

NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH

*A Report on Current Research
Findings–Implications
for Courts and Future Research Needs*



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ACKNOWLEDGMENTS

The National Symposium on Court-Connected Dispute Resolution Research was the product of the diligent efforts of a host of individuals and their generous donations of time, expertise, and creativity. The symposium truly was a team endeavor, beginning with the cooperation between the State Justice Institute and the National Center for State Courts and continuing with the dedication of the symposium advisory committee, the project consultants, the symposium workshop teams, the plenary session speakers, and the symposium participants. As the acknowledgments below indicate, many of these individuals served the symposium project in multiple roles, and without their commitment and contributions the symposium would not have achieved its goals.

The symposium advisory committee provided guidance in developing the structure and substance of the symposium agenda, determining the content and organization of the working papers, and assuring that the working papers comprehensively addressed the issues pertinent to court and program management. In addition, the advisory committee members participated on the symposium program, either as members of the workshop teams or as plenary session speakers, or both. For these contributions, we heartily thank Honorable Rosemary Barkett, Chief Justice, Supreme Court of Florida; Carl Bianchi, Director of Legislative Services for the State of Idaho, Idaho State Court Administrator, retired, and State Justice Institute Board Member; Thomas A. Fee, Executive Vice President, National Institute for Dispute Resolution; Honorable Resa Harris, District Court Judge, Mecklenburg County, North Carolina; Dr. Craig McEwen, Professor of Sociology, Bowdoin College; Ms. Melinda Ostermeyer, Director, Multi-Door Courthouse, Superior Court of the District of Columbia; and Michael D. Planet, Court Administrator, King County Superior Court, Seattle, Washington.

The project consultants authored five of the symposium working papers, provided guidance on the content and organization of the working papers, assisted in the development of the research bibliography, offered suggestions in creating the workshop teams, and led or served on the workshop teams and the plenary panels. Their contributions surpassed by far the monetary compensation they received for their services. For this invaluable assistance we are particularly grateful to Dr. Stevens Clarke, Institute of Government, University of North Carolina at Chapel Hill; Ms. Ericka Gray, Director of Professional Services, EnDispute, Inc., and former Director of the Middlesex County Multi-Door Courthouse, Cambridge, Massachusetts; Dr. Jessica Pearson,

Director, Center for Policy Research; Dr. Janice A. Roehl, Vice President, Institute for Social Analysis; and Ms. Margaret Shaw, Adjunct Professor of Law, New York University School of Law, mediator, and court consultant.

Because a primary goal of the symposium was to encourage the exchange of ideas among the participants, the symposium format was somewhat unconventional. Highly interactive workshops facilitated by teams comprised the heart of the agenda, while opening and closing plenary sessions framed the proceedings to orient the participants to the workshop process and to summarize the workshop discussions. Symposium participants were recruited to serve on the workshop teams and plenary session panels, and all participants played an active role in the workshops. For their enthusiastic and enlightening dialogue in an unusual setting, we thank the nearly 200 judges, court managers, program administrators, dispute resolution providers, researchers, judicial educators, attorneys, academicians, representatives of dispute resolution organizations, and others who participated in the symposium.

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Thanks also go to the Florida Academy of Certified Mediators for hosting a reception for the symposium participants and their guests. The opportunity for relaxed discussion outside the structured workshops was much appreciated.

The State Justice Institute provided not only the financial support for the symposium, but also substantive assistance in planning the symposium agenda, editing the working papers, developing the workshop teams, orienting the team members to the workshop process, and conducting the symposium. Pamela Bulloch was very helpful in preparing the workshop teams for their assignments, David Tevelin supported planning decisions that enhanced the quality of the symposium and lent a thoughtful ear during the symposium to the participants' views, and Richard Van Duizend contributed many good ideas and strong support during the planning, preparation, and conduct of the symposium. We are particularly appreciative of the conscientious efforts and commitment of Daina Farthing-Capowich to ensure the success of the symposium. For her generous assistance, useful advice, humor, and camaraderie we are very thankful.

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NATIONAL SYMPOSIUM ON COURT CONNECTED DISPUTE RESOLUTION RESEARCH

The growth of alternative dispute resolution (ADR) in the courts in the last decade has been significant. As with the adoption of many other innovations and reforms, ADR's growth has outpaced attempts to evaluate it. Questions remain about how ADR affects litigation and case management, what structural and procedural mechanisms promote the most appropriate and beneficial outcomes for litigants and for the justice system, and how the quality of dispute resolution can be measured and maintained.

Yet, a significant body of research and evaluation of ADR has developed over the past decade. This literature, which has become more refined over time, chronicles and analyzes a wide array of experiences in designing, implementing, managing, and evaluating court-connected ADR programs. It offers significant information and guidance to judges, court managers, ADR program administrators, and others who have an interest in improving the ability of the judicial system to provide quality dispute resolution to litigants and to the public.

One limitation of the body of research and evaluation of ADR is that it has produced diverse and sometimes conflicting findings. One reason for this result is the lack of both a common terminology for the various ADR processes and a uniform understanding of their purposes and goals. For example, a process presumed to be mediation in a particular study might actually be case evaluation or some hybrid of mediation and arbitration. Thus, the usefulness of the findings from that study would be diminished not only for the managers of the program evaluated, but also for those in other jurisdictions who seek guidance on implementing a mediation program. Another reason for the inconsistency and reduced utility of some research findings is the variability of the rules, procedures, and jurisdictional contexts across the programs that have been studied. This variability may contribute significantly to the discrepancies in findings and mask the possible benefits and drawbacks to using the particular dispute resolution process subjected to evaluation.

A second shortcoming of the ADR research and evaluation literature is its lack of ready accessibility to judges, court managers, and program administrators. The research findings are published in a wide variety of texts, periodicals, and reports that have been difficult for court officials to gather and to analyze. Consequently, courts have not been able to apply the full body of research and evaluation findings systematically in designing and assessing their own ADR programs.

To address these problems, the National Center for State Courts (NCSC) conducted the National Symposium on Court Connected Dispute Resolution Research under a cooperative agreement with the State Justice Institute. The symposium, held on October 15-16, 1994 in Orlando, Florida, was designed to enhance the value of existing ADR research and evaluation for

court policy makers and practitioners and to encourage the greater utility of future studies. The symposium participants included representatives of 48 states, the District of Columbia, Puerto Rico, Guam, and the Northern Mariana Islands, as well as researchers, representatives of dispute resolution organizations and federal government agencies, and other interested individuals.

Prior to the symposium, the participants received seven working papers prepared by NCSC staff and project consultants. These papers reviewed the major research and evaluation studies on different types of court-connected ADR, distilled the research findings relevant to court and ADR program management, discussed the implications of the research for designing, managing, and improving ADR programs in the courts, and identified issues that require further study.

The symposium thus served as a forum for judges, court managers, program administrators, researchers, attorneys, and others to elaborate the issues raised in the working papers and to exchange their ideas about the research findings. It also provided participants the opportunity to voice their views about the direction future research should take and about how dissemination of the findings could be improved. In individual workshops, the symposium participants addressed specific ADR topics, including civil dispute resolution processes, such as mediation, early neutral evaluation, and summary jury trials; court-annexed arbitration; family mediation; multi-door courthouses; community justice and victim-offender mediation programs; private dispute resolution; selection, training, and qualifications of neutrals; and multi-cultural issues in ADR.

From the abundant ideas expressed in the symposium discussions, the following five interrelated themes emerged from the symposium proceedings:

- To understand the effects of ADR, *courts need to know more about the dynamics of the litigation process and attorneys' expectations about how ADR fits into that scheme*. This greater knowledge would enable courts to better integrate ADR into their case management systems and to assess which cases are most amenable to ADR, which ADR processes are best suited to particular cases, and when in the litigation process a case would benefit most from ADR.
- *Courts need more reliable findings on the benefits of ADR*, including any cost avoidance or reductions, not only to develop and improve ADR programs, but also to obtain political and financial support for those programs. Therefore, future studies should use more consistent sets of measures in order to develop more comparable sets of findings across jurisdictions.
- In court-based programs, quality assurance is the responsibility of the court. To establish standards for and monitor the performance of those who provide ADR services, *courts need significantly greater knowledge about the most effective methods for training, qualifying, and selecting ADR providers*.

- *Innovative measures of participant satisfaction should be developed* because most individual litigants are one-time users of the justice system and thus have no reference for comparing the dispute resolution process they experienced with other processes. In addition, *research on satisfaction should address a broader array of factors* and identify those that contribute to greater satisfaction with the dispute resolution process and its outcomes.
- Finally, *courts need better access not only to research findings, but also to practical guides* for implementing, operating and evaluating ADR programs.

Post-symposium revisions to the working papers reflect these themes, as well as capture the more specific concerns and recommendations expressed by the symposium participants. The working papers also seek to clarify the terminology applied to the various dispute resolution processes under discussion and point out how differences in program structures, rules, and procedures might contribute to the variability in study findings. These clarifications are intended to assist judges, court managers, program administrators, and other practitioners in determining the extent to which the research findings might apply to their existing or planned ADR programs.

This report of the symposium proceedings consists of the revised working papers, an annotated bibliography of dispute resolution research projects and their products, and a list of ADR related projects funded by the State Justice Institute. The report thus presents the first comprehensive review of the research completed to date on court-connected ADR; guidance on how courts can apply the research in designing, implementing, managing, and evaluating ADR programs; and details of the research agenda outlined by the symposium participants.

The consumers of this report should keep in mind that evaluation is a dynamic process, and that as ADR evolves so will the questions requiring attention. Readers should not despair that research cannot provide the answers they need because a great number of issues related to ADR remain unresolved after a significant investment of time and money in seeking their resolution. Despite the multitude of issues remaining to be adequately addressed, the working papers in this report clearly demonstrate that available research findings have much to offer policy makers, ADR program planners, and practitioners. The development of knowledge about court connected ADR has come a long way, and reaching a stage in its development that clarifies what we should now seek to learn is a great advance.

CIVIL DISPUTE RESOLUTION PROCESSES

*A Working Paper for the
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Dispute Resolution Research
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Civil Dispute Resolution Processes

INTRODUCTION

Courts have employed a number of processes to improve the resolution of civil disputes. In addition to court-annexed arbitration, which is addressed in the Court-Annexed Arbitration Working Paper, these processes include civil case mediation, case evaluation, summary jury trial, small claims mediation, appellate mediation, and medical malpractice mediation. Most dispute resolution techniques have some common goals while also having particular objectives that may differ from the objectives of the others. Some methods are more prevalent than others, and a common nomenclature and universal understanding of what they actually are have yet to be developed fully. Furthermore, perhaps because the use of most of these dispute resolution techniques is a relatively recent development, only limited research has been conducted to assess their effectiveness. Consequently, less information is available from which to draw conclusions concerning fairness, timeliness, and cost savings that can be translated into court and dispute resolution program policies, procedures, and management.

The issues common to most of these processes are their effects on litigant satisfaction, the pace and cost of litigation, and court workloads; whether they are fair procedures that do not systematically favor one set of participants over others or distort outcomes; whether they enhance or impede access to justice;

what kinds of cases are most (and least) amenable to resolution through these methods; what qualifications should be set for neutrals; and how neutrals should be selected, trained, and monitored. Research primarily has addressed settlement rates, participant satisfaction, and fairness. Research on some dispute resolution methods has examined the effects on pace and on costs for litigants and the courts.

CIVIL CASE MEDIATION

Mediation is a consensual process in which a neutral person helps the disputing parties reach their own resolution to the dispute. The mediator may frame the issues in new ways and offer suggestions to the parties, but the ultimate agreement is made by the parties themselves. The agreement may be binding or nonbinding. The use of mediation in general civil litigation began slowly but has grown rapidly in the past few years. The reasons for this growth have not been probed systematically. Perhaps mediation has become popular because it can be implemented without the more elaborate rules that govern court-annexed arbitration, where the outcome is subject to appeal and trial de novo. Attorneys also can maintain greater control over their cases in mediation than in other forms of dispute resolution. Another explanation for its increased use may be that attorneys are developing mediation skills and including mediation in their practice.

In addition to the issues that are common to most dispute resolution processes, concerns raised about civil mediation include whether the parties have comparable bargaining power, which cases are most likely to benefit from the relative intensity of mediation compared to other processes such as neutral case evaluation, and

whether the process used is truly facilitative and consensual without subtle pressure being applied to resolve the dispute.

The limited research to date addresses civil mediation's effects on pace, litigation costs, court workload, trial rates, settlement rates, and participant satisfaction.

Conclusions of Studies

| MEDIATION STUDIES | | | | |
|---|--|--|---|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Mediation of Civil Cases in Hennepin County: An Evaluation (1991) | Minnesota Judicial Center (Kobbervig) Office of the State Court Administrator | Hennepin County, MN | Pace, trial rates, effect on judicial time, litigant and attorney satisfaction, quality of justice, cost | Random assignment of 596 cases to experimental group (mediation, arbitration, judicial process) and 590 to control group (arbitration and judicial process) |
| Evaluation of the ADR Pilot Project: Final Report (1991) | McEwen Maine Superior Court | Maine Superior Court, York and Knox Counties | Settlement rate, trial rate, court activity, cost (discovery), litigant and lawyer satisfaction | Random assignment of 170 cases to ADR and 156 cases to the control group (in addition, 87 cases entered ADR voluntarily) |
| Florida's Alternative Dispute Resolution Project: An Empirical Assessment (1990) | Florida Dispute Resolution Center (Schultz) Florida Dispute Resolution Center | Hillsborough County (Tampa), FL | Participant satisfaction, litigant costs, disposition patterns, settlement rate | Comparison of all mediated cases from the 13th Circuit (702) and a random sample of other civil cases (number not reported) |
| An Analysis of Mediation Programs at the Multi-Door Courthouse of the Superior Court of the District of Columbia (1992) | The Urban Institute (Fix and Harter) State Justice Institute | District of Columbia Superior Court | Participant views of process, satisfaction, compliance, litigant costs, court workload, trial rates, pace | Comparisons of cases referred to mediation with similar cases not refined, telephone interviews with 96 litigants and 73 attorneys in the mediation group, and 112 litigants and 65 attorneys in the non-mediation group |

The four studies discussed here all used some type of control group, but each had a different methodology and different program rules and procedures. These variations are sufficiently significant to preclude precise and direct comparisons across research studies, but some implications can be gleaned from the patterns that emerged from the quartet of studies. To err on the side of caution, however, it is important to point out the differences among the programs and their evaluation methodologies. In

Hennepin County (Minneapolis, Minnesota), cases over \$50,000 in which discovery was completed and serious settlement negotiations had been conducted were randomly assigned to either the experimental group or a control group. Cases in the control group could be referred to arbitration or to the traditional court process (called the judicial process by the evaluators). Cases in the experimental group could be referred to mediation, arbitration, or the judicial process. Thus, the difference between the

experimental and control group was the availability of mediation in the experimental group.

In Maine, all cases in which the pretrial scheduling statement had been filed were randomly assigned to "ADR" or to one of two trial tracks (regular and expedited). Some cases also participated in ADR voluntarily. Formal discovery was prohibited until the mediation process concluded. The ADR process was intended to be mediation, but the neutrals employed varying dispute resolution approaches using differing combinations of elements of neutral evaluation and mediation. There also were differences in procedures and requirements of the litigants.

In Florida's Thirteenth Judicial District (Tampa), the court ordered selected answered cases in the major civil categories to mediation. The study compared these cases to a randomly selected group of cases not referred to mediation. Mediation sessions are held in courthouse conference rooms and conducted by private mediators who had satisfied Florida's certification and training requirements. Cases are assigned to mediators in rotation but the parties may move to disqualify the assigned mediator and select another.

In the District of Columbia, the mediation program encompassed cases designated as Civil II. These cases have under \$200,000 in controversy and generally have fewer parties and less complex issues than cases designated as Civil I. At the time of the study, cases were eligible for mediation if the answer had been filed and a trial had been scheduled at

least three months away. (The program rules and procedures have since changed.) Either party could request mediation, and if the court determined that the case was eligible, it ordered the parties to appear at one mediation session. The court also ordered some cases to mediation without a request from a party. Mediation was provided by volunteer attorneys at no charge to the parties. The mediation group included all cases filed through the multi-door courthouse in 1987-1989 and the comparison group was composed of a sample of contract and automobile personal injury cases filed in the Superior Court's Civil Division. Because this study relies on information obtained in litigant and attorney interviews, and no case record data are analyzed, as in the other three studies, the findings of this study related to pace of litigation, court workload, and trial rates are not discussed here.

Case processing time. Based on the findings from three studies, mediation has mixed effects on case disposition time. In Florida, the mediation group had many cases that were much older than the cases in the comparison group. For that reason, the researchers measured disposition time from the time the case was referred to mediation, rather than from case filing. Presumably, the disposition times for the control group were measured from a standard, hypothetical mediation referral date. Under this comparison, cases in the mediation group had significantly shorter disposition times than did the cases in the control group. Within the mediation group, a key finding was that the older cases were resolved in the same amount of time as the newer cases. Furthermore, there were no

significant differences in disposition time between the cases that did not settle in mediation and those that did.

In Maine, successfully mediated cases had shorter disposition times compared to the control group. However, disposition times were longer in cases that did not settle in mediation than in the control group cases. The shorter disposition times in settled mediation cases were attributed to the restrictions on formal discovery after cases were referred to mediation. The average time to disposition for the experimental group as a whole (including successful and unsuccessful mediations) was about 60 days shorter than for the control group. The picture is cloudier in Hennepin County. There the median disposition time in the experimental group was shorter than in the control group. The overall reduction in time for the experimental group was attributable primarily to faster disposition times in the cases referred to arbitration, however. Within the experimental group, which contained cases referred to arbitration and to the judicial process as well as to mediation, the median disposition times in cases referred to mediation and cases disposed in the judicial process were identical (251 days) and longer than the disposition time in the arbitration cases (212 days).

Court workloads. Maine and Hennepin County showed decreases in court workload based on the frequency of motions and hearings in mediation cases compared to the control groups. In Maine, hearings were held in 54 percent of the control group cases, compared to 35 percent of the cases assigned to ADR and 30

percent in the voluntary ADR cases. Fewer motions were filed in the assigned and voluntary ADR groups (65 percent of cases, mean number 1.7 in assigned and 1.2 in voluntary) compared to the control group (74 percent of cases, mean number 2.5). In Hennepin County, there was virtually no difference in the mean number of court appearances in the mediation group (1.1) and in the control group (1.17), but judicial activity was required in a somewhat lower proportion of mediation cases (53 percent compared to 60 percent).

Trial rates. There is mixed evidence on whether mediation reduces trial rates. In Maine, the trial rate in the completed cases was lower in the ADR groups than in the control group (10 percent assigned ADR, 2 percent voluntary ADR, and 13 percent control group). These positive findings should not be attributed solely to mediation, however, because varying and hybrid dispute resolution processes were employed by the neutrals in the ADR groups. In Hennepin County, the trial rate in the experimental group was higher than in the control group (8.9 compared to 7.6). On the other hand, among the experimental cases, mediated and arbitrated cases had lower trial rates than did the cases processed judicially (7.3 compared to 10.4).

Settlement rates. It is unclear from the report of the study findings in Florida's Thirteenth Judicial District what the average settlement rate in the mediated cases was, but it reportedly was over 50 percent. In Hennepin County, 62 percent of the cases referred to mediation settled, and 46 percent of the cases that

were mediated settled. In Maine, higher proportions of the assigned ADR and voluntary ADR cases settled compared to the control group (79 percent assigned, 90 percent voluntary, and 73 percent control). Of the cases that were mediated, 34 percent of the assigned cases and 42 percent of the voluntary cases settled. The evaluators point out that another way to look at settlement rates is that 20 percent of the control group cases were resolved through trial or judicial finding (e.g., summary judgment), compared to 13 percent of the assigned ADR cases and 8 percent of the voluntary ADR cases. An important issue to consider regarding settlement rates is the relationship of mediation to the ultimate settlement of the case. In Maine, for example, the rate of settlement during mediation is much lower than the overall settlement rate, but how much of the overall settlement rate can be attributed in significant part to the mediation process? No settlement rates are reported in the District of Columbia study.

Litigant costs. The research on this issue is limited and broad conclusions cannot be drawn from it. In Florida's Thirteenth Judicial District, 72 percent of the attorneys surveyed reported that mediation was less costly than typical case processing. In Hennepin County, however, perceptions of cost savings depended on whether the cases settled in mediation. In cases that settled, 43 percent of the litigants believed they saved money, whereas only 9 percent of the litigants whose cases did not settle in mediation had this view. Similarly, 56 percent of litigants whose cases settled in mediation thought attorney time billed to them was reduced and 16 percent

thought it increased, whereas in cases that did not settle in mediation, 20 percent perceived a decrease and 61 percent perceived an increase. Two-thirds of the attorneys whose cases did not settle reported spending more time on mediated cases than on other cases. In cases that settled, the same proportions of the attorneys thought they spent less time and more time (31 percent and 30 percent). An indirect measure of litigant costs can be gleaned from the findings on discovery activity in the Maine study. There the average number of discovery requests was 4.7 in the control group cases, compared to 3.1 requests in the assigned ADR group and 2.6 in the voluntary ADR group. Cases that settled in ADR averaged only 1.1 discovery requests, but nonsettled ADR cases averaged nearly as many requests as the control group (4.4). Thus, the prohibition on discovery before completion of ADR appears to have saved litigation costs for those parties who settled their case in mediation. In the District of Columbia, about half the attorneys thought that participating in mediation was more expensive than the traditional process.

Participant satisfaction. Both litigants and attorneys find mediation to be fair and satisfactory. In Hennepin County, litigants in mediation rated it more favorably than did litigants in the judicial process, but attorneys rated the judicial process more highly. About 75 percent of both litigants and attorneys viewed mediation to be fair. Litigants in mediation also thought this process was more efficient than did their counterparts in the judicial process, but efficiency ratings by attorneys in both groups were nearly equal. The ratings on fairness and

efficiency were higher in cases that settled in mediation than in cases that did not. In Florida's Thirteenth Judicial District, the researchers assessed litigant and attorney satisfaction in only the mediation cases. There, litigant satisfaction varied by the mediator, and both litigants' and attorneys' satisfaction was greater in cases that were disposed more quickly. In the District of Columbia, 70 percent of parties who settled their case, regardless of the process, were satisfied with that process. Mediation appears to have the greatest impact on cases that do not settle. In these cases, parties rated mediation more highly than parties rated unassisted negotiations. The level of dissatisfaction among those who settled without mediation was twice that of those who reached settlement through mediation. The parties in mediation also had greater perception that the outcome was fair and that the full story was told.

Implications for Court and Program Management

Program structure and management.

The experience in Maine suggests that sufficient court staff should be assigned to any mandatory mediation program. Although additional court staff may not be needed, the evaluator in Maine found that program administration there required at least a half-time position. Program rules also should be sufficiently explicit to promote uniform and consistent procedures, requirements for litigants, and types of dispute resolution processes used by the neutrals. Deadlines also should be enforced. Limits on formal discovery may be beneficial for controlling litigation costs

and delay, but some informal discovery is probably beneficial. In Maine, in 29 percent of the cases that did not settle in mediation, the mediators reported that the lack of discovery impeded settlement. Cases in the District of Columbia were mediated after the parties had ample opportunity to complete discovery. Although settlement rates there are not available, nearly all of the participants reported that they had enough information to make decisions to resolve their cases.

Integration into the court's case management system. The use of non-judicial resources appears to have improved case processing time in two of the studies. In Maine, trial rates and the volume of motions and hearings were lower in the cases referred to ADR than in the control group cases. Based on the experience in Hennepin County, where mediation scheduling and case tracking were carried out by the mediation providers and mediation did not reduce case processing time, courts should consider maintaining responsibility at least for tracking cases. Scheduling might be more efficiently handled by the provider with less burden on court staff.

Case screening and referral criteria.

Some types of cases, defined either by area of law or by attitudes of the parties, appear to be more or less amenable to resolution in mediation than others. For example, the settlement rates for medical malpractice and product liability cases were lower than for other cases in Florida's Thirteenth Judicial District. (Because these types of cases can be very costly to litigate, however, mediation may still be advantageous despite the

lower success rate.) The lower settlement rates did not negatively influence disposition time for these cases, however. The ADR process was more successful in cases voluntarily participating in ADR in Maine, but the assigned ADR cases also fared well. If the success of mediation can be measured by the extent to which attorneys choose it, the findings from the District of Columbia can be read to indicate that mediation is useful in automobile personal injury cases and, to a somewhat lesser degree, in breach of contract cases. There, of those requesting mediation, 88 percent were plaintiffs' attorneys in automobile personal injury cases and 67 percent were plaintiffs' attorneys in breach of contract cases. (Defense counsel were less likely to request mediation in both types of cases.) In Hennepin County, litigants and attorneys with higher enthusiasm for mediation were more likely to be satisfied with mediation, with very high satisfaction ratings in cases that settled in mediation. This suggests that courts should develop methods for educating litigants and attorneys about the purposes and potential benefits of mediation.

Selection, training, and retention of neutrals. Perhaps the most crucial feature of a successful mediation program is the quality of the mediation process. Courts should ensure that mediators understand and can implement the principles of the facilitative mediation model, that is, a process that assists the parties in reaching an agreement by considering their needs, interests, and options, rather than a process in which the neutral evaluates the merits of the case, shuttles between parties seeking bottom lines and

top offers, and ultimately recommends a reasonable settlement amount. The mediators also should strive for uniformity in the process, while maintaining flexibility for the particular needs of individual cases. To gain the credibility of attorneys and litigants, mediators should have adequate experience and training. Perhaps the most telling research finding on the issue of mediator qualifications was the wide variability of satisfaction with individual mediators in Florida's Thirteenth Judicial District. Although some of the variability among mediators may be attributable to personal style, wide and consistent fluctuations among mediator ratings should signal to the court that the mediators with less favorable ratings may lack the skills to adequately carry out their function. The performance of mediators should be monitored regularly to promote the integrity and quality of the mediation process.

Participant satisfaction. None of the studies of civil mediation attempted to find associations between satisfaction and other views of the process. The findings on participant satisfaction indicate, however, that litigants want their cases to be heard and that they do not like assembly line justice, in which individual cases appear to receive limited attention from the court and from counsel. For example, in Hennepin County a greater proportion of litigants who participated in mediation thought that the opposing party had heard their point and felt that they had an opportunity to express their view compared to litigants in the judicial process. Attorney satisfaction may hinge on other qualities of the process, such as greater direction from the

neutral who serves more as an evaluator. The different goals of the parties and litigants have implications both for the nature of the process employed (e.g., mediation, case evaluation or some hybrid of the two) and for the selection, qualifications, and training of mediators.

CASE EVALUATION

In case evaluation, a neutral person with experience in litigating the type of matter in dispute, usually an attorney or a retired judge, reviews the case with the litigants and their attorneys and gives advice on the strengths and weaknesses of their position in the case. The case evaluator may help the parties convey additional information to each other, develop a discovery plan, and narrow the issues in dispute. The evaluator also may facilitate the resolution

of the case. Case evaluation may take place early in the litigation or after sufficient discovery has been conducted to seriously negotiate a settlement. A form of case evaluation is early neutral evaluation, which is a flexible process designed to occur primarily before significant discovery activity has been undertaken.

Although case evaluation and early neutral evaluation differ somewhat in their goals, the terms are often used interchangeably. Early neutral evaluation seeks to streamline the conduct of the case (e.g., set schedules for discovery and filing particular motions) and increase the parties' understanding of the issues in the case. Case evaluation, on the other hand, more often seeks to promote settlement by providing advice to the parties about the likely outcome of their case at trial or in settlement negotiations.

Conclusions of Studies

| CASE EVALUATION STUDIES | | | | |
|--|---|-----------------------------------|--|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Assessment of the MA Motor Vehicle Tort Litigation Evaluation Program (1992) | National Center for State Courts (Lowe and Walker) State Justice Institute | Suffolk County Superior Court, MA | Attorney satisfaction, pace, cost | Random assignment of 300 experimental and 100 control group cases |
| The Early Neutral Evaluation Program (1992) | Rosenberg, Folberg, and Barrett Administrative Office of the U.S. Courts | Northern District of California | Pace, cost, attorney and litigant satisfaction | Random assignment of 1,034 cases to ENE and 1744 cases to control group; telephone interviews, focus groups, mail survey, case records |

Although several states have experimented with or instituted case evaluation programs, there have been few studies of these programs. Two studies are reported here. Both of them examined the programs' effects on pace,

cost, information sharing, and litigant satisfaction.

One study assessed a case evaluation program for motor vehicle torts in Suffolk County, Massachusetts established in 1990. The

second study is the last in series of examinations of an early neutral evaluation (ENE) program instituted in 1985 as a pilot in the United States District Court for the Northern District of California, which later served as a demonstration district under the Civil Justice Reform Act. The first two studies of the California program included relatively few cases and had no control group. The most recent study, which was conducted under the auspices of the Task Force on Alternative Dispute Resolution of the Civil Justice Reform Act Advisory Group, examined approximately 2,700 cases assigned randomly to ENE or to a control group. Because the California ENE program has evolved over time and the task force study is more rigorous, only this study is reported here. (The Bibliography contains citations to the literature stemming from the earlier studies.)

Participation in both the Massachusetts and California programs was mandated by the court, but beyond this shared characteristic, the two programs are not comparable. Case evaluation in Massachusetts occurs about nine months after the case is filed and after discovery has been completed. The process used is a hybrid of case evaluation and arbitration. If the parties do not reach a settlement during the case evaluation, the case evaluator assesses the merits of the case. This assessment is expressed in the form of a written award. The award becomes a judgment of the court if neither party rejects it within 30 days.

Early neutral evaluation in California is designed to occur within 150 days of case filing, although in practice the ENE sessions may take

place well after this point in the litigation. The goals of the California ENE program are varied and include helping the parties better understand the factual and legal issues in the case, narrowing the issues in dispute, tailoring discovery to fit those issues, facilitating settlement, and assessing the likely settlement value or trial outcome of the case.

Case processing time. There is some evidence that case evaluation reduces case processing time. In Massachusetts, the matters referred to case evaluation were disposed 32 days more quickly than were the control group cases (314 days compared to 346 days). The number of control group cases was very small, however (only 18 had closed at the time of the analysis compared to 204 in the case evaluation group). As more cases close, it can be assumed that the difference between the median disposition times for the control group and experimental cases would become even greater because 80 percent of the control group cases remained open in comparison to a third of the experimental cases. In California, a greater proportion of ENE cases than non-ENE cases had closed in each 30 day period, beginning at 60 days after filing. The magnitude of the difference between the two groups in the number of dispositions per period was about one sixth. These findings were consistent with reports from the ENE participants on disposition time. ENE sessions were held in one third of the ENE cases, and half the participants who had ENE sessions thought their cases were resolved more quickly than they would have been without ENE.

Settlement rates. Neither the Massachusetts nor the California studies reported settlement rates, but the California study sought information from the participants about the impact of the ENE session on settlement. Twenty-three percent of the attorneys and 35 percent of the parties reported that the case had settled in the ENE session or as a direct result of the session. Slightly over half of the attorneys and parties agreed that ENE had increased the prospects of earlier settlement.

Litigant costs. Research to date does not indicate whether case evaluation reduces costs. In California, 39 percent of the attorneys and 42 percent of the litigants thought that ENE reduced costs and attorneys fees, but 38 percent of both the attorneys and the litigants thought that ENE increased costs and fees. About half the participants believed that ENE produced a net savings. In Massachusetts, there were no differences in the number of hours attorneys spent on cases in the experimental and control groups.

Informing litigants about the case. In California, 46 percent of the attorneys and 40 percent of the parties thought that ENE gave them a better understanding of the factual issues in the case, while 35 percent of the attorneys and 51 percent of the parties agreed that ENE helped their understanding of the legal issues. There were some significant differences in views across the types of cases, however. For example, 60 percent of the participants in contract cases thought ENE improved understanding of the factual issues compared to 20 percent in patent cases, and 52 percent of the participants in

insurance and "other contract" cases (contracts other than insurance, Miller Act. negotiable instruments and stockholder suits) felt that ENE added to their knowledge of the legal issues compared to 16 percent in trademark cases.

Participant satisfaction. In Massachusetts, the litigants in case evaluation viewed the process more favorably than did the litigants in the control group, but the majority of both groups found the process they used and the outcome to be fair. In fact, ratings of the fairness of the outcome were the same for both groups. In California, two-thirds of the attorneys and the parties were satisfied with the ENE process. Two-thirds of the attorneys strongly agreed that ENE procedures were fair, compared to 53 percent of the attorneys in the non-ENE cases. Fifty-nine percent of the attorneys thought that ENE merited the resources devoted to it, while 66 percent of the parties held this view.

When asked to choose which process would have been most useful during the first four months of the case, attorneys ranked ENE the highest among a Rule 16 case management conference with a judge, a settlement conference hosted by a judge or magistrate, and a mediation session attended by either attorneys and the parties or attorneys alone. Furthermore, 84 percent of the attorneys and 67 percent of the parties reported that they would voluntarily request ENE in at least some types of cases in the future. Perhaps the greatest vote of confidence in ENE comes from the fact that 70 percent of the parties thought that evaluators should be paid \$500 per session, and many thought that a \$1000 fee would be appropriate.

Satisfaction with ENE was associated with a number of factors, including the amount of time the case required to be resolved and several personal characteristics of the individual evaluators. The evaluator characteristics having the strongest associations with attorney satisfaction were the evaluators' skills at facilitating communication, ability to accurately analyze legal issues, interest in exploring creative solutions, preparation for the session, understanding of the participants' perspectives, ability to listen carefully to both the attorney and the client, interest in exploring settlement, and expertise in the substantive area of the dispute.

Implications for Court and Program Management

Program structure and management.

Whether or not to charge litigants fees for dispute resolution services is a topic of concern to those who fear that fees will deny less affluent litigants access to high quality dispute resolution processes. Both the *National Standards for Court-Connected Mediation Programs and Report #1 of the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution* advocate that parties should not be required to bear the costs of participation in court mandated dispute resolution. Because a majority of litigants in the California ENE program indicated that a \$500 per session fee for the evaluators would be appropriate, there is a fee to offset at least some the court's administrative expenses or the services of case evaluators in programs where the evaluators do

not serve pro bono. However, the California study does not indicate whether those who supported the idea of paying fees tended also to have greater resources at their disposal. To ensure equal access to dispute resolution programs, courts should waive fees for litigants who can demonstrate that paying the fee would constitute an unreasonable burden.

Integration into the court's case management system. In California, the majority of attorneys (57 percent) and parties (60 percent) thought that the ENE session had taken place at the appropriate time in the litigation. This finding suggests that ENE can be useful at any point in the process because it is a flexible process with numerous goals. For example, 59 percent of attorneys and 66 percent of the parties agreed that ENE helped identify and clarify issues that made discovery and trial preparation less costly. By first identifying the purpose of the dispute resolution process, courts may better determine the most appropriate and effective timing of the intervention.

There is at least some support, however, for the proposition that ENE in the early stages of the case can be more effective in resolving the dispute at lower cost and in less time. Fifty-seven percent of the participants in the non-ENE cases indicated that costs and fees increased because one or more of the parties did not have an adequate understanding of the case early in the litigation. Furthermore, evaluators of the California ENE program found a fairly strong relationship between the amount of time from case filing to the ENE session and the time from case filing to disposition. The evaluators point

out, however, that it is not clear from this finding whether earlier use of ENE generally leads to earlier case resolution or that less complex cases were ready for ENE and amenable to resolution sooner. Despite this proviso, the relationship between the timing of ENE and case resolution, coupled with the finding that 20 percent of the parties thought that ENE took place too late in the litigation, indicates that the "early" in ENE should be the general rule.

Case screening and referral criteria.

There is little evidence that any particular types of cases are more likely to benefit from case evaluation or ENE than are others. Overall participant satisfaction in California did not vary by the area of law or the amount in dispute. On the other hand, there were some differences among case types in the extent to which the participants thought that ENE resulted in net savings, and clarified either legal or factual issues. On these measures, ENE tended to be less beneficial in copyright, trademark, and patent cases. These findings do not suggest, however, that courts should exclude any particular types of cases from case evaluation or ENE.

Selection, training, and qualification of neutrals. Perhaps the most significant findings from the California study were that the personal characteristics of the evaluators played a significant role in the success of ENE. The individual evaluator accounted for thirty-five percent of the participants' satisfaction level and some support for courts requiring litigants to pay 60 percent of the case disposition time. Moreover, as noted above, participant

satisfaction had a strong relationship to several attributes of the evaluator. The California study also found great differences in the evaluators' understanding of the purposes of ENE and in the manner in which the process was conducted, despite the availability of clearly written materials addressing these issues. The lack of consistency among evaluators may have been the result of the modest level of evaluator training. Evaluators participated in only a single two and one half hour training session, and some evaluators had little opportunity to discuss the purposes of and procedures for ENE because they viewed videotaped training sessions in lieu of attending a live session. When training is minimal, the individual characteristics of the evaluators have even greater significance to program quality. The California experience strongly indicates the importance of selecting competent evaluators, providing in-person training on the goals and procedures of case evaluation or ENE, and monitoring performance. The authors of the California study also stress the need for coordination between the program administrators and the evaluators and for the court to diligently check for conflicts of interest before assigning evaluators to cases.

Participant satisfaction. The findings on participant satisfaction indicate that attorneys and litigants need dispute resolution mechanisms that help them break through the barriers of miscommunication and inadequate understanding of the issues in dispute. As in other types of dispute resolution, the opportunity to be heard and to receive attention from a neutral party are important values to participants in case

evaluation. Courts should strive to provide these services in any dispute resolution process they offer.

SUMMARY JURY TRIAL

The concept of the summary jury trial (SJT) was developed by Judge Thomas Lambros of the United States District Court for the Northern District of Ohio under the authority of Rule 16 of the Federal Rules of Civil Procedure. The SJT verdict is usually advisory only, but the parties may agree that the verdict will be binding. The summary jury is composed of six jurors drawn from the court's jury pool. A judge, magistrate, or other court official may preside at the SJT. During the proceedings, counsel make abbreviated presentations of the evidence and legal arguments in favor of their client's case. There is no live testimony, but in some modified SJTs videotaped depositions may be presented. Following the presentations, the jury deliberates and renders a verdict on liability and damages. The judge, attorneys and litigants may question the jurors about their decisions. Soon after the SJT the parties meet to try to reach a settlement. Thus, the primary goal of the SJT is to facilitate settlement and avoid the time and expense of trial. The cases for which SJT generally is suitable are those in which other attempts at

settlement negotiations and dispute resolution processes have failed and which are on the verge of a lengthy, and costly, trial.

A primary issue raised about SJTs is whether courts should mandate their use. Some attorneys object to mandatory referral on the grounds that they are forced to reveal their trial strategy and case preparations. Both the Sixth and Seventh Circuit Courts of Appeals have held that courts can not mandate participation in SJTs under Federal Rules of Civil Procedure 16 (*In re NLO, Inc., et al.*, No. 93-3065 (6th Cir. 1993); *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988)). The Sixth Circuit stated, however, that judges should encourage and aid early settlement of cases. Two federal district courts in the Sixth Circuit had previously allowed mandatory SJTs (*McKay v. Ashland Oil, Inc.* 120 F.R.D. 43 (E.D. Ky. 1988); *Cincinnati Gas & Electric Co. v. General Electric Co.*, 117 F.R.D. 597 (S.D. Ohio 1987)). A ruling by the Middle District of Florida in favor of mandatory SJTs still stands (*Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988)). Another issue that emerges from the research is whether and the extent to which the original SJT model developed in the federal courts should be modified to extend its utility in state court litigation.

Conclusions of Studies

| SUMMARY JURY TRIAL STUDIES | | | | |
|--|---|--|---|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Summary Juries in the North Carolina State Court System (1991) | Private Adjudication Center (Metzloff, Willett, Rice, Peters) Dispute Resolution Committee of the North Carolina Bar Association | Seven counties in North Carolina | How SJT was conducted in each case, utility of SJT, why lack of use, matching SJT to case, cost savings, participant satisfaction | Case studies of all cases (17) assigned to SJT from 1987 to 1991, participant interviews (attorneys and judges) |
| Summary Jury Trials in Florida: An Empirical Assessment (1989) | Florida Dispute Resolution Center (Alfini) Florida Bar Foundation | Florida's Nineteenth Judicial Circuit and U.S. District Court for the Middle District of Florida | Settlement rate, influences on settlement, participant satisfaction | Examination of 53 state cases volunteering for SJT (43 SJTs held) and 104 federal court cases assigned to SJT (51 SJTs held) |
| Summary Jury Trials in the Northern District of Ohio: A Report to the Federal Judicial Center (1982) | Federal Judicial Center (Jacoubovitch and Moore) | U.S. District Court for the Northern District of Ohio | Attorney views, settlement rates | Examined all cases (28) assigned to SJT between February and October of 1980 (37) |

As in mediation and case evaluation, there is little empirical research on summary jury trials. The studies discussed here examined settlement rates, litigant costs, and attorney satisfaction. These studies are based on small numbers of cases, however, and the findings should be viewed with caution as to their application to other summary jury trial programs. Moreover, because none of the studies employs a control group of comparable cases not assigned to an SJT, comparisons of the effects of SJTs to traditional court processing cannot be made.

In Florida, researchers studied cases participating in summary jury trials in the state and federal courts. The state court program was voluntary, but participation was mandatory in the federal court program. The majority of the federal court cases were assigned to an SJT before a federal magistrate on the basis of their

age and likelihood of a lengthy trial. The average age of cases assigned to SJT in the federal court was 27 months, while the average age of the state SJT cases was 10 months. The North Carolina study consisted of case histories of 17 cases that had an SJT. Participation in the SJT was entirely voluntary. The findings of the study are not reported quantitatively because the rules and formats of the SJTs varied considerably and statistical reports on the small number of cases examined would likely lead to strained, if not distorted, conclusions about the effects of any one model employed. In Ohio, a few of the cases assigned to an SJT had participated in pretrial conferences with Judge Lambros, but the majority were identified by Judge Lambros and assigned to pretrial conferences with two federal magistrates. Cases that did not settle in pretrial went on to an SJT before the magistrate.

Settlement rates. In the state court in Florida, 33 cases settled (77 percent of the SJTs held, 62 percent of all cases assigned to an SJT). One case settled before the SJT, and in eight cases the parties decided to forego an SJT. In the federal court, 29 cases settled as a result of the SJT (59 percent of the SJTs held). Compared to the state court cases, a larger proportion of the federal court cases assigned to SJT settled before the SJT (25 or 24 percent), while the court agreed to allow the parties to forego an SJT in 28 cases (27 percent of the cases assigned to SJT). There also was a large difference between the state and federal court cases in the rates at which plaintiffs prevailed; in the state court SJTs, plaintiffs prevailed in 86 percent of the cases, while federal court plaintiffs prevailed in 56 percent of the cases. In the Northern District of Ohio, 11 cases (30 percent) settled before the SJT, 15 (41 percent) settled after the SJT with no request for a trial, and another two cases (five percent) settled after requesting a trial but before the trial date. In North Carolina, all but one of the cases settled during or shortly following the SJT, and the remaining case settled within a few weeks of the SJT.

Litigant costs. In the Florida federal court, 57 percent of the attorneys reported spending more billable hours on the case than they would if the case had not had an SJT, while only 16 percent of the attorneys in the state program reported spending more hours. In contrast, 78 percent of the attorneys in the state program reported spending fewer billable hours on their SJT case. These estimates may relate to the differences in the average time spent in

the SJT (4 hours in state court and 5 to 16 hours in federal court), as well as the differences in settlement rates in the state and federal court programs. In the North Carolina case studies, most of the attorneys reported that the SJT saved trial costs, particularly expert witness fees.

Participant satisfaction. In the Northern District of Ohio, data from a very small number of litigants suggest that attorneys for plaintiffs were more satisfied with the SJT than were defendants' attorneys. Plaintiffs' attorneys reported that they had a good opportunity to present all of the evidence and legal arguments in favor of their case. No plaintiffs' attorneys preferred that their case had been assigned to trial rather than to an SJT. While about half of the defense attorneys expressed a preference for forgoing the SJT, most of them would try an SJT again. In Florida, a higher proportion of the attorneys participating in state SJTs was satisfied compared to the attorneys participating in the federal SJTs (91 percent compared to 51 percent). A similar pattern emerged in attorney reports of client satisfaction (86 percent in state court and 51 percent in federal). One probable reason for the large differences in ratings was the fact that participation in the state court program was voluntary, whereas assignment to an SJT was mandatory in the federal court program. Another factor that might have impacted attorneys' views was the differences in the nature of the cases in the state and federal courts. The cases in the federal court generally had higher amounts in controversy and often were more complex in terms of the number of parties and issues. Attorneys in both state and federal courts

appeared to be most concerned that the SJT have predictive value for the outcome of the case; that is, that the format, substance, and atmosphere of the SJT should resemble a trial as closely as possible. In North Carolina, attorneys gave generally favorable assessments of their experiences with the SJT. Furthermore, most attorneys indicated that their clients had been satisfied with the SJT procedure, even if the results had been disappointing.

Implications for Court and Program Management

The primary implication from the research on SJTs relates to voluntary and mandatory referral. The findings from Florida suggest that voluntary participation promotes greater success in achieving the goals of the SJT. Mandated participation of cases that have reached the trial stage appears to add another layer of litigation to cases that already have demonstrated their resistance to settlement. On the other hand, resolving over half of the cases that would have gone to trial, as in the Florida federal court cases, indicates that SJTs can have about the same success rate as mediation and other dispute resolution processes. Because SJTs consume court -- and especially judicial -- time, however, they should be used primarily in cases that are fully developed and ready for trial. Courts also should consider using masters, referees, and other quasi-judicial officers to preside over SJTs.

A second implication that can be derived from the Florida and North Carolina studies is that perhaps a wider range of cases can benefit

from a SJT than was originally conceived. Because SJTs exclude live testimony, some observers have suggested that SJTs are appropriate for determining damages but not liability, which often hinges on the credibility of the witnesses. Several attorneys in North Carolina expressed the opposite view, that the SJT had been very helpful in addressing liability issues. Similarly, 80 out of 114 attorneys in the Florida federal court SJT cases that settled identified liability as an issue in the SJT that was important to settlement.

Finally, the Florida study suggests that the costs of SJTs might be contained by restricting the length of the SJT. In the Florida state court cases, 86 percent of the SJTs were completed in four or fewer hours and over three-quarters of the attorneys reported saving time through the SJT. In contrast, only 30 percent of the attorneys in the federal court SJTs reported spending fewer billable hours on the case, and only eight percent of the cases were completed in four hours.

Medical Malpractice Mediation

In response to the medical malpractice crisis of the 1970s, the ensuing rise in malpractice insurance rates, and the decline in availability of insurance for particular medical specialties, a majority of the states legislated changes in the processing of medical malpractice claims. The purposes of the reforms were to reduce the high transaction costs and delays in obtaining relief, to stimulate early settlement of legitimate claims, and to filter out frivolous

claims. Two of the most commonly adopted alternative processing techniques were arbitration and screening panels. Little empirical information developed about the effects of either process on malpractice claims. The only mediation program aimed specifically at medical

malpractice claims was introduced in Wisconsin in 1986. Although the process is called the mandatory mediation panel system, in practice it functions more as case evaluation than as mediation.

Conclusions of Study

| MEDICAL MALPRACTICE MEDIATION | | | | |
|--|--|-------------------|--|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Mediating Medical Malpractice Claims in Wisconsin (1991) | Disputes Processing Research Program, Institute for Legal Studies, University of Wisconsin Law School (Meschievitz) State Justice Institute | Wisconsin | Settlement rate, patterns of claims filing and disposition | Analyzed data on first 400 claims filed between 1986 and 1988 (database includes 870 claims); interviewed selected lawyers, panel members, parties; round table discussion |

The Disputes Processing Research Program of the Institute for Legal Studies at the University of Wisconsin Law School conducted an empirical evaluation of the Wisconsin mandatory mediation panel system (MMPS). The MMPS replaced Patient Compensation Panels, which had operated for a decade in Wisconsin. The MMPS panels are composed of an attorney, who serves as chair of the panel, a physician or health care professional with some experience in the area of the claim, and a public member. The Office of the Director of the State Courts administers the program.

The statute governing the MMPS requires medical malpractice claimants to file a request for mediation within 15 days of filing their claim in the circuit court (Wisconsin's court of general jurisdiction). Claimants also may request mediation before filing their claim in the circuit court. Mediation must be completed

within 90 days of the request for mediation, and discovery may not be conducted during this period. The statute of limitations for medical malpractice claims is tolled for this time period as well as for an additional 30 days following the mediation panel. The parties are required to submit a statement of the claim or a rebuttal of the claim and to exchange all patient health care records they possess.

Panel sessions are nonbinding, no record of the proceedings is made, and no information exchanged during the session is admissible in subsequent court proceedings. The function of the panel is to identify the strengths and weaknesses of the parties' position, offer and discuss recommendations on settlement amounts, and facilitate settlement of the claim. If the parties do not reach a settlement agreement, the panel may render advice on the probable outcome of the case at trial

Settlement rates. Settlement rates in the MMPS were much lower than in most other court-connected dispute resolution programs and declined over time. In the first 232 claims, 9.5 percent of the cases settled at or shortly after the panel session, whereas only 3.7 percent of the next 158 claims settled at this time. In about one third of the claims, at least one of the parties reported that mediation served a "constructive purpose," but in 40 percent of the cases neither party held this view. The researchers suggest that the low settlement rates may account for the rise in cases that were filed in mediation and court simultaneously, and the corresponding decline in the proportion of cases filed initially only with MMPS.

Deterring meritless claims. The MMPS appears to have discouraged some meritless or marginal claims, and its performance in this area improved over time. In the first 232 cases, 15.9 percent neither settled in mediation nor were filed in court before the statute of limitations expired. The proportion of unsettled claims not going on to court increased to 22.8 percent of the next 158 claims.

Implications for Court and Program Management

Program structure and management. The evaluators of Wisconsin's MMPS offer some analysis of their findings that bears on program structure and management. Two aspects of the program rules appear to impede settlement in the MMPS. The first is the prohibition against discovery during the mediation period. Many attorneys interviewed in the MMPS study

indicated that the parties lacked sufficient information relating to the extent of the plaintiff's medical injuries and the potential liability of the defendant needed to make informed settlement decisions. Because so few cases settled in the MMPS, transaction costs were not contained as contemplated by the discovery limitation. Given the complexity associated with medical malpractice cases, perhaps some limited amount of discovery should be allowed before mediation or any dispute resolution process is attempted. Second, defendants must report any settlement payment to the State Medical Examining Board. Although few reports to the board result in disciplinary action, many defense attorneys stated that their clients did not settle even small claims because they did not want to be investigated by the Board. Reporting requirements such as those imposed in the Wisconsin MMPS, therefore, may have negative effects on settlement as well as acceptance of the dispute resolution process.

Selection, training, and retention of neutrals. In the Wisconsin MMPS, only the attorney/chair of the panel received mediation training, and the amount of training was very small (three hours). The lack of adequate training for all of the panel members may have contributed to the low settlement rates in MMPS. For example, the lack of training may have resulted in confusion among both the panel members and the parties about the purpose of the MMPS. This confusion could in turn undermine the confidence of the parties that the dispute resolution mechanism could yield fair outcomes. The MMPS experience also highlights the risk of using the term mediation, when another dispute

resolution process, in this instance case evaluation, is actually what takes place. In telephone interviews, attorneys commonly expressed complaints about the panel's lack of power to enforce its recommendations. These responses indicate that the participants in the MMPS did not understand the purpose of the panel and that this misunderstanding led to disappointment with the process. If the panel members had received training for their roles, they would have been better prepared not only to carry out their roles, but also to communicate to the parties what the goals of the MMPS were. By the same token, materials prepared for the attorneys and litigants that explain the purpose of the panel and the goals of the process might better shape the expectations of the participants.

SMALL CLAIMS MEDIATION

Small claims courts were developed in the early 20th century to reduce case delay by simplifying pleadings and eliminating procedural steps, and to lower expenses by reducing filing fees and eliminating the need for attorneys. They were to operate with relaxed rules of evidence and procedure; while the proceedings remained adversarial, judges were to assist litigants in bringing out facts and relevant issues.

Small claims courts later were criticized for the same faults as the system they replaced. Critics asserted that the pressure of large caseloads caused some small claims judges to process cases hurriedly, deny litigants a chance

to tell their full stories, and not explain their decisions in court. Other criticisms included the inappropriateness of adversarial procedure where the dispute has a long history or interpersonal nature; inadequate assistance for pro se litigants; allowing attorney representation which puts pro se parties at a disadvantage and adds to formality and costs; turning the small claims court into a "collection agency" for businesses, creditors, and landlords acting against individual defendants; and poor compliance with the court's judgments. Such criticisms led to the development of small claims mediation as early as 1954.

The purported benefits of using mediation in small claims cases are similar to those attributed to community mediation programs (see the Community Justice and Victim Offender Mediation Working Paper). These potential benefits include reducing the courts' workload and costs, and providing a forum in which the disputants have more control over the process, that affords them a better opportunity to be heard and to hear the other side's story. Another advantage claimed for mediation is that it can consider underlying problems more important to the parties than legally-phrased claims, leading in turn to a healing of wounds and an improvement of future relationships. Yet another argument in favor of mediation is that it improves compliance with the resolution of the case because it is based on consent, rather than imposition of authority.

Conclusions of Studies

| SMALL CLAIMS MEDIATION STUDIES | | | | |
|--|---|--|--|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF MEDIATION STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Small Claims Mediation in Three Urban Courts (1992) | National Center for State Courts (Goerd) | Des Moines, IA, Washington, DC, and Portland, OR | Agreement rate, court workload, court costs, litigant satisfaction | Observed mediation sessions in each location; approximately 40 cases in Washington (mandatory) and 65 cases in Portland and Des Moines (voluntary) |
| Civil Case Mediation and Comprehensive Justice Courts: Process, Quality of Justice and Value to State Courts | Institute for Social Analysis (Roehl Hersch and Llaneras) | Burlington County, NJ | Effect of admitted liability, court work load, litigant satisfaction and costs, compliance | 397 small claims and special civil cases randomly assigned to mediation or adjudication |
| Small Claims Mediation Project in the District Court of Oregon for Multnomah County (1991) | State Justice Institute | Portland, OR | Agreement rate, court workload, cost, litigant satisfaction | Evaluated 11, 124 small claims cases, 4 percent of which went to mediation |
| Small Claims Court: Reconceptualization of Disputes and an Empirical Investigation (1984) | District Court, Civil Division, Multnomah County (Olexa and Rozelle) | Middlesex County, London, Ontario, Canada | Agreement rate, effect of admission of liability, compliance | Evaluation of 203 randomly sampled contested cases assigned to mediation |
| Small Claims Mediation in Maine: An Empirical Assessment (1981) | State Justice Institute Vidmar Donner Canadian Foundation and University of Western Ontario McEwen and Maiman National Science Foundation | Augusta, Brunswick and Portland, ME | Agreement rate, litigant satisfaction, compliance | Quasi-experimental study comparing 403 cases from 6 courts (3 courts with mediation programs and 3 without) |

The small claims mediation programs evaluated in the studies reviewed here took cases referred by the small claims court on the day of the scheduled trial. These cases involved civil claims up to the jurisdiction's limit (ranging from \$800 to \$5,000) regarding money, goods, or services. Common party relationships were consumer and merchant, homeowner and subcontractor, landlord and tenant, or business associates; for most parties, these were not continuing relationships. In the programs studied, small claims cases in which both parties showed up ready for trial on the scheduled trial date were referred to the mediation program (other cases usually ended in dismissal or default judgment). Participation was voluntary in some programs and mandatory in others. Mediation

usually was conducted by a trained unpaid volunteer and lasted about an hour. Mediated agreements could be endorsed through the court. If the parties failed to reach an agreement, the case went to trial on the same day. The issues in evaluation of day-of-trial small claims mediation programs include the size of the caseload referred to mediation, settlement rates, reduction of court workload, litigant satisfaction, effects of mediation on outcomes and compliance, and whether mediation reaches the underlying issues in the case.

The evaluations of day-of-trial small claims mediation programs reviewed here cover eight locations in five states and one Canadian province: Augusta, Brunswick, and Portland, Maine; Burlington County, New Jersey; Des

Moines, Iowa; Portland, Oregon; Washington, D.C.; and London, Ontario, Canada.

Proportion of small claims cases referred to day-of-trial mediation programs and agreement rates. Participation in day-of-trial small claims mediation seems to be much higher than in community mediation programs, probably because the litigants have much less choice about it. The participation rate was 100 percent in Burlington County, New Jersey (where participation ostensibly was voluntary, but judges exerted pressure); and in Washington, D.C. (where participation was mandatory). Participation rates were lower where participation was voluntary: 75 percent in Portland, Oregon and 65 percent in Des Moines. (Researchers did not report participation rates for the London, Ontario and Maine programs.) As in community mediation, the majority of mediated small claims cases resulted in agreements: the agreement rate was 66 percent in Maine, 55 percent in New Jersey, 85 percent in Des Moines, 54 percent in Portland, 47 percent in Washington, and 50 to 60 percent in Ontario.

Court workload and costs. The two studies that examined this issue found substantial effects on court workloads, but differed with regard to program costs. The New Jersey researchers found that the mediation program cut the number of required judges and other court employees by about two-thirds; the program cost was minimal because no additional paid staff were hired for it and mediators (except for two law clerks on the court's regular staff) were unpaid. The study of Washington, D.C. and Des

Moines found that mediation programs save 500 to 750 hours of judge and courtroom staff time annually, but the cost for the full-time program coordinators evidently exceeded the savings for the court.

Participant satisfaction. According to the evaluations that considered participant satisfaction, mediation appears to be more satisfactory than the small claims court process, but the evaluators addressed the question in different ways. The Maine study found the litigants were somewhat more likely to be satisfied with the overall experience in their cases in mediation (67 percent) than in adjudication (54 percent), and were more satisfied with mediated outcomes (44 percent) than with adjudicated ones (24 percent). Winning or losing affected satisfaction strongly (winners were more satisfied than losers), and interacted with mediation. Mediation made the greatest difference where the party was on the losing end (losers in mediation were more satisfied than losers in adjudicated cases). For parties who won, mediation made little difference in satisfaction. The New Jersey study also showed higher satisfaction ratings for mediation than for adjudication; however, mediation added to procedural satisfaction but not to satisfaction with the outcome. The Washington, D.C./Portland/Des Moines study found just the opposite: greater satisfaction regarding outcome (77 percent in mediation versus 61 percent in adjudication), but no difference regarding procedure (79 percent versus 76 percent).

Effects on compromise. The reviewed studies agreed that more compromise was

involved in cases that reached mediated agreements, but disagreed about whether the difference was attributable to the program or to the predisposition of defendants to concede some liability. The Maine study found that plaintiffs were more likely to receive part of their claim in mediation than in adjudication, but less likely to receive the entire claim; McEwen and Maiman attributed the difference to the consensual, accommodative process of mediation. The Ontario study found the same pattern, but attributed it to the defendants' willingness to concede partial liability before mediation rather than to mediation itself. Where defendants admitted no liability, the usual outcome was all or nothing for the plaintiff regardless of whether the case was mediated or adjudicated. McEwen and Maiman reanalyzed the Ontario data and concluded that both admitted partial liability and mediation affected whether intermediate (compromise) outcomes were reached, and that mediation had a greater effect where there was admitted liability. The New Jersey results supported these conclusions.

Effects on compliance. The reviewed studies indicate that mediation improves compliance with the outcome, but vary in their estimates of the amount of improvement. The Maine study found that mediation was considerably more likely to lead to compliance than adjudication: the percentage of full compliance was 74 percent in mediated cases and 48 percent for adjudicated ones, and the noncompliance rates were 11 percent versus 45 percent, respectively. After controlling for a number of other factors that could affect

compliance (such as the size of the plaintiff's award), the Maine researchers still found a positive relationship between mediation and compliance, and attributed it to the consensual nature of mediation. The Ontario study also found much better compliance where outcomes were mediated, although admitted partial liability also played a role. The New Jersey evaluation's results were somewhat different: partial payment was higher in mediated cases than in adjudicated cases (18 percent for all cases referred to mediation, 25 percent for successfully mediated cases, and 10 percent in adjudicated cases), but full payment was not (61 percent in all cases referred to mediation, 65 percent in successfully mediated cases, and 63 percent in adjudicated cases). Because the New Jersey study involved a controlled design, unlike the Maine and Ontario studies, its findings regarding compliance -- which do not show as great an effect for mediation -- may merit more confidence.

Addressing underlying problems. The research indicated that parties were allowed to speak their concerns more freely in mediation than in small claims court; consequently, underlying nonlegal problems were more likely to be brought up. However, the two studies that considered the question found little evidence that mediation dealt effectively with underlying problems. The Maine study found that only 12 percent of mediated agreements involved anything but payment, even though 40 percent of the parties said there were other issues besides money. The Ontario study found that mediators focused the process on factual legal issues and how the case might be decided at trial rather than

on conciliation or exploration of non-legal issues that might underlie the dispute.

Implications for Court and Program Management

Program structure and management, and integration of small claims mediation into case management system. The findings on agreement rates from Ontario, where there were no differences in agreement rates in cases with and without attorney participation, suggest that litigants do not need attorneys in small claims mediation. Where programs are mandatory, as in New Jersey, the court may significantly reduce the number of judges and court staff required to handle small claims cases. If volunteers serve as mediators, the costs of small claims mediation should be limited for the most part to recruiting, training, monitoring, and assigning mediators. Courts should not assume, however, that these costs will be negligible. Courts of limited jurisdiction without a designated small claims court may consider implementing a mediation program for cases involving dollar amounts in the small claims range (up to \$5,000).

Case screening and referral criteria and procedures. The findings from Maine suggest that collections, landlord/tenant, consumer, and low dollar contract disputes are more suitable to resolution in mediation than are traffic accident claims. Collections cases had the highest settlement rate (85 percent), while disputes other than traffic accidents had settlement rates over 50 percent. Only 41 percent of traffic accident claims were settled. In Oregon, collection agencies were the least likely

to choose mediation, but the settlement rate in these cases was the highest among the plaintiffs (69 percent compared with 22 to 54 percent among other categories of plaintiffs).

Selection of neutrals. The only study that examined differences in settlement rates among the neutrals was New Jersey. Findings from this study suggest that volunteers may be as proficient in achieving settlement as are court staff and attorneys. The agreement rates for each of these groups were similar (about 55 percent), but the functions and procedures varied widely across the three groups.

APPELLATE MEDIATION

The use of mediation in appellate courts provides a striking paradox. On the one hand, the procedure of encouraging parties to settle their disputes short of full-blown litigation is found in many appellate courts. According to a survey conducted by the Institute of Judicial Administration, over 40 intermediate appellate and last resort courts have either required or offered a third-party neutral to help parties settle civil appeals short of the costly and lengthy process of brief preparation, oral argument, and a judicial decision. Yet, on the other hand, mediation is unusual because it is not among the basic elements in most of the settlement programs. In fact, only one state appellate court appears to have tried to marry the traditional settlement conference approach with modern mediation techniques. The Florida Fourth District Court of Appeal is the first court that has

used persons trained in mediation to host the settlement conferences. Because the Florida experience was such a striking success in terms of case processing time savings and attorney

satisfaction, the program merits attention and a discussion of how mediation contributed to the program's relatively high degree of success.

Conclusions of Study

| APPELLATE MEDIATION | | | | |
|--|---|---|---|---|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF MEDIATION STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Florida's Fourth District Court of Appeal Appellate Mediation Project (1991) | National Center for State Courts (Hanson) | Florida's Fourth District Court of Appeal | Settlement rate, timing of settlement, overall case processing time, participant satisfaction | Random assignment of 393 cases to settlement conference and 66 cases to control group |

The Fourth District's settlement conference program began on January 1, 1989, on an experimental basis. Every third appeal was assigned to the program, thereby creating a rigorous basis of comparison between appeals referred to the conference (experimental group) and those not referred to the program (control group). Attorneys in civil cases, except those involving pro se litigants, were informed by the Clerk of the Court that a settlement conference would be scheduled in their case and that they must attend. The conference was conducted by one of seven retired Florida judges, each of whom had received training in contemporary mediation techniques. All of the judges had used that training in mediating trial court cases prior to agreeing to serve as appellate settlement conference hosts.

The conference format in Florida was informal but orderly. The settlement conference began with some introductory remarks. The judge's background and experience were summarized, the purpose of and authority for the conference were outlined, the conference's ground

rules were set forth, and both sides were told that they would have the opportunity to present their position.

The role of the settlement conference judge was not to make rulings or to issue orders. Rather, the task was to defuse emotional issues that may surround the appeal, to give both sides a more realistic picture of their likelihood of prevailing, and to suggest the futility of relitigating settled matters.

This is no easy task. Litigants may not understand the appellate process. For example, the defendant who won at the trial level may not believe that an appeal court may reverse the lower court's decision: "If I managed to avoid having a judgment imposed against me, how can I possibly lose before the appellate court?" Litigants may not realize that 20 to 30 percent of lower court decisions, including those in favor of the defendant, are, in fact, modified on appeal.

Another misconception may exist in the mind of the party bringing the appeal: "If I win on appeal, don't I get what I want?" However, even if the lower court decision is modified, the

appellate court only may order a new trial. The outcome, moreover, of the new trial is uncertain rather than a foregone conclusion. Because of these and other misconceptions, previous applications of the settlement conference idea in other jurisdictions have not always been successful, despite the hypothetical advantages.

The acid test of a settlement conference program is whether there are more settlements with it than without it. If there are more settlements, then inquiry appropriately is directed toward understanding what other consequences are attributable to the program. Does it produce settlements more quickly (or more slowly)? Does the increase in settlements translate into more (or less) expeditious handling of cases that do not settle? How is the program received by attorneys? These issues are addressed in the context of the first year's operation of the Fourth District's program.

Settlement rates. Systematic evidence indicates that the Fourth District's program met the objective of increasing the settlement rate. The settlement rate among cases scheduled for a conference is nearly three out of every five cases (58 percent). This rate compares favorably with the normal attrition. Without the conference, approximately two out of every five cases settle (42 percent). The difference between the two rates is striking. It represents nearly a forty percent increase in the number of settlements. (Although the settlement rate dropped in the second year of operations, the percentage increase in the settlement rate for mediated cases was even greater. During 1990, the settlement rate was 45 percent with the conference and 31

percent for the nonconferenced cases, a nearly 50 percent difference).

Case processing time. The Fourth District's settlement conference program not only produced more settlements, but it produced them faster. As seen in Table 1, the elapsed time from filing to disposition for the conference appeals that settled compared favorably along every indicator of pace to the nonconferenced appeals that settled. For example, the average (median) case processing time was 110 days for the appeals that had been referred to conferences and 178 days for the appeals that had not been referred. Even more dramatic, perhaps, is the fact that the appeal of the 75th percentile of the conference settlements took only nine days longer to resolve than the median of the nonconferenced settlements (187 days to 178 days).

Table 1

| | Timing of Settlements Notice of Appeals to Final Disposition | |
|-----------------|---|-----------------------------|
| | Appeals Referred | Appeals Not Referred |
| | Number of Days | Number of Days |
| 75th Percentile | 187 | 354 |
| 50th Percentile | 110 | 178 |
| 25th Percentile | 47 | 73 |

The greater timeliness in case processing produced by the settlement conference extends beyond the settled cases. The cases that were referred to the settlement conference but did not settle were also resolved more expeditiously. As

seen in Table 2, nonsettled appeals referred to the settlement conference were disposed of, on average, 79 days earlier than those not referred. At the 25th and 75th percentiles, the case processing times for the conference appeals are 123 and 109 days shorter, respectively, than they are for the nonconferenced appeals. These quicker case processing times for the nonsettled appeals are of importance. They are consistent with the claim that settlement conferences reduce the number of issues and clarify the issues in the complex appeals that do not settle.

Table 2

| Case Processing Time for Nonsettled Appeals (in days) | | |
|--|-------------------------|-----------------------------|
| | Appeals Referred | Appeals Not Referred |
| | Number of Days | Number of Days |
| 75th Percentile | 486 | 595 |
| 50th Percentile | 368 | 447 |
| 25th Percentile | 277 | 400 |

Participant satisfaction. The overwhelming majority of the attorneys endorsed the settlement conference. Questionnaires were mailed to 415 attorneys identified in court records as having been part of an appeal where a conference was held. They were asked "Do you believe that the settlement conference should be continued without any major modification? Modified? Or should it be discontinued?"

Over three-quarters of the 197 attorneys responding to the survey (77.3 percent) favored continuation of the settlement conference. More

specifically, a plurality (40.1 percent) stated that the conference should be continued without major modifications. The second largest group (37.2 percent) thought it should be continued with modifications and only 22.7 percent indicated it should be discontinued. The two modifications suggested most frequently were to screen cases before referral to the settlement conference and to make participation in the program voluntary rather than mandatory.

The attorneys' support for the conference program is based on two factors. First, they assessed the program in terms of the settlement conference's basic function. If they saw the conference as enhancing negotiations, they favored continuation. Second, they assessed the program in terms of the judge's role in fulfilling the conference's basic function. If they saw the conference judge as enabling them to evaluate better the merits of their position, they favored continuation.

The attorneys' support for the conference is consistent with the literature on procedural justice. For the past several years, researchers have found that attorneys' and litigants' degrees of satisfaction with the American court system depend not on their winning or losing. Rather, if the administration of justice is considered clear, orderly, and fair, then there is satisfaction with court performance. The parallel appears to be true for the Fourth District's settlement conference. Does each conference meet its objective of helping attorneys and litigants resolve their disputes short of a time consuming and expensive appeal to the appellate court? If it does, the attorneys are pleased with it.

Implications for Court and Program Management

Basically, mediation offers traditional appellate settlement programs three enhancements that courts should try to achieve. First, mediation clarifies the role of the settlement conference host, whether that person is a sitting appellate judge, retired trial or appellate judge, staff attorney, or private practitioner. Based on the Florida experience, the role is to encourage settlement by assisting the opposing sides to see the strengths and weaknesses of their positions. Settlement cannot be imposed through orders or court decisions. In Florida, all of the conference hosts reported that their mediation training made them much more sensitive to the idea that they were neutrals. They said that they found it easier to perform the function of encouraging negotiation between the parties because of their mediation training and experience.

Second, mediation appears to motivate the conference hosts to view negotiation in proper perspective. The Florida settlement conference hosts all sought to extend the time frame surrounding the negotiation process when settlement appeared possible. The host encouraged negotiation beyond the boundaries of the normal time frame of one and a half hour sessions either by holding additional sessions or by making subsequent contacts with the parties. In sum, mediation helped the hosts to see their task as encouraging negotiation rather than presiding over a single proceeding with a fixed time frame.

Third, mediation broadened the objective of the settlement conference. The hosts did not

believe that their success should be measured strictly in terms of whether settlement was achieved at the conference. On the contrary, they believed that two other objectives were equally important: (1) achieving settlements subsequent to the completion of the conference, and (2) resolving some of the issues in complex cases that did not settle. The data indicate that both objectives were met. More settlements occurred after the conference than at the conference. This result is attributable to the successful framing of issues at the conference and the promotion of continued negotiation by the parties. Concerning the resolution of issues in complex cases, the accelerated pace of the entire caseload suggests that the settlement conference helped to reduce the number of issues in appeals that did not settle but that were decided by the court. Thus, the Florida program demonstrates the value of mediation for courts that seek to maximize efficiency and participant satisfaction.

Needed Research on Civil Dispute Resolution Processes

Although the research on civil dispute resolution reported to date provides many hints for program planners and managers, there are no definitive results to guide them and numerous questions remain open. Most of these questions are common to all of the processes reviewed in this paper and many are interrelated. An underlying theme to these questions is the need to examine the organization of the dispute

resolution program in the context of its relationship to the legal process and the players in that process. For example, how far along in the development of the case is dispute resolution most likely to be effective in reducing costs and delays and improving consumer satisfaction? Discovery expenses add significantly to the costs of litigation, but many attorneys may not believe it wise or ethical to proceed with dispute resolution without adequate knowledge of the facts in the case. How do lawyers' expectations shape the dispute resolution process and clients' expectations? How does the availability or requirement of a dispute resolution process impact attorneys' behavior? The search for answers to questions about the use of dispute resolution must be conducted with the goal of understanding the dynamics of civil dispute resolution processes within the context of judges' and lawyers' perceptions and the incentives that govern legal practice.

A related theme is the need to learn how dispute resolution mechanisms can be integrated into the court's case management system. Because case management also requires an understanding of the dynamics of litigation and collaboration with the bar in establishing procedural rules and case management schedules, achievement of the court's mission will be facilitated by viewing dispute resolution as an integral component of case management.

Cost. What is the cost to litigants for traditional litigation and for dispute resolution including legal fees, fees charged for dispute resolution, and other costs? What incentives would encourage attorneys to control discovery?

Should there be fees for court-annexed dispute resolution or should the court fund these processes through filing fees or other mechanisms? What is the true cost to the court in terms of personnel, overhead, and other direct and indirect costs? Are court savings offset by program costs?

Case processing time. Do these processes save time for litigants and reduce delay in the courts? How do the design of the dispute resolution system and the degree of its incorporation into the court's case processing system affect disposition time? Does the timing of the dispute resolution process affect time to disposition? How does the timing of referral fit into the case management system? What processes work best for which cases at which times? What incentives would encourage attorneys to engage in settlement negotiations earlier in the litigation process?

Participant satisfaction. Do these processes provide greater satisfaction for litigants and attorneys than unassisted negotiation and settlement conferences, and if so, why? How is satisfaction defined and by what criteria is it measured? Which processes do litigants and attorneys prefer, and why? What impact do program goals and the establishment of expectations for the court and the participants have on satisfaction? Whose preferences about dispute resolution should be considered most heavily, the judges', the attorneys', the litigants', legislators', or others'? How is satisfaction related to compliance?

Selection, training, and retention of neutrals. Are there minimum qualifications for

inclusion in the pool? Should courts establish standards for inclusion in the pool, or should some other entity have this responsibility? How much and what kind of training is optimum and feasible? Should neutrals be matched to cases, especially in terms of content area knowledge and experience? How should neutrals be supervised and their performance monitored? What quality assurance mechanisms are effective? What aspects of the process or the individual neutral's behavior are associated with greater participant satisfaction and with the ability to facilitate case disposition? Should neutrals be volunteer or paid and is there a difference in quality and/or settlement rates? If neutrals are paid, how much and by whom? What responsibilities should courts have in referring cases to specific neutrals, and do these responsibilities vary by whether the neutral is paid?

Form and function of the dispute resolution processes. What are the goals and intended dynamics of the various dispute resolution processes? What actually happens during individual dispute resolution sessions? Are the same names being used for different processes? Research should lead to common definitions and understandings of the processes used. Are settlement rates affected by the length of the process? Should dispute resolution processes be mandatory or voluntary? Does mandated participation negatively impact settlement rates, satisfaction, and cost in comparison to voluntary participation? If

settlement rates are lower in mandatory programs than in voluntary programs, but higher than without dispute resolution, should the court mandate participation in dispute resolution despite the drawbacks? Do these processes impact compliance with the outcome? What effects do the court's rules and procedures have on compliance?

Obtaining valid answers to some of these questions, particularly those related to effects on litigant costs and court resources, will require new methodologies that get a better picture of actual litigant costs (e.g., attorneys' fees, discovery costs) and court workload costs (e.g., personnel, facilities). Perhaps because dispute resolution is becoming more widely accepted and used, attorneys will be willing to share actual cost information from their files (i.e., more detailed accounts of time charges for events such as depositions, negotiations, and court proceedings). Courts also may be more inclined to make the effort to analyze the costs of providing the dispute resolution process, as well as perform time and workload studies to determine if the process reduces burdens on the court and increases time available for handling more complex cases or a higher volume of cases. Experimental designs that allow more rigorous comparisons of court and dispute resolution processes also are vital to providing reliable information to guide legislatures, policy makers, and practitioners.

Court-Annexed Arbitration

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COURT-ANNEXED ARBITRATION

INTRODUCTION

The primary goals of court-annexed arbitration are to speed up the resolution of cases, reduce litigation costs to the parties and to the court, provide a process that is fair and satisfactory to litigants and their attorneys, and provide attention to cases that otherwise would settle with little or no involvement of the court. Although these goals are similar to those of other dispute resolution processes, court-annexed arbitration is unique because it entails an adjudicatory proceeding in which a decision is rendered. Attorneys, or pro se litigants, present documentary evidence, testimony, and legal arguments in a hearing before a neutral, third-party fact-finder. The fact-finder may be a single arbitrator, or a panel of two or three arbitrators. The arbitrator's decision can become an order of the court if none of the litigants rejects it within a specified period of time. Because it is an adjudicatory process, court-annexed arbitration is governed by rules that usually are more elaborate than the rules related to civil mediation and other consensual or advisory processes.

The similarity of court-annexed arbitration to traditional adjudication, coupled with familiarity among the bench and bar with commercial arbitration, may account for the relatively early rise in the popularity of court-annexed arbitration in state and federal courts. Since its introduction in Pennsylvania in 1952, over half of the states, the District of Columbia, and 10 federal courts have experimented with court-annexed arbitration. (An additional 10

federal courts were selected for voluntary court-annexed arbitration programs, but the plans are still in preliminary stages as funding is not yet available.) A few of the programs have been abandoned (Colorado), others have been reincarnated in new forms (New Hampshire, Nevada), and nearly all have been modified. The 1980's saw the greatest growth in programs, but the rate of program adoption has dropped off steeply since 1990.

State statutes, supreme court rules, or local court rules may provide the authority and rules for court-annexed arbitration. These statutes and rules mandate that designated civil cases be assigned to arbitration. Most programs base eligibility for arbitration on the amount of money at stake in the dispute. The eligibility limits range from \$6,000 to \$150,000, but the most common limit is \$50,000. Hawaii limits its program to personal injury claims. New Jersey originally limited arbitration to automobile negligence cases, but later expanded the program to include personal injury claims and, in some counties, contract disputes.

The rules and scope of court-annexed arbitration are nearly as various as the jurisdictions that have implemented the process. The introduction to volume 14, number 2 (1991) of the *Justice System Journal*, a special issue devoted to court-annexed arbitration research, presents comparisons of several program characteristics among the 25 jurisdictions that operated programs in 1990. These

characteristics include jurisdictional limits, arbitrator qualifications, selection and compensation of arbitrators, the nature of arbitration hearings and timing of decisions, and trial de novo provisions. The only constant among the rules is that the right to a trial de novo is preserved through an appeal or rejection process. An appeal or rejection of the award places the case back on the trial docket. The uniformity among programs ends here, however, because some programs provide disincentives to appeal, such as appeal fees and penalties if the appealing party does not achieve an improved outcome at trial.

Issues raised about court-annexed arbitration. Because court-annexed arbitration requires litigants in certain kinds of cases to participate in an alternative adjudicatory proceeding before a jury trial can proceed, the process has been challenged on various constitutional grounds, including the rights to a jury trial, equal protection, and due process. None of these challenges has succeeded, primarily because all programs provide the right to trial de novo, and the courts reviewing challenges have concluded that the benefits to the consumers of the justice system outweigh the burdens on individual litigants. (See *Davis v. Gaona*, 396 S.E.2d 218 (Ga. 1990); *Firelock, Inc. v. District Court of 20th Judicial District*, 776 P.2d 1090 (Colo. 1989); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979).) There are questions about whether the latter conclusion is sustained by empirical evidence, however. There are concerns that arbitration's

adversarial nature and right of appeal may prolong litigation and increase costs by introducing another layer of procedure. Thus, skeptics as well as would-be supporters ask whether arbitration actually reduces delay and costs.

Arbitration's effects on access to justice, fairness, and quality also have been questioned. If parties are required to pay for a mandatory process, will litigants of lesser means be discouraged from pursuing claims? Will corporate litigants and insurers gain an advantage because they are more familiar with the arbitration process by virtue of being repeat players? Are outcomes in arbitration substantially different from outcomes in traditional litigation? What are litigants' and attorneys' perceptions of the fairness of arbitration and satisfaction with the process and its outcomes?

Issues research has addressed. There is a considerable body of research and evaluation of court-annexed arbitration. Of all the processes used in civil dispute resolution, arbitration has received the greatest share of attention by researchers. All the studies have examined arbitration's effects on the pace and cost of litigation, but the assessments of costs have focused more on litigant costs than on court costs. Most studies also have measured the rates at which arbitration awards are appealed, whether arbitration reduces trial rates, and litigants' and attorneys' views of the fairness of and satisfaction with the arbitration process and its outcomes.

CONCLUSIONS OF STUDIES

| COURT-ANNEXED ARBITRATION STUDIES | | | | |
|---|---|--|--|--|
| TITLE OF STUDY | EVALUATORS AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Hawaii's Court Annexed Arbitration: Program Evaluation (1991) | Judiciary of the State of Hawaii, Program of Conflict Resolution, University of Hawaii at Manoa (Barkai and Kassebaum) | First Circuit Court of Hawaii | Pace, appeal rate, litigant costs, participant satisfaction | Over 1,200 tort cases were randomly assigned to either mandatory arbitration or control group |
| DuPage County Mandatory Court-Annexed Arbitration Project (1992) | Center for Legal Studies, Sangamon State University (Collins, Ford, and Wassenberg) Administrative Office of the Illinois Courts | DuPage County, IL | Pace, litigant costs, participant satisfaction, quality of justice | Quasi-experimental design (pre-post) comparing a pre-arbitration sample (507 cases) and a sample of cases assigned to arbitration (606 cases) |
| Lake County Mandatory Court-Annexed Arbitration Project (1991) | Center for Legal Studies, Sangamon State University (Collins and Ford) Administrative Office of the Illinois Courts | Lake County, IL | Pace, litigant costs, participant satisfaction, quality of justice | Quasi-experimental design (pre-post) comparing a pre-arbitration sample (487 cases) and a sample of cases assigned to arbitration (663 cases) |
| Winnebago County Court-Annexed Arbitration Pilot Project Evaluation (1988) | Center for Legal Studies, Sangamon State University (Collins and Ford) Administrative Office of the Illinois Courts | Winnebago County, IL | Pace, litigant costs, participant satisfaction, quality of justice | Quasi-experimental design (pre-post) comparing all arbitration eligible cases closed during the year before arbitration instituted (628) and randomly selected cases assigned to arbitration (420) |
| University of Colorado Court-Annexed Arbitration Evaluation Project (1987-1988) | University of Colorado Conflict Resolution Consortium (Burton and McIver) State Justice Institute | Four Colorado general jurisdiction trial courts | Appeal rate, cost of litigation, participant satisfaction. | Quasi-experimental design (pre-post) comparing a pre-arbitration sample (800 cases) and a sample of cases assigned to arbitration (800 cases) |
| Court Ordered Arbitration: Case Outcome and Litigant Satisfaction (1987) | Institute of Government (Clarke, Donnelly, and Grove) State Justice Institute | Three judicial districts in North Carolina | Pace, appeal rate, type of disposition, recovery, participant satisfaction | Randomly assigned all arbitration eligible cases in a six month period to an arbitration group or a control group (pre-program group also compared) |
| Evaluation of the New Jersey Automobile Arbitration Program (1987) | Institute for Civil Justice, RAND Corporation (MacCoun et al.) | Eight New Jersey general jurisdiction trial courts | Pace, disposition patterns, trial rate, costs, participant satisfaction | Quasi-experimental design (pre-post) comparing a random sample of over 1,000 auto negligence cases filed either before or after the inception of the mandatory arbitration program |
| Evaluation of New Jersey's Expanded Arbitration Program (1991) | Institute for Social Analysis (Roehl, Capowich, and Burner) New Jersey Administrative Office of the Courts | Nine counties in New Jersey | Pace, appeal rate, attorney and litigant satisfaction | Comparison of arbitrated and non-arbitrated cases eligible for arbitration (1,997 cases in seven counties); also comparison to non-arbitrated cases in two counties without arbitration (557 cases); telephone and mail surveys of 189 litigants and 402 attorneys |

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| COURT-ANNEXED ARBITRATION STUDIES | | | | |
|---|--|---|---|--|
| TITLE OF STUDY | EVALUATORS AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| An Experiment in Court-Ordered, Mandatory Arbitration (1987) | Research and Development Division, DC Superior Court National Institute for Dispute Resolution and Eugene and Agnes E. Meyer Foundation | Superior Court of the District of Columbia | Appeal rate, attorney satisfaction, disposition patterns, award amounts | Quasi-experimental design (pre-post) comparing 308 civil cases assigned to mandatory arbitration and a group of pre-arbitration cases |
| Evaluation of the Effects of Court-Annexed Arbitration on Pace, Cost and Quality of Dispute Resolution (1988) | National Center for State Courts (Hanson and Keilitz) State Justice Institute | Fulton County Superior Court, GA; Hillsborough County Superior Court, NH | Pace, litigant costs, appeal rate, trial rate, participant satisfaction | Quasi experimental design (pre-post) comparing 539 arbitration cases to 156 pre-arbitration cases and samples of contemporaneous cases in comparable jurisdictions without arbitration |
| FEDERAL DISTRICT COURTS | | | | |
| Court-Annexed Arbitration in Ten District Courts: Evaluation (1990) | Federal Judicial Center (FJC) (Meierhoefer) | 10 Federal Districts: Northern CA, Middle FL, Western MI, Western MO, NJ, Eastern NY, Middle NC, Western OK, Eastern PA, Western TX | Pace, litigant costs, procedural fairness, participant satisfaction | Cases randomly assigned to arbitration or control group in each of the ten districts |
| An Evaluation of Court-Annexed Arbitration in a United States District Court (1990) | Institute for Civil Justice (ICJ), RAND Corporation (Lind) | Middle District of North Carolina | Access, cost, pace, participant satisfaction, appeal rate | 350 arbitration eligible cases randomly assigned to an experimental or control group |
| Court-Annexed Arbitration in the Middle District of North Carolina (1989) | Federal Judicial Center (FJC) (Meierhoefer) | Middle District of North Carolina | Pace, trial rate, appeal rate, satisfaction, fairness | 195 arbitration eligible cases randomly assigned to arbitration (161 cases) or a control group (34 cases) |

This report is based for the most part on the findings of the studies shown in the table above. Only four of the studies listed in the table have an experimental design featuring random assignment of cases to either arbitration or a control group: North Carolina (Clarke), Hawaii (Barkai), Middle District of North Carolina (Lind, ICJ), and Middle District of North Carolina (Meierhoefer, FJC). The findings of these experimental studies may be more reliable because the use of contemporaneous groups reduces the possibility that any differences between the two groups are attributable to factors other than arbitration. Most of the remaining studies are quasi-experimental because they employ control groups composed of cases

processed before the introduction of arbitration that would have been eligible for arbitration under the program rules. Studies without at least a quasi-experimental design are not in the table but are discussed where the lack of a comparison to traditional court processing is irrelevant, e.g., litigant or attorney views about the fairness of arbitration hearings. It is important to keep in mind that the findings discussed here are derived from evaluations of programs with a variety of rules and procedures, and that the evaluations were conducted in different jurisdictions with varying demographic characteristics. This high degree of variability may account for divergence in the studies' findings and limit the extent to which definitive conclusions can be drawn from

the aggregated body of research. By the same token, the variability in research results suggests that the way arbitration is implemented and the characteristics of the court system in which it takes place play important but unexamined roles in shaping arbitration's impact on case processing time, costs, and other variables.

Does arbitration reduce case processing time? The evidence is mixed on arbitration's effects on the pace of litigation. Cases referred to arbitration in Colorado, the District of Columbia, Hawaii, DuPage and Lake Counties, and North Carolina were resolved more quickly than cases in the control and comparison groups. In Fulton County, arbitration cases were only slightly faster than the comparison cases. In Winnebago County the mean disposition time for arbitration cases was shorter, but the median time was not. Arbitration cases reached resolution more quickly in three of seven federal district courts (FJC), but the non-arbitration cases were faster in both New Jersey studies and in the Middle District of North Carolina. In several programs, fewer arbitration cases than control cases are resolved in the first three or four months, but arbitration cases then overtake control cases in later months. The slow start for arbitration cases may be an indication of the effect of scheduling the hearing. Three studies found that resolution dates in arbitration cases tend to cluster around the hearing date (Lind, New Jersey (ICJ), and Illinois).

Does arbitration reduce litigant costs? Research has not clearly shown that arbitration results in cost savings for litigants. In Hawaii, the Middle District of North Carolina, and

Winnebago County, researchers found that arbitration reduces costs to litigants if the case settles before an arbitration hearing is held. In each study, however, no savings resulted for the overall arbitration caseload. The Winnebago County researchers explain that any decrease in the cost of pre-arbitration cases that settle is often offset by an increase in the cost of post-arbitration cases that are appealed. Other studies do not show cost reductions. A drawback to all of the studies on costs is the methodology for obtaining data. Findings on litigant costs are based on reports by litigants and attorneys about the actual amount of fees or on estimates by attorneys about comparative costs for litigating a particular case through arbitration or the traditional court process. For a variety of reasons, including faded memories, faulty record keeping, and unavailability of information, these measures are neither accurate nor reliable, nor do they have the capacity to produce consistent findings.

Does arbitration reduce costs to the court? There have been few attempts to evaluate whether arbitration saves court costs, and the small amount of data gathered has not shown cost reductions. For example, in DuPage and Lake Counties, there were no apparent reductions in court costs to offset the operational costs of the arbitration program. The lack of information about court costs stems in part from methodological problems in gathering data on court costs and drawing conclusions from these data. For example, the evaluators of the Winnebago County program distributed surveys to judges in an attempt to gather workload and

time data. There is no mention of the results of this survey, however, which suggests that the data were incomplete or too difficult to interpret. In the Middle District of North Carolina, costs for processing arbitration cases were estimated to be slightly lower in comparison to the control group cases, but the difference was not statistically significant. Moreover, the researchers could not determine if the administrative costs of the arbitration program were offset by savings elsewhere.

Because case processing costs are difficult to measure directly, studies have examined various factors that impact the court's workload, such as trial rates, the volume of pre-trial motions, and the frequency of pre-trial conferences. Some studies have found that arbitration reduces the trial rate (see below). Lind found no difference in the number of motions filed or frequency of pre-trial conferences in the Middle District of North Carolina. Hawaii showed an average of four fewer documents per case in arbitration, and in DuPage and Lake Counties, parties in arbitration cases had fewer court appearances. None of the studies has established, however, that positive findings concerning reduced court activity and trial rates translate to cost savings. Moreover, the high rates of appeal in most programs suggest that arbitration may increase burdens on court staff who monitor appealed cases and maintain the trial docket.

Do litigants and attorneys view arbitration to be a fair and satisfactory process? Litigants and attorneys generally think that both the arbitration process and its outcomes

are fair and satisfactory. Attorneys' views are important for comparing processes because they have participated in both, whereas litigants typically have experienced only one process or the other. In most studies, attorneys view arbitration as fair and satisfactory, but traditional litigation also fares well in their ratings. Among litigants, winners generally are happier with arbitration than are losers. In the Middle District of North Carolina, litigants in arbitration gave arbitration higher ratings compared to litigants in the traditional court process. The researchers found no differences in satisfaction with the litigation experience, the hearing or the award among first time litigants and repeat players, litigants in tort and contract disputes, or corporate and individual litigants. Some differences emerged between corporate and individual litigants, however. Corporate litigants viewed arbitration to be more fair than did the individual litigants, and corporate litigants favored more-formal hearings, whereas individual litigants preferred less formality. In both groups, litigants who participated in an adjudicative hearing were more satisfied with the litigation experience than were those whose cases settled without an arbitration hearing or trial.

What proportion of arbitration cases are appealed? Appeal rates in most jurisdictions fall within 40 to 60 percent, but the range is great. The high is 83 percent in Sacramento, California and the low is 9 percent in North Carolina (Clarke). The evaluators in North Carolina attributed this low appeal rate to overall litigant satisfaction with the arbitration result, low expectations of improving their position

through appeal, and the costs of appeal. Among several jurisdictions in both New Jersey studies, appeal rates were the lowest where cases were screened before referral to arbitration and where the arbitration panels were larger in size. In contrast to the relatively high rates of appeal, the proportion of appealed cases going to trial is low everywhere because the vast majority settle before trial. The primary effect of an appeal is to lengthen case disposition time, although other, currently unmeasured, costs are incurred when cases are appealed.

Most arbitration programs have some sort of disincentive in place to discourage parties from filing appeals. There are primarily three types of disincentives used either alone or in conjunction to inhibit appeals: non-refundable fees payable by the appealing party regardless of the success of the appeal; fees contingent on the success of the appeal; and deposits refundable upon success of the appeal (success is based on improvement by a given percentage on the amount of the arbitration award). Because there are so few arbitration programs that do not assess a fee to appeal the arbitration award, it is difficult to draw comparisons about the relative effects that the disincentives and sanctions have. The great range of appeal rates across states with similar types of disincentives to appeal suggests that the effects of these disincentives may not be dramatic. On the other hand, the lack of disincentives in California, the state with the highest appeal rates, suggests that some fees or sanctions might be effective in curbing appeals.

Does arbitration reduce trial rates?

Whether arbitration reduces trial rates remains an

open question. The trial rate declined in North Carolina (Clarke) and in Lake and Winnebago Counties, where program limits are low (\$15,000); in Fulton County, where the limit is set at \$25,000 (but actual claims averaged over \$40,000); and in the District of Columbia, where the limit is \$50,000 (but 45 percent of the cases had claims of more than \$50,000). No statistically significant reduction in trial rates has been shown elsewhere.

One problem associated with comparing trial rates stems from the fact that trial rates in traditional litigation generally are very low and statistical tests do not have the power to show that any trial rate reductions in arbitration are significant. For example, in the Middle District of North Carolina the trial rate was lower in arbitration cases compared to the control cases (4.1 versus 5.5), but the researchers could not determine statistically whether the difference was the effect of arbitration or random variations in the caseloads. In Hawaii, a reduction in trial rates coincided with the implementation of the arbitration program; however, the researchers were unable to attribute this reduction either directly or indirectly to the arbitration program.

Implications for Court and Program Management

Program management and structure.

Because most of the studies of court-annexed arbitration have been conducted by different researchers in various jurisdictions, there is no body of standardized, comparative research on whether a particular management model leads to greater success on measures of pace, cost, and

quality. Some implications can be drawn, however, from information gathered from attorneys, arbitrators, and program managers about the perceived benefits and drawbacks of various models. For example, in Fulton County, Georgia, court oversight and control of the process (including assigning arbitrators, scheduling hearings, holding the hearings in the court's facilities, and requiring the results of hearings to be posted the day of the hearing) eliminate delays in scheduling hearings, obtaining the arbitrators' decisions, and payment of arbitrators. Close supervision of the progress of the case and conducting arbitration hearings in court facilities also may render to a greater degree the imprimatur of the court and instill the respect accorded to court orders. In models that invest in arbitrators greater responsibility for handling the case, as in Hawaii, where the arbitrators control discovery and other pre-trial matters, the court cannot maintain the same level of oversight as Fulton County does. Regardless of the management model, however, the court must maintain accurate records of the progress of cases through arbitration, both to monitor adherence to time limits (e.g., assignment to arbitrator, hearing held, decision returned, appeal filed) and to intervene when it appears that the process is stalled.

Some implications for structuring the hearing process and use of arbitrators can be drawn from the research. First, less than half of the cases referred to arbitration make it to a hearing. (Across programs, the range of cases settling before a hearing is from a low of 10 percent in Colorado and Lake County to highs of

60 percent in Fulton County and 98 percent in one county in New Jersey, where very few cases were scheduled for a hearing.) These findings indicate that courts should plan on scheduling hearings for half or fewer of the cases that are expected to fall within the programs' scope. The number of hearings has an impact on the size of the pool of arbitrators needed and on the amount of funds needed if the court pays the arbitrators' fees. (Before setting the jurisdictional and case type limits for the arbitration program, the court should analyze its case load to estimate how many cases would come into the program applying the various limits under consideration.)

There does not appear to be any variance in the effectiveness of arbitration based on whether the parties or the court pays the arbitrators' fees. (With the exception of Colorado, Oregon, and Rhode Island, the court pays the fees in state programs; in federal courts, the parties pay the fees. In Hawaii, arbitrators serve pro bono.) The source of the fee has secondary implications, however, for the retention of arbitrators (see below).

The number of arbitrators assigned to a case also may have little consequence on the success of arbitration. In Colorado, researchers found no differences in satisfaction with one or three arbitrators. The study of New Jersey's arbitration program for automobile torts showed no differences in litigants' or attorneys' perceptions of the fairness of hearings conducted by one arbitrator or by a panel of two, but litigants whose cases were heard by a panel of two arbitrators had slightly higher levels of satisfaction with the outcome compared to

litigants who had one arbitrator. In contrast, in New Jersey's expanded arbitration program, attorneys viewed panels of two arbitrators to be more fair than a single arbitrator, but litigants had the opposite view. Moreover, the appeal rate was significantly higher in cases with a single arbitrator than in cases with a panel of two arbitrators. In the study of ten federal courts, the overall reaction of attorneys to arbitration was less favorable in the courts that used only one arbitrator, but in individual cases there was no association between attorney satisfaction and the number of arbitrators who heard the case. Taken together, the findings from these studies indicate that courts can lower expenses for arbitrators' fees by assigning only one arbitrator to each case because one arbitrator appears to be adequate to provide fair and satisfactory hearings and outcomes. Appeal rates might be lowered, on the other hand, by providing a panel of two arbitrators.

Only one study has demonstrated any association between the formality of the hearing and participant satisfaction. In the Middle District of North Carolina, where the program limit is \$150,000, Lind found that attorneys in higher stakes cases preferred a higher degree of formality and that attorneys in the larger cases rated the traditional court process as more effective than did the attorneys in arbitration. These findings suggest that for higher stakes cases the court should establish policies and practices that discourage holding hearings in casual settings and promote the use of uniform procedures that resemble those used in court hearings. The level of formality of the hearing

also has been associated with ratings of fairness. In New Jersey, litigants' perceptions of informality were linked to their perceptions of the fairness of arbitration hearings, although the attorneys appeared to be largely indifferent regarding the formality of hearings.

Integration of the arbitration program into the case management system. To ensure that all the cases targeted for arbitration actually are referred to the program, the case referral mechanism should be part of the court's overall case management system. Without an integrated referral system, significant numbers of cases might slip out of the program, as happened early on in Fulton County and in Oregon. If the court issues scheduling orders in all civil cases, the orders should include arbitration referral and completion times. In the Middle District of North Carolina, the time from the last answer to the first pre-trial order was much shorter in arbitration cases because the clerk of court issues a standard pre-trial schedule rather than waiting for attorneys to file orders.

The use of arbitrators apparently can reduce the demands on court resources and judicial time if the arbitrators have responsibility for handling more matters in the case than the arbitration hearing only. In Hawaii, where arbitrators control discovery as well as discovery-related motions, arbitration results in overall faster case processing time and in lower costs if the case settles before a hearing. The controls on discovery may prompt earlier settlement, which leads to time and money savings. The use of arbitrators for discovery management likely reduces demands on the

clerk's office and on the motions docket. Except in smaller valued cases, arbitration is not likely to reduce the trial rate, however. Moreover, arbitration does not appear to affect either positively or negatively the processing of the rest of the court's caseload. Courts therefore should not expect arbitration to speed up the disposition of cases not referred to arbitration.

Case screening and referral criteria and procedures. If the pool of arbitrators or the availability of funds for arbitrator fees is limited, courts should consider referring cases to arbitration after the answer has been filed to avoid expending system resources on cases that will result in default judgments anyway. On the other hand, if increasing access to a judicial forum is a program goal, referrals and notices of referrals might be made shortly after case filing. There is some evidence from the Middle District of North Carolina that the opportunity for an adjudicative hearing in arbitration may encourage litigants to pursue cases that otherwise would not have been contested. In that federal district court, cases were referred shortly after case filing and more cases in the arbitration sample were answered compared to the control group. Although many of the attorneys apparently knew of the arbitration referral before they filed an answer, they did not receive official notice of the referral before the answer was filed. Therefore, it is not clear whether the referral encouraged pursuing a defense of the claim.

Aside from the question of referring cases before an answer is due, the general consensus from the research indicates that earlier referral, after a reasonable time to complete some

discovery, increases the effectiveness of arbitration. For example, the time limit for completing discovery in Georgia is six months after the last answer is filed. Fulton County sets its arbitration hearings seven months from case filing to allow sufficient time to complete discovery and put the parties in the position to either settle the case or be prepared for a hearing. This approach is supported by the views of some attorneys who had served as arbitrators in New Jersey's expanded arbitration program. Forty percent of these attorneys thought that arbitration was scheduled too early in the case; of this 40 percent, 87 percent cited incomplete discovery as the reason for this view. Because cases tend to settle close to arbitration hearing time, case disposition time may be reduced by earlier referral to arbitration and earlier scheduling of the hearing.

Most court-annexed arbitration programs include the major civil litigation case types within the scope of the program rules, i.e., torts, contracts, and property. Many of the programs exclude equitable actions from arbitration. Thus, the bulk of cases processed through arbitration are routine civil cases that usually involve relatively straightforward issues of fact and law. Most of the research has found no differences in the success of arbitration in handling torts and contract disputes or relatively low value (\$15,000 and under) and higher stakes cases (\$150,000 or more in Hawaii and several federal district courts). Even in Hawaii, attorneys rated only seven to 14 percent of the cases as involving complex questions of procedure, fact or law. Going contrary to these findings, complex

contract disputes specifically targeted for arbitration in one New Jersey county had significantly longer average disposition times than did simple contract disputes and personal injury cases in other counties. The evaluators suggest that further study of arbitrating contract disputes is warranted because simple disputes may not need the treatment of arbitration, while more complex disputes do not appear to benefit from arbitration. The experience of commercial arbitration in resolving contract disputes may shed some light on this issue.

Virtually all of the research on court-annexed arbitration has been conducted in jurisdictions where arbitration is mandatory. Most programs allow voluntary stipulations to use arbitration in cases that fall outside the program's eligibility rules. Because court-annexed arbitration is highly rule-bound and requires considerable effort to implement, voluntary programs, which traditionally have been under-used, probably would not warrant the expenditure of time and resources.

Selection, training and retention of arbitrators. A few court-annexed arbitration programs permit persons other than attorneys to serve as arbitrators, but the vast majority of arbitrators are attorneys. In the Middle District of North Carolina, parties are provided with a list of recommended attorney arbitrators; however, ultimately they may select any person they feel is qualified, whether or not he or she is an attorney (FJC). Unlike in other dispute resolution processes, there has been little debate about whether arbitrators should be attorneys, perhaps because arbitration is adjudicatory and does not

call for the conflict resolution skills needed in a consensual process. Program rules generally require attorneys to have been in practice for a specified period of time, ranging from 1 year to 10, with the most common period being 5 years. Arbitrators also are required to participate in various amounts of training. Litigants' and attorneys' ratings of fairness and satisfaction indicate that higher ratings of the skills of the arbitrator are associated with more favorable views of the process and outcomes. Training in the program rules, procedures, and conduct of the hearing therefore is essential for effective performance of the arbitrators' responsibilities. Arbitrators' performance should be monitored to ensure that hearings are held within the prescribed time lines and in accordance with program rules, and that decisions are rendered fairly and filed in a timely manner. In addition, the court should evaluate litigant and attorney satisfaction with arbitrators' performance through periodic surveys.

Arbitrators are selected in a variety of processes, including court appointment, selection by the parties from a pool, and selection from a limited number on a strike list. The only direct comparisons of court selection and party involvement in selection are from the Federal Judicial Center's study of court-annexed arbitration in ten district courts. Attorneys in programs that allowed litigants to select the arbitrator had lower approval ratings for arbitration and were less likely to choose an arbitration hearing over a hearing before a judge or jury compared to attorneys in districts in which the court appointed the arbitrator. Among

the reasons the author of the study suggests might account for this finding is the time and expense consumed by party involvement in the selection process. Courts seeking to streamline the arbitration process and minimize delay should consider establishing fair and efficient procedures for either assigning arbitrators from a pool of qualified individuals or providing a limited number of arbitrators on a strike list that must be returned within a brief period of time.

Maintaining an adequate pool of arbitrators is essential for the success of an arbitration program. Even programs that mandate the participation of bar members should provide incentives for enthusiastic, rather than reluctant, service. Arbitrator fees are one obvious incentive. Research conducted in the late 1980's (Fulton County) suggests that the rewards for serving as an arbitrator stem more from the professional growth obtained through the experience than from the fee earned. Whether that view will prevail in the future is open to question, however. Indications of arbitrator "burn out" in Hawaii, where the arbitrators serve pro bono, warn that offering no fee may not be a viable long-term plan. (The study of New Jersey's expanded arbitration program suggests, however, that volunteer arbitrators perform as well as those who are paid, as measured by appeal rates, case disposition times, and litigant satisfaction.) Moreover, as the growth of both court-based mediation and private dispute resolution continues, the opportunities for attorneys to earn higher fees by providing these services may cause attorneys to alter their benign views of the relatively small fees offered in court-

annexed arbitration programs. Higher arbitrator fees, on the other hand, may diminish the popularity of court-annexed arbitration. The Federal Judicial Center study of court-annexed arbitration in ten district courts offers some instruction here. Higher arbitrator fees, which the parties paid, were associated with lower approval ratings by attorneys.

When and how the fee is paid also should be considered carefully. The experience in Colorado suggests that arbitrators should not be responsible for collecting their fees. Arbitrators there complained that collecting the fee from losing parties became difficult and sometimes resulted in awards being boosted and the winning party being assessed more than its fair share of the fees to encourage payment to the arbitrator. Although payment at the beginning of the arbitration process eliminates the problem of collecting from recalcitrant or insolvent litigants, payment up front leaves no leverage over the arbitrator to produce a written award, which usually triggers payment of the fee. At least one court, Rhode Island Superior Court, has attempted to solve this dilemma by requiring half of the fees at the front end of arbitration and half when the award is rendered. In programs where the parties pay the arbitration fees, payments should be made to the court, both to relieve the burden of collection on the arbitrator and to use the power of the court to encourage payment.

Participant Satisfaction. Litigants and attorneys are generally very satisfied with arbitration, although traditional litigation also is highly rated by attorneys. Perhaps the most salient aspect of arbitration in relation to

participant satisfaction is its potential to provide third party review to cases that otherwise would settle with no intervention. Both litigants and attorneys appear to appreciate having the opportunity to present their cases to a skilled and neutral fact-finder. These findings indicate that programs in which a greater proportion of the cases experience an arbitration hearing will have greater support from litigants and attorneys. On the other hand, providing hearings in the majority of cases might break the budget and drain the pool of arbitrators. Perhaps a key to high participant satisfaction is to find the balance between encouraging settlement before an arbitration hearing is held and promising an expeditious forum in which the litigants can air their disputes. Arbitration seems to accomplish the former; across the programs that have been evaluated, from 40 to 90 percent of cases referred to arbitration settle without a hearing. Nevertheless, courts should strive to ensure that program procedures do not thwart participants' desires to have a hearing and that arbitrator training emphasizes the importance of conducting arbitration hearings in a manner that permits a full and fair presentation of each party's case.

Program evaluation. Courts should establish an ongoing evaluation of the arbitration program that is tied to the procedures for monitoring the progress of cases and managing the program. If the program management records are maintained in a computerized data base, periodic reports can be derived from the records without placing a great burden on the court or program staff. Program records should include pertinent dates that relate to the program

structure, i.e., case filing; referral to arbitration; assignment of arbitrator; scheduling of hearings (original and continuances); award filed; award appealed/rejected; case settled; and trial held. Measurements of time lapses between case events will reveal where delays are occurring and indicate what changes might need to be made. Program records also should contain the names of arbitrators assigned to each case and the outcomes in hearings (award amounts) and at subsequent trials (judgments). The record of appealed cases may reveal patterns that can help program managers develop strategies for reducing the appeal rate. For example, particular types of cases may be appealed more often, particular arbitrators may have more cases appealed than the norm, or substantive and procedural errors may recur. Monitoring the number of cases arbitrators are assigned may help ward off "burn out" as well as facilitate equitable distribution of the workload. The court can evaluate the performance of arbitrators, as well as the effectiveness of arbitration program rules and procedures, by asking litigants and attorneys in a randomly selected number of cases to complete brief surveys following the arbitration hearing or at the conclusion of the case. These evaluations can be conducted periodically or continually, depending on the size of the program caseload. The court should revise the program rules and procedures if the evaluations indicate that changes are warranted and require arbitrators who receive poor ratings to obtain further training to improve their skills.

Evaluation reports should be geared primarily for improving the operation of the

arbitration program. Individual courts will have other uses for evaluation reports, however, including internal reports to the court, documentation of program success for use in maintaining or increasing funds for the program, and community and media relations.

QUESTIONS REMAINING TO BE ANSWERED

Despite the greater volume of research on court-annexed arbitration than on other processes used to resolve civil cases, many questions remain open about the function of arbitration and how it can best be implemented to facilitate fair resolution of disputes. One reason clearer answers have not emerged from the research is the great variety of program models evaluated. Another is the lack not only of experimental studies, but also of comparable studies. Many of the questions about arbitration are common to other processes, such as mediation and case evaluation, and concern primarily what place arbitration has in the litigation process and in the court's case management system (see Civil Dispute Resolution Processes Working Paper). What types of cases are most suited to resolution in arbitration? When is the optimum referral time? Should cases be screened or categorically referred? Does arbitration reduce litigant costs and expenditures of court resources? Other questions include how qualified neutrals can be

obtained and retained, how the quality of arbitration can be ensured, and what aspects of the process lead to greater satisfaction for attorneys and litigants.

Questions peculiar to arbitration concern the various operational features and the measures that should be taken to reduce appeal rates. What dollar limits are most appropriate? How much should arbitrators be paid? What is the optimum number of arbitrators to hear each case? How effective are disincentives to appeal, such as appeal fees and sanctions for failure to improve the appellant's position at trial? What timelines for appeal allow sufficient time for post-arbitration negotiations to avoid appeals without prolonging unnecessarily the resolution of the case?

Perhaps the more fundamental questions remaining open about court-annexed arbitration relate to its distinction from other civil dispute resolution processes. As an adjudicatory process, how does arbitration's function differ from the functions of mediation and case evaluation, which are not adjudicatory? Do attorneys perceive the differences in the purposes and goals of these very different processes, and if so, do their perceptions influence the success of arbitration? Finally, what function should arbitration perform for attorneys and litigants to influence the disposition of the case?

Family Mediation

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FAMILY MEDIATION

INTRODUCTION

Twenty years ago, experimental programs to resolve divorce disputes amicably and avoid litigation were begun in the Los Angeles Conciliation Court and in a private mediation center in Atlanta (Brown, 1984). Since then, the mediation of family disputes has evolved to an established area of practice. Training programs abound for those aspiring to be mediators, membership associations exist for practitioners, standards of practice have been developed, and thousands of individuals have added mediation to the array of legal and mental health services they offer to the divorcing and previously divorced population. Indeed, a recent survey showed a fourfold increase in dispute resolution programs during the 1980s (ABA, 1990).

Although most of the nation's 2,420 domestic relations courts have yet to attempt mediation, the National Center for State Courts estimates that there are approximately 205 programs offering court-based or court-annexed services for divorce disputes (at pre and post-dissolution stages). Of these, 75 mandate participation categorically, 75 permit case-by-case judicial (mandatory) referrals, and the remaining 55 are initiated by one or both of the parties. While about half of the court programs focus on custody and visitation disputes, the other half include child support, spousal support, and property division issues as well (McEwen et al., 1993).

The use of mediation in child abuse and neglect cases has been more limited, but it too appears to be on the rise. To date, court based programs using mediation techniques in juvenile court filings are operational in the Family Division of the Connecticut Superior Courts and several jurisdictions of California (Thoennes, 1992). Moreover, pursuant to a law enacted in California in 1992 (Chapter 360, Statutes of 1992), seven counties in that state will develop and evaluate dependency mediation programs in their juvenile courts over the next several years. (Other types of family disputes that are subject to mediation interventions in courts are not addressed in this literature review. They include the mediation of parent-child disputes for status offenders and their families and the mediation of petitions for domestic restraining orders.)

The popularity of mediation techniques reflects several trends regarding the resolution of family disputes. One is the increase in case volumes and the decline in court budgets that preclude strong judicial participation. In the early 1960s, there were fewer than ten divorces per year per 1,000 couples; today, approximately half of all marriages end in divorce. Filings in the juvenile court have also increased dramatically. For example, between fiscal years 1982-83 and 1983-84, dependency court filings in Los Angeles County reportedly increased 42 percent (Saunders et al., 1991). Under the

pressure of these numbers, the quest for alternatives mounted.

Relieving court dockets, however, has not been the only stimulus for mediation techniques in family disputes. Proponents of mediation techniques maintain it accomplishes a lot for disputing parties. (See Fuller, 1970; Deutsch, 1973; and Rubin and Brown, 1975 for early conceptual work on "cooperative dispute resolution.") Advocates characterized mediation as an informal, non-intimidating, participatory forum that is more understandable, accessible and humane for disputing families. As a result, mediation is believed to be associated with enhanced client satisfaction and perceptions of fairness with both the process and outcome of family proceedings. It is also viewed as more effective than adversarial interventions in generating appropriate, non-obvious, and tailored resolutions.

Despite the growth in mediation services in the public and private sector and widespread enthusiasm for it, a debate rages regarding its use in both the child maltreatment and divorce areas. For example, in the maltreatment area, the concerns voiced include the issues of children's safety, parental rights, the existence of non-negotiable issues and the potential duplication of other settlement efforts. Essentially, some critics worry whether solutions generated in mediation fail to protect an abused or neglected child, while others worry that parents are too disadvantaged to negotiate with representatives of the child protective services systems, and that as a result of these power imbalances, they are ill-served by the process. Still others are skeptical that there

are issues worth negotiating in child protection cases or fear that the process will encourage efficient case disposal to the exclusion of other considerations and principles (See Harrington, 1985; Galanter, 1983; Genn, 1987).

Critics of divorce mediation have also raised fundamental questions about the issues of power imbalance and the adequacy of the child custody and financial terms generated in the process. They have asserted that gender-linked characteristics, economic disparities between men and women, and domestic violence factors place women at a disadvantage in the mediation process; as a result, they generate agreements that run counter to their longer term financial and psychological welfare. Among the criticisms of the process are that it invites trade-offs between money and time with the children, leaves women without the benefits of representation, results in joint custody agreements that break down over time, compromises the autonomy of women who are de facto custodial parents, and results in lower child support awards.

Mandatory mediation practices and formats in which mediators recommend outcomes to the courts when the parties fail to produce agreements on their own have come under particular attack. In these settings, it is feared that women are compelled both to participate in potentially unbalanced negotiations and to adopt the agreements generated in those forums either explicitly or more subtly through mediator communications with the judiciary. These fears may have led to several recent state statutes that encourage the development of mediation programs but also require their assessments

(Rogers and McEwen, 1989). In 1991, the Society for Professionals in Dispute Resolution recommended that all mandatory mediation programs be accompanied by ongoing monitoring.

Perhaps the most controversial issue concerning mediation is its use in cases where domestic violence is alleged to have occurred, with some critics maintaining that all domestic violence cases should be screened out (See Bryan, 1992; Woods, 1985; Bruch, 1988; Grillo, 1991). One indicator of the controversy surrounding the mediation of family disputes is the fact that several states have recently enacted or are considering legislation that would prohibit mandatory mediation where there is a history of domestic violence between the parties or require that certain safeguards be undertaken (Hart, 1992).

The empirical literature on family mediation addresses some, but not all of these issues. Since all of it has been conducted within the constraints imposed by non-laboratory settings, its conclusions are not without controversy. However, at least on certain issues, there is substantial consistency across studies which lends a certain validity to the conclusions that can be gleaned despite the methodological weaknesses of individual investigations.

The next section of this report summarizes the major studies of family mediation that have been conducted, the methodologies they have employed, and the questions they have addressed. Following this summary, we discuss the conclusions that can be drawn across studies, the contradictions that surface and the issues that remain to be addressed.

RESEARCH FINDINGS ON DIVORCE MEDIATION

| DIVORCE MEDIATION STUDIES | | | | |
|--|---|--|---|--|
| TITLE | EVALUATION AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Denver Custody Mediation Project (CMP) (1979-1991) | Center for Policy Research (Pearson & Thoennes) Piton Foundation | Denver, CO | Client characteristics, outcomes and user reactions over time; time and cost factors; compliance and relitigation | Random assignment of divorcing couples with child custody and visitation disputes to mediation (N=219) and adversarial groups (N=89) and three sets of telephone interviews over a three-year period of time |
| Divorce Mediation Research Project (DMRP) (1981-1983) | Center for Policy Research (Pearson & Thoennes) U.S. Department of Health and Human Services | Los Angeles, CA; Hartford, CT; Minneapolis, MN and Denver, CO | Client characteristics, outcomes and user reactions over time; mediator techniques; child adjustment patterns; time and cost factors, compliance and relitigation | Telephone interviews at three time points over a three-year period with 450 divorcing parents who used court-based mediation services, 100 individuals who used the traditional court system and 100 divorcing individuals with no divorce disputes. Retrospective interviews with 100 mediation clients at each site who had mediated five years earlier; in-depth interviews with parents and children and analysis of 81 audio taped mediation sessions |
| The Charlottesville Mediation Project (1982-1987) | University of Virginia (Emery et al.) | Charlottesville, VA | Client characteristics, outcomes and reactions of men versus women; psychological adjustment of adults | Random assignment of families with custody or visitation disputes to mediation (N=35) versus adversary settlement (N=36) and telephone interviews. Separate analysis for men and women concerning satisfaction and outcome as well as psychological impact of various dispute resolution experiences |
| Mandatory Divorce Mediation in Maricopa County (1986) | Conciliation Court of the Superior Court of the State of Arizona Maricopa County (Trost & Braver) | Phoenix and Tucson, AZ | Complaints, court hearings, types of agreements | Review of case files for randomly selected Domestic Relations cases filed prior to (N=745) and following (N=751); initiation of mandatory mediation |
| The Delaware Child Support Mediation Project (1984-1985) | Center for Policy Research (Pearson & Thoennes) National Institute for Dispute Resolution | Wilmington, DE | Child support order levels; user reactions | Telephone interviews with 50 individuals who mediated child support in 1983-1984 and analysis of order levels and guideline deviations for 880 cases with child support actions of which half involved mediation |
| The Equity of Mediated Divorce Agreements (1987-1990) | Center for Policy Research (Pearson & Thoennes) State Justice Institute | CA, CO, FL, IL, ME, MI, NY, OR | Terms of agreements; user reactions; cost factors | Telephone interviews with 302 individuals who utilized mediation services in one of four public or ten private sector programs |
| The Divorce Mediation Project (1983-1990) | Northern CA Mediation Center (Kelly) San Francisco Foundation, Hewlett Foundation, Fund for Research in Dispute Resolution | Marin County, CA | Client characteristics, outcomes, user reactions over time (men vs. women), psychological adjustment, terms of agreements, cost factors, spousal relationships | Longitudinal assessment of 106 couples who mediated at the NCMS and 225 adversarial respondents Who filed for divorce in Marin County. Interviews at baseline and then mailed questionnaires at four subsequent time points over a three-year period with final assessment two years post-divorce |

Table continued from preceding page

| DIVORCE MEDIATION STUDIES | | | | |
|--|--|---|---|---|
| TITLE | EVALUATION AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Divorce Settlements: Comparing Outcomes of Three Different Processes for the Resolution of Disputes: NY (1987) | Cornell University (Ray) Foundation of the Monroe County (NY) Bar and the National Institute for Dispute Resolution | 3 counties in New York | Terms of agreements | Telephone interviews with 58 parents who successfully mediated, 36 parents who used attorneys to negotiate divorce settlements, and 22 parents who required judicial assistance |
| Divorce Settlements: Comparing Outcomes of Three Different Processes for the Resolution of Disputes: Georgia (1991) | The Finger Lakes Law & Social Policy Center, Inc.(Bohmer & Ray) Fund for Research on Dispute Resolution | 3 counties in Georgia | Terms of agreements | Mailed questionnaires completed by 19 parents who used mediation, 34 who used attorneys, 18 who required judicial assistance, and 11 who negotiated without third-party assistance. |
| An Analysis of Mediation Programs at the Multi-Door Courthouse of the Superior Court of the District of Columbia (1987-1989) | The Urban Institute (Fix & Harter) State Justice Institute | Washington, DC | Outcomes, user reactions, cost factors | Telephone interviews with two non-comparable groups: 190 divorcing parents who mediated and 51 attorneys who represented them; and 144 parents and 64 attorneys in divorce cases not mediated |
| Evaluation of a Court Mediation Program (1988-1989) | Judicial Council of California/Family Court Services Superior Court of Alameda County, CA (Duryee) | Alameda County, California | Outcomes, reactions of men vs. women | Analysis of intake forms and mediator reports on 1694 cases and 209 mailed questionnaires completed by parents 6 months following mediation |
| Multi-State Assessment of Divorce Mediation and Traditional Court Processing (1988-1990) | National Center for State Courts (Keilitz et al.) State Justice Institute | Florida, Nevada, New Mexico, North Carolina | Outcomes, user reactions, time and cost factors, relitigation and compliance | Comparisons of court-based mediation programs with courts without programs in four states Across sites, interviews conducted with 191 mediating and 84 litigating parents and 93 attorneys |
| California Family Court Services Snapshot Study (1991) | Judicial Council of California/ Judicial Council of California (Depner) | 75 branch courts in California | Client characteristics, outcomes, user reactions. | Self administered questionnaires completed by clients and mediators in 1388 mediation sessions in June 1991 |
| Essex County Custody Mediation Project (1986-1990) | Rutgers University (Kressel et al.) New Jersey Administrative Offices of the Courts | Essex County, NJ | Client characteristics, outcomes, user reactions, dynamics of mediation process | Post-mediation telephone interview, audit of court files and analysis of audio and video recordings for 50 mediations in pilot court project |
| Evaluation of Mandatory Mediation in Indianapolis (1989-91) | Center for Policy Research (Thoennes et al.) State Justice Institute | Indianapolis, IN | Client characteristics, outcomes, terms of agreement, user reactions | Assessment of court information on 352 cases assigned to mediation and 331 non-equivalent cases assigned to non-mediation comparison group; telephone interviews with 124 parents in both groups and blind evaluations by six family law experts of 80 divorce agreements produced by parents who mediated and 80 agreements produced by couples not exposed to mediation |

Settlement Rates

There is little doubt that mediation is effective in disposing of a substantial proportion of contested custody and visitation cases for courts. Across studies, settlement rates stand in the 50-75 percent range. For example, in the Denver Custody Mediation Project (CMP), 60 percent of couples who mediated reached agreements (Pearson, 1981). In Essex County, New Jersey, a court-based custody mediation project reported a settlement rate of 62 percent (Kressel et al., 1991). Full or partial agreement rates in court-based mediation programs in Alameda County (Duryee, 1991) and Charlottesville, Virginia (Emery and Wyer, 1987) stood at 76 and 77 percent, respectively; only 23 percent could not agree on anything. These patterns were strikingly similar to agreement rates observed in a recent assessment of a voluntary, comprehensive, integrated mediation process in the private sector where 59 percent reached a written divorce agreement, 15 percent resolved one or more issues and 26 percent were unable to reach agreement on anything. (Kelly, 1989).

In addition to producing agreements during the sessions, several evaluations also find that mediation has various "spillover" effects that translate into more voluntary agreement-making and less judicial decision-making. For example, a majority of those who failed to produce an agreement in mediation in the CMP reached a stipulation prior to their court hearing, leaving only about 20 percent of cases in the mediation group requiring a court determination (Pearson, 1981). In Essex County, New Jersey,

notification about the mediation process triggered agreement-making in about 17 percent of the cases referred for mediation of custody/visitation disputes (Kressel et al., 1991). An assessment of court-based mediation services in four jurisdictions found that substantial proportions of cases at each site were settled after referral but prior to mediation, as well as after the conclusion of an unsuccessful mediation session (Keilitz et al., 1992). Finally, an evaluation of mandatory court mediation of custody and visitation issues in Maricopa County, Arizona, found a higher proportion of stipulations on property and support issues even though these matters were not the subject of the mediation intervention (Trost and Braver, 1986).

As a result of the tendency of most divorcing parties to reach agreements on their own and the effectiveness of court-based mediation programs, only a tiny fraction of cases proceed to trial or a judicial determination. For example, in two counties of California where court-based mediation services operate in every branch of the Family Court, only 1.5 percent of divorce filings with minor-aged children were decided by a judge; another 2.2 percent were settled during trial; and 5.2 percent were settled after case evaluation. More than half of the contested cases (55 percent) were settled with mediation (Maccoby and Mnookin, 1992). We lack precise estimates of the proportion of cases with minor-aged children that require judicial interventions when a mediation program is not available. According to one assessment in Virginia, only 31 percent of such cases settled

out-of-court (Emery and Wyer, 1987). In the CMP, half of the couples in the adversarial samples stipulated a custody/visitation arrangement and half relied on a judicial determination (Pearson, 1981).

Court Costs and Processing Times

Despite the impressive agreement rates produced in most divorce mediation programs, they appear to have little impact on the courts' overall workload. Contested custody and visitation cases comprise a small proportion of the domestic relations calendar. For example, administrators estimate that custody disputes occur in 10-20 percent of divorce cases with minor-aged children (Thoennes et al., 1991b). A recent study of custody mediation and adjudication in eight jurisdictions in four different states concluded that the proportion of cases in which child custody was contested ranged from 2 percent to 19 percent of the filings with minor-aged children (Keilitz et al., 1992). Even the successful disposition of 60-80 percent of these cases as a result of mediation may not have a big numerical effect on the court system. Nevertheless, since mediation removes many of the most time consuming, bitter, and emotionally complex cases, its impact is likely to be felt and appreciated by judges and other court workers (Fix and Harter, 1992). It should be noted that one of the major arguments in favor of the enactment of the statute making mediation mandatory in California in 1980 was the proposed cost-effectiveness of the program in Los Angeles in 1979 which handled 1,733 cases

with an estimated net savings to the county of \$280,362 (McIsaac, 1981).

Another reason for the modest effects of mediation programs on court costs and workload is that many courts require that the parties appear in court before being referred to mediation and after mediation to present agreements to the court. This was the case in Maricopa County, Arizona, where the introduction of a mediation program produced no reductions in the number of court proceedings held in such cases, although they were more likely to involve brief reviews of stipulated agreements rather than hearings on contested matters (Trost and Braver, 1987).

Mediation programs may actually increase the number of post-divorce court appearances that occur in such cases. This was the conclusion reached by researchers at the NCSC who assessed samples of couples who mediated and used traditional court procedures in four different states and observed higher numbers of hearings among the mediation samples at some sites (Keilitz et al., 1992). They speculate that this is because mediators often sensitize parents to the need to revise visiting plans periodically to reflect the changing needs of children and as a result, mediating couples return to court to make periodic adjustments. Mediation cases that do not result in agreements may consume more court resources because they require multiple interventions: mediation, evaluation or court hearings. Evaluators of Washington D.C.'s Multi-Door Court House conclude that mediation increases resources expended by the court per

case if mediator time and program administration costs are taken into account (Fix and Harter, 1992).

Research findings on the impact of mediation on case processing times is also mixed. Some studies (Emery and Wyer, 1987) conclude that settlements are reached more quickly in mediated cases as compared with litigated cases. In the CMP, only successful mediation translated into time savings. Since custody mediation required the postponement of an investigation and the continuation of a hearing, cases moved the fastest if they mediated successfully (8.5 months) or litigated (10.5 months). Conversely, cases moved the slowest if they mediated unsuccessfully and needed both mediation and litigation (14.2 months) (Pearson, 1981). The NCSC evaluation did not find that mediation had consistent effects on the pace of litigation across its four project sites, moving faster at some courts and slower at others. They underscore the complexity of case processing patterns and note that case processing times are affected by many other factors pertaining to courts and local legal culture that are not accommodated in mediation research designs (Keilitz et al., 1992).

Litigant Cost Savings

There is much less ambivalence in the research literature on the impact of mediation on savings to the parties in attorneys' fees. Virtually all studies that examine this issue find evidence of cost savings. The most impressive evidence on savings comes from an evaluation of upper middle class users of a voluntary, private service offering comprehensive mediation of all divorce

issues. Overall, a comparison group composed of divorcing parents who utilized traditional court procedures to reach their divorce agreements spent 134 percent more than members of the mediation sample. Total average divorce costs for couples in the mediation sample were \$5,243 while total average divorce costs for couples in the adversarial sample were \$12,234 (Kelly, 1990b).

Though dated, studies conducted in the late 1970s and early 1980s also show evidence of modest savings in attorneys fees. For example, in the CMP, those who successfully mediated paid an average individual legal fee of \$1,630. Those who did not mediate successfully paid an average fee of \$2,010. The purely adversarial respondents spent an average of \$2,360 (Pearson, 1981).

The only mediation study showing no savings in attorneys fees comes from attorney accounts in the NCSC comparison of mediation and non-mediation sites in four different states. Although about one-third of the attorneys at each mediation site felt that they had spent less time on the case because it went to mediation, their specific reports of hours spent on each case indicated no differences in billings due to the mediation and non-mediation forum used. This suggests that divorce billing practices may be fairly normative in geographic settings and that many attorneys may in fact use a fixed fee approach rather than billing on an hourly basis (Keilitz et al., 1992).

User Satisfaction

Another strong area of consensus in the evaluation literature is the high level of user satisfaction with both the mediation process and the outcomes it generates. With few exceptions, study after study concludes that mediation is consistently favored as compared with adversarial interventions. Most assessments find that user satisfaction falls in the 70-90 percent range. These patterns do not differ for users of mandatory versus voluntary mediation programs, challenging the notion that mediation cannot be effective and liked unless participation is voluntary. For example, in the CMP, 77 percent of all those interviewed expressed extreme satisfaction with mediation. Although those who reached agreements in mediation were most enthusiastic about the process, a substantial proportion of those who failed to reach agreement believed that it was useful and would recommend it to others (Pearson, 1981). Similarly, in their study of custody mediation in the Essex County court, researchers found that 90 percent of those who reached agreements were very satisfied with the process as were 33 percent of those who failed to reach agreements (Kressel et al., 1991).

A recent reading on user reactions to mandatory mediations for contested custody and visitation matters comes from the California snapshot, which assessed participants in 1,388 mediation sessions conducted in 75 branches of the California Family Court during a fixed period in 1991. Approximately 90 percent of users felt that the mediation process had been clear, the

mediator had good ideas, and that they had been listened to. More than three-quarters felt that the mediator had helped them see more ways to work together as parents. Nearly two-thirds felt as though the mediator also had made them aware of community resources for their families (Depner et al., 1992).

Still another reading on user satisfaction comes from the NCSC assessment of divorcing litigants in mediation and conventional court programs in four states. Although the majority of respondents in both settings felt they had participated in a fair process that yielded satisfactory results, mediation was rated more favorably on most measures of the quality and fairness of the process. Compared with their adversarial counterparts, mediation participants felt less pressured to agree to something they did not want, less intimidated by a spouse, and less pressured to reach agreement. As to outcome, mediation participants were significantly more satisfied with their agreements. While they were no more apt to feel they had received everything they wanted, they were significantly more likely to feel as though they had control over the decision (Keilitz et al., 1992). In a similar vein, surveys with clients who mediate and litigate find greater dissatisfaction with court-imposed parenting plans (Duquesnel, 1991).

Finally, in her longitudinal evaluation of mediating and litigating parents, Joan Kelly finds that users of a private service that offered comprehensive divorce mediation consistently rated it more highly on an extensive array of user

reaction measures. All but 2 of 18 significant differences between the two groups favored the mediation group. Mediation users were decidedly more satisfied with their divorce experiences, perceived them to be fairer, felt more empowered, informed, and protected and were more apt to feel as though they had equal influence over the terms of their agreements (Kelly, 1989, 1990).

Some common themes that run through many of the client satisfaction evaluations are an appreciation of the opportunity to express a point of view without interruption; the professionalism, control, and neutrality displayed by the mediator; the understandability of the process and the outcomes generated in it; and the opportunity to focus on the children and the issues pertaining to their care (Duryee, 1991; Kelly, 1990). In both the CMP and the Divorce Mediation Research Project (DMRP), 60 to 90 percent of all respondents in the studies agreed that mediation helped them to focus on the needs of the children and that this was beneficial. Seventy to ninety percent of respondents at each court mediation site in the DMRP felt that mediation had given them an opportunity to air their grievances (Pearson and Thoennes, 1989). Many mediation clients also appreciated the information-giving and educational functions of effective mediation (Duquesnel, 1991).

In contrast, several studies find that court experiences are not as favorably rated. For example, in the DMRP, fully 40 to 60 percent of those who had custody investigations felt dissatisfied with the service and perceived it to be unfair. Between 50 and 70 percent of the

respondents at all sites also expressed general dissatisfaction with the legal system. Among their objections were the impersonality of the court experience, the public and almost criminal overtones of a court appearance, and the degree of control exercised by lawyers and judges (Pearson and Thoennes, 1984b). One study found that clients who had parenting arrangements imposed from the outside tended to develop an adversarial "winner" versus "loser" mentality about themselves that carried into future transactions (Duquesnel, 1991).

Overall, the mediation research literature finds few differences in the reactions of men versus women to the mediation experience (Kelly, 1990; Depner et al., 1992; Duryee, 1991). Where gender differences appear, they tend to favor women (Kressel et al., 1991; Kelly and Duryee, 1992; Keilitz et al., 1992). The only research study to find that men who mediate were significantly more positive than women was an assessment of mediation and court users in Charlottesville, Virginia (Emery and Wyer, 1987). According to the researchers, however, men's favorable mediation ratings in that setting were due to their extreme dissatisfaction with court processes. Women reportedly felt they did well in both settings and tended to rate both mediation and litigation satisfactorily.

Of course, feelings of pressure, intimidation, and coercion, are experienced in both mediation and court processes. Although both men and women voice these complaints, women are more apt to report such feelings. But they are not necessarily a product of mediation. In the NCSC study, the respondents most apt to

report feeling pressure and intimidation during the divorce process were women in the court group. Mediation women reported feeling less coercion and more control (Keilitz et al., 1992).

User Dissatisfaction

Not everyone reacts to mediation with enthusiasm: all evaluations reveal at least some level of client disaffection; a few evaluations reveal high incidences of disappointment. For example, despite generally favorable user ratings, about half of the respondents in the DMRP reported that the mediation had been tension-filled, they had felt angry and on the defensive. Between a quarter and a third felt that the process was rushed and should be given more time. For some, the short duration created anger and perceptions of assembly line treatment (Pearson and Thoennes, 1989).

Some of these complaints surface in other evaluations of divorce mediation programs although they tend to be expressed by a minority of participants. In the CMP, approximately 15 percent of the sample felt that the mediator had failed to control the bickering and had put them on the defensive (Pearson, 1981). The California snapshot revealed that about 15 percent of mediation clients felt that the session had been rushed, they had felt pressured to go along with something they didn't want or they had felt too intimidated to say what they really thought (Depner et al., 1992). More than half of the respondents in the Essex County, New Jersey, evaluation felt that mediation had come too late in the divorce process and should have been made

available to them at an earlier point (Kressel et al., 1991).

The sources of user discontent with mediation are not entirely clear. There is some evidence that dissatisfaction may become more pronounced in single issue mediation situations, particularly those that focus exclusively on child support. Women who participated in mandatory support mediation in Indianapolis tended to feel their ex-husbands were being dishonest about their financial standing, while men tended to feel powerless and disadvantaged relative to their ex-wives. At the same time, neither mothers nor fathers in the non-mediating comparison group in Indianapolis reported themselves to be satisfied with their child support arrangements, suggesting that child support outcomes may inspire dissatisfaction regardless of where they are produced (Thoennes et al., 1991).

The quality of the mediation intervention may also be a factor in user reactions. As with legal representation, mediator quality is extremely variable. Public and private sector mediation interventions differ in scope, duration, style, and format. For example, an assessment of child support mediations in the Family Court of Delaware revealed that they were conducted in a single, 45-minute session that was devoted exclusively to calculating the child support guideline and lacked the communication, therapeutic, and bargaining features usually associated with mediation. Not surprisingly, user satisfaction was lowest in that program evaluation. Few Delaware respondents (18 percent) thought mediation "brought issues,

problems and feelings out into the open." Nearly all perceived it to be a rushed experience that should have been given more time (94 percent). Finally, when asked to compare mediation sessions with hearings by judges or masters, fewer than half felt that it was a preferable approach. Clearly, clients will suffer in programs that cut too many corners (Pearson and Thoennes, 1985a).

Still another explanation for user dissatisfaction with mediation is confusion about the procedure. In the DMRP, about 20 to 39 percent of respondents at each site agreed with the statement that "Mediation was confusing" and in-depth interviews often revealed profound misconceptions about the goals of mediation with some people expecting reconciliation counseling, others expecting a custody investigation, and still others expecting weekly counseling sessions (Pearson and Thoennes, 1984a). Perhaps for this reason, the NCSC evaluation revealed that user satisfaction ratings concerning the process were highest in Santa Fe where all mediation participants attended an orientation session aimed at explaining the process and dispelling misconceptions about it (Keilitz et al., 1992).

Types of Agreements

There is less empirical research on the adequacy and equity of agreements generated in mediation and other forums. Moreover, it is difficult to do. For example, one effort to subject agreements produced in mediation and lawyer negotiated forums to blind review by a panel of independent, legal experts was thwarted by extensive modification of mediated agreements

by private lawyers in the process of developing inter-party stipulations and final divorce decrees. As a result, the panel of reviewers was unable to reliably guess which agreements had been produced in each forum, and their ratings, which were equivalent for both groups, reflected assessments of hybrid processes rather than pure types (Thoennes et al., 1991).

The most common approach to assessing agreements produced in different forums is to survey litigants about the terms of their divorce agreements and compare them across forums. Naturally, like all assessments that rely on respondent reports, this approach is subject to errors of recall, especially about detailed financial arrangements.

While some studies find evidence of generosity in mediation agreements (Richardson, 1988) and others reveal the opposite (Ray, 1988), the general consensus across the studies is that agreements produced in different forums resemble one another in many important ways. Moreover, other legal changes, such as child support guidelines, have had the effect of reducing variation in divorce agreements.

Thus, while early evaluations revealed a tendency for mediating couples to opt for joint legal custody arrangements as compared with sole maternal custody arrangements in adversarial samples (CMP, DMRP), more recent evaluations fail to find distinct custody outcomes among those who mediate (Duquesnal, 1991). Several studies find that joint legal custody is the predominant arrangement in all dispute resolution forums (Pearson, 1990; Kelly, 1990; Duryee, 1991). In terms of day-to-day living

arrangements, regardless of forum, children tend to live with their mothers and with the exception of California, joint residential custody remains a rarity in both mediation and adversarial samples (Maccoby and Mnookin, 1992).

Most visitation patterns are also fairly consistent across forums. While some studies find that visitation arrangements are more generous in mediated agreements and that adversarial samples have more extreme either/or visitation patterns (Kelly, 1990), other studies find no difference in the number of days of contact or the types of parenting arrangements non-residential fathers have with their children (Emery and Jackson, 1989). The one consistent difference by forum is the degree of detail about visitation. Nearly every evaluation of mediated agreements finds that they are much more specific with respect to visitation and that substantial proportions of agreements generated in conventional, non-mediation forums contain vague references to "reasonable visitation." It should be noted that reasonable visitation orders characterize 40 percent of the cases handled by court programs to enforce visitation rights and confusion about such orders is credited with being a prime cause of post-dissolution relitigation (Pearson and Anhalt, 1992).

Child support guidelines have generally introduced elements of consistency in child support awards. Most recent studies find that child support is almost always ordered in sole maternal and joint legal custody arrangements, regardless of forum. Support awards tend to be missing in about half the awards with joint

legal/joint physical custody, again regardless of forum. Although an earlier New York study conducted in a pre-guidelines era indicated that child support was missing in many joint legal custody cases that quickly broke down and led to de facto sole custody without child support benefits (Ray, 1988), a more recent replication of this study in Georgia concluded that all agreements tended to have child support and that they were most apt to be missing in self-negotiated arrangements (Bohmer and Ray, 1992).

The evidence on order amounts in different forums is mixed. For example, an earlier study of order levels generated in informal sessions, dubbed mediation in Delaware, found that they were significantly lower than order levels produced in master and judicial forums (Pearson and Thoennes, 1985a). In contrast, a recent comparison on child support order levels produced in mediated, lawyer negotiated, and judicial forums in Georgia concluded that order levels were in closest compliance to guidelines in the mediation forum (Bohmer and Ray, 1992). Similarly, the NCSC evaluation found that at the one site where child support was mediated, order levels were equal to those produced at the matched court site (Keilitz et al., 1992). Mediated child support agreements were also more likely to extend coverage beyond age 18 (Kelly, 1990) and include provisions for the payment of college expenses as well as health insurance costs and uncovered medical expenses (Kelly, 1990; Pearson, 1990).

Assessments of property division and alimony awards in mediated and non-mediated agreements reveal that they are comparable and reflect prevailing legal norms (Bohmer & Ray, 1992), with wives receiving just over half the property and alimony being awarded about 20 to 25 percent of the time, mainly in lengthy marriages and high paternal income situations (Pearson, 1990).

Finally, direct questioning about the incidence of custody blackmail in mediation reveals that it is a relatively rare phenomenon. For example, in one study, about 10 percent of mothers with sole or joint custody arrangements reported feeling pressured to trade time with the children for financial concessions (Pearson & Thoennes, 1985b). In a second study, pressure was a problem for as many as 20 percent (Pearson, 1990), although women reporting pressure were more apt to be represented by attorneys, suggesting that mediation and other informal dispute resolution processes did not necessarily contribute to the problem.

Mediator Behaviors Associated with Successful Mediation

Successful mediation is a result of dispute and disputant traits as well as mediator characteristics. A statistical analysis examining these variables simultaneously revealed the importance of mediator behaviors in predicting settlement in mediation as well as willingness to recommend the process. The two indices that were best able to predict both settlement and willingness to recommend the process were users'

perceptions of the mediators' ability to facilitate communication, and of the mediators' ability to provide them with a better understanding of their own feelings and those of their children and ex-spouse (Thoennes & Pearson, 1985). This finding underscores the importance of the communicative aspects of mediation and the value of gaining insights into oneself and others during the process.

Other researchers also conclude that mediator skill and style are critical to outcomes and user reactions. For example, through a review of audiotapes and case debriefings following mediation sessions in Essex County, New Jersey, Kressel et al. (1991), identified two mediator styles that they termed settlement-oriented style (SOS) versus problem-solving style (PSS). Although both approaches worked, they found that PSS led to more durable agreements and more favorable user reactions. While SOS was focused on generating a settlement, PSS was more focused on understanding the causes of conflict through questioning and involved a departure from strict mediator neutrality if one parent was destructive during the mediation process.

The feasibility and ethics of mediator neutrality itself are also subjects of debate. Although the notion of party-driven agreements is central to mediation, mediators generally acknowledge that they act within a value context that includes safeguarding weaker parties and discouraging unjust settlements. In point is a recent analysis of audio taped mediation sessions

that revealed how mediators encouraged some outcomes and resisted others while continuing to present themselves as neutral (Greatbach and Dingwall, 1989). Since then, researchers have examined how the order in which information is presented in mediation affects the evolution of the process (Rifkin et al., 1991) and perceptions of mediator neutrality (Fuller et al., 1992).

Other mediator techniques have also surfaced in the research literature as effective. For example, an analysis of ten successful and ten unsuccessful tapes of divorce mediations generated in Los Angeles in the DMRP revealed that successful mediators used more intense structuring and reframing interventions in response to attacks than did unsuccessful mediators (Donohue, 1991). In other words, successful mediators were more apt to exercise control in such situations by rephrasing negative comments into positive ones.

Another key mediator strategy involved addressing relational concerns. In both the L.A. tape analysis and a second analysis of audiotapes of mediations in Indianapolis, researchers found that mediators who bypassed relational issues tended not to reach agreements. By exclusively focusing on resolving narrow, legal issues and avoiding a discussion of the couples' relational problems, mediators in both studies essentially tried to "arrange the deck chairs on the Titanic." Although the deck was tidy, the ship sank (Donohue, 1991 and 1993).

Kelly (1990) also found that mediation worked in many complex cases, including ones where anger and conflict were very intense, but

that these cases required more time and mediator skill. Many couples who had serious conflicts about adult and marital issues had fewer problems with respect to the children and could be helped to compartmentalize their parenting roles. In her study, high anger and low cooperation couples did reach agreements, but they needed a few more hours to do so as well as skilled and knowledgeable mediators.

Clients Amenable to Mediation

Although mediator skill stands out as a prime feature of successful mediations that are well received by participants, certain types of disputes and disputants are clearly more amenable to the process than others. The intensity of the dispute and the level of conflict between the disputants are relevant. Although most mediation clients have serious family problems and limited resources that make the sessions very tense and difficult (Depner, Cannata and Session, 1992), and positive mediation outcomes can be achieved in high conflict cases (Pearson and Thoennes, 1984b), some disputes and disputants are poor mediation candidates. For example, Kressel et al., (1991), find that while most mediation clients have serious conflicts and problems, non-settlers are apt to have multiple conflicts and less apt to have positive dispute elements like genuine caring for the children or the health and stability of one parent. The key disputant characteristic Kressel singles out as critical to outcomes is the level of parent pathology, usually that of the father. In unsuccessful cases, one parent is typically

preoccupied with his or her own needs, disparaging of the other parent, and unable to take responsibility for his or her role in the conflict.

Cases involving domestic violence.

Power imbalances, safety problems and domestic violence are other disputant characteristics that make mediation more problematic. Some national women's organizations and scholars have taken the position that mediation is always inappropriate if any domestic violence ever occurred because of fear that such women would be intimidated by the violence and would be disadvantaged by the mediation process. Among the features of mediation involving battered women that are viewed as alarming are the face-to-face format, the emphasis on compromising outcomes, the espousal of mediator neutrality, and its routine implementation in jurisdictions with mandatory approaches (Gagnon, 1992; Grillo, 1991; Germane et al., 1985; Lerman, 1984).

Although the incidence varies depending upon the way the question is asked, most studies suggest that the incidence of domestic violence and other serious issues of family dysfunction are common among separated and divorcing families. For example, the California snapshot revealed that domestic violence was alleged in 39 percent of surveyed mediation sessions; indeed, only 20 percent of families did not have serious concerns about substance abuse, child abuse, or family violence (Depner et al., 1992). Other surveys with users of public sector programs and those involved with lawyer negotiations place the incidence of reported domestic violence to up to

half the cases (Thoennes et al., 1991; Ellis and Stuckless, 1992). One recent survey of users of court mediation and evaluation programs in the Portland area found that severe abuse (beating or choking) was reported by 38 percent of the women and 20 percent of the men (Newmark, Harrell and Salem, 1993).

Unfortunately, there are no simple ways to determine whether and how divorce mediation can serve abused women fairly and safely. While some studies find that women reporting abuse are significantly less empowered than non-abused women, they appear to be no different on measures intended to detect whether they can state their needs and stand up for themselves (Newmark, Harrell and Salem, 1993). That some high conflict couples can mediate effectively can be seen in one study where 60 percent of the women reporting prior abuse and 70 percent of non-abused women described their current relationship with the ex-husbands as fairly cooperative (Thoennes et al., 1991). About half of the women reporting domestic violence said they did not feel that it had impaired their ability to communicate with their ex-spouses on an equal basis. Reports that the violence had a detrimental effect on spousal communication did not correlate well with perceptions of an imbalance of bargaining power. Only about a third of the women who said the violence had lessened their ability to communicate with their ex-spouses also reported feeling that they had less bargaining power than their ex-husbands during mediation. Moreover, this study as well as several others found that those who felt a lack of power tended to end mediation without

reaching an agreement (Kelly, 1990; Duryee, 1991; Thoennes, Pearson & Bell, 1991).

These patterns are consistent with findings obtained in a visitation mediation project conducted by the Alaska Judicial Council (DiPietro, 1992). Due to statutory criteria that excluded cases in which there had been an indication of domestic violence, 68 percent of parents requesting mediation were declared ineligible. In many of these cases, women objected to being barred from mediation because they did not expect the violence to continue or they believed that mediation would provide a safe context in which to work out their visitation problems. As one mother put it, "the violence is the least of my worries."

Indeed, a recent Canadian study of divorcing couples with a history of abuse who mediated and used legal proceedings found that the only group to evaluate mediation negatively and report further incidents of abuse were abused women who felt they had been coerced to mediate and only participated in one session. Among those who voluntarily chose mediation or engaged in a more extensive mediation experience, evaluations of the process were positive and there was no impact on post-separation aggression (Ellis, 1993).

It will clearly take more research to resolve the debate over if, when, and how to mediate when one party has been victimized by another.

Compliance and Relitigation

Although the evidence regarding the compliance and relitigation patterns associated

with mediated and adjudicated agreements is somewhat mixed, several longitudinal studies find short-term improvements in compliance and relitigation for those who mediate. For example, approximately 12 months following generation of child support and visitation orders in the 1981 sample of the CMP, custodial parents reported that a third of those who had mediated or stipulated custody reported irregular or absent child support payments as compared with over half of those who had contested custody. A comparison of accounts by those who were supposed to be exercising visitation rights reveals that none of those who had resolved their custody disputes in mediation reported visitation to be infrequent while this was reported to be the case by 30 percent of non-custodians in every other dispute category (Pearson and Thoennes, 1989).

These patterns of poorer payment and visitation in the adversarial groups, however, did not hold for DMRP samples who had mediated and adjudicated in 1978 and were interviewed four to five years later. By that time, the groups were virtually identical on the frequency of reported disagreements over visitation and nonpayment of child support (Pearson and Thoennes, 1989).

More recently, Kelly's (1990) longitudinal assessment of mediating and adjudicating couples found that the mediation group was significantly more compliant immediately after divorce and at the first year anniversary, but by the two-year assessment the differences between the two groups had vanished. In these generally compliant samples, both

groups came to resemble one another with respect to child support compliance over time.

There is even more uncertainty about the capacity of mediation to reduce relitigation. In the CMP, there was evidence of lower relitigation among mediation clients at the two-year follow-up with court modification sought by 13 percent of successful mediation clients and 35 percent of the adversarial sample. To contrast, a follow-up survey conducted in the DMRP with mediation and adversarial samples five years following divorce indicated that both groups were equally apt to return to court to modify (Pearson and Thoennes, 1989).

Other researchers also fail to find evidence of differences in relitigation. Kelly (1990) finds that one year following divorce, 15 percent of her mediation and adversarial samples had seen an attorney or returned to court to enforce or change a divorce agreement and that these proportions did not change in the ensuing year. Trost and Braver (1986) find that relitigation rates are comparable to pre-program levels following introduction of a mandatory mediation program. And in its assessment of mediation and court samples in four different states, the NCSC finds that rates of modification of custody and visitation arrangements are actually higher in some of the mediation samples, possibly reflecting the fact that mediators encourage parents to return to court to modify agreements as their circumstances change (Keilitz et al., 1992).

Given these contradictory findings, it may be safest to conclude that while mediation is not more effective than adjudication in promoting

long-term compliance and preventing relitigation, mediated agreements are no more unstable than those originating from judicial forums or lawyer-conducted negotiations.

Relationships with Ex-Spouses and Adjustment of Children and Adults

Research results on spousal relationships and the psychological adjustment of children and adults following divorce underscore that mediation is a brief intervention that essentially produces short-term effects. While several studies find that mediation produces impressive short term reductions in conflict and higher levels of cooperation among mediation participants, these advantages do not appear to last. For example, one longitudinal study found that the improvements evidenced during the divorce process and in the first year following mediation vanished over the subsequent 12 months (Kelly, 1990). At the two-year anniversary of the divorce, adversarial and mediation groups looked alike with respect to general conflict (although in this sample mediation respondents continued to perceive the other parent as a source of assistance).

In a similar vein, researchers have been generally unable to find that mediation affects psychological adjustment. In two studies that examined adult adjustment, there were no significant differences between mediation and adversarial samples; improvements observed between initial and final assessments were due to the passage of time rather than the forum of dispute resolution (Kelly, 1990; Emery and Wyer, 1987).

As to child adjustment, while the assessment of children in the DMRP whose parents successfully mediated were generally the best, further analysis revealed that child adjustment was a product of family dynamics and overall environment rather than a result of dispute resolution forum (Pearson and Thoennes, 1988). A more recent assessment of parent perceptions of child adjustment found that parents who were satisfied with their post-divorce parenting arrangements rated their children more favorably, regardless of forum. Nevertheless, because parents who mediated tended to be more satisfied with their plans, they also gave more favorable child adjustment ratings (Duquesnel, 1991). Regardless of forum, it appears that children in high-conflict and violent families disputing custody were more disturbed than normal populations and that parents were more emotionally dysfunctional (Johnson, 1992).

Mediation Formats

Unfortunately, few studies have explicitly assessed the impact of various mediation formats like the pros and cons of mandatory versus voluntary referral systems or the use of pre-mediation orientation sessions. Several of the assessments suffer from various methodological problems. For example, one effort to compare divorce cases randomly assigned to mediation and non-mediation treatments in Indianapolis revealed tremendous self-selection out of mediation, with only 11.4 percent of filings targeted for experimental treatment actually engaged in mediation

(Thoennes, Pearson & Bell, 1991). Another study aimed at comparing contesting couples with a domestic violence history who were randomly assigned to mediation versus custody evaluation had to be abandoned because couples preferred the mediation option and refused the evaluation treatment (Newmark, Harrell & Salem, 1993).

Still another barrier to a more rigorous analysis of mediation formats is the imprecision in terminology. For example, in some jurisdictions with "voluntary" mediation, individual judges "strongly recommend" that couples mediate; conversely, in some "mandatory" jurisdictions, the court imposes no sanctions for failure to appear and the bar and the general public may fail to take the mediation order seriously.

A final difficulty in assessing the viability of mediation formats is the issue of program quality. Public and private sector mediation interventions differ in scope, duration, style, and mediation personnel. To some extent, the variable readings gleaned in assessments of various formats may reflect quality issues rather than intrinsic features of the program. Given these caveats, it is nevertheless important to note the limited reading available on key format options.

Mandatory vs. voluntary. As to mandatory approaches, several studies comparing mandatory mediation clients with their voluntary counterparts find that agreement rates are comparable as are satisfaction levels, willingness to recommend the process to others,

and support for mandatory formats. Similarly, there were no differences in ratings by mediation users in California court programs that utilized confidential formats versus programs that required the mediator to report to the court where couples failed to produce agreements on their own (Depner et al., 1992).

Pre-mediation orientation. The one reading in the literature on the impact of a pre-mediation orientation programs comes from the NCSC evaluation of mediation at four different court sites. At the one site that used a pre-mediation orientation, Santa Fe, user ratings were significantly more favorable on some items suggesting that the sessions may influence the litigants' perceptions of the more general effects of the mediation process. On many other measures of mediation outcome, however, there were no differences across sites, suggesting that the impact of orientation does not extend to the level of satisfaction the parties have with the agreements they reach in mediation (Keilitz et al., 1992). Nevertheless, since many clients appear to appreciate the education and information-giving functions that mediators perform (Duquesnel, 1991) it would appear that other, focused educational interventions might be extremely beneficial.

Mediator characteristics and training. Although there have been no rigorous comparisons of mediator characteristics and training levels on outcomes, the limited available data suggests few differences. For example, there were no differences in user ratings across the four sites in the NCSC study that tracked with the in-house versus contractor status of the

mediation personnel. As a result, the authors conclude that contract arrangements are clearly viable and that each program should be developed to fit the needs of the courts and communities in which they are housed (Keilitz et al., 1992).

Comparisons of lawyer-trained versus social worker-trained mediators in the CMP also failed to reveal consistent differences. Indeed, the only background characteristic that was associated with more favorable outcomes was the experience level of the mediator. For both lawyers and social workers, agreement rates and approval ratings improved significantly after they had mediated five cases (Pearson, 1981). A recent evaluation of mandatory, comprehensive mediation in Maine finds support for the use of volunteer lay people who present little threat to the role of lawyers in the divorce process (McEwen et al., 1993).

Scope of issues mediated. There is limited evidence on the pros and cons of mediating custody/visitation issues in isolation versus using comprehensive formats that consider both financial and child matters. While some program administrators believe that joint consideration will promote trade-offs between time with the children and money, the arguments for issue separation tend to be pragmatic. They include the relative acceptance of custody and visitation mediation by lawyers, the comfort level of court mediators who tend to have a mental health background, and limitations in program resources. Clearly, the mediation of financial issues requires different types of mediator training and is likely to be resisted by the bar if

lawyers are not expected to participate in the process.

There are many similarities in agreement rates and user satisfaction levels across evaluations of comprehensive formats and those restricted to custody and visitation issues (Keilitz et al., 1992; Duryee, 1991; Kelly, 1990). Among the studies favoring comprehensive formats is one conducted in Canada indicating greater generosity in mediated maintenance awards (Richardson, 1988) and one conducted in England and Wales that found that financial and child custody issues were interrelated and that isolated settlement of one issue was unstable (Ogus et al., 1989). The NCSC evaluation of mediation in four court sites found that agreement rates were highest (79 percent) in Brevard County, where child support was mediated along with custody and visitation issues, and that satisfaction levels were comparable (Keilitz et al., 1992). One consistent benefit to a comprehensive mediation format is greater client savings in attorneys' fees (Kelly, 1990; Pearson, 1991).

Two studies of child support mediation revealed high levels of user dissatisfaction and lower child support order levels (Pearson and Thoennes, 1985; Thoennes et al., 1991). It is not clear whether these findings reflected antipathy to the child support issue in every forum, program quality issues, or the scope of issues being mediated.

Domestic violence policies. One of the most controversial format issues concerns mediation in cases where domestic violence has

occurred. Several courts currently attempt to screen for domestic violence, although this is not a simple process. There is always the risk that women will not disclose the abuse, even when the screening occurs without her partner present. Nor is it an easy matter to decide on a definition for domestic violence. One study that involved an assessment of domestic violence among court mediation program users in Hawaii found that most involved relatively minor episodes, but that about half the women who reported violence also described themselves as frightened of the abuser (Chandler, 1990). Different interventions are warranted depending on whether the violence is part of an ongoing, episodic dynamic of family violence; a one-time event due to stress or trauma; or the result of psychopathology or drug addiction (Johnston and Campbell, 1990).

If screening for domestic violence is challenging, so too is deciding what to do once cases have been identified. An Alaskan study of visitation mediation where 67 percent of the cases were excluded because of a history of abuse revealed that many excluded women felt further victimized by the exclusion and believed that they should have been allowed to make the choice (DiPietro, 1992). Several state statutes (Hart, 1992) and courts have developed procedures to ensure the provision of safe, fair mediation services when abuse has occurred. For example, Maine's Domestic Abuse and Mediation Project (Maine, 1992) recommended the use of "shuttle" mediation, where the mediator moves between the disputing parties. Another approach endorsed by several courts would allow battered

women to have an advocate available during mediation. Still other courts suspend mandatory formats or provide victims of battering with orientation programs that explain their various legal options. None of these approaches has been empirically assessed.

Role of attorneys. A final format issue deals with the role of attorneys in the mediation process. Mediation practices differ on lawyer presence, with some programs excluding them and others including them on a routine basis. A recent evaluation of mandatory, comprehensive divorce mediation in the state of Maine found strong lawyer support for the program. Most

interviewed lawyers in Maine reported attending the mediation session and found it an extremely helpful way to pursue negotiations, prepare for trial, involve clients, assist them with legal and non-legal issues, and to manage cases (McEwen et al., 1993).

The model of mediation used in Maine, where all the parties and their attorneys are required to come together at one time with a facilitator for a detailed face-to-face discussion, closely resembles the mediation format used in child maltreatment cases. This type of mediation is discussed in the next section of this report.

RESEARCH FINDINGS ON MEDIATION OF CHILD MALTREATMENT CASES

| CHILD ABUSE MEDIATION STUDIES | | | | |
|--|---|--|--|--|
| TITLE | FUNDED AND CONDUCTED BY | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Child Protection Mediation in Colorado (1984-1986) | Center for Policy Research and CDR Associates (Thoennes & Mayer) National Center for Child Abuse and Neglect | Denver, CO | Case characteristics, outcomes, terms of agreements, compliance, user reactions. | Assessment of 67 mediated child welfare cases using records kept by mediators, telephone interviews with caseworkers, mediators, GALs, attorneys, and parents, and follow-up interviews with key actors in the case six months later to assess compliance patterns. Experts assessed agreements produced in 25 mediated cases. |
| Child Protection Mediation in Washington, DC (1987) | Center for Policy Research (Thoennes) National Institute for Dispute Resolution | Washington, DC | Case referral factors. | In-depth interviews with project participants and other child welfare professionals. |
| The Mediation of Child Abuse and Neglect Cases (1989-1992) | Center for Policy Research (Thoennes) State Justice Institute | Los Angeles and Orange County, CA; Hartford, CT. | Case characteristics, outcomes, terms of agreements, compliance, user reactions. | Observations of mediations, qualitative interviews with professionals who participate in the process, and collection of information on 729 cases from files maintained by the Juvenile Court and child welfare agency. |

The literature on the advisability of incorporating mediation into the resolution of child maltreatment cases is sparser than the divorce mediation literature. Relatively few programs exist and even fewer have been the subject of evaluations. For example, two demonstration projects were funded in the 1980's. Both were targeted at the intake stage of the child protection process and mediation was used to prevent court filings. In both settings, the use of the service was voluntary and largely dependent upon social worker referrals. To different degrees, both programs were underutilized and required considerable efforts to elicit referrals and to coordinate mediation interventions with social workers and families.

The first effort to introduce mediation into the juvenile court process in dependency cases occurred in one Los Angeles juvenile court in 1983. Court filings that were not successfully negotiated by the attorneys in the case were automatically set for mediation. The program has since expanded throughout the county. A pre-trial settlement conference program utilizing mediation techniques was launched the following year in the Family Division of the Connecticut Superior Courts. In 1987, Orange County, California, responded to judicial concerns over increasing numbers of juvenile court filings by implementing a mediation service within its juvenile court. All three pioneer court programs were recently evaluated by the Center for Policy

research (CPR) (Thoennes, 1992). The issues addressed in the research on mediation in child maltreatment cases include factors that influence settlement rates, power imbalances, safety of children, and compliance rates.

The findings from CPR's study indicate that while there was initial resistance to mediation among the professionals who were expected to participate at each site, all three court programs have grown and gained strong community support. Today, the following points are frequently cited as reasons underlying the support for mediation of abuse/neglect matters in court settings:

- Cases settle in mediation. This is evidence that all settlement efforts have not been exhausted at the point of mediation, and negotiable points do remain. It is also proof that mediation is not merely an additional step prior to a hearing. It can, in fact, replace a contested hearing.
- Mediation can protect children. In every system, most child protection cases are resolved without resorting to a contested hearing. The mediation process simply formalizes the process, moving it from hallway exchanges between a few parties to sessions with all relevant parties present.
- Parents are not at a disadvantage in mediation. Mediation does not require parents to mediate "one-on-one" with the CPS agency. The parent's attorney is

present during the mediation and generally takes primary negotiating responsibility.

- Imbalances of power can be addressed in mediation. The imbalances may be the result of different skill levels, differing degrees of experience, or differences in professional status between social workers and attorneys. Mediators can help the less powerful party by giving this person an opportunity to speak, rephrasing points, or stopping exchanges that are angry and unproductive.
- Parents are more likely to be involved in mediation than in other negotiating forums. Mediation provides an opportunity to elicit parental input. It offers a chance to explain to the parents--sometimes for the first time--what is transpiring and what they will need to do to have their children returned home.

As to mediation outcomes and compliance rates, the CPR evaluation found that settlement rates at the three court sites ranged from 60 to 80 percent. Although mediators and mediation participants identified several types of cases that they believed were especially difficult to mediate (e.g., cases with criminal charges pending, cases where parents have mental health problems, cases involving disputes among family members, and sexual abuse cases), these patterns were not totally supported in the empirical analysis. Indeed, case data revealed few

correlates of settlement in mediation. Further, the variables that were identified rarely cut across the sites. Thus, the factors related to settlement varied greatly by site and included the following:

- Criminal charges had not been filed (Connecticut)
- The perpetrator had a known drug or alcohol abuse problem (Connecticut)
- The maltreatment involved serious physical abuse (Connecticut)
- Sexual abuse was not alleged (Los Angeles County)
- There were prior abuse neglect reports (Orange County)

Although it appears counterintuitive that settlement would occur in cases with prior maltreatment reports, drug or alcohol problems, or serious injuries resulting from physical abuse, it may well be that in these types of cases the parents' attorney saw little hope for a better resolution through a court hearing and felt that cooperation in mediation would be the best method of avoiding a long-term placement or termination of parental rights.

In Connecticut and Orange County, there were associations between the issues discussed and the outcome of mediation. However, only a single pattern held across these two sites: mediations that included discussions about the child's placement outside the home were less likely to result in a settlement. It may be that

disputes over placement are not easily resolved. Both sides may view this as a fundamental, non-negotiable issue. In Connecticut and Orange County, there was also a positive relationship between parental attendance at the mediation session and the production of an agreement.

Not surprisingly, there was little difference between the terms of mediated and non-mediated agreements produced at the court sites. In part, this reflected the similar needs of many cases, the limited service options available and the fact that, regardless of the forum in which the plan is produced, the same individuals had input into the conditions of the treatment plan. The only real difference between mediated and non-mediated plans was the greater likelihood that victims received services through mediated agreements at two of the sites. In one site, there was also a greater likelihood that parents with mediated agreements received multiple services--especially counseling.

Compliance problems were common at all three sites; child welfare agency records indicated that non-compliance occurred in nearly half of all the cases. However, in two of the three sites, there were significant differences between mediated and non-mediated cases, with mediated cases displaying better compliance.

Recommendations and Conclusions

The most fundamental conclusion to be drawn from research on court-based divorce and child protection mediation is that it represents an important, useful adjunct to court practices in both types of cases. In the child protection arena.

mediation brings all the relevant parties together at one place and time and allows for the sharing of information, options, and ideas that can resolve disputes, clarify the issues, or narrow the differences. It represents a significant improvement over the pre-trial approaches utilized in most juvenile courts, which involve rushed, informal meetings conducted between hearings that include some, but frequently not all, of the parties.

In the divorce arena, the research shows that mediation also has had impressive effects. Despite the brevity of most court based mediation interventions, they are frequently the only forms of assistance available to a growing pro se population. More to the point, mediation is usually effective, leading to the production of agreements that are perceived to be highly satisfactory and fair, even among non-custodians and others who may be viewed to have lost, and even after statistically controlling for initial levels of cooperation. The process does not eliminate conflict between divorcing parents, but it is typically viewed as less damaging than adversarial interventions. While more research on outcomes and power differentials in mediation is needed, the evidence available to date suggests that mediation results in agreements that are virtually identical to those produced in other forums at greater cost saving to the parents. And while it cannot reduce later relitigation or consistently inspire compliance, mediation does not generate excessive litigation or merely defer inevitable litigation. Parents appear to differentiate mediators based on their perceptions of the mediator's skills but not to evaluate

voluntary and mandatory mediation differently. Outcomes are better predicted by mediator expertise in facilitating communication and problem solving than by the characteristics of disputants and their disputes.

Clearly the research does not lend empirical support to the more extreme fears of unfairness and imbalance voiced by mediation critics. At the same time, the research also fails to support many of the hopes and claims made by mediation reformers. In both child protection and divorce mediation contexts, non-compliance and recidivism are serious problems. The mediation forum does not revolutionize communication and behavior patterns in dysfunctional and/or divorcing families. Similarly, mediation outcomes resemble those generated in other forums and share many of the same weaknesses. Thus, mediated child protection agreements reflect the limited service options available for child welfare populations in most communities and fall short of what is probably needed to help families and truly protect children. And while divorce mediation does not appear to exacerbate the financial predicament of women and children following divorce, it does not appear to do a better job of protecting them from severe financial dislocations. It is a mistake to expect the mediation forum to produce changes that require more basic social and economic reforms and to fault it for failing to do so.

The research findings have many implications for courts contemplating mediation programs. One is the danger of expecting the program to produce reductions in court costs and workload. Because mediated cases comprise a

small proportion of the court's overall workload, even highly effective mediation programs divert relatively few cases from judicial calendars. Moreover, requirements for judicial review and the need to use multiple treatments in unsuccessfully mediated cases may translate into higher case costs. Case processing time and court costs depend much more on complicated factors pertaining to caseload management, the quality of court administration and local legal culture than on whether or not there is a mediation program.

At the same time, the research shows that mediation programs have the potential to serve courts in many important ways. They are credited with removing more complex and vexing cases from judicial calendars and are appreciated by the bench. While mediated agreements resemble non-mediated ones in most respects, they typically contain more detail about visitation arrangements and avoid the use of vague, reasonable visitation orders that often bring parents back to court. In child protection cases, they tend to call for more extensive referral to community resources and counseling. Despite the brevity of many mediation sessions, they are lengthier than most judicial interventions. This extra time and personal attention is generally appreciated by participants and translates into more favorable user reactions than conventional court experiences garner. Finally, although long-term compliance remains elusive, many studies find significant improvements in short-term compliance, in excess of one year following mediation.

Mediation, however, is not automatically associated with user satisfaction--participants respond to quality factors. The research findings should cause courts to examine the quality of the mediation services they offer. More research is needed on the components of quality mediation. Outcomes appear to be more durable and appreciated when mediation involves more communicative and problem-solving approaches rather than those that are narrowly focused on producing agreements. Moreover, attention to relational issues appears to be basic to the goals of mediation and not simply a frill that can be dispensed with in time-pressured situations. The need for extra time and attention to underlying relational issues is particularly important with very angry couples. Admittedly, this means lengthier and more costly mediation interventions with more highly skilled and better trained mediators. On the other hand, programs that simply strive to expedite case processing and handle the largest number of cases at lowest cost will accomplish much less than they otherwise might.

We lack clear empirical direction on many important format issues. Thus, most outcome patterns are essentially comparable for programs employing mandatory versus voluntary formats; those stressing confidentiality versus those in which mediators report to the judiciary; those that deal with custody and visitation issues versus those that also deal with financial issues; those that use volunteer or staff mediators versus those that contract with private mediators; and programs that utilize orientations versus those

that do not. Although there is a great deal of interest in the use of educational programs for divorcing parents, there is little information on their impact. To the extent that there are differences by format, it appears that individuals in comprehensive mediation formats realize greater savings in private attorney fees, and that pre-mediation orientation programs help to dispel some misconceptions about the mediation process and track with more favorable process ratings. In two studies of what was essentially mandatory child support mediation, order levels were lower than those produced in other forums, users were dissatisfied and the mandatory approach was resented. Unfortunately, both studies were unable to determine whether these outcomes reflected basic frustrations with negotiations over child support, the brief and focused style of the mediation sessions, or their mandatory nature.

In general, courts should shape programs to reflect the needs and capacities of the community in which they are situated. Among the practical considerations to keep in mind is the fact that mandatory formats attract greater program usage than voluntary ones (although even in mandatory programs, attendance at mediation sessions requires judicial commitment and communication with the bar). In addition, the mediation of financial issues in court settings is more controversial but is supported by lawyers if they can participate in the mediation process. We have only begun to examine the various roles lawyers play in the mediation process. While relatively rare in divorce mediation programs,

lawyer participation is the norm in all child maltreatment mediation sessions.

Another issue that has not yet been addressed in research or court practice in most settings is serving the needs of unmarried parents. The dramatic rise in out-of-wedlock births suggests that this population warrants attention. At minimum, including never-married parents in court mediation programs will require the adoption of new procedures to make it accessible to this population, the extension of mediator expertise to a host of new issues, and the creation of supportive services like supervised visitation.

The issues of power balancing, fairness, and intimidation are critical ones. Unfortunately, the research to date tends to highlight the complexity of these issues rather than yielding firm implications for policy. While several studies confirm that domestic violence is a problem in up to half of mediating divorce cases, they also show that much of it is minor and fails to correlate with perceived ability to communicate with an ex-spouse, fear or perceived imbalance. To further complicate the picture, research finds that some women who have been barred from mediation because of a domestic violence incident feel further victimized by their exclusion and that men and women who feel a lack of power tend to end mediation without reaching an agreement. At the same time, one study found that participation in mediation tracked with post-mediation violence among abused women who had been coerced to attend a single mediation session.

To date, none of the procedures recommended to enhance the safety of mediation when abuse has occurred have been empirically assessed. This includes various screening devices, shuttle mediation techniques and/or the use of a victim advocate during the mediation process. Clearly, this research is needed. Moreover, it may be most prudent for courts with mandatory programs to make participation voluntary when abuse is a factor. However, there is some indication that at least some of the concern may be misplaced. Standards of practice for mediators typically address issues of power imbalance and domestic violence (Norton et al., 1992). The same cannot be inferred lawyers and judges. Preliminary research from a Canadian investigation comparing mediation and adversarial procedures in divorce situations where domestic violence has occurred suggests that mediators are more sensitive to these issues than private attorneys and judges (Ellis, 1993).

Perhaps the most important messages for courts from research on family mediation are that the impact of either mediation or traditional court processing on the long-term welfare of families is limited, and that there is a need to develop community resources that address the underlying problems that dysfunctional and divorced families face. For example, to enhance safety, supervised visitation services are needed so that couples who should be kept apart may exchange their children in a non-threatening setting and parent-child contact may occur when allegations concerning safety are made. In a similar vein, communities need an array of relevant investigation, counseling, drug treatment, and support services to which parents may be referred. Moreover, to the extent that unemployment, underemployment, job instability and other financial considerations contribute to family violence and non-compliance with court orders, the long-term solution for many may require more basic economic reforms.

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Multi-Door Courthouse

*A Working Paper for the
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MULTI-DOOR COURTHOUSE

INTRODUCTION

Research about multi-door courthouses has focused on both implementation and case processing issues. Several of the major studies conducted of multi-door courthouses focus on individual processes for civil cases rather than on the design and application of the multi-door courthouse model. These studies are included in this paper with additional research on non-multi-door courthouse dispute resolution programs for civil cases being addressed in the Civil Dispute Resolution Processes Working Paper. Many of the research issues and implications for both civil dispute resolution and multi-door courthouse programs are identical.

The differences between individual court-annexed dispute resolution programs and multi-door courthouses are significant. The multi-door courthouse model provides a coordinated approach to dispute resolution with intake and referral operating under one centralized program, rather than independently. This model allows for substantial flexibility of intake and referral procedures to meet the needs and resources of each jurisdiction. Other court-connected dispute resolution programs generally offer a single dispute resolution process and categorical case referral. (See Civil Dispute Resolution Processes Working Paper.) The design, implementation, and coordination of effective and efficient dispute resolution systems within the court is a vital function of a multi-door courthouse program.

THE MULTI-DOOR COURTHOUSE

The concept of the multi-door courthouse was first put forth in 1976 by Harvard Law School Professor Frank E. A. Sander at the Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (commonly referred to as the Pound Conference.) Sander (1976) proposed assigning certain cases to alternative dispute resolution processes, or a sequence of processes, after screening in a dispute resolution center.

As a centralized intake and diagnostic center to screen cases for referral to the most appropriate type of dispute resolution process (which comprise all of the "doors"), the multi-door courthouse model significantly broadens the current structure of the court's intake process. The multi-door courthouse concept was implemented in three jurisdictions in 1984 and 1985 (Roehl, 1986) with the support of the American Bar Association's Standing Committee on Dispute Resolution (now the Section on Dispute Resolution). Washington, D.C., Houston, Texas, and Tulsa, Oklahoma were chosen as the initial sites after a process of outreach, application, and site review was completed (Roehl, 1986.) Less than a year later, the Comprehensive Justice Center, a program based on the multi-door concept, was implemented by the Superior Court in Burlington County, New Jersey, under grant funds from the state's Administrative Office of the Courts. In 1989, a multi-door courthouse was established in

Cambridge, Massachusetts, with funding from a variety of private, public, and state court grants (Lowe, 1992).

The American Bar Association's Standing Committee on Dispute Resolution stated the following objectives of the 18-month Phase I of the multi-door program:

- Increase the public awareness of dispute resolution processes
- Assist citizens in locating dispute resolution forums
- Increase coordination among dispute resolution programs
- Offer a selection of high quality dispute resolution mechanisms
- Assist parties and the court in selecting the most suitable dispute resolution mechanisms
- Recruit, train, and maintain a cadre of qualified neutrals.

The Screening Function

A basic tenet of the multi-door courthouse model is diagnostic screening of cases entering or already filed in the court system. Screening may be categorical, individualized, or a combination of these two. The type of case and structure of the court system usually define the types of screening mechanisms utilized.

Categorical Screening

Categorical screening may be by case type, dispute resolution type, age of case, amount of claim, or other common factor.

Categorical screening by case type.

Cases falling within certain pre-defined

categories are referred to a particular dispute resolution process. Examples include the referral of small claims cases to mediation on the day of trial at both the Comprehensive Justice Center in Burlington County, New Jersey and the District of Columbia Multi-Door Dispute Resolution Division and referral of motor vehicle tort cases to arbitration at the Comprehensive Justice Center. All cases or a selected portion may be referred, depending on resources and statutory definitions and limitations. Such categories include among others, the value of the claim, party representation, and type of case.

Categorical screening by dispute

resolution process. On occasion, programs such as settlement weeks are developed to which all types of civil cases may be referred. Settlement weeks such as those held by the D.C. Multi-Door Dispute Resolution Division offer the opportunity to refer large numbers of cases in a defined period of time to mediation (or in some instances, to case evaluation) with judicial support available during the defined period.

Individualized Screening

In individualized screenings, each case is individually diagnosed for needs and appropriate dispute resolution referral.

Individual case screening conference.

At the Middlesex Multi-Door Courthouse (MMDC) in Cambridge, Massachusetts, an individual case screening conference is conducted by professional staff who meet with all of the attorneys (and litigants when available) involved in the case for a diagnostic assessment of the case's needs. The screener recommends the

process and assigns the best neutral for the issues that need to be addressed. Legal and non-legal issues are addressed and vital case management functions occur, including mediation of discovery issues, in the screening conference (Lowe & Keilitz, 1992).

Citizen intake. In Burlington County, New Jersey, an Intake Specialist is available to work with pre-filing cases or those already filed in the court. The screening of pre-filing cases may be done either in person or via telephone contact upon a referral by one party involved in the dispute or by police or court personnel. Referral to volunteer mediators, social service agencies, governmental agencies, or legal resources may be made.

Washington, D.C.'s Multi-Door Dispute Resolution Division staffs an Intake and Referral Center to assist residents of the area, in person or by telephone, in conciliating the dispute or providing referral to an appropriate legal, social service, governmental, or dispute resolution organization. The intake staff investigates resources and will work with the citizen to develop a plan of action, which may involve successive steps, to resolve the dispute.

Computerized assessment. In Washington, D.C., attorneys involved in some cases entering the Multi-Door Courthouse Division complete a computerized assessment form. After analysis, a recommendation as to the most appropriate dispute resolution processes is provided to the judge for use at the four month scheduling conference.

Combination. A combination of categorical and individual screening may occur.

In some programs, domestic relations cases may be screened for potential or actual violence to determine the appropriateness of referral to dispute resolution. In the Middlesex Multi-Door Courthouse, a project diverted all motor vehicle and premises liability cases to an abbreviated individualized screening conference.

Dispute Resolution Processes: The "Doors"

Unlike court-connected programs that are designed for one case type or one dispute resolution process, multi-door courthouses offer and coordinate more than one "door" for resolution of disputes and handle a variety of cases. The doors may include mediation, arbitration (binding or non-binding), case evaluation (early neutral evaluation or bar paneling), complex case management, summary jury trials, mini-trials, and adjudication. Events and programs such as settlement weeks, statutory diversion of certain cases (e.g. mandatory arbitration in motor vehicle tort cases under a certain damage limit), and police and court clerk referral training programs, for example, may also be coordinated through a multi-door courthouse. A comparison of three programs is offered below:

The Burlington County Comprehensive Justice Center operates or monitors at least 20 dispute resolution programs in every division of the Superior Court. Programs in the civil division (including small claims, landlord/tenant mediation, automobile arbitration, and civil case evaluation programs), family division (including a truancy mediation program and a school based mediation program), criminal division, and

municipal division (including volunteer community mediation and a program in which all police officers in a township were trained in diversion techniques) have been operating for many years.

The Middlesex Multi-Door Courthouse operates in the Superior Court, where larger civil cases with a filing threshold of \$25,000 are handled, and in the Probate and Family Court. Mediation, case evaluation, complex case management, arbitration (binding), summary jury trials and mini-trials are all available as necessary for Superior Court cases. Mediation is offered in the Probate and Family Court for issues involving custody, property division, child and spousal support, modifications, and many other issues, including will disputes.

Approximately 1,000 cases per year are scheduled for screening with 25 mediators, 25 case evaluators, and a flexible pool of arbitrators available. Settlement weeks are being planned for 1994, and proposals for expansion into other court departments have been submitted. User fees are charged for dispute resolution in the Superior Court program but not in the Probate and Family Court Program, which has been using the volunteer services of 20 highly trained and experienced divorce and family mediators for up to 40 cases per month.

The District of Columbia's Multi-Door Dispute Resolution Division operates in the Superior Court and processes almost 10,000 cases each year with the assistance of more than 600 neutrals. Services are provided at no charge. Dispute resolution mechanisms are integrated into the case processing systems for all civil,

family, probate, and tax assessment cases.

Mediation is mandatory for small claims cases under \$2,000 and collection cases under \$25,000. Mediation, binding and non-binding arbitration, and neutral case evaluation are required for simple to complex civil matters. Furthermore, parties are required to consider mediation for all family cases including issues of child support, custody, visitation, property division, and spousal support. In addition, probate and tax assessment cases are routinely referred to mediation. An intake and referral service assists citizens locate and utilize resources within and outside of the courthouse. The Division recruits, selects, trains, and monitors the performance of more than 600 neutrals who are paid a stipend on a per-case basis.

Issues Raised About Multi-Door Courthouses

Since the inception of multi-door courthouses, there have been questions about the impact on the trial court and on the cases these programs handle. Some of these questions are addressed or alluded to in the research considered in this paper.

Cost. What is the cost to litigants for traditional litigation compared to alternative dispute resolution, including legal fees, fees charged for dispute resolution, and other costs? Should user fees be charged for court-annexed dispute resolution or should the court fund these processes through increased filing fees or other mechanisms? What is the true cost to the court in terms of personnel, overhead, and other direct and indirect costs? Is it worth it? Are multi-door

courthouses worth the cost when compared to the cost of stand-alone dispute resolution programs?

Time. Do these processes reduce case processing time?

Satisfaction. Do ADR processes provide greater satisfaction for litigants and attorneys? Are the users satisfied with the neutrals used by the program? Are the courts satisfied with the programs?

Neutrals. What does the research say about matching neutrals to cases, especially in terms of content area knowledge and experience? How do these programs supervise their neutrals, and are there minimum qualifications for inclusion in the pool? What training is required or provided for neutrals to be included in the pool? What are the quality assurance mechanisms used? Should neutrals be volunteers or paid and is there a difference in quality or settlement rates? If neutrals are paid, how much and by whom?

Processes. What processes are actually being studied? Are the same names being used for different processes? What processes work best for which cases? Are settlement rates affected by the length of the process?

Screening/Intake. When should cases be screened? When should cases enter dispute resolution? Where should screening occur: in courts or community centers? What types of screening mechanisms work best and do they affect settlement? Who should conduct the screening: judges, ADR professionals, computerized assessment from self-report forms?

Other. Do these processes affect compliance with the outcome? Should they be mandatory or voluntary and does this affect settlement rates, satisfaction, cost, and other factors? How do multi-door courthouses compare with stand-alone dispute resolution programs in the courts?

CONCLUSIONS OF STUDIES

Overview

Little research on multi-door courthouses is reported in the literature. Some internal program evaluations in the form of descriptive statistics are available, but only a few independent research projects using experimental or quasi-experimental designs with comparison groups have been completed. This review reports these more rigorous studies as well as the primarily descriptive evaluations.

The lack of standardized nomenclature for dispute resolution processes makes comparison of programs difficult. Meaningful comparisons cannot be made without knowing what process is being evaluated. For example, some mediators in Burlington County and the District of Columbia offered an evaluation of the case or recommended settlement options. Other variations across programs add to the difficulties: those that are mandatory (New Jersey's automobile tort arbitration program) and voluntary (Middlesex) and which case types are included (motor vehicle torts in New Jersey; all torts and other case types in Middlesex).

| MULTI-DOOR COURTHOUSE STUDIES | | | | |
|---|---|--|---|--|
| TITLE OF STUDY | EVALUATORS AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Multi-Door Dispute Resolution Centers Phase I: Intake and Referral Assessment Executive Summary Final Draft (1986) | Janice Roehl American Bar Association Special Committee on Dispute Resolution National Institute of Justice | Washington, DC, Tulsa, OK, and Houston, TX | Development and implementation of first 3 multi-door courthouses, assess process and outcome of intake and referral systems | Observation, staff interviews, materials review, post-process interviews with participants in 1200 cases |
| Evaluation of the Phase I Settlement Plan at DC Superior Courts (1990) Civil Dispute Resolution Program: A Survey of Program Participants (1992) | DC Research and Development Division DC Research and Development Division | Washington, DC Washington, DC | Case characteristics, processing factors, mediation outcomes Assess litigant and attorney perceptions of dispute resolution processes, performance of neutrals | Tracked settlement rates, post mediation questionnaires in 817 cases Surveys of attorneys and litigants in 119 cases handled in dispute resolution during summer, 1992 |
| Middlesex Multi-Door Courthouse Evaluation Project, Final Report. (1992) | National Center for State Courts (Lowe and Keilitz) State Justice Institute | Cambridge, MA | Assess effectiveness of program, the screening and referral process, cost effectiveness, satisfaction of users, speed of processing | Experimental design with random selection of more than 2500 civil cases from court docket; litigant and attorney interviews and questionnaires; interviews of staff, court personnel, judges, steering committee members; case file analysis; observation of case screening conferences; docket review |
| Middlesex Multi-Door Courthouse Annual Report, 1992 (1992) | Middlesex Multi-Door Courthouse (Gray) | Cambridge, MA | Case processing and settlement rates for 1992 | Descriptive data for 973 cases processed in 1992 |
| Civil Case Mediation and Comprehensive Justice Centers: Process, Quality of Justice, and Value to State Courts (1992) | Institute for Social Analysis (Roehl and Lianeras) State Justice Institute | Burlington County, NJ | Assess quality of justice, perceptions of fairness, effectiveness and impact on state courts of mediation in small claims and other civil cases; describe the integration and coordination of dispute resolution services in state court operations | Experimental design with 397 small claims and other low value civil cases (213 mediated and 184 tried); observation of all mediation sessions and trials; litigant questionnaire; post process interviews of litigants; interviews of court staff and judges |

Participant satisfaction. There is substantial evidence that attorneys and litigants are more satisfied with dispute resolution in a variety of areas than they are with the court (D.C. Research and Development Division, 1992; Lowe & Keilitz, 1992; Roehl, 1992). These areas include satisfaction with the procedure and outcome (Roehl, 1992; Lowe & Keilitz, 1992), neutral's performance (Lowe & Keilitz, 1992; D.C. Research & Development Division, 1992), and with the process assigned. Although the consistency of these findings does not necessarily imply dissatisfaction with traditional court

processing, significant weight must be given by the court to the implications of this analysis. In addition, courts in which multi-door courthouse programs operate report a great deal of satisfaction with the program (Lowe & Keilitz, 1992; Roehl, 1992).

Cost. Determining the costs to litigants and the courts is perhaps the most difficult issue to measure with any accuracy. The studies that have addressed cost have compared factors assumed to influence the cost of case processing (e.g., number of hearings held and motions filed). However, no direct measures of cost have been

made, in part because value of services differ by jurisdiction and program type.

With this in mind, significant cost savings for both litigants and the courts were found in Superior Court cases using the Middlesex Multi-Door Courthouse. This conclusion is made from the findings that 25 percent more attorney hours were reported, one-third more motions were filed, and more documents per case were processed for cases remaining in the traditional litigation track (Lowe & Keilitz, 1992). For small claims cases in Burlington County, use of mediation was found to significantly reduce the costs to the courts (Roehl, 1992).

Time. Day of trial processes such as small claims mediation do not generally result in time savings for litigants or the courts. Small claims mediation may take approximately twice as long as trial (Roehl, 1992), unlike dispute resolution of Superior Court civil cases, which generally takes considerably less time than trial (Gray, 1992). Significant judicial and court staff time savings were documented in New Jersey when mediation was used (Roehl, 1992).

Intake/screening and choice of process. Little research has been conducted on case screening and referral mechanisms. There is some evidence, however, that personalized attention may positively affect case settlement. In Washington, D.C.'s program, settlement rates are greater in cases in which a neutral has made contact with the parties before the mediation (Washington, D.C. Research & Development, 1992). The individual case screening conference at the Middlesex Multi-Door Courthouse appears

to serve the same purpose of preparing cases for mediation and determining stumbling blocks (e.g., settlement authority, outstanding discovery issues) as does pre-mediation contact by the mediator (Lowe & Keilitz, 1992; Gray, 1992). At the Middlesex Multi-Door Courthouse, a significantly greater proportion of individually screened cases entered dispute resolution and had higher settlement rates than those that were categorically screened (Gray, 1992).

Compliance. Logic would suggest that agreements entered into voluntarily through a process in which the litigants control the outcome would have higher compliance rates than when a decision is imposed by someone else. This has been borne out by the research in small claims mediation (Roehl, 1992), which shows substantially higher levels of compliance for payment in full and in part by litigants who use mediation. This effect carries through to a lesser degree when small claims cases are tried following an unsuccessful mediation. In civil cases involving larger claims, a substantially higher compliance rate has been shown in mediated cases (Fix, 1992). There are no reported data regarding compliance with dispute resolution processes other than for mediation.

Voluntary or mandatory. The limited available research suggests that voluntary dispute resolution in civil cases may result in greater satisfaction and higher settlement rates than with mandatory dispute resolution (Gray, 1992), but no known research has specifically addressed this issue.

The neutrals. Some studies indicate that the matching of a case with a neutral who has specific content area knowledge results in increased satisfaction and higher settlement rates (D.C. Research and Development, Division, 1990 and 1992; Lowe & Keilitz, 1992). Mediators' styles may differ, with some providing a facilitative mediation and others an evaluative mediation (D.C. Research & Development Division, 1990; Roehl, 1992). How does this difference affect the outcome and the process?

Evaluation Results

Implementation of Multi-Door Courthouses

- ***Multi-Door Dispute Resolution Centers Phase 1: Intake and Referral Assessment Executive Summary Final Draft. Janice Roehl, 1986. (Funded by the American Bar Association Special Committee on Dispute Resolution and the National Institute of Justice)***

Purpose: This study documents the development and implementation of the first three multi-door courthouse projects (Washington, D.C., Houston, Texas, and Tulsa, Oklahoma) and assesses the process and outcome of the intake and referral procedures developed in these jurisdictions. Documentation of caseloads and procedures, tracking of cases from intake to disposition, documentation of the dispute resolution processes used, assessment of litigant satisfaction, and assessment of satisfaction of referral sources are provided for each program.

Study Design: Observation, staff interviews, and materials review were the basis

for documentation of the programs' development, implementation, and operations. Databases were created for each center to gather information about caseload and referral decisions, follow-up interviews with litigants in over 1,200 cases were completed within six months of intake, and interviews were conducted with representatives of referral agencies.

General Conclusions: Each multi-door courthouse was designed and implemented to fit the needs of the jurisdiction in which it is located. Therefore, there are substantial variations among the programs, particularly in the intake sites and type of caseloads.

Tulsa's Citizen Complaint Center handled consumer disputes, minor criminal cases, neighborhood disputes, and other similarly small disputes. Intake was conducted in the prosecutor's office. Referrals to the Center were made through a television action line, the Better Business Bureau, and the bar association.

Washington's Multi-Door Dispute Resolution Division handled small claims, civil matters, domestic relations/family, and landlord/tenant. The division was established as part of the Superior Court, and intake staff were located at the court. Cases were referred by the court and the Lawyer Referral and Information Center.

Houston's Dispute Resolution Center handled money and property disputes, minor assaults, and harassment and threat disputes. Intake points operated at the district attorney's office, city prosecutor's office, Neighborhood Justice Center, Justice of the Peace Court, and two community centers.

The study concluded that the multi-door dispute resolution programs were successfully established in all three cities with effective intake and referral procedures that provided services to thousands of citizens during the 18-month pilot phase.

Over 40 percent of the disputes handled through intake were resolved and reactions of citizen users and referral agencies were very positive about the programs. Users in 90 percent of the cases reported that they were fully or partially satisfied while 92 percent said they would use the service again. There was some confusion reported in distinguishing the multi-door courthouse staff from staff of the agencies in which the intake unit was housed.

Differences in referrals among programs were found. In Tulsa, 18 percent of the cases were referred to mediation while 46 percent of the cases in Houston and 43 percent of the cases in D.C. were similarly referred. In D.C., very few cases were referred to the court or prosecutors while almost one-third of the cases in Tulsa and Houston were so referred. Across all centers, 43 percent of the cases were resolved at the time of the follow-up interviews.

Washington, D.C.'s Multi-Door Dispute Resolution Division

- *Evaluation of the Phase I Settlement Plan at D.C. Superior Courts: November 13 - December 8, 1989. Research and Development Division, District of Columbia Courts, April 1990.*

Purpose: This evaluation focuses on a descriptive approach to quantifying settlement

rates in terms of case characteristics, litigant characteristics, mediator involvement, attendance at mediation session, length of mediation session, amount claimed, and content area knowledge of the mediator assigned to the case. Cost, satisfaction, time, and compliance issues were not directly addressed in this study.

Study Design: In late 1989, the D.C. Superior Court converted its calendar from a master system to an individual system. In the first stage of this conversion, more than 800 civil cases were ordered to participate in mediated settlement conferences. The Court's Research and Development Division designed this evaluation effort to track case characteristics, processing factors and mediation outcomes for all cases. In addition to tracking settlement rates, questionnaires completed by mediators and attorneys provided data about the impact of pre-mediation contact and matching of mediator expertise with case type on settlement. Other factors considered included whether mediators provided valuations of the case to the participants, either in private or joint sessions. Cases included in this project were personal tort cases, contract cases, and property tort cases.

General Conclusions: Fifty-nine percent of the 817 cases that were scheduled for a mediated settlement conference were resolved or otherwise disposed and removed from the pending caseload. Of the cases resolved or otherwise disposed, 24 percent (186) resolved before the scheduled conference, 35 percent (275) resolved as a direct result of the mediated settlement conference, 25 percent were not settled, while the remaining cases were continued.

rescheduled, canceled, or later disposed. Of those cases actually mediated, 40 percent were settled, 12 percent were continued, and 48 percent were not settled.

Property tort cases comprised only 16 percent of all mediated cases, yet had the greatest likelihood of settlement through mediated settlement conferences (47 percent settlement rate). 42 percent of the contract cases, which represented 25 percent of the cases, settled while 38 percent of personal injury cases, comprising 54 percent of the cases, settled.

The size of monetary claims significantly affected the settlement rates. Those with the lowest values settled at greater rates. Settlement rates for cases valued at less than \$10,000 were 52 percent, compared to 47 percent for cases valued between \$10,000 and \$50,000, 43 percent for cases valued between \$50,000 and \$100,000, and 39 percent for cases valued between \$100,000 and \$500,000. Whether or not the mediator placed a value on the case was reported by attorneys to be a factor in settlement.

Pre-conference contact between the mediator and the parties resulted in higher settlement rates, and matching of mediator expertise to case type resulted in slightly higher settlement rates. The length of the session also impacted settlements, with short sessions (less than one hour) and longer sessions (more than two hours) resulting in slightly higher settlement rates than sessions lasting between one and two hours. Cases with pro se litigants also had higher settlement rates.

- ***Civil Dispute Resolution Program: A Survey of Program Participants. Research and Development Division, District of Columbia Courts, October 1992.***

Purpose: To assess attorney and litigant perceptions of the dispute resolution processes and the performance of the neutrals assigned to the case in an effort to ensure delivery of high quality, professional services.

Study Design: Surveys were conducted among attorneys and litigants who participated in the Civil Dispute Resolution Program during the summer of 1992. This program provides arbitration, mediation, and case evaluation services. In all civil cases, approximately four months after filing the parties attend a judicial scheduling conference where they discuss using dispute resolution and a decision is made as to whether the court will order a dispute resolution process. All such orders set a date for concluding the process.

In this study, attorneys were surveyed by telephone, while litigants received a self-administered, written questionnaire. Neutrals distributed these questionnaires to litigants at the close of the dispute resolution process with instructions to complete the questionnaire, place it in a sealed envelope, and drop it in the "Litigant Survey Box" located in the dispute resolution meeting room. Most of the arbitration and case evaluation cases were motor vehicle claims while most mediation cases were non-motor vehicle personal injury cases. The sample included 40 cases that were sent to arbitration

and 79 cases that were sent to mediation or case evaluation.

General Conclusions: More than 200 attorneys and 75 litigants participated in the survey. Of the attorneys surveyed, 81 percent were satisfied with their neutral's performance in mediation, 77 percent in arbitration, and 71 percent in case evaluation. Attorneys in 93 percent of cases assigned to arbitration by a judge agreed with this choice of process, 86 percent assigned to mediation were satisfied with this assignment, while 59 percent of the attorneys in cases assigned to case evaluation agreed with this assignment. The attorneys most commonly cited two concerns regarding program procedures: 1) that cases and neutrals should be matched more closely by the neutral's expertise in the content area of the case; and 2) that outstanding discovery issues and the lack of full settlement authority of attorneys participating in the dispute resolution process often precluded the possibility of settlement.

In those cases assigned to arbitration, 7 of the 40 cases settled before the hearing. Following the arbitration hearing, 15 percent planned to file trial de novo requests even though a penalty is imposed. Of the cases sent to mediation or case evaluation, 24 percent settled as the result of the process. Attorneys in 76 percent of cases not settled during dispute resolution cited pending motions and discovery issues as well as lack of settlement authority as factors that precluded settlement. These rates do not include pre-dispute resolution settlement rates.

In cases assigned to or selecting arbitration, non-binding arbitration was preferred to binding arbitration in 85 percent of the cases due to lack of adequate information about the neutral's background or experience being provided to attorneys. Attorneys suggested that the court provide more information in these areas to better assist with selection of neutrals for the case. Dissatisfied participants expressed concern with the arbitrator's qualifications and recommended better matching of neutral expertise to the case.

Middlesex Multi-Door Courthouse Cambridge, Massachusetts

- *Middlesex Multi-Door Courthouse Evaluation Project, Final Report. Robert Lowe, Susan Keilitz, National Center for State Courts, March 1992. (Funded by a grant from the State Justice Institute)*

Purpose: To provide useful information for the Superior Court, as well as all jurisdictions interested in developing a multi-door courthouse the evaluation assessed the overall effectiveness of the program, the screening and referral processes, and the cost effectiveness of the program.

Study Design: An experimental design was used with random selection at approximately 6.5 months after filing of both a control group and experimental group from the same population of civil cases in which both a complaint and answer(s) had been filed with the Superior Court. The experimental group of cases was processed in the Middlesex Multi-Door

Courthouse (MMDC) while the control cases were processed in traditional court. The evaluation period was July 1, 1990 through September 30, 1991 and included 1,256 experimental group cases with an equal number of control group cases designated.

Litigants and attorneys were asked to complete questionnaires at the conclusion of screening conferences and dispute resolution processes for experimental cases. Attorneys in the control group received mailed surveys. Case file analysis determined cost and resource requirements of processing cases. Dates of case filing and settlement or disposition were collected from the court's docket book to measure case processing time. Additionally, case screening conferences were observed and interviews of court personnel, program staff, program steering committee members, and others were completed. Neither settlement rates nor compliance data were directly addressed in this study.

General Conclusions: Participants in the experimental group were more satisfied with the manner of case presentation in dispute resolution, the ways in which legal and non-legal issues were addressed, the opportunity to participate in structuring the outcome of the case, and the fairness of the process, regardless of the dispute resolution process selected, than were those in the control group. More than 90 percent of those responding from the experimental group would consider using the dispute resolution process again, and all indicated that they would be willing to use the neutral again (97 percent to 100 percent). The court also reported a great deal of satisfaction with the program.

Significant differences between the experimental group and control group were noted in the following areas: over 25 percent more attorney hours were spent on control group cases than on MMDC cases; one-third more motions were filed in control group cases than in MMDC group cases, and more documents per case were processed by the clerk's office in control group cases. Although participants in dispute resolution must pay user fees, dispute resolution appears to be cost effective for litigants as well as for the courts.

Median time from filing to settlement was calculated for all cases. Similar case processing times were discovered for both the MMDC group and the control group. This may be accounted for by the fact that MMDC cases entered the process only 7.5 to 8.5 months after filing. However, the median time from the screening of the case by the MMDC staff to disposition (settlement or return to court) was 34 days.

The individual case screening process, mandated by the court for all MMDC cases, served its intended functions of addressing issues that affect the case and its movement towards resolution, educating attorneys and litigants about dispute resolution and the options available to them for case resolution, as well as serving as a successful and effective diagnostic tool for selection of the most appropriate dispute resolution process and neutral, according to exit questionnaires and interview responses by attorneys, litigants, judges, and court personnel.

The evaluators concluded that the neutrals used by the MMDC are well qualified

and respected by the bar and the screeners are familiar with the specialized skills and areas of expertise of the neutrals and can match the neutral to the case. Almost all respondents in cases using dispute resolution thought that the neutral fit the case (93-98 percent) and would be willing to use the neutral again (97-100 percent). Neutrals viewed the program as well organized and well run and found the pre-dispute resolution screening to be very important because it provided information about the issues involved in the case.

MMDC staff made recommendations at the mandatory screening conference as to the most appropriate dispute resolution process for each case. Selection of any dispute resolution process was voluntary and parties could choose a process other than the one recommended by the screener. Approximately one-third of the cases elected to use dispute resolution during the evaluation period. Of the cases selecting dispute resolution, almost 92 percent of motor vehicle tort cases selected case evaluation while more than 74 percent of the contract cases selected mediation.

- ***Middlesex Multi-Door Courthouse Annual Report, 1992. Ericka B. Gray, 1992.***

Purpose: To report case processing and settlement rates for the calendar year 1992.

Study Design: This report provides a description of case intake and outcomes during 1992. The cases included are Superior Court cases (filing threshold of \$25,000 minimum) and all civil case types.

General Conclusions: Of the 655 cases scheduled for a screening conference in 1992, 30 (five percent) settled before screening, 5 cases were canceled for valid reasons, and 16 cases chose to use private dispute resolution providers. Therefore, 604 cases were actually screened. Fifty-six (nine percent) of these settled at or after screening without entering dispute resolution, while 402 (61 percent) of the cases entered a dispute resolution process. An additional 218 tort (motor vehicle and premises liability) cases were scheduled for case evaluation without a screening conference in the case diversion program. These cases could opt-out of the program without penalty and most did with only 28 percent choosing to use the process.

During 1992, 672 cases selected to use or were assigned to a dispute resolution process. Sixty-seven percent of the cases were assigned to or elected to use case evaluation, 31 percent elected mediation, 1 percent selected binding arbitration, and half a percent selected complex case management. No cases elected to use mini-trials or summary jury trials.

Case diversion cases settled at a lower rate than those that were screened. Only 45 percent of these cases settled at the case evaluation or within 60 days following the evaluation. In contrast, of those cases entering case evaluation following a screening conference, 69 percent settled. Cases entering mediation settled at the rate of 63 percent.

**Comprehensive Justice Center
Burlington County, New Jersey**

- ***Civil Case Mediation and Comprehensive Justice Centers: Process, Quality of Justice, and Value to State Courts, Final Report. Janice Roehl, Rebekah Hersch, Ed Lianeras, Institute for Social Analysis, December 1992. (Funded by a grant from the State Justice Institute)***

Purpose: "To assess the quality of justice, particularly procedural justice and perceptions of fairness, effectiveness, and impact on state courts of mediation services for small claims and other relatively low value civil cases" and "to describe the integration and coordination of dispute resolution services (i.e., Comprehensive Justice Centers) in state court operations."

Study Design: This evaluation concentrated on only one program of the Comprehensive Justice Center operating in the Burlington County Superior Court, New Jersey. Its day-of-trial mediations for small claims (up to \$1,000) and special civil (up to \$5,000) cases were the focus of this evaluation. Almost all cases were referred to mediation on day of trial by the judge who then heard those cases that did not settle in mediation. To provide a control group of cases that were tried and not mediated, mediation was suspended during designated months. All 397 cases included in this study were observed by research staff, with 184 of these cases in trial and 213 in mediation. Of the cases that were mediated and did not settle, researchers also observed the trial. A self-report questionnaire was provided to all litigants during

the study to determine basic demographic information and to provide information necessary for follow-up. Follow-up interviews were conducted with 447 disputants (representing at least one disputant for 81 percent of the cases studied.) Another program model in Hudson County, New Jersey, is described but not studied due to the inability to establish an experimental design.

General Conclusions: Mediation for small claims cases was found to be fair and effective. Disputants reported significantly higher levels of fairness with mediators, outcomes, and mediation sessions than disputants in adjudicated cases. Disputant's perceptions of procedural justice were a primary focus of this study. Satisfaction levels for all categories were higher for the mediated cases than for the court cases. Although "technically voluntary," referral by the judge was perceived to be a mandate to use mediation. No disputants refused to participate in mediation. Additional supervision and monitoring of the trained volunteer mediators, trained law clerks, and volunteer attorneys was recommended to ensure the quality of the services provided. Some neutrals were less facilitative and more evaluative than others, and some neutrals recommended settlements.

Day-of-trial mediation did not affect the cost to disputants but significantly reduced the time and personnel expenses of the court. When all cases were tried, rather than sent to mediation, two additional judges plus their court staff and additional security were necessary to handle the caseload. Time for case processing was almost

identical as mediation was provided on the day of trial. Since most cases were scheduled for trial within a few weeks of the complaint being filed, time was not a significant issues for these cases.

Fifty-five percent of the mediated cases settled. Cases in which defendants admitted some liability for the claim settled at a significantly higher rate than those in which liability was contested. No other factors were noted that affected settlement rates in this study.

Compliance with mediated agreements stood at 65 percent of losers paying in full, 25 percent paying partially, and only 10 percent not paying anything. In all cases decided by the court (including cases that were mediated without an agreement and referred to trial), 60 percent of those who did not prevail in court paid in full, 9 percent paid partially, and 31 percent did not pay anything.

IMPLICATIONS FOR COURT AND PROGRAM MANAGEMENT AND FUTURE RESEARCH NEEDS

Because multi-door courthouses are mechanisms for promoting, coordinating, and managing various dispute resolution processes, the issues critical to understanding the effectiveness of these processes are germane to the operation and management of multi-door courthouses. It follows that the implications for court and program management arising from the studies of these individual processes apply to multi-door courthouses as well. Those engaged in designing, implementing, and managing multi-door courthouses should review the working papers on civil dispute resolution processes; court-annexed arbitration; family mediation;

private dispute resolution; and selection, training, and qualification of neutrals, which present the implications from the research on these processes. There has been little empirical examination of the mechanics and procedures of multi-door courthouses, and the few implications for program management relate to intake and referral processes. These implications are discussed below within the context of needed research on intake and referral.

Although the research to date on multi-door courthouses is limited, it has provided significant benefits for managing and operating these programs. Further research is a priority, however, for those who are charged with funding, implementing, regulating, managing, and evaluating these programs to justify their continuation and to make effective decisions about the best use of limited resources. There is general consensus among judges and court managers that far too little empirical data exist and that available information is difficult to synthesize and use effectively. Pragmatic information is needed about how dispute resolution affects caseflow management, delay reduction, litigant and court costs, litigant and attorney satisfaction, and case settlement. What is the impact of integrating dispute resolution programs with the court's case processing system? Do such programs affect the efficiency of case processing, in terms not only of time, but also of their impact on management of discovery issues and on coordination of case management efforts within the court system? Are there standardized models for program implementation? What are the success rates, and

how is success defined? Is satisfaction with dispute resolution different from satisfaction with traditional litigation in which most civil cases settle through negotiation before trial? These questions and those that follow overlap substantially with questions about civil dispute resolution processes that warrant further research.

Participant satisfaction. The issue of satisfaction has been researched in more depth than most others and the findings of greater satisfaction with dispute resolution than with traditional court processing are consistent across all studies and all case types. There is a suggestion that satisfaction may be influenced by whether the process is voluntary or mandatory, and whether the participants have any choice in the procedure used. However, these issues require further study with emphasis on how satisfaction is defined and what measures are used to evaluate satisfaction. In addition, questions as to how satisfaction is influenced by prior experience with ADR, the effect of the use of ADR on the litigant/attorney relationship and on the attitudes of litigants and attorneys, and whether mandatory or voluntary referrals lead to greater satisfaction are of interest to those who are involved in funding, developing, managing, and evaluating multi-door courthouse projects.

Cost. Like most agencies struggling with funding and budget issues, courts often make decisions about programming based on cost. In fact, research into the issue of the cost of ADR is a high priority for courts. Allocation of scarce resources is an ever-present concern of those charged with running the court system.

Without evidence that ADR is cost effective, or that it provides significant advantages over traditional litigation, courts and state legislators may be reluctant to provide or continue the funding necessary to operate multi-door courthouse programs. To date, little reliable information has been reported to support the notion that dispute resolution costs less for courts and for litigants. Suggested areas of future research on multi-door courthouse programs include analysis of systemic cost savings as well as the impact on costs for litigants, attorneys, insurers, and taxpayers.

Time. Several issues related to case processing time that require further study or that have not yet been studied include the impact of length of the dispute resolution process on settlement rates, satisfaction, and subsequent trial time if no settlement was reached; at what point in the litigation process the dispute resolution intervention should occur; whether dispute resolution affects the number of hours attorneys and litigants spend in case preparation and trial; the extent to which program management is time intensive and how this affects quality of programming, settlement rates, and costs; and whether citizen intake diverts cases from traditional litigation thereby resulting in time and cost savings for both the courts and the litigants. Speed of case disposition is an important area for further research because it directly affects the courts' efforts to reduce delay and costs to the system and its users. Courts are beginning to seek better mechanisms to divert disputes before they enter the court system. Is ADR, in the form of a multi-door courthouse program or other

court-annexed program, an effective tool for pre-filing diversion of civil cases?

Intake/screening and choice of process.

The question of which process is best for which case and how to best determine this is a hotly debated issue in the dispute resolution field. It is also an issue of great interest for those who fund and manage multi-door courthouses and other types of court-annexed ADR programs. For example, popular wisdom holds that cases best suited to mediation are those in which there is an ongoing relationship among the parties. However, the popularity and success of mediation for civil cases in which there is no ongoing relationship (motor vehicle torts and some small claims cases, for example) seems to dispel this limiting notion. Research is needed to provide information as to which dispute resolution process is best suited to each case. Indeed, courts are very interested in whether centralized or decentralized intake and screening mechanisms are most effective, or whether the type of process matters less than the availability of any process. If more individualized screening mechanisms are found to be more effective in case management, case diversion, and case disposition, are the improvements in effectiveness sufficiently significant to justify the cost of such procedures? What factors influence whether litigants choose to participate in dispute resolution, and what factors are most important in promoting selection of the best process for each case? To what degree do the personal dynamics of the parties and their counsel rather than case characteristics impact the selection of dispute resolution processes? Random assignment of cases

encompassing a range of issues to different dispute resolution processes would provide important information about case screening as would comparisons of programs within the same court system that use different methods of screening.

Washington, D.C.'s Multi-Door Dispute Resolution Division uses a computerized assessment that focuses on a number of factors that may have some value in guiding the selection of dispute resolution process. This assessment is used by judges in discussions with the attorneys at a four month scheduling conference in which issues such as time of ADR, case complexity, discovery schedules, and motions are discussed. In addition, the neutral often calls the parties in advance of the dispute resolution process to clarify settlement authority, case posture, and other issues. Settlement rates are higher in cases in which the neutral has made this contact with the parties.

The Middlesex Multi-Door Courthouse relies on an individual case screening conference for its large civil cases. This approach provides the opportunity for both the legal and non-legal issues that impact case resolution to be addressed early and in terms of use of dispute resolution. The subjective case factors, such as relationships among attorneys, between attorneys and clients, contested discovery issues, disputes among litigants that are not delineated in the current complaint, and many others have often been the key to appropriate case matching. These issues are not likely to be discerned from a computerized assessment or categorical referral of cases to a particular process. However, the

question remains whether generalizations can be made and intake streamlined so that labor intensive screening mechanisms can be reduced or eliminated without a loss of effectiveness.

Voluntary or mandatory. There is little empirical information to guide courts on the differences between voluntary or mandatory dispute resolution programs in their impact on the court and on litigants. Voluntary dispute resolution processes have substantially lower volumes than do mandatory processes, but voluntary participation appears to have positive effects on compliance and may result in greater satisfaction and higher settlement rates than mandatory dispute resolution (Gray, 1992). However, research has not specifically addressed this issue. If, in fact, satisfaction and settlement rates are lower in mandated dispute resolution processes, are the rates sufficient for the courts to continue to use mandatory programs? Do mandatory programs have a greater impact on court caseloads than do voluntary programs, which may rely upon self-referral or more labor intensive individualized screening? How does satisfaction with mandatory dispute resolution compare to satisfaction with traditional adjudication? Do court orders mandating participation in dispute resolution bring attorneys to the table who otherwise would not propose use of a dispute resolution process to avoid showing any weakness in their client's case? Do mandatory programs expose attorneys and litigants to processes which they may then choose to use voluntarily in another case, thereby providing an educational benefit? A related policy issue that research might enlighten is

whether courts should mandate the use of programs or procedures that may cost litigants money and time.

Neutrals. A variety of issues regarding the selection, training, qualifications, and performance of neutrals have yet to be addressed in the research. These issues include, among others, the effect of volunteer or fee-for-service neutrals, matching neutrals expertise and experience to cases, basic qualifications and training requirements, and monitoring and evaluating neutrals' performance. These issues should be examined in the context of their effects on the quality of the dispute resolution process, outcomes, satisfaction, and the rate at which parties choose to participate in dispute resolution.

Evaluation. The lack of funding has been a primary deterrent to research. Intensive, well designed studies are usually expensive and time consuming. Courts rarely have extra money to spend on research and often are more interested in implementing programs with all possible speed than in searching for grants to evaluate program effects. Moreover, the few funding agencies that may be interested in dispute resolution are inundated with requests for their limited funds. Because research funds are limited, courts should consider including evaluation or a research project in the implementation phase of the program. Not only will data not be lost, early evaluation may be helpful in quickly streamlining policies and procedures and eliminating ineffective or costly programming. Collaboration between the courts and universities in developing high quality research efforts also should be considered. The

social sciences train many graduate students who are required to complete research, and as the field of dispute resolution grows, student researchers and the courts may benefit mutually by involving the students in court evaluation programs.

Summary. Multi-door courthouses, designed to provide a more comprehensive approach to ADR than individual ADR programs can provide, are more costly to establish but are well regarded by the courts in which they operate. This is partly due to the volume of cases which can be processed, the ability to work within the court to coordinate case processing systems, and the quality of and satisfaction with services provided by attorneys, litigants, and court personnel. The coordinated approach to dispute resolution within the administrative structure of the trial court, a basic tenet of the multi-door courthouse model, also provides significant administrative support to the court with the ability to respond to changing case trends quickly and effectively. Care should be taken to provide the necessary resources and to

complete a thorough needs assessment prior to implementing a multi-door courthouse, however.

Some courts have experienced ADR programs that have not met the needs of the court or litigants. It is likely that programs that fail are more often the result of inadequate needs assessment, poor program design, lack of cooperation from key sectors (such as the judiciary or the bar), lack of training and supervision of the neutrals, limited or no funding, and other factors that are totally unrelated to the dispute resolution processes themselves. Unfortunately, courts that have had experience with inadequate ADR programs may be reluctant to try again. Program specialists who know the courts and who know dispute resolution are available to provide assistance to courts in designing and implementing dispute resolution processes. The cost savings related to establishing an effective program versus one that fails appear to be significant and sufficient advance planning appears to save money and provide credibility and good will in the long term.

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Community Justice and Victim-Offender Mediation

*A Working Paper for the
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Dispute Resolution Research
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COMMUNITY JUSTICE AND VICTIM OFFENDER MEDIATION

COMMUNITY JUSTICE PROGRAMS

Introduction

Community justice programs, also known as community mediation, neighborhood justice centers, or dispute settlement centers, substitute mediation for adjudication to resolve disputes among persons with ongoing or prior relationships. (The term "community mediation" is used in this working paper.) Three neighborhood justice centers, created by the U.S. Department of Justice in 1977 in Atlanta, Kansas City, and Los Angeles, spurred the development of community mediation. The programs have various goals, including reducing court backlogs and delays, resolving disputes with greater satisfaction of the parties, increasing people's access to justice, and empowering local residents by enabling them to resolve their disputes and reduce tensions without recourse to the state (McGillis, 1986; Roehl and Cook, 1982). The primary method used by the community programs to resolve disputes is mediation--the parties negotiate toward a mutually agreeable settlement with the assistance of a mediator, usually a trained, unpaid volunteer, who has no power to impose a disposition.

Typical types of cases handled by the programs are (1) minor criminal charges between persons related as couples, relatives, neighbors, or friends; and (2) small civil cases involving landlord-tenant, consumer-merchant, and employer-employee disputes. Many programs rely heavily on the courts or police to refer cases,

while still accepting "self-referred" cases brought in by disputants directly.

Key ideas in the theory of community mediation are satisfaction with the process, voluntary participation, and getting at underlying problems. Disputants are believed to find the process of mediation more satisfying, or perceive it as fairer, than standard court procedure, principally because they have more control over the process and can "tell their side of the story" as well as hear the other side's. Voluntary participation is thought to make the parties more likely to comply with the result of mediation than with a judgment imposed by authority of the court (McEwen and Maiman, 1984). Mediation advocates claim that mediation is more effective than adjudication because it can address the underlying causes of the dispute, while courts are constrained to deal with narrowly defined legal issues (Felstiner and Williams, 1978, 1980, 1982). A related concept in mediation theory is that ongoing interpersonal relationships make mediation more successful than standard court procedures because of (1) the parties' desire to preserve these relationships and (2) their ability to influence each other (Clarke et al., 1992: 10-11).

Issues Addressed by the Research

Research on community mediation has addressed the following issues:

- How many eligible cases do community mediation programs reach, and to what extent do disputants participate?
- Do community mediation programs lessen court and correctional costs? And do such savings justify the programs' own costs?
- Do community mediation programs satisfy participants more than the regular court process?
- How well do participants in community mediation comply with mediated agreements compared to adjudicated outcomes, and do community mediation programs reduce recidivism?
- Do community mediation programs deal with "underlying causes" of disputes?
- Do community mediation programs lessen community tensions and reduce reliance on court to solve problems?

Conclusions of Studies

| COMMUNITY MEDIATION STUDIES | | | | |
|--|--|---|---|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Neighborhood Justice Centers (NJC) Study (1978-79) | Roehl and Cook (1982); Cook, Roehl, and Sheppard (1980) National Institute of Justice | Atlanta, Kansas City, and Los Angeles | Organization, types of cases handled, referral and participation, effect on court workload and costs, satisfaction, compliance | Primarily descriptive; some use of small matched comparison group |
| Dorchester, MA Urban Court Study (1976-77) | Felstiner and Williams (1982, 1980, 1978) Law Enforcement Assistance Administration | Dorchester, MA | Training, organization, types of cases handled, referral and participation, effect on court workload and costs, satisfaction, compliance, recidivism (repeated charges) | Descriptive (no control or comparison group) |
| Brooklyn, NY Dispute Center (1977-78) | Vera Institute of Justice (Davis, Tichane, and Grayson (1979); Davis (1982)) New York State Division of Criminal Justice Services | Brooklyn, NY | Training, organization, types of cases handled, referral and participation, effect on court workload and costs, satisfaction, compliance, recidivism (repeated charges), parties' relationships | Random assignment to control and experimental groups |
| North Carolina Community Mediation Study (1990-91) | Institute of Government, University of North Carolina (Clarke, Valente, and Mace (1992)) State Justice Institute | Henderson, Iredell, and Durham Counties, NC | Organization, types of cases handled, mediator characteristics, referral and participation, effect on court workload, satisfaction, compliance, recidivism (repeated charges), parties' relationships | Quasi-experimental (three program counties matched with three nonprogram counties) |

The evaluations covered in this review were selected because they investigated major issues systematically and in considerable depth. As shown in the accompanying table, they dealt with programs in eight locations.

How many eligible cases do community mediation programs reach, and to what extent do disputants participate? Judging from the research reviewed, community mediation programs reach only a fraction of related-party criminal cases suitable for mediation (19 to 23 percent in the Dorchester and North Carolina studies and 30 percent in the Brooklyn study). Many complainants have used the regular court procedure before their current case and consider it successful in solving their problems with defendants. Therefore, complainants may prefer to stick to the regular court process unless they are persuaded that mediation could be better for them.

Self-referred cases tend to be about money or property (landlord-tenant, consumer-merchant, or employer-employee matters), according to the study of the Los Angeles program; generally, citizens did not bring other types of interpersonal problems to Neighborhood Justice Centers on their own. This finding suggests that community mediation programs may continue to rely on justice system officials for cases (in North Carolina's programs statewide, about 60 percent of cases actually mediated come from the criminal courts).

Of eligible cases that were referred to community mediation programs and actually reached mediation sessions, almost all (90

percent or more) resulted in mediated agreements followed by court dismissal of charges. But 30 to 50 percent of the cases referred did not in fact reach mediation (in small claims cases, the unmediated percentage evidently was even higher - 77 percent -- according to the Neighborhood Justice Centers study). Complainants usually were responsible for failure to mediate; defendants had more incentive to participate because of the threat of continued prosecution or litigation.

Studies disagreed about whether disputants' characteristics or programs' efforts had more effect on referral and participation. The Brooklyn study suggested that disputants in intimate relationships with a history of conflict were more likely to participate than others. On the other hand, the North Carolina study found no difference between mediated and unmediated eligible cases and identified the program's intake system as the main determinant of referral and participation.

Do community mediation programs lessen court and correctional costs? The reviewed research looks at community mediation's effect on court and correctional costs in terms of its effect on workload. The Brooklyn study suggests that about 27 percent of felony cases were eligible for the program, although it actually handled only 8 percent. The North Carolina study estimated that about 13 percent of non-traffic misdemeanor cases were eligible, although the programs in fact handled only about 3 percent. (The studies did not investigate whether cases that went to mediation would have

involved the same amount of work for the court as other cases.) These findings suggest that community mediation programs could have a much greater effect on court and correctional workload if they handled more eligible cases.

Do the programs' cost savings justify their own costs? The Dorchester study estimated that a mediated agreement "saved" (in the sense of reducing court and probation workload) from \$114 to \$168 per case, on average; however, the average agreement cost the program \$403. The NJC study, which did not estimate court cost savings, found that program costs ranged from \$202 to \$589 per case resolved. Thus, a program may cost substantially more than it "saves" the court and correctional system. But if programs increase their intake, their unit costs might well go down, as indicated in the NJC study which found that resolving a case cost only \$202 in the highest-caseload NJC (Atlanta). Programs that increase intake might take advantage of the fact that many of their unpaid mediators currently handle few cases. On the other hand, unpaid mediators may be unable or unwilling to take on more cases.

Do community mediation programs satisfy participants more than the regular court process? To measure satisfaction, one must first determine what participants want. The Brooklyn and North Carolina studies found that complainants usually did not want punishment when they filed charges. Rather, they wanted to change the future behavior of the defendant -- to induce the defendant to stop harassing them, leave them alone, get treatment, or compensate

them for injury or damage. The North Carolina study found that getting the defendant convicted contributed nothing to complainants' satisfaction; instead, what was most important was "solving the problem," which usually meant altering the defendant's behavior toward them.

All the reviewed studies found high levels of complainant satisfaction with the outcome and procedure of community mediation. Mediation was more satisfying than regular court procedure for two reasons: (1) it was more likely to produce a desired outcome, such as improved behavior on the defendant's part or a better relationship with the defendant; and (2) the mediation procedure was more satisfying than standard court procedure. Studies have not investigated defendants' satisfaction as thoroughly as complainants', but all indications are that they too were generally more satisfied with mediation.

For example, in the Brooklyn study, 54 percent of the control group who went through the standard court process were satisfied with their case outcome, compared with 73 percent of complainants who went to mediation. In the North Carolina study, 50 percent of all interviewed complainants believed that the problem that led them to file charges had been solved by the court process, but 77 percent of those who reached mediated agreements thought the problem had been solved by mediation. Also, this study indicated that the mediation procedure, as such, contributed significantly to complainants' satisfaction apart from its effect on outcomes such as "solving the problem." The

NJC study (Atlanta, Kansas City, and Los Angeles) found that complainants who participated in mediation were consistently more satisfied with the mediated agreement, mediation process, and mediator, than were complainants in the control group with the court disposition, court procedure, and judge.

Why do participants like mediation procedures? According to the NJC study, participants feel that mediation gives them a better opportunity to "tell their story" and listen to the other side's story. It also gives them more control over the process than they would have over regular prosecution because they can stop mediation at any time. Finally (as all the reviewed studies found), participants give high marks to mediators for their competence and fairness.

How well do participants in community mediation comply with mediated agreements compared to adjudicated outcomes, and does mediation affect their recidivism? All reviewed studies reported a high degree of compliance with mediated agreements. In follow-up interviews at intervals ranging from four to ten months after disposition, participants reported compliance rates of 79 to 98 percent for themselves and 67 to 84 percent for their adversaries. It is difficult to compare this compliance with typical criminal court dispositions, because if conviction occurs, the usual result is punishment of the defendant rather than a disposition regarding the parties' future conduct toward each other. The Brooklyn and North Carolina studies indicate that the parties' relationship improved more after mediation than

after standard prosecution, which suggests that standard court disposition did not ameliorate the parties' subsequent behavior toward each other as much as community mediation did.

Recidivism, as the term is used here, applies to criminal cases and refers to parties coming back to court with new criminal charges against each other. Mediation advocates sometimes claim that mediation programs close the "revolving door" of recidivism. The reviewed research suggests this claim may be untrue -- and in any event recidivism appears to be rare. The Brooklyn study found only a 12 to 13 percent recidivism rate during four months after disposition; the North Carolina study found only 2 to 4 percent over the same period; and the Dorchester study (using two small matched comparison groups) found 10 to 13 percent within two years after disposition. None of the studies found that mediation affected the probability of recidivism.

Do community mediation programs deal with "underlying causes" of disputes? The reviewed studies found that mediated agreements generally dealt with very specific behavior and issues capable of compromise, rather than with deeply rooted problems. The Dorchester study noted that labor-management negotiation was the basis of community mediation's ideology and training, and pointed out that labor negotiation is quite different from the interpersonal disputes handled by community mediation. For example, interpersonal disputes involve a continuing relationship rather than a single set of issues that can be resolved in one session as in labor-management disputes. This

study found that community mediation was most successful dealing with particular incidents, not with underlying matters like marital problems or alcoholism. It criticized the mediation program's emphasis on getting a single agreement, suggesting that instead the program should concentrate on follow-up to encourage constructive communication during a continuing relationship. The Brooklyn study reached similar conclusions, suggesting mediation might be more effective as the first step in a sustained series of interventions -- for example, repeated mediation sessions, counseling, and other social services.

Do community mediation programs lessen community tensions and reduce reliance on court to solve problems? The NJC evaluation found that although NJCs had the potential to reduce community tensions, there was no evidence that they actually had done so; to have a substantial effect, the programs would have to handle more cases. Whether community mediation programs reduce reliance on courts to solve problems seems almost a moot point because the reviewed evaluations found such low rates of recidivism (either party charging the other) in mediation-eligible cases.

Implications for Court and Program Management

Community mediation's effect on court costs and resource allocation. Community mediation programs may save work for the courts and corrections agencies but probably will not reduce their costs. These programs, like

other alternative dispute resolution programs that seek to divert cases from regular court procedures, generally cannot reduce court and correctional expenditures in the short run, because they will not bring about reductions of judges or other personnel. Furthermore, the community mediation programs cost money themselves, no matter how much they rely on unpaid volunteers. However, the programs may bring about a kind of cost savings by reducing the amount of work that court and correctional officials do in cases suitable for mediation. In the long run, reducing work could lessen future increases in staff, but more likely the saved staff time would be reallocated to other cases -- for example, to more serious criminal cases that are not interpersonal disputes.

Realizing the full potential benefit of the programs. As explained above, community mediation programs apparently handle only a fraction of eligible cases. To increase the rate of referral from court and improve the participation of complainants after referral, researchers in the Dorchester, Brooklyn, and North Carolina studies recommended more vigorous intake efforts by the programs, including early screening to identify mediatable related-party cases immediately after arrest and on-the-spot explanations to complainants in court of the possible advantages of mediation. The North Carolina study found that the program with the most aggressive intake system had considerably higher rates of referral and participation than did the other two programs, and reduced trials to a much greater extent in eligible cases.

Community mediation often complements, rather than supplants, standard court procedure; this complementary relationship may benefit both the programs and the courts. Participants usually are well satisfied with their experience in mediation, but this does not necessarily mean that they are dissatisfied with courts. Many cases that undergo community mediation -- probably a majority -- are referred by courts. Therefore, satisfaction with community mediation often does not mean satisfaction with an alternative to court -- rather, satisfaction with a supplementary procedure. In other words, the parties are more satisfied with court plus mediation than they would be with court alone.

In cases referred from court, the complainant first invokes the authority of the court -- for example, by filing a charge and getting the defendant arrested. Later, the parties go to mediation while the court case is continued. Many cases would never obtain the benefits of mediation if they were not referred by the court; for such cases, commencing prosecution or a civil action is essential to mediation. In addition to producing a referral, initiating the standard court procedure may encourage successful mediation. Calling on the court's authority gives the complainant some control over a bad situation which may make him or her more willing to mediate. The possibility of continued prosecution may give the defendant a strong incentive to participate in mediation.

Need for continuing evaluation. The mediation field "needs to be careful about its claims" (Roehl and Cook, 1989:47). The call for continuing evaluation of community mediation programs is expressed as much by favorable observers like McGillis (1986) and Roehl and Cook (1982) as it is by critics like Tomasic (1982). One reason for keeping up the evaluation is that the programs are continually evolving; another is that they continue to rely in part on public funding; and a third is that court managers and policymakers continue to search for better ways of resolving disputes.

The studies discussed above suggest that cases generally do well once they are in mediation, but that it is difficult to get them in. Therefore, future evaluation should focus more on intake systems, and in particular -- since so many cases are court-referred -- on various methods of identifying suitable cases in court and explaining mediation to the parties. Also, it would be wise to evaluate the court's performance along with the program's performance, recognizing that the two often complement each other. In other words, rather than searching for a better alternative to court, research might better look for ways in which mediation can make the court experience more satisfactory and vice versa.

Three additional topics have not been adequately addressed to date. First, in addition to the courts, other organizations, such as social, mental health, and employment services, have

complementary relationships with community mediation programs. These relationships need to be explored and taken into account in future evaluations of such programs. Second, it may be desirable to consider the effects of community mediation on the entire community. Does community mediation inspire political activity and mobilization to improve some aspects of community life or to combat some force that threatens the quality of neighborhood life? The degree of fit between mediation and the community may shape the impact of mediation on the community as a whole. Third, the published research to date does not appear to have examined whether groups that differ culturally or economically have quite different needs that mediation could address. All groups have disputes that require resolution, but they may benefit from quite different approaches. Research therefore needs to address whether, for example, offering culturally diverse modes of dispute resolution may increase the overall impact of community mediation programs.

VICTIM-OFFENDER MEDIATION PROGRAMS

Introduction

Victim-offender mediation (also sometimes called victim-offender reconciliation or VORP) began in 1974 in a program in Kitchener, Ontario, founded by two Mennonite church members (one a probation officer) who were seeking better means of dealing with young criminal offenders. Victim-offender mediation first appeared in the United States in Elkhart,

Indiana, in 1978, through the leadership of the Mennonite church there, acting with a local judge, probation officers, and a local community corrections organization. By 1989, there were at least 171 such programs in the United States (Umbreit and Coates, 1992b:191). Victim-offender mediation programs handle both juvenile delinquency and adult criminal cases, but in the United States most victim-offender mediation programs focus on juvenile cases (Umbreit and Coates, 1992a:5).

Victim-offender mediation was inspired by the peace-making tradition of the founders' religion. Some of its key ideas are reconciliation of the crime victim and offender through face to face meetings, restitution to the victim by the offender, and encouraging lay participation in the justice system. The program seeks to treat criminal cases as disputes, to "[put] the disputing parties at centre stage," and to "[define] justice primarily as psychological and material restoration rather than as retribution" (Peachey, 1989:14-18). The objective is to "empower the victim, offender and community to solve their own problems" through a mutually satisfactory agreement, with community participation in the form of volunteer mediators, and to integrate offenders into the community rather than treat them as outcasts" (Chupp, 1989:65-66).

Where a juvenile offender is concerned, the program is somewhat more concerned with affecting the offender than with resolution of the dispute or with reconciliation. A 1987 nationwide survey of 79 juvenile victim-offender

mediation programs indicated that their most important goal was holding the offender accountable for his or her misconduct. Other important goals were providing restitution, reconciliation of victim and offender, rehabilitation of the offender, and providing an alternative to institutionalization (Hughes and Schneider, 1989:221-222).

Victim-offender mediation and community mediation programs differ in important ways. (1) Victim-offender mediation frequently operates at the post-conviction stage, serving as a sentencing (or juvenile court disposition) option for convicted nonviolent offenders, while community mediation operates at the pretrial stage, sometimes even before charges have been filed. (In this review, the term "violent" means "involving an element of assault on a person.") Thus, despite its goal of focusing on disputants rather than courts, victim-offender mediation depends more on the courts for referrals than community mediation generally does. (2) Victims and offenders in victim-offender mediation usually do not have a prior personal relationship (Umbreit and Coates, 1992b:190-191), while in community mediation programs they usually do. (3) Juvenile victim-offender mediation programs emphasize rehabilitating the offender and making the offender take responsibility for his or her actions; this is not the primary emphasis in community mediation. (4) In theory, at least, victim-offender mediation seeks to facilitate reconciliation and provides follow-up services in what may be a protracted process; in contrast, community mediation usually focuses on a specific dispute.

As described by Chupp (1989), the typical victim-offender mediation process (in both criminal and juvenile cases) consists of four steps: intake; preliminary meetings; a victim-offender reconciliation meeting (the key ingredient); and reporting and follow-up. Cases usually are referred to the program by the court, either after conviction or adjudication of delinquency or earlier in the process. The most common offenses involved are nonviolent ones like larceny and burglary. A referred case is screened for acceptance; it may be rejected, for example, if there is overt hostility between the parties or there is no need for reconciliation or restitution. If accepted, the case is referred to mediation, which may be conducted by a single mediator or a pair of co-mediators. Mediators usually are trained, unpaid volunteers; in difficult cases a paid staff member may take over the mediation or assist the volunteer. Use of paid staff as mediators apparently is much more common in juvenile than in criminal cases (Hughes and Schneider, 1989:223-224).

The mediator holds separate preliminary meetings with the offender and victim (usually with the offender first) to explain victim-offender mediation, to listen to the person's story about his or her experience with the crime, to try to get the person to agree to meet with the other party, to schedule the meeting if both sides agree to it, and to explore realistic options for restitution. The mediator offers support and encouragement, which are meant to reduce both parties' sense of alienation from the community. Victims usually are reluctant to meet the offender, but may become less reluctant when told about who the

offender is and about the possibilities for restitution. The mediator does not attempt to coerce the victim to participate, but relies on sympathetic listening and explanation of possible advantages of mediation.

The next step, the victim-offender reconciliation meeting, is similar to community mediation. The mediator explains the process and then encourages each party to relate the facts of the crime from his or her point of view. This is meant to help the victim to understand the offender's motivation and the offender to understand the crime's hurtfulness to the victim, including the victim's physical losses, fear, suspicion, and anger. This may lead to the primary goal, reconciliation, which entails an apology by the offender and acceptance or forgiveness by the victim. Reconciliation is thought to occur when the offender realizes "the human consequences of her or his actions" and the victim begins to see the offender as a person rather than "some violent monster he or she has conjured up . . . The expression of emotions encourages people to direct their feelings toward the cause rather than lashing out at society or others working in criminal justice." (Chupp, 1989:63).

Reconciliation may not be achieved at one meeting; it may take months or years. Whether or not reconciliation is achieved, the mediator explores ways in which the offender can "make things right," usually including an agreement to effect restitution (by money payment or service) by the offender, or perhaps a

promise to refrain from certain behavior in the future or stay away from the victim.

After the reconciliation meeting, the mediator writes a report including the written agreement, if any. The agreement usually becomes part of the court's sentence or juvenile disposition. The program staff then follow up the case to determine compliance with the agreement; additional meetings may be necessary if the offender has difficulty complying. A final "closure meeting" is held once the agreement has been fulfilled; this is seen as another important step toward reconciliation.

The 1987 nationwide survey by Hughes and Schneider (1989) of victim-offender mediation programs for juvenile offenders revealed 79 programs in 31 states. The programs typically were private nonprofit organizations (43 percent), but some were operated by probation departments (21 percent), state or county agencies (17 percent), courts (7 percent), and other organizations (12 percent). The majority handled fewer than 50 cases in 1986; often intake was restricted by excluding certain kinds of offenders -- for example, violent offenders, sex offenders, and those with drug or mental health problems. Referrals usually came from the courts or from probation officials. The surveyed juvenile programs apparently relied more on professional mediators than criminal case programs do; 55 percent of the programs used only paid program staff as mediators, and another 37 percent used a combination of paid staff and unpaid volunteers (only 8 percent used

volunteers exclusively). Training, usually conducted by program staff, involved a median of 20 hours plus 9 hours of follow-up or in-service training. Mediation sessions normally lasted about an hour. Parents frequently participated in mediation sessions; attorneys rarely did. The most common provision of mediation "contracts" was monetary restitution; other provisions were community service and behavioral requirements for the offender, such as school attendance or counseling. Courts usually approved the contracts and they became part of the courts' disposition of the juvenile cases. Ninety-one percent of the programs monitored compliance with the contract.

Issues Addressed by Research

The following issues concerning victim-offender mediation have been addressed by the reviewed studies:

- What proportion of eligible cases do victim-offender mediation programs actually handle?
- What factors affect disputants' participation?
- Do the programs reduce court workloads and costs? And what are the programs' costs?
- Are the procedures and outcomes of victim-offender mediation more satisfying to disputants than those of regular adjudication?
- How does victim-offender mediation affect disputants' recidivism and compliance with dispositions?

Conclusions of Studies

| VICTIM-OFFENDER MEDIATION STUDIES | | | | |
|---|--|---|---|---|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Analysis of Victim-Offender Mediation Programs in Four States (1990-91) | University of Minnesota (Umbreit and Coates, 1992a) State Justice Institute | Albuquerque, Austin (TX), Minneapolis, and Oakland (CA) | Services offered, types of cases handled, referral and participation, program costs, satisfaction, compliance | Quasi-experimental (program group compared with (1) matched non-referred group and (2) referred but nonparticipating group) |
| Indiana-Ohio VORP Study (1983-84) | Coates and Gehm Florence V. Burden Foundation | Indiana (7 counties) and Ohio (one county) | Services offered, types of cases handled, referral and participation, satisfaction, compliance | Quasi-experimental (program group compared with matched non-referred group) |

Generally, evaluations of victim-offender mediation have not been as rigorous as those of community mediation. Comparison with standard court procedures is especially lacking. The two studies considered here dealt with victim-offender mediation programs in Albuquerque, New Mexico; Austin, Texas; Minneapolis, Minnesota; Oakland, California;

seven counties in Indiana; and one county in Ohio.

The questions for those evaluating victim-offender mediation are much like those in evaluating community mediation. The following is a summary of the findings of the studies reviewed.

What proportion of eligible cases do victim-offender mediation programs actually handle? And what factors affect disputants' participation? The reviewed research does not answer these important questions. Aside from noting that victim-offender mediation is aimed at young offenders who commit nonviolent crimes against property, the evaluations considered here made no attempt to define the population of cases that were eligible or suitable for victim-offender mediation, or to measure how much of this potential "market" was served by the program. They also did not investigate how the initial decision to refer a case to the program was made, and who (besides court officials) influenced it. This omission leaves the research open to the criticism that it was looking only at cases that were hand-picked (or self-selected) because of likely success in victim-offender mediation, and thus did not constitute a fair test.

Once referred to victim-offender mediation, many cases did not proceed to the mediation that is the key feature of the program. The mediation rate in referred cases ranged from 27 percent (Albuquerque and Austin) to 60 percent (Indiana and Ohio counties). The research provides no insight into why so many cases failed to mediate, other than suggesting that offenders have more incentive to participate than do crime victims (to avoid further prosecution or ameliorate punishment).

Do the programs reduce court workloads and other costs? What are the programs' costs? The reviewed evaluations made no effort to estimate savings in court

workload or costs, even though victim-offender mediation sometimes is aimed at diverting juvenile or adult offenders from court processing. Reported program costs per case mediated ranged from \$292 to \$986.

Are the procedures and outcomes of victim-offender mediation more satisfying to disputants than those of regular adjudication?

The research suggests that victim-offender mediation procedures in fact are more satisfying to victims than are regular court procedures. The strongest evidence of this is a comparison of mediated cases in Albuquerque, Austin, Minneapolis, and Oakland with a matched sample of non-referred cases showing that 79 percent of victims in the former group were satisfied with the procedure in their cases compared to 57 percent of victims in the latter group. Offenders, on the other hand, were satisfied in about the same proportions in each group.

A high proportion of both victims and offenders were satisfied with the outcome of victim-offender mediation (usually an agreement). But no comparison of satisfaction with regular court outcomes was reported.

How does victim-offender mediation affect disputants' recidivism and compliance with dispositions? Researchers using matched samples of Albuquerque and Minneapolis cases with (1) mediated restitution agreements and (2) court-ordered restitution found a much higher percentage paid in the former (81 percent) than in the latter (58 percent). Comparing matched samples of mediated and non-referred cases in

Albuquerque, Minneapolis, and Oakland, the recidivism rates were 18 and 27 percent, respectively. (Recidivism was defined as a new criminal charge within a year of disposition.) This comparison suggests that participation in victim-offender mediation has some effect on offenders' recidivism; however, as the researchers noted the difference in rates is not statistically significant.

Implications for Court Management

Need for further evaluation. Court managers and policymakers, when considering support of victim-offender mediation programs,

have good reason to require rigorous evaluation. Several questions need to be addressed that have not received sufficient attention in published research: (1) What types of cases are suitable for victim-offender mediation, and how many are there? (2) What proportion of suitable cases do the programs actually serve? (3) What factors affect referral of cases and participation of victims and offenders? (4) What effect do the programs have on court workload?

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Private Dispute Resolution

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PRIVATE DISPUTE RESOLUTION

INTRODUCTION

Private dispute resolution is a relatively new and burgeoning form of dispute resolution. As defined for this paper, private dispute resolution refers to dispute resolution procedures conducted by a neutral third party on a for-profit basis which disputing parties have entered into voluntarily and are paying for themselves. Operating under a variety of often imprecise names such as private adjudication, private judging, private justice, rent-a-judge hearings, and the like, private dispute resolution (as defined for this paper) covers the following processes:

- Private judging, a procedure practiced only in California under a 100-year old statute, whereby the public courts, with the agreement of litigants, refer civil cases to privately compensated retired judges for adjudication. The decision of the private judge stands as the decision of the court, rendering it binding and appealable through the public court system.
- Private arbitration, a voluntary process in which an arbitrator paid by one or both parties to a dispute renders an award that is legally binding. A special form is "hi/lo" arbitration, in which the parties agree in advance to high and low limits of an award. These boundaries are not communicated to the arbitrator, and if the award exceeds or falls below the agreed upon limits, the award is adjusted to the closest pre-set limit.
- Private mediation, also often labeled settlement conferences or the like, in which the mediator is paid by one or both parties and works to facilitate an agreement between them. (Private family mediation is not included here.) Multiple sessions are

common, and the agreement is non-binding yet typically enforceable as a de novo suit for breach of contract. A variant is "med/arb", in which the parties agree in advance to empower the mediator with the option to become an arbitrator should a mediated agreement appear to be unreachable.

- Other forms of private dispute resolution are less common than mediation and arbitration procedures, but probably occur more often than the more controversial private judging processes. These forms include conciliation and negotiation assistance, case evaluation, fact finding, and mini-trials.

Private divorce mediation is a form of private dispute resolution of fairly long-standing, and its implications for the courts are covered in the Family Mediation Working Paper. In many cases, divorce mediation is under the aegis of a court. Also excluded from the discussion here is labor arbitration, a dispute resolution forum that has been institutionalized for decades.

In addition to the characteristics of processes summarized above, private dispute resolution often occurs outside the public court system without monitoring or authorization. The cases involved may or may not be filed in the public system, and the court may or may not know that private dispute resolution processes are underway. At present, courts have little say in when, how, or for which cases private dispute resolution procedures are sought. For the most part, the courts' stance by necessity is rather reactive and limited to narrow issues under their

control when a case is pursuing two tracks -- attempting private resolution while remaining an active court case. Thus, as a topic for court and program management, private dispute resolution occupies a fairly unique place. Many questions have been raised, and few answers are available as yet.

Issues raised by private dispute resolution. A variety of forces have fueled the growth of private dispute resolution in recent years. One is court delay for civil cases in the public court systems in key jurisdictions (Griller & Planet, 1989) and the concomitant rising costs of litigation (Vangel, 1988). On the positive side, private dispute resolution may attract many users because of its procedural flexibility and convenience (Green, 1985).

Little has been written to date on private mediation and arbitration. Many of the issues surrounding private dispute resolution raised by proponents and critics have been formed in response to the controversy over private judging. Proponents point to a constellation of individual benefits, while others voice concerns about access to justice and harm to court reform efforts. Both positive and negative effects on the courts have been postulated. Most of the issues discussed under the rubric of private judging are also germane to private arbitration, and many apply to private mediation processes as well, as reported by Kornblum (1990), Werchick (1990), Colino (1989), Thompson (1988), and Cortez (1988).

The claimed advantages of private dispute resolution are primarily benefits to individual litigants, to retired judges and private

neutrals, and finally, to the public justice system. More specifically, the benefits of private judging and other forms of private dispute resolution are purported to be speed and convenience, procedural flexibility, lower costs, the ability of the parties to select their third party, confidentiality, benefits to retired neutrals, and reductions in the backlog of court cases with the related benefit of defraying trial costs (Vangel, 1988; Christensen, 1982; Coulson, 1982; Chernick, 1989a; Shapiro, 1990; Longworth, 1987). Time and money (primarily in attorneys' fees) are reportedly saved by the rapid hearing of cases in the private system, which may also result in fresher and more reliable evidence. Choosing a private neutral by agreement of both parties may result in the case being heard by an expert in the appropriate area of law, theoretically reducing trial time and lending greater credibility to the outcome. Privacy enables parties and their disputes to remain out of public view. The private forums also encourage creative solutions and offer procedural flexibility with relaxed rules of evidence (Green, 1985). Retired judges benefit from the high compensation offered and the opportunity to continue hearing cases. Reductions in court backlogs and saving of public money are also benefits attributed to the diversion of cases to the private system.

Some believe that the speed of disposition alone is the driving force behind private dispute resolution, and if reasonable speed can be achieved in the public court system, cases will remain there. In Maricopa County (Phoenix) Superior Court, the guarantee of a

quick, firm trial date reportedly inhibited the private dispute resolution business promoted by Civil Court, a private firm (Griller & Planet, 1989). In southern California, where private dispute resolution services have grown rapidly in recent years, many of the larger superior courts have significant backlogs for trial dates.

The purported advantages of private dispute resolution are countered by a host of public policy, ethical, and constitutional concerns (Longworth, 1987; Christensen, 1982; Haynes, 1984; Vangel, 1988; Gnaizda, 1982; Ray, 1992). The critics of private dispute resolution point mainly to public detriments, particularly unequal access to justice and fears that the private system will erode the quality of the public system by removing pressures for court reform and discouraging increased revenues for public improvements.

One of the biggest concerns is that the availability of private dispute resolution will establish two forms of justice -- "rich man's justice" for those who can afford the private system and "poor man's justice" for those who cannot (Green, 1985). In this respect, some contend that private dispute resolution is unconstitutional, violating the due process and equal protection clauses of the fourteenth amendment. The ability to appeal judgments made by private judges under special California statutes also leads to charges of procedural abuse. It has been hypothesized that private judging might be used to gain early entry to the appellate calendar, particularly in jurisdictions such as Los Angeles County where backlogs are very long.

Because of the opportunity for "repeat customers," fears have been raised that private neutrals may not maintain impartiality. In some instances, one party assumes all responsibility for private dispute resolution fees to induce the other party to participate (Chernick, 1989b). The issue of power disparity may also arise when infrequent users are in litigation against frequent users (Hazard & Scott, 1988). A typical example that illustrates these concerns is the situation where insurance companies turn repeatedly to private dispute resolution to settle disputes against one-time participants, likely to be in a weaker position in terms of dispute resolution experience and resources. The privacy of dispute resolution hearings presents several ethical and legal problems, including questions about judicial accountability, the public's right to know, the lack of precedent setting, and the lack of development of the law (Vangel, 1988).

The impact of private dispute resolution on the public courts may be negative as well as positive -- there are fears of a drain of judicial talent as sitting judges leave the bench for lucrative private positions and retired judges busy hearing cases privately become unavailable for public judicial assignment. There are a few well-known cases of judges leaving the bench to join private firms, yet several studies have failed to find a significant "brain drain" due to private judging (D'Amico, Friedman, Oram, & Schmidt, 1988; Roehl, Huitt, & Wong, 1993).

SUMMARY OF RESEARCH

The articles cited above describe private dispute resolution processes and raise myriad

issues about practice and impact, but there is very little empirical research available to shed an objective light on these issues. Mediation and arbitration are believed to be the most common forms of private dispute resolution, used primarily for tort, contract, and commercial disputes. For-profit firms, independent third parties, and non-profit organizations provide the dispute resolution services, which may be voluntary or compulsory.

While the courts may be concerned about or affected by private dispute resolution processes, it appears that few track or monitor cases in private processes in any way. Much of the private dispute resolution practice is truly private, conducted outside the courts with no court oversight. Key issues for discussion include case management of private cases, the nature of referrals, qualifications of neutrals, and court impact. Research and evaluation studies are sorely needed. Because of the paucity of research in this area and the general lack of knowledge about the extent and practice of private dispute resolution, background information on the field is provided below before the presentation of research findings.

Who is doing private dispute resolution? There are at least three different business arrangements for those practicing private dispute resolution: (1) employment via private, for-profit firms that recruit and hire third party neutrals, providing case management, administration, advertising, and marketing services for them; (2) self-employment as third party neutrals; and (3) association with the largest non-profit organizations, the American

Arbitration Association, Arbitration Forums, and Center for Public Resources, which provide case management and administration services for independent third party neutrals working on a for-profit basis. Recent legislation in Connecticut creates a fourth hybrid form of private dispute resolution, in which federal and state senior judges can participate in private dispute resolution while serving on the bench.

Some third party neutrals work exclusively for one private firm under a contractual arrangement; the majority are likely to be affiliated with one or more private firms, working on an on-call, as available basis, as well as independently. The new Connecticut program will operate differently, as described later in this paper. Generally, private dispute resolution firms and independent neutrals offer the full range of dispute resolution services found in the public system, including negotiation, mediation, and arbitration (Thompson, 1988). Because of the private nature of dispute resolution forums and their relative newness, comprehensive information is not available and some private firms are quite reluctant to disclose details of their businesses. The information reported below has been drawn from the open literature, more-fugitive literature such as hearings before the California Judicial Council, and direct contacts with private firms and reviews of their marketing materials.

Private for-profit firms. There are many private, for-profit firms in the United States. They include Judicate, headquartered in Philadelphia, which is marketed as the "first national private court system" and is the only

firm publicly owned. It has purchased American Intermediation Services, a mediation firm in San Francisco. Firms with offices in several states include Judicial Arbitration & Mediation Services (JAMS), EnDispute, and US Arbitration and Mediation. Other firms (believed to be single offices) include the First Mediation Corporation, Creative Dispute Resolution Center, and Alternative Resolution Center, all in California; Dispute Resolution, Inc., in Hartford, Connecticut; Ohio's Private Judicial Management and Private Judicial Services; Judicial Alternatives in Santa Fe, New Mexico; Dispute Settlement, Inc., and the Judicial Arbiter Group in Colorado; ADR, Inc., in Boston, Massachusetts; the Private Adjudication Center affiliated with Duke University in North Carolina; and New Jersey Alternative Dispute Resolution, advertised as the "state's first private court system."

Judicate was one of the earliest private dispute resolution firms established, opening in Philadelphia in 1985 as a privately owned firm. It experienced a quick spurt of growth, opening offices in several major cities, and even implemented a short-lived experiment with private appellate hearings. In the late 1980s, Judicate suffered financial losses, perhaps due to such rapid growth in a largely untried field, and now maintains offices only in Philadelphia and Los Angeles. Like JAMS, all neutrals affiliated with Judicate are retired judges. Its roster of retired judges numbers over 550 nationwide; its central office matches these judges to local cases requesting private dispute resolution hearings. Judicate appears to hold approximately equal

numbers of mediation sessions and arbitration hearings, although the firm does not label their processes as such.

Private dispute resolution is probably most common in California, particularly southern California. JAMS is California's leading private dispute resolution firm and the second largest provider nationwide. JAMS established its first office in Orange County in 1979. The firm now has eleven California-based offices plus 10 offices nationwide, including recently opened offices in Seattle, Portland, Houston, and New York. JAMS' 160 retired judges in California outnumber the civil judges in the Los Angeles Superior Court, where over 100,000 civil cases are filed annually. About two-thirds of JAMS cases are mediated; the rest are privately judged, arbitrated, or resolved in another way (drawn from 1989 testimony before the California Judicial Council's Advisory Committee on Private Judging by Justice John Trotter, JAMS' chief judicial officer).

EnDispute, Inc., is the nation's third largest private ADR service provider. In addition to offering dispute resolution services for individual cases, EnDispute designs and implements dispute resolution systems for corporations and other large organizations. It also provides training and technical assistance for in-house dispute resolution. Currently, EnDispute has offices in Boston, Chicago, San Francisco, New York, and the District of Columbia, and recently announced plans to merge with a San Francisco-based provider, the Bates Edwards Group. The merger is expected to boost EnDispute's annual caseload from an

estimated 4,100 in 1993 to 7,500 (World Arbitration and Mediation Report, 1993).

U.S. Arbitration and Mediation Services, known as USA, has branch offices in over 35 states, with headquarters in Seattle. The mediators and arbitrators associated with USA generally are not retired judges. In addition to offering the full range of individual case resolution mechanisms, USA provides consulting services in designing alternative dispute resolution procedures, holds educational seminars, trains employees in dispute resolution, and administers class action suits (such as asbestos cases under the purview of the Manville Trust). In the sizable majority of USA's cases mediation is used.

None of the other private firms have national reputations similar to those mentioned above. It is likely, however, that they operate in a similar manner: the firms provide advertising, marketing, case management, financial management, and facilities to mediators, arbitrators, and retired judges who hear cases. Fees paid by the litigants are divided by pre-arrangement between the firm and the private neutral, and additional administrative fees may be charged.

Independent third party neutrals.

There are an unknown number of independent private neutrals who, while they may work occasionally for one of the private firms, have built private practices in dispute resolution. In California, many of these are retired judges, although mediators, arbitrators, and attorneys also provide dispute resolution services. Several of the retired judges are in such demand that they

have their own private backlogs, with cases scheduled eight to twelve months in advance. The extent to which independent neutrals provide mediation, arbitration, private judging, or other forms of dispute resolution is not known, although one study found mediation and arbitration to be the most commonly used processes (Roehl et al., 1993).

The non-profits. The venerable 65-year old American Arbitration Association (AAA) has over 57,000 arbitrators on its roster. The national office is in New York City, with 36 additional offices throughout the country. The non-profit AAA provides administrative services for arbitration hearings conducted on a fee-for-service basis; disputants pay AAA's administrative fees plus the hourly fees of the arbitrator. Like USA, its mainstay is offering dispute resolution services (in AAA's case, primarily arbitration) under longstanding contracts with organizations and corporations that have agreed not to use the public courts for settling grievances. AAA's involvement in labor management disputes is well known. Unlike other private firms, AAA has over 7,000 dues-paying members -- companies, unions, trade and educational associations, law firms, arbitrators, and interested individuals. In addition to resolving individual cases, AAA provides a number of services to its members and the field-at-large. These include the impartial administration of elections, a variety of publications including a quarterly journal on alternative dispute resolution, information services on arbitration law and practice, conferences, and training.

The New York City-based Center for Public Resources (CPR) also plays a unique role in private dispute resolution. It is a "nonprofit alliance of over 500 leading corporations, law firms, legal academics and federal judges working towards the sound integration of alternative dispute resolution into legal, business, and judicial practice," according to its promotional materials. Administering individual cases at no cost for its panels of over 400 attorneys and retired judges is a minor part of its work. CPR develops and implements dispute resolution for significant business and public disputes; provides research and development services; educates law departments, law firms, the judiciary, and government through publications, training, and technical assistance; and advocates alternative dispute resolution among bar, judicial, business, and public leaders. The CPR Judicial Project provides dispute resolution information, technical assistance, and training to federal and state courts.

Arbitration Forums, Inc., is a non-profit firm created in 1948 to resolve insurance claims. It is the largest provider of dispute resolution services, with over 10,000 neutrals across the U.S. available to hear cases. Most of Arbitration Forums' services fall under an inter-company program in which client companies have executed general agreements to arbitrate specific controversies. The companies agree to forgo litigation and seek resolution of their disputes through arbitration, with insurance claims personnel and specialists in a wide variety of fields serving as arbitrators. Arbitration Forums also offers a voluntary Mediation/Arbitration

Program (MAP) for individuals and corporations seeking dispute resolution services. At present, MAP represents a small portion of Arbitration Forums' business (personal communication, Karin Vaught, Field Office Manager, 9/2/93), and arbitration is much more common than mediation. The neutrals hearing cases under MAP are retired judges and attorneys with mediation training. Arbitration Forums also provides clients with educational materials, a hotline, and training workshops.

Connecticut's plan. On October 1, 1993, the Connecticut Judicial Branch implemented a unique private dispute resolution program that is the result of collaboration between the state and federal judiciaries. The private, non-profit corporation, Sta-Fed ADR, Inc., operates independently from the Judicial Branch. Senior state judges and judge referees and senior federal judges serve as neutrals in cases referred from both the state and federal courts. The senior state judges must serve in the state court system at least 75 days per year to be eligible to serve as a neutral in private cases. They also are restricted to handling private cases only through Sta-Fed ADR. Users' fees are charged on a sliding scale and waived in whole or in part for parties unable to pay the fee.

A newly enacted state statute allows a stay of proceedings up to three months in cases referred to any private dispute resolution provider. Parties who try private dispute resolution do not lose their place on the trial list. Sta-Fed ADR is one of over 100 private dispute resolution providers in a directory compiled and maintained by the Judicial Branch. The directory

is one component of a Judicial Branch public relations campaign to promote private dispute resolution to litigants and attorneys. The private dispute resolution directories and resource binders, which contain any promotional material the dispute resolution providers submit, are available in each judicial district within the Connecticut court system.

The creation of Sta-Fed ADR has not been without controversy. Concerns have been raised about creating a monopoly on private judicial talent and about potential conflicts of interest for Sta-Fed ADR judges, given that they serve on the state court bench while working for a private dispute resolution company. The Connecticut approach is novel, aiming to keep talented judges on the bench while offering them the opportunity to handle private cases and to receive compensation for their services. The judiciary has pledged to track the cases using the private system, in part to limit the number of cases involving the same parties that each judge hears. The structured program and tracking system may also provide useful opportunities for research.

How do cases come to private dispute resolution processes? Litigants come to private dispute resolution in a variety of ways. Several states reportedly have statutes allowing private judging, including New York, South Carolina, Washington, Kansas, Maine, Missouri, Nebraska, New Hampshire, North Carolina, and Oklahoma (Vangel, 1988), Oregon and Rhode Island (Haynes, 1984). California is the only state to have experienced it to any noticeable extent, however (Christensen, 1982). To use

private judging, the case must first be active in the public system and the litigants must request private judging, which the court may then allow.

Increasingly, however, a number of state statutes permit, encourage, support, and, in some cases, mandate private dispute resolution. There has been no systematic review of these statutes, but New Jersey's Alternative Procedure for Dispute Resolution Act enacted by the legislature in 1987 is one example (O'Hara, 1988).

Private corporations and industry associations are increasingly requiring that consumers and business clients and partners agree to standard agreements and contractual clauses that encourage or mandate the use of private dispute resolution should any claims or disputes arise. Specific firms, such as the American Arbitration Association and Arbitration Forums, Inc., are frequently designated as the arbiter in such clauses. At least 600 corporations have signed pledges with the Center for Public Resources to explore alternative dispute resolution in disputes with other signers and 150 law firms have pledged to discuss the availability of alternative dispute resolution with clients when appropriate. CPR recently led a group of major franchise companies to form a mediation program to settle franchise disputes and is working with insurance carriers, local government, and property owners to resolve disputes arising from the 1991 Oakland Hills firestorm and Hurricanes Andrew and Iniki.

Arbitration clauses have been inserted in millions of standardized contracts nationwide, leading to charges that individual litigants are

forced into contractual arbitration not of their cognizant choosing (Werchick, 1990). These contracts are increasingly commonplace in the corporate health, insurance, stock brokerage, and real estate industries (Guill & Slavin, 1989). Over six million enrollees of the Ross-Loos Medical Group, the oldest health maintenance organization in the U.S., and Kaiser Permanente, the nation's largest, have mandatory arbitration clauses in their contracts (G.A.O., 1992).

Disputes are also taken to private dispute resolution forums without any intervention by a court, contractual agreement, or corporate policy. While it is possible that some disputants hire private parties for dispute resolution as a first step after bilateral negotiation fails, prior to any consultation with a lawyer or filing a suit in court, this approach is probably rare. However, a growing number of attorneys are discussing such options with their clients and encouraging the use of private mechanisms. In-house counsel at insurance and other companies also frequently seek out private dispute resolution.

Who is using private dispute resolution forums, and to what extent? While solid information is sorely lacking, it is believed that many private dispute resolution firms concentrate on moderate-sized personal injury matters, while others focus on one or more areas in which they have established expertise (such as construction contracts), on medium to large multi-party cases (environmental disputes, for example), or on small, higher volume cases (Mazadoorian, 1988). AAA reports that it arbitrates automobile accident, commercial, community, labor, and international claims.

CPR panelists address "significant" commercial and financial contracts, construction projects, long-term supply contracts, breach of employment contracts, Superfund cost allocation, insurance coverage, and product liability. USA handles major commercial and employment-related disputes, personal injury claims, medical malpractice and products liability cases, securities claims, environmental/toxic tort matters, and real estate and construction-related issues. AIS mediates civil suits related to personal injury, product liability, toxic tort, construction, real estate, employment, professional liability, partnership, and contracts; complex, multi-party disputes are known to be its specialty. These examples illustrate the general nature of cases heard via private dispute resolution mechanisms -- personal injury and contracts cases are perhaps the most common.

A third of a sample of privately judged cases in California in 1991 were contract disputes, about 20 percent were personal injury cases, and the remainder were domestic relation cases (private judges may grant divorce decrees), money/collections cases, and property rights issues (Roehl et al., 1993).

No estimates exist of the total number of cases heard nationwide annually, yet it is widely accepted that mediation and arbitration are the most common mechanisms used. It appears that somewhere between 200 and 300 civil cases were heard in private trials in 1991 in California (Roehl et al., 1993). Specific information from several of the largest firms is available and reported below.

In 1992, the AAA heard 59,156 cases, most of which were arbitrated (personal communication, Barbara Brady, April 1993). Approximately 27 percent were labor cases, 21 percent were no-fault insurance claims, 21 percent were commercial cases, 13 percent were accident claims, 10 percent were non-auto insurance claims, and 7 percent were construction cases. Just over 60,000 cases were heard by AAA each year in 1990 and 1991. Arbitration Forums, Inc., reports that it processes approximately 250,000 cases annually with a total claim value approaching \$1 billion. The large majority of the cases involve insurance matters, which typically are disputes between two insurance companies.

JAMS is believed to have handled about 10,000 cases annually in recent years, producing as much as \$17 million in gross revenues in 1990 (Orange County *Register*, 4/23/91). JAMS' caseload grew from 6,355 cases heard in 1988

and an estimated 7,000 in 1989 (Justice Trotter's 1989 testimony before the Advisory Committee on Private Judging).

In 1990, 1,202 cases were filed with Judicate in California, and about 40 percent of these were mediated or arbitrated (Roehl et al., 1993); the remainder were resolved prior to a hearing or were never brought to a hearing, typically because one party declined to participate. Nationwide, 4,003 cases were filed with Judicate in 1988 (*Wall Street Journal*, 2/7/89) and 4,152 and 4,785 cases were filed in 1989 and 1990, respectively (personal communication, Jay Seid, President of Judicate, February 1991). In contrast, CPR reported hearing over 50 significant disputes in 1992. The number and types of cases heard by the remainder of the smaller private firms and self-employed neutrals across the nation are not known.

CONCLUSIONS OF STUDIES

| PRIVATE DISPUTE RESOLUTION STUDIES | | | | |
|---|---|--|---|--|
| TITLE OF STUDY | EVALUATOR AND SOURCE OF SUPPORT | LOCATION OF STUDY | ISSUES ADDRESSED | STUDY DESIGN |
| Private Judging: A Study of its Volume, Nature, and Impact on State Courts (1993) | Roehl, Huitt, & Wong State Justice Institute | CA, primarily the Superior Courts of Los Angeles, San Diego, and Orange Counties | Extent of use, characteristics of users, processing, quality of justice, court impact | Non-experimental: (1) Analysis of privately judged cases, and sample of others heard in private and public processes (2) Follow-up interviews with attorneys and litigants (3) Survey of retired judges and private neutrals (4) Court survey. |
| Final Report of the Connecticut ADR Project, Inc. (1988) | The Connecticut ADR Project | CT, primarily Hartford | Processing, quality of justice, distributive justice | Non-experimental: (1) Analysis of 1037 processed cases (2) Follow-up with claims managers and attorneys |

Only two research studies of private dispute resolution have been completed. Their salient elements are described in the table below. Two important studies are underway by the RAND corporation, but results are not yet available. One study aims to gather information on the supply of private dispute resolution services in southern and northern California

separately, the nature of the cases processed in the private sector, the services provided, and trends in private dispute resolution compared with trends in the courts. The second study is developing information on how corporations use private dispute resolution and the extent to which it affects costs, speed, and outcomes.

Private Judging: A Study of Its Volume, Nature, and Impact on State Courts. Roehl, Huitt, and Wong (1993) recently completed a study of private judging and other forms of private dispute resolution, funded by the State Justice Institute. This study was conducted in 1991-92, primarily in southern California, with the assistance of three superior courts and two private dispute resolution firms, Judicate and USA. The evaluators focused on private judging as narrowly defined by Article VI, Section 21, of the California Constitution and California Code of Civil Procedure section 638. These private judging procedures are characterized by three criteria: (1) the private judge who conducts the procedure has authority that approximates that of a sitting public judge, (2) the parties must stipulate their desire to have the case heard by this private judge, and (3) the parties pay for the services of this private judge. Other forms of dispute resolution served as comparison groups in this study: public adjudication, settlement, rent-a-judge hearings (in which retired judges paid by the court conduct trials), private arbitration, and private mediation.

The study aimed to assess the extent of private judging; document who is using it and why; compare details of case processing to the other dispute resolution mechanisms; and assess the quality of justice rendered, compliance, and the impact of private judging on the courts where it is used. Four separate tasks composed the non-experimental research design. The study analyzed all privately judged cases in 1991 that could be located in the courts, as well as similar data gathered from a random sample of the other

dispute resolution mechanisms. The evaluators conducted follow-up interviews with litigants and attorneys in the privately judged and comparison cases, a mail survey of retired judges and private neutrals, and telephone interviews with presiding judges, civil judges, and court administrators in the state's nine largest courts.

Perhaps the most notable finding of the study concerns the small extent of the practice: it was estimated that somewhere between 200 and 300 civil cases were heard in private trials in 1991 in California, with the total probably closer to 200 than 300. These figures represent a very small proportion of the civil case filings in the superior courts of California, which were over 720,000 in 1991 (Ostrom, 1993). Even using a comparison to only tort filings (over 114,000) and assuming a trial rate of five percent (5,700), the proportion of cases with private trials is very small. The extent of other private dispute resolution processes was not estimated beyond the reporting of data provided by the survey of neutrals, which cannot be extrapolated to statewide estimates.

Contract, personal injury, and other civil matters were privately judged. Many of them were complex, multi-party cases, yet the litigants were a mixture of individuals and businesses. Litigants in personal injury actions primarily used rent-a-judge, private mediation, and private arbitration processes.

To the litigants and attorneys in privately judged cases, speed was the most important factor in their decision to use private judging, followed by the finality of the outcome, experience of the private judge, convenience, and

cost. Speed and convenience were also most important to participants in the other dispute resolution processes. Those involved in mediation judged the informality of the process, experience of the mediator, and finality of the outcome to be important. Participants in arbitration rated the finality of the outcome -- a binding award -- as most important, followed by cost, convenience, and speed.

These reasons offered for using private judging are most interesting given other findings of the study. Private judging outcomes are not truly final, given that appeals may be filed. Appeals were filed in 19 percent of the privately judged cases, compared to 22 percent of the publicly judged cases. The outcomes of the appellate processes are unknown. Privately judged cases took an average of 20 months to reach final disposition from the point of being "ready," a speed that was lower but not significantly different from the 18.6 months for publicly tried cases. The average disposition time for privately mediated or arbitrated cases was about seven months. Private trials were more informal than public trials and scheduled at the convenience of the parties. Although the cost data obtained were meager, private judging appeared to be more expensive than public adjudication.

About a quarter of the attorneys and litigants in privately judged cases knew the retired judge because he or she had heard one or more private or public cases of theirs previously. Other evidence indicated little repeat business for private judges. The parties in mediated cases were more apt to have prior experience with the

judge or third party, while parties in arbitrated cases were less likely to have personal knowledge of the third party.

Settlement figures are based on small samples, but it appeared that privately judged cases had proportionately larger judgments than cases in other processes (although the similarity of cases is questionable). The settlement-to-claims ratios of privately and publicly tried cases were comparable, however. At the time of the follow-up interview, 64 percent of the privately judged judgments had been complied with, compared to 78 percent in rent-a-judge cases, 69 percent in publicly tried cases, 88 percent in mediated cases, and 100 percent in arbitrated cases.

The majority of the attorneys and litigants in each dispute resolution process felt the process and third party were fair, and the study found no significant differences between groups. Similarly, all processes received high scores on procedural justice. Forty-five percent of the parties in private trials were dissatisfied with the outcome of their case, however, compared to a range of 11 percent to 29 percent in the other dispute resolution proceedings.

Finally, the findings indicate that private judging, strictly defined in this study, had only minor effects, either positive or negative, on court calendars, workloads, and judicial resources. Fewer than half of the sitting judges and court administrators reported small benefits due to private judging. Many detailed a number of programmatic adaptations and innovations developed by the courts to address trial delays and shortages of judicial resources, such as using

pro bono attorneys for settlement conferences and having retired judges oversee discovery processes. While sitting judges perceived that some judges were retiring early to do private dispute resolution (not necessarily private judging), the results of the retired judges survey did not support this perception.

The study concluded that there is "little to recommend more widespread adoption of private judging; conversely, we have found little to support its abolition either." The study issued warnings to monitor private mediation and private arbitration processes, especially in regard to concerns about "repeat customers" and potential bias.

The Connecticut ADR Project. The Connecticut ADR Project (Project), conducted in 1986-1987, implemented a pilot program of alternative dispute resolution for insurance claims disputes, particularly those related to automobile accidents (*Final Report of the Connecticut ADR Project, Inc.*, 1988). Originally developed as a marketing and education organization, the Project became involved in the actual resolution of cases, funded by insurance company contributions and users fees. Five private dispute resolution firms -- Dispute Resolution, Inc., AAA, ADR, Inc., U.S. Arbitration Service, and American Intermediation Services -- provided services.

The Project aimed to compare the performance of alternative dispute resolution with "conventional dispute resolution." However, the study ultimately did not report comparison data because response rates from cases heard through the alternative processes were low (a

problem the private judging study encountered as well). The project compiled statistics on case outcomes for the cases heard through alternative dispute resolution, and obtained the subjective evaluations of participants (claims managers and plaintiffs' attorneys) via mailed questionnaires.

The 1,037 cases handled by the Project involved a wide variety of claims including automobile, general liability, construction, uninsured motorist, multi-party claims, and claims involving liens and disputed liability. Of these, 39 percent were settled prior to a hearing. Cases took an average of 120 days to reach a hearing; 351 cases (34 percent) were actually heard, 80 percent in a binding procedure. Overall, 70.5 percent of the cases submitted to the Project ultimately were settled. Of those that went to hearing, 92 percent ultimately settled.

Thirteen claims managers returned follow-up questionnaires. The majority reported that the Project and its providers were effective in assisting in case settlement and that they saved defense costs. Nearly half felt settlements resulting from hearings were too high. The majority cited the "opportunity to settle a case after a short hearing" as the prime benefit of participation, and about half appreciated the voluntary nature of private dispute resolution, control over the outcome, timeliness, and the ability to have the insurance company representative value the case after the plaintiff's testimony. Drawbacks included the time taken to obtain the plaintiff's participation and to schedule a hearing.

Virtually all of the 39 plaintiffs' attorneys responding to the survey said the Project was effective in inducing settlement, and all stated they would use private dispute resolution again. The vast majority indicated the most significant benefit of private dispute resolution was the opportunity to settle a case years prior to reaching trial. Over two-thirds reported that the settlements from binding and non-binding procedures were proper.

In addition to these findings, the study provided guidelines on the settlement of insurance disputes. The final conclusion was simply that private dispute resolution "does work."

IMPLICATIONS FOR COURT AND PROGRAM MANAGEMENT

Private, for-profit dispute resolution is a rather peculiar new member of the family of alternative dispute resolution forums because it exists outside of the courts' control. Because of the paucity of empirical research on private dispute resolution and its nature and newness, the implications for courts are wide open for discussion and debate.

Two esteemed bodies have recently issued rules or recommendations regarding the courts and private dispute resolution. The California Judicial Council has published rules specific to private judging, touching upon case management, the use of court facilities (courtrooms, clerks, juries, etc.), privacy, disclosure, and other aspects. These were reached after considerable public debate and

commentary and therefore serve as a guide to other jurisdictions. The most significant rules are:

- A privately compensated temporary judge should disclose, as soon as practicable, any potential ground for disqualification or bias, as well as any private payment received from an attorney or party in the instant case for service as a judge, mediator, arbitrator, referee, or settlement facilitator in the past eighteen months.
- Court facilities, personnel, and summoned jurors shall not be available for private judging, unless the presiding judge finds their use would further the interest of justice.
- A presiding or supervising judge may order that a case be heard before a privately compensated temporary judge if deemed to be in the public interest.
- The presiding or supervising judge may order that a case before a privately compensated temporary judge be held in a site easily accessible to the public.
- Original papers will remain in the court files, with copies provided to the privately compensated temporary judge. Exhibits in the possession of the temporary judge must be made available for inspection and returned to the court at the conclusion of the proceedings.
- A motion to seal records in a case before a privately compensated temporary judge will be heard by the presiding judge or judge designated by the presiding judge.

In response to increased public sector encouragement of the use of private dispute resolution, the Law and Public Policy Committee of the Society of Professionals in Dispute

Resolution (SPIDR) reviewed key issues in the field and made the following recommendations (SPIDR, 1993):

- Increased use of private dispute resolution processes should complement, not replace, continued efforts to improve the public justice system.
- The public justice system, and public policy generally, should support a variety of dispute resolution processes.
- In some instances, such as child custody matters, public officials should carefully consider whether the public's interest can be met through private processes. Even where it can, referrals in some cases should be contingent on the public justice system's ability to ensure that the public interest is met.
- Referral to private processes should maximize the party's choice of neutral, and the qualifications for neutrals should be based on the types of experience and training likely to be related to quality of practice.
- The public justice system should take responsibility for the quality of the dispute resolution provided by the neutrals to whom it refers cases.
- Quality control by the public justice system should be more substantial when the neutrals receiving referrals from the public justice system are granted immunity from liability.
- Any written settlement agreement that results from private dispute resolution should have no further protection from public disclosure than a written agreement reached by the parties in unassisted settlement negotiations.
- The careful balancing reflected in statutes regulating public access to decision-making by public officials should not be modified by mediation privilege statutes.

- When enforcement of agreements to arbitrate in cases involving civil rights forecloses other court or administrative agency access, the public justice system should take special care to ensure that such agreements resulted from free, fair, and informed bargaining.

There are many thorny issues to be considered by the courts in relation to private dispute resolution. A helpful starting place would be to reach consensus on a definition of private dispute resolution. One definition has been offered here -- private dispute resolution is any voluntary resolution process in which the parties themselves pay for the services of the third party neutral. Other proposals include defining private dispute resolution as (1) anything a private neutral does and (2) any form of dispute resolution outside the court's authority. More substantive issues needing further study include:

Program structure and management.

Since the dispute resolution procedures covered here are outside the courts' purview except for rare instances such as Connecticut's Sta-Fed program, questions of in-house program management are narrow. They tend to revolve around the referral process, case management, and the use of court resources. Courts do and will suggest to attorneys and litigants that they should perhaps try private processes. Should they then maintain a comprehensive list of all providers in the area? How should they make referrals? It is generally agreed that courts should not refer cases to particular individuals or firms, to avoid the appearance and reality of cronyism. Yet many believe that if the courts do

refer cases to private processes, they have a responsibility to ensure the quality of dispute resolution provided. This responsibility logically leads to the development and application of criteria for private neutral selection, which could result in a ranking system that could compromise the court's neutrality in making referrals.

Court officials and judges may view the court's oversight responsibilities for cases filed in the public system prior to going private differently from their responsibility for overseeing cases in the private system that were never publicly filed. Furthermore, if there is public interest in regulating the private system, should regulations come from the judicial or executive branch in the same way that the state requires licensing and certification of the medical profession? Or will the private system be able to police itself, in the same way that the market place appears to control quality in the commercial sector of private arbitration?

A related issue is how to ensure fair access to private dispute resolution for pro se litigants. In summary, guidelines are needed concerning appropriate court oversight responsibilities.

Integration into the court's case management system. Few courts track or monitor cases heard in private processes. Systems to ensure accurate tracking and monitoring are needed for a variety of purposes. Although proponent's hopes are high, there is little evidence to date of positive effects of private dispute resolution on case processing time, trial rates, or court costs. As the practice increases, however, court benefits in terms of the

easing of judicial workloads may occur as lengthy, complex cases are handled privately. On the other hand, the potential for a "brain drain" and other problems may grow. We will be unable to answer these questions and others without adequate monitoring systems for cases in the private system.

Case screening and referral criteria.

As far as can be known from the existing literature, it appears that privately resolved cases are all civil, with a variety of personal injury, tort, contract, and similar matters dominating the caseloads. Private dispute resolution appears especially promising for complex, multi-party cases, and where narrow expertise is desirable from the neutral third party. Questions about the best time to refer a case remain unanswered. In the private judging study, it appeared that stipulations to private judging were often preceded by one of a variety of settlement-type conferences in the courts. There remains much to be learned about who uses private dispute resolution procedures and why. Is private dispute resolution taking cases that would have settled anyway? What are the characteristics of individuals and businesses that use private dispute resolution and how representative of the community are they? Are individuals or businesses with low economic resources equally able to take advantage of the benefits of private procedures? Are private processes handling complex cases with sophisticated attorneys that might take months to try, thus relieving judicial workloads? Do court backlogs spur the private business, or do litigants pursue private dispute resolution for other reasons?

The Los Angeles Superior Court's rent-a-judge program was ended when funds became available to hire more judges on assignment. Yet, even though the court paid the fees of the retired judge, the process was voluntary. Mandatory referrals to private, fee-for-service procedures may be inappropriate, but perhaps information from mandatory divorce mediation processes can inform discussion of this issue.

Selection, training, and monitoring of neutrals. This is another very important question in private dispute resolution with few answers. Many of the mediators and arbitrators who conduct private hearings have been well-trained in negotiation techniques and have substantial experience on which to draw. Other self-appointed neutrals have no prior experience or training in this area; many are attorneys trained in the adversarial manner. Many of the retired judges are highly regarded by their peers and attorneys alike -- they are viewed as good "settlement judges," fair-minded, and extremely experienced.

There are no widely accepted standards for private dispute resolution providers, although professional associations such as the Society of Professionals in Dispute Resolution (SPIDR), the American Bar Association, AAA, and others have developed or are working on standards and qualifications for neutrals. Private dispute resolution providers are not monitored by any group, and private judgments, arbitration awards, mediated settlements, and other outcomes are rarely reviewed. Much work remains to be undertaken in these areas.

Participant satisfaction. The limited data available as yet on participant satisfaction are equivocal. Based on very little evidence, it appears that private judges receive extremely high marks for their fairness and expertise, and the private processes are generally viewed as fair. Satisfaction with outcomes may be less positive. Although the private judging study did not find litigant desires for speed and finality to be satisfied in fact, the postulated reasons driving the growth of private dispute resolution (e.g., delays, backlogs, and rigidity of processes) deserve a second look.

Program evaluation. Evaluations of private dispute resolution processes are sorely needed, and very difficult to implement without the full participation of private service providers. Some are willing to open their doors to outside scrutiny, while others feel only that they have something to lose if they do so. There are few carrots or sticks to use in gaining access to private firm records and clients. The courts can help in this regard by carefully tracking cases that leave the public courts to enter the private system, and welcoming research and evaluation efforts about the nature, experiences, and outcomes of these cases.

QUESTIONS TO BE ANSWERED

It would be much easier to list questions that have been definitively answered in private dispute resolution than to list all those that remain open and important. Every issue mentioned in favor of or in opposition to private dispute resolution requires additional research. This includes benefits to individuals in terms of

speed, cost, convenience, quality of justice, compliance, and the finality of the outcome; potential benefits to the courts in terms of caseload decreases, easing of workloads, and lower system costs; and potential problems including access to justice, two-tiered justice systems, power disparities, enforcement of private agreements and decisions, impact of confidentiality protections, court reform, loss of judicial talent, hindered development of common law, and favoritism toward repeat customers.

Other questions deserving of research go beyond the purported benefits and detriments to litigants and the courts. What regulations and policies should be implemented in regard to the practice of private dispute resolution? Should there be public mechanisms to pay for private dispute resolution for those who cannot afford it? What should the roles of the bar and judiciary be? How can courts be improved to capture what is good about private dispute resolution and reduce the problems of the public system? Which private forums fit what types of disputes best? These questions, along with innumerable others, remain to be answered in the years ahead.

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Selection, Training, and Qualification of Neutrals

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SELECTION, TRAINING AND QUALIFICATION OF NEUTRALS

The last decade has witnessed a remarkable increase in the extent to which courts are encouraging and even mandating litigants to use mediation and other forms of dispute resolution to settle their cases short of trial. Whether located inside or outside the courts, programs and services providing alternative dispute resolution (ADR) options are generally promoted as providing faster, cheaper and better quality outcomes. Proliferation of these programs and services, particularly when they are offered or mandated by the court, raises serious issues of quality control. ^{fn1} At risk is not only the waste of scarce resources but also dissatisfaction and loss of confidence in the public justice system by its users and, ultimately, by the public at large.

Intuitively we know that the key to the quality of ADR programs and services is the neutral. Now research has confirmed that the identity of the individual neutral plays a significant role in the outcome of a given case. ² However, research is only beginning to tell us what kinds of knowledge, skills, abilities and other attributes are critical to effective performance as a neutral, and, as a corollary, how such knowledge, skills, abilities and other attributes are acquired. More specifically, what is the impact of training on a neutral's effectiveness? What kinds of training programs work best? Are there adequate substitutes for training? As courts seek to develop rosters of qualified neutrals, the answers to these questions are critical. This paper discusses what kind of

guidance current research findings provide on the selection, training, and qualifications of neutrals and suggests subjects of future inquiry.

Background

Courts designing and implementing alternative dispute resolution programs have addressed the eligibility, competence and quality of the nonjudicial neutrals to whom they refer cases in a variety of ways. While courts often require the neutrals serving in different types of cases to be attorneys, increasing numbers are qualifying neutrals -- particularly mediators -- on the basis of performance, knowledge and skills rather than by degree-based criteria. ³ Specialized training for neutrals is also increasingly emphasized in many jurisdictions, with some states going so far as to regulate the ADR training content itself. ⁴

In selecting and certifying neutrals, many if not most states now use a hybrid method. ⁵ requiring some combination of two or more of the following qualifications: an academic degree; ⁶ apprenticeship or mentoring requirements; ⁷ training requirements; ⁸ and practical experience. ⁹ The type of degree, extent of apprenticeship, amount of training, or level of experience varies from jurisdiction to jurisdiction and depends upon the type of process as well as the type of case involved.

With the development of court-connected ADR and its emergent variety of practices has come the call for standards and principles related to the selection, training and qualifications of

neutrals. This, in turn, has inspired researchers, previously focused on outcomes and on comparisons between different dispute resolution processes, to begin examining questions related to relative quality among neutrals. The research in this area is young, and can be said to divide itself into several strands.

Concern about quality control led the Society of Professionals in Dispute Resolution (SPIDR) to impanel a Commission on Qualifications to investigate and report on basic principles that might influence policy for setting qualifications for mediators, arbitrators and other dispute resolution practitioners in both court-connected and independent programs and services. The Commission's 1989 Report contained a number of important conclusions, beginning with the recognition that when disputants' choices over the dispute resolution process, program and neutral are limited, as often is the case in court settings, marketplace checks on quality are missing. In such circumstances, the Commission concluded, mandatory standards or qualifications should be set by public institutions.¹⁰ The Commission also concluded that no particular type of degree, prior education, or job experience had been shown to be an effective predictor of success as a mediator, arbitrator or other practicing neutral, and thus, that standards or required qualifications should be performance-based.¹¹

The SPIDR report provided the impetus for research now being conducted under the auspices of the Test Design Project related to the job tasks, knowledge, skills, abilities and other attributes related to successful job performance

as a mediator.¹² This type of investigation represents one strand of the research related to the selection, training and qualification of neutrals.

In 1990, the State Justice Institute funded a project to develop national standards for court-connected mediation programs, including standards on qualifications of mediators.¹³ Citing with approval the conclusions of the SPIDR Commission on Qualifications, the Standards provide:

Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases. Qualifications of mediators to whom the courts refer cases should be based on their skills. Skills can be acquired through training or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.¹⁴

While recognizing that qualifications might be based on either experience or training, the Standards go on to address the nature of the training that courts should offer:

Courts need not certify training programs but should ensure that the training received by the mediators to whom they refer cases includes role-playing with feedback.¹⁵

This recommendation has been echoed in training standards developed by individual states and local jurisdictions.¹⁶

Articulation of such standards has led researchers to go beyond validating the knowledge, skills, abilities and other attributes related to successful job performance as a neutral

to ask how this set of knowledge, skills, abilities and other attributes is acquired and what role training plays in a neutral's overall effectiveness. This inquiry represents a second strand of the research currently underway relating to the selection, training and qualification of neutrals.

A third strand is more descriptive research, involving the effort to document current preferences, policies and practices related to assessing or evaluating neutrals for competence. When does assessment or evaluation take place: before, during or after training? What kind of assessment or evaluation is used? All three strands of research have implications for policy-makers addressing the eligibility, competence and quality of the nonjudicial neutrals to whom courts refer cases, and will be discussed more fully below.

Before turning to this discussion, it is important to note that most of the research relating to selection, training and qualification of neutrals has focused on mediators, although a few recent studies have also examined the behaviors and skills of early neutral evaluators.¹⁷ Since arbitration is an adjudicatory process it has simply been assumed that lawyers with some degree of experience are competent to arbitrate.¹⁸ Recent attention to the training and competency of mediators may inspire attention to the training and competency of other types of neutrals.

It should also be recognized that there is no consensus, where non-adjudicatory ADR processes such as mediation are concerned, about what constitutes quality practice. How neutrals are selected, trained and evaluated is critically

dependent upon a court's or program's goals.¹⁹ Is the primary goal to settle cases, narrow issues, increase the involvement of parties in the resolution of their case, save the parties' costs and time, increase the court's ability to resolve cases within given resources, increase the parties' satisfaction with the results of dispute resolution, or assist the parties in developing a wider range of outcomes than are available through adjudication? These inconsistent or competing goals can lead to different choices in policies and practices relating to the selection, training and evaluation of neutrals. These dynamics highlight the importance of courts and programs choosing and articulating their goals clearly when they plan and implement ADR.²⁰

The Knowledge, Skills, Abilities and Other Attributes of an Effective Neutral

The neutral's individual characteristics and abilities

The SPIDR Commission on Qualifications posited in its 1989 report a list of skills it deemed necessary for competent performance as a neutral.²¹ Other similar lists have been developed,²² some by individual ADR programs. Such lists have been based, however, on the thinking and values of experienced practitioners rather than on empirical research.

Research on several alternative dispute resolution programs now confirms that the identity of the individual neutral plays a significant role in the outcome of a given case. In other words, some neutrals are more likely to have higher success rates than others. An empirical evaluation of the Alternative Dispute

Resolution Demonstration Project in Florida's 13th Judicial Circuit, fn23 for example, found a statistically significant association between the mediator and case status (resolved or unresolved). fn24 The study also found a statistically significant association between the mediator and the time for case processing, and between the mediator and participant satisfaction with the process. fn25 However, the research was not designed to determine the basis for these kinds of associations or, in other words, what knowledge, skills, abilities or other attributes of the mediator determine success.

Similarly, an empirical evaluation of the early neutral evaluation program in the Northern District of California confirmed the importance of the neutral's individual characteristics. 26 Interviews and focus groups revealed that

"[w]hile it was unclear why parties regularly requested an evaluation from one evaluator who did not volunteer one, and regularly refused a proffered settlement amount from other evaluators who always offered it, it was clear that there were individual factors involved." f7

Questions concerning the skills and personal characteristics of evaluators revealed that participant satisfaction correlated strongly with the belief that the evaluator listened carefully, understood what she listened to, was skilled at facilitating communication between the sides, was able to analyze accurately the legal issues, had subject-matter expertise, and was interested in exploring creative solutions to the litigants' problems. In addition, the study found that over 60 percent of the variation in pendency times of

different cases was attributable to the identity of the evaluator. 28

While this research tells us that the identity of the individual neutral is key, and that in one program setting certain of the neutral's characteristics were shown to correlate with effectiveness as measured by participant satisfaction and case processing time, it falls short of providing a rigorous basis for selecting and qualifying neutrals. This is the overall purpose of the Test Design Project, which seeks to provide tools for programs wishing to test mediators before, after, or in lieu of training them.

Concern about the lack of clear, consistent and intellectually respectable criteria for selecting, training and evaluating mediators led the Coordinator of Arbitration Services for the State of Wisconsin Employment Relations Commission, Christopher Honeyman, to pioneer a study in 1985-86 in which a group of five labor mediators working for the Commission were

observed closely to determine whether their very divergent styles as neutrals contained any matrix of common skills and abilities. 29 Although on the surface these mediators differed greatly in terms of their approach and style, it was determined that "to a surprising extent, they all followed the same sequence of action." 30 On the basis of this discovery, Honeyman and his colleagues designed a set of evaluation scales that could be used to observe mediators or candidates in simulated role-play settings and assess the quality of their performance. 31

Honeyman's performance criteria were subsequently tested in a very different setting. They were used to select a group of mediators to serve in a new program implemented to address the civil caseload in the Suffolk County, Massachusetts Superior Court.³² Two findings from this experience are particularly notable. First, there was an extraordinarily high degree of consistency among the evaluators in rating the mediator candidates.³³ Second, the evaluators' judgments predicted the mediator's subsequent performance.³⁴ These findings as to consistency among evaluators and correlation between judgments and actual job performance have been found to hold true across at least three very different settings involving different types of cases,³⁵ confirming the viability of identifying a common core of knowledge, skills, abilities and other attributes that determine a neutral's effectiveness.³⁶

Honeyman's performance criteria as subsequently refined³⁷ have not yet been validated empirically according to standards recommended by the testing industry. Since the results of the testing experiments conducted to date are necessarily limited in scope, it is unclear whether the Test Design Project's findings are applicable in other ADR contexts. Efforts are currently underway to address this gap in a second phase of the project through the Mediation Skills Assessment Project, which will conduct both systematic job analysis across various types of mediation and formal validation research.³⁸

In sum, findings from this strand of the research on the selection, training and

qualification of neutrals suggests not only that performance differs significantly depending upon the identity of the neutral, but also that it is possible to identify particular knowledge, abilities, skills and other attributes that determine effective performance. It should be noted again, however, that this research focuses on the knowledge, skills and other attributes of mediators and does not address those of other types of neutrals.³⁹

Other attributes: gender, race and ethnicity

There is little research documenting the effects of a neutral's gender, race or ethnicity on his or her performance.⁴⁰ However, studies have shown that different groups of people both

experience and handle conflicts differently.⁴¹ Both for this reason and out of a commitment to encourage participation by minorities and women, courts and programs often seek affirmatively to promote diversity among their rosters of neutrals.⁴² Gender, racial or ethnic diversity, in other words, may be considered as a distinct attribute with regard to qualifying neutrals.⁴³

How the Neutral's Knowledge, Skills, Abilities and Other Attributes are Acquired

While the research described above is proceeding apace, less has been done to gather data concerning how the knowledge, skills, abilities and other attributes of effective neutrals are acquired. Some surmise that such knowledge, skills, abilities and other attributes derive primarily from an individual's innate

qualities; others believe that they can be acquired through training. Still others emphasize experience as the source of skills and abilities.⁴⁴ How the skills and abilities needed for effective performance are acquired is an important issue for courts seeking to develop rosters of qualified neutrals.

Research in other professional fields has addressed this precise question. An empirical study of psychotherapists, for example, assessed the relationship between clinical experience, training format (no training, self-instructional or intensive training), and therapeutic outcome in time-limited therapy. Clients of experienced therapists had consistently superior outcomes when compared with clients of the less experienced therapists, but the more intensely trained therapists realized better outcomes, irrespective of their experience as a therapist.⁴⁵

The findings of preliminary research in the dispute resolution field addressing this question are less clear. For example, performance-based testing to select mediators for the Suffolk County, Massachusetts, civil mediation program indicated no strong correlation between training or prior experience and performance:

We found that candidates with extensive mediation training did not necessarily perform better than those with little or no training. Lawyers did not perform better than nonlawyers. And contrary to our expectations, even those with previous mediation experience did not consistently score so well that prior experience could be relied upon as a strong predictor of effective performance.⁴⁶

While these findings are of limited scope and somewhat impressionistic in nature,⁴⁷ they appear to be consistent with other current research on the subject.

Only one study has sought to compare the nature and extent of a neutral's training and prior experience with the outcome of mediated cases. The Supreme Court of Ohio and the Ohio Commission on Dispute Resolution and Conflict Management conducted a survey of mediators, parties and attorneys in approximately 460 cases mediated during the Franklin County Court of

Common Pleas Settlement Week in June, 1992.⁴⁸ While this study has yet to be replicated,⁴⁹ its findings suggest interesting policy implications. Overall, when the hours of the neutral's mediation training were compared to the outcome of mediation and to a number of other measures,⁵⁰ it appeared that while some training was helpful, distinctions among mediated cases for the most part were not significant beyond about six hours of training.⁵¹ Nor did the type of training appear to have great significance.⁵² Previous mediation experience appeared to be related to settlement, although not necessarily to other measures such as perceived effectiveness and party satisfaction.⁵³

A study of twenty citizens volunteering to be trained and serve as mediators in a community dispute center examined when, where and how mediators acquire their techniques and skills.⁵⁴ The study gathered information about the demographics and conflict management styles of these trainees,⁵⁵ who were then observed and evaluated in a role-play setting prior to any

training.⁵⁶ After they completed training, the trainees were evaluated again according to the same criteria, first in a role-play setting following the completion of training and later during their first and third mediations with actual clients.

The study found that predisposition to being an able mediator, as measured by an individual's conflict management style, was more significantly determinative of mediator effectiveness across time and in post-training role play and actual mediation performance than either training or prior experience. Individuals who generally take a collaborative approach to managing conflict were most effective overall. In addition, the study found more numerous and stronger associations between collaborative approaches and positive ratings of effectiveness across time in post-training role play and actual mediator performance, suggesting that highly collaborative mediators benefit from training and develop skills from experience as well. The study also found that

[i]n contrast, a competitive orientation seems to predispose an individual not to be a 'natural' mediator, as this style was associated with the most extensive set of ratings at pre-training testing. The subsequent pattern of ratings is both interesting and suggestive. Specifically the initially negative ratings at pre-training screening were not observed in the post-training role-play ratings, suggesting that training had some positive impact. However in actual mediations high conflict mediators were not viewed favorably by disputants, suggesting that any positive impact of training may have "worn off or been overwhelmed by natural inclination."⁵⁷

In sum, while findings from this strand of research on the selection, training and qualifications of neutrals are as yet sparse, they suggest that there are no simple answers to the question of how the knowledge, skills, abilities and other attributes of effective neutrals are acquired. This may be because the possible sources studied (predisposition, training and experience) are not necessarily mutually exclusive. Indeed, what these findings seem to suggest is consistent with the experience of mediation trainers generally. Mediation trainers often say that judging from their experience in learning and practicing the skills and techniques taught, about 20 percent of any class of trainees can be expected to perform at a superior level; about 20 percent should probably not be assigned to mediate cases; and the remaining 60 percent can be expected to perform adequately. As the findings of the research discussed above seem to suggest, it may be that both training and experience enhance the effectiveness of those with certain innate qualities but are not, by themselves, the source of the requisite knowledge, skills, abilities and other attributes. In other words, careful screening or testing prior or subsequent to training may be of critical importance.^{fn58} This leads to consideration of the third strand of research relating to the selection, training and qualification of neutrals.

Assessing or Evaluating Neutrals

The third strand of research examines when and on what basis a neutral's competence is assessed or evaluated. Should testing be done before, after or in lieu of training? Should

assessment or evaluation be based on settlement rates? On user satisfaction? On training or experience? Surveys of current preferences, policies and practices have attempted to provide some guidance in this regard.

The timing of testing is certainly relevant to courts, particularly as it relates to resource allocation. As was pointed out by those who tested mediators to serve in the Suffolk County, Massachusetts Superior Court program,

Because we had limited supervisory and training resources and the mediators had limited time to give to the program, we realized that we would be using the selection process to predict future mediator behavior with limited opportunities to shape it once the mediator was selected. This contrasts with the Wisconsin situation, where the mediators are full-time staff....This may have afforded that agency greater time to train and assist inexperienced mediators placing slightly less pressure on the selection process itself. ⁵⁹

Is it ultimately more cost-effective for courts to put their resources into performance-based testing prior to or in lieu of training, on the theory that those selected can be expected to perform well and any training subsequently offered will enhance natural skills? Or, should courts simply proceed to train all candidates, and test for competence later on the basis of their performance in handling actual cases?

At least one survey has attempted to determine current practices regarding when, generally, a neutral's competence is assessed or evaluated. While the number of responses was limited, ^{fn60} the survey indicates that testing to determine a neutral's competence occurs over a

span of time. Sixty-three percent of the respondents indicated that assessment or evaluation takes place prior to hiring, training, or placement on a roster in the mediation program with which they were most closely associated. Forty-eight percent said testing occurs during training, 48 percent after training, and 41 percent within the first year after training. Only 15 percent said mediators were never assessed or evaluated. ⁶¹

On what basis, then, should neutrals be assessed or evaluated? The answer to this question depends, in part, on timing. Clearly some measures, such as settlement rate comparisons and degree of user satisfaction, can only be used after a neutral has been selected to serve on a court roster. Thus programs must rely on other measures in their hiring processes.

A number of different measures of neutral competence have been used by courts and others, either alone or in various combinations. These include performance-based testing, ⁶² completion of training, depth and breadth of prior experience, settlement rates, user perceptions of the process, user satisfaction, and the opinions of judges, attorneys and peers. There are difficulties, as well as advantages and disadvantages, in using each measure. For example, the competence of a neutral who is consistently unsuccessful in settling cases is clearly questionable. Yet comparing settlement rates of two neutrals may not be fair because one may have handled more difficult and complex cases than the other. In addition, settlement rates do not address the quality of settlements. Nor is settlement itself something that is easy to

define.⁶³ Which competency measures are used will also depend, in large part, on the program's philosophy and goals.⁶⁴

One measure, in particular, warrants further discussion. While client satisfaction is often used to measure neutral competence and program quality, it is a measure that should be distinguished from perceptions of procedural fairness, perhaps a more relevant subject of inquiry. Research suggests that there are qualities of dispute resolution processes, such as dignity of treatment and the sense of being heard, that are of vital importance to disputants and that contribute even more than do outcomes to disputants' sense that justice has been served.⁶⁵ A neutral's ability to ensure that these qualities of dispute resolution processes are present, then, may be important to assess, although this is a factor that program evaluations have often overlooked.

While no research reported to date has examined the comparative effect of using one measure of competency over another, surveys have sought to determine interested views on the subject. For example, in a study of alternative dispute resolution programs in California,⁶⁶ judges and ADR providers were asked to rank various criteria for evaluating providers. The two criteria deemed most important by both judges and providers were the satisfaction of the provider's clients and the provider's percentage of cases settled.⁶⁷ While judges ranked success ratio higher than client satisfaction, the reverse was true of providers. Judges and providers found both success ratio and client satisfaction to be better measures of a neutral's competence than

bar membership, training, breadth of experience, number of years of experience or the opinion of others. Interestingly, years of experience ranked very high for providers and relatively low for judges, while the opinion of judges ranked very high for judges and relatively low for providers. Training ranked fifth for both judges (after success ratio, client satisfaction, opinion of judges, opinion of the bar and breadth of experience) and providers (after client satisfaction, success ratio, years of experience and the opinion of providers).⁶⁸

Implications and Future Research Needs

One of the major conclusions that emerges from the research is that we have very little solid empirical data about how to select, train, and evaluate neutrals. This conclusion may seem discouraging, especially when contrasted against our individual and collective experiences. Yet the paucity of research findings is understandable given the variation in perspectives about what constitutes quality in a neutral's performance. How we define quality, and thus the characteristics of neutrals we look for, what we train neutrals to do, and the ways we measure their success are critically dependent upon a number of different factors such as the goals of the particular dispute resolution program, the type of dispute at hand, and even the stage in the life of the dispute at which the intervention occurs. Furthermore, because courts employ a range of ADR processes for resolving different types of disputes, we need to broaden the examination of neutral qualifications beyond the current focus on mediators to include all

types of neutrals who serve our public justice system. Perhaps even more importantly, differences in cultural settings or in the ethnic backgrounds of individual disputants make generalizations about the quality of a neutral's performance problematic. What may look like quality in one program, in one type of dispute, or with one set of disputants may look very different in other contexts.

The research does suggest at least one set of findings that is important for courts to heed: the attributes that determine a neutral's effectiveness appear to be derived from a mixture of sources, including personal characteristics, training, and experience. Courts therefore should not rely exclusively on any one factor, such as the academic or training credentials of candidates, when they develop rosters of qualified neutrals. Furthermore, careful monitoring and evaluation of performance before and after selection and training are equally, if not more important to quality assurance than is the establishment of neutral qualifications.⁶⁹

The importance of monitoring and evaluation highlights the necessity of resolving the issue of how we measure quality and effective performance. We do not yet know enough, for example, about whether client satisfaction with perceptions of procedural justice, whether either or both of these factors impact case settlement, and how the individual neutral's performance affects all three factors. If correlation among these measures of quality are found not to exist, we must work harder to reach consensus on a more useful and appropriate definition of quality in court-connected ADR.

We also need to find both the means and the methodologies to answer these and other questions. For example, what kinds of processes and outcomes are users of dispute resolution services looking for? Do factors such as who pays for the service influence satisfaction? What is the impact on neutral performance of various types of training? What makes training effective? What is a good "predisposition" for an effective neutral and how can we identify those who have it? Does experience as a judicial officer or as an attorney impact performance? In any research on these questions, it will be critical to examine the effects of cultural, racial, ethnic and gender diversity.

Given the current gaps in research regarding neutral qualifications, courts should exercise caution in certifying or establishing qualification criteria. In developing qualifications or standards for neutrals handling cases referred by the courts, courts should avoid erecting barriers in the form of exclusionary criteria. Useful resources that courts might consult when developing qualifications for neutrals include the *National Standards for Court Connected Mediation Performances* and the SPIDR Commission on Qualifications' *Qualifying Neutrals: The Basic Principles*. Courts also should seek input from users, community groups, and those who will be served by court programs, test a variety of approaches, and share their findings with others. Only through active experimentation, research and discussion can effective and proven models for qualifying neutrals emerge.

¹ It is generally agreed that courts are responsible for ensuring the quality of the dispute resolution programs and services to which they refer litigants. *See, e.g., National Standards for Court-Connected Mediation Programs*, Center for Dispute Settlement and Institute of Judicial Administration, 1992; and Conference of State Court Administrators Committee on ADR, Report to the Membership, 1990.

² *See, e.g.,* K.D. Schultz, *Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment*, Florida Dispute Resolution Center, 1990; and J.D. Rosenberg and H.J. Folberg, *Alternative Dispute Resolution in a Civil Justice Reform Act Demonstration District: Findings, Implications and Recommendations*, University of San Francisco School of Law, 1993.

³ E. Plapinger and M. Shaw, *Court ADR: Elements of Program Design*, New York: Center for Public Resources (1992) at 63-68.

⁴ *Id.* at 68-72.

⁵ R. Moberly, unpublished paper written for SPIDR Commission on Qualifications, March 15, 1993. Qualifications are generally established by legislation, articulated in court rules, recommended by statewide ADR task forces or commissions, or determined by local court practice.

⁶ Most frequently a law degree, social work degree or degree in mental health.

⁷ Observing a certain number of mediations and/or conducting a certain number of mediations under the supervision and observation of another mediator.

⁸ Participation in a certain number of hours of training, sometimes including continuing education, and sometimes participation in training that is certified by the court.

⁹ Florida, for example, requires its certified family mediators to have four years of practical experience and its certified circuit court mediators to have five years of Florida law practice.

¹⁰ SPIDR Commission, *Qualifying Neutrals: The Basic Principles* (1989). The SPIDR Commission also stated that "The most commonly discussed purposes of setting criteria for individuals to practice as neutrals are: 1) to protect the consumer and 2) to protect the integrity of various dispute resolution processes. Concerns have also been raised, particularly about mandatory standards or certification, including 1) creating inappropriate barriers to entry into the field, 2) hampering the innovative quality of the profession, and 3) limiting the broad dissemination of peace-making skills in society."

¹¹ *Id.*

¹² Formed by the Coordinator of Arbitration Services for the State of Wisconsin Employment Relations Commission, Christopher Honeyman, out of his early experiments with development of performance-based criteria both for labor mediators employed by state government in Wisconsin and for civil case mediators selected by a court program, the Test Design Project has as its goal the development of empirically validated testing criteria for mediator selection. *See* discussion at pp. 9-10, *infra*. It should also be noted that SPIDR has reactivated its Commission on Qualifications which, among other things, is currently engaged in an effort to develop listings of competencies for mediators in specific sectors of practice.

¹³ Directed by the Center for Dispute Settlement and the Institute of Judicial Administration, the Standards were developed through the deliberations of a national, blue-ribbon advisory board consisting of judges, court administrators, mediation program administrators, higher income users, lower income users, mediators, academics and evaluators.

¹⁴ *National Standards for Court-Connected Mediation Programs*, Center for Dispute Settlement and Institute of Judicial Administration, 1992 at 6-1. Commentary to this Standard states that no recommendations are made "...with respect to the number of hours of training or experience that should be required. The amount of training and experience will vary depending upon the type of case being mediated." *Id.* at 6-4.

¹⁵ *Id.* at 6-4. Commentary to this Standard states, "While training, by itself, does not guarantee competence, experiential programs that allow participants to engage in simulations and receive individual observation and feedback are most likely to advance quality performance."

¹⁶ *See, e.g., Massachusetts Association of Mediation Programs, Mediation Training Standards*, Draft 1: September, 1992. These Standards articulate as their philosophy that "[a] basic mediation training program should emphasize interactive participation, encouraging 'learning by doing' in a constructive and supportive atmosphere. It should include a mixture of theory and practice that enhances the performance of trainees and provide a variety of learning techniques that reflect a sensitivity to individual learning styles."

¹⁷ *See, e.g.,* J.D. Rosenberg and H.J. Folberg, *supra* note 2.

¹⁸ In both federal and state courts the basic eligibility requirements for arbitrators are admission to the bar of the jurisdiction and five to fifteen years experience as a

practicing attorney. Law professors and former judges are also usually eligible to serve. E. Plapinger and M. Shaw, *supra* note 3 at p. 64.

¹⁹ A core group of volunteer community mediators who handle a disproportionate percentage of a program's caseload has also been found to heavily influence the program's perspectives of what constitutes "good" mediation practice. C.B. Harrington and S.E. Merry, "Ideological Production: The making of community mediation," *Law and Society Review* 2 (4) (1980) at 709-35.

²⁰ *The National Standards for Court-Connected Mediation Programs*, *supra* at note 14 also stress the importance of clarity of goals in ensuring that "... -- A case or class of cases is referred to an appropriate mediator or program; -- The program is of high quality and suitable to the case or class of cases referred; [and] -- The court has clear objectives by which to monitor and evaluate the program's performance. *Id.* at 2-3.

²¹ SPIDR Commission on Qualifications, *supra*, note 10 at 17-19.

²² See, e.g., M. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution Sponsored by New Jersey Center for Public Dispute Resolution*, 12 Seton Hall Legislative Journal 125 (1988); and "Universe of Competencies for Environmental and Public Dispute Mediators" prepared by the Environmental/Public Disputes Sector Committee of the Society of Professionals in Dispute Resolution.

²³ The primary sample for this study focused on civil cases and consisted of all of the 13th Circuit's mediated cases as well as a systematic random sample of the circuit's other civil cases.

²⁴ K.D. Schultz, *supra* note 2 at p. 17.

²⁵ *Id.* at 18.

²⁶ J.D. Rosenberg and H.J. Folberg, *supra* note 2 at 76-82.

²⁷ *Id.* at 76.

²⁸ *Id.* at 82.

²⁹ Test Design Project, *Interim Guidelines for Selecting Mediators*, Washington, D.C.: National Institute for Dispute Resolution (1993) at 3. A full description of the study and its results appears in C. Honeyman, "Five Elements of Mediation," *Negotiation Journal* 4 (1988) at 149-158.

³⁰ *Id.* The five types of activities were described as investigation, empathy, invention, persuasion and distraction.

³¹ C. Honeyman, "On Evaluating Mediators," *Negotiation Journal* 6 (1990) at 23-36.

³² The skills-based evaluation process used in Suffolk County modified Honeyman's five categories by adding a sixth criterion, described as managing the interaction. A seventh criterion, substantive knowledge, was subsequently added to the list. See *Interim Guidelines*, *supra* and discussion at note 36, *infra*.

³³ B. Honoroff, D. Matz and D. O'Connor, "Putting Mediation Skills to the Test," *Negotiation Journal* 7 (1990) at 40.

³⁴ "Perhaps the most important measure of the test's effectiveness is whether it picked out the mediators who perform well on the job. Since we did not recommend to the court those who performed poorly on the evaluation, we don't have a true "control group." But we do have the rankings that we derived from the test and can compare those rankings with performance on the job. Those candidates with the highest scores are doing very well; those with somewhat lower scores started a bit later and have encountered somewhat more problems. Assuming those results are not the product of self-fulfilling prophecies, performance on the job appears to correlate roughly with performance on the evaluation." *Id.* It should be noted that the authors of this article documenting the Suffolk County, Massachusetts Superior court experience did not specify their criteria for ranking performance on the job.

³⁵ C. Honeyman, K. Miezio and W.C. Houlihan, "In the Mind's Eye? Consistency and Variation in Evaluating Mediators," Harvard Program on Negotiation *Working Paper Series No. 90-21* (1990).

³⁶ This also confirms the viability of performance-based testing to evaluate a neutral's performance. See discussion note 63, *infra*.

³⁷ The Test Design Project produced *Interim Guidelines for Selecting Mediators*, which were reviewed and modified by a distinguished group of twenty judges, court administrators, mediators and mediation program administrators. The guidelines were intended to address the tasks performed by mediators working in commercial, family and community settings and to serve as a testing tool for individual dispute resolution programs.

³⁸ HumRRO International, Inc. and the American Institutes for Research are conducting a preliminary part of this

research with funding from the National Science Foundation. The project will, among other things, administer job analysis questionnaires to a cross-section of mediators to evaluate the importance of various knowledge, skills, abilities and other attributes, indicate when, over the course of one's career as a mediator, different "KSAOs" are required, and assess the importance of various mediation activities.

³⁹ See *supra*, note 17 and accompanying text.

⁴⁰ A few study findings do exist. For example, it has been found that there is no relationship between the gender of a mediator and disputants' satisfaction and assessment of the mediator's fairness and clarity. V. Wall and M. Dewhurst, "Mediator Gender Communication Differences in Resolved and Unresolved Mediations," *Mediation Quarterly* vol. 9, no. 1 (Fall, 1991) at 63-86.

⁴¹ A number of researchers have documented the relationship between culture and conflict style. See, e.g., S. Ting-Toomey, "Toward a Theory of Conflict and Culture," *Communication, Culture and Organizational Processes*, W. Gudykunst, L. Stewart and S. Ting-Toomey (eds.), New York: Sage Press (1985). Researchers have also demonstrated differences between men's and women's experiences with community mediation. T. Northrup and M. Segall, *Fund for Research on Dispute Resolution Final Report*, Washington, D.C.: National Institute for Dispute Resolution (1991).

⁴² A number of studies have found a lack of diversity among mediator pools at community justice centers, raising questions about how well the centers represent the communities they serve. See, e.g., S. Rogers, "Ten Ways to Work More Effectively with Volunteer Mediators," *Negotiation Journal* (April, 1991) at 201. The *National Standards on Court-Connected Mediation Programs*, *supra* note 14, explicitly state that "...courts should not set up barriers that inappropriately exclude competent mediators and should encourage diversity among service providers, including gender, racial and ethnic diversity." *Id.* at 6-1.

⁴³ A Roster Qualifications Panel appointed by the FDIC and RTC, for example, recommended that points be awarded to neutral applicants for various qualifying factors including quantity and quality of prior experience as a neutral, and that "extra credit" be given to diversity. *Report of the FDIC/RTC Roster Qualifications Panel*, undated. It is generally agreed that sensitivity to gender, racial and ethnic differences should be a subject of training for neutrals.

⁴⁴ The effectiveness of mediators handling child custody cases in court programs, for example, was found to jump significantly after they had handled at least ten cases. See

J. Pearson, N. Thoennes and L. Vanderkoi, "Mediation of Child Custody Disputes," *Colorado Lawyer* Vol. 2, No. 2 (February, 1982) at 335.

⁴⁵ G.M. Burlingame, A. Fuhrman, S. Paul and B. Ogles, "Implementing a Time-Limited Therapy Program: Differential Effects of Training and Experience," *Psychotherapy* vol. 26, No. 3 (1989) at 303-313.

⁴⁶ B. Honoroff, D. Matz and D. O'Connor, *supra*, note 33 at 4.

⁴⁷ The testers acknowledged several methodological problems: "We did not put those whom we judged not likely to do well in the program through the evaluation, so that our sample of those who did undertake the test is necessarily skewed...[And s]ince we did not recommend to the court those who performed poorly on the evaluation, we don't have a true "control group." *Id.*

⁴⁸ The study made many other comparisons, including the effect of mediation on costs, and the relationship between outcome and type of case, stage of discovery, and motions. The extensive database from the survey is available on disk from the Supreme Court of Ohio, and others are encouraged to use and conduct their own analyses of the data.

⁴⁹ The Supreme Court of Ohio plans to replicate the study in one or two counties in the fall of 1993, revising the methodology to include random selection of cases assigned to mediation. In the instant study, cases were assigned to both the process and particular mediators by a referee. This may have influenced some of the results. (Telephone interview with the Supreme Court of Ohio Coordinator of Dispute Resolution Programs, June 17, 1993.)

⁵⁰ Fourteen measures were used, including the outcome of mediation, tactics employed by the mediator, perceived effectiveness of the mediator, perceived fairness of the mediation process, whether the settlement contained non-monetary provisions, and whether the participants would recommend mediation to others.

⁵¹ This finding, however, may not be generalizable. It has been hypothesized that the referee assigning cases in the study sample to mediation assigned the most difficult and complex cases to the mediators who had more than 40 hours of training. Interview with Supreme Court of Ohio Coordinator, Dispute Resolution Programs, *supra*.

⁵² Mediators were asked whether their training included role-playing experience with feedback.

⁵³ Supreme Court of Ohio *Database*, *supra*, note 48

⁵⁴ See M.R. Van Slyck, "Determining Sources of Mediator Effectiveness: Predisposition, Training and Experience," *Monograph Series*, New York: Research Institute for Dispute Resolution (1993). The center handled minor criminal, civil and family matters.

⁵⁵ The trainees were asked to complete the Thomas-Kilman Conflict Inventory, which indicates an individual's dominant conflict management style as either competitive, collaborative, accommodating, avoidant or compromising.

⁵⁶ This procedure was similar to the performance-based tests discussed above and at note 63, *infra*, although the trainees were evaluated according to somewhat different criteria.

⁵⁷ M.R. Van Slyck, *supra*, note 54.

⁵⁸ This hypothesis would help explain the preliminary findings of the Ohio Supreme Court survey regarding training, which appear to run counter to the weight of thinking in the field today. In other words, the survey found that the number of hours of training was not significantly determinative of case outcomes, which correlated more closely with individual characteristics of the mediator such as age. However this finding may be attributable at least in part to the fact that the mediators in the data sample were not pre-screened.

⁵⁹ B. Honoroff, D. Matz and D. O'Connor, *supra*, note 33 at 39.

⁶⁰ The survey was conducted by HumRRO International, Inc. as part of its grant from the National Science Foundation (see footnote 35, *supra*). Questionnaires were completed by 27 individuals attending a symposium on "Qualifications and the Quality of Practice: Values, Tools and Applications" at the National Conference on Peacekeeping and Conflict Resolution, May 29, 1993.

⁶¹ A study of 400 volunteer community mediators from 10 dispute resolution centers in the state of New York found that a real source of mediator dissatisfaction was that after their initial training and apprenticeship program the mediators did not generally receive regular feedback and were often uncertain about how their skills were progressing. S. Rogers, *supra*, note 42.

⁶² See C. Honeyman, "On Evaluating Mediators," *supra*, note 31. Candidates perform a simulated mediation (simulated to control dynamics and content) under the observation of trained evaluators (multiple evaluators minimize bias in the evaluation process) who assess performance in accordance with an evaluation instrument provided to candidates in advance. In addition to use in the Suffolk County, Massachusetts Superior Court (*see supra*, note 32 and accompanying text), performance-based testing has been used to select mediators in the Washington, D.C. Superior Court, at the San Diego. California Mediation Center and in Hawaii's Court-Centered Domestic Mediation Project.

⁶³ Do cases that settle not during mediation but later, before trial, count? What about partial settlements? Does it matter whether settlements endure over time? For a discussion of the advantages and disadvantages of various competency measures see R. Moberly, *supra*, note 5 and C. Honeyman, "In the Mind's Eye?" *supra*, note 35.

⁶⁴ See *supra*, note 19 and accompanying text.

⁶⁵ See, e.g., T.R. Tyler, *The Social Psychology of Procedural Justice*, New York: Plenum Press (1988).

⁶⁶ The study was taken to develop recommendations to foster greater use of ADR programs by California courts. J. Folberg, J. Rosenberg and R. Barrett, "Use of ADR in California Courts: Findings and Proposals," *University of San Francisco Law Review* Vol. 26, No. 3 (1992).

⁶⁷ *Id.* at 404.

⁶⁸ This ranking by providers is not dissimilar to that reflected by other surveys. See, e.g., D. Roth, Columbia University School of Law, Unpublished paper (forthcoming, 1993).

⁶⁹ Commentary to the *National Standards for Court-Connected Mediation Programs*, *supra*, note 14, also states that "[m]onitoring [mediators'] performance may be equal in importance to the initial selection process." *Id.* at 6-6.

Bibliography

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CIVIL DISPUTE RESOLUTION PROCESSES

Civil Mediation

Florida's Alternative Dispute Resolution Demonstration Project (Florida Dispute Resolution Center)

This project evaluated the Alternative Dispute Resolution Project in Florida's 13th Judicial Circuit. The Florida Legislature funded the study of mediation's impact on the pace, cost and quality of dispute resolution and the judicial workload; whether particular types of cases are more amenable to resolution through mediation; and whether particular qualifications or other attributes of the mediators made them more effective.

Project Product

Schultz, Karl. *Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment*. Florida Dispute Resolution Center, 1990.

Mediation of Civil Cases in Hennepin County (Research and Planning, Office of the State Court Administrator/Minnesota Judicial Center)

This project evaluated the success of a pilot mediation program for large, general civil cases in Hennepin County. Nearly 1200 civil cases were randomly assigned to one of two groups: an experimental group, where cases could be referred to mediation or arbitration at the discretion of the judge or to a control group, where the only alternative was arbitration and no cases were referred to mediation. The program had three primary goals: to increase early settlement of cases to reduce judicial caseloads and speed the judicial process for all; to maintain or increase litigant satisfaction levels with the system and the quality of justice rendered; and to reduce the costs of litigation.

Project Product

Kobbervig, Wayne. *Mediation of Civil Cases in Hennepin County: An Evaluation*. Judicial Center, February 1991.

Evaluation of the ADR Pilot Project: Maine Superior Court (McEwen/Maine Superior Court)

This study evaluated the settlement rate, trial rate, court activity, cost of discovery, and litigant and lawyer satisfaction in cases filed in the Maine Superior Court in York and Knox Counties. Cases were randomly assigned to an ADR process or to a control group. In addition, other cases entered ADR voluntarily. The neutrals used various dispute resolution approaches, including mediation and neutral evaluation. All formal discovery was prohibited until the ADR process concluded.

Project Product

McEwen, Craig. *An Evaluation of the ADR Pilot Project: Final Report*. Bowdoin College, January 1992.

Mediation: Related Literature

Fix, Michael and 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*. The Urban Institute, June 2, 1992.

Kressel, Kenneth, Dean Pruitt and Associates. *Mediation Research*. San Francisco, CA: Jossey-Bass Publishers.

Case Evaluation

Court Sponsored Case Evaluation: A Strategy for Cost Containment and Streamlined Disposition of Motor Vehicle Tort Litigation. (Commonwealth of Massachusetts: The Trial Court/SJI)

This project studied the early case evaluation program for motor vehicle cases in the Suffolk County Superior Court. The program was designed to bring the parties together at a earlier point in the processing of motor vehicle tort cases to resolve these cases more rapidly and inexpensively than traditionally processed cases. The court randomly assigned cases to case evaluation and to a control group. Case evaluation took place nine months after case filing and after discovery was completed. The study examined attorney satisfaction with the program, litigants costs, and case disposition time.

Project Product

Low, Robert. *Assessment of the Massachusetts Motor Vehicle Tort Litigation Case Evaluation Program*. National Center for State Courts, February 1992.

Early Neutral Evaluation Program of the United States District Court for the Northern District of California (Administrative Office of the United States Courts)

This study is the third in a series of examinations of an early neutral evaluation (ENE) program instituted in 1985 as a pilot in the United States District Court for the Northern District of California, which later served as a demonstration district for the Civil Justice Reform Act of 1990. Pursuant to this act, the Northern District of California adopted a "Civil Justice Expense and Delay Reduction Plan" in December of 1991. This plan sought to administer and further refine the District's dispute resolution programs, and in particular, to create a task force to study the efficiency and effectiveness of the ENE program. The task force studied approximately 2,700 cases assigned randomly to ENE or a control group to determine the effects of ENE on quality of justice, litigation costs, and time to case disposition.

Project Products

Rosenberg, Joshua D. and H. Jay Folberg. "Alternative Dispute Resolution in a Civil Justice Reform Act Demonstration District: Findings, Implications and Recommendations." *Stanford Law Review*, Vol. 46, No. 6, July 1994 (forthcoming).

Rosenberg, Joshua D., H. Jay Folberg, Robert C. Barrett, and Stephen P. Pijas. *Report to the Task Force on Alternative Dispute Resolution Civil Justice Reform Act Advisory Group Regarding the Early Neutral Evaluation Program of the United States District Court for the Northern District of California*, December 1, 1992.

Case Evaluation: Related Literature

Brazil, Wayne, Michael Kahn, Jeffrey Newman, and Judith Gold. "Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution." *Judicature*, Vol. 69, No. 5, February 1986.

Levine, David. "Early Neutral Evaluation: A Follow Up Report." *Judicature*, Vol. 70, No. 4, December 1986.

Levine, David. "Early Neutral Evaluation: The Second Phase." *Journal of Dispute Resolution*, Vol. 1989, 1989.

Levine, David. "Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution." *Judicature*, Vol. 72, No. 4, December 1988.

"Lawyers Prefer Early Neutral Evaluation To Court's Initial Status Conference." *Practice and Perspective*, Newsletter from The Bureau of National Affairs, Vol. 2, August 18, 1988.

"Perspective of Lawyers, Clients, and Evaluators Detailed In Survey of Early Neutral Evaluation." *Practice and Perspective*, Newsletter from The Bureau of National Affairs, Vol. 2, August 4, 1988.

Summary Jury Trials

Summary Jury Trials in Florida: An Empirical Assessment (Florida Dispute Resolution Center/Florida Bar Foundation)

This study assessed the strengths and weaknesses of the summary jury trial programs in Florida's Nineteenth Judicial Circuit and in the United States District Court for the Middle District of Florida. The state court program was voluntary, while participation in the federal court program was mandatory. The data for the case studies were collected from court records, interviews with summary jury trial participants, and mail surveys of attorneys.

Project Product

Alfini, James. *Summary Jury Trials in Florida, An Empirical Assessment*. Florida Dispute Resolution Center, 1989.

Summary Jury Trials in the Northern District of Ohio (Federal Judicial Center)

This study analyzed all summary jury trials heard in the United States District Court for the Northern District of Ohio between February and October, 1980. The study examined the attorneys' perceptions at the process and settlement rates.

Project Product

Jacoubovitch, M. Daniel and Carl Moore. *Summary Jury Trials in the Northern District of Ohio: A Report to the Federal Judicial Center*, May 1982.

Summary Juries in the North Carolina State Court System (Private Adjudication Center)

This study evaluated the use of summary jury trials in pilot programs of three urban judicial districts in North Carolina. The study analyzed all the summary jury trials conducted in these districts from the inception of the program in 1987 until 1991. The researchers conducted interviews with attorneys and judges to ascertain relevant information about the reasons the participants elected to use summary jury trials; how the summary trial was conducted; and the participants' satisfaction with the process.

Project Product

Metzloff, Thomas et al. *Summary Juries in the North Carolina State Court System*. Private Adjudication Center, May 1991.

Medical Malpractice

Mediating Medical Malpractice Claims in Wisconsin (University of Wisconsin School of Law/SJI)

This project studied the strengths and weaknesses of Wisconsin's mandatory mediation panel system (MMPS) program. MMPS was enacted by the Wisconsin legislature in May of 1986 and requires pre-litigation mediation of all medical malpractice claims. Through case data analysis, participant interviews, mediation observations, and a round table discussion, the researchers accumulated information and drew conclusions concerning the success of the MMPS in diverting medical malpractice claims from the court.

Project Products

Meschievitz, Catherine. "New Research on Medical Malpractice Disputing Underway." *NIDR Forum*, Summer/Fall 1991.

Meschievitz, Catherine. "Mediation and Medical Malpractice: Problems with Definition and Implementation." *Law and Contemporary Problems*, Vol. 54, No. 1, Winter 1991.

Meschievitz, Catherine. *Mediating Medical Malpractice Claims in Wisconsin: A Final Report*, 1991.

Small Claims Mediation

Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics and Outcomes in 12 Urban Jurisdictions (National Center for State Courts/SJI)

This study described and compared the procedures, caseload size, caseload characteristics, case outcomes, and pace of litigation in traffic cases filed in 1987 across 12 urban jurisdictions in a variety of states. A component of this study examined whether mediation of small claims disputes is a viable alternative to adjudication by trial.

Project Product

Goerd, John. "Small Claims Mediation in Three Urban Courts," Part IV in *Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics and Outcomes in 12 Urban Jurisdictions*. National Center for State Courts, 1992.

Civil Case Mediation and Comprehensive Justice Courts: Process, Quality of Justice, and Value to State Courts (Institute for Social Analysis/SJI)

This study evaluated the use of mediation and court processing in small civil cases in the Burlington County Comprehensive Justice Center in the Burlington County, New Jersey Superior Court. The study assessed the quality of justice in these dispute resolution forums and the effects of mediation services on court workload and overall efficiency. It also described the integration and coordination of the mediation program with the court's operations.

Project Product

Roehl, Janice, Rebekah Hersch, and Ed Llaneras. *Civil Case Mediation and Comprehensive Justice Courts: Process, Quality of Justice, and Value to State Courts: Final Report*. Institute for Social Analysis, 1992.

Mediation Training Project (Oregon Office of the State Court Administration/SJI)

This project is described under Selection, Training, and Qualification of Neutrals.

Appellate Dispute Resolution

Florida's Fourth District Court of Appeal Appellate Mediation Project (Florida State Court System/SJI)

This project tested the use of mediation to settle or narrow the issues in civil appellate cases. Cases were randomly assigned to mediation or to a control group to assess the effects of mediation on settlement rates, the number of issues considered, litigant and court costs, and case disposition time.

Project Products

Hanson, Roger and George W. Hersey. "An Experimental Test of the Florida Fourth District Court of Appeals' Settlement Conference Program." *IJA Report*, Fall-Winter 1991.

Hanson, Roger. "An Assessment of Florida Fourth District Court of Appeal Settlement Conference Program." *Florida State University Law Review*, Vol. 18, No. 1, Summer 1990.

Hanson, Roger and George W. Hersey. "Appellate Court Congestion or How Do You Spell R-E-L-I-E-F?" *Governing Florida*, Summer 1991.

Hanson, Roger. *Final Report: An Evaluation of the Florida Fourth District Court of Appeal Settlement Conference Program*. National Center for State Courts, 1990.

Pre-Argument Conference Program in the Sixth Circuit Court of Appeals (Federal Judicial Center)

This project evaluated whether the Sixth Circuit Court of Appeals conference program was meeting its stated objectives of saving judge time, lessening case management burdens, simplifying and clarifying issues on appeal, and reducing procedural and substantive motions. Cases were randomly assigned to the program or to a control group.

Project Product

Eaglin, James. *The Pre-Argument Program in the Sixth Circuit Court of Appeals: An Evaluation*. Federal Judicial Center, 1990.

General

National Standards for Court Appointed Mediation Programs (Institute for Judicial Administration/SJI)

These standards for court-connected mediation programs were developed to guide and inform courts interested in initiating, expanding or improving mediation programs to which they refer cases. The advisory board that developed these standards included judges, state and local court administrators, mediators, mediation program administrators, attorneys for corporations as well as lower and higher income individuals, academic evaluators, and officers of professional court and mediation organizations.

Project Product

Shaw, Margaret, Linda Singer and Edna Povich. *National Standards for Court-Connected Mediation Programs*. Institute of Judicial Administration, 1992.

Judicial Project of the Center for Public Resources/CPR Legal Program (Center for Public Resources Legal Program)

This project developed a manual to guide judges, court officials, lawyers and ADR practitioners in designing and operating high quality ADR programs. The manual examines fundamental policy and practice issues facing federal and state courts as they integrate ADR into the civil litigation process and analyzes the broad spectrum of current approaches and rules. It provides examples from specific programs, identifies model programs and rules, and offers justice system officials concise information about how other courts structure ADR.

Project Product

Plapinger, Elizabeth and Margaret Shaw. *Court ADR: Elements of Program Design*. Center for Public Resources, 1992.

National Conference on Emerging ADR Issues in State and Federal Courts (Center for Public Resources/SJI)

The project provided scholarships to approximately 30 state court judges to attend the National Conference on Emerging ADR Issues in State and Federal Court. The conference was held on April 18-21, 1991 at Harvard University Law School, a co-sponsor of the conference along with CPR and the Litigation Section of the American Bar Association.

Project Product

Emerging ADR Issues in State and Federal Courts. Frank Sander (ed.), American Bar Association, Section of Litigation, 1991.

Civil Dispute Resolution; Related Literature

Goldberg, Stephen B., Frank E.A. Sander, and Nancy Rogers. *Dispute Resolution*. Waltham, MA: The Little Brown Publishing Company, 1992.

The Law and Public Committee of the Society of Professionals in Dispute Resolution. *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts*. Washington, D.C.: Society for Professionals in Dispute Resolution.

MacCoun, Robert J., E. Allan Lind, and Tom R. Tyler. *Alternative Dispute Resolution in Trial and Appellate Courts*. Santa Monica, CA: RAND, Publications Department, 1992.

Rosenberg, Joshua, Jay Folberg, and Robert Barrett. "Use of ADR in California Courts: Findings and Proposals." *University of San Francisco Law Review*, Vol. 26, No. 3, Spring 1992.

Symposium on Emerging Alternative Dispute Resolution Systems: Kentucky Law Journal. Vol. 81, No. 4, 1992-93.

COURT-ANNEXED ARBITRATION**Court Ordered Arbitration Demonstration Project (North Carolina Administrative Office of the Courts/SJI)**

North Carolina's pilot program of court ordered arbitration, begun in January of 1987, substituted informal hearings before an arbitrator for standard procedure in selected civil damage suits under \$15,000. The study was conducted in three judicial districts in North Carolina: the 14th (an urban area in the central part of the state); the 3rd (a semi-urban district in the eastern part of the state); and the 29th (a rural area in the western part of the state). The project studied whether court-annexed arbitration alleviated congestion on the civil trial calendar, reduced court and litigation costs, shortened time to disposition, or improved court access. The study used an experimental design with random assignment of program eligible cases to the arbitration program and to a control group, as well as a comparison to a group of cases disposed before the program began.

Project Products

Clarke, Stevens, Laura Donnelly and Sara Grove. *Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction: A Final Report*, Institute of Government, 1991.

Clarke, Stevens, Laura Donnelly and Sara Grove. "Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction." A Final Report, Institute of Government, Vol. 14, No. 2, 1991.

The Impact of Court-Annexed Arbitration on the Administration of Civil Justice in Colorado (Conflict Resolution Consortium, University of Colorado at Denver/SJI)

The project evaluated the effectiveness of Colorado's two year experimental mandatory non binding arbitration program. Implemented in January of 1988, the program was enacted in eight of the state's 22 judicial districts, and included both urban and rural settings. Through mail surveys, telephone

interviews, hearing observations, and court records analysis, the project assessed the strengths and weaknesses of the program in order to aid the Colorado judiciary and legislature in restructuring the program to facilitate successful statewide expansion. The legislature ultimately discontinued the program.

Project Products

Burton, Lloyd, John McIver and Laura Stinson. *Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program: A Final Report*, 1991.

Burton, Lloyd, John McIver and Laura Stinson. "Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program." *Justice System Journal*, Vol. 14, No. 2, 1991.

Evaluating the Consequences of State Court-Annexed Arbitration on the Pace, Cost, and Quality of Dispute Resolution (National Center for State Courts/SJI)

The project studied the court-annexed arbitration programs in two general jurisdiction trial courts: Georgia's Fulton County Superior Court and New Hampshire's Hillsboro County Superior Court. The study employed a quasi-experimental design to examine the comparative consequences of court processing and arbitration on the pace, cost, and quality of dispute resolution. By drawing on common themes, the study attempted to assist courts considering whether to adopt court-annexed arbitration as well as courts seeking to refine the management and evaluation of existing programs.

Project Products

Boersema, Craig, Roger Hanson and Susan Keilitz. "State Court-Annexed Arbitration: What Do Attorneys Think?" *Judicature*, Vol. 75, No. 1, June-July 1991.

Hanson, Roger and Susan Keilitz. "Arbitration and Case Processing Time: Lessons from Fulton County." *Justice System Journal*, Vol. 4, No. 2, 1991.

Hanson, Roger, Susan Keilitz and Henry Daley. "Court-Annexed Arbitration: Lessons from the Field." *State Court Journal*, Vol. 15, No. 4, Fall 1991.

Court Annexed Arbitration: Evaluation Study (Office of the State Court Administrator, Oregon Judicial Department)

The study evaluated the effectiveness of court-annexed arbitration in Oregon's district and circuit civil and domestic relations courts. The study consisted of telephone and mail surveys and an analysis of case record data. The study did not compare arbitrated cases to unarbitrated cases.

Project Product

Kiefer, Peter, Donna Bishop and Brian Smith. *Court-Annexed Arbitration: Evaluation Study: Final Report*. Office of the State Court Administrator, Oregon Judicial Department, June 1992.

Hawaii's Court-Annexed Arbitration Program (University of Hawaii/Judiciary of the State of Hawaii, Program on Conflict Resolution at the University of Manoa)

This project evaluated Hawaii's court-annexed arbitration program (CAAP), begun in 1986. The project focused on the effects of CAAP on the cost of litigation, pace of case disposition, and satisfaction of the participants. Personal injury cases valued up to \$150,000 were assigned to CAAP and to a control group. The project drew data from case records, surveys, and interviews with participants.

Project Products

Barkai, John and Gene Kassebaum. "Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience." *Justice System Journal*, Vol. 14, No. 2, 1991.

Hawaii's Court-Annexed Arbitration Problem Evaluation Report; Program on Conflict Resolution. PLR Working Paper Series, University of Hawaii, 1992-1991.

The New Jersey Automobile Arbitration Program Project (Institute for Civil Justice/ Administrative Office of the New Jersey Courts)

The project evaluated the effects of arbitration on the nature and timing of case dispositions, litigant and attorney satisfaction, discovery activities, attorney hours, and litigant costs. The project randomly sampled more than 1,000 auto negligence cases filed in eight New Jersey courts before and after arbitration was implemented.

Project Product

MacCoun, Robert J. "Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey." *Justice System Journal*, Vol. 14, No. 2, 1991.

MacCoun, Robert J., E. Allan Lind, Deborah R. Hensler, David L. Bryant, and Patricia A. Ebener. *Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program*. Santa Monica, CA: Institute for Civil Justice, the RAND Corporation, 1988.

Evaluation of New Jersey's Expanded Arbitration Program (Institute for Social Analysis, Administrative Office of the New Jersey Courts)

This study evaluated the effects of New Jersey's expanded arbitration program on case processing time, attorney and litigant satisfaction, and appeal rates in civil cases eligible for arbitration. In seven counties with arbitration programs, the study compared arbitrated cases with non-arbitrated cases. In addition, the study compared the arbitrated cases with non-arbitrated cases in two counties without arbitration programs.

Project Product

Roehl, Janice, George Capowich, and Lori Butler. *Evaluation of New Jersey's Expanded Arbitration Program: Final Report*. New Jersey Administrative Office of the Courts, May 1991.

Judicial Arbitration in California (The Institute for Civil Justice)

The survey updated information previously collected to determine whether there were noteworthy changes in California's judicial arbitration program and whether previously observed trends had continued. The purpose of the survey was to provide current information about arbitration to California decision-makers and policy planners.

Project Product and Related Literature

Bryant, David. *Judicial Arbitration in California: An Update*. The Institute for Civil Justice, June 1989.

Hensler, Deborah. *Court-Ordered Arbitration: An Alternative View*. RAND Corporation, 1992.

An Evaluation of Court-Annexed Arbitration in a United States District Court (Insititute for Civil Justice)

The project examined 350 cases filed between 1985 and 1988 to assess the effects of the arbitration program on access to the judicial system, the private and public costs of litigation, overall case delay in the court, and litigant and attorney satisfaction. Cases eligible for arbitration were randomly assigned to arbitration or to a control group.

Project Product

Lind, E. Allan. *Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court*. RAND, The Institute for Civil Justice, 1990.

Court-Annexed Arbitration in the Middle District of North Carolina (Federal Judicial Center)

This study was part of the Federal Judicial Center's (FJC) examination of court-annexed arbitration in ten federal district courts (see below). This FJC study also was part of a collaborative effort between the FJC and the Institute for Civil Justice to evaluate arbitration in the Middle District of North Carolina (see above). The FJC study examined outcomes in 161 cases referred to arbitration and in 34 cases that were eligible for arbitration but not referred. It also surveyed litigants, attorneys, and judges.

Project Product

Meierhoefer, Barbara. *Court-Annexed Arbitration in the Middle District of North Carolina*. Federal Judicial Center, 1989.

Court-Annexed Arbitration in Ten District Courts (Federal Judicial Center)

This project was conducted pursuant to congressional legislation to assess the benefits and drawbacks of mandatory court-annexed, non-binding arbitration in ten federal districts: Northern California, Middle Florida, Western Michigan, Western Missouri, New Jersey, Eastern New York, Middle North Carolina, Western Oklahoma, Eastern Pennsylvania, and Western Texas. Arbitration eligible cases were assigned randomly to arbitration or a control group. The study examined case disposition time, litigant costs, procedural fairness, and participant satisfaction.

Project Product

Meierhoefer, Barbara. *Court-Annexed Arbitration in Ten District Courts*. Federal Judicial Center, 1990.

FAMILY MEDIATION

An Evaluation of the Use of Mandatory Divorce Mediation (Center for Policy Research /SJI)

The study compared divorce cases assigned to mandatory mediation with those resolved through court processing in Marion County (Indianapolis), Indiana. The purpose of the study was to assess differences in the adequacy and equity of divorce agreements, user satisfaction with the mediation process and outcome, and compliance. Cases were randomly assigned to mediation and court processing. Project staff analyzed court and mediated case file data and interviewed divorced parents, attorneys, judges, and court and mediation program personnel.

Project Product

An Evaluation of the Use of Mandatory Mediation: Final Report to the State Justice Institute. Center for Policy Research, October 1991.

Child Protection Mediation in the Courts (Center for Policy Research/SJI)

The study examined three court-based mediation programs for child abuse and neglect cases. The study assessed the effects of mediation on case outcomes, time and cost factors, the nature of treatment plans, and compliance patterns.

Project Products

Alternatives to Adjudication in Child Abuse and Neglect Cases: Final Report to the State Justice Institute. Center for Policy Research, October 1992.

Thoennes, Nancy. "Mediation and the Dependency Court: The Controversy and Three Courts' Experiences." *Family and Conciliation Courts Review*, Vol. 29, No. 3, July 1991.

The Equity of Mediated Divorce Agreements (Center for Policy Research/SJI)

This project compared divorce settlements produced through public and private sector mediation services with settlements generated through inter-party stipulations, attorney-assisted negotiations, and judicial hearings. The study involved divorcing parents who used courts in California, Colorado, Florida, Illinois, Maine, Michigan, New York and Oregon. A panel of three family law attorneys conducted a blind assessment of mediated and court determined divorce agreements to rate the adequacy and equity of the agreements.

Project Products

Pearson, Jessica. "The Equity of Mediated Divorce Agreements." *Mediation Quarterly*, Vol. 9, No. 2, Winter 1991.

Pearson, Jessica. *The Equity of Mediated Divorce Agreements: Final Report to the State Justice Institute.* April 1990.

Domestic Abuse and Mediation Project (Court Mediation Service State of Maine Judicial Department/SJI)

This project convened a team of judges, attorneys, mediators, court administrators, domestic abuse prevention workers, advocates for abused persons, and social scientists. The team examined existing research on the use of mediation in cases involving protective orders and in divorce cases involving domestic violence and considered the appropriateness and safety of using mediation in these types of cases. The project report recommends procedures for screening and mediating domestic relations cases in which there has been domestic abuse.

Project Product

Mediation in Cases of Domestic Abuse: Helpful Option or Unacceptable Risk? The Final Report of Domestic Abuse Mediation Project. Paul Charbonneau, Project Director, Maine Court Mediation Service, 1992.

The Denver Custody Mediation Project: A Longitudinal Evaluation (Center for Policy Research/Piton Foundation)

This project was a three-year longitudinal evaluation (1979-1981) of couples with child custody disputes who were randomly offered the opportunity to mediate and to resolve their differences using normal attorney and court assisted procedures in Denver, Colorado. The project involved 3 sets of interviews with 217 mediation clients, 113 who rejected the offer of mediation, and 89 others who used traditional approaches for a total of 1257 interviews.

Project Product

Pearson, Jessica and Nancy Thoennes. "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation." *Family Law Quarterly*, Vol. 17, No. 4, Winter 1984.

The Divorce Mediation Project (Center for Policy Research/Department of Health and Human Services, Children's Bureau)

This project involved three sets of interviews with 450 clients of court-based mediation programs in .Connecticut, Minneapolis, Minnesota, and Los Angeles, California. Interviews at comparable times also were conducted with 100 individuals using traditional approaches and 100 individuals in uncontested cases for a total of 1950 interviews with divorcing parents.

Project Product

Reflections on a Decade of Divorce Mediation Research: The Process and Effectiveness of Third Party Intervention. Kressel, Pruitt, and Associates (eds.), Jossey-Bass Publications, Center for Policy Research, 1989.

Alaska Child Visitation Mediation Pilot Project (Alaska Judicial Council)

The Alaska Child Visitation Mediation Pilot Project was a seventeen month pilot project created and funded by the Alaska Legislature. Its primary purpose was to help selected parents with visitation disputes resolve their disputes through mediation, and then to evaluate the effects of mediation on the families who participated. The study sample was small because all cases involving domestic violence were ineligible for participation in the project.

Project Product

DiPietro, Suzanne. *Alaska Child Visitation Mediation Pilot Project: Report to the Legislature*. February 1992.

Views of Mediation in Voluntary and Mandatory Mediation Settings (Joan B. Kelly and Mary A. Duryee)

This project surveyed respondents from both a voluntary mediation program, the Northern California Mediation Program, and a mandatory mediation program, the California Family Court Services. The project compared the responses of men and women to the mediation process.

Project Product

Kelly, Joan and Mary Duryee. "Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings." *Family and Conciliation Courts Review*, Vol. 30, No. 1, January 1992.

Family Mediation: Related Literature

Family and Interpersonal Mediation: A Bibliography of the Periodical Literature 1980-1989. Guelph, Ontario: Family Mediation Canada.

Fish, Linda, and Kenneth Kressel. *The Settlement Orientation vs. The Problem-Solving Style in Custody Mediation*. Englewood, NJ: New Jersey Mediation Associates, 1992.

Kelly, Joan. *Developing and Implementing Post-Divorce Parenting Plans: Does the Forum Make a Difference?* Unpublished manuscript, 1992.

Kibler, Sherrie, Ernie Sanchez, and Maxine Baker-Jackson. "Pre-Contempt/Contemnors Group Diversion Counseling Program: A Program to Address Parental Frustration of Custody and Visitation Orders." *Family and Conciliation Courts Review*, Vol. 32, No. 1, January 1994.

Lehner, Larry. "Education for Parents Divorcing in California." *Family and Conciliation Courts Review*, Vol. 32, No. 1, January 1994.

McCroy, J. "Legal and Practical Issues in Divorce Mediation: An American Perspective," in *The Role of Mediation in Divorce Proceedings: A Comparative Perspective*. South Royalton, Vermont: Vermont Law School Dispute Resolution Project, 1987.

McIsaac, Hugh. "Orientation to Mediation in Portland, Oregon." *Family and Conciliation Courts Review*, Vol. 32, No. 1, January 1994.

Myers, S., B. Gallas, R. Hanson, S. Keilitz. "Divorce Mediation in the States: Institutionalization. Use and Assessment." *State Court Journal*, Vol. 12, No. 4, 1988.

Petersen, Virginia and Susan Steinman. "Helping Children Succeed After Divorce: A Court Mandated Education Program for Divorcing Parents." *Family and Conciliation Courts Review*, Vol. 32, No. 1, January 1994.

Roeder-Esser, Carol. "Families in Transition: A Divorce Workshop." *Family and Conciliation Courts Review*, Vol. 32, No. 1, January 1994.

Rosenhan, D.L. and F.O. Keller. *A Program for Providing Supervised Child Visitation; Report on a Demonstration Project Using Senior Citizens as Supervisors: Report to Judicial Council of California*. April 1993.

Stern, Marilyn and Michael Van Slyck. *Assessing the Impact of Parent-Child Mediation: A Comparison with Justice System and Mental Health Approaches*. Washington, D.C.: National Center for Dispute Resolution, Publication Department, 1992.

Thoennes, Nancy, Jessica Pearson and David Price. *Child Access Demonstration Projects: Preliminary Assessment: Report Submitted to Office of Child Support Enforcement*. Denver, CO: Center for Policy Research and Policy Studies, Inc., October 1991.

Additional references are cited in the Family Mediation Working Paper.

MULTI-DOOR COURTHOUSE

Middlesex Multi-Door Courthouse Evaluation Project (National Center for Citizen Participation in the Administration of Justice and National Center for State Courts/SJI)

The project was a comprehensive evaluation of the Middlesex Multi-Door Courthouse (MMDC), a court-annexed program in Cambridge, Massachusetts created to provide a coordinated approach to dispute resolution within the administrative structure of the Trial Court. The evaluation focused on case processing time, litigant costs, court costs and resource requirements, and participant satisfaction. Cases were randomly assigned to an experimental group (cases processed by the MMDC) or to a control group (cases processed through traditional court procedures).

Project Products

Gray, Erika. *Middlesex Multi-Door Courthouse Annual Report*. 1992.

Lowe, Robert and Susan Keilitz. *Middlesex Multi-Door Courthouse Evaluation Project: Final Report*. National Center for State Courts, March 1992.

Middlesex Multi-Door Courthouse Evaluation Project: Executive Summary. 1992.

The Multi-Door Courthouse Centers Project Phase I: Intake and Referral (American Bar Association/National Institute of Justice)

This project traces the establishment of some of the first multi-door programs located in Tulsa, Oklahoma, Houston, Texas, and Washington, D.C. Central to this effort was an attempt to determine the most effective approaches in screening and referring disputes to the resolution process. The three multi-door programs collectively handled disputes of all kinds, including assault charges, small claims disputes, and citizen complaints. In addition to describing the implementation of the programs, the assessment focuses on Phase I of the program, the intake and referral process. The major data sources used were interviews with the participants and key representatives of referral agencies.

Project Products

Ray, Larry. *The Multi-Door Courthouse Centers Project Intake and Referral Assessment*. The Pound Conference, National Institute of Justice, 1986.

Roehl, Janice. *Multi-Door Dispute Resolution Centers Phase 1: Intake and Referral Assessment: Executive Summary Final Draft*. American Bar Association Special Committee on Dispute Resolution and the National Institute of Justice, 1986.

Project Related Literature

Civil Dispute Resolution Program: A Survey of Program Participants. Research and Development Division, District of Columbia Courts, October 1992.

Evaluation of the Phase I Settlement Plan at D.C. Superior Courts: November 13-December 8, 1989. Research and Development Division, District of Columbia Courts, April 1990.

Civil Case Mediation and Comprehensive Justice Centers: Process Quality of Justice, and Value to State Courts (Institute for Social Analysis/SJI)

This project is described under Civil Dispute Resolution: Small Claims Mediation.

Multi-Door Courthouse: Related Literature

American Bar Association Standing Committee on Dispute Resolution. *The Court and Community: Partners in Justice, the Multi-Door Experience*. ABA Standing Committee on Dispute Resolution, Washington, D.C.

Alternative Dispute Resolution Programs: 1992. Superior Court of the District of Columbia Multi-Door Dispute Resolution Division, 1992.

Gray, Ericka B. "One Approach to Diagnostic Assessment of Civil Cases: The Individual Case Screening Conference." *The Court Manager*, Summer 1992.

Kessler, Gladys & Linda J. Finkelstein. "The Evolution of a Multi-Door Courthouse." *Catholic University Law Review*, Vol. 37, No. 3, Spring 1988.

Sander, Frank E. A. *Varieties of Dispute Processing, Pound Conference*. 70 F.R.D. 79, 1976.

Additional materials are available from the American Bar Association's Section on Dispute Resolution, and from *Dispute Resolution Access: A Guide to Current Research and Information* (see Surveys: Related Literature).

COMMUNITY JUSTICE/VICTIM OFFENDER MEDIATION

Evaluation of Mediation Programs in North Carolina (Mediation Network of North Carolina and the Institute of Government/SJI)

This project focused on misdemeanor cases involving interpersonal disputes that had been referred to mediation programs from North Carolina district courts. Three counties with mediation programs (Durham, Iredell, and Henderson) were matched with similar counties without programs (New Hanover, Davidson and Rutherford). The study examined the organization of the programs, types of cases handled, referral processes, participation rates, effects on court caseloads, mediator characteristics, participation satisfaction, compliance and recidivism.

Project Product

Clarke, Stevens, Earnest Valente, and Robyn Mace. *Mediation of Interpersonal Disputes in North Carolina: An Evaluation of North Carolina's Programs*. Chapel Hill, NC: Institute of Government, University of North Carolina, 1992.

Community Dispute Resolution Programs and Public Policy (National Institute of Justice/U.S. Department of Justice)

This study documented the origins and development of the community dispute resolution movement in the first comprehensive study of its kind. The study examined the philosophies, goals and techniques of programs throughout the United States to assess the relative success of the programs. The report was designed for use by program administrators to improve program operation.

Project Product

McGillis, Daniel. *Community Dispute Resolution Programs and Public Policy*. National Institute of Justice, 1986.

Community Involvement in Mediation of First and Second Time Juvenile Offenses (Community Board Programs, Inc./SJI)

This project established and evaluated a community-based program to mediate referrals of first and second time juvenile offenders from the San Francisco Juvenile Court and Probation Department. The study examined the effectiveness of mediator training and program operations, as well as variations in satisfaction, outcome, quality of justice, and recidivism between mediated cases and cases in a control group.

Project Product

Community Involvement in Mediation of First and Second Time Juvenile Offenses: Executive Summary. Community Board Programs, Inc., 1993.

Cross Site Analysis of Victim Offender Mediation: Its Effect on Participants (Minnesota Citizens Council on Crime and Justice/SJI)

The project evaluated the impact of victim and juvenile offender mediation on participants and court systems in four cities: Albuquerque, New Mexico; Minneapolis, Minnesota; Oakland, California; and Austin, Texas. The study examined restitution completion rates, cost savings to the court,

recidivism rates, client satisfaction with mediation, and victims' attitudes toward the court. The study was based on 1053 interviews with crime victims and offenders including both pre- and post-mediation interviews.

Project Products

Umbreit, Mark. *Victim Offender Mediation: An Analysis of Programs in Four States of the U.S. Final Project Report*. Minnesota Citizens Council on Crime and Justice, 1992.

Umbreit, Mark. Program Evaluation Kit: *Victim Offender Mediation Programs*. Minnesota Citizens Council on Crime and Justice, 1992.

Umbreit, Mark. *Victim Meets Offender: The Impact of Restorative Justice Theory*. Monsley, NY: Criminal Justice Press, December 1993.

Umbreit, Mark. and Robert Coates. "The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States." *Juvenile & Family Court Journal*, Vol. 43, No. 1, 1992.

Umbreit, Mark. "Juvenile Offenders Meet Their Victims: The Impact of Mediation in Albuquerque." *Family and Conciliation Courts Review*, Vol. 31, 1993.

Umbreit, Mark and Robert Coates. "Cross-Site Analysis of Victim-Offender Mediation in Four States." *Crime & Delinquency*, Vol. 39, No. 4, 1993.

Umbreit, Mark. "Crime Victims Confront Their Offenders: The Impact of a Minneapolis Mediation Program." *Journal of Research on Social Work Practice* (Forthcoming).

Umbreit, Mark. "Restorative Justice Through Mediation: The Impact of Offenders Facing Their Victims in Oakland." *Law & Social Work* (Forthcoming).

Umbreit, Mark. "The Development and Impact of Victim Offender Mediation in the U.S." *Mediation Quarterly* (Forthcoming).

Umbreit, Mark and Robert Coates. "The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States." *Juvenile & Family Court Journal*, Vol. 44, 1993.

Umbreit, Mark. "Minnesota Mediation Center Produces Positive Results." *Corrections Today*, Vol. 53, August 1991.

Community Justice/Victim Offender Mediation: Related Literature

Coates, Robert B., and John Gehm. "An Empirical Assessment." In Martin Wright and Burt Galaway (eds.), *Mediation and Criminal Justice: Victims, Offenders and Community*. London: Sage Publications Ltd., 1989.

Hughes, Stella P., and Anne L. Scheider. "Victim-Offender Mediation: Survey of Program Characteristics and Perceptions of Effectiveness." *Crime and Delinquency*, Vol. 35, No. 2, 1989.

McEwen, Craig and Richard Maiman. "Mediation in Small Claims Court: Achieving Compliance Through Consent." *Law and Society Review*, Vol. 18, No. 1, 1984.

COURT-CONNECTED DISPUTE RESOLUTION

McEwen Craig and Richard Maiman. "The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance." *Law and Society Review*, Vol. 210, No. 3, 1986.

Peachey, Dean E. "The Kitchener Experiment." In Martin Wright and Burt Galaway (eds.), *Mediation and Criminal Justice: Victims, Offenders and Community*. London: Sage Publications, 1989.

Stipanowich, Thomas J. "The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation." *Kentucky Law Journal*, Vol. 81, No. 4, 1992-93.

Vidmar, Neil. "An Assessment of Mediation in a Small Claims Court." *Journal of Social Issues*, Vol. 41, No. 2, 1985.

Vidmar, Neil. "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance." *Law and Society Review*, Vol. 21, No. 1, 1987.

Vidmar, Neil. "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation." *Law and Society Review*, Vol. 18, No. 4, 1984.

Additional references are cited in the Community Justice/Victim Offender Mediation Working Paper.

PRIVATE DISPUTE RESOLUTION

Private Judging: A Study of its Volume, Nature, and Impact on State Courts (Institute for Social Analysis/SJI)

This project conducted an in-depth examination of private judging, including the extent of its use, the nature of the process, and its impact on state courts.

Project Product

Roehl, Janice A., R.E. Huitt, & H. Wong. *Private Judging: A Study of Its Volume, Nature, and Impact on State Courts*. Pacific Grove, CA: Institute for Social Analysis, 1993.

The Connecticut ADR Project (Connecticut ADR Project)

The Connecticut ADR Project implemented a pilot program of alternative dispute resolution for insurance claims disputes, particularly those related to automobile accidents. Originally developed as a marketing and education organization, the Project became involved in the actual resolution of cases with the assistance of five private dispute resolution firms: Dispute Resolution, Inc.; AAA; ADR, Inc.; U.S. Arbitration Service; and American Intermediation Services. The Project aimed to compare the performance of alternative dispute resolution with "conventional dispute resolution." The 1,037 cases handled by the Project involved a wide variety of claims including automobile, general liability, construction, uninsured motorist, and multi-party claims. The project compiled statistics on outcomes in the cases heard through alternative dispute resolution, and obtained the subjective evaluations of participants (claims managers and plaintiffs' attorneys) via mailed questionnaires.

Project Product

Final Report of the Connecticut ADR Project, Inc. Hartford, CT: 1988.

Private Dispute Resolution; Related Literature

Galanter, Marc and John Lande. *Private Courts and Public Authority*. The Dispute Processing Research Program, University of Wisconsin-Madison Law School.

Moller, Erik, Elizabeth Rolph, and Patricia Ebener. *Private Dispute Resolution in the Banking Industry*. RAND, The Institute for Civil Justice, 1993.

Additional references are cited in the Private Dispute Resolution Working Paper.

SELECTION, TRAINING AND QUALIFICATION OF NEUTRALS**Post Conference Training for the Judiciary on Alternative Dispute Resolution (National Judicial College/SJI)**

This project entailed the development of materials for judicial training on alternative dispute resolution.

Project Products

Judicial Settlement: Manual. National Judicial College, 1988.

Judicial Settlement: Course Notebook. National Judicial College, 1988.

Judicial Settlement: Videotape. National Judicial College, 1988.

Outline for Instructional Sessions Using Dispute Resolution Videotapes on Arbitration, Mediation, and Summary Jury Trial. Reno, NV: National Judicial College, 1989.

Interim Guidelines for Selecting Mediators (Test Design Project/National Institute for Dispute Resolution)

These guidelines are intended to provide tools for programs wishing to test mediators before, after or in lieu of training them. The focus is on those dispute resolution fields experiencing rapid increases in mediator populations and having a pattern of mandatory assignments of particular individuals to conduct the mediation. These identified fields currently include family, commercial, and community disputes. A further purpose of the guidelines is to provide training assistance. Experience with prototype tests has demonstrated that performance based testing enables programs to make distinctions among their newly selected mediators' skills, so that training can be targeted to individual needs.

Project Product

Interim Guidelines for Selecting Mediators: Draft for Comment. National Institute for Dispute Resolution, 1993.

Understanding Our Criminal Justice Volunteers: Factors Affecting the Length of Service, Degree of Disengagement, and Productivity of Community Mediators (Brooklyn Mediation Center/SJI)

This extensive study of volunteer community mediators in New York State explored key issues of interest to both volunteer dispute resolvers and those who administer dispute resolution agencies in our criminal justice system. These issues include what motivates volunteer mediators; how satisfied they

are with their work; and what community dispute resolution centers can do to keep their volunteers professionally enthused, dedicated and involved in the ongoing operations of the agency. Using a sample of 400 mediators from ten different dispute resolution centers in urban, suburban and rural locations, the study showed that factors associated with both the agency and the mediator affect such issues as the mediators' levels of commitment and satisfaction, and their lengths of service and productivity. The research findings have implications for the effective management of volunteer dispute resolvers and the promotion of a collaborative working environment for paid and volunteer staff where quality services can be effectively rendered to disputing parties.

Project Products

Rogers, Susan. "Ten Ways to Work More Effectively With Volunteer Mediators." *Negotiation Journal*, Vol. 7, No. 2, 1991.

Rogers, Susan. "Understanding Our Criminal Justice Volunteers: A Study of Community Mediators in New York State." *Mediation*, Vol. 7, No. 2, 1990.

Rogers, Susan. *Understanding Our Criminal Justice Volunteers: A Study of Community Mediators in New York State: A Final Report to the State Justice Institute*. October, 1989.

Rogers, Susan. *Understanding Our Criminal Justice Volunteers: A Study of Community Mediators in New York State*. An Executive Summary of the study distributed to dispute resolution centers in New York State and nationally. October, 1989.

Mediation Training Project (Oregon Office of the State Court Administration/SJI)

This project describes and analyses a court-annexed mediation program for small claims cases using court-trained volunteers. The project report describes the development and implementation of the program, analyzes data from small claims cases heard and settled in 1990, and offers practical suggestions for organizing and conducting court-connected mediation training programs for volunteers. One section of the report is a compilation of mediation reference materials, including an annotated bibliography, examples of forms currently used in the program studied, and other training aids. The report also contains the training manual developed and used by Conference Northwest, professional mediator-trainers and 25 trainer-interns in the Multnomah County courts. The manual covers general skills needed by mediators, addresses specific techniques for successful mediation, and provides a format for training in a court context.

Project Product

Olexa, Joseph and Dina Rozelle. *Small Claims Mediation Project in the District Court of the State of Oregon for Multnomah County*. Portland, OR: Oregon Fourth Judicial District, 1991.

Judicial Settlement: Development of New Course Module, Film and Instructional Manual (National Judicial College/SJI)

This project was designed to train judges in judicial settlement techniques using two mock settlement conferences dealing with a personal injury case and a divorce settlement.

Project Product

Judicial Settlement: Videotape. National Judicial College, 1992.

Selection, Training, and Qualification of Neutrals: Related Literature

Baruch Bush, Robert A. "Efficiency and Protection, or Empowerment and Recognition? The Mediators' Role and Ethical Standards in Mediation." *Florida Law Review*, Vol. 41, No. 2, Spring 1989.

Additional references are cited in the Selection, Training and Qualification of Neutrals Working Paper.

MULTI-CULTURAL ISSUES

Future Demographic Changes and Culturally Appropriate Dispute Resolution Procedures for the Judiciary of Hawaii (Hawaii Research Center for Future Studies/SJI)

The project studied the demographic and cultural changes underway in the United States and considered the possibility of incorporating into the present dispute resolution system some techniques that other cultures use in resolving conflicts. A team of nine researchers from the Hawaii Center for Future Studies and the the Hawaii Judiciary studied four main areas: demographic and cultural changes; legal precedents; alternative dispute resolution techniques in the Pacific Region; and videotaped discussions with members of different ethnic groups in Hawaii.

Project Products

Barner, Brent. *Cultural Pluralism and the Future of the Judiciary*. University of Hawaii, August 1991.

Cultural Approaches to Conflict Resolution: Videotape. University of Hawaii, August 1991.

Dator, Jim. *Culturally Appropriate Dispute Resolution Techniques and the Formal Judicial System in Hawaii*. A Report to the Chief Justice, Hawaii State Judiciary, August 1991.

Jones, Christopher. *Exploring Alternative Dispute Resolution Techniques in the Asia-Pacific Region*. University of Hawaii, August 1991.

Scheder, Jo and Sharon Rodgers. *The Use of Videotape in Analyzing Cultural Approaches to Conflict Resolution*. University of Hawaii, August 1991.

Schultz, Wendy. *Culture in Transition: The Changing Ethnic Mix in Hawaii and the Nation*. University of Hawaii, August 1991.

Evaluation of Rural Alternative Dispute Resolution Projects (Alaska Judicial Council/SJI)

The project, begun in 1987, evaluated three rural alternative dispute resolution programs in Alaska--two tribal courts and a conciliation project. The evaluation determined the nature of the cases handled, the outcomes in relation to cases processed by the courts, the effectiveness of the processes used, and whether such programs would be successful elsewhere in Alaska and the United States. The evaluation produced a comprehensive picture of the programs, including the contexts within which they function.

Project Products and Related Literature

Resolving Disputes Locally: Alternatives for Rural Alaska. Alaska Judicial Council, August 1992.

Connors, Joan R. "Resolving Disputes Locally in Rural Alaska." *Mediation Quarterly*, Vol. 10, No. 4, Summer 1993.

Resolving Disputes Locally: A Statewide Report and Directory, March 1993.

"Public Law 280 and Tribal Court Jurisdiction in Alaska." *Alaska Law Review* (forthcoming).

Multi-Cultural Issues: Related Literature

Asuncion-Lande, Nobleza. *Mediation in Intercultural Conflict*. University of Kansas, Department of Communications Studies, 1992.

Austin, Raymond. "ADR and the Navajo Peacemaking Court." *Judges Journal*, Vol. 32, No. 6, Spring 1993.

Baggett, Earlene. "Cross Cultural Legal Counseling." *Creighton Law Review Annotated*, Vol. 18, 1985.

Bangert, David C. and Kahkashan Pirzada. *Culture and Negotiation*. PCR Working Paper Series University of Hawaii, 2404 Maile Way, Honolulu, HA 96822 (BANGERT@MIR.CBA.HAWAII.EDU), 1991.

Chester, Mark. *Racial/Ethnic/Cultural Issues in Dispute Resolution*. Working Paper #28, Program on Conflict Management Alternatives, University of Michigan.

"The Cultural Defense in the Criminal Law." *Harvard Law Review*, Vol. 99, No. 6, 1986.

Curriden, Mark. "Settling Racial Conflict is CRS Goal: Little Known Division of Justice is Dispatched to Resolve School Bus Dispute." *American Bar Association Journal*, Vol. 79, No. 1, October 1993.

Delgado, Richard, et al. "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution." *Wisconsin Law Review*, Vol. 1985, No. 4, 1985.

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SURVEYS

A Study of State Alternative Dispute Resolution Programs (Institute of Judicial Administration/SJI)

The purpose of the project was to survey, analyze, and assess existing alternative dispute resolution (ADR) programs in Illinois, Michigan, and Ohio. A survey questionnaire was developed to elicit information from programs about their methods of dispute resolution, sources of referral for cases, types of cases handled, character and background of intervenors, type and extent of training, caseloads, budgets and sources of funding. From the information obtained, the evaluators made recommendations about implementing and operating ADR programs.

Project Product

Shaw, Margaret and J. Michael Keating. *Alternative Dispute Resolution Programs in Ohio, Michigan, and Illinois: A Study Funded by the State Justice Institute*. Institute of Judicial Administration, 1990.

Comprehensive State ADR Program Database (National Center for State Courts/SJI)

This project developed an electronic database containing comprehensive information about court-connected alternative dispute resolution (ADR) programs operating throughout the United States. The database was designed primarily for ADR practitioners and state court personnel who operate, plan, or evaluate ADR programs. This database is accessible through the Information Service of the National Center for State Courts.

Project Product

Keilitz, Susan. "A Court Guide Manager's Guide to the Alternative Dispute Resolution Database." *State Court Journal*, Vol. 14, No. 4, 1990.

Surveys: Related Literature

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Dispute Resolution Access: A Guide to Current Research and Information. The Community Board Program, 1540 Market Street, Suite 490, San Francisco, CA 94102. (This bi-annual newsletter about current dispute resolution research, policy papers, evaluations, articles, and other information is available through subscription.)

Hinchcliff, Carole L. *Ohio State Journal on Dispute Resolution Bibliography Issue: Ohio State Journal on Dispute Resolution*. Columbus, OH: 1992.

Kim, Sung Hee. *Conflict, Negotiation, and Dispute Resolution: An Annotated Bibliography*. Cambridge, MA: The Clearinghouse Program on Negotiation at Harvard Law School, 1991.

STATE JUSTICE INSTITUTE FUNDED ADR PROJECTS

*State Justice Institute
1650 King Street, Suite 600
Alexandria, Virginia 22314*

STATE JUSTICE INSTITUTE

ALTERNATIVE DISPUTE RESOLUTION PROJECTS

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|--------------------|---|
| 87-005 & 88-028 | Study of Alternative Dispute Resolution Programs Institute of Judicial Administration Sam Estreicher (212-998-6226) |
| 87-010 & 89-065 | Alternative Dispute Resolution Court Support Program American Bar Association Larry Ray (202-331-2258) |
| 87-011 | Court-Ordered Arbitration Demonstration Project North Carolina Administrative Office of the Courts Daniel Becker (919-733-7107) |
| 87-051 | Mediating Medical Malpractice Claims in Wisconsin University of Wisconsin School of Law Dr. Catherine Meschievitz (608-263-2545) |
| 87-052 | Equity of Mediated Divorce Agreements Center for Policy Research Dr. Nancy Thoennes (303-837-1555) |
| 87-064 | ADR: Prioritizing the Needs of Children as Part of the Divorce Process; A Rural Model North Dakota Supreme Court Greg Wallace (701-224-4216) |
| 87-065 | Post-Conference Training for the Judiciary on Alternative Dispute Resolution National Judicial College Burton A. Scott (800-255-8343) |
| 88-002 | Impact of Court-Annexed Arbitration on the Administration of Civil Justice in Colorado University of Colorado at Denver Dr. Lloyd Burton (303-556-3508) |
| 88-009 | Civil Case Mediation Services in New Jersey Institute for Social Analysis Dr. Janice Roehl (408-655-1513) |
| 88-011 | Evaluation of the DC Multi-Door Courthouse Mediation Programs The Urban Institute Michael Fix (202-857-8517) |
| 88-013 | Understanding Volunteer Community Mediators: Retention and Productivity John Jay School of Criminal Justice Dr. Susan Rogers (212-316-2975) |

COURT-CONNECTED DISPUTE RESOLUTION

- 88-032 Florida's Fourth District Court of Appeals Appellate Mediation Project
Florida State Court System
Honorable Barry Stone (407-686-1903)
- 88-041 Evaluating the Consequences of State Court-Annexed Arbitration on the Pace,
Cost and Quality of Dispute Resolution
National Center for State Courts
Dr. Roger Hanson (804-253-2000)
- 88-060 Comprehensive State ADR Program Database
National Center for State Courts
Information Service (804-253-2000)
- 88-078 Model Judicial Mediation Training Program
American Arbitration Association
Alan Silberman (212-484-3231)
- 89-013 Evaluation of the Use of Mandatory Divorce Mediation
Center for Policy Research
Dr. Jessica Pearson (303-837-1555)
- 89-022 Alternatives to Adjudication in Child Abuse and Neglect Cases
Center for Policy Research
Dr. Nancy Thoennes (303-837-1555)
- 89-026 Judicial Conference and District Workshops in ADR
(Training Materials)
& 91-060 Drake University, Smith Law Center
Professor Daniel Power (515-271-3851)
- 89-028 Future Demographic Changes and Culturally Appropriate Dispute Resolution Procedures
for the Hawaii Judiciary
University of Hawaii at Manoa - Hawaii Research Center for Future Studies
Dr. James Dator (808-956-6601)
- 89-036 Evaluation of Community Mediation Programs in North Carolina
Mediation Network of North Carolina
John Fenner (704-877-3815)
- 89-044 Judicial Settlement: Development of a New Course Module, Film
and Instructional Manual
National Judicial College
Burton A. Scott (800-255-8343)
- 89-051 Court-Sponsored Case Evaluation of Motor Vehicle Torts
Massachusetts Trial Court
Mark Greeley (617-742-8575)

- 89-052 Analysis of the Civil Settlement Process
New Jersey Administrative Office of the Courts
Harold Rubenstein (609-984-3150 or 0275)
- 89-056 Dispute Resolution and the Appellate Courts
Institute of Judicial Administration
Sam Estreicher (212-998-6226)
- 89-058 Cross-Site Analysis of Juvenile Offender-Victim Mediation
Minnesota Citizens Council on Crime and Justice
Dr. Mark Umbreit (612-624-4923)
- 89-067 Multi-State Assessment of Divorce Mediation
National Center for State Courts
Susan Keilitz (804-253-2000)
- 89-082 Domestic Abuse and Mediation Project
Maine Court Mediation Service
Paul Charbonneau (207-338-3107)
- 90-043 Private Judging: A Study of Its Volume, Nature and Impact on State Courts
Institute for Social Analysis
Dr. Janice Roehl (408-655-1513)
- 90-044 State Judicial Scholarships for the National Conference on Emerging ADR
Issues in State and Federal Courts
Center for Public Resources
Susan Scott (212-949-6490)
- 90-045 Community Involvement in Mediation of First and Second Time Juvenile Offenses
Community Board Program
Terry Amsler (415-552-1250)
- 90-046 Middlesex Multi-Door Courthouse Evaluation
National Center for Citizen Participation in the Administration of Justice
Florence Rubin (617-350-6150)
- 90-047 Mediator Training Project
Oregon Office of State Court Administration
Joseph Olexa (503-248-3750)
- 90-055 Neighborhood Dispute Resolution Demonstration Project
Utah State Bar
Dr. Marlene Lehtinen (801-581-8091)
- 90-062 Standards for Court-Connected Mediation Programs
Institute of Judicial Administration/Center for Dispute Settlement
Edna Povich or Linda Singer (202-265-9572)

COURT-CONNECTED DISPUTE RESOLUTION

- 91-033 Family Matters: Public Education Video Program
Ohio Judicial Conference
Allan Whaling (614-466-4150)
- 91-055 An Experimental Test of Court-Annexed Arbitration
National Center for State Courts
Dr. Roger Hanson (804-253-2000)
- 91-068 Evaluation of Rural Alternative Dispute Resolution Projects
Alaska Judicial Council
Teresa Carns or Suzanne DiPietro (907-279-2526)
- 92-038 Judicial Settlement (In-State Implementation of 89-044)
Multnomah Circuit Court of Oregon
Joseph Olexa (503-248-3750)
- 92-051 Impact of State Court-Annexed Arbitration on Civil Justice in Nevada
Nevada Supreme Court
Joseph Carpenter (702-687-5179)
- 92-169 National Symposium on Court-Connected ADR Research
National Center for State Courts
Susan Keilitz (804-253-2000)
- 93-076 Tennessee Supreme Court Commission on Dispute Resolution
Tennessee Supreme Court
Timothy Babb (615-741-2687)
- 93-210 Dispute Resolution for Children of Domestic Violence
Florida Supreme Court/Sixth Circuit Court
Thomas Walsh (813-582-7560)
- 93-277 In-Depth Courses for New Judges and Short Courses for Judges Regarding Referrals
to Dispute Resolution Processes
Ohio State University School of Law
Professor Nancy Rogers (614-292-2631)

Pending Award:

- A94-001 Evaluation of Mediated Settlement Conferences
North Carolina Bar Foundation
Frank Laney (919-828-0561)

