PLENARY SESSION PANEL: THE SIXTH JOHN A. SPEZIALE ALTERNATIVE DISPUTE RESOLUTION SYMPOSIUM*

HARRY N. MAZADOORIAN:¹

In the three or so decades of the current ADR revolution, we have seen a lot of activity, many successes, a respectable number of failures, and a lot of occurrences that we don’t know how to categorize as failures or successes. When the current movement was starting, the ABA section was still in its infancy and the watchword was, “Let a thousand flowers bloom,” suggesting that innovation was the key for the future. Well, we are here today to discuss how the garden of ADR flowers has fared so far and, more importantly, how will our garden grow? Of course, beauty is often in the eye of the beholder, so not all view the garden the same way. And we are going to hear about that in this plenary session.

Our panel is an impressive one, and the idea is not to hear about them but to hear from them. I do want to just say a sentence about each one. Let me start with Paul Bland. Paul is an attorney with Public Justice in Washington, DC, and long active in consumer issues and involved in several fascinating consumer cases. Larry Mills is a partner of Mills Meyers Swartling of Seattle, Washington. Larry is chairman of the ABA Section of Dispute Resolution. Professor Lela Love is next to Larry. She is from Cardozo Law School and, by the way, she is the chair elect of the ABA section of Dispute Resolution. Lela has handled some major mediations and has authored numerous ADR texts. Professor Deborah Hensler is from Stanford Law School. When I first met Deborah, she was director of the Rand Institute for Civil Justice and on the faculty of USC. She is a prolific writer on a wide variety of civil justice issues, ranging from class actions to personal injury compensation. Tim Fisher of McCarter & English is a partner of the

¹ All footnotes herein were added after the presentation, in preparation for publication, by the symposium speakers and the editorial staff of the Quinnipiac Law Review.

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firm and a powerhouse in both the Connecticut Bar Foundation and the Connecticut Bar Association. Like my dean, Brad Saxton, he co-chairs the CBA Task Force on the Future of the Legal Profession. Mr. Feinberg, you have already met.\(^2\) The format we will follow is to ask for five minutes of comments from each panelist on a specific issue, followed by reactions from the panelists, and then followed by comments and questions from the audience.

Deborah, we spend so much time talking about ADR successes and failures and yet, much of what we hear is merely anecdotal. You have been involved in a number of empirical studies and assessments of ADR. Can you comment on just how much data is out there on whether ADR is succeeding? And what was ADR supposed to do? How do we measure the success or failure of ADR?

**Panel Presentations**

**DEBORAH R. HENSLER:**\(^3\)

Harry told me when we were planning for this session that he was going to ask me if we had enough data on ADR. And I thought, “Well, that’s like asking a chocoholic whether she has enough chocolate.” Ask somebody like me whether we have enough data on just about anything and I always say, “Of course not.” So what *do* we know? We know the polls show that people say they like mediation and arbitration. But we do not know what those people have in mind when they say this. We do not know what they think mediation or arbitration is. We do not know how the use of mediation or arbitration would, in their minds, affect the outcomes of their disputes. We know, however, that in many instances, litigants do say that they are satisfied with court-connected ADR immediately after the process has taken place. We do not know how they might feel if we came back and asked them that same question six weeks later or six months later after they have lived with the outcomes of the process.

We know, perhaps most importantly in terms of bringing groups of


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people like this together, that thousands of ADR procedures are held each year in court and outside of court for routine and complex litigation. We also know that trials are disappearing from state courts and federal courts. What we do not know, in my view, is what the consequences of this movement are for parties, for courts, or for the public interest. And as Ken's comments importantly highlighted, what we do know about consequences is not very nuanced. So we do not know how ADR matters in different circumstances. That is the important question—or certainly one important question.

The important story is about why we do not know more. Actually, I think there are two stories. One has to do with court-connected ADR and the other has to do specifically with private ADR and arbitration in particular.

There is an important link between these stories. When court-connected ADR began in the late 1970s and early 1980s, there was actually a considerable debate about its likely effects, both inside courts and outside courts. There was a sense that these were public programs, whether they were mandated or encouraged by the courts. In many courts, judges felt that they should take responsibility for them. For at least a decade, courts invited researchers into their courts to help answer the questions that they and lawyers and other representatives of non-governmental organizations had about the programs, how they were operating, and what their effects were. This was the era of the court-connected, so-called advisory arbitration, judicial arbitration, non-binding arbitration programs.

By the mid to late 1980s and on into the 1990s, mediation had taken hold inside the courts and outside the courts. With the advent of mediation, in my experience, the attitude towards empirical research shifted sharply. Mediator lawyers learned that mediation provided a stream of revenue. Judges came to believe that mediation took cases off their dockets, and instead of being extremely concerned about the effects of the programs that had been wrought, they, in some instances, seemed to behave as if “out of sight, out of mind.” Private mediators had little interest in investigating the net benefits or costs of what they were doing. Enthusiasm for evaluating court-connected ADR waned, and in my experience, turned into outright hostility. Nobody wanted to evaluate these programs anymore.

The arbitration story is somewhat different. Arbitration began as a

4. See Keynote Presentation, supra note 2.
business-to-business process, wholly a creature of private contract. As one might expect in that kind of context, if parties were concerned about what the consequences were of the programs they were participating in, they could keep their own book on the programs. I assume repeat players often did keep a book, although I think a surprising number of people involved in all of these programs in the private sector have not systematically evaluated the effects of the programs. Nonetheless, you could make a good claim that there was no public interest in requiring studies of arbitration.

Fast-forward to the current era, in which arbitration has expanded beyond contracts between equally-positioned parties and into the consumer and employment domains, where we commonly see the inclusion of mandatory arbitration clauses and adhesion contracts. We have turned what was a wholly private mechanism into a mechanism that has a potentially huge impact on the public. We have protected it as a private procedure. At the same time, we have protected mediation, both inside and outside the court, with strict standards of confidentiality.

I have a rather pessimistic view about the current state of and the future of research on ADR. I think a movement that began with great enthusiasm and inquiry about what it could do for people, what it could do for courts, and that was accompanied by considerable enthusiasm for trying to answer those questions, has turned into a highly-protected process that is difficult for anyone outside to learn about and, therefore, to assess its impact.

MAZADOORIAN:

Thank you, Deborah. Let me continue on the theme of the success of ADR, and I would like to turn to Larry Mills and ask how we can seek out and identify good-quality ADR from bad-quality ADR, particularly in mediation where there are so many styles and techniques. As I said earlier, where a thousand flowers are blooming, some of us get dizzy. You have been working on that question in the [ABA] Section [of Dispute Resolution], Larry. Can you tell us about that?
I am honored to be included in this symposium. It is remarkable for a work-a-day practitioner, mediator, and arbitrator from Seattle to be asked to be on this distinguished panel. I know I have been asked to be here because of my current position as Chair of the American Bar Association Section of Dispute Resolution. I will adopt that perspective and describe what the Section has been doing to improve the quality of both mediation and arbitration over the years. I am going to try to relate to you what has been happening and discuss some current developments in the attempt to improve the quality of dispute resolution, particularly mediation.

The ABA Section of Dispute Resolution, which now has over 18,000 members, has been very active in continuing legal education for mediators and arbitrators, and has tried to promote the best practices in both these processes by allowing people to share their experience at conferences like this that we sponsor around the country. The Section supported the Revised Uniform Arbitration Act and the Uniform Mediation Act. The Section has also been very active in adopting standards of conduct for arbitrators and mediators as practice guides. For example, over the years the Section has been active in promulgating the Code of Ethics for Arbitrators in Commercial Disputes and, more recently, the revised Model Standards of Conduct for Mediators, which are published and available to the public. Practitioners regularly cite the Code of Ethics and the Model Standards, and we feel that these guides are having some impact—although we do not have a lot of data on that—and that active arbitrators and mediators look to these sources for guidance in improving the quality of arbitration and mediation.

At one point, when I first became an officer of the Section, we looked hard at mediator credentialing. We studied extensively the feasibility and desirability of a nationwide mediator credentialing process. This was back in 2002 to 2005. In 2003, the Section actually

5. Lawrence R. Mills is a principal in the Seattle law firm Mills Meyers Swartling. He has practiced business law, commercial transactions, and commercial litigation for over thirty years. For over twenty years, Mr. Mills has maintained an active practice as an arbitrator and mediator in a wide variety of contexts. Mr. Mills is an honors graduate of Princeton University and earned his master's degree in public policy and a law degree from the University of Michigan.


issued a report that said, in essence, rather than look at mediator credentialing, let’s start out by giving some kind of a credential or certificate to high-quality mediator training programs. We thought that was an easier place to start, but that actually has not gone very far. What happened then was, in 2004, we launched a survey of our members to determine their views about mediator credentialing. This was an online survey that was jointly sponsored by the Section and the Association for Conflict Resolution, ACR. We got a lot of feedback on national mediator credentialing. Safe to say, there was significant opposition and many problems that people saw with credentialing. It’s also safe to say that the Section, which is a big tent, was much divided. The ACR folks were more pro-credentialing on balance. It’s hard to know exactly, in terms of percentages, what the breakdown was. In any event, the Section considered the results of the survey and decided not to proceed with any kind of national mediator certification. That was, in part, because under the ABA Bylaws, the ABA cannot certify specialty practice, and so certification did not seem to be a productive avenue for the ABA.

Following that decision in 2005, the Section had quite a discussion about what could be done to improve mediation quality. And at that point, in January of 2006, the Section created the Task Force on Improving Mediation Quality. The purpose of the Task Force was to investigate the attributes of high-quality, successful mediations. It consisted of seventeen members who were very diverse—geographically, by types of practices, and by mediation perspectives. It focused on mediation quality in litigated civil cases where the parties were represented by counsel, asked users of mediation services what they did and did not like about mediation, and what made mediation successful. The Task Force conducted ten focus groups in nine different cities in the United States and Canada over a two-year period. The Task Force also received questionnaires completed by about one hundred people, and interviewed some people by telephone in extended interviews.8

The Task Force identified four elements of high-quality, successful mediations. The four elements are: number one, successful, high-quality

mediations require preparation by the mediator, counsel, and the parties; number two, customization of the mediation process; number three, analytical inputs from the mediator (we can discuss how a mediator can deliver analytical assistance, but mediation participants clearly want the mediator to help them analyze the case); and number four, which would be obvious, I think, is persistence by the mediator. In the face of apparent impasse, the mediator should be willing to go the extra mile to reach resolution. Thank you.

MAZADOORIAN:

Thank you, Larry. Let me turn to Paul Bland. Paul, we often have a loud chorus of ADR supporters singing its praises. And yet, over the past decades, there have been some very pointed concerns about ADR. Ken mentioned some of these concerns. He specifically referred to mandated ADR. Many authors have written about the dark side of ADR. Is there a dark side? Would you offer any cautions? Are there dangers ahead?

F. PAUL BLAND:9

As a litigator, with all these judges in the room, I'm afraid that if I spoke sitting down I would be hit by lightning, so I'm going to stand up. I think it is wonderful, after all this talk about how there is a garden with the flowering ADR, that you allow a skunk to the garden party, because for my clients, ADR is typically a disaster. Nearly all of them want to get out of it. We searched it in Westlaw and found that there were maybe 500 cases last year in which consumers or employees went to court to fight to try to get out of mandatory arbitration clauses and tried to be allowed to go back to court. Now, at the Supreme Court, they are saying, "Gee, you know, arbitration is so much better and fairer than the jury system. What were the founders thinking when they came up with the jury system when they could have had mandatory arbitration?"

Let me make clear what part of ADR I'm talking about. I love mediation. The vast majority of the cases I have handled that have been successful have been cases that were mediated to a successful result. I have no concern at all about pre-dispute binding arbitration between two

9. F. Paul Bland, Jr., is a staff attorney with Public Justice. He has successfully argued more than twenty cases that have led to reported decisions, including important wins for consumers, employees, or whistleblowers in four different U.S. Courts of Appeal and the high courts of five different states. Mr. Bland earned his J.D. from Harvard Law School in 1986 and A.B. from Georgetown University in 1983.
large, sophisticated commercial entities. This happens all the time. The Federal Arbitration Act was passed in 1929 for that purpose. It has been a great success and not a problem for me. Also, I have very little concern with non-binding arbitration, such as the way the Better Business Bureau handles lemon-law cases. I have no problem at all with post-dispute arbitration where both parties get together.

What I am concerned about is mandatory arbitration when it is imposed by a company upon an individual consumer, an employee, or a medical patient in a fine-print “take it or leave it” contract that the individual generally does not understand. The company, in writing the contract, picks an arbitration company that it believes will give it the more favorable outcome and frequently, sticks in a lot of different favorable provisions. Now, this differs a lot from industry to industry. For example, cell phone companies, banks, and credit card companies do not care at all about individual cases. What they want is a ban on class actions, so everything else does not matter. They will write their arbitration clause so that it looks pretty fair on an individual case basis, because what they are trying to do is make sure that a court will enforce the ban on class actions.

Nearly every standard-form consumer and employment contract now has a ban on class actions, usually hidden inside the arbitration clause. These are effectively exculpatory “get out of jail free” cards in a whole bunch of different settings involving claims of deceptive trade practices, predatory lending practices, and the like. There are tons of cases out there which would never be brought on an individual basis—they are either a class action or they are nothing—and companies know that. I have been in mediations in which the plaintiff’s lawyers on my team all think that the case is going to turn on the facts. They are going to set out how the computer company engaged in a deceptive trade practice, or how this really is predatory lending, and they believe that the company is going to realize that. The company will come in and say, “You know what? Forget it. We have a ban on class actions and a Texas Choice of Law Clause. In Texas, they would enforce this clause if a gun was held to the head of the consumer, and we’re just not going to settle at all. Go away.” The class action ban is the entire case.

These provisions are unenforceable and unconscionable in a lot of states. This is actually the biggest part of what my career has been and is. I have argued or helped people in a number of states in which state supreme courts or federal appellate courts have struck down the bans on class actions. Many of these big companies have written cert petitions,
which are pending in the Supreme Court right now, arguing that if you take something that would otherwise be illegal and put it in a paragraph labeled “arbitration,” it is acceptable. The big companies are hoping that the U.S. Supreme Court is going to overturn all the state laws that have found that those provisions are unconscionable or unenforceable, and that the Supreme Court will find that the Federal Arbitration Act preempts all of that state law. That is what the Arbitration Clause is for in the bank context. A nursing home contract is a totally different setting. The nursing home is not afraid of a class action. I have yet to see the class action in which someone says, “The drunk orderly accidentally drowned everyone on the third floor.” Those are individual cases. By the way, three years ago, very few nursing homes had arbitration clauses. Now, virtually every nursing home in America has one, just in the last couple of years. Eight years ago, almost no car dealers had arbitration clauses. Now, try to buy a new car in America and finance without an arbitration clause. Ten years ago, only one bank had an arbitration clause in its credit card contract. Now, the top twenty credit card issuers all have them.

In the nursing home setting, they have all of these different unfair provisions crammed into the contract, like bans on punitive damages, or a thirty-day statute of limitations. And they think that because it is an arbitration clause, a court will let them get away with it. Or they frequently have arbitrators chosen who are with companies who they know tilt strongly towards them. The companies actually advertise. One group, the National Arbitration Forum, runs advertisements that say, in essence, “If you’re a company, don’t pick the American Arbitration Association or JAMS because sometimes a consumer will win with them. Come with us because we’re basically for you.” The advertisements were pretty much that close.

We have little or no discovery in our system, and these companies know that the system is completely unreviewable. In the United States, the arbitrators’ decisions are not meaningfully reviewed. Judge Posner said in a decision last year that a “wacky” decision of law by an arbitrator is not grounds for overturning the decision.10 Justice

10. Wise v. Wachovia Securities, LLC., 450 F.3d 265, 269 (7th Cir., 2006) (Posner, J.) (“That is why in the typical arbitration, which unlike the one in this case is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, . . . for only then were they exceeding the authority granted to them by the contract’s arbitration clause.”) (emphasis added) (citations omitted).
O'Connor wrote for the Supreme Court, in the Steve Garvey baseball player case involving the pension fund, that "silly" fact finding by an arbitrator is not grounds for overturning arbitration decision. The only way you can get an arbitration decision overturned in the United States is if the arbitrator will be so stupid as to say on the record, in writing or into a tape recorder, "I know this is wrong but I'm going to do it anyhow." Now, we have not seen that case yet. About once a week, somebody comes to me and says, "The arbitrator was asleep. The arbitrator wouldn't listen to any of our evidence. The arbitrator was a cousin of (for example) the defense lawyer." We say, "Gee, we're really sorry, you know. We just don't take those cases." We turn that case down again and again. In the individual setting, it is often a rigged deal, and that is unjust.

MAZADOORIAN:

Thank you Paul. I know there will be a lot of questions for you in a few minutes. Turning to Lela Love, ADR is still largely unregulated. Larry has talked a little bit about the efforts for credentialing. We hear a lot of talk about self-regulation and arbitrators' codes of ethics and mediators' standards of practice. Are there major ethical issues involved in an industry this big? And how are these issues being addressed? How should they be addressed?

LELA PORTER LOVE:12

The question of ethics regulations is burdened by instances of having too few rules, on the one hand, and then too many rules, in what I see as undulating cycles. I wanted to mention two current areas where I

11. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (U.S. 2001) (per curium) ("Judicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement . . . . It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable . . . . When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, fact finding' does not provide a basis for a reviewing court to refuse to enforce the award.") (emphasis added) (citations omitted).

12. Lela Porter Love is a professor of law and Director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law. She founded and directs Cardozo's Mediation Clinic in 1985, which was among the first clinical programs in the country to train law students to serve as mediators. Professor Love earned her J.D. from Georgetown University Law School, her M.Ed. from Virginia Commonwealth University, and her B.A. from Harvard University.
think there are too many rules, and one area where there are too few. Before I do that, I’m struggling here under the burden of speaking an hour and a half into a program. I read recently that law professors were boring. So, I’m worried about that right now and I would like to get everyone energized with a light-bulb riddle. I assume many people here have served as arbitrators, mediators, or judges, so this is going to be something you can ponder over in your practice. How many judges does it take to change a light bulb? Seeing no volunteers, I’ll answer. None. Judges don’t change light bulbs—they tell you who is responsible for the darkness. How many arbitrators does it take to change a light bulb? Seeing no volunteers, again I’ll tell you. Arbitrators don’t change light bulbs either. Like judges, they tell you who is responsible for the darkness and you cannot appeal whatever they say. How many mediators does it take to change a light bulb? None again. Mediators don’t change light bulbs—they empower light bulbs to change themselves. So, returning to the theme of too many rules, too few rules, and the importance then of having a very responsive, flexible system to get the right balance. Let’s look at a litigation, an arbitration, and a mediation example.

Last week, I was serving on a jury pool in Manhattan, a state jury pool. I participated in a full day of a voir dire in which approximately 150 people got winnowed down to a very small number of people. It started with my feeling, “Wow! The system is refined. The judge is being fair. The procedure is extraordinarily thoughtful and careful.” But after hearing answers from these 150 people to seemingly endless questions, “Where do you live? Where do you work? What do you do? What do you think about drugs? Have you had experience with the police? Do you know anybody in the DA’s Office? The Legal Aid Office? Have you formed an opinion so far? If you’re a lawyer, can you set aside everything you know or you think you know about the law and follow my [the judge’s] instructions and not say anything you know about the law to the other jurors?” I began to get weary. It seemed the system had lost confidence in citizens. To the last question I mentioned, I thought, “No, I don’t think I can do that.” The question I finally got thrown out on was a personal one that seemed disconnected to my ability to be impartial and fair-minded. It felt as though a system that was at one time concerned about fairness and ethics had now gone amuck. At three-thirty in the afternoon, after starting at ten a.m., we still only had three chosen jurors out of a pool of about 150 people with the room now getting emptier and emptier; at that point, I was eliminated. All of these
people disqualified; it did not seem as if the fine-toothed comb that had been developed was serving the purpose of getting a jury of one's peers.

In a similar vein, looking at the topic of conflicts of interest, one of the hot questions with arbitrators these days is disclosure requirements and the prevention of conflicts of interest. Larry mentioned efforts of the ABA Section of Dispute Resolution. Our Arbitration Committee has been laboring over the creation of a disclosure checklist. There are forty-three questions on the current draft, which include inquiry into social clubs, investments, friends, family's friends and on and on. So far, this checklist has gotten a tremendous amount of pushback, and I think rightfully so. It again may be an example of too many rules.

In the mediation world, I do not know how many of you have followed the New York case of Hauzinger v. Hauzinger. This case shows the problems that can arise from having too few rules. Hauzinger arguably strikes down mediation confidentiality in New York—or at least leaves it surrounded by question marks. The mediator in that case was subpoenaed by the wife in a divorce action, despite an agreement by the parties to keep matters confidential and not subpoena the mediator. The court upheld the subpoena. Consequently, New York mediators do not know what to say regarding the status of confidentiality—unless they are operating in the context of a community center where there is a statute. Hauzinger reaches a result opposite to that reached under either the New York statute for community mediators or the Uniform Mediation Act, which grants the mediator a privilege enabling the


15. Article 21-A, Sec. 849-b of the NYS Judiciary Law provides that, in the context of community dispute resolution centers:

[A]ll memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.


16. Id.
resisting of subpoenas under these circumstances. This is an area, at least in New York, where more clarity is needed.

Let me conclude by saying that what Ken Feinberg described to us about a process he developed was a tribute to balancing, to being responsive, yet working within a thoughtful framework of rules. We must strive ceaselessly to get the framework articulated and correct, but develop systems that are customized, as Larry mentioned from the [ABA Section of Dispute Resolution] Task Force [on Improving Mediation Quality], that are nuanced, that are flexible. One of the Task Force recommendations was case-by-case customization of the mediation process. Ken Feinberg has given us a model of customization in this one special context that he described this morning. Thank you.

MAZADOORIAN:

Thank you, Lela. Turning now to Tim Fisher: Ken also mentioned the relationship between ADR and the courts. He had some hopes and he also had some concerns. On Mondays, Wednesdays, and Fridays, I marvel at the synergy between the courts and the private ADR system. And on Tuesdays and Thursdays I see them as competing and hopelessly opposite. Is there an answer to my schizophrenic observation? Which reality is closer to the truth? And what should that relationship be?

TIM FISHER:

Thank you, Harry. To respond to the question, "ADR and the courts, are they complementary or competing?" I want to pose an answer, and then pose two further questions beyond it. I suggest that the answer is yes, they are both complementary and competing, and that is a good thing.

It is easy to identify the ways in which they are complementary.

17. Under the Uniform Mediation Act, Sections 4-6, a mediator may refuse to disclose mediation communications despite waiver of confidentiality by the parties. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT (2001).
18. See Keynote Presentation, supra note 2.
19. See TASK FORCE, supra note 8.
20. See id. at 12.
21. See Keynote Presentation, supra note 2.
22. Timothy S. Fisher is a partner at the law firm McCarter & English LLP. He is an experienced practitioner in alternative dispute resolution, working as a neutral as well as counsel for parties in the firm's Construction Practice Group. He is Vice President of the Connecticut Bar Foundation, and chairs its Long Range Planning Committee. He earned his B.A. from Yale University and his J.D. from Columbia Law School.
All of us have experienced how there are certain kinds of disputes and certain kinds of resolutions that lend themselves naturally to a court context, others that lend themselves naturally to an ADR context. I do not think there is much question or dispute about that, although we could spend some time further defining where those lines are.

It is more interesting to discuss how private and court ADR are in competition. To this I said, "Yes, they compete, and that is a good thing." First, in the most raw economic analysis, what does competition do to a market? It increases supply. That is to say, if you are parties to a dispute and you need to find someone to help reach a resolution, you have a larger range and, arguably, a larger quantity of opportunities to get help.

Second, competition also probably improves quality, as each system strives to make itself continue to be relevant. And, both consciously and unconsciously, neutrals in the two sectors learn from each other. They learn that techniques that have proven successful in private ADR can improve the quality of court ADR proceedings, vice versa as well.

Third, I want to pick up on a point that Ken made about what was crucial for his program, which was transparency of process. I think that any one of us who has worked as a neutral has experienced that first hand. But I would suggest that we in the ADR community probably have not sufficiently acknowledged the fact that we had, as a starting point, decades—arguably centuries—of tradition of developing clarity and fairness in civil procedural rules. The ADR community then took those rules and adopted them and adapted them to the appropriate ADR context, all the while keeping in mind transparency, which is so crucial in the courts, and there seems to be much more focus, especially recently, on how that has benefited our ADR processes.

Allow me if I may to move on to two related questions, pose them, and invite others to pick up on these. First is the vanishing trial—Judge Kravitz in Connecticut has written a superb piece, published in the Connecticut Bar Journal. The general consensus is that it is an unfortunate development. Query whether ADR is a culprit or just an avenue to something that is caused by greater forces. I think that is a fascinating topic and it deserves more consideration. Second, what about the rule of law? I think we have a point/counterpoint here.

23. See Keynote Presentation, supra note 2.
Generally speaking, the rule of law is defined as “reasonable and objective standards, consistently applied.” One could make a challenge to ADR as to whether it represents the rule of law. In ADR there is often not a record and almost no appeal rights, and you do not know exactly what is going to govern the outcome. Is that “reasonable objective standards, consistently applied”? Well, actually, it is great freedom to deviate from that. Experience in America—and I think around the world—indicates that there are gaps in dispute resolution that are difficult for the courts to fill smoothly and adequately. And ADR, very often, is capable of filling those gaps as, Ken, your experience illustrates so incredibly.25

I want to close with a story along those lines that illustrates this point about the rule of law at the very low end of the spectrum. I gave a talk to a group of lawyers from a former Soviet Republic in Central Asia a few years ago. They related to me how commercial disputes are resolved there. The court system is hopeless. Nobody would bother to file a lawsuit to resolve a commercial dispute; they would go to arbitration. They would go through the process and obtain an award. The problem is: how do you enforce it? The winning party would hire a gang. The losing party would hire a gang. The gang leadership would get together to talk about what they were going to do with us, but their starting point was the award. It may not be much, but it’s something. Thank you.

MAZADOORIAN:

Tim, I see a whole new specialty developing in our field. Ken, you have heard our panelists opine on these many issues. Can you identify the top two or three ADR issues which, in your mind, you feel practitioners and scholars should focus on in the years ahead?

25. See Keynote Presentation, supra note 2.
I think the major issues are the ones that we have heard today: contracts of adhesion, the vanishing trial, all of those problems. I will just add three more to the list of problems, just to list them, and then we can move on. First, this whole issue of what Lela talked about, system design, mainly the whole question of hearings. How do you design a mediation or an arbitration system that assures that the litigants or the claimants will have a vested stake in the process?

Second, a mechanical problem, a practical problem that I see in a lot of mediations: I cannot get the right people there. You do a mediation, the litigant is not there or the company sends a lawyer but there is no in-house company representative, or the insurance company is the empty chair. It's a problem when you do these mediations. When people with authority to settle the case are not present: that is problem number two.

Finally, one that we all know about. I do about a dozen arbitrations a year and I really do not enjoy it all that much. Arbitrations, to me, are so complicated, so complex, so delay-ridden, so inefficient. It is not a whole lot better, in my experience, in some of these mega-cases, than a trial. It is so far removed from the world of mediation that I get frustrated at many arbitrations where the rules governing the arbitration are as complicated as if you had filed the lawsuit.

MAZADOORIAN:

Thanks, Ken. Let me throw it open to the panelists for a few minutes before we ask for audience comments. And I will just ask for anyone who wants to react or introduce a new point just to speak up. Larry?

26. Kenneth R. Feinberg was appointed by the Attorney General of the United States to serve as the Special Master of the Federal September 11th Victim Compensation Fund of 2001. He also has served as Special Master in Agent Orange, asbestos personal injury, wrongful death claims, and DES (pregnancy medication) cases. In 2004, he was named "Lawyer of the Year" by the National Law Journal (2004), and has been named repeatedly as one of "The 100 Most Influential Lawyers in America" by the National Law Journal. He is the managing partner and founder of the Feinberg Group, LLP. Mr. Feinberg earned his J.D. from New York University School of Law in 1970 and graduated cum laude from the University of Massachusetts in 1967.
PLENARY SESSION

PANEL DISCUSSION

MILLS:
I am sitting here beside Paul, and we have some disagreements about the subject he talked about. I just want to highlight for Paul and for others that the issue Ken characterized as “contracts of adhesion and arbitration clauses” is hotly debated within our [ABA] Section [of Dispute Resolution] and there is quite a split. We spent a significant amount of time at a recent Section Council meeting discussing the issue. This is an issue that, I think, divides the dispute resolution community. I think people in general would say that they want dispute resolution processes to be voluntary—that both sides agree to go into a dispute resolution process. And yet we have the overlay of law outside of dispute resolution of the shrink-wrap contracts—contracts of adhesion that have been enforced by the courts unless they are deemed unconscionable.

The unconscionability doctrines are really the safety valve for the dispute resolution community in dealing with the enforceability of arbitration clauses in adhesion contracts. Is that adequate? I know there is a breakout session on this.27 We may get into it more in [the breakout session entitled] “Hot Topics”. But I think this is a really hot topic for us, and we should be discussing this. I am hopeful that there is some middle ground. Right now, it seems to be a choice between either no enforceable pre-dispute arbitration clauses in certain types of contracts or presumed agreement and enforcement of adhesion contracts unless challenged as unconscionable. I am hopeful we can have a more nuanced discussion of these issues.

BLAND:
Well, I am glad to hear that this Section is divided like that. The last time I appeared in front of this Section about five years ago, there were 125 people in the room: three plaintiff’s lawyers and 122 defense lawyers, mostly for the banks. I did not feel warmly embraced. I remember getting a question of, “Wasn’t it a good idea to repeal the

27. The panel discussion was followed by morning and afternoon “Breakout Sessions,” each session focusing on a particular aspect of dispute resolution. The following Breakout Sessions were offered: “Collaborative,” “Consumer,” “Ethics,” Hot Topics,” “Commercial,” “Community,” “Courts/Pl,” “Education,” and “Family.”
Truth in Lending Act because it was a really stupid technical statute?" So I did not feel like I was totally on the same page as most of the other people there. With respect to unconscionability challenges as a safety valve, I think it depends enormously on the court. I just had oral arguments for a case in the New Mexico Supreme Court in which a debt collector, who terribly abused a woman, had an arbitration clause that said that if the consumer had any disputes, she had to go to arbitration. But if the debt collector had a dispute, he could go to court or arbitration, depending on how he felt. I think that we have a good chance of getting another state supreme court to strike down that type of clause.

On the other hand, a lot of states do very little. Several years ago, the Connecticut Supreme Court heard a case in which a guy worked at an accounting firm. For a while he was a regular employee at the firm, and then he went out on his own but was not doing so well. He went back to the accounting firm and did some hourly work. He did a lot of work for a client and the client ended up not paying the firm, and the firm then refused to pay the accountant. So, the accountant sued; but they had an arbitration clause. Under their arbitration clause, every one of the arbitrators would be a partner in the accounting firm. Literally, one of the worst unconscionable contracts I have seen anywhere in the country. Connecticut Supreme Court says, "That's okay. There's no problem with that." The court said, "Look. Even if the guy wins the full amount that he's claiming, it would only come out to $1,200 per arbitrator. And who's to say that an arbitrator would be biased because they had been given $1,200." Can you imagine if I walked into a

28. Hottle v. BDO Seidman LLP, 268 Conn. 694, 846 A.2d 862 (2004) (holding that an arbitration clause in a contract executed under New York law is enforceable when it authorizes an arbitration panel consisting solely of directors and partners of one of the parties).

29. Id. at 698 n.6 ("The arbitrators are selected from a pool of partners from the defendant's offices located throughout the United States.").

30. Id. at 713 (noting that under New York law, "the New York appellate courts repeatedly have upheld the enforceability of alternative dispute resolution clauses that authorize adjudication by employees and other representatives of a party to the underlying dispute").

31. Id. at 716-17 ("The plaintiff asserts, as an example, that were he to prevail on his contractual claim for $300,000, each of the 250 partners of the partnership would bear an average loss of $1,200. Even if we were to assume that this is true, although we agree that $1,200 is not an insignificant sum of money, we cannot say that it constitutes so substantial an interest that the law should presume, in advance of arbitration, that the partners acting as arbitrators cannot have the disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity regarding the controversy.") (internal quotation marks omitted).
federal judge’s courtroom in the beginning and said, “Hey, by the way, Your Honor, there’s 1,200 bucks in it if you rule for the plaintiffs in this case.” I would finally achieve my lifetime goal of getting the little pixilated picture in the “Wall Street Journal” on the front page. Can you imagine that being okay in court?

A court the other day upheld an arbitration clause that had a statute of limitations in an employment setting of six months, but in court, it would have been three years. There are courts that have upheld “loser pays” rules that are truly an end-game for consumers. None of my clients are in a position to say, “Okay. Well, I think I was cheated by a bank out of, say, $1,000. But if I lose and I have to pay $25,000 to the bank, that’s okay.” There are courts that have upheld that. I have maybe won about twelve to fifteen cases in which I have gotten courts to strike down an arbitration clause as unconscionable. But there are a ton of cases out there that have gone the other way; it’s the wild, wild west and no one is paying attention. One final comment: I think it was our keynote speaker at our Section, spring conference, Tom Stipanowich, who said that when law students are first introduced to arbitration, it is under unconscionability in the contracts text.

LOVE:

Part of my thesis was just that: there are too many rules in some cases, too few rules in others, and a recurring need to balance up. That is, to have an adequate framework of rules but with a modicum of flexibility. I think what you have devoted this significant part of your career to will lead to a balancing up. You would have registered some support at the last Council meeting of the ABA Section of Dispute Resolution. There is now a spotlight on this issue. People are talking about opt-out provisions for arbitration clauses in employment and consumer contracts. Bills are introduced in Congress banning pre-dispute arbitration provisions in a variety of contexts. There are procedural due process protocols that have been and are being put into place, and various industries address the sort of concerns that Paul has raised. So it will keep balancing up, and we need this sort of energy to keep pushing.

MAZADOORIAN:

Let me entertain one more comment from the panel, and then we will take questions from the audience.
HENSLER:

So maybe I will play the role of the second skunk at the party in terms of the notion that it will be okay and it will all balance out. Some of these issues that we are talking about, as Ken reminded us, are issues of system design. They are really appropriate for the kinds of people who are sitting in this room—for sophisticated parties to think about. Some of these issues—particularly the issues with regard to mandatory arbitration, the issues with regard to the institution of mandatory mediation in courts, and the use of that to drive people away from adjudication—are deeply political issues. The notion that they will all be worked out by right-minded people, I fear, is naïve. There is a bill that has been introduced in Congress to try to address mandatory arbitration clauses. The Chamber of Commerce has responded to that with a survey. They went out and talked with people and said, “Do you like arbitration?” People said, “Gee, that sounds like a good thing. Yes, we like arbitration.” The Chamber has said to Congress, “Well, this is a reason why you would not want to pass this bill.” So I think it is really important—as we consider the variety of issues having to do with ADR—to focus in on the issues that can be dealt with by ADR professionals and others who are interested in the process. But always keep in mind that this is taking place in a political environment and that the consequences of these systems are determined not just by the little specific rules or the good will of the third party neutral, but by larger political dynamics.

QUESTIONS FROM THE AUDIENCE

QUESTIONER 1:

Could there be a more multidisciplinary approach to some of the problems that the court sees? I do not know if any of our panelists deal particularly with that. Does anyone want to take a crack at that?

32. See Keynote Presentation, supra note 2.


34. See U.S. Chamber of Commerce, Voters Strongly Back Arbitration, New Poll Shows, http://www.uschamber.com/press/releases/2008/april/08-109.htm (“The recent poll found that seventy-one percent of likely voters oppose efforts by Congress to remove arbitration agreements from consumer contracts, and eighty-two percent prefer arbitration to litigation as a means to settle a serious dispute with a company.”).
LOVE:

I’m not sure if I am the best person to answer this, but there are a number of efforts that I am familiar with, both in the criminal courts. The Red Hook Community Justice Center in New York that received an award last year for its interdisciplinary effort to create a community criminal court that brought together a variety of disciplines to help make a better community while responding to the criminal cases before the court. 35 The family courts in New York have family group conferencing, which brings in social workers, as well as attorneys, for the various people involved. There are a number of ongoing efforts. Of course, there is the huge collaborative law movement. We now have a committee of the ABA Section of Dispute Resolution that addresses collaborative law, which is all about a multidisciplinary approach to clients’ problems.

QUESTIONER 2:

First of all, Ken, I would like to comment on your presentation. That probably was one of the best presentations I have listened to in years. 36 I want to thank you very much for your insight about the programs you have been involved with. I have just one comment. Toward the end, you talked about court mediation. Looking around the room, several of my colleagues on the state bench in Connecticut are here today who are all involved in the court mediation. It has actually been quite successful with the ones who really throw themselves into it and want to do it. Picking up on the points you said—having the right people at the table, having them there voluntarily, trying to work together, having a common goal—it works very well. The other thing that we have found is that sometimes, in the cases we cannot settle, we can be helpful with discovery issues. We can be helpful with tracking cases toward trial that sometimes in private mediation cannot be done. I encourage private mediation all the time, but the court-assisted mediation has worked very well in Connecticut with some judges. There are still some who don’t get the program, so to speak, and they are attempting something like mediation and they do not do it very well. But the ones who have followed the models that you have talked about, I think have had great success.

35. For more information on the Red Hook Justice Center, see the description provided by the Brooklyn District Attorney's Office at www.brooklynda.org (follow “Community Initiatives” hyperlink; then follow “Red Hook Community Justice Center” hyperlink).

36. See Keynote Presentation, supra note 2.
FEINBERG:

The question that I would ask you is whether, overall, the state judiciary in Connecticut is tuned in to ADR? Or—despite the presence of judges here who get it—that as a general rule, do you find that the state judiciary still has a long way to go philosophically in embracing ADR, and the glass is still half empty?

QUESTIONER 2:

I think we have passed the halfway mark. We are moving toward the glass being half full. But five years ago, my answer would have been that, overall, the state judiciary does not get it. I think that we have really moved in that direction in the last few years, but we are not yet there altogether. But as I said, the judges who are involved—maybe fifteen percent of our state judges are very actively involved in mediation—do so very successfully. A number of our senior judges, judge trial referees who are seventy years and older, are very actively involved and very successfully involved in it. So we are moving in the right direction.

QUESTIONER 3:

I have a comment on what was just said and, also, I wanted to raise an issue that was not really addressed here. On the notion of mediation and the buy-in with the judiciary: when I was in practice, we had pre-trial conferences, and now those pre-trial conferences are being called mediation. I do not see them as being true mediation, nor do they differ significantly from traditional pre-trial conferences. The pre-trial conferences that are now called mediation consist of a judge sitting with the attorneys; the participants are really excluded from the process, by and large. I have concerns about whether, in the Connecticut system, we really have gotten into the modern view of what is ADR.

The other issue I wanted to raise is the whole restorative justice area. I realize that most people here are in the civil side of things. But I think it is an area that has not been adequately addressed. There are little pockets here in Connecticut, particularly in juvenile offender victim mediation. Then there are some other bits and pieces. There are some programs in other parts of the country that are much more progressive. But it is a huge area that I would invite people to consider as a way to address some of the problems that we have in the criminal justice
system. Lela [Love] mentioned Red Hook, but that is more of a holistic kind of process, which is certainly good. But I think it is something that we need to think about and look to try to institute more in Connecticut.

QUESTIONER 4: Mr. Feinberg, you mentioned procedural due process; you said that the claimant had a right to be heard. What other elements of procedural due process did you find that were important to introduce or put into your process?

FEINBERG: The right to bring anyone you want into the hearing. You can bring a lawyer, an accountant, a friend, a relative, anybody, and as many people as you wanted. There were no barriers. It was your hearing. You could bring whomever. The hearing would be under oath, giving you an opportunity to know that this was a formal opportunity. This was not something that was just a give-away. This was something that was official. A transcript would be made at the government’s expense so that you could, after the hearing, order a copy and reread what you had said and have that in your possession.

Finally, even though the statute prohibited any appeal to the courts, if you were in the 9/11 Fund, as you administrative law experts know, we created an administrative appeal. If you did not like the size of your award, or if you wanted to have a hearing before an award was even rendered, either way, you had the right. Well, if you wanted a hearing before the award was rendered, you did not have the right to an appeal; but if you got an award in the mail, "Dear Mr. Jones. You have been awarded $3.1 million." If he thought that unfair, we did provide the right for that person to come in and to have an opportunity to argue that the calculation was inadequate or inappropriate. Those are some of the procedural mechanisms we designed in an effort to promote claimant fund friendliness in terms of the non-adversary system. It was very non-adversarial. We were really fiduciaries for these claimants, not adversaries.

37. See supra note 35 and accompanying text.
38. See Keynote Presentation, supra note 2.
QUESTIONER 5:
Is there a current consensus on whether serving as a mediator or as an arbitrator is considered the practice of law? If so, does that discourage people from acting as mediators and arbitrators?

MILLS:
Yes. As far as the ABA Section of Dispute Resolution is concerned, serving as a mediator is not considered the practice of law. I realize different jurisdictions have asserted their regulatory powers in various ways, but that is the Section's position and we have taken a strong stand on that. I also want to emphasize that our Section itself has many members who are non-lawyer professional mediators. We welcome them. The door is open to whomever the parties choose to be a mediator. The Section does not consider being a mediator to be the practice of law.

QUESTIONER 6:
This is a follow-up to a topic that Mr. Feinberg was addressing earlier. With respect to designing and calculating awards based on individual circumstances, what do you think of the use of guidelines or quotas?  

FEINBERG:
We could spend the rest of the day here. I am a big believer in maximum discretion. I do not mind guidelines and formulas as long as they are guidelines and they are not mandatory. The 9/11 Fund was great. Congress passed a law that said the Special Master must consider economic loss, must consider non-economic loss, must consider collateral sources of income and may exercise his discretion to see that justice is done. "Thank you. That's a big help." Must, must, must, may. It worked for the 9/11 Fund, but I must say, back to design, the notion that you want to provide a very flexible method for resolving the dispute. I am a big believer in maximum discretion conferred on the mediator.

QUESTIONER 7:
This is primarily a question for Paul [Bland]. I don't know if you

39. See Keynote Address, supra note 2.
are familiar with the AAA's\textsuperscript{40} rules for employment arbitration and mediation, but if it is considered to promote procedural due process, and if there were simple rules for consumer litigation, would you be less opposed to contractual arbitration clauses?

BLAND:

They do have due process protocols in consumer cases. I think that they are much better than if they did not have them. I think the AAA is one of the better providers out there, comparatively. This is one of the reasons that you see so many companies writing them out of contracts right now and replacing them with the National Arbitration Forum.\textsuperscript{41} The AAA’s role in the market is disappearing pretty rapidly. I will say, I think the AAA’s due process protocols in the consumer context are quite vague. They will have something like, “The costs will be reasonable,” but that, I think, turns out not to be so true in a lot of cases. I have seen cases in which gigantic costs are visited upon consumers, despite those clauses. So I think that there are some limits there.

There is one quick thing I wanted to throw in at the end if I can: there is something that happened yesterday that I think most people probably missed. There was a legislative development. The Senate passed overwhelmingly this gigantic farm bill.\textsuperscript{42} One of the provisions in the farm bill bans mandatory pre-dispute arbitration of disputes between large agri-businesses and individual farmers.\textsuperscript{43} This will be the third time in five or six years that Congress has exempted some category of claims from the Federal Arbitration Act. This one issue has made the Chamber of Commerce so angry that they are trying to get senators and congressmen to vote against the entire farm bill because they are concerned about the precedent being set of mandatory arbitration being banned in a particular sector.


\textsuperscript{43} Id. § 210.