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NOTE: MANDATORY MEDIATION AND **SUMMARY JURY TRIAL:** GUIDELINES FOR ENSURING FAIR AND EFFECTIVE PROCESSES.

LEXISNEXIS SUMMARY:

... Finally, because these consensual processes do not include the procedural protections involved in traditional adjudication, mandatory mediation and SJT legislation must include safeguards ensuring that these processes are fair and effective. ... Although initially statutes authorized mandatory ADR only for certain categories of disputes, a few states have enacted legislation permitting courts to mandate pretrial arbitration, mediation, and SJT according to judges' informed discretion. ... Furthermore, even when mandatory mediation and SJT require more public expenditure, forcing taxpayers to pay for the amicable resolution of disputes is justified, especially in view of the more subtle, but equally important advantages of these consensual processes -- speedier discovery and dispute resolution, and increased party autonomy. ... Although courts have yet to impose sanctions for failure to participate in mediation and SJT, some courts have imposed sanctions for lack of meaningful participation in the analogous context of court-annexed arbitration. ... In addition to implementing safeguards, courts and legislatures must ensure that the confidentiality guaranteed to parties engaged in consensual ADR does not exacerbate the likelihood of coercion. ... In addition, mandatory mediation and SJT legislation should control the conduct of mediators once they have entered the profession by establishing both an ethical code and professional standards. ... However, in exceptional circumstances, where neutral decisionmakers believe that settlement will only occur in a longer time-frame or where the complexity of the case requires more extensive proceedings, legislatures should allow neutral decisionmakers to extend the length of the proceedings to a week or more, subject to party agreement.

TEXT:

[*1086] In recent years, as adjudication has become more time-consuming and expensive, many courts and legislatures have begun to mandate the use of alternative dispute resolution (ADR) methods. Mandatory ADR occurs when courts or legislatures require parties to engage in pretrial arbitration, [n1] mediation, [n2] or summary jury trial (SJT). [n3] Although courts generally have found mandatory ADR both constitutional and practicable, some appeals courts have held that judges do not have the authority to order mediation and SJT without explicit statutory or local-rule authority. [n4] Judicial confusion over ADR has resulted in inconsistent case law and unclear standards specifying whether, and under what circumstances, courts may order ADR as well as the procedural protections necessary to ensure a fair and effective system. In addition, the underuse of these processes has caused parties to litigate in an adversarial fashion when more consensus-based methods of dispute resolution would better resolve the parties' underlying differences.

This Note argues that Congress and state legislatures should enact statutes enabling courts to mandate participation in consensus-based ADR more frequently, particularly in cases where protection of the parties' future relationship is essential. Part I examines the background and purposes of compulsory ADR, as well as the authority of judges to order these processes. Part II argues that legislatures should authorize courts to mandate mediation and SJT because initial compulsion offers the best way to integrate these important alternative frameworks for resolving disputes into the judicial system. Finally, Part III sets out a model for ensuring the fairness and effectiveness of mandatory mediation

and SJT.

I. MANDATORY ADR

A. Background and Purpose

Beginning in the early 1970's and continuing through the 1980's as dissatisfaction with the judicial system mounted, state legislatures **[*1087]** began to seek alternative methods of resolving legal disputes. [n5] A growing backlog in court dockets, which created delays that dramatically increased litigation expenses, [n6] prompted this effort. The legislatures adopted statutes that encouraged private ADR in some cases [n7] and mandated it in others. [n8]

Currently, ADR encompasses both private [n9] and court-annexed [n10] methods of dispute resolution. Although private ADR is always voluntary, court-annexed ADR can be either voluntary [n11] or mandatory. [n12] Voluntary ADR can be binding and thus a complete substitute for litigation; in contrast, mandatory ADR is only a precondition to litigation. Under the mandatory system, dissatisfied parties can refuse to settle following mediation or SJT, or they can request a de novo trial following arbitration, and thus preserve their rights to litigate in a traditional forum. [n13]

To date, there are three main types of mandatory ADR: nonbinding court-annexed arbitration, mediation, and SJT. [n14] Adversarial in **[*1088]** nature, arbitration most resembles traditional litigation. Attorneys usually make presentations to one or three neutral decisionmakers, [n15] who determine a winning party and make an award. The award is binding unless one of the parties opts for a de novo trial. [n16] In order to discourage frivolous de novo trial requests, court-ordered arbitration systems typically impose sanctions on parties who request de novo trials and fail to improve their results. [n17]

In contrast to the adversarial process of arbitration, the consensual processes of mediation and SJT give third parties no decisionmaking authority and can resolve disputes only through mutual agreement of the parties. The recent increased use of these ADR processes reflects a belief among courts and legislatures that some disputes are better resolved through a consensual process, rather than an adversarial one such as litigation or arbitration. [n18] In mediation, a third party holds a series of joint sessions and separate caucuses with the prospective litigants in an effort to facilitate agreement. [n19] The mediator seeks to improve communication between the parties, identify issues, expand the range of possible solutions, and inspire consensual resolutions with which the parties are likely to comply. [n20] A voluntary decision to settle binds the parties. [n21]

[*1089] Although also cooperative, SJT employs a "mini-jury trial" in which, after jointly drafting a protocol or set of procedures, the lawyers present their cases to a mock jury for a nonbinding verdict. [n22] After observing the trial, principals with settlement authority seek agreement. Parties who settle are bound. [n23] Those who do not may seek redress in court. [n24]

B. Courts' Power To Mandate ADR

Although the Constitution does not forbid ADR, [n25] the source of courts' authority to require ADR has been neither uniform nor clear. Some courts have grounded such power in the trial court's inherent authority to manage its docket and rule 16 of the Federal Rules of Civil Procedure (FRCP). [n26] Other courts, in rejecting such inherent or FRCP authority, have suggested that courts need explicit statutory **[*1090]** authorization or a local rule to mandate ADR. [n27] For instance, in *Department of Transportation v. City of Atlanta*, [n28] the Supreme Court of Georgia held that a trial court did not have the power to order mediation. Although acknowledging the efficiency of pretrial mediation, the court concluded that the trial court could not compel the parties to "resolve their differences" through this process. [n29] Similarly, in *Strandell v. Jackson County*, [n30] the Seventh Circuit invalidated a court-ordered SJT on the ground that neither the court's inherent authority nor FRCP 16 authorized courts to require ADR. [n31] Soon after the *Strandell* decision, however, district courts in three other circuits expressly rejected the Seventh Circuit's analysis and enforced court-ordered SJTs as authorized by FRCP 16. [n32]

Recent state legislation has provided a more firm basis for courts to mandate ADR. Although initially statutes authorized mandatory ADR only for certain categories of disputes, [n33] a few states have enacted legislation permitting courts to mandate pretrial arbitration, mediation, and SJT according to judges' informed discretion. [n34]

II. MANDATORY MEDIATION AND SJT

Although many states have had considerable experience with mandatory arbitration, [n35] several states recently have passed statutes enabling courts to order mediation and SJT when judges determine that **[*1091]** the parties would benefit more from these consensual processes than from adjudication. For example, Texas and Minnesota enacted legislation allowing judges to order litigants to participate in various forms of nonbinding ADR, and Florida and Oklahoma passed similar statutes applying only to arbitration and mediation. [n36] This Part argues that more states should adopt mandatory mediation and SJT statutes and discusses several significant advantages of such laws. [n37]

First, by fostering mutual agreement, mediation and SJT [n38] preserve or enhance relations between parties. [n39] Although the adversarial system ensures legal resolution of disputes, its confrontational nature may not allow parties to resolve their underlying differences and often leaves their relationships permanently scarred. [n40] Such an outcome may be inevitable for many deep-seated conflicts, but parties often can resolve their disputes on a more amicable basis. Thus, parties who must or wish to interact on a regular basis in the future benefit greatly from consensual conflict resolution.

In landlord-tenant or custody disputes, for example, parties may be more interested in cooperative resolutions of disputes over rent or visitation than in legal or equitable remedies. Likewise, in a conflict between a manufacturer and distributor over a mutually profitable but defective product, the parties may be concerned less with assessing blame than with improving the product and safeguarding relations. When parties must preserve their future relations, consensual ADR is more appropriate than adjudication in resolving disputes. Although traditional settlement negotiations allow many cases to avoid detrimental adjudication, [n41] other cases require the participation of a neutral third party to spur settlement by overcoming difficulties such as a lack of effective communication, different assessments of information, different attitudes toward risk, or constituency pressures. [n42]

[*1092] Second, mediation and SJT allow parties to engage in integrative bargaining. [n43] In contrast to the adversarial system, which selects one party as the "winner" and the other as the "loser," [n44] consensus-based ADR allows both parties to view themselves as winners. [n45] In both mediation and SJT, parties, with or without the aid of a neutral party, invent options for mutual gain by making concessions on issues that they discount in order to gain ground on issues they view as most important. [n46] In so doing, parties often reach a mutually beneficial solution. [n47] The integrative bargaining that consensual ADR promotes allows parties to discover creative solutions [n48] that they might never have considered in litigation.

Third, consensual ADR increases party autonomy; the parties have more input into the process [n49] and fashion their own remedies. [n50] They can conduct mediation and the settlement negotiations in SJT without lawyers and thus control dispute resolution more directly. [n51] Even with lawyers, the parties play a larger role in mediation and SJT than in arbitration or adjudication. [n52] Moreover, by teaching the parties about the dispute resolution mechanisms as well as the dispute, these consensual processes encourage more cooperative relations in the future. [n53] Finally, empirical studies indicate that parties to mediation and SJT will more likely abide by results secured by mutual agreement. [n54]

In addition to these three individual-level benefits, consensual ADR offers several systemic advantages. When courts provide consensual alternatives for certain categories of disputes, they reduce the **[*1093]** length of conflicts, prevent unnecessary adjudication, and hasten the disposition of other cases that require adversarial resolution. [n55]

Although mediation and SJT are beneficial for a certain category of cases, parties, attorneys, and judges have underused these processes. Many parties do not engage in consensual ADR because of lack of familiarity with or skepticism about the process. [n56] Other parties believe that court adjudication is strategically advantageous or a

superior mode of dispute resolution. [n57] In addition, lawyers may discourage ADR in order to protect their sizeable fees for lengthy trials, or their control over both the dispute settlement process and their clients. [n58] Moreover, some judges may not encourage ADR because they believe that courts should adjudicate rather than manage litigation. [n59]

In the face of resistance to ADR, some legislatures and courts have begun to compel these pretrial processes; they contend that ADR benefits litigants and the administration of justice. [n60] Mandatory mediation and SJT force parties to try consensual ADR, and, in doing so, legitimate these processes as equal to public adjudication and court-annexed arbitration. Furthermore, compelling these processes broadens societal attitudes about the potential for consensual dispute resolution. [n61]

Empirical studies have suggested that most parties involved in mandatory mediation express greater satisfaction than do those involved in adjudication. [n62] Parties often do not desire the full-blown procedural due process model that the judicial system provides. [n63] Furthermore, **[*1094]** cases ordered to mediation settle at about the same rate as those voluntarily mediated, which indicates that compulsion does not impede the effectiveness of these processes. [n64] Thus, courts and legislatures have begun to change litigants' attitudes toward appropriate mechanisms of dispute resolution. Legislatures should continue this process by authorizing courts to order cases to pretrial mediation and SJT.

Although commentators have noted several shortcomings of ADR, many of these concerns seem misplaced or overstated. First, when courts and legislatures compel parties to undertake pretrial mediation and SJT, they do not interfere with parties' rights because parties retain the right to litigate in court. As courts long have recognized, such a requirement usually only delays, rather than terminates, the exercise of constitutional rights. [n65] Moreover, although requiring parties to resolve their disputes through a consensual process may appear paternalistic, courts traditionally have justified a variety of mandatory processes as in the parties' best interests. [n66] For example, courts have ordered parties to attend pretrial settlement conferences because they believe forced discussion of various options may encourage parties to settle, and thus to avoid unnecessary trials. [n67] In addition, numerous courts and legislatures have mandated arbitration in order to promote less costly and more efficient methods of resolving disputes. [n68]

Systemic critiques of mandatory mediation and SJT are more prolematic than individual-level attacks. Some commentators have argued that, if ADR does not increase the percentage of cases that settle, it will augment public expenditure by adding yet another layer of procedure onto the civil justice system. [n69] However, because public monies fund pretrial motions in cases that eventually settle through traditional conferences, [n70] early assignment to ADR will not necessarily **[*1095]** increase settlement costs. Furthermore, even when mandatory mediation and SJT require more public expenditure, forcing taxpayers to pay for the amicable resolution of disputes is justified, especially in view of the more subtle, but equally important advantages of these consensual processes -- speedier discovery and dispute resolution, [n71] and increased party autonomy. Moreover, because consensual ADR addresses and resolves the underlying conflicts and hostilities more effectively than traditional litigation and settlement, it can fundamentally transform relations between parties. In addition, the combination of mandatory mediation and SJT with arbitration and adjudication promotes a more sophisticated conception of social interactions that emphasizes the importance of cooperation and consensus, as well as confrontation. Thus, although court-ordered mediation and SJT may in the short term increase public costs for cases that would often settle, they promote more valuable long-term changes in the civil justice system.

In sum, voluntary mediation and SJT have been underused in spite of their individual-level and systemic benefits. Congress and state legislatures should enable courts to mandate these processes on a widespread basis.

III. ASSURING THAT MANDATORY MEDIATION AND SJT ARE FAIR AND EFFECTIVE

Legislatures should enact statutes to secure the advantages of mediation and SJT that enable courts to require parties to participate in such processes. In order to ensure that pretrial ADR is both fair and effective, however, this Part argues that the enabling legislation must satisfy four criteria. First, such statutes must require the presence of not only lawyers but also clients who are willing to participate in a meaningful fashion. Second, they must ensure the fairness of

results through procedural protections that prevent informal coercion, provide adequate supervision of confidential proceedings, and uphold the quality of the processes. Third, although efficiency is not the major goal of mediation and SJT, these statutes should not significantly delay trial. Finally, statutes should provide mechanisms for screening out those cases that require adversarial dispute resolution.

A. Attendance and Meaningful Participation

Although legislatures have begun to mandate ADR, they have not specified adequately the necessary level of party involvement in the **[*1096]** proceedings. Because settlement depends upon mutual agreement, the success of the cooperative process requires both the presence and meaningful participation of all relevant parties. As a result, legislation should require that both lawyers and clients attend consensual ADR sessions, and that they engage in good-faith negotiations.

First, the presence of both lawyers and principals is often crucial to the potential success of these processes because participation in the processes can create the momentum that leads to settlement. However, such an attendance requirement imposes on the principal the costs of the lawyer's hourly bills, the travel expenses of both the lawyer and the principal, and the principal's time away from work. Thus, the legislation, while striving to limit the attendance burdens placed on the parties, should be flexible to maximize the potential settlement in each case. As long as the processes last only one or two days, [n72] the requirement that both the lawyer and the principal attend the sessions would not pose an unjustifiable hardship for the parties.

Courts have upheld such requirements. In a 6-5 en banc decision in *Heileman Brewing Co. v. Joseph Oat Corp.,* [n73] the Seventh Circuit held that, in order to preserve the possibility of agreement, a district court could order the appearance at a pretrial conference of not only the lawyers but also the principals with settlement authority. The majority derived the trial court's power from FRCP 16, [n74] which encourages district court judges to use their inherent powers "to manage actively their dockets from an early stage" in the interest of "preserv[ing] the efficiency . . . of the judicial process." [n75] Although this case did not involve pretrial ADR, it involved a similar pre-litigation proceeding; thus, the holding suggests that courts may compel principals to attend ADR proceedings in the future.

In order to improve the likelihood of success and the fairness of these consensual processes, the system should also require meaningful party participation. Although no cases, statutes, or rules require or clearly define "meaningful participation" in the mediation or SJT contexts, [n76] some statutes recently have been amended to require a "good faith effort to mediate" for either a specific [n77] or an open-ended time period. [n78] However, such vague requirements do not provide the parties **[*1097]** with sufficient guidance on what constitutes compliance, [n79] and they suggest the difficulty of defining meaningful participation. Legislation may have to define such participation in negative terms and to punish parties who frustrate the process by failing to act cooperatively. Frustration of the process should include, but not be limited to, failure of lawyers and principals to attend the proceedings, indication that parties do not intend even to consider settlement, and, in SJT, refusal to provide necessary but unprivileged [n80] information or witnesses. A disclosure requirement should preserve the parties' ability to protect confidential information in order to prevent parties from merely attending the proceedings to extract vital information from the opposing party to use at trial.

Although courts have yet to impose sanctions for failure to participate in mediation and SJT, some courts have imposed sanctions for lack of meaningful participation in the analogous context of court-annexed arbitration. In *Gilling v. Eastern Airlines, Inc.,* [n81] a New Jersey district court upheld sanctions against a party for merely going '"through the motions,"' because the defendants had appeared at the hearing only through counsel and had not presented live testimony, but rather had rendered fact and position summaries. [n82] The court suggested in dictum that it would uphold a statutory provision allowing it to deny a party's application for de novo trial if the "party absolutely refuse[d] to participate in or even attend arbitration." [n83] However, the court declined to reach the constitutionality of this maximum sanction because it decided to order the defendant to pay the plaintiff's ADR fees. [n84] Other courts have more emphatically refused to deny the de novo trial request of parties who fail to participate meaningfully in the ADR proceedings [n85] because the constitutionality **[*1098]** of these systems rests on the ability of the parties to go to trial if

they fail to agree. [n86] Courts should apply the *Gilling* holding to a limited extent in the mediation and SJT contexts, and impose monetary sanctions on but not reject the trial request of a party who frustrates the process.

B. Fairness

As a matter of fairness, legislatures must protect parties from informal coercion to settle. [n87] The traditional confidentiality of the proceedings has made policing coercion difficult. [n88] As a result, overseers and the media have been unable to scrutinize the processes or to act as a check on illicit activities. In addition, the structure of the pretrial aDR system itself makes coercion difficult to identify. When judges mediate or conduct SJT prior to a trial over which they will preside, parties are more likely to feel pressure to settle if they believe the judge wants settlement and thus might rule against the reluctant party at trial. [n89] Furthermore, when mediators or SJT judges attempt to force parties to settle according to their recommendations, they undermine the consensual nature of these processes; such pressure causes parties to attempt to persuade the third party about the legal merits of their dispute instead of focusing on the various interests underlying each legal claim. [n90]

Courts can alleviate the problem of informal coercion in four ways. First, legislatures should require mediators and judges administering SJTs to warn parties that they cannot be pressured to settle and that they may report such coercion to the local bar committee. [n91] Second, **[*1099]** legislatures should direct courts to police such coercion through heightened judicial review. Third, the various codes of ethics for mediators [n92] (and mediating judges) should expressly forbid not only settlement coercion but also more informal pressures. [n93] Finally, courts should permit mediator malpractice suits under the common law doctrine of fiduciary duty. [n94] No mediators have been held liable for malpractice; [n95] some state legislation largely precludes mediator liability, [n96] and parties have had difficulty proving informal coercion. [n97] Nevertheless, such a self-operating method of guarding against coercion would likely reduce the risk of abuse. [n98]

In addition to implementing safeguards, courts and legislatures must ensure that the confidentiality guaranteed to parties engaged in consensual ADR does not exacerbate the likelihood of coercion. Mediators and judges must not be allowed to coerce parties to settle or to make specific decisions behind the veil of secrecy that confidential procedures require. [n99] Although pretrial settlement negotiations traditionally have been private and may require privacy to encourage parties to resolve disputes, such a policy should never be absolute. External supervision, either from ADR overseers, the media, or interested members of the public, may be necessary when the dispute **[*1100]** involves a matter of significant public importance or when disclosure is necessary to prevent coercion or to promote justice. [n100] Courts have hesitated to allow such review. [n101] Although courts should continue to protect parties' confidentiality, they should require open proceedings when parties can demonstrate with clear and convincing evidence that the harm caused by secrecy outweighs the risk to the effective operation of the ADR proceedings. [n102] By engaging in such a balancing test, courts can protect parties from both unnecessary publicity and illegitimate coercion.

Furthermore, mediation and SJT legislation should prohibit one wealthy or powerful party from coercing a weaker party into an unfair settlement. [n103] Courts traditionally have held that they may not infringe upon the liberty of relatively equal parties or their contract rights to bargain as they please. [n104] Absent a showing of undue coercion or patently unfair results, courts should assume that the parties have made reasonable decisions. When mediators or judges find a great disparity in bargaining power, however, they cannot assume that the weaker party acted with free choice. As a result, they should either send the dispute directly to trial, with its greater procedural safeguards, or require parties to be represented by attorneys, who can equalize power relations. Furthermore, mediators and judges must prevent parties from signing agreements that would be unconscionable under contract doctrine. [n105]

[*1101] Finally, mandatory mediation and SJT require quality control. [n106] Legislators can police quality by imposing a variety of requirements on those entering the profession, [n107] including licensure and training, a code of ethics for mediators and judges conducting SJT, and a code of professional standards.

Although existing statutes demonstrate a preference for training over testing requirements, [n108] a performance test

would best evaluate mediators' skills. [n109] After completing a training program, [n110] applicants would conduct a mock mediation, which would focus on five skills required of mediators: investigation, demonstrations of empathy, invention, persuasion, and distraction. [n111] Although expensive, [n112] such a test would allow for screening based on the interactive skills required for a consensual process rather than on academic skills, which are less important.

In addition, mandatory mediation and SJT legislation should control the conduct of mediators once they have entered the profession by establishing both an ethical code and professional standards. [n113] Ethical **[*1102]** codes include a set of prohibitions that potential practitioners must abide by as a condition of licensure or certification; [n114] professional standards indicate the moral and social expectations for members of a profession. [n115]

C. Efficiency

Although efficiency is not the primary objective of mandatory mediation and SJT, these processes become difficult to justify if they hinder, rather than expedite, dispute resolution. [n116] The point at which cases are referred to ADR has important implications for both the resource expenditure and effectiveness of the programs. There is a tension between the benefits of assigning cases early, thus increasing efficiency, and the benefits of assigning cases only after extensive discovery when the issues are clearer, thus improving the chances of success. [n117] Building a more focused and limited discovery process into ADR would help to achieve both goals. Under such a system, if the parties requested discovery, an intake official could act as a magistrate and create a program for limited discovery followed by a meeting to decide whether the case remained appropriate for mediation or SJT.

In addition, mandatory ADR should be limited to one or two days to promote efficiency and to prevent undue infringement on the trial rights of the parties. [n118] However, in exceptional circumstances, where **[*1103]** neutral decisionmakers believe that settlement will only occur in a longer time-frame or where the complexity of the case requires more extensive proceedings, legislatures should allow neutral decisionmakers to extend the length of the proceedings to a week or more, subject to party agreement.

D. Case Assignment

Finally, legislatures must adopt a method for assigning cases in order to send disputes requiring full trials directly to court. Either categorical or individualized considerations can govern the assignment of cases. Categorical statutes or local rules mandate pretrial ADR for all cases below a certain maximum monetary claim [n119] or involving a particular subject matter, such as medical malpractice, divorce custody, and farm mortgages. [n120] Custom-made referrals, by contrast, are based on judges' individual assessments of the type of process best suited to that particular dispute. [n121] Although custom-made decisions incorporate the differences between individual cases, categorical statutes and rules tend to produce more uniform and efficient referrals -- necessary attributes for widespread adoption of pretrial mediation and SJT. Nevertheless, when enacting categorical statutes, legislatures should attempt to maintain some consideration of parties' individual circumstances. As a result, such systems should include limited opt-out provisions, [n122] which allow parties to object to mediation or SJT when their cases warrant individualized consideration because they involve new issues of law, [n123] unsettled precedents, [n124] or constitutional **[*1104]** matters. However, the opt-out should be limited by a judge's ability both to deny a nonmeritorious opt-out request and to sanction parties deemed to have opted out without cause. [n125]

IV. CONCLUSION

Mandatory mediation and SJT are necessary additions to the civil justice system because they are more appropriate than adjudication for resolving disputes involving important ongoing relationships and those with a potential for integrative bargaining. Legislatures should encourage and perhaps require judges to mandate these processes because, despite the many benefits of consensual ADR, parties and attorneys have been unwilling to engage voluntarily in mediation and SJT. Finally, because these consensual processes do not include the procedural protections involved in traditional adjudication, mandatory mediation and SJT legislation must include safeguards ensuring that these processes

are fair and effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury Trials

FOOTNOTES:

n1 *See infra* p. 1088.

n2 *See id.*

n3 *See infra* p. 1089.

n4 *See infra* p. 1090.

n5 *Cf.* E. ROLPH, INTRODUCING COURT-ANNEXED ARBITRATION: A POLICYMAKER'S GUIDE 1 (1984) (pointing out that only Pennsylvania instituted court-annexed arbitration prior to 1970, but that several states, "hop[ing] to solve their growing congestion and budget problems," have adopted such programs since 1970).

n6 *See, e.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Simoni, Wise & Finigan, *Litigant and Attorney Attitudes Toward Court-Annexed Arbitration: An Empirical Study*, 28 SANTA CLARA L. REV. 543, 543 (1988); Note, *Compelling Alternatives: The Authority of Federal Judges To Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 483 (1988); *see also* Oklahoma Dispute Resolution Act, OKLA. STAT. ANN. tit. 12, § 1801 (West Supp. 1990) (stating that one of the goals of Oklahoma's ADR statute is to "help alleviate the backlog of cases which burden the [state's] judicial system").

n7 *See, e.g.*, U.S. Arbitration Act, 9 U.S.C. § 2 (1988) (providing for enforceability of agreements to arbitrate); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1982 & Supp. 1989) (adopting the Uniform Arbitration Act); N.D. CENT. CODE §§ 32.29.2-01 to -21 (1976 & Supp. 1989) (establishing an arbitration procedure, and later adopting the Uniform Arbitration Act).

n8 *See, e.g.*, CAL. CIV. PROC. CODE §§ 1141.10-.32 (West 1982 & Supp. 1989) (establishing court-ordered arbitration); FLA. STAT. § 44.302 (1987), *as amended by* 1989 General Law and Proposed Constitutional Amendments, 1989 Fla. Sess. Law Serv. 89-31 (West)

(creating court-ordered mediation).

n9 Private, or voluntary, ADR takes place by mutual agreement of the parties either before or after the litigation has arisen. It is usually binding on and fully funded by the parties.

n10 Court-annexed ADR involves judicial referral of cases to pretrial ADR processes, while the court preserves the rights of the parties to go to trial if the results do not satisfy them.

n11 *See, e.g.*, OKLA. STAT. ANN. tit. 12, ch. 37 app., rule 7(E) (West Supp. 1990) (providing that a case may be sent to mediation by party stipulation with court approval).

n12 *See, e.g.*, CAL. CIV. PROC. CODE § 1141.11 (West 1982 & Supp. 1989) (requiring the use of ADR for civil disputes involving amounts in controversy under $ 50,000).

n13 Furthermore, the parties themselves usually finance voluntary ADR, but mandatory court-annexed ADR may use public monies. Recently, some jurisdictions have begun to fund court-annexed ADR through surtaxes on court filing fees. *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 1809 (West Supp. 1990) (funding ADR by taxing each party in all civil cases $ 2.00 and all parties in dispute resolution proceedings $ 5.00, unless a party files an affidavit *in forma pauperis* asking the court to waive the fee).

n14 In addition, an increasing number of cases are sent to *binding* arbitration in the administrative law context. *See* Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 MO. J. DISPUTE RESOLUTION (forthcoming).

n15 The arbitrators are generally volunteers screened and chosen by the court. Arbitration proceedings usually take place in a courthouse at public expense. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 231 (1985) [hereinafter S. GOLDBERG].

n16 Cases are removed from the court's calendar when the parties accept the arbitration award. *See id.* at 227.

n17 *See* E. ROLPH, *supra* note 5, at 26. Sanctions generally involve either the imposition of monetary penalties, *see, e.g.*, CAL. CIV. PROC. CODE § 1141.21 (West 1982 & Supp. 1989) (imposing sanctions of the arbitrator's fee, paid to the county, plus the other party's trial costs); DEL. SUP. CT. R. 16(c)(8)(D) (imposing sanctions of the arbitrator's fee plus the costs of arbitration); MICH. CT. R. 2.403(o) (imposing sanctions of the opponent's "actual costs," including attorneys' fees for trial and court costs), or the admission of the arbitration result at trial, *see, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984) (providing for admissibility of an arbitration award and

establishing a presumption that it is correct).

n18 *See* sources cited *infra* note 60.

n19 Mediation has many different meanings. This Note focuses mainly on interest-based mediation, in which the mediator explores the needs and concerns of the parties. In contrast, rights-based mediation focuses on the rights the disputants would have in court and uses those rights to develop parameters within which the parties might resolve the dispute. This version of mediation is more appropriate for parties involved in a one-shot relationship. *Cf.* N. DIST., CAL. FED. CT. R. General Order No. 26 (establishing an Early Neutral Evaluation system). Finally, some mediation processes are more akin to arbitration; they create a forum for brief case presentations regarding the legal rights of the parties, and result in a nonbinding decision by a panel of third parties. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154-025 (Vernon Supp. 1989) (establishing Texas' Moderated Settlement Conference); MICH. CT. R. 2.403 (setting up Michigan's mediation system).

n20 *See* Pearson, *An Evaluation of Alternatives to Court Adjudication*, 17 JUST. SYS. J. 420, 422, 433-35 (1982).

n21 *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.071 (Vernon Supp. 1989) (providing that a written settlement agreement is "enforceable in the same manner as any other written contract"). *But cf.* MINN. STAT. ANN. § 572.35(1) (West 1988) (providing that mediated settlement agreements are not binding unless they explicitly state both that they are binding and that the parties understand their rights regarding the mediation process).

n22 The mock jury is chosen from the regular jury pool and is paid with public funds. In order to maintain the predictive value of their verdict, the mock jury members are often not told that their verdict is nonbinding until after they issue it. *See* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369 (1986).

The lawyers' presentations of arguments and summaries of depositions -- there is typically no live testimony -- are brief and usually last only a half-day. However, the process is flexible and can include live testimony from key witnesses or the showing of a video if a determination of credibility is key to a decision. *Cf. An SJT with Two Juries Helps in Resolving Major Mich. Water-Contamination Dispute*, 6 ALTERNATIVES 19, 20 (1988) (describing Judge Enslen's successful use of an unusual SJT format in a Michigan groundwater contamination case, involving two mock juries and the use of videotaped evidence).

n23 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154-071 (Vernon Supp. 1989).

n24 Neither the SJT process nor the nonbinding verdict are usually admissible at trial. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154-073 (Vernon Supp. 1989) (providing that any communication or record made in ADR is confidential and inadmissible "in any judicial or administrative proceeding").

n25 *See generally* Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989) (concluding that although the Supreme Court has never ruled on the constitutionality of mandatory ADR, lower courts have generally held that nonbinding ADR is constitutional).

n26 *See, e.g.*, Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988) (concluding that a court's inherent power and FRCP 1 & 16, as well as the court's local rule, authorize the court to order SJT); McKay v. Ashland Oil, 120 F.R.D. 43, 47-48 (E.D. Ky. 1988) (holding that both FRCP 16 and the district court's inherent power authorize a local, mandatory SJT rule); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (holding that FRCP 16 authorizes courts to order parties to engage in pretrial SJT).

Rule 16(c), which governs subjects to be discussed at pretrial conferences, provides: "The participants at any conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . ." FED. R. CIV. P. 16.

n27 *See* Lance, Inc. v. Dewco Servs., 422 F.2d 778, 783-84 (9th Cir. 1970) (asserting that district courts promulgate local rules "primarily to promote the efficiency of the Court" and that they are given broad discretion in applying and interpreting those rules); FED. R. CIV. P. 83 (permitting district courts to make and amend rules governing its practice in any manner "not inconsistent with these rules").

n28 259 Ga. 305, 380 S.E.2d 265 (1989).

n29 *See* 380 S.E.2d at 267.

n30 838 F.2d 884 (7th Cir. 1988).

n31 *See id.* at 886-87. The court's negative approach to mandatory ADR may be due in part to the fact that, in this case, a mandatory SJT would have required the plaintiff's lawyer to disclose information privileged from discovery under the work-product doctrine. *See id.* at 888.

n32 *See* cases cited *supra* note 26.

n33 Mandatory mediation has been authorized in the areas of divorce custody, *see, e.g.*, CAL. CIV. CODE § 4607 (West Supp. 1990); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1989); DEL. FAM. CT. R. 16(b), medical malpractice, *see, e.g.*, ME. REV. STAT. ANN. tit. 24, §§ 2851-2859 (West Supp. 1989); WIS. STAT. ANN. § 655.43 (West Supp. 1989), and agricultural property, *see, e.g.*, IOWA CODE ANN. § 654A.6 (West Supp. 1989); MINN. STAT. ANN. § 583.26 (West 1988 & Supp. 1990).

n34 *See, e.g.*, FLA. STAT. § 44.302 (1987) (providing for court-ordered mediation and arbitration); MINN. STAT. ANN. § 484.74 (West Supp. 1990) (allowing courts to order parties to nonbinding private trials, neutral expert fact-finding, mediation, mini-trials, and other forms of ADR when the amount in controversy exceeds $ 50,000); OKLA. STAT. ANN. tit. 12, ch. 37 app., rule 7(D) (West Supp. 1990) (allowing local courts to establish procedures by which to refer cases to mediation); TEX. CIV. PRAC. & REM. CODE ANN. § 154 (Vernon Supp. 1989) (allowing courts to order arbitration, mediation, SJT, mini-trial, and moderated settlement conference).

n35 *See infra* note 68.

n36 *See* statutes cited *supra* note 34.

n37 No conclusive data exist regarding the success of these generic ADR statutes in terms of increasing the settlement rate and improving party satisfaction. *But see, e.g., Minnesota Judicial ADR Program Reaches 65% Settlement Rate*, 7 ALTERNATIVES 21, 35 (1989) [hereinafter *Minnesota Judicial*] (asserting that "nearly two-thirds" of the cases ordered to mediation from Minnesota state court are settled). Future studies of developments in Texas, Florida, and Oklahoma will facilitate an evaluation of such legislation.

n38 Although this Note focuses on the similarities between mediation and SJT, the rationale for compelling SJT differs from that for ordering mediation. SJT encourages settlement by giving the parties a mock jury hearing to help eliminate unrealistic appraisals of the potential outcome at trial.

n39 *See* S. GOLDBERG, *supra* note 15, at 92.

n40 *Cf.* J. FOLBERG & A. TAYLOR, MEDIATION 10 (1984) ("[L]itigation tends to focus hostilities and harden the disputants' anger into rigidly polarized positions.").

n41 Only about five to ten percent of the cases filed in court end in adjudication -- the rest settle before they reach trial. *See* S. GOLDBERG, *supra* note 15, at 152.

n42 *See id.* at 88-89 (listing eleven factors contributing to the failure of negotiators to reach agreement).

n43 *See* R. FISHER & W. URY, GETTING TO YES 73-79 (1981).

n44 *See* W. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 11 (1988).

n45 *See* J. FOLBERG & A. TAYLOR, *supra* note 40, at 10; Lubet, *Some Early Observations on an Experiment with Mandatory Mediation*, 4 OHIO J. DISPUTE RESOLUTION 235, 242-43 (1989).

n46 *See* R. FISHER & W. URY, *supra* note 43, at 76-78.

n47 *See id.* at 73.

n48 *See* W. BRAZIL, *supra* note 44, at 10-11; R. FISHER & W. URY, *supra* note 43, at 62-63.

n49 *Cf.* Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 505 (1985) (asserting that settlement allows participation by clients as well as lawyers, fosters communication, and provides flexible procedures).

n50 *See* J. FOLBERG & A. TAYLOR, *supra* note 40, at 7.

n51 *See* W. BRAZIL, *supra* note 44, at 4-5 (contrasting the freedom that parties to consensual processes have to design their own procedures with their lack of control over formal adjudication).

n52 *See* J. FOLBERG & A. TAYLOR, *supra* note 40, at 10-11, 137.

n53 *See id.* at 9-10.

n54 *See* McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981); Menkel-Meadow, *supra* note 49, at 502. *But cf.* Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 41-42 (1987) (claiming that explanations, which ADR decisions often lack, render judicial decisions credible).

n55 By avoiding trial, mandatory mediation and SJT make more time available for cases that most merit consideration by traditional courts, such as those that involve constitutional issues or important new issues of law.

n56 *See* S. GOLDBERG, *supra* note 15, at 485-86; Volpe & Bahn, *Resistance to Mediation: Understanding and Handling It*, 1987 NEGOTIATION J. 297, 298.

n57 *See* S. GOLDBERG, *supra* note 15, at 486.

n58 *See id.* at 486-87.

n59 *See* Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) (arguing that judges should act in a neutral, disinterested, and deliberative fashion, and suggesting that active judicial management might tarnish this primary role). *But see* Brunet, *supra* note 54, at 50 (asserting that "the demand for court-annexed ADR has come largely from individual judges, the very producers of court output").

n60 *See, e.g.*, McKay v. Ashland Oil, 120 F.R.D. 43, 49-50 (E.D. Ky. 1988) (upholding mandatory SJT and pointing out its benefits); OKLA. STAT. ANN. tit. 12, § 1801 (West Supp. 1990) (asserting that the statute attempts to provide citizens with "fair, effective, inexpensive, and expeditious" ADR proceedings).

n61 *Cf.* K. Johnson, An Introduction to Alternative Dispute Resolution 5 (Apr. 5, 1985) (unpublished staff brief, Wisconsin Legislative Council Staff) (on file at the Harvard Law School library) (arguing that ADR can reduce court workload, improve access to dispute resolution forums, achieve better results, and change public attitudes about dispute resolution).

n62 *See* McEwen & Maiman, *supra* note 54, at 256-57.

n63 *See* J. ADLER, D. HENSLER & C. NESSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 63, 65 (1983) [hereinafter SIMPLE JUSTICE] (asserting that most litigants surveyed did not desire formal due process but rather had a "very simple model of what constitutes a fair hearing of a dispute," including only an opportunity to have the case heard and decided by a neutral third party).

n64 *See* McEwen & Maiman, *supra* note 54, at 252.

n65 *See* Golann, *supra* note 25.

n66 *See* Linder v. Smith, 629 P.2d 1187, 1189-90 (Mont. 1981) (discussing the constitutionality of pretrial settlement conferences and special masters).

n67 *See* Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 651 (7th Cir. 1989) (en banc); *Linder*, 629 P.2d at 1190; *see also* FED. R. CIV. P. 16(c)(7) advisory committee's note (arguing that the provision of a neutral forum for discussion might foster settlement).

n68 Pennsylvania adopted the first mandatory court-annexed arbitration in 1952. *See* E. ROLPH, *supra* note 5, at 5; 42 PA. CONS. STAT. ANN. § 7361 (Purdon 1982 & Supp. 1989). Since then, over fifteen states and over ten federal district courts have adopted compulsory arbitration, *see* P. EBENER & D. BETANCOURT, COURT-ANNEXED ARBITRATION 3 (1985), and there is evidence that parties are satisfied with these programs even though their participation is mandated. *See* SIMPLE JUSTICE, *supra* note 63.

n69 *See* Posner, *supra* note 22, at 388-89.

n70 *See* Johnson v. St. Vincent Hosp., Inc., 237 Ind. 374, 384, 404 N.E.2d 585, 592 (1980) (arguing that submitting claims to a medical malpractice panel may eliminate the normal expenses associated with pretrial discovery).

n71 By assigning cases to ADR soon after the filing of the complaint and providing for focused discovery lasting several weeks, judges can promote agreement far in advance of trial -- the time at which settlement normally occurs. *See infra* pp. 1102-03.

n72 *See infra* text accompanying note 118.

n73 871 F.2d 648 (7th Cir. 1989) (en banc).

n74 *See id.* at 652.

n75 *Id.*

n76 Most mandatory mediation statutes or rules do not specify how parties must behave. *See, e.g.*, OKLA. STAT. ANN. tit. 12, ch. 37 app., rules 2, 8(B) (West Supp. 1990); *see also* N. ROGERS & C. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 49 (1989).

n77 *See* MINN. STAT. ANN. § 583.27 (West 1988 & Supp. 1990) (requiring good-faith mediation of a farm mortgage dispute until settlement or for up to sixty days).

n78 *See* ME. REV. STAT. ANN. tit. 19, §§ 214, 752 (Supp. 1989); *see also* KAN. STAT. ANN. § 72-5430(c)(4) (1985) (requiring "participat[ion] in good faith in the mediation").

n79 *Cf.* N. ROGERS & C. MCEWEN, *supra* note 76, at 51-52 (pointing out the indeterminacy of the good-faith bargaining requirement in the labor context).

n80 Principals conducting SJT discussions should be allowed to hold back information that would be protected from discovery. *Cf.* Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1988) (warning that SJT may erode the protections provided by the normal discovery process).

n81 680 F. Supp. 169 (D.N.J. 1988).

n82 *See id.* at 170.

n83 *Id.* at 171.

n84 The sanction included fees incurred by the plaintiff both in arbitration and in opposing defendant's de novo trial application. *See id.* at 171-72.

n85 *See, e.g.*, Lyons v. Wickhorst, 42 Cal. 3d 911, 727 P.2d 1019, 231 Cal. Rptr. 738 (1986) (holding that the court was not authorized to dismiss plaintiff's request for de novo trial based on plaintiff's failure to present any evidence at the mandatory arbitration hearing); Schulz v. Nienhuis, 448 N.W.2d 655 (Wis. 1989) (affirming refusal to dismiss action based on claimant's failure to participate in a mediation session within the statutory period due to scheduling problems). *But see* New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712 (E.D. Pa. 1983) (denying de novo trial request of a defendant who presented no excuse for failing to appear at an arbitration hearing).

n86 *See* Golann, *supra* note 25.

n87 *See* J. FOLBERG & A. TAYLOR, *supra* note 40, at 135 (criticizing "muscle mediation," in which the mediator narrows options, eliminates effective choices, or informs the parties of the best "voluntary" settlement). Courts have long held that judges do not have the power to force settlement. *See* Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (asserting that "pressure tactics to coerce settlement simply are not permissible"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (Vernon Supp. 1989) (asserting that ADR neutrals "may not compel or coerce the parties to enter into a settlement agreement"). Indeed, to require settlement would likely violate the jury trial and due process rights of litigants.

n88 *See* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903 (6th Cir. 1988) (stating that SJT is a settlement technique that "ha[s] historically been closed to the press and public"), *cert. denied*, 109 S. Ct. 1171 (1989); N. ROGERS & C. MCEWEN, *supra* note 76, at 96 (noting the history of confidentiality in mediation and other consensual processes).

n89 *See* N. ROGERS & C. MCEWEN, *supra* note 76, at 79.

n90 *See id.* at 76.

n91 Moreover, if states have created ADR boards for other purposes, they should use such boards to police the processes. For example, Oklahoma established a Dispute Resolution Advisory Board to advise the administrators of the ADR act and to assist in supervising, evaluating, and investigating complaints regarding dispute mediation programs. *See* OKLA. STAT. ANN. tit. 12, § 1803.1 app., rules 6, 14(B) (West Supp. 1990). Although establishing independent ADR quality-control committees might ensure more comprehensive oversight of these processes, existing bar committees or ADR boards could assume this responsibility at much less cost.

n92 *See, e.g.*, N. ROGERS & C. MCEWEN, *supra* note 76, at 811-27 app. D (setting out the ABA Standards of Practice for Lawyer Mediators in Family Disputes, the Association of Family and Conciliation Courts' Model Standards of Practice for Family and Divorce Mediation, and the Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution, all of which fail to mention informal coercion).

n93 For an example of a code that explicitly forbids informal coercion, see OKLA. STAT. ANN. tit 12, ch. 37 app. A, § B(1)(d)(2)-(3) (West Supp. 1990) (Code of Professional Conduct for Mediators), which provides that a mediator must never force parties to reach an agreement or make decisions for them.

n94 *See* Chaykin, *Mediator Liability: A New Role for Fiduciary Duties*, 53 U. CIN. L. REV. 731, 732 (1984) (arguing that mediators, unlike judges and arbitrators who enjoy broad immunities, should be liable for their clients through fiduciary duties).

n95 *See* J. FOLBERG & A. TAYLOR, *supra* note 40, at 280; *see also* N. ROGERS & C. MCEWEN, *supra* note 76, at 186 (asserting that mediator liability "has not assumed a major role as a means of quality control").

n96 *See, e.g.*, ME. REV. STAT. ANN. tit. 4, § 18(2-A) (1989) (providing for mediator immunity from "any civil liability"); OKLA. STAT. ANN. tit. 12, § 1805(E) (West Supp. 1990) (providing for mediator immunity except for cases of "gross negligence with malicious purpose" or "willful disregard of the rights, safety, or property of any party").

n97 *Cf.* Lange v. Marshall, 622 S.W.2d 237 (Mo. Ct. App. 1981) (reversing a negligence finding for lack of proof of causation).

n98 *See* Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO J. DISPUTE RESOLUTION 47, 50-53 (1986) (arguing against mediator immunity and pointing out nine areas of common law liability that can be applied to mediators); Chaykin, *supra* note 94. *But see* Stulberg, *Mediator Immunity*, 2 OHIO J. DISPUTE RESOLUTION 85, 87, 89 (1986) (arguing for mediator immunity except when a mediator participates in an illegal agreement or deliberately helps one party at the expense of the other).

n99 For an overview of the confidentiality required in mediation, see N. ROGERS & C. MCEWEN, cited above in note 76, at 96-100.

n100 The public's right of access to criminal proceedings is clearly established. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (recognizing a qualified right of public access to preliminary criminal proceedings conducted before a magistrate and in the absence of a jury); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980) (establishing the first amendment rights of the public to attend criminal trials). However, the public has a more limited right of access to civil pretrial proceedings. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984) (holding that a litigant has no absolute right to distribute discovery material). *But cf. In re* San Juan Star Co., 662 F.2d 108, 118 (1st Cir. 1981) (suggesting a limited first amendment protection of public disclosure of information obtained through discovery).

n101 *See, e.g.*, Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903 (6th Cir. 1988) (denying the press access to SJT proceedings because SJT is primarily a settlement device and not a court proceeding), *cert. denied*, 109 S. Ct. 1171 (1989); *see also* Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988) (holding that the court had power and discretion to close SJT to the public).

n102 *Cf.* N. ROGERS & C. MCEWEN, *supra* note 76, at 145 (noting that "[a]bout half" the statutory mediation privileges are qualified privileges that balance the need for confidentiality against the need for information).

n103 *See, e.g.*, Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984) (stating that settlements will produce unfair results when the parties have unequal bargaining power).

n104 *See* Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 606, 386 A.2d 1216, 1228-29 (1978) ("[R]eluctance on the part of the judiciary to nullify contractual arrangements . . . serves to protect the public interest in having individuals exercise broad powers to structure their own affairs . . . a concept which lies at the heart of the freedom of contract principle.").

n*Cf.* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448-49 (D.C. Cir. 1965) (asserting that a court may refuse to enforce an unconscionable contract, and defining unconscionability as one party's lack of meaningful choice, or gross inequality of bargaining power); OKLA. STAT. ANN. tit. 12, ch. 37 app. A, § B(1)(e)(1) (West Supp. 1990) (allowing a mediator to suspend or terminate the process "when it appears that continuation would harm or prejudice any party").

n106 When the processes are voluntary, the free market can control quality, but the same does not hold true when the processes are mandatory. *See* SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, REPORT OF THE COMMITTEE ON QUALIFICATIONS (1989), *reprinted in* DISPUTE RESOLUTION F., May 1989, at 8.

n107 The Society of Professionals in Dispute Resolution (SPIDR) recommended that a variety of organizations, and not a single entity, establish the qualifications for neutrals, and that they be evaluated on the basis of performance rather than resume credentials. *See id.*, *reprinted in* DISPUTE RESOLUTION F., May 1989, at 3.

n108 *See* OKLA. STAT. ANN. tit. 12, ch. 37 app., rules 11-12 (West Supp. 1990) (emphasizing training but also requiring that mediators applying for certification conduct an "actual mediation" while being observed); FLA. R. CIV. P. 1.760. Florida has the most stringent requirements for those entering the profession, but it does not include any testing prerequisites. Circuit court mediators need only a law degree coupled with five years of Florida practice experience and forty hours of training. *See id.* 1.760(c). The law degree requirement is of questionable value because most lawyers do not necessarily have the skills required for effective mediation. *See* Lubet, *supra* note 45, at 247-48.

n109 *See* Honeyman, *Five Elements of Mediation*, 4 NEGOTIATION J. 149, 158-59 (1988) (describing an oral exam conducted through role playing); Honoroff, Matz & O'Connor, *Putting Mediation Skills to the Test*, 6 NEGOTIATION J. 37 (1990).

n110 For a discussion of the skills that mediator training should include, see J. FOLBERG & A. TAYLOR, cited above in note 40, at 233-42.

n111 *See* Honeyman, *supra* note 109, at 153-55; *see also* Baker-Jackson, Bergman, Ferrick, Hovsepian, Garcia & Hulbert, *Ethical Standards for Court-Connected Mediators*, 8 MEDIATION Q. 67, 72 (1985) (listing eighteen mediator skills).

n112 The test consumes time and resources because it requires a panel of experienced mediator judges as well as several actors to play the role of the parties in the mock mediation.

n113 Oklahoma has incorporated such standards into its mandatory ADR legislation. *See* OKLA. STAT. ANN. tit. 12, ch. 37 app. A (West Supp. 1990) (setting forth a Code of Professional Conduct for Mediators, including ethical provisions). State mediation and SJT groups can propose professional and ethical provisions for legislative approval.

n114 *See* J. FOLBERG & A. TAYLOR, *supra* note 40, at 250; N. ROGERS & C. MCEWEN, *supra* note 76, at 811-27 app. D (presenting various mediator codes of ethics).

n115 *See* CENTER FOR DISPUTE RESOLUTION, CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS, *reprinted in* J. FOLBERG & A. TAYLOR, *supra* note 40, at 349 (providing a general code applicable to all types of mediation); *cf.* J. FOLBERG & A. TAYLOR, *supra* note 40, at 250, 258 (discussing the distinction between standards and ethics and explaining why professional standards are necessary). *But see* Chaykin, *supra* note 94, at 736 (asserting that articulating professional standards for mediators is difficult because mediation "relies heavily on personal style").

n116 Time spent preparing for SJT (and to a certain extent for mediation) is not wasted even if the case eventually goes to trial because SJT forces parties to organize their cases for trial. *See, e.g.*, Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 605 (D. Minn. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988). *But see* Posner, *supra* note 22, at 388-89 (arguing that pretrial SJT does not reduce the settlement rate and is only an expensive substitute for other techniques of encouraging parties to settle).

n117 *See* S. GOLDBERG, *supra* note 15, at 229-30.

n118 For examples of such limitations on court-annexed ADR, see SIMPLE JUSTICE, cited above in note 63, at 12, which asserts that hearings in the Pittsburgh Court Arbitration program last about 30-45 minutes; AM. BAR ASS'N, ALTERNATIVE DISPUTE RESOLUTION: A HANBOOK FOR JUDGES (1987), which asserts that SJT "rarely lasts longer than a full day," *id.* at 7; and *Minnesota Judicial*, cited above in note 37, which asserts that parties in Minnesota who settled their disputes through mediation "spen[d] an average of 3.7 hours in mediation," *id.* at 35. *But see, e.g.*, FLA. R. CIV. P. 1.820(g) (setting a limit of 30 days on nonbinding, court-ordered arbitration).

n119 Court-annexed arbitration statutes assign cases to pretrial ADR when their amount in controversy is below a ceiling that varies from about $ 3000 to $ 150,000. *See, e.g.*, NEV. REV. STAT. §§ 38.215-.245 (1988) (requiring all auto accident cases in which the amount in issue does not exceed $ 3000 to be submitted to arbitration).

n120 *See* statutes cited *supra* note 33.

n121 For examples of cases referred to pretrial ADR on an individualized basis, see Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988); and Department of Transportation v. City of Atlanta, 259 Ga. 305, 380 S.E.2d 265 (1989).

n122 *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.021-.022 (Vernon Supp. 1990) (providing for judicial referral to various ADR procedures with an option for parties to object in writing within ten days of receiving notice).

n123 *See* K. Johnson, *supra* note 61, at 5 (asserting that cases involving issues with no legal precedent should go to court; *see also* MIDDLE DIST., N.C. R. ANN. 602(b)(1) (providing an exemption from mandatory arbitration for cases in which the court determines that legal issues are "unusually complex or novel").

n124 Pretrial mediation and SJT establish no precedents; thus these processes have potentially negative implications for stare decisis, by decreasing the number of written opinions available for citizens to consult in making legally significant decisions. *Cf.* Brunet, *supra* note 54, at 13-14, 41-42 (asserting that ADR is almost entirely procedural and accords "little relevance" to substantive principles, and questioning the lack of reasoned explanations for ADR decisions). However, parties to arbitration can choose a de novo trial, and parties to mediation or SJT can refuse to agree. The continuing trial option provides a safety valve for cases mistakenly sent to ADR based on an inability to discern undecided issues of law during pretrial screening.

n125 The statutes usually do not provide directly for such denials, but sometimes imply them in opt-out provisions. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.022 (Vernon Supp. 1990) (allowing parties to object to ADR referral but prohibiting a court from referring a case only if it finds a "reasonable basis" for the objection).