



SPECIAL MASTERS

A Different Answer to a Perennial Problem

By Merrill Hirsh, James M. Rhodes, and Karl Bayer

For decades, thoughtful drafters have amended rules with a view toward reducing the costs of civil litigation: Meet and confer requirements; limiting, for example, the number of interrogatories or the length of deposition; requiring signatures; imposing sanctions for discovery abuse; and providing electronic (“e”) discovery rules.¹

You’d think that with so many solutions to a longstanding and important problem, we would be on to other problems by now. But, as Judge Lee Rosenthal, former chair of the Advisory Committee on Civil Rules, noted: “[S]ince their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens.”²

Below, we suggest that for all the fine efforts made to amend the *rules*, to solve the problem of overlitigation, we need to do something else: Amend the *process* to incentivize efficient litigation by employing significantly more intensive case management than judges and magistrate judges currently have the resources to provide. Make special masters not a rare exception to the normal process of complex civil litigation but a normal part of complex litigation. Instead of using special masters ad hoc (when a judge perceives unusual circumstances warrant appointment) and post hoc (after things have gotten so bad that the problems are difficult for anyone to solve), bring them in regularly at the outset and maintain a roster of special masters chosen through a vetting process, trained to manage the litigation, and monitored and evaluated to confirm how well they are accomplishing it. Instead of attempting to define options within the scope of general rules, tailor the approach to the disputes involved.

Because what is past is prologue, we begin by looking at prior studies on to what extent litigation is inefficient and why.

Inefficient Litigation: Warring Camps that Find Peace

There is healthy room for disagreement over whether and how much to blame the rules for causing or failing to prevent civil litigation from being too expensive and protracted. Some, such as the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), argue that prior amendments have led to a situation where “discovery can cost far too much and can become an end in itself,” and they have cited as typical views that call e-discovery a “morass” and prior rule amendments a “nightmare.”³

Others, such as Emery Lee III and Thomas Willging, argue that this view, however strongly and widely held, is mistaken because what statistics we have suggest that it is not the rules that drive the costs but rather that costs are proportional (and, therefore, correlated) to the amount at stake and the complexity of the case.⁴ Or they urge (also strenuously) that

it is mistaken to amend rules generally because the data suggest that “complex, high stakes litigation, handled by big firms with corporate clients, are the cases most likely to involve the kind of problematic discovery that skews the discovery debate.”⁵

Look more closely, and the two camps’ ideas converge on several important points. First, they appear not to be so much disagreeing over the problem as looking at different parts of the elephant. Both agree that many judges, lawyers, and parties report from experience that civil litigation is too expensive and damages our efforts to obtain justice. The Advisory Committee on Federal Rules relates that “[a]lmost half” of plaintiff and defense respondents to a survey of ACTL Fellows “believed that discovery is abused in almost every case.”⁶ Ask for examples, and what you hear is not reasonable differences over how to conduct discovery but sheer waste. As Judge Mark Bennett has written, “Plaintiffs’ counsel often ask for so much irrelevant information that they would have no idea what to do with it if they received it”; while not to be outdone, “[t]heir overbroad discovery requests are inevitably met with every equally silly and impermissible boilerplate objection known to humankind.”⁷

Saying that discovery costs are proportional to the case’s stakes and complexity does not mean that all of these observers are delusional or make obvious waste efficient. As Lee and Willging recognize, empirical statistics can “shed some light” on a judgment by telling you how much people are spending or how much they are spending relative to variables, but statistics do not tell you whether they *should be* spending so much.⁸ In fact, even if it were true that the amount at stake in litigation explained 100 percent of the variation in the cost of discovery (and, of course, it does not), it would not tell you what portion of the amount spent on any case is necessary. It could be, for example, that as cases approach “bet the company” levels, there is less control over the expense and, concomitantly, much more waste when compared to litigation that is “lean and mean” (or, perhaps, “lean and cooperative”). Indeed, statistics suggesting that “complex, high stakes litigation, handled by big firms with corporate

clients,” seems to be the problem,⁹ it may also suggest that when more is at stake, the dispute is more likely to be handled counterproductively.

Nor does saying that costs are proportional to stakes and complexity tell you that cost is something potential parties can afford to pay. These days, it is not unusual for large complex cases to use scores or even hundreds of timekeepers and involve scores of millions of dollars in fees, including seven- or even eight-figure expenses for e-discovery alone. With numbers this large, even large corporations have to think twice before they take a case to judgment. Nor are the complexity and stakes of a case necessarily tied to the parties’ ability to pay for them. As Magistrate Judge John Facciola recently noted, the high cost of civil litigation has made the federal courts



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“inaccessible to the middle class” and, unless things change soon, “the vast majority of Americans will never step inside a federal court no matter how just or meritorious their claims may be.”¹⁰

Second, at this point, both camps generally agree that regardless of whether rules are the problem, they have not been the solution. ACTL-IAALS’s recent follow-up agrees that “rules reform without a change in culture will not be effective.”¹¹ Their recommendations take the form primarily of “Principles.”¹² Lee and Willging suggest that gamesmanship may limit the effective-

magnify pain or delay reckoning. But what makes the problem of litigation cost particularly insidious is that you do *not* need to ascribe bad motives to the participants to see how our incentives are currently disserving our expressed goal of just, fair, and efficient resolution of disputes.

Look at our current incentives. To begin with, we (for good reason) tell lawyers in the words of the old ethics canons to defend their clients “zealously within the bounds of law.” But the boundaries we set are inherently vague and debatable and, because we value parties having access to

Judge Frank Maas commented, civil trials have “gone the way of the dodo bird,” thus eliminating the necessity for lawyers to focus on identifying the evidence needed to prove their case at trial.¹⁷ Judge Bennett calls discovery abuses “the mark of ‘litigators’—water cooler Clarence Darrows, paper-pushing paper tigers who seldom, if ever, try cases.”¹⁸

Moreover, because the vast majority of civil cases settle, the effectiveness of these strategies is rarely tested by a final decision. The cost of the process itself encourages parties to settle regardless of merits and does not often identify efforts as counter-productive. Just as real estate lawyers put the word “enfeoff” in deeds not because they know what it means, but because lawyers have done that since the Middle Ages, litigators do not want to risk going without methods everyone seems to use, at least until someone gives them a reason not to.

You do not have to ascribe bad motives to see how these incentives push the process, and the envelope, toward broader discovery and greater expense and why (for all the hard work) rules have not by themselves solved the problem. Rules change the terms of engagement, not necessarily the incentives themselves. Limit the number of interrogatories and lawyers argue over how to count them (subparts, commas, etc.) or whether to grant leave to increase the number. Limit the number of hours for depositions and you incentivize the defending side to go into the four corners to have as little asked as possible.

Worse, well-intentioned procedures can increase the incentive to be unreasonable. For decades, courts have required parties to “meet and confer” before they can bring matters to the court’s attention. The logic seems unassailable: 97 percent of ACTL survey respondents say that “when all counsel are collaborative and professional, the case costs the client less.”¹⁹

The problem, as ACTL-IAALS reports in the very next sentence, is that “[u]nfortunately,” notwithstanding decades of meeting and conferring, “cooperation does not often occur.”²⁰ Requiring lawyers to meet and confer does not necessarily incentivize them to be cooperative. To the contrary—in practice, it can encourage lawyers to be

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ness of rules or that rules simply may not be the “the actual drivers of cost.”¹³ Either way, the message is to look to other solutions besides rules.

Both camps also agree that “the ‘one size fits all’ approach to litigation does not work,”¹⁴ and it is a mistake to make general amendments based on problems that are particular to some instances and not to others.¹⁵ Accordingly, both camps would seem to subscribe to ACTL-IAALS Principle No. 2 that “[t]he ‘one size fits all’ approach of the current federal and most state rules should be discouraged. Case management should allow for flexibility to create different sets of rules and protocols for certain types of cases so that all cases can be resolved expeditiously and efficiently.”¹⁶

The Problem Is Not Just Culture, but Incentives

If one size does not fit all, what does? It is easy to assume that litigation is too expensive because lawyers run up costs or that parties want costs to increase so as to

information, necessarily expansive. There is a tension here: You cannot make lawyers pledge to defend their clients to the death and then expect to gain traction by admonishing them not to overdo it. If circumstances encourage lawyers to overdo discovery (and attending disputes), then we should not be surprised when they do that.

Our system is also a victim of lawyers’ admirable desire not to prejudice clients by missing something. We expect that lawyers will wake up at night in a cold sweat about the information they *failed* to request, not the requests they made in overabundance of caution.

Then add that, because it has been so long since civil cases routinely went to trial, there are now legions of lawyers at impressive firms who have little or no trial experience and learned at the feet of others who also had little or no trial experience. What lawyers have learned to do well is assemble massive staff and apply them to discovery so that no stone, pebble, or grain of sand remains unturned. As Magistrate

unreasonable in the first instance because they know that nothing can go to court without *the other side having to negotiate*.

Decades ago, parties frequently filed discovery requests and responses with the court. It is understandable why courts eliminated that practice: All the clerks' offices in the world could not house all that paper, and it is hard to picture many judges leaping at their in-boxes to read the Third-Party Plaintiff's Third Supplemental Objections and Responses to Third-Party Defendant's Fourth Set of Contention Interrogatories. But when courts stopped having discovery filed, they confirmed what was already true: Parties are supposed to conduct discovery between themselves, confer about disagreements between themselves, and bother the court only when they cannot play nice enough together.

In practice, this process can punish lawyers for acting reasonably. Imagine (and we do not have to; we see it every day) that an unreasonable lawyer (UL) knows that the adversary is a "reasonable lawyer" (RL). UL sends unreasonable discovery demands knowing that RL will send only reasonable ones. UL makes as many objections and as few responses as possible knowing that RL will provide limited objections and reasonable responses. UL now has the responses, can schedule depositions, and can use the material in motions (all the while threatening *in terrorem* to demand the full unreasonable responses). In most courts, RL at best has to go through the meet-and-confer process, file a motion to compel, get the motion fully briefed, attend a hearing, and await a decision that in some courts could take months. Who would you rather be?

When disputes come to the court's attention only after objections, letters, counter-letters and recriminations, the process resembles a parent trying to make peace between finger-pointing children. The court is more likely to blame both children . . . er . . . lawyers than to have the time and inclination to sort out who did what to whom or to head off the next fight. And if courts are busy (which, of course, they are) and the motion remains undecided, the dispute festers and grows, with both sides assuming theirs is the correct position as they begin the next discovery fight.

It is good to divorce the ethical obligation to represent clients zealously from the seeming need to be unreasonable and to admonish them to be reasonable.²¹ But admonishing lawyers to play nice is no more effective than it is with children. We cannot expect lawyers to be reasonable when they perceive that the system rewards being unreasonable: The RLs of the world risk having virtue be its own (and only) reward.

A Solution Requires Not Just Rules, but Resources

True virtue, like integrity, may well be "doing the right thing even when no one is watching."²² But to incentivize virtuous *conduct*, we need to be watching. Serve discovery and the responses not only on adversaries but also a neutral, who will schedule a call to discuss the reasonableness of the parties' requests or responses *before* the parties disagree. Under this system, three things happen:

1. Lawyers are incentivized to be reasonable in the first place. No lawyer really wants to look unreasonable in front of a decision maker. Perhaps before asking for the sun, the moon, and the stars, think about whether you really need Alpha Centauri.
2. If they are unreasonable, they do not gain by it.
3. The lawyers get an answer quickly—before they waste time on objections, letters, counter-letters, and recriminations.

Don't just tell lawyers that they should not ask argumentative or unfair deposition questions or make speaking objections or improper instructions not to answer. Tell them that a decision maker will actually be available for a telephone call, or, if necessary, be there in person to rule on objections. As Judge William Schwarzer and Lynn Pasahow note, when counsel know that the decision maker will actually take telephone calls from depositions, "[t]he mere fact the judge is readily accessible tends to cause attorneys to act more reasonably at depositions and forgo objectionable conduct, or at least to become more reasonable once a call to the judge is inevitable."²³

If we do not want "one size fits all" for complex cases, have someone there in complex cases who can tailor the procedures. For example, if you want to deal with e-discovery, then have the decision maker armed with technical expertise. To their credit, some judges and magistrate judges have developed expertise in e-discovery and have worked to develop both rules and protocols for e-discovery. And the Seventh Circuit's Electronic Discovery Pilot Program, which brings e-discovery experts into the committees that design protocols, is an important step.²⁴

But we cannot expect every judge or magistrate judge to be a technology expert, and efforts to resolve the problem by rule or protocol have inherent limitations. Technology changes every week. It is difficult enough to keep up with the latest advance sheets much less pore over every new software upgrade. Technological expertise allows you not just to *address* e-discovery problems but to craft solutions. For example, e-discovery experts can suggest ways to find information that seems inaccessible; balance the costs and benefits of collections from legacy data systems; and establish a protocol for leveraging technology-assisted review including e-mail threading, search term filtering, or predictive coding. These experts could also offer creative solutions to resolve disputes, such as semi-automated privilege logs, categorical logs or indices, or the production of database export reports in lieu of e-mails for establishing facts.

Could the parties themselves save hundreds of thousands (or millions) of dollars by agreeing to all this themselves? Perhaps. But not if e-discovery is a fight for supremacy. Like the prisoners' dilemma, the fact that efficient process benefits everyone does not mean that either side will agree to it. You need a neutral to enforce the parties' higher self-interest.

This type of tight case management is extremely time consuming and certainly not free, but the potential returns are enormous. If we invest \$1 million in managing a massive complex case, we can potentially save the parties \$10 million or more. Indeed, if case management incentivizes lawyers to be reasonable, then the investment in case management will reduce the need for it:

Lawyers will have fewer disputes and waste less time (the court's and each other's).

Just because a case could involve many millions of dollars in legal fees, however, does not mean that judges and magistrate judges have \$1 million to invest in managing it. It is no criticism of the bench to recognize that very few judges and magistrate judges have the time to provide this level of hands-on case management. ACTL-IAALS's "Principles" (though more modest than the hands-on control we discuss here) "call for greater involvement by judges" and urge "[w]here judicial resources are in short supply, they should be increased."²⁵ But saying it does not make it happen. With courts in some places closed one day a week for insufficient funding, judicial vacancies, an enormous caseload, and priorities for criminal trials, it is not reasonable to expect that judges or magistrate judges will have the resources to perform the type of hands-on case management necessary to change the incentives in the process.

Nor, critical as case management is to justice, is this type of case management the best and highest use of judicial time. As frustrations like those expressed by Judge Bennett and Magistrate Judge Maas reflect, very few judges or magistrate judges believe that they were called to the bench in order to herd cats. Nor should they. They should be able to focus on case adjudication, not on this type of case management.

This puts our judicial system in a conundrum. We could all save time managing cases if we took more time away from other judicial functions to manage cases.

Special Masters Can Do This

Courts should make a dramatically broader use of special masters in complex cases to perform the hands-on case management that controls costs. In some senses, this is a significant change from the way we use special masters. For example, Federal Rule of Civil Procedure 53 has long discussed the appointment of special masters, but literally the rule is not so much an authorization to appoint special masters as it is a limitation on the inherent ability to do so. Rule 53(a)(1) specifies that, "[u]nless a statute provides otherwise, a court may

appoint a master *only to*" perform specified functions, including "(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." While this language seems broad enough to permit appointment of special masters in a class of complex cases that outstrip judicial resources to manage, the traditional thinking has been "that appointment of a master must be the exception and not the rule."²⁶

However, the reason for making special masters the exception is precisely the reason now to use them in complex cases. The 2003 Advisory Committee Notes explain that "[t]he need to pay compensation is a substantial reason for care in appointing private persons as masters," especially because parties may have uneven ability to pay.²⁷ If, however, special masters pay for themselves by reducing the cost of complex litigation, it makes the process more fair, not less.

Making the process more regular also makes the case management effort more effective and less expensive. Now, with limited exceptions, special masters are brought into cases both ad hoc and post hoc. Most likely, a special master will be retained if something has gone wrong—as a sanction against a party that has failed to comply with discovery, or as a way of monitoring a remedy imposed for wrongdoing, or as a pox on both houses to deal with discovery disputes that have already led judges and magistrate judges to throw up their hands.

It isn't that special masters cannot help in those situations. They can. But coming in to try to pick up the pieces that parties have worked to shatter is not an occasion where anyone is likely to shine. And as litigants never know whether they will be under the tighter control of a special master, they cannot know that someone will be watching.

Another apparent difference with current practice is that most courts do not maintain rosters of special masters. Rule 53 says very little about how special masters are to be chosen. Rule 53(a)(2) says that, absent disclosure and consent, the master "must not have a relationship to the parties, attorneys, action, or court that would

require disqualification of a judge under 28 U.S.C. § 455." Rule 53(b)(1) says that "[b]efore appointing a master, the court must give the parties notice and an opportunity to be heard" and that "[a]ny party may suggest candidates for appointment."

By maintaining a roster of special masters, judges and court staff can provide quality assurance. They can establish a selection process, training and review, and a means of assessing the work of special masters to make sure that they are improving the situation. They can link them to e-discovery expertise.

Having a regular process can also facilitate regular study. Observe and evaluate special masters. Do a test project (like those of the Federal Judicial Center) comparing cases litigated with and without special masters to determine whether resolutions are less expensive. Develop working relationships among the bar, the court, and the special masters so that the process is both predictable in advance and evaluable in retrospect.

On the other hand, what is new is also in some sense old. Some state courts have programs that are somewhat closer to this model, at least in particular areas. For example, some trial courts in California have standing rules for appointing special masters in particular types of cases—such as construction or domestic disputes.²⁸

Moreover, both federal and state courts already routinely use neutrals as a means of addressing their caseload. Years ago, judges spoke about settlement in far more hushed terms. Now, there has been an explosion in the use of court-based alternative dispute resolution programs, primarily mediation.²⁹ Civil litigators advise their clients to expect that they will need to discuss settlement or attend mediation. At pretrial conferences, it is routine for judges to discuss Rule 16(c)(2)(I), involving appropriate action on "settling the case."

It could be equally routine to discuss Rule 16(c)(2)(H) ("referring matters to a magistrate judge or a master") and (P) "facilitating in other ways the just, speedy and inexpensive disposition of the action." Identify at the outset complex cases that can benefit from tight case management, convince parties that this is likely to save them

time and money, and make sure it works by carefully selecting masters to perform a regular service and evaluate their work.

This may seem like a tall order. But, in fact, most of the facilities for doing this already exist. Substitute “mediator” for “special master” and many courts do have rosters; they do have training, observations, evaluations, and surveys. These days, most courts have directed admirable energy to doing agreement among litigants. By forming a committee to recommend guidelines to facilitate more efficient use of special masters, the Judicial Division can help courts to do disagreement too. ■

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Endnotes

1. See, for example, FED. R. CIV. P. 26 advisory committee note on the amendments in:

1980: “[t]here has been widespread criticism of abuse of discovery”;

1983: the “first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information”; Rule 26(g) “provides a deterrent to both excessive discovery and evasion”;

1993: “A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives”;

2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources “that are accessible only by incurring substantial burdens or costs.”

2015: Amendments that, among other things, expressly limit discovery to be “proportional to the needs of the case”; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be “construed,” but also “administered, and employed by the court

and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

2. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228 (2010). See also, e.g., Emery C. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 766–69 (2010) (many argue that the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 1997 Boston College conference, and the 1980, 1983, 1993, 2000, and 2006 rule revisions all failed to curtail the expansiveness of discovery).

3. See, e.g., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2, 14–15 (rev. Apr. 15, 2009), available at <http://www.actl.com/Content/NavigationMenu/Publications/AllPublications/default.htm>. See also Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 706–07 (1998); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752–53 (1998) (describing rising opposition to broad discovery).

4. See, e.g., Lee & Willging, *supra* note 2, at 769–76; Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2074 (2002).

5. Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685 (1998). See *id.* at 689 (“[T]he Advisory Committee will further amend the discovery rules—even if this is neither necessary nor desirable—because it is in the nature of bureaucracy that committees, once called into existence, do something. Max Weber probably said that, someplace.”).

6. Judicial Conference Report, *supra* note 2, Rules Appendix at B-6 (emphasis added).

7. Hon. Mark W. Bennett, *Reflections on Judicial Regrets*, 41 LITIG. 5, 6 (Winter 2015).

8. Lee & Willging, *supra* note 2, at 770–71.

9. Mullenix, *supra* note 5, at 685.

10. Gail Gottcher, *Judges Panel: What's Wrong with Discovery? Top Magistrate Judges Analyze E-Discovery Problems at Driven Inc. Panel*, LAW TECH. NEWS (Feb. 9, 2015).

11. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROMISE & PROGRESS 3 (General

Observation No. 1) (2015) [hereinafter PROMISE & PROGRESS], available at http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf.

12. *Id.* at 4–28.

13. Lee & Willging, *supra* note 2, at 783.

14. PROMISE & PROGRESS, *supra* note 11, at 3 (General Observation No. 3).

15. Mullenix, *supra* note 5, at 686 (“If complex litigation is the source of more problematic discovery practice, then rule reform ought to be tailored to the universe of this particular litigation that inspires complaint.”).

16. PROMISE & PROGRESS, *supra* note 11, at 4. See also Corina Gerety, *Trial Bench Views: IAALS Report on Findings from a National Survey on Civil Procedure*, 32 PACE L. REV. 301, 303 (2012) (7 percent of state and federal trial judge respondents in a 2010 survey agreed that the “civil justice system works well for certain types of cases but not others”).

17. Gottcher, *supra* note 10.

18. Bennett, *supra* note 7, at 6.

19. PROMISE & PROGRESS, *supra* note 11, at 11.

20. *Id.*

21. See, e.g., *id.* at 11 (discussing Seventh Circuit’s Electronic Discovery Pilot Program’s Principle 1.02 that “[a]n attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner”).

22. The quote is attributed to author C.S. Lewis.

23. See WILLIAM W. SCHWARZER & LYNN H. PASAHOW, CIVIL DISCOVERY: A GUIDE TO EFFICIENT PRACTICE 139 (1989).

24. See PROMISE & PROGRESS, *supra* note 11, Appendix A at xii–xiii (describing the program).

25. *Id.* at 14 (Principle 10).

26. FED. R. CIV. P. 53 advisory committee note on 2003 amendment.

27. *Id.*

28. See, e.g., SAN MATEO COUNTY LOCAL COURT RULES, DIVISION VIII.

29. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58, required each of the 94 federal districts to “authorize” use of ADR in civil cases. As of 2004, 63 districts authorized mediation; 28 some form of nonbinding arbitration; and 23 early neutral evaluation. Thomas J. Stipanowich, *Arbitration and the “Vanishing Trial”*: The Growth and Impact of “Alternative Dispute Resolution,” 1 J. EMPIRICAL LEGAL STUD. 843, 849 (2004). As long ago as 1990, it was estimated that more than 1,200 ADR programs were being operated by or in conjunction with state courts. *Id.*