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Rule 16 and Alternative Dispute Resolution

Robert B. McKay*

I. Introduction

When the Federal Rules of Civil Procedure were adopted in 1938, the judicial function was widely regarded as one of neutrality between opposing advocates who carried the entire responsibility for fact development and argumentation. The role of the judge was that of referee to ensure that the combatants played according to the rules of the game. The judge was not viewed as a manager or even an active participant in the contest. Judges were, in brief, to be seen but not much heard—unless lawyers asked for assistance or overstepped bounds of propriety that were in any event not well defined. Professor Abram Chayes has well described the traditional legal process as

party-initiated and party-controlled. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.¹

As I shall suggest, that remains the vision still clung to by some of our most thoughtful contemporary scholars. Most of the profession, however, has moved on—some rejoicing and others traveling more reluctantly down the new path.

Some judges and some lawyers long ago recognized the need for change, and at least a few recognized Rule 16,² even before amendment,

* Professor of Law, New York University School of Law.

1 Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. R. 1281, 1283 (1976) (emphasis in original).

2 Prior to amendment, Rule 16 provided:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- 1) The simplification of the issues;
- 2) The necessity or desirability of amendments to the pleadings;
- 3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- 4) The limitation of the number of expert witnesses;
- 5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- 6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

FED. R. CIV. P. 16, 28 U.S.C. app. R. 16 (1982).

as the vehicle for change. Judge Harold Medina (when a mere youth of 76), wrote this:

In the heyday of Common Law Pleading, when each of the numerous technicalities involved provided the members of the bench and bar with a source of continual intellectual amusement and pleasure, the sporting theory of justice prevailed. . . . The development of pre-trial procedure and the formulation of Rule 16 . . . represents one of the great Twentieth Century contributions to the improvement of judicial administration and the furtherance of effective, timely justice.³

At that relatively early date, barely half way to the present half-century mark of the Rules, most of Judge Medina's colleagues did not share his views. While conversion is not yet complete, movement toward a more activist conception of the judicial role of case management is clearly the mood of the day.

Chief Judge Robert Peckham of the Northern District of California is one of the early advocates of the concept of judicial management. Rejecting the notion that judges are solely "dispensers of justice, weighing opposing evidence and legal arguments on their finely-calibrated scales to mete out awards and punishments," he noted that "[m]any judges will find the new emphasis on pretrial management techniques unfamiliar and uncomfortable. . . . But the task is not directed toward efficiency for its own sake. Justice itself requires speedy, smooth, and inexpensive disposition of cases. . . ."⁴

A. *The Contemporary Relevance of Judicial Management*

Development of the case for judicial management under the authority of Rule 16, particularly as amended in 1983,⁵ begins with two propositions that should be beyond dispute.

³ Clark v. Pennsylvania R.R., 328 F.2d 591, 594 (1964).

⁴ Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 771 (1981).

⁵ Rule 16, as amended in 1983, reads as follows:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

- 1) expediting the disposition of the action;
- 2) establishing early and continuing control so that the case will not be protracted because of lack of management;

- 3) discouraging wasteful pretrial activities;

- 4) improving the quality of the trial through more thorough preparation, and;

- 5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- 1) to join other parties and to amend the pleadings;

- 2) to file and hear motions; and

- 3) to complete discovery.

The scheduling order also may include

- 4) the date or dates for conferences before trial, a final pretrial conference, and trial;

and

- 5) any other matters appropriate in the circumstances of the case.

First: Pretrial is where the action is. Since an estimated 95 percent of all civil cases are settled before trial, it makes no sense to leave the pretrial process entirely in the parties' control. The Rules—and especially Rule 16—have rejected party control for 50 years, and the 1983 amendment to Rule 16 makes the point emphatically. The judge *does* have control.

Second: While some advocates of judicial management argue for judicial intervention as a means of gaining control over crowded dockets, that point, relevant though it surely is, does not reach the main issue. Central to the need for early and firm judicial management is the concern for justice, including efficiency as justice.

The above propositions take on special meaning in the contemporary world of law, which is no longer as comfortable and relaxed as once

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

- 1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
- 2) the necessity or desirability of amendments to the pleadings;
- 3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- 4) the avoidance of unnecessary proof and of cumulative evidence;
- 5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
- 6) the advisability of referring matters to a magistrate or master;
- 7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;
- 8) the form and substance of the pretrial order;
- 9) the disposition of pending motions;
- 10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by a least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

it was. The once well understood role of lawyers and judges has changed drastically. Although I do not rely principally on the escalation in the volume and the increased complexity of federal litigation, the mounting burden on each federal judge is now so well known that it scarcely needs reiteration. For a variety of reasons federal courts remain the commonly preferred forum when choice is possible, as demonstrated by the continuing reluctance of the bar to eliminate diversity jurisdiction. Factors that have led to the surge in federal filings include the following:

- a) A vast increase in habeas corpus filings.
- b) Recently available civil rights and public interest remedies, including fee-shifting authorization.
- c) The proliferation of administrative agencies and enlarged rule making.
- d) Changed notions of justiciability.
- e) Provisions for representation of the poor as well as the well-to-do.
- f) A threefold increase in the number of lawyers in less than three decades, thus vastly enlarging the system's capacity to handle the increased volume of claims.

We have all become familiar with the complaints about the burden on the courts, expressed annually by Chief Justice Warren Burger during his 17-year tenure as Chief Justice of the Supreme Court of the United States. He is joined in that expression of concern by a mighty chorus, including present members of the Supreme Court, probably all court of appeals chief judges, and specifically by such thoughtful judges as Richard Posner of the Seventh Circuit and Harry Edwards of the District of Columbia Circuit.⁶ Academic critics have joined the fray as well, led by Harvard's President Derek Bok who has not only complained about the volume of litigation, but who has argued forcefully as well that the system has its priorities wrong.⁷

Whatever the reasons, the ineluctable fact is that crowded dockets inevitably lead to delay and sometimes desperate efforts to deal with the problem. These efforts have in general not succeeded in effecting any basic solution to the still swelling tide of new cases. But even that is not the central point. The proper question should be this: Does the judicial system deliver the best brand of justice that we know how to offer? There is considerable evidence that the truthful answer must be negative.

As acute an observer as Judge Jon Newman of the Second Circuit argues forcefully that reformers interested in a fair judicial system cannot look solely at "fairness" to the litigants in each individual case. Rather, he contends, they must balance the individual litigant's interest in fairness with that shared by all other current and potential litigants.⁸

Even if one shrinks from that newer sense of collective versus individual justice, the system remains obligated to review the process by

⁶ Posner, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution; Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986).

⁷ D. BOK, REPORT TO THE HARVARD BOARD OF OVERSEERS (1983).

⁸ Newman, *Rethinking Fairness: Reflections on the Litigation Process*, 40 THE RECORD 12 (1985).

which disputes are resolved in order to determine which process best meets the needs of litigants in each dispute.

The critics⁹ of alternative dispute resolution (ADR) misunderstand its objectives and potential utility in three respects:

First, the critics of ADR (if for the moment I may aggregate individuals with somewhat differing views) tend to accept the view that nearly all disputes are best resolved in court or at least under the shelter of the judicial process. They are surely not wrong in believing that many disputes are best resolved through the courts; but they fail to recognize that many other disputes can be resolved more expeditiously, less expensively and with greater satisfaction to the disputants through procedures outside the courts.

Second, the term "alternative dispute resolution" is commonly misunderstood to embrace a system parallel to, but separate from the judicial system, almost as a rival system competing for dispute resolution business. The fault may be with the term itself: *Alternative* dispute resolution suggests an entirely out-of-court system. But that is far from true. While arbitration and mediation, for example, may be initiated and completed outside the judicial framework, some of the most promising devices, such as court-annexed arbitration, summary jury trial, and the various processes of judge-assisted settlement, are all ADR processes within the judicial system. The issue thus is not competition between courts and ADR, but rather what process of dispute resolution is best for each individual dispute.

Third, the critics often misconceive the objectives of ADR, believing that its advocates seek indiscriminate elimination of all or most disputes from the courts, regardless of their nature. Thus, when Judge Posner recommends an empirical study by random sample to determine appropriateness for regular court process or for ADR, the suggestion misses the point. Only *some* cases deserve special judicial attention to remove them from the regular court docket for summary jury trial or other form of court-related ADR.

B. *Rule 16 and the Role of the Judge*

For 45 years, from 1938 to 1983, Rule 16 was like a sleeping giant. The original language offered the judge an opportunity to control the pretrial conference and the pretrial order, confirming in what seemed unmistakable terms the judge's discretion to order the parties to appear for a conference to consider (1) simplification of issues; (2) amendments to pleadings; (3) admissions of fact and documents; (4) limitation on expert witnesses; (5) advisability of reference of some issues to a master; and (6) "such other matters as may aid in the disposition of the matter."

Some judges, again notably Judge Peckham,¹⁰ read Rule 16 broadly and encouraged amplification by local rules as permitted by Rule 83.

9 Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Posner, *supra* note 6; Resnik, *Failing Faith, Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

10 Peckham, *supra* note 4.

Rule 16 itself, however, was silent in its original form about the judicial role in settlement or as to sanctions by way of enforcement; and it is fair to say that most judges declined to accept the proffered weapon.

Rule 16 was amended in 1983 to make specific what had probably been intended from the beginning—that the trial judge was indeed the ruler, not only of the pretrial conference, but of the entire pretrial process. Consider the language:

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating the settlement of the case.¹¹

To be sure, Rule 16 amendments do not stand alone in the search for expedited justice. Although the objectives of economy, efficiency and justice may not always have been perfectly achieved by the various devices in the Rules, unquestionably those were the aims of enlarged discovery (and its various modifications), class action, Rule 11 (particularly as amended in 1983), Rule 68,¹² and the Manual for Complex Litigation.

Fortunately, there are more efficient, and more just ways of accomplishing these results. Now I speak specifically of ADR—settlement of *some kinds* of disputes earlier and with greater party satisfaction than would have been the case if those disputes had been allowed to run the course of adversary combat.

C. *The Decade of ADR*

Then. As the decade of the 1980s draws toward its close, it has been called all sorts of things—good and bad. For our purposes I rechristen the 1980s as the decade of ADR. In the early years of the decade there were a few voices that spoke in support of the potentiality of ADR in the courts, such as Judge Robert Peckham of the Northern District of California and Judge Thomas Lambros¹³ of the Northern District of Ohio. Most, however, remained as before in the old mold of the relatively pas-

¹¹ FED. R. CIV. P. 16. For the full text, see *supra* note 5.

¹² The Supreme Court of the United States has interpreted Rule 68 in a way that suggests the intensity of that Court's commitment to negotiated settlement, even though the result imposes a severe burden on public interest advocates. See *Marek v. Chesney*, 473 U.S. 1 (1985). See also *Evans v. Jeff D.*, 475 U.S. 717 (1986) (interpreting the Civil Rights Attorney's Fees Awards Act of 1976 to permit a defendant to negotiate a settlement with a plaintiff that excludes attorney fees, even in public interest litigation).

¹³ Peckham, *supra* note 4; Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); McThenia & Shaffer, *For Reconciliation*, 93 YALE L. J. 1073 (1984). See also CENTER FOR PUBLIC RESOURCES, *ADR AND THE COURTS: A MANUAL FOR JUDGES* (1987) [hereinafter *ADR AND THE COURTS*]. Two casebooks, now widely used in American law schools for the teaching of ADR, have been published since 1985: S. GOLDBERG, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* (1985); L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987).

sive judge. Indeed, to describe a federal judge as a "settlement" judge was a term of some opprobrium.

Before the 1980s, ADR was not taught to any significant extent in the law schools, except in an occasional course in arbitration, which itself relied on the adversarial model, although outside the court. References to interviewing, counseling, and even mediation were rare, even though advocacy skills programs should logically have included training in these basic lawyering skills (as they increasingly do now).

The first suggestion of a possible change in direction came even before the 1980s, although the significance of this aspect of the Roscoe Pound Conference¹⁴ made little immediate impact on the federal courts in 1976, the year of the Conference, or in the immediately succeeding years. Professor Frank Sander of the Harvard Law School introduced at that Conference the concept of the "multi-door courthouse" as a place where any individual could be directed to the proper "door" for an answer to inquiries, complaints, and how best to resolve disputes.¹⁵ Not surprisingly, some of the most important "doors" opened to the courts, where resolution of disputes could best be administered through the judicial process. Other "doors," however, opened into administrative agencies, mediation services, or what came to be known as neighborhood justice centers.¹⁶

And Now. As previously reported, Rule 16 was amended in 1983 with the unmistakable purpose of encouraging ADR as a significant part of the judicial process. By the mid- and late-1980s, a number of organizations provided information and offered services for those interested in the now fast-growing field of ADR. For example:

1. The American Arbitration Association now emphasizes mediation as well as its staple services for arbitration.¹⁷
2. The American Bar Association created a Standing Committee on Dispute Resolution (currently chaired by Professor Frank Sander).¹⁸ State and local bar associations have responded similarly. For example, the Association of the Bar of the City of New York changed the name of its Committee on Arbitration to the Committee on Arbitration and Alternative Dispute Resolution.

¹⁴ The formal title was the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (taken from the title of Roscoe Pound's address to the American Bar Association in 1906, 29 A.B.A. Rep. 395 (1906)). The 1976 Conference was jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association. For the report of the Conference, see 70 F.R.D. 83 (1976).

¹⁵ Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

¹⁶ Neighborhood Justice Centers operate in more than 200 communities across the nation. In New York State alone the Community Dispute Resolution Centers Program operates in all except four counties, sometimes at multiple locations within an urban area. See the 1985-1986 Annual Report of Thomas F. Christian, Director of the Community Dispute Resolution Centers Program (1986). For an inventory of Neighborhood Justice Centers (as of 1983), see AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, DISPUTE RESOLUTION DIRECTORY (1983).

¹⁷ The American Arbitration Association briefly considered adding Mediation to its name.

¹⁸ In addition, a number of the divisions, sections, and other units of the ABA have their own committees or subcommittees on the subject of ADR. See also ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES (1987), a valuable publication of the Standing Committee.

3. The Center for Public Resources, newly created in the 1980s, now has as members almost half of the "Fortune 500" corporations, many of the most prominent law firms, and a number of individual academics.¹⁹
4. The Institute for Civil Justice of the Rand Institute researches issues surrounding the growing volume of tort litigation, with special emphasis on product liability suits.²⁰
5. The Program on Negotiation, a joint project of Harvard University, Massachusetts Institute of Technology and Tufts University, has an ongoing research and publication effort.²¹
6. The Association of American Law Schools has established a Committee on Alternative Dispute Resolution, in response to the growing interest among member law schools in sharing information on how best to meet the teaching and research needs in this field.²²
7. Organizations concerned with judicial administration and judicial education have taken cognizance of ADR in developing their training and outreach programs. These developments have occurred at the National Center for State Courts (and its affiliate, the Institute for Court Management), the Federal Judicial Center, the Institute of Judicial Administration, the Federal Judicial Center, and the National Judicial College, as well as in state judicial education programs.²³
8. Various organizations have been created to provide information to the growing network of individuals and groups interested in ADR (e.g., Society of Professionals in Dispute Resolution — SPIDR); to promote research into the issues and practices of ADR (e.g., National Institute for Dispute Resolution); and to provide direct service to organizations and individuals who wish to engage in ADR (e.g., EnDispute).²⁴
9. In industries that have been overwhelmed by product liability litigation, sometimes to the point of corporate bankruptcy, as in the case of asbestos and the Dalkon Shield, "facilities" have been established to deal with the tens or hundreds of thousands of claims.²⁵

19 As part of the Center for Public Resources, the CPR Legal Program was established in 1979. Its membership includes more than 300 general counsel of major companies, law firm practitioners and legal scholars. Its mission is to promote "alternatives to the high costs of litigation facing business and public institutions Through the Judicial Project, innovative judicial practices have become an equally important part of the Legal Program agenda." *Preface to ADR AND THE COURTS*, *supra* note 13, at 1.

20 Illustrative titles from the more than 50 monographs published by the Institute for Civil Justice through 1987 include the following: ADLER, FELSTINER, HENSLER & PETERSON, *THE PACE OF LITIGATION* (1982); EBENER, *COURT EFFORTS TO REDUCE PRETRIAL DELAY* (1981); EBENER & BETANCOURT, *COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE* (1985); PETERSON, *NEW TOOLS FOR REDUCING CIVIL LITIGATION EXPENSES* (1983); PRIEST & KLEIN, *THE SELECTION OF DISPUTES FOR LITIGATION* (1984).

21 *Negotiation Journal* is the quarterly publication of the Program on Negotiation.

22 More than half the law schools accredited by the American Bar Association offer one or more courses in ADR.

23 See, e.g., FEDERAL JUDICIAL CENTER, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* (1986).

24 SPIDR's publication for its members is *SPIDR News*; the National Institute for Dispute Resolution (NIDR) promotes law school training in ADR; and EnDispute is one of the several organizations that offer ADR services to disputants who agree to such assistance.

25 The bankruptcy order for the Manville Corporation, for example, provides for the creation and financing of two facilities, one for the settlement of the tens of thousands of personal injury claims and one for the estimated one to two hundred thousand property damage claims. Although structures are in place for both facilities, they do not become operational until the order receives final judicial approval. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988), *cert. denied sub nom. MacArthur Co. v. Johns-Manville Corp.*, 109 S. Ct. 176 (1988).

II. ADR in the Federal Courts

The still-growing volume of cases in the federal courts is well known. Less well understood is the fact that the burden of case disposition would have been substantially greater if ADR had not already made substantial inroads on that caseload. For example, many of the asbestos-related and Dalkon Shield cases would have required individual adjudication if they had not been successfully shifted into out-of-court forums where they could be more inexpensively and expeditiously processed.²⁶

Alternative dispute resolution takes many forms in the federal courts, as identified in the following discussion:

Settlement²⁷ is often thought of as party-initiated and negotiated, as it most often is and should be. In addition to the cases that settle voluntarily, judges can often identify cases that would and should settle but for the intransigence of one or both parties or their counsel. It is by now familiar practice, particularly in state courts, to bring in an experienced "settlement" judge, or even a team of judges, to reduce a backlog by encouraging settlement of over-age cases. As federal judges become more comfortable with their out-of-court role in dispute resolution, they are likely to find, as others have, considerable personal satisfaction and the gratitude of litigants for expedited resolution of what might have been protracted litigation. This is not to suggest that parties should in any way be pressured to settle; the purpose is to persuade as to the advantages of an agreed disposition. The most important aid a judge can have in this effort to persuade is a clear docket so that litigants reluctant to settle can be offered an early trial. It is well known that most cases settle "at the courthouse door." If the courthouse door can be opened months or years before it would otherwise have swung open, early settlement is likely to be induced.

A. *Magistrates and Masters*

There is nothing new about the use of magistrates to facilitate case disposition in federal courts, except that federal judges are increasingly referring issues—and whole cases—to magistrates for the performance of some of the tasks allocated to judges under Rule 16 and elsewhere. Similarly, federal judges are increasingly appointing special masters to perform important tasks in complex cases. Magistrate Wayne Brazil has identified the benefits and risks:²⁸

First, in recent years it has been repeatedly demonstrated that special masters can bring significant skills to complex litigation that threat-

²⁶ Although processed out of court in the instances of *Manville* and *A.H. Robins*, the bankruptcy court continues to exercise supervisory jurisdiction.

²⁷ Although the present discussion of settlement relates to civil cases, a similar analysis applies to settlement negotiation in criminal matters, more commonly known as plea bargaining. While the judge is not likely to be an active participant in plea bargaining negotiations, there is no reason for a judge to discourage discussion of that topic between prosecution and defense.

²⁸ Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394, 410-12, 417-23 (1986).

ens to overwhelm particular courts, or even whole systems. There is now a rich literature of success.²⁹

Second, to be sure, there are correlative dangers. The use of masters may fundamentally alter the judicial process in troublesome ways by making adjudication too informal, removing it from public scrutiny, and encouraging judges to rely on masters to a degree not compatible with the appropriate exercise of judicial functions.

Third, the task, surely not impossible, is to find the middle way that frees individual judges from mind-boggling detail and thus allows them to focus on the issues of judgment that are their proper assignment. The Manual on Complex Litigation is helpful in this regard. Moreover, it has now been demonstrated in such situations as the Kansas City Hyatt skywalk collapse,³⁰ that federal and state courts can successfully cooperate to solve jurisdictional problems that might otherwise develop into an unseemly display of federalism at war with itself.³¹

B. *Mediation*

Although federal judges should not themselves function as mediators in cases which they might later try, they can employ available resources to serve a mediating function. For example:

First, Judge Marvin Aspen of the Northern District of Illinois recommends the use of special masters for highly technical matters on complex issues where the judge may ultimately try the case, and so prefers not to be engaged in negotiations that might lead to settlement of some or all issues. He cites an 80 percent success rate and reports examples.³²

Second, in what has been called "Michigan Mediation," Judge Richard Enslin of the Western District of Michigan engages private lawyers to act as mediators, who make an evaluation of each case which they are requested to hear. Regular trials are available to any party dissatisfied with the evaluation, but sanctions are invoked against those making such demands. This procedure is supported by local rule,³³ which permits initiation of the process by one party, both parties, or by order of the judge.

Third, a local rule in the Western District of Washington provides for a mediation program that is managed almost entirely by the private bar, although on order of the court, usually with consent of the parties. The parties may select the mediator from a list of volunteer attorneys or, in case of disagreement, the judge makes the selection. It is reported that all judges in the district support the plan and that the local bar is enthusiastic.³⁴

²⁹ See Brazil, *supra* note 28, for citation to the principal sources.

³⁰ Eighteen cases were filed in federal courts and 187 in state courts against a total of about 25 defendants. The story of the settlement of all claims within 18 months (surely a record for that kind of disaster) is reported in 3 ALTERNATIVES TO THE HIGH COST OF LITIGATION 5 (Sept. 1985).

³¹ In 1987, the American Bar Association established a Mass Torts Commission to consider the various problems involved in a single accident with multiple victims and product liability issues involving numerous victims over an extended period of time.

³² See *Special Masters as Mediators*, in ADR AND THE COURTS, *supra* note 13, at 225.

³³ *Michigan Mediation*, in ADR AND THE COURTS, *supra* note 13, at 57.

³⁴ *Volunteer Attorney Mediation in Washington*, in ADR AND THE COURTS, *supra* note 13, at 119.

4. Judge Patrick F. Kelly of the District of Kansas reports success with a settlement conference program. The local rule authorizes the trial judge to assign any civil case to any other trial judge, to a magistrate or, with consent of the parties, to an attorney or panel of attorneys for a settlement conference. It is reported that attorneys are used as mediators in about one third of the cases.³⁵

C. *Court-Annexed Arbitration*

The title is a misnomer since the procedure is neither voluntary nor binding, as would be the case with true arbitration. Nevertheless, unlike the mediation processes discussed above, in court-annexed arbitration programs the "arbitrator" renders a "judgment." If the parties accept the arbitration decision, it is entered as the order of the court. If either party objects, trial de novo is ordered, although if the objecting party does not equal or improve his/her position in the ensuing trial, sanctions are assessed, presumably for unnecessarily imposing on court time. Court-annexed arbitration was first employed in Pennsylvania state courts in 1952, where its scope has since been enlarged. It is now in use in at least 18 states and 10 federal district courts.³⁶

D. *Summary Jury Trial*

Judge Thomas D. Lambros of the Northern District of Ohio is a principal spokesperson for the summary jury trial, which is gaining adherents in other jurisdictions.³⁷ Although there is some variation in aspects of the summary trial among judges and in the conduct of summary jury trials even by a single judge, the essential features are these:

First, the summary jury trial should be considered only when a case is otherwise ready for trial.

Second, the trial judge should be convinced that it is a case that should settle, but might be long and costly to try.

Third, a six-person jury should be selected by standard procedures from the regular jury panel.

Fourth, a summary jury trial should ordinarily be scheduled for less than a day, although trials as long as eight days have been recorded.

Fifth, jurors are usually not advised that the case may not involve a final judgment until after their decision is made.

Sixth, ordinarily, representatives of each party with decision-making authority are expected to be present to hear testimony and to assess the advisability of adhering to the jury's determination.

Questions remain. Must the parties consent before a summary jury trial is ordered? In *Matter of Strandell v. Jackson County, Illinois*,³⁸ the Seventh Circuit has answered in the affirmative, but trial judges in other cir-

³⁵ *Mediation: A Settlement Conference Format That Works*, in *ADR AND THE COURTS*, *supra* note 13, at 133.

³⁶ Hensler, *What We Know and Don't Know about Court Administered Arbitration*, 69 *JUDICATURE* 270 (1986).

³⁷ See Lambros, *supra* note 13, and *Summary Jury Trial: A Flexible Settlement Alternative*, in *ADR AND THE COURTS*, *supra* note 13, at 79.

³⁸ 838 F.2d 884 (7th Cir. 1988).

cuits have sometimes ordered summary jury trials without seeking consent. If judges are truly independent managers, as here suggested, consent does not seem essential so long as the right of trial de novo is preserved. Comparisons with court-annexed arbitration, with which there is long experience, and with court-ordered mediation, suggest an absence of a need for consent when the objective involves a reasonable expectation of reduced cost and delay.

III. Conclusion

Alternative dispute resolution is here to stay. As Francis McGovern observed, "The managerial horse is out of the judicial barn."³⁹ The question is how best to employ its advantages of flexibility, economy and superior resolution of disputes in *some kinds of cases*. As I have sought to demonstrate, there is no single way; courts are still in the early stages of experimentation to learn how best to use this multi-faceted technique.

If you share my view that not every case that does not voluntarily settle should proceed inexorably to trial, and if you share my faith in the quality of the federal judiciary, I submit that you should join in celebration of Rule 16 and encourage further testing of the validity and workability of its premises.

³⁹ McGovern, *supra* note 13.