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1993

National Symposium on Court-Connected Dispute Resolution Research

Hyatt Orlando • October 15-16, 1993
/

SYMPOSIUM ADVISORY COMMITTEE

Honorable Rosemary Barkett
Chief Justice
Supreme Court of Florida

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Professor of Sociology
Bowdoin College
Brunswick, Maine

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District of Columbia Superior Court

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Michael D. Planet
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Honorable Resa Harris
District Court - Mecklenburg County
Charlotte, North Carolina

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Library
National Center for State Courts
300 Newport Ave.
Williamsburg, VA 23187-8700

Symposium Agenda

Friday, October 15, 1993

7:00 a.m. - 8:30 a.m. **Registration** *St. Augustine Lounge*

Continental Breakfast *Kissimmee Hall
Symposium Participants*

8:30 a.m. - 9:15 a.m. **Opening Plenary** *Polk City/St. Cloud*

9:30 a.m. - 12:15 p.m. **Concurrent Workshops**

9:30 a.m. - 10:45 a.m. Community Justice/
Victim Offender Mediation *Ft. Lauderdale Room*

11:00 a.m. - 12:15 p.m. Multi-Cultural Issues *Ft. Lauderdale Room*

9:30 a.m. - 12:15 p.m. Civil Dispute Resolution Processes *Cocoa Room*
Court-Annexed Arbitration *Key Largo Room*
Family Mediation *Key West Room*
Selection, Training & Qualifications *Boca Raton Room*

12:30 p.m. - 1:30 p.m. **Group Lunch** *Kissimmee Hall
Symposium Participants*

1:45 p.m. - 4:30 p.m. **Concurrent Workshops**

Civil Dispute Resolution Processes *Cocoa Room*
Court-Annexed Arbitration *Key Largo Room*
Family Mediation *Key West Room*
Selection, Training & Qualifications *Boca Raton Room*
Multi-Door Courthouse *Sarasota Room*
Private Dispute Resolution *Ft. Lauderdale Room*

5:30 p.m. - 6:30 p.m. **Reception - Pool Number Two** (*Kissimmee Hall in case of rain*)

Symposium Participants, Spouses, and Guests.

Hosted by the Florida Academy of Certified Mediators and the
National Center for State Courts

Symposium Agenda

Saturday, October 16, 1993

7:30 a.m. - 9:00 a.m.

Continental Breakfast

*Kissimmee Hall
Symposium Participants*

9:00 a.m. - 10:30 a.m.

Concurrent Workshops: Professional Perspectives

*Key Largo Room
Boca Raton Room
Cocoa Room
Key West Room
Ft. Lauderdale Room
Sarasota Room*

Appellate Judges
Trial Judges
State Court Administrative Office/State DR Administrators
Trial Court Administrative Office/Local DR Administrators
Researchers/Academics
Dispute Resolution Providers/Association Representatives

10:30 a.m. - 10:45 a.m.

Break

10:45 a.m. - 12:00 p.m.

Informal Q&A Sessions

Saint Cloud Hall

Community Justice/Victim Offender Mediation
Court-Annexed Arbitration/Civil DR Processes
Family Mediation
Multi-Door Courthouse
Private Dispute Resolution
Selection, Training & Qualifications

12:15 p.m. - 2:30 p.m.

Group Lunch / Closing Plenary *Kissimmee Hall
Symposium Participants*

Symposium Agenda

Friday, October 15, 1993

7:00 a.m. - 8:30 a.m.

Registration

Saint Augustine Lounge

Continental Breakfast

*Kissimmee Hall
Symposium Participants*

8:30 a.m. - 9:15 a.m.

Opening Plenary

Polk City/Saint Cloud

Welcome:

*Larry L. Sipes,
President, National Center for State Courts*

*Carl Bianchi,
State Justice Institute Board of Directors
Director, Legislative Services for
the Idaho State Legislature*

*Rosemary Barkett,
Chief Justice,
Supreme Court of Florida*

Setting the Stage:

*Craig McEwen, Moderator
Professor of Sociology
Bowdoin College, Maine*

*James C. Drennan,
Director, Administrative Office of the Courts,
North Carolina*

*Thomas J. Moyer,
Chief Justice,
Supreme Court of Ohio*

*Jessica Pearson,
Director, Center for Policy Research,
Colorado*

Friday, Continued.

9:30 a.m. - 12:15 p.m. Concurrent Workshops

**9:30 a.m. - 10:45 a.m. Community Justice/
Victim Offender Mediation Ft. Lauderdale Room**

Workshop Team:

*Susan Rogers, New York
Terry Amsler, California
Stevens Clarke, North Carolina
Thomas Christian, New York
Albie Davis, Massachusetts
Marlene Lehtinen, Utah
Janice Roehl, California
Mark Umbreit, Minnesota*

11:00 a.m. - 12:15 p.m. Multi-Cultural Issues Ft. Lauderdale Room

Workshop Team:

*Albie Davis, Massachusetts
Terry Amsler, California
James Dator, Hawaii
Suzanne DiPietro, Alaska
Honorable Okla Jones, II, Louisiana
Nina Meierding, California
Mildred Enid Negron-Martinez, Puerto Rico*

9:30 a.m. - 12:15 p.m. Civil Dispute Resolution Processes Cocoa Room

Workshop Team:

*Margaret Shaw, New York
Ericka Gray, Massachusetts
Barbara Hulbert, Virginia
Craig McEwen, Maine
Melinda Ostermeyer, Washington, D.C.
Elizabeth Plapinger, New York
Kathy Stuart, North Carolina
Honorable Paul Webber, III, Washington, D.C.*

Friday, Concurrent Workshops Continued

9:30 a.m. - 12:15 p.m.

Court-Annexed Arbitration

Key Largo Room

Workshop Team:

*Thomas Fee, Washington, D.C.
Michael Broderick, Hawaii
Roger Hanson, Virginia
Felicia Jones, Delaware
Honorable Roger Kaufman, Arizona*

Family Mediation

Key West Room

Workshop Team:

*Jessica Pearson, Colorado
Michael Arrington, Delaware
Honorable Anne Kass, New Mexico
Ann Milne, Wisconsin*

Selection, Training & Qualifications

Boca Raton Room

Workshop Team:

*Sharon Press, Florida
Christopher Honeyman, Wisconsin
Lansford Levitt, Nevada
Alice Phalan, Oregon
Barbara Stedman, Massachusetts*

12:30 p.m. - 1:30 p.m.

Group Lunch

*Kissimmee Hall
Symposium Participants*

1:45 p.m. - 4:30 p.m.

Concurrent Workshops

Civil Dispute Resolution Processes

Cocoa Room

Workshop Team:

*Judith Filner, Washington, D.C.
Honorable Kristena LaMar, Oregon
Frank Laney, North Carolina
Honorable Thomas Moyer, Ohio
Michael Planet, Washington
Sharon Press, Florida*

Friday, Concurrent Workshops Continued

1:45 p.m. - 4:30 p.m.

Court-Annexed Arbitration

Key Largo Room

Workshop Team:

*Kathy Shuart, North Carolina
Joseph Carpenter, Nevada
Stevens Clarke, North Carolina
Honorable Rosemary Higgins-Cass, New Jersey
John McIver, Colorado
Honorable Joseph Rodgers, Jr., Rhode Island*

Family Mediation

Key West Room

Workshop Team:

*Paul Charbonneau, Maine
Mary Duryee, California
Nina Meierding, California
Alice Phalan, Oregon*

Selection, Training & Qualifications Boca Raton Room

Workshop Team:

*Margaret Shaw, New York
Honorable Rosemary Barkett, Florida
Kimberly McCandless, Georgia
Joseph Olexa, Oregon
Allan Silberman, New York*

Multi-Door Courthouse

Sarasota Room

Workshop Team:

*Larry Ray, Washington, D.C.
Honorable Lawrence Fleischman, Arizona
Ericka Gray, Massachusetts
Prudence Kestner, Washington, D.C.
Melinda Ostermeyer, Washington, D.C.*

Friday, Concurrent Workshops Continued.

1:45 p.m. - 4:30 p.m.

Private Dispute Resolution

Ft. Lauderdale Room

Workshop Team:

*Richard Van Duizend, Virginia
Honorable Aaron Ment, Connecticut
Elizabeth Plapinger, New York
Janice Roehl, California
Elizabeth Rolph, California*

5:30 p.m. - 6:30 p.m.

Reception - Pool Number Two *(Kissimmee Hall in case of rain)*

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*Kissimmee Hall
Symposium Participants*

9:00 a.m. - 10:30 a.m.

Concurrent Workshops: Professional Perspectives

Key Largo Room

Appellate Judges

Discussion Leader:

*Susan M. Leeson,
Oregon Court of Appeals*

Boca Raton Room

Trial Judges

Discussion Leaders:

*Kristena LaMar,
Multnomah County Circuit Court,
Oregon*

*Anne Ellington,
King County Superior Court,
Washington*

*Isadore Patrick,
Warren County Circuit Court
Mississippi*

Cocoa Room

State Court Administrative Office/State DR Administrators

Discussion Leaders:

*Robert N. Baldwin,
Virginia Supreme Court*

*Sharon Press,
Florida Dispute Resolution Center*

*Constance C. Talmage,
Colorado Office of Dispute Resolution*

Saturday, Professional Perspectives Continued

Key West Room

Trial Court Administrative Office/Local DR Administrators

Discussion Leaders:

*Michael D. Planet,
King County Superior Court,
Washington*

*Felicia Jones,
Superior Court of Delaware*

Ft. Lauderdale Room

Researchers/Academics

Discussion Leaders:

*Craig McEwen,
Bowdoin College, Maine*

*Jessica Pearson,
Center for Policy Research, Colorado*

*Edward Sherman,
University of Texas School of Law*

Sarasota Room

Dispute Resolution Providers/Association Representatives

Discussion Leader:

*Ann Milne,
Association of Family and
Conciliation Courts, Wisconsin*

10:30 a.m. - 10:45 a.m.

Break

10:45 a.m. - 12:00 p.m.

Informal Q&A Sessions

Saint Cloud Hall

Community Justice/Victim Offender Mediation
Court-Annexed Arbitration/Civil DR Processes
Family Mediation
Multi-Door Courthouse
Private Dispute Resolution
Selection, Training & Qualifications

Saturday, Continued.

12:15 p.m. - 2:30 p.m.

Group Lunch / Closing Plenary

Kissimmee Hall

Symposium Participants

Margaret Shaw, Moderator
Mediator and Court Consultant,
New York

Professional Perspectives

Susan M. Leeson, Oregon Court of Appeals

Kristena LaMar, Multnomah County
Circuit Court, Oregon

Robert Baldwin, Executive Secretary,
Virginia Supreme Court

Michael Planet, Court Administrator
King County Superior Court,
Washington

Craig McEwen, Professor of Sociology,
Bowdoin University, Maine

Ann Milne, Executive Director,
Association of Family
and Conciliation Courts, Wisconsin

Synthesis of Symposium Proceedings

Nancy Rogers, Assistant Dean,
Ohio State University School of Law

Closing Remarks

David I. Tevelin, Executive Director
State Justice Institute, Virginia

NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH

Hyatt Orlando
October 15-16, 1993

Participants

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G

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NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH

Participants' Role in the Symposium

The Purpose of the Symposium

The symposium will provide a forum for dialogue among judges, court administrators, dispute resolution program managers, researchers and others about the implications of the dispute resolution research findings for court and program policy setting, operational planning, and management. The symposium participants were selected to attend specifically because of their interest in and/or knowledge about court-connected dispute resolution. Multiple perspectives are represented among the symposium participants to ensure that the symposium addresses the various viewpoints that form the whole.

The symposium process is intended to:

- Enable individual participants to apply research findings to program and policy decision making upon their return to their position in the court community;
- Enhance the working papers for post-symposium publications and dissemination nationally; and
- Result in the development of an agenda for further court-connected dispute resolution research and evaluation.

The Symposium Structure

The symposium agenda is composed primarily of facilitated workshops designed to promote discussion among the participants. The opening plenary session will briefly set the stage for the symposium proceedings. The Friday workshops focus on the working papers prepared for the symposium. During the Saturday workshops, participants will meet with others whose professional positions are similar to discuss the research implications from their perspectives. Following these workshops, symposium participants will have the opportunity to discuss issues directly and individually with many of the evaluators of court-connected dispute resolution. The closing plenary session will synthesize the symposium discussions and propose an agenda for future research on court-connected dispute resolution based on the symposium proceedings.

How the workshops will be conducted

There will be no formal presentations in the workshops. Instead, workshop teams will guide you and the other participants through discussion of and elaboration on the research findings presented in the symposium working papers. **Your ideas, experiences, concerns, and needs related to the implications of the research are essential to fulfill the purposes of the symposium.** It is therefore very important to the process that you read the working papers written for the workshops you will attend on Friday. (Please check your workshop assignments and fax the form back if you would like to change your assignment(s).) The

Saturday workshops also will be more beneficial to you and productive if you are at least familiar with the issues addressed in each of the working papers. As you read the working papers, you may wish to make notes in the margins regarding questions or issues you might wish to raise during the workshop discussions. If you are aware of other research that you believe should be included to the workshop discussions, please be prepared to introduce this research during the workshops. (It also will be helpful if you can provide citations or copies to symposium staff.)

Although particular individuals have been selected for the workshop teams, in a broader sense all symposium participants are part of the team because each of you will serve as a resource based on your unique experience in the court community. The teams will conduct the workshops in an interactive manner and keep track of the proceedings on flip charts. Although there may not be time to cover every research fact related to a particular topic or dispute resolution process, the goal is to work through those facts, their implications, and the research needed.

State Justice Institute and National Center for State Courts staff will assimilate the information discussed in each Friday workshop for use by Professor Nancy Rogers, who will present the synthesis of the workshop discussions during the closing plenary session. Information from the professional perspective sessions also will be integrated into the closing plenary, with reporters from each professional group reviewing the highlights from their particular perspective.

Informal Q & A Sessions

The question and answer sessions on Saturday will give you an opportunity to informally ask questions of the researchers, as well as one another, that either were not addressed in Friday's workshops or that might have been too narrow for the workshop discussions. The symposium notebooks will contain forms for writing your questions, which will be passed on to the researchers to enable them to address your questions more thoroughly.

A Word of Thanks

The State Justice Institute and the National Center for State Courts thank you for your contributions to the National Symposium on Court-Connected Dispute Resolution. We look forward to seeing you in Orlando!

Community Justice and Victim-Offender Mediation Programs

*A Working Paper for the
National Symposium on Court Connected
Dispute Resolution Research
October 15-16, 1993*

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under a cooperative agreement with
the State Justice Institute. The views
expressed are those of the author and
do not necessarily reflect the policies
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NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION

COMMUNITY JUSTICE AND VICTIM-OFFENDER MEDIATION PROGRAMS

I. Community Justice Programs

A. Introduction

Community justice programs, also known as community mediation, neighborhood justice centers or dispute settlement centers, are intended to substitute mediation for adjudication to resolve disputes among persons with ongoing or prior relationships. (The term "community mediation" is used in this working paper.) Their development was spurred by the three neighborhood justice centers created by the U.S. Department of Justice in 1977 in Atlanta, Kansas City, and Los Angeles. 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, in which 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 without first filing charges.

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).

B. 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?

C. Conclusions of Studies

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.

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, Mass. Urban Court Study (1976-77)	Felstiner and Williams (1982, 1980, 1978) Law Enforcement Assistance Administration	Dorchester, Massachusetts	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, New York	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, North Carolina	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)

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), even though most referrals carry the authority of court officials or police. 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 court 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.

D. 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; focus on intake systems. 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 policy-makers 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, in future evaluation it may be desirable to 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*.

II. Victim-Offender Mediation Programs

A. 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 nation-wide 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 nonviolent¹ offenders, while community mediation operates at the pretrial stage sometimes even before charges have been filed. (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

¹Throughout this review, the term "violent" means "involving an element of assault on a person."

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 is 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 nation-wide 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 like 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.

B. 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?

C. Conclusions of Studies

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 (see accompanying table).

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 (Texas), Minneapolis, and Oakland (Calif.)	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)

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.

D. Implications for Court Management

Need for further evaluation. Court managers and policy-makers, 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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Cultural Pluralism and the Future of the Judiciary

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Introduction

Change is a given in the substance, practice, and administration of law. Even the most conservative lawyer anticipates some future modifications. However, most people commonly seem to expect only incremental change that builds on and fine tunes tradition. Very few appear to welcome radical change which could divorce the practice of law from the past. Thus, law is seen as a series of transitions, a process of adaptation. Current and often contradictory trends in the law can be identified. The challenge is to place them in context, judging their relative importance as sustained trends for the future. This paper examines two aspects of the law relating to culture and difference: on the one hand, there is the desire to maintain the integrity of the law by according equal treatment and identical principles of due process to all individuals, thus refusing to recognize cultural differences in legal proceedings. On the other hand, there are jurists who would open the door to and allow the furtherance of diverse group values, norms, and behaviors in the form and content of the administration of justice.

It is our purpose here to see where past and present decisions by the United States Supreme Court stand in relation to these two trends. Specifically, to what extent do Supreme Court decisions support the right and/or ability of certain groups to settle their own disputes independently of the formal judicial system? To what extent will the formal courts uphold decisions made according to rules or procedures which differ from those of the formal courts? What kinds of groups, in what kinds of controversies, have such procedures recognized by the courts, and which do not? Is there evidence of a trend towards more or towards less recognition of such practices by the US Supreme Court?

Cultures as Resources for Conflict Management Techniques

Recent efforts legally to recognize cultural differences have not resulted in startling changes in law but nonetheless have already given rise to significant controversy. One example is the "cultural defense" which seeks to allow the consideration of cultural differences as a basis for establishing a reasonable doubt of a defendant's guilt (see Note, Harvard Law Review, 1986). But another, richer, and potentially further reaching manifestation of a trend supporting cultural diversity is the recognition of cultural differences as a fund of *opportunities* rather than a set of *problems*.

Different cultures, viewed as legitimate systems of values, and derivative systems of social institutions, often have different procedures for managing and resolving conflict. Culture as used in this context refers to a system of shared values, norms, and practices, including a shared functional understanding of communicative language and other representative uses of symbols. The existing mainstream legal system itself can be considered to be a distinct culture, comprised of particular values integrated systematically. It may be possible that, to the extent different cultures can coexist and learn from each other, different sets

of conflict-managing and conflict-resolving systems can also coexist and learn from each other as well. Moreover, given a likely increase in cultural diversity in the United States, and the growing potential for damaging divisiveness, a reasonable alternative to attempting to force compliance, acculturation, and general homogenization of cultures might be to recognize and accept cultural diversity and to use these diverse cultures as helpful reservoirs of alternative ways to lessen or control conflict.

These cultures have the potential of providing a diverse repertoire of management tools and different sets of software for organizing and managing conflict. Certainly, recognizing these different processes might increase the complexity of our institutional conflict managing systems, but given the currently increasing amount of cultural diversity, the failure institutionally to recognize it seems to be a kind of oppression reminiscent of Procrustes, the ogre encountered by Theseus in the Greek myth who, by stretching or chopping, forces each of his victim "guests" to fit his iron bed.

The Struggle for Cultural Identity

The assertion of a cultural identity in defiance of the central order of a nation state is an important aspect of contemporary politics. These phenomena are evident in many parts of the world, where the prevalence and vigor of such struggles is on the rise. Notable are the Kurds of the Middle East; the Lithuanians, Latvians, Estonians, Armenians, and others of the Soviet Union; the Tamils of Sri Lanka; and the Moslems of the Southern Philippines whose struggles periodically make headlines around the globe. Less violent examples of the assertion of cultural identity are also readily available, such as the Welsh, the Maori of New Zealand, the Hawaiians, and others who to varying degrees have experienced cultural "renaissances." Such cultural rebirth and reinvigoration seems significant in the formation of group identity, and in the values, behavior, and identity of many individuals experiencing themselves as distinct from a dominant culture which surrounds them.

Other phenomena of equal importance in the United States and elsewhere, involve increased cultural diversity through immigration, especially from immigrants and refugees who are relatively "more different" from the communities they enter than were previous immigrants. The most notable examples in the United States include Southeast Asian immigrants, particularly those from remote rural highland areas, such as the Hmong and the other hill tribes. Such immigrants make vivid the need for concern about traditional values, because such hill tribes have not had extensive experience with outsiders, and accommodation of different ways of doing things may not mean change in their culture but complete loss of the culture.

The rhetoric of groups supporting or asserting cultural diversity often depicts the dominant culture of the United States as embodied by and protected in the laws of the United States, and it is not uncommon for them to portray this legal system as monolithic, exclusive, and uncompromising. Although to a great

degree our legal system does demand accommodation to and assimilation of the dominant values and behaviors embodied within our mainstream culture, there are significant exceptions. To some extent the "cultural defense" previously mentioned has proved somewhat successful at least in providing mitigation in sentencing.

However, the cultural defense may not benefit cultural groups as a whole before the law. Although the cultural defense involves the identification of the individual defendant with a distinct cultural group, and locates the perceptions of the defendant and the performance of the criminal action in the context of the different values which that group shares, this defense is essentially an argument of individual exception, a basis for juridical discretion. Of more significance for cultural groups seeking legitimation of their distinct values are the experiences of those groups which have already, to some extent, carved out domains of semi-autonomy within the legal system.

In an effort to establish the nature, basis, and relative success in protecting their semi-autonomy, several types of such groups, and their respective constitutional protections, were surveyed. Religious and labor groups, Native Americans, and Pacific Islanders are the focus of this paper which concludes with a brief discussion of opportunities for other groups to achieve some degree of autonomy within our legal system.

Groups and Law in the US: Survey of Legal Precedent

This section of the paper looks at various groups in the United States and its related territories in the Pacific to determine the extent of their autonomy for resolving conflict without government intervention. The groups selected have, or are reputed to have, a degree of semi-autonomy or jurisdiction within which they may settle disputes without scrutiny and possible contradiction by the US government's legal agencies. These sections review the degree of, and the basis for, these various groups' semi-autonomy, and then summarizes how and to what extent these groups maintain their special status with respect to the law.

Labor Groups and Autonomy

Labor law is a huge and complicated body of law. It is nonetheless possible to generalize that the autonomy available to labor groups to settle internal conflict without possible government intervention is extremely limited. In general, the actions of private groups are not subject to the same constitutional limits as government actions are and wholly private groups which are voluntary associations can therefore interfere with the fundamental constitutionally guaranteed freedoms of individuals, including those of speech, religion and assembly. Labor groups, however, have often been subject to greater government intervention due to the significant role they play in society.

Precedent supporting private organization's autonomy include cases addressing group interference with the exercise of individual rights, such as *Collins v. Hardiman* (1951) in which "Federal legislation enacted to protect such activities from private interference has been held unconstitutional" (Note, HLR, 1963, p. 1058, supra 27). However, government intervention into the actions of labor groups has been extensive. Labor's jurisdiction to settle their own disputes is the same as that accorded to all voluntary associations, but labor groups have seen far more government intervention into their practices than other types of voluntary associations. For instance, the mass of labor law makes it far from clear whether labor groups can determine their own membership, specify conditions for membership, and resolve conflicts which arise between members, powers which are usually available to voluntary associations. The grounds for intervention have often been based on fairness and equal treatment, but also include "the state's interest in fostering public purposes" (Note, HLR, 1963, pp. 1057, 1058), for instance public safety and the public welfare.

Labor groups have limited powers to determine their own membership: the government has intervened and the judicial system supported that intervention based on a standard of fairness and equal treatment. Many Court decisions have favored the constitutional rights of individuals over those of the labor group, such as *Railway Mail Ass'n v. Corsi* (1945). "The question to what extent the state may compel association was first raised in *Railway Mail Ass'n v. Corsi*...prohibiting labor unions from denying membership on racial grounds" (Note, HLR, 1963, p. 1057). Using similar criteria of fairness and equal treatment, *Railway Employees' Dept. v. Hanson* (1956) favored the constitutional rights of the group, in that an employee was required to join a labor union in order to keep his job.

Labor groups have not been treated as typical private associations due to their role in public society, characterized by ubiquity, large size, and their significant influence in the economy in general, and particularly in the safety and welfare of private citizens. In sum, although mitigated by precedent recognizing their groups' rights as voluntary associations, labor groups on the whole have had their group integrity violated quite frequently as judicial decisions recognized the need for protecting the public welfare and individual rights.

Freedom of Religion

In law, religious groups are considered a type of voluntary association, but a very special type. Evaluating the extent of the semi-autonomous jurisdiction provided religious groups by the Constitution is problematic. There is no consensus on the degree of autonomy or the conditions which govern the protections of religious organizations from government intervention. On the contrary, this is such a highly charged and contentious area of law that new cases are continually being considered by appellate courts.

The outcomes of these cases are unpredictable, depending largely on the precise definition of the case, which leads to a determination of what part of law is applicable. For a constitutional question of religious freedom to emerge, it

must be found relevant by a presiding judge. The judge locates the jurisdiction of the state with regard to a case in defining the significance of the case. Refusing to examine the merits of religious freedom is sometimes avowed to be exercising judicial restraint (Tays, 1990). A review of Supreme Court standards leads to the reasonable assumption that "religious autonomy must be preserved unless there is a compelling state interest that would warrant an infringement" (Tays, p. 403). A compelling state interest that would warrant intervention into the practices of a religious group must be clearly defined and it must be demonstrated that grave harm is posed to public health, welfare or safety. Otherwise, as Laurence Tribe has described, "if the harm is ill defined or plainly not serious" then the religious practice must be granted an exemption (Tays, p. 403).

The Establishment Clause and the Free Exercise Clause of the First Amendment

The Court's treatment of religious groups has in practice not been static over time, and recent decisions have demonstrated some relatively new definitions of the limits of constitutional protection. Summarizing this body of law is not simple. However, there are some particularly relevant standards used to assess the position of government and the application of constitutional law involving religious groups which have been set by noteworthy decisions establishing precedent, and are largely if not entirely derived from the Establishment Clause and/or the Free Exercise Clause of the First Amendment.

"Benevolent Neutrality": The process of selecting and applying standards and deriving the government's position in a dispute inevitably involves considerable analysis and judicial discretion. Complicating the assessment of the extent of state compulsion to intervene is the tension between the two religion clauses of the First Amendment. In *Walz v. Tax Commission* (1970) Chief Justice Warren Burger wrote that either of the two clauses "...expanded to a logical extreme, would tend to clash with the other..." (Tays, p. 401). Burger concluded that as a consequence of the necessity to avoid such a clash, "[n]o perfect or absolute separation is really possible" between church and state; Burger's solution was to take a position of "benevolent neutrality" (Tays, p. 401).

This standard was applied in *Wisconsin v. Yoder* (1972), when the Supreme Court allowed Amish to withdraw their children from school at the age of fourteen despite Wisconsin state law. Torn between the right of the Amish to free exercise of their religious convictions, and enforcing state law applicable to all citizens, the Court chose to grant the Amish an exception in an exercise of benevolent neutrality.

"Balancing Approach": However, there are limits to the exceptions granted religious organizations and their members. One of the variables which governs the setting of limits is size of the population which is to be excepted. As an aspect of the Court's "balancing approach" taken in free exercise cases which recognizes that an individual's right to the free exercise of his or her religion cannot be absolute but must be balanced against the government's legitimate interest, claims to exceptions as an aspect of religious freedom have sometimes been

denied. For instance, *Reynolds v. United States* (1878) rejected a free exercise claim by Mormons who sought to practice polygamy in violation of state law and *Leary v. United States* (5th Cir. 1967) denied an exemption from the drug laws to a person who alleged that marihuana use was part of his religious practice. In *Leary*, the Court found the exemption from criminal statutes for drug use would threaten enforceability of those laws, due to the large number of youths eager to experiment with marihuana. (Note, HLR 1986, pp. 1309-1310, and Clark, 1969, *supra* note 36, p. 332)

The exemption of citizens from law is calculated as a cost to government, a cost directly proportional to the number of potential claimants. *Sherbert v. Verner* (1963), described below, specifically noted that the number of potential claimants was very small, and exempted a Seventh Day Adventist from unemployment compensation rules. *Sherbert* was until recently thought applicable to the Native American Church use of peyote as a sacrament, but the Court's 1990 decision on *Employment Division v. Smith* "marks an abrupt shift in free exercise jurisprudence, granting government broad new powers over religious practices" (Boston, p. 4).

Supreme Court precedent involving the practice of religion and the actions of religious groups is not an absolutely integrated body of standards; depending on the precedent case or cases cited, interpretation and application of the First Amendment varies. One case which established one of these standards is *Everson v. Board of Education* (1947) in which the Court specified three fundamental aspects of the Establishment Clause: affirming the "wall" between church and state activity, prohibiting government aid to all religions, and prescribing government neutrality between religion and irreligion. This last fundamental aspect of the Court's interpretation of the Establishment Clause allowed New Jersey to subsidize parochial school bus transport on the grounds it was not religious aid, but benefited the health and safety of children.

"Indirect Burden": Another standard is based on *Braunfeld v. Brown* (1961). This case held that an "indirect burden" on religion is permissible in accomplishing a goal which serves a legitimate purpose. A Pennsylvania Sunday closing law was upheld despite challenges from Jews and other Saturday Sabbath observers.

A frequently cited standard at odds with the indirect burden standard is *Sherbert v. Verner* (1963), which provides a key test for balancing the state's interest against the Free Exercise Clause. In *Sherbert* the Court ruled that forcing a woman to choose between work and the precepts of her religion puts "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship" (Tays, p. 402). The three-part test considers: whether there is a burden placed on the free exercise of religion, and if so, whether the infringement is justified by a compelling state interest, and if a compelling state interest exists, if there is any less intrusive alternative means to meet the government's objective. (Tays, p. 402) For decades this test has been used to identify and weigh the needs of the state against instances of religious

free exercise. As noted above, its apparent reliability as a standard for defining government's interests and restraining government intervention is becoming more problematic.

An important test regarding the Establishment Clause originated in the *Lemon v. Kurtzman* decision of 1971. Chief Justice Warren Burger wrote that public policy must meet the following standards in order not violate the Establishment Clause:

1. The statute must reflect a clearly secular legislative purpose;
2. the primary effect of the law is neither to advance nor inhibit religion; and
3. it must avoid excessive governmental entanglement with religion. (Tays, p. 402)

Using this test, the Court decided in *Lemon* that state aid to private schools for teachers' salaries, textbooks, and instructional aids in certain secular subjects was excessive government entanglement and unconstitutionally fostered religious beliefs.

Property Disputes

Historically the vast majority of Court judgments concerning religious groups involve property, because judges have generally avoided intervening in and have dismissed all other types of cases as beyond their competence. Further, in nearly all court cases involving the use of church property the Court has chosen to follow the precedent of *Watson v. Jones* (1872), and "defer to the appropriate ecclesiastical authority or tribunal on all questions within that body's competence" (Note, HLR, 1963, p. 1055-1056). It is through this judgment addressing a property dispute that the Court made its most cited decision regarding the conditions and extent of autonomy allowed church organizations for settling disputes without government intervention.

Watson v. Jones involved a church torn by two factions, each claiming the church to be its property. This factional split was related to the position taken on slavery by a larger religious organization, the "supreme authority" of the Presbyterian church. The *Watson* decision involved, in part, establishing jurisdiction for settlement of disputes within religious organizations, and ascertaining the authoritative decision-making body within the organization. In *Watson* the Court defined three contexts of property disputes:

1. Where there is a will or deed committing property to a particular type of religious practice.
2. Where the dispute is within a congregation that is independent of other religious associations and is not subordinate to a central ecclesiastical governing body.

3. Where the dispute is within a congregation subordinate to a general church organization, governed by ecclesiastical tribunals under the control of a central church judicatory.

Cases of the first type would be decided by following standard civil procedure. In the second case, a majority of the congregation rules, following a democratic model of decision making. In the third case, *Watson* determined that the decision-making body of the church hierarchy has the jurisdiction to decide the dispute. By emphasizing the voluntary nature of religious association, the Court found state intervention into church conflicts inappropriate within congregations with hierarchical affiliation (Recio, p. 540). Such a church decision-making body has plenary power over church property, and it may use the courts to enforce its decrees (Note, Yale Law Review, 1965, p. 1137).

After *Watson*, the next major Court decision concerning the resolution of disputes within churches was *Kedroff v. Saint Nicholas Cathedral* (1952). The Court, citing *Watson*, found the case to be a dispute over property within a church with ecclesiastical hierarchical authority. Therefore, jurisdiction for settlement of the conflict was with the authoritative church tribunal. *Kedroff* held that the First and Fourteenth Amendments "prohibit the courts, as well as legislatures, from interfering with the ecclesiastical governance of churches" (Recio, p. 541). It is maintained that *Kedroff* "constitutionalized" *Watson* with regard to the settlement of property disputes in hierarchical churches (Recio, p. 541; Note, HLR, 1962, p. 1182).

Nevertheless, over time the issue of "neutral principles of law" emerged—a standard at odds with *Watson*. This standard of neutrality was not at all like Burger's benevolent neutrality in *Walz v. Tax Commission*. It was a standard which emerged in state court decisions maintaining that civil procedures may be used to decide church property disputes without violating the Establishment Clause. Cases using this standard are numerous, including *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church in Georgia* (1969), and at least eight other cases in Maryland, Virginia, Connecticut, Ohio, California, and Colorado cited in Recio (*supra* notes 81-82, p. 547).

A noteworthy case was *Jones v. Wolf* (1978) in which the Georgia Court ruled for a secessionist majority faction's right to possess and control their local church property. The Supreme Court review of *Jones* in 1979 recognized a variety of "permissible means" for resolving church property disputes, maintaining that the Constitution did not mandate any particular method. This is distinctly at odds with the perception that *Watson* was "constitutionalized." Further, in *Jones* the Court "distinctly favored the neutral principles approach" (Recio, p. 550). Four Justices dissented, criticizing the majority for intrusion into the church polity and for fashioning restrictive rules of evidence. This criticism refers to the narrowing of evidence allowed by the neutral principles approach to scrutiny of the church's constitution and restriction to language explicitly dealing with the control of property (Recio, p. 551). Using this approach moves control of decision making from authoritative ecclesiastical bodies to the language of a document which is

assessed in terms similar to any other legal document. Recio argues persuasively that causing such movement of the locus of control is not in itself neutral behavior, but intrudes upon church internal conflict management (pp. 557-558).

In addressing disputes within religious organizations, an important function of the courts is to establish the locus of control. *Watson* established strict criteria based on the affiliation, or lack of affiliation, of the congregation involved. The neutral standard of *Jones* regards *Watson's* analysis itself as intervention and seeks to avoid intervening in matters of religion by ignoring the church organization *per se* and referring only to formal legal documents. In all cases, establishing a locus of control and then recognizing and possibly enforcing the decision of that authority are the courts' responsibilities. The locus of control issue—locating the legitimate decision-making authority—is an extremely important aspect of judicial decision making in deciding disputes of all types, including disputes within voluntary associations. A thorough analysis of this issue would include examination of the tensions between individual rights, group rights, and the needs of the state, and of how primacy is assessed and asserted (see Gedicks, 1989, and Duesenberg, 1959).

"Wall" of Separation Between Church and State

Freedom of religion and the rights of religious groups are explicitly protected through the Constitution's First Amendment. However, judicial decisions over time have not been absolutely consistent, so application of the diverse standards derived from precedent is problematic. The free exercise of religion guaranteed in the First Amendment has "afforded religious organizations great autonomy in conducting their internal affairs" (Note, HLR, 1963, p. 1055).

Thomas Jefferson considered the intent of the Establishment Clause to be the erection of a wall of separation between Church and State. Though not appearing in the Constitution or codified as law, this view has often been considered a strong secondary source of law which has often guided judicial actions in the past. However, Chief Justice Rhenquist's resolve to eschew "interpretation" of the Constitution is well known. Rhenquist has stated that he does not find any reference in the Constitution to an impenetrable wall separating Church and State. However, *any* application of the Constitution to a particular case involves interpretation through definition of the relevant aspects, so Rhenquist's resolve means, in practice, that he will interpret the Constitution without overt reference to secondary sources of law. This approach allows him to ignore Jefferson's statement regarding the intent of the Constitution's First Amendment. Rhenquist and a majority of the present Court seem inclined to diminish the jurisdiction for autonomous control available to church organizations, for instance in *Employment Division v. Smith* (1990), previously quoted. Nevertheless, the Free Exercise Clause and the Establishment Clause are still significant and influential protectors of religious group autonomy.

Native American Autonomy

Native Americans, also known as American Indians, have strong claims to autonomy within certain jurisdictions of sovereignty. This autonomy is derived from references in the Constitution, court decisions, and legislated statute. "There are two clauses in the Constitution which reflect the understanding that Indians are a distinct and separate people: The Indian Commerce Clause and the clause exempting Indians from taxation for representation purposes" (Kahanu, MacKenzie, and Van Dyke, 1990, p. 2). *Worcester v. Georgia* (1832) has been said to preserve and insulate tribal sovereignty from state interference. *United States v. Wheeler* (1978) found tribes to be "unique aggregations possessing attributes of sovereignty over both their members and their territory." Under certain circumstances, "this power may even extend over nonmembers or extend beyond territorial limits" (Kahanu et al., p. 3).

Congress has never expressly extinguished the Indian right to sovereignty. There is, however, an ongoing struggle for Native Americans to resolve conflict for their own people and on their own lands. Statutes enacted by Congress in 1982 have further diminished the exercise of Native American sovereignty. It is said that the Pueblo in New Mexico "do rely heavily on customary procedure, and may operate quite informally, relying on traditional methods of dispute resolution" (Kahanu et al., p. 10). However, the practice and application of custom law free from intervention of state or federal law has continually diminished over time, and is now highly restricted.

The salient factor held in common by the approximately 499 federally recognized and 136 non-recognized tribal entities is the right to internal self-governance (Kahanu et al., p. 26). Fundamental powers retained by Native Americans include:

- 1) Power to establish a form of government
- 2) Power to determine membership
- 3) Power to legislate
- 4) Power to administer justice (Kahanu et al., pp. 9-10)

The jurisdiction of Native American authorities to administer justice and resolve conflict is said to extend to the bounds of Indian Country, which is defined as all Indian reservations, dependent communities, and allotments with titles which have not been extinguished. Tribal criminal and civil jurisdiction is exclusive in Indian Country, except where limited by Congress. The three acts which currently curtail Native American tribal jurisdiction include *Public Law 280* (1982), the *General Crimes Act* (1982), and the *Major Crimes Act* (1982).

Public Law 280 authorizes any state that so wishes to assume exclusive criminal jurisdiction and some civil jurisdiction over all Indian reservations. Sixteen states have adopted all or part of the jurisdiction enabled by P.L. 280. In states where P.L. 280 does not apply, Indian criminal defendants go to federal courts for most major crimes, and to tribal courts for all minor and some major

crimes. Non-Indians cannot go to tribal court (Kahanu et al., pp. 12-15). In sum, the "exclusive" jurisdiction of tribal law in criminal and civil cases within Indian Country is, in fact, very much diminished by laws that allow Federal and State intervention and structuring of jurisdiction.

In a "complicated opinion," *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* (1989) established some circumstances in which a tribe may "regulate the conduct of non-Indians." In order to do so the tribe must demonstrate serious impact which "imperils tribal political integrity, economic security, or health and welfare" (Kahanu et al., p. 25).

A relatively lucid opinion was given regarding the power of Indian tribes to determine membership in their tribe. Native American tribes are clearly empowered to determine criteria for tribal membership (see *Santa Clara Pueblo v. Martinez* (1978)). However, judicial recognition of Native American jurisdiction and sovereignty is constantly being tested.

As for future trends, the best benchmark may be that "a majority of the present Supreme Court appears to favor limiting the sovereignty of Indian tribes" (Kahanu et al., p.1).

Pacific Island Peoples and Custom Law

It might be expected that by investigating the enactment of the Constitutions of Pacific peoples one could find some examples of effective means of incorporating state law with culturally appropriate dispute resolution technique in the form of custom law. The Federated States of Micronesia, Pohnpei, Truk, the Marshall Islands, Palau, and American Samoa all have legal codes and judicial systems modeled closely on the US system, and in each case there is some recognition of custom law in their constitutions and statutes. For instance, the constitution and statutes of the Federated States of Micronesia mentions custom law, calling for "due regard for custom law," and directing judges to "consider" custom law (Bowman, 1990, pp. 14-15, p. 24). Nevertheless, in practice, custom law is clearly secondary to the mainstream legal system. Although customary law is widely practiced, its initiatives are recognized only at the discretion of prosecutors and judges, and are usually considered at most as mitigating factors in sentencing. Given these circumstances, such codified references to consideration of custom law are what Bowman calls "ameliorating." (Bowman, p. 24).

Micronesia

Nickontro Johnny, writing when he was serving as National Justice Ombudsman of the Federated States of Micronesia Supreme Court, describes the need for alternatives to Western law to best serve the people of Micronesia (Johnny, 1987). The Micronesian Supreme Court was created in 1981, and up to the time he wrote his article in 1987 the only two justices of the Court were Americans. He recognizes that there have been efforts by the Court to develop a

system of jurisprudence which reflects the values of Micronesians and which is understandable to Micronesians, and to this end Justice Ombudsmen were chosen to act as liaisons between the Court and the community. Johnny explains how these efforts have fallen short.

In many instances the Western law model, the basis of the Micronesian Constitution, does not reflect Micronesian cultural values. Further, even where there is not a conflict of values, the Western codified law is too inflexible "to provide precise justice for certain kinds of disputes" (p. 10). To a great extent conflicts in the community are settled through traditional means by the decision-making authority of traditional leaders; this is the case for almost all land and domestic cases (p. 13). The cases that do reach the Micronesian courts include "almost no cases involving disputes between individuals" (p. 14). In such cases a confrontational model of fact finding and guilt finding is inappropriate, because there is a need to gain acceptance of whatever result is reached from all parties concerned or a need for community consensus that justice has been done. To this end, there is a need for alternative dispute resolution processes, but Johnny notes that efforts to persuade the Court's two American justices of the need for alternative dispute resolution practices "have met with little success" (p. 15). Apparently, from Johnny's description, Micronesians feel the best strategy is to avoid having situations come to the attention of the Court, and to settle disputes through the traditional authorities. There is not yet any significant integration of the two systems, and when the Court becomes involved in a dispute, the community may not feel well-served.

Melanesia

Bernard Narokobi writes that Western law still dominates Melanesian legal systems (1989). However, "[t]he customs and usages of the Melanesian people were also declared to be part of the underlying law of the State, though given varying degrees of importance" by the various constitutions. Nevertheless, custom law was expressly ignored during colonial times, and to the present day is not sufficiently recognized by the constitutional judicial system. He argues that colonial judges, by not recognizing the Melanesian institutions of social order, "unwittingly created the seeds for social disorder" through the general breakdown of the order of traditional law and social order (p. 18).

This lack of recognition is substantially continued by the current judiciary, which applies standards that are inappropriate, in an effort to promote social order in a way that is ultimately futile. For Melanesian communities, social order cannot be maintained through the application of a narrow, uniform legal code, but must consider "the ways of the people in their total environment, both physical and metaphysical, tangible and intangible, concrete and abstract" (p. 19). Narokobi describes such custom as still prominent in villages, and says that "Village Courts, Local Land Courts and Local Government Councillors as well as village leaders use custom to establish local control, and more recently, extend central authority over the people and introduce social change" (p. 17). However, with respect to the central legal system which still follows the Western model, custom has had a limited role. "Custom has been most effective in criminal law,

especially in mitigation of sentences for crime, and to a lesser extent in the development of defences for criminal offences" (p. 17). Here again, when custom is recognized by formal jurisprudence, it is at the discretion of the court, and acts in mitigation of, not a substantial alternative to, the system which is part of the colonial legacy.

Tony Deklin, Senior Lecturer in Law at the University of Papua New Guinea, describes the shortcomings of efforts to remodel Western legal systems to accommodate the real needs of Melanesian peoples. He states that "there have been efforts made to remodel national legal systems in the Pacific," but that there has been "more political rhetoric than real action in pushing for legal changes." There have been changes made, but "these changes fall into the black-letter-Law type of changes" (1987, p. 112), which manipulate details but do not reform the basic model.

Neither Deklin nor Narokobi apparently foresee a potential for the complete abandonment of Western law in Melanesia and a complete conversion to reliance on custom law. Narokobi sees the challenge to be the infusion of "appropriate degrees of Melanesian thought and practice into these systems, while being cognizant of the positive elements introduced from the West over the past century, and sensitive to the pressures from the Far East in the coming century" (p. 26).

David Akin has examined the difficulties in codifying custom or *kastom* law in East Kwaio, Malaita of the Solomon Islands of Melanesia, and the difficulties in combining selected aspects of the Western legal system with elements of *kastom* law (1987). Problems include the differing basic motivations for undertaking the project of codification, with various groups using codification as a political tool to further particular goals. This is complicated by the heterogeneous nature of *kastom* law in the area, with different rules and procedures proving to be mutually exclusive, thus prohibiting a central set of *kastom* law acceptable to all groups. Even within groups, codifying *kastom* law proves elusive, because the basic nature of *kastom* law is its dependence on context and flexibility.

The Potential for Integrated Systems

The legal systems, constitutions and statutes of Pacific Islanders are essentially derived from US, British, or French law, and in the case of Vanuatu "a tragicomic amalgam" of both British and French law (Narokobi, 1989, p. 18). While custom law is still widely practiced, especially in villages, there is no significant integration of custom law with the jurisprudence derived from colonial models. The constitutions of now independent nations commonly make reference to the co-existence of custom law with the derived mainstream legal system of the state. In substance, there is co-existence to the extent that custom law manages to function by avoiding the attention of the formal judicial system. The references to custom law being an integral part of the formally-recognized law amount to ameliorative passages, and in practice, custom law is considered only at the discretion of judges and prosecutors who are fundamentally faithful to the western system from which their formal jurisprudence is derived.

Designing and institutionalizing a legal system which truly integrates custom law with a formal jurisprudence is a formidable task. At present in Pacific island nations, these two systems seem to co-exist best when used as mutually exclusive paths. In systems which have attempted to incorporate or in any sense integrate formal and custom law, it is evident that custom law is used at best as a mitigating factor in the defense, or more often in mitigating the consideration of sentence, much like the cultural defense in the United States. At worst, custom law is ignored altogether, or given recognition only in the rhetoric of the decision, serving as a decoration of the judicial process.

Unity, Diversity, and the Futures of Law

The beginning of this paper stated that there is evidence of two contradictory current trends in law: resistance to the recognition of cultural difference and support of diverse values, norms, and behaviors indicative of cultural identity and cultural difference. Given the individuals comprising the current Supreme Court, and the resistance to cultural diversity apparent in the pattern of their recent decisions, finding strong evidence in support of diversity in the above summaries of decisions is problematic. Focusing on the treatment of these selected groups would seem, generally, to undermine rather than support the assertion of such a trend.

Nevertheless, this study may prove useful in demonstrating the changing environment surrounding Court decisions regarding groups and autonomy over time, and to expose the current shifting and uncertainty inherent in the Court's views on these issues. The previous sections of this paper have provided a glimpse at the overall structure defining groups in law, focusing on what has happened in the past and shapes the present. The remainder of this paper is more concerned with the future—what might be. For groups seeking greater autonomy, there are, fortunately, other directions to look that may prove more satisfactory for finding remedies.

Definition of Cultural Groups

So far, this paper has side-stepped several extremely important and extremely complex issues. For instance, given group semi-autonomy, how does one identify group membership? Who decides? How does one identify a cultural group? After all, they are not all necessarily grouped on an ethnic-genetic basis.

In terms of American society and cultural change, some of the most interesting phenomena involve the emergence and increasing prevalence of relatively new conceptions of individual identity that can not be subsumed within the values of a single readily identifiable group culture (see Adler, 1973). Given an increased prevalence of conflict management alternatives available to specific culture groups, will such multi-cultural individuals be denied access to

alternatives available to *bona fide* group members and limited to mainstream alternatives? This would be a gross and absurd inequity, but not out of the question given the current lack of coherence surrounding the issue.

Of equal interest are new group cultures, with some attributes of more readily identifiable groups of the past, but with significant differences. There may be multiple group identities, overlapping and shifting, a flux of bonds initiated then withdrawn (see Melucci, 1988). Therefore, to some extent, when the intent is to develop alternatives for people in a changing society, an exclusive focus on legitimized groups and their members is insufficient, or not a sufficiently forward-looking perspective to satisfy social needs. We must go beyond the limited view of legitimate groups which even this paper has adopted as an organizing format. Truly opening our formal and informal means of conflict management to real alternatives, developing ways of controlling social pathology and fostering community which embrace a diversity of values, and engendering democratic pluralism, must involve an extremely complex set of planning and implementation events.

Despite this complexity, we can speculate about the qualities of such a system. Peter Adler, one of the people most active in the development of ADR in Hawaii in the past two decades, wrote in the early 1970s about culture and identity, and how multi-cultural individuals need not be marginalized, but can demonstrate variation and flexibility of identity and behavior to reflect a variety of contexts and environments (1973, pp. 37, 38). This concept can also be applied to societies as a whole, including the system of conflict resolution. There would not be only one "legitimate" culture to be emulated, a culture by which the other co-existing cultures would be assimilated and judged. Neither would a single system of judicature predominate, directly or indirectly. In order to support a diverse social system truly based on democratic pluralism, there must exist a correspondingly diverse and flexible system of conflict resolution options.

Potential for Change

The primary intent of this paper has been to establish a context within which to locate the pursuit for democratic pluralism in the law. There is evidence that law has intermittently supported the freedom to engage in behaviors which are reflections of diverse group values. These activities are by no means limited to the groups explored in the preceding sections but encompass diverse issues including, for instance, the recent controversial "right to die" cases, the support of laws forbidding discrimination on the basis of sexual preference, and the support of bilingual education in schools.

Also of relevance is the growth of alternative dispute resolution which, although not as pervasive and not always of the particular variety envisioned by some of the ADR movement's progenitors, has continued to grow—if slowly. These alternatives include arbitration, mediation, and the use of "private" courts. However, a full examination of these phenomena, and all the other aspects of this trend of increasing support for and development of diversity in law, is far beyond the scope of this paper. Having noted these limitations, the remaining portion of

this paper briefly points out additional opportunities to support the trend toward legal recognition of diversity, a trend which may be an early indicator of the development of democratic pluralism in the United States.

Two Paths to Change

How might movement toward such a society proceed? The most obvious answer, but perhaps the most difficult, revolves around changes in law: Congress could change federal laws or the states amend the Constitution. Although changing the law is one possibility, it is not necessary for all such change. Following are two other alternatives to move toward a system with greater cultural flexibility.

Consensual Agreement Contracts: One possibility that has the potential for considerable growth is through the use of contracts. "Consensual agreement contracts" may be used to carve domains of semi-autonomy from the judicial system. Such an agreement might stipulate that all conflicts of a given kind be managed by specified means. For instance, a medical group could create such an area of autonomy by having its clients enter into a contract specifying that all malpractice claims be settled through arbitration, with arbitrators drawn from a particular claims board. With such an agreement, the arbitrators' decision would apply unless there were evidence of coercion in entering into the contract, or deprivation of constitutional rights (see e.g., *Madden v. Kaiser Foundation Hospitals* (1976)).

Consent is the essential element for such a contract to work; if it can be found that meaningful choice was not available in entering into such an agreement, the contract is vulnerable to challenge. Of course, such contracts have serious restrictions that if abused could reduce rather than enhance people's access to appropriate means of dispute resolution. However, the potential exists for making private settlements not subject to intervention by outside parties, and if used with creativity these could enhance people's ability to make their own decisions in managing conflicts, decisions which would endure regardless of the values and views of those not directly involved.

Changes in Interpretation of Law: A Department of Justice report issued to the Attorney General in October 1988 states that new interpretations could expand the protections of the Equal Protection Clause of the Constitution in a way that would influence *all* aspects of public policy. Showing a "disproportionate burden" or "disproportionate impact" on any particular group could render a government statute, policy, program or practice unconstitutional, without need to show discriminatory intent, if *Griggs v. Duke Power Co.* (1971) were extended to the area of equal protection area (p. 50). Areas impacted by this might include criminal statutes and penalties; it is pointed out that the death penalty might be found unconstitutional by such interpretation. This interpretation could also be used to gain acknowledgment of the autonomy of various means of alternative dispute resolution for members of groups that can demonstrate a disproportionate rate of incarceration (thus suggesting an unconstitutional bias in the law and process).

An August 1988 report from the Department of Justice's Office of Legal Policy notes that more judges are using an "equity interpretation" (based on an interpretation of Article III of the Constitution) to justify the exercise of discretion and allow them to "do justice" rather than follow just the strict application of rules. Tracing the overt emergence of this trend to Justice Douglas' *Hecht* opinion and noting that to a degree this trend was institutionalized by the career of Chief Justice Warren through his conviction that federal judges must "do justice,...regardless of law and precedent," the report sounds a dire warning to those concerned about loss of constitutional guidance (p. 158).

This may be the opening needed for judges who have been unwillingly acting as so many Procrustes and put in the position of mutilating disputants to fit the existing jurisprudential bed. If a strong movement developed of judges "doing justice" it is conceivable that truly enlightened judges may decide that much of formal jurisprudence is not appropriate for doing justice in a complex society, and must be supported by a more complex system of cultural values, and derivative means, methods, and systems for maintaining social order. This would be a formidable undertaking, no doubt, requiring much courage to initiate, and a continuing process of trial and adaptation.

The Power of State Courts to Create Change

It is important to recognize that any such changes need not be made at the federal level to be effective: state supreme courts are increasingly distinguishing their decisions from the federal Supreme Court's, and, on balance, may be creating greater changes in public policy. State courts may be closer to and more responsive to the values of the people they govern and more concerned with giving meaning to those values (Witt, p. 32). Although significant state supreme court recognition of pluralism might require an amendment of the state's constitution, state amendments are much more likely to occur than federal Constitutional amendments: the present constitutions of the fifty states have been amended more than 5,300 times, especially in states with citizens' initiative processes (Witt, 1988, p. 38). With or without constitutional amendments, if state supreme court justices decide there must be institutional recognition of cultural difference, and such interpretation is based on their state's constitution, such a decision would be "virtually immune from US Supreme Court review" (p. 35).

Supreme Court Justice Brennan has stated that the way is clear for experimentation, and that state courts may "shield state constitutional law from federal interference and insure that its growth is not stunted by national decision makers" (Witt, p. 35). Assuming this to be the case, Hawaii could be the first state to adopt truly significant recognition and institutionalization of a diverse assortment of conflict resolution systems, based on truly pluralistic values, thus initiating the first functionally-democratic system of social order. While this may require constitutional amendment and significant coordination of diverse interest groups, the most important factor would be a shared conviction that everyone need not be exactly alike for the society as a whole to have justice.

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Civil Dispute Resolution Processes

*A Working Paper for the
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Dispute Resolution Research
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expressed are those of the author and
do not necessarily reflect the policies
of the State Justice Institute.*



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NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH

CIVIL DISPUTE RESOLUTION PROCESSES

I. Introduction to Civil Dispute Resolution Processes

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 that are 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.

II. Civil Case Mediation

A. Introduction

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.

B. 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, Minnesota	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), Florida	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 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. There is very little research on this issue, and broad conclusions should not be drawn from that which exists. 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.

C. 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.

III. Case Evaluation

A. Introduction

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 also may help the parties convey additional information to each other, develop a discovery plan, narrow the issues in dispute, and facilitate 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 designed to occur before significant discovery activity has been undertaken. Case evaluation and early neutral

evaluation differ somewhat in their goals. 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 encourage settlement by providing advice about the likely outcome of the case at trial or in settlement negotiations. Several states have experimented with or instituted case evaluation programs.

Very little research has been conducted on early neutral evaluation and case evaluation. The research discussed here stems from an early neutral evaluation (ENE) program instituted in the mid-1980s in the United States District Court for the Northern District of California and a case evaluation program for motor vehicle torts in Suffolk County, Massachusetts established in 1990. These processes are not comparable, however. Early neutral evaluation in California was designed to occur within 100 days of case filing, although this goal was reached in only two cases. Case evaluation in Massachusetts took place about nine months after the case was filed and after discovery was completed. The process used was a hybrid of case evaluation and arbitration. If the parties did not reach a settlement during the case evaluation, the case evaluator assessed the merits of the case, which was expressed in the form of a written award. The award became a judgment of the court if neither party rejected it within 30 days. The studies of these two programs examined the processes' effects on pace, cost, information sharing, and litigant satisfaction, but neither study examined all three. Neither of the studies reported or discussed settlement rates.

B. 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
Early Neutral Evaluation: the Second Phase (1989)	Levine National Institute for Dispute Resolution	Northern District of California	cost, effects on settlement and litigation process, fairness, attorney and litigant satisfaction, communication between parties	150 cases assigned to ENE, 67 of which participated in ENE, no control group

Case processing time. There is scant evidence that case evaluation reduces case processing time. In Massachusetts, the matters referred to case evaluation were disposed 32 days more quickly than the control group cases (314 days compared to 346 days). The number of control group cases was very small (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. Nevertheless, clearer evidence from more programs is needed to indicate that case evaluation has positive effects on the pace of litigation.

Litigant costs. Research to date does not indicate whether case evaluation reduces costs. In California, two-thirds of the attorneys for litigants whose cases settled as a result of ENE thought that their clients had saved money, while only 38 percent of those whose cases did not settle had this view. 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, over half (53 percent) of the attorneys agreed that ENE provided new information on their cases and 59 percent agreed that they learned new information about the opposing party's case. The majority of attorneys also thought that they obtained information sooner and at less expense through ENE. Over half of the attorneys and the litigants believed that ENE had improved the prospects for settling the case.

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, over 75 percent of the attorneys in ENE were satisfied with the process. In cases that settled, 83 percent of the attorneys thought ENE had contributed more to settlement than had a judicially hosted settlement conference, but only one-sixth of those whose cases did not settle held this view. Perhaps the greatest vote of confidence in ENE comes from the fact that an overwhelming majority of attorneys favored expanding ENE and expressed a willingness to pay half the \$500 fee.

C. Implications for Court and Program Management

Because the research on case evaluation is scant, there are limited implications for court and program management. Courts may consider requiring litigants to pay for the services of case evaluators because the majority of litigants, attorneys, and case evaluators participating in ENE in California agreed that charging a fee would be fair. Courts should not expect case evaluation to dispose of significant numbers of cases sooner than they otherwise would be resolved. Although a goal of ENE is to streamline discovery, only 37 percent of the attorneys reported that ENE served this function. To promote this function, ENE rules might include a requirement that the parties develop a discovery plan with the aid of the neutral evaluator.

The California ENE study did reveal some information related to recruitment and training of neutrals. One problem cited in this study was a need for the evaluators to clearly communicate their thoughts about the case to the litigants and attorneys. For example, 94 percent of the evaluators reported that they had assessed the probability of the plaintiff's success, but only 56 percent of the litigants and 77 percent of the attorneys reported that the evaluator had done so. Litigants also often reported that they did not know the reasoning for the evaluators' advice. Because promoting greater understanding of the case is a primary goal of case evaluation, training for evaluators should stress the importance of clearly communicating their views of the case. Because the emphasis of case evaluation is on providing credible advice on the issues in dispute and not necessarily on reaching an agreement, matching the experience of the evaluator to the subject matter of the case should have priority in selection of the neutral. Finally, because those qualified to serve as case evaluators are likely to have developed a sizable litigation practice, conflicts of interest may arise frequently. Therefore, courts may need to recruit senior or recently retired judges for the pool of evaluators.

IV. Summary Jury Trial

A. Introduction

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. The U.S. Court of Appeals for the Seventh Circuit held that courts can not mandate participation in SJTs (*Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988)), but federal courts in other circuits have not reached this conclusion (*Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); *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)). 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.

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.

B. 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 assigned to SJT from the onset of the programs in 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 assigned to SJT between February and October of 1980 (37)

In Florida, researchers studied cases participating in summary jury trials in the state and federal courts. The state court program was voluntary, but in the federal court, participation was mandatory. 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 (four hours in state court and five 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.

C. 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.

V. Medical Malpractice Mediation

A. Introduction

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.

B. 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.

C. 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.

VII. Appellate Mediation

A. Introduction

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, and perhaps only, 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.

B. Conclusions of Study

APPELLATE MEDIATION				
TITLE OF STUDY	EVALUATOR AND SOURCE OF SUPPORT	LOCATION OF 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**

	Elapsed Time for Appeals Referred to the Conference	Elapsed Time for Appeals Not Referred to the Conference
	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 to the Settlement Conference	Appeal Not Referred to the Settlement Conference
	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.

C. 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.

VII. Day-of-Trial Mediation of Small Claims

A. Introduction

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.

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.

B. Conclusions of Studies

SMALL CLAIMS STUDIES				
TITLE OF STUDY	EVALUATOR AND SOURCE OF SUPPORT	LOCATION OF STUDY	ISSUES ADDRESSED	STUDY DESIGN
Small Claims Mediation in Three Urban Courts (1992)	National Center for State Courts (Goerd)	Des Moines, Iowa, Washington, D.C., and Portland, Oregon	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, New Jersey	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

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TITLE OF STUDY	EVALUATOR AND SOURCE OF SUPPORT	LOCATION OF STUDY	ISSUES ADDRESSED	STUDY DESIGN
Small Claims Mediation Project in the District Court of Oregon for Multnomah County (1991)	District Court, Civil Division, Multnomah County (Olexa and Rozelle) State Justice Institute	Portland, Oregon	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)	Vidmar Donner Canadian Foundation and University of Western Ontario	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)	McEwen and Maiman National Science Foundation	Augusta, Brunswick and Portland, Maine	agreement rate, litigant satisfaction, compliance	quasi-experimental study comparing 403 cases from 6 courts (3 courts with mediation programs and 3 without)

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.

C. 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.

VIII. Questions about Civil Dispute Resolution Processes Remaining to be Answered

Most of the open questions noted in this section are common to all of the processes reviewed in this working paper. An underlying theme to these questions is the need to examine the organization of the dispute resolution program and 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? With the exception of small claims mediation, the search for answers to the following questions must be conducted with the goal of understanding the dynamics of civil dispute resolution processes within the context of lawyers' perceptions and the incentives that govern legal practice.

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? 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? Does the timing of the dispute resolution process affect time to disposition, as well as settlement rates?

Participant satisfaction. Do these processes provide greater satisfaction for the consumers: litigants and attorneys? What aspects of the process or the neutral's behavior are associated with greater satisfaction? What impact do program goals and the establishment of expectations for the court and the participants have on satisfaction?

Selection, training, and retention of neutrals. 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 used? Are there minimum qualifications for inclusion in the pool? How much and what kind of training is optimum and feasible? 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?

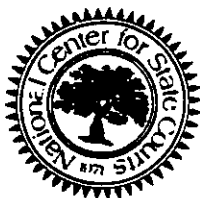
Form and function of the dispute resolution processes. What dispute resolution processes are actually being employed? Are the same names being used for different processes? What processes work best for which cases? Are settlement rates affected by the length of the process? Should dispute resolution processes be mandatory or voluntary? Does mandated participation negatively impact settlement rates, satisfaction, and cost? Do these processes impact compliance with the outcome?

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.

Court-Annexed Arbitration

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NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH

COURT-ANNEXED ARBITRATION

A. Introduction

The primary goals of court-annexed arbitration are to speed up the pace at which cases are resolved, 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, and 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, however, primarily because all programs provide the right to trial *de novo* and, the courts have concluded, the benefits to the consumers of the justice system outweigh the burdens on individual litigants. (See *Davis v. Gaona*, 260 Ga 450, 396 SE2d 218 (1990); *Firelock, Inc. v. District Court of 20th Judicial District*, 776 P2d 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. Although arbitration has survived the constitutional challenges, concerns remain that its 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 impacts on access to justice, fairness, and quality have also 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?

Other issues raised in the context of arbitration include what should be the training and qualifications of arbitrators, what inspires confidence in arbitrators, and what measures might reduce appeal rates.

Issues research has addressed. A considerable body of research and evaluation of court-annexed arbitration has developed. Of all of the processes used in civil dispute resolution, arbitration has received the greatest share of attention by researchers. All of the studies have examined arbitration's effects on the pace and cost of litigation, but litigant costs have been studied to a greater degree than have court costs. Most studies have measured the rates at which arbitration awards cases 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. Several studies have sought to determine what aspects of arbitration are associated with more favorable ratings of the process by litigants and attorneys.

B. Conclusions of Studies

COURT ANNEXED ARBITRATION STUDIES				
TITLE OF STUDY	EVALUATORS AND SOURCE OF SUPPORT	LOCATION OF STUDY	ISSUES ADDRESSED	STUDY DESIGN
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 scheduled for arbitration (1997 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
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 (tort cases)	over 1,200 cases were randomly assigned to either mandatory arbitration or control group
Winnebago County Court-Annexed Arbitration Pilot Project Evaluation (1988)	Sangamon State, Illinois (Collins and Ford)	Winnebago County, Illinois	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 treatment cases (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 of 800 cases and an arbitration mandated sample of 800 cases

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TITLE OF STUDY	EVALUATORS AND SOURCE OF SUPPORT	LOCATION OF STUDY	ISSUES ADDRESSED	STUDY DESIGN
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 (auto negligence litigation)	quasi experimental design (pre-post) comparing a random sampling of over 1,000 cases filed either before or after the inception of the mandatory arbitration program
An Experiment in Court-Ordered, Mandatory Arbitration (1987)	Research and Development Division, D.C. 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 retrospective group of non-arbitrated 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, Georgia; Hillsborough County Superior Court, New Hampshire	pace, litigant cost, appeal rate, trial rate, participant satisfaction	quasi experimental design (pre-post) comparing 539 arbitration cases to 156 cases filed prior to the inception of the program
FEDERAL DISTRICT COURTS				
Court-Annexed Arbitration in Ten District Courts: Evaluation (1990)	Federal Judicial Center (FJC) (Meierhoefer)	10 Federal Districts: Middle FL, Western MO, Western OK, Middle, NC, Northern CA, Western MI, NJ, Eastern NY, 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	comparison of 35 randomly assigned arbitration cases and a control group

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 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 conducted in different jurisdictions with many differing 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.

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, 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 Illinois, researchers found that arbitration reduces costs to litigants if the case settles before an arbitration hearing is held. In each study, however, the savings disappeared for the overall arbitration caseload. The Illinois 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 estimates by attorneys about comparative costs for litigating a particular case through arbitration or the traditional court process. These measures are not accurate, nor do they 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. The lack of information stems from methodological problems in gathering data on court costs and drawing conclusions from the 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 uninterpretable. 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 and pre-trial motions and conferences. Some studies have found that arbitration reduces the trial rate (see below). Lind found no difference in motions filed or frequency of pre-trial conferences in the Middle District of North Carolina. Hawaii showed an average of 4 fewer documents per case in arbitration; by contrast, New Jersey showed an increased use of interrogatories in arbitration. 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. 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 individual litigants favored less formal hearings, whereas corporate litigants preferred more formality. In both groups, litigants who participated in an adjudication hearing were more satisfied with the litigation experience than were those whose cases settled without a hearing or trial.

What proportion of arbitration cases are appealed? Appeal rates in most jurisdictions fall within 40 percent to 60 percent, but the range is great. The high is 83 percent in Sacramento, California and the low is nine 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 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 discourage 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 of 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 both North Carolina (Clarke) and

Winnebago County, where program limits are low (\$15,000), in Fulton County, where the limit is set at \$25,000 (but actual claims average 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. Hawaii experienced a reduction in its trial rates coincided with the implementation of an arbitration program; however, the researchers were unable to attribute this reduction either directly or indirectly to the arbitration program.

C. 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) eliminates delays in scheduling hearings, obtaining the

arbitrators' decisions, and payment of arbitrators. Close supervision of the progress of the case and holding hearings in court facilities also may render to a greater degree the imprimatur of the court and 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. (The range across programs is from lows of 10 percent in Colorado and 12 percent in Illinois 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 do not appear to be any differences in the effectiveness of arbitration based on whether the parties or 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.) 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 arbitration program into case management system. To ensure that all of 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. 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, however, arbitration is less likely to reduce the trial rate. Moreover, overall case processing of the rest of the caseload was not shown to be affected either positively or negatively by arbitration in Fulton County. Courts therefore should not expect arbitration to speed up cases that are not referred to arbitration.

Case screening and referral criteria and procedures. If the pool of arbitrators and/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 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 programs eligibility rules. Because court-annexed arbitration is highly rule-bound and requires considerable effort to implement, voluntary programs, which traditionally have been underused, 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, even if not an attorney

(FJC). There has been little debate about whether arbitrators should be attorneys, perhaps because the process is adjudicatory and not consensual. The programs that use attorneys generally require them to have been in practice for a specified period of time, ranging from one year to 10, with the most common period being five 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 insure 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 in a brief amount 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 an award. Some courts have 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 to relieve the burden 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. 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. Providing hearings in the majority of cases, however, might break the budget and drain the pool of arbitrators. 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 on-going 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. The names of arbitrators assigned to each case, whether there was an appeal, and the outcomes in hearings (award amounts) and at subsequent trials (judgments) also should be recorded. 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 performance of arbitrators, as well as the arbitration program rules and procedures, can be evaluated periodically (or continually, depending on the size of the program caseload) 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. Adjustments in the program can be made if the evaluations indicate that changes are warranted, and arbitrators who receive poor ratings can be required 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, 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.

VIII. 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. Most of these questions are common to other processes, such as mediation and early neutral evaluation (see Civil Dispute Resolution Processes Working Paper).

Does arbitration reduce litigant costs and expenditures of court resources? What types of cases are most suited to resolution in arbitration? When is the optimum referral time? Should cases be screened or categorically referred? How can qualified neutrals be obtained and retained? How can the quality of arbitration be ensured?

Questions peculiar to arbitration concern what measures should be taken to reduce appeal rates: disincentives like appeal fees and sanctions for failure to improve the appellant's position at trial; improvements to the arbitration process and arbitrators' skills; extension of the time to appeal so that post-arbitration negotiations can have a greater likelihood of settling the case without an appeal.

Perhaps the more fundamental questions remaining open about court-annexed arbitration relate to how it fits into the litigation scheme, that is, what function should it perform to influence the disposition of the case? 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?

Family Mediation

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NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH

FAMILY MEDIATION

I. 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 2420 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.¹

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 1000 couples; today, approximately half of all marriages are expected to 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 it 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.

¹ There are other types of family disputes that are subject to mediation interventions in courts that 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.

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 and/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 lend 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.

II. Research Findings on Divorce Mediation

STUDIES ON DIVORCE MEDIATION				
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, Colorado	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.

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TITLE	EVALUATION AND SOURCE OF SUPPORT	LOCATION OF STUDY	ISSUES ADDRESSED	STUDY DESIGN
Mandatory Divorce Mediation in Maricopa County (1986)	Conciliation Court of the Superior Court of the State of Arizona Maricopa County (Braver & Frost)	Phoenix and Tucson, Arizona	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, Delaware	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	California, Colorado, Florida, Illinois, Maine, Michigan, New York, Oregon	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 California Mediation Center (Kelly) San Francisco Foundation, Hewlett Foundation, Fund for Research in Dispute Resolution	Marin County, California	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.
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 N.Y. State.	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.

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TITLE	EVALUATION AND SOURCE OF SUPPORT	LOCATION OF STUDY	ISSUES ADDRESSED	STUDY DESIGN
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, D.C.	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, No. 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, New Jersey	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, Indiana	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.

A. 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 and/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).

B. 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 they 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 1733 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 and/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).

C. 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 comprised 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 utilize a fixed fee approach rather than billing on an hourly basis (Keilitz et al, 1992).

D. 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 didn't 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).

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 two 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), 60-90 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).

In contrast, several studies find that court experiences are not as favorably rated. For example, in the DMRP, fully 40-60 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, 1984).

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).

E. 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 and/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, 1985).

Still another explanation for user dissatisfaction with mediation is confusion about the procedure. In the DMRP, about 20-39 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, 1984). 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).

F. 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 hybrids 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 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 forum. 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, 1985). 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 20-25 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.

G. 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 audio-tapes and case debriefings following mediation sessions in Essex County, New Jersey, Kressel et al (1991), identified two mediator styles which they termed settlement-oriented (SOS) versus problem-solving (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.

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 audio tapes 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.

H. 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 and/or the health and stability of one parent. The key disputant characteristic he singles out as critical to outcomes is the level of parent pathology, usually 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 for battered women that are viewed as alarming is its face-to-face format, its emphasis on compromising outcomes, its 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).

Unfortunately, there are no simple ways to determine whether and how divorce mediation can serve abused women fairly and safely. 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 negatively evaluate mediation and report further incidents were abused women who felt they had been coerced to mediate and only participated in one session. Among those who voluntarily chose mediation, 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.

1. 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.

J. 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).

K. 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.

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).

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 which 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).

If screening for domestic violence is challenging, so too is deciding what to do once cases have been identified. 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 and/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.

III. Research Findings on Mediation of Child Maltreatment Cases

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 which 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.

STUDIES ON CHILD ABUSE MEDIATION				
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, Colorado	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, D.C. (1987)	Center for Policy Research (Thoennes) National Institute for Dispute Resolution	Washington, D.C.	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 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 60-80 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 which 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.

IV. 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 court 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. More than the mandatory or voluntary status of mediation interventions, parents appear to respond to the quality of their mediators. Outcomes are better predicted by mediator expertise than 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. More than mediation program status, case processing time and court costs reflect complicated factors pertaining to case load management, the quality of court administration and local legal culture.

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. 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. 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 staff. 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 staff mediators versus those that contract with private mediators; and programs that utilize orientations versus those that do not. To the extent 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 the main issue being negotiated--child support, the brief and focused style of the programs 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. While relatively rare in divorce

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

The issues of gender 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 in a single mediation session.

To date, none of the procedures recommended to enhance the safety of mediation when abuse has occurred has 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. 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 are the limited impact of either mediation or traditional court processing on the long-term welfare of families, and the

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 need to 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.

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 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.¹ At risk is not only the waste of scarce resources but also dissatisfaction and loss of confidence in the public justice system by users and, ultimately, by the public at large.

Intuitively we know that the key to the quality of alternative dispute resolution 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 will discuss what kind of guidance current research findings provide in this area and suggest subjects of future inquiry.

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.

I. 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: an academic degree⁶; apprenticeship or mentoring requirements⁷; training requirements⁸; and practical experience⁹. The type of degree, extent of apprenticeship, amount of training, and/or level of experience varies from jurisdiction to jurisdiction and depends upon the type of process as well as the type of case involved.

³E. 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.

⁵R. 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.

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

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

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

⁹Florida, 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.

With the development of court 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 empanel 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' choice over the dispute resolution process, program and neutral is limited as it often is 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

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.*

The SPIDR report provided the impetus for research now being conducted under the auspices of the Test Design Project related to the job tasks, knowledges, skills, abilities and other attributes related to successful job performance as a mediator.¹² This type of investigation represents one strand of the research being conducted generally 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 and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.¹⁴

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.

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 knowledges, skills, abilities and other attributes related to successful job performance as a neutral to ask how those knowledges, skills, abilities and other attributes are acquired and what role training plays in a neutral's overall effectiveness. This 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 and/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,

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."

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 are inconsistent or competing goals that will lead towards different choices in policies and practices relating to selection, training and evaluation of neutrals, highlighting the importance of courts and programs choosing and articulating their goals clearly when ADR is planned and implemented.²⁰

II. The Knowledges, Skills, Abilities and Other Attributes of an Effective Neutral

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 their 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.

A. 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 Circuit²³, for example, found a statistically significant association between the mediator and case status (resolved or unresolved).²⁴ 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.²⁵ However the research was not designed to determine the basis for these kinds of associations or, in other words, what knowledges, skills, abilities or other attributes of the mediator determine success.

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.

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."²⁷

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 at least 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

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

²⁷ *Id.* at 76.

²⁸ *Id.* at 82.

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

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.

true across at least three very different settings involving different types of cases,³⁵ confirming the viability of identifying a common core of knowledges, 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, generalizability of the Test Design Project's findings is unknown. Efforts are currently underway to address this gap in a second phase of the project through the Mediation Skills Assessment Project, which will conduct systematic job analysis across types of mediation and conduct 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 knowledges, abilities, skills and other attributes that determine effective performance. It should be noted again, however, that this research focuses on the knowledges, skills and other attributes of mediators and does not address those of other types of neutrals.³⁹

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 A preliminary part of this research is being conducted by HumRRO International, Inc. and the American Institutes for 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 knowledges, skills, abilities and other attributes, indicate when, over the course of one's career as a mediator, different "KSAO's" are required, and assess the importance of various mediation activities.

³⁹ See supra, note 17 and accompanying text.

B. Other attributes: gender, race and ethnicity

There is little research documenting the effects on a neutral's performance of his or her gender, race or ethnicity.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

III. How the Neutral's Knowledges, 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 knowledges, skills, abilities and other attributes of effective neutrals are acquired. Some surmise that such knowledges, skills, abilities and other attributes derive primarily from an individual's innate qualities; others that they can be acquired from training. Still others emphasize experience as the source.⁴⁴

⁴⁰ A few studies 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.

This issue is an important one 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 their less experienced counterparts, and the more intensely trained therapists realized better outcomes, irrespective of therapist experience.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 research being done 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

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.*

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 between 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

Another study was conducted of twenty citizens volunteering to be trained and serve as mediators in a community dispute center, to examine when, where and how mediators acquire their techniques and skills.⁵⁴ Information was collected as to the demographics and conflict management styles⁵⁵ of these trainees, who were then

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.

observed and evaluated in a role-play setting prior to any training.⁵⁶ The trainees were evaluated again after they completed training, according to the same evaluation 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 as measured by an individual's conflict management style was more significantly determinative of mediator effectiveness⁵⁷ 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, more numerous and stronger relationships with positive ratings of effectiveness were found across time in post-training role play and actual mediator performance, suggesting that high collaborators benefit from training and develop from experience as well. The study also found that

"In 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 knowledges, skills, abilities and other attributes of effective neutrals are acquired. This may be because the possible sources studied

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 evaluation criteria.

⁵⁷ M.R. Van Slyck, *supra*, note 54.

(predisposition, training and experience) are not necessarily mutually exclusive. Indeed, what the finding seems to suggest is consistent with the experience of mediation trainers generally. Mediation trainers often say that judging from their effectiveness 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 knowledges, skills, abilities and other attributes. In other words, careful screening or testing prior or subsequent to training may be of critical importance.⁵⁸ This leads to consideration of the third strand of research relating to the selection, training and qualification of neutrals.

IV. 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 and/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,

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.

"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 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,⁶⁰ the survey indicates that testing to determine a neutral's competence is occurring over a spectrum of time. Sixty-three percent of the respondents indicated that assessment or evaluation was taking place in the mediation program they were most closely associated with prior to hiring, training, or placement on a roster.⁶¹ Forty-eight percent said testing took place during training, forty-eight percent after training, and forty-one percent within the first year after training. Only fifteen percent said mediators were never assessed or evaluated.⁶²

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 *Symposium Materials*, National Conference on Peacekeeping and Conflict Resolution, May 29, 1993. Respondents were asked to check all categories that applied.

⁶² 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.

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 once 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 testing⁶³, 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 each measure. For example, the competence of a neutral who is 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.⁶⁴ Which measures are used will also depend, in large part, on the program's philosophy and goals.⁶⁵

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

⁶³ 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 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.

⁶⁴ 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.

⁶⁵ See *supra*, note 19 and accompanying text.

resolution processes, qualities such as dignity of treatment and the sense of being heard, that are of vital importance to disputants and that contribute even more than outcomes to disputants' sense that justice has been served.⁶⁶ 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 has often been overlooked in program evaluations.

While no research, 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,⁶⁷ 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.⁶⁸ 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 judges (after success ratio, client satisfaction, opinion of judges, opinion of the bar and breadth of experience) and fifth

⁶⁶ See, e.g., T.R. Tyler, The Social Psychology of Procedural Justice, New York: Plenum Press (1988).

⁶⁷ 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).

⁶⁸ Id. at 404.

for providers (After client satisfaction, success ratio, years of experience and the opinion of providers.)⁶⁹

V. Implications and Recommendations

Looking at all three strands of the research, it is apparent that consideration and resources need be given to each aspect of neutral qualifications: the selection process, training, and performance evaluation. While studies have told us more than we knew before about the knowledges, skills, abilities and other attributes that determine a neutral's effectiveness, they also appear to confirm that these qualities are derived from a mixture of sources: innate personal characteristics, training and experience. The implication is that courts cannot rely on any one factor alone, such as training, in developing rosters of qualified neutrals. Careful screening and performance evaluation either before or after training is also a must.⁷⁰

The importance of performance evaluation highlights the necessity of addressing one of the more significant unresolved issues in this area: how should we measure effective performance? We do not yet know enough, for example, about whether client satisfaction correlates with perceptions of procedural justice and whether either or both of these measures correlate with settlement. Future research focusing on such questions is needed, for if these kinds of correlations are found not to exist, we must work harder to reach consensus on a more precise definition of quality in court ADR.

Finally, we need to consider whether continuing to focus almost exclusively on mediators when considering neutrals' qualifications is appropriate. Perhaps the attention this subject has garnered will inspire more attention in the future to the

⁶⁹ 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).

⁷⁰ 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.

selection, training and evaluation of all of the types of neutrals who serve our public justice system.

Multi-Door Courthouses

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MULTI-DOOR COURTHOUSES

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I. 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 ADR and Multi-Door Courthouse programs are identical.

The differences between individual court-annexed dispute resolution programs and Multi-Door Courthouse's 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.

A. 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.

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, TX, and Tulsa, OK* 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, NJ*, under grant funds from the State's Administrative Office of the Courts. In 1989, a Multi-Door Courthouse was established in *Cambridge, MA*, 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.

1. 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.

a. 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 and D.C. 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. (D.C. Multi-Door Dispute Resolution Division) Settlement weeks offer the opportunity to refer large numbers of cases in a defined period of time to mediation (or sometimes, case evaluation) with judicial support available during the defined period.

b. Individualized Screening

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, MA, 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 which 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, NJ, 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 via the 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, screening of domestic relations cases for potential or actual violence may occur to determine the appropriateness of referral to dispute resolution. In the Middlesex Multi-Door Courthouse, a project was undertaken during which all motor vehicle and premises liability cases were diverted to an abbreviated individualized screening conference.

2. 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 area of the Superior Court, a unified court system. 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 both the Superior Court handling larger civil cases with a filing threshold of \$25,000 and in the Probate and Family Court in a non-unified court system. 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.

D.C.'s Multi-Door Dispute Resolution Division operates in the Superior Court where almost 10,000 cases are processed each year with the assistance of more than 600 neutrals. Services are provided at no charge. ADR 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 provides assistance to citizens to 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.

B. Issues Raised About Multi-Door Courthouses

Since the inception of such programs, 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 there be user fees 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 save case processing time for litigants and/or for the courts?

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 and/or provided for inclusion in the pool? What are the quality assurance mechanisms used? Should neutral services be volunteer or paid and is there a difference in quality and/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 length of process?

Screening/Intake: When should cases be screened? When should cases enter dispute resolution? Where should screening occur: courts, community centers, etc. What type(s) of screening mechanisms work best and does this affect settlement? Who should conduct the screening: judges, ADR professionals, computerized assessment from self-report forms?

Other: Do these processes impact compliance with outcome? Should they be mandatory or voluntary and does this impact settlement rates, satisfaction, cost, etc.? How do Multi-Door Courthouses compare with stand alone dispute resolution programs in the courts?

II. Conclusions of Studies

A. Overview

There is surprisingly little research available given the number of multi-door and civil ADR programs in existence for years. Internal program evaluations in the form of descriptive statistics are often, but not always, available. Only a few independent research projects which use an experimental or a quasi-experimental design with a comparison group have been completed. These studies are reported here and are given greater weight in the discussion than the primarily descriptive evaluations that are also reported.

Comparison of programs is made difficult by the lack of standardized nomenclature for dispute resolution processes. Careful questioning as to the actual process under discussion is necessary in making any type of meaningful comparison. Additional problems of comparison result from other variations across programs: 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). Even within the same process, it was found that some mediators offered evaluation of the case or recommended settlement options. (Roehl, 1992; D.C. Research & Development Division, 1990) How do these differing styles affect the process and outcome?

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, D.C., 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 D.C. Superior Courts (1990)	D.C. Research and Development Division	Washington, D.C.	case characteristics, processing factors, mediation outcomes	tracked settlement rates, post mediation questionnaires in 817 cases
Civil Dispute Resolution Program: A Survey of Program Participants (1992)	D.C. Research and Development Division	Washington, D.C.	assess litigant and attorney perceptions of dispute resolution processes, performance of neutrals	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 of 397 small claims and other low value civil cases with 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 overwhelming 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 which 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 done, 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, NJ, 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 when mediation was used in New Jersey for purposes of research comparisons (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 to cases may impact positively on case settlement. In Washington, D.C.'s program, settlement rates are greater in cases in which a neutral has made contact with the parties prior to 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 which 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 larger civil cases, a substantially higher compliance rate has been shown in mediated cases (Fix, 1992). There are no data reported 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). Since mediator style 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?

B. Evaluation Results

1. 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 included 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 included money and property disputes, minor assaults, and harassment and threat disputes. Intake points operated at the District Attorney's Office, Neighborhood Justice Center, Justice of the Peace Court, City Prosecutor's Office, 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 which 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.

2. 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.

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: 59 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 impacted the settlement rates with those with the lowest value settling at greater rates. Settlement rates for cases value at less than \$10,000 were 52 percent, compared to 47 percent settlement rate for cases valued between \$10,000 and \$50,000, 43 percent settlement rate for cases valued between \$50,000 and \$100,000 and 39 percent settlement rate 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.

Settlement rates also were impacted by the presence of pro se litigants, with higher settlement rates recorded for these cases. Pre-conference contact with the parties by the mediator 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.

Cost, satisfaction, time, and compliance issues were not directly addressed in this study.

- ***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. Approximately 4 months after filing of all civil cases, the parties attend a judicial scheduling conference

where ADR recommendations are discussed and a decision is made as to whether ADR will be ordered, with a date set for conclusion.

Attorneys were surveyed by telephone, while litigants received a self-administered, written questionnaire. These questionnaires were distributed by the neutrals to litigants at the close of the dispute resolution process with instructions to complete, place in a sealed envelope, and drop in the "Litigant Survey Box" located in the ADR 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 which were sent to arbitration and 79 cases which were sent to mediation or case evaluation.

General Conclusions: More than 200 attorneys participated in the survey with 75 litigants participating in completion of the questionnaire. 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 most common concerns expressed regarding program procedures were that closer matching of neutrals to case by content area expertise be provided and that the lack of full settlement authority of attorneys in attendance and outstanding discovery issues 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 which 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.

3. 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: The evaluation was designed to assess the overall effectiveness of the program, the screening and referral processes, and the cost effectiveness of the program. It was also intended to provide useful information for all jurisdictions interested in developing a multi-door courthouse.

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 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 was also

used in determining cost and resource requirements of processing cases. Filing and settlement or disposition dates 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, regardless of 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 case and issues involved.

MMDC staff made recommendations at the mandatory screening conference as to the most appropriate dispute resolution process for the case and its individual issues. Selection of any dispute resolution process was voluntary and parties could choose another process 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 descriptive report 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 (5 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 (9 percent) of these settled at or after screening without entering dispute resolution, while 402 (61 percent) of the cases elected to enter 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 .5 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.

4. 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 which did not settle in mediation. In order to provide a control group of cases which 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 which were mediated and did not settle, researchers also observed the trial. A self-report questionnaire was provided to all litigants during the study in order 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, N.J. 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 in order to ensure the quality of the services provided. Some neutrals were less facilitative and more evaluative (sometimes even recommending settlements) than others.

Day-of-trial mediation did not impact on 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 which 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 which 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.

III. Implications for Court and Program Management and Future Research

A. Overview

In general the limited research done in the areas of court connected dispute resolution for civil cases and Multi-Door Courthouses has provided significant benefits to these programs in terms of management and operations.

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. These issues need to be studied further.

Cost. Like most agencies struggling with funding and cost issues, courts often make decisions about programming based on cost. Until recently, no reliable information was published to support the notion that dispute resolution costs less for courts and for litigants. Further research into this issue is highly recommended with cost breakdowns for courts and litigants included.

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 process on settlement rates, satisfaction, and subsequent trial time following dispute resolution without settlement; whether dispute resolution affects the number of hours attorneys and litigants spend in case preparation and trial; how 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.

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. 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. Random assignment of

cases encompassing a range of issues to different dispute resolution processes would provide important information about case screening.

Washington, D.C.'s Multi-Door Dispute Resolution Division uses a computerized assessment which 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, pre-mediation calls are often made by the mediator to the parties to clarify settlement authority, case posture, and other issues. Settlement rates are higher in cases in which this contact between the mediator and the parties has been made.

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 which 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 whether voluntary or mandatory dispute resolution programs are superior. Voluntary dispute resolution in civil cases 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? Other issues to be examined include the often greater impact of mandatory programming on court caseloads than that of voluntary programs which may rely upon self-referral or more labor intensive individualized screening. Is satisfaction with mandatory dispute resolution greater than satisfaction with traditional adjudication? 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?

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 have been fortunate in the number of 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 student in court evaluation programs.

B. 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 which 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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SUGGESTED ADDITIONAL READING

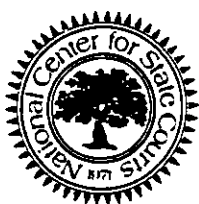
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Private Dispute Resolution

*A Working Paper for the
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Private Dispute Resolution

I. Introduction

Private dispute resolution is a relatively new and burgeoning form of dispute resolution. The term is intended to encompass several forms of dispute resolution procedures conducted by a neutral third party on a for-profit basis, with the parties themselves paying for these services. 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. 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 which 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 judges, 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 CiviCourt, 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 substantial.

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 in order 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 used to illustrate 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, resources, etc. 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).

II. 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 courts 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 impact on the court. 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, and 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. 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. 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 U.S. 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 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. Its first office was established in Orange County in 1979, and the firm now has nine California-based offices and 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., offers qualitatively different private dispute resolution services than Judicate, JAMS, and probably the majority of private dispute resolution firms. While its principals and associated neutrals do provide dispute resolution services for individual cases, EnDispute concentrates on designing and implementing dispute resolution systems for corporations and other large organizations and providing 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.

U.S. Arbitration and Mediation Services, known as USA, has approximately 30 small offices across the nation, with its 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). The sizable majority of USA's hearings are for mediation.

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 most common (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, arbitration primarily) under long-standing contracts with organizations and corporations which 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 a inter-company program in which client companies have executed general agreements to arbitrate specific controversies. The companies agree to forego 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.

How do cases come to private dispute resolution processes?

Litigants come to private dispute resolution in a variety of ways. Several states have statutes allowing private judging (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, however, to have experienced it to any noticeable extent (Christensen, 1982). To use private judging, the case must first be active in the public system and the litigants must stipulate to (request, essentially) 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 consent 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 cited in such clauses as the arbiter. 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, it 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 relations (private judges may grant divorce decrees), money/collections cases, and property rights issues (Roehl *et al.*, 1993).

No estimates exist of the total number 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.

The AAA heard 59,156 cases in 1992 (personal communication, Barbara Brady, April 1993); most were arbitrated. 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, typically disputes between two insurance companies.

In contrast, CPR reported hearing over 50 significant disputes in 1992. 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 rapidly from 6355 cases heard in 1988 and an estimated 7000 in 1989 (Justice Trotter's 1989 testimony before the Advisory Committee on Private Judging). In 1990, 1202 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, 4003 cases were filed with Judicate in 1988 (*Wall Street Journal*, 2/7/89) and 4152 and 4785 cases were filed in 1989 and 1990, respectively (personal communication, Jay Seid, President of Judicate, February 1991). 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

Only two completed research studies of private dispute resolution were found.

Their salient elements are described in the table below:

PRIVATE DISPUTE RESOLUTION STUDIES				
Title of Study	Evaluators 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	California, primarily the Superior Courts of Los Angeles, San Diego, and Orange Counties	Extent of use, characteristics of users, processing, quality of justice, court impact	(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	The Connecticut ADR Project	Connecticut, primarily Hartford	Processing, quality of justice, distributive justice	(1) Analysis of 1037 processed cases (2) Follow-up with claims managers and attorneys

There are several important studies 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. Conducted primarily in southern California with the assistance of three Superior Courts and two private dispute resolution firms, Judicate and USA, this study focused on private judging 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: public adjudication, settlement, rent-a-judge hearings (in which retired judges *paid by the court* conduct trials), private arbitration, and private mediation. The study was conducted in 1991-1992.

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 comprised the non-experimental research design. An analysis was conducted of all privately judged cases capable of being located in the courts in 1991; similar data were gathered from a random sample of the other dispute resolution mechanisms. Follow-up interviews were conducted with litigants and attorneys in the privately judged and comparison cases, a mail survey of retired judges and private neutrals was conducted, and telephone

interviews were conducted 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), the proportion of cases with private judges is minuscule. 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 state-wide 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. Rent-a-judge, private mediation, and private arbitration processes were dominated by personal injury actions.

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. The informality of the process, experience of the mediator, and finality of the outcome were also judged as important by those involved in mediation. 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 not significantly different from the 18.6 months for publicly tried cases. The same time period for cases that were privately mediated or arbitrated 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 numbers, 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; no significant differences were found between groups. Similarly, all processes received high scores on procedural justice. Forty-five percent of the parties in private trials, however, were dissatisfied with the outcome of their case, compared to 11 percent to 29 percent in the other dispute resolution proceedings.

Finally, the findings indicate that private judging, strictly defined in this study, had minor effects, 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 gave no support to this idea.

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". Warnings to monitor private mediation and private arbitration processes were issued, especially in regard to concerns about "repeat customers" and potential bias.

The 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 (*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 study was conducted in 1986-1987.

The Project aimed to compare the performance of alternative dispute resolution with "conventional dispute resolution". Comparison data were ultimately not reported because of low response rates from the follow-up efforts on cases heard through the alternative processes (a problem encountered in the private judging study as well). Statistics on case outcomes were compiled for the cases heard through alternative

dispute resolution, and the subjective evaluations of participants (claims managers and plaintiffs' attorneys) were obtained via mailed questionnaires.

The 1037 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 were ultimately settled. Of those that went to hearing, 92 percent ultimately settled.

Thirteen claims managers returned follow-up questionnaires. The majority reported 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 prime benefit to participation was the "opportunity to settle a case after a short hearing," 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 plaintiff testimony. Drawbacks included the time taken to schedule a hearing and get the plaintiff's participation.

Virtually all of the 39 plaintiff's attorneys responding said the Project was effective in inducing settlement and all said 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."

III. 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 in that it exists outside of the courts' control. Due to the paucity of empirical research on private dispute resolution, combined with its nature and newness, the implications for courts are a matter 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 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 suggested the following recommendations:¹

- 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.

¹ These recommendations are drawn from an unedited version of the committee's report printed in the *World Arbitration and Mediation Report*, 4 (4), April 1993, 100-103. The full text is due to be released about the time of the symposium.

- 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.

Among the issues to be considered by the courts in relation to private dispute resolution are:

Program structure and management. Since the dispute resolution procedures covered here are outside the courts' purview, questions of in-house program management are narrow. They tend to revolve around the referral process, case management, and the use of court resources.

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 the hopes of proponents 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.

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.

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 seem inappropriate, but perhaps there is information from mandatory divorce mediation processes to add insight into this area. Many issues must be settled, particularly the court's role in referring cases to specific individuals or firms and judging the quality of services provided.

Selection, training, and monitoring of neutrals. This is a very important question in private dispute resolution, again, 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 negotiation; many are attorneys trained only 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 so on are rarely reviewed. Much work remains to be undertaken in these areas.

Participant satisfaction. The little data available as yet on participant satisfaction is 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 upheld in fact, the postulated reasons driving the growth of private dispute resolution (delays, backlogs, rigidity of processes, etc.) 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.

IV. 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, and compliance; potential benefits to the courts in terms of caseload decreases and easing of workloads; and potential problems including access to justice, two-tiered justice systems, power disparities, court reform, loss of judicial talent, 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.

Bibliography

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I. COMMUNITY JUSTICE/VICTIM OFFENDER MEDIATION

A. Evaluation of Mediation Programs in North Carolina (Mediation Network of North Carolina/SJI)

This project, begun in January of 1990 and completed in April of 1992, concentrated on misdemeanor cases involving interpersonal disputes that had been referred to mediation programs from the district court. Within North Carolina, three counties with mediation programs (Durham, Iredell, and Henderson) were matched with similar counties without programs (New Hanover, Davidson and Rutherford). Interviews with participants from each set of counties were compared to determine the overall effectiveness of mediation in this type of dispute situation.

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

Project Related Literature:

Cook, Royer F., Janice A. Roehl, and David I. Sheppard. *Neighborhood Justice Centers Field Test: Final Evaluation Report*. Washington, D.C.: American Bar Association, 1980.

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Tomasic, Roman. "Mediation as an Alternative to Adjudication Rhetoric and Reality in the Neighborhood Justice Movement." In Roman Tomasic and Malcolm M. Feeley, (Eds.), Neighborhood Justice: Assessment of an Emerging Idea. New York: Longman, 1982. pp. 215-248.

Vidmar, Neil. "An Assessment of Mediation in a Small Claims Court." *JOURNAL OF SOCIAL ISSUES*, Vol. 41, No. 2, 1985. pp. 127-144.

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. pp. 155-164.

Vidmar, Neil. "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation." *LAW AND SOCIETY REVIEW*, Vol. 18, No. 4, 1984, pp. 515-550.

B. Community Dispute Resolution Programs and Public Policy (National Institute of Justice/U.S. Department of Justice)

This study, conducted in 1986, sought to update a 1977 study and document the national developments in the area of community dispute resolution. As the first comprehensive study of its kind, it traced the origins of the community dispute resolution movement. The study assessed the philosophies, goals and techniques of programs throughout the United States by means of telephone surveys, site visits and program profiles to determine the relative success of the programs. The report was designed to be used by program administrators interested in improving dispute program operation.

Project Product:

McGillis, Daniel. Community Dispute Resolution Programs and Public Policy. National Institute of Justice, 1986.

C. Cross Site Analysis of Victim Offender Mediation: Its Effect on Participants (Minnesota Citizens Council on Crime and Justice/SJI)

The project focused on 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. It 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*. Minneapolis, MN: Minnesota Citizens Council on Crime and Justice, 1992.

Umbreit, Mark. *Program Evaluation Kit: Victim Offender Mediation Programs*. Minneapolis, MN: Minnesota Citizens Council on Crime and Justice, 1992.

Umbreit, Mark. *Victim Meets Offender: The Impact of Restorative Justice Theory*. (In 1992, entered into a contract with Criminal Justice Press, Monsey, N.Y., for publication in December of 1993).

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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. pp. 217-233.

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. pp. 14-26.

Umbreit, Mark. "Having Offenders Meet With Their Victims Can Benefit Both Parties." *Corrections Today*, July 1991.

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Umbreit, Mark. and K. Pate. "Cross-National Assessment of a Canadian Justice Initiative." In J. Hudson and J. Roberts (Eds.), Evaluation Research in Canadian Justice Policy and Programming. 1993.

Umbreit, Mark. "Crime Victims and Offenders in Mediation: An Emerging Area of Social Work Practice." *SOCIAL WORK*, 1993.

II. CROSS CULTURAL ISSUES

A. Future Demographic Changes and Culturally Appropriate Dispute Resolution Procedures for the Judiciary of Hawaii (Hawaii Research Center for Future Studies/SJI)

The project, begun in 1989, 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 which other cultures use in resolving conflicts. A team of nine researchers from Hawaii Center for Future Studies and 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.

B. 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 relied on various methods of collecting information to provide a comprehensive picture of the programs including the contexts within which they function.

Project Products:

"Public Law 280 and Tribal Court Jurisdiction in Alaska." *ALASKA LAW REVIEW*.
(Publication Pending).

"Resolving Disputes Locally in Rural Alaska." *MEDIATION QUARTERLY*.
(Publication Pending).

Resolving Disputes Locally: Alternatives for Rural Alaska. Alaska Judicial Council, August, 1992.

Project Related Literature:

Resolving Disputes Locally: A Statewide Report and Directory. March 1993.

This report provides a comprehensive overview of dispute resolution organization functioning throughout rural Alaska in early 1993. The number of active tribal courts and councils has grown significantly since the start of the project in 1987, thus this report is a necessary supplement to the original project.

III. CIVIL DISPUTE RESOLUTION PROCESSES

Civil Mediation

A. 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.

B. 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 program in mediation of large general civil cases in Hennepin county implemented in April of 1988. Nearly 1200 civil cases were randomly assigned to one of two groups: an experimental group, where cases could be referred to mediation by the judge at his/her discretion, and a control group, where referral to mediation was not allowed. The program had three primary goals: to increase early settlement of cases thereby reducing the caseloads of judges and speeding 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*. Minnesota Judicial Center: St. Paul Minnesota. February 1991.

C. Evaluation of the ADR Pilot Project: Maine Superior Court (McEwen/Maine Superior Court)

This study, conducted in 1991, evaluated the settlement rate, trial rate, court activity, cost of discovery, and litigant and lawyer satisfaction Maine Superior Court cases in York and Knox Counties. Using an experimental design, the project randomly assigned cases to ADR and to the control group. In addition, other cases entered ADR voluntarily. Various dispute resolution approaches were used, including mediation and neutral evaluation, and all formal discovery was prohibited until the mediation process concluded.

Project Product:

McEwen, Craig. "An Evaluation of the ADR Pilot Project: Final Report." Bowdoin College, January 1992.

D. 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.

Case Evaluation

A. 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, implemented in September of 1990, studied the court-sponsored early case evaluation program in the Suffolk County Superior Court. The program was designed to provide a reliable, predictable means of bringing the parties together at a relatively early point in the processing of motor vehicle tort cases and to resolve these cases more rapidly and inexpensively. An experimental design was used to determine the overall satisfaction with the program, the costs incurred, and the elapsed time.

Project Product:

Lowe, Robert. *Assessment of the Massachusetts Motor Vehicle Tort Litigation Case Evaluation Program*. National Center for State Courts, February 1992.

B. Early Neutral Evaluation in the Northern District of California (National Institute for Dispute Resolution)

This project, implemented in 1985, studied both the initial pilot and the secondary experimental phase of the Early Neutral Evaluation program (ENE) in the Northern District of California. The ENE program seeks to bring neutrals together with the parties and their attorneys at the earliest possible point to either aid in the identification of disputed issues and the development of the case or facilitate early settlement. Settlement is NOT the primary goal of ENE. In the study, researchers did not use a control group, rather they evaluated case materials and questionnaires filled out by the participants.

Project Products:

Brazil, Wayne, Michael Kahn, Jeffrey Newman, and Judith Gold. "Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution." *JUDICATURE*, Vol. 69, No. 5, pp. 279-286, February 1986.

Levine, David. "Early Neutral Evaluation: A Follow Up Report." *JUDICATURE*, Vol. 70, No. 4, pp. 236-241, December 1986.

Levine, David. "Early Neutral Evaluation: The Second Phase." *JOURNAL OF DISPUTE RESOLUTION*, Vol. 1989, pp. 1-58, 1989.

Levine, David. "Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution." *JUDICATURE*, Vol. 72, No. 4, pp. 235-258, December 1988.

Project Related Literature:

"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

C. Related Literature

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.

Rosenberg, Joshua D. and J. Jay Folberg. *Alternative Dispute Resolution in a Civil Justice Reform Act Demonstration District:: Findings, Implications and Recommendations. To be published in the July 1994 Stanford Law Review.*

Summary Jury Trials

A. Summary Jury Trials in Florida: An Empirical Assessment (Florida Dispute Resolution Center/Florida Bar Foundation)

This study, begun in 1987, assessed the strengths and weaknesses of the summary jury trial program in Florida's Nineteenth Judicial Circuit and the United States District Court for the Middle District of Florida. The data collected for the case studies were derived from court records, interviews with summary jury trial participants and mail surveys of attorney participants.

Project Product:

Alfini, James. *Summary Jury Trials in Florida, An Empirical Assessment.* Florida Dispute Resolution Center, 1989.

B. 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 the dates March 5, 1980 and October 6, 1980. The study described the attorneys' perceptions, as well as the views and observations of the others who participated in the proceedings.

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.

C. Summary Juries in the North Carolina State Court System (Private Adjudication Center)

This study evaluates the use of summary jury trials in pilot programs of three urban judicial districts in North Carolina. By analyzing all of the summary jury trials conducted in these districts from the inception of the program in 1987 until 1991, the study seeks to describe the reactions and views of the participants. From this base, the researchers make informed suggestions for establishing future policy. The study did not use a random sampling or a control group, rather they used personal and telephone interviews to ascertain relevant information about: (1) the reasons the participants elected to use summary jury trials; (2) how the summary trial was conducted; and (3) 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

A. Mediating Medical Malpractice Claims in Wisconsin (University of Wisconsin School of Law/SJI)

This project, begun in June of 1988, 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. Various data collecting techniques were used, including interviews, mediation observation, and a Round Table discussion, to accumulate information and draw 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.

Appellate Dispute Resolution

A. Florida's Fourth District Court of Appeals Appellate Mediation Project (Florida State Court System/ SJI)

This project tested the use of mediation to settle or narrow the issues in appellate civil cases. The project used an experimental design to determine the effect that mediation has on the rate of settlement, the number of issues considered, the litigant and court costs, and the 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 Appeals Settlement Conference Program." 118 *FLORIDA STATE LAW REVIEW*. 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 Appeals Settlement Conference Program*. National Center for State Courts, 1990

B. Pre-Argument Conference Program in the Sixth Circuit Court of Appeals (Federal Judicial Center)

This project, based on cases selected between March of 1985 and August of 1986, was conducted to determine whether the Sixth Circuit Court of Appeals conference program was meeting its stated objections 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 and 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.

Small Claims Mediation

A. 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 from a variety of states. As one of its goals, the 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.

B. Civil Case Mediation and Comprehensive Justice Courts: Process, Quality of Justice, and Value to State Courts (Institute for Social Analysis/SJI)

A quasi-experimental study evaluated the use of mediation and court processing in small civil cases. The study was conducted in Burlington and Hudson Counties, New Jersey, in 1989 to assess the quality of justice in these dispute resolution forums and the effect of mediation services on court workload and overall efficiency.

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.

General

A. 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 who developed these Standards included judges, state and local court administrators, mediators, mediation program administrators, attorneys for both lower and higher income individuals and corporations, 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.

B. Judicial Project of the Center for Public Resources/CPR Legal Program (Center for Public Resources Legal Program)

This project gathered information to guide judges, court officials, lawyers and ADR practitioners in designing and operating high quality ADR programs. It examines fundamental policy and practice issues facing federal and state courts as they integrate ADR into civil process and analyzes the broad spectrum of current approaches and rules. The manual provides examples from and cites to specific programs, offering justice system officials concise information about how other courts structure ADR, and identifying model programs and rules for further investigation or replication.

Project Product:

Plapinger, Elizabeth and Margaret Shaw. *Court ADR: Elements of Program Design*. Center for Public Resources, 1992.

C. 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 Courts April 18-21, 1991. The conference was held at Harvard University Law School, a co-sponsor along with CPR and the Litigation Section of the American Bar Association.

Project Product:

Emerging ADR Issues in State and Federal Courts. Ed. by Frank Sander. Section of Litigation, American Bar Association, 1991.

IV. COURT-ANNEXED ARBITRATION

A. 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. The study was conducted in three judicial districts in North Carolina: the 14th (an urban area in the central part of the state), the third (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 the effects of court-annexed

arbitration, specifically, whether it 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 Product:

Clarke, Stevens, Laura Donnelly and Sara Grove. "Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction." *JUSTICE SYSTEM JOURNAL*, Vol. 14, No. 2, 1991.

B. 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 the use of mail surveys, telephone interviews, observation, and court records, 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.

Project Product:

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.

C. 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, begun in November of 1988, studied the court-annexed arbitration programs in two contrasting 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 the courts considering whether to adopt court-annexed arbitration as well as the 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.

D. Court Annexed Arbitration: Evaluation Study (Office of the State Court Administrator, Oregon Judicial Department).

The study evaluated the effectiveness of court-annexed district and circuit civil and domestic relations arbitration programs from July 1, 1989 to June 30, 1990. The study used several different survey techniques, including telephone and mail surveys, to evaluate the arbitration process in the Oregon courts.

Project Product:

Chief, Peter. *Court Annexed Arbitration: Evaluation Study*. Final Report. Office of the State Court Administrator, Oregon Judicial Department, June 1992.

E. 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 focus of the project was on the effects of CAAP on the cost of litigation, pace of disposition, and the satisfaction of the participants. The project used a randomized experimental design and drew data from case records, various surveys conducted after the case had closed and again after the appeal had been filed, 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. University of Hawaii. PLR Working Paper Series: 1992-1991.

F. The New Jersey Automobile Arbitration Program Project (Institute for Civil Justice/ Administrative Office of the New Jersey Courts)

The project, begun in 1986, used a pre-post research design to determine the effect that the New Jersey Arbitration Program had on the nature and timing of case dispositions, litigant and attorney satisfaction, discovery activities, attorney hours and costs. The project randomly sampled more than 1,000 auto negligence cases

filed in eight New Jersey courts in the second half of 1983 (before the program's inception), and the second half of 1985.

Project Product:

MacCoun, Robert. "Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey." *JUSTICE SYSTEM JOURNAL*, Vol. 14, No. 2, 1991.

G. Judicial Arbitration in California (The Institute for Civil Justice)

The survey, conducted during May and June of 1987, was limited to updating information previously collected to determine whether there were noteworthy changes in the arbitration program and whether previously observed trends had continued. The survey was designed only to provide more recent information about arbitration to California decision-makers and policy planners.

Project Product:

Bryant, David. *Judicial Arbitration in California: An Update*. The Institute for Civil Justice, June 1989.

Project Related Literature:

Hensler, Deborah. *Court-Ordered Arbitration: An Alternative View*. Rand Corporation, 1992.

H. Evaluation of New Jersey's Expanded Arbitration Program (Institute for Social Analysis)

This study, conducted in 1991, studied the effects of the expanded arbitration program on case processing time and attorney and litigant satisfaction in nine counties in New Jersey appeals rates also were examined. The project compared arbitrated cases with non-arbitrated cases scheduled for arbitration in the seven counties with arbitration programs. The study also compared these cases in the seven counties with non-arbitrated cases in two counties without arbitration programs. To determine the levels of satisfaction, the project surveyed both the litigants and the attorneys via telephone and mail.

I. An Evaluation of Court-Annexed Arbitration in a United States District Court: Arbitration in the Middle District of North Carolina.

The project, based on cases filed between 1985 and 1988, assessed the effects of the arbitration program on access to the judicial system, the private and public costs of litigation, overall case delay and outcome, and litigant and attorney reaction. The research was conducted using a randomized experimental design in which cases were removed from the arbitration program at random and placed in a control group.

J. Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center)

This study, conducted in 1981, assessed the success of early pilot court-annexed arbitration programs in three federal courts: the Eastern District of Pennsylvania, the District of Connecticut, and the Northern District of California. The primary aim of the study was to determine whether the local arbitration rules produced the beneficial consequences anticipated, reducing the time and expense of certain civil cases, without unacceptable adverse consequences, such as dissatisfaction among the participants. The study utilized a quasi-experimental design comparing two groups of cases, and gathered its information from questionnaires from counsel and arbitrators, docket information, and some interviews and observation of arbitration.

Project Product:

Lind, E. Allan and John Shapard. *Evaluation of Court Annexed Arbitration in Three Federal District Courts*. Federal Judicial Center, 1983.

K. Court Annexed Arbitration in Ten District Courts (Federal Judicial Center)

This project, begun in 1985, was conducted pursuant to congressional legislation to assess the successes and failures of mandatory court-annexed, non-binding arbitration in ten federal districts; Eastern Pennsylvania, Middle Florida, Western Missouri, Western Oklahoma, Middle North Carolina, Northern California, Western Michigan, New Jersey, Eastern New York, and Western Texas. The study focused primarily on participant satisfaction and goal achievement, and used various data collection techniques in the different districts.

Project Products:

Meierhoefer, Barbara. *Court Annexed Arbitration in Ten District Courts*. Federal Judicial Center, 1990.

Meierhoefer, Barbara. *Court-Annexed Arbitration in the Middle District of North Carolina*. Federal Judicial Center, 1989.

V. FAMILY

A. An Evaluation of the Use of Mandatory Divorce Mediation (Center for Policy Research /SJI)

The study, originating in October of 1989 and continuing through December of 1990, 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. 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 Product:

An Evaluation of the Use of Mandatory Mediation. Final Report to the State Justice Institute. October 1991.

B. Child Protection Mediation in the Courts (Center for Policy Research/SJI)

The study, begun in October of 1989, examined four court-based alternative dispute resolution programs handling child abuse and neglect cases to determine their effect 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. October 1992.

"Mediation and the Dependency Court: The Controversy and Three Courts' Experiences." *FAMILY AND CONCILIATION COURTS REVIEW*, Vol. 29, No. 3, July 1991.

C. The Equity of Mediated Divorce Agreements (Center for Policy Research/SJI)

This project, conducted from September of 1988 to November of 1989, compared divorce settlements produced through public and private sector mediation services with settlements generated through inter-party stipulations, attorney-assisted negotiations, and judicial hearing. The study involved divorcing parents who used courts in Maine, Colorado, West Palm Beach, Florida, and Clackamas County, Oregon.

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.

D. Domestic Abuse and Mediation Project (Court Mediation Service State of Maine Judicial Department/SJI)

This project, conducted from January of 1990 to October of 1991, 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 of protective orders and in divorce cases involving domestic violence. The team considered the appropriateness and safety of using mediation in these types of cases. Where mediation was found to be an appropriate alternative, the project team recommended 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.

E. 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.

F. The Divorce Mediation Project (Center for Policy Research/Department of HHS, Children's Bureau)

Conducted during 1981-84, this project involved three sets of interviews with 450 clients of court-based mediation programs in Connecticut, Minneapolis and Los Angeles. Interviews at comparable times were also conducted with 100 individuals using traditional approaches and 100 divorcing but non-contesting individuals 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.

G. Alaska Child Visitation Mediation Pilot Project (Alaska Judicial Council)

The Alaska Child Visitation Mediation Pilot Project, a seventeen month pilot project created and funded by the Alaska Legislature, started in July of 1990. 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 and was taken from a pool of screened applicants (with an indication of domestic violence as the most significant reason for disqualification), who actively chose to participate in the project.

Project Product:

Di Pietro, Suzanne. *Alaska Child Visitation Mediation Pilot Project: Report to the Legislature.* February 1992.

H. Views of Mediation in Voluntary and Mandatory Mediation Settings (Joan B. Kelly and Mary A. Duryee)

This project, conducted in 1991, used questionnaires to survey respondents from both a voluntary mediation program, the Northern California Mediation Program, and a mandatory mediation program, the Family Court Services. The project then compared the differing responses that men and women had to similar experiences with 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.

I. Related Literature

Depner, Charlene, K. Cannata, and M. Session. "Building a Uniform Statistical Reporting System: A snapshot of California Family Court Services." *FAMILY AND CONCILIATION COURTS REVIEW*, Vol. 30, 1992

Duryee, Mary. *Demographic and Outcome Data of the Court Mediation Program and a Consumer Evaluation of a Court Mediation Program.* Reports to the Judicial Council, State of California, Statewide Offices of Family Court Services, May, 1991.

Emery, D. and M. Wyer. "Child Custody Mediation: An Experimental Evaluation of the Experience of Parents." *JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY*, 55, 1987. pp. 179-186.

Fix, Michael and Philip 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 (SJI), June 1992.

Kelly, Joan. *Mediated and Adversarial Divorce Resolution Processes: An Analysis of Post-Divorce Outcomes*. Final Report prepared for the Fund for Research in Dispute Resolution, 1990.

Kelly, Joan. "Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs." *MEDIATION QUARTERLY*, Vol. 8, No. 1, Fall 1990.

Kelly, Joan. *Developing and Implementing Post-Divorce Parenting Plans: Does the Forum Make a Difference*. Unpublished manuscript, 1992.

Kelly, Joan. "Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes." *MEDIATION QUARTERLY*, No. 24, Summer 1989.

Kressler, Kenneth, et al. *Final Report of the Essex County Custody Mediation Project: Obstacles to Intervention, Effective Mediator Strategies and Recommendations*. Rutgers University, June 1991.

Trost, Melanie and Sanford Braver. *Mandatory Divorce Mediation: Part 1: The Impact of Mandatory Mediation on the Court System*. Arizona State University, February 1987.

VI. SELECTION, TRAINING AND QUALIFICATIONS OF NEUTRALS

A. Post Conference Training for the Judiciary on Alternative Dispute Resolution (National Judicial College/SJI)

On November 16-18, 1988, the State Judicial Institute, National Center for State Courts, and National Institute for Dispute Resolution sponsored a National Conference on Dispute Resolution and the State Court in Baltimore, Maryland. Over 300 participants from the judiciary, court management, the bar, the dispute resolution community, business and higher education took part in the conference. It was the goal of the conference to develop materials to aid in the implementation of dispute resolution programs throughout the country.

Project Products:

Judicial Settlement: Manual.

Judicial Settlement: Course Notebook.

Judicial Settlement: Videotape.

Outline for Instructional Sessions Using Dispute Resolution Videotapes on Arbitration, Mediation, and Summary Jury Trial. National Judicial College: Reno Nevada, 1989.

Project Related Literature

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.

B. Interim Guidelines for Selecting Mediators (Test Design Project/National Institute for Dispute Resolution)

These guidelines attempt to provide tools for programs wishing to test mediators before after or in lieu of training them. The particular focus is on those dispute resolution fields characterized by rapid increases in mediator populations combined with a pattern of mandatory assignments of particular individuals to the parties. These have been identified initially as family, commercial and community disputes. A further purpose is to assist programs in their training. Experience with prototype tests have shown that performance based testing enables programs to make distinctions between their newly selected mediator's skills, which allows training to be targeted to individual needs.

Project Product:

Interim Guidelines for Selecting Mediators: Draft for Comment. National Institute for Dispute Resolution, 1993.

C. 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 questions of interest to both volunteer dispute resolvers and those who administer dispute resolution agencies in our criminal justice system including: 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. With 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. Most importantly, research findings had 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, pp. 201-211.

Rogers, Susan. "Understanding Our Criminal Justice Volunteers: A Study of Community Mediators in New York State." *MEDIATION*, Vol. 7 No. 2 1990, pp. 3-6.

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.

VII. MULTI-DOOR COURTHOUSE

A. 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, including cases opened between July 1990 and September 1991, was a comprehensive evaluation of the Middlesex Multi-door Courthouse, 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 three substantive areas: case processing time; litigant and court costs and resource requirements; and participant satisfaction. An experimental design was used to compare cases in an experimental group (processed by the MMDC) with cases from a control group (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.

B. The Multi-Door Courthouse Centers Project Phase I: Intake and Referral. (American Bar Association/National Institute of Justice)

This project, published in 1986, 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, from assault charges to small claims dispute to 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 collecting method was interviewing, including follow-up interviews with both the participants and key representatives of referral agencies.

Project Products:

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.

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:

Roehl, Janice, Rebekah Hersch, Ed Llaneras. *Civil Case Mediation and Comprehensive Justice Centers: Process, Quality of Justice, and Value to State Courts, Final Report*. Institute for Social Analysis, December 1992.

VIII. PRIVATE DISPUTE RESOLUTION

A. Private Judging: A Study of its Volume, Nature, and Impact on State Courts (Institute for Social Analysis/SJI)

This project, started in October of 1990 and completed in June of 1991, 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.

B. Related Literature

Chernick, R. Rent-A-Judge option. *LOS ANGELES LAWYER*, October 1989a. pp.18-27.

Chernick, R. What's wrong with private judging? In defense of a two-tiered system of justice. *LOS ANGELES LAWYER*, November 1989b. pp.19-27.

Christensen, B.F. "Private Justice: California's General Reference Procedure." *AMERICAN BAR FOUNDATION RESEARCH JOURNAL*, 79 (1), 1988. pp. 79-110.

Cortez, M.C., Jr. "The "Private Judge" Alternative to Traditional or Mandatory Arbitration." *THE CIVIL LITIGATOR*, May 1988. pp. 831-834.

Colino, S. "Enter the Private Courts of Justice." *STUDENT LAWYER*, April 1989. pp. 35-38.

Coulson, R. "Rent-a-Judge: Private Settlement for the Public Good." *JUDICATURE*, 66 (1), 1982. pp. 6, 11-13.

D'Amico, S., Friedman, P.N., Oram, M.E., & Schmidt, H. *California Judicial Retirement Study*. San Francisco: National Center for State Courts, 1988.

Final Report of The Connecticut ADR Project, Inc. *Final Report of the Connecticut ADR Project, Inc.* Hartford, CT, 1988.

G.A.O. *Medical Malpractice: Alternatives to Litigation*. Washington, D.C.: U.S. General Accounting Office, January 1992.

Gnaizda, R. "Rent-a-judge: Secret Justice for the Privileged Few." *JUDICATURE*, 66 (1), 1982. pp. 6, 11-13.

- Green, E.D. "Private Judging: A New Variation of Alternative Dispute Resolution." *TRIAL*, October 1985. pp. 36-43.
- Green, E.D. "Getting Out of Court -- Private Resolution of Civil Disputes." *BOSTON BAR JOURNAL*, May/June 1985. pp. 11-20.
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- Guill, J.L. and Slavin, Jr., E.A. "Rush to Unfairness: The Downside of ADR." *THE JUDGE'S JOURNAL*, Summer 1989.
- Haynes, S.K. "Comments: Private Means to Public Ends: Implications of the Private Judging Phenomenon in California." *UNIVERSITY OF CALIFORNIA, DAVIS, LAW REVIEW*, 17, 1984. pp. 611-652.
- Hazard, G.C., Jr. & Scott, P.D. "The Public Nature of Private Adjudication." *YALE LAW & POLICY REVIEW*, 6, (42), 1988. pp. 42-60.
- Kornblum, G.O. "Voluntary Private Dispute Resolution: Complement or Competitor to Courts?" *DEFENSE COUNSEL JOURNAL*, July 1990. pp. 370-373.
- Longworth, J.E. "Notes: Private Judging: An Effective and Efficient Alternative to the Traditional Court System." *VALPARAISO UNIVERSITY LAW REVIEW*, 21 1987. pp. 681-718.
- Mazadoorian, H.N. "For-Profits Take Firm Hold on Field." *THE BAR LEADER*, September-October 1988. pp. 22-25.
- O'Hara, J.V. "The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a 'Better Way'?" *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 136 (6), 1988. 1723-1760.
- Ostrom, Brian, et al. *State Court Caseload Statistics: Annual Report 1991*. Williamsburg, Va: National Center for State Courts, 1993. pp. 111, 160.
- Raven, R. "Private Judging: A Challenge to Public Justice." *ABA JOURNAL*, 8, 1988.
- Ray, L. Privatization of justice. In G.W. Bowman, S. Hakim, & P. Seidenstat (Eds.), *Privatizing the United States Justice System: Police, Adjudication, and Corrections Services from the Private Sector*. Jefferson, North Carolina: McFarland & Company, Inc., Publishers, 1992.
- Shapiro, D.J. "Private Judging in the State of New York: A Critical Introduction." *COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS*, 23, 1990. pp. 275-315.

Thompson, M. "Rented Justice." *CALIFORNIA LAWYER*, March 1988. pp. 42-46.

Vangel, T.S. "Private Judging in California: Ethical Concerns and Constitutional Considerations." *NEW ENGLAND LAW REVIEW*, 23, 1988. pp. 363-396.

Werchick, A. "Judge Not...Controversy in Public Judging." *THE SAN FRANCISCO ATTORNEY*, August/September 1990. pp. 16-23.

IX. SURVEYS

A. A Study of State Alternative Dispute Resolution Programs (Institute of Judicial Administration/SJI)

The purpose of the project, started in October of 1987, 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 resolutions, 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, conclusions were drawn and recommendations made about ADR programming factors.

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.

B. Comprehensive State ADR Program Database (National Center for State Courts/SJI)

This project, begun in January of 1989, 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.

CONFERENCE OF STATE COURT
ADMINISTRATORS

COMMITTEE ON ALTERNATIVE DISPUTE
RESOLUTION

REPORT TO THE MEMBERSHIP

December 1, 1990

COSCA
ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

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Administrative Director of the Courts, Idaho

Rene Arrillaga-Belendez
Administrative Director of the Court, Puerto Rico

Robert L. Duncan
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Susan Keilitz, Senior Staff Attorney
National Center for State Courts

COSCA
Committee on Alternative Dispute Resolution
Report to the Membership

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COSCA

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

REPORT TO THE MEMBERSHIP

Executive Summary

Over the past four years, the COSCA Committee on Alternative Dispute Resolution has investigated the extent to which courts have instituted ADR processes, endorsed empirical evaluation of the effects of ADR processes, guided the research initiatives of the National Center for State Courts, tracked the latest developments and studies regarding ADR, and encouraged the American Bar Association committee on Standards Relating to Court Organization to incorporate the COSCA perspective on court use of ADR into the ABA standards on ADR. In the accomplishment of these tasks, the committee discussed the information it gathered and weighed its significance to the administration of justice. These deliberations have led the COSCA committee to recommend that courts explore the use of alternatives to traditional court processes and to endorse the ADR standards embodied in the ABA Standards Relating to Court Organization. This report complements the ABA ADR standards, and is meant to be an educational resource for COSCA members and others contemplating development of court-annexed or court-referred ADR programs.

This report reflects the committee's review of the development of ADR and its impact on the state courts. It urges courts to experiment with alternatives to formal litigation, while emphasizing the need for on-going evaluation of all ADR programs that are connected in some way to the court. The first section of the report states the committee's position on the court's responsibilities in regard to instituting ADR programs. The second section is a discussion of some of the issues that the ADR movement raises for the administration of justice. The third section reproduces the ADR standards embodied in the ABA Standards Relating to Court Organization, which were formally adopted by the ABA House of Delegates in February, 1990. The fourth section is a bibliography of further sources of information on ADR.

The COSCA committee gratefully acknowledges the contributions of Susan Keilitz, Senior Staff Attorney, National Center for State Courts, in the preparation of the committee report.

Instituting an ADR Program: The Court's Responsibilities

The following statement summarizes the conclusions of the COSCA Committee on Alternative Dispute Resolution (ADR) concerning court use of alternative dispute resolution procedures:

Courts should explore the use of alternatives to traditional court processes that are organized to permit appropriate court supervision and evaluation, and designed and managed to promote faster, less expensive, and better ways to resolve society's disputes.

This statement is qualified, however, by the following three considerations:

1. Courts retain responsibility for fair and equitable dispute resolution.

Judges and court administrators are responsible for the fair and equitable administration of justice to those who bring their disputes to the court for resolution. If the court refers part of its caseload to alternative processes, the responsibility for the fair administration of justice in those cases remains with the court. Because some alternative dispute resolution processes may lack the procedural and evidentiary formality of the traditional court process, the court must establish methods to insure that procedures employed by the alternative process protect the rights of all disputants, preserve the accountability of the judicial process and do not dilute the court's authority.

2. Questions remain open about both the effects of alternative processes on the pace, cost and quality of dispute resolution and the appropriate ways to organize and manage ADR programs.

When applied appropriately, alternative dispute resolution processes may have beneficial effects for litigants and the judicial system, but these benefits are by no means guaranteed. Research findings to date indicate that for certain types of cases and in certain jurisdictions alternative processes such as mediation and arbitration can provide speedy disposition, greater levels of compliance with agreements, and participant satisfaction. No single alternative dispute resolution process or program model is, however, suitable for all cases and for all jurisdictions. A process or program that works well in one court, jurisdiction or state does not necessarily produce the same effects in another court, jurisdiction or state.

Before deciding to implement an alternative dispute resolution program, judges and court administrators should carefully evaluate the particular problems and needs of their court. Some of the

factors judges and court administrators should assess are 1) the social, economic and political characteristics of the court's jurisdiction; 2) the resources available to the court, including funds, the potential pool of mediators and arbitrators, and the existing dispute resolution programs in the community; and 3) the attitudes and likely response of the bench and bar to the introduction of an alternative dispute resolution program or programs.

The assessment of the court's needs should lead to the development of goals for the proposed program, and judicial planners should tailor the program to meet those goals. For example, if the primary program goal is to speed the time of case disposition, the program should set early time limits for completion of discovery and the hearing on the merits of the case and provide sufficient resources and incentives for effective case management; if the court's goal is to clear inactive cases, it may institute settlement weeks; and if the goal is early disposition of a high number of new civil cases, the program should 1) be mandatory; 2) have program eligibility criteria that capture a significant number of cases; 3) be organized for early referral and 4) include substantial resources for close monitoring of the cases that are sent out for arbitration or mediation.

No alternative process should sacrifice quality for cost or speed. The quality of the process should be assessed on at least four criteria: 1) consistent access to procedures that neither bestow unfair advantages upon parties with superior resources nor prevent full presentation of arguments; 2) fairness of outcomes that treat similarly situated litigants similarly; 3) compliance with the terms of judgments made and agreements reached and 4) the satisfaction of the parties with the process.

An essential component of all dispute resolution programs should be an evaluation system based on program goals. Judicial planners should not become wedded to particular programs, structures or procedures, but rather should be willing to modify or to eliminate alternative programs if evaluation reveals the programs or procedures are not serving their defined purposes.

3. The more closely connected to the court an alternative dispute resolution program is, the higher the degree of control the court should exercise.

Alternative dispute resolution programs vary in their relationship to the court. Court-annexed programs are administered and funded by the court; court referred programs operate outside the direct control of the court but are institutionally linked by referrals or funding, and private programs are totally autonomous and have no formal relationship of the court. The closer the relationship of the court to the program, the more control the court must exercise over the program.

If judges and court administrators institute a court-annexed program, they have responsibility for establishing program goals, structure, procedures, and the qualifications of those who serve as mediators, arbitrators and other types of neutrals. The court should regularly and rigorously monitor and evaluate the program's performance. Judges and court administrators should be prepared to modify any and all aspects of a program that fail to meet the court's goals.

If judges and court administrators adopt a policy of referring a portion of the court's caseload to a dispute resolution program outside the court, they should establish mechanisms to review periodically the quality of the services provided by the program. The relationship of the court to the program should be maintained by an appointed liaison to ensure that communications with the program administrators are regular, clear and effective.

The court has no direct responsibility to monitor or to evaluate private programs, but judges and court administrators should be knowledgeable about private programs in the community as well as the community needs that these programs address. The court should maintain some communication with private programs so that in appropriate circumstances parties can be made aware of the services of private programs and the benefits they may offer.

ADR Raises Issues

Alternative Dispute Resolution has been called "the most creative social experiment of our time".¹ It is a label applied to an increasingly broad range of alternatives to traditional litigation, including mediation, arbitration, negotiation, private judging, minitrials, advisory settlement conferences, and summary jury trials. ADR can be "complementary" when it is arrayed with the traditional processes in the public courthouse.

The movement to establish alternative methods for dispute resolution in both public and private institutions arises from a dissatisfaction with both the adversarial system of litigation and the unreasonably high cost and lengthy delays experienced in many court systems. The advocates of ADR seek more open access to formal dispute resolution services, a less costly process in terms of time and money, empowerment of people to resolve their own

¹ Derek Bok, "A Flawed System," Harvard Magazine, May-June, 1983.

disputes, and social peace without the psychic costs, inequalities and divisiveness of the adversarial process.

Whether the movement actually offers these benefits to our society without significant risks and unintended consequences is and ought to be a subject for empirical investigation as well as thoughtful philosophical reflection. The outcomes of carefully controlled experiments with alternative and complementary methods for dispute resolution should be measured against clear statements of goals and objectives and should be compared with the outcomes of, and reactions to, traditional processes. On a larger level, consideration of ADR offers an opportunity to articulate and clarify the values that underlie our current system for dispute resolution and to analyze how judicial systems can improve on their efforts to reach valued outcomes. The challenge is to find a balance between traditional court dispute resolution and the alternatives being suggested.

Issues for Courts

The Anglo-American legal system has developed slowly and incrementally. Today's American judicial institutions have evolved to provide public forums for disputants to resolve conflicts peacefully. Public resolution of those conflicts allows for articulation of clear norms that, once announced and refined as necessary in the appellate process, allow individuals to order their affairs to avoid similar conflicts in the future. The genius of the legal system design is that it values individual choice while meeting society's need for norms and guidelines to define acceptable social behavior. Individuals may invoke the jurisdiction of the courts, thus subjecting their disputes to public scrutiny and resolution, or they may settle their differences without filing a law suit. While the majority of lawsuits are resolved without a trial, once a case has been adjudicated, a public interest develops in it because the law of the case offers prospective normative guidance to society at large.

Although the development of private dispute resolution promises benefits to society, it, creates value conflicts for the administration of justice. For example, if judges and court managers encourage the resolution of disputes outside the public system, a potential consequence is a judicial system that adjudicates only criminal cases and pro se civil cases in which the parties cannot afford the private alternatives. Some see that possibility, however remote as it may be, as a threat to the status of the third branch of government and a weakening of its law-making function. On the other hand, our government system values individual choice, and judicial dispute resolution has always relied on the individual bringing forward the case for resolution. By thwarting efforts to provide alternatives to the public system, courts may infringe a value they otherwise seek to promote.

Paradoxically, the possibility that private dispute resolution might restrict access and opportunity for traditional litigation within the common law might threaten the balance of power among disputants that courts have sought, albeit sometimes unsuccessfully, to achieve.

The current level of litigation across the United States represents a great challenge to the traditional juridical system for resolution of conflicts. How will courts accommodate growing caseloads while preserving reasonable access to a public forum for litigants pursuing resolution of conflicts? Will ADR processes help courts meet the needs of disputants seeking prompt, low cost or less adversarial resolution? How will courts continue to carry out their normative function while already limited resources are divided even further to fund diverse dispute resolution processes both within and outside the public system? Will the body of law as developed and refined in the publicly funded appellate process be changed significantly by the recourse of some disputants to private forums without appellate review?

Finding Faster and Less Costly Dispute Resolution Processes

One potential advantage of ADR programs may be that they are faster and less costly than traditional court processes. Evaluations of some programs, such as North Carolina's Court-Ordered Arbitration², Pittsburgh's Court Arbitration³, and the District of Columbia Superior Court's mandatory arbitration report success in terms of reduced time to disposition, at about the same cost, with increased user satisfaction. On the other hand, a study of New Jersey's Automobile Arbitration Program concluded that the program did not reduce the trial rate, slowed the pace of case disposition, and was no less costly than the traditional litigation process.⁴

² Stevens H. Clarke, Laura F. Donnelly, Sara A. Grove (1989) North Carolina's Experiment with Court-Ordered Arbitration. Institute of Government. Chapel Hill.

³ Jane W. Adler, Deborah R. Hensler, Charles E. Nelson (1983) Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program. Rand. Santa Monica.

⁴ Robert J. MacCoun, E. Allan Lind, Deborah R. Hensler, David L. Bryant, and Patricia A. Ebener (1989) Alternative Adjudication: An Evaluation of the New Jersey Automobile

Some types of cases will benefit from alternative treatment in terms of time and cost savings and user satisfaction, but others will not. For example, mandatory use of arbitration or mediation for some cases will lengthen the resolution time and raise the cost to the parties if they contest the arbitrator's award or fail to reach agreement in mediation. While it may not be possible for the system to predict which alternative is most appropriate for an individual case, courts can make informed decisions regarding the design and implementation of alternative programs by gathering data on case characteristics in the course of conducting controlled experiments on alternative dispute resolution processes. The results of these reviews must be subjected, however, to close quantitative and qualitative analysis.

There are a growing number of models for establishing court-annexed and court-referred programs, but no consensus has developed in favor of any particular model. What may work well in one jurisdiction may not work well in another because of varying levels of funding, program capacities, commitment of the judges and cooperation of the local bar. The burgeoning growth and interest in ADR programs offers, however, an opportunity for determining which are the best approaches for courts. Each new program should be implemented and evaluated as an experiment that will provide an empirical measurement of whether the program achieves its goals or whether it has unintended consequences.

Developing Better Means to Accommodate the Needs of Litigants

The adversarial system has been criticized as being ineffective because it intensifies conflict and because the adversaries may be ill-matched. The effects are especially evident in divorce litigation. Families already under stress become more antagonistic because of the nature of the process and because the relative strength of the adversaries may appear more pronounced in an acrimonious personal dispute. Although the adversarial system has its drawbacks, it allows a tested means for expression of each party's position. The adversarial process, for whatever reasons, usually leads to settlement of the dispute before trial. All courts today encourage settlement, which recent research indicates parties resent because they do not understand the process and are generally excluded from it.⁵ The litigants studied cared strongly

Arbitration Program. Rand. Santa Monica.

⁵ Lind, E. Allan, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Judith Resnick, and Tom R. Tyler (1989) The Perception of Justice: Tort Litigant's View of Trials, Court-

about whether their cases received dignified, careful and unbiased hearings, regardless of the outcome or the type of dispute resolution process. As might be expected, when the process leaves the litigants in the hallway while the lawyers conduct private negotiations with the case resolver, litigants' satisfaction is lower than when they participate throughout the process. The lesson from these findings is that to improve disputant satisfaction, those involved in the process should pay closer attention to the disputant's need for information and involvement, whether the forum is the traditional court setting or an alternative resolution process.

To meet the challenge of increasing litigation, courts will need to add substantially to their current resources, i.e., judges, staff and facilities. Because society may be unwilling to make the necessarily large investment of public funds, it appears that courts will have to look to alternative means to meet the demands placed on them. Relying cautiously and experimentally on court-annexed civil dispute resolution mechanisms, courts could meet the new demands while building support for the mission of the third branch. ADR alternatives are not, however, without their own expense. Difficult choices will have to be made regarding public resources such as whether to add a law clerk for the busy judge or to add a divorce mediator. Courts may be forced to divert some of their traditional workload to other public forums, or they may see some kinds of cases channelled to private agencies that might be more efficient in processing certain kinds of disputes. Access to the courts for review of these extra judicial resolutions must be preserved, however, if the courts are to guarantee justice regardless of the initial forum for resolution.

Exploring Alternatives

Answers to the issues raised in this report are becoming clearer as judicial systems experiment with new alternatives and the variety and number of alternatives grows. Because these are issues of fundamental importance to our system of governance and to the well being of society, they should be addressed by state and federal court leadership. The presence of these issues, however, should not inhibit court efforts to experiment with alternative approaches to dispute resolution. The judiciary should seek the assistance of legislators, private industry, academics and researchers from the social sciences, law and philosophy, and advocates of alternative methods for resolving disputes.

Annexed Arbitration, and Judicial Settlement Conferences. Santa Monica: Institute for Civil Justice, the Rand Corporation.

To learn how better to assist disputants while safeguarding their rights and carrying out the mission of courts, courts should explore court-annexed and court-referred dispute resolution methods that are complementary to litigation. With the assurance that the adversarial system's procedural and substantive due process remain available to all who would choose it, courts should experiment with dispute resolution alternatives which will improve and expand court services to the public.

ABA Standards Relating to Court Organization on Alternative Dispute Resolution

The COSCA ADR Committee endorses the following ADR standards, which are part of the American Bar Association Standards Relating to Court Organization, adopted by the ABA House of Delegates in February, 1990.

Section 1.12.5 Alternative Dispute Resolution. There are systems that are complementary to the usual adversary process, such as conciliation, mediation, and arbitration, which are used to solve disputes. Judicial system involvement in these programs, commonly known as alternative dispute resolution (ADR) programs, is through those which are court annexed and those not court annexed to which the court may make referral. If judges and court administrators institute a court-annexed program, they have responsibility for establishing program goals, structure, procedures, and the qualifications of those who serve as mediators, arbitrators, and other ADR professionals. The court should regularly and rigorously monitor and evaluate program performance and modify any and all aspects of a program that fails to meet the court's goals.

(a) **Court-annexed programs.** Court-annexed ADR programs are those operated under the authority of the judicial system and which provide complementary methods, such as mediation or arbitration, to the usual adversarial process of dispute resolution. These programs may be mandatory or voluntary, and there should be incentives for use. A dissatisfied party should have recourse to the court.

(i) **Standards and process.** Court-annexed ADR programs should have uniform structure and be governed by uniform rules, standards, and procedures, including confidentiality, intake, referral, and determination processes promulgated by the supreme court. Statutory procedure, if so provided, and the structure, rules, standards, and procedures should be sufficiently

flexible to permit creative approaches to dispute resolution not inconsistent with the requirements of uniformity. Rules, standards, and procedures should be designed to provide the same quality of dispute resolution expected from traditional court procedures.

(ii) Administration. Pursuant to the rules and standards promulgated by the supreme court, the administrative office of the courts should have the responsibility for management and coordination of court-annexed ADR programs. Management and coordination at the trial court level should be carried out by the trial court administrator pursuant to the rules and standards, the administrative requirements established by the administrative office of the courts, and the direction of the chief judge.

(iii) ADR professionals. Education and experience requirements for ADR professionals should be established by statute or supreme court rule. In addition to initial education and experience qualifications, ADR professionals should be required to participate in continuing education and training through special programs, conferences, and other applicable learning experiences. ADR professionals may be engaged under contract as their services are requested or needed.

(iv) Referrals to ADR programs. Whether the ADR programs are mandatory or voluntary, the types of cases to be referred should be specified clearly and uniformly throughout the judicial system by statute or supreme court rule. The parties should have the opportunity to select the ADR professional or professionals to preside over the matter within established court procedures. If they cannot agree, the selection should be made by the judge.

(v) Fees. Nominal fees for ADR services may be imposed by statute or supreme court rule. Fees should be reasonable, so as not to preclude either party from using the ADR program, and fees should be waived for indigent parties.

(b) Court-referred ADR Programs. A court-referred ADR program is one not under the direct supervision of the judicial system. Certification of the dispute resolution center or program, the types of cases which may be referred, and the guidelines and criteria for intake and referral should be provided for by statute and supreme

court rule. Confidentiality, court recourse, and fee structure should also be provided by statute and supreme court rule and should be similar to those required in court-annexed programs.

Commentary

What are now known as alternative dispute resolution programs or mechanisms have been used for many years in almost all jurisdictions, although many of them have functioned independently of the judicial system. Conciliation, mediation, and arbitration have been used to resolve labor disputes for more than seventy-five years in some states. A number of states have also had informal resolution of consumer disputes with automobile manufacturers for some time. Panels to resolve or mediate medical malpractice claims prior to filing a court case are also found in a growing number of jurisdictions. The use of ADR outside of the court setting is more extensive, but the above examples should suffice.

Although there were a few court-annexed ADR programs in the 1950s and 1960s, ADR gained considerable judicial system support in the 1970s and 1980s for several reasons. Federal funds were made available for community dispute resolution programs through the Law Enforcement Assistance Administration in the 1970s and early 1980s. Growth in court backlogs and delay in case dispositions made alternatives to the traditional adversary process much more attractive.

National organizations, such as the American Bar Association and the National Center for State Courts, have studied ADR extensively. Several organizations were formed and conferences held to study, examine, and support the use of ADR mechanisms, either court annexed or court referred. An increasing number of states have adopted or are considering statutes for court-related ADR programs. Even so, many of these programs are still in experimental stages, and their utility has not yet been determined. Additional research efforts are underway, and should be encouraged, to measure the effects of alternative dispute resolution on the pace, cost, and quality of litigation and the appropriate ways to organize and manage ADR programs.

Many advocates of ADR express the view that the purpose for

Court Organization

developing these programs is first and foremost to ensure quality justice and to provide a variety of forums so that the most appropriate one may be selected for a particular case. For example, the New Jersey task force on dispute resolution set forth several goals for dispute resolution programs and mechanisms:

- To be as accessible as possible to all disputants and not favor one group or segment;
- To protect the legal rights of all disputants;
- To provide a fair and competent mechanism for resolving disputes;
- To encourage the confidence and respect of disputants and the general public in the fairness, integrity, and justness of the methods by which disputes are resolved;
- To be an effective forum for the enforcement of law, including formulating outcomes in terms that are conducive to subsequent enforcement when necessary; and
- In achieving these goals, to be as efficient as possible in terms of the cost and time required of both the system and the disputants.¹

The literature indicates that several ingredients are required to assure these and comparable goals, and these ingredients are set forth in Standard 1.12.5.

Court-annexed and court-referred ADR programs should be based on statutes and supreme court rules. These programs should have uniform structure and be governed by uniform rules, standards, and procedures. Within uniformity requirements there should be sufficient flexibility to provide program variety, so that the widest range of alternatives can be provided consistent with protecting the rights of the parties involved and assuring them equal treatment.

Administration and coordination of court-annexed ADR programs should be carried out by the administrative office of the courts pursuant to statutes and supreme court rules. Under central

¹Supreme Court of New Jersey, 1988 Judicial Conference Task Force on Dispute Resolution, Discussion Paper Volume 1 (1988).

direction and coordination, chief trial judges and trial court administrators should be responsible for program management at the trial court level.

To assure high-quality service by ADR professionals, adequate education and experience standards should be set for their employment, either directly or under contract. Further, continuing educational requirements should be established and performance evaluated periodically in the same way as for judicial officers.

Parties in a matter referred to an ADR program should have the opportunity to select, within established court procedures, the ADR professional or professionals who will preside. Any party dissatisfied with the result of an ADR proceeding should have recourse to the court.

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Research Questions Related to Community Justice

Research Questions Related to Victim Offender Mediation

**Research Questions Related to
Civil Dispute Resolution Processes**

Research Questions Related to Court-Annexed Arbitration

Research Questions Related to Family Mediation

**Research Questions Related to
Selection, Training & Qualifications**

**Research Questions Related to
Multi-Door Courthouse**

**Research Questions Related to
Private Dispute Resolution**

NATIONAL SYMPOSIUM ON COURT-CONNECTED
DISPUTE RESOLUTION RESEARCH

Hyatt Orlando
October 15-16, 1993

Evaluation Form

SCALE: Circle the number which best describes your response for each question.

1	2	3	4	5	6
No/Poor	Barely/Not Well	Somewhat/Fair	As Expected/Average+	Very Well/Good	Over Expectations/Superior

Friday, October 15, 1993

Opening Plenary

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| 1. Given the Symposium objectives, was this session appropriate? | 1 | 2 | 3 | 4 | 5 | 6 |
| 2. Was the presentation style appropriate for the material? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

Morning Concurrent Workshops

Community Justice/Victim Offender Mediation

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| 3. Did this workshop provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

Multi-Cultural Issues

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Comments:

A.M. Civil Dispute Resolution Processes

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Comments:

A.M. Court-Annexed Arbitration

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| 3. Did this workshop provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

A.M. Family Mediation

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| 3. Did this workshop provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

A.M. Selection, Training & Qualification of Neutrals

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| 2. Was the workshop format appropriate for the material? | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. Did this workshop provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

Afternoon Concurrent Workshops

P.M. Civil Dispute Resolution Processes

- | | | | | | | |
|---|---|---|---|---|---|---|
| 1. Given the Symposium objectives, was this workshop appropriate? | 1 | 2 | 3 | 4 | 5 | 6 |
| 2. Was the workshop format appropriate for the material? | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. Did this workshop provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

P.M. Court-Annexed Arbitration

- | | | | | | | |
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| 2. Was the workshop format appropriate for the material? | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. Did this workshop provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

P.M. Family Mediation

- | | | | | | | |
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Comments:

P.M. Selection, Training, & Qualification of Neutrals

- | | | | | | | |
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Comments:

Multi-Door Courthouse

- | | | | | | | |
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Comments:

Private Dispute Resolution Processes

- | | | | | | | |
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Comments:

Saturday, October 16, 1993

Professional Prospectives

Please circle which workshop you attended:

Appellate Judges

Trial Judges

State Court Administrative Office/State DR Administrators

Trial Court Administrative Office/Local DR Administrators

Researchers/Academics

Dispute Resolution Providers/Association Representatives

- | | | | | | | |
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Comments:

Informal Q&A Sessions

- | | | | | | | |
|--|---|---|---|---|---|---|
| 1. Given the Symposium objectives, was this session appropriate? | 1 | 2 | 3 | 4 | 5 | 6 |
| 2. Was the format appropriate for the material? | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. Did this session provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

Closing Plenary

- | | | | | | | |
|--|---|---|---|---|---|---|
| 1. Given the Symposium objectives, was this session appropriate? | 1 | 2 | 3 | 4 | 5 | 6 |
| 2. Was the format appropriate for the material? | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. Did this session provide useful information for your work? | 1 | 2 | 3 | 4 | 5 | 6 |

Comments:

SYMPOSIUM OVERALL (Please include comments as appropriate)

- | | | | | | | |
|---|---|---|---|---|---|---|
| 1. Were the Symposium objectives communicated clearly? | 1 | 2 | 3 | 4 | 5 | 6 |
| 2. Did the symposium meet your expectations? | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. How much did the Symposium add to your existing knowledge? | 1 | 2 | 3 | 4 | 5 | 6 |
| 4. Will you be able to apply what you learned to your work? | 1 | 2 | 3 | 4 | 5 | 6 |
| 5. Were the written materials useful during the Symposium? | 1 | 2 | 3 | 4 | 5 | 6 |
| 6. Will the written materials be useful to you after the Symposium? | 1 | 2 | 3 | 4 | 5 | 6 |
| 7. How would you rate the Symposium overall? | 1 | 2 | 3 | 4 | 5 | 6 |
| 8. How would you rate the Symposium administration staff? | 1 | 2 | 3 | 4 | 5 | 6 |
| 9. How would you rate the meeting facilities? | 1 | 2 | 3 | 4 | 5 | 6 |

10. What did you like best about the Symposium?

11. What did you like least about the Symposium?

12. What additional comments do you have about the symposium?

15. Your Position: _____

16. Please provide citations to any additional research or court connected dispute resolution you believe should be addressed in the post-symposium publications

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