant could not have relied on what plaintiff said or did in the mediation to prove that its refusal of the policy-limits offer was not unreasonable. This determination would have allowed the plaintiff to participate in the mediation without risk of jeopardizing his *Stowers* position if settlement were not achieved. These are the sorts of determinations and accommodations that courts should be willing to consider when ADR participation orders are claimed to trench unduly on parties' strategic interests.

D. Obligation to Attend with Settlement Authority

Court orders that the parties participate in ADR proceedings often provide that they must attend with "full authority to settle the case" and, in the case of a corporate party or governmental body, that a representative attend who has authority to settle. Such orders raise questions, first, as to what persons are included when parties are ordered to attend, and, second, as to what kind of settlement authority the parties and/or attorneys must have.

101. Tex. Civ. Prac. & Rem. Code § 154.073(a) & (b); *see supra* note 68.

1. Mandatory Client Attendance

The conviction that it is essential for the parties to attend settlement proceedings has been relatively late in coming. The original pretrial conference rule (Rule 16), promulgated in 1937, authorized federal courts only to "direct the attorneys for the parties to appear before it for a conference."[102] In 1983 it was amended to include, in addition to the attorneys, "any unrepresented parties."[103] Increasingly, however, courts have come to the conclusion that attendance of the parties themselves, whether represented by counsel or not, increases the possibility of success of both settlement conferences and newly emerging ADR proceedings.

Professor Riskin has made an examination of the advantages and disadvantages of client attendance that offers useful guidance for courts.[104] Advantages include giving the client a chance to tell his story in his own words, learning about the strengths and weaknesses of both sides, permitting him to act on new information, allowing cooperation and momentum to build in the offer process, clearing up miscommunications about facts and interests between lawyers and clients, and providing the information to spot opportunities for problem-solving solutions.[105] Disadvantages include the risk that the client may give away valuable information that could leave him vulnerable to exploitation or weaken his case, that exposure to the other side's behavior will anger or harden some clients, or that direct communication will cause a flare-up and loss of objectivity.[106]

On balance, required attendance of individual parties at ADR proceedings is consistent with the four principles of court-mandated ADR.[107] Client participation reduces coercion by providing full information to the person who must ultimately decide whether to settle and enhances litigant autonomy by allowing the client to participate in the presentation of his own case. It strengthens the feeling of the parties that they have had their day in court. Its compatibility with the ability of the ADR process to achieve its objectives varies with the process. It is certainly consistent with the objectives of "facilitative" ADR by including the client as an active participant in search-

102. FED. R. CIV. P. 16(a), original text contained in 3 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 16.01[5] (2d ed. 1993).

103. FED. R. CIV. P. 16(a), as amended, 1983. The MANUAL FOR COMPLEX LITIGATION 365 (2d ed. 1985) provides in its Sample Order Setting Initial Conference: "Each party represented by counsel shall appear through its attorney who will have primary responsibility for its interests in this litigation. Parties not represented by counsel are expected to appear in person or through a responsible officer."

104. Riskin, *The Represented Client in a Settlement Conference*, *supra* note 79.

105. *Id.* at 1099-1102.

106. *Id.*

107. *Id.* at 1107 n.167. Riskin concludes that client attendance is more likely to be useful in an ADR process that has such features as "participatory lawyer-client relationships, problem-solving negotiation, and judicial interventions emphasizing facilitation rather than pressure." *Id.* at 1106. He recommends that the "judicial host" in a settlement conference should "1. routinely require attendance of represented clients, and representatives of organizational clients with full settlement authority, in the absence of a suitable, and suitably presented objection, and 2. take appropriate measures to ensure that the client's presence is worthwhile to the client." *Id.* at 1106-07.

ing for solutions. It may not be as important in "evaluative" or "trial run" ADR, as the attorney usually plays the key role in summarizing and presenting the case, but the client can often add a critical aspect to both the case presentation and the negotiation that is expected to follow.

An exception to this analysis is when a named party has no real interest in the case. This frequently arises in personal-injury or property-damage cases filed against a fully insured defendant. Under standard insurance policy provisions, the insurance company has sole authority over the defense of cases, including whether to settle or go to trial. The insurance company representative, therefore, is the crucial person on the defense side for settlement negotiations. The insured defendant may have some interest in the case since its conduct is in question, but determination of that issue may have no monetary consequences to it. Most insured defendants are content to leave settlement matters to the insurance company, with no interest in devoting time and emotional capital to participating in settlement negotiations. An appropriate court order, therefore, would not require an insured defendant to attend when it has no realistic exposure over policy limits and when its consent to settle is not required. It is quite different, however, if there is any realistic possibility of recovery against the defendant above policy limits. The paradigm example arises when a plaintiff offers to settle within policy limits in a state that provides for recovery against an insurance company for bad faith failure to settle. As demonstrated in the *Decker* case, the defendant has a significant interest to preserve in the settlement negotiations, and, in fact, its desire to escape exposure by having the insurance company settle within policy limits may provide an interesting dynamic in the settlement proceedings.

Difficult questions also arise when the client is not an individual but a corporation. A broad range of issues in this context was explored by a Seventh Circuit en banc decision, *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*[108] The court members obviously found the issues intriguing, writing six separate majority and dissenting opinions. The case arose out of a magistrate's order that the defendant send a "corporate representative with authority to settle" to a settlement conference. The majority upheld the order, rejecting the defendant's contention that it was unreasonable to impose on the company the expense and burden of requiring its president "to leave his business [in Camden, New Jersey] to travel to Madison, Wisconsin, to participate in a settlement conference."[109] The majority conceded that circumstances could arise in which requiring a corporate representative to appear "would be so onerous, so clearly unproductive, or so expensive in relation to the size, value, and complexity of the case that it might be an abuse of discretion."[110] However, it found no such situation here, where the claim was sizable ($4 million) and turned on complex factual and legal issues, where

108. 871 F.2d 648 (7th Cir. 1989) (en banc). The issues, however, were couched in terms of a court's power, under Rule 16, to order the attendance of a corporate representative with settlement authority.

109. *Id.* at 654.

110. *Id.*

the trial was expected to be lengthy (one to three months), and where the corporation had sent an attorney from Philadelphia to speak for the principals, whose expenses would not have exceeded sending a corporate representative from Camden.

Judge Posner, dissenting, expressed the concern "that in their zeal to settle cases judges may ignore the value of other people's time."[111] "One reason people hire lawyers is to economize on their own investment of time in resolving disputes," and, in this instance, defendant "didn't want its executives' time occupied with this litigation."[112] Posner conceded that "[a]ttorneys often are imperfect agents of their clients," and he left open the question whether, under Rule 16, there are circumstances in which a party represented by counsel can be compelled to attend a pretrial conference.[113]

Judge Posner's point is well taken. There surely are circumstances when an attorney can adequately represent a party and when requiring a non-attorney representative is unnecessarily wasteful. The majority opinion, however, also recognized this, and the factors it cited reasonably support its conclusion that a party representative was needed in this case. There should be no fixed rule either way as to party representative attendance; the efficiency and proportionality considerations identified by the majority provide appropriate guidance for case-by-case determinations (for example, in a low-value case a court should be more willing to accept a local attorney as a party's representative).

Judge Easterbrook, also dissenting, added a further consideration. Many firms send their lawyer to negotiate in collective bargaining or merger talks, he observed, and a lawyer is no less suited to negotiating in a settlement conference.[114] But this too depends on the particular circumstances. ADR places great importance on having in attendance the person who will make the ultimate decision to settle so that he can hear, see, and participate in the proceedings, thus being capable of being affected by the discussion and interaction with the other side. Thus, if a lawyer is the sole representative she should be essentially the alter ego of the corporate decision-maker(s), with the same knowledge, reactions, interests, and settlement authority as he has. The very role of lawyers as legal advisors with independent professional duties and standards suggests that they are often not a suitable alter ego and that the party representative himself should attend. Although anti-coercion and litigant-autonomy policies favor honoring the party's choice of a representative, a court should be entitled to determine that the day-in-court and promotion-of-ADR-settlement objectives cannot be served by the sole attendance of an attorney.

2. *Scope of Settlement Authority*

Courts also routinely include in ADR orders a requirement that the par-

111. *Id.* at 657.
112. *Id.*
113. *Id.* at 657-58.
114. *Id.* at 663.

ties and counsel come to the proceeding with settlement authority.[115] This is based on the frequent experience that a settlement is less likely to be achieved if persons not in attendance must approve the settlement agreed upon. Coming without full settlement authority has also been seen as an illegitimate tactic used by parties, particularly insurance companies, to allow the negotiator to claim inability to bargain outside of a prescribed range and to allow absent officials to disavow agreements made by their negotiating representative as outside their authority.[116]

Lockhart v. Patel[117] provides an extreme example of an insurance company's noncompliance with such an order. After a non-binding summary jury trial that awarded the plaintiff $200,000 for a lost eye in a medical malpractice case, the plaintiff agreed to settle for $175,00, but the attorney for the doctor's insurer told the judge he was only authorized to offer $125,000 and not to negotiate any further. The judge then called a settlement conference, directing the defense attorney to bring the home-office representative of the insurance company who had issued these instructions and a representative with equal authority. He said: "Tell them not to send some flunky who has no authority to negotiate. I want someone who can enter into a settlement in this range without having to call anyone else."[118]

The defense attorney brought an adjuster from the local office who advised the court that her instructions from the home office were to reiterate the previous offer "and not to bother to call them back if it were not accepted."[119] The judge then made findings that the insurer "had deliberately refused to obey the order of the court,"[120] striking the pleadings of the defendant, declaring him in default, and ordering a show cause hearing why the insurer should not be punished for criminal contempt. Later that day, the insurer settled for $175,000. At the contempt hearing, the judge accepted the assurances of the insurer that "it had all been a misunderstanding" and permitted it to purge itself with a letter of apology from its Chief Executive Officer.[121]

Lockhart is an appropriate fact situation for sanctions. Defendant's refusal to send a representative with any settlement authority at all, other than

115. *See, e.g., In re* Air Crash Disaster at Stapleton International Airport, 720 F. Supp. 1433, 1441 (D.Colo. 1988) (settlement conference order that "Representatives of all parties, with full settlement authority, shall attend the settlement conference and participate fully in all negotiations. The court expressly notes that the presence of counsel of record does not fulfill the requirement of the presence of an individual with settlement authority.").

116. *See* CHESTER L. KARRASS, GIVE AND TAKE: THE COMPLETE GUIDE TO NEGOTIATING STRATEGIES AND TACTICS 96-97 (1974) ("Limited authority is a source of power. A man is generally better off if he doesn't have full authority. . . . A negotiator with limits can prove to be tough. He can say 'no' gracefully. It is never he who says 'no' but somebody or something else. . . . If you challenge my lack of authority by bumping the problem upward, other apprehensions set in. Now you must take on my boss or my boss's boss or the legal counsel, all of whom represent new status relationships. . . .").

117. 115 F.R.D. 44 (E.D. Ky. 1987).

118. *Id.* at 45.

119. *Id.*

120. *Id.*

121. *Id.*

to reiterate the previous offer, insured that the conference would be a futile proceeding. Requiring settlement authority does not coerce a party into settling for any specific amount, and litigant autonomy cannot justify ignoring a requirement directed at avoiding wasteful negotiation tactics.

The hard cases arise when the representative's settlement authority is more ambiguous than in *Lockhart*. Assume that an insurance company sends a representative with authority to settle only up to $10,000, on the basis that it has thoroughly reviewed the case and is convinced that there is no liability at all and, that, in any event, the reasonable damages are much smaller than that amount. Surely the company should not be required to give its representative authority to settle at a higher amount when it has concluded that there is no justification for doing so. But the key inquiry is what the representative's instructions are. If he is sent without authority to consider any settlement above $10,000, this is essentially a "no authority" case as in *Lockhart*. A court should be entitled to require that the representative at least be open to hearing the arguments of the other side with the possibility of settling at any amount found to be persuasive, even though the representative understands that the company has evaluated the case as not worth more than $10,000. If his authority and instructions are so limited that he is deaf to any persuasion, then he is not the proper representative with adequate authority that the court has ordered.

A further question, however, is whether the representative must himself possess full authority to settle. Would it be sufficient to have a representative at the regional office with broader settlement authority be available by phone? What is troubling with this approach is that the person with the ultimate authority cannot be subjected to the discussion that takes place in the settlement conference, thus undermining the effectiveness of the process. On the other hand, requiring the representative to be the person with ultimate settlement authority can impose enormous burdens on that official's time or force her to delegate the authority further down the line than she finds it prudent to do.

G. Heileman Brewing Co., Inc. v. Joseph Oat Corp. wrestled with these issues. The majority upheld the magistrate's order that the defendant send a "corporate representative with authority to settle" on the ground that it did not require coming to court "willing to settle on someone else's terms," but only "to consider the possibility of settlement."[122] It interpreted the term "authority to settle" as meaning only that the corporate representative "was required to hold a position within the corporate entity allowing him to speak

122. 871 F.2d at 653. Judge Posner dissented on the ground that requiring "full settlement authority" was different from merely demanding that "a party who has not closed the door to settlement send an executive to discuss possible terms." *Id.* at 658. It is only defensible, he said, if a party has a duty to bargain in good faith, which he contended Rule 16 does not impose. He thus viewed the combination of the full settlement authority requirement and the good faith bargaining requirement as coercing the defendant into settling at some amount. This seems to be a misreading of "good faith participation" as requiring affirmative offer behavior. The majority's description of the duty imposed — to be able to speak definitively and to commit to a particular position — is far removed from coercing a party to settle at a specific settlement figure.

definitively and to commit the corporation to a particular position in the litigation."[123]

Judge Easterbrook's dissenting opinion raised the concern that such a requirement invades the decision-making autonomy of the corporation. He concluded that the magistrate found the corporation's attorney was "inadequate only because he was under instructions not to pay money."[124] This suggests, he said, that even the corporation's CEO would have been an inadequate representative if he had instructions from his board to settle without paying cash and to bring back for the board's consideration any financial proposals. He pointed out that most corporations reserve the power to agree and that their negotiating representatives only have the "power to *discuss* and *recommend*."[125]

Should a corporation (or a governmental body which can only act by the vote of a governing group) be required to rearrange its structure in order to give its negotiator full settlement authority? The answer would seem to depend on whether the authority-structure is reasonable (or required by law) and whether it can be accommodated by reasonable procedures to permit the negotiating representative to obtain ultimate approval. Normally, it would appear, a company should not be able to avoid sending a person with settlement authority just because it wants to limit that authority to someone higher up who cannot attend. It seems reasonable to expect the representative to be a person with suitable authority and discretion to engage in meaningful bargaining.[126] Professor Riskin suggests that an ideal representative would be one "whose attributes approached, as closely as feasible, those of an individual litigant," and that "a representative with two or three of them ordinarily would satisfy my notion of full settlement authority."[127]

How should a court treat governmental entities which are subject to internal regulations or statutory limitations that restrict settlement authority to high-level officials? In *In re Stone*,[128] federal agencies and entities (including the Internal Revenue Service and Government National Mortgage Association) sought to mandamus a federal district judge from enforcing a standing order that required the federal government to send a representative with "full settlement authority" to settlement conferences. U.S. Attorneys may settle cases up to $500,000; if the client agency disagrees with the U.S. Attorney as to terms of settlement an Assistant Attorney General must approve the settlement; and settlements in classes of important cases must always be approved by the Deputy Attorney General or an Assistant Attorney Gen-

123. *Id.*

124. *Id.* at 663-64.

125. *Id.* at 664.

126. A model Order of Referral to Mediation recommended to judges by the Standing ADR Committee of the Texas State Bar Association provides that "each organization or agency party shall be represented by an officer or representative with authority and discretion to negotiate a settlement." 2 ALTERNATIVE RESOLS. 11 (Winter 1992).

127. Riskin, *supra* note 79, at 1110-11.

128. 986 F.2d 898 (5th Cir. 1993) (*per curiam*).

eral. The government argued that a court may never compel the Department of Justice to alter its settlement-authority regulations.

The Fifth Circuit disagreed, but cautioned that courts "must consider the unique position of the government as a litigant."[129] It found that the purpose of the AG's regulations was to promote centralized decisionmaking on important questions; this serves the important objectives of allowing the government to act consistently, to pursue policy goals more effectively by placing authority in the hands of a few officials, and to promote political accountability. It concluded that, given these reasonable policy justifications and the insignificant interference with the operation of courts by respecting these regulations, the standing order was an abuse of discretion as applied in the particular cases involved.[130]

The Fifth Circuit opinion went on to recommend that district courts take "a practical approach" to imposing settlement-authority requirements and consider "less drastic steps" before requiring the attendance of an official with ultimate settlement-authority.[131] It suggested, for example, that a court could require the government to declare whether a case could be settled within the local U.S. Attorney's authority, and, if so, require him to attend or be available by telephone. A court could also take such actions as requiring the government to advise it who has settlement authority and then advising such person in advance of the conference to consider settlement and be fully prepared and available by telephone to discuss settlement at the time of the conference. Only if such lesser measures fail, should a court resort to requiring the attendance of the official with full settlement authority.[132] This appears to be a reasonable approach to the problem of governmental representation at ADR proceedings, although it accords greater deference to the government than courts have been willing to accord to corporations and private business entities.

A further problem encountered by governmental entities can arise from statutory requirements that assign decision-making authority to a group (such as a governing board or commission, a city council, or county commissioners). In such situations, all that can be reasonably expected of a representative in a settlement conference or ADR proceeding is that he be given tentative authority to negotiate on behalf of the entity without imposing artificial limitations that would close his mind to persuasion. Approval by the group could, in some situations, be sought immediately by requiring the members to be available by phone, or, where decision-making must be made in an open meeting (as with governmental bodies under certain open meetings statutes)[133] by requiring a meeting within a short period of time after

129. *Id.* at 903.

130. *Id.* at 904.

131. *Id.* at 905.

132. *Id.*

133. *See, e.g.*, the Texas Open Meeting Act, TEX. REV. CIV. STAT. ANN. art. 6252-17 (Pamp. 1993), § 1(a), defining a meeting that must be open as "any deliberation between a quorum of members," and § 2(l), requiring any final settlement of a suit to be made in an open meeting.

the conclusion of the ADR proceeding.

E. PARTIES' OBLIGATION TO PAY MEDIATOR'S FEE

A necessary consideration in court-ordered ADR is who will pay for the third-party neutral. The problem normally arises only with mediation since courts generally pay for the neutrals in court-administered processes such as early neutral evaluation, court-annexed arbitration, and summary jury trial. Most courts do not have funds for payment of mediators[134] and therefore require the parties to bear the cost, analogizing a mediator to special masters and other judicial surrogates like guardians ad litem whose fees are assessed against the parties. The plaintiffs in *Decker* objected to being ordered to pay for the mediator, but the appellate court observed that the Texas ADR statute[135] allows the court to set a "reasonable fee" for the services of an impartial third party, concluding that it "certainly allows a reasonable fee to be charged."[136]

The difficult issue is what is a "reasonable fee." Complaints of very large mediator's fees, in the thousands of dollars per day, have been raised in some states.[137] There is also a question as to whether the parties must accept a court-appointed mediator and his fee schedule, or whether they may use another mediator, including one from a community-based low-fee or non-fee service. The policies underlying court-mandated ADR would seem to be best satisfied by according the parties a role in the selection of a mediator, so that they can consider both his qualifications and fees in making the selection.[138] Only when this is not feasible due to time constraints should courts appoint a mediator without consulting with the parties in advance. Money often becomes an important consideration in procedural matters, and court's insensitivity to this issue can undermine support for ADR in the bar and the community at large.

IV. CONCLUSION

Court-mandated ADR is presently going through growing pains. Courts have embraced ADR for a variety of reasons, not all of them consistent with the principle of voluntariness that underlies non-binding ADR processes. In

134. California, however, mandates conciliation for issues of child custody or visitation as a prerequisite to a divorce trial, and conciliation counsellors are provided by the court. *See* CAL. CIV. CODE ANN. § 4607 (West Supp. 1993).

135. TEX. CIV. PRAC. & REM. CODE ANN. § 154.054(a) (Vernon Supp. 1993).

136. *Decker*, 824 S.W.2d at 250.

137. *See* Richard Connelly, *Mediation Law Loses Some Leverage*, TEXAS LAW., Jan. 20, 1992, 1, at 32. ("Mediators [in Houston] have consistently waived their fees in the past whenever a challenge was made to court-ordered mediation.").

138. This could be accomplished by giving the parties a brief period of time to select a mediator, or by providing them a list of qualified mediators from which to choose. with the court making the selection if they fail to do so. *See* the proposed Order of Referral to Mediation of the ADR Committee of the Texas State Bar Association, 2 ALTERNATIVE RESOLS. 11 (Winter 1992) (parties ordered to confer and within ten business days may submit an agreed order nominating a mediator, but meanwhile naming a mediator who will be appointed in default of the parties' agreement).

implementing mandatory ADR orders, court-imposed requirements as to participation should be carefully scrutinized to insure their compatibility with the ADR process involved. A "good faith participation" requirement is not compatible with the objectives of court-annexed ADR and risks satellite litigation over sanctions that is inimical to effective and efficient settlement. In contrast, participation requirements for the exchange of position papers and objective information enhance the settlement process without unduly interfering with litigant autonomy. Similarly, a "minimal meaningful participation" standard that requires only such participation as is needed to prevent frustration of the objectives of the particular ADR process is consistent with the role of ADR in the litigation system. Requirements for attendance of parties and persons with adequate authority and discretion are also critical to the settlement function of court-annexed ADR, but must be applied pragmatically to protect against unnecessary expense and inconvenience. Cautious use of courts' power to mandate ADR is necessary both for public support and to insure compatibility with the objectives of ADR as an integral part of the litigation system.