

The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.

Matthias Prause*

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* Senior Research Fellow and Ph.D. Candidate in Law (Dr. iur), Institute of International Law at Ludwig-Maximilian University Munich (Germany); Visiting Researcher at Harvard Law School and Teaching Fellow at Harvard University's Department of Government 2006-07; LL.M. 2006, Harvard Law School; Second State Exam, 2005; First State Exam 2003, Humboldt University of Berlin. I owe an ongoing debt of gratitude to my mentor, Professor Frank E. A. Sander, for his encouragement, inspiration and support. I wish to thank especially Professor Craig A. McEwen of Bowdoin College for sharing his data and thoughts. Special thanks to John Odito and Paula Morreau for their helpful comments on earlier versions of this article. Thanks also to all institutions and individuals who have made this study possible through their generous contributions of empirical data.

INTRODUCTION

Thirty years after the historic Pound Conference¹ that marked the birth of the modern alternative dispute resolution (ADR) movement, mediation has reached an adolescent stage. After years of innovation and experimentation, mediation is now a widely accepted method of resolving disputes in the United States and is now finding acceptance in courts, companies, professional organizations, government agencies, local communities, schools and universities.² However, this process of institutionalization³ has not been homogeneous;

1. See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 131 (1976) (proposing “not simply a court house but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case”); see also American Bar Association, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976) (analyzing the immediate impact of the Pound Conference on the judicial system); Griffin D. Bell, *The Pound Conference Follow-Up: A Response from the United States Department of Justice*, 76 F.R.D. 320 (1978); William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System In The Twenty-First Century*, 76 F.R.D. 277 (1978). For a current perspective of the Pound Conference, see Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 547-58 (2002).

2. See Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292 (2004) (describing the effects of the institutionalization of ADR); James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001); James J. Alfani et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997).

3. The institutionalization of mediation, particularly through court-annexed mediation programs, has raised concerns as to what extent this process has eroded the core values of process control and consent by the parties as those values had been originally envisioned by the founders of the ADR movement. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1, 14 (1991) (suggesting that instead of challenging the adversarial system, ADR was itself changed and transformed by the court system, losing much of its original core values). For current perspectives, see, e.g., Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 1012-15 (2004) (asserting that “if mediation is to survive as a conciliatory ADR process, it must ‘liberate itself from the courts’”); Joseph P. Folger, *“Mediation Goes Mainstream”: Taking the Conference Theme Challenge*, 3 PEPP. DISP. RESOL. L.J. 1, 3 (2002) (arguing that institutionalization of court mediation is threatening the fundamental principles of ADR); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 195-96 (2003) (arguing the dispute resolution movement will contribute to, if not create, a profound change in our view of the justice system, diminishing the citizens’ abilities to use the justice system to effectively achieve social change); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 431 (2005) (expressing concerns that the institutionalization of ADR could “erode both important rights guaranteed to

instead, there are substantial geographical differences in the institutionalization of mediation. While some jurisdictions – such as Florida or the District of Columbia⁴ – seem to have considerably high levels of mediation activity, others have much less mediation going on.⁵ This leads to a number of questions whose answers might be influential for policy and future practice of ADR: What are the factors that facilitate an increased use of mediation? What are the barriers? What political, statutory and academic environments provide the best conditions for a flourishing mediation community?

The ADR community is indebted to Professor Frank E.A. Sander for providing a tool which helps to answer these questions: the Mediation Receptivity Index (MRI).⁶ After helping to give birth to modern ADR⁷ and nurturing its growth, Professor Sander is now again thinking ahead to the next stage: how the process of ADR institutionalization can be accelerated until it reaches the “Tipping

all citizens and the processes that had evolved over centuries to secure those rights”); Symposium, *Dispute Resolution and Capitulation to the Routine: Is There a Way Out?*, 108 PENN ST. L. REV. 1 (2003); Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 191 (warning that mediation might relieve courts of the obligation to deliver either substantive or procedural justice; however, the solution would be the institutionalization of procedural justice in mediation rather than the abandonment of court-annexed mediation programs); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4 (2001) (arguing that “as mediation has been institutionalized in the courts and as evaluation has become an acknowledged and accepted part of the mediator’s function, the original vision of self-determination is giving way to a vision in which the disputing parties play a less central role”).

4. For Florida, see *infra* note 81. For the District of Columbia, see *infra* notes 92-93.

5. Frank E.A. Sander, *Developing the MRI (Mediation Receptivity Index)*, 22 OHIO ST. J. ON DISP. RESOL. 599, 599 (2007) (“I have long wondered why some states (such as Florida and Ohio) appear to have a high level of mediation activity, while others have moderate or low levels of mediation activity.”).

6. See *id.* For a first framework implementing Sander’s idea of the MRI, see, in the Appendix of Sander’s Article, Matthias Prause, *A Methodology for the Determination of the MRI (Mediation Receptivity Index)*, 22 OHIO ST. J. ON DISP. RESOL. 610 (2007).

7. See *supra* note 1. See also Joshua Brodesky, *From Pioneering to Policymaking in Dispute Resolution*, DISP. RESOL. MAG., Fall 2003, at 11; Ericka B. Gray, Special Section, *Creating History: The Impact of Frank Sander on ADR in the Courts*, 22 NEGOT. J. 445 (2006); Stephen B. Goldberg & Eric D. Green, Special Section, *Creating the Canon: Reflections on The First Edition of Dispute Resolution*, 22 NEGOT. J. 455 (2006); David A. Hoffman, Special Section, *The Future of ADR Practice: Three Hopes, Three Fears, and Three Predictions*, 22 NEGOT. J. 467 (2006); Michael L. Moffitt, Special Section, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437 (2006); Mosten, *supra* note 2, at 298; Nancy H. Rogers, Special Section, *No Panaceas, Only Promising Avenues: Frank Sander’s Legacy for Dispute Resolution in Law Schools*, 22 NEGOT. J. 459 (2006).

Point”⁸ at which the “burden of proof” shifts to a presumption for considering and using ADR in lieu of more traditional adjudicative methods unless it is otherwise indicated by the particular circumstances of the case.⁹

Professor Sander’s idea of an MRI which measures the geographical distribution and development of mediation activity is both a promise and a challenge. It is a promise not only because it might allow us for the first time to glance at the “big picture,” namely, the state of mediation in the country, but also because Professor Sander predicts that the very process of determining the MRI will provide us with invaluable information and insights into various aspects of practical mediation which might be far more important than the mere end result. It is a challenge because the availability of data might be as heterogeneous as the development of mediation throughout the country; information might be difficult to obtain due to decentralized organization and lack of coordination, and even if successfully obtained, there might be too many variables to accurately compare and contrast it. But these same challenges can provide the incentive necessary to improve the coordination and interconnection of mediation activities by courts, professional and non-profit ADR organizations as well as the collection of basic empirical data on mediation practice.¹⁰

This study undertakes the opportunity and challenge of fleshing out Professor Sander’s idea of an Mediation Receptivity Index and providing a first experimental determination of Mediation Receptivity for the U.S.¹¹ Due to limited time and resources, it cannot be considered as more than a first rough cut – a preliminary attempt to develop a practical protocol which might serve as a basis to determine the MRI. Nonetheless, the results make sense.¹² The MRI paints a surprisingly vivid picture of the state of mediation throughout the

8. This “Tipping Point” refers to the moment of critical mass, when mediation activity has exceeded a certain threshold, after which it has become so common that it is considered the regular method of resolving disputes.

9. Sander, *supra* note 5, at 600.

10. See Gina Viola Brown, *Making Dispute Resolution Work*, 26 JUST. SYS. J. 327, 338 (2005) (reporting that while in some court systems there is little incentive to collect the data, in others, empirical data is used to monitor the program’s quality, obtain additional funding, and justify continued funding).

11. The author follows Professor Sander’s suggestion of the MRI as a Full Employment bill for ADR students and untenured professors (see Sander, *supra* note 5, at 604 n.10) providing inspiration for research opportunities which are not only academically challenging but will also have the potential to support the promotion of ADR in policy and practice. For a first conceptual framework, see Prause, *supra* note 6.

12. The results make sense, especially if compared with the results of a survey conducted among ADR experts, which is reflected in the subjective sub-MRI. See tables 2 and 3, *infra* pp. 163, 164. See, e.g., *infra* notes 81, 92-93.

country, largely supporting the impression that has been drawn in the literature.¹³ And as Professor Sander predicted, it reveals a variety of invaluable insights which in themselves fully justify the undertaking. This study is a first attempt to develop a detailed methodology to determine the MRI and to apply it to currently available empirical data; it discusses the difficulties that have been encountered in the course of this endeavor and it provides a starting point for further research.

I. MEASURING THE IMMEASURABLE

A. *Goals and objectives: Why measure Mediation Receptivity?*

Professor Sander's Mediation Receptivity Index provides a powerful, multifunctional tool for the hands of scholars, practicing mediators, dispute system designers, legislators, court administrators and the ADR community at large.¹⁴ The index a) helps to illuminate what factors and environments might facilitate an enhanced utilization of mediation; b) helps to answer the question of what models for mediation programs and multi-door courthouses might work best¹⁵ so that legislators and court officials are equipped to take appropriate decisions in implementing mediation; c) enables us to identify deficiencies in particular areas and to make this information easily available; and d) provides guidance for overcoming barriers that prevent substantial growth of ADR. The various uses of the MRI can be paired accordingly with four functional dimensions: a) research and analysis; b) policy and decision-making; c) coordination and information exchange; and d) advocacy and promotion.¹⁶ These

13. For Florida, see *infra* note 85 and for the District of Columbia, see *infra* notes 92-93.

14. See Sander, *supra* note 5, at 599.

15. Since the early times of ADR court-mediation programs in particular have been the subject of empirical evaluation. For an overview of multiple studies, see, e.g., Bobbi McAdoo et al., *What Do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG., Winter 2003, at 8, 8; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002); and Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 572 (1997).

16. Concepts underlying the sustainability indices served as a model to formulate these purposes. *But cf.*, Thomas M. Parris & Robert W. Kates, *Characterizing and Measuring Sustainable Development*, 28 ANN. REV. ENV'T. & RESOURCES. 559, 566 (2003). See also Sander, *supra* note 5, at 600.

four functional dimensions (four pillars) of the MRI are all interconnected and serve as guiding principles for the determination of the MRI indicators.¹⁷

B. *A basic model for determining the MRI*

The basic features of the MRI model used in this study were designed according to the concept developed by Professor Sander.¹⁸ The goal of the study was to create an index that reliably described the geographical distribution of Mediation Receptivity in the U.S. and could be visualized graphically in a multicolored map. The MRI is a composite index drawing from different kinds of data from various sources and combining them according to their respective relevance as an indicator for Mediation Receptivity. In order to improve the accuracy of the index, data from multiple sources was used and then adjusted according to the respective population; this was done for most of the indicators. However, the dearth of reliable hard data and the relatively small number of sources limited the accuracy of the index and therefore broader categories within the index were chosen. Instead of providing a score between 0 and 10 for every jurisdiction, it seemed much more appropriate to group the states¹⁹ into the three categories of low, medium and high Mediation Receptivity in order to avoid implying an accuracy that is not backed up by the quality of the data.²⁰ Once the data basis is improved in the future, a much more discriminating grid could be used.

Following Professor Sander's suggestion, the methodology of the Corruption Perceptions Index (CPI) served as a model to determine the MRI.²¹ First, a pool comprising the 50 U.S. states and the District

17. See *infra* Part II.B, at p. 141.

18. See Sander, *supra* note 5. For a description of the methodology, see Prause, *supra* note 6.

19. In the following, the terms "state" and "jurisdiction" will be used synonymously in order to make the text more readable, irrespective of the status of the Federal District of Columbia.

20. The grouping was achieved by a simple division of the 10-unit metric into thirds.

21. Transparency International's current Corruption Perceptions Index (CPI) is available at, Transparency International: Surveys and Indices, http://www.transparency.org/policy_research/surveys_indices/cpi (last visited Dec. 8, 2007). See also JOHANN GRAF LAMBSDORFF, TRANSPARENCY INT'L & UNIV. OF PASSAU, BACKGROUND PAPER TO THE 2003 CORRUPTION PERCEPTIONS INDEX: FRAMEWORK DOCUMENT (Sept. 2003), <http://www.transparency.org/content/download/1554/8053/file/framework.pdf>; Fredrik Galtung, *Measuring The Immeasurable: Boundaries And Functions Of (Macro) Corruption Indices*, in, MEASURING CORRUPTION 101, 101-30 (C. Sampford et al. eds., 2006); Johann Graf Lambsdorff, *Measuring Corruption – The Validity And Precision Of Subjective Indicators (CPI)*, in MEASURING CORRUPTION, *supra*, at 81.

of Columbia was selected to provide a representative longitudinal profile of Mediation Receptivity throughout the country.²² Second, a fairly broad definition of Mediation Receptivity was formulated to serve as a starting point and benchmark. Third, criteria were determined that could serve as reliable indicators for Mediation Receptivity and actual empirical data was collected for these criteria. This third step was one of the most challenging parts of the study due to a scarcity of hard and sufficiently relevant data. Fourth, for each indicator, sub-MRIs were calculated which served as base internal units. These sub-MRIs were then scaled with a metric between 0 (low Mediation Receptivity) to 10 (high Mediation Receptivity) using the statistical method of percentile ranking.²³ The results were then weighted and the final MRI was calculated using an overall formula. Lastly, the results of the calculation were placed into three categories: low, medium and high Mediation Receptivity. As mentioned,²⁴ this simplification was necessary because the dearth of reliable hard data and the relatively small number of sources limited the accuracy of the calculated index.

II. THE METHODOLOGY OF THE MRI: HOW TO MEASURE MEDIATION RECEPTIVITY

One of the major challenges in determining the MRI is the development of a methodology which is able to sufficiently quantify something as ambiguous as Mediation Receptivity.²⁵ An interdisciplinary approach eventually contributed significantly to a solution. In economics, the oxymoron of *measuring the immeasurable* is a common theme, especially when it comes to questions of sustainable development²⁶ and quantification of corruption.²⁷ Like Mediation Receptivity, both of these economic questions have broad appeal and little specificity; however, unlike Mediation Receptivity, much work has already been done to develop quantitative indicators for them.²⁸ This

22. For a discussion of this issue see Sander, *supra* note 5, at 602; Prause, *supra* note 6, at 611.

23. For details see *infra* II.C, p. 146. See also Prause, *supra* note 6, at 613-16.

24. See *supra* Part I.B.

25. See Prause, *supra* note 6.

26. See, e.g., SIMON BELL & STEPHEN MORSE, SUSTAINABILITY INDICATORS: MEASURING THE IMMEASURABLE? (1999); HARTMUT BOSSEL, INDICATORS FOR SUSTAINABLE DEVELOPMENT: THEORY, METHOD, APPLICATIONS. A REPORT TO THE BALATON GROUP (1999); DONELLA MEADOWS, INDICATORS AND INFORMATION SYSTEMS FOR SUSTAINABLE DEVELOPMENT (1998); Parris & Kates, *supra* note 16.

27. See generally MEASURING CORRUPTION (C. Sampford et al. eds., 2006) and the references, *supra* note 21.

28. *Id.*

work served as a suitable basis on which the methodology for the determination of the MRI was developed.

A. *Defining the subject matter: What is Mediation Receptivity?*

First it was necessary to clarify the subject matter for measurement. Should mediation receptivity be considered primarily as a subjective term capturing the willingness of the wider public to use mediation as a means of resolving disputes irrespective of the existing infrastructure? Should it instead be defined more objectively as describing the actual measurable use of mediation and the accompanying infrastructure as it might be reflected through the existence of court-annexed or community mediation programs? Or is it a combination of both? These considerations show that it may be difficult to distinguish between the “ingredients” and the “end product” between Mediation Receptivity as the subject matter to be measured and the actual criteria which constitute it. It is the familiar dilemma of “what you put in, you will get out” – the fact that the end result of a formula is determined by the variables can lead to circular conclusions. This makes it difficult to limit the ambiguity of the term. In the field of sustainable development, this problem has been solved by choosing between a deductive, top-down and an inductive, bottom-up approach.²⁹ Most efforts in this field are deductive in nature, establishing a definition on the basis of first principles or negotiation consensus which in turn leads to a particular choice of indicators.³⁰

Because of the strong interweaving of criteria and end-result, a combination of both approaches appears to be the most promising way to define Mediation Receptivity.³¹ If these methods are applied

29. See Parris & Kates, *supra* note 16, at 569.

30. See Generally THE BOSTON INDICATORS PROJECT, THE BOSTON FOUND., THE WISDOM OF OUR CHOICES: BOSTON'S INDICATORS OF PROGRESS, CHANGE AND SUSTAINABILITY (2000), available at <http://www.tbf.org/IndicatorsProject/News/detail.asp?id=2999>; COMM'N ON SUSTAINABLE DEV., UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, GLOBAL TRENDS AND STATUS OF INDICATORS OF SUSTAINABLE DEVELOPMENT: BACKGROUND PAPER NO.2 (2006), http://www.un.org/esa/sustdev/csd/csd14/documents/bp2_2006.pdf (last visited Dec. 2, 2007); U.S. INTERAGENCY WORKING GROUP ON SUSTAINABLE DEV. INDICATORS, SUSTAINABLE DEVELOPMENT IN THE UNITED STATES: AN EXPERIMENTAL SET OF INDICATORS (2001), available at <http://www.sdi.gov>.

31. As far as the definition of mediation itself is concerned, it was not necessary to formulate a definition which is more specific than the generic definition of mediation as a “negotiation carried out with the assistance of a third party.” STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 111 (4th ed. 2003). The author agrees with Abramson that it is already “too late to justify a favored, circumscribed definition of mediation.” *Id.* (quoting Harold A. Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 106 (2005)).

to the problem of determining the MRI, they might not produce a consensus about the definition of Mediation Receptivity. However, the purposes³² of the MRI developed above might indeed serve as basic principles guiding its further definition. Following Professor Sander's suggestion, a fairly expansive concept of mediation was used, which is not limited to a certain subject area (such as family, victim-offender and small claims mediations). If one of the purposes of the MRI is to facilitate an increased use of mediation by identifying the "growth factors" for mediation and detecting deficiencies, then the MRI must have a strong objective component which might be reflected in the number of mediated cases, the size and quality of mediation programs, or in a high amount of public funds devoted to mediation. Subjective criteria can be added to capture what is difficult to quantify objectively and to determine differences between the objective infrastructure and subjective awareness which may reveal deficiencies in promotion and publicity and guide appropriate actions to overcome these problems. Based on these considerations, Mediation Receptivity could be defined as follows:

Mediation Receptivity describes the level of *use* and *awareness* of mediation as a means to resolve disputes in a particular environment and the level of supporting *infrastructure*.³³

The structure of this definition is threefold: First, it includes the actual *use* of mediation as an indicator for a high practical "mediation activity."³⁴ Second, it refers at the same time to *awareness* as an indicator of any other activity in mediation, such as training, publication and coverage in the media as well as the resulting awareness of mediation in the public, which does not necessarily manifest itself tangibly in actual case numbers.³⁵ The reason for the inclusion of an awareness element lies in the fact that some states might have a

32. See *supra* Part I.A.

33. The author is aware of the fact that every attempt to formulate a definition of Mediation Receptivity and, much more so, every proposal of a methodology to determine the MRI, might raise all kinds of objections and caveats. However, the very nature of exploratory endeavors into unknown territory is to choose one of several possible ways. As for the choice of this definition, the arguments for the inclusion of these three elements appeared to me more convincing than the arguments against such an inclusion.

34. In that sense, the three elements, although part of the definition itself, serve a second function as indicators for the invisible, unspoken meta-term of 'mediation activity'.

35. Awareness of mediation is therefore not a solely subjective element. A high awareness of mediation might manifest itself in a vivid public and academic debate but not necessarily in an increased use of mediation.

highly active mediation community, including a high number mediation trainers, conferences, and publications, but at the same time a significantly lower actual caseload.³⁶ This scenario is best described by the motto “many trainers but few (active) mediators,” – a scenario which might be characteristic of the early stages of adoption of mediation by a particular community, be it a county, a state, or even a country.³⁷ In this scenario, enthusiasm for mediation might have taken hold within the legal community and might even be reflected in mediation legislation and existing infrastructure; but it may have not yet reached the wider public or impacted conflict resolution practice. The awareness element therefore encompasses situations in which high activity by the mediation community has not yet manifested itself in a high actual caseload. Nevertheless, such activity may create the potential for further growth in the actual use of mediation in cases.

Third, in the definition of Mediation Receptivity is the *infrastructure element*, which encompasses the institutional support of mediation through legislation, public funding, and the existence of state offices of mediation or of court or community mediation programs. While these measures are generally apt to foster actual mediation activity, the presence of particular infrastructure elements alone does not necessarily lead to a higher caseload. It could instead be the case that certain infrastructure measures turn out to be not that effective or that, despite the beneficial environment, further growth is impeded by other factors.³⁸ Altogether, these three elements paint a very reasonable image of Mediation Receptivity and can serve as a first basis for the determination of the MRI.

B. *Selecting the indicators*

After defining the subject matter, the next step was to identify criteria to serve as indicators for Mediation Receptivity. This was methodologically complicated: how does one reliably measure something as ambiguous as the receptivity to mediation? How does one

36. This is the current state of mediation in Germany, where the awareness of mediation as an alternative to litigation is high but little actual mediation is taking place.

37. Cf. David Plimpton, *Ethical Duties are needed for trainers Promoting ADR Courses*, 19 ALTERNATIVES TO HIGH COST LITIG. 171,188 (2001) (arguing “that every year more mediators are being turned out, many of whom will be disappointed by the lack of opportunities to mediate”).

38. This refers to the issue “On Paper v. In Use” discussed by Sander, *supra* note 5, at 603.

quantify the almost immeasurable? A comparative look at advancements in the economic fields of sustainable development and corruption research³⁹ shows that even ambiguous and largely intangible concepts such as Mediation Receptivity can be measured. Although the definitional ambiguity of the subject matter persists, the question of how to measure it accurately can be resolved by means of a composite index fed by various weighted indicators.

The indicators and sources that qualify for inclusion must ideally comply with a set of five basic principles: (1) they must be relevant to assessing Mediation Receptivity in the sense that there is a causal connection. In other words, there must be a direct correlation between the presence and value of an indicator and the use or awareness of mediation. (2) They must be based on either readily available data or on data which is available with reasonable effort and cost. (3) They must be based on data which is verifiable and of adequate quality. (4) They must be capable of being updated at recurring intervals as the legal system evolves. (5) They must be able to show trends and progress.⁴⁰

Professor Sander proposed a set of indicators⁴¹ which provided a basis for the first practical determination of the MRI. Due to the varying availability of data some indicators could not be considered and others were added. The model developed in this study uses a combination of objective and subjective indicators in order to improve the accuracy and reliability of the data and to gain valuable insights into the factors which benefit an increased use of mediation. The indicators used in this study are the following:

I. Objective MRI

A. Quantitative indicators

1. Number of community mediation centers
2. Number of companies offering mediation services
3. Number of Members of ADR organizations
4. Academic Citation index⁴²

B. Infrastructure indicators

39. See sources cited *supra* notes 21, 26.

40. For the issue of reconciling the dilemma of compatibility and flexibility, see Prause, *supra* note 6, at 618.

41. See Sander, *supra* note 5, at 600-01.

42. The Academic Citation Index attempts to measure the frequency of the coverage of particular states in connection with mediation in academic publications. See *infra* note 50.

1. Uniform Mediation Act (UMA)⁴³ implemented
2. State ADR Office

II. Subjective MRI

1. Survey of ADR experts

Objective indicators measure either quantitative aspects of mediation activity or the infrastructure in place that cannot be quantified.⁴⁴ The ideal indicator to capture the use of mediation would be the actual caseload of mediation programs compared to the caseload in judicial proceedings within the same jurisdiction and court division. Unfortunately, such high quality data is extremely difficult to obtain and the lack of consistent data collection throughout the U.S. made it necessary to use lower quality data which was readily available for all examined jurisdictions.⁴⁵ For the purpose of this study, a set of indicators was selected which was easily accessible and significant enough to serve as a reliable benchmark for the mediation activity in a particular state. The indicators used for this study include the number of community mediation centers⁴⁶ which are members of a prevalent community mediation organization,⁴⁷ the number of companies offering mediation services or training in publicly accessible

43. For a discussion of the Uniform Mediation Act and its impact on mediation practice, see John M. McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 PEPP. DISP. RESOL. L.J. 317 (2003); Monica Rausch, *The Uniform Mediation Act*, 18 OHIO ST. J. ON DISP. RESOL. 603 (2003); Scott H. Hughes, *The Uniform Mediation Act: To The Spoiled Go The Privileges*, 85 MARQ. L. REV. 9 (2001).

44. These factors include various aspects of the statutory or financial environment (e.g. the implementation of the UMA, other mediation legislation, dispute resolution funds to finance ADR, etc.).

45. However, some states such as Florida have made statistics on the caseload in court-annexed mediation programs available; see EARNESTINE RESHARD, *FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM* (19th ed. 2006). The National Association for Community Mediation (NAFCM), to name an example, uses the MadTrac system to gather information about the caseload in its member community mediation centers in order to create a National Report on the state of Community Mediation. The success of this endeavor will depend largely on the consistent and complete participation of all centers because incomplete data will not be sufficiently representative to serve as the basis for a national report.

46. Although it is likely that the geographical distribution of community mediation centers might be an indicator for the overall mediation receptivity in a given area (a hypothesis which still needs to be proven empirically) the MRI is not limited to one aspect of mediation activity only. The MRI is a composite index in which multiple indicators from different sources are combined so that the activity in the field of community mediation will only be one of many elements which are considered.

47. The data on community mediation centers was acquired from the NAFCM through its web-based database, which can be found at, National Association For Community Mediation, <http://www.nafcm.org> (last visited Dec. 8, 2007). The particular structure of the database and the geographical distribution of community mediation centers might eventually give rise to particular caveats in regard to the question:

directories⁴⁸ and the number of members in ADR organizations.⁴⁹ Additionally, an academic citation index was included to approximately measure the frequency of the coverage of particular states in connection with mediation in academic publications.⁵⁰ Since academic institutions⁵¹ often serve as catalysts for the development of mediation, additional data on the number of schools that teach mediation, the presence of dispute resolution journals, etc. could be included in future versions of the MRI, as Professor Sander suggested.⁵² In addition to quantitative information, data on infrastructure features such as the adoption of the Uniform Mediation Act (UMA) and the presence of a State ADR Office was collected.

A large part of mediation activity takes place in court-annexed mediation programs; therefore, data on these programs are a natural choice as reliable indicators for the MRI. Unfortunately, the important dimension of court-mediation could not be represented in this study for two primary reasons. First, it was not possible to acquire information on the number of court-connected mediation programs for all of the states. Although many court administrators have been extremely helpful in providing sufficient information, the lack of data even for a small number of states makes a nationwide comparison impossible. Second, a survey of court-connected mediation programs

to what extent might it indeed be representative for the entire mediation community. However, a combination of these data with data from other sources might minimize this effect. If properly interpreted, the data will provide valuable information on trends and developments of community mediation.

48. For this study, entries from multiple yellow page directories (www.yellowpages.com and yellowpages.superpages.com as of November 2006) were processed and combined. Although the process of inclusion into a particular directory may include a certain level of randomness, it can be assumed that the conditions for inclusion are the same for every state, which lowers the statistical relevance of this aspect significantly. This indicator therefore seems to be a powerful and cost effective tool to get a first rough picture of current trends, which later can be combined with indicators from different sources. If these data prove to be a reliable indicator of mediation receptivity in a particular area then it might even serve as an ad-hoc indicator, a preliminary snapshot, a first rough cut of the state of mediation in the country which could be determined at regular intervals. See YellowPages Home Page, <http://www.yellowpages.com> (last visited Nov. 1, 2006); YellowPages SuperPages, <http://yellowpages.superpages.com> (last visited Nov. 1, 2006).

49. For this study the number of members of the ACR and the CPR Institute were examined. For the CPR Institute the number of neutral panelists was also considered.

50. As a basis for this research the title entries of the Westlaw database of law journals and law reviews were used. This method does not allow a complete coverage of ADR publications but it allows a fairly useable snapshot of major trends.

51. Such as the Program on Negotiation (PON) at Harvard Law School or the ADR programs at Ohio State University and Pepperdine University.

52. See Sander, *supra* note 5, at 600-01.

includes significant definitional challenges. Often it is not entirely clear what subject matters of mediation are covered. Should the survey include family mediation or even criminal victim-offender mediation and are sufficient data for these fields available? What is actually covered by the term “mediation program”? Some programs might only include one particular court while others are present at multiple courts throughout the state. In some cases, the particular structure of a mediation program might prevent a meaningful comparison, as is the case in the District of Columbia where ADR services are offered through the Multi-Door Dispute Resolution Division for the entire Unified Court System.⁵³

Not all aspects of Mediation Receptivity are objectively quantifiable. Some states might have only a few high quality mediation programs which are used as a model for in-depth academic studies. This scenario refers to Professor Sander’s example of the high-MRI island in a low-MRI sea,⁵⁴ which is difficult to detect through a conventional quantitative assessment. Some states might have many ineffective mediation programs,⁵⁵ while others have only a few very active programs with high case loads.⁵⁶ The difficulties in assessing these situations are methodological difficulties in assessing quality aspects of mediation activity in contrast to mere quantitative aspects. While it may be much easier to determine the number of members of ADR organizations or to get a rough estimate of the number of companies offering mediation services in a particular state, the quality and the impact of a particular program is difficult to capture. This is precisely the point where statistical measurability ends and intuitive knowledge begins. Certain programs which have forged paths in the history of the modern ADR movement might not be easily distinguishable

53. See Gladys Kessler & Linda J. Finkelstein, *The Evolution of A Multi-Door Courthouse*, 37 CATH. U. L. REV. 577 (1988). See also JOHNNIE DANIEL, ASSESSMENT OF THE MEDIATION PROGRAM OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 1-2 (1995); MICHAEL FIX & PHILIP J. HARTER, HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (1992); Superior Court of D.C., Multi-Door Dispute Resolution Division, <http://www.dccourts.gov/dccourts/superior/multi/index.jsp> (last visited Nov. 4, 2007) (describing the Multi-Door Dispute Resolution Division at the Superior Court of the Federal District of Columbia).

54. See Sander, *supra* note 5, at 602.

55. For an examination of the problems courts are facing in the process of institutionalization of ADR see Louise P. Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327 (2003).

56. Professor Sander pointed out this problem of “On Paper vs. In Use.” Sander, *supra* note 5, at 603.

from other programs if one merely looks at the numbers. But knowledgeable experts in the field will know these noteworthy programs and if there is a consensus among a significant and representative number of experts, then this might be a fairly reliable indicator of what is otherwise immeasurable: the quality aspects of mediation activity. For these reasons, the pool of indicators for the MRI has been extended by a subjective element which aims to take advantage of the valuable yet unused asset of collective, intuitive knowledge of experienced members of the mediation community.⁵⁷ The data for this element was acquired through a survey in which the perceptions of ADR experts about the Mediation Receptivity in different states were measured.⁵⁸ This survey provided an excellent means to complement, verify and consolidate the objective indicators.

C. *Creating a metric and scaling the data*

Next, the data samples needed to be further processed and standardized in order to allow analytical insights and comparisons as to the level of mediation receptivity they represent.⁵⁹ This was done by calculating a standardized and preliminary Mini-MRI (sub-MRI) for each indicator. These sub-MRIs provide the variables, which will – in a final step – feed the overall formula that weighs the different indicators according to their significance and results in the actual final MRI. As a metric a range from 0 (Low Mediation Receptivity) to 10 (High Mediation Receptivity) was chosen which also served as a base

57. Such an element has been proposed by Professor Sander, *supra* note 5, at 601. In the resulting MRI this element will be weighted with 20%.

58. The survey consisted of two questions. In the first question the respondents were asked to rank the five states which they consider to have the highest mediation receptivity. These states are Florida, California, Maryland, New York and Ohio. In a second question the respondents were asked to evaluate the level of mediation receptivity for the pool of the fifty U.S. states and the District of Columbia. The survey was conducted among state members of State ADR offices and court ADR coordinators as well as ADR experts from ADR organizations and the academia across the country, twelve of whom returned the survey. This number reflects the character of this study primarily as a methodological demonstration and the interpretation of the numerical data is therefore subject to several caveats. However, the data shows a surprisingly high correlation with the general impression reflected in the literature about the distribution of mediation activity in the country. See, e.g., J. Sue Richardson, *Review of Florida Legislation, Comment: Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 FLA. ST. U. L. REV. 623, 623 (1990) (stating that “Florida is leading the way in the establishment of alternative dispute resolution procedures”). Because the subjective MRI is considered only with a value of 20% its statistical effect is in any case minimal.

59. For a detailed description of the methodology, see Prause, *supra* note 6, at 613.

internal unit for the final calculation of the MRI.⁶⁰ The data was then converted into a much simpler metric consisting of the three categories of low, medium and high Mediation Receptivity.

In order to eliminate the population size as a misleading factor, the data was first adjusted to the population size of the respective jurisdictions for one version of the MRI (relative MRI).⁶¹ Since the sources use a variety of different units, the data of each source was standardized and scaled on a metric from 0 to 10 using the statistical method of percentile ranking.⁶² The percentile rank describes the proportion of indicator values in the entire set of the jurisdictions examined in this study that a specific value is greater than or equal to. In other words, this technique determines the relative standing of a particular indicator value in relation to the values for all the remaining jurisdictions. In order to calculate the sub-MRI, the respective percentile ranks for all indicator values were determined and multiplied by 10 in order to scale the resulting rank on a metric from 0 to 10. The resulting sub-MRIs formed the basis from which the final MRI was calculated (quantitative sub-MRI).

Due to their binary nature (the values returned were either “yes” or “no”), a different scheme was used for the infrastructure indicators. For the existence of each infrastructure element (implementation of the UMA and existence of state ADR offices) a score of 0.5 was attributed. The sum of all scores – maximum one – was then added to the overall MRI of the respective jurisdiction so that the existence of a particular infrastructure increased the MRI of that jurisdiction. In order to remain within the 10 unit range, the percentile rank of these intermediate values was calculated. The strength of this method is that it can deal with the binary nature of the data which manifests itself in the lack of quantifiable values for the indicators and makes an immediate scaling impossible. As a result of the scaling process, sub-MRIs for every indicator were determined which might reveal helpful insights such as what factors either foster or impede a high use of mediation and therefore provide a powerful tool for detecting deficiencies within a particular mediation community. This procedure was applied to the different subsets resulting in two different

60. The framework here follows the approved methodology for the Corruption Perceptions Index (CPI). For an overview of the CPI, see *supra* note 21.

61. See Sander, *supra* note 5, at 601.

62. For details, see ARTHUR M. GLENBERG, *LEARNING FROM DATA: AN INTRODUCTION TO STATISTICAL REASONING*, 44-45 (2nd ed. 1996); LINDA CROCKER & JAMES ALGINA, *INTRODUCTION TO CLASSICAL AND MODERN TEST THEORY*, 439-42 (1986). The percentile rank was determined with the spreadsheet software Microsoft Excel.

sub-MRIs: a) the *subjective sub-MRI* as standardized and scaled value of the results from the survey among ADR experts and b) the *objective sub-MRI* as the numerical average of all the remaining sub-MRIs. All MRIs have furthermore been processed both in an *absolute* and in a *relative* variant, representing the unadjusted, absolute indicator values (*absolute sub-MRI*) and a relative version of the indicator values, which was adjusted to the population (*relative sub-MRI*).

D. *Weighting the indicators: How to design the overall formula*

The final step of the MRI calculation was weighting the indicators.⁶³ In order to be meaningful the sub-MRIs needed to be combined and each considered according to its significance as a representative indicator for Mediation Receptivity. The design of the overall formula was therefore the most crucial and conceptually challenging part of the determination of the MRI. To what extent should every indicator (e.g. the number of community mediation centers, the number of companies offering mediation services, the number of members of ADR organizations, etc.) be weighted, and more importantly, to what extent should the subjective sub-MRI flow into the end result? For the MRI, all indicators were considered equally unless particular reasons warranted a different weighting. The latter is true for the subjective sub-MRI which serves as a corrective and complements the objective sub-MRIs. Following Professor Sander's suggestion,⁶⁴ the subjective sub-MRI was considered with 20% as a reasonable value reflecting the auxiliary nature of the subjective part of the MRI. The intrinsically subjective nature of the weighting process, which requires that one out of many reasonable and equally well-founded combinations is chosen, implies that a certain level of arbitrariness is inevitable as is the case with every weighted index. The question remains as to how reasonable and well argued the choice for a particular weighting formula is. Since the study uses a relatively rough grid which groups the jurisdictions into three categories, the issue is less difficult than it might seem: within a rather broad range, variations in the actual weighting proportions would have little or no influence on the end-result.

Implementing these considerations as design parameters, the overall formula for calculating the final MRI is as follows:⁶⁵

$$MRI = 0.8 \times \text{objective MRI} + 0.2 \times \text{subjective MRI}$$

63. Cf. Prause *supra* note 6, at 617 (to compare the conceptual framework of the weighting process).

64. See Sander, *supra* note 5, at 601.

65. See Prause, *supra* note 6, at 617

The objective MRI was determined according to the following formula:

$$\text{objective MRI} = \text{infrastructure score} + \frac{\sum \text{quantitative sub-MRI's}}{\text{number of quantitative sub-MRI's}}$$

III. MEDIATION RECEPTIVITY IN THE U.S.: A FIRST ROUGH CUT

Based on available empirical data, the MRIs for the fifty U.S. states and the District of Columbia were determined with the method described above and the result visualized with a Geographical Information System (GIS)⁶⁶. What conclusions can be drawn from this first data? Are they sufficiently reliable enough to serve as a benchmark for the actual state of mediation in the country and trends for the distribution of Mediation Receptivity? Do the results “make sense”? What caveats need to be taken into consideration when interpreting the MRIs?

A. *The interpretation of the MRI*

Any interpretation of the MRI⁶⁷ must be guided by the assumption that the calculated MRI is only a first rough cut, a tentative determination of what is possible with limited resources. And the result might well change once more reliable data is available or the composition of the overall formula is changed. However, given these caveats the data seems to confirm, and – more importantly – quantify the diversity in the endorsement of mediation within the U.S. The MRI draws a surprisingly realistic picture of the major trends in mediation activity in the U.S., largely consistent with the general impression reflected in academic literature as well as in the survey results of jurisdictions with particularly high mediation activity.⁶⁸ The empirical data make the gap visible between those jurisdictions that enthusiastically embrace mediation as a practical alternative to adversarial processes and those that are still at the beginning of embracing mediation on a large scale. The results of this study reveal five gravitation centers of mediation activity in the United States:⁶⁹ a) on the West Coast (California, Oregon and Washington), b) in

66. See Figures 1 and 2, *infra* p. 165.

67. For the purpose of better readability, the terms “MRI” and “Sub-MRI” will be used synonymously for the remainder of the article.

68. See, e.g., for Florida, sources cited *infra* note 81, and for the District of Columbia, sources cited *infra* notes 92-93. For the survey among ADR experts, see *supra* note 58, and tables *infra* pp. 162-64.

69. For a graphical visualization of the MRI, see the maps *infra* p. 165.

parts of the Mid-West (Colorado and Nebraska) and in Texas, c) in Florida, d) in Hawaii and e) in what could be described as the ‘*mediation belt*’ stretching from the Great Lakes region (including Minnesota, Illinois, Michigan, and Ohio) through almost the entire East Coast region: North Carolina, Virginia, Maryland, Delaware, New Jersey, the District of Columbia, and New York to New England, including Connecticut, Massachusetts, Vermont, and Maine.⁷⁰

The empirical data seem to confirm the general impression reflected in the survey among ADR experts as well as in the literature.⁷¹ The data furthermore suggest a significant correlation between the objective and the subjective MRI, that is between objective, quantifiable data and the subjective perception of Mediation Receptivity. All states that were considered by ADR experts as having high mediation receptivity – and were therefore grouped in the high subjective MRI segment – also have a high objective MRI (with the exception of Oregon).⁷² This means that the subjective perception of Mediation Receptivity can be confirmed by empirical data with an overlap correlation of 94.71 %.⁷³ This indicates reversely that the calculated, numerical objective MRI seems to be capable of monitoring the actual level of Mediation Receptivity with a quite high level of probability. Consequently, all states of those groups having both a high absolute and a high relative MRI (with the exception of Florida, which only has a high absolute but a medium relative MRI) were also considered by ADR experts as high (subjective) MRI jurisdictions.⁷⁴ Valuable conclusions can also be drawn from an analysis of the relationship between the *absolute* and the *relative* MRI, that is, between the absolute level of mediation activity in a particular jurisdiction

70. For this list, both the absolute and the relative MRI were considered. Montana was not included because its high relative MRI (mediation density) probably results from its relatively low population of only 944,632 people (2006 population estimate). “Montana” U.S. Census Bureau, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US30&-qr_name=ACS_2006_EST_G00_DP5&-ds_name=ACS_2006_EST_G00_&-lang=en&-sse=on (last visited Dec. 2, 2007). This interpretation is confirmed by the low absolute MRI and medium subjective MRI. Adjusted by the statistical effect Montana might well be considered as a medium MRI state. According to the data, the state seems to have a small, but active mediation community.

71. This intuitive impression is best reflected in the literature as well as in the results of the survey among ADR experts, which together form the subjective factors of the calculation of the MRI. See *supra* note 58; and *infra* notes 81, 93 for references.

72. Oregon has a medium relative and a high absolute MRI. See Table 1, *infra* p. 162.

73. This correlation results from an overlap of 16 out of 17 subjective sub-MRI jurisdictions in comparison with the objective sub-MRI dataset (absolute and relative).

74. See *generally* data for the respective sub-MRI datasets, *infra* pp. 163-64.

and the *relative* level of mediation activity in relation to the population (*mediation density*). From that perspective the examined jurisdictions form five major groups:

1) “*Undoubtedly high MRI states*”

The first group –which might be dubbed as “*undoubtedly high MRI states*”– contains those states that have both a high absolute and a high relative MRI: California, Colorado, Connecticut, Maryland, Massachusetts, Minnesota, New York and Ohio.⁷⁵ These states’ MRIs indicate that they are not only the most active states in terms of their absolute level of mediation but also that their mediation activities remain high even relative to their population. In other words: the data suggests a high mediation *density* in these states. The latter is particularly remarkable if one considers the inclusion of California and Ohio. These states belong to the 10 most populated states in the U.S.,⁷⁶ which require a significant level of actual mediation activity in order to attain a high mediation density (high relative MRI).⁷⁷ Interestingly, all of the states (except Florida) that were among the high subjective MRI group are also part of this group.

The fact that a predictable state⁷⁸ such as Florida is not part of this group might be interpreted in three ways. One reason for this result might be simply the fact that the mediation density that is reflected in the relative MRI is indeed not as high as it is in other states, despite the high absolute level of mediation that is going on.

75. The influence of educational and research programs in ADR growth and the subjective perception of Mediation Receptivity is illustrated by the fact that programs at Ohio State University and at Pepperdine University have been ranked among the best five programs in the country according to the ranking of specialty programs at U.S. Law Schools by U.S. News & World Report 2006. For a close-up of Ohio State University’s Dispute Resolution Curriculum see Sarah Rudolph Cole et al., *Sustaining Incremental Expansion: Ohio State’s Experience in Developing the Dispute Resolution Curriculum*, 50 FLA. L. REV. 667 (1998).

76. Ohio has 11,478,006 inhabitants. “Ohio” U.S.Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=search&geo_id=e&_geoContext&_street&_county=&_cityTown=&_state=04000US39&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007). California is the most populated state in the U.S. with a population of 36,457,549. “California” U.S.Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=search&geo_id=&_geoContext&_street&_county=&_cityTown=&_state=04000US06&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007).

77. New York, as a major economic center, has an exceptional position which makes having a high mediation density *and* a high absolute mediation activity more probable.

78. Florida has been ranked among the five leading states in mediation in a survey among ADR experts. *See supra* note 58. *See also infra* note 81.

Florida is the 4th largest state in the U.S.⁷⁹ and it requires an extraordinary level of mediation activity, both inside and outside the courts, in order to lift this jurisdiction over the threshold into the high relative MRI segment. That some states such as Florida are nevertheless considered as high MRI states⁸⁰ might then be best explained by its size and the quality of its mediation programs. The impression, which is reflected in its high subjective MRI, that Florida has high mediation activity is indeed correct but its exclusion from the first group might be due to the fact that Florida has a large population. The *mediation density* might then be less than one would expect.

Another reason for this contra-intuitive result might be the very design of this study in combination with the particular structure of Florida's mediation community. Florida is widely known for its comprehensive court mediation program which is among the oldest in the country and has taken the lead in many ways.⁸¹ As discussed earlier,⁸² however, court-annexed mediation programs have explicitly not been examined due to a lack of complete and comparable data, a fact that might well be reflected in Florida's medium relative MRI.⁸³

79. Florida has a population of 18,089,8889 which is only exceeded by that of California, Texas and New York. Population estimates by the U.S. Census Bureau as of 2006. "Florida" U.S. Census Bureau, http://factfinder.census.gov/servlet/ACSSAFF?_event=search&geo_id&_geoContext&_street&_county=&_cityTown=&_state=04000US12&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007).

80. See survey cited *supra* note 58.

81. See Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, FLA. B. J., Oct. 1996, at 44; Richardson, *supra* note 58, at 623 ("Florida is leading the way in the establishment of alternative dispute resolution procedures."); Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11, 11 (2002) ("Over the past twenty-five years, the state of Florida has been recognized across the United States as a leader in the development of court-connected alternative dispute resolution programs."); Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 501-02 (2003); Robert B. Moberly, *Ethical Standards For Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 726 (1994) ("Florida has perhaps the most comprehensive system of state-wide and state-controlled court mediation in the country."); Richardson, *supra* note 58, at 623 ("Florida is leading the way in the establishment of alternative dispute resolution procedures."); Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 88 (2003).

82. See *supra* Part II.B. The result might also be influenced by the anomaly in the dataset with respect to community mediation programs.

83. It is ironic that Florida, which is exemplary in publishing comprehensive statistical data of its court mediation program, has in a sense become the "victim" of the overall lack of comparable statistical data. However, in order to be useful the data

Another explanation might be that an important aspect of its Mediation Receptivity could be difficult to grasp with hard numbers. The majority of ADR experts surveyed saw something in Florida that let them consider it a high MRI state but that did not immediately manifest itself in a high objective relative MRI, and this might well be the *quality* of its court-mediation programs and their impact across the state lines. Florida is widely considered to be a national leader in the field of mediation,⁸⁴ with the continuous use of mediation since 1975⁸⁵ and a highly developed court-annexed mediation program that publishes an annual compendium with current information and detailed statistics including the caseload, settlement rate and number of mediators involved.⁸⁶ The results could therefore be a confirmation of the assumption developed earlier, that the subjective sub-MRI in combination with its objective counterpart is best able to measure the quality aspects of mediation.

2) “*Large scale mediation states*”

The second group is formed by those states having a high absolute but a medium relative MRI and that might be described as “large scale mediation states”. This group includes Florida, Georgia, Illinois, Michigan, New Jersey, North Carolina, Pennsylvania, Texas and Washington. These states have a high level of mediation activity – a large number of companies offering mediation services, members of ADR organizations, and community mediation centers – but their high MRI is primarily due to the states’ large population. The data suggests that the density of mediation activity is relatively lower in the states in the second group than it is in the states in the first and third groups. Therefore, it is not surprising that these nine states are among the fourteen most populated states in the country, as their high MRI is partly a natural consequence of their size.

The data suggests that the subjective perception of Mediation Receptivity is, to a large extent, more influenced by the absolute Mediation Receptivity than by the mediation density (relative MRI). States within the second group might be somewhat more visible than others simply because of their size and absolute level of mediation activity. It is remarkable, though, that one state – Florida – was

need to be available in a standardized form for all jurisdictions. For statistical data of Florida, see RESHARD, *supra* note 45.

84. See sources cited *supra* note 81.

85. Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 46 (2003).

86. See RESHARD, *supra* note 45.

named among the group of five leading Mediation Receptivity states in the nationwide survey among ADR experts.⁸⁷ As demonstrated earlier,⁸⁸ surveys among knowledgeable ADR experts can grant access to a collective, often subconscious knowledge of Mediation Receptivity, including its qualitative aspect, and it is precisely this difference in quality and impact that might single out this state.⁸⁹

3) “*Small but beautiful*”

The third group consists of those jurisdictions that have a medium absolute and a high relative MRI and it includes the District of Columbia, Maine, Nebraska and Oregon – jurisdictions with a rather small population that could be denominated with the motto “small but beautiful.”⁹⁰ Similar to the states in the second group, the high relative MRI of the states in this group might be attributable to their (this time small) population. However, the fact that other states with comparable populations⁹¹ rank significantly lower than jurisdictions in this group shows that population size is not the only factor leading to a high relative MRI in these cases. As the medium absolute MRI suggests, there is in fact a considerable amount of mediation going in these states, which is in itself worthy of further examination. The survey of ADR experts provided further insights into the states in this group. Although none of these states were among the first five

87. For the list of the five states see *supra* note 58. If the first ten states are considered this list would include Georgia and Texas in addition to Florida.

88. See *supra* Part III.A.1.

89. Florida’s medium ranking in the category of the relative MRI might result from statistical anomalies in the data which was used. Specifically, the NAFCM, which provided the data for the survey of Community Mediation Programs, has relatively few members in this state and therefore might not adequately represent the actual level of community mediation. This observation is supported by the fact that the state ranks significantly higher in all other categories. See Tables 2 and 3 in the Appendix. However, since the MRI is a composite index which includes multiple sources, the anomaly within the data might not have become statistically relevant. In three out of five categories the state ranks within the medium MRI category so that the statistical effect is minimal. See also sources cited *infra* note 97.

90. The state population ranges from 581,530 in the District of Columbia, “District of Columbia” U.S. Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=search&geo_id&_geoContext&_street&_county=&_cityTown=&_state=04000US11&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007), to 3,700,758 in Oregon, “Oregon” U.S. Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=search&geo_id&_geoContext&_street&_county=&_cityTown=&_state=04000US41&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 1, 2007).

91. The states in the third group cover the range of the twenty-five smallest states in terms of population of the U.S.

states in the survey, all of the jurisdictions (with the exception of Nebraska) were considered to be high MRI states by the ADR experts. This suggests that the quality and impact of mediation activities in these states is noticeable, although it might not be easily quantifiable by bare numbers. Such is the case with the District of Columbia. The D.C. Superior Court introduced early on an innovative and ambitious court-connected ADR program⁹² that has been very successful ever since the Multi-Door Dispute Resolution Division, and it is therefore widely considered as one of the jurisdictions which takes a lead in the practical implementation of mediation.⁹³

4) “*Small beginnings*”

The fourth group consists of Delaware, Hawaii, Montana and Vermont. These states’ MRIs show a high contrast with a low absolute but a high relative MRI. This contrast indicates a low mediation activity but a high mediation density, a situation which might be described as “small beginnings.” These results might be best explained by the distorting statistical effects of these states’ relatively small populations,⁹⁴ which make even a low mediation activity statistically significant if one looks at these states’ mediation density. However, in comparison to states with similar populations, the MRI of these jurisdictions suggests a significantly higher level of mediation activity – a finding that could be confirmed with further targeted studies.

92. For studies on the court-connected ADR program in the District of Columbia see DANIEL, *supra* note 53; FIX & HARTER, *supra* note 53; for Florida see KARL D. SCHULTZ, FLORIDA’S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT (1990); for Ohio see DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 215 (1997) (evaluating ADR programs in Ohio and also in California, Michigan, Missouri and West Virginia).

93. *Matching Fuss to Forum: D.C. Trial Court’s Creative ADR Case-Classification Procedures*, 9 ALTERNATIVES TO HIGH COST LITIG. 44 (1991) (“Since 1983, the Superior Court of the District of Columbia has been one of the most ADR-ambitious of jurisdictions.”). “In 1990 the Superior Court of the District of Columbia then led by Chief Judge Fred B. Ugest received CPR’s award for outstanding practical achievement for its ambitious use of ADR in a variety of ways since 1983.” *D.C. Court, Eaton Corp. are Among Honorees in the 1990 CPR Legal Program Awards in ADR*, 9 ALTERNATIVES TO HIGH COST LITIG. 37 (1991).

94. Montana is the 8th smallest state within the U.S. with 944,632 inhabitants. “Montana” U.S. Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=search&geo_id&geoContext&_street&_county=&_cityTown=&_state=04000US30&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007).

5) “White spots on the mediation map”

The fifth and last group could be described as “white spots on the mediation map” and consists of those states having both a low absolute and a low relative MRI. This group includes Arkansas, Iowa, Kansas, Kentucky, Louisiana, Mississippi, North Dakota, Rhode Island, South Dakota, and West Virginia. The data for these states indicates a mediation receptivity that is low in absolute numbers as well as in relation to these states’ population. The population of states in this group ranges from mid-size to small⁹⁵ and geographically these states largely occupy parts of the South and Mid-West. These states seem to stand at the beginning of their mediation growth and the MRI could be a helpful tool to draw the attention of legislators, court officials and the mediation community to the barriers currently impeding an increased use of mediation and it might point out jurisdictions that could serve as models in order to implement measures that foster further mediation growth.

Apart from analyzing the five different sub-MRI’s, valuable conclusions can also be drawn by comparing the MRI to various external data. This brings up two interesting questions: how does the MRI relate to the number of attorneys in the state? And if the latter is an indicator for the litigiousness of a particular jurisdiction,⁹⁶ then how is mediation receptivity linked to litigiousness? An analysis of the MRI and the number of attorneys per state shows a significant correlation between the respective absolute versions of the MRI and the ‘Attorney Index.’⁹⁷ The jurisdictions with a high MRI overlap those jurisdictions with a high number of attorneys with a correlation of

95. From North Dakota with a population of 635,867, “North Dakota” U.S.Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=search&geo_id&_geoContext&_street&_county=&_cityTown=&_state=04000US38&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007), to Louisiana with 4,287,768, “Louisiana” U.S.Census Bureau, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=search&geo_id&_geoContext&_street&_county=&_cityTown=&_state=04000US22&_zip&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Dec. 2, 2007).

96. In this direction see Prause, *supra* note 6, at 614. See also Paul Taylor, *The Difference Between Filing Lawsuits and Selling Widgets: The Lost Understanding that Some Attorneys’ Exercise of State Power is Subject to Appropriate Regulation*, 4 PIERCE L. REV. 45 (2005).

97. The algorithm for calculating the ‘Attorney Index’ was similar to those used for the MRI: it is the percentile rank multiplied with 10 for the entire set of 51 jurisdictions. Cf. *supra* at page 14 for details. For the results, see Tables 2 and 3 in the Appendix, *infra* pp. 163-64.

88.24 %.⁹⁸ In regard to the relative index, the correlation is only 52.94 %.⁹⁹

B. *Challenges and future perspectives*

What is the state of the ADR Movement today? What has been achieved within the last decades? In which jurisdictions are the processes of institutionalization and mainstreaming¹⁰⁰ of mediation most advanced? How can mediation as a method of amicable dispute resolution, whose core values¹⁰¹ are deeply rooted in American tradition and cultural identity,¹⁰² gain traction in social and legal life?

98. 15 out of 17 jurisdictions with a high number of attorneys (percentile rank > 0.66) are also part of the high absolute MRI group.

99. 9 out of 17 jurisdictions with a high number of attorneys relative to the population size (percentile rank > 0.66) are also part of the high relative MRI group.

100. See sources cited *supra* notes 2-3.

101. Core values of mediation are the principles of mutual respect, self-determination and informed decision-making as well as reconciliation, see generally *supra* note 31, which find its expression in legal thought through the comprehensive law movement. Following this vein, U.S. Chief Justice Warren E. Burger commented on the high, even sacred calling of the legal profession: "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. . . . They ask whether our profession is fulfilling its historical and traditional obligation of being healers of human conflicts." Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 274 (1982). According to Burger, "[Lawyers] must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers – not the promoters – of conflict." Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 378 (1980). The concept expressed by Burger, which also serves as a foundation of the modern ADR movement, finds its theological and philosophical roots in the Judeo-Christian tradition of Western culture, especially in the Gospels, Luke 12:57-59; Matthew 5:23-25, 7:12, 22:39, and the Pauline letters, e.g., 1 Corinthians 6:1-8, on which Supreme Court Justice Antonin Scalia comments: "Paul is making two points: first, he says that the mediation of a mutual friend, such as the parish priest, should be sought before parties run off to the law courts I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation." Antonin Scalia, *Teaching About the Law*, CHRISTIAN LEGAL SOC'Y Q., Winter 1987, at 8-10.

102. Alternative methods of dispute resolution have – in varying degrees – always been part of Western culture and have been used in the past much more intensively as Chief Justice Burger points out: "Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity." Burger, *supra* note 101, at 275. The spiritual foundation of consensual dispute resolution and reconciliation, however, is much older and can be found in the very center of the Gospels and the Pauline letters, see *supra* note 101, as a direct implementation of the love command, Matthew 22:39, expressed in the golden rule, Matthew 7:12; Tobit 4:15. The paramount principle of reconciliation and the healing of broken relationships demands settlement: "Why do you not judge for yourselves what is right? If you are to go with

The MRI provides a powerful tool to help answer these questions. However, given the dearth of reliable empirical data, the calculated MRI can be no more than a first rough cut, a tentative glance at trends which might indicate where mediation stands today.¹⁰³

What are the methodological conclusions from this first practical assessment of the MRI? As Professor Sander predicted, it was the process of determining the MRI rather than the actual numbers that was most revealing.¹⁰⁴ However, this process and the development of a methodology that enables a reliable determination of the MRI included considerable challenges. The lack of sufficient data and its often limited quality was one of the most substantial problems in this study. This problem was most salient in the field of court-connected

your opponent before a magistrate, make an effort to settle the matter on the way” Luke 12:57. And litigation is discouraged: “To have lawsuits at all with one another is already a defeat for you. . . . But you yourselves wrong and defraud—even your own brothers!” 1 Corinthians 6:7-8. The Gospel also contains in Matthew 18:15-18 a unique procedure which is aimed at restoring the relationship while maintaining the substantial integrity of the law, starting with conversation, and if that fails, moving on to mediation, and if that fails, ending with a binding decision. In a way, it already foreshadows the dispute resolution continuum as it is recognized today by describing the primary processes of negotiation, mediation, and binding decision. See GOLDBERG ET AL., *supra* note 31, at 3 (describing the dispute resolution continuum). In this passage, Jesus makes known to the disciples the great principles proper to the new order of things, and especially what they must do in case of offences given to them. It declares the successive primacy of negotiation and mediation before binding decision making the latter subsidiary. This procedure, however, applies only for moral and not for material conflicts, since litigation is not encouraged for the latter; it is also not aimed at a compromise but rather at convincing the sinning brother of his fault in the most sensitive way. For the roots of mediation in Western civilization and the Judeo-Christian tradition, see Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665-68 (1985). For patristic theological thought on conflict resolution and reconciliation, see, e.g., John Chrysostom, *Homilies on the Gospel of Saint Matthew*, in 10 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 372-75 (P. Schaff et al. eds., T&T Clark, Eerdmans 1991) (1888); For early patristic reflections on the “Art of Reconciliation” see ANCIENT CHRISTIAN COMMENTARY ON SCRIPTURE: NEW TESTAMENT, IB: MATTHEW 14–28, at 76-78 (Manlio Simonetti ed. 2002). Abraham Lincoln, having worked as a lawyer himself, absorbed this thought, recommending in respect to litigation: “Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.” Abraham Lincoln, *Notes for a Law Lecture*, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler ed., 1953). In the same tone, Judge Learned Hand remarked: “I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.” Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address Before the N.Y. City Bar Ass’n (Nov. 17, 1921), in 3 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 89, 105 (James N. Rosenberg et al. eds., 1926).

103. See Appendix, *infra* pp. 162-65 for details.

104. See Sander, *supra* note 5, at 603.

mediation programs,¹⁰⁵ but it occurred in all measured aspects of mediation. Thirty years after the groundbreaking Pound Conference, mediation is still in many areas a fairly unregulated field, which might be precisely one of the reasons for its success.¹⁰⁶ However, the converse side of a liberal regulatory regime is inevitably a scarcity of statistical data, which makes it hard to quantify mediation activity. There is no license requirement for mediators¹⁰⁷ and mediations outside of the court-annexed mediation programs are difficult to capture statistically.¹⁰⁸ The process of determining the MRI revealed the areas of mediation in which the collection of statistical data needs to be improved. Yet the example of Florida, where the State Dispute Resolution Center publishes an annual compendium with comprehensive statistical data,¹⁰⁹ and the implementation of an electronic case tracking system by the National Association for Community Mediation (NAFCM) shows impressively that this can be done. Future studies might conduct more extensive surveys among ADR experts to measure the perception of mediation receptivity and again compare these findings with objective empirical data.¹¹⁰ The selection of the indicators and the definition of their particular weight in the overall formula will remain challenges for scholars in the coming years as they affect the very core of the MRI.

What then is left to be done? In order to encourage continued growth in mediation the MRI might be used to monitor the states'

105. See *supra* p. 144.

106. In the private sector – outside court-annexed mediation programs – mediation is still by and large unregulated. There are no standards for the licensing of mediators yet, and statutory provisions apply mostly to court-connected mediation. See McAdoo & Welsh, *supra* note 3, at 414; Hensler, *supra* note 3, at 187 (describing mediation as a “new and largely unregulated industry that operates – by design – behind closed doors”).

107. The question of whether and to what extent mediators should be certified or even licensed is the subject of an ongoing debate: See, e.g., Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOLEDO L. REV. 327, 344-52 (1998); Sarah Rudolph Cole, *Mediator Certification: Has the Time Come?*, DISP. RESOL. MAG., Spring 2005, at 7; Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189 (1999).

108. An exception seems to be community mediation programs such as those affiliated with the NAFCM, which are increasingly using electronic case tracking software for the collection of empirical data.

109. See, e.g., RESHARD, *supra* note 45.

110. Subjective data, such as the responses to surveys among ADR experts, might serve as a benchmark for quality aspects of mediation which are difficult to access through mere objective indicators. See *supra* p. 153 for more details. It would be interesting to see to what extent the results of such a survey would differ if a higher number of ADR experts would participate.

progress towards the increased use of mediation over a longer period of time. This would allow year-to-year comparisons and provide legislators and court administrators with the empirical data necessary to assess the impact of their activities and to adjust their initiatives if necessary. Such a comparable long-term-trend MRI needs to be compatible with previous versions but at the same time flexible enough to include new indicators as they become available. A solution for this dilemma might be to create a long-term version of the MRI with a constant methodology while the development and adjustment of the actual MRI will be an ongoing project.¹¹¹ As consistent data about the court-connected mediation programs becomes available and issues of standardization and definition¹¹² are solved, more data might be included into the MRI since court-annexed mediation programs are often the backbone of the local mediation community and serve as centers of innovation and of practical advancement of ADR. In a further step it might be worthwhile, as Professor Sander suggests,¹¹³ to undertake the assessment of mediation growth on an international scale. However, due to cross-cultural differences¹¹⁴ and a predictable dearth of comparable data, a short narrative or a rough ranking based on a survey among ADR experts might be a more appropriate format for this task rather than a numerically calculated MRI.¹¹⁵

IV. CONCLUSION

Mediation Receptivity is a term of little specificity but is of central importance for the understanding and advocacy of ADR. Despite its definitional ambiguity, Mediation Receptivity can be measured. In this study a practical methodology for the determination of the Mediation Receptivity Index (MRI) was developed that is able to reliably measure Mediation Receptivity and which might serve as a basis for further research. This study formulates a detailed protocol¹¹⁶ and a mathematical formula¹¹⁷ that makes it possible to calculate a numeric MRI as well as sub-MRIs that describe particular aspects of Mediation Receptivity. Based on a framework of four fundamental

111. See Prause, *supra* note 6, at 618.

112. See *supra* Part II.A.

113. See Sander, *supra* note 5, at 16.

114. *Id.*

115. *Id.*

116. See *supra* Parts I.B, II, III.A.

117. See *supra* Part II.D.

purposes¹¹⁸ of the MRI (the four pillars), guidelines for selecting indicators for Mediation Receptivity and their weighting with the overall formula were proposed¹¹⁹ that guide the underlying decision making process.

In order to demonstrate this methodology and to get an overview of Mediation Receptivity in the United States the practical protocol for the determination of the MRI was applied to all fifty states of the U.S. and the District of Columbia. For each of these jurisdictions, the MRI was determined as a composite index drawing from data from multiple sources and combining it according to its relevance as an indicator for Mediation Receptivity. The tentative data of the calculated MRIs showed a great diversity in mediation receptivity throughout the country with five gravitational centers of mediation activity: a) the West Coast (California, Oregon and Washington); b) parts of the Mid-West (Colorado and Nebraska) and in Texas; c) Florida; d) Hawaii; and e) what could be described as the '*mediation belt*' stretching from the Great Lakes region (including Minnesota, Illinois, Michigan, and Ohio) through almost the entire East Coast region from North Carolina, Virginia, Maryland, Delaware, New Jersey, the District of Columbia, and New York to New England including Connecticut, Massachusetts, Vermont, and Maine.¹²⁰ Further studies based on more extensive data are necessary to confirm these preliminary results. It was shown that the various sub-MRIs that describe particular aspects of Mediation Receptivity can serve as powerful instruments for the interpretation of the MRI and that a subjective element is indeed a reliable indicator for the quality aspects of mediation. Through this study, the particular areas of mediation that suffer most from a shortage of data could be identified, possibly leading to an increased collection of data for future research.

This study is a first rough cut, a pilot project on Mediation Receptivity that paves the way for further research to come. Its tentative results provide an initial glance at the trends of mediation use in the U.S. and show the necessity for further research. Professor Sander's MRI is a powerful tool to help ADR scholars understand what factors influence an increased use of mediation. The MRI might present a challenge to states to each try to take the lead in the use of

118. See *supra* Part I.A.

119. See *supra* Part II.D.

120. See Appendix, *infra* pp. 162-65.

ADR and in doing so, the MRI might serve one of its noblest¹²¹ purposes: the further promotion of ADR throughout the country.

121. This noble purpose is beautifully summed up in the famous quotation from the Beatitudes, which could be the motto for those devoted to the advocacy of mediation: "Blessed are the peacemakers, for they shall be called sons of God." Matthew 5:9.

V. APPENDIX

A. Tables

TABLE 1: FINAL MRIS

Absolute Final MRI (High)	Relative Final MRI (High)	Absolute Final MRI (Medium)	Relative Final MRI (Medium)	Absolute Final MRI (Low)	Relative Final MRI (Low)
California	California	Alabama	Alaska	Alaska	Alabama
Colorado	Colorado	Arizona	Florida	Arkansas	Arizona
Connecticut	Connecticut	D.C.	Georgia	Delaware	Arkansas
Florida	D.C.	Indiana	Idaho	Hawaii	Indiana
Georgia	Delaware	Maine	Illinois	Idaho	Iowa
Illinois	Hawaii	Missouri	Michigan	Iowa	Kansas
Maryland	Maine	Nebraska	Nevada	Kansas	Kentucky
Massachusetts	Maryland	New Mexico	New Hampsh.	Kentucky	Louisiana
Michigan	Massachusetts	Oklahoma	New Jersey	Louisiana	Mississippi
Minnesota	Minnesota	Oregon	New Mexico	Mississippi	Missouri
New Jersey	Montana	South Carolina	North Carolina	Montana	North Dakota
New York	Nebraska	Tennessee	Pennsylvania	Nevada	Oklahoma
North Carolina	New York	Utah	Texas	New Hampsh.	Rhode Island
Ohio	Ohio	Wisconsin	Utah	North Dakota	South Carolina
Pennsylvania	Oregon		Washington	Rhode Island	South Dakota
Texas	Vermont		Wisconsin	South Dakota	Tennessee
Virginia	Virginia		Wyoming	Vermont	West Virginia
Washington				West Virginia	
				Wyoming	

TABLE 2: ABSOLUTE SUB-MRIs

Absolute Sub-MRI # of community mediation programs	Absolute Sub-MRI # of companies offering mediation services	Absolute Sub-MRI # of members in ADR Organizations	Absolute Sub-MRI Citation Index	Absolute Objective Sub-MRI	Subjective Sub-MRI	Absolute Index - Number of Attorneys	Absolute Final MRI
California	California	California	California	California	California	California	California
Colorado	Colorado	Colorado	Colorado	Colorado	Colorado	D.C.	Colorado
D.C.	Florida	Connecticut	Florida	Connecticut	Connecticut	Florida	Connecticut
Illinois	Georgia	Florida	Illinois	Florida	D.C.	Georgia	Florida
Maryland	Illinois	Georgia	Indiana	Georgia	Florida	Illinois	Georgia
Massachusetts	Massachusetts	Illinois	Louisiana	Illinois	Georgia	Maryland	Illinois
Michigan	Michigan	Maryland	Maine	Maryland	Hawaii	Massachusetts	Maryland
Minnesota	Minnesota	Massachusetts	Maryland	Massachusetts	Maine	Michigan	Massachusetts
New York	New Jersey	Michigan	Massachusetts	Michigan	Maryland	Minnesota	Michigan
North Carolina	New York	Minnesota	Michigan	Minnesota	Massachusetts	Missouri	Minnesota
Ohio	North Carolina	Missouri	Minnesota	New Jersey	Michigan	New Jersey	New Jersey
Oregon	Ohio	New Jersey	New Jersey	New York	New York	New York	New York
Pennsylvania	Pennsylvania	New York	New York	North Carolina	North Carolina	Ohio	North Carolina
Texas	Texas	Ohio	Ohio	Ohio	Ohio	Pennsylvania	Ohio
Virginia	Virginia	Pennsylvania	Texas	Pennsylvania	Oregon	Texas	Pennsylvania
Washington	Washington	Texas	Virginia	Texas	Texas	Virginia	Texas
Arizona	Alabama	Virginia	Alabama	Virginia	Virginia	Washington	Virginia
Connecticut	Arizona	Alabama	Connecticut	Washington	Alaska	Alabama	Washington
Florida	Connecticut	Arizona	Missouri	Alabama	Arizona	Arizona	Alabama
Georgia	D.C.	D.C.	Montana	Arizona	Arkansas	Colorado	Arizona
Hawaii	Indiana	Delaware	Nebraska	D.C.	Delaware	Connecticut	D.C.
Indiana	Kansas	Indiana	New Mexico	Indiana	Illinois	Indiana	Indiana
Iowa	Kentucky	Kentucky	Pennsylvania	Kentucky	Minnesota	Iowa	Maine
Kansas	Louisiana	Maine	South Carolina	Louisiana	Missouri	Kansas	Missouri
Missouri	Maryland	New Hampsh.	Tennessee	Maine	Nevada	Kentucky	Nebraska
Nebraska	Missouri	North Carolina	Utah	Missouri	New Jersey	Louisiana	New Mexico
Nevada	Nevada	Oklahoma	West Virginia	Nebraska	New Mexico	Mississippi	Oklahoma
New Hampsh.	Oklahoma	Oregon	Wisconsin	New Mexico	Oklahoma	North Carolina	Oregon
New Jersey	Oregon	Tennessee	Alaska	Oklahoma	Pennsylvania	Oklahoma	South Carolina
New Mexico	South Carolina	Washington	Arizona	Oregon	Utah	Oregon	Tennessee
Oklahoma	Tennessee	Wisconsin	Arkansas	South Carolina	Vermont	South Carolina	Utah
South Carolina	Utah	Alaska	D.C.	Tennessee	Washington	Tennessee	Wisconsin
Tennessee	Wisconsin	Arkansas	Delaware	Utah	Wisconsin	Utah	Alaska
Wisconsin	Alaska	Hawaii	Georgia	Wisconsin	Alabama	Wisconsin	Arkansas
Alabama	Arkansas	Idaho	Hawaii	Alaska	Idaho	Alaska	Delaware
Alaska	Delaware	Iowa	Idaho	Arkansas	Indiana	Arkansas	Hawaii
Arkansas	Hawaii	Kansas	Iowa	Delaware	Iowa	Delaware	Idaho
Delaware	Idaho	Louisiana	Kansas	Hawaii	Kansas	Hawaii	Iowa
Idaho	Iowa	Mississippi	Kentucky	Idaho	Kentucky	Idaho	Kansas
Kentucky	Maine	Montana	Mississippi	Iowa	Louisiana	Maine	Kentucky
Louisiana	Mississippi	Nebraska	Nevada	Kansas	Mississippi	Montana	Louisiana
Maine	Montana	Nevada	New Hampsh.	Mississippi	Montana	Nebraska	Mississippi
Mississippi	Nebraska	New Mexico	North Carolina	Montana	Nebraska	Nevada	Montana
Montana	New Hampsh.	North Dakota	North Dakota	Nevada	New Hampsh.	New Hampsh.	Nevada
North Dakota	New Mexico	Rhode Island	Oklahoma	New Hampsh.	North Dakota	New Mexico	New Hampsh.
Rhode Island	North Dakota	South Carolina	Oregon	North Dakota	Rhode Island	North Dakota	North Dakota
South Dakota	Rhode Island	South Dakota	Rhode Island	Rhode Island	South Carolina	Rhode Island	Rhode Island
Utah	South Dakota	Utah	South Dakota	South Dakota	South Dakota	South Dakota	South Dakota
Vermont	Vermont	Vermont	Vermont	Vermont	Tennessee	Vermont	Vermont
West Virginia	West Virginia	West Virginia	Washington	West Virginia	West Virginia	West Virginia	West Virginia
Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming	Wyoming

- High Absolute Sub-MRI
- Medium Absolute Sub-MRI
- Low Absolute Sub-MRI

TABLE 3: RELATIVE SUB-MRIs (MRI ADJUSTED TO POPULATION)

Relative Sub-MRI # of community mediation programs	Relative Sub-MRI # of companies offering mediation services	Relative Sub-MRI # of members in ADR Organizations	Relative Sub-MRI Citation Index	Relative Objective Sub-MRI	Subjective Sub-MRI	Relative Index - Number of Attorneys	Relative Final MRI
Colorado	Alaska	California	Colorado	D.C.	California	Alaska	California
D.C.	Colorado	Colorado	Connecticut	California	Colorado	California	Colorado
Hawaii	Connecticut	Connecticut	D.C.	Colorado	Connecticut	Colorado	Connecticut
Maine	D.C.	D.C.	Delaware	Connecticut	D.C.	Connecticut	D.C.
Maryland	Delaware	Delaware	Idaho	Illinois	Florida	D.C.	Delaware
Massachusetts	Florida	Georgia	Louisiana	Maine	Georgia	Illinois	Hawaii
Minnesota	Illinois	Illinois	Maine	Maryland	Hawaii	Louisiana	Maine
Montana	Massachusetts	Maine	Massachusetts	Massachusetts	Maine	Maryland	Maryland
Nebraska	Minnesota	Maryland	Minnesota	Minnesota	Maryland	Massachusetts	Massachusetts
New Hampsh.	Montana	Massachusetts	Montana	Montana	Massachusetts	Minnesota	Minnesota
New Mexico	Nebraska	Minnesota	Nebraska	Nebraska	Michigan	Missouri	Montana
Oregon	Nevada	Missouri	New Mexico	New Jersey	New York	New Jersey	Nebraska
South Dakota	New Hampsh.	New Hampsh.	New York	New York	North Carolina	New York	New York
Vermont	New Jersey	New Jersey	North Dakota	Ohio	Ohio	Pennsylvania	Ohio
Virginia	Oregon	New York	Utah	Vermont	Oregon	Rhode Island	Oregon
Washington	Rhode Island	Ohio	West Virginia	Virginia	Texas	Vermont	Vermont
Wyoming	Wyoming	Pennsylvania	Wyoming	Wyoming	Virginia	Washington	Virginia
Arizona	California	Alabama	Alabama	Alaska	Alaska	Alabama	Alaska
California	Hawaii	Arizona	Alaska	Delaware	Arizona	Delaware	Florida
Connecticut	Idaho	Florida	California	Florida	Arkansas	Georgia	Georgia
Delaware	Kansas	Hawaii	Florida	Georgia	Delaware	Hawaii	Idaho
Idaho	Maryland	Iowa	Illinois	Hawaii	Illinois	Kansas	Illinois
Indiana	Michigan	Kentucky	Indiana	Louisiana	Minnesota	Kentucky	Michigan
Iowa	New Mexico	Michigan	Maryland	Michigan	Missouri	Maine	Nevada
Kansas	New York	New Mexico	Michigan	Missouri	Nevada	Michigan	New Hampsh.
Michigan	Ohio	North Carolina	Missouri	Nevada	New Jersey	Montana	New Jersey
Nevada	Oklahoma	Oklahoma	Nevada	New Mexico	New Mexico	Nebraska	New Mexico
New York	Pennsylvania	Oregon	Ohio	North Dakota	Oklahoma	New Mexico	North Carolina
North Carolina	South Carolina	Rhode Island	South Carolina	Oklahoma	Pennsylvania	Ohio	Pennsylvania
Ohio	South Dakota	Texas	South Dakota	Oregon	Utah	Oklahoma	Texas
Pennsylvania	Texas	Vermont	Texas	South Carolina	Vermont	Oregon	Utah
Tennessee	Utah	Virginia	Vermont	Utah	Washington	Texas	Washington
Utah	Vermont	Washington	Virginia	Washington	Wisconsin	Virginia	Wisconsin
Wisconsin	Wisconsin	Wisconsin	Wisconsin	Wisconsin	Alabama	Wyoming	Wyoming
Alabama	Alabama	Alaska	Arizona	Alabama	Idaho	Arizona	Alabama
Alaska	Arizona	Arkansas	Arkansas	Arizona	Indiana	Arkansas	Arizona
Arkansas	Arkansas	Idaho	Georgia	Arkansas	Iowa	Florida	Arkansas
Florida	Georgia	Indiana	Hawaii	Idaho	Kansas	Idaho	Indiana
Georgia	Indiana	Kansas	Iowa	Indiana	Kentucky	Indiana	Iowa
Illinois	Iowa	Louisiana	Kansas	Iowa	Louisiana	Iowa	Kansas
Kentucky	Kentucky	Mississippi	Kentucky	Kansas	Mississippi	Mississippi	Kentucky
Louisiana	Louisiana	Montana	Mississippi	Kentucky	Montana	Nevada	Louisiana
Mississippi	Maine	Nebraska	New Hampsh.	Mississippi	Nebraska	New Hampsh.	Mississippi
Missouri	Mississippi	Nevada	New Jersey	New Hampsh.	New Hampsh.	North Carolina	Missouri
New Jersey	Missouri	North Dakota	North Carolina	North Carolina	North Dakota	North Dakota	North Dakota
North Dakota	North Carolina	South Carolina	Oklahoma	Pennsylvania	Rhode Island	South Carolina	Oklahoma
Oklahoma	North Dakota	South Dakota	Oregon	Rhode Island	South Carolina	South Dakota	Rhode Island
Rhode Island	Tennessee	Tennessee	Pennsylvania	South Dakota	South Dakota	Tennessee	South Carolina
South Carolina	Virginia	Utah	Rhode Island	Tennessee	Tennessee	Utah	South Dakota
Texas	Washington	West Virginia	Tennessee	Texas	West Virginia	West Virginia	Tennessee
West Virginia	West Virginia	Wyoming	Washington	West Virginia	Wyoming	Wisconsin	West Virginia

- High Relative Sub-MRI
- Medium Relative Sub-MRI
- Low Relative Sub-MRI

B. *Maps*

FIGURE 1: ABSOLUTE MRI



FIGURE 2: RELATIVE MRI (BY POPULATION)



