

# Research-Informed Models for Communicating the Value of Court-Connected Alternative Dispute Resolution for Public Funding

## Working Paper

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## Introduction

The Administrative Office of the Trial Court sponsored the Massachusetts Office of Dispute Resolution (MODR) at the University of Massachusetts Boston to prepare this working paper depicting the state of research on alternative dispute resolution (ADR)<sup>1, 2, 3, 4</sup> for the purpose of compiling an evidence base for public funding of court ADR programs.

The format of the paper is a summary of research and an outline of decision-making models for legislators and budget analysts. To inform this work, a workshop was held with directors of court-connected community mediation centers focused on communicating the value of mediation services to the state. Now, as a Working Paper, this work will be employed as a guide by the Trial Court Standing Committee on Dispute Resolution and court ADR programs for planning implementation and funding strategy.<sup>5</sup> The term “Working Paper” implies launching a process of inquiry and planning.

This paper is presented in a style similar to advising a senior executive making an investment decision. There is therefore a “return on investment” orientation to the Working Paper. We brought to bear an outside, management science perspective as recommended in the Monan Report<sup>6</sup>. In contrast to that report this is an operational level analysis. We suggest readers review that report first, if they have not done so already, as it outlines the executive level, strategic thinking about advancing the court system – a regime within which court-connected ADR must operate.

While the Monan Report outlines recommendations for improvement of the judiciary, recommendations specific to ADR are not included. Operational recommendations for ADR are yet to be developed. In addition, the implementation of ADR should be included in service and outcome evaluation systems deployed in the court.

There is a need now to integrate this work with the formation of Trial Court policy on court-connected ADR, in the context of actions taken in response to the Monan report, such as time standards for case management, and then aligning this with the legislative budget decision process.

The basic idea of this Working Paper is to encourage a broad overview of the field rather than emphasizing details of particular research projects (i.e., the purpose of this summary is insight not numbers). The last compilation of information on the value of ADR for the state was completed in February 1998, “Report to the Legislator on the Impact of Alternative Dispute Resolution on the Massachusetts Trial Court.” The present work draws on more than twice as many studies. At this time they are provided as a roughly 70-page annotated bibliography in draft form. For the purpose of compiling a larger collection of summary data, the Working Paper draws to a large extent on the work of other reviewers of the field.

This data is presented, in this Working Paper, in a framework to enable a yes/no decision for budget decision-makers. This is done by dividing the analysis into a set of simpler models and asking whether the investment in ADR makes sense based on each model taken individually; then tallying the votes. This approach makes the task of interpreting this data simpler for the reader. In other words, one could look at the data for each model and ask whether the data tends to lean on the side of a return on investment or not?

Formal decision analysis in this regard, would necessarily take into account the risk adversity / risk affinity of the decision maker(s). For the purpose of this Working Paper, a risk adverse position is generally adopted, reflecting a conservative approach to the budget decision. The conservative stance entails setting reasonable expectations regarding benefits and assessing the potential of the downside or loss.

There is very little formal evaluation data specific to Massachusetts court-connected ADR that is less than seven years old. So too, there does not appear to be a substantial record of evaluation of pertinent performance measures of the judicial system that would permit a comparative analysis. Massachusetts is not however unusual in this regard.<sup>7</sup>

The strength of the existing data in the field is in establishing some bounds on the distribution of results of implementing ADR. The implementation of ADR in Massachusetts is not monolithic; it is largely left up to each court and the initiative of local ADR practitioners. So considering the broad distribution of results of ADR studies in the field would probably more accurately reflect the distribution of results to expect within Massachusetts than a particular study of a program in one or several Massachusetts courts. It is reasonable to presume that Massachusetts' implementation of ADR would perform within the bounds of those distributions. Massachusetts has a longstanding history of implementing ADR in various programs throughout the state. Based on their previously adjudicated success, a number of these programs, such as the Multi-Door Courthouse and the court ADR programs of the Massachusetts Office of Dispute Resolution, have served as models for other states. These programs then served as subjects in further research. So, in the absence of timely Massachusetts specific data, and in the interest of more realistically representing the distribution of expected results than can be inferred from data studies of several Massachusetts specific programs, we adopt the technique of portfolio analysis. This is a technique very common in the investment community and increasingly applied within organizations for their own projects.<sup>8</sup> Some of the parlance in the following pages is drawn from this realm, for example, "risk"<sup>9</sup> and "uncertainty,"<sup>10</sup> "aversion to loss," "return on investment," and so forth.

The analysis which follows is course-grained. It is analyzed with respect to sensitivity to variation in the results reported in studies as they pertain to the effect on the yes/no answer on the pertinent model. A benefit of the portfolio approach is that the broad distribution of results in the data set accommodates the variation in performance objectives of the court system, and situational differences of individual courts. A value in the analysis is surfacing considerations regarding the assumptions of the decision-maker.

The modularity of the approach, and affinity of models with different performance objectives, enables weighting according to legislative or court system's policy directives.

We note the resource commitment to this endeavor has been two and a half person weeks sponsored by the Trial Court and four person weeks contributed by MODR of work conducted over a two month period. The project also enjoyed the contribution of over thirty people as listed in the acknowledgements section. It also enabled MODR to engage other researchers with an interest in the nature of this work.

In preparing the following analysis over one thousand documents were assembled in electronic form with full-text indexing providing an ongoing resource for research.

In closing please note that the author does not consider that the above compilation constitutes research in the field of ADR. While it might be considered to be within the realm of meta-analysis, the work at this stage is overly reliant on secondary resources, sacrifices distinction-making amongst cases in favor of broad managerial overview, and sacrifices statistical nuance in favor of presenting a view of the field to the non-scientist. These are limitations with respect to the strictures of scientific method. The purpose of this work is rapid assembly of a decision-making tool to foster structured dialogue amongst the court, community mediation centers, and budget decision-makers.

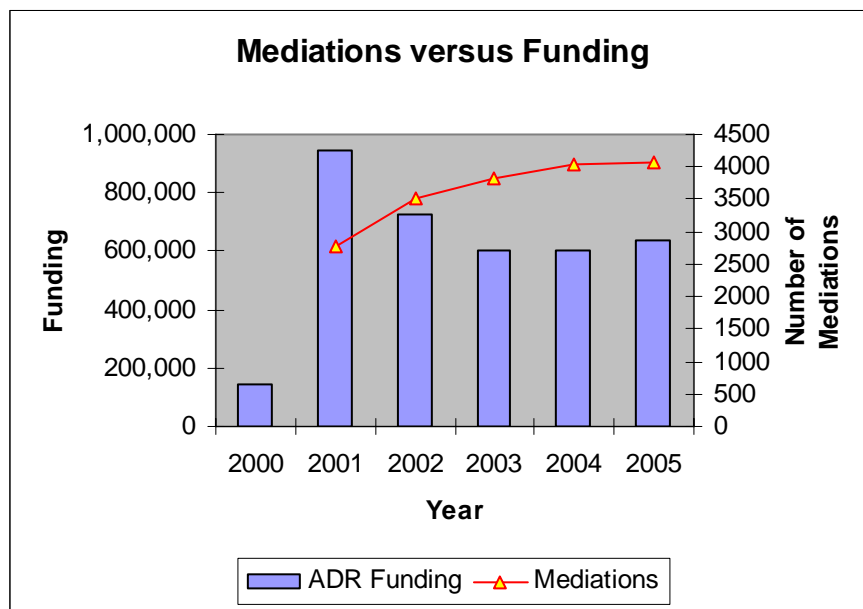
## Overview

The purpose of framing the research in the following models is to assist the court and its court-connected mediation programs in their ongoing dialogue with the funding decision-makers in addressing the question: Is state funding of community mediation centers and court ADR generally a worthwhile investment? As a means of setting forth components of an analytic framework, the following simplified financial models are offered to draw out salient aspects of the nature of the investment. The simplified models are employed primarily for the purpose of illustrating the investment in terms of classic financial models familiar to a budget analyst. These models intend to provide guidance in framing the funding decision. They are presented from a conservative stance – that is guiding where there are good levels of certainty, low levels of risk, and low downside, regarding return on investment.

## Simplified Model 1: ADR Services Viewed as Outsourced Contractual Services

### Introduction

Suppose that the state contribution to community mediation centers were viewed as a contract to provide mediation services to the courts. A simplified input output model over time is drawn from the Administrative Office of the Trial Court.<sup>11</sup>



### Model

From the perspective of this model, the state is protected from the risk of cost-overrun because the nature of the appropriation is as a fixed-price contract – that is, cost-overruns are absorbed by the mediation centers and their network of volunteers. For example, if mediation consumes significantly more time than

normally expected, the community mediation centers do not submit an additional charge to the court; indeed there is no chargeback system at all.

Are a reasonable number of mediations conducted in comparison to the size of the contribution? Is this approach to acquiring services competitive with respect to the market? Estimates by the Trial Court of the total number of mediations indicate that the average “cost” per mediation is likely to be far below market value.<sup>12</sup> Estimates by mediation centers of “in-kind” service provided by volunteers indicate a breakeven point for state support of the center at roughly one third of market value of the same service contracted on an hourly basis by the court. For example, a prototypical center that receives \$50,000 from the state, which harnesses 1,000 volunteer hours, can be viewed as delivering mediation services at \$50/hr, whereas the market rate is around \$150/hr. This very simplified analysis suggests that if the state were to issue a request for proposals to outsource mediation services the contract administrator would be hard-pressed to find bidders.

It is notable, that in this “contract” model, there is no limit to the number of cases referred by the court to the centers. In this case the state is protected from a much larger potential cost-overrun should there be a larger number of cases referred given the same state contribution to the centers. Is there evidence that the courts and the state benefit from this control of the financial risk of cost-overrun in terms of volume? There has been fairly consistent growth in the total number of mediations provided while annual state allocation to the community mediation centers has varied considerably. Secondly, prior to the currently more organized state support, the community centers steadily delivered mediation services, in many cases actually subsidizing the court through their own fundraising. Thirdly, while their service load generally continues to increase, a number of centers do not request any increase in funding.

The state could probably derive even more benefit in this regard. Over the past few decades, through a variety of educational and training venues, the size of the qualified volunteer base in Massachusetts has grown substantially. The Trial Court estimates over 500 volunteers in the network of sponsored centers, with a previous estimate of nearly 2000 across the state. There are indications that this resource is underused, that is, from a resource perspective, there is overcapacity.<sup>13</sup> Secondly, indications in Massachusetts<sup>14, 15</sup> reflect the findings of studies in many states that the utilization rate for mediation in cases for which it is appropriate is often low, perhaps as low as 25%.<sup>16</sup> With respect to this simplified model, viewing provision of mediation services as a fixed-price contract without designating or limiting the expected number of mediations to be provided, the risk of cost-overrun to the state is in underutilization. Utilization in cases appropriate for mediation is primarily a function of the referral rate by the court.

Therefore, when viewed as a “contract” for services, the risk of “cost” overrun is primarily under the control of the courts as a function of their referral rate. A review of literature by Hedeem, regarding the nature of referrals, highlights research by Mika that “the most powerful influence toward referring cases is a word-of-mouth recommendation.”<sup>17</sup> Consistent congressional advocacy, court

leadership, a properly orchestrated system of incentives, and measurement system to improve utilization, supported by community centers working in partnership with the courts to improve the dynamics of referrals are all measures to improve utilization.<sup>18</sup> The danger is unintentionally increasing the rate of inappropriate referrals.

### **Discussion**

In summary, from the perspective of this simplified model of the state investment as “contract” the evaluation of volume of mediations and average “cost” per case (as an apportionment of state funding to the centers) demonstrates “contract” performance advantageous to the state. Risk management of “cost” overruns, primarily under the control of the courts, is also to the advantage of the state.

*Counterpoint* – On the other hand, suppose that the court dramatically increased its utilization rate. Unless the growth in referrals was somehow indexed to state support of community centers, their coordination resources would likely be overwhelmed. At that point either more funding on a cost per case basis for the programs would have to be provided or ADR services would have to be moved internally to be provided by court personnel.

*Counterpoint* - As in most analogical thinking, the real insight comes from looking at where the analogy falls short. In Massachusetts, state funding of community mediation centers is not a “contract.” The funding primarily goes to supporting infrastructure, not paying fees for services. The services provided are coordinated by the centers with the delivery of the service made by uncompensated volunteers. The model is inappropriately narrow in considering the benefits to the state based solely on comparative costs of outsourcing with respect to the court rather than the broader, total cost/benefit picture. The infrastructure supports many activities at the community level beyond handling referrals from the court. The model also presumes mediation will be offered and thus does not address comparative costs to the court of eliminating mediation. Another option to consider is internalizing mediation services completely within the court versus “outsourcing,” a question addressed in the next model.

In order to compare the value of investment in court-connected ADR, it would be appropriate to consider where else in the state budget there is a contract with a private service provider for an unspecified and to a large extent unlimited volume of service requests, at a fixed price, in which the court and the state are protected from the risk of cost overruns. Public agencies may operate under this type of public funding but are there other such funding arrangements executed with private vendors? If so, these would be an interesting basis for comparing the nature of the earmark to community centers viewed as a contract.

## **Simplified Model 2: ADR Services Viewed as an Internal Court Function**

### **Introduction**

Suppose internalizing mediation services within the courts were considered. There are examples of states which provide a high percentage of mediation directly through the courts. Perhaps the most extensive statewide system is Florida. The tracking of ADR in



Illinois is representative of the breadth and diversity of ADR implementations across a state. Such an arrangement may also enable additional innovation in earlier engagement with previously reported success.<sup>19</sup>

### **Model**

The first point to highlight from the perspective of this simplified model is that the state funding to the centers is primarily employed for infrastructure. If the courts took on the task of providing mediation services within the courts themselves, and available infrastructure already being paid for could be reused, that is, the cost of additional infrastructure investment eliminated, could it save the state money? Let us further suppose that the courts bypass the centers to access their network of volunteers and that direct delivery of mediation services remains uncompensated. Let us also suppose there are no additional transition costs, but that the current court staff is already fully loaded. Would this provide savings to the court and to the state?

An estimate of the additional court staff can be made from two perspectives. One, the Massachusetts Housing Court does internalize ADR services to a large extent. It requires a staff of 25 both to coordinate services and serve as neutrals. The volume of non-housing ADR interventions is much larger. A second basis of estimates is simply replacing the function of community center staff. Presume at least one court staffer would be required to replace each currently funded community center. The number of additional court staff would again at least be greater than twenty. An increase in court budget, accommodating at least twenty additional staff would be greater than the total budget request of the community centers. Given the comparative volume of housing ADR interventions versus non-housing, the number of additional staff required is probably much higher. Such budgets are in place in California and are far larger, by any metric or ratio, than that allocated by Massachusetts.

In the case that the state chose to redirect funds from the community mediation centers directly to the courts they would lose the cost overrun protection brought to light in the model above.

### **Discussion**

In considering the justification for an operating budget, it is often useful to consider some basis for comparison with respect to another course of action toward which the funds could be allocated. Would the cost-benefit analysis of internalizing court-connected mediation justify a budget allocation to the court? Such an analysis must of necessity compare alternative venues of investment, in this case internalizing versus outsourcing. While this is a natural mode of analysis in the financial community, and in industry, and in many public policy systems, this type of thinking is not much in evidence within the current budget process. Nor is there much of a comparative research base to support such analysis.

A difference in this model, compared to states which internalize mediation would be in the cost of transition of Massachusetts to such a system. There is almost no research concerning transitions from one type of system to another.

What is the likelihood of funding this approach to provision of mediation services? Budget allocations to the courts in this area have been decreasing. Indeed, the Uniform Rules, which call for a coordinator in each court – to interact with the community centers and pro bono service providers (and not as ADR neutrals) goes largely unfulfilled in the non-housing arenas.

*Counterpoint* – A good argument could be made for the potential of improved efficiencies and increased utilization through the internalization of ADR services as has been done within the Housing Court in Massachusetts. Unfortunately there is no solid research base comparing in-court versus court-connected community mediation centers. Therefore such a decision must of necessity address substantial risk in conversion of the system. Should such a path be chosen, experimentation in selected courts, which are leaders in integrated case management, would be the appropriate venue. The time required for launch and evaluation of such pilots would probably require 3-5 years prior to statewide roll out.

## **Simplified Model 3: ADR Services Viewed as a Mechanism of Court Efficiency**

### **Introduction**

Another narrow view of a budget justification for supporting mediation of any kind is viewing it as an investment in a process improvement program as a means of reducing costs<sup>20</sup> to the court. It can be framed as follows.

### **Model**

State funding of a particular community mediation center can reasonably be expected to perform within the wide range of costs and benefits previously evaluated and reported for the variety of mediation services in its portfolio. What would be an appropriate basis of comparison for an investment with a similarly low level of volatility in terms of investment performance? The preclusion of cost-overrun, via a fixed-price unlimited services contract, can be interpreted as an investment vehicle with low volatility and risk. A reasonable comparison would be investment in a municipal bond or Treasury note. The hurdle rate therefore would be returns on the order of less than 10%, probably around 4-6%.

While there are studies which conclude there is no discernable effect of mediation services on costs, and even some studies which suggest that mediation is more costly for certain types of cases, the majority of studies suggest cost savings greater than that expected for investment in a bond or Treasury note, and some present stellar returns.

If the median of the distribution of returns is even as low as in the range of 10%-12% cost savings, an investment is on a par with returns expected of a well diversified financial investment portfolio; better than many mutual funds. Yet it likely enjoys a much lower volatility than the mutual fund market because it is a fairly mature service delivery process, which expends resources in very small increments. The evidence of cost studies that do report savings to the court accruing from court-connected ADR, especially when part of an integrated court management system, is generally higher than 20%.

## Discussion

There are a number of studies which report cost savings to the court at 10% and above. It is interesting to note that in several interviews with people familiar with the research base the opinion was expressed that 10% savings was not compelling. But as an investment vehicle these returns are outstanding as compared to an alternative investment at similar risk. A 10% cost savings to the court, for an investment in ADR, is twice the return on investment, which ought to be expected for an investment vehicle with a low risk profile.

*Counterpoint:* The returns are probably not as great as the typical hurdle rate expected of other process improvement investments such as for information technology. IT project investments are typically heavily discounted to accommodate the likelihood of cost overruns. Typical expected annual return on investment for IT is around 30%.

A shortfall of this analogy is that the investment in mediation has no cash-out mechanism – that is the returns are not liquid. Furthermore, the cost savings, if accrued, and in order to be realized, must be accompanied by a managerial objective for either reducing staff, or redirecting resources. This is something difficult to do, although other states have demonstrated such.

A conservative stance on the research base for court cost reduction is that in comparison to many other metrics, this one is fairly immature. Most all the studies reviewed lack financial sophistication.<sup>21</sup> Many of the court cost studies which provide good detail on costs incurred for specific cases, do not include comparative control groups or randomized sampling. There is widespread agreement that the evaluation of cost is contingent on context, situation, case type, degree of integration with court management systems, spatial location, amount of training of the referring coordinators, and so forth. Some reviewers of the field conclude there is not strong evidence that there is any effect. A small, but vocal set of researchers, who consider ADR “second rate” justice, attack the extant research base on the effect of court costs. So too, cost studies are extremely expensive to conduct. The cost of the oft-cited RAND report on the topic,<sup>22</sup> was four to eight times the total annual Massachusetts state budget for court-connected ADR. The critical response<sup>23</sup> to the RAND report suggests that a broad consensus was not reached on the results. A major part of the controversy is whether it is appropriate to compare the costs of court-connected ADR to that of trials at all since most cases are resolved without going to trial with or without ADR.<sup>24</sup>

An earlier work by Hensler at RAND presaged some of the difficulties in conducting the RAND CJRA study. “What is the evidence that ADR programs actually achieve cost savings for taxpayers...? The issue is not whether individual litigants can achieve cost savings by using ADR in specific disputes – the answer to that question is almost certainly yes. Rather, the question is whether courts or litigants can achieve aggregate cost savings – reductions that show up on the bottom line – by substituting ADR for litigation in large classes of disputes. The answer to this question is still largely unknown.”<sup>25</sup>

In the absence of sound data, compiled by the courts, an alternative indicator regarding the bottom-line effect of ADR is suggested. The high rate of endorsement of ADR by lead users, such as corporations, and the expanding use of ADR in corporate law, can serve at least as proxy indicators in this regard.<sup>26</sup>

Is there a high risk of a downside for investing in court-connected ADR? “Could investing in court-connected ADR actually significantly increase costs? There appears to be no compelling evidence that aggregate costs to courts are increased across all situations. Indeed, there are generally cost savings when the implementation of court-connected ADR is accompanied by other changes in case management. There is however, some suggestion in the available data that, because of the positive expectations of ADR, an unintended consequence of implementing ADR may be to increase the filing of claims. This may act to increase costs.

Another example of a suspected, unintended effect is the hypothesis is that as parties and their lawyers become facile with the mediation process, some may tend to revise their plans more often, entailing more revisits to the court. This is not a well substantiated overall finding. Yet, it presents an interesting problem in the design of research which seeks to ascertain actual costs. Bounding the scope of inquiry as the comparative cost of the resolution associated with one filing misses the effect on costs throughout the life-cycle of the court’s involvement in addressing the underlying problem. Expanding the scope of inquiry to include the effect of revisits on cost would be better. This too would fall short of evaluating the trade-off of fairly minor costs for additional visits likely to be of higher quality with the likely improvement in compliance and decreased, much higher costs of enforcement. Measuring actual costs requires a systems dynamics perspective<sup>27</sup>,<sup>28</sup> and a life-cycle orientation.

A decision not to fund community programs must necessarily address the potential risk of increasing court costs – since the majority of studies do report improvement in this regard. In addition, if not funded, there is an increased likelihood that some community programs will fold. Following a decision not to fund these programs, the court assumes the liability of transition costs to provide ADR by other routes, or will engender the exit costs of eliminating ADR as a service.

In summary, Model 3 can be interpreted as follows:

- Expected returns should probably be much lower than returns for riskier investments in process improvement such as that for information technology. Comparison with bonds seems reasonable.
- The evidence base and reviewers of the evidence base are generally supportive of a decision to invest in ADR presuming a) the emergence of new regime of performance accountability as called for in the Monan Report; b) integration of ADR referrals with court management systems; and c) monitoring of service and outcome objectives applied throughout court services that enable the timely steering of ADR implementation.
- There is a high level of uncertainty in projecting cost savings to the court, due to: a lack of data in the overall field as well as that specific to Massachusetts; no commonly accepted standards for metrology (as there is in measures of satisfaction); ongoing controversy regarding the scope of inquiry and the basis of comparative analysis; insufficient economic and financial discipline in the ADR research community; and the varied influence of contextual factors specific to the courts being measured. In this regard, data cited which pertain to cost effects on court operations ought to be considered unrefined or anecdotal.

- Projected cost savings to the court, resulting from an investment in ADR, as they pertain to a diversion of court resources or a build-down in court staffing should probably not be made until an integrated court management system and evaluation baseline are in place. Until this transpires, it is unlikely that actual, bottom-line savings will be realized. If gains are realized, it is unlikely the court would know it and therefore the “savings” probably won’t be converted efficiently.
- It is instructive to compare the yes or no decision for Model 3 on the basis of risk aversion to loss.
  - If an investment in ADR is made is there a high expectation that this will lead to an increase of cost to the court? No. Across the broad spectrum of implementation the results are mixed. There is not a compelling evidence base that demonstrates investments in ADR are consistently associated with higher costs to the court. Indeed, the RAND report concluded there was no significant effect on costs.<sup>29</sup>
  - If an investment in ADR is not made is there a high expectation that this will lead to an increase of costs to the court? Presuming ADR referrals are still made to the community programs a risk of concern is losing capacity. If ADR services are offered in another manner, or if ADR is eliminated as a service, then there will be transition costs. And of course, if there is a significant cost savings to ADR, then it will not be realized.<sup>30</sup>

On its own, this model illustrates the danger of adopting a narrow bound to return on investment. Investment decision makers are increasingly concerned with total cost. The question is what is the appropriate scope of concern? From the perspective of the state, it would seem that consideration of total cost to the state and its citizenry, rather than simply the operation of the court would be appropriate. We take up consideration of the value provided litigants in the next model.

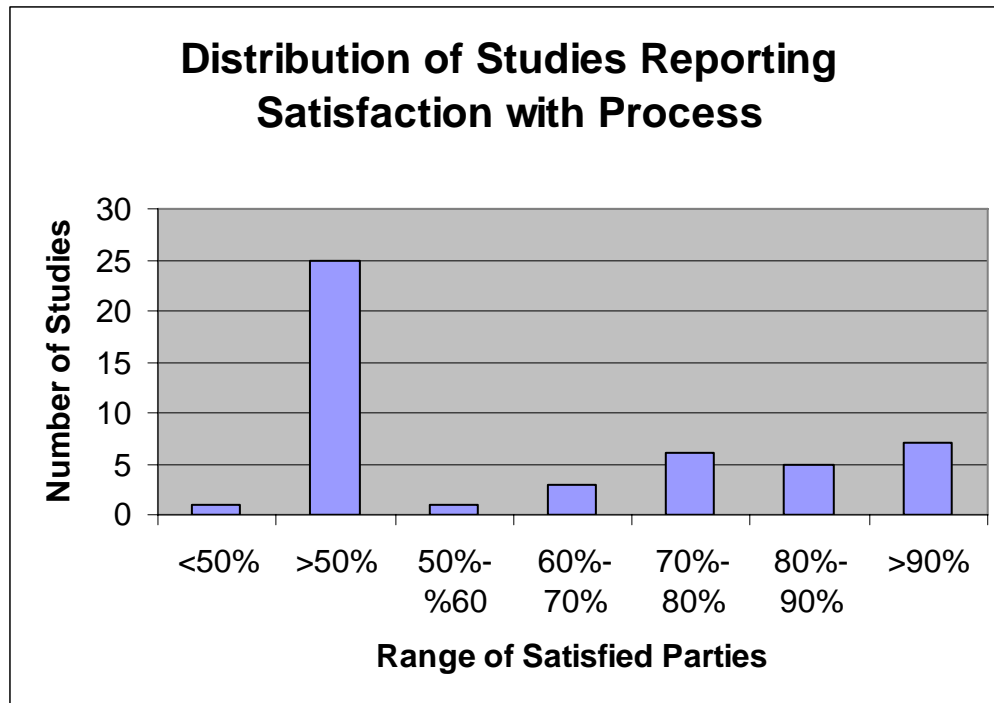
## **Simplified Model 4: ADR Services Viewed as a Quality Improvement Measure**

### **Introduction**

Perhaps the most consistently reported benefit of providing mediation services in any format is the significant improvement in party satisfaction. The term “significant” means incontrovertible statistical correlation of benefit.<sup>31</sup> Many if not most of the studies provide a comparative basis with respect to a proper control group, for example, of disputes that were appropriate for mediation but took the litigation route. Many studies include randomized studies that confer a high degree of confidence in the findings. “Satisfaction”, in particular, “satisfaction with the process”<sup>32</sup>, is a widely employed metric amongst the ADR research community. “Satisfaction” as a metric has been cultivated over the past three decades, is fairly consistently applied, and backed up well by quantitative statistical approaches. The predominant body of evidence is that parties to a mediation are more satisfied with mediation as compared to litigation – regardless of whether the outcome is in their favor or not. That is an amazing, prevalently reported finding, which has enjoyed a broad consensus for over two decades and in a large variety

of contexts. The decision to invest in ADR as a means of improving quality is supported by a robust evidence base.

Historians of the ADR movement commonly cite the 1976 Pound Conference's concern with dissatisfaction as a launch point for ADR.<sup>33</sup> The development of measures of satisfaction was directly linked to this purpose. In the following, a narrower consideration of the effect of quality improvement on return on investment is considered.



A summary of the number of studies in the annotated bibliography reporting mediation satisfaction levels.

### Model

A strategy to curtail growth in court budgets can productively focus on curtailing preventable costs. Measures of satisfaction probably serve as a common indicator that directly pertains to many preventable future costs. How so?

Adopting the model of mediation as ‘quality improvement’ evokes the simple analogy of ‘satisfaction with process’ as ‘customer satisfaction with service.’ An analogy<sup>34</sup> to the realm of manufacturing, where the Total Quality Management (TQM) movement began, is to view “a mediation with satisfied parties” as a ‘defect free product’. In TQM, the adage, ‘right the first time’, captures the idea that eliminating defects eliminates rework, which eliminates preventable costs. The analogy to the ADR arena is resolving a dispute properly, that is getting it ‘right the first time’, implies fewer return visits to the court. TQM practitioners demonstrated through countless cases that eliminating rework not only improved quality, but saved costs as well. This was a mantra of the widely endorsed *Quality is Free* program of Phil Crosby.<sup>35</sup> These approaches were translated into government in the 1990’s,<sup>36</sup> as well as the legal profession,<sup>37</sup> and the courts<sup>38, 39, 40, 41, 42, 43, 44</sup>.

What is the “rework”, that is, the preventable future costs in the courts? It comes in many forms. The list includes for example, lack of compliance with agreements, and other shortfalls that require more appearances before a judge. In general, these are often failures to address underlying relational problems that lead to reentry into the courts, or other state or community supported systems at a later time.

Assume that ADR interventions generally focus on addressing the underlying relationship between the parties. For cases appropriate for ADR, ADR tends to address the underlying relationship better than litigation almost every time. Evidence is good that parties to mediation are almost always more satisfied with the process. They also gain some capacity for dealing with their underlying difficulties – at the very least to know that they have an alternative to continuing conflict and entering litigation. Further, presume a common sense linkage of “satisfaction” as a strong indicator of eliminating revisits into the court and that this presumption is supported by some solid data. The question is whether there is a cost to this improved quality?

The majority of evidence in this regard is that litigants experience cost savings, often large cost savings in comparison to similar cases that engage litigation – often on the order of 30%. For example, a study of mediation in general civil cases reported that half of the mediations reduced client cost an average of \$6,000 with estimates for those which increased cost at an average of \$1,000.<sup>45</sup> Larger percentage savings are experienced in the larger cases. For example, an analysis of 828 Civil Cases demonstrated an average cost of ADR of \$870 for 19 hours of work in contrast to average litigation costs of \$10,700, for 89 hours of work.<sup>46</sup>

Is there an increased cost of quality engendered by the courts? Based on the discussion in Model 3 we cannot say for sure. However, there is definitely not a strong compelling body of evidence that ADR taken as an overall portfolio, costs significantly more than litigation. Furthermore, other reviewers in the field, who conclude that there is no discernable effect on cost to the court, actually support the notion that there is no cost of quality.

## **Discussion**

*Counterpoint* - In the parlance of TQM, the first task is improving control of variance, and then adjusting performance to a target objective.<sup>47</sup> A caveat here is that the court administration must set directives and build up a number of managerial subsystems which span human resource management, incentive structures, information systems with timely performance feedback, data collection, evaluation, research, training programs, and esprit de corps in order to exercise control on its performance. Where is the overall court system in this regard?<sup>48</sup>

*Counterpoint* - TQM has a high failure rate in the non-manufacturing domains. Failed TQM programs go largely unpublished as this is not something people like to admit about their own attempts, and it is not a popular situation to study in academia. So does this make Model 4 inappropriate? As TQM was diffused into the non-manufacturing domains of industry, the service sector, healthcare, NGOs, and government, it had to be re-envisioned and reinvented. Is anyone engaged in such a discourse regarding TQM in

ADR? Yes. For example, NACFM has an ongoing program promoting TQM in community mediation.<sup>49</sup>

*Counterpoint* - There are unintended consequences of TQM. For example, if improvements in productivity outpace increase in demand then there is overcapacity and fewer workers are needed. Organizations must often support innovation to expand into new domains in order to reuse the capacity they invested in. If they do not, they usually end up cutting staff levels. Then workers associate TQM with headcount reduction and the next wave of TQM is unsupported. Are there such unintended consequences resulting from the growth of ADR and the seemingly high achievement of improved satisfaction (quality)? There is such discourse. For example, a 2004 study in California included an investigation as to whether the success of ADR encouraged early retirement of Judges who went into private ADR practice. They found no supportive evidence for this contention but kept open the concern. Another unanticipated dynamic may be that since the number of attorney billable hours is significantly reduced, attorneys may be earning less in using mediation, and consequently, they could become disinclined towards ADR. The Collaborative Law movement stands in stark contrast to this concern, but it may be a dynamic nevertheless. A third such unintended consequence, mentioned during interviews, is that in areas where ADR is affecting a decrease in the workload of judges, or even just perceived as such, there are judges who quietly decline to bring attention to this effect. Note here the work of Galanter on "The Vanishing Trial."<sup>50</sup> A fourth effect, also mentioned during interviews, is that while judges' time is likely to be freed up to attend to cases which are not appropriate for ADR, they may be missing the cases that are of intellectual interest to them. This at least creates uncertainty of the mixed effect of ADR on their work. Yet another phenomenon derives from misperception -- another interview included a scenario that some clerks believe that the court-connected mediation services are directly funded by the court. In the face of unfilled vacancies among court personnel and budgetary pressures on local courts, or even headcount reduction within the court, this creates resentment towards ADR providers and the service.

*Counterpoint* – What about liquidity? Conversion of efficiencies engendered by the use of ADR is more likely to be seen in productivity improvement or curtailing future growth in personnel rather than bottom-line cost savings.<sup>51</sup>

*Counterpoint* – What about the studies which indicate increased costs and decreased quality? These studies, which are considered outliers by many, nonetheless warrant serious consideration especially as they pertain to equal access to justice, the prospective emergence of a two-tiered system of justice, ethnic and cultural bias, power imbalances, inappropriately referred cases, and application of mediation in realms for which it is not well suited. Instead of wishing them away because of their comparatively small number, they probably ought to be the focus of the next wave of research – as that would seem to be the source of discoveries, critical to the field. These may warrant serious inquiry.

While TQM has been implemented in the courts over the past decade, and there is continued deployment specific to ADR, as promoted for example by NACFM, courts have gone beyond TQM to adopt new managerial models such as strategic planning, data mining, and futures studies.<sup>52</sup>



## Simplified Model 5: ADR Services Viewed as means of Reducing Lifespan of Case

### Introduction

The data on cycle time reduction for ADR integrated with court management systems is generally compelling, indicating the potential for substantial reductions in both the calendar time and the lifespan of a case pending before the court. Some studies indicate, for certain situations, that cycle time to conduct mediation can sometimes take longer. This increase is shouldered largely by the ADR service and to a much less extent by the court. So too, the widespread endorsement of the ADR approach by the business community<sup>53</sup> often underlines their preferred use of ADR in the interests of reducing time to resolution, to get back to business, and reduce unproductive time in courts. This is especially of concern to small businesses. Reluctance to engage in ADR on the basis of expected cycle time is associated with a lack of familiarity with the process, and a desire for finality, which is based on their confidence in, and appeal to the authority of a judge.

### Model

Many studies indicate cycle time reduction of months, some just a matter of days. Very few studies indicate significant increases in time, and several suggest little difference. While the raw research can seem confusing, reviewers of the field generally agree that time savings are enjoyed when ADR is integrated with court management systems. Of special note is the endorsement of this finding by reviewers who question the overall value of ADR.

It is interesting to note that with respect to expectations regarding the duration of a case, many businesses seek ADR for the same reason others avoid it and litigate. That is, their belief in the certainty of a rapid resolution.

It is notable that some studies indicate that more money is transacted in ADR handled cases versus litigation. It is also noteworthy that in civil cases, as the amount in dispute increases, there tends to be a greater percentage cycle time savings and increased percentage of cost savings to the litigants from ADR.

### A Tabulation of Reported Effects on Disposition Time

*(This table, drawn from the annotated bibliography, is roughly sorted from reports of worse performance, to indiscernible effects, to strong support that ADR saves time.)*

Bahr	1987	Attorneys believed mediation increased time
Crime Justice	1992	Time to complete the process; the potential cases required an average of 17 days to complete court processing with a range of 31 to 259 days. For actual cases, the average length of time from referral to completion of mediation was 18.6 days with a range of 1 to 50 days.
Hanson	1997	The median number of days to settlement for mediated cases was 146; for non-mediated cases it was 109 (for settled cases only). For non-settled cases mediation adds time to some cases that finish quickly, but has no overall effect on the pace of settlement.
Clarke	1992	Disposition time increased in 2 of 3 counties, staying the same in the 3rd.
Kakalik	1996	There was no difference in time to disposition between mediation and non-mediation groups in PA, OK, and NY, and significantly slower in mediation in TX

Keilitz	1988-90	Regarding case processing time, the evaluators found the pace of litigation was faster for mediated cases in some courts and slower for mediated cases in others. The evaluators point out that many things affect case processing time which are unrelated to the mediation program.
Stienstra		46% of the attorneys involved in the program reported that it decreased disposition time. Forty-one percent felt the program had no effect on disposition time.
Kobbervig	1991	No difference in time to disposition was found
Eavenson	1998	No significant change in time to disposition in Gwinnett County, a 57 day drop in disposition time in Cobb County during first 6 months of program. Long-term effect not significant (0.6 month drop in second 6 months).
Georgia Dis Res	2000	Participants did not feel that they spent less time litigating their case if they went to mediation
Nasworthy	2000	Lawyers believed they worked the same amount of time as for a trial, but other interviewees said mediation would save courts money (attorneys are paid by the court).
Stienstra	1994	61% of the attorneys reported that ADR reduced the time to disposition. Only 24 attorneys reported that ADR added to the disposition time of their case.
Wissler	1997	Parties thought they were saving time; attorneys thought processing time was greater.
Wissler	1999	There was little sense by parties that mediation reduced time involvement (23%). Attorneys thought it reduced time (about 66%)
Donnelly	2000	No difference found between mediated and non-med cases. 76% Attorneys found meditation reduced time spent on case
Gomez	1998	The programs did not appear to affect the time to disposition or the number of pre-trial hearings or motions. They did appear to reduce the number of pre-trial conferences
Keilitz	1992	Mediation did not reduce the number of hearings held. Time to disposition was faster for mediated cases in 3 of 4 courts.
Bridenback	1979	The average time from case referral to disposition was 11 days; the median time was 8 days. For three of the neighborhood justice centers studied, the time from a referral to a mediation hearing was 10 days. The time to disposition without a mediation hearing was 11 days. For cases that failed to achieve a resolution, the time was 14 days. Case processing in traditional court took longer.
Cook	1980	Time to disposition was significantly lower for cases that were mediated than for those that were not.
Emery	1982-87	Evaluators found settlements are reached more quickly in mediation
Hartwell	1988	Attorneys believed that mediation saved their and their clients' time
Schultz	1990	Processing time decreased (but looked at mediation cases from time of referral, not from filing).
Goerd	1992	The author estimated that each case settled saved 30-45 minutes of judge time
Schildt	1994	Participants who settled their cases in mediation overwhelmingly believed mediation was a quicker alternative to litigation
Macfarlane	1995	Lawyers and parties thought processing time was shorter for mediated cases, a perception that was affirmed through court records.
McAdoo	1997	46.7% said it saved attorney time

Hann	2001	For each case type, a higher percentage of Rule 24.1 cases were disposed of within 6 months than for cases in the control group (in which cases were managed but only a few were mediated). Time to disposition appeared to be quicker after Rule 24.1.
Wissler	2002	Early referral led to shorter time to disposition – for both cases that settled and those that did not. Parties were more likely to believe time and money were saved if the case settled in mediation.
Eaglin	1990	Unsettled mediated cases took an average of 12 days longer to move from docketing to submission than non-mediated cases, but taken as a group all cases assigned to mediation took an average of 25 fewer days from filing to disposition
Clarke	1995	Processing time decreased 7 weeks w/ mediation
Emery	1989	Time to settlement was three weeks in mediation and seven weeks in adversarial settlement.
Fairbanks	2001	The median number of days in James City County in disposition time for mediated cases was 48 days; in York County the median was 92 days.
Hanson	1991	Case processing time, the mediated cases were faster with a 110 day median versus 178 days for the control group. In addition, the appeals of settlements were not much longer than appeals of non-conference settlements. For the 75th percentile, the medians were 187 days (mediated) versus 178 days (control).
Zuberbuhler	1999	No significant difference was found in time to disposition; mediated cases on average were disposed of 2 months faster than those undergoing custody evaluations (which included 5.3% of the control group).
Judicial Council of CA	1996	The pace of litigation, the average time from filing to mediation was 343 days. In San Diego, the time was 257 days; in Los Angeles, the average time was 385 days. The researchers also found that the number of days from filing to mediation was longer for successful mediation (298 days) than for failed mediation (262 days).
Lowe	1992	The program improved the pace of litigation. The median time for the experimental group was 314 days while the median time for the control group was 346 days, from filing to disposition.
Slack	1996	Prior to the mediation program, time to disposition ranged from 37 to 1434 days, with a mean of 367.47. After the mediation program commenced, time to disposition ranged from 44 to 974 days, with a mean of 338.73.
Hanson	2000	Prior to the introduction of mediation the average number of days to the grant or denial of appeal was 448, with another 202 days to opinion. Mediation took 60 days to move from the filing of the petition for review to mediation (some took up to 120 days).
Mandell	2002	Time to resolution, 13% of cases in the treatment were resolved within 3 months (the deadline for mediation), as compared to 9% of cases in the control group. Approximately 25% of cases in the treatment group were resolved within 4 months (the deadline for discovery), as opposed to 12% of control group cases. All other date-delimited percentages were the same. Thus, the main impact of mediation on time to disposition came within the first months of the life of the case.
McEwan	1991	Successfully mediated cases had shorter disposition time compared with the control group; however, for cases that did not settle, the disposition time was longer. The average time to disposition for the experimental group as a whole was about 60 days shorter than for the control group.

Pearson	1991	The evaluators found that successfully mediated cases had time savings. Cases that mediated successfully took 8.5 months. Cases that litigated took 10.5 months. Cases that mediated unsuccessfully and therefore needed both mediation and litigation took 14.2 months.
Pearson	1984	Time from the initiation of the proceeding to the final order in successfully mediated cases was 9.7 months on average, 11.9 months on average for the control group, 11.1 months for those who were referred but rejected mediation, and 13.4 months for cases that were unsuccessfully mediated.
Snapp	1997	Strong statistical and practical support for proposition that ADR saves time. ADR brought case terminations at 28% faster rate than traditional litigation - often without the need for discovery.

## Discussion

What is the value of reduced cycle time to the court? This is likely to be specific to the court system in question and the objectives of court administration, scheduling, and the case management system need.

Is there a cost to cycle time and calendar time reduction? Most studies in the ADR research base suggest a correlation with cost savings. In industry, it is widely believed that improving quality tends to decrease cost and decreasing cycle time reduction tends to improve quality as well as reduce cost.

*Counterpoint:* Some studies suggest that ADR is viewed by some as a mechanism for the court to dispose of cases faster, which they see as inappropriate. As for example in family matters where speed is not always in the interest of the children, the parents, or the need of the court for detailed investigation. There are also reports that some parties to an ADR process feel unduly pressured to settle more quickly than the parties anticipate. Similarly, settlement rates, which have become a de facto standard of the success of ADR, is viewed by many as placing the goal of case processing efficiency above the interests of the parties. These all warrant consideration. They further support the notion that more than one metric or narrow model needs to be considered.

To the extent that the budget decision-maker believes that ADR will be well integrated in the emerging court management systems and that an objective for court performance is improved disposition time, the evidence supports an affirmative decision. There is not a substantial evidence base which demonstrates a high risk of not achieving improvement in disposition time when ADR is integrated with court management. However, the variety in the reported data, lack of recent Massachusetts data, and early stage of the new court management regime implies a high degree of uncertainty in projecting actual potential time savings. So, in the context of a directive to integrate ADR with the court management systems there is a low downside risk of failure, but a very high degree of uncertainty regarding the level of upside success.

What about studies regarding unintended consequences with respect to disposition? One RAND study in the handling of automotive cases in New Jersey presents a cautionary note.<sup>54</sup> But note that this was in the realm of arbitration outside the typical practice of community mediation centers.

# Simplified Model 6: ADR Services Viewed as a Risk Management Vehicle

## Introduction

Investment in community ADR could be viewed as an approach to risk management. The basic idea is that ADR interventions preclude bigger problems later. More specifically, investment ADR interventions are paid back by avoiding the large cost of a comparatively small number of events at a later time. Previous models constrained the scope of inquiry to the court and metrics that pertained primarily to performance of the court. In this model the scope of interest is the total cost to the state across all services, and for longer time horizons than disposition time of particular cases.

## Model

Consider the following examples.

- Juvenile / Neighborhood Criminal Cases: Interventions including mediation with a juvenile criminal, who is causing trouble in a neighborhood, can be viewed as a mechanism of risk management with respect to the correctional system. Suppose that of the several dozen such cases engaged by a community center over a two year period that one is ascertained to have kept the juvenile out of the juvenile detention system. The estimated savings solely from avoiding the cost of detention for one year is \$30,000+.
- Permanency Mediation Cases – similarly, consider the cost savings to avoiding a contested court case involving foster care. In Massachusetts an estimated savings from precluding this type of event is conservatively estimated at \$6,000. Let us suppose three such events are prevented by said center every two years.

Average Cost per mediation	\$3,000
Projected Cost of Court Case (1 week)	\$8,860
Court Case Reimbursement rates	\$1,772/day
Judge	\$421
Clerk Magistrate	\$331
Session Clerk	\$143
Court Officer	\$174
Probation Officer	\$189
DSS Social Worker	\$138
DSS Attorney	\$179
CPCS Attorney	\$195

Plus costs for stenographers and expert witnesses,

Plus continued foster care placement during litigation.

This is a conservative underestimate as cases often run longer.<sup>55</sup>

- Permanency Mediation Cases – suppose that one success is achieved by said center every two years that avoids a single year of foster care placement – saving \$20,000+ per annum.

Note that the average Massachusetts state funding per funded center is \$40K per year. The above set of precluded events would pay back the entire contribution of the state to that center.

### **Discussion**

Consider yet another type of event, reviewed in a Ph.D. dissertation at John Hopkins. In a program in Maryland, after several calls to police for domestic violence at the same address, the police make a referral to mediation themselves with documented savings.<sup>56, 57, 58</sup>

Risk management approaches have evolved in domains of practice concerned with safety. A risk management framework may be applicable in the role of mediation in violence prevention as it pertains to safety. This is an emerging perspective of public health research in addressing violence. An example of the transference of risk management approaches between domains is seen in the adoption of methods of the National Transportation Safety Board in the Patient Safety arena. The use of mediation as a mechanism of risk management can be seen as part of a broad shift in risk management services provided to families.<sup>59</sup>

## **Simplified Model 7: ADR Services Viewed as Leveraged Funding Portfolios**

### **Introduction**

Perhaps the most compelling, solid, indisputable, current data, specific to Massachusetts, is the diversified portfolios of funding assembled by the community mediation centers. Several examples from the past year illustrate the portion of the state contribution to these centers.

### **Model**

As a benchmark, note that the current average funding per center of \$40K is less than 75% of the average operating budgets of community mediation centers nationwide.<sup>60</sup> Massachusetts reflects the nation in the leveraging effect – the other 75% of the funds is raised by the community mediation centers themselves.

Consider the following example centers for FY05 funding:

Center 1	State contribution was 25% of total program funding
Center 2	State contribution was 23%% of total program funding
Center 3	State contribution was 12.5% of total program funding
Center 4	State contribution was 15% of total program funding
Center 5	State contribution was 8% of total program funding.

How has the state contribution and overall portfolios changed over time?

Center 1 grew their funding over 110% over the past decade with the state contribution floating between 25-30% of total funding.

Center 2 grew their funding portfolio by 50% over the last five years – with only a minor increase in state support.

Center 3 has grown their portfolio almost tenfold over the past fourteen years with the state's contribution declining as a percentage of total revenue.

Center 4's revenue has declined about 10% over the last several years reflecting a sudden 25% decline in the state's contribution followed by fairly steady funding at the lower level.

Center 5 grew revenue by 12% over the past five years while the state contribution declined 28%.

Many believe that the state investment in a community mediation center is an important signal for other funders such as foundations, and corporations. It is taken as a mark of legitimacy, which is stronger than certification. Furthermore, many foundations will not fund infrastructure as the earmark does.

A strong argument can be made that the state, by providing at least some funding, leverages its investment.

### **Discussion**

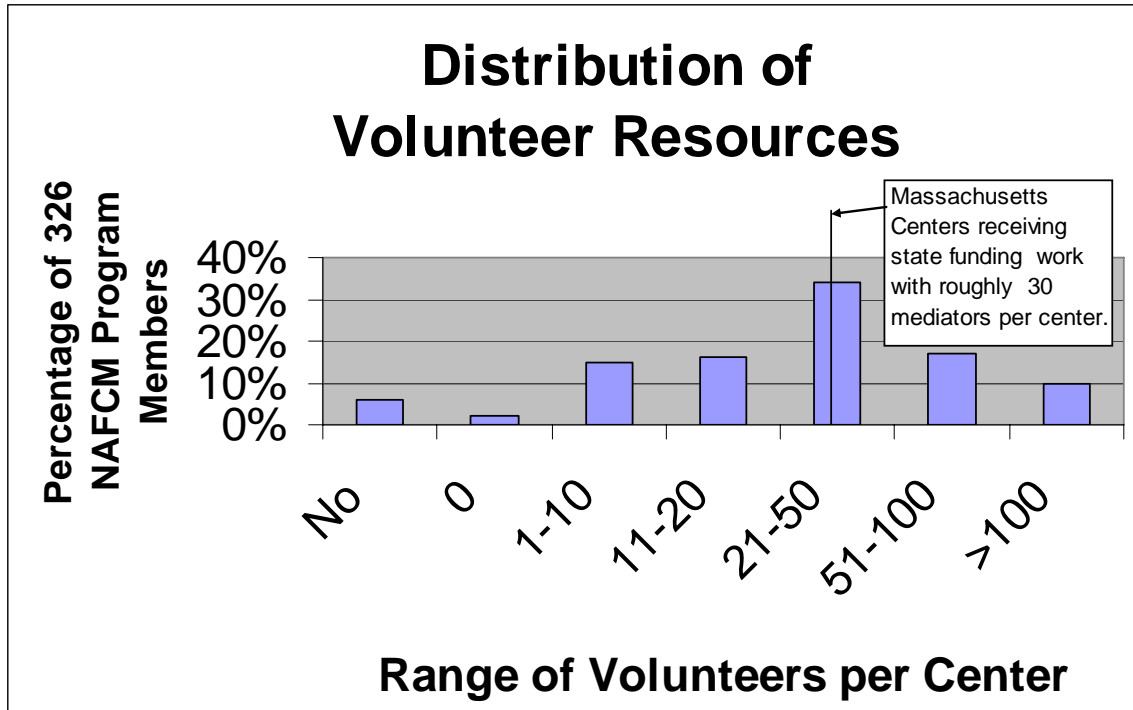
The state's contribution is leveraged several-fold by additional contributions assembled by the community centers in the service of the public. It is believed by several interviewees, and some literature, that by sending a signal of legitimacy and value, the state is in part responsible for assisting the community centers in this additional fund-raising. From this perspective, for the sample of community centers above, the state contribution leverages 300% to 1250% of additional funding.

It may also be appropriate in the portfolio model to include the donation of 'in-kind services.' In Model 1, the role of volunteer mediation was viewed "as if" it were a contracted service. Pro bono mediation provided by volunteers is more appropriately considered from the standpoint of leveraged resources. The state investment in infrastructure can be viewed as leveraging the contribution of volunteer resources. For example, the state contributed roughly \$180K to Center 5 from 2000-2005. During that period, Center 5 handled over 10,000 ADR transactions.

▪ Community & Court mediation referral	2,347
▪ Community & Court mediations	1,279
▪ School mediation referrals	1,393
▪ School mediations	602
▪ Participants in facilitations	1,546
▪ Participants in communication skill and mediation trainings	1,029
▪ Participants in school trainings	1,305 youths 832 adults

While the work of community centers in school mediation is partially funded by the Department of Justice, the infrastructure funded by the earmark also serves volunteers in the school setting. This spill-over effect is viewed as critical by community center directors.

Across the state there are perhaps over 2,000 trained mediators, with roughly 500 attached to the community centers receiving state funding via earmark. Massachusetts centers reflect national volunteer resources in the leveraged portfolio such centers.



The distribution of volunteers per center based on a national sample compiled by NAFCM.<sup>61</sup>

By its inconsistency in annual budget allocation, the state is sending a mixed signal to the other funders who support the centers' service to the state. When, by lack of infrastructure funding, a center becomes insolvent, the state in essence either loses the relational infrastructure of the volunteer resources or transfers the burden of transition to the volunteers themselves.

## Simplified Model 8: ADR Services Viewed as Investments in Social Capital

### Introduction

This model views the partnership of court and community mediation centers as a network for building healthy safe communities in furtherance of statewide initiatives such as Massachusetts Partnership for Healthy Communities (MPHC). The purpose of MPHC overlaps and intersects with activities of the community mediation programs. At the community level, community mediation centers prevent family violence, integrate community policing with neighborhood leadership, organize resources with mental health services, coordinate elderly services, prevent homelessness, and repair business relationships.

### Model:

The community mediation programs can frame their supportive purpose as: *Practitioners of Alternative Dispute Resolution deliver mediation services which strengthen communities throughout Massachusetts. Community Mediation helps build healthy communities by its focus on strengthening the relationships that make up a community - within the family, between neighbors, between businesses and their customers, and between agencies and the citizens they serve. By*



*declaring the intent to partner with the Massachusetts Partnership for Healthy Communities community mediation centers acknowledge their longstanding involvement towards the intent of the MPHC initiative and declare their joint intent in leveraging community mediation activities, especially in support of community action programs.*<sup>62</sup> Community Mediation Programs are at the heart of building strong vibrant communities. Mediators engage communities through a spectrum of interventions:

- In schools
  - o Delivering peer mediation training for preventing youth violence
  - o Ensuring alignment of services with children's needs
  - o Assisting children with life transitions
- With the Family
  - o Preventing violence, and protecting the interests of children, the parties, and the neighborhood during difficult transitions such as divorce, placement of children, and providing restorative justice after family violence.
  - o Facilitating positive outcomes in the joint interests of family, neighborhoods, and victims involved with juvenile behavior.
- In the neighborhood
  - o Ensuring equitable situations regarding housing and the prevention of homelessness.
  - o Resolving conflicts over property rights and gaining agreements on land use issues.
- In business
  - o Supporting productive local markets through resolution of disagreements in business transactions.
- For education and academia
  - o Providing training opportunities through internships for students of mediation programs and law schools.
  - o Directly training and delivering continuing education for volunteer mediators in the community, building community capacity, and steadily transforming the culture.

Therefore, state contribution to community mediation centers could be viewed as investments in social capital and expanding the Commonwealth's investment in the Massachusetts Partnership for Healthy Communities. State funding could be appropriated for community mediation centers through the MPHC initiative as well as through the Trial Court.

The emergence of court and community collaboration also serves as models of social capital building. For example, the Worcester Housing Court makes referrals to homeless prevention programs to assist tenants at risk of eviction. Similarly, the District and Probate Courts make referrals to community mediation programs. Beyond resolving a dispute, the mediation process often connects parties to a network of support services. Community mediation centers are a locus of interagency coordination. Partnerships of the court with community programs and working through the community programs are methods for community-building.

Court and community collaboration is in evidence across the country in the community justice movement<sup>63</sup>, community/neighborhood courts, problem-solving courts, restorative justice, preventative justice, therapeutic jurisprudence. The community justice movement is seen by its practitioners as a mechanism of public safety.<sup>64</sup>

### **Discussion:**

The growth in use of ADR and mediation, as part of an extended service of the court, can be seen as part of a long cycle in the balance of the justice system with systems of equity.<sup>65, 66</sup> The fulcrum of this pendulum is in the connection between state and municipal legal systems with social systems embedded in the community, especially community mediation centers. Early in the twentieth century, Mary Parker Follet<sup>67</sup>, a scholarly practitioner in community development and mediation in the Boston area, characterized this dynamic as “a kind of balance theory” concerning individuality versus society’s interests.<sup>68</sup> She considered the “balance theory” which seemed to underlie partisan politics at the state level a “monstrous fallacy” since these forces must be brought into synchrony at the neighborhood level. The Neighborhood Justice Centers project government justice reform program, of the mid-1970s, sought to restore neighborhoods as the locus of the system of equity. A review by the Department of Justice suggests the role of the courts in this regard resulted from the waning influence of the traditional social institutions of family, church, and informal community leadership.<sup>69</sup>

Aligning the purpose of the state budget on court-connected community mediation programs with an overarching strategy for community-building makes a lot of sense. Community mediation programs can easily engage as partners in these types of initiatives throughout the Commonwealth. To the extent that some are already engaged in this partnership, why not raise the visibility of their involvement? Is there a broader statewide initiative which matches so many service areas already engaged by the community mediation programs? Is there greater momentum behind any statewide program that could be leveraged in so many areas as that for Healthy Communities? By engaging this as a strategic directive, community mediation centers frame the value for which they provide such unique and critical competencies: in building social capital by focusing on strengthening communities – *one relationship at a time*.

## **Summary and Analysis of Models for Evaluating ADR Return on Investment**

The first four models outlined above address cost. As over-simplifications:

- Model 1 addresses cost control via the model of a contract;
- Model 2 considers the classic ‘internalize versus outsource’ decision;
- Model 3 addresses ADR as a cost reduction strategy.
- Model 4 asks “Is there a cost of quality in ADR?” Quality drives cost reduction.

The analysis in Model 1 surfaced the mechanism of controlling the risk of cost overrun for services built into the current funding and service delivery arrangement. It concludes there is an arrangement favorable to the state. The risk is underutilization which is primarily under the control and influence of the courts.

Model 2 drew out the need to evaluate funding in comparison to some alternative. That comparison considered the extreme cases of not funding external services at all – either by internalizing it or returning completely to litigation. Model 2 indicates the feasibility of internalizing ADR services but illustrates that it would require a major upheaval in the approach to budgeting of both the courts and the community centers. Such a consideration ought to consider the total system.

Model 3 suggests that people involved in this budget decision-making process ought to adjust the “hurdle” rate expected of the investment to be in line with other low risk investments.

Model 4 acknowledged that ADR improves the quality of court services. This is well documented and enjoys a very broad consensus. It also notes that since there is no compelling body of evidence that ADR costs more than litigation, there is no ‘cost of quality’. Model 4 draws on the good evidence base regarding “satisfaction with process” as another, powerful means of demonstrating the low risk of investment in ADR. It also points out how the improvement of quality can be seen as a driver of cost reduction.

Model 4 makes the bridge to consideration of process life cycle, closely associated with the concern of cycle time reduction in Model 5.

In considering a budget allocation as an investment, it is appropriate to consider other investment options which have comparable risk profiles with a solid data record regarding its volatility and return on investment over time – that is, the financial markets. Interestingly enough, this is not very complicated at a first level of analysis. A proxy approach is to consider simply the distribution of the number of studies that report returns on ADR investment at various levels. Look at the variation of the data on ADR and match it to a general class of financial instrument. After review of a large number of such studies, ADR would seem to appeal to a risk adverse investor. This implies that a reasonable “hurdle” rate to expect, as a return on investment in ADR, ought to be in line with the comparable returns from a class of financial instruments with a similar risk profile. That is just 4-6%.

Why then would anyone consider a 10%-20% cost savings to not be an attractive return on investment. A 10%-20% cost savings is two to five times the expected rate of return for an alternative investment with similar risk. Perhaps, as was suggested by a participant in the workshop, “because they just never thought about it that way.” Whatever the reason, this point warrants consideration, particularly by budget analysts.

Model 3 points out that while the research on the impact of ADR on court costs can seem complicated, confusing, and inconclusive, one can derive valuable insight regarding the overall distribution of reported cost impacts and interpret that as volatility. While there is great variation, the distribution is not unusual at all. Cost studies within organizations for their portfolio of projects of a common type typically indicate a “bunching” of costs savings near the low end. There are typically a small percentage of projects that have negative returns. There are also typically a set of projects which enjoy cost savings. The number of projects which perform in a stellar fashion are comparatively low in number.<sup>70</sup>

ADR seems less volatile than financial markets that can go into a downswing. There is no comparable evidence of the “downswing” phenomenon in the ADR field that would

cause widespread devaluation of the ADR investment. The beauty of the ADR investment is that the returns are comparatively incremental and steady. The returns may sometimes not play out on a case-by-case basis, or in certain situations, or in court administrations that do not integrate ADR with case management systems and scheduling. Yet, the majority of studies indicate positive returns on investment in terms of cost savings. There is good consensus in the research community on positive returns when ADR is deployed in conjunction with strong court administration, integrated with case management systems.

Still, there is no solid consensus in the research community that, in the absence of integrated case management, ADR will still provide cost savings to a court. Bibliometrics on the topic indicate that it is an active area of debate. Would it then be useful for the purpose of budget justification to try to discern the data on impact on court costs? Probably not. Researchers, at the RAND Corporation, supported by economists, statisticians, analysts, and a budget several-fold larger than the Massachusetts annual state budget for community mediation centers, pursued this question and the results were considered inconclusive by reviewers. Trying to draw a different conclusion ourselves would likely be similarly inconclusive and, in the worst case, lead to “paralysis by analysis.”

The more important finding is that most all the studies focus on a few metrics with which to assess judicial and court staff time to measure cost savings. Few studies address the effect of ADR on costs to other state and municipal agencies that are often involved in cases appropriate for ADR. No study considers the use of ADR in the courts with respect to all the cost reductions to business relationships (and hence taxes), police, social services, the penal system, healthcare, mental health services, and the schools. One must ask of course, where is it appropriate to draw the boundaries of analysis with respect to organizations and time?

Models 5, 6, 7 and 8 illustrate broader consideration of the return on investment than is typically captured within the narrow scope of inquiry of most research studies.

- Model 5 Cycle Time, through tabulation of summary findings on disposition time, illustrates the variety of answers provided by research given different definitions of what is being measured.
- Model 6 presents the actuarial stance, apropos to risk management. The strength of the presentation is that comparatively few downstream events are required to payback investment in ADR. The weakness is that there are few longitudinal studies which provide an evidence base.
- Model 7 (Leveraging) points out that the state is already engaged in a public-private partnership enabled by the diversified funding portfolios of the community centers. In contrast to most of the research studies cited in the report, this data is based on hard numbers, specific to the programs, and are current with good trend data. This does not require any significant additional research.
- Model 8 presents the investment in ADR as an investment which complements the state’s strategic agenda for strengthening communities.

**Recommendations on Investment Based on Different Models  
and with Respect to Different Policy Objectives**

	Yes	No	Comment
Model 1 Outsourcing	✓		A contract with no downside risk
Model 2 Internalize vs. Outsource			Don't know, there are great examples but internalizing would require a switch to long range budget planning
Model 3 Court Costs		✓ *	A risk adverse investor would say there is too much uncertainty, even though there might not be much actual financial risk.
Model 4 Quality	✓ * **		Strongest, most consistent data on satisfaction supports an affirmative vote on this measure under any policy.
Model 5 Cycle Time	✓ *	✓ **	Evidence base is generally supportive but it is not clear a focus on cycle time is in the interest of society.
Model 6 Risk Management	✓ **		Its believable, makes common sense, this is where the really compelling stories are from. But this type of analysis requires longitudinal studies over a lifetime. A yes vote seems to just make sense, but it would only be supported anecdotally rather than by a strong evidence base.
Model 7 Leveraging	✓ * **	✓ *	This is hard data, current, and most specific to the programs. But this thinking about the good of the whole community may be too broad if a decision maker is focused on court efficiency alone.
Model 8 Social Capital	✓ **	✓ *	Excellent endeavor that can be launched regardless of the funding decision.

Under a Policy Objective Focused on Court Efficiency

\* Given the softness of the data, if the policy objective were to focus primarily on improving court efficiency, and the state had a choice of investment vehicles towards that end, then investing the money in the strategic level actions recommended in the Monan Report would be a priority. This would include such things as an integrated case management system, reorganization, data collection, training for court personnel. Even if court-connected ADR has a stellar effect on the court efficiency, one would never be able to confirm it because the court systems are unable to track its performance. Investment based on the models taken individually is recommended based on Models 1, 4, and 7. Investment advice from Models 2, 3, and 5 are not supported by a strong evidence base with respect to implementing an efficiency policy. Model 3 is however, an implicit presumption in implementing ADR. It is not clear that Models 6 and 8 are directly supportive of an efficiency policy.

Under a Policy Objective Focused on Service to the Community

\*\* If on the other hand the policy objective were to provide benefit for the state, especially local communities, then these models suggest investment advice would be to fund it. Models 7 and 8 are the most compelling in this regard. Model 7 has hard data and Model 8 great stories but no firm evidence base. Model 4 seems to be a strong supporter of this directive as well. It is not clear that Model 5 supports overall societal goals – this is a current topic of debate. It is not clear if Model’s 1, 2, or 3 are directly supportive of an directive for overall benefit to the state.

A range of similar policy objectives needs to be developed and one policy objective selected. Then the financial models for ADR can be evaluated within a performance context along the lines above.

Budget Justification with Respect to Policy Directive			
Model	Policy Directive	Court Performance	Overall Benefit to State
	Supports Funding Decision	1, 4, 5, 7	4, 6, 7, 8
	Strong Evidence-Base	1, 4, 7	4, 7
	Don't know if model supports directive	6, 8	1, 2, 3

- Model 1 Cost control via contract
- Model 2 Internalize
- Model 3 Cost reduction strategy
- Model 4 Cost of quality
- Model 5 Reducing case lifespan
- Model 6 Risk Management
- Model 7 Leverage portfolios
- Model 8 Building Social Capital.

## Conclusion

The primary value often derived from the above type of analysis is the surfacing of assumptions and identification of the need for clarity in direction setting. The use of multiple models is a means of generating a variety of perspectives towards that end. Care has been taken to illustrate where these models, taken as analogies, fit as well as fall short. The sensitivity of a yes/no decision based on particular models is to some extent illustrated with respect to the stance and belief of the decision maker and the administrative objectives of the court system.

Several places in the narrative point out where performance objectives for the court system pertain to both the value of the model as well as whether one could draw a conclusion on a model. Performance and accountability in government suggest setting objectives and measuring results as a means of ensuring transparency in public funding.

The objectives serve the guiding and monitoring of implementation and the integration with court management systems. The “ostensible” case management and quality objectives for implementing ADR, identified by the Standing Committee in the 1998 report,<sup>71</sup> should probably be revisited with respect to priority setting.<sup>72</sup>

The Trial Court’s pamphlet “A Guide to Court-Connected Alternative Dispute Resolution Services” identifies the top four advantages of ADR<sup>73</sup> as *saving time and money, finality, compliance, and custom-made solutions*. This appeal is no doubt based on the *Homo economicus* model of the rational, fully informed, economically self-interested person driven by extrinsic motivations. Yet, the advantage included in the guide, which is most directly pertinent to the building of social capital, appealing to the combined interest of the individual, the community they live in, the court, and the state which serves them is *Preservation or Enhancement of Long-Term Relationships*.<sup>74</sup> Critical to the integrity, development, and resilience of families and their neighborhoods this objective is also especially pertinent to small claims involving businesses. Businesses well understand the adage that “it costs an order of magnitude more to get a new customer as to preserve a relationship with an existing customer.” The current Trial Court Standing Committee on Dispute Resolution should reflect on whether the belief system which underlies how they prioritize proposed benefits of ADR might be better served by combining this baseline with a *Homo sociologicus*<sup>75, 76</sup> model, which accounts for the strong social influence on what parties to a dispute really want. That is *their voice to be heard, someone to listen to their story* - to address their and society’s interest in the fulfillment of social roles. The nature of such frame reflection is critical to policy setting in order to balance the Logic of Consequence with a Logic of Appropriateness.

A combined framework would also better accommodate the dual need of community centers to appeal to the combined interest of prospective users of the ADR process, as well as better represent the intrinsic motivation and reflective craftsmanship of volunteer ADR practitioners – the greatest asset in the system of equity which balances the formal system of jurisprudence.

## Suggestions for Future Work

The following suggestions are offered to continue the work initiated in this Working Paper. MODR is interested in collaborating on the execution of these projects. Individual project proposals can be developed and funding sources identified to complement the annual appropriation.

1. Setting Policy
  - 1.1. Clarify policy objectives and priorities in the context of the Uniform Rules on Dispute Resolution. Foster alignment of the Legislature, the CJAM, and the Standing Committee on common policy directives.
  - 1.2. Integrate ADR policy directives with the court management systems, data collection and evaluation.
2. Implementing Court-Connected ADR
  - 2.1. Map the current geographic coverage of all court-connected mediation in the state.
  - 2.2. Launch a strategic planning process for the development of an Implementation Plan for Court Connected ADR System, integrated with court ADR policy.
  - 2.3. Conduct a needs assessment for the court and the legislature of the court-connected programs to inform decision making in the FYO8 Budget Cycle.
  - 2.4. Develop a new Report to the Legislature on the Impact of ADR on the Court.
  - 2.5. Construct a projective cost-benefit analysis of ADR in the Courts.
  - 2.6. Install a data collection and evaluation system, drawing on existing ADR data collection standards<sup>77, 78</sup> to generate Massachusetts ADR performance data on an ongoing basis. This ought to be conducted in conjunction with related administrative activities launched in response to the Monan Report.
  - 2.7. Conduct “Future of Court-Connected ADR” event.
3. Connecting Court and Community ADR to Broader Public Initiatives
  - 3.1. Forge a strong collaboration between mediation centers and the Massachusetts Partnership for Healthy Communities initiative.
  - 3.2. Select and implement innovative proven models from other states to advance court-community collaboration in new areas.
  - 3.3. Form a state association – Practitioner-Research network.
4. Connecting Court and Community ADR to MODR’s Overall Research Agenda
  - 4.1. Commission the Trial Court Libraries to compile a special collection on ADR research starting with those reports in the annotated bibliography.
  - 4.2. Launch research network considering the role of ADR in Social Capital formation and community building.
  - 4.3. Engage the Campbell Collaboration of the American Institutes of Research in Systematic Research Synthesis of lifespan effects of mediation.
  - 4.4. Design and deploy a forecasting system for conflict prevention in communities leveraged by Geographic Information Systems for the purpose of supporting data-driven planning of future budgets.



## Endnotes

<sup>1</sup> Stone, Katherine V.W., "Alternative Dispute Resolution", Encyclopedia of Legal History, Stan Katz, ed., Oxford University Press.

*This article describes the various types of alternative dispute resolution (ADR) mechanisms in common use today, including arbitration, mediation, fact-finding, minitrials, small claims courts and rent-a-judges. Professor Stone provides a history of the use of such mechanisms in the United States, with focus on the modern ADR movement that began with the Pound conference in 1976. She describes the rapid growth in private as well as court-ordered ADR in its aftermath and summarizes some of the judicial doctrines that have been supportive of these trends.*

<sup>2</sup> ABA Section on Dispute Resolution, 25 Years After Pound: Have We Found a Better Way? A Mini-Conference On Court ADR, Seattle, Washington, April 4, 2002.

<sup>3</sup> Frank E. A. Sander, The future of ADR, *Journal of Dispute Resolution*, Volume 2000, Number 1, p.3.

<sup>4</sup> Deborah R. Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System, RAND Institute for Civil Justice, RP-1090 (originally published in Penn State Law Review, v. 108, no. 1, 2003), 2004.

*A critical perspective on one part of the history of the ADR movement in the United States: the evolution of ADR in the legal world. Includes historical antecedents, discusses the "community justice movement," and more.*

<sup>5</sup> The scope of the work of this report and attending workshop is a) to assist the community programs in organizing the representation of their service to the legislator. MODR was asked to extend this work as it may inform Standing Committee in addressing its implementation challenge.

<sup>6</sup> The Visiting Committee on Management in the Courts - Report to Chief Justice Margaret Marshall, March 2003. [<http://www.mass.gov/courts/courtreformfinal.pdf>]

<sup>7</sup> Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution", Prepared for the Symposium on the Vanishing Trial, *Journal of Empirical Legal Research* (July 20, 2004).

*General limitations of court data - Unfortunately, even well-established federal and state court ADR programs seldom collect sufficient information to provide a clear understanding of their impact on the litigation process, including the number of trials. For one thing, court administrative systems are generally geared to reporting annual changes in total numbers of cases – the kind of information that is critical to identifying resource needs; they are not typically designed to yield evaluative data on a court program. More sophisticated tracking systems require resources that many courts do not have.*

<sup>8</sup> Reasoning based on distributions and portfolios is unfamiliar to some. It may be useful for the reader to be reminded of a distinction between risk and uncertainty. There are formal definitions for risk according to various theories which includes defining it by measured probability of complete information of the prior history of outcomes. At best, the data in the field could be considered a small sampling. As Wissler notes, empirical research on court-connected ADR has lagged its implementation over the last fifteen years. Quantitatively assessing probabilities based on these distributions requires more in depth analysis than offered here. Also distinguished are volatility and exposure. In some of the metrics in the following the variation in data can seem considerable. In such instances it is important to keep in mind the actual exposure or level of potential loss. There may be wide variation in reported effects on improvement on a particular measure. For example, a data set might include several reports of up to 20% negative results to most reports on the positive side with up to 30% positive results. A conservative stance is to impute the broad distribution of the data from the field to a similar volatility of returns within the state. In this example the exposure, or downside is up to 20% negative results, but the likelihood is low because the majority of results, varied as they may be, are on the positive side. Whether this makes sense as an investment depends on the decision-makers expectations and other options for investing the same money. If they are highly risk adverse to loss, and they have a less volatile opportunity, then the performance on this measure would not convince them to invest even though there is a high upside. Note that lower expected volatility usually entails much lower expected returns. For example, an alternative investment vehicle people are generally familiar with are stocks, mutual funds, bonds, and treasury notes. The example above is less volatile than particular stocks, more volatile than the long range performance of the market overall, more volatile than

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mutual funds but potentially much higher payoff, and presents losses which would be unusual for treasuries. Another alternative investment vehicle, more specific to process improvement, as sought in the implementation of ADR is for information technology. This example would not pass muster if considered as an IT project because expected returns must typically be higher than 30%. And IT decision makers also realize that investing in such a project is much more risky than putting the money in the stock market.

<sup>9</sup> Knight, Frank H. (1885-1972), *Risk, Uncertainty, and Profit*, Hart, Schaffner & Marx; Houghton Mifflin Company, Boston, MA, 1921. [<http://www.econlib.org/library/Knight/knRUP.html> ]. Knight offered a groundbreaking distinction of risk versus uncertainty that still informs economic decision making - "risk is present when future events occur with measurable probability, uncertainty is present when the likelihood of future events is indefinite or incalculable". This distinction is a long running topic of debate, for example, an introductory text in the History of Economic Thought, *Choice under Risk and Uncertainty*,

[<http://cepa.newschool.edu/het/essays/uncert/intrisk.htm>] by Gonçalo L. Fonseca of the New School, states: *Nonetheless, many economists dispute this distinction, arguing that Knightian risk and uncertainty are one and the same thing. For instance, they argue that in Knightian uncertainty, the problem is that the agent does not assign probabilities, and not that she actually cannot, i.e. that uncertainty is really an epistemological and not an ontological problem, a problem of "knowledge" of the relevant probabilities, not of their "existence". Going in the other direction, some economists argue that there are actually no probabilities out there to be "known" because probabilities are really only "beliefs". In other words, probabilities are merely subjectively-assigned expressions of beliefs and have no necessary connection to the true randomness of the world (if it is random at all!).*

<sup>10</sup> The difference of numbers for a particular metric – for example between a 10% court cost savings in one state versus an 18% savings in another serves primarily to inform our decision-making by illustrating the nature of the distribution. Little inference regarding specific, expected returns for Massachusetts can be drawn from data generated in a previous decade, in another location, in a different court administration. That is, in most of the data sets, and because of their wildly disparate origins, there is a high degree of uncertainty in projecting actual performance. Yet, it was found that understanding the bounds of the risk serves the decision-making well.

<sup>11</sup> Data provided by Timothy Linnehan, Coordinator of ADR Services, Administrative Office of the Trial Court of Massachusetts.

<sup>12</sup> This rough estimate simply divides the total earmark for the community-mediation programs by the number of mediations delivered by the community mediation programs.

<sup>13</sup> Hedeem, Timothy, "The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Promise," *Conflict Resolution Quarterly* 22(1&2): 101-133, 2004. pg. 118. . Citing S. J. Rogers, "Ten Ways to Work More Effectively with Volunteer Mediators," *Negotiation Journal*, 7, 1991, pgs. 201-210.

*Paradoxically, while these diverse volunteer mediators are among the most trained dispute resolvers in the country, many would be willing to donate more hours than they already do. In interviews with community mediators, most indicate that they are underused, as many centers rely on a small cadre of volunteers who have both strong skills and (probably more importantly) regular, broad availability due to flexible schedules.*

<sup>14</sup> Hon. Gail L. Perlman, Breathing New Life into Court-Connected Mediation, *Family Mediation Quarterly*, Summer 2004, Vol. 3.

<sup>15</sup> Reasons for low utilization span lack of proximity to the court, and poor provision of information about mediation services. Interviews with directors of mediation centers in Massachusetts suggest low utilization rate for minor criminal matters due to positions of District Attorneys and Assistant DAs regarding their belief in the usefulness of mediation.

<sup>16</sup> Clarke, S. H., Valente, Jr., E., and Mace, R. R. *Mediation of Interpersonal Disputes: An Evaluation of North Carolina's Programs*. Chapel Hill: Institute of Government, University of North Carolina, 1992.

<sup>17</sup> H. Mika, *An Evaluation of Michigan's Community Dispute Resolution Program: Detailed Findings, Recommendations, and Appendices*, Lansing: Michigan Supreme Court State Court Administrative Office, 1997.

<sup>18</sup> In Hedeem's 2004 review of Mika's 1997 study he states:

*Based on the very large proportion of cases referred through another agency or program, coordination with referral sources is critical for community mediation. Despite this fact, a study of*

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*Michigan's statewide network of programs concluded that "few written agreements or contracts exist between local programs and their referral sources that articulate expectations, processes, and problem-solving strategies. The norm is that referral sources receive little or no feedback.* (Hedeem 2004) pgs. 109-110.

<sup>19</sup> Donna Stienstra, Demonstrating the Possibilities of Providing Mediation Early and by Court Staff: The Western District of Missouri's Early Assessment Program, in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (Edward J. Bergman & John G. Bickerman, Ed.), 1998, A.B.A. Sec. Disp. Resol. 251.

<sup>20</sup> This is typically referred to as "transaction costs." Other cost reduction targets could be reducing the number of claims brought. For transaction costs a description of how "court costs" is typically evaluated is well illustrated in a recent study: Judicial Council of California Administrative Office of the Courts, Office of the General Counsel, Evaluation of the Early Mediation Pilot Programs, February 27, 2004. pg. [http://www.courtinfo.ca.gov/]

#### Court Costs/Workload

To measure whether the pilot programs had an impact on court costs, this study examined whether the workload of judges in the pilot court changed as a result of the pilot program and then estimated the potential monetary value of any change identified. Two measures of court workload were examined: (1) the trial rate and (2) the average number of pretrial hearings per case that were conducted by judges.

As noted above, the trial rate was calculated by dividing the number of cases that went to trial by the total number of cases that reached disposition. Program impact on trial rate was measured by comparing the difference in trial rates between the available comparison groups (program/control, pre-/post-program, stipulated/nonstipulated).

In calculating the average number of pretrial hearings conducted by judges, three different types of pretrial hearings were separately counted: (1) case management conferences, (2) motion hearings, and (3) all other pretrial hearings. Overall program impact on the average number of pretrial hearings was measured by comparing the average number of each hearing held by judges in cases in the available comparison groups (program/control, pre-/post-program, stipulated/non-stipulated).

When overall program impact on either the trial rate or the average number of pretrial hearings was found, the average number of days spent per trial and the average number of minutes spent per hearing were used to calculate the number of judge days saved (or added). The monetary value of judge-days saved (or added) was then estimated.

<sup>21</sup> An example of a more sophisticated approach for analyzing cost impact is Activity Based Costing. A recommendation for implementing Activity Based Costing in the court system in Australia is found in an audit by Insight Business Solutions, *ACT Law Courts: Review of Financial Management Practices (the McFeat Report)* 2002. Rejection of this recommendation by the courts is reported by the Auditor General in the Australian Capital Territory. See Auditor-General Australian Capital Territory, *ACT Auditor-General's Office Performance Audit Report Courts Administration*, Canberra City, September 2005. [http://www.audit.act.gov.au/auditreports/reports2005/Report%204\_2005.pdf].

<sup>22</sup> J. Kakalik, et al, Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under The Civil Justice Reform Act (Vol. I, 51 Pp.); Implementation of The Civil Justice Reform Act In Pilot And Comparison Districts (Vol. II, 283 Pp.); An Evaluation of Judicial Case Management Under The Civil Justice Reform Act (Vol. III, 386 Pp.); And an Evaluation of Mediation and Early Neutral Evaluation under The Civil Justice Reform Act (Vol. IV, 492.) Rand ICJ 1996.

<sup>23</sup> For example, the Summer 1997 issue of Dispute Resolution Magazine includes ten articles responding to and critiquing elements of the RAND report.

<sup>24</sup> Deborah R. Hensler, ADR Research at the Crossroads, *Journal of Dispute Resolution*, Vol. 2000, No. 1, pp.71-78, 2000. The 1996 RAND CJRA report received a critical response. Hensler considers the response a "dramatic manifestation of this shift... away from empirical investigation and critical analysis of ADR consequences". In addressing the question "What is the effect on litigation and court costs?" RAND Researcher Hensler formulated the nature of the debate as follows.

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*...it is indisputable that ADR has been 'sold' within the court context as a set of procedures for reducing judicial caseloads and cutting time to disposition. ADR proponents have therefore been disappointed by research suggesting that cost and time savings may be illusory.*

*This is not because resolving a dispute short of adjudication is as costly as taking a case to trial. If parties can reach resolution through ADR, the public and private costs of litigation will almost certainly be less than the costs of full-blown trial. But in the court setting, ADR does not substitute for trial, but rather adds one or more procedures for facilitating settlement to the lawyer-driven negotiation process.*

*The question is: Under what circumstances does ADR reduce cost and time to disposition, by comparison with old-fashioned negotiation? My reading of the available data suggests that when savings occur, it is because they are accompanied by other changes in case management, for example, imposing strict time guidelines where such did not exist (or, were not consistently implemented) previously, or limited discovery.*

Hensler concludes this section with the suggestion that “large institutional ‘repeat players’ are in a better position to provide data for research than courts.” We can go one step further and ask “do large institutional ‘repeat players’ generally endorse the use of ADR? Surveys suggest this is a resounding ‘yes’, and studies indicate further expansion of its use. (Note as the contrary position is not a popular one it may be under-reported.)

“Why is there a perception that ADR saves time and money?” “Why does there seem to be a discrepancy between the perception and objective data?” Hensler suggests:

*One possibility is that we are missing something in our measures. Indeed there are few studies that have attempted to measure whether the use of ADR reduced parties’ time spent on litigation or has positive consequences...sometimes lumped into the ‘qualitative’ benefits of using ADR But they have real – and in principle, measurable – financial value. By ignoring them we may be underestimating savings associated with court ADR.*

Also noted is the absence of studies on the effect of ADR on time and resource allocation. Hensler concludes consideration of this question by suggesting the perceptions may simply be wrong on several accounts. “...individuals overestimate the likelihood of low-probability-high-negative consequence events...Since every lawsuit has a small probability of going to trial and since the costs of trial can be enormous, it would not be surprising for those costs to loom large in individual’s subjective calculus of savings associated with ADR.” She also suggests that via ‘stereotyping’ trials as expensive and time consuming “ADR practitioners themselves may enhance the likelihood that parties and their lawyers will compare the costs of their ADR experience with the costs of a statistically unlikely trial.”

<sup>25</sup> Deborah R. Hensler, Does ADR Really Save Money? The Jury’s Still Out, *The National Law Journal*, 1994, reprint by RAND/RP327.

<sup>26</sup> Leo E. Strine, Jr., “Mediation Only” Filings in the Delaware Court Of Chancery: Can New Value Be Added by one of America’s Business Courts?”, University of Pennsylvania Institute for Law and Economics Research Paper No. 03-17, February 26, 2003. Social Science Research Network Electronic Paper Collection: [[http://ssrn.com/abstract\\_id=414483](http://ssrn.com/abstract_id=414483)]

<sup>27</sup> Peter S. Hovmand, Effectiveness of court mandated referrals: A system dynamics model and simulation, The 129th Annual Meeting of the American Public Health Association, Atlanta, GA, Oct 21-25, 2001. [[http://apha.confex.com/apha/129am/techprogram/paper\\_28794.htm](http://apha.confex.com/apha/129am/techprogram/paper_28794.htm)]

<sup>28</sup> Narrowing the Gap Between Research and Practice: Taking Nonlinear Dynamics into Account, The Eighth Annual Conference of The Society for Social Work and Research Symposium, 2004. [<http://www.sswr.org/papers2004/490.htm>]

*Social work has a long history of appreciating the importance of understanding complex systems, from individuals to large organizations. While social work has been theoretically oriented toward a systems perspective, most research methods have a limited ability to represent and evaluate nonlinear processes. Stressing empirically based practice while relying on methods that are essentially limited to linear cause-effect relationships can have the unintended effect of actually increasing the gap between social work research and practice. The goal of this symposium is to present research that represents and evaluates nonlinear dynamics.*

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<sup>29</sup> From Kakalik 1996: “[RAND ICJ] found no strong statistical evidence that the mediation or neutral evaluation programs, as instituted in the six districts studied, significantly affected time to disposition, litigation costs, or attorney view of fairness or satisfaction with case management. The only significant outcome is that these ADR programs appear to increase the likelihood of a monetary settlement.”

<sup>30</sup> Also around 1996, a Federal Judicial Center (FJC) report to the U.S. Judicial Conference Committee on Court Administration and Case Management documented significant savings in dispute resolution time and cost in federal district court programs. See Donna Stienstra, et al, Report to The Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under The Civil Justice Reform Act Of 1990 (Federal Judicial Ctr. 1997).

<sup>31</sup> Note that correlation is not as strong as ascertaining “causality.”

<sup>32</sup> J. Thibaut and R. Walker, *Procedural Justice*. New York: Wiley, 1975. These social psychologists are likely the most influential in the development of the measure of “satisfaction with process” widely employed in the mediation research community.

<sup>33</sup> Resource Materials of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, ABA, St. Paul, Minnesota, April, 1976.

<sup>34</sup> Dana Baggett, TQM Project Coordinator in Maine.

*A court is an organization that is filled with processes; therefore, TQM [which focuses on improving processes] has potential and application in the court environment.*

<sup>35</sup> Philip B. Crosby, *Quality is Free: The Art of Making Quality Certain*, New American Library, New York, NY, 1979.

<sup>36</sup> Examples of the translation of the Total Quality Management movement into government, with examples in the courts is found in: (a) David K. Carr, and Ian D. Littman., *Excellence in Government: Total Quality Management in the 1990s*, Coopers and Lybrand, Arlington, VA, 1990. (b) Regina Kay Brough, "Total Quality Management in State Government," *Journal of State Government*, Jan.-Mar. 1992, pages 4-8. (c) Steven Cohen, and Ronald Brand, *Total Quality Management in Government: A Practical Guide for the Real World*, Jossey Bass Publishers, Inc., San Francisco, CA, 1993. (d) G. Ronald Gilbert, "Human Resource Management Practices to Improve Quality: A Case Example of Human Resource Management Intervention in Government," *Human Resource Management Journal*, Vol. 30, No. 2, pages 183-98. (e) Stephen J. Harrison, and Ronald J. Stupak, "Total Quality Management: The Organizational Equivalent of Truth in Public Administration, Theory and Practice," *Public Administration Quarterly*, Vol. 16, No. 4 (Winter 1993), pages 416-29. (f) Henry Lefevre, ed., *Government Quality and Productivity - Success Stories* (ASQC Quality Press, Milwaukee, WI, 1992). (g) David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, Addison-Wesley Publishing, Co., Inc., Reading, MA, 1992. (h) A. K. Smith, "Total Quality Management in the Public Sector, Part 1", *Quality Progress*, Vol. 26, No. , (June 1993), pages 45- . (i) A. K. Smith, "Total Quality Management in the Public Sector, Part 2," *Quality Progress*, Vol. 26, July 1993, pages 57- . (j) Ronald J. Stupak, and Rudolph B. Garrity, "Introduction," *Public Administration Review*, Vol. 16, No. 4, Winter 1993, pages 409-415. (k) James E Swiss, "Adapting Total Quality Management (TQM) To Government," *Public Administration Review*, Vol. 52, No. 4, July/August 1992, pages 356-62. (l) George D. Wagenheim, and John H. Reurink, "Customer Service in Public Administration," *Public Administration Review*, Vol. 51, May/June 1991, pages 263-269.

<sup>37</sup> Ward Bower, “In Search of Excellence: Applying TQM to a Legal Environment,” *Law Practice Management*, vol. 19, no 3. April 1993, p. 22. “An estimated 400 of the Fortune 500 corporate law departments are expected to be applying TQM by 1994.”

<sup>38</sup> a) Aikman, Alexander B., "Total Quality Management in the Courts: The Time is Now," *State Court Journal*, vol. 17, no. 2, Spring 1993, pages 3 et seq.. b) Ehrenberg, Rudolph, Jr., and Ronald J. Stupak, "Administrative Theories Applicable to the Implementation of Total Quality Management in Public Sector and Service Organizations", An Occasional Paper Series of the Institute for Court Management of the National Center for State Courts (Unpublished paper) 1991. (c) Lee, Gary E., "Total Quality Management," *The Court Management and Administration Report*, Vol. 3, No. 11, November 1992. (d) Anne Thompson, "Total Quality Management: A Court Application," A Court Executive Development Program Phase III Project Report, May 1993.

<sup>39</sup> Lee, Gary E., "Total Quality Management," *The Court Management and Administration Report*, Vol. 3, No. 11 (November 1992).

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<sup>40</sup> H. Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (Australian Institute of Judicial Administration Inc, 2001)

<sup>41</sup> Alexander B. Aikman and Adam L. Fleischman, "Total Quality Management: Where the Courts are Now," *State Court Journal*, Winter 1994.

*Minneapolis is the leading local government unit cited for success with TQM, but Phoenix, (a) Milwaukee, (b) and Los Angeles (c) also claim significant successes. And, as indicated by the quotations at the beginning of this chapter, courts that have tried TQM also are finding positive results. The Tulsa Municipal Criminal Court has documented improvements in juror attitudes toward service and the court. The Los Angeles Municipal Court has documented a marked decrease in waiting time and customer complaints since instituting its TQM program. Robert Quist of that court says: "In the past, the mentality was for courts to search for ways of dealing with angry customers; under TQM, the focus shifts to doing a good job so that there are no angry customers.... Suzie White of the Administrative Office of the Probate and Family Court in Massachusetts calls TQM 'a common sense model for management.'*

Citing (a) James P. Garrison, "Phoenix: A Quality City," *Public Risk*, May/June 1993, page 42. (b) Jonathan Walters, "The Cult of Total Quality," *Governing*, vol.5 no. 8, May 1992, page 38, 42. (c) Laura Jessee, "Productivity: Part of the Governmental Culture in Los Angeles," *Government Finance Review*, December 1990, page 15.

<sup>42</sup> Alexander Aikman, *Total Quality Management in the Courts: A Handbook for Judicial Policy Makers and Administrators* (Denver: National Center for State Courts, 1994).

<sup>43</sup> "A Plan for the Use of Total Quality Management in the Maine Judicial Branch," September 1, 1992.

<sup>44</sup> Susanne White, "Proposal for Implementing a Service Quality Improvement Plan in the Probate and Family Court Department of the Trial Court of the Commonwealth," *State Court Journal*, Winter 1994

<sup>45</sup> Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, Ohio State Journal on Dispute Resolution, 2002.

<sup>46</sup> Jeffrey Senger, Deputy Senior Counsel for Dispute Resolution, Evaluation of ADR in United States Attorney Cases, *United States Attorney Bulletin*, November 2000, pg. 25.

<sup>47</sup> This idea is typically illustrated with learning archery – first get the arrows to land close to each other, then try to shoot for the bull's eye.

<sup>48</sup> The Visiting Committee on Management in the Courts - Report to Chief Justice Margaret Marshall, March 2003. [<http://www.mass.gov/courts/courtreformfinal.pdf>]

<sup>49</sup> National Center for State Courts, *Total Quality Management in the Courts*, 1994.

[KIS\_AdmOCtTQMInCts.pdf]. Here is an excerpt from the Conclusion:

*Because TQM has been identified in the general media with the resurgence of the American automobile industry and several other large manufacturers have had marked success with TQM, some in the judicial branch have decided it is not appropriate for courts. The early pioneers with TQM among courts have demonstrated that is not true. TQM can apply and be helpful in courts. Courts that have started down the path of changing their court's management culture share the enthusiasm of their private sector counterparts about the value and merits of TQM. It is not a fad and it is not something that will disappear if we wait long enough. It is hard for some to think of the people who come through the courthouse doors-other than attorneys, perhaps-as "customers," but they are the objects and recipients of the service courts provide and thus are customers. Rather than diminishing the courts' mission of providing justice in individual cases and being perceived as providing justice, TQM can materially improve and enhance courts' service and at the same time enhance their capacity to fulfill that mission.*

<sup>50</sup> Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution", Prepared for the Symposium on the Vanishing Trial, *Journal of Empirical Legal Research* (July 20, 2004).

<sup>51</sup> Rudolph H. Ehrenberg, Jr. and Ronald J. Stupak, "Administrative Theories Applicable to the Implementation of Total Quality Management in Public Sector and Service Organizations," (An Occasional Paper Series of the Institute for Court Management of the National Center for State Courts), 1991.

*Many in courts who consider TQM will do so because of the prospect of budget savings. That subject deserves further discussion. The Federal Quality Institute reports that studies show that \$4 to \$5 are saved for every dollar invested in TQM...*

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*The approach has merit, but it is not clear how many of these savings showed up as reductions in line items in (the) budget. In government, not all improvements in quality involve fiscal savings. The city of Phoenix cites two programs as positive examples of the benefits of TQM that did not produce any savings*

*Even in state-funded judicial systems, savings representing even as much as say ten percent of a non-personnel item, will seem small next to the dollar savings achievable by other government units or larger corporations. The biggest non-personnel items in trial courts' budgets are court reporting transcript fees, jury fees, and indigent defense costs. While all of these are susceptible to savings and other out-of-pocket costs can be limited or reduced, the magnitude of real-dollar savings will be limited unless a court identifies new processes that require fewer staff. This can happen and real dollar savings can be achieved as a result, although the nature of public-sector employment is that those filling the eliminated positions often will be reassigned rather than terminated.*

*Personnel are reduced through attrition far more often than through lay offs. Courts' benefits from TQM are likely to be: improved productivity that will defer or eliminate future staff increases or enable a court to remain current with fewer staff,.*

<sup>52</sup> National Center for State Courts with acknowledgment to the State Justice Institute (SJI), Report on Trends in the State Courts 1999-2000 Edition, 2000.

[[http://www.ncsconline.org/WC/Publications/KIS\\_CtFutu\\_Trends99-00\\_Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_CtFutu_Trends99-00_Pub.pdf)]

#### **TQM, RIP?**

*In the 1993-94 edition, we reported that total quality management (TQM) "is not a fad and...is not something that will disappear if we wait long enough."\* While courts are still very interested in providing quality customer service to court users and other goals of TQM, TQM is not necessarily the means that courts use to accomplish such goals. Newer processes such as strategic planning, data mining, and futures studies seem to have replaced TQM's grassroots planning techniques.*

\* quoting Alexander Aikman, Total Quality Management in the Courts: A Handbook for Judicial Policy Makers and Administrators (Denver: National Center for State Courts, 1994).

<sup>53</sup> Ann L. MacNaughton, Law Practice in the 21st Century: Assisted Negotiation and Multidisciplinary Problem-Solving, American Bar Association, Annual Meeting of the State Bar of Texas, 1999. The presentation describes the trend toward cooperative business solutions and its implications for law practice in the 21st Century.

<sup>54</sup> R. J. MacCoun, Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey, RAND Institute for Civil Justice, RP-134 (originally published in *The Justice System Journal*, Vol. 14, No. 2, 1991), 1992. "Arbitration programs are expected to reduce delays and costs by providing a more efficient substitute for trial, but because most disputes are already resolved without adjudication, an arbitration program is likely to divert more cases from settlement than from trial."

<sup>55</sup> Sandra Azar, Jack Demick, Peter Gibbs, Permanency Mediation Pilot Programs: Impact and Outcomes, Center for Adoption Research, University of Massachusetts, report to the Massachusetts Supreme Judicial Court, June 30, 2000.

<sup>56</sup> Hedeon, Timothy, "The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Promise," *Conflict Resolution Quarterly* 22(1&2): 101-133, 2004, pg. 124.

[<http://www3.interscience.wiley.com/cgi-bin/fulltext/109801328/PDFSTART>]

*An additional measure of cost efficiency may be derived from the cost of services saved, that is, those services that were not required or delivered due to the successful resolution of concerns through mediation. Just as the research on the Durham center identified the potential court costs saved, another study has found that police referrals can lead to a decrease in return calls for service (Charkoudian, 2001), leading to direct cost savings for municipalities.*

<sup>57</sup> Charkoudian, L. "Economic Analysis of Interpersonal Conflict and Community Mediation." Unpublished doctoral dissertation, Johns Hopkins University, 2001.

<sup>58</sup> Ian Heisey, Building Stronger Communities Through Mediation, *Shelterforce Online*, Issue #136, July/August 2004, a publication of the National Housing Institute.

[<http://www.nhi.org/online/issues/136/mediation.html>]

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*Mediation offers an alternative to placing calls to the police and seeking prosecution or retaliation against neighbors. Residents learn to resolve their disputes in an assertive and nonviolent way, finding ways to address their differences without relying on law enforcement for help.*

*When mediation is used to manage neighbor or community conflicts, police are able to devote their attention to more pressing law enforcement matters. A 2001 study by Dr. Lorig Charkoudian, "Economic Analysis of Interpersonal Conflict and Mediation," looked at the Community Mediation Program of Baltimore and the Baltimore Police Department and found that mediation saved the police department time and money. Specifically, with mediation, the police department saved an average of nine calls and over four hours of patrol time within a six-month period.*

<sup>59</sup> David Green, Alison McClellan, Uncertainty, risk and children's futures, *Family Matters*, No.64 Autumn 2003. [<http://www.aifs.gov.au/institute/pubs/fm2003/fm64/dg.pdf>]

*In this opinion piece we argue that, as the Western world undergoes a period of profound economic and social change, insufficient attention is being paid to how that change, and the consequential risks and uncertainties that are generated, could be managed by governments to strengthen and protect families.*

*We maintain that the material insecurities associated with change are likely to undermine the strength of relationships, so important to family stability and to children's development. We also argue that the way family and children's services are funded and delivered means that these problems of uncertainty and relationship instability are compounded.*

*While vulnerable families have always been subject to both risk and uncertainty, the modern welfare state softened their impacts in the interests of stability, equity and optimising the futures for children. We contend that, in a period of profound change, the management of risk currently delivers certainty to those with social power and secure in their inclusion, at the expense of those unable to control their own participation in today's economy (Taylor-Gooby 2000). This distribution of risk and uncertainty is of particular importance to parenting, which more than ever is a longterm project, requiring a firm and secure foundation in the present (Bourdieu 1998, cited by Bauman 2002: 177).*

*In terms of outcomes, these management processes result in policy shifts from collectivising the response to uncertainty to relocating it within families, individuals and localities; from solving social problems to managing them; and from program approaches to social problems based on treatment to approaches based on harm minimisation (Garland 2001). And at the level of practice, governments are adopting radically different approaches to the funding and delivery of services, including the transfer of the responsibility for the delivery of services to contracted providers. All these changes have implications for the distribution of risk.*

Citing (a) Taylor-Gooby, P. "Risk and welfare", in P. Taylor-Gooby (ed.) *Risk, Trust and Welfare*, Macmillan Press Ltd, London, 2000. (b) Z. Bauman, *Society Under Siege*, Polity Press, Cambridge, 2002. (c) D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford University Press, Oxford, 2001.

<sup>60</sup> Amber Hardin, *The State of Community Mediation Report on 2004 Data*, National Association for Community Mediation.

<sup>61</sup> *Ibid.*

<sup>62</sup> An example of a strong community partnership is in Fall River. [<http://www.gfrpartners.com/healthycity.htm>] Two example priority actions of Fall River involve preventing relationship violence and eliminating homelessness. These are reasonable initiatives for community mediation programs to join; community mediation can leverage these existing activities. For example, the privately-funded [Katie Brown Educational Program](http://www.kbep.org/) [<http://www.kbep.org/>] [<http://www.gfrpartners.com/05KatieBrown.html>] is providing education to hundreds of Fall River students in an effort to prevent relationship violence. Fall River has joined a growing list of cities around the country that are participating in a national movement to end homelessness. [<http://www.gfrpartners.com/05HomelessTaskForce.html>] The project is based on concepts developed by the Federal [Interagency Council on Homelessness](http://www.ich.gov/) [<http://www.ich.gov/>] and the [National Alliance to End Homelessness](http://www.endhomelessness.org/) [<http://www.endhomelessness.org/>].

<sup>63</sup> Clear, Todd R. and David R. Karp. *The Community Justice Ideal: Preventing Crime and Achieving Justice*, Westview Press, Chicago, 2000.



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<sup>64</sup> Todd Clear (John Jay College of Criminal Justice, USA), Community Justice as Public Safety, Keynote Paper presented at the Probation and Community Corrections: Making the Community Safer Conference, convened by the Australian Institute of Criminology and the Probation and Community Corrections Officers' Association Inc., Perth, 23-24 September 2002. [<http://www.aic.gov.au/conferences/probation/>] (citing Clear and Karp)

<sup>65</sup> Thomas O. Main, University of the Pacific McGeorge School of Law, ADR: The New Equity, Working Paper 479, 2005. [<http://law.bepress.com/expresso/eps/479>]

<sup>66</sup> Douglas M. Gane, The Birth of a New Equity, 67 *The Solicitors' Journal & Wkly. Rptr.* 572, 572 (May 26, 1923).

<sup>67</sup> (a) Albie M. Davis, "An interview with Mary Parker Follett," *Negotiation Journal*, (July 1989). (b) Albie M. Davis, "Follett on facts: Timely advice from an ADR pioneer," *Negotiation Journal*, (April 1991), pp. 131-138. (c) Albie M. Davis, "Liquid Leadership: The Wisdom of Mary Parker Follett (1868 - 1933)", August 1997. [[http://sunsite.utk.edu/FINS/Mary\\_Parker\\_Follett/Fins-MPF-03.txt](http://sunsite.utk.edu/FINS/Mary_Parker_Follett/Fins-MPF-03.txt)].

<sup>68</sup> Mary Parker Follett, *The New State: Group Organization the Solution of Popular Government*, Longman Green and Co., New York, 1918., (now carried by Penn State University Press).

[[http://sunsite.utk.edu/FINS/Mary\\_Parker\\_Follett/Fins-MPF-01.html](http://sunsite.utk.edu/FINS/Mary_Parker_Follett/Fins-MPF-01.html)]. In Chapter XVI, [[http://sunsite.utk.edu/FINS/Mary\\_Parker\\_Follett/XVI.txt](http://sunsite.utk.edu/FINS/Mary_Parker_Follett/XVI.txt)], *Democracy Not "Liberty" and "Equality": Our Political Dualism* she writes:

*There has been long a kind of balance theory prevalent: everything that seems to have to do with the one is put on one side, everything that has to do with the many, on the other, and one side is called individuality and freedom, and the other, society, constraint, authority. Then the balancing begins: how much shall we give up on one side and how much on the other to keep the beautiful equilibrium of our daily life? How artificial such balancing sounds! We are beginning to know now that our freedom depends not on the weakness but on the strength of our government, our government being the expression of a united people. We are freer under our present sanitary laws than without them; we are freer under compulsory education than without it. A highly organized state does not mean restriction of the individual but his greater liberty. The individual is restricted in an unorganized state. A greater degree of social organization means a more complex, a richer, broader life, means more opportunity for individual effort and individual choice and individual initiative. The test of our liberty is not the number of limitations put upon the powers of the state. The state is not an extra-will. If we are the state we welcome Our liberty."*

<sup>69</sup> Hedeem, Timothy, "The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Promise," *Conflict Resolution Quarterly* 22(1&2): 101-133, 2004. Hedeem characterizes the supplanting of degrading social institutions with community mediation centers as follows: "The reliance on courts to resolve concerns was a product of many social trends. It was a project of the Department of Justice to pilot the concept of mediation for low-level civil and criminal matters. It began in 1978 and many of the centers created through the project live on. The final report on the NJC Field Test explained:

*The courts have not actively sought to become the central institution for dispute resolution; rather the task has fallen to them by default as the significance and influence of other institutions has waned over the years... Many of the disputes which are presently brought to the courts would have been settled in the past by the family, the church, or the informal community leadership. While the current role of these societal institutions in resolving interpersonal disputes is in doubt, many citizens take their cases to the courts.*

citing Cook, R. F., Roehl, J. A., and Sheppard, D. I. Neighborhood Justice Centers Field Test: Final Evaluation Report. Washington, D.C. Department of Justice, 1980. pg. 2.

<sup>70</sup> Such an apparent "variety" of cost savings is typically well fit by a log normal distribution, or a multiplicative log normal distribution. The preclusion of cost overrun in the contract model would be accommodated by a truncated log normal distribution.

<sup>71</sup> Supreme Judicial Court / Trial Court Standing Committee on Dispute Resolution for the Chief Justice for Administration and Management of the Trial Court, *Report to the Legislature on The Impact of Alternative Dispute Resolution on the Massachusetts Trial Court*, February 2, 1998.

- Reduce backlog of older cases;
- Reduce case disposition time;

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- Expedite particular categories of cases;
  - Save judicial resources;
  - Reduce litigant costs;
  - Produce high litigant satisfaction;
  - Produce high attorney satisfaction;
  - Produce high judicial satisfaction;
  - Increase pre-event dispositions;
  - Streamline litigation;
  - Find the best forum for resolving the presented and underlying issues;
  - Empower citizens to resolve their own disputes while developing conflict resolution skills that reduce further conflict;
  - Produce better outcomes;
  - Involve the bar and public in effective problem-solving and the administration of justice

<sup>72</sup> Susan Jeghelian, Executive Director, Massachusetts Office of Dispute Resolution, *Stakeholder Input and Recommendations for Design for June 28th ADR Conference*, Memorandum to Honorable Robert Mulligan Chief Justice for Administration & Management of the Trial Court and Honorable Gail Perlman, First Justice, Hampshire Division, Probate & Family Court, Chair of the Trial Court Standing Committee on Dispute Resolution, May 20, 2005. The following are findings based on interviews with court and program representatives regarding objectives for court ADR.

*Some, but not all, department and approved program representatives articulated goals for court ADR. Many Standing Committee members were not clear on the overall goals of the system for court-connected ADR. There seems to be a lack of clarity around this. Some programs expressed an interest in talking about goals with individual courts in a more systematic way --such as an annual meeting to check in, see how things are going from both the court's and the program's perspectives, and establish goals for the coming year.*

The following is a list of the goals for Court ADR noted by Stakeholders:

#### **Case Management for the Court**

- Settling cases through ADR and earlier settlements through ADR
- Resolving cases as early as possible through the most appropriate method
- Honing issues and enhancing case processing through ADR
- Streamlining case management; enhancing efficiency of court system
- Focus priorities on courts/case types of greatest need i.e., back logs (old cases); divisions/courts in the worst shape (look at statistical caseload data to determine this)
- Increase number of cases resolving through ADR
- Increase number of referrals to ADR
- Expand ADR more courts, wider range of case types and ADR processes
- Having court approved ADR programs in every division that wants them – some do not
- Expanding ADR to other case types (e.g., minor criminal cases in District Court; pro se cases/restraining orders in Superior Court)

#### **Quality Alternatives for Litigants and Peaceful Communities**

- Offering a range of viable options for resolution to litigants
- Providing affordable and accessible mediation services
- Increased satisfaction in how conflicts get resolved
- Better administration of justice
- Serving pro se parties effectively
- Empowering litigants to resolve their own disputes in a professional environment; help litigants feel a part of the process – control over decisions, not just judge driven
- Bringing together parties that do not often agree (e.g., DSS and parents)
- Reducing the costs associated with litigation
- Promoting improved satisfaction of litigants and members of the bar
- Providing options to meet needs of wide range of litigants and issues
- Increased compliance and create enduring resolutions which can preserve long-term relationships

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### **Building Greater Acceptance of and Capacity for ADR as Core Function of Court**

- Integration and support of ADR at all levels of the court
- ADR is treated as a core function of the court - not an add on and funding as such
- Judges, clerks and other court personnel who know about ADR, how to use ADR and how to work with approved programs in their court
- Increased visibility of ADR & ADR programs in the court house
- Increasing public awareness of ADR in the courts

*Program goals drive decisions about design, structure, funding and other resource allocation, and serve as the basis for program evaluation. Goals should be clearly articulated and prioritized.*

<sup>73</sup> Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution in cooperation with the SJC Public Information Office, *A Guide to Court-Connected Alternative Dispute Resolution Services*, section: *What are the potential advantages of using court-connected Dispute resolution services?* pg. 10.

[<http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/ccadr0601large.pdf>]

#### ***Savings of Time and Money***

*An average lawsuit in America can take over three years to reach trial or settlement. Often court-connected dispute resolution proceedings can resolve cases in days or even hours, saving the parties from having to attend multiple court appearances. Parties can schedule an appointment with a court-connected dispute resolution service provider as soon as they choose their preferred dispute resolution process and provider. By resolving the issue early on, both parties avoid some of the costs associated with pre-trial litigation.*

#### ***Finality***

*Resolution of disputes achieved through binding methods of court-connected dispute resolution is final, eliminating the long and costly process of appeal.*

#### ***Compliance***

*Studies show that parties are more likely to adhere to court-connected dispute resolutions than to court-imposed decisions.*

#### ***Custom-Made Solutions***

*Some court-connected dispute resolution proceedings, such as mediation, allow the parties to create their own solutions tailored to their specific needs. These voluntary court-connected dispute resolution processes often achieve resolution through the sharing of information and the development of mutual understanding of each party's concerns.*

It is interesting to compare this with the guiding principles published in Report of the (Commonwealth of Massachusetts) Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution "Dispute Resolution in the Courts: A Plan to Promote Access, Choice, and Integrity in Court-Connected Dispute Resolution, June 18, 1996. The guiding principles are *quality, integrity, accessibility, informed choice of process and provider, self-determination, timely services, diversity, and qualification of neutrals.*

<sup>74</sup> The Guide pg. 11-12.

#### ***Preservation or Enhancement of Long-Term Relationships***

*Often disputes are caused by underlying issues, and court-connected dispute resolution processes offer the opportunity to create an enduring resolution that will satisfy everyone's goals. Some conflicts are the result of deep differences between parties who nevertheless must sustain ongoing working relationships. For these disputes, some court-connected dispute resolution processes offer the opportunity to examine and resolve these differences so that the parties' short-term and long-term goals may be achieved*

<sup>75</sup> Milan Zafirovski, *Some Amendments to Social Exchange Theory: A Sociological Perspective*, *Theory and Science*, 2003. [[http://theoryandscience.icaap.org/content/vol004.002/01\\_zafirovski.html](http://theoryandscience.icaap.org/content/vol004.002/01_zafirovski.html)] citing Raymond Boudon, *The Unintended Consequences Of Social Action*, St. Martin's Press, New York, 1982. pg. 9.

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“...*homo sociologicus* is “an advance over *homo oeconomicus*. *Homo sociologicus* is an intentional actor, endowed with a set of preferences, seeking acceptable ways of realizing his objectives, conscious of the degree of control over the elements of the situation (of the structural constraints), acting in the light of limited information and in a situation of uncertainty.”

The key feature of the *homo sociologicus* model is an acknowledgement of limited rationality.

<sup>76</sup> The evolution from the *Homo economicus* model to the *Homo sociologicus* model, put forth by sociologists is reflected in a transition of the economic theory of Adam Smith to that proposed by John Nash. Paraphrasing succinctly: “According to Adam Smith’s theory, in competition, individual ambition serves the common good’, this is incomplete, “the best result will come from everybody in the group doing what’s best for himself, and the group”. For this finding, backed up by mathematical rigor, John Nash was awarded the Nobel Prize. Avner Greif, “Cultural Beliefs and the Organization of Society: Historical and Theoretical Reflection on Collectivist and Individualist Societies,” *The Journal of Political Economy*, (October 1994);

<sup>77</sup> Elizabeth S. Rolph and Erik Moller, *Evaluating Agency Alternative Dispute Resolution Programs: A Users’ Guide to Data Collection and Use*, RAND Institute for Civil Justice, MR-534, 1995. “Manual created to assist those with responsibility for evaluating federal agency alternative dispute resolution programs; discusses issues in designing evaluations, lays out approaches to data collection, provides sample data analysis plans, and includes a number of prototype data collection instruments.”

<sup>78</sup> Melinda Ostermeyer, and Susan Keilitz, *Monitoring and Evaluating Court-Based Dispute Resolution Programs*, National Center for State Courts, SJI, 1997.