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[Vol. 15: 437, 2015] *Lightening the Load or Losing Potential?*
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Lightening the Load or Losing Potential? ADR and the Courts of Appeal

Paul Thies[1]

I. INTRODUCTION

In any field of work, legal or otherwise, there is an end goal for which we each strive; a diamond for which we are willing to sift through the rubble and go to great lengths to find. No matter how long we must wait or how much rubble we must move, in the end, our diamonds are worth it. For appellate courts, there are countless cases for which there is abundant precedent and established case law. Beyond the important impact each of these cases has on the lives of the parties involved, these cases are the legal rubble appellate courts must sift through in order to find a rare diamond; an opportunity to set important legal precedent. Now, imagine if there was a process that made this easier. Imagine the process removed most of the rubble so that more diamonds could be found. For a number of legal scholars, appellate level Alternative Dispute Resolution programs represent such a process.

While ADR is commonly associated with an opportunity to avoid the perils of a trial,[2] there is a growing trend among court systems to utilize ADR even after the verdicts are dealt. Prior to entering the appeal process,

1. Juris Doctor Candidate 2015, Pepperdine University School of Law.
2. Marjorie O. Rendell, *ADR Versus Litigation*, 55 DISP. RESOL. J. 69, 71 (2000).

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courts are beginning to refer cases to ADR.[3] ADR has the ability to directly impact the traditional appeal process in several ways. First, appellate courts are facing a massive influx of cases that appears to be growing over time.[4] Of those cases, a large percentage may qualify for referral to ADR programs.[5] By referring these cases to ADR programs, this system will likely alleviate stress from the courts by shouldering some of this expanding caseload[6] and allow the courts to "be able to direct more of their attention to those cases that require formal judicial determination."[7] For the parties involved, pursuing ADR rather than immediate appellate litigation has the potential to save money[8] and narrow cases down to their key issues.[9] Additionally, ADR programs offer a well-rounded perspective that goes beyond the immediate legal issues involved.[10] As such, many scholars see these programs as removing the rubble in order for appellate courts to find their diamonds more easily.

But what if, for all the efficiency this process created, some of the biggest diamonds in the world of appellate law were lost in the process? This is a crucial problem with appellate level ADR programs that has lasting ramifications. While referring many of these cases to ADR would undoubtedly lighten the load of appellate courts, some of these cases may deal with important issues of law that could set valuable legal precedent. If

3. Robert J. Niemic, *Mediation Becoming More Appealing in Federal and State Courts*, DISP. RESOL. MAG., Summer 1999, at 13, 15-17; Rendell, *supra* note 2, at 69, 72. *See generally* Frank G. Evans & Bruce Ramage, *Alternative Dispute Resolution Procedures at the Appellate Level*, 1 App. Advoc. 3, 3-4 (1988).

4. Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121, 2126-27, 2129 (1993).

5. Niemic, *supra* note 3, at 13, 14.

6. Solum, *supra* note 4, at 2159; Niemic, *supra* note 3, at 13.

7. Evans & Ramage, *supra* note 3, at 5; *see also* Solum, *supra* note 4, at 2159.

8. Stephen O. Kinnard, *What to Expect If You're Looking to Settle at the Appellate Level*, DISP. RESOL. MAG., Summer 1999, at 16, 17; *see also* Niemic, *supra* note 3, at 13, 15.

9. Niemic, *supra* note 3, at 13.

10. Kinnard, *supra* note 8, at 16, 17.

the parties involved decide to pursue ADR for the sake of efficiency and cost, the courts lose the opportunity to hear these cases and answer these questions of law. By lightening the load of the courts, ADR programs may be creating missed opportunities to strengthen the law at the appellate level. To address this problem, courts should answer an additional question when referring cases to ADR programs: even if cases *can* be referred to ADR, *should* they be?

In part II of this article, I outline the history and current literature on post-trial ADR programs and the growing need for a more thorough analysis of this topic. Such programs have existed for forty years,[11] and they have become ever more pervasive throughout federal and state appellate court systems.[12] While a number of articles highlight this development, few present this trend through an analytical framework, and none appear to analyze such programs with a critical eye. Additionally, the growing use of existing ADR programs makes this issue increasingly relevant,[13] while the looming risk of future defunding through budget cuts[14] calls to question the

11. Niemic, *supra* note 3, at 13; *see generally*, ANTHONY PARTRIDGE & ALLAN LIND, FED. JUDICIAL CTR., A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (1983), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/recamp.pdf/$file/recamp.pdf.

12. Niemic, *supra* note 3, at 13-15; Rendell, *supra* note 2, at 69, 72; Solum, *supra* note 4, at 2126-27.

13. *See* argument *infra* Section V.

14. *See* Amanda Bronstad, *Budget woes claim ADR program in Los Angeles*, THE NATIONAL LAW JOURNAL, March 13, 2013 ("To address an 'extreme budget shortfall,' Los Angeles County, Calif., Superior Court plans to close its alternative dispute resolution program on June 18 after 20 years in operation."); Victoria Pynchon, *In Stunning Move, Los Angeles Courts Abolish Mediation Programs*, NEGOTIATION LAW BLOG (Dec. 5, 2012), http://www.negotiationlawblog.com/in-stunning-move-los-angeles-courts-abolish-mediation-programs/ ("Most startling of all court service cuts is the total shut down of *all* court-run ADR programs - including the free mediation services that settle thousands of lawsuits every year."); *ADR Department*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, http://www.lasuperiorcourt.org/adr/UI/INDEX.ASPX (last visited Oct. 10, 2014); *see also Economic Downturn and the Use of Court Mediation*, RESOLUTION SYSTEMS INSTITUTE (2012), http://www.aboutrsi.org/pfimages/CourtADRbudgetcuts.pdf; Gregory D. Call, *Budget Cuts: The Continuing Impact In State Courts*, SAN FRANCISCO DAILY JOURNAL, Dec. 27,

future value of such programs. As such, more research must be done in order to present a complete analysis of this pressing issue.

In part III, I outline the both the benefits of these ADR programs and the crucial problem many create. By allowing cases to avoid the appellate process, such ADR programs lighten the often massive caseload of appellate courts,[15] can be cost efficient for those involved,[16] distill cases down to their most important issues,[17] and offer a well-rounded perspective for each case.[18] However, in doing so, they take away the opportunity for these courts to set valuable legal precedent by taking cases away from the courts that would have otherwise been published.

In part IV, I set forth my proposed solutions for this problem. If courts would like to avoid this loss of legal precedent, they may eliminate such programs altogether. They may also take cues from states like Montana[19] and tailor their criteria for ADR programs in order to keep cases that involve more pressing legal issues in the court system. However, I propose that courts add an additional level of discretion in qualifying cases for ADR programs. Specifically, courts should apply their existing standards for publishing opinions to look for the potentially important legal issues in the cases themselves. If these courts allow qualified cases to go to ADR only if they do not meet the criteria for an otherwise publishable case involving important issues of law, they will avoid losing valuable legal precedent

2011, *available at* http://www.crowell.com/files/111227-Budget-Cuts-The-Continuing-Impact-in-State-Courts-Daily-Journal-Greg-Call.pdf.

15. J. EAGLIN, FED. JUDICIAL CTR., THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS (1990), *available at* http://www.ca6.uscourts.gov/internet/mediation/eaglinevaluation_pt1.htm; *see also* Niemic, *supra* note 3, at 13 ("The programs have the potential to benefit the courts as well as the parties. Many courts started their programs to help conserve scarce judicial resources.").

16. Niemic, *supra* note 3, at 14 ("Early scheduling gives parties an opportunity to settle before they incur the expense of filing briefs and appendices.").

17. PARTRIDGE & LIND, *supra* note 11, at 5.

18. Kinnard, *supra* note 8, at 16, 17; *see also* Niemic, *supra* note 3, at 13.

19. MONT. CODE ANN. § 25-21-7 (WEST 2011).

while retaining the benefits that these ADR programs provide, thereby improving the efficiency of the legal system.

Additionally, part V acknowledges future changes surrounding this issue and addresses some concerns highlighted in part II of the article. First, the number of important cases lost to ADR programs will likely increase over time. This is shown by highlighting the growing percent of cases that are published as legal precedent and the growing caseload handled by the appellate courts.[20] Additionally, while the current budget cuts facing numerous court systems[21] may mitigate this problem through the defunding of ADR programs, I argue that the loss of any legal precedent to these programs requires this additional level of court discretion in order to improve the efficiency of the court system. Finally, part VI concludes the article by summarizing the analysis and reemphasizes my recommended solutions to this issue.

II. BACKGROUND AND SIGNIFICANCE

While court ADR programs have become increasingly popular in recent times, such programs have existed for forty years.[22] Founded in 1974, the Second Circuit's Civil Appeals Management Plan (CAMP) is considered to be the first incarnation of court-run, pre-appeal ADR programs.[23] This program created mandatory prebriefing conferences that emphasized the settlement of appeals.[24] Additionally, this program featured four particular

20. *See* argument at Section V.

21. *See supra* note 14.

22. Niemic, *supra* note 3, at 13.

23. *Id.*

24. "Nevertheless, the two features that were central to the plan in 1974 remain central today: first, the use of conferences conducted under the auspices of staff counsel in which participation by the lawyers for appellants and appellees is mandatory and, second, the use of scheduling orders, issued by staff counsel, to impose briefing schedules that differ from case to case depending on the needs of the particular appeal and the argument schedule of the court." PARTRIDGE & LIND, *supra* note 11, at 13.

objectives for its prebriefing conferences: "(1) encouraging the resolution of appeals without court action, (2) [a]ccelerating the consideration and disposition of those appeals that go to argument, (3) clarifying the issues in appeals that go to argument, [and] (4) resolving a variety of procedural matters in an informal manner and without the necessity for judicial participation."[25] Soon after this program was created, various other circuits created similar programs featuring prebriefing conferences.[26] However, few of these programs shared the same objective of settling cases.[27]

Since then, numerous court systems have adopted ADR programs that allow post-trial cases to participate in ADR prior to being appealed.[28] In federal courts, nearly every circuit has some form of ADR program as an alternative to appellate review.[29] In the 3rd Circuit Court of Appeals, for

25. *Id.* at 13-14.

26. "Since 1974, a number of other federal courts of appeals have inaugurated programs that include prebriefing conferences, and at least one has borrowed the Second Circuit's title and called its program a Civil Appeals Management Plan. Prebriefing conferences are also used in a number of state appellate courts." *Id.* at 13.

27. "It is important to recognize that the programs adopted by other courts, although they may have a surface similarity to CAMP in the Second Circuit, do not necessarily have the same objectives. In the Seventh and Ninth Circuits, for example, prebriefing conferences are held in which settlement of appeals is not a major goal. To the best of our knowledge, only the Eighth Circuit employs scheduling orders in a manner similar to that used in the Second Circuit . . . ." *Id.* at 13.

28. Niemic, *supra* note 3, at 13-15; Rendell, *supra* note 2, at 69, 72.

29. Niemic, *supra* note 3, at 14.

> In the 1st and 2nd Circuits, nearly all civil cases docketed (including administrative agency cases) are eligible and scheduled for mediation. In the 6th, 10th, and Federal Circuits, settlement discussions are held in nearly all civil cases that meet eligibility requirements.
>
> The 3rd, 4th, 5th, 8th, 9th, and District of Columbia Circuits schedule mediation only in cases in which it appears that program efforts are likely to contribute toward settlement. For instance, cases in which one or more of the parties require a judicial resolution of the issues on appeal might not be deemed likely to settle. These six programs also may consider the parties' expressed interest in mediation, the complexity of the case, the parties' underlying interests insofar as they are identifiable, or the amount of monetary relief requested. In some of these courts, before assigning a case to mediation, mediation staff not only review case documents but also contact appellate

example, "nearly 1,200 cases have been referred to mediation, and approximately 500 of those cases have been settled prior to briefing at the appellate level" over a five year period.[30]

This trend is similarly pervasive in state courts. As highlighted by Robert J. Niemic in *Mediation Becoming More Appealing in Federal and State Courts*, "[f]ewer than 10 state courts have voluntary programs. For the rest, the parties are required to attend the ADR conference if their case is selected under the program. A small percentage of courts with mandatory programs allow eligible parties who are not selected to opt in."[31]

There are a number of existing inquiries into the appellate level ADR programs. However, while each serves an important role in understanding these programs, none of them analyze this issue with a critical eye. In *Mediation Becoming More Appealing in Federal and State Courts*, Robert J. Niemic outlines the growing trend of appellate level ADR programs.[32] In his article, Niemic highlights the popularity of ADR programs by showing that they contribute to the appellate court's goal of settlement.[33] Additionally, Niemic shows that the popularity of these programs also likely comes from allowing parties to avoid the costs of the appeal process.[34] However, despite this thorough summation of the benefits of ADR programs, his analysis simply ends at highlighting this growing trend; he does not address any of the possible consequences these programs may have on the court's ability to set legal precedent.[35]

> counsel by telephone to evaluate the possibility of settlement and suitability for the program.
>
> The programs in the 7th and 11th Circuits use other selection techniques, after reviewing all civil cases that meet basic eligibility requirements.

Id.

30. Rendell, *supra* note 2, at 69, 72.
31. Niemic, *supra* note 3, at 15.
32. *Id.* at 17.
33. *Id.* at 14.
34. *Id.* at 14, 15.
35. *Id.* at 17.

In *ADR Versus Litigation*, Justice Marjorie O. Rendell outlines the status of the Third Circuit's ADR program.[36] In doing so, Justice Rendell argues that such programs are more likely to result in the settlement of disputes compared to litigation, which by its very nature breeds conflict.[37] Justice Rendell proposes that the legal community should become more open to the benefits of these programs by "approach[ing] the resolution of disputes as a wide-open range of possibilities, and suit the approach to the needs of the case from the beginning."[38] However, as beneficial as this call for change may be, Justice Rendell does not address any potential problems with the program, nor does Justice Rendell view the program with a critical eye.[39]

In *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision,* Lawrence B. Solum addresses future approaches to ADR programs.[40] In his analysis, Solum outlines five different approaches to ADR programs and provides his own recommendations for the future of such programs.[41] And while Solum does approach these programs with an

36. Rendell, *supra* note 2, at 69.

37. *Id.* at 69-70.

38. *Id.* at 71.

39. *Id.* at 69.

> I intend to speak a little about the mediation program, at the 3rd Circuit Court of Appeals, but I would like to bracket it with some remarks--initially, perhaps a bit of a personal perspective on our adversarial system and the way that alternative dispute resolution can and should play a role. Then, lastly, I will share with you a few philosophical offerings on a lighter side to help nurture your ADR spirit.

Id.

40. Solum, *supra* note 4, at 2165.

41. *Id.* at 2132 ("The first scenario involves the revitalization of the traditional litigation process through a variety of reforms. The second scenario explores the expansion of private judging into the full-scale privatization of justice. The third scenario envisions the incorporation of alternative dispute resolution into a multi-door courthouse. The fourth scenario investigates the use of administrative tribunals to replace traditional courts for the resolution of most disputes. The fifth and final scenario imagines the evolution of Neighborhood Justice Centers into a community-based system of justice.").

analytical framework by providing recommendations to future scholars looking to the role of ADR in the court system, he does so with a limited focus on the cases involved rather than its effect on the court itself.[42] In turn, his analysis avoids addressing any potential issues with ADR programs. In order to provide a thorough exploration of such programs, additional research must be conducted with a more critical eye to the effects of ADR on the appellate court system.

In addition to the absence of critical analysis in the scholastic dialogue, the growing caseload of appellate courts makes the need for such analysis particularly ripe. Appellate courts are dealing with an increasing number of cases.[43] Therefore, this trend in utilizing these programs to mitigate this growth in caseload appears to only be increasing.[44] This widespread use further emphasizes the need for a more thorough analysis of the subject.

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42. *Id.* at 2181-82.

43. *Id.* at 2126-27.

> Over the past thirty years, the absolute number of cases filed in both the appellate and trial courts of California has increased substantially. However, on a per capita basis, filings have remained relatively constant at the trial level, while increasing significantly at the appellate level. If civil cases are considered separately, the per capita increases at the small claims and superior court levels are modest; the per capita increase in civil filings in municipal court is more substantial.
>
> The increase in the caseload of the appellate courts in California has been dramatic. Although the number of appellate court judges has increased during that time, the size of the California Supreme Court has remained constant, raising concerns about the court's ability to process its caseload. One reason for the increase in appellate cases seems to be the growth in the number of original criminal proceedings at the appellate level.

Id.

44. Niemic, *supra* note 3, at 16-17.

> Appellate mediation and settlement programs have grown over the last 10 years, both in federal and state courts. At the federal level, some form of mediation-like program is available at each of the regional courts of appeals. In many state courts, appellate ADR programs have become deeply rooted and several new programs have begun in recent years. As litigants get more accustomed to court-based ADR at the trial level, they increasingly may come to expect that similar programs will be available at the appellate level.

Most recently, however, various court systems have faced budget cuts that have increasingly affected ADR programs.[45] While most of the programs affected remain only at the trial level, it is entirely conceivable that appellate level ADR programs may be affected if these budget cuts continue. If this is the case, courts may have to decide whether to refund these programs once budgets have been sufficiently restored. Herein lies another concern: if this problem regarding lost legal precedent remains when that time comes, would this problem warrant keeping such programs defunded? As such, this verging legal trend is primed for a more thorough analysis in order to assess the value of such programs being used with increasing regularity as well as those programs that hang in the balance.

III. POTENTIAL PROBLEM

While there are certainly benefits provided by appellate level ADR programs, such benefits are provided at a cost that is neither acknowledged nor analyzed by current legal scholars. As mentioned by various authorities, ADR programs have buttressed the caseload of appellate courts.[46] In an evaluation of the Sixth Circuit's ADR program, James B. Eaglin concluded:

> We were able to establish that about 69% of the conference-eligible appeals in the control group reached argument or submission. For appeals that were subjected to the pre-argument conference procedures, the number of cases argued orally or submitted on the briefs was reduced to 57%. . . . This means that the program resulted in a reduction of 12% in the number of conference-eligible cases that would otherwise have been submitted. . . . The implications of this finding to the court can be viewed in terms of

Id.

45. *See supra* note 14.

46. EAGLIN, *supra* note 15, § 3; *see also* Niemic, *supra* note 3, at 13 ("The programs have the potential to benefit the courts as well as the parties. Many courts started their programs to help conserve scarce judicial resources.").

> savings in judge time [showing that] the conferencing program is doing the work of 1.06 appellate judges.[47]

In a similar evaluation of the Second Circuit's ADR program, authors Anthony Partridge and Allan Lind found that the program "has a number of beneficial effects," including producing "the settlement or withdrawal of appeals that would otherwise have to be considered by three-judge panels, .†.†. faster disposition of appeals," and having the potential to "help improve the quality of briefs and argument in some appeals, and . . . resolv[e] procedural problems."[48]

These programs may also allow for parties to investigate issues that expand beyond issues of law. As highlighted in *What to Expect If You're Looking to Settle at the Appellate Level*:

> [T]he mediator will likely go far beyond a discussion of the legal issues and also discuss with the parties jointly and separately (1) the parties' underlying interests, preferences, motivations, assumptions, and new information or other changes that may have occurred; (2) future events based upon the various outcome alternatives of the appeal; (3) how resolution of the appeal impacts the underlying problem; (4) cost-benefit and time considerations; (5) any procedural alternatives possibly applicable to the appeal (e.g., vacatur, remand, certification of state law questions, suggestion of mootness).[49]

Additionally, appellate level ADR programs are often cost-efficient for the parties involved.[50] As highlighted by Niemic:

> Most mediation conferences occur at an early stage in the appeal. An underlying assumption by some program designers is that parties' incentives for settlement often

47. *See supra* note 46.

48. PARTRIDGE & LIND, *supra* note 11, at 5.

49. Kinnard, *supra* note 8, at 16, 17; *see also* Niemic, *supra* note 3, at 13 ("While most programs focus mainly on settlement, they also address procedural issues and case management. They often help parties simplify or clarify issues and may, without motions, resolve procedural matters. These steps have the potential to streamline the appellate process. Even when cases do not settle, effective case management at the conclusion of mediation can improve the quality of briefs and oral arguments, which can expedite decisions.").

50. Niemic, *supra* note 3, at 14.

> decrease as their briefing and oral argument preparation progresses. Early scheduling gives parties an opportunity to settle before they incur the expense of filing briefs and appendices.[51]

All of these benefits undoubtedly assist the appellate courts and make the case for using such programs compelling. However, for all of these benefits cited by these authorities, there is a cost that needs to be appropriately weighed by each court.

While these programs lighten the load of the courts, it is inevitable that some of these cases will deal with important issues of law that could set valuable legal precedent. If these cases are resolved through ADR for the sake of easier caseload and lower cost, the courts will lose the opportunity to hear these cases and answer these questions of law. For example, in the California Courts of Appeal, 17% of the court's decisions in civil cases are published.[52] This equates to roughly 510 published opinions each year that stand as legal precedent. However, given that most civil cases are eligible for ADR prior to appeal, and ADR programs typically relieve 12% of the court's caseload, ADR programs would prevent the court from publishing approximately 60 opinions each year.

While 60 opinions is not an astounding number, it is important to understand why losing this number of published opinions can be a dramatic loss of important rulings of law as well as a decline in the appellate court's overall efficiency. When a court's opinion is published, future parties and courts may cite to or rely upon its holdings.[53] Through this process, published opinions set legal precedent in future cases dealing with similar issues of law, thereby ensuring uniform statutory interpretation among the lower courts. In underlining the importance of this uniformity, Justice

51. *Id.*

52. Judicial Council of California, 2013 Court Statistics Report 27 (2013), *available at* http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf.

53. For an example of this standard within the California Courts of Appeal, see *Opinions*, CALIFORNIA COURTS, http://www.courts.ca.gov/opinions.htm (last visited Oct. 10, 2014). For an example of this rule in a federal court, see 6TH CIR. R. 32.1(b).

Wayne noted in *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 350 (1855), "[O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity . . . to the interpretation of the constitution and the legislation of congress . . . ." Furthermore, the importance of uniform statutory interpretation among the courts goes back even further in our nation's history. As stated by Alexander Hamilton in the Federalist Papers, "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest . . . to settle and declare in the last resort, a uniform rule of civil justice."[54] While the uniformity garnered from legal precedent is understandably crucial for the issues of law addressed by the Supreme Court, such reasoning applies to issues of state law as well. As such, when a court loses an opportunity to publish an opinion, they are losing an opportunity to answer an issue of law and establish uniformity in the law's interpretation for future cases. To put it simply, these courts are losing the opportunity to improve the law for the sake of a lighter caseload.

In understanding that each of these cases is a lost opportunity to answer important issues of law, this loss in legal precedent is not something to be taken lightly. While it can certainly be argued that the issues in those cases will appear down the road and that this loss in published opinion is a small price to pay for a lighter caseload, it is up to each court to decide whether the weight lifted by ADR programs is worth the toll these programs inevitably take on important case law.

IV. POTENTIAL SOLUTIONS

While a number of different solutions exist, courts looking to resolve this issue must choose the one that ensures important cases will be heard at

54. THE FEDERALIST PAPERS, No. 22, at 150 (Alexander Hamilton) (1961).

the appellate level while preserving the benefits that appellate level ADR programs provide. They must also do so with precision and efficiency. If courts feel that this issue is one of utmost importance, they may decide to stop funding appellate level ADR programs altogether. However, such a decision would cause the courts to gain an influx of cases that otherwise would have settled through these programs. Given the variety of other solutions available, such a decision is unnecessary.

The answer to this problem does not necessitate sacrificing efficiency for legal precedent. If courts find that this loss in legal precedent is an issue worth addressing, there are a number of options available to each court. In some courts, ADR programs are only available to certain types of cases. In Montana state courts, for example, cases involving areas of law such as worker's compensation, domestic relations, and money judgments must first go through the state's ADR program.[55] Other states are less restrictive and merely limit rather than require ADR programs for certain issues of law.[56] As highlighted by Niemic, "some programs exclude certain cases in which a public agency is a party because government attorneys often cannot secure sufficient authority to settle a case. Recent changes in federal and state government policies concerning ADR may affect these perceptions."[57] If there are certain areas of the law that are better suited for ADR than others, or certain areas of the law that often involve important issues of law worth addressing, the court can tailor its criteria for ADR eligibility to close the gap these cases may fall through.

55. MONT. CODE ANN. § 25-21-7 (WEST 2011).

56. Niemic, *supra* note 3, at 14 ("The programs differ, however, in their civil case-selection processes. Because some program managers find it difficult to predict which types of cases are likely to settle, they schedule nearly all civil cases for mediation or select cases by random draw. Other program managers have developed criteria to select cases. For example, some programs exclude certain cases in which a public agency is a party because government attorneys often cannot secure sufficient authority to settle a case. Recent changes in federal and state government policies concerning ADR may affect these perceptions.").

57. *Id.* at 14.

However, while this particular solution does help to prevent the loss of some of these important cases to ADR programs, it does so indirectly and imprecisely. While certain areas of law undoubtedly contain more cases in need of appellate review, denying all cases of that type the opportunity to seek resolution in ADR programs simply because some others may be important for setting legal precedent is an imperfect answer at best. Ideally, there must be a solution that distills cases involving important issues of law out from ADR programs without unfairly dragging other cases along with them that otherwise would have been settled efficiently through ADR.

Such a solution exists; in order to most accurately find the cases in need of appellate review, courts may exercise more discretion over their approval of cases for ADR. Given that the majority of cases may qualify for ADR programs,[58] courts may add another level of criteria or analysis by which to decide each case's ability to qualify for ADR programs. While current considerations focus entirely on how the case will benefit the parties,[59] courts should also consider the legal issues involved in order to decide whether the court should hear this issue in order to create important legal precedent.

Specifically, courts must find a criteria that will allow them to efficiently identify cases that involve important issues of law and will allow them to set important legal precedent for future cases. While the courts could create new criteria, the most effective criteria is one which they already employ; the standards by which judges decide which opinions to publish. By considering these same factors that appear later in the appellate process, judges will be able to readily identify which cases contain important issues of law that can set valuable legal precedent.

An example of this can be found in the California Rules of Court. Under Rule 8.1105, subdivision c, California Courts of Appeal or the

58. *Id.* at 13, 14.
59. *Id.* at 14.

appellate division of the Superior Court must publish an opinion if it does any of the following:

> (1) Establishes a new rule of law; (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions; (3) Modifies, explains, or criticizes with reasons given, an existing rule of law; (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule; (5) Addresses or creates an apparent conflict in the law; (6) Involves a legal issue of continuing public interest; (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law; (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.[60]

These standards also exist at the federal level.[61] Under Rule 36-2 of the United States Code, decisions under the Ninth Circuit Court of Appeals may be published if the decision does any of the following:

> (a) Establishes, alters, modifies or clarifies a rule of federal law, or; (b) Calls attention to a rule of law that appears to have been generally overlooked, or; (c) Criticizes existing law, or; (d) Involves a legal or factual issue of unique interest or substantial public importance, or; (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or; (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or; (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.[62]

60. CAL. R. CT. 8.1105(c).

61. For each federal circuit court's standards for publishing opinions, see 1ST CIR. R. 360.0; 2D CIR. JUD MISCON. R. 24(B); 3D CIR. LAR, APP. I, IOP 5.2; 4TH CIR. R. 36(A); 5TH CIR. R. 47.5; 6TH CIR. IOP 32.1(B); 7TH CIR. R. 32.1; 8TH CIR. APP. II, R. 24(B); 9TH CIR. R. 36-2; 10TH CIR. R. 36.2, 11TH CIR. ADD. III, R. 24(B); FED. CIR. R. IOP 10(4).

62. 9TH CIR. R. 36-2.

While these considerations normally occur after the opinion has been written, such factors can easily be repurposed to judge a case's potential for dealing with important issues of law. Rather than analyzing whether an opinion addresses any important issues of law, courts would instead look to see whether the case itself involves any important issues of law that would likely be addressed through the future opinion.

While most courts have established standards or criteria for whether cases have important legal precedent, it should be noted that a number of courts do not. In the Tenth Circuit Court of Appeals, for example, decisions regarding an opinion's publication appear to be left to the lower courts from which they are appealed. Specifically, "When the opinion of the district court, an administrative agency, or the Tax Court has been published, this court ordinarily designates its disposition for publication."[63] Some courts, such as the Seventh Circuit Court of Appeals, are more ambiguous about these standards. Regarding the publication of their opinions, "It is the policy of the circuit to avoid issuing unnecessary opinions."[64]

While it may be more difficult to apply such standards to cases in order to determine whether they contain important legal issues likely to result in legal precedent, these standards still contain the necessary elements to execute this analysis. Regarding the Tenth Circuit's standard, most of the lower courts it relies upon will likely find that their cases are worthy of publication when they contain answers to important issues of law. As such, the Tenth Circuit relies on the lower courts to pinpoint these important cases for them. Additionally, the Seventh Circuit's standard, despite its concise nature, undoubtedly implies that a case is unnecessary for publication when there are published cases that already address the areas of law at issue in that case. Therefore, a case deemed qualified for publication has to address a new issue of law left unaddressed by existing court precedent. As such, this

63. 10TH CIR. R. 36.2.
64. 7TH CIR. R. 32.1.

succinct standard nevertheless allows for the Seventh Circuit to analyze cases as easily as courts with more defined standards.

By applying these standards to determine which cases are suitable for ADR programs, courts will pinpoint cases involving important issues of law while allowing other cases to benefit from the ADR programs. Additionally, some court rules, such as Rule 8.1105, subdivision d of the California Rules of Court, specify that the courts cannot consider, among other factors, the workload of the court in determining whether to publish an opinion.[65] This would allow the courts to focus solely on whether cases involve important issues of law rather than being influenced by the draw of a lighter caseload. This system would create greater efficiency in the courts of appeal by allowing the ADR process to lighten the load of the courts without losing any important case law in the process. Additionally, this may also improve the court's overall analysis of such cases by focusing on these issues of law earlier in the appeal process.

Therefore, under this system, cases would first qualify for ADR programs through their usual means of qualification. However, once a case has passed the first qualification for ADR, it may only fully qualify for its respective ADR program if the court has not found that the case contains important issues of law and would likely result in a published opinion. If the court finds that the case would likely result in a published opinion, it will not qualify for ADR. While this solution adds more work to the court's schedule, it is done using readily available means of analysis that would not outweigh the benefit of legal precedent. As a result, this solution allows for ADR programs to continue to benefit the appellate court while creating a greater efficiency in the appellate system by pinpointing cases involving important issues of law in order to set valuable legal precedent that would otherwise be lost without this additional analysis.

While some may argue that it would be superfluous to have justices apply a similar level of inquiry both before and after they author opinions,

65. Cal. R. Ct., Rule 8.1105(d).

the way in which the courts would apply this standard is sufficiently different to avoid redundancy. When using the standard for publishing opinions to determine whether a case involves important issues of law, the court would look to the case itself rather than an already-written opinion. By focusing on the important issues of law this early in the appeal process, the courts may apply this standard with less depth because they have yet to actually decide the issues of law; they are only looking at the potential for legal precedent rather than determining whether to actually set legal precedent. However, even if courts apply this standard with the same level of analysis as they do after the opinion has been written, this would undoubtedly expedite their later analysis because the courts are already familiar with the significance of the legal issues at hand.

V. FUTURE CASES

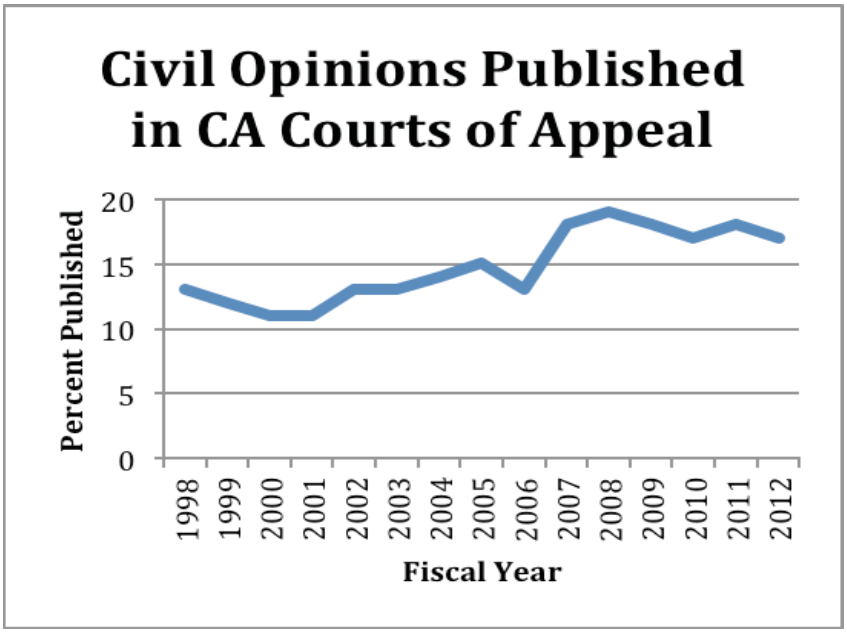
If left unaddressed, appellate courts will continue to lose otherwise publishable cases to ADR programs, thereby losing valuable legal precedent. As previously mentioned, the California Courts of Appeal lose approximately 60 cases a year to ADR programs that otherwise would have been published. Besides the significance that 60 lost opportunities to establish legal precedent presents, this number has been increasing and will likely continue to increase over time. As displayed in the chart below,[66] the

66. The data is accumulated from the Judicial Council of California's Court Statistics Reports, for the fiscal years of 1998 to 2012. JUDICIAL COUNCIL OF CALIFORNIA, 2013 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS (2013) *available at* http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2012 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS (2012), *available at* http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2011 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 23 (2011), *available at* http://www.courts.ca.gov/documents/2011CourtStatisticsReport.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2010 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 29 (2010), *available at* http://www.courts.ca.gov/documents/csr2010.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2009 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 31 (2009), *available at*

percentage of civil opinions that California Courts of Appeal publishes has slowly risen from an average of 12.75% between 1998 and 2005 to 17.14% between 2006 and 2012.[67]

http://www.courts.ca.gov/documents/csr2009.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2008 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 29 (2008), *available at* http://www.courts.ca.gov/documents/csr2008.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2007 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 29 (2007), *available at* http://www.courts.ca.gov/documents/csr2007.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2006 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 29 (2006), *available at* http://www.courts.ca.gov/documents/csr2006.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2005 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 29 (2005), *available at* http://www.courts.ca.gov/documents/csr2005.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2004 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 31 (2004), *available at* http://www.courts.ca.gov/documents/csr2004.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2003 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 31, *available at* http://www.courts.ca.gov/documents/csr2003.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2002 COURT STATISTICS REPORT STATEWIDE CASELOAD TRENDS 29 (2002), *available at* http://www.courts.ca.gov/documents/csr2002.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2001 COURT STATISTICS REPORTS STATEWIDE CASELOAD TRENDS 29 (2001), http://www.courts.ca.gov/documents/csr2001.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 2000 COURT STATISTICS REPORTS STATEWIDE CASELOAD TRENDS 29 (2000), *available at* http://www.courts.ca.gov/documents/2000csr.pdf; JUDICIAL COUNCIL OF CALIFORNIA, 1999 COURT STATISTICS REPORTS STATEWIDE CASELOAD TRENDS 31 (1999), *available at* http://www.courts.ca.gov/documents/1999csr.pdf.

67. *Id.*



This is an increase of 34%. In understanding that every published case is considered to contain important legal precedent, this increase suggests that there are a growing number of cases going through ADR programs that contain valuable legal precedent and that otherwise would have been published. Additionally, combined with the growth in the sheer number of cases being handled by these ADR programs,[68] this rise in publishable cases suggests that the number of cases containing important issues of law being lost to ADR programs is likely to increase. As a result, this is a problem that is only getting bigger.

68. Niemic, *supra* note 3, at 16-17.

While the number of cases being lost to ADR programs continues to grow, another recent trend may render the problem of these programs less severe. In recent years, numerous court systems faced budget cuts that affected the efficiency of the court system.[69] For some of these courts, this resulted in the defunding of ADR programs.[70] In California, for example, trial court ADR programs were defunded by more than 95%.[71] In particular, the Superior Court of Los Angeles shut down its ADR program after nearly 20 years.[72] With this ADR program being the largest in the country, "'there will be a lot more cases clogging the system.'"[73] Additionally, given that 70% of participants used free services provided by the program, there will be many with an increased financial hardship as a result.[74]

California is not the only state suffering from financial strain. In New York, dispute resolution centers lost a large amount of funding in 2011, with some centers losing 40% of their budget.[75] This has led to both cuts in services as well as cuts to the size of the staff.[76] In North Carolina, dispute resolution centers were completely defunded.[77] This also resulted in a loss of staff and free mediation services.[78] In Kentucky, budget cuts in 2009 resulted in the elimination of their mediation program, which addressed thousands of cases each year.[79] Only one staff member remains.[80]

69. *See supra* note 14.
70. *See supra* note 14.
71. *Economic Downturn and the Use of Court Mediation*, *supra* note 14.
72. Bronstad, *supra* note 14.
73. *Id.*
74. *Id.*
75. *Economic Downturn and the Use of Court Mediation*, *supra* note 14.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

While these budget cuts have only affected ADR programs at the trial level, it is foreseeable that such budget cuts will affect appellate level ADR programs if they continue. If this is the case, the number of otherwise publishable cases lost to these programs may decline significantly depending on the level of defunding and the program's downsizing. However, even though this trend might mitigate the issue of lost legal precedent, any case containing legal precedent can be incredibly valuable. As such, even if only one such case is lost to ADR, it is still a crack in the system that must be mended.

If ADR programs are defunded completely, court systems will be faced with an entirely different question: if the budget allows for these ADR programs to be brought back, then should appellate level ADR programs be reinstated? Specifically, does the problem of legal precedent outlined in this article justify the continued defunding of such programs for the sake of state budgets and obtaining valuable legal precedent?

While it would certainly be up to each court to address this issue, implementing an additional level of court discretion in order to pinpoint cases containing important issues of law would improve the court's efficiency by allowing the ADR programs to lighten the court's load without sacrificing any important cases that would set legal precedent. Therefore, regardless of any budget cuts to ADR programs, the additional level of court review outlined in this article remains necessary for improving the efficiency of the appellate court system.

VI. CONCLUSION

Although ADR programs have become increasingly popular throughout the various courts of appeal, scholars have yet to address the inevitable problem with this process. While ADR programs lighten the caseload of

appellate courts[81] and allow for a more holistic analysis of each case,[82] such benefits come at a price: opportunities for the courts to hear important cases and set valuable legal precedent.[83] Regardless of whether they choose to exercise more discretion over their approval of cases or tailor their criteria for ADR eligibility to close the gap important cases may fall through, it is necessary for to each court to address this issue and decide whether the weight lifted by ADR programs is worth the toll these programs inevitably take on important case law.

However, if the court chooses to address this problem of lost legal precedent, it would be wise to add an additional level of discretion before qualifying cases for ADR programs. In doing so, courts will be able to pinpoint cases that involve important issues of law that would likely result in a published opinion while allowing other cases to benefit from the ADR programs. This solution creates a greater efficiency in the appellate court system by allowing the ADR process to remove rubble without losing any important legal precedent. And thanks to the recent fiscal crisis facing numerous court systems, the value of such efficiency has never been greater. It is with this increased efficiency that we further refine the appellate process, using all the tools ADR programs have to offer in helping the appellate courts better find their diamonds.

81. EAGLIN, *supra* note 15, § 3; *see also* Niemic, *supra* note 3, at 13 ("The programs have the potential to benefit the courts as well as the parties. Many courts started their programs to help conserve scarce judicial resources.").

82. Kinnard, *supra* note 8, at 16, 17; *see also* Niemic, *supra* note 3, at 13.

83. *See* argument *supra* Part III.