

**AMERICAN LAW INSTITUTE STUDY ON
PATHS TO A "BETTER WAY":
LITIGATION, ALTERNATIVES, AND
ACCOMMODATION
STEERING COMMITTEE REPORT**

I. ORIGINS AND CONCERNS OF THE STUDY

Speaking to the Annual Meeting of the Institute in May, 1985, Chief Justice Warren Burger called for an ALI study of litigation and its alternatives. His address included these remarks:

For some disputes, trials will always be the only means, but for many claims, we simply do not need trials by the adversary contest. As we now practice it, that system is too costly, too painful, too destructive, and too inefficient.

My submission is this: Has the time not come for a careful, thoughtful, objective examination—a typical American Law Institute study—of the whole litigation process under the common law system[?]

. . . .

We need that study to answer the question: Is there a better way?¹

Chief Justice Burger's call came against a background of mounting distress at excessive cost, volume, and delay in litigation, as well as major efforts to address these problems through both substantive and procedural reform. Prominent among these efforts was the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference").² Among other developments, that conference helped to inspire the great expansion over the last several years of alternative dispute resolution (ADR) mechanisms.³

The Chief Justice's call presents the perennial challenge of finding and implementing ways to render justice with reasonable speed, efficiency, humaneness, and accuracy. The American Law Institute concluded that the Chief Justice's challenge could be met best not by any single, massive study, but rather through a wide range of studies and

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1. Burger, *Opening Remarks*, in AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 62D ANNUAL MEETING 1, 8-9 (1985).

2. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds. 1979).

3. See, e.g., Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

reforms conducted or implemented by various bodies over a period of time. Certain Institute projects already in progress respond to other aspects of the challenge, including issues going to the scope of substantive liability.⁴ However, the Institute concluded that the challenge also called for an effort on its part to help draw the "road map" of paths to a "better way," with whatever proposals might emerge from that effort. The recommendations that follow point to promising paths to a "better way"; they focus primarily on general civil disputes in federal and state courts and adjuncts thereto, such as court-annexed arbitration plans.

II. PHASES OF THE PROJECT

The Steering Committee for this project met during 1986 and 1987 to discuss the themes of the study. The Project Director prepared an extensive background paper, which surveys the relevant literature and discusses promising paths for further work. An earlier draft of that paper was a basis for discussions at an invitational conference at Northwestern Law School in April, 1988, attended by a group including practicing lawyers, judges, corporate officials, and researchers and scholars. This Steering Committee report draws on the background paper and the deliberations at the Northwestern conference.⁵ After a synopsis of major themes, we offer suggestions for reform, experimentation, and further research—which would, in many instances, be a vital precondition to major action. In brief summary, our recommendations call for:

- (1) Measures to reduce or reallocate expenses of litigating, such as:
 - Broader use of pretrial neutral evaluation mechanisms, possibly coupled with formal offer of settlement devices affecting liability for post-offer attorney fees when a case continues beyond the initial award;
 - Renewed efforts to curb excessive discovery (and attendant high expenses) by such possible measures as regularizing the award of attorney fees to parties prevailing on contested discovery matters; sharply limited discovery of right with leave of court often required for more

4. Related Institute work includes the Project on Compensation and Liability for Product and Process Injuries, the Restatement of the Law Governing Lawyers, and the Study of Complex Litigation. On questions of substantive tort reform, professional responsibility, and mega-case procedure, this study largely defers to these other efforts. See also Rowe, *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation—Background Paper*, 1989 DUKE L.J. 824, 865 [hereinafter] *Background Paper* (discussing the relations between substantive law and dispute processing, including such problems as the effect of punitive damages on litigation and settlement; administrative alternatives; and the role of professional responsibility).

5. Although this study has been conducted under the auspices of the American Law Institute, this Report is that of the Steering Committee. The Institute speaks only through the Council and votes of the membership as a whole. Similarly, the Project Director is responsible for the article that follows this Report.

extensive discovery; and perhaps even an expanded judicial role in pre-trial fact-gathering;

—Compensation for parties forced to incur attorneys' fees to oppose groundless claims and defenses; incentive-based fee award formulas; and possibly increased attorney responsibility for shifted fees; and

—Exploring means of providing legal services for the poor.

(2) Measures to reduce the delay and contentiousness of litigation by promoting settlement, such as carefully crafted offer of settlement rules and various forms of judicial involvement, without excessive judicial pressure or sacrifice of important rights.

(3) Filling information gaps by further basic research and improved data gathering, in such areas as state court statistics, grievances and disputes in which redress is not sought, judicial work loads, and ADR "tracking" systems.

III. THEMES OF THE STUDY

A. *The Nature of the "Problem."*

The perception is widespread that American federal and state courts face a crisis of volume, cost, and delay, and that these detrimental effects hamper the system's ability to process cases efficiently and to render justice. Despite this widespread perception, serious disagreements about the scale of these problems divide commentators; little consensus seems to exist about the causes and implications of caseload growth. Some see an explosion of litigiousness; others see more liberal recognition of justified grievances and argue that much criticism of litigation amounts to "blaming the victims." In any event, much of the growth of litigation in recent decades reflects the expansion of substantive law and legal rights.

The causes of burdens in civil dispute processing systems hold relevance for the types of responses that might be appropriate. For instance, caseloads resulting from a specific, temporary source, such as black lung cases some years ago, peak and then decline in due course, or require targeted rather than across-the-board measures. A problem of more generalized scope, such as filing of nuisance claims or abusive litigation conduct across a wide range of cases, can warrant a broader response. The sources of caseload growth are many and often complex; one is the general effect of increases in population and economic activity. Beyond that, it appears that over the first several decades of this century there was a major increase in tort litigation. Yet although tort cases are prominent in perceptions of the "litigation explosion," in the past two decades the *relative* proportion of overall civil court dockets coming from general tort filings seems to have stopped growing and has perhaps even begun to

decline somewhat.⁶ At the same time, *federal* civil and appellate dockets have increased at a much higher rate than most state court caseloads. Significant parts of the federal courts' workload increase, however, have resulted not only from private litigation but from government policy decisions such as stiffer scrutiny of Social Security benefit claims.

Many contributing causes to undue cost and delay in litigation lie outside the court system itself—in social attitudes, urbanization, and growth in the coverage of substantive law. Their effects are especially felt when judicial resources do not expand to keep pace with the increased workload. Yet the problems also result partly from several major characteristics of the American system of civil litigation, in particular the right to trial by jury in civil cases; broad discovery; the financing of litigation by contingent fees; the American rule against attorney fee shifting; and low court user fees. In addition, the system has too often been tolerant of abusive tactics in litigation.

The sources of cost and delay, those both external and internal to the court system, often involve deeply rooted institutions and values, such as the adversary system and the sense that access to justice should be readily available. Such factors constrain change, and suggest that the litigation "crisis" may be the product of powerful social forces. Hence political realism and sensitivity to important values are necessary in considering possible reforms.

B. *The Value of Justice and the Problem of Tradeoffs.*

A basic difficulty facing civil justice reform is the tension between the value of access to justice and the costs and consequences of assuring such access. Ideally, doing justice for those who have suffered wrongs should be costless, or at least sheltered from the influence of costs, and realism must not eclipse the social value of making whole the victims of injustice and legal harm. The ideal of costless justice, however, is not attainable, and pursuit of the ideal to the exclusion of other considerations would have serious consequences. Providing courts or other dispute processing mechanisms requires expensive social resources. The parties themselves necessarily must incur some costs in their pursuit of justice, however those costs eventually are allocated. Trying to provide justice as a totally free good would lead to an increase in abusive claims along with meritorious ones, queueing, and stiff competition for resources from other social demands. Sanctioning processes might lessen abuses but would produce costs and problems of their own.

6. See *Background Paper*, *supra* note 4, at 854.

Dilemmas and tradeoffs therefore must be confronted. Some ways of easing access to justice might swamp the court system, at least at the level of resources society is likely to provide. Accuracy in finding facts and applying law is essential to doing justice, yet attaining accuracy can be cumbersome and create openings for tactical abuse. The cost of resolving legal disputes is often lamentably high, but the specter of those costs gives parties a powerful incentive to settle—one that could diminish if costs were reduced or their allocation changed. We should not, however, rely heavily on this incentive in order to keep the system running, for it exacts an unfair toll from many litigants, including the risk-averse, the under-financed, and even those with deep pockets defending against nuisance claims.

Compromises thus prove necessary; they should be made in ways that minimize the sacrifice of important values. Access to justice might be kept relatively easy if it is accepted that many disputes can do with less than the most elaborate notions of due process. Accuracy may be improved by efforts to clarify the shadow of the law in which disputants bargain. Mechanisms to promote realism early in the disputing process also can facilitate fair and less costly settlement. Similarly, it is worth exploring means of allocating costs—primarily attorneys' fees—to encourage strong claims and defenses while filtering out weak and invalid ones.

In confronting these issues we should avoid highly technical approaches:

[W]hen we seek to understand major institutional change in the past, or abroad, or in some other sector of our own contemporary society, we search for the political, economic, and ideational forces that we know must have been at work. When legal scholars think about major change in their own court system in their own time, however, there is a tendency to consider the reform process as a *deus ex machina*. Inquiry focuses on the purely technical aspects of reform, on the implicit assumption that reform results from the intrinsic merit of reform proposals, their superior efficiency, fairness, or other virtue.⁷

We realize as well that there is little new under the sun; in civil justice reform, the path to significant improvement often “is not that of discovering presently unimagined techniques, but of discovering how to orchestrate a new combination of presently obvious techniques.”⁸ Against this background, we offer the following recommendations for reform, experimentation, and further study.

7. Hazard, *Court Delay: Toward New Premises*, 5 CIV. JUST. Q. 236, 241 (1986).

8. *Id.* at 239.

IV. RECOMMENDATIONS

1. *Pretrial Neutral Evaluation and Offers of Settlement.* At the Northwestern conference that was part of this study, a consensus emerged on the value of some form of third-party "quick look" at the merits. Such devices include early neutral evaluation programs and non-jury or advisory jury hearings before trial.

While the exact specifics of such procedures will vary with context and experience, we suggest models along the following lines: 1) Soon after court filing, by automatic or selective reference cases would go to an arbitration track, followed by very limited discovery. 2) At a firmly fixed time not more than several months after filing, the case would proceed to a mandatory informal hearing before an arbitrator, normally a private lawyer paid by the state, who would issue an award with a brief oral or written explanation. An award not appealed by either party within a limited time would be final. 3) If either side refused to accept the award, regular proceedings would go forward—summary judgment, plenary trial, etc.—with opportunity for formal offers of settlement. The offer provision would entitle the offeror to recover some or all post-offer costs and reasonable attorney fees if the adversary declined the offer and, at trial, did not come close enough to or improve on the offer. A party appealing from the first-tier award who failed to improve on it also might be required to pay the arbitrator's charges, and perhaps a user fee for the costs of a court trial.

This system resembles many existing "court-annexed arbitration" plans, such as those approved for ten federal district courts by Congress in 1988,⁹ although few systems include an offer provision that affects liability for attorney fees. The model recognizes that most filed cases do not go to trial and therefore concentrates on the pretrial stage. A party dissatisfied with the results of the pretrial hearing would retain the right to "appeal to the jury" or to a non-jury process. By making available a preliminary ruling on the merits without the time and expense of a full jury trial, yet preserving the right, the model responds to the problems that jury trials create for litigants and the system while respecting the constitutional guarantee and the role of public participation in administering justice.

Categorical or individual exceptions would have to be recognized, such as preliminary injunction litigation and cases turning on novel or complex *legal* issues. Even for fairly complex matters, however, an

9. See 28 U.S.C.A. §§ 651-658 (West Supp. 1989).

impartial "early look" can be valuable.¹⁰ Jurisdictional ceilings for court-annexed arbitration programs have been rising; Congress has authorized them in selected federal districts for cases involving up to \$100,000, and Hawaii has set the limit for the program in its state courts at \$150,000.¹¹

Research reports about present court-annexed arbitration programs reveal generally high levels of user satisfaction, even on the part of losers.¹² Many litigants appear to want simply a dignified, careful hearing before a neutral decisionmaker, and generally not to feel that their "day in court" must include full trial. In these programs, many cases settle on the eve of the arbitration; having to prepare for arbitration itself may advance settlement. "Appeals" in the form of rejection of awards are not infrequent, but they are often preludes to further settlement negotiation rather than to trial. Only now is research being done that carefully compares trial rates with and without court-annexed arbitration, and this work may allow more confident conclusions about when an early hearing is likely to be only an added and costly step. It is also important for both justice and the acceptability of arbitration results that the arbitration awards not diverge widely and regularly from the results of trials; thus far, the overall patterns appear to be tolerably close.

Another necessary feature of the model is some discovery, but it should be quite limited: basic interrogatories and document exchange, and perhaps a short deposition or two in larger cases. At least for larger cases, limited prehearing briefing can be necessary to crystallize issues and may help overcome inertia against settlement. Making the arbitration mandatory even though non-binding appears important; otherwise, one of the adversaries may see advantage in not participating.¹³ Firm deadlines for the hearing are also needed to ward off procrastination.

10. See, e.g., Sobel, *Abbreviating Complex Civil Cases*, in CPR LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 193, 195-96 (1987) (for complex cases, proposing model involving pleading motions, abbreviated discovery, partial summary judgment motions, limited briefing, settlement efforts, and nonbinding ADR before full discovery and trial).

11. See 28 U.S.C.A. § 652 (West Supp. 1989); *News in Brief—Alternative Dispute Resolution*, 58 U.S.L.W. 2129, 2130 (Aug. 29, 1989).

12. See, e.g., A. LIND, R. MACCOUN, P. EBENER, W. FELSTINER, D. HENSLER, J. RESNIK, & T. TYLER, *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (Rand Institute for Civil Justice 1989).

13. For cases in which the parties see it in their mutual best interest to use an expedited proceeding leading to regular trial without an earlier hearing, special rules could provide an optional fast track. See McMillan & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985).

Having offers of settlement affect attorney fee liability is controversial, and the device is not an absolutely essential part of the model.¹⁴ Attorney fee consequences should not turn on offers made *before* the initial hearing and award; at that stage, the threat of fee liability could too greatly encumber access to speedy justice. The information revealed by the first hearing, however, should reduce what otherwise can be the stab-in-the-dark unfairness of offer devices. Disputes over the amount of fee awards can be mitigated by using fee schedules rather than individualized determinations. Careful empirical experimentation with offer devices affecting fee liability may be especially important before any moves to adopt them on a wide scale.

2. *Discovery.* Over the last two decades the problems of pretrial discovery have been extensively studied¹⁵ and the civil discovery rules amended several times. Levels of discovery abuse and discontent with the discovery process nonetheless remain high.¹⁶ Perhaps the courts are simply failing to make enough use of their case management and sanctioning powers. However, that efforts at mastering discovery problems through increased use of sanctions have met only limited success for so long suggests the need for significant efforts along other lines. In any case, it should be remembered that serious discovery controversies arise in relatively few cases.

The "quick look" model proposed above responds to some of the problems with discovery. It would sharply limit discovery before the initial hearing and, through presentation of arguments and evidence at the hearing itself, provide something of a substitute for discovery. To the extent that this process disposed of cases, discovery problems would be obviated. Further, for civil litigation generally, consideration should be given to making the award of attorney fees the norm for a party prevailing on any contested discovery matter. One source of discovery abuse is the opportunity to inflict unrecoverable expense on the adversary. Strengthening the threat of having to internalize those costs could increase deterrence against discovery abuse.

More controversial would be further enlargement of the judicial role in discovery management and perhaps even fact-gathering. Trial judges already have extensive discretionary powers over the discovery process,

14. For fuller discussion of the benefits and problems of the device, see *Background Paper*, *supra* note 4, at 895.

15. See, e.g., American Bar Ass'n, Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 (1980).

16. *Judges Give Delay Causes; Discovery Abuse Tops List*, A.B.A. J., July 1, 1988, at 29 (in Harris poll of 200 federal and 800 state judges, 45% of federal and 34% of state judges listed discovery abuse among most serious causes of delay).

and many actively use them. Besides such powers, perhaps there should be some general limits that could be exceeded only upon motion with good cause shown—if that itself would not create too much satellite litigation.¹⁷ In large and more complex cases, it might be desirable to appoint special discovery masters in early stages.¹⁸

Beyond tighter judicial management of discovery lies the possibility of judge-dominated fact-gathering on the Continental model.¹⁹ Such a radical departure from our present adversarial approach might eventually prove necessary to curb discovery excesses, but much research and experimenting would be required before its general implementation. This sort of approach would almost certainly demand some expansion of judge-power, as well as redefinition of the role of the judge. It also seems important to learn whether the popular preference for adversarial control over case presentation at trial²⁰ extends to pretrial fact-gathering.²¹

Short of such a major departure it would be worthwhile, in addition to exploring the other measures discussed above, to determine more precisely the contexts in which discovery problems most commonly arise—including whether significant discovery contests are at all frequent in relatively low-stakes cases—and what kinds of controls are especially successful.

3. *Settlement and the Judicial Role.* Although settlement is often desirable and worth encouraging, excessive or indiscriminate pressure to settle raises numerous problems.²² Values of accuracy, judicial impartiality, and substantive policy also must be respected. Ideally, settlements should closely correlate with the outcomes of trials on the merits,²³ and

17. Federal District Judge William Schwarzer makes a thoughtful proposal for a somewhat different innovation worth considering: mandatory disclosure with pleadings of relevant documents and witnesses, with further discovery allowed only by court order upon a showing of need. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

18. See Rosenbleeth, *Neutral Discovery Managers: An Alternative for Discovery Dispute Resolution*, in CPR LEGAL PROGRAM, *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* 273, 275-76 (1987) (arguing that trial responsibilities often make it impossible for judges to exercise their authority to manage discovery).

19. See Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

20. See generally, e.g., J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE* (1975).

21. Cf. E. LIND & T. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 86-87 (1988). Lind and Tyler describe studies indicating that process control preferences can be "subdivided." They find high acceptance of a hybrid procedure that leaves much control over presentation of evidence and arguments in the hands of adversaries, while allowing greater-than-usual initiative by judges to ask questions and seek clarification.

22. See *Background Paper*, *supra* note 4, at 875 (discussion of controversies over settlement and means of promoting it).

23. Especially in some private law situations, of course, it may be quite unobjectionable if parties prefer a settlement different from or more flexible than the anticipated outcome of trial. If

in any event should not detract from the judicial role or sacrifice important rights.

Even outside the context of the "quick look" model, further consideration should be given to formal offer of settlement rules that affect liability for attorney fees, notwithstanding the controversy some years ago over proposals to amend Federal Rule 68. Such rules afford incentives for parties to evaluate seriously their cases early on, and reduce an obstinate adversary's opportunity to force compromise by inflicting unrecoverable costs. They also keep any problems connected with judicial intervention in settlement to a minimum.²⁴

Finally, studies have shown generally favorable reactions to judicial furtherance of settlement, while also reflecting reservations about excessive settlement pressure.²⁵ Because most settlement activity goes on out of public view, further research is especially needed to learn more about what is happening, on what scale, what problems arise, and which approaches seem to work best.²⁶ More generally, judicial involvement in the settlement process is one aspect of the increasingly significant and somewhat controversial judicial role in case management. With that role becoming well established, it may be important to include training in management techniques in the orientation and continuing education of judges and magistrates.

4. *Litigation Finance: Attorney Fees and the Provision of Legal Services.*

a. *Fee shifting against groundless claims and defenses.* In cases under federal fee shifting statutes, the rule of *Christiansburg Garment Co. v. EEOC*²⁷ allows recovery of reasonable attorney fees when a claim was frivolous, unreasonable, or groundless, or was pursued after it clearly became so in the course of a litigation. It requires no finding of subjective bad faith to permit a fee award. We recommend consideration of extending the *Christiansburg* rule beyond cases already governed by fee

important public values are not jeopardized, "party satisfaction justice" may be at least as good as "system justice."

24. See *Background Paper*, *supra* note 4, at 895 (discussion of the problems and possible benefits of offer of settlement rules affecting attorney fee liability).

25. See, e.g., W. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (1985).

26. See generally *Background Paper*, *supra* note 4, at 875; Provine, *Managing Negotiated Justice: Settlement Procedures in the Courts*, 12 JUST. SYS. J. 91 (1987); see *id.* at 100:

We need better information on what judges are doing to encourage settlement, particularly on the extent to which judges are involving new decisionmakers in the pretrial process. As it is, we cannot even estimate how many litigants are affected by court efforts to promote settlement or what types of litigation are most impacted.

27. 434 U.S. 412 (1978).

shifting statutes, and to apply against defendants as well as plaintiffs even when defendants would not otherwise be liable for plaintiffs' fees. We see no reason why such a standard should not apply to all claims and defenses.

b. Incentive-based fee award formulas. Fee award calculation methods should provide desirable incentives for lawyers' and litigants' behavior.²⁸ The present market-rate-times-reasonable-hours "lodestar" formula sometimes creates perverse incentives and gives rise to much satellite litigation. In some situations, such as suits for injunctive or declaratory relief and when prevailing defendants are entitled to a fee award, something like the lodestar approach may be unavoidable. Still, its many problems suggest the need for careful study of ways to administer it more economically and of alternatives—such as approaches based in whole or in part on amounts recovered—that might reduce conflicts of interest and engender less "second round" litigation.

c. Attorney responsibility for shifted fees. Practice under amended Rule 11 of the Federal Rules of Civil Procedure highlights a possibility that deserves further study: attorney, rather than client, responsibility for payment of some attorney fee awards. It has been thoughtfully argued that two-way, loser-pays fee shifting with attorney payment would be an effective, market-based approach for providing legal assistance to the poor.²⁹ The logic of that proposal goes beyond the context of aiding the indigent. Attorney responsibility for an opposing party's fee would increase entrepreneurial incentives in lawyers' selection and rejection of claims and defenses. While broadening attorney liability would likely be controversial, it has enough promise to warrant further study.

d. Providing legal services for the poor. The time may be ripe for a fresh study of means to meet the legal needs of people of low and moderate income. This country has long employed both private charity and public subvention to provide legal services for the indigent. It has not broadly tried such alternatives as the British approach of a sliding-scale contributory scheme, with public payments to private lawyers for both the indigent and persons of modest income.³⁰ We recommend an in-depth and comparative study of this area.

28. See *Background Paper*, *supra* note 4, at 892.

29. Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231 (1988).

30. See *Lease, Legal Aid in England and Wales*, 71 JUDICATURE 345, 351 (1988).

5. *Background Work.*

Our recommendations focus primarily on practical measures and experiments. Basic research into disputes and dispute processing, however, is also vital to intelligent reform in the long run. One need is continuing improvement in state court statistics, building on the work of the National Center for State Courts. Second, it is important to know more about the "base" of the disputing pyramid, i.e., the disputes that do not get as far as the courts or ADR mechanisms. Many people suffer legal wrongs but do not seek redress; understanding why they do not is fundamental to evaluating the "litigation explosion" controversy and responses to caseload growth. Further studies like those of the University of Wisconsin's Civil Litigation Research Project, perhaps targeted on areas of specific concern, could be money well spent.

Another important question concerns what phases of litigation and what types of cases take more and less of judges' time; a major study of this question is being conducted by the Federal Judicial Center, following up on parallel work in earlier decades. Controlled experimentation comparing cost, speed, outcome, and litigant satisfaction under various ADR devices and conventional court dispute processing seems essential. Further work is also needed on the question of "tracking" for ADR devices.

V. CONCLUSION

Our study does not seek to explore all possible "paths to a 'better way'"; we have tried to identify the most promising.³¹ We close by emphasizing two themes: the importance of procedural quality and adequate public support for the judicial system, and the responsibility of the bar. Many of the paths we have suggested are likely to work well only if administered by competent judges and magistrates equipped with modern office technology. The continuing pattern of erosion of judicial pay relative to the private sector, and the far too frequent backwardness of court equipment, cost the nation judicial talent and make it much harder for able and dedicated court personnel to do their jobs. If the nation continues its underinvestment in the systems of justice, it can expect lowered quality.

31. Most disputes do not reach trial, and much research has focused on the conduct of trials. See, e.g., NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS (1988). We therefore have not dealt with possible "better ways" of trial, such as bifurcation of liability and damages issues, see, e.g., Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963), or damages guidelines for juries to reduce verdict disparities and aid settlement by raising predictability, see Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1825-28, 1854 (1986).

While our proposals mostly have been for implementation or study of procedural mechanisms, the members of the legal profession owe it to their clients and the public to strive to be part of the solution rather than part of the problem. We have in mind such vices as procrastination; "churning" billable hours; and extreme "hardball" litigation tactics, especially obstinacy in discovery. Mutual forbearance, such as expressed in the Center for Public Resources' corporate pledge to explore lower-cost ADR mechanisms, can spare clients and the system expense, time, and antagonism. We echo the call of the ABA Commission on Professionalism that

[t]he Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice. Lawyers . . . have a duty to make the system of justice work properly.³²

Finally, concern for heavy caseloads can make short cuts tempting. A simplified process *can* be adequate, certainly if the litigants are satisfied with it. But merely disposing of cases must not become a dominant goal. Mechanisms like "early looks" therefore focus on the merits as well as efficiency. The outcomes of conventional litigation, however, are not necessarily the standard that alternatives should always approximate, for existing mechanisms include defects that distort results. Delay, for example, can force a low settlement on a claimant in need of money quickly; the threat of unreimbursable litigation costs can give weak claims a nuisance settlement value they do not deserve. Thus reforms and alternatives can improve not just processing but also outcomes. "Paths to 'better ways'" must lead not only to more dispositions, but also to better justice.

32. American Bar Association Commission on Professionalism, ". . . *In the Spirit of Public Service.*" *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 278 (1986) (emphasis omitted).