

# BRINGING TRANSPARENCY AND ACCOUNTABILITY (WITH A DASH OF COMPETITION) TO COURT-CONNECTED DISPUTE RESOLUTION

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## INTRODUCTION

Proponents often claimed that courts' institutionalization of processes like mediation would increase access to justice. These processes are now institutionalized, but have they had the promised effect? How can we tell? Overwhelmingly, we have no data regarding the number of cases that are referred to mediation and other alternative dispute resolution (ADR) processes, the dispositions that result, or parties' perceptions of the process. The goal of this Article, therefore, is both relatively modest and ridiculously ambitious. The Article calls for regular data collection regarding the use and effects of all court-connected dispute resolution processes and the publication of certain aggregate results. The Article uses court-connected mediation to illustrate the need for legislation mandating these activities, but the rationale applies just as easily to the many nontrial procedures used to resolve civil disputes in our courts—i.e., nonbinding arbitration, early neutral evaluation, and even judicial settlement conferences. This Article's rationale and its call for data collection and publication could even apply to purportedly private dispute resolution processes that actually rely on public

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courts for enforcement of dispute resolution clauses, arbitral awards, and mediated settlement agreements.<sup>1</sup>

Advocating for the institutionalization of data collection and transparency regarding courts' use of dispute resolution is particularly timely for several reasons. First, ADR is now a regular feature of civil litigation in the U.S. federal and state courts. Indeed, some urge that ADR should be understood to mean "appropriate" rather than "alternative" dispute resolution.<sup>2</sup> We should be able to see the degree to which these processes contribute to our public courts' management of cases—especially when courts order parties to participate in dispute resolution. Overwhelmingly, we cannot.

Second, we should be able to see whether these processes help or hinder access to justice (A2J). Data has undoubtedly played a key role in inspiring the current renaissance of A2J literature and research,<sup>3</sup> and A2J commentators are now beginning to call for greater transparency within dispute resolution. However, these commentators have tended to focus on the need to bring openness to the procedures themselves and to the outcomes in individual cases.<sup>4</sup> Such a focus raises very difficult—perhaps even insurmountable—issues regarding confidentiality protections and party self-determination. This Article's call for data gathering and the publication of aggregate results responds to many A2J concerns while avoiding the disclosure of personally identifiable information that would violate confidentiality.

Third, legislators and constituents increasingly assume that data on court operations and trends will be available. In response, influential organizations such as the National Center for State Courts (NCSC) are urging all state courts to begin collecting standardized data and have even begun piloting such collection.<sup>5</sup> This effort is gaining traction as an increasing number of

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1. Ironically, some claim that private dispute resolution has become so ubiquitous that it is a primary cause for declining civil filings in state and federal courts. *See, e.g.*, CIVIL JUSTICE IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 12 (2016), <https://www.ncsc.org/~media/microsites/files/civil-justice/ncsc-cji-report-web.ashx> [<https://perma.cc/TKC6-7WNS>]; Laurie K. Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 465–66, 483 (2006) (urging that privacy offered by ADR has certainly fueled its popularity); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018); Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 535–36 (2009).

2. Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 43 (2002).

3. *See* Elizabeth Chambliss et al., *Introduction: What We Know and Need to Know About the State of "Access to Justice" Research*, 67 S.C. L. REV. 193, 194 (2016) (describing government agencies' and research foundations' increasing support for A2J evidence-based research).

4. *See* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitration*, 96 N.C. L. REV. 605, 611 (2018); *see also* Nancy A. Welsh, *Dispute Resolution Neutrals' Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823, 838 (2019) (detailing the Consumer Financial Protection Bureau's effort to bring transparency to mandatory predispute consumer arbitration in the context of financial services and goods).

5. *See* CIVIL JUSTICE IMPROVEMENTS COMM., *supra* note 1, at 31–32; Email from Diane Robinson, Senior Court Research Assoc., Nat'l Ctr. for State Courts, to Nancy A. Welsh,

courts turn to a relatively small number of private vendors to supply case and data management software. If courts are moving to normalize the collection of data regarding the courts' "traditional" operations, now is also the time to seek inclusion of data regarding "alternative" (but really, now, not-so-alternative) dispute resolution.<sup>6</sup>

Fourth, data, metrics, and rankings are increasingly popular tools to compare nations' judiciaries, signal leadership, and gain competitive advantage by demonstrating trustworthiness and governance quality. Dispute resolution is explicitly included in some of these metrics,<sup>7</sup> and data is needed to inform them.

Fifth, a "new kid" on the ADR block—online dispute resolution (ODR)—is attracting substantial attention. The NCSC, Pew Charitable Trusts ("Pew"), Institute for the Advancement of the American Legal System (IAALS), Conference of Chief Justices, and Joint Committee on Technology, among others, are strongly encouraging state courts to adopt ODR to handle many high-volume, low-value matters.<sup>8</sup> Reasonably enough, there are also calls to evaluate the effectiveness and fairness of this new dispute resolution

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Chair, Am. Bar Ass'n Section of Dispute Resolution's Research Advisory Comm. (Feb. 4, 2020, 16:33 CST) (on file with author). Recommendations 10.3–10.5 provide:

To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management[,] . . . use information technology to inventory and analyze their existing civil dockets[,] . . . [and] publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

CIVIL JUSTICE IMPROVEMENTS COMM., *supra* note 1, at 31.

6. In fact, the NCSC has established a workgroup focused on developing standardized data elements for ADR. This Article's author serves as chair of the American Bar Association Section of Dispute Resolution's Research Advisory Committee, which has provided recommendations to the workgroup regarding the data elements that courts should collect on ADR and settlement assistance. AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, ADVISORY COMM. ON DISPUTE RESOLUTION RESEARCH, PRELIMINARY RECOMMENDATIONS ON DATA ELEMENTS FOR COURTS TO COLLECT REGARDING ADR/SETTLEMENT ASSISTANCE (2019) (on file with author); Letter from Nancy A. Welsh, Chair, Am. Bar Ass'n Section of Dispute Resolution's Research Advisory Comm., to Nicole Waters, Dir., Research Servs., Nat'l Ctr. for State Courts (July 17, 2019) (on file with author).

7. *See infra* notes 270–71.

8. *See* CIVIL JUSTICE IMPROVEMENTS COMM., *supra* note 1, at 37 (recommending that courts "create online, real-time court assistance services, such as online chat services, and 800-number help lines," noting that "[o]nline resolution programs also offer opportunities for remote and real-time case resolution," and urging courts to consider "remote audio and video services for case hearings and case management meetings"); JOINT TECH. COMM., JTC RESOURCE BULLETIN: ODR FOR COURTS at 1 (2017), <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx> [<https://perma.cc/U7BR-FZLX>] [hereinafter JOINT TECH. COMM., VERSION 2.0] ("While courts are using technology effectively to improve case management and administrative processes and to address federal disposition reporting requirements, ODR has the potential to dramatically expand the public's access to justice and improve their experience with justice processes."). *See generally* JOINT TECH. COMM., JTC RESOURCE BULLETIN: CASE STUDIES IN ODR FOR COURTS: A VIEW FROM THE FRONT LINES (2017), <https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/jtc%20resource%20bulletins/2017-12-18%20odr%20case%20studies%20final.ashx> [<https://perma.cc/57A7-ZZUP>] [hereinafter JOINT TECH. COMM., VERSION 1.0].

platform. As courts identify the key pieces of information (i.e., “data elements”)<sup>9</sup> to collect in order to evaluate ODR, there will be the opportunity to apply these more broadly to other dispute resolution processes and to institutionalize their continued use.

Finally, it is noteworthy that a few—a very few—entrepreneurial courts have demonstrated that it *is* possible to collect and produce data that is both transparent and accountable regarding dispute resolution operations.

Among the various dispute resolution processes, mediation is the most widely institutionalized in American courts. As a result, this Article focuses primarily, although not exclusively, on the data collected and disseminated regarding court-connected mediation. The Article begins with a brief description of the institutionalization of mediation and other dispute resolution processes in the federal judicial system and in select U.S. state court systems. This narrative reveals substantial reference to the availability of mediation but a dizzying patchwork in terms of institutionalization and a significant lack of system-wide information in some states. The Article then focuses on the data that these courts collect and make publicly available regarding the extent of the use and effects of court-connected mediation. What do we know about the number of referrals to court-connected mediation? What do we know about the number of cases that actually mediate? What do we know about the effects of mediation, in terms of settlement and parties’ perceptions of fairness? Except for data from a few pioneering federal district courts and the state courts of Florida, we do not know much. The Article then suggests what we ought to know about the use and effects of court-connected mediation, at least in terms of collecting data elements and reporting aggregated results. Finally, the Article urges that a constellation of international, domestic, and technological developments provide both legislators and courts with a unique opportunity to institutionalize the collection and publication of key metrics regarding court-connected mediation and court-connected dispute resolution more broadly.

#### I. THE INSTITUTIONALIZATION OF COURT-CONNECTED MEDIATION AND DISPUTE RESOLUTION IN THE UNITED STATES

Many federal and state courts deserve recognition as key players in the emergence of the “contemporary mediation movement”<sup>10</sup> (or the “quiet revolution”)<sup>11</sup> in the United States and in the institutionalization of court-connected mediation and other forms of dispute resolution. This Part briefly describes the current state of such institutionalization in the federal district courts and in select states’ trial courts.

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9. This would include information such as whether a case was referred to an ADR procedure, which ADR procedure, whether the ADR procedure actually occurred, the date of such occurrence, whether the case settled, etc. *See infra* notes 233–42 and accompanying text.

10. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 1 (1994).

11. *See generally* Linda R. Singer, *The Quiet Revolution in Dispute Settlement*, 7 *MEDIATION Q.* 105 (1989) (discussing the move toward ADR).

*A. Federal Judiciary*

Federal district courts in the United States began institutionalizing mediation and other ADR procedures in the late 1970s through the 1990s.<sup>12</sup> In 1983, revisions to Rule 16 of the Federal Rules of Civil Procedure explicitly authorized federal district judges to discuss “settlement” or “the use of extrajudicial procedures”<sup>13</sup> to resolve disputes when they met with parties in pretrial conferences. The Civil Justice Reform Act of 1990<sup>14</sup> (CJRA) required the federal courts to consider adopting case management principles as part of developing plans to reduce costs and delays.<sup>15</sup> One of these potential case management principles specifically involved the use of ADR,<sup>16</sup> and Congress included financial incentives to encourage implementation.<sup>17</sup> Rule 16 was revised again in 1993 “to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation” and to acknowledge statutes and local rules that permitted federal courts to require parties’ use of these procedures.<sup>18</sup> Then, in 1998, Congress passed the Alternative Dispute Resolution Act of 1998,<sup>19</sup> which mandated that all federal courts implement ADR programs, make improvements to existing programs, and appoint judicial officers to supervise ADR procedures in the courts.<sup>20</sup>

Today, Rule 16 permits federal district courts to mandate parties’ participation in certain ADR procedures, including mediation, “when authorized by statute or [the district court’s] local rule.”<sup>21</sup> Each federal district court has its own local rules regulating the use of ADR. Some federal district courts offer court-connected arbitration programs, but many more

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12. See DONNA STIENSTRA, FED. JUDICIAL CTR., ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 1 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf) [<https://perma.cc/5ZQN-YKNZ>].

13. FED. R. CIV. P. 16(c)(7) (repealed 1993).

14. Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified as amended in scattered sections of the U.S.C.).

15. *Id.*

16. See *id.* The CJRA provides for a four-year sunset provision. 28 U.S.C. § 471 note (2018) (Program Requirements in Pilot Program).

17. See 28 U.S.C. § 477(a)(1) (2018) (establishing an early implementation program designed to create incentives for early compliance by all district courts with the CJRA’s mandate to formulate civil justice expense and delay reduction plans).

18. See FED. R. CIV. P. 16 advisory committee’s note to 1993 amendment. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as minitrials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. See, e.g., 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651–658 (2018). Rule 16 acknowledges the presence of statutes and local rules or plans that may authorize the use of some of these procedures even when not agreed to by the parties. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers. See FED. R. CIV. P. 16 advisory committee’s note to 1993 amendment.

19. 28 U.S.C. §§ 651–658 (2018).

20. *Id.*

21. FED. R. CIV. P. 16(c)(2)(I) (“At any pretrial conference, the court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule.”).

offer mediation and settlement conferences.<sup>22</sup> As of 2011, 28.7 percent of district courts had authorized the use of only mediation, while another 36.2 percent had authorized the use of multiple procedures, with mediation very likely among them.<sup>23</sup> Early neutral evaluation is also used in several federal district courts, but mediation represents the dominant ADR process.<sup>24</sup>

Many districts permit individual judges to require the use of mediation.<sup>25</sup> Some districts have adopted programs that automatically refer all cases of a certain type to the process.<sup>26</sup> For example, the Southern District of New York<sup>27</sup> has authorized automatic referral of certain cases concerning civil rights, employment discrimination, and police abuse.<sup>28</sup> A minority of districts require the parties' consent to mediation.<sup>29</sup>

A few district courts have one or two staff mediators,<sup>30</sup> but most rely on rosters of private mediators.<sup>31</sup> These rosters include experienced lawyers and retired judges.<sup>32</sup> Federal magistrate judges, and even federal district judges, may also be recorded as providing mediation.<sup>33</sup> While a few districts provide mediation on a pro bono basis, most districts relying on rosters require the parties to pay for the mediators' services,<sup>34</sup> often based on the mediators' market rates or sometimes using a tiered arrangement that includes some pro bono services.<sup>35</sup>

A wide variety of federal cases are resolved through mediation—for example, claims concerning contract, employment discrimination, civil

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22. See generally STIENSTRA, *supra* note 12.

23. See *id.* at 6–7.

24. See FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS § 6.4 (Jeffrey S. Gutman ed., 2014).

25. See STIENSTRA, *supra* note 12, at 8–9 (reporting that forty-six districts authorize judges to order mediation without party consent).

26. See *id.* (reporting that twelve districts mandate referral for all or specified cases).

27. See *infra* Part II.A.3.

28. See Rebecca Price, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York*, 6 Y.B. ON ARB. & MEDIATION 170, 171–74 (2014) (describing the automatic referral to mediation for employment discrimination and selected § 1983 cases).

29. See STIENSTRA, *supra* note 12, at 9.

30. The Northern District of California is a notable example of a district court with staff mediators. See *Biographies of ADR Legal Staff*, N. DISTRICT CAL., <https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/adr-legal-staff/> [<https://perma.cc/NH4H-68DQ>] (last visited Apr. 12, 2020).

31. See STIENSTRA, *supra* note 12, at 10 (reporting that forty-two districts—or more than two-thirds of those authorizing the use of mediation—have established panels of mediators).

32. See generally *id.*

33. See generally *id.*

34. See, e.g., *Statistical Summary: Use and Benefits of Alternative Dispute Resolution by the Department of Justice*, U.S. DEP'T JUST. (June 6, 2018), <http://www.justice.gov/olp/alternative-dispute-resolution-department-justice> [<https://perma.cc/7M7W-3HN8>]. The Department of Justice's (DOJ) 2015 mediation expenditures totaled \$1,347,478 and there were 527 cases authorized to receive ADR funding; this suggests an average expenditure of \$2557 per case. *Id.* In 2014, the DOJ authorized 446 cases for ADR spending and the expenditures for mediation services totaled \$1,748,855; this suggests an average expenditure of \$3921 per case in 2014. *Id.*

35. See STIENSTRA, *supra* note 12, at 12.

rights, property damage, and personal injury.<sup>36</sup> As of 2011, twenty-one district courts also had authorized the referral of pro se cases to mediation—including both prisoner and nonprisoner pro se cases.<sup>37</sup>

### B. Selected State Court Systems

State courts throughout the United States also began institutionalizing mediation in the 1970s.<sup>38</sup> However, each state has institutionalized court-connected mediation differently, implementing unique statutes and court rules<sup>39</sup> that often create further variations within each state among different types of trial courts and governmental subdivisions (i.e., counties).<sup>40</sup> Some states provide public information summarizing their statewide court-connected dispute resolution programs.<sup>41</sup> Many states, however, do not provide such statewide summaries.<sup>42</sup>

This section describes court-connected mediation policies in five states which legal scholars recognize as leaders in their use of mediation and dispute resolution: Florida, Maryland, New York, Texas, and California.<sup>43</sup> The descriptions of Florida, Maryland, and New York are drawn from public sources—i.e., online descriptions provided by the state courts or court-

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36. *See id.* app. 5.

37. *See id.* at 7 (reporting that eighteen districts had authorized the use of mediation for nonprisoner pro se cases, while eleven districts had authorized mediation for prisoner pro se cases).

38. *See, e.g.,* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 171–81 (2003); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “the Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 6–8 (1999).

39. For an exhaustive list of American states’ mediation-related statutes, see SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* app. A (2015).

40. The Resolution Systems Institute (RSI), a nonprofit organization in the United States, has developed a searchable online database called “Court ADR Across the U.S.” *Court ADR Across the U.S.*, RESOL. SYSTEMS INST., <https://www.aboutrsi.org/acrossus> [<https://perma.cc/H5A8-X3H5>] (last visited Apr. 12, 2020). This resource includes statutes, rules, and other information regarding dispute resolution for each state. *See id.* Some of the links no longer exist or are inaccessible, but the database is nonetheless quite valuable. *See id.*

41. *Id.*

42. *Id.*

43. This is not an exhaustive list. Several other states also can lay claim to being leaders—for example, Colorado, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, and Virginia. *See, e.g.,* Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, 18 HAMLIN J. PUB. L. & POL’Y 376, 379 (1997); Thomas J. Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation*, 46 VICT. U. WELLINGTON L. REV. 1191, 1229–30 (2015) (referencing a study of case assessment and mediation in the Michigan circuit courts that found tort cases more likely to be referred to mediation than nontort cases and more likely to settle or end with consent judgments). *See generally* Geetha Ravindra, *Reflections on Institutionalizing Mediation*, DISP. RESOL. MAG., Spring & Summer 2008, at 28; Nancy A. Welsh & Barbara McAdoo, *Alternative Dispute Resolution (ADR) in Minnesota—an Update on Rule 114*, in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 203 (Edward J. Bergman & John G. Bickerman eds., 1998); Roselle L. Wissler, *Court-Connected Mediation*, DISP. RESOL. MAG., Spring 2002, at 30; *Research and Data*, COLO. JUD. BRANCH, <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=annrep> [<https://perma.cc/QH8Q-FVQ6>] (last visited Apr. 12, 2020).

connected dispute resolution programs.<sup>44</sup> Texas and California, like many states, do not provide such summaries.

### 1. Florida

Florida has one of the most comprehensive court-connected mediation programs in the United States.<sup>45</sup> The Florida State court system's use of ADR began with the creation of the first citizen dispute settlement (CDS) center in 1975.<sup>46</sup> In the mid-1980s, the Florida Dispute Resolution Center (DRC) was created to assist with the development of court-connected ADR programs, education, and research.<sup>47</sup> The DRC is a key player in providing and overseeing court-connected ADR in Florida.

In 1988, the Florida Legislature granted civil trial judges the authority to refer cases to mediation or arbitration,<sup>48</sup> subject to the rules and procedures established by the Supreme Court of Florida.<sup>49</sup> Since then, the Florida Legislature has revised the relevant statute several times.<sup>50</sup> In addition, Florida has implemented procedural rules, certification qualifications,<sup>51</sup> ethical standards, grievance procedures, training standards, and continuing education requirements for mediators.<sup>52</sup> The Florida Supreme Court has created committees and boards to implement these procedures and standards, and the DRC staffs these entities.<sup>53</sup>

At this point, section 44.102 of the Florida Statutes provides Florida's courts with the authority to order the use of mediation and even *requires* courts to order mediation under certain circumstances.<sup>54</sup> Although there are

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44. See *infra* notes 45, 65, 89.

45. This section's summary is derived from the official Florida court system website. *About ADR & Mediation*, FLA. CTS., <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/about-adr-mediation.stml> [https://perma.cc/B67C-EGXS] (last visited Apr. 12, 2020). For key statutes, see FLA. STAT. §§ 44.102–44.104, 44.106–44.108 (2020). For additional information, the official Florida court system website provides contact information for the Florida Dispute Resolution Center. See *About ADR & Mediation, supra*.

46. *Alternative Dispute Resolution*, FLA. CTS., <https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution> [https://perma.cc/99VG-7REF] (last visited Apr. 12, 2020).

47. *Id.*

48. In addition to mediation and arbitration, some Florida judicial circuits provide summary jury trials on an ad hoc basis. *About ADR & Mediation, supra* note 45. Various Florida state agencies (e.g., “the Department of Insurance, the Division of Mobile Homes of the Department of Business and Professional Regulation, and the Workers Compensation Division of the Department of Labor and Employment Security”) also offer ADR programs. *Id.*

49. *Id.*

50. *Id.*

51. As of July 2019, 5621 individuals were certified as mediators in Florida—2014 were certified as county mediators, 2257 as family mediators, 3126 as circuit mediators, 230 as dependency mediators, and 455 as appellate mediators. *Id.* Note that an individual may be certified to serve as more than one type of mediator.

52. *Id.*

53. The official Florida court system website lists the committees and boards staffed by the DRC. *Id.*

54. FLA. STAT. § 44.102 (2020).



exceptions, upon the request of one party, a court *must* “refer to mediation any filed civil [nonfamily] action for monetary damages, provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties.”<sup>55</sup> A court “may” refer to mediation any civil action for which mediation is not required.<sup>56</sup> Rule 1.700 of the Florida Rules of Civil Procedure gives courts the authority to “enter an order referring all or any part of a contested civil matter to mediation.”<sup>57</sup> Florida’s Family Court, meanwhile, must refer to mediation cases involving custody, visitation, or other areas of parental responsibility.<sup>58</sup> However, these courts may not refer such family cases to mediation if there has been a history of domestic violence.<sup>59</sup> Courts may also refer dependency matters to mediation.<sup>60</sup>

In most cases, parties select their mediators. However, if the parties cannot agree on a mediator, the judge may appoint a certified mediator.<sup>61</sup> Both certified mediators and noncertified mediators are bound by the ethical standards contained in the Florida Rules for Certified and Court-Appointed Mediators.

In 2004, the state of Florida became responsible for funding the Florida State court system and its ADR programs.<sup>62</sup> This structural and funding change was significant, leading to relative consistency in the ADR services provided by courts throughout the state.

## 2. Maryland

Maryland Chief Judge Robert Bell, often hailed as a visionary, played a central role in the state’s institutionalization of ADR.<sup>63</sup> Chief Judge Bell

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55. *Id.* § 44.102(2)(a). For example, it does not apply if the action is a landlord and tenant dispute, is filed for the purpose of collecting a debt, concerns medical malpractice, is governed by the Florida Small Claims Rules, or involves parties who have agreed to an expedited trial. *Id.* § 44.102(2)(a)(1)–(5), (7).

56. *Id.* § 44.102(8)(b).

57. FLA. R. CIV. P. 1.700. Section 44.102 of the Florida Statutes requires court-ordered mediation to be conducted according to the rules of practice and procedure adopted by the Florida Supreme Court. FLA. STAT. § 44.102(1).

58. FLA. STAT. § 44.102(2)(c).

59. *See id.* (“In circuits in which a family mediation program has been established and upon a court finding of a dispute, [a court] shall refer to mediation all or part of custody, visitation, or other parental responsibility issues as defined in s. 61.13. Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.”).

60. *See id.* § 44.102(2)(d).

61. Florida’s family, dependency, and circuit court mediators must have at least a bachelor’s degree and must meet a one-hundred-point requirement that is calculated based on a combination of their mediation training, education/mediation experience, and the mentorship they have received. *See* FLA. RULES FOR CERTIFIED & COURT-APPOINTED MEDIATORS § 10.100 (FLA. DISPUTE RESOLUTION CTR. 2018). Mediators may earn mentorship points by observing mediations conducted by certified mediators and by conducting mediations under the supervision and observation of certified mediators. *See id.*

62. *About ADR & Mediation*, *supra* note 45.

63. This section’s summary is derived from ADMIN. OFFICE OF THE COURTS, ALTERNATIVE DISPUTE RESOLUTION LANDSCAPE: AN OVERVIEW OF ADR IN THE MARYLAND COURT SYSTEM,

viewed ADR quite expansively as “a way to promote access to justice, empower citizens to resolve their own disputes, and prevent conflicts from ever reaching the courts.”<sup>64</sup> He created the Maryland ADR Commission in 1998 and oversaw a strategic planning process that involved more than seven hundred stakeholders and resulted in a plan for the statewide advancement of mediation and conflict resolution.<sup>65</sup> The creation of the ADR Commission ultimately “led to the development of a court-related agency, the Maryland Mediation and Conflict Resolution Office (MACRO).”<sup>66</sup> Like Florida’s DRC, MACRO plays a central role in overseeing court-connected dispute resolution in Maryland.<sup>67</sup>

At this point, Maryland has a significant court-connected dispute resolution program, with ADR of some type offered in every jurisdiction in the state and in four of the five levels of its state courts.<sup>68</sup> However, these ADR programs vary in the processes used, type of neutrals available, and program structure.<sup>69</sup> Unlike Florida courts, Maryland courts generally do not have the power to mandate mediation without the parties’ consent. One exception is in the family law area. Rule 9-205 of the Maryland Rules of Procedure provides that a judge may order mediation of a dispute over child custody or visitation unless the court finds that there is a genuine issue of spousal or child abuse.<sup>70</sup>

ADR in Maryland encompasses a variety of approaches, including mediation, settlement conferences, arbitration, and community conferencing, among others. Currently, all of Maryland’s twenty-three counties and Baltimore City provide at least one court-connected ADR process.<sup>71</sup> Jurisdictions with larger case volumes—such as Baltimore City, Baltimore

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at vi–ix (2014), <https://www.courts.state.md.us/sites/default/files/import/courtoperations/pdfs/adrlandscape.pdf> [<https://perma.cc/WDC8-G7RL>]. For key court rules, see Md. R. 17-101 to 17-507. *See also* MEDIATION & CONFLICT RESOLUTION OFFICE, MARYLAND JUDICIARY, CONSUMER’S GUIDE: ALTERNATIVE DISPUTE RESOLUTION (ADR) SERVICES IN MARYLAND (2019), <https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/consumersguide/consumersguidetoadrservices.pdf> [<https://perma.cc/5JNQ-59XM>]; Deborah Thompson Eisenberg, *What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 254 (2016) (“Maryland has been an international model for court-annexed dispute resolution programs, with mediation and other processes integrated at five court levels: the limited jurisdiction (or small claims) District Court; the general jurisdiction Circuit Court; the Orphan’s Court[;] and the intermediate appellate court, the Maryland Court of Special Appeals. Maryland law mandates mediation for all child access or custody cases. Most jurisdictions in Maryland offer mediation and settlement conferences for various types of civil cases, including marital property, child welfare, general civil, orphans’ court matters, and small claims.” (footnotes omitted)).

64. Deborah Thompson Eisenberg et al., *Alternative Dispute Resolution and Public Confidence in the Judiciary: Chief Judge Bell’s “Culture of Conflict Resolution,”* 72 MD. L. REV. 1112, 1114 (2013).

65. ADMIN. OFFICE OF THE COURTS, *supra* note 63, at vi.

66. Eisenberg et al., *supra* note 64, at 1113.

67. *See id.*

68. ADMIN. OFFICE OF THE COURTS, *supra* note 63, at vi.

69. *Id.*

70. *See* MD. R. 9-205(b)(1)–(2).

71. *See* MEDIATION & CONFLICT RESOLUTION OFFICE, *supra* note 63, at 23–80.

County, and Montgomery County—offer the greatest variety of ADR processes at all levels of the court.<sup>72</sup>

Maryland's courts are most likely to offer ADR programs to resolve family cases in the circuit courts. All jurisdictions provide mediation for child access cases, and many of Maryland's counties offer mediation for cases involving child welfare and marital property disputes.<sup>73</sup> Some counties offer other ADR processes such as settlement conferencing,<sup>74</sup> facilitation,<sup>75</sup> and a combined communication skills counseling-mediation process.<sup>76</sup> The processes of collaborative law and parent coordination are two emerging ADR practices for family law matters in Maryland.<sup>77</sup>

Mediation of general civil matters in the circuit courts began in the early 1990s in Baltimore City.<sup>78</sup> As of 2013, a little more than half of the state's counties offered mediation for these cases.<sup>79</sup> Pretrial and settlement conferences are also available.<sup>80</sup>

Maryland's district courts handle small claims, landlord-tenant matters, civil claims involving limited monetary amounts, traffic offenses, misdemeanors, and some felonies.<sup>81</sup> ADR programs began in these courts in 1998; as of 2013, civil ADR existed in over half of the counties.<sup>82</sup> These programs offer day-of-trial and pretrial mediation and settlement conferences for civil cases.<sup>83</sup> ADR is also available for certain misdemeanor cases in some counties.<sup>84</sup>

A variety of individuals serve as neutrals for Maryland's ADR programs. At the circuit court level, "ninety-two percent . . . of domestic and general civil circuit court mediation programs utilize a court-approved roster of mediators."<sup>85</sup> Generally, the mediators receive compensation directly from the parties.<sup>86</sup> Some programs, however, rely upon neutrals employed by the court to conduct most or a portion of the court's family ADR services.<sup>87</sup> At the district court level, the programs use a court-approved roster of ADR practitioners and district court ADR office staff.<sup>88</sup>

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72. *See id.*

73. Eisenberg et al., *supra* note 64, at 1118.

74. *Id.*

75. *Id.* at 1117–18.

76. *See id.* at 1118.

77. *See* ADMIN. OFFICE OF THE COURTS, *supra* note 63, at viii.

78. Eisenberg et al., *supra* note 64, at 1118.

79. *Id.*

80. Some counties also offer mediation for probate and delinquency matters. *See, e.g.*, MEDIATION & CONFLICT RESOLUTION OFFICE, *supra* note 63, at 5, 64.

81. *See generally id.*

82. Eisenberg et al., *supra* note 64, at 1117.

83. *Id.* at 1117–18, 1117 n.29.

84. *Id.* at 1120.

85. ADMIN. OFFICE OF THE COURTS, *supra* note 63, at ix.

86. *Id.*

87. *Id.*

88. *Id.*

### 3. New York

Despite the many dispute resolution leaders located and practicing in New York, the New York State Unified Court System's institutionalization of court-connected dispute resolution has been rather limited in comparison to a state like Florida.<sup>89</sup> Mediation has been available, but, as expressed by New York Chief Judge Janet DiFiore, ADR has not become "an integral part" of the "court culture and civil justice process."<sup>90</sup> Rather, for many years, the New York State Unified Court System has focused on funding the Community Dispute Resolution Centers Program (CDRCP),<sup>91</sup> with services available from community dispute resolution centers throughout the state to assist with resolving disputes involving parenting and families, neighbors, housing, elder care, small claims, and other similar disputes.<sup>92</sup> Similar to Florida and Maryland, the New York State Unified Court System established the Office of Alternative Dispute Resolution but with a relatively limited role—overseeing the CDRCP and a few other specialized programs.<sup>93</sup> Individual state courts provide for voluntary use of mediation and other forms of ADR, but there is no statewide summary regarding these services. Instead, an online directory refers the public to individual judicial districts for information about their particular programs.<sup>94</sup>

New York courts generally have not ordered the use of mediation.<sup>95</sup> That is about to change. In 2019, Chief Judge DiFiore announced the Unified Court System's intention to expand the use of ADR in New York's civil

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89. This summary is derived from *ADR Programs*, N.Y. ST. UNIFIED CT. SYS., <http://www.courts.state.ny.us/ip/adr/programs.shtml> [<https://perma.cc/YW5X-5H42>] (last visited Apr. 12, 2020). For key statutes, see N.Y. JUD. LAW §§ 849-a to -g (McKinney 2020).

90. Press Release, N.Y. State Unified Court Sys., New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice 2 (Apr. 20, 2018), [http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR18\\_10.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR18_10.pdf) [<https://perma.cc/4GQY-7CCV>].

91. This program was established pursuant to New York Judiciary Law. JUD. §§ 849-a to -g.

92. For more information about this program, see CMTY. DISPUTE RESOLUTION CTRS. PROGRAM, 2014–15 ANNUAL REPORT, [http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/2014-15\\_CDRCP\\_AR.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/2014-15_CDRCP_AR.pdf) [<https://perma.cc/BX4S-THBF>] (last visited Apr. 12, 2020).

93. These programs include the Attorney-Client Fee Dispute Resolution Program, Collaborative Family Law Center, Agricultural Mediation Program, and Children's Centers Program. *About Us*, N.Y. ST. UNIFIED CT. SYS., <http://www.courts.state.ny.us/ip/adr/about-us.shtml> [<https://perma.cc/4CKC-264U>] (last visited Apr. 12, 2020). The Office of Alternative Dispute Resolution also is responsible for the Mediator Ethics Advisory Committee. *Id.* For more information, see *id.*

94. For information about what is available in each of New York's judicial districts, see *Court Connected ADR Programs*, N.Y. ST. UNIFIED CT. SYS., [http://www.courts.state.ny.us/ip/adr/Info\\_for\\_parties.shtml#courtbasedprograms](http://www.courts.state.ny.us/ip/adr/Info_for_parties.shtml#courtbasedprograms) [<https://perma.cc/CHZ9-LJG3>] (last visited Apr. 12, 2020).

95. See Press Release, N.Y. State Unified Court Sys., Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases 2 (May 14, 2019), [https://www.pbwt.com/content/uploads/2019/05/PR19\\_09.pdf](https://www.pbwt.com/content/uploads/2019/05/PR19_09.pdf) [<https://perma.cc/NGK7-FUSL>] ("Currently, most mediation referral relies on the parties to opt in to mediation or on individual judges to refer parties to mediation in individual cases.").

courts, family courts, and surrogate's courts.<sup>96</sup> To that end, the New York State Unified Court System formed an advisory committee—comprised of judges, lawyers, ADR practitioners, and academics—to examine services currently available and “make recommendations for improvement and expansion.”<sup>97</sup> Inspired in part by New Jersey courts' experience with court-connected mediation<sup>98</sup> and pilot programs in some New York state jurisdictions,<sup>99</sup> the committee recommended expanding a “presumptive ADR” model that requires parties to participate in mediation or some other form of ADR before a case can proceed in court, with opt out permitted in appropriate cases.<sup>100</sup> Presumptive dispute resolution, along with uniform rules for the program, was scheduled to be in place throughout the state by the end of 2019.<sup>101</sup> At this point in 2020, the rollout and implementation have begun, with initiatives reported in New York, Nassau, Suffolk, and Westchester counties.<sup>102</sup>

#### 4. Texas

Experts have called Texas a “national leader in ADR, particularly in matters of pending litigation, as the Texas ADR Act was one of the first comprehensive statutes providing courts the authority to refer cases to a variety of ADR processes.”<sup>103</sup> Texas courts have had the authority since 1987 to order parties into mediation or other consensual ADR processes.<sup>104</sup> These courts may issue these orders on their own motion or the motion of

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96. See generally ADR ADVISORY COMM., INTERIM REPORT AND RECOMMENDATIONS OF THE STATEWIDE ADR ADVISORY COMMITTEE (2019), <https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/InterimReportRecommFeb-2019.pdf> [<https://perma.cc/3GUL-D3DP>].

97. Press Release, *supra* note 90, at 2.

98. See Dan M. Clark, *New York Courts to Begin Presumptive Mediation for Civil Cases Later This Year*, N.Y.L.J. (May 16, 2019), <https://www.law.com/newyorklawjournal/2019/05/16/new-york-courts-to-begin-presumptive-mediation-for-civil-cases-later-this-year/> [<https://perma.cc/7ST7-CDXM>].

99. See generally Melissa A. Rodriguez, “Start Spreading the News” . . . the Big Apple Gets a Taste of Mandatory Mediation, 7 Y.B. ON ARB. & MEDIATION 176 (2015) (describing a mandatory mediation pilot adopted by the commercial division of New York County's Supreme Court).

100. Press Release, *supra* note 90, at 9; see also ADR ADVISORY COMM., *supra* note 96.

101. See Clark, *supra* note 98; “Presumptive Mediation”: New York Moves to Improve Its Court ADR Game, ALTERNATIVES TO HIGH COST LITIG., July/Aug. 2019, at 107, 107; Press Release, *supra* note 95, at 2–3 (indicating that implementation and rollout will begin in September 2019).

102. See Syed Rizvi, *Presumptive ADR Poised to Expand Across New York State After Promising Start in New York City*, JD SUPRA (Feb. 7, 2020), <https://www.jdsupra.com/legalnews/presumptive-adr-poised-to-expand-across-15179/> [<https://perma.cc/XM4Y-XJQP>].

103. Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 951 (2000).

104. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a) (West 2020); see also L. Wayne Scott, *The Law of Mediation in Texas*, 37 ST. MARY'S L.J. 325, 327 (2006). See generally Lisa Weatherford, *History of the Texas ADR Act*, ALTERNATIVE RESOLUTIONS, Summer/Fall 2007, at 2.

one of the parties.<sup>105</sup> The courts may refer the matter to a dispute resolution system, a for-profit or nonprofit dispute resolution organization, or a “nonjudicial and informally conducted forum for the voluntary settlement of citizens’ disputes through the intervention of an impartial third party.”<sup>106</sup> Before making the referral, the court must confer with the parties to select the most appropriate ADR procedure.<sup>107</sup> For dissolution of marriage cases or suits affecting the parent-child relationship, the court may refer the suit to mediation only.<sup>108</sup>

Scholars widely report that judges throughout Texas, particularly in its major cities, order many cases into mediation; many lawyers now recommend the voluntary use of the process, and mediation has become an integral part of litigation.<sup>109</sup> Many Texas courts have adopted local rules governing mediation and other ADR processes,<sup>110</sup> and the Texas Legislature has established that “[i]t is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures.”<sup>111</sup>

However, Texas has neither an office of dispute resolution nor a unit of the Texas judiciary responsible for ADR. There is not even an official overall summary describing the operation of court-connected mediation or dispute resolution in the state.

The Texas Legislature has established statutory criteria that courts must use in appointing mediators,<sup>112</sup> but one commentator has described both mediators and mediation in Texas as “for the most part, unregulated.”<sup>113</sup> For example, even though the Texas Legislature provided by statute that mediators must complete training in order to receive court referrals, the legislature also provided an exception that allows a court to exercise its discretion to appoint an individual not meeting the training requirements “if

105. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a).

106. See *id.* § 154.021(a)(3); see also Scott, *supra* note 104, at 332–33, 332 n.21.

107. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(b).

108. See TEX. FAM. CODE ANN. §§ 6.602(a), 153.0071(c) (West 2020).

109. See, e.g., Walter A. Wright, *Texas Attorney-Mediators’ Perceptions of Changes in Mediation Practice*, 40 *ADVOCATE* 10, 15 (2007) (reporting that “mediation is an integral part of the litigation process” and that “Texas attorney-mediators perceive that most Texas judges and attorneys have accepted—even welcomed—mediation’s role in litigation and its contribution to resolving cases in a timely and cost-effective manner”); Jeffrey S. Abrams, *Compulsory Mediation: The Texas Experience*, *INT’L MEDIATOR*, <http://www.internationalmediator.com/Articles/Compulsory-Mediation-The-Texas-Experience.shtml> [https://perma.cc/NS6A-WQ8J] (last visited Apr. 12, 2020). See generally Mike Amis et al., *The Texas ADR Experience*, in *COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS*, *supra* note 43, at 369.

110. See Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do That?*, 47 *S. TEX. L. REV.* 849, 850 (2006).

111. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002. The statute provides for “special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children.” *Id.*

112. To qualify for appointment by the court, an ADR neutral must be impartial and meet specified training requirements. See *id.* § 154.052(a). Additional training is required for neutrals handling cases that involve the parent-child relationship. See *id.* § 154.052(b).

113. TEX. MEDIATOR CREDENTIALING ASS’N, *MEDIATION BENCHMARK* 6 (2d ed. 2017).

the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.”<sup>114</sup> Some commentators have noted that “[a]s a practical matter[,] this exception seems to specifically address the appointment of former judges or magistrates who have not attended training, but who obviously have great experience in most of the alternative dispute resolution procedures.”<sup>115</sup> In a similar vein, the Texas Supreme Court adopted ethical guidelines for mediators but specified that they are “aspirational” and “voluntary” and added that “[c]ompliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement [sic] by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.”<sup>116</sup>

### 5. California

As in Texas, it is widely reported that California makes extensive use of mediation and other dispute resolution procedures.<sup>117</sup> Also like Texas, California has no public statewide summary that describes its court-connected ADR programs. Unlike Texas, however, the Judicial Council of California has designated one of its lawyers to coordinate and provide support for the county courts’ ADR program administrators located throughout the state.<sup>118</sup> California also provides public online access to information about many (although not all) of the superior courts’ dispute resolution programs for civil cases.<sup>119</sup> California courts’ mediation programs receive some funding for their mediation services through the Dispute Resolution Programs Act<sup>120</sup> (DRPA), administered by California’s Department of Consumer Affairs.<sup>121</sup>

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114. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(c).

115. TEXAS PRACTICE GUIDE ALTERNATIVE DISPUTE RESOLUTION § 2:15, Westlaw (Robert C. Prather, Sr. & Joe L. Cope eds., database updated Nov. 2017).

116. Approval of Amendments to the Ethical Guidelines for Mediators, Misc. No. 11-9062 (Tex. Apr. 11, 2011) (with same language regarding the aspirational nature of the guidelines); see Coselli, *supra* note 113, at 7.

117. California mediators have garnered special attention for their approach to mediation, particularly their use of the caucus. See, e.g., Stipanowich, *supra* note 43, at 1204–07.

118. This position is held currently by Kristi Morioka. Memorandum from Olivia Countryman, Research Assistant, Tex. A&M Univ. Sch. of Law, to Nancy A. Welsh, Chair, Am. Bar Ass’n Section of Dispute Resolution’s Research Advisory Comm. (July 17, 2019) (on file with author).

119. See *Court ADR Programs*, CAL. CTS., <http://www.courts.ca.gov/3075.htm> [<https://perma.cc/DC49-8VJG>] (last visited Apr. 12, 2020). There are links to thirty-six of California’s fifty-eight counties. *Id.* Of the thirty-six links provided, six do not work or fail to link to a county ADR program page. *Id.* Among the links that work, some indicate that the county does not have an ADR program (e.g., Placer, San Bernardino). *Id.*

120. CAL. BUS. & PROF. CODE §§ 465–471.5 (West 2020).

121. Interestingly, the Department of Consumer Affairs treats mediation services just like any other pay-for-service industry. See Email from Rebecca A. Bon, Attorney, Cal. Dep’t of Consumer Affairs, to Olivia Countryman, Research Assistant, Tex. A&M Univ. Sch. of Law (Aug. 7, 2019, 17:17 CST) (on file with author). DRPA-funded programs are supposed to report annually regarding their operations, but it appears that few counties actually provide such reports. See *id.*

California mandates the use of mediation in a limited context—contested child custody cases.<sup>122</sup> The state also established a civil action mediation program that permits courts in Los Angeles (and other counties electing to participate) to require mediation for civil cases in which the amount in controversy does not exceed \$50,000 for each plaintiff.<sup>123</sup> The program is largely defunct.<sup>124</sup>

For general civil cases, California requires each court to make available to the plaintiff an ADR information package that includes, at a minimum, general information about ADR processes (including their advantages and disadvantages) and the ADR programs available in that court (and relevant citations to local rules).<sup>125</sup> Depending on the county, courts may also need to provide information about DRPA-funded dispute resolution programs.<sup>126</sup> The plaintiff then must serve a copy of the ADR information package to each defendant along with the complaint.<sup>127</sup>

Many experienced lawyers serve as mediators in California, and courts may offer their own judges to provide “judicial mediation.”<sup>128</sup> However, court-connected ADR programs have suffered due to fiscal constraints that California experienced several years ago.<sup>129</sup> Many court ADR programs shrank or were eliminated.<sup>130</sup> In its 2017 report to the California chief

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122. See CAL. FAM. CODE § 3170 (West 2020).

123. See CAL. CIV. PROC. CODE §§ 1141.11, 1775.3 (West 2020).

124. Due to state budget cuts, the Los Angeles Superior Court ceased providing ADR services and no longer offers mediation as an alternative to court-ordered judicial arbitration. H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE—ALTERNATIVE DISPUTE RESOLUTION ch. 4-C, Westlaw (database updated Dec. 2019). Other counties that elected to participate in the civil action mediation program included Lake, Nevada, Riverside, and Santa Barbara. *Id.*

125. CAL. CT. R. 3.221(a)(1)–(2).

126. *Id.* r. 3.221(a)(3).

127. See *id.* r. 3.221(c).

128. Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 347–51 (describing the program in San Luis Obispo and other court programs that train their judges in mediation skills and then offer judges as mediators).

129. Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123, 147–48 (2016).

130. Professors Lela Love and Ellen Waldman recently commented on the cutbacks in California, as well as those affecting dispute resolution programs in other states:

This dependence on public monies has presented serious challenges as state courts and agencies have been subject to deep budget cuts. In 2011, the New York State Unified Courts System lost \$140 million in government funds, resulting in a 41 percent decrease in funding for statewide community mediation programs. During the three year period from 2008–2011, the California court system saw more than a 30% reduction in state general funds. This funding crisis has shuttered small claims and family courts throughout the state and eviscerated staffing for mediation trainers and providers as well as legal advisers’ offices for small claims disputants. In North Carolina, community mediation centers handling court-referred juvenile and criminal cases lost the entirety of their judicial funding, nearly 20% of their operating budget. To make up the shortfall, centers cut staff and began charging for services that had previously been offered without charge. Kentucky’s Court-Annexed Mediation Program, which had handled thousands of small claims and



justice, the Commission on the Future of California's Court System called for increased funding from the judicial branch budget in order to return California's court-connected mediation and other ADR programs to their prior health, expand upon them, and experiment with the use of ODR.<sup>131</sup>

### C. Summary

First and foremost, in each of the jurisdictions described here, it appears that there is significant court-connected dispute resolution that includes and is dominated by mediation.

Second, however, while innovation continues to some degree, dramatic expansion of court-connected mediation appears to be in the past for most jurisdictions. Court-connected dispute resolution has even suffered setbacks over the years in some jurisdictions—California most notably<sup>132</sup>—as courts dealt with serious financial cuts. New York may be the exception to this trend, with its presumptive dispute resolution initiative.<sup>133</sup> In addition, the recent enthusiasm for ODR, described below, represents a new channel for innovation.<sup>134</sup>

Last, it is striking that jurisdictions vary dramatically in their perceived need to provide the public with an overall summary of their court-connected dispute resolution programs and activities. New York and California, both recognized leaders in the dispute resolution field,<sup>135</sup> have no statewide summary describing court-connected mediation or other ADR programs. Instead, this information is available only on a county-by-county or court-by-court basis. Texas, another very large state with a reputation for the widespread use of court-connected mediation and ADR,<sup>136</sup> does not provide *any* statewide means to learn about such processes or programs. Maryland, with MACRO playing a central role, provides a statewide summary but acknowledges very substantial variations among the state's counties. Meanwhile, occasional reports from projects at the Federal Judicial Center (FJC) provide some information about the federal district courts' use of

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misdemeanor cases for the Kentucky Courts, lost funding in 2009 and shut down entirely. A ten million dollar budget cut in judicial funding in Connecticut similarly led to the closure of community mediation centers around the state. What does this mean for a tenant trying to recover her security deposit from an unresponsive landlord, a consumer seeking compensation for a car repair negligently performed, or a patron injured by a slip and fall in a neighborhood bodega? It means that mediation services that may have once existed may no longer be available. If the service still exists, it is likely thinly staffed by over-stretched providers and lacks the assistance of necessary ancillary services, such as court translators and security personnel.

*Id.* (footnotes omitted).

131. See COMM'N ON THE FUTURE OF CAL.'S COURT SYS., REPORT TO THE CHIEF JUSTICE 25–26 (2017), <https://www.courts.ca.gov/documents/futures-commission-final-report.pdf> [<https://perma.cc/TRD7-AZ2U>].

132. See *supra* notes 129–31 and accompanying text.

133. See *supra* notes 100–01 and accompanying text.

134. See *infra* Part IV.B.

135. See *supra* text accompanying note 43.

136. See *supra* text accompanying note 43.

dispute resolution, but many variations exist among these districts. Florida, with the DRC as a unit within the judicial system and state funding for all of the court-connected ADR programs, is noteworthy for the information that it makes available and the relatively consistent structure of the ADR services available throughout the state.<sup>137</sup> Among the jurisdictions presented here, it also offers the most synergistic picture of court-connected dispute resolution.

## II. WHAT WE KNOW ABOUT THE EXTENT AND EFFECTS OF COURT-CONNECTED MEDIATION AND DISPUTE RESOLUTION IN THE UNITED STATES

Despite the sense that there is substantial activity in U.S. courts, it is not at all clear exactly *how much* court-connected dispute resolution actually occurs. Therefore, this Article now turns from the narrative regarding each jurisdiction's court-connected mediation and dispute resolution services and programs to the numbers they make publicly available regarding the extent of the use and effects of court-connected dispute resolution. This Part first considers the overall data available for the federal district courts, as well as data collected and disseminated by a few individual district courts. This Part then returns to Florida, Maryland, New York, Texas, and California to examine the statewide data that each state collects and makes publicly available regarding the number of cases its courts refer to mediation, the number of cases that actually get mediated, the results of such mediations, and party perceptions of their experience.

### A. The Federal Judicial System

Members of the public who are interested in gaining a systemic sense of the activity of the federal courts turn to the reports published annually by the Administrative Office of the U.S. Courts (AOUSC).<sup>138</sup> These reports provide an overview of the federal courts, with separate sections devoted to component parts of the federal judiciary.<sup>139</sup> The reports highlight and explain unusual increases or declines in civil filings or dispositions.<sup>140</sup> These explanations alert federal court watchers to trends throughout the federal courts and in particular jurisdictions.

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137. See *supra* note 47 and accompanying text.

138. *Director's Annual Report*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/directors-annual-report> [<https://perma.cc/8FYZ-4GRK>] (last visited Apr. 12, 2020).

139. See generally *id.*

140. See, e.g., *U.S. District Courts—Judicial Business 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018> [<https://perma.cc/RWX5-TUUL>] (last visited Apr. 12, 2020) (reporting a 222 percent surge in Racketeer Influenced and Corrupt Organizations Act cases “primarily in response to multidistrict litigation (MDL) filings related to national prescription opiate litigation in the Northern District of Ohio,” a 134 percent increase in environmental cases, “mostly because of MDL cases in the Eastern District of Louisiana (LA-E) involving the oil spill by the oil rig Deepwater Horizon,” and a 34 percent increase in contract cases “largely due to cases addressing flooding in the Middle District of Louisiana”).

Twice each year, the AOUSC also publishes the most frequently requested tables of statistics regarding the workload of the federal courts.<sup>141</sup> For civil cases, the tables contain aggregate information regarding numbers of cases filed, terminated, and pending, as well as the nature of the suit and actions taken by the court that resulted in termination.<sup>142</sup> Both the annual reports and the semi-annual tables of statistics are available online at no cost.<sup>143</sup>

However, especially for those interested in the federal courts' use of mediation and other ADR processes, there are notable gaps in the data captured for aggregation and publication. The statistical tables do not contain any information regarding the number of referrals to or dispositions resulting from mediation, judicial settlement conferences, or any other dispute resolution procedures.<sup>144</sup> Meanwhile, the AOUSC's annual "Judicial Business" reports devote only two or three sentences to the federal courts' use of ADR.<sup>145</sup> The 2019 Judicial Business Report, for example, observes that, in addition to conducting trials,

[j]udges also are heavily involved in case management efforts, alternative dispute resolution (ADR) activities, and settlement negotiations and consultations. This year, 60 districts operated ADR programs of some form, and 58 of these districts provided mediation or judge-hosted settlement conferences. The ADR programs affected more than 32,300 civil cases.<sup>146</sup>

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141. *E.g.*, *Statistical Tables for the Federal Judiciary*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary> [https://perma.cc/8PQU-2X6N] (last visited Apr. 12, 2020).

142. *See, e.g.*, *Statistical Tables for the Federal Judiciary—December 2019*, U.S. CTS. (Dec. 31, 2019), <https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2019> [https://perma.cc/5T4Q-YZEK]. The tables indicate how many civil cases are terminated without court action and with court action occurring before trial, during or after pretrial, during or after a nonjury trial, and during or after a jury trial. *See, e.g.*, *Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (December 31, 2017)*, U.S. CTS., <http://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2017/12/31> [https://perma.cc/U5RK-GQMP] (last visited Apr. 12, 2020).

143. *See Statistical Tables for the Federal Judiciary*, *supra* note 141.

144. *See* Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 1044–45 (2016) ("While much is reported about magistrate judges' functions, much more is unknown—e.g., how many dispositions actually result from magistrate judges' settlement sessions, how many cases go to mediation, how often magistrate judges serve as mediators, how many dispositions result from mediation and other settlement procedures, and the terms of these dispositions.").

145. *See, e.g.*, *U.S. District Courts—Judicial Business 2019*, U.S. CTS., <https://www.uscourts.gov/us-district-courts-judicial-business-2019> [https://perma.cc/8YN2-L9LM] (last visited Apr. 12, 2020).

146. *Id.* The 2017 and 2018 reports indicated that "more than 25,500 civil cases were included in ADR programs." *U.S. District Courts—Judicial Business 2018*, *supra* note 140; *see also U.S. District Courts—Judicial Business 2017*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017> [https://perma.cc/ZZD3-GW9A] (last visited Apr. 12, 2020). The 2016 report indicated that "43 districts operated mediation and arbitration programs" and that these "affected more than 22,600 civil cases." *See U.S. District Courts—Judicial Business 2016*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2016> [https://perma.cc/7HCQ-Q9FW] (last visited Apr. 12, 2020).

Although the report fails to identify any source, the “more than 32,300” figure was derived primarily from annual reports submitted by federal district courts to the AOUSC to permit the federal judiciary to project staffing needs, including needs for ADR programs.<sup>147</sup> The number contained in the Judicial Business report therefore does not reflect all of the ADR activity conducted in all of the district courts; rather, it only reflects the activity of those offering mediation and judge-hosted settlement conferences and seeking funding for ADR program staff.<sup>148</sup> It does not reflect the district courts’ ADR programs that offer processes in addition to mediation and judge-hosted settlement conferences, such as arbitration, summary jury trials, minitrials, and “multi-option” processes. Additionally, it is unclear what was meant by the phrase that these cases were “affected” by ADR programs. Were these cases just referred to ADR, or were ADR sessions actually held? How many of these

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147. See Email from Brad Sweet, Court Program Adm’r, Admin. Office of the U.S. Courts, to Nancy A. Welsh, Chair, Am. Bar Ass’n Section of Dispute Resolution’s Research Advisory Comm. (Apr. 23, 2020, 14:14 CST) (on file with author), in which Brad Sweet explained:

I have reviewed the spreadsheets . . . entitled ADR Filings July 1, 2017 to June 30, 2018 and ADR Filings July 1, 2018 to June 30, 2019. I can confirm that the spreadsheets are consistent with national ADR numbers reported to the Administrative Office. I can also confirm that the total numbers listed for mediation and judge-hosted settlement conferences in the spreadsheet, entitled ADR Filings July 1, 2018 to June 30, 2019, are consistent with the national ADR figure contained in the 2019 Judicial Business Report. . . . [T]his data is collected for internal administrative purposes related to projecting staffing needs of district court clerk’s offices. Detailed ADR data are not intended for public distribution outside of the national aggregate total provided in Judicial Business.

*Id.*

148. The number reported in the 2019 Judicial Business Report is consistent with the district courts’ submissions regarding their use of mediation and judge-hosted settlement conferences for the period from July 1, 2018, to June 30, 2019. *See id.*; *see also* Admin. Office of the U.S. Courts, ADR Filings July 1, 2017 to June 30, 2018 and ADR Filings July 1, 2018 to June 30, 2019 (Oct. 29, 2019) (unpublished spreadsheet) (on file with author). However, the sixty district courts providing this information reported that the overall use of ADR in 2019 was even higher—totaling 38,388 cases using ADR—when court-connected arbitrations, summary jury trials, and “multi-option” processes (like those in the U.S. District Court of the Northern District of California) were factored in (i.e., 1562 arbitrations, 324 early neutral evaluations, 26,370 mediations, 5 summary jury trials, 188 settlements, 0 minitrials, 5962 judge-hosted settlement conference, and 3977 “other”). Admin. Office of the U.S. Courts, *supra*. Until very recently, the number in the 2018 Judicial Business Report (“more than 25,500”) was *not* consistent with the numbers submitted by the district courts (which totaled 28,895 cases using mediation or judge-hosted settlement conferences and 35,764 cases using some form of ADR. *Id.* As a result of conversations with the author during her research for this Article, the AOUSC determined that the 2018 Judicial Business Report was in error and has now revised it to say that “[m]ore than 28,800 civil cases were included in ADR programs.” *See* Email from Brad Sweet, Court Program Adm’r, Admin. Office of the U.S. Courts, to Nancy A. Welsh, Professor of Law, Tex. A&M Univ. Sch. of Law (May 4, 2020, 9:25 am CST) (on file with author); *see also* Admin. Office of the U.S. Courts, *supra*. Several years ago, FJC Senior Researcher Donna Stienstra authored a report using the district courts’ submissions for the twelve-month period ending on June 30, 2011. *See generally* STIENSTRA, *supra* note 12. At that time, 17,833 cases had gone to mediation, another 4222 went to a multi-option program that included mediation, and 1571 cases were referred to a category that primarily included judicial settlement sessions. *See id.* at 14–15 (observing that these numbers probably do not include all cases sent by all districts to mediation and represent about 15 percent of the civil dockets of the reporting districts).

cases were mediated, and how many went to judge-hosted settlement conferences?<sup>149</sup> And how many of these cases reached disposition through the use of ADR procedures? The AOUSC provides none of this information.

Several years ago, the FJC began a research project to learn more about the extent and effects of dispute resolution processes.<sup>150</sup> This project has involved review of case files, as well as surveys and interviews in eight federal judicial districts.<sup>151</sup> To date, the FJC has shared with each district the research report written about that district, and Senior Researcher Donna Stienstra has made presentations at conferences regarding some of the results.<sup>152</sup> The individual district reports will be posted on the FJC's public website. However, there is not yet a comprehensive written report available to the public, and it is uncertain that one will be produced.

At this point, then, determining the number of federal district court cases that are mediated and resolved through mediation would require using PACER to examine individual case files. This would represent a time-consuming and expensive undertaking.<sup>153</sup>

Fortunately, a few individual federal district courts have taken it upon themselves to report data regarding their use of mediation and other ADR processes.<sup>154</sup> These districts tend to have ADR program directors or

149. The reports submitted by the district courts provide such detail. *See supra* note 148. However, this information is not publicly available on the AOUSC website. *See Administrative Office of the U.S. Courts*, U.S. CTS., <https://www.uscourts.gov/topics/administrative-office-us-courts> [<https://perma.cc/Q8YL-GP2G>] (last visited Apr. 12, 2020). Brad Sweet provided the following breakdown:

Nationally, mediation cases comprise approximately 80–85% of the published total and judge hosted settlement conferences the other 15–20% (approximate). These ranges are based on four recent years of data where the national breakdown of mediation and judge hosted conferences has shifted up and down but stayed within the range of 80%/20% to 85%/15% each year.

Email from Brad Sweet, Court Program Adm'r, Admin. Office of the U.S. Courts, to Nancy A. Welsh, Chair, Am. Bar Ass'n Section of Dispute Resolution's Research Advisory Comm. (Nov. 19, 2019, 14:46 CST) (on file with author).

150. *See Dispute Resolution in Federal Courts: New Study to Look at How It's Working*, U.S. CTS. (Jan. 23, 2014), <http://www.uscourts.gov/news/2014/01/23/dispute-resolution-federal-courts-new-study-look-how-its-working> [<https://perma.cc/P68R-WTU7>].

151. *See id.*

152. *See, e.g., Dispute Resolution Symposium & Schmooze: Shining a Light on Dispute Resolution: Transparency, Metrics and Empirical Research*, TEX. A&M U. SCH. L., <https://law.tamu.edu/faculty-staff/news-events/conferences-and-symposia/dispute-resolution-symposium> [<https://perma.cc/785L-LUJL>] (last visited Apr. 12, 2020); *Law at the Crossroads: Le droit à la croisée des chemins*, LAW & SOC'Y ASS'N, <https://www.lawandsociety.org/Toronto2018/toronto2018.html> [<https://perma.cc/3DN9-F4N2>] (last visited Apr. 12, 2020).

153. *See* Carissa Byrne Hessick, *Paying for Public Records*, PRAWFSBLAWG (Feb. 13, 2019), <https://prawfsblawg.blogs.com/prawfsblawg/2019/02/paying-for-public-records.html> [<https://perma.cc/3PMK-LGS8>] (reporting that while PACER charges a fee of \$0.10 per page, the estimated cost of retrieving a page is estimated to be “only \$0.0000006 per page” and that PACER “brought in more than \$146 million in fees during the 2016 fiscal year, even though it cost just over \$3 million to operate” (quoting Matt Ford, *The Courts Are Making a Killing on Public Records*, NEW REPUBLIC (Jan. 31, 2019), <https://newrepublic.com/article/153003/courts-making-killing-public-records-pacer-fees> [<https://perma.cc/PV8Z-LDXT>])).

154. *See infra* Parts II.A.1–3.

coordinators on their staffs who must respond to questions about their programs' operations.<sup>155</sup> These individuals also tend to be committed to using data in making programmatic decisions.<sup>156</sup> Among the districts collecting and reporting data are the Northern and Central Districts of California and the Southern District of New York.

### 1. Northern District of California

Under the leadership of Chief Judge Robert Peckham and then Magistrate Judge Wayne Brazil, the Northern District of California has long been recognized as a leader of court-connected dispute resolution.<sup>157</sup> The Northern District also has long collected data regarding its program.<sup>158</sup> For example, in 2017, the ADR program for the Northern District of California reported the following data for 2013 through 2016.<sup>159</sup>

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155. See, e.g., Email from Howard Herman, Adjunct Professor of Law, UC Hastings Law, to Nancy A. Welsh, Chair, Am. Bar Ass'n Section of Dispute Resolution's Research Advisory Comm. (July 12, 2018, 17:00 CST) (on file with author).

156. See *id.* The author has also had conversations with ADR coordinators regarding their reasons for collecting such data. See Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 882 n.36 (2012) (regarding the use of data as a basis for refining services).

157. See LISA BLOMGREN BINGHAM ET AL., *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING AND RESOLVING CONFLICT* (forthcoming 2020) (manuscript at ch. 7) (on file with author) (describing the court's history of leadership in court-connected dispute resolution, including its creation of nonbinding arbitration and early neutral evaluation (ENE) as dispute resolution options even before its designation under the CJRA as "one of five 'demonstration districts,' directed to 'experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution'" (quoting Civil Justice Reform Act, Pub. L. No. 101-650, § 104, 104 Stat. 5089, 5097 (1990))); see also 28 U.S.C. § 471 note (2018) (Program Requirement in Demonstration Program).

158. See Wayne Brazil, *Informalism and Formalism in the History of ADR in the United States and an Exploration of the Sources, Character, and Implications of Formalism in a Court-Sponsored ADR Programme*, in *FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION* 250, 303–04, 317, 330–32 (Joachim Zekoll et al. eds., 2014) (describing the use of data gathered by district court staff to discuss party perceptions of mediator interventions and fairness, as well as parties' or their attorneys' preferences for mediation); *id.* at 321–22 (hypothesizing that lawyers may prefer mediation and judicial settlement conferences due to familiarity, flexibility of process, inclusion of interests, or to find out the best alternative to trial, not to find out the value of trial as the best alternative to a negotiated agreement); *id.* at 332 (hypothesizing, based on available data that does not show significant differences in parties' perceptions of different processes, that parties' and lawyers' overwhelming choice of mediation signals that "users [are] telling us that the only thing they really value . . . is direct help in getting cases settled"); *id.* at 335 (hypothesizing that lawyers actually are choosing the equity/compromise that is apparent in mediation over early neutral evaluation's illusory goal of accurate prediction of what would occur at trial).

159. N. DIST. OF CAL., *ADR PROGRAM REPORT: FISCAL YEAR 2017 (OCTOBER 1, 2016 THROUGH SEPTEMBER 30, 2017)* 3 (2017), <https://www.cand.uscourts.gov/filelibrary/3227/ADR-Annual-Report-2017.pdf> [<https://perma.cc/K9BY-PURT>]. Note that the number of filings or cases eligible for ADR reflect the fiscal year and include both ADR Multi-Option Program cases and Americans with Disabilities Act (ADA) access cases. ADA cases are subject to the court's General Order 56 and "are not counted as Multi-Option Program referrals." *Id.* at 1. The number of case referrals are tracked by calendar years, rather than fiscal years, due to the lead time involved in the referral of a case to a process. *Id.*

Table 1: ADR Program for the Northern District of California

	2013	2014	2015	2016
<b>Total ADR-Eligible Cases</b>	4168	3796	4124	4341
<b>Total Cases Referred to ADR Processes</b>	1982	1729	1884	1795
<b>Total Cases Referred to Mediation</b>	791 (40%)	637 (37%)	697 (37%)	745 (42%)
<b>Total Cases Referred to Magistrate Judge Settlement Conference</b>	656 (33%)	570 (33%)	619 (33%)	522 (29%)
<b>Total Cases Referred to Private ADR</b>	414 (21%)	415 (24%)	445 (24%)	428 (24%)
<b>Total Cases Referred to Early Neutral Evaluation</b>	118 (6%)	101 (6%)	117 (6%)	97 (5%)
<b>Total Cases Referred to Arbitration</b>	3 (<1%)	6 (<1%)	6 (<1%)	3 (<1%)

Table 1 reveals that the Northern District of California has referred 1700 to 2000 cases to ADR for the past few years—ranging from 41 percent to 47 percent of the cases eligible for ADR—and that a plurality of these cases has been referred to mediation. The Northern District of California also reported on settlement rates.<sup>160</sup> For example, for mediation cases filed in the 2016 calendar year, the settlement rate was approximately 55 percent, and for early neutral evaluation (ENE) cases, the rate was approximately 40 percent.<sup>161</sup> The ADR program report described these settlement rates as “consistent with historical expectations and . . . remarkably good for an early-ADR, court-annexed program.”<sup>162</sup>

Finally, and commendably, the Northern District of California regularly seeks evaluations from ADR participants. The ADR program recently reported that “[s]urveys continue to show that over 95% of the participants

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160. *Id.*

161. *Id.*

162. *Id.* The Northern District of California also reported over 1000 telephone conferences in the 2017 fiscal year, mostly to assist parties in choosing ADR processes or resolving problems associated with cases that had been referred to ADR. *Id.*

in Mediation and ENE report that the processes were fair, and that over 85% report the benefits outweighed the costs.”<sup>163</sup>

## 2. Central District of California

Although the Central District of California is not nearly as well known in dispute resolution circles as its sister district, it reported very similarly regarding the cases handled by its ADR program.<sup>164</sup>

Table 2: ADR Program for the Central District of California

	2013	2014	2015	2016
<b>Total Cases Referred to ADR Processes</b>	2235	2443	2693	2932
<b>Total Cases Referred to Court Mediation Panel</b>	1129	1192	1305	1394
<b>Total Cases Referred to Private Mediation</b>	735	880	1012	1114
<b>Total Cases Referred to Magistrate Judge Settlement Conference</b>	371	371	376	424

Interestingly, the Central District referred more cases for the 2013–2016 period than the Northern District. Most of the referrals were to mediation, with services provided either by mediators on the court’s roster or by private mediators.

The Central District also reported on settlements. For 2016, the mediation panel had a 50.5 percent settlement rate, including both full and partial settlements.<sup>165</sup> With the inclusion of cases that settled within sixty days after a mediation session, the settlement rate increased to 56.9 percent, and an additional 425 cases referred to the mediation panel settled before mediation.<sup>166</sup> The Central District also provided additional detail regarding the different settlement rates achieved in the various types of cases referred to mediation.<sup>167</sup>

Similar to the Northern District, the Central District reported on the evaluations of its mediations and members of its mediation panel, with 89

163. *Id.*

164. CENT. DIST. OF CAL., 2016 ADR PROGRAM REPORT 1 (2016), [https://www.cacd.uscourts.gov/sites/default/files/documents/ADR\\_Program\\_Report\\_2016.pdf](https://www.cacd.uscourts.gov/sites/default/files/documents/ADR_Program_Report_2016.pdf) [<https://perma.cc/5Z2D-7LXU>].

165. *Id.*

166. *Id.* at 2.

167. The types of cases included claims under the ADA, as well as claims involving civil rights, employment, copyright, contract, trademark, insurance, labor, personal injury, and consumer credit. *Id.* Of these different types of cases, a provided bar chart suggests that in ADA, employment, copyright, contract, and personal injury cases, mediations produced settlements more than 50 percent of the time. *See id.*



percent of responding participants indicating that they were “satisfied” or “very satisfied” with their mediation outcomes and nearly 89 percent finding that the benefits of mediation outweighed the costs.<sup>168</sup> Approximately 95 percent described the mediation procedure as “very fair” or “fair.”<sup>169</sup> 84 percent of the responding participants rated their mediator as “excellent” or “very good”; another 11 percent rated their mediator as “satisfactory”; and 4 percent rated their mediator as “unsatisfactory” or “terrible.”<sup>170</sup>

### 3. Southern District of New York

The Southern District of New York is another federal district that provides substantial detail regarding its ADR caseload. For example, in its 2016 Mediation Program Annual Report, the Southern District reported the referral of 1072 cases.<sup>171</sup> Of this total, 340 were cases referred by judges;<sup>172</sup> the remainder were the result of automatic referral of three types of cases: employment cases that included counsel, certain civil rights cases against the New York City Police Department, and certain Fair Labor Standards Act (FLSA) cases.<sup>173</sup>

Bar graphs indicated that the mediation program had an overall settlement rate of slightly more than 50 percent.<sup>174</sup> There were higher settlement rates for judge-referred cases (approximately 65 to 75 percent, depending on location) and for automatically referred FLSA cases (approximately 63 to 71 percent, depending on location).<sup>175</sup>

The Southern District did not provide data regarding parties’ perceptions of the mediation process or the mediators.

#### *B. Select State Court Systems*

Like the federal courts, state judiciaries regularly publish annual reports with aggregate information regarding their statewide operations.<sup>176</sup> Some of these reports mention the courts’ mediation and other ADR programs or

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168. *Id.*

169. *See id.* at 3.

170. *Id.*

171. *See* S. DIST. OF N.Y., MEDIATION PROGRAM ANNUAL REPORT: JANUARY 1, 2016–DECEMBER 31, 2016, at 2 (2017), <https://www.nysd.uscourts.gov/sites/default/files/pdf/Mediation/Mediation%20Program%20Annual%20Reports/Annual%20Report.2016.Final%20Draft.pdf> [<https://perma.cc/RWZ6-LE3H>].

172. *Id.* at 4. These cases involved various legal claims: employment, copyright, fraud, insurance, medical malpractice, motor vehicle, patent, personal injury/product liability, prisoner civil rights, contract, property, trademark, securities, racketeering, intellectual property, construction, education, consumer credit, interstate commerce, maritime, admiralty, Fair Labor Standards Act, Federal Employers Liability Act, ADA, Federal Communications Act, Fair Credit Reporting Act, Fair Housing Act, and Employment Retirement Income Security Act. *Id.* at 5.

173. *See id.* at 2.

174. *See id.* at 7.

175. *See id.*

176. *See infra* notes 179–80, 196, 202, 212.

initiatives.<sup>177</sup> With few exceptions,<sup>178</sup> however, the state courts tend not to report quantitative information regarding the extent of their use of mediation or other dispute resolution processes, the cases disposed through these means, or the parties' perceptions.

### 1. Florida

Florida is an exception to the general trend. The state court system identifies mediation as integral. The Florida State courts' 2016–2017 annual report, for example, recognized that “Florida has long been hailed as a national leader in promoting and institutionalizing court-connected mediation”<sup>179</sup> and then profiled the courts' ADR offerings as an important means to enhance access to justice and court services.<sup>180</sup>

Florida's courts provide online aggregate information regarding their general operations through the Summary Reporting System (SRS).<sup>181</sup> The summaries generated by the SRS list the number of cases filed and the number of cases disposed of in Florida's courts during any specified time frame.<sup>182</sup> While the SRS does not reference mediation or any other ADR process,<sup>183</sup> Florida offers two other online resources that report on state courts' use of mediation. The first is Florida's Uniform Data Reporting that specifically includes quarterly statistics regarding the judicial circuits' use of ADR.<sup>184</sup> For July through September 2017, for example, the Florida courts reported the referral of 26,231 cases to mediation, with another 196 cases referred to arbitration.<sup>185</sup> Most of these referrals were for “county small

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177. See *infra* notes 179–80, 196, 202, 212.

178. See Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1667–68 (2015) (reporting that, in Illinois, court-connected arbitration includes a public dimension and outcomes are in a court database).

179. FLA. STATE COURTS, 2016–2017: ANNUAL REPORT 31 (2018), <https://www.flcourts.org/content/download/218125/1974696/florida-courts-annual-report-2016-17.pdf> [<https://perma.cc/ZJ9F-44M4>].

180. See *id.* at 31–34; see also FLA. STATE COURTS, 2015–2016: ANNUAL REPORT 30–32 (2017), [https://www.flcourts.org/content/download/218126/1974702/Annual-Report\\_2015-2016-FINAL.pdf](https://www.flcourts.org/content/download/218126/1974702/Annual-Report_2015-2016-FINAL.pdf) [<https://perma.cc/NS8E-BUFE>].

181. TRIAL CT. STAT. SEARCH, <http://trialstats.flcourts.org> [<https://perma.cc/UTD8-GT88>] (last visited Apr. 12, 2020).

182. See *id.*

183. For civil cases in state circuit courts, for example, the disposition types are identified as follows: dismissed before hearing, dismissed after hearing, disposed by default, disposed by judge, disposed by nonjury trial, disposed by jury trial, and other. *Id.*

184. *Uniform Data Reporting*, FLA. CTS., <https://www.flcourts.org/Publications-Statistics/Statistics/Uniform-Data-Reporting> [<https://perma.cc/Y4RG-7TGL>] (last visited Apr. 12, 2020).

185. Most of the referrals were for “county small claims” (13,440), “family–joint income combined” (6927), “other mediation orders” (3202), and “family court–dependency” (1319). *Uniform Data Reporting: Alternative Dispute Resolution Programs: Cases Ordered*, FLA. CTS., <http://www.flcourts.org/core/fileparse.php/541/urlt/Alternative-Dispute-Resolution-Program-Jul-Sep17.pdf> [<https://perma.cc/WD4Z-HW32>] (last visited Apr. 12, 2020). Other mediation referrals involved: residential evictions (998), other county civil (332), and commercial evictions (13). See *id.* (noting that “[t]his data is reported by court administration

claims” (13,440), “family–joint income combined” (6927), “other mediation orders” (3202), and “family court–dependency” (1319).<sup>186</sup> During the same period, 12,522 mediation sessions were held.<sup>187</sup> Again, most of the mediation sessions involved county and family court cases.<sup>188</sup>

The second online resource offered by Florida is the Trial Court Statistical Reference Guide (the “Guide”).<sup>189</sup> The Guide reports annual totals regarding case filings and dispositions in Florida’s circuit courts, with a breakdown for dispositions as a result of mediated settlements.<sup>190</sup> For the 2018–2019 fiscal year, for example, the Guide reported 208,437 civil case filings and 188,056 case dispositions in Florida’s circuit courts,<sup>191</sup> with 2467 of those dispositions occurring pursuant to mediated settlements reached before a hearing and 2603 occurring pursuant to mediated settlements reached after a hearing.<sup>192</sup> Overall, therefore, 5070 dispositions—i.e., 2.7 percent of all dispositions—were the result of mediated settlements.<sup>193</sup>

Florida provides no direct information regarding the settlement rate for its mediations. Indeed, the last report providing settlement information for Florida’s court-connected mediations is from 2007 to 2008.<sup>194</sup>

There is also no reporting regarding parties’ evaluation of mediation or mediators in Florida. On the other hand, Florida provides the names of mediators sanctioned for violations of Florida’s Rules for Certified and Court-Appointed Mediators.<sup>195</sup>

## 2. Maryland

Maryland’s courts, like those in Florida, clearly acknowledge mediation as an integral part of the judicial system. Indeed, the Maryland Judiciary’s

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through the Uniform Data Reporting System web application and is not audited” and that it may be later amended).

186. *Id.*

187. Most of the sessions were for “county small claims” (5268), “family–joint income combined” (5345), and “family court–dependency” (954). *See id.* Sessions also involved: residential evictions (683), other county civil (260) and commercial evictions (12). *See id.*

188. *Id.*

189. *Trial Court Statistical Reference Guide*, FLA. CTS., <https://www.flcourts.org/Publications-Statistics/Statistics/Trial-Court-Statistical-Reference-Guide> [https://perma.cc/5GC4-H8XY] (last visited Apr. 12, 2020).

190. The types of cases include professional malpractice, products liability, auto negligence, other negligence, condominium, contract and indebtedness, real property/mortgage foreclosure, eminent domain, and other. *See id.*

191. *See* FLA. OFFICE OF THE STATE COURTS ADM’R, FY 2018–19 STATISTICAL REFERENCE GUIDE 1 (2019), [https://www.flcourts.org/content/download/630230/7163082/20200304\\_18\\_19\\_Circuit\\_Civil.pdf](https://www.flcourts.org/content/download/630230/7163082/20200304_18_19_Circuit_Civil.pdf) [https://perma.cc/EE66-5ZYY].

192. *See id.* at 22.

193. *See id.* at 23.

194. *See generally* ELIZABETH S. ROACH, FLORIDA MEDIATION PROGRAMS: AN ABBREVIATED COMPENDIUM: COURT CONNECTED CASELOAD DATA (21st ed. 2008), <http://www.flcourts.org/core/fileparse.php/254/urlt/FY2007-2008CompendiumCaseloadFinal.pdf> [https://perma.cc/HU7L-6GWM].

195. *See Discipline Proceedings and Sanctions*, FLA. CTS., <https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution/Rules-Discipline-Sanctions/Discipline-Proceedings-Sanctions> [https://perma.cc/8VE4-YP7H] (last visited Apr. 12, 2020).

Judicial Council devoted a substantial portion of its 2017 annual report to describing initiatives to develop a single, revised uniform set of standards for the state's mediators.<sup>196</sup> These initiatives sought to implement the findings from a five-year research study on the landscape of ADR and effective mediator interventions.<sup>197</sup>

Unlike Florida, however, Maryland does not provide information regarding the extent of its use of mediation to resolve cases filed in the courts. The Maryland Judiciary Statistical Abstract for 2017, for example, indicates only the number of civil cases filed and terminated in the courts.<sup>198</sup> It provides no detail whatsoever regarding the manner of disposition for these civil cases.<sup>199</sup> Obviously, under these circumstances, there is no information about the number of cases referred to or settled through mediation.<sup>200</sup>

Maryland also does not provide information on a regular basis regarding either the settlements achieved by mediation or the perceptions of parties who participate in mediation. Notably, Maryland recently conducted an empirical research project to determine how various mediator interventions affected settlement and parties' perceptions, but this was a time-limited study and involved a limited number of courts.<sup>201</sup>

### 3. New York

New York is another state that acknowledges the use of ADR and mediation in its courts. New York currently collects and reports data regarding a few of its court-connected ADR programs. The New York State Unified Court System's annual report for 2017, for example, devoted a page to ADR.<sup>202</sup> There, the court system described its funding for one of its ADR programs—the CDRCP—and observed that in 2017 the CDRCP had served 67,118 individuals in 27,072 cases and that 75 percent of the cases had been

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196. MD. JUDICIAL COUNCIL, MARYLAND JUDICIARY JUDICIAL COUNCIL ANNUAL REPORT 21 (2017), <https://mdcourts.gov/sites/default/files/import/judicialcouncil/pdfs/judicialcouncilannualreport2017.pdf> [<https://perma.cc/SA9L-XDX9>].

197. *Id.* at 21–22.

198. *See* MD. JUDICIARY, STATISTICAL ABSTRACT 2017, at 37–46 (2017), <https://www.courts.state.md.us/sites/default/files/import/publications/annualreport/reports/2017/fy2017statisticalabstract.pdf> [<https://perma.cc/93YV-EX3U>].

199. *See id.*

200. *See* Letter from Nadine Maeser, Pub. Info. Officer, Md. Judiciary, to Nancy A. Welsh, Professor of Law, Tex. A&M Univ. Sch. of Law (Oct. 23, 2019) (on file with author) (explaining that the state court administrator had denied a request for data on the use and effects of court-connected mediation in Maryland because fulfilling the request would require eighty-one working hours, the individuals who would fulfill the request were “working on critical and/or time sensitive projects and [could not] be pulled away” to work on the request, and the request would “impose[] a significant operational burden on the [Administrative Office of the Courts] which [could not] be overcome by the prepayment of additional expenses”).

201. *See* Eisenberg, *supra* note 63, at 254–55.

202. N.Y. STATE UNIFIED COURT SYS., 2017 ANNUAL REPORT 31 (2018), [http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/17\\_UCS-Annual\\_Report.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/17_UCS-Annual_Report.pdf) [<https://perma.cc/LRR8-K9QC>].

resolved.<sup>203</sup> The 2017 annual report also described the free mediation provided by another particular ADR program provider—the Collaborative Family Law Center—to qualifying divorcing couples in the New York City area.<sup>204</sup> The report indicated that the center had assisted more than 3600 families.<sup>205</sup> The annual report provided no information, however, regarding the number of mediations provided by this program, their settlement rate, or parties’ perceptions. Beyond these two specific programs, New York has provided no information regarding the number of cases referred to court-connected ADR, their settlement rates, or parties’ perceptions of their ADR experience.

With New York’s adoption of presumptive mediation and dispute resolution, however, change may be in the air. The ADR Advisory Committee specifically recommended the development of “data collection and analysis tools that track” a variety of metrics “by judicial district and by individual program”: “referrals to mediation, opt-outs and matters actually mediated, settlements in the mediation (or sooner thereafter than if there had been no mediation), other mediation-related outcomes (such as opportunities for accelerated adjudication or other ADR processes), and litigant satisfaction with the experience.”<sup>206</sup> The advisory committee further recommended the development of “mechanisms for evaluating, monitoring and ensuring the quality of mediation services being performed by court personnel and members of court-approved panels.”<sup>207</sup> Recent announcements indicate that the New York State Unified Court System has generally adopted the advisory committee’s recommendations to collect, analyze, and use data.<sup>208</sup> The advisory committee also urged public education regarding court-connected mediation,<sup>209</sup> but its recommendations did not address the need for public reporting and transparency regarding the results of the data collected by the courts.

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203. *See id.* New York’s CDRCP publishes its own annual statistical supplement for each fiscal year. *Id.* According to the report for the 2016–2017 fiscal year, the CDRCP handled 27,765 cases. *Id.* Dispute resolution services were provided in 17,305 of these cases, and the parties reached resolution in 12,844 cases (a 74.2 percent settlement rate). *Id.* Dispute resolution services were not provided in cases when they were screened and found inappropriate for ADR, the CDRCP was unable to contact the parties, or parties declined to participate or withdrew. *See* N.Y. STATE UNIFIED COURT SYS., COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM: STATISTICAL SUPPLEMENT 7 (2016–2017), [http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/2016-2017\\_Stat\\_Supp.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/2016-2017_Stat_Supp.pdf) [<https://perma.cc/WS83-ZQZJ>].

204. *See id.*

205. N.Y. STATE UNIFIED COURT SYS., *supra* note 202, at 31.

206. ADR ADVISORY COMM., *supra* note 96, at iii.

207. *Id.*

208. *See* Press Release, *supra* note 95 (noting that “comprehensive data will be collected to help evaluate the progress of court-sponsored ADR programs and allow for changes to improve the performance of programs going forward”).

209. ADR ADVISORY COMM., *supra* note 96, at 5–6.

## 4. Texas

Strikingly, the Texas Legislature has given the Texas Supreme Court the right to “determine the need and method for statistical reporting of disputes referred by the courts to [ADR].”<sup>210</sup> Such authorization certainly would permit Texas courts to report the number of cases going to ADR and their results. However, the Texas Judiciary does not report any specific information regarding the number, types, or settlement rates of cases referred to mediation by the state’s judges.<sup>211</sup> Instead, the Texas Judiciary’s annual reports provide information only regarding the number of case filings and dispositions.<sup>212</sup> The 2017 annual statistical report identified several types of dispositions—including dismissed by plaintiff, agreed judgment, and all other dispositions.<sup>213</sup> Some of these dispositions could be the result of mediation, but there is no data to support this supposition.<sup>214</sup>

The only data reported recently regarding the extent and results of court-connected mediation in Texas was in a 2016 time-limited study evaluating the impact of “expedited actions rules” on Texas county courts,<sup>215</sup> which included examining “the role of mediation in civil litigation.”<sup>216</sup> One of the goals of the expedited action rules was to encourage “more deliberative use of mediation.”<sup>217</sup> The researchers reported that a relatively small percentage

210. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.072 (West 2020).

211. In 1998, the ADR coordinator for the Dallas courts estimated that “at least 6,000 cases” would be mediated that year. Amis et al., *supra* note 109, at 378. In 1997, in Houston’s courts, there were 5114 referrals to ADR, and in San Antonio, from October 1, 1996, to September 30, 1997, there were more than 2500 referrals to ADR. *Id.* at 380, 383. The numbers do not consider the parties’ voluntary use of mediation. *Id.* At this time, settlement rates in the state are said to be “in excess of 80%.” *Id.* at 379.

212. See generally OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2017 (2018), <https://www.txcourts.gov/media/1441397/ar-fy-17-final.pdf> [<https://perma.cc/DB75-9V4Q>].

213. See *id.*

214. The 2017 annual report provides that for the 173,577 civil, nonfamily cases disposed of in the district courts (trial courts of general jurisdiction), and excluding civil cases related to criminal matters, the following methods of disposition applied: dismissed by plaintiff (43 percent), default judgment (15 percent), agreed judgment (12 percent), bench trial (10 percent), dismissed for want of prosecution (9 percent), all other dispositions (9 percent), summary judgment (3 percent), and jury/directed verdict (0.6 percent). *Id.* at 22. For family cases disposed of during this period, the following methods of disposition applied: agreed judgment (35 percent), bench trial (26 percent), dismissed by plaintiff (13 percent), dismissed for want of prosecution (11 percent), all other dispositions (5 percent), default judgment (7 percent), and jury/directed verdict (0.1 percent). *Id.* at 23. For justice courts—courts of limited jurisdiction that handle landlord-tenant matters, debt claims, and small claims—cases were disposed of by: default judgment (29 percent), nonsuited/dismissed by plaintiff (27 percent), trial/hearing by judge (23 percent), all other dispositions (10 percent), dismissed for want of prosecution (7 percent), agreed judgments (4 percent), and jury trial (0.2 percent). *Id.* at 46.

215. See generally NAT’L CTR. FOR STATE COURTS & STATE JUSTICE INST., CIVIL JUSTICE INITIATIVE: TEXAS: IMPACT OF THE EXPEDITED ACTIONS RULES ON THE TEXAS COUNTY COURTS AT LAW (2016), <https://www.txcourts.gov/media/1437615/texasimpactoftheexpeditedactionsrulespdf.pdf> [<https://perma.cc/9KCA-SLM4>].

216. *Id.* at 2.

217. *Id.* Concerns had been raised that Texas courts’ referrals of cases to mediation, especially in standing orders, actually increased parties’ costs and time to disposition. *Id.* at 11. Rule 169 of the Texas Rules of Civil Procedure was therefore amended to provide:

of the cases included in the study had been referred to mediation—14.7 percent of the total in 2011 and 12.2 percent of the total in 2013.<sup>218</sup> The researchers also surveyed 316 Texas lawyers whose 2013 cases (totaling 236) had been referred to mediation.<sup>219</sup> Although noting that the response rate from the lawyers was small (10 percent),<sup>220</sup> the researchers reported these rather startling results: “of the responses received[,] only a quarter of cases referred to mediation actually resulted in mediation” and “three out of four cases that did have mediation settled as a result.”<sup>221</sup> This very limited dataset

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Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer the case to an alternative dispute resolution procedure once, and the procedure must: (i) not exceed a half-day in duration, excluding scheduling time; (ii) not exceed a total cost of twice the amount of applicable civil filing fees; and (iii) be completed no later than 60 days before the initial trial setting.

TEX. R. CIV. P. 169(d)(4)(A). Further, “[t]he court must consider objections to the referral unless prohibited by statute,” *id.* r. 169(d)(4)(B), and “[t]he parties may agree to engage in alternative dispute resolution other than that provided for in (A).” *Id.* r. 169(d)(4)(C). The researchers found “no statistically significant difference in the time to disposition for cases that were referred to mediation but ultimately disposed by judgment.” NAT’L CTR. FOR STATE COURTS & STATE JUSTICE INST., *supra* note 215, at 25. When the researchers took into account both the referral to mediation and implementation of the Expedited Actions Rules, the “cases in the 2013 sample that were referred to mediation but were ultimately disposed by judgment not only resolved sooner . . . but this effect was above and beyond the independent effects of the Expedited Action Rules and the mediation referral.” *Id.*

218. More specifically, the researchers found that in 2011, of the 2293 cases studied, 337 had been referred to mediation (14.7 percent of the total); in 2013, after implementation of the Expedited Actions Rules, the number of referrals declined to 302 (12.2 percent of the 2467 cases studied). NAT’L CTR. FOR STATE COURTS & STATE JUSTICE INST., *supra* note 215, at 11. The researchers drew their samples from contested cases filed between July 1 and December 31, 2011, and July 1 and December 31, 2013, during which at least some discovery had taken place in the county courts of five urban counties (Dallas, Fort Bend, Harris, Lubbock, and Travis) and a disposition had been reached by settlement, summary judgment, or bench or jury trial. The researchers further reduced the number of cases studied by applying sampling weights. *Id.* at 3. Of those cases referred to mediation, 9 were the result of a motion, 199 were the result of a court order, and 129 were the result of a standing order. *Id.* at 11. In 2013, of the 2467 cases examined, 51 were referred to mediation as the result of a motion, 193 were the result of a court order, and 58 were the result of a standing order. *Id.* at 11 tbl.9.

219. *Id.* at 5.

220. *Id.* at 29.

221. *Id.* at v, 29. The researchers concluded:

The relatively low rate of participation in mediation, even for cases referred to ADR, suggests that at least some of the value of mediation is that scheduling a mediation session provides the parties with a concrete incentive to examine the strength of their respective positions before engaging in formal settlement negotiations. After doing so, many (perhaps most) parties are able to agree on a settlement without actually going through the mediation process. In effect, a mediation referral may operate in much the same way as a firm trial date.

*Id.* at 29. The researchers further reported that the “average mediation session was 3.75 hours and fee per party ranged from \$400 to \$1200 (average \$703),” “[t]he mediator’s style was described as facilitative in five of the cases and evaluative in the remaining three,” and “[b]oth the attorneys and the parties in the cases that resolved reported being satisfied or very satisfied with the outcomes of the mediation.” *Id.* For cases resolved through mediation, the attorneys “reported that the resolution saved an average of 13 attorney/staff days, four days of trial, and an additional five months on the court calendars.” *Id.* Because all of these cases were subject to the limitations imposed by the Expedited Actions Rules, the researchers assessed these estimates as “highly inflated.” *Id.*

suggests that a modest percentage of Texas's civil cases is being referred to mediation, a much smaller percentage is actually being mediated, the referral itself likely causes settlement, and those cases that do go to mediation also are quite likely to settle.

### 5. California

California occasionally mentions its use of mediation and ADR. For example, the Commission on the Future of California's Court System has proposed increased use of mediation in civil cases and ODR for small claims and refinements to family mediation in California's courts.<sup>222</sup> However, the California Judicial Council's annual statistical report regarding caseload trends makes no mention of mediation, ODR, or any form of ADR.<sup>223</sup>

California only provides data regarding the number of court filings and dispositions during the fiscal year and the length of time to disposition.<sup>224</sup> For the dispositions of civil cases, California lists those that occur before trial and after trial.<sup>225</sup> For those occurring before trial, California differentiates between dismissals for delay in prosecution and dispositions through "other" means.<sup>226</sup> Of course, these dispositions could be the result of settlements achieved through mediation, another ADR process, or negotiation between the lawyers—but once again, there is no data to support this supposition. Thus, the California State court system provides no information regarding the number of mediations, their settlement rate, or participants' evaluations.

As part of a recent review of the volume of mediations (both court-connected and private) occurring in California, the California Law Revision Commission could only observe: "It is clear that mediation is well-established in California. There are many mediators, lots of mediation

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222. See COMM'N ON THE FUTURE OF CAL.'S COURT SYS., *supra* note 131, at 5, 15, 22–23. The commission acknowledges that fiscal constraints have forced reductions and closure of court-provided ADR programs in California but urges increased use of ADR:

Although such programs may increase court expenditures, they also offer long-term benefits for both the courts and the parties. ADR programs help to resolve cases more quickly, reduce court workloads, save litigants' time and money, and improve user satisfaction with court services. ADR programs also fulfill standard 10.70(a) of the California Standards of Judicial Administration, which provides that all trial courts should implement mediation programs for civil cases as part of their core operations. The most effective and efficient type of ADR differs among case types. While day-of-trial mediation or an online settlement negotiation program may be most effective in small claims cases, earlier neutral evaluation or mediation may be more effective in other cases, avoiding unnecessary discovery or dispositive motions. Settlement discussions are critical aspects of effective case management.

*Id.* at 25.

223. See *Court ADR Programs*, *supra* note 119.

224. See JUDICIAL COUNCIL OF CAL., 2017 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 2006–2007 THROUGH 2015–2016, at 95–98 (2017), <https://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf> [<https://perma.cc/NTL4-Y9FP>].

225. For the dispositions occurring after trial, California compares the dispositions that occurred after a jury trial to those that occurred after a bench trial. *See id.*

226. California notes that this category "includes other dismissals and transfers, summary judgments and all other judgments before trial." *Id.* at 97.



programs, and numerous mediations. Nonetheless, precise statistical information appears to be scarce.”<sup>227</sup> In considering the lack of data on court-connected mediation, the commission stated:

Collecting data on mediation programs and analyzing such data is . . . expensive, slow, time-consuming, and hard to finance when state budgets are tight and data collection would divert funds and resources away from direct provision of services to the public. In addition, “sound empirical data is necessarily hard to obtain given the confidential nature of most mediation.” In fact, it is even hard to learn how many mediations occur.<sup>228</sup>

This paucity of data mattered, as the California Law Revision Commission determined whether to recommend an exception to the confidentiality of mediation communications. The commission was required to consider whether such an exception would have a negative impact on mediation and its effects. In order to demonstrate an appreciable negative impact, the commission had to know whether a significant number of mediations were occurring, whether they had positive effects, and whether a proposed amendment to California’s current statutes could represent a significant burden. Without that data, the commission had to guess at the results of its proposed exception to the confidentiality of mediation communications.

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227. CAL. LAW REVISION COMM’N, RECOMMENDATION: RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT 200 (2017), <http://www.clrc.ca.gov/pub/Printed-Reports/Pub240-K402.pdf> [<https://perma.cc/T5AP-5B3D>] (footnote omitted) (citing the online information provided by California counties regarding their court-connected ADR programs).

228. *Id.* at 180 nn.510–13, 181–82 (quoting Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 250); James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 45–46 (2006) (noting that many mediations are private matters, so it is difficult to determine the number of mediations conducted in any jurisdiction); Bobbi McAdoo, *All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 430 (2007) (“In this era of severe budget constraint encompassing the fiscal environment in state and federal government, great creativity will be needed to generate effective systems to monitor and evaluate ADR programs.”); Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear*, 17 HARV. NEGOT. L. REV. 97, 102–03 (2012) (reporting in 2012 on a 2000–2004 survey of California judicial officers regarding their settlement practices); Ignazio Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 188 n.23 (2005) (“[S]ome programs have been required to limit the resources devoted to the collection of data, thereby making the process of drawing conclusions about the reasons for programmatic success somewhat more conjectural than might be desirable.”); Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 592 n.158 (2008); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 250; Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 KAN. J.L. & PUB. POL’Y 351, 354 (2003) (“[M]uch of the ADR that takes place is never reported.”). The commission also noted the challenge of long-term tracking to determine the durability of settlements reached in dispute resolution processes. CAL. LAW REVISION COMM’N, *supra* note 227, at 181 n.511; Lynn Kerbeshian, *ADR: To Be or . . . ?*, 70 N.D. L. REV. 381, 400 (1994) (“[L]ong term follow-up is nonexistent.”).

### C. Summary

Of all the court systems profiled here, only the federal district courts in the Central and Northern Districts of California report annual data regarding their number of mediation referrals, actual mediations, settlement rates, and participants' evaluations of the mediation process and mediators.<sup>229</sup> The Florida State courts provide commendably detailed reports regarding the number of mediation referrals, actual sessions held, and dispositions but somewhat confusing reports regarding settlement rates and nothing regarding participants' perceptions.<sup>230</sup> The Southern District of New York reports annually on the number of the referrals it receives and their settlement rate, but it does not report on participants' perceptions.

The remainder of the court systems examined here report much more limited information or, more frequently, nothing at all. The New York Unified State Court System reports on referrals, number of mediations, and settlement rates for its CDRCP, but this is just one small part of court-connected dispute resolution in the state.<sup>231</sup> The U.S. federal court system as a whole provides a figure—i.e., “*more than 32,300 civil cases*” were “*affected*” by ADR programs—but this number provides only a general sense of the volume of cases, with no clarity about what it means to be “*affected*.”<sup>232</sup> The states of Maryland, Texas, and California provide no quantitative information at all.

### III. WHAT WE OUGHT TO KNOW ABOUT THE USE, EFFECTS, AND TYPICAL INTERVENTIONS OF COURT-CONNECTED MEDIATION AND DISPUTE RESOLUTION

The notion that we ought to know more than we do about the actual use and effects of court-connected mediation is far from novel. There have been previous calls for data collection,<sup>233</sup> evaluation,<sup>234</sup> and greater

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229. See *supra* Parts II.A.1–2.

230. See *supra* notes 181–95 and accompanying text.

231. See *supra* text accompanying notes 202–05.

232. See *U.S. District Courts—Judicial Business 2019*, *supra* note 145 (emphasis added); see also *supra* text accompanying notes 146–49.

233. The California Law Revision Commission report noted this history. CAL. LAW REVISION COMM'N, *supra* note 227, at 181 n.510; see also *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*, at 12, COM (2016) 542 final (Aug. 26, 2016) (calling for a better database on the use of mediation in the European Union); Welsh, *supra* note 156, at 882 (pointing out the need for data); BINGHAM ET AL., *supra* note 157 (manuscript at ch. 7) (“All courts should commit the necessary resources to collect data that will allow for effective internal and external evaluation. Best practices include coding case data in the internal court system, including the type and time of ADR referral, the processes to which the case was referred, the outcome of these processes, the type of case, and whether parties were represented.”).

234. See ALT. DISPUTE RESOLUTION SECTION OF THE AM. BAR ASS'N TASK FORCE ON MEDIATOR CREDENTIALING, FINAL REPORT 4 (2012), [https://www.americanbar.org/content/dam/aba/images/dispute\\_resolution/CredentialingTaskForce.pdf](https://www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf) [<https://perma.cc/7B78-99C4>] (detailing the recommendation of the majority of the task force to monitor credentialed

transparency.<sup>235</sup> More than a decade ago, the American Bar Association (ABA) Section of Dispute Resolution's Task Force on Research and Statistics surveyed court administrators and identified the "top ten" data elements that courts should collect (accompanied by an explanation and recommended collection method for each piece of information).<sup>236</sup> In sum, the task force sought regular collection of data regarding the extent of the use of dispute resolution processes, the particular processes being used, how referrals occurred, the substantive types of cases in which dispute resolution was used, the case-related timing of the use of dispute resolution, and dispute resolution processes' effects (including settlement and participant satisfaction). The task force suggested that most, though not all, of these data elements could be integrated into courts' existing case management systems.<sup>237</sup> Overwhelmingly, such integration has not taken place.

Recently, the ABA Section of Dispute Resolution established a new entity—the Research Advisory Committee—that is in the process of

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mediators and solicit feedback from parties); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 5 (2001) (“[E]valuation can serve a useful educational function and can aid party self-determination by assisting the parties in making informed decisions.”).

235. Professors Cynthia Alkon and Andrea Kupfer Schneider are also calling for greater transparency regarding negotiated settlements in the criminal context—i.e., plea bargaining. See generally Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019).

236. See Memorandum from the Am. Bar Ass'n Section of Dispute Resolution Task Force on Research & Statistics to Court Adm'rs & ADR Program Adm'rs (June 9, 2006), [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/cle\\_and\\_mtg\\_planning\\_board/teleconferences/2012-2013/May\\_2013/topten.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/cle_and_mtg_planning_board/teleconferences/2012-2013/May_2013/topten.authcheckdam.pdf) [<https://perma.cc/Q3SL-9ZA7>]. The “top ten” data elements included: (1) “Was ADR used for this case (yes/no)?”; (2) “What ADR process was used in this case? (Mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial, other)”; (3) “Timing Information (the date the claim was docketed; Date of referral to ADR; Date of first ADR session; Date of close of ADR referral period; At what point in the docket duration did ADR occur (Before suit, after filing suit, before discovery, just before trial) the final disposition date of the case; the date of post-trial motions)”; (4) “Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part”; (5) “What precipitated the use of ADR? (Court order *sua sponte*, party consent to the process, party motion with one or more parties opposed and a court order for ADR following, automatic referral per court rule due to kind of case)”; (6) “Was there a settlement without ADR (yes/no)? If so, how was the case terminated—e.g., dispositive motion, settlement in ADR, settlement by some other process, during or after trial, removal to another court, etc.”; (7) “Case type (general civil, criminal, domestic, housing, traffic, small claims)”; (8) “The cost of the ADR process to the participants (cost of neutral, filing fees, attorneys' fees of disputants, time spent by disputants in ADR, costs of experts, etc.)”; (9) “Did the disputants use more than one form of ADR? If so, which?”; and (10) “Satisfaction data: How satisfied are the participants with the process, the outcome, and the neutral.” *Id.* The memorandum also provided the task force's explanations for including each element. *Id.*

237. *Id.* The task force acknowledged the “significant constraints on the information management systems in many courts and that recording the information will impose an additional responsibility.” It concluded: “[t]o ease that burden, we recommend that the data collection be integrated into forms and procedures the court already uses to enhance the likelihood that some ADR information will be recorded.” *Id.*

revisiting and revising the task force's recommendations.<sup>238</sup> In part, revision is appropriate simply because courts' use of dispute resolution has continued to grow and diversify. There is also an increasing expectation that data about the extent of mediation and its results should be available and increasing recognition that we also should know more about the pool of people serving as mediators, particularly regarding their diversity and inclusivity.<sup>239</sup> Members of the dispute resolution field have consistently expressed their commitment to diversification and have urged that regular collection and publication of data from dispute resolution organizations regarding the demographics of neutrals selected for cases are likely to encourage such diversification.<sup>240</sup>

At this point, then, the ABA Section of Dispute Resolution Research Advisory Committee has preliminarily recommended collection of the following data elements:

Data elements regularly recorded in case management or ADR management systems:

- Case characteristics
- Party represented by counsel?
- Benchmark dates
- Was case eligible for referral to ADR?
- Case outcome, including dates
- Case outcome: process that led to settlement
- ADR/settlement assistance process(es) used
- ADR/settlement assistance benchmark dates
- Information on neutral

Data elements collected through surveys:

- What led to use of ADR/settlement assistance?
- Case characteristics
- ADR/settlement assistance outcome: occurrence of settlement
- ADR/settlement assistance outcome: nature of settlement

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238. The author is the chair of the advisory committee. The other members are Lin Adrian, Howard Herman, Jennifer Shack, Donna Shestowsky, Donna Stienstra, Thomas Stipanowich, and Doug Van Epps. See Memorandum from Nancy A. Welsh, Chair, Am. Bar Ass'n Section of Dispute Resolution's Research Advisory Comm. to Harrie Samaras, Chair, Am. Bar Ass'n Section of Dispute Resolution (Aug. 2, 2019) (on file with author).

239. See AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105 (2019); Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681, 690–93 (2017); Maria R. Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 PEPP. DISP. RESOL. L.J. 201, 206 (2019) (describing the recently established ADR Inclusion Network in New York).

240. See Volpe, *supra* note 239, at 201 (referencing former ABA Section of Dispute Resolution Chair Ben Davis's advocacy for a "diversity scorecard").

- Case outcome: process that led to settlement
- Party type
- Party demographics
- Party represented by counsel?
- Assistance received by party
- Attorney demographics
- Cost to parties to participate
- Party/attorney assessment of process and outcome<sup>241</sup>
- Information on neutral
- Party/attorney assessment of neutral
- Actions taken by mediator
- Neutral's assessment of case<sup>242</sup>

Substantively, the most controversial proposals here are likely to be the required disclosures regarding demographics and outcomes.<sup>243</sup> Regarding outcomes, the advisory committee's preliminary recommendations would notably require disclosure only of the occurrence and general nature (i.e., monetary, nonmonetary, combination of monetary and nonmonetary) of settlements.<sup>244</sup> For purposes of assuring A2J, however, it will be necessary for courts to go further, collecting information regarding the terms of settlement and reporting aggregate or average outcomes.

An obvious concern regarding such disclosures is the potential loss of promised confidentiality.<sup>245</sup> Defendants generally seek private settlements,

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241. Professor Julie Macfarlane is among the advocates calling for even greater input of system users into justice system reform. See, e.g., Julie Macfarlane, *New Year Wishes: 5 Excuses for Not Involving the Public in A2J Reform to Leave Behind in 2014*, NAT'L SELF-REPRESENTED LITIGANTS PROJECT (June 8, 2015), <https://representingyourselfcanada.com/new-year-wishes-5-excuses-for-not-involving-the-public-in-a2j-reform-to-leave-behind-in-2014/> [<https://perma.cc/HW83-5WM4>]; Julie Macfarlane, *Public Participation and User Input into Justice Reform—What Are We Afraid of?*, NAT'L SELF-REPRESENTED LITIGANTS PROJECT (Sept. 7, 2013), <https://representingyourselfcanada.com/public-participation-and-user-input-into-justice-reform-what-are-we-afraid-of/> [<https://perma.cc/XLJ2-3A52>].

242. ADVISORY COMM. ON DISPUTE RESOLUTION RESEARCH, PRELIMINARY RECOMMENDATIONS ON DATA ELEMENTS FOR COURTS TO COLLECT REGARDING ADR/SETTLEMENT ASSISTANCE: VERSION 2.0, at 2–8 (2019).

243. The second version of the committee's preliminary recommendations indicates that such information "could come from a required case closing form, to be filed by the parties." *Id.* at 3.

244. See *id.* at 5.

245. See Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 13 (2011) ("Rather than playing supporting roles, confidentiality and the [mediation] privilege seem to be gaining stature as among mediation's most salient and prized attributes."); see also Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1422 (2006); Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387, 1392 (2006); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 23 (2001); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1256–57 (2006).

and plaintiffs can benefit from a “secrecy premium.”<sup>246</sup> Some courts may fear that requiring disclosures about mediated outcomes and party demographics will deter both the use of the process and settlement. Some research has demonstrated, however, that the loss of privacy need not have this effect. For example, state requirements of public disclosure regarding medical malpractice settlements have not been shown to affect the rate of settlement.<sup>247</sup> In addition, the disclosures proposed here would not be identifiable on an individual case basis. Rather, they would and should be publicly reported and analyzed only in the aggregate; this would identify the average settlement value of specified types of cases and determine whether certain demographic groups regularly fare worse than other groups, particularly in case types that result in relatively standardized terms of agreement.<sup>248</sup> Such differences would signal a systemic A2J problem. Stephen Yeazell has made a very similar “NASDAQ for lawsuits” proposal, noting that insurers already have compiled comparative information to guide their settlements and urging courts to democratize this particular marketplace by requiring parties to complete and file a form describing the terms of their case settlement “as a condition of enjoying the benefits of doctrines preventing one from being sued again on the same claim.”<sup>249</sup>

In addition to the rather long list of data elements that should be collected regularly pursuant to the advisory committee’s preliminary recommendations, there is likely to be a need for less frequent, periodic collection of other data for a more nuanced understanding of the use of dispute resolution processes. For example, certain processes now have the potential to rely on such different behaviors that it may not be particularly useful to ask simply whether a case was resolved in a process bearing a particular process label.

This definitional problem is especially acute for mediation. Many would assume that mediation inevitably will involve the presence of the litigating parties, at least some meeting of all the parties in joint session, and at least

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246. See Eric Helland & Gia Lee, *Secrecy, Settlements, and Medical Malpractice Litigation*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 3, 3–5 (Joseph W. Doherty et al. eds., 2012).

247. *Id.*

248. See Orna Rabinovich-Einy & Avital Mentovich, Plenary Session at the Online Dispute Resolution 2019 Conference (Oct. 29, 2019) (comparing face-to-face and online adjudication of traffic violations and finding that in face-to-face adjudication, both African Americans and younger litigants pay higher fines than other demographic groups and, additionally, African Americans receive fewer charge reductions; this was not the case in online adjudication). Data is being used similarly to search for racial disparities in debt collection. See generally Jessica Lavoie & Domonkos F. Vamossy, Racial Disparities in Debt Collection (Sept. 2019) (unpublished manuscript).

249. Stephen Yeazell, *Transparency in Civil Settlements: NASDAQ for Lawsuits?*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM, *supra* note 246, at 143, 151, 153–57. Yeazell also notes that the Census Bureau uses various techniques to preserve confidentiality and privacy. See *id.* at 159; see also *Introduction to CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM*, *supra* note 246, at xxii, xxii–xxiii (identifying various means to gain the benefits of transparency regarding settlement amounts while avoiding the disclosure of information that would identify outcomes in individual cases).

some facilitation of the parties' voices and direct dialogue. However, there is both anecdotal and preliminary empirical evidence that an increasing number of mediations do not involve the litigating parties, proceed entirely in caucus (or separate meetings) with no joint meeting or direct dialogue between the parties, and seek primarily the mediators' case evaluations and settlement proposals.<sup>250</sup> A mediation that proceeds entirely in caucus is significantly different from a mediation that involves at least some use of the joint session. Similarly, a mediation that focuses on facilitating the parties' direct dialogue is significantly different from one that focuses on the mediator's assessment of the case and proposal for resolution.

Which of these variations is more likely to produce settlement, compliance, improved relationships between the parties, and positive perceptions of the mediation process and the courts? A recent report by the ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques revealed that we really do not know.<sup>251</sup> We should know, however, particularly when courts are ordering parties to participate in mediation.<sup>252</sup>

The lack of data regarding court-connected dispute resolution, however, is one part of a much larger problem with data collection regarding court operations in the United States. Over the years, commentators have complained generally about the inadequacy of court data.<sup>253</sup> The problem is

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250. See LEONARD R. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 327–31 (6th ed. 2019); Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMUL. REV. 721, 727 (2017); see also Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, DISP. RESOL. MAG., Fall 2014, at 30, 33; Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 12, 19; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014, at 25, 25–27; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISP. RESOL. MAG., Winter 2016, at 6, 7. The author observed many of these changes occurring as early as 2000. See Welsh, *supra* note 234, at 49–50; cf. Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 803 (2016) (pointing out that we should focus on the interventions actually used during processes, rather than process labels).

251. See generally AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, *REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES* (2017), [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/med\\_techniques\\_tf\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf) [<https://perma.cc/P85N-GGHC>]; Roselle L. Wissler & Gary Weiner, *How Do Mediator Actions Affect Mediation Outcomes?*, DISP. RESOL. MAG., Fall 2017, at 30; Michael Leathes, *Here's How Mediation Science Truly Can Originate in the Real World*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (May 17, 2019), <http://mediationblog.kluwerarbitration.com/2019/05/17/heres-how-mediation-science-truly-can-originate-in-the-real-world/> [<https://perma.cc/B6QP-P4BQ>]; Jennifer Shack, *Which Mediator Techniques Are Most Effective?: Report Points to Some with Potential*, MEDIATE.COM (Oct. 3, 2017), <https://www.mediate.com/articles/shackjbl20171027.cfm> [<https://perma.cc/L9EG-XQBJ>].

252. See Eisenberg, *supra* note 63, at 252.

253. See generally Naomi Burstyn et al., *Using Technology to Discover More About the Justice System*, 44 RUTGERS COMPUTER & TECH. L.J. 1 (2018); Gillian K. Hadfield, *Where Have All the Trials Gone?: Settlements, Non-trial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); Rebecca Love Kourliss & Pamela A. Gagel, *Reinstalling the Courthouse Windows: Using Statistical Data to Promote Judicial Transparency and Accountability in Federal and State*

especially acute in the state courts. Not all states collect the same data.<sup>254</sup> Not all states use the same case or data management software, and thus they use different languages for similar concepts.<sup>255</sup> Perhaps most concerning, not all states have direct access to case-specific data.<sup>256</sup> Rather, case-level data exists only at the county level, and the state must rely on aggregate numbers provided by the counties.<sup>257</sup>

This situation may be changing. On a periodic basis, the NCSC reviews the “landscape” of state court operations.<sup>258</sup> The NCSC is working toward the development of greater consistency in data standards to improve the accuracy of this “landscape” and to permit state courts to learn from and compare and collaborate with each other. The Conference of Chief Justices and many other organizations are also calling for courts to collect and report standardized data.<sup>259</sup> In 2018, the NCSC established a National Open Court Data Standards workgroup to move forward on this front.<sup>260</sup> The workgroup solicited recommendations regarding ADR-related data elements to include,<sup>261</sup> chose to adopt some of those recommendations, and has now begun piloting data collection in selected state courts.<sup>262</sup>

The regular and systematic collection of data also may be eased by the fact that many states’ courts now use case management software to manage their dockets, and many of these courts have turned to a relatively small number of private vendors for the software. These vendors could bring greater consistency to the courts’ collection and reporting of data.<sup>263</sup> One of the

*Courts*, 53 VILL. L. REV. 951 (2008); Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295 (2016); Yeazell, *supra* note 249, at 143. There are also complaints about a lack of data regarding plea bargaining in the criminal justice system. *See generally* Schneider & Alkon, *supra* note 235.

254. *See* PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 6–13 (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/KH85-BYTA>].

255. *See id.*

256. *See id.*

257. *See id.*

258. *See generally id.*

259. *See supra* note 58 and accompanying text.

260. Press Release, Nat’l Ctr. for State Courts, NCSC Teams Up with Measures for Justice to Develop Court Data Standards (June 26, 2018), <https://www.ncsc.org/Newsroom/News-releases/2018/Data-Standards-for-Courts.aspx> [<https://perma.cc/VNT7-JT6T>].

261. Email from Doug Van Epps, Dir., Mich. Supreme Court’s Office of Dispute Resolution, to Donna Stienstra, Senior Researcher, Fed. Judicial Ctr. et al. (June 24, 2019, 12:44 CST) (on file with author); Letter from Nancy A. Welsh, Chair, Am. Bar Ass’n Section of Dispute Resolution’s Research Advisory Comm., to Doug Van Epps, Dir., Mich. Supreme Court’s Office of Dispute Resolution (Aug. 29, 2019) (on file with author); Letter from Nancy A. Welsh, Chair, Am. Bar Ass’n Section of Dispute Resolution’s Research Advisory Comm., to Nicole Waters, Dir., Research Servs., Nat’l Ctr. for State Courts (July 17, 2019) (on file with author).

262. *See* Email from Diane Robinson to Nancy A. Welsh, *supra* note 5.

263. Some have raised concerns that these vendors will have a proprietary interest in the systems they develop and control access to the code, other features, and even data collected through the system. *See, e.g.*, Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 745 (2017).



largest vendors, Tyler Technologies, has also brought a well-respected ODR provider, Modria, in-house.<sup>264</sup> Thus, Tyler is particularly aware of dispute resolution processes beyond litigation and is primed to recognize that data elements on dispute resolution could and should be among those regularly collected. Tyler and the other case management system vendors have indicated a willingness to work with the NCSC to identify ADR-related data elements that should be “standard”; through its National Open Court Data Standards workgroup,<sup>265</sup> the NCSC will play a key role in encouraging those data elements to be collected and incorporated into publicly available databases or annual reports.

#### IV. RECOGNIZING AND EXPLOITING OPPORTUNITIES FOR THE INSTITUTIONALIZATION OF DATA COLLECTION AND TRANSPARENCY

Thus far, this Article has described substantial activity in the provision of mediation and other ADR services in the U.S. federal district courts and the court systems of Florida, Maryland, New York, Texas, and California. This Article has also demonstrated that, at this point, it is possible to find hard quantitative evidence of the extent of dispute resolution activity and its effects in very few jurisdictions. Several federal district courts and Florida’s state courts stand out as models. Admittedly, there are some hopeful signs of change. New York appears ready to begin collecting and reporting data. The ABA Section of Dispute Resolution’s advisory committee is well along in developing a consensus regarding useful data elements to be collected by courts. The NCSC is pursuing consistent data standards, including ADR-related data, and case management vendors appear ready to offer their expertise and support.

Nonetheless, the analysis offered by the California Law Revision Commission undoubtedly remains correct in pointing out that many jurisdictions do not already collect and report this information because collecting and analyzing data is “expensive, slow, time-consuming, and hard to finance when state [or national] budgets are tight and data collection would divert funds and resources away from direct provision of services to the public.”<sup>266</sup> As another colleague recently explained rather pithily, courts are

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264. *Modria*, TYLER TECHNOLOGIES, <https://www.tylertech.com/products/modria> [<https://perma.cc/MB6D-FBTQ>] (last visited Apr. 12, 2020).

265. *National Open Court Data Standards (NODS)*, NAT’L CTR. FOR ST. CTS., <https://www.ncsc.org/nods> [<https://perma.cc/P6DG-P6C4>] (last visited Apr. 12, 2020).

266. CAL. LAW REVISION COMM’N, *supra* note 227, at 181; Jones, *supra* note 228, at 283 (“Given the importance of process integrity and confidentiality, how can we measure the performance of alternative dispute resolution programs, particularly those that are connected to our formal systems of justice?”); *id.* at 302 (“I have found little in the way of measurement of dispute resolution processes, with the notable exception of the ex post participant satisfaction surveys that have become so common . . . . Efforts at standardization and consistency in the collection and reporting of longitudinal data are desperately needed.”); *id.* at 303 (“We do not even have a good idea about how many mediations are conducted each year.”); *see supra* note 228.

dealing with “reform on a shoestring.”<sup>267</sup> Providing data is a luxury, particularly if it appears to detract from court staff’s ability to provide core services.

At this point, then, it is worthwhile to consider whether there are meaningful incentives or disincentives that could motivate courts to institutionalize the collection of data regarding dispute resolution and, even further, to make some portions of such data publicly available. Will reporting dispute resolution referrals, sessions, and effects *benefit* judges, courts, states, or our nation in some tangible way? Alternatively, will the *failure* to provide such information harm them in some tangible way? What are the desirable benefits or feared penalties motivating the Central and Northern Districts of California, the Southern District of New York, the Florida State court system, and perhaps now the New York State Unified Court System to provide more information while most other court systems provide less?

### A. Market Competition, Leadership, and A2J

We seem to live in an age of rankings, and judiciaries are not exempt from this trend. An increasing variety of metrics now permit comparisons among nations of the quality of their governance and their commitment to the rule of law.<sup>268</sup> Many of these metrics include considerations of courts<sup>269</sup> and

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267. My thanks to Peter Salem, executive director of the Association of Family and Conciliation Courts, for this observation.

268. See, e.g., KLAUS SCHWAB, WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT (2017–2018), <http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017%E2%80%932018.pdf> [<https://perma.cc/8MPQ-9TP2>]; WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2019), <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf> [<https://perma.cc/RJ7Q-PHBK>]; 2019 *Index of Economic Freedom*, HERITAGE FOUND., <https://www.heritage.org/index/> [<https://perma.cc/GBK9-66SC>] (last visited Apr. 12, 2020); *Corruption Perceptions Index*, TRANSPARENCY INT’L, <https://www.transparency.org/research/cpi/overview> [<https://perma.cc/49WR-T3Z3>] (last visited Apr. 12, 2020); *Doing Business 2020*, WORLD BANK, <https://www.doingbusiness.org/> [<https://perma.cc/V97C-PB9W>] (last visited Apr. 12, 2020); *Economic Freedom of the World: 2019 Annual Report*, FRASER INST., <https://www.fraserinstitute.org/studies/economic-freedom> [<https://perma.cc/CS8X-XLR7?type=image>] (last visited Apr. 12, 2020); IMD, <https://www.imd.org/wcc/world-competitiveness-center/> [<https://perma.cc/L9S9-7LUK>] (last visited Apr. 12, 2020); *The International Framework for Court Excellence*, INT’L CONSORTIUM FOR CT. EXCELLENCE, <http://www.courtexcellence.com/> [<https://perma.cc/XF5F-XAP8>] (last visited Apr. 12, 2020); *Worldwide Governance Indicators*, WORLD BANK, <https://info.worldbank.org/governance/wgi/> [<https://perma.cc/K9QN-UFPB>] (last visited Apr. 12, 2020).

269. See, e.g., *Efficiency of Legal Framework in Settling Disputes*, WORLD ECON. F., <http://reports.weforum.org/global-competitiveness-report-2018/competitiveness-rankings/#series=EOSQ040> [<https://perma.cc/54RY-4UPX>] (last visited Apr. 12, 2020) (showing that the United States ranked third out of 140 countries); *Judicial Independence*, WORLD ECON. F., <http://reports.weforum.org/global-competitiveness-report-2018/competitiveness-rankings/#series=EOSQ144> [<https://perma.cc/4T86-2UJF>] (last visited Apr. 12, 2020) (showing that the United States ranked fifteenth out of 140 countries). The World Bank’s Worldwide Governance Indicators rankings are based on the following six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption. *Worldwide Governance Indicators*, *supra* note 268. The rule of law dimension includes consideration of the following variables from various data sources: fairness of the judicial

some specifically reference dispute resolution (e.g., the World Justice Project's Rule of Law Index<sup>270</sup> and the World Bank's Doing Business project<sup>271</sup>). Even when civil justice metrics do not specifically reference dispute resolution, they may allow us to draw inferences; recent research conducted by Shahla Ali indicates that courts' mediation programs "are associated with positive gains in the advancement of civil justice quality."<sup>272</sup>

Why do or should courts care about these sorts of metrics? The answer is simple: nations—and their judiciaries—that do well are more likely to attract investment, commerce, and respect.<sup>273</sup> There certainly are examples of

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process, speediness of the judicial process, judicial independence, confidence in the judicial system, and trust in the judiciary. *See id.* The International Consortium's quality management system for courts consists of three parts: the International Framework, a self-evaluation process, and Global Measures of Court Performance. *The International Framework for Court Excellence*, *supra* note 268. The Fraser Institute uses forty-two data points to measure the degree of economic freedom in the following five areas: size of government, legal system and property rights, sound money, freedom to trade internationally, and regulation. *Economic Freedom of the World: 2019 Annual Report*, *supra* note 268. The area regarding the legal system and property rights includes consideration of judicial independence, impartial courts, integrity of the legal system, and legal enforcement of contracts. James Gwartney et al., *Economic Freedom of the World: 2018 Annual Report*, FRASER INST. (Sept. 25, 2018), <https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2018-annual-report> [<https://perma.cc/XC68-766R?type=image>]. *See generally* Tracey E. George & G. Mitu Gulati, *Courts of Good and Ill Repute: Garoupa and Ginsburg's Judicial Reputation: A Comparative Theory*, 83 U. CHI. L. REV. 1683 (2016) (reviewing the judicial reputation theory proposed by Nuno Garoupa and Tom Ginsburg).

270. *Civil Justice (Factor 7)*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law/civil-justice-factor-7> [<https://perma.cc/D2N6-WPF7>] (last visited Apr. 12, 2020). Civil justice is the seventh factor of the World Justice Project Rule of Law Index. It measures:

whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system. The delivery of effective civil justice requires that the system be accessible and affordable (7.1), free of discrimination (7.2), free of corruption (7.3), and without improper influence by public officials (7.4). The delivery of effective civil justice also necessitates that court proceedings are conducted in a timely manner and not subject to unreasonable delays (7.5). Finally, recognizing the value of Alternative Dispute Resolution mechanisms (ADRs), this factor also measures the accessibility, impartiality, and efficiency of mediation and arbitration systems that enable parties to resolve civil disputes (7.7).

*Id.*; *see also* Anjanette Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485, 488 (2014) (relying on the World Justice Project Rule of Law Index as a framework for a discussion of greater use of ODR).

271. *Enforcing Contracts*, WORLD BANK, <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/what-measured> [<https://perma.cc/VBR2-7DY2>] (last visited Apr. 12, 2020). One of the areas included in the quality of judicial processes index is ADR, specifically whether the economy has "adopted a series of good practices . . . in [its] court system" in the area of ADR as well as the areas of court structure and proceedings, case management, and court automation. *See id.*

272. *See* SHAHLA F. ALI, COURT MEDIATION REFORM: EFFICIENCY, CONFIDENCE AND PERCEPTIONS OF JUSTICE 12 (2018). Shahla Ali's conclusions were based on ten country case studies, survey research, and analysis of civil justice indicators.

273. Many of these metrics have arisen as means to assist foreign investors and international aid organizations in assessing the risk of entering or assisting nations. *See* Tor Krever, Note, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52 HARV. INT'L L.J. 287, 315 (2011) ("[J]urisdictions now

courts in the United States that have used and advertised procedural innovations to attract large, complex matters that bring prestige and phalanxes of lawyers and consultants to town.<sup>274</sup> The U.S. District Court for the Eastern District of Texas made itself attractive to plaintiffs in patent litigation cases.<sup>275</sup> The U.S. District Court for the Eastern District of Virginia has long prided itself for its “rocket docket.”<sup>276</sup> The already-respected Delaware Chancery Court now offers fast-track arbitration for commercial cases.<sup>277</sup>

Some judges and state court administrators have worried aloud about declining numbers in civil dockets and about private mediators and arbitrators taking “market” share.<sup>278</sup> Increasingly, private dispute resolution organizations are making use of their own metrics to enable comparisons of the private arbitrations and mediations occurring in different nations and geographic regions.<sup>279</sup> It seems inevitable that such metrics will be used in

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compete in a crude legal boosterism for both foreign capital and development aid, for which *Doing Business* and the WGI conveniently provide benchmarks.”).

274. See, e.g., Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 270–77 (2016) (exploring the procedures adopted by the U.S. District Court for the Eastern District of Texas that have made it attractive to plaintiffs in patent litigation cases and hypothesizing that the district’s judges have sought to attract such cases because some of the judges desire more interesting work, such a caseload increases the judges’ and district’s prestige and reputation, such cases are beneficial to the local economy and to the judges’ families and friends, and expertise with such cases has enabled some judges to retire and join national law firms or offer their services as mediators); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1554 (2003) (arguing in favor of competition among dispute resolution forums and explaining that in England, “a weak doctrine of precedent and a competitive legal order[] provided a framework for the common law to evolve largely insulated from rent-seeking pressures and in favor of efficiency-enhancing rules”).

275. See Klerman & Reilly, *supra* note 274, at 270–77.

276. See Amy Semet, *Specialized Trial Courts in Patent Litigation: A Review of the Patent Pilot Program’s Impact on Appellate Reversal Rates at the Five-Year Mark*, 60 B.C. L. REV. 519, 582 (2019) (observing that the Western District of Wisconsin is recognized as a “rocket docket”).

277. See Gregory Varallo & John Mark Zeberkiewicz, *Delaware Private Arbitration: An Explanation of Delaware’s Chancery Arbitration Program and Its Benefits*, 11 DEPAUL BUS. & COM. L.J. 483, 489 (2013).

278. See Pamela Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1192 (2019) (discussing competition between litigation and international commercial arbitration).

279. See Mark Baker & Ayaz Ibrahimov, *Data Insights: Q&A with Bill Slate, Chairman, CEO and Co-founder of Dispute Resolution Data*, INT’L ARB. REP., Oct. 2017, at 2; see also Brian Canada et al., *A Data-Driven Exploration of Arbitration as a Settlement Tool: Does Reality Match Perception?* (June 11, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/06/11/data-driven-exploration-arbitration-settlement-tool-reality-match-perception/> [<https://perma.cc/29M8-JYHG>] (reporting, based on “approximately 216,000 data points, collected across 4,100 alternative dispute resolution cases,” that for three of the top four arbitral case types—commercial contracts, hospitality and travel, and wholesale and retail trade—the most frequent outcome was settlement or withdrawal, while awards were the outcome 50 percent of the time for the case type of financial services and banking; plans to “examine both case type (including more specific subtypes) and case region (that is, where arbitration took place) are noted as factors potentially affecting arbitration outcomes, the time required to reach those outcomes, and the associated costs of achieving those outcomes”); *International Commercial Arbitration and Mediation: What Does the Data Show?*, DISP.

the future to compare (and facilitate competition between) public dispute resolution systems (i.e., the courts) and private ones.<sup>280</sup> U.S. courts need to be ready to offer attractive court-connected dispute resolution—and the data that demonstrates their processes’ extent and quality.<sup>281</sup>

The pursuit of market share, however, does *not* seem to explain why the Northern and Central Districts of California (and, to a lesser extent, the Southern District of New York and the Florida State court system) collect and publicize data regarding their system-wide use of mediation and other dispute processes, settlement rates, and parties’ perceptions. Rather, these jurisdictions—especially the Florida State court system and the Northern District of California—seem to be motivated primarily by A2J entrepreneurialism. Both systems have well-deserved reputations as pioneers in the provision of services and the creation of a culture and infrastructure (e.g., dedicated staff members) to assure the quality of such services.

The Northern District of California’s dispute resolution program, led originally by U.S. Magistrate Judge Wayne Brazil, has always been committed to the provision of services that provide litigants with another option for meaningful A2J in its public courts.<sup>282</sup> The Northern District also

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RESOL. DATA, [http://www.disputeresolutiondata.com/international\\_commercial\\_arbitration](http://www.disputeresolutiondata.com/international_commercial_arbitration) [<https://perma.cc/J9KJ-BGNL>] (last visited Apr. 12, 2020) (“Dispute Resolution Data (DRD) is receiving data from 17 international entities and then aggregating the data by case type (28 different) and seven geographic regions. In this process, each closed international commercial arbitration provides information for up to 100 data fields and each closed international mediation up to 45 data fields. Presently, over 1,000 cases have provided information, in excess of, 40,000 data fields.”).

280. Domestically, Kaiser Permanente produces metrics on an annual basis regarding its arbitration program. *E.g.*, *2018 Annual Report*, KAISER PERMANENTE, [https://healthy.kaiserpermanente.org/static/health/annual\\_reports/kp\\_annualreport\\_2018/?kp\\_shortcut\\_referrer=kp.org/annualreport](https://healthy.kaiserpermanente.org/static/health/annual_reports/kp_annualreport_2018/?kp_shortcut_referrer=kp.org/annualreport) [<https://perma.cc/74XK-RAXJ>] (last visited Apr. 12, 2020). In a recent article, Professor Alan Morrison analyzed this data and noted the inability to compare the arbitration program’s costs and speed with litigation due to the lack of data available from California’s courts. *See* Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair?: The Kaiser Permanente System*, 70 DISP. RESOL. J. 35, 40 (2015).

281. Because New York City has international stature, judges and dispute resolution advocates located there may be particularly aware of the value of making the rest of the world aware of the state’s presumptive ADR initiative. *See, e.g.*, Rafal Morek, *Presumptive Mediation*, WOLTERS KLUWER: MEDIATION BLOG (Sept. 18, 2019), <http://mediationblog.kluwerarbitration.com/2019/09/18/presumptive-mediation/> [<https://perma.cc/24RR-HSSJ>] (suggesting that this is “yet another case in which New York is setting global trends”).

282. *See* Wayne Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 240 (2007) [hereinafter Brazil, *Hosting Mediations*] (exploring what it means for litigants to feel “well-served by their public institutions,” particularly the courts, in court-connected mediation). Brazil has noted the importance of “public confidence in the integrity of the processes the courts sponsor and public faith in the motives that underlie the courts’ actions,” and has urged that courts must take great care not to make program design decisions that invite parties to infer that the courts care less about doing justice and offering valued service than about looking out for themselves as institutions (e.g., by reducing their workload, or off-

has collected data for a very long time to inform its operations and has often been the subject of articles and book chapters regarding best practices in dispute resolution.<sup>283</sup> Because the Northern District regularly received so many requests from others regarding the details of its operations, it began producing annual reports.<sup>284</sup> Similarly, from the inception of its program, Florida has had visionary leadership and a commitment to developing and sustaining a framework to assure mediation quality—for example, ethics provisions, disciplinary structures, and advisory services.<sup>285</sup> In a sense, collecting and publicizing data may simply be consistent with the character of these court programs and their leaders.<sup>286</sup>

Today, though, there are calls for a second wave of leadership that responds to the increasing concern about the lack of A2J for many members of the public. A large percentage of the U.S. population cannot afford legal services.<sup>287</sup> Defaults in collection matters are on the rise.<sup>288</sup> Private companies increasingly impose mandatory predispute arbitration clauses on employees and consumers and bar them from participating in class actions.<sup>289</sup> There is increased awareness of the discrimination suffered by women and people of color in the workplace, on the streets, and elsewhere.<sup>290</sup> According

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loading kinds of cases that are especially taxing or emotionally difficult or that are deemed “unimportant”).

Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 124 (2002) [hereinafter Brazil, *After Pound*] (noting that providing parties with the ability to choose the process they prefer is part of ensuring procedural fairness); see also BINGHAM ET AL., *supra* note 157 (manuscript at ch. 7).

283. See Brazil, *Hosting Mediations*, *supra* note 282, at 251–53 (describing the post-mediation questionnaires distributed by the U.S. District Court for the Northern District of California); Brazil, *supra* note 158, at 250, 303–04, 317, 330–32 (using data gathered by district court staff to discuss party perceptions of mediator interventions and fairness, as well as parties’ or their attorneys’ preference for mediation); Leonard Riskin & Nancy A. Welsh, *Is That All There Is?: The Problem in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 921 (2008) (describing the assistance that the Northern District provides to better enable lawyers and parties to choose or customize their dispute resolution process).

284. My thanks to Howard Herman, former director of the ADR program of the U.S. District Court of the Northern District of California, for this observation.

285. See, e.g., Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1993); Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN. ST. L. REV. 43, 51 n.47 (2003) (referencing the collection and analysis of data); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997); Sharon Press, *Mediator Ethical Breaches: Implications for Public Policy*, 6 Y.B. ON ARB. & MEDIATION 107 (2014).

286. It is also possible that more data began to be collected in Florida when the state became responsible for its own funding and the DRC was required to demonstrate that its services were an integral part of the courts.

287. See HANNAFORD-AGOR ET AL., *supra* note 254, at 11–12, 37–38.

288. *Id.*

289. See, e.g., Nancy A. Welsh, *Class Action-Barring Mandatory Pre-dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. 381 (2017).

290. See, e.g., Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, 23 EMP. RTS. & EMP. POL’Y J. 115 (2019).

to one international ranking system, the United States is comparable to Uganda on metrics assessing A2J.<sup>291</sup>

Some A2J advocates have directed their attention toward mediation and arbitration to urge that these processes, because they are conducted in private and their results are confidential, have too much potential to deprive people of access to fair processes and outcomes.<sup>292</sup> These concerns certainly have been raised before,<sup>293</sup> but the proposed remedy is new. Today's A2J advocates are not calling for an end to these processes but instead seeking greater transparency—specifically, open proceedings and information regarding the outcomes in individual cases.<sup>294</sup>

While most proponents of dispute resolution would resist opening up confidential mediation and arbitration proceedings, many share the unease expressed by A2J advocates. There are serious concerns regarding the negative effects of implicit bias in mediation,<sup>295</sup> lack of access to legal information and advice,<sup>296</sup> and mediators' insufficient awareness of the needs and concerns of marginalized parties.<sup>297</sup> In other contexts, dispute resolution proponents have supported the regular collection *and* publication of data in order to protect the integrity of dispute resolution.<sup>298</sup> Dispute resolution proponents also have urged courts' data *collection* regarding the extent of the use of dispute resolution processes, their outcomes, and parties' perceptions.<sup>299</sup> Dispute resolution proponents concerned about A2J should also be ready to support<sup>300</sup> *public reporting* of aggregate results and demographic patterns.<sup>301</sup> Such data will reveal successes—and perhaps areas of concern that deserve attention and correction.

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291. See Chambliss et al., *supra* note 3, at 195 (observing that “the United States ranks 67th—tied with Uganda—in the World Justice Project’s country rankings of access to justice and affordable legal services”).

292. See, e.g., Resnik, *supra* note 4; Resnik, *supra* note 178.

293. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1402–04; Owen Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–50 (1991).

294. See Doré, *supra* note 1, at 468; Estlund, *supra* note 1, at 679–80; Resnik, *supra* note 4, at 606, 611; see also Robert Rubinson, *There Is No Such Thing as Litigation: Access to Justice and the Realities of Adjudication*, 18 J. GENDER RACE & JUST. 185, 208–10 (2015) (proposing that law students and lawyers should participate in actual legal proceedings and thus gain awareness of the reality of the A2J issues in courts).

295. See Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 654–61 (2017); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 74 (2010).

296. See Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 799–823 (1998); Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 306–07 (2014).

297. See Welsh, *supra* note 250, at 750–61.

298. See Welsh, *supra* note 4, at 872–73.

299. *Id.* at 863.

300. See generally *id.* (urging that mediators should have an ethical obligation to provide such support, particularly when the process is imposed upon parties by contract or court order).

301. Professor Rebecca Sandefur has called for such data:

*B. ODR: The Shiny New Thing*

Interestingly, some courts in the United States and in other parts of the world have responded to A2J concerns with the adoption of ODR. Because ODR uses modern technology—for example, smartphones, computers, and apps—it enables people to access the courts in the same way that they now access many other private and public services. Thus, ODR represents “the shiny new thing.” British Columbia established the online Civil Resolution Tribunal (CRT) in 2016 that handles small claims and neighbor-related claims.<sup>302</sup> The CRT offers four staged services—information or self-help, party-to-party negotiation, online facilitation with asynchronous communication, and adjudication.<sup>303</sup> In 2020, the United Kingdom is scheduled to launch its own three-stage Online Solutions Court, offering algorithmic tailored assistance and information, followed by case management and conciliation by case officers, and last, a legal determination.<sup>304</sup> In the United States, courts in Michigan, Ohio, Arkansas, Texas, Utah, Hawaii, and Florida have adopted or will soon adopt ODR for small claims, warrant cases, traffic violations, landlord-tenant matters, debt collection, and even some family issues.<sup>305</sup>

The NCSC, Conference of Chief Justices, Joint Technology Committee, IAALS, and Pew are now urging all state courts to adopt ODR for high-

Solving the crisis of restricted and unequal access to justice requires a robust and reliable base of evidence: about when access to justice can be achieved without the use of law, courts, or legal services, and when such tools are necessary. . . . “[W]hen” are legal interventions necessary for what kinds of problems, compared to what kinds of existing alternatives, for what characteristics of person, facing what kind of other party, and involved or not in what kind of process?

Today, the information needed to answer any useful formulation of most of these research questions does not exist, because there has been little investment in collecting meaningful data about civil justice in the United States for more than fifty years.

Rebecca L. Sandefur, *Access to What?*, 148 *DÆDALUS* 49, 53–54 (2019); *see also* Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 *S.C. L. REV.* 295, 296 (2017).

302. ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 160 (2017); Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 *AM. U. L. REV.* 165, 190 (2017).

303. *See* KATSH & RABINOVICH-EINY, *DIGITAL JUSTICE*, *supra* note 302, at 160–61; Rabinovich-Einy & Katsh, *supra* note 302, at 191–92.

304. *See* Rabinovich-Einy & Katsh, *supra* note 302, at 194–96. Some elements of the program appear to have already been launched. *See* Mike Brazier, *Helping Users to Access Our Online Services*, GOV.UK (Jan. 23, 2020), <https://insidehmcts.blog.gov.uk/2020/01/23/helping-users-to-access-our-online-services/> [<https://perma.cc/9S7A-RY9C>];

*Transformation—Courts and Tribunals 2022*, GOV.UK (Apr. 8, 2020), <https://insidehmcts.blog.gov.uk/category/transformation-courts-and-tribunals-2022/> [<https://perma.cc/6QJB-BHCU>]; *see also* *HM Courts & Tribunals Service*, HMCTS MONTHLY BULL. (Oct. 3, 2020), <https://content.govdelivery.com/accounts/UKHMCTS/bulletins/27db6a5> [<https://perma.cc/9458-CHZT>].

305. *See* Rabinovich-Einy & Katsh, *supra* note 302, at 194–96. The COVID-19 crisis appears to have sped up these developments. *See* Email from Amy J. Schmitz, Elwood L. Thomas Mo. Endowed Professor of Law, Univ. of Mo. Sch. of Law, to Dispute Resolution List (Mar. 31, 2020, 13:51 CST) (providing an update from Paul Embley of the NCSC).



volume, low-value matters.<sup>306</sup> The NCSC and Pew have teamed up to provide technical assistance and conduct rigorous evaluation for selected state courts.<sup>307</sup> Obviously, data collection is necessary in order to conduct evaluations. However, the NCSC and Pew are also urging all courts using ODR to commit to collecting data elements in the long term for ongoing accountability and quality control.<sup>308</sup>

From a transparency perspective, ODR creates a unique opportunity to collect, analyze, and make public substantial amounts of data in order to assess the innovation's effects<sup>309</sup> and detect problematic patterns.<sup>310</sup> Professors Orna Rabinovich-Einy and Ethan Katsh have written glowingly about this use of data by ODR provider Matterhorn,<sup>311</sup> working with several state courts:

The data gathered and analyzed indicate that the availability of online proceedings where Matterhorn was used has been an important factor in improving access to justice, both by encouraging more parties to bring their case and by reducing the average processing time of all cases in courts

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306. See *supra* note 8; see also Erika Rickard & Amber Ivey, *Can Technology Help Modernize the Nation's Civil Courts?*, PEW CHARITABLE TR. (Mar. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/03/04/can-technology-help-modernize-the-nations-civil-courts> [<https://perma.cc/8P7C-G4XC>].

307. See *NCSC/Pew Charitable Trusts ODR Project Announcement*, NAT'L CTR. FOR TECH. & DISP. RESOL. (July 10, 2018), <http://odr.info/ncscpew-charitable-trusts-odr-project-announcement/> [<https://perma.cc/AU23-P26G>].

308. *Online Dispute Resolution Offers a New Way to Assess Local Courts*, PEW CHARITABLE TR. (Jan. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/factsheets/2019/01/online-dispute-resolution-offers-a-new-way-to-access-local-courts> [<https://perma.cc/4XVM-TYC4>].

309. Rabinovich-Einy & Katsh, *supra* note 302, at 198 ("Courts that have implemented Matterhorn collect and analyze data with great tenacity, evaluating such measures as cost savings, time frames, and impact on access to justice. In addition, studies have measured litigant perceptions of fairness and emotions towards online platforms.").

310. See *id.* at 192. Orna Rabinovich-Einy and Ethan Katsh described the data collected and used by British Columbia's CRT:

The CRT team constantly seeks feedback from both satisfied and unsatisfied users to improve the process, identify problems, and replicate successful elements. They collect data in a myriad of ways available only because of the CRT's online nature: active user input given through rating and ranking, open text boxes, ex-post feedback, and analysis of dispute resolution data. Indeed, CRT developers have devoted significant efforts and resources to the development and refinement of categorizations of claims and defenses in order to allow for meaningful use of the data. Such data helps to improve the CRT and the diagnosis phase, and, perhaps more importantly, helps prevent future claims.

As the CRT team has recognized, learning from data and prevention of problems need not be limited to the improvement of the system itself, but could be viewed as a broader goal of the legal system. As use of online systems expands and data is stored and studied more extensively by courts, they will be able to detect, through such indicators as spikes in particular claims, that there is a regulatory gap or a need for better enforcement of existing laws in certain areas. In this way, dispute resolution data collected in courts can be used to prevent future disputes from occurring.

*Id.*

311. Matterhorn was founded in 2013 at the University of Michigan School of Law by J. J. Prescott and one of his former students. *Id.* at 197.

employing Matterhorn. In these courts, Matterhorn cases and traditional cases were resolved in substantially less time. Research on litigant perceptions regarding the fairness of online proceedings in courts using Matterhorn has underscored the significance of procedural justice in this context and has generated important insights for the design of online courts. Such issues include the need for interpersonal cues from court officials or more interactive communication avenues to enhance perceptions of fairness in these proceedings.<sup>312</sup>

Of course, while ODR offers all of these data-related advantages, it also presents some of the same dangers that exist elsewhere in the online world, including the potential for security breaches,<sup>313</sup> victimization as a result of inaccurate information,<sup>314</sup> and unfairness as a result of biased algorithms.<sup>315</sup> Arguably, the presence of these dangers makes it even more important to ensure a certain degree of transparency and the ability to compare ODR's results to those of all other court-connected dispute resolution processes. This will be possible if and only if the case management system used for ODR is the same (and includes the same key data elements) as the system used for all other court-connected processes, including the dispute resolution processes of mediation, ENE, nonbinding arbitration, and settlement conferences (and perhaps even bench trials and jury trials).

When mediation was first institutionalized in the courts, numerous evaluation projects were conducted that ultimately supported its value. These projects were short-term, however, and mediation proponents failed to advocate for ongoing data collection, evaluation, and reporting. Who needed data when we knew that our motives were pure and our processes were good? As a result of this attitude, most of the information we have regarding court-connected mediation's implementation and effects is quite dated. The current enthusiasm for introducing and evaluating ODR represents a new opportunity to institutionalize the regular and ongoing collection and reporting of data regarding *all* court-connected dispute resolution.

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312. *Id.* at 198.

313. *See, e.g.*, Nick Clements, *Equifax's Enormous Data Breach Just Got Even Bigger*, FORBES (Mar. 5, 2018, 5:04 PM), <https://www.forbes.com/sites/nickclements/2018/03/05/equifaxs-enormous-data-breach-just-got-even-bigger> [<https://perma.cc/JM2Z-TZEH>]; Reuters, *Target Settles 2013 Hacked Customer Data Breach for \$18.5 Million*, NBC NEWS (May 24, 2017), <https://www.nbcnews.com/business/business-news/target-settles-2013-hacked-customer-data-breach-18-5-million-n764031> [<https://perma.cc/2NFL-N69C>].

314. *See, e.g.*, Aaron Klein, *The Real Problem with Credit Reports Is the Astounding Number of Errors*, CNBC (Sept. 27, 2017, 3:48 PM), <https://www.cnbc.com/2017/09/27/the-real-problem-with-credit-reports-is-the-astounding-number-of-errors-equifax-commentary.html> [<https://perma.cc/7LBW-QE9R>].

315. *See* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1257 (2008) (discussing the Terrorist Surveillance Program and warning that “[u]nsophisticated algorithms and faulty data [can] generate high rates of false positives that might serve as a basis for baseless, stigmatizing criminal investigations”); Raymond & Shackelford, *supra* note 270, at 522; Anjanette H. Raymond et al., *Building a Better HAL 9000: Algorithms, the Market, and the Need to Prevent the Engraining of Bias*, 15 NW. J. TECH. & INTELL. PROP. 215, 222–40 (2018) (including the discussion of predictive policing).

*C. The Legislative Branch: Public Policy Development and Accountability*

Thus far, this Article has considered the following incentives for courts' collection and publication of data regarding court-connected mediation and other dispute resolution processes: to gain or protect U.S. courts' reputation and market share, to demonstrate leadership in ensuring A2J, and to assure the quality of the "shiny new thing" that is ODR and enable its comparison to the other processes offered by the courts.

Probably, though, courts are most likely to collect and publish data regarding court-connected dispute resolution if legislatures require them to do so and provide the resources to make it happen. Notably, although some federal courts were experimenting with the use of mediation and other dispute resolution procedures before 1990, the processes were not institutionalized until Congress forced the issue with the CJRA and, later, the Alternative Dispute Resolution Act.<sup>316</sup> Legislatures have played similarly decisive roles in the institutionalization of mediation in various states, including Florida, Texas, and Minnesota. In each case, legislatures have focused on making courts more accessible, more effective, and more efficient.

There are indications that state legislatures are looking to the courts for more litigation-related data. Some of these requests for information have involved current public crises—for example, filings regarding access to guns and the opioid crisis. In a few instances, state legislators have asked courts for more information about the use and effects of court-connected mediation.<sup>317</sup> The courts have not been able to respond with the requested information. Why? Because they are not collecting that data and have no efficient means to search for it.

Risk avoidance can be a powerful incentive. Courts may be most motivated to develop their own approaches to the collection and publication of data in order to avoid the likelihood that Congress and state legislatures will fashion their own, potentially more intrusive, requirements for data collection and reporting.

If courts do not take the initiative, however, Congress and state legislatures should require courts to collect and report *at least* what the federal courts in the Northern and Central Districts of California currently report: the number of cases that are eligible for mediation (and other dispute resolution processes), the number that are referred, the number that actually mediate (or use another dispute resolution process), the number that settle, and the perceptions of the litigants.<sup>318</sup> Beyond this, however, and particularly in the interests of A2J, the courts *should* collect more detailed information regarding the outcomes achieved in court-connected mediation and other

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316. *See supra* Part I.A.

317. Such a question led to the 2016 report on the impact of the expedited action rules in Texas. *See supra* notes 215–21 and accompanying text; *see also* Volpe, *supra* note 239, at 206 (describing a legislator's question about the effectiveness of mediation and the lack of data available to answer the question).

318. *See supra* Parts II.A.1–2.

dispute resolution procedures and should report aggregated information. Where the volumes are large enough and the settlement terms are sufficiently standardized, the courts should also report demographic patterns.

#### CONCLUSION

This Article began by noting that its goals were simultaneously modest and ridiculously ambitious. At this point in the evolution of court-connected mediation, it is common sense that we should know how many cases are being referred to mediation, how many mediations are occurring, and how many dispositions result from mediation. We should also know, in the aggregate, what outcomes are produced by court-connected mediation and how participants (both lawyers and litigants) perceive the process and its outcomes. Beyond this, we should know how mediation compares to the range of dispute resolution processes provided by the courts—such as bench trials, jury trials, dispositive motions, nonbinding arbitration, judicial settlement conferences, etc. And, finally, we should know whether mediation and these other processes are providing A2J or facilitating injustice for certain segments of society.

At this point, what we *do* know is this: it is possible to collect and report data regarding the use and effects of court-connected mediation. The federal district courts in the Northern and Central Districts of California have proven that. The entire, very busy state of Florida collects and publishes most of this data. These court systems are leaders, models, and perhaps even provocateurs.

We also know, however, that most courts do not collect and report this information. It has not been done in the past. It requires resources. It is quantitative rather than qualitative. It brings transparency, and transparency can bring vulnerability.

And yet, the stars may be aligning in a way that will incentivize the collection and reporting of this data. Leading judicial organizations and funders are calling for it. Assessing A2J requires it. Private vendors of case management systems are signaling that they are ready to enable such collection. Consensus is developing regarding the data elements that should be collected. Frequent users of dispute resolution services are using data—i.e., governance-and-court-related metrics—to make important decisions about where to invest and resolve their disputes. Private dispute resolution organizations are beginning to make data available regarding their operations. ODR is creating the opening for data collection and the need for comparative analysis.

Dare we hope that the time has arrived for both data and transparency?