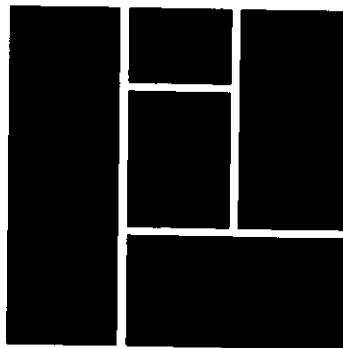
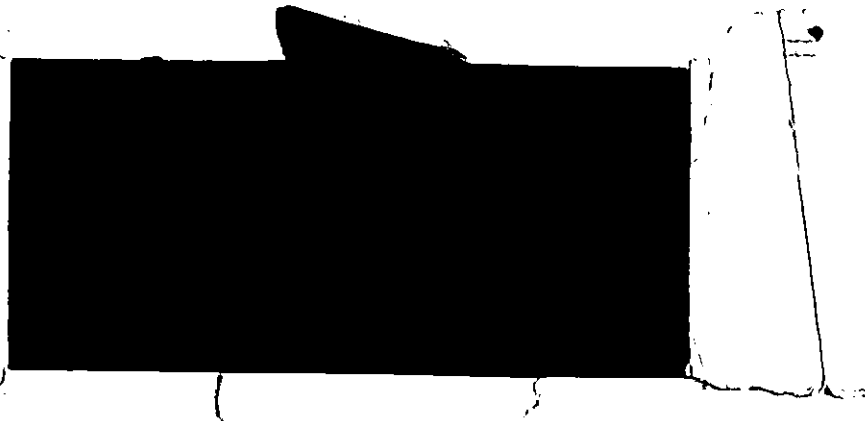


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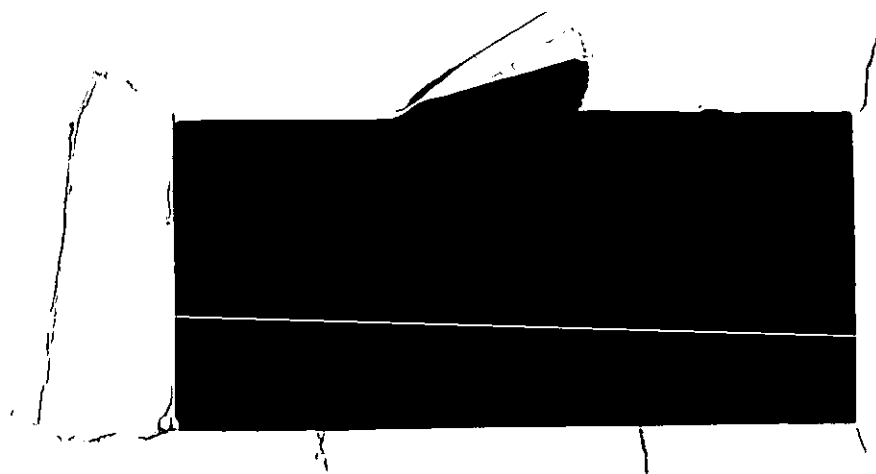


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**HARD CASES, VULNERABLE PEOPLE :
An Analysis of Mediation Programs at
the Multi-Door Courthouse of the
Superior Court of the District of Columbia**

by

**Michael Fix
Philip J. Harter**

recid 9/30/93

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PREFACE

Many people contributed to this report, and we would like to thank some whose help made the report significantly better.

Gladys Kessler and Linda Finkelstein, founders of the Multi-Door Courthouse in Washington, provided encouragement to undertake the evaluation and then insights and orientation once we did. Chief Judge Fred Ugast's support was essential in securing the cooperation of everyone at the court, and his efforts were responsible for the extraordinary response we obtained from litigants and lawyers alike. Melinda Ostermeyer, Director of the Multi-Door Dispute Resolution Division of the Superior Court, showed us the practical operation of the programs and supplied an enormous amount of data; she was the gateway into the rest of the court and provided reliable guidance and functional introductions.

Jessica Pearson and Austin Sarat made helpful comments on our research design, illuminating questions we had not seen and pointing out other shortcomings of the plan. We owe great thanks to Margaret Shaw for wading through a too rough draft. Her comments on organization, style, and additional areas to probe were hugely helpful.

As for getting the work done, John Lingelbach developed the descriptions of the various doors and the theoretical setting for the analysis. Lee Bawden shared his experience and insights into sampling and the design of questionnaires; his inquiries on early versions of the questionnaires gently pointed out where more work was needed and usually how to do it. Rob Dymowski translated a pile of numbers into intelligible tables and statistical analyses. Without his abilities with the computer, we would have been left with a pile of filled in questionnaires but no way to access the trends. Mark Kadish and Liz Wharton both helped develop the ideas that led to the proposal and the plan by which it would be executed. Cristy Krull and her colleagues at TeleCall Associates gathered the data through hours on the telephone with the respondents while implementing our questionnaires. Karen Ault

transformed drafts of varying degrees of bad typing and worse handwriting into a finished product.

Finally, we owe special thanks to Daina Farthing-Capowich, our project officer at the State Justice Institute. Her patience, understanding, and good humor are acknowledged with gratitude.

This edition of the report has been revised slightly since it was first published to take into account comments pointing out minor factual errors.

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WHY THIS STUDY?

Programs in which alternative means of dispute resolution are routinely employed as a substitute for traditional litigation are proliferating across the country. Indeed, the Bush Administration recently endorsed such an approach.¹ The very first recommendation of the "Civil Justice Reform" program of Vice President Quayle's Council on Competitiveness is to —

[c]reate a "multi-door courthouse" to permit the parties to choose between several different methods for resolving their dispute. Before the contest would be set for trial, the parties would attend a mandatory conference to identify the areas in controversy. At this conference the parties would be given the opportunity to resolve their claims through a variety of alternative dispute resolution mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial.²

The expansion of these programs raises basic questions about what Alternative Dispute Resolution (ADR) techniques work, why, and the extent to which successes are replicable. Further, the sometimes uncritical adoption of ADR raises concerns over justice, efficiency, and the impact of ADR on traditional court processes. As Robert Raven, former president of the American Bar Association and currently the chair of its Standing Committee on Dispute Resolution, warned —

We must be careful in our rush to embrace ADR not to create a two-tiered system of justice. Our courts of law, with their elaborate procedures and safeguards built over centuries, should not become the exclusive province of only those who can afford them. The type of dispute — and not the parties' income or the amount in controversy — should determine whether ADR procedures apply. ADR can and must hold out its promise to rich and poor, corporate and individual, big case and small alike, to flourish in a nation dedicated to the principle of equal justice.³

1. U.S. Department of Justice, Civil Justice Reform — Implementation of Executive Order 12778 (1991) at 27.

2. *Id.* at 35.

3. Raven, Alternative Dispute Resolution: Expanding Opportunities, Speech of November 6, 1987.

Raven continues,

We must develop data about ADR. Have dispute resolution programs improved the quality of justice? Have they reduced the volume of litigation in courts and regulatory agencies? Have they led to greater satisfaction for the disputing parties than adversarial modes of conflict resolution?⁴

Although there is a growing body of research addressing these issues, empirical data is still quite limited and has found mixed results. This study was designed to further the analysis of the effects of the ADR programs on the courts, on the litigants, and on important societal values to the end of informing important decisions currently being made as to how we resolve our differences.

The evaluation was conducted with the cooperation of the Superior Court of the District of Columbia which administers the Multi-Door Courthouse ("MDCH"). The MDCH provides the citizens of the District of Columbia with an opportunity to make informed choices as to how they will reconcile their differences. It affords a mechanism for systematically screening and referring disputes that have not yet resulted in litigation to forums both within and outside of the court system. At the same time, the Multi-Door Courthouse embodies a range of dispute resolution alternatives for cases that have already been filed. These include the mediation of small claims, domestic relations, and civil matters. Other ADR techniques include arbitration, summary jury trials, and procedures designed to expedite the traditional litigation process. "Settlement Week" relies on a form of mediation to resolve cases that have remained on the court's calendar for a long period. The MDCH of the District of Columbia was one of the very first comprehensive court-annexed ADR programs in the country, and hence it affords the deepest experience.

We begin by reviewing the ideas behind the creation of multi-door courthouses and other

4. Id.

forms of court-annexed⁵ dispute resolution techniques. We then explore the issues surrounding the use of ADR, highlighting some of the major themes in the literature on ADR and laying out a framework for our analysis. That framework distinguishes the effects of mediation on —

- **Courts.** Does mediation reduce the caseload and cost of processing cases so that courts can devote their resources to the cases that most need them?
- **Litigants.** Are the parties themselves satisfied with the process and the outcome of mediation as compared to traditional litigation? Does mediation help the parties deal with each other in the future or to craft more workable solutions to their problems? Is it cheaper and faster?⁶
- **Society.** Does the use of ADR result in "second class justice" or does it actually increase the access to justice?

The next section of the report provides a summary or overview of the findings. The heart of the study is contained in the sections that follow. They analyze the mediation programs for Domestic Relations and Civil II cases (typical civil cases without special complexity) comparing cases that were mediated with similar ones that were not.

We hope this evaluation will help provide some insight into the use of ADR, and specifically, mediation as an adjunct of the courts. For some cases, we found it to be a highly desirable process delivering on all of its promises. For others, however, it delivered on

5. The term "court-annexed" dispute resolution programs means that the program is somehow affiliated directly with a court. It may be that a particular type of case is referred to the dispute resolution program before it is permitted to proceed to trial, or the ADR process may be available as an *option* that a party can choose to use voluntarily. As will become clear, some programs are hybrids in which some parties choose a particular process while other parties are ordered into using it.

6. The Vice President's Council on Competitiveness certainly thought so:

Alternative Dispute Resolution (ADR) seeks to resolve controversies with less cost and burden imposed upon the parties. Remedies fashioned through ADR may be more flexible than the restricted relief available through the courts. Because ADR frequently relies upon consensus, its use may foster continuing relationships.

Civil Justice Reform, *supra* note 1 at 35.

virtually none. Unfortunately, one cannot predict with much specificity which cases are likely to reach those outcomes, throwing into doubt many of the conventional assumptions about when mediation is assured to work. Until we know more, a multi-door courthouse should be constructed with the doors opening off a central hallway, allowing the parties to select from a number of forums to resolve their disputes. Such a courthouse should not simply serve as a vestibule through which all parties must pass in order to get to the door they really want.

WHAT THE STUDY CONCLUDED: A BRIEF SUMMARY OF THE FINDINGS

The Domestic Relations and Civil II mediation programs of Washington's Multi-Door Courthouse provide an opportunity to see the workings of mediation in very different settings within that court. To understand the operation and success of these programs, we conducted a lengthy telephone survey of litigants and attorneys who brought cases within the Domestic Relations and Civil II mediation programs of the Multi-Door Courthouse. We also interviewed litigants and attorneys who brought Domestic Relations and Civil II disputes to the Superior Court during the same period but who did *not* use the services of a mediator. These telephone surveys were supplemented by interviews with court staff and mediators, as well as an extensive review of court documents. When taken together, the data provide a reliable portrait of the use of mediation in the Superior Court during 1987-89. We cannot say, though, whether the results provide an accurate picture of the program as it operates today, as it has changed substantially over the years. Further, important differences in the types of cases that were mediated in the Multi-Door as compared to those contested outside it,⁷ make it difficult to evaluate the use of mediation *per se* to resolve disputes or to extrapolate from our results to predict outcomes in court-annexed mediation programs in other cities. That said, however, we believe the findings as set out below call into question a good deal of the conventional wisdom about the use of mediation in urban court settings.

7. For example, even though we sought to examine *all* cases entering Domestic Relations mediation during the period and a random sample of non-mediated cases involving similar issues, the profiles of the two sets of cases were quite different. Less than half of the non-mediated cases involved children but more than 90% of those mediated did. Moreover, significantly more of the parties in mediation were unmarried parents. In short, the mediated cases seemed to be more difficult — more complex, more bitter, and more protracted.

IMPACT ON THE COURT

The litigants reported that mediation was a powerful means of settling cases short of trial. In Domestic Relations, the percentage of parties in mediation who reported that a decision of the court was required to resolve the matter is less than half that reported by the parties who did not mediate. In Civil II, the parties reported that 7% fewer cases had to go to trial when the matter was mediated. The responses of the attorneys in both Domestic Relations and Civil II, however, indicated a narrower difference in trial rates between cases that are mediated and those that are not. While still helpful in dealing with a backlog, the reduction of 2-3% that they reported is less dramatic.

In both Domestic Relations and in Civil II, mediation was typically used successfully to resolve emotionally difficult cases — those where the parties were quite bitter and viewed the issues as important — that did not involve complex legal issues. These cases can consume disproportionately large court resources to resolve.

In Civil II, the parties were more likely to abide by a decision reached in mediation. But, in both Domestic Relations and in Civil II, mediated outcomes were *less* durable: the parties were more likely to have subsequent disputes over related issues.

Between 5-9% of respondents in both Domestic Relations and Civil II indicated that their cases would either not have been brought or would have been dropped if mediation were not available. While in absolute terms that is a very small number because of the few cases that were actually mediated during the study period, it could mean a rather substantial *increase* in the court's case load if mediation were used more broadly.

All in all, mediation did not appear to have had a significant effect on reducing the court's case load. It did, however, remove bitter, emotionally complex cases from the court.

IMPACT ON THE DISPUTANTS

A far higher percentage of the cases in Domestic Relations that were mediated involved children than the cases that were not. Probably as a result, the mediated cases tended to be quite bitter, and the parties believed the issues were very important to them. Perhaps, therefore, it is not entirely surprising that the parties to mediated cases on the whole were unhappy with the *outcome*: the issues were of seminal importance in their lives, and mediation could only solve a small part of the difficulty. As a result, the parties in mediation were less satisfied with the outcome than those who did not mediate. If only cases involving children are compared, the differences narrow but do not disappear. The distinction largely vanishes, however, when the emotional involvement is normalized — for disputes that are very bitter and involve important issues, the parties' satisfaction was about the same whether or not the case is mediated. Non-mediating parties in Domestic Relations were also more satisfied with the *process* used to resolve the matter. Mediation generated the highest comparative satisfaction level when the parties were bitter, believed the issues to be very important, and did not view their bargaining power as being weak.

In Civil II, the parties were more satisfied with both the outcome and the process of mediation than unassisted settlement negotiations. But, if the case did not settle and had to go to trial, the parties were less satisfied mediating than not. As in Domestic Relations, mediation was used for cases that were particularly bitter, involved important issues, but did not raise complex legal questions. The parties in mediation appeared to feel wronged — that they were done an injustice. Unlike Domestic Relations, plaintiffs in Civil II mediation did not have as strong an advantage when it came to bargaining position as those who did not mediate; generally, the parties' bargaining power was more balanced in mediation.

In both Domestic Relations and in Civil II, those usually thought to be disenfranchised

appeared to be more satisfied with mediation. Thus, in Domestic Relations, women are more satisfied than men, blacks than whites, those appearing pro se versus those who are represented, and those with lower incomes as opposed to those who are wealthier. In Civil II, women, parties with fewer financial resources, those with less bargaining power, those who are more risk averse, and individuals rather than organizations preferred mediation. Whites also preferred mediation. Black litigants were relatively neutral as between processes, but their lawyers clearly preferred mediation. These parties — who might otherwise be at a comparative disadvantage — were the equal of their adversary during mediation, and they were telling their story to an officer of the court. That appeared to be important.

In Civil II, more sophisticated parties — in terms of education, wealth, occupation, and experience in disputing — did not choose to mediate when they were plaintiffs. Rather, plaintiffs in mediation were more likely to be women, less well off financially, less sophisticated in business affairs, and more risk averse; they also had less bargaining power than plaintiffs who did not mediate.

Defendants in Civil II preferred litigation. They appeared to rely on the court and the law to define and protect their rights. In Civil II, the parties were more likely to feel that "justice was done" and that "the full story was told" in mediation. Further, the parties in mediation were less likely to accuse the other of acting in bad faith.

The Domestic Relations results with regard to these latter measures are more complex. The parties in mediation were more likely to think the other side acted in bad faith and were less likely to think justice was done. Again, that probably reflects the nature of the cases.

In both Domestic Relations and Civil II, the reports indicated that mediation was more expensive than not mediating. In Domestic Relations that may be explained by the more complex and contentious nature of the cases. In Civil II, however, mediation is believed to

settle the cases faster than not mediating, so someone was saving resources even if it is not the clients.

IMPACT ON SOCIETY

In both Domestic Relations and Civil II, the parties valued the principles of law and what a court would decide as important factors in determining what they would settle for. Indeed, parties viewed them as *more* important than do those who do not mediate. The lawyers looked to what a court would decide or what would occur in unassisted negotiations to frame their settlement strategies. The parties therefore did indeed bargain in the shadow of the law, and society's norms were incorporated at least as much as in unassisted settlement negotiations. In short, although the parties chose to resolve their case outside the court itself and were, therefore, free to craft any agreement that addressed their needs, in fact they continued to apply to prevailing legal norms. That said, however, the lawyers felt that mediation was qualitatively different than unassisted settlement negotiations.

THE ONE SENTENCE SUMMATION

Overall, mediation appeared to improve access to justice by those traditionally thought to be vulnerable. At least in Civil II, it also increased the satisfaction level for those cases that settled, but not for those that eventually go to trial. But, it appeared to have little effect on the court's caseload. Thus, if the mediators' time were taken into account as well as the staff required to implement the program, mediation likely increased the total resources expended by the court per case.

THE ORIGIN, HISTORY, AND CURRENT FORM OF THE DISTRICT OF COLUMBIA'S MULTI-DOOR COURTHOUSE

PROFESSOR SANDER'S VISION

The "Multi-Door Court House" was first envisioned by Professor Frank E. A. Sander of Harvard University, who articulated the concept during an address he delivered in 1976 at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (more commonly known as the Pound Conference).⁸

Sander pointed out that adjudication by the courts is just one dispute resolution process among many: a range of alternative dispute resolution processes exist. He argued that we should reevaluate our virtually exclusive reliance on adjudication by the courts and experiment in some circumstances with employing alternative processes such as mediation and arbitration. Sander's primary interest was in ways of reducing the court system's near-overwhelming caseload. He saw the increased use, even the institutionalization, of alternative dispute resolution as a promising approach to the problem.

Sander speculated that a number of benefits might be derived from the use of ADR. He pointed to cost, speed, and credibility as areas in which ADR might prove more effective than an exclusive reliance on the courts, noting some of the positive characteristics of particular ADR processes. For instance, with respect to mediation he argued that, unlike adjudication, there is no coercive third party, nor are its outcomes predominantly "win/lose." Furthermore, mediation broadens the focus of the process from just the legal issues in dispute to the entire

8. See, Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).

relationship of the disputants.⁹

Sander did, however, sound one cautionary note: institutionalizing ADR processes might increase the number of disputes handled by the legal system. He noted that little was known about the extent to which people simply avoid "processing" disputes, and he questioned whether making additional dispute resolution mechanisms available might bring some of these hidden disputes into the system. In his words, "[t]he important thing to note is that there is a clear trade-off: the price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed."¹⁰

Sander went on to consider criteria that might determine which dispute resolution process would be most appropriate for a given dispute, identifying the nature of the dispute, the relationship of the disputants, and the amount at stake. For instance, he conceptualized that negotiation and mediation may well make the most sense in situations where the disputants are in a long-term relationship. He postulated that a solution reached by disputants on their own, or with the non-coercive aid of a mediator, "is likely to be far more acceptable (and hence durable)." Furthermore, he stated that in these instances negotiation or mediation has the advantage of facilitating "a probing of conflicts in the underlying relationship, rather than dealing with each surface symptom as an isolated event."¹¹

Sander began to make the form of his "Multi-Door Court House" vision clear towards the end of his address when he called for the use of "a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combination of processes)" He envisioned —

9. Id. at 115 and 120.

10. Id. at 113-114.

11. Id. at 120.

not simply a court house but a Dispute Resolution Center where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7 ¹²

Sander concluded his address with a call for more empirical information. He was fully aware — and spent some time stating — that little data existed with which to substantiate his or others' hypotheses concerning the efficacy of using ADR as an alternative to litigation. In particular, he pointed to the need for information on the comparative efficacy and cost of various dispute resolution processes and on how to determine whether litigation or an ADR process is appropriate for a given dispute. He also called for information on the roles played by various participants, particularly lawyers, in each dispute resolution process.¹³

THE "MULTI-DOOR COURTHOUSE": FROM VISION TO REALITY

In 1981, the Special Committee on Dispute Resolution of the American Bar Association began to consider strategies for implementing Professor Sander's "Multi-Door" vision. Ultimately, the Committee proposed a three stage development process.¹⁴ The first phase would establish "intake centers" in three jurisdictions. The Committee recognized that while

12. Id. at 130-131.

13. Id. at 133.

14. See, Roehl, *The Multi-Door Courthouse Project of the American Bar Association: Phase I: Intake and Referral Assessment*, Institute for Social Analysis, (January 1986).

numerous alternative dispute resolution programs are already in communities, no mechanism existed for assisting a citizen in finding the program that could most effectively address the particular dispute. Hence, the idea was to create a referral mechanism through which citizens could be systematically referred to the appropriate dispute resolution program. These "intake centers" would provide information and assistance necessary for people to make informed choices regarding the dispute resolution programs already available in their community. A citizen's dispute would be diagnosed at an intake center by a trained "intake counselor," and the person would then be referred to — and encouraged to take advantage of — the appropriate dispute resolution forum.

The second phase proposed by the Committee would build on information obtained during the first. It called for establishing new types of dispute resolution programs and improving existing ones to address the range of disputes being processed by the intake centers. A third phase would involve extensive evaluation of the progress achieved during the earlier two phases and an effort to establish programs in other jurisdictions. In 1983, the Committee chose three cities in which to establish "Multi-Door" projects: Houston, Texas; Tulsa, Oklahoma; and the District of Columbia.

ORIGINS OF THE "MULTI-DOOR DISPUTE RESOLUTION DIVISION" OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

The Superior Court of the District of Columbia submitted a proposal in 1982 for establishing a "multi-door project" to the ABA's Special Committee on Dispute Resolution. There had been support for such an effort for some time within the court. The late H. Carl Moultrie I, who was then Chief Judge of the court, had been particularly interested in the idea.¹⁵ Judge Gladys Kessler, then presiding judge of the Family Division, and Linda

15. See, Kessler and Finkelstein, The Evaluation of a Multi-Door Courthouse, 37 Cath. U. L. Rev. 577 (1988).

Finkelstein, then Director of the Court's Division of Research, Evaluation and Projects, supported the initiative and were instrumental in getting the program off the ground. Ms. Finkelstein went on to direct the program for the first few years, during its experimental stage.

Unlike the programs in Houston and Tulsa, the DC program was intended from the outset to be court-annexed, housed under the same roof and a part of the court's overall services. The proposal called first for the establishment of an intake and referral center and mediation programs in small claims and domestic relations.¹⁶ While a broader range of programs was envisioned in the long-term, the thought was to begin with ADR programs for the high volume areas of the court that involved less complex disputes. Evidence of ADR's benefits — particularly mediation — was strongest in these areas. Once these programs were established and accepted as successful, programs in other areas could be initiated.¹⁷ On the basis of the court's proposal, Washington was chosen by the ABA Committee as one of the three cities to host a "Multi-Door" project.

FOUNDER'S OBJECTIVES: A CHOICE OF PROCESSES

The founders of the DC Multi-Door program envisioned the project as a way of expanding and improving the court's ability to administer justice.¹⁸ They had a number of interrelated objectives in mind — some of which have materialized, others of which arguably have not. Whereas Sander had emphasized the case management objectives, the DC Multi-Door program's founders placed higher emphasis on the advantages to citizens. The founders believed the Multi-Door program would improve the situation of citizens with disputes in a

16. An Implementation Plan for the Multi-Door Dispute Resolution Program: A Working Paper, unpublished (1984).

17. Interview with Joanne Pozzo, Director of Policy and Research, D.C. Superior Court, June 9, 1989.

18. The discussion below is based on the writings of two of the program's founders. See Kessler and Finkelstein, *supra* note 15 at 577-578.

number of ways. At bottom was the goal of providing citizens with greater access to justice by offering them a variety of processes for resolving their disputes. This might make justice available to those for whom litigation had always been too expensive, complex, or intimidating. Beyond this, the founders believed that citizens would value non-adversarial settings, with the consequent reduction in acrimony and the opportunity to construct their own agreements. They also expected that citizens would gain from early case assessment and accelerated case processing.

The potential benefits to the court and taxpayers were also seen as reasons to establish the Multi-Door program. The founders expected that, as disputes otherwise slated for court were taken to mediation or arbitration, the consequent reduction in the court's caseload would free it up to provide higher quality attention to the rest of its docket.

To ensure that the Multi-Door program would meet both these objectives, its designers sought the appropriate blend of court and outside involvement in shaping and administering the program. The MDCH was to be administered by the court and housed at the courthouse. At the same time, the support and involvement of community groups, particularly the bar, was considered essential, as was the active assistance of outside ADR experts in designing the program and training staff and volunteers.

Above all, the Multi-Door program "was designed to be as creative and fluid as the concept upon which it was based. From the outset, the program was intended to address the needs of the citizens of Washington, DC, changing whenever new dispute resolution needs were identified."¹⁹

19. Id. at 579-580.

DEVELOPMENT OF MDCH

The Multi-Door Dispute Resolution Program began as a pilot project administered by the Court's Division of Research, Evaluation, and Special Projects. The Intake Center, Small Claims Mediation, and Domestic Relations Mediation programs were established at the outset. Later on, the Accelerated Resolution of Civil Disputes, Settlement Week, and Civil I Mediation programs were phased in. Eventually, with the early programs gaining acceptance and fulfilling their promise, and the additional programs being established, the Multi-Door project was made a full operating division of the court in February, 1989. The Multi-Door Dispute Resolution Division currently has an 18 person staff and provides the following services.²⁰

Intake Centers. The Multi-Door Program began offering services with the opening of the Intake Center in January, 1985. The Center maintains information on the dispute resolution services in the community. When someone visits the center, a trained intake specialist provides assistance in identifying and evaluating the various available dispute resolution services. On the basis of information conveyed by the citizen concerning the characteristics of the dispute, the intake specialist refers him or her to the appropriate dispute resolution service. The referral may be to a service available in the community or to one of the Multi-Door programs. Alternatively, litigation may be advised. In 1991, intake specialists processed approximately 1,200 requests for assistance.²¹

Small Claims Mediation. In April, 1985, the second of the three original Multi-Door programs began operation. The Small Claims Mediation Program provides mediation services for small claims suits — civil suits involving up to \$2,000 in damages. The program has two

20. Alternative Dispute Resolution Programs, Multi-Door Dispute Resolution Division of the D.C. Superior Court (1992).

21. *Id.* at 7.

components: mediation of cases on day of trial and mediation of cases referred by the Intake Center.²² In either case, when mediation is requested by the parties to a dispute, a trained mediator is made available at no cost to the disputants. The mediator helps the parties find a mutually acceptable solution; no agreement is reached until each party agrees to all of the terms. Nearly 15,000 small claims cases were mediated from 1985 through 1991. The program mediates approximately 2,300 cases annually, with approximately 50% being resolved.²³

Domestic Relations Mediation. The third of the three original Multi-Door programs, the Domestic Relations Mediation Program, began offering services in November, 1985. Mediation is available for cases involving child custody, support or visitation, spousal support, and property division. Mediation is not available if: one party has been seriously injured by the other; there is a history of violence; one party has brandished a weapon against the other; or there is a severe disparity in bargaining power.²⁴ Representation by an attorney is not required, but it is recommended that each party have an attorney review any agreement that is reached. In 1991, 160 cases completed mediation and, of those, 62% reached agreement.²⁵

Civil Disputes Resolution Program. In June, 1986, eighteen months after the Intake Center opened its doors, a program was established to encourage the use of ADR for the court's civil cases. It focussed on the court's most complex cases, referred to as Civil I cases. Civil I cases are not defined by a monetary limit, but by complexity: they are the cases that judges believe will take the longest to try. (An example would be a case involving the dissolution of a law firm where there are charges of malpractice and breach of contract claims.)²⁶ A year

22. Implementation Plan, supra note 16.

23. ADR Programs, supra note 20 at 7-8.

24. Guidelines for Domestic Relations and Intrafamily Mediation (May 10, 1985).

25. ADR Programs, supra note 20 at 15.

26. Interview with Linda Finkelstein, May 12, 1992.

later, in June, 1987, the court had its first "Settlement Week". For a week the court did not hear civil cases. Instead, more than seven hundred of the court's oldest pending cases were mediated, with judges and local attorneys serving as the mediators. The Civil II Mediation Program was established in October, 1987. Civil II cases generally involve fewer parties and involve less complex issues than Civil I cases. The bulk are breach of contract, personal injury, or negligence cases. The Civil Disputes Resolution Program currently offers mediation, arbitration, and neutral case evaluation in which a neutral third party provides the parties with feedback concerning the likely outcome of the trial and suggestions concerning a fair settlement.²⁷

The Setting for this Study. Mediation has been employed in far more cases in the MDCH than other ADR techniques. Thus, the mediation programs undoubtedly have the greatest impact on both the parties and on the court. Moreover, Washington's MDCH may well offer the most sophisticated and diverse use of mediation in a court affiliated system; it was a pioneer in emphasizing mediation in a court-annexed program.

It would be ideal to analyze all of MDCH's mediation programs. Unfortunately, however, that was beyond the resources available to this project. The two programs that are analyzed here — Domestic Relations and Civil II — provide a solid picture of the use of mediation by a large, complex, urban court. Together they permit us to examine most of the critical issues on the use of mediation raised by the literature.

27. ADR Programs, *supra* note 20 at 9-12.

ISSUES SURROUNDING COURT-ANNEXED ADR PROGRAMS

INTRODUCTION

Does ADR make sense as an alternative or supplement to litigation? If so, when and how can it best be best integrated and implemented? For the most part, commentators have focussed on raising and refining questions, arguing on theoretical and common sense grounds. Empirical data is still limited, with only a modest number of studies completed. Not surprisingly, the issues being debated are wide ranging, but for the purposes of providing a framework for this overview, three broad categories can be identified: The costs and benefits of ADR for (1) the courts, (2) the disputants, and (3) society.

The first group of issues, regarding impacts on the court, primarily involve questions of cost and efficiency, with implications for the quality of justice. At issue is whether a court-annexed ADR program can help ease over-crowded dockets, thereby helping to improve the quality of judicial decision-making for a court's remaining cases. The second set of issues, concerning the disputants who use the programs, focusses on questions of personal satisfaction, asking whether the disputants are pleased with the process and the outcome. It also includes issues concerning the long-term effects on parties' relationships, their problem-solving and communication skills, and the likelihood of their relitigating the same or related claims. Issues such as time and cost to the disputants are also debated. The third category of issues bearing on societal costs and benefits includes matters such as whether the amount and quality of justice in our society is increased through court-annexed ADR programs or whether such programs lead to "second-class" justice.

IMPACTS ON THE COURTS: REDUCTION IN CASELOAD AND COSTS

The original impetus for establishing court-annexed ADR programs was the pressing need to address the increases in caseloads being experienced by the nation's courts. ADR was seen

as a strategy for drawing away and successfully resolving some types of cases. While the impact on court administration is no longer the primary focus of the debate over implementation of court-annexed ADR programs, it remains the driving force behind their continuation and expansion.²⁸

The fundamental issue here is whether court-annexed ADR programs are a cost-effective approach to reducing court dockets. That is to say, can a court's resources be conserved by diverting some of its cases from trials to ADR, as opposed to investing comparable resources into other forms of case management, such as more judges, magistrates, and courtrooms. The answer depends on numerous variables, including —

- At what stage are cases diverted to the ADR track — how many court resources have already been expended in filing cases, pre-trial conferences, motions, and discovery?
- What is the cost to the court of the ADR program compared to its savings in litigation-related expenses?
- What is the success rate of the ADR program? How many of its cases are not fully resolved and require subsequent judicial resources?
- Of those cases successfully resolved in the ADR program, how many — had they not been in the program — would have gone to trial? How many would have settled or have been dismissed prior to trial?
- How many new disputes are drawn into the court system (inclusive of the ADR program) as a result of the ADR program?

Early proponents did not have answers to these questions: they simply postulated favorable answers. And, indeed, subsequent studies have been unable to provide definitive answers regarding the impact on the courts due to the difficulties in determining values for the numerous relevant variables described above. But, those findings that do exist indicate that the impact is rarely dramatic. Jessica Pearson, for example, conducted a comprehensive review of the early studies of court-annexed ADR programs and concluded that “[d]espite the

28. See, e.g., ADR Program, *supra* note 20 at 3.

expectations of many, mediation and arbitration appear to have negligible effects on civil trial calendars."²⁹ As a result, some commentators have downplayed the impacts on the courts as a primary rationale for court-annexed ADR programs.

Most of the major studies relating to court impact have focussed on court-annexed arbitration programs. For instance, a study was recently conducted on North Carolina's court-ordered arbitration pilot program in which cases involving money damages up to \$15,000 (there are exceptions) are required to go through arbitration. The study, conducted by the Institute of Government at the University of North Carolina at Chapel Hill, did not attempt to quantify the impacts of the program on the courts' overall workloads.³⁰ It did, however, find that "[d]uring the evaluation period, the arbitration program reduced the trial rate by two thirds in *contested cases eligible for the program*."³¹ On the other hand, another of the study's findings raises the question of whether the program could be *increasing* overall costs: "The quantitative analysis strongly suggests that arbitration hearings and awards took the place of out-of-court settlements considerably more often than they took the place of trials." All in all, however, the study concluded that "[b]ecause of the program's substantial reduction in the trial rate, as well as its hastening of disposition, it is reasonable to conclude that it saved court resources."³²

The Institute for Civil Justice conducted a study in 1988 of the New Jersey automobile arbitration program, which required that personal injury cases involving an automobile and damages of up to \$15,000 undergo arbitration.³³ The study was "unable to detect any

29. Pearson, An Evaluation of Alternatives to Court Adjudication, 7 Just. Sys. J. 420, 438 (1982).

30. Clark, Donelly, and Grove, Court-Ordered Arbitration in North Carolina: An Evaluation of Its Effects, Institute of Government, University of North Carolina at Chapel Hill (1989) at 78.

31. *Id.*, emphasis added.

32. *Id.*

33. MacCown et. al., Alternative Adjudication: An Evaluation of the New Jersey Automobile Arbitration Program, Institute for Civil Justice (1988).

statistically significant reduction in trial rates resulting from the introduction of the arbitration program."³⁴ This was due in part to the study's small sample size and to the fact that only a small percentage of automobile-related cases ever make it to trial even without arbitration. The study did find a "dramatic reduction" in the number of cases being settled, however.³⁵ Thus, the conclusion appears to be that overall resources required for disposition of the claim were *increased* as a result of the program.

One of the most recent studies of a court-annexed mediation program was conducted in Minnesota.³⁶ It found that "[t]rial rates did not decline as a result of mediation, and in fact were higher for those cases where mediation was an option."³⁷ It concluded that "mediation . . . should not be regarded as a panacea for problems associated with increased litigation or other increased resource demands on the courts."³⁸

Some commentators have suggested that while mediation programs may not reduce trial rates overall, they may "remove from courts certain types of interpersonal cases that are particularly distressing and time consuming for judges."³⁹

As becomes apparent through even this brief review of the debate, the difficulties in developing hard data on the court-impact issues are substantial. Nonetheless, the number of cases being processed through court-annexed ADR programs is continuing to increase. Meanwhile, the focus of the debate over these programs has shifted for the most part to issues such as disputant satisfaction and the effects of ADR on the access to and quality of justice.

34. Id. at 30.

35. Id. at 34.

36. Kobberrig, Mediation of Civil Cases in Hennepin County: An Evaluation, Office of the State Court Administrator, Minnesota Judicial Center (1991). The study was of the pilot mediation program for large civil cases in Hennepin County (Minneapolis).

37. Id. at 33.

38. Id. at 2.

39. Pearson, *supra* note 29, at 438.

IMPACT ON DISPUTANTS: SATISFACTION, LONG-TERM BENEFITS, AND COST

The analysis of the effects on the disputants themselves breaks down into three distinct issues:

- *Satisfaction*: How satisfied are the parties with the process and outcomes?
- *Communication and Autonomy*: Are the disputants better able to communicate with their putative adversaries and solve their own problems as they arise because of the non-adversarial nature of mediation? Further, does mediation develop a better relationship between the disputants by providing a forum in which the underlying sources of conflict can be more fully addressed than in litigation, where day-to-day problems must be recast into legally cognizant issues?
- *Costs and Efficiency*: Is ADR more efficient? Does it take less time or resources to reach a decision than the use of traditional litigation?

Of these, certainly the most attention has been devoted to the question of satisfaction. Scholars disagree, however, over the weight to be given to this measure of the ADR's "success". Some contend that evaluations of court-annexed ADR programs should focus on more "objective" — if less empirically accessible — issues such as the programs' impact on the costs of dispute resolution both for litigants and/or the courts. Seen in this light, disputant satisfaction is important *only* to the degree that it indicates whether "justice" is being served; considering disputant satisfaction for any other reason seems at best irrelevant and at worst potentially misleading. One scholar argued, in essence, that our civil justice system simply is not in the business of disputant satisfaction, that its role "is not to maximize the ends of private parties . . . but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."⁴⁰

Moreover, commentators have argued that disputants lack the necessary basis for comparison with which to make enlightened judgments regarding their satisfaction:

[D]isputant satisfaction has a dangerously seductive quality as a criterion of

40. Fiss, Against Settlement, 93 Yale L. J. 1073, 1085 (1984).

evaluation. It is easy to measure and seems to have face validity. Reliance on satisfaction may not, however, be objectively justified. Disputants may not be aware of the rights to which they are entitled and may, as a result, not realize what they are giving away in an alternative dispute procedure. In addition, disputants may not have experienced the alternative procedures which might have occurred, so they have no basis for knowing if they could have been more satisfied under a different procedure.⁴¹

Other commentators accept disputant satisfaction as an important measure of the value of court-annexed ADR programs.⁴² They are interested not only in disputants' perceptions of fairness, but in their overall satisfaction as "consumers" of our justice system. This view is based on three beliefs: (1) the system is at least in part in the business of serving the disputing parties; (2) greater disputant satisfaction leads to greater compliance with agreements and less relitigation;⁴³ and, (3) if the disputants are not satisfied, the system will not be used.⁴⁴

Viewed broadly, the issue of satisfaction raises several discrete questions. Regardless of the underlying disagreement as to how disputant satisfaction should be used in evaluating ADR, empirical data regarding disputant satisfaction is generally utilized in evaluating court-annexed ADR programs. In part, this is because empirical data on satisfaction levels is easier to compile than empirical data on the "quality of justice" and the like. A variety of satisfaction-related factors are considered:

- Were the disputants satisfied with the process — both those disputants that perceive themselves as winners and those that perceive themselves as losers?
- Did they believe the process was fair?

41. Tyler, The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possibilities, 66 Den. L. J. 419 (1989) at 432.

42. See, e.g., Lind et. al., The Perception of Justice: Tort Litigants Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences, The Institute for Civil Justice (1989) at 1.

43. See, e.g., Kelly and Gigy, "Measuring Clients' Perceptions and Satisfaction" in Lemmon (Ed.), Establishing Standards for Performance and Evaluation, 19 Med. Q. (Spring, 1988).

44. See, e.g., Adler, et. al., Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program, The Institute for Civil Justice (1983), "Ultimately, the success of court-administered arbitration depends on its ability to satisfy court personnel, attorneys, and litigants." At 60.

- Were they satisfied with the outcome?
- Did they believe the outcome was fair?
- Did the process allow them ample opportunity to present their cases?
- Were they satisfied with their role in the process?
- Did they find the process understandable and not intimidating?

As with issues relating to impacts on the courts, many of the more comprehensive empirical studies regarding disputant satisfaction issues focus on court-annexed arbitration programs. These studies consistently reveal high levels of satisfaction among disputants. These levels are even high among the "losers" in arbitration.⁴⁵

A 1983 study of the court-annexed arbitration program in the Pittsburgh Court of Common Pleas shed light on some of the aspects of ADR that led to user satisfaction. The study revealed that most of the disputants involved in the program found the arbitration process relatively informal and 90% would not have wanted it any more formal.⁴⁶ These disputants felt that it was easier to express themselves when the procedure was more relaxed. *Pro se* disputants tended to find "any pronounced degree of formality intimidating and confusing." Interestingly, 70% of the disputants appreciated the increased privacy that their arbitration hearing provided as compared to a public trial; they indicated no interest in having an open hearing as a way of assuring the fairness of the process.⁴⁷

How well a process "gets at the facts" was found to be the single most important component of disputant satisfaction by the North Carolina study.⁴⁸ A study comparing litigants' views of trial, court-annexed arbitration, and judicial settlement conferences found

45. See, e.g., Clark, et.al., *supra* note 30 at 79.

46. Adler, et al., *supra* note 44.

47. *Id.* at 64.

48. Clark, et al., *supra* note 30 at 55.

a "moderate correlation" between a disputant's sense of control over the process and the level of satisfaction, both with the process and with the outcome, as well as with his or her level of perceived fairness.⁴⁹ On the other hand, no such correlation was found with respect to the degree of participation a process provided,⁵⁰ nor with the comprehensibility of the process.⁵¹

The findings with respect to court-annexed mediation programs are similar. In reviewing the pre-1982 studies of mediation programs, Pearson found high levels of disputant satisfaction: "Looking across program evaluations, we consistently find that individuals who mediate are extremely pleased with the process whether or not they are able to generate agreement. . . . [D]isputants who arbitrate and mediate are also more satisfied with their case outcomes than disputants who litigate."⁵² In the studies Pearson reviewed, anywhere from 66% to 88% of the disputants who had used mediation spoke positively of the experience.⁵³

McEwen and Maiman report a number of interesting findings in their study of court-annexed small claims mediation in Maine.⁵⁴ Their data "identify expected, but generally modest, differences between the processes of mediation and adjudication."⁵⁵ With respect to overall satisfaction, 67% percent of disputants using mediation indicated that they were completely or mostly satisfied, while only 54% so responded for adjudication. The study's findings lend some support to the claim that mediation may be especially well suited for disputants in an ongoing relationship: 80% of these disputants responded that they were

49. Lind, et al., *supra* note 42 at 61.

50. *Id.* at 62.

51. *Id.* at 64.

52. Pearson, *supra* note 29 at 431-432. Pearson points out that the mediation programs reviewed were all voluntary and that the high satisfaction rates must be evaluated in light of this self-selection.

53. *Id.*

54. McEwen and Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Me. L. Rev. 237 (1981).

55. *Id.* at 259.

completely or mostly satisfied.

The study did not make a concerted effort to determine what characteristics of mediation generated the satisfaction, but some of its findings were noteworthy. For instance, 78.6% of mediating disputants reported that they understood “everything that was going on,” as compared to 64.8% of adjudicating disputants.⁵⁶ On a related matter, 81.2% of mediating disputants expressed confidence that their mediator “completely” or “mostly understood [w]hat the dispute was all about” as compared to 71% of adjudicating disputants who expressed such confidence in their judge.⁵⁷

The study generated similar findings regarding perceived fairness. 67% of the disputants using mediation deemed their settlement to be fair as compared to 59% of disputants employing adjudication.⁵⁸ And, “it was almost twice as likely in mediation as in adjudication that *both* parties would view the outcome as fair or unfair.”⁵⁹ McEwen and Maiman raise an important question here: why did roughly one-third of the disputants using mediation — a voluntary process — agree to settlements they felt were unfair? By way of a tentative explanation, the authors point out that the “unfair” responses often came out of mediations that took longer than average to complete. This, they suggest, may indicate a tendency in some instances to agree to a settlement “just to get it over with.”⁶⁰

IMPACT ON SOCIETY: ACCESS TO AND QUALITY OF JUSTICE

The most vigorous debate over court-annexed ADR programs concerns issues relating to society's interest in the dispensation of justice. After all, few would deny that this is the

56. *Id.* at 256.

57. *Id.*

58. *Id.* at 257.

59. *Id.* at 258; emphasis added.

60. *Id.* at 260.

primary role of the legal system in our society, nor that any alternative to the traditional system should dispense justice at least as well. Consequently, the quality of the justice afforded by court-annexed ADR programs — and any shifts in the accessibility of justice that they provide — are critical to any evaluation of these programs. This is especially true given that many observers fear that court-annexed ADR programs are sometimes administered with an eye towards managing a court's docket with insufficient concern for the resulting quality of the justice. The pejorative term for this concern is that ADR results in "second class justice."

The contrary argument, however, is that this view represents an idealized vision of the justness of the courts. In reality, however, courts are beyond the financial reach of most, their processes are incomprehensible and defeating to any but the most experienced litigants, and their results are often random. The argument of ADR's proponents, therefore, is that ADR *increases* the level of, and access to, justice for most people.

Bringing the debate over justice down to earth and translating it into empirically measurable terms creates substantial difficulties. In theory, the "justness" of court-annexed ADR could be measured against the higher principles of justice and morality by which we judge the existing legal system. The problem, of course, is that little agreement exists concerning the specifics of these principles — certainly not enough to provide a sufficiently precise measure for an empirical study. Consequently, efforts to evaluate the justness of court-annexed ADR programs using empirical data typically use existing *legal* norms as their measures. These ADR programs are, thus, evaluated on the basis of the extent to which they replicate the procedural safeguards and substantive outcomes of the existing legal system.

Issues that arise concerning the dispensation of justice by court-annexed ADR programs include:

- Is some group or class of disputants, such as those with less means, systematically and unjustly funnelled into ADR?
- Can ADR fully protect the rights of disputants with less bargaining power?

- Do the agreements reached through ADR sometimes exceed legal norms, and, if so, what is the effect?
- Does ADR tend to generate compromise agreements that are less just?
- Do these programs increase access for citizens to the legal system?

As indicated, there are two distinct concerns regarding coercion and unequal bargaining power. The first is an "equal protection" concern: do court-annexed ADR programs amount to second class justice for disputants — especially those channeled into it by judges and court administrators? The second is a "due process" concern: do sufficient procedural safeguards exist to prevent parties with less bargaining power from being coerced into agreeing to unjust outcomes?

With respect to both issues, most scholars agree that the appropriate comparison is not to a trial and decision by the court, but rather to out-of-court settlements. After all, fewer than 10% of the cases filed with the court are resolved through a decision by the court. In many instances, cases settled through court-annexed ADR are likely to be ones that otherwise would have settled unassisted.

The main "outcome" issues are whether ADR agreements fail to conform to legal norms and whether they reflect unjust compromises. While there is broad agreement that the range of possible outcomes is much larger with ADR than in traditional litigation, there is less agreement whether this a liberating or dangerous quality of ADR. Some commentators argue that increased flexibility allows the parties to address important underlying issues that a court simply is not equipped to address. They argue that it allows the parties to be creative in developing win/win outcomes not likely to be found in judicial decisions, thereby providing a richer justice.⁶¹ Others see this latitude as making ADR susceptible to abuse by parties in powerful bargaining positions, or by a "system" that is overloaded and focussing predominantly

61. Menkel Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA Law Rev. 754 (1984).

on expediency.

Some commentators argue that this concern about the latitude provided in ADR processes is overblown; that both court-annexed ADR and unassisted settlement are likely to produce outcomes that comply with our legal norms. As Mnoonkin and Kornhauser point out in their article on divorce and dispute resolution, disputants do not bargain "in a vacuum; they bargain in the shadow of the law."⁶² This theory holds that as long as each party has recourse to the courts, we can expect that any agreement they reach will be at least as acceptable to each party as the outcome of a trial.⁶³ The protections and boundaries inherent in our legal norms and enforced by the courts will therefore extend indirectly to parties in ADR.

Given the significant implications of this "shadow of the law" theory, one of the most important functions a study can serve is to test its validity. Little empirical work has been done to date in this area, however, in large part because of the difficulties inherent in the task. Many studies consider disputant satisfaction and leave it at that. One notable exception is the McEwen and Maiman study of Maine's small claims mediation. They compared the agreements reached through mediation with decisions of the court and found that parties to mediation tended not to take advantage of any increased latitude in structuring win/win agreements — very few of the agreements involved anything other than payments by one party to the other.⁶⁴ Nor did the agreements exceed the legal norms. On the other hand, they found that the "split the difference image of mediation" was "somewhat overdrawn." While they found that a plaintiff was more likely to win something in mediation, in "only one-fifth

62. Mnoonkin and Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979).

63. This assumes, of course, that each party has recourse to the courts. Thus, the extent to which obtaining a judicial decision imposes resource demands on parties must be factored into what a party would be willing to settle for. That is, the expected result from trial must be discounted not only by the inherent uncertainties of the outcome but also by the cost of achieving it.

64. McEwen and Maiman, *supra* note 54 at 254.

of the mediated settlements did the amount awarded represent between 45% and 55% of the original claim."⁶⁵

65. Id.

KEY TO THE TABLES — WHAT THE ABBREVIATIONS MEAN

To gain an insight into the effects of mediation or the effect different characteristics of the respondents had on the phenomenon under observation, it was necessary to identify whether the respondents were plaintiffs or defendants, whether their cases were or were not mediated, and whether the person responding was a party or the attorney for a party. To get all that information into the relatively small space of the cells in a table, some abbreviations were necessary. Unfortunately, the quest for conciseness led directly into either ambiguity or confusion. Thus, we need to make clear at the outset what the tables mean. The following abbreviations are used in the tables throughout the remainder of this report to differentiate among the respective respondents:

DMLP
DMAP
DMLD
DMAD
DNMLP
DNMAP
DNMLD
DNMAD

CMLP
CMAP
CMLD
CMAD
CNMLP
CNMAP
CNMLD
CNMAD

The first letter indicates whether the person appeared in a "Domestic Relations" case (a "D") or in a Civil II case (a "C"). The "M" or "NM" indicates whether the case entered mediation ("M") or not ("NM"). The "L" or "A" indicates whether the person responding was a party, or litigant (the "Ls"), or the attorney (the "As") for a party. The final letter indicates whether the person was a plaintiff (a "P") or a defendant (a "D"). Hence a respondent labelled "CNMAP" is the attorney ("A") for the plaintiff ("P") in a non-mediated ("NM") Civil II ("C") case.

A number of questions asked the respondents to rank their opinion on a scale of 1 to 5. For example, they were asked how important the issues were to them, with a response of "1"

indicating that the issues were not important and a response of "5" indicating the issues were very important. Sometimes the full gradation from 1 to 5 is reflected in the tables below. But, often the extremes are aggregated for ease of presentation since it is the general reaction that is sought. For example, we might report a response to the question about the importance of the issues as "Not Important," "Medium," and "Important". The first would reflect answers of 1 and 2; the Medium would reflect a "3"; and, "Important" would include answers 4 and 5. This pattern will be used throughout unless otherwise indicated.

Unless otherwise stated, all tables are expressed in terms of percentages. That was done to put the responses in a common reference since there were a different number of respondents for each row in each table. We emphasize that the percentages are across rows, and not within columns. Thus, for example, in the table below, one *cannot* say that twice as many Xs said no.

	YES	NO
"X"	40	60
"Y"	70	30

AN ANALYSIS OF THE MEDIATION OF DOMESTIC RELATIONS CASES

THE MULTI-DOOR COURTHOUSE'S DOMESTIC RELATIONS MEDIATION PROGRAM

In the following paragraphs we review the principal rules that have determined the eligibility of cases for mediation in the domestic relations program of the MDCH. They reflect the three comparatively discrete phases of the program's evolution from 1986 to the present. During this period the program has changed from one that admitted only pre-scheduled cases in which both parties agree to mediation to one in which most cases appearing before a judge or commissioner are routinely referred to mediation. The principal focus of the section will be on the rules in force during the period 1987 - 1989, when the cases we examined were filed.

Sander's Pound Lecture was especially hopeful about the application of ADR and mediation to family matters:

Another long-term (at least sometimes) relationship that may be amenable to this type of dispute resolution mechanism is the family. . . . [I]t may well be that as our courts are beginning to play less and less of a role in divorce, as a result of the pervasive adoption of no-fault statutes, a need arises for some flexible new instrument — clearly not a court — that will concern itself with the resolution of family conflicts.⁶⁶

The domestic relations mediation program within the MDCH was established during the programs' first phase of development, when mediation programs for the less complex, higher volume types of cases heard by the court were to be introduced.⁶⁷

The program accepts cases for mediation that involve issues of child custody, support or visitation, spousal support, and property division. Cases over adoption, paternity and support involving AFDC recipients filed by the District of Columbia (which constitute a large share of

66. Sander, *supra* note 8 at 122.

67. Obviously not all domestic relations cases fit this description as some involve large amounts of money and/or complicated legal and emotional issues.

the caseload of the Superior Court's Family Division) or paternity are not eligible for mediation. However, if an AFDC parent in a paternity case requests visitation, that issue alone may be submitted to mediation. In general, the Multi-Door will not mediate cases that involve only divorce.⁶⁸

Mediation is also available to cases involving domestic violence filed under the Intrafamily Offenses Act, but only after a judge has issued a civil protection order. The issues that can be mediated include visitation and personal property division.

Unlike Small Claims mediation, the women's bar in D.C., most notably the Women's Legal Defense Fund, objected to mediating domestic relations cases. Their concerns included the fates of minors and the fairness of child support agreements, the impact of prior physical abuse on the bargaining process and its outcomes, the equitability of the division of pension rights, and the adequacy of mediator training.⁶⁹

These concerns were met, in part, by an emphasis on the voluntariness of the process and a requirement that *both* parties to a domestic dispute must agree to mediate. They were also met by making cases ineligible for mediation where there was an obvious power imbalance — a judgment that would be made by MDCH staff. These include cases where:

- one party has been seriously injured by the other
- one party has brandished or used a weapon against the other
- there is a long history of repetitive violence between the parties
- there is a severe lack of parity in bargaining power between the parties, or
- there is evidence of child abuse.⁷⁰

68. "The Domestic Relations Mediation Program," Multi Door Dispute Resolution Division, undated.

69. Interviews with Linda Finkelstein, Circuit Executive, U.S. Court of Appeals for the District of Columbia February 1, 1990, and with Michael Terry, Domestic Relations Specialist, Multi-Door Dispute Resolution Division, April 26, 1990.

70. Guidelines for Domestic Relations and Intrafamily Mediation, Superior Court of the District of Columbia, November 10, 1987.

The Court and members of the D.C. Bar Association have a strong, abiding concern that mediation not be perceived as a way to get around the legal norms that would otherwise be imposed by the Court. This is made most vivid in the area of domestic relations when it comes to decisions arrived at under the legislatively-promulgated Child Support Guidelines. The Guidelines set comparatively severe minimum requirements for child support. (Roughly half of the take-home pay of absent parents with low-to-moderate income is deducted for child support.) The Guidelines respond to a large degree to concerns that fathers — especially non-custodial low income fathers — were shifting their child support obligations to the state and the AFDC system. The MDCH has responded to concerns that litigants will try to bargain in mediation to go outside the norms of the court by requiring that any agreement departing from the Child Support Guidelines must have a powerful rationale.⁷¹

During the period observed (1987 - 1989), the domestic relations disputes that found their way to mediation could be filed directly with the MDCH itself, or they could be filed with the Superior Court's Family Division and then referred to the MDCH. Agreements that are reached in cases originating in the MDCH (versus being filed with the Family Division) do not need to be approved by a judge; they are simply signed by the parties. If the parties wish to have the agreements incorporated into a court order, they must be reviewed and signed by a judge before they can be approved. Roughly half of the cases that were mediated within the MDCH during the study period were filed with the court.

Until 1989, all domestic relations cases that were mediated were scheduled in advance. Beginning in 1989, however, the MDCH began to hold day-of-trial mediation sessions. In these cases a judge or commissioner would strongly recommend that litigants try to mediate their dispute before reappearing in the courtroom. The introduction of this day-of-trial mechanism

71. Interview with Michael Terry, *supra* note 69.

more than doubled the comparatively low volume of domestic relations cases handled by the MDCH from approximately 100 per year in 1987 and 1988 to 252 in 1991.⁷²

The introduction of the day-of-trial program has had a potentially significant, if unintended effect, on the rules governing the representation of parties in mediation. Before day-of-trial cases were accepted by the MDCH, attorneys could not attend the mediation sessions unless both parties were represented. However, members of the bar resisted coming to court only to have their clients directed into mediation sessions from which the lawyers were barred. As a result, the MDCH now permits the sessions to take place even if only one of the parties is represented. The mediation is *not* to go forward, though, unless both the mediator and the *pro se* litigant feel comfortable with proceeding.

Through 1992, other modest efforts to increase the volume of cases to the MDCH were initiated — none very successfully. The result was a comparatively small, if growing caseload. While the caseload remained low, the pool of trained mediators available to the program — like the other MDCH mediation programs — is large. In mid-1991, 65 mediators were available to the program, which mediated 160 cases in 1990. Most cases are co-mediated by a team that typically includes both a lawyer and either a social worker or a psychologist.

In 1992, a major departure in the approach of the Superior Court to mediating domestic relations cases took place as part of an overall court reform program.⁷³ Now all cases satisfying the basic eligibility criteria for mediation are routinely referred to mediation when they first come before a judge or commissioner. This has not only changed the largely voluntary aspect of mediation, it has dramatically increased the caseload of the domestic relations program of the MDCH. The change also marks what appears to be a shift in the mediation program's overriding goal: from trying to improve the quality of justice offered

72. ADR Program, *supra* note 20 at 15.

73. ADR Program, *supra* note 20.

litigants to improving the overall efficiency of the court in disposing of domestic relations disputes.

RESEARCH APPROACH

Appendix I reviews the general research approach that was taken in the study. We review here only those issues that are specific to data collection and analysis pertaining to domestic relations: specifically, the strategies adopted for selecting mediated cases and a comparison sample of unmediated cases. We review them here because we believe they bear on how the study's outcomes in domestic relationships should be interpreted.

Selecting Mediated Cases.

Case Status. Our strategy was to examine *all* cases entering (versus completing) the mediation process in order to capture the full range of possible outcomes that could eventuate once a case had been registered within the MDCH. By focussing on all cases filed with the MDCH, in theory a significant share of our "mediated cases" could involve parties who had never attended a mediation session — a fact that might in and of itself have had significant policy implications. As it turns out, though, 95% of the litigants and 98% of attorneys indicated that at least one mediation session had been held which both parties attended. Hence, our sample of mediating respondents was drawn almost entirely from those who had actively begun the process, actually attending a mediation session.

Year Case Filed. A second issue that we faced was the age of the cases we would examine — i.e., the date filed. Because of the comparatively low caseload of the MDCH domestic relations section, we decided to examine the universe of all cases filed in 1987, 1988, and 1989. According to Court statistics, approximately 100 cases entered mediation in 1987 and 1988, and 147 in 1989. (As we indicate above, 1989 marked the first year in which Day-of-Trial domestic relations cases were assigned to the MDCH.)

As the actual interviewing took place in the late spring and early summer of 1990, this meant that most cases would likely be completed (i.e. an agreement would have been reached and signed either by the parties or by the court, or the dispute would have been abandoned) and that some time would have elapsed in most cases since the dispute's resolution. This would permit the survey to test for the separate issues of compliance, durability, and autonomy (i.e., the parties' capacity to resolve related disputes without resort to the court).

Drawing A Comparison Sample. We drew the comparison sample of non-mediated cases randomly from the cases filed in the Family Division of the Superior Court in 1988 and 1989. Cases filed with the Family Division during this period were classified by the court in several ways for the purposes of case-monitoring and data retrieval: (a) divorce and support; (b) paternity; (c) reciprocal support; (d) custody, and (e) intra-family. We excluded cases that had been filed at some point with the MDCH as well as those that would have otherwise been ineligible for mediation.

Our initial analyses indicated that the great majority of paternity cases filed with the court were brought by the Corporation Counsel's Office, and simply represented efforts to enforce child support decrees. Because they raised no ancillary issues to paternity such as custody, they would not be eligible for mediation within the MDCH. Hence, we excluded simple paternity and support cases from our comparison sample of non-mediated cases. Similarly reciprocal support cases, representing efforts to enforce child support decrees across state boundaries did not appear to be relevant to our analysis and were excluded. Because intrafamily cases represented a small and rapidly declining share of the overall cases within the MDCH (1.1% in 1989) we decided not to include them in our sample of non-mediated cases. Similarly, as custody cases where divorce is not a related issue represented a small to negligible share of MDCH cases, we excluded them.

The analysis of the case types that predominated within the MDCH (principally, ancillary issues relating to divorce) suggested, then, that a prudent strategy would be to draw all cases for the comparison sample of non-mediated cases from those classified under the "divorce and support" category. Hence, we drew a random sample of every *nth* case within the divorce and support categories for 1988 and 1989. (Records for 1987 had not been automated.)

Sampling cases in this random, automated fashion provides an effective approximation of the caseload entering the Family Division of the Superior Court that resemble the majority of cases filed with the MDCH. Our analysis of case characteristics, however, reveals that even this carefully drawn sampling strategy yielded somewhat different profiles for the comparison and experimental groups, reflecting the distinctive character of domestic relations cases that entered mediation from 1987 to 1989.

In the first place, our sample of mediated cases included a larger share of parties with children. While 7% of litigants in mediated cases had no children, 52% of respondents in non-mediated cases had no children. Domestic disputes involving children tend to be more complex, and are often more bitter and difficult to resolve than those that do not. We can control for differences in family composition (the presence of children) between our two samples by comparing the responses of mediating parties with children — and the attorneys who represent them — to those given by non-mediating parties *with* children and their attorneys.

It is important to note that a larger share of the divorce and support cases that are filed with the court are more summary in character and raise fewer contested issues than cases that go to mediation. Mediated cases, then, seem to be more difficult — more complex, bitter, protracted — leading one to expect lower success rates and satisfaction levels. Our results have been interpreted taking these differing case characteristics into account.

A third way in which our comparison sample of non-mediated cases differs somewhat from our experimental group is in the number of mediated cases involving unmarried parents. This

may owe to excluding paternity and support actions from the comparison group of non-mediated cases.

As the following table indicates, the distribution of respondents within domestic relations was generally even — except when it comes to attorneys for defendants in non-mediated cases, where the response rate was lower than for other categories.

DOMESTIC RELATIONS RESPONDENTS		
	LITIGANTS	ATTORNEYS
Mediated	190	51
Unmediated	144	64

DOMESTIC RELATIONS RESPONDENTS — BY NUMBER OF PLAINTIFFS AND DEFENDANTS⁷⁴				
	LITIGANTS		ATTORNEYS	
Mediated	Plaintiffs	97	Plaintiffs	28
	Defendants	87	Defendants	21
	Total	184	Total	49
Unmediated	Plaintiffs	99	Plaintiffs	50
	Defendants	87	Defendants	11
	Total	142	Total	61

THE CONTEXT OF THE DISPUTE

In this section, we examine the characteristics of the couples whose disputes enter mediation, the character of their relationships, and the nature of the disputes they bring to the MDCH. These are contrasted, in turn, with the parties and disputes in our comparison group that are filed with the Family Division and that do not enter mediation.

The Parties.

74. Differences between total respondents reported in this and the preceding tables reflect differences in response rates in relevant questions.

Race. One distinguishing characteristic of parties to mediation is their racial composition. 84% of parties to mediation reported themselves to be black; 14% white. At the same time, 58% of parties to unmediated cases reported themselves to be black and 33% white. According to the 1990 Census, the general population of Washington, D.C. is 66% black and 27% white.⁷⁵

RACIAL MAKEUP OF DOMESTIC CASELOAD		
	BLACK	WHITE
DMLD	82	14
DMLP	86	14
DNMLD	56	33
DNMLP	60	33

Other differences between mediated and non-mediated cases emerge, albeit less sharply, when other demographic characteristics such as occupation, education, schooling, and wealth are taken into account. Parties to non-mediated cases were more likely to hold professional degrees, to be employed in white collar/professional jobs, and to report higher incomes than parties to mediated cases. To illustrate: 13% of parties to mediation report having received some post-college education as compared to 31% of parties to unmediated cases.

75. State Populations for Blacks, Hispanics, The Urban Institute (1991). The racial composition of the non-mediated comparison sample would have been changed if paternity actions had been included in the sample. These cases typically involve efforts on the part of the Corporation Counsel to recover child support payments on behalf of the District's Department of Human Services. As a result, the individuals involved fall below the poverty line and poverty is largely a minority phenomenon in the District of Columbia. They were not included because paternity actions were not eligible for mediation.

RECIPIENTS OF SOME PROFESSIONAL EDUCATION	
DMLD	12
DMLP	14
DNMLD	27
DNMLP	34

These trends are also reflected in the incomes of parties to unmediated cases: 15% claimed to have incomes over \$60,000 versus 4% of parties to mediation. Less variation is observed for other income categories.

Occupation. These differences in socioeconomic status were reinforced by narrative responses to our inquiries into the occupations of the parties. While these responses should be viewed anecdotally rather than statistically, they are revealing. They show that almost 70% of responding parties in unmediated cases were white collar workers versus 40% of parties in mediated cases. The corollary is also true: 17% of respondents in unmediated cases reported that they or the other party were blue collar workers versus 42% for parties to mediation.

OCCUPATION OF PARTIES				
MEDIATED CASES				
Blue Collar	White Collar	Disability Welfare	Retired	No Work
42	40	6	8	2
UNMEDIATED CASES				
17	68	0	12	3

Representation. Parties to mediation were substantially less likely to be represented by a lawyer than were parties in unmediated cases. 35% of parties in mediation had their own lawyer as contrasted with 55% of parties in unmediated cases. Both parties rarely used the

same attorney in mediated cases. This practice was more common in unmediated cases (6% versus 1%), reflecting what appears to be the more consensual nature of many of these transactions.

Gender. Mediated and un-mediated cases also differed with regard to the gender of the plaintiffs and defendants. Both attorneys and litigants reported that plaintiffs in mediated cases were substantially more likely to be women than in non-mediated cases. This probably reflects the fact that cases that mediate are more likely to involve children and the related issue of support. Women are more likely to be the moving parties in those cases. This may indicate that in more contentious cases, women view themselves as the aggrieved party, and initiate the action.

GENDER OF PARTIES⁷⁶		
	MEN	WOMEN
DMAD	61	39
DMAP	21	79
DMLD	62	38
DMLP	34	66
DNMAD	73	27
DNMAP	51	49
DNMLD	59	41
DNMLP	49	51

Character of the Litigants' Relationship. It appears that the parties in unmediated divorce and support cases filed with the Family Division of the Court have less complicated and contentious relationships than is the case for parties mediating within the MDCH. The most salient difference between parties to mediated and unmediated cases is whether or not they

76. Reflects gender of client, not attorney.

will have to deal with each other in the future. Both attorneys and litigants indicated that parties to mediation were substantially more likely to have to deal with the other party in the future than were their counterparts in unmediated cases.

WILL PARTIES HAVE TO DEAL WITH EACH OTHER IN THE FUTURE?		
	YES	NO
DMA	81	19
DML	75	43
DNMA	37	63
DNML	37	63

These outcomes may be explained in part by the fact that parties to mediation are far more likely to have children than are parties to unmediated cases. 95% of respondents in mediation indicated that the parties had children. Only 52% of respondents in unmediated cases indicated that the parties had children.

DO THE PARTIES HAVE CHILDREN?		
	YES	NO
DM	95	5
DNM	52	48

When we control for children we find that the difference between expected future dealings are virtually eliminated.

WILL PARTIES WITH KIDS HAVE TO DEAL WITH EACH OTHER IN THE FUTURE?		
	YES	NO
DM	59	41
DNM	55	45

But differences in contentiousness persist between mediated and unmediated cases even when the presence of children is taken into account. This is best revealed by the comparative bitterness of the parties at the time the case was filed. Parties to mediated cases were far more likely to report that their relationship was very bitter than were parties to unmediated cases. Correlatively, parties in unmediated cases were far more likely to report that their relationship with the other party was generally friendly before the case was filed with the Court. These patterns hold even when the presence of children is controlled for.

RESPONDENTS REPORTING VERY BITTER RELATIONSHIP			
DMAD	53	DNMAD	10
DMAF	57	DNMAF	15
DMLD	38	DNMLD	15
DMLP	43	DNMLP	18

RESPONDENTS REPORTING GENERAL- LY FRIENDLY RELATIONSHIP			
DMAD	0	DNMAD	20
DMAF	4	DNMAF	17
DMLD	16	DNMLD	20
DMLP	15	DNMLP	26

It is interesting to note that attorneys representing parties in mediation reported more bitter and less friendly relationships among their clients than did the parties themselves. This could suggest either that parties who get representation have the most contentious cases; that attorneys overstate the bitterness of the parties; or that attorneys, themselves, exacerbate relations between the parties. The latter explanation is a staple of journalistic accounts of domestic mediation. The same disjuncture between the perspectives of attorneys and parties does not characterize non-mediated cases, however.

Violence. Patterns of deeper conflict were also revealed by the fact that violence was more common in mediated than unmediated cases. Responses to the question, "Was there ever physical violence between the parties" elicited the following results:

PERCENT OF RESPONSES REPORTING PHYSICAL VIO- LENCE BETWEEN THE PARTIES			
DMAD	36	DNMAD	0
DMAP	31	DNMAP	18
DMLD	27	DNMLD	14
DMLP	29	DNMLP	24

One explanation for the comparatively high level of violence reported here could be that, in practice, the standards for exclusion — one party has seriously injured the other; there is a history of violence; or, one party has brandished a gun — address only more serious types of physical abuse.

Marital Status. The marital status of the parties in our sample of mediated and unmediated cases differed both at the time the cases were filed and at the time the respondents were surveyed. Parties to unmediated cases were far more likely to be married at the time that cases were filed and correlatively more likely to be divorced at the time of the telephone survey. Parties in mediated cases were more likely to have already been divorced or separated

at the time the case was filed. In addition, parties to mediated cases were far more likely to report themselves to be unmarried parents.⁷⁷

HOW PARTIES WERE RELATED WHEN CASE WAS FILED				
	% MARRIED	% DIVORCED	% SEPARATED	% UNMARRIED PARENT
DMA	46	10	32	12
DML	46	9	12	33
DNMA	83	3	14	0
DNML	85	1	13	1

HOW PARTIES WERE RELATED AT TIME OF THE SURVEY				
	% MARRIED	% DIVORCED	% SEPARATED	% UNMARRIED PARENT
DMA	6	69	13	13
DML	8	41	18	33
DNMA	7	92	2	0
DNML	5	84	9	1

Finally, there were some noticeable differences in the length of time that the parties had lived together as 24% of parties to mediated cases (versus 2% non-mediated) had never lived together. This is consistent with the fact that more never-married parties appear in mediated cases.

Balance of Power. Another important dimension of the parties' relationships that could influence the use and results of mediation is the balance of power. Critics of domestic relations mediation believe that women participants often fare worse in mediation than in court because their presumed weaker bargaining power can be more fully exploited in informal settings. This

77. As we report above, this difference is a function of the sampling strategy that (1) excluded paternity cases from the comparison sample of non-mediated cases and (2) focussed on divorce and support cases where the parties were, by definition, previously married to one another.

imbalance could result from, or be reflected by, a combination of factors. The four that we chose to probe in our telephone survey were (1) the relative sophistication of the parties in business; (2) the parties' relative standing financially; (3) the willingness of the parties to take risks; and, (4) how each party viewed their own and the other party's bargaining power.

No strong patterns emerge to suggest that the presence or absence of power imbalances drives parties to mediate or not to mediate cases, or characterizes mediated versus non-mediated cases.

RESPONDENTS CLAIMING THEY WERE FINANCIALLY BETTER OFF COMPARED TO OTHER PARTY					
MEDIATED			UNMEDIATED		
	D	P		D	P
DMA	31	18	DNMA	55	16
DML	26	24	DNML	36	41

RESPONDENTS CLAIMING THAT THEY WERE MORE SOPHISTICATED THAN OTHER PARTY					
MEDIATED			UNMEDIATED		
	D	P		D	P
DMA	45	12	DNMA	60	52
DML	67	61	DNML	52	60

RESPONDENTS CLAIMING THEY WERE MORE WILLING TO TAKE RISKS					
MEDIATED			UNMEDIATED		
	D	P		D	P
DMA	11	14	DNMA	25	40
DML	38	23	DNML	35	32

HOW STRONG DID YOU FEEL YOUR BAR-GAINING POWER WAS?					
MEDIATED			UNMEDIATED		
	D	P		D	P
DMA	52	51	DNMA	33	42
DML	47	58	DNML	42	60

The Character of the Dispute.

Legal Issues Raised. We asked whether the following types of legal issues were involved in the respondent's case:

- child support
- custody
- visitation
- property division, and
- support of a former partner.

The responses we received were as follows:

LEGAL ISSUES REPORTED RAISED IN DISPUTE				
ISSUE	MEDIATED		UNMEDIATED	
	DMA	DML	DNMA	DNML
Child support	73	63	31	20
Custody	37	26	21	9
Visitation	41	30	14	*
Property division	45	19	35	19
Support former partner	12	4	6	*

As we indicate, virtually all respondents to cases in mediation had children while only roughly half of the respondents in non-mediating cases did so. When we control for the children the sharp differences in issues decline but are not eliminated, suggesting the more complicated, contentious character of cases filed.⁷⁸

Importance of the Issues. Differences in the underlying disputes in mediated versus non-mediated cases are suggested by the importance the parties assign to the issues raised. Mediating parties viewed the issues raised by the case as more important than parties to unmediated cases:

THE ISSUES IN THIS CASE WERE VERY IMPORTANT TO ME/MY CLIENT			
DMAD	82	DNMAD	63
DMAP	89	DNMAP	77
DMLD	77	DNMLD	47
DMLP	84	DNMLP	39

78. We received too few responses for two case categories — visitation and support of a former partner — from litigants in non-mediated cases to permit analysis.

The importance assigned the issues rises for parties in non-mediated cases when they have children. 63% of all respondents in non-mediated cases where the parties had children ranked the issues' importance as "5." However, they still lagged the importance assigned issues by parties in mediated cases — even when the mediating parties had no children (63% versus 77%).

Bad Faith. These differences in relative importance are paralleled by the disputes' contentiousness, as mediated cases appear to be more difficult and, perhaps, unfairly fought. Parties to mediated cases were far more likely to believe that the other party acted in bad faith than their counterparts in non-mediated cases.

THE OTHER PARTY <i>DID NOT</i> ACT IN GOOD FAITH		
	AGREE	DISAGREE
DMA	24	13
DNMA	7	51
DML	35	36
DNML	19	47

The more complex, contentious — or, if you will, less routine — character of cases in mediation may also be reflected by the degree to which the outcomes of the cases could be anticipated by the parties as compared to the less predictable nature of the outcomes of non-mediated cases.

THE OUTCOME OF THE CASE WAS AS I EXPECTED		
	AGREE	DISAGREE
DMA	73	15
DNMA	90	3
DML	62	24
DNML	82	9

Summary. Our analysis suggests that the cases that were heard within the MDCH during this phase were different in a number of respects from those that were routinely filed within the Family Division itself. Parties in mediation were substantially more likely to appear pro se, to be black, to be unmarried, to have somewhat lower incomes and to have blue collar rather than white collar jobs than were parties in the unmediated cases sampled in this study.

The character of the relationships of those entering mediation during this period varied in important ways from those who did not mediate. Most importantly, those entering mediation were substantially more likely to have children than parties filing domestic actions in the Family Division. Further, they tended to have lived together longer, to have had more bitter relationships, to view the other party as acting in bad faith, to have experienced some violence in their relationships and to view the issues in dispute as being more important than parties who did not mediate. A number of these characteristics persist (bitterness, e.g.) even when the presence of children is controlled.

Further, the number of unmarried couples in mediation was far larger than the number in our comparison sample. And a larger share of parties to mediation were separated (versus either married or divorced) than was the case for parties in non-mediated cases.

Taken together, then, the profile of the parties and the cases suggests that mediation during the period observed was populated by lower to middle income minority working couples,

usually appearing pro se, some of them unmarried; many having been married for a comparatively long time. They presented the court with cases that were frequently characterized by high emotion, but where the underlying issues rarely presented complex legal or property issues.

By contrast the typical divorce and support case filed with the Family Division appears to be more consensual in nature, less emotional, and to present equivalently straight-forward legal issues. Given this quite different complexion of the cases entering each system, it should not be surprising that the way in which parties to mediated cases assess mediation should be influenced by the relative difficulty of the underlying dispute that they bring to it.

THE DECISION TO MEDIATE AND THE MEDIATION PROCESS

In this section, we examine the dispute resolution process used in mediated and unmediated cases, addressing a range of issues that are likely to distinguish the two systems with regard to cost, access, and quality of justice. These process-related issues include entry; the extent to which discovery is complete at the time mediation or settlement negotiations begin; the use and role of attorneys; the level and type of fact-finding that takes place; the emotional climate of the process (i.e., how comparatively acrimonious or adversarial it is); and how the mediation process differs from conventional litigation in the eyes of the participants.

When Cases Enter Mediation and How They Get There. The way in which domestic relations cases enter mediation in the MDCH has evolved over the past five years. All cases filed that were mediated in 1987 and 1988 — the first two years of the study period — were pre-scheduled by MDCH staff. In part because the programs had rather low visibility among the commissioners and judges within the Family Division of the Court, relatively few cases were, in effect, directed into mediation by court personnel. Then in 1989, an effort was made to increase the volume of cases that were mediated in the MDCH. As a result, a Day-of-Trial program was established in which judges and commissioners could directly refer cases from

court into same-day mediation. While mediation was not formally mandatory, the directive nature of the judge or commissioner's charge would have been clear. Indeed, 42% of the attorneys in our sample indicated that they had used mediation because "we were ordered to by the court."

Our interviews with court personnel and the results of our survey indicated that the type of case that was most likely to be referred for same-day mediation was that presented by an unmarried couple appearing unrepresented before the court. 65% of unmarried respondents reported that they learned of mediation from "an official of the court, including a judge." This rather small subset of cases within our sample⁷⁹ typically presents cases that are emotionally highly-charged but where the underlying legal and property issues are comparatively simple and straightforward.

Appearances Before Judge or Commissioner. Cases entering mediation appear to be more developed or ripe when the first mediation session is held than are unmediated cases when the "first settlement negotiation was held." Only 40% of all respondents in mediated cases indicated that their cases had *never* been before a judge or commissioner. 30% indicated that their case had been before a judge or commissioner once and 30% indicated that their case had been heard two or more times. Hence, one third of the cases had already been before a judge two or more times by the time they reached mediation. Interestingly, attorneys and litigants in mediated cases responded in almost exactly the same way to this procedural question. One might expect that litigants with attorneys would have thornier cases and that they would have appeared more frequently in court before mediation was initiated.

The contrast to a typical unmediated divorce and support case filed in the Family Division is sharp. 68% of our attorney respondents indicated that "we did not appear before a judge or

79. As we indicate in the discussion of research methodology included as Appendix I, we were not made aware of the role of Day-of-Trial program until we had completed the telephone survey. Hence, we failed to include any question that specifically asked whether the case being examined was referred to mediation as part of this informal court initiative.

commissioner before starting serious settlement negotiations;" 16% had appeared once; and only 10% had appeared two or more times.

NUMBER OF TIMES PARTIES HAD BEEN BEFORE A JUDGE OR COM- MISSIONER ⁸⁰			
	0	1	2 or more
DMA	33	37	30
DML	42	30	28
DNMA	74	16	10
DNML	72	19	9

Discovery. But while mediated cases were more likely to have come before a judge or commissioner one or more times, this "exposure" does not necessarily translate into more developed discovery or fact-finding. As the table below indicates, the types of information exchanged *before settlement negotiations begin* in unmediated cases is comparable to the type of information exchanged *before mediation has been concluded* in mediated cases.

INFORMATION EXCHANGED BEFORE SETTLEMENT NEGOTIA- TIONS WERE BEGUN ⁸¹		
	YES	NO
Financial Info	70	30
Tax Forms	56	44

How developed are the cases that enter mediation? Our attorney respondents indicated that discovery had been completed 27% of the time; that interrogatories had been conducted 35% of the time; that depositions had been conducted 8% of the time and that documents had

80. Before first mediation session (in mediated cases) or before first settlement session (in unmediated cases).

81. Information provided by attorney respondents in non-mediated cases.

been exchanged 49% of the time. This suggests that despite the fact that many of the cases entered mediation comparatively late in the dispute resolution process, they were still not very developed in terms of discovery.

INFORMATION EXCHANGED BEFORE MEDIATION CONCLUDED ⁸²		
	YES	NO
Financial Info	74	26
Tax Forms	40	60

Differences Between Mediation and Settlement Negotiations. One hypothesis we tried to examine is whether the process of mediating cases ends up being indistinguishable from settlement negotiations. In this regard we asked attorneys to scale the extent to which they agreed with the statement "There is not much difference between mediation and unassisted settlement negotiations." Both groups *strongly* disagreed with the statement, indicating that from their perspective there were indeed substantial differences.

THERE IS NOT MUCH DIFFERENCE BETWEEN MEDIATION AND UNASSISTED SETTLEMENT NEGOTIATIONS	
	DISAGREE
DMA	72
DNMA	76

82. Information provided by attorney respondents in mediated cases.

We also asked attorneys and parties the extent to which they agreed with the statement, "Mediation just added another step to resolving this case and was not helpful." Again, most respondents disagreed.

MEDIATION ADDED ANOTHER STEP AND WAS NOT HELPFUL		
	AGREE	DISAGREE
DMA	23	64
DML	29	55

The Role of Attorneys. We probed the use of attorneys, their fees, and how they were paid, as well as the degree to which the two processes tended to be attorney *versus* client-centered. Our interviews with parties to mediated and unmediated cases revealed that lawyers were far more likely to be used in unmediated cases: 55% of respondents in unmediated cases reported that they used a lawyer *versus* only 35% in mediated cases.

Use of Attorneys in Mediation. Somewhat to our surprise, the lawyers did not appear to be obstacles to mediating cases. None of the litigants in non-mediated cases reported that their attorneys had discouraged them from using mediation, while only 3 percent of represented litigants in mediation reported that their attorneys had discouraged mediation. Similarly only 2 percent of attorneys in mediation and 3 percent of attorneys in unmediated cases reported discouraging their clients from mediating.

Attorney's Fees. Clear differences also characterized the method of payment between the two systems as attorneys in unmediated cases reported that they received fixed fees more frequently than did attorneys in mediated cases. Attorneys in mediated cases were more commonly paid by the hour.

SHARE OF ALL ATTORNEYS CHARGING CLIENTS A FIXED FEE VS. BY THE HOUR		
	DMA	DNMA
Fixed Fee	13	31
Hourly	76	56

There are also differences in the amount that attorneys in mediated and unmediated cases receive. Lawyers in mediated cases appear to receive higher fees than attorneys in unmediated cases.

AVERAGE FEES REPORTED BY ATTORNEYS ⁸³	
DMA	\$ 2,765
DNMA	\$ 1,020

All told, these differences — in the number of times before a Commissioner or court, how the lawyers were paid, the average fees they charged — can be viewed as reinforcing our assumption that cases in mediation tend to be more complex, closely fought, and contentious than is the typical case filed in the Family Division of the Court.

Attorney/Client Roles. ADR advocates claim that the mediation process is more client centered than attorney centered and hence develops the parties' autonomy by strengthening their problem-solving skills. We found that represented parties are far more likely to lead the discussion in mediated cases, presumably playing a more active role in fashioning agreements than in non-mediated cases.

83. The results are derived from responses to the question "How much did your client pay you before this case was finished?" 59% of DMA and 61% of DNMA responded to the question. A single large fee was excluded for both DMA and DNMA that distorted the results, by biasing them upwards.

WHO LED THE DISCUSSION FOR YOUR SIDE? ⁸⁴			
	ATTORNEY	CLIENT	SAME
DMA	30	57	13
DNMA	75	7	18

Another commonly-ascribed attribute of mediation is the reduced adversarial climate of the negotiations. We probed this dynamic by asking whether "lawyers are less adversarial in mediation than in unassisted settlement negotiations." There was strong agreement with the statement among attorneys in mediated cases but substantially less agreement among those in unmediated cases.

LAWYERS ARE LESS ADVERSARIAL IN MEDIATION THAN IN UNASSISTED SETTLEMENT NEGOTIATIONS		
	AGREE	DISAGREE
DMA	51	29
DNMA	43	37

Controlling Norms. We hypothesized that there would be a difference between how parties who choose to mediate cases value the norms that they believe animate the process. Proponents of mediation often contend that those who value external, court-imposed norms opt for litigation while parties who value the ability to shape their own bargain free of legal constraints opt for mediation.

Our survey did not confirm the hypothesis. Parties in mediation were as likely to look to principles of law in deciding what to agree to as those who did not mediate. In fact, parties in unmediated cases were *more* likely to believe that principles of law were not important in

84. Attorney Responses.

shaping the agreement. We also found that the litigants in both mediated and unmediated cases were more likely to look to principles of law than were attorneys.

HOW IMPORTANT WERE PRINCIPLES OF LAW IN HELPING YOU OR YOUR CLIENT DECIDE WHAT TO AGREE TO?		
	NOT IMPORTANT	VERY IMPORTANT
DMA	22	27
DNMA	13	25
DML	13	48
DNML	23	47

Along the same lines, we found that parties in mediated cases were likely to assign *greater* importance to "what a court would likely decide" than parties in non-mediated cases. Indeed, attorneys in mediated cases weighted "what a court would likely decide" more heavily than lawyers in unmediated cases.

HOW IMPORTANT WAS WHAT THE COURT WOULD LIKELY DECIDE IN HELPING YOUR CLIENT DECIDE WHAT TO AGREE TO?		
	NOT IMPORTANT	VERY IMPORTANT
DMA	10	35
DNMA	12	21
DML	9	47
DNML	27	39

This somewhat counter-intuitive result may be explained by the fact that parties to court-annexed mediation programs like the MDCH may have a stronger impression that they are bargaining "in the shadow of the law" than parties to non-mediated domestic cases. After all, parties to mediated cases are more likely to have appeared before a judge or magistrate before initial negotiation sessions begin than are parties in unmediated cases.

Child Support Guidelines. One of the concerns of both practitioners and opponents of domestic mediation has been that women, bargaining from a position of weakness, will trade away their rights to support under the Child Support Guidelines.⁸⁵ At the same time, it could theoretically be the case that parties bargaining freely within mediation would choose to depart from these legislative norms knowingly and willingly.

We hypothesized that parties to mediation were more likely to fashion agreements that departed from the Child Support Guidelines than parties in unmediated cases. This did not turn out to be true, however. 50% of attorney-respondents in non-mediated cases involving child support claimed that the final decision was not within the Child Support Guidelines; 48% of attorneys in comparable mediated cases claimed that the final decision was not within the Child Support Guidelines.

There are a number of explanations for these outcomes. In the first place, the Guidelines were introduced during the period studied (1987 - 1989).⁸⁶ Soon after their development and introduction by the Superior Court, they were challenged and struck down — only to be later enacted legislatively by the D.C. City Council. The result was that the Guidelines, which represent a new approach to resolving child support cases, had yet to become part of the judicial culture during the study period.

Further, it appears that some judges and commissioners regard the Guidelines as imposing rather onerous support obligations on the absent parent. Court personnel indicated that they sometimes use the threat of forcing the absent parent to pay the full amount specified by the Guideline to prompt further settlement negotiations or mediation between the parties. In these

85. The Washington, D.C. Child Support Guidelines, which have been codified into law, D.C. Code § 16-916.1 et seq. (effective July 25, 1990), set standards for judges or commissioners to follow in determining the child-support payments of noncustodial parents.

86. The Child Support Guideline was adopted by the Board of Judges of the D.C. Superior Court on September 28, 1987.

cases the Guidelines are invoked more for their power to force negotiation between the parties than to determine child-support payment levels for the absent parent.

These results tend to reinforce the concerns of women's groups about the outcome of support cases generally and specifically those in mediation.

Summary. The results reported in this section have a number of implications for the impact of mediation *on the courts*. At the start of the study period (1987 and 1988) all cases entered mediation voluntarily, most doing so rather late in their development — after they had been before an official of the court one or more times. That process began to change during the study period (in 1989) with the introduction of a Day-of-Trial program. The Day-of-Trial program changed the existing program in two ways: (1) cases were effectively directed into mediation; and (2) cases entered mediation earlier in their development. During this phase the type of case commonly referred to mediation involved unmarried parents appearing pro se.

While many of the mediated cases examined in this study had been before an official of the court one or more times, the discovery process did not appear to be very advanced at the time of mediation. So, while cases may have been entering late in the process, extensive fact development had yet to take place.

Finally our respondents did not believe, as some have contended, that mediation served as a substitute for a settlement negotiation, simply adding a step to the dispute resolution process.

The evolution of the domestic relations mediation programs is now, in a sense, complete, as all cases appearing for status conferences are routinely referred to mediation, where at least one session must be held. As a result the number of cases that now mediate is dramatically higher, with cases entering earlier in their development. Thus, from the court's perspective, it is likely that the cost-effectiveness concerns that could have been raised about the low-volume, voluntary program that was in place during the study period, have been put to rest.

In terms of the impact of mediation *on the disputants*, we found that mediating parties were more likely to appear pro se than parties to non-mediated cases. At the same time, though, when lawyers were used in mediated cases, average attorney's fees were substantially higher than those paid by parties to non-mediated cases — reflecting, we suspect, the more contentious and complicated character of these cases.

Mediation appeared to be more client-centered — even when the parties were represented. The lawyers appear to be less adversarial in mediated rather than non-mediated cases.

Finally, in terms of the impact of mediation *on society*, we found that parties to mediating cases weighted the importance of "principles of law" or "what a court would likely decide" as high, if not higher, than did parties to non-mediated cases. Indeed parties to non-mediated cases departed as frequently from The District of Columbia Child Support Guidelines as did parties to mediation.

OUTCOMES

In this section, we examine the results or outcomes of mediation, separately exploring comparative settlement rates: the durability of the settlements, satisfaction levels, selected quality of justice measures, and comparative costs.

Settlement. A fundamental measure of the effectiveness of mediation is its ability to help or to fully resolve the dispute. Here our results provide striking evidence of the success of mediation in the domestic relations context. The parties reported a higher share of mediated cases settling outside the Court (80%) than non-mediated cases (53%)⁸⁷ and a substantially higher share of non-mediated cases being resolved by a "judgement of the court." (47% versus 20%). Moreover, results from our survey indicate that the parties frequently settled their domestic disputes *within mediation*.

87. "Settling outside of the Court" involves cases settling in mediation (57%), settled after mediation (16%) and cases dropped (7%).

Attorneys reported that mediated cases are resolved by the judgment of the court almost as frequently as cases that are not mediated. This might owe to the fact that lawyers are involved in more complex disputes that do not lend themselves to settlement, to lawyers' resistance to early settlement, or to their taste for judicial ratification or decision-making. Attorneys also reported that mediated and unmediated cases settle at roughly the same rate (55% versus 52%).⁸⁸

HOW WAS YOUR CASE RESOLVED?				
	DMA	DNMA	DML	DNML
In mediation	30	n/a	57	n/a
Settled after mediation	25	n/a	16	n/a
Judgement by Court	41	44	20	47
Dropped	5	5	7	3
Settled (non-mediated only)	n/a	52	n/a	50

Durability. It is often claimed that mediated cases are more likely to yield durable outcomes than are litigated cases. As we have seen, though, the domestic relations cases that enter the MDCH differ from those found in the general run of divorce and support cases filed with the Family Division: the parties are more likely to have an ongoing relationship, the relationship is more likely to be bitter, and the cases are likely to be more complex and contentious. It should not be surprising, then, that mediated cases generate less durable settlements. Both attorneys and parties to mediation indicated that subsequent disputes arose roughly three times more frequently than in non-mediated cases. Viewed from another perspective, though, the fact that cases that were mediated produced durable outcomes approximately 70 percent of the time can be viewed as positive — especially in light of the comparative difficulty of the cases.

88. "Settlement" in mediated cases includes the share of cases resolved "in mediation" (30%) and "settled after mediation" (25%). In non-mediated cases, "settlement" equals this share of cases "settled" (52%).

HAVE ANY DISPUTES OVER RELATED ISSUES ARISEN?		
	YES	NO
DMA	32	68
DNMA	13	87
DML	31	69
DNML	9	91

Another dimension of durability that bears on costs is further legal action. Here again, when further disputes arose, legal action was more likely to arise out of mediated than non-mediated cases.

HAVE YOU TAKEN FURTHER LEGAL ACTION?⁸⁹		
	YES	NO
DML	51	49
DNML	25	75

Finally, we stratified our sample to focus on cases with children, which are, presumably, more difficult. Even when we look at only those in which the parties had children, the probability that future disputes will arise remains substantially higher in mediated versus non-mediated cases. Hence, settlements in non-mediated cases remain significantly more durable.

HAVE ANY DISPUTES OVER RELATED ISSUES ARISEN? (CASES WITH KIDS ONLY)		
	YES	NO
DML	31	69
DNML	14	86

89. Responses limited to litigants because of low numbers of attorney respondent to this question.

Satisfaction. Another measure of case outcomes is satisfaction or the revealed preferences of users. We asked all respondents in mediated and unmediated cases how satisfied they were with (a) "the outcome of the case" and (b) "the process used to make the decision in this case."

In general, we found that parties and attorneys in unmediated cases were significantly more satisfied than parties who mediated despite the high absolute levels of satisfaction expressed by those who mediated. We should again caution that differences in the underlying difficulty of mediated cases may partially explain these outcomes.

SATISFACTION WITH OUTCOME OF THE CASE		
	DISSATISFIED	SATISFIED
DMAD	11	68
DMAP	7	85
DMLD	34	51
DMLP	26	56
DNMAD	10	90
DNMAP	8	90
DNMLD	12	79
DNMLP	12	83

Satisfaction and the Disposition of the Case. Both litigants and attorneys in mediated cases that did not settle short of trial were far more likely to be dissatisfied with case outcomes than were parties to mediated cases that settled. At the same time, though, the lawyers in mediated cases were generally less likely to be dissatisfied with case outcomes than the litigants — whether the cases settled or not. This may reflect the fact that the lawyers were less invested in the cases or that they were more realistic about possible outcomes — or both.

Moreover, litigants in non-mediated cases who either settled or failed to settle short of trial were more satisfied than their counterparts in mediated cases.

In non-mediated cases, it seems to make much less difference whether cases do or do not settle short of trial. High satisfaction levels persisted for both litigants and their attorneys in both categories, although they fell slightly for cases that failed to settle.

SATISFACTION WITH OUTCOME		
	NOT SATISFIED	SATISFIED
DML-S⁹⁰	24	58
DML-NS	47	43
DMA-S	4	79
DMA-NS	18	71
DNML-S	17	72
DNML-NS	10	82
DNMA-S	14	83
DNMA-NS	0	100

Characteristics of the Parties. What characterizes respondents who are satisfied or dissatisfied with mediation? And how do patterns of satisfaction differ across mediated and unmediated cases? One pattern that emerges from the data is that the groups of litigants who expressed the greatest satisfaction with the outcomes of mediation are those who historically have been viewed in some sense as being disadvantaged: women, blacks, and the unrepresented. However, this *may* have more to do with general expectations than with any affinity to consensual dispute resolution processes, as the same groups also tend to be very satisfied with outcomes in non-mediated cases.

90. S=Settled short of trial; NS=Required a decision by the court.

Attorneys vs. Litigants. Attorneys in mediated cases were more satisfied with outcomes than litigants. No comparable differences emerged in unmediated cases.

Pro Se vs. Represented Parties. Unrepresented litigants in both mediated and unmediated cases were more satisfied with outcomes than litigants represented by lawyers.

SATISFACTION WITH CASE OUTCOMES — BY REPRESENTED VS. PRO SE		
	DISSATISFIED	SATISFIED
DML (rep)	40	48
DML (pro se)	24	57
DNML (rep)	14	74
DNML (pro se)	10	90

Gender. Women were far more likely to be happier with the outcomes of mediation than were men, and they were less likely to be dissatisfied with case outcomes.⁹¹ Men and women were equally satisfied with outcomes in unmediated cases.

91. These two results do not necessarily flow from one another. While there might be a larger share of women who are more satisfied with the outcomes than men (women who perceive themselves to have been "winners"), that does not necessarily mean that a smaller share of women will be less satisfied with results than men (women who perceive themselves to have been "losers"). In fact, more women than men could perceive themselves to be either "winners" or "losers."

SATISFACTION WITH CASE OUTCOMES — BY GENDER		
	DISSATISFIED	SATISFIED
DML (men)	40	40
DML (women)	20	66
DNML (men)	13	85
DNML (women)	10	77

Race. Race also correlates with satisfaction in mediated cases, as blacks were significantly more likely than whites to be satisfied with case outcomes. In fact, white litigants who mediated were surprisingly unhappy with case outcomes. In unmediated cases, whites were slightly more satisfied than were black respondents. That said, though, both blacks and whites in unmediated cases were significantly more satisfied with outcomes than were black and white parties in mediated cases.

SATISFACTION WITH CASE OUTCOMES — BY RACE		
	DISSATISFIED	SATISFIED
DML (black)	28	58
DML (white)	43	38
DNML (black)	17	75
DNML (white)	7	84

Parties with Children. The sharp differences between the satisfaction levels of parties who did and did not mediate declines when we take into account the presence of children, with

satisfaction levels in non-mediated cases falling, but still remaining higher than for mediated cases.

SATISFACTION WITH OUTCOME — BY PRESENCE OF CHILDREN		
	DISSATISFIED	SATISFIED
DML — W/KIDS	31	56
DML — W/O KIDS	*	*
DNML — W/KIDS	21	69
DNML — W/O KIDS	9	82

* Number of cases too low to produce meaningful results.

Income. There is a strong inverse correlation between satisfaction with process and outcomes in mediation by income, with lower income parties being more satisfied than higher income parties. No comparable pattern emerges in non-mediated cases.

SATISFACTION WITH OUTCOME — BY INCOME		
INCOME	DISSATISFIED	SATISFIED
	NON-MEDIATED CASES	
< 10,000	—	63
10-25,000	5	88
25-40,000	18	68
> 40,000	19	67
	MEDIATED CASES	
< 10,000	20	75
10-25,000	23	62
25-40,000	34	54
> 40,000	38	48

Satisfaction and the Relationship of the Parties. In addition to examining satisfaction with outcomes according to party characteristics the study also explored how satisfaction varied within the relationship of the parties. Several patterns emerged. One suggests that difficult cases tend to breed dissatisfaction no matter what dispute resolution mechanism is used. Parties who are separated, who have lived together for a long time, or who expect further dealings are comparatively displeased with results in mediation. At the same time, satisfaction with outcomes in non-mediated cases falls off sharply when relations between the parties are bitter or when the disputed cases are very important to the parties. Finally, weak bargaining power leads to dissatisfaction, whatever the forum.

Relation of Parties at Time of Filing. Mediating parties who were separated (versus being married, divorced, or unmarried) at the time the case was filed were especially dissatisfied with outcomes. Parties who had lived together for more than ten years were also unusually dissatisfied with results in mediated cases. Similar results were not observed in unmediated cases.

Future Dealings. Respondents in mediated cases who will have to deal with each other in the future were more dissatisfied with outcomes than parties to unmediated cases, but they were not substantially more likely to be displeased with mediation than mediating parties who would not have to deal with each other in the future.

SATISFACTION WITH CASE OUTCOMES — BY WHETHER PARTIES WILL HAVE TO DEAL WITH EACH OTHER IN THE FUTURE		
	DISSATISFIED	SATISFIED
DML (yes)	32	50
DML (no)	28	58
DNML (yes)	17	71
DNML (no)	8	88

Bitterness. In unmediated cases satisfaction with case outcomes declined sharply as bitterness rose. No comparable pattern emerged in mediated cases as satisfaction levels remained more or less constant as bitterness varied. However, even at their lowest, respondents' satisfaction levels in unmediated cases equaled the satisfaction levels reported by all parties to mediation.

SATISFACTION WITH CASE OUTCOMES — BY BITTERNESS		
BITTERNESS	SATISFACTION WITH OUTCOME	
	Unmediated Cases	Mediated Cases
1 (Friendly)	87	52
2	96	54
3	82	49
4	76	55
5 (Bitter)	50	53

Importance of the Issues. In unmediated cases litigants' satisfaction with case outcomes also declined as the issues grew increasingly important. The reverse was true in mediated cases: respondents who ascribed the highest importance to the issues raised were the most satisfied with the outcomes. Indeed satisfaction rose as the issues grew more important.

SATISFIED WITH OUTCOME — BY IMPORTANCE OF THE ISSUES		
IMPORTANCE	SATISFACTION WITH OUTCOME	
	Unmediated Cases	Mediated Cases
1 (Not)	100	43
2	100	20
3	69	38
4	86	42
5 (Very)	61	55

Bargaining Power. In both mediated and unmediated cases, satisfaction correlated directly to the parties' perceived bargaining power, declining as power diminished and rising as it increased. The wide gap between the parties' satisfaction levels in mediated and unmediated cases narrowed as bargaining power increased. When parties to mediation viewed their bargaining power to be weak, their satisfaction with outcomes was strikingly low in both absolute and relative terms. This suggests that those who view their relative bargaining power to be weak may be particularly unsuited to mediation.

SATISFIED WITH OUTCOME — BY STRENGTH OF BARGAINING POWER		
BARGAINING POWER	SATISFACTION WITH OUT- COME	
	Unmediated Cases	Mediated Cases
1 (Low)	50	21
2	58	32
3	64	41
4	82	72
5 (High)	94	78

Quality of Justice, Autonomy, Convenience.

Justice. Both attorneys and litigants in unmediated cases were more likely to agree strongly with the statement that "Justice was served by this process," than attorneys and litigants in mediated cases. The results hold even when responses are stratified to account for cases with children.

JUSTICE WAS SERVED BY THE PROCESS	
AGREE	
DMA	65
DNMA	83
DML	61
DNML	78

We also probed issues that bear on the quality of justice. In sharp contrast to the wide gap found between mediated and non-mediated cases regarding *outcomes*, there was little difference reported in satisfaction with the *process*.

SATISFACTION WITH PROCESS USED IN THE CASE		
	DISSATISFIED	SATISFIED
DMA	19	68
DNMA	7	69
DML	23	66
DNML	14	77

Moreover, what small differences emerged between respondents in mediated and non-mediated cases were narrowed further when the presence of children was taken into account.

SATISFACTION WITH PROCESS — BY PRESENCE OF CHILDREN		
	DISSATISFIED	SATISFIED
DML — W/KIDS	23	68
DML — W/O KIDS	—	—
DNML — W/KIDS	12	70
DNML — W/O KIDS	6	91

But this story changed — and changed dramatically — in those cases where the *mediating* parties were unable to settle the case short of trial. In those cases both litigant and attorney satisfaction fell by almost half, while dissatisfaction with outcomes rose three-fold. Moreover, the results were almost perfectly parallel as between the attorneys and the litigants in non-mediated cases.

However, in non-mediated cases there was little appreciable difference between the satisfaction levels of attorneys and parties in cases that did and did not settle short of trial.

SATISFACTION WITH PROCESS		
	NOT SATISFIED	SATISFIED
DML-S	13	79
DML-NS	44	44
DMA-S	12	80
DMA-NS	35	47
DNML-S	10	76
DNML-NS	8	88
DNMA-S	10	83
DNMA-NS	0	100

Autonomy. We viewed autonomy in two ways: (a) as the ability of the client or party to be able to "tell his or her side of the story," and (b) as helping one party deal with the other. While parties to both mediated and non mediated cases broadly believed that they had been

able to tell their side of the story, the responses of mediating parties indicated that they were able to tell their story somewhat more effectively.

I/MY CLIENT WAS ABLE TO TELL MY/HIS SIDE OF THE STORY		
	AGREE	DISAGREE
DMA	89	7
DNMA	73	16
DML	84	8
DNML	73	17

There was less agreement with the statement that "The process helped me/my client deal with the other party." Parties to mediation were only slightly more likely to subscribe to the statement than their counterparts in unmediated cases. In general, these results do not reveal that mediation is notably more effective in promoting autonomy — a frequent claim of its proponents.

THE PROCESS HELPED ME/MY CLIENT DEAL WITH THE OTHER PARTY		
	DISAGREE	AGREE
DMA	31	56
DNMA	25	43
DML	32	52
DNML	37	42

Convenience/Access. We probed the extent to which the process of resolving the dispute was confusing to the respondent or their attorney and the degree to which participation was convenient to the parties. The results revealed that parties to mediated and non-mediated cases viewed the two processes as equivalently transparent and convenient.

Costs. Another claim made by ADR's proponents is that mediation will reduce both client and court costs. Our findings yield mixed results.

Attorney Use and Fees. As we indicated earlier, parties in unmediated cases were more likely to be represented than those in mediated cases. However, average attorney fees were so much higher (\$2,765 vs. \$1,020) in mediated cases that when fees were averaged across all cases they were still 70% higher in mediated cases. This suggests, in turn, the more contentious character of cases in which mediation takes place.

Judge or Commissioner Time. In addition, we know that mediated cases tend to have been before a judge or commissioner more frequently than non-mediated cases. Indeed, our respondents reported that mediated cases frequently had been before a judge or commissioner two or more times before mediation began. In this regard they were three times more likely to have had such extensive court contact when compared to the amount of court contact involved in unmediated cases before settlement negotiations have begun.

At the same time, though, our respondents indicated that cases settled at a higher rate in or following mediation than did non-mediated cases following settlement negotiations.

What if Mediation Not Available. Although somewhat speculative, we asked the litigants who mediated their cases what "would have happened if mediation were not available." The vast majority — 77% — responded that the case would have gone to trial. Only 6% said they would have dropped the case. This suggests that mediation did serve to siphon off cases that might have otherwise consumed substantial court resources.

Further Disputes and Litigation. Related disputes were far more likely to arise and further legal action much more likely to take place in mediated cases than in unmediated cases.

Costs of MDCH. Finally, the low number of cases that entered the domestic relations mediation program of the MDCH during the period of the study translated into comparatively high program costs when viewed on a cost per case basis.

Induced Cases. The corollary of this small caseload is clear evidence that the existence of court-annexed domestic mediation did not have the effect of inducing a large number of new cases into the court system. At the same time, it indicates that the program did not remove a large number of cases from the court's general caseload.

SUMMARY

What do the results obtained here mean for the court system? Perhaps the most salient single outcome was the higher settlement rate outside of the court among cases that were mediated versus those that were not mediated (i.e. the rate at which they settled within or outside of mediation but before trial). Indeed one half of all mediated cases settled within mediation.

But while settlements can generally be achieved in mediation, they appear to be significantly less durable than is the case in non-mediated cases. Related disputes were three times more likely to arise in mediated than non-mediated cases, which, all in all, seem to produce remarkably durable outcomes. Again, this result is probably in large part a function of the comparative contentiousness and difficulty of the underlying relationships between the parties in the mediated cases. Yet, even when we control for the presence of children we find that future disputes over related issues were more than twice as likely to arise in mediated than non-mediated cases.

What would have happened if mediation had not been available? 77% of the users of mediation claimed that the case would have gone to trial if mediation had not been available. While such "counterfactual" assertions are always speculative, they are nonetheless suggestive.

The low volume of cases that mediated in the MDCH during the period under observation makes it perfectly clear that the mere creation of a low-cost alternative dispute resolution forum will not increase court costs by inducing substantial numbers of new cases into the court system that would not otherwise have opted for formal resolution.

Looking to the results reported here *from the disputants' perspective*, parties to mediated cases were substantially less satisfied with the outcomes in their cases than were parties in the sample of non-mediated cases surveyed. These differences narrow when we compare only mediated and non-mediated cases in which children were present. They virtually disappear when the parties to non-mediated cases were very bitter or when they ranked the importance of the issues being disputed quite highly.

The results arrayed in this section indicate that at least in the domestic relations context, mediation will generate the highest comparative satisfaction levels with regard to outcomes when (a) the parties are bitter, (b) they believe the issues involved are very important, and (c) they do not view their bargaining power as being weak.

Looking at mediated cases alone, what are the characteristics of those who appear to be most satisfied? Here again our results are somewhat counter-intuitive. Members of what might be thought to be historically disenfranchised groups appeared to be most satisfied with the outcomes achieved in mediation. Hence, women were more satisfied than men, blacks than whites, those appearing pro se than those who are represented, and parties with lower incomes than those with higher incomes.

The degree to which entry appeared to be voluntary also did not seem to be significant. Unmarried parents, who were the most likely to be directed into mediation during the period examined, were as likely to be equivalently satisfied with the result as other parties to mediation whose participation was, presumably, more voluntary.

Looking at mediated cases alone, and taking into consideration the comparative difficulty or contentiousness of those cases, one must be impressed that in over half of the cases surveyed, the parties to mediation declared themselves to be highly satisfied with the outcomes achieved.

While mediating parties were pronouncedly less satisfied with outcomes than non-mediating parties, those differences declined sharply and nearly disappeared when it came to process measures. This may mean that mediation is working as the framers might have envisioned it: forcing compromises between the parties that leave them less happy with the outcomes than they are with the process itself. But disputant satisfaction with the process of mediation fell off sharply in cases that failed to settle short of trial, with no comparable pattern emerging in unmediated cases.

Parties to both mediated and non-mediated cases found the processes comprehensible and convenient and consistently believed that they were treated with dignity.

AN ANALYSIS OF THE MEDIATION OF CIVIL II CASES

INTRODUCTION

The Civil II Mediation Program was established in October, 1987 as a result of the success experienced in mediating Civil I cases, the Resolution of Civil Disputes Program, and the first annual Settlement Week. Civil II cases generally involve fewer parties and involve less complex issues than Civil I cases. The bulk are breach of contract, personal injury or negligence cases. To be eligible for mediation, a Civil II case must be "at issue" — the complaint and answer filed, and a trial date scheduled but at least three months away.

At the time of the study, a Civil II case could enter the mediation program in either of two ways. An attorney for one of the litigants, or the party if appearing pro se, could request mediation; if the case was eligible for mediation, the judge would order the rest of the parties to attend at least one mediation session.⁷⁴ Alternatively, even without a request by a party, the judge could order all the parties into mediation if he or she thought the process would be valuable.⁷⁵ The use of mediation did not affect the pre-trial or trial schedule for the case.

The program has evolved since the study, however. Currently, the parties are required to fill out a case classification form when a civil complaint is filed. The form lists a number of case characteristics which are then analyzed by computer in the MDCH. This program pairs the factors with dispute resolution techniques and develops a recommendation as to the appropriate procedure to be followed for the case — mediation, arbitration, or neutral case

74. Roughly a quarter of the cases requesting mediation were found ineligible, however. Research and Development Division, Accelerated Resolution of Civil Disputes Through the Multi-Door Dispute Resolution Program, Superior Court of the District of Columbia (1989) at 9.

75. Typically, however, at least one party requested mediation.

It should be noted, therefore, that in the analysis that follows, some of the parties actively requested that the case be mediated, whereas other parties were ordered into mediation.

evaluation.⁷⁶ 3 to 4 months later, the judge to whom the case has been assigned conducts a conference to determine which ADR procedure — if any — will be employed in the case and a schedule for doing so. Arbitration is typically held within 120 days, while mediation generally starts 4-8 months after the conference, depending on the complexity of the case and the amount of discovery needed.⁷⁷

The analysis that follows is designed to gain an insight into the effect of mediation — on the court, on the litigants, and on society. To do so, it compares the experience of parties who mediated with cases in which mediation was not used. The first step of the analysis, therefore, is to develop the cases which were compared: what types of cases were available for analysis, how the cases were selected, and what the composition was of the cases that were selected in terms of the numbers of plaintiffs, defendants, and lawyers for each. From there we move into an analysis of the parties to see who participated in mediation and who did not. Next, the dynamics of the litigation is explored: what the issues were in mediation and the comparison cases; how those issues were resolved; how durable the decisions were. Since the relationship between the lawyer and the client could have a significant effect on a party's participation in mediation and satisfaction with the overall process, that relationship is examined within the context of who chose to mediate what types of cases. The decision to mediate and its consequences are then examined. To determine why settlement agreements — in mediation and in unassisted negotiations — are reached, we probe the factors that the parties and their lawyers believed were important in making those decisions. Since bargaining power can have a powerful influence on the outcome of mediation and settlement, and hence on whether a case goes to trial, we asked the participants a number of questions that were designed to illuminate their relative strengths. Finally, we sought the parties' reactions to the experience: were they

76. ADR Program, *supra* note 20 at 9.

77. *Id.*

satisfied with the process by which the decision was made and its substantive outcome, and was justice done? To determine whether the answers varied as a function of important characteristics of the parties, the analysis is stratified along those lines.

RESEARCH APPROACH

The Universe of Mediated Cases. The universe of Civil II cases consisted of all 146 cases handled by the MDCH's Civil II program between its inception in October, 1987, and the end of 1988.⁷⁸ During its three months of operation in 1987, 39 cases entered Civil II mediation; 14 of these completed mediation and 9 reached agreement. 107 new cases entered Civil II mediation in 1988. 111 cases completed mediation that year, including some which started the process in 1987. 58 of the 111 reached agreement. Thus, during the two-year observation period, 125 of the 146 cases handled by the Civil II program completed mediation and 67 of these reached agreement. These figures, contrasted with the slightly more than 2,500 new civil cases that were filed in 1988 alone, indicate that the mediation program handled a *very* small percentage of the overall caseload.

Selection of Mediated Cases. By examining all cases which began the mediation process, but did not necessarily complete it, we take into account the rate of discontinuation that would not be captured in a study which concentrates solely on cases that completed mediation. This approach also allows for the analysis and identification of variables which influence the rate of mediation completion.

Drawing a Comparison Sample. Unlike the MDCH case files, the Civil II litigation files are voluminous. Drawing the litigation comparison group therefore required additional steps that were not necessary in the creation of the experimental group.

To ensure that the comparison group mirrored the experimental group, only cases involving issues eligible for the mediation program were considered for the comparison group.

78. The statistics in this paragraph are from 1988 Annual Report of the District of Columbia Courts at 65, 100-101.

Out of the total number of cases determined by the first two steps to be eligible for the comparison group, a specified number were randomly drawn.

Composition of the Sampled Cases: Plaintiffs versus Defendants. The sample of cases that was analyzed consisted of 102 cases that had been mediated and 135 cases that were not. Of these, we were able to interview 346 people. Just over 200 were litigants, 96 of whom participated in mediation and 112 of whom did not; 138 were attorneys, 73 representing parties in cases that were mediated and 65 representing parties in non-mediated cases. Thus, as far as the overall distribution of the parties goes, the sample was relatively balanced.

CIVIL II RESPONDENTS		
	LITIGANTS	ATTORNEYS
MEDIATED	96	73
NON-MEDIATED	112	65

Breaking the composition of the cases down further to reflect plaintiffs and defendants, the mediated cases were likewise relatively balanced between plaintiffs and defendants (approximately 48 apiece) and attorneys (around 36), although the plaintiffs were somewhat more prevalent (42 to 31). In the non-mediated cases, the percentage of defense attorneys to defendants was approximately the same as in the mediated cases (66% versus 61%), but the ratio of attorneys to plaintiffs was significantly lower (54% versus 93%). It is likely this difference owes to the fact that more non-mediating plaintiffs were interviewed than the other categories. But for that aberration, the distribution was relatively consistent. In particular, this distribution cannot be attributed to the fact that non-mediated cases were more likely to involve multiple plaintiffs. Rather, the cases were relatively consistent with respect to having multiple plaintiffs; though some may view multi-party cases as inappropriate for mediation, that was not a determining factor.

CIVIL II RESPONDENTS		
	LITIGANTS	ATTORNEYS
MEDIATED: PLAINTIFF	45	42
MEDIATED: DEFENDANT	51	31
NON-MEDIATED: PLAINTIFF	71	38
NON-MEDIATED: DEFENDANT	41	27

NUMBER OF PARTIES			
	1	2	>2
<u>MEDIATED</u>			
▸ PLAINTIFFS	81	15	4
▸ DEFENDANTS	52	36	12
<u>NON-MEDIATED</u>			
▸ PLAINTIFFS	85	13	2
▸ DEFENDANTS	65	21	14

The Issues Involved. The table below indicates that a significantly greater percentage of the cases in mediation involved personal injuries (54%) than non-mediated cases (35%). On the other hand, a greater proportion of the non-mediated cases involved breach of contract than was the case in mediation. Between them, the two categories comprise 86% of the mediated cases and 75% of the non-mediated cases. When cases involving the payment of goods and services are included, fully 93% of the cases in both categories are represented.

ISSUES INVOLVED		
	%CML	%CNML
Personal injury-traffic	35	24
Personal injury-not traffic	19	11
Assault and battery	1	3
Payment-goods or services	7	20
Defective goods or services	4	1
Breach of contract	32	40
Employer/employee issues	1	2
Civil rights	1	1

THE CONTEXT OF THE DISPUTE

This section develops a profile of the parties — both those who do and those who do not use mediation. We begin by reviewing the people and organizations involved in Civil II cases and who sues whom. As to individuals, we look at the demographics: their gender, race, age, occupation, education, and income. Each of these factors may influence who uses mediation and their satisfaction with the process used to resolve their dispute. We then contrast the types of organizations that use mediation with those that do not. Finally, since mediation is often touted as particularly appropriate when there is an on-going relationship between the parties or in dealing with emotional issues, we look at the relationship between the parties.

People or Organizations. Unlike Domestic Relations in which all parties are necessarily individuals, companies or other types of organizations may be either plaintiffs or defendants in Civil II cases. Whether a party is an organization or an individual may have a significant bearing on mediation, so we analyzed our responses accordingly. In general, two thirds of the parties — whether plaintiff or defendant — were individuals and one third were organizations. However, 84% of the plaintiffs in the mediated cases were individuals. That is not surprising given the nature of the mediated cases: a substantial percentage are personal injury matters — necessarily involving individual plaintiffs.

INDIVIDUAL VS ORGANIZATIONAL PARTY AS PERCENT OF CASES		
	INDIVIDUAL	ORGANIZATION
<u>MEDIATED</u>		
▸ PLAINTIFF	84	16
▸ DEFENDANT	64	36
<u>NON-MEDIATED</u>		
▸ PLAINTIFF	67	33
▸ DEFENDANT	63	36

Profile of the Individuals. The people who appeared in Civil II cases as individuals rather than as representatives of an organization had the following characteristics in terms of gender, race, occupation, education, and income —

Gender. Although the difference in gender of the parties in mediated and non-mediated cases was not great, there was a slight bias in favor of men in non-mediated cases. 56% of the women participated in mediation, whereas only 47% of the men did.

GENDER OF PARTIES AS PER CENT OF CASES		
	MALE	FEMALE
MEDIATED		
▸ PLAINTIFFS	58	42
▸ DEFENDANTS	56	44
NON-MEDIATED		
▸ PLAINTIFFS	63	37
▸ DEFENDANTS	70	30

Race. The racial composition of the parties was relatively consistent across mediated and non-mediated cases, although there was one inconsistent result. The table demonstrates that a slight majority of the plaintiffs were black and about 60% of the defendants were white. The defendant litigants in non-mediated cases disagreed with this, and reported that 72% of the

defendants were black; the lawyers, on the other hand, reported that only 40% were.⁷⁹ Of the litigants interviewed, 59% of the whites participated in the mediation while 46% of the blacks did.

The data also indicate that *none* of the mediating plaintiffs were other minorities, even though 10% of the plaintiffs in non-mediated cases were other minorities.

RACE OF LITIGANTS AS PERCENT OF CASES			
	BLACK	WHITE	OTHER
CMLP	59	41	
CMAP	68	32	
CMLD	35	58	8
CMAD	42	58	
CNMLP	51	40	9
CNMAP	56	33	11
CNMLD	72	28	
CNMAD	40	53	7

Age. There is nothing particularly startling in the data with respect to the parties' age — it shows that those who used the court system were predominately between 30 and 50. The data does suggest, however, that older people were more likely to use the civil mediation program than were younger individuals.

79. As is discussed below at page 98, fully a third of all blacks appear pro se in non-mediated cases while virtually all are represented in mediated cases. The differences in these responses could well indicate that individual black litigants do not choose mediation but their lawyers do.

AGE OF THE PARTIES AS A PERCENT OF CASES			
	<30	31-50	>50
CMLP	10	60	30
CMAP	27	57	23
CMLD	27	42	31
CMAD	15	38	46
CNMLP	17	58	25
CNMAP	22	67	11
CNMLD	15	65	20
CNMAD	7	73	20

Occupation. The percentage distribution of occupations in our sample is:

Student	3
Employee of DC Gov't	5
Employee of Fed. Gov't	5
Hourly employee	13
Salaried employee	15
Self-employed	14
Professional	34
Not employed	3
Other	8

Thus, by far the largest category is that of professionals — they are more than twice the percentage of the next highest occupation. When viewed in terms of occupational classification, the *only* plaintiffs to use mediation more than litigation were the hourly employees. Those who are self-employed, professional, or salaried were **twice** as likely to litigate than to mediate when they were plaintiffs. Interestingly, these trends were not mirrored on the defense side.

Education. Those with higher educations did not appear inclined to initiate actions in mediation. For example, exactly half of those holding professional degrees (one third of the respondents) used mediation. Interestingly, professionals were twice as likely to be defendants in mediated cases, but in cases that were not mediated just the opposite is true: they were twice as likely to be plaintiffs.

Income. This trend continues when the income of the individual participants is examined: Those earning more than \$60,000 per year were much more likely to have their case resolved without mediation if they were plaintiffs, and much more likely to be defendants if they used mediation.

Insurance. Those who appeared in their personal capacity were asked if they participated in the litigation because their insurance company required it. Only 8.5% responded that this was the case, and those were roughly evenly divided between mediated and non-mediated cases.

Organizations. Those who indicated that they participated in the litigation as a representative for or as an attorney representing an organization were asked about those firms. Together contractors and banks constituted 43% of all the organizations (22% apiece); insurers accounted for another 15%; and retail stores represented 7.5% of the respondents. Of these, 40% of the contractors used mediation, as did 10% of the banks, 43% of the insurers, and 14% of the retail stores.

The representatives were also asked how many lawsuits their organization had been involved in over the past five years. The responses are telling: It appears that those with experience preferred litigation, especially when they were plaintiffs.⁸⁰ Novices, on the other hand, chose mediation.

80. Given the way the Civil II mediation program worked, if one party requested that the case be mediated the judge would more than likely order the case into mediation. That these experienced litigants did not mediate reflects a preference that their case be handled that way.

NUMBER OF LAWSUITS IN PAST 5 YEARS			
	1	2-5	6+
CMLP	38	23	38
CMLD	17	35	48
CNMLP	3	19	78
CNMLD	16	5	79

Ten percent of those responding indicated that their organization was in the case because of insurance.

Relationship with the Other Party.

Type. Reflecting the nature of Civil II cases, only 1% of the respondents reported that they and the opposing party shared an "intimate" relationship; of these, mediation was used exactly half the time. The remaining cases had the following characteristics:

NATURE OF RELATIONSHIP			
	NONE BEFORE THIS CASE	IMPERSONAL, BUSINESS	PERSONAL
CMLP	40	51	9
CMLD	43	45	13
CNMLP	23	74	3
CNMLD	62	38	0

Although the point should not be pressed because of the small numbers involved, the table does indicate that disputes between people with a personal relationship were more likely to be resolved in mediation than in litigation, just as theory predicts.

Length and Future. Nearly half of the respondents reported that they had had their relationship with the other party for less than a year. The bulk of Civil II cases are arms-length, non-personal matters. In nearly 75% of all the cases, the parties knew each other for two years or less. Moreover, an overwhelming 83% of the respondents indicated that the parties would not have to deal with each other again. Whether or not mediation is used does

not appear to be a function of whether the parties will have to deal with each other in the future — one of the putative benefits of mediation.

Emotional Aspects. The parties were asked to rank the emotional nature of their relationship at the time the case was filed. The result of the inquiry is:

BITTERNESS OF THE RELATIONSHIP			
	FRIENDLY (1-2)	MIDDLE (3)	BITTER (4-5)
CMLP	19	31	50
CMAP	26	31	43
CMLD	13	50	38
CMAD	17	34	48
CNMLP	20	45	34
CNMAP	8	50	42
CNMLD	28	44	28
CNMAD	32	40	28

The table indicates that the relationships between the parties in mediation were more bitter than those between their counterparts who did not mediate. For example, in *every* category of respondents in mediated cases, the number of cases reflecting bitterness exceeded those where the parties were friendly; indeed, for 3 of the 4 categories of respondents the ratio was significantly more than 2:1. In fact, the litigants and lawyers to non-mediated cases were almost as likely to describe relations between the parties as being "generally friendly" as "very bitter." An important exception was the response of plaintiffs' attorneys in non-mediating cases, who generally painted a picture of bitter relations between the parties.

Summary. Roughly two thirds of the parties to both mediated and non-mediated Civil II cases were individuals. However, plaintiffs in mediation were significantly more likely to be individuals. That is at least somewhat attributable to the number of personal injury cases that are mediated. Although about 60% of the individual litigants were men, the percentage of women in mediation was higher than men. Individual plaintiffs were more likely to be

black, and individual defendants were more likely to be white. Whites were more likely to be in mediation than were blacks.

Individuals who are (1) highly educated, (2) are professional, self-employed, or salaried, and (3) have higher incomes were significantly more likely *not* to mediate when they were plaintiffs. They did, however, use mediation as defendants, which may, of course, be because the plaintiffs requested it. Similarly, organizations that were experienced in litigation shunned mediation when they were plaintiffs.

The relationship between the parties in Civil II cases is, by and large, arms length — very few will have to deal with each other again. Even those that will have to deal with each other in the future reported that this was not a significant factor as to whether or not a case was mediated. **But**, the cases in mediation were significantly more emotionally charged than were non-mediated cases.

This profile suggests that experienced, sophisticated litigants do not choose mediation. One cannot generalize, however, and say that typically vulnerable populations end up in mediation: while women were more likely to, blacks and other minorities were not. The cases in mediation were more bitter than those that were not; the plaintiffs in the cases appear more emotionally invested in their cause.

The data alone would not seem to have very profound effects on the courts, although it does indicate that the emotionally difficult cases — which can consume a disproportionate amount of trial time — are siphoned off into mediation. As for the individuals, this cross section only provides the setting for subsequent analysis. As for the effect on society, the data raises a troubling question: Why is it that sophisticated parties do not mediate as plaintiffs?

LAWYERS AND THEIR CLIENTS

Lawyers clearly play a critical role in the resolution of disputes. One purported benefit of mediation is that it may make parties more able to resolve the case on their own, and hence enable them to resolve the matter without lawyers. But, if there are lawyers, they may select mediation, or caution against it; their manner of payment may influence which process is followed; who a client chooses to represent him or her may also affect whether mediation is used. This section probes these issues.

Represented or Pro Se. The representation of the parties is a bit surprising. Virtually all — 98% — of the individual plaintiffs in mediation were represented, but slightly less than 90% of the individual defendants were. Interestingly, a greater percentage of the plaintiffs in mediation had lawyers than their counterparts who did not mediate. Nearly a quarter of all the defendants who did not use mediation were pro se. Thus, in Civil II, parties to mediated cases were not more likely to appear pro se than parties to non-mediated cases. This could indicate that the lawyers themselves suggest mediation or that the more difficult cases are referred to the mediation program.

REPRESENTED OR PRO SE		
	REPRESENTED	PRO SE
Mediated — Plaintiffs	98	2
Mediated — Defendants	89	11
Non-med — Plaintiffs	93	7
Non-med — Defendants	76	24

Virtually all blacks in mediation were represented, but more than a third who did not mediate appeared pro se. To the contrary, nearly a quarter of the whites who mediated appeared pro se, but only about half that share (13%) appeared pro se in non-mediated cases. This may indicate that whites are more comfortable in mediation and hence go it alone, but then want the protection of counsel in litigation. While this conjecture — and it is just that —

would seem to be reasonable in a normal mediation setting, this mediation takes place at the door of the courtroom, and much of the litigation process has already taken place; thus mediation versus litigation itself would not seem to be a determinative factor. Rather, some other characteristic of the case and the parties is likely at work.

REPRESENTED OR PRO SE — BY RACE⁸¹		
	REPRESENTED	PRO SE
Mediated — Black	96	4
Mediated — White	76	24
Non-med — Black	64	35
Non-med — White	87	13

Attorney-Client Relationship. Clients can secure their lawyers in any of a number of ways — they can be retained especially for the occasion; they can be furnished by some organization; they can be the client's customary/on-going attorney. To see if there was a difference with respect to whether the case was mediated, we inquired into that relationship. The results are described in the table below, and what we see is a snapshot of an urban court.

Virtually all of the plaintiffs who did not mediate reported that they used their regular lawyer, whereas only a third of those in mediation did so. Nearly half the lawyers for defendants in mediation reported that they were provided by an insurance company, as opposed to less than a quarter for non-mediated cases. These choices reflect the nature of the cases that are heard by the two processes: The plaintiffs reported that 58% of the mediated cases involved personal injury of some sort — just the type that are defended by insurance companies. On the other hand, the non-mediating plaintiffs reported that only 20% of their cases involved personal injuries. 75% of the non-mediated cases either involved a breach of

81. This table includes only those who answered that they appeared as individuals and not as a representative of an organization.

contract (43%) or were merchandise related (32%). Plaintiffs in these cases would likely have, and use, their customary lawyer.

RELATIONSHIP BETWEEN ATTORNEY AND CLIENT								
	MLP	MAP	MLD	MAD	NMLP	NMAP	NMLD	NMAD
Regular family/business	33	22	29	13	93	29	75	22
Furnished by insurer	3	10	26	47	7	6	25	22
In-house counsel	3	0	12	7	0	3	0	19
Represented client before	18	22	5	13	0	20	0	15
Retained for this case	35	41	26	17	0	40	0	19
Provided by other org.	0	0	0	0	0	0	0	4
Friend	10	5	2	3	0	3	0	0

How the Lawyer Is Paid. The manner in which the attorney is paid could conceivably affect how the case is resolved. Responses to this question confirmed our expectations: Three quarters of the non-mediating plaintiff's lawyers reported that they were paid on a contingent fee basis; a slightly lower percentage of the plaintiff's attorneys in mediation charged likewise. Half of the non-mediating plaintiffs reported paying on a contingent fee basis as did — again — a slightly lower percentage of those in mediation. The preponderance of defense lawyers charged by the hour, as we had expected. Given the nature of the case loads, it is not surprising to find that the proportion of lawyers on salary was twice as high for those who did not use mediation. In addition, significantly more mediating defendants reported paying their lawyers a retainer than any other category. Plaintiffs who pay a flat, fixed rate appear far more likely — 3:1 — to mediate than not, as reported by their lawyers; the plaintiffs themselves reported a similar, although not as pronounced, phenomenon.

A little more than a quarter of those who were charged either a flat rate or a contingent fee reported that the rate would go up if the case went to trial. The figures were remarkably consistent across all the categories of respondents.

HOW THE LAWYER IS PAID								
	MLP	MAP	MLD	MAD	NMLP	NMAP	NMLD	NMAD
Flat rate, fixed charge	16	10	16	3	10	3	17	13
Contingent fee	44	68	5	3	50	77	9	0
Salary	8	0	5	7	12	3	13	17
Hourly Rate	24	15	50	72	17	14	52	65
Retainer	3	2	11	0	2	0	4	4
Nothing	5	5	13	14	10	3	4	0

Satisfaction with the Lawyer. The respondents were asked how satisfied they were with their lawyers and how satisfied the lawyers thought their clients were with them. Happily for the profession, the parties were generally quite pleased with counsel. One interesting aspect is that the lawyers for those who mediated thought more of their clients were unhappy than those who did not mediate. The most unhappy of the lot tended to be the plaintiffs in litigation, but only marginally more so than plaintiffs in mediation. Defendants in mediation were less pleased with their attorneys than their counterparts. **But**, none of these figures should be pushed because the differences in percentages are too small to bear much weight.

SATISFACTION WITH COUNSEL			
	NOT SATISFIED (1-2)	MEDIUM	VERY SATISFIED (4-5)
CMLP	13	13	75
CMAP	5	14	81
CMLD	12	12	76
CMAD	7	13	80
CNMLP	16	9	75
CNMAP	3	7	87
CNMLD	7	4	89
CNMAD	0	24	76

Summary. Mediation does not appear to enable the parties to deal with each other directly, without lawyers. In fact, the parties in mediation were *less* likely to appear pro se than if the case were not mediated. That is very likely due to the way cases enter mediation,

however, since it is likely that it is the lawyers, not the clients, who choose to mediate. Very few blacks appeared in mediation pro se, while a third of those who did not mediate went it alone. The rates for whites are reversed: more appeared pro se in mediation than in non-mediated cases.

Although there is nothing particularly startling concerning the relationship between the lawyers and clients as a function of mediating or not, it does appear that the cases in mediation have a far wider variety of attorney-client relationships. There do not appear to be any significant findings with respect to how the lawyers are paid overall. Finally, the clients were, on the whole, quite pleased with their lawyers. Plaintiffs had very similar reactions to their lawyers whether or not the case was mediated. Defendants, on the other hand, were more satisfied and less dissatisfied when their cases were *not* mediated.

THE DYNAMICS OF THE LITIGATION

This section looks at the dynamics of the litigation: The forces that are at work with respect to whether the case is settled or requires a decision by the court and whether the decision that is reached does in fact end the matter. Thus, the first part examines whether the issues were resolved by settlement, a decision by the court, or whether the matter was abandoned. To determine whether the manner of resolution may be a function of particular case characteristics, we separately reviewed the nature of the issues in contention, whether the party was an individual or an organization, whether an individual party is a male or female, and whether an individual party is black or white. Mediation is frequently touted as being better able to finally resolve matters so that the parties are more likely to comply with the decisions and less likely to require subsequent lawsuits over related issues. We therefore probed the rate of compliance with the decision and its "durability" — as measured by the necessity of further litigation over the same issues. Then, to see if the types of cases proceeding to mediation are somehow different in kind from those that take the traditional

route, we looked at the importance of the issues. By comparing the responses of the lawyers to those of the clients, one can distinguish between cases that are important because of their emotional impact from those that are important because they raise more difficult legal issues.

How the Issues Were Resolved: Settlement, Litigation, or Abandonment. One of the major reasons court-annexed ADR programs are established is to reduce the court resources required to resolve a case. Thus, the effect of mediation on the number of cases that actually go to trial (that is, are resolved by the court versus settled by the parties short of trial) is one important measure of the success of the program. As the table indicates, according to the litigants themselves, 13% of the cases that were mediated actually required a judgment by the court. That compares to 20% for the cases that were not mediated. Thus, when mediation was used, a significant 7% fewer cases went to trial.⁸² That would surely seem to bear out the aspirations of those who look to mediation to reduce caseloads. These figures do not reflect whether the reason for the higher settlement rate was the intervention of a mediator or whether mediation was chosen in those cases that were more likely to settle: Self-selection may be at work.

The lawyers reported a slightly different story, however. Lawyers, both for those who mediated and for those who did not, reported that roughly 80% of cases settled, and 16-18% of the cases required a decision by the court. Thus, from the lawyers' perspective, mediation had a relatively small reduction — 2% — on the trial rate. The difference is explained in part by the fact that *pro se* litigants are significantly less likely to settle than are those who have representation.⁸³

82. 80% of the litigants who mediated reported that they settled shy of trial, and 7% reported that the case was abandoned short of resolution. That contrasts with only 72% of the non-mediating parties who reported settling. The abandonment rate was about the same. These figures do not include cases that were terminated for lack of service. If these cases were included, the percentage of cases actually going to trial would, of course, be smaller.

83. For non-mediating litigants who were represented by counsel, 75% settled, 18% required a decision by the court, and 6% abandoned the case. That contrasts with those appeared *pro se*, in which 62% settled, 23% required a judicial resolution, and 15% abandoned the matter.

HOW THE ISSUES WERE RESOLVED ⁸⁴			
	SETTLED	COURT	ABANDONED
CML	80	13	7
CMA	81	16	4
CNML	72	20	8
CNMA	80	18	2

To determine whether some categories of parties were more likely to settle — whether or not in mediation — the data was analyzed by the type of issue presented, whether the party was an individual or an organization, whether a man or woman, whether black or white.

Issues Raised in the Litigation. Some types of issues may, of course, be easier to resolve through negotiations than others. If certain kinds of matters were far more likely to require a decision of the court than others, it would make sense to channel cases that are amenable to settling in an amicable forum into mediation, and to reserve trials for those more likely to require it. This would avoid the extra time and cost of mediation if there is little likelihood of success. On the other hand, it may be that certain types of cases have a greater tendency to require judicial resolution but nevertheless hold enough potential for settling to merit a concerted effort to negotiate. To probe this, we analyzed the four kinds of cases that are most frequently mediated — automobile related personal injuries, non-auto related personal injuries (such as medical malpractice or an injury while at someone's home or place of business), payments for goods or services, and breach of contract. The table below indicates the percentage of each type of case that required a decision of the court — that is, the percentages of cases that *did not settle*.

If the cases were all of the same degree of complexity — something we were unable to control for — the table shows that mediation was quite successful in resolving auto related and breach of contract cases, with less than half of those in mediation requiring judicial

84. This table reflects the responses to CML Question 54, CNML Question 28, CMA Question 57, and CNMA Question 51. Those who either did not know or who did not answer were not included in the tabulation.

intervention than if mediation is not used. On the other hand, all of the non-mediated non-auto related PI cases settled, while 18% of those in mediation required a decision by the court. As we will see later, these results are reflected in decisions by the parties themselves — plaintiffs in these cases do not select mediation.⁸⁵ The results of the cases involving payments for goods and services are strangely inconsistent.

ISSUES REQUIRING DECISION BY THE COURT				
	AUTO RELAT- ED PI	NON-AUTO PI	PAYMENTS	BREACH OF CONTRACT
CML	3	19	0	15
CMA	6	18	50	13
CNML	10	0	0	30
CNMA	11	0	17	36

Individual or Organization. The respondents were asked whether they appeared in the lawsuit as an individual or as a representative of an organization. The table below indicates that organizations were far more likely to settle their cases, whether or not they were mediated.

This phenomenon is likely another manifestation of the fact that individuals appear to become invested with the correctness of their cause and hence may not be as willing to settle short of what they think is their due, even if it is unlikely that they will prevail on the merits. Organizations, on the other hand, are more likely to make a "business" judgment as to whether or not to force the matter to litigation, and they are more likely to be experienced at disputing — having a better feel for when to settle. As between mediating and not, parties —

85. See discussion at p. 114.

individuals and organizations alike — undoubtedly benefit from hearing the perspective of their opponents during mediation, and hence they are more likely to settle.⁸⁶

Whether the respondent was an organization or an individual, a higher percentage of the mediated cases were settled and fewer required a decision of the court.

HOW ISSUES WERE RESOLVED — BY INDIVIDUAL OR ORGANIZATION			
	SETTLED	COURT	ABANDONED
CML-INDIVIDUAL	76	16	8
CML-ORGANIZATION	88	6	6
CNML-INDIVIDUAL	72	21	8
CNML-ORGANIZATION	77	14	9

Gender. It is commonly thought that women are more likely to settle their differences than are men. This notion was borne out in the mediated cases: Women were close to three times less likely to require a decision by the court than were men. Women both settled more and abandoned cases more often than men. For non-mediated cases, however, women were *more* likely to require a judgment by the court and were *less* likely to abandon the case than were men. The response levels in the non-mediated cases were so low that a very few cases in either direction would have a major effect on the results.

86. Again, however, the cases are at least partially self selected for mediation, and hence those that are more likely to settle may be mediated. Thus, these figures cannot be relied upon to determine the efficacy of mediation in inducing settlements.

HOW ISSUES WERE RESOLVED — BY GENDER			
	SETTLED	COURT	ABANDONED
CML-MALE	71	21	7
CML-FEMALE	77	9	9
CMA-MALE	77	19	4
CMA-FEMALE	87	7	7
CNML-MALE	68	18	13
CNML-FEMALE	73	26	0
CNMA-MALE	84	10	5
CNMA-FEMALE	80	20	0

Race. To determine whether the race of the litigant was a factor in the settlement rate, we analyzed the responses from people who indicated they had appeared in the case as individuals, not as representatives of organizations. The numbers are small here, so caution must be taken in generalizing from the results, but the results are dramatic: Whites were far more likely to resolve their case through a decision by the court than were blacks, by a margin of from 2.5:1 to 5.5:1. The responses are consistent for 3 of the 4 categories of respondents — only the lawyers in mediation saw things differently.

HOW ISSUES WERE RESOLVED — BY RACE			
	SETTLED	COURT	ABANDONED
CML-BLACK	86	5	9
CML-WHITE	61	30	9
CMA-BLACK	79	17	4
CMA-WHITE	87	7	7
CNML-BLACK	74	11	16
CNML-WHITE	69	31	0
CNMA-BLACK	93	7	0
CNMA-WHITE	64	27	9

Compliance with the Decision. One of the putative benefits of mediation is that since the parties craft their own agreement to remedy their dispute, they will have a higher degree of "ownership" in it and hence will be more likely to abide by its terms. To test this hypothesis, the parties and their lawyers were asked whether they and their counterparts had complied with the decision. The responses were:

COMPLIANCE WITH THE DECISION			
	FULLY	PARTIALLY	NONE
Mediation Litigant -- Self	89	7	4
Mediation Litigant -- Other party	83	8	9
Mediation Attorney -- Client	92	0	8
Mediation Attorney -- Other party	90	6	4
Non-med Litigant -- Self	92	3	5
Non-med Litigant -- Other party	78	0	22
Non-med Attorney -- Client	93	0	7
Non-med Attorney -- Other party	88	0	15

The parties and their lawyers agreed that the rate of non-compliance by the other party with the decision was about twice as great for non-mediated cases as for those that were mediated. This is as the theory predicts. Their views of their own compliance were similar across the two categories. *But*, the table also indicates a significantly greater rate of partial

compliance — both by the respondent and by the respondent's adversary — in mediation than in non-mediated cases.

Durability. One of the nominal benefits of mediation is that it is able to resolve issues once and for all, without having to revisit other, related issues later. To test this hypothesis, the respondents were asked whether any disputes over the issues involved in this case had arisen since it was resolved. The results do not support the contention. Indeed, the responses indicate that plaintiffs in mediation had *more* subsequent disputes than did their counterparts. If one looks at the lawyers' responses, there is virtually no difference between litigation and mediation, at least for the types of disputes involved in Civil II — the vast proportion of which are breach of contract or personal injury. The issues of these cases would seem more amenable to a one-time decision than would more complex, multi-issue matters.

DURABILITY OF THE RESOLUTION — ANY SUBSEQUENT DISPUTES			
	YES	NO	DON'T KNOW
CMLP	14	87	0
CMAP	5	95	0
CMLD	4	96	6
CMAD	17	83	0
CNMLP	6	94	9
CNMAP	6	94	0
CNMLD	3	92	5
CNMAD	18	82	0

Importance of the Issues. To determine whether the types of cases are qualitatively different from those in which mediation was not chosen by a party, we asked the respondents to rank how important the issues in contention were. Almost all (93%) of the plaintiffs in mediation thought the issues involved were important (indeed, 86% responded that they were very important, a "5"). Their lawyers discounted that view significantly: only half of the

plaintiffs' lawyers in mediation thought the issues were important and more than a third of them thought the issues were *not* important (a "1"). This likely means that the issues had taken on a personal significance to the individual litigant, but were not particularly important legal issues. It may be that these people felt they had been "wronged" and wanted to set the matter straight. As we saw above, plaintiffs in mediation tend to be invested emotionally in the case.

Three quarters of the defendants in mediated cases reported that the issues were important. As with the plaintiffs, their lawyers discounted the importance, but not nearly as much. From the lawyers' perspective, therefore, the issues were more important to the defendants than to the plaintiffs; and, similarly, the plaintiffs' lawyers thought the issues were not as important far more often than did the defendants' attorneys.

About three quarters of respondents in the non-mediated cases thought the issues were important. The defendants' attorneys did not rank the importance of the issues as highly as other parties to non-mediated cases.

Thus, from the *parties'* perspective, a higher percentage of the mediated cases involved "important" issues than did non-mediated cases. Plaintiffs' lawyers, however, felt that more of the non-mediated cases involved important issues. This would appear to be consistent with the earlier observation that while plaintiffs who mediate are emotionally involved with their cases, those cases do not present particularly complex legal matters. Plaintiffs with complex, legally difficult cases seem to prefer to remain outside mediation.

IMPORTANCE OF THE ISSUES			
	NOT IMPORTANT (1-2)	MEDIUM (3)	IMPORTANT (4-5)
CMLP	2	5	93
CMAP	38	14	48
CMLD	9	13	78
CMAD	15	23	62
CNMLP	16	14	71
CNMAP	17	13	71
CNMLD	15	8	77
CNMAD	33	22	44

Summary. The impacts of mediation on courts, the litigants, and society presented in this section offers a mixed picture.

Mediation clearly appears to help resolve cases short of litigation. The litigants themselves reported 7% fewer cases required a judgement by the court in mediation. Mediation appears particularly helpful in resolving automobile related personal injury cases and breach of contract matters.

Mitigating this observed effect, however, it also appears that the cases that are mediated tend to be less complex legally; they might therefore lend themselves more readily to a negotiated resolution than would more difficult legal matters. On the other hand, the parties themselves are invested in their cause in mediation, and those cases can be difficult to try. On the whole, we confirm that mediation does have a beneficial effect on the court's workload.

Mediation also appears to resolve the issues with greater certainty. Thus, if an agreement is reached with the aid of mediation, it is significantly more likely that the parties will abide by it. Mediation, therefore, seems to lead to compliance. But, unfortunately, the data also suggests, although less strongly, that more issues must be revisited in subsequent cases in mediation, and hence that mediated settlements are less durable.

Whether in mediation or not, organizations clearly settled more frequently than did individuals. The data also indicates that as predicted, women did settle cases more frequently

than did men. Most of the respondents also indicated that blacks were far more likely to settle their cases than were whites — by a significant margin. The mediating parties, non-mediating parties, and non-mediating attorneys concurred in this observation.

THE DECISION TO MEDIATE AND THE MEDIATION PROCESS

To determine who asks for mediation and why, and what the mediation was like once initiated, we inquired into a number of factors that we hypothesized might be influential. Thus, we asked whether the lawyers were familiar with mediation; perhaps those who did not choose it simply did not know about it, or perhaps they did and made a strategic choice. Does mediation save money or, perhaps as we saw in Domestic Relations, does it actually cost more? Who chooses mediation and to what extent is the request to mediate a function of some important characteristics of the parties, such as race or gender or how the lawyer is paid? We then look at the mediation process itself — when in the litigation process does it start, and how long does it last? Finally, we tried to determine what would happen if mediation were not available — does it provide a forum for cases that otherwise would not be heard?

Lawyers' Familiarity with Mediation. Lawyers are well aware of the mediation program. 85% responded that they had used the process before, and an additional 5% were familiar with it. Indeed, 97% of the defense lawyers in mediation had used it before.

LAWYERS' EXPERIENCE IN MEDIATION		
	YES	NO
CMAF	81	19
CMAD	97	3
CNMAF	89	11
CNMAD	85	15

Roughly 70%⁸⁷ of the lawyers representing clients in mediation said they viewed themselves "as an expert in representing clients in mediation". In contrast, only a little more than half of the lawyers who did not mediate viewed themselves as an expert in mediation.⁸⁸ Thus, the comfort a lawyer feels with the process may be an important ingredient as to whether or not the case enters mediation. This is important because lawyers appear to be crucial in the decision to mediate.

The Litigants' Understanding. In contrast to the lawyers, nearly two thirds (63%) of the defendants and slightly over half (55%) of the plaintiffs who did not mediate did not know that mediation was available without charge. Of those who knew mediation was available but who chose not to use it, more than 90% said they had a "fairly clear understanding of what mediation would be like." And, indeed, 53% of the plaintiffs and 40% of the defendants had used it before.

Cost of Mediating. The primary reason the litigants gave for using mediation was that they thought it would be cheaper. The primary reason their lawyers gave was that they thought it would be faster; the second most frequently reason the lawyers cited for choosing mediation was that it would be cheaper.

To test the hypothesis that mediation is a cheaper way to resolve disputes, the attorneys who participated in mediation were asked whether they thought participating in mediation saved their clients money. Only a few thought so, and about half thought mediation was more expensive. Thus, at least for this program, one needs to be skeptical at best as to the notion that mediation saves money. Countering this, however, is the data indicating that lawyers, especially in auto cases and other relatively straightforward cases, regularly chose mediation

87. 73% for plaintiffs' lawyers and 69% for defendants'.

88. 59% for plaintiffs' lawyers versus 52% for defendants'.

when they were paid a contingent fee.⁸⁹ One would assume that choice is influenced by the likelihood of an expeditious settlement — something borne out by the numbers. In these cases, the *client* may not save money — the payment would be the same — but the overall cost to society would be lower. Moreover, defendants, who presumably do not pay contingent fees, would save in the aggregate because fewer cases would go to trial.

WHAT MEDIATION COSTS AS COMPARED TO LITIGATION			
	EQUAL	MORE	LESS
CMAF	36	45	18
CMAD	26	59	15

Who Asks for Mediation. The parties who participated in mediation and their lawyers were asked whether they had requested that their case be mediated. Only a third of the clients who had a view thought that either they or their lawyers had asked for mediation. Even fewer of the defense lawyers said their side had asked for it. Nearly two thirds of the plaintiffs' lawyers, however, reported that they had requested that their case be mediated.

88% of the plaintiffs' lawyers for mediated cases involving traffic-related personal injuries requested mediation, while only 33% of the defendants' attorneys did. No lawyer — plaintiff or defendant — in cases involving non-traffic related personal injuries, such as medical malpractice, requested mediation.⁹⁰

67% of the lawyers for plaintiffs in breach of contract suits requested mediation, but half that share of defendants' lawyers did. Thus, mediation appears most attractive to the

89. See discussion *infra* at p. 115.

90. One lawyer who is familiar with the program explained that non-auto related PI cases are generally more complex than auto cases. By the time mediation would normally start in this program both sides would have invested a large amount of time in preparing for trial; thus the savings of a small amount of time — the perceived benefit of mediation — is not all that attractive. Further, non-auto PI cases frequently have a "lottery" element in that a plaintiff may be able to persuade the jury to make a very substantial award. As a result, the bargaining over these cases is far more complex and less normed than in auto cases. Lawyers therefore do not view them as appropriate for mediation. As the figures above show, however, they are regularly settled short of trial.

plaintiffs' bar, and within it, for cases involving traffic related personal injuries or breach of contract.

REQUESTED MEDIATION		
	YES	NO
CMLP	33	67
CMAF	62	38
CMLD	38	62
CMAD	25	75

Of those who mediated but did not request it, 55% of the parties reported that they agreed to do so voluntarily, but only 32% of their lawyers concurred. Thus, in keeping with the way the Civil II mediation program works, if one party requests that the case be mediated, the others can either be ordered or pressured into it.

Race. Far more white litigants recalled having requested mediation (43%) than black litigants (24%), but among the attorneys, those representing blacks requested mediation more often (50%) than did those representing whites (37%). Lawyer/client comparisons display wide divisions as well, especially among black respondents. More than twice as many attorneys for blacks reported having requested mediation than did their clients (50% to 24%). White litigants and their attorneys also disagreed, but again in the opposite way: more litigants recalled requesting mediation than attorneys, by 43% to 37%.

WHO REQUESTED MEDIATION — BY RACE		
	YES	NO
CML-BLACK	24	76
CML-WHITE	43	57
CMA-BLACK	50	50
CMA-WHITE	37	62

Gender. Gender evidently does play a role in requests for mediation. Female litigants and their attorneys alike recalled having requested mediation more often than their male counterparts. 39% of female litigants requested mediation, compared to 32% of male litigants. The difference was more pronounced among the attorneys: 57% of the attorneys representing females requested mediation as compared to 40% of those representing males.

This analysis also shows a clear difference between the inclinations of attorneys and litigants to mediate: Attorneys reported requesting mediation far more often than litigants.

WHO REQUESTED MEDIATION — BY GENDER		
	YES	NO
CML-MALE	32	68
CML-FEMALE	39	61
CMA-MALE	40	60
CMA-FEMALE	57	43

How the Lawyer was Paid. The method used to calculate a lawyer's fee clearly influences the rate at which mediation is sought. Both litigants who paid and attorneys who charged contingent fees reported having requested mediation more often than their counterparts not using the contingent fee system. It would seem that a lawyer on contingent fee would be interested in the course of action that would resolve the case the fastest on terms relatively favorable to the client; as we have seen, the primary reason the lawyers gave for choosing mediation is that it is faster.

WHO REQUESTED MEDIATION — BY HOW LAWYER IS PAID		
	YES	NO
CML-NOT CONTINGENT FEE	33	67
CML-CONTINGENT FEE	40	60
CMA-NOT CONTINGENT FEE	42	58
CMA-CONTINGENT FEE	55	45

When Does Mediation Begin. To gain an understanding as to when in the litigation process mediation typically began, the respondents were asked how many times they had appeared before a judge or commissioner *before* the first mediation session. The results indicate that by-and-large mediation comes before the first session with a court official. The percentage of the responses indicating that mediation began before seeing a judge was:

Plaintiffs	70
Plaintiffs' Attorneys	80
Defendants	74
Defendants' Attorneys	75

Another 11-18% indicated that they had been before a judge or commissioner once before undertaking mediation.

70% of the respondents indicated that they did not see a judge after their last mediation session, and 17% indicated that they subsequently appeared once before a judge. Thus, in 13% of the cases the parties had to appear more than twice before the court after the conclusion of mediation.

In contrast, 87% of the attorneys who did not mediate said they started serious settlement negotiations before seeing a judge. Thus, serious unassisted settlement negotiations were more likely to begin before seeing a judge than was mediation.

Time Involved in Mediation. The responses indicate that the parties spent an average of 2.2 hours in the mediation sessions. A third of them reported spending an hour or less. Unfortunately, the response to this question for cases not in mediation was not sufficient to draw a comparison. The lawyers reported that the parties spent an average of 2.5 hours in mediation and 1 hour in settlement.

Relationship to Discovery. The mediation program for Civil II cases begins when the "case is at issue." That is, when discovery is complete and a trial date has been set. This qualification is not quite reflected in the responses, however: a quarter thought discovery was not over. Not unexpectedly, settlement negotiations began earlier in the process than did mediation — before discovery was completed. The respondents were also asked whether they had enough information to make a decision. The answer was virtually (>90%) uniform: yes. This particular mediation program is not designed to reduce the effort of discovery, and by design it comes at the very end of the process — just before trial. It is, therefore, a way of facilitating settlements very much in the shadow of the bench. These and the figures from the preceding two sections define the program: it is to help the parties resolve issues that have been raised and developed, as opposed to starting with the problem, identifying the necessary information, developing it jointly, and working in tandem toward a solution. It is more akin to a judicially supervised settlement than a process in which the mediator works with the parties to define the issues and work together towards their resolution. That said, however, an overwhelming proportion — 77% — of mediating lawyers disagreed with the statement "There is not much difference between mediation and unassisted settlement negotiations." While the mediation is clearly in the shadow of the trial, it would therefore appear to add a qualitatively different dimension to the settlement negotiations than the typical lawyer-lawyer discussions.

HAD DISCOVERY BEEN COMPLETED			
	YES	NO	DON'T KNOW
CMLP	61	12	27
CMAp	78	22	0
CMLD	61	24	15
CMAD	77	23	0
CNMLP	46	29	25
CNMAp	58	37	5
CNMLD	58	25	17
CNMAD	58	42	0

What Would Have Happened Without Mediation. Although counter-factual questions are always problematical, to gain some insight into the role mediation plays in the resolution of these types of issues, the respondents were asked what would have happened if mediation were not available — would they have dropped the suit, settled it, proceeded to trial, or not have brought it in the first place? Interestingly, several responses indicated that the case would not have been brought in the first place or that the case would have been abandoned. This would seem to indicate that the mediation programs do indeed provide another path to justice by affording a means for resolving disputes that would not otherwise be heard.

The plaintiffs seemed the most pessimistic about resolving their case short of trial if mediation were not available, whereas the defense attorneys were the most optimistic.

WHAT WOULD HAPPEN WITHOUT MEDIATION				
	DROPPED	SETTLED	TRIAL	NOT FILED
CMLP	3	26	72	0
CMAp	6	38	53	3
CMLD	5	38	56	2
CMAD	0	61	39	0

Summary. Mediation in this program came late in the litigation process, but even then roughly three quarters of the cases saw the mediator before the judge. At the same time, 87%

of the attorneys in non-mediated cases reported that they had begun serious settlement negotiations before seeing a judge for the first time. From this alone, it does not appear that mediation saved court resources.

Lawyers are clearly the gate keepers to mediation. Their familiarity with it and comfort in participating in it seem to be important factors in its selection. In particular, lawyers for plaintiffs in traffic related personal injury cases and in breach of contract cases requested it. A lawyer paid a contingent fee was more likely to request mediation than one who was not. The primary reason lawyers gave for selecting mediation was that it is faster; the second reason was that it is cheaper. But, when asked directly about costs, the lawyers — who presumably would be in a better position to judge costs based on their experience with similar cases — thought mediation might actually be more expensive; that report must be discounted, however, by the increased settlement rate and the fact that those in whose interest it is to resolve the matter the fastest are the most likely to select mediation. Mediation was clearly more often chosen by plaintiffs than by defendants.

Although white litigants were far more likely to choose mediation than were blacks, attorneys for blacks were far more likely to choose mediation than attorneys for whites. Women were more likely to request mediation than were men, as were their lawyers. Thus, lawyers for two groups — blacks and women — that traditionally lack power requested mediation more often than the attorneys for those who traditionally have it. This may raise an issue of second class justice; or, of course, it may be precisely the contrary: Based on their experience in similar cases, the lawyers may believe their clients can do better in mediation than before a court. Far from selling them into a lesser forum, the chosen one may in fact empower them. We must know more before we can judge.

A number of respondents answered that if mediation had not been available they either would have dropped the case or would not have brought it in the first place. Thus, mediation

appears to offer a forum for resolving some matters that would not otherwise be resolved. In this regard, mediation improves access to justice.

WHAT FACTORS ARE IMPORTANT IN SETTLEMENT

To gain an insight into what factors the parties and their counsel regard as important when deciding what to agree to in settlement, those who participated in mediation or who settled prior to trial were asked to rate the influence each of a series of factors had on their deliberations. They were asked to "indicate how important each of the following factors was in helping you decide what you would agree to in mediation [or settlement]." Those factors were —

- The principles of law
- What the court or jury would likely decide
- What I would get if I or the lawyers settled the case before trial
- What would be "right" or "fair" under the circumstances
- What the mediator told me to do
- What would end the case the fastest
- What my lawyer told me to do.

The respondent was asked to rank the importance of the factor from 1, Not Important, to 5, Very Important.⁹¹ To simplify the results, and because the distinctions between 1 and 2 and between 4 and 5 are likely to be small, we again aggregated the extremes. The results of the inquiry are displayed in the following charts and graphs.

Principles of Law. The very phrase "Bargaining in the Shadow of the Law" connotes that parties define what they would be willing to settle for by reference to the principles of law.

91. It should be noted that each question asks how important the particular factor was in deciding what to settle for; therefore, each question only indicates how the respondent felt about that particular issue. The questions and the accompanying tables do not permit a relative comparison of the importance of the individual factors.

Those principles determine the relative rights and responsibilities of the parties. The results of the survey indicate that they did, indeed, play a role, although probably not as important a one as some might assume. The respondents who viewed the law as the most important were plaintiffs in mediation. This is interesting since they were resolving their cases outside the direct reach of the court, and hence one might think the practicalities of the situation would be more important and hence diminish the importance of the principles of the law. This finding *could* indicate that the parties in mediation in fact focus on the law and do not sell it short as some have feared. In each instance, the parties thought the principles of law were more significantly important than did their lawyers. Only a third of the attorneys for plaintiffs who did not participate in mediation thought the principles of law were very important, as contrasted with 58% of the defense counsel.

The lawyers appear to be the pragmatists: in each instance a smaller percentage of them believed the law to be very important than did their clients. It is not particularly surprising that the non-mediating defense lawyers thought the law was more important than their colleagues since it is likely that they *rely* on it far more than do the others.

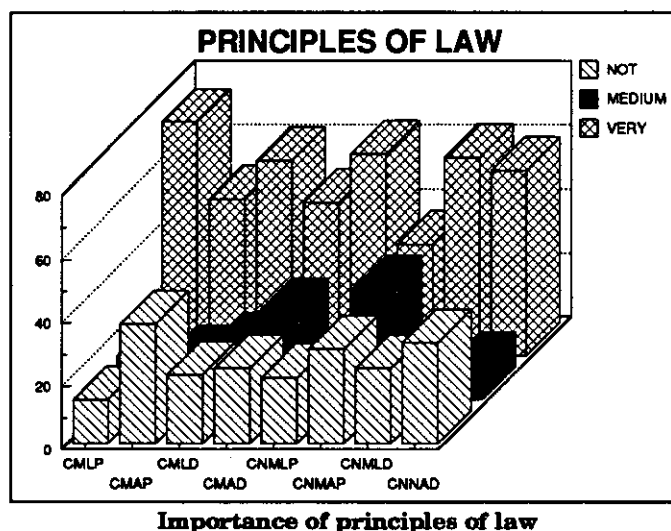
PRINCIPLES OF LAW			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	14	14	73
CMAP	38	13	49
CMLD	22	17	61
CMAD	24	28	48
CNMLP	21	15	63
CNMAP	30	35	35
CNMLD	24	14	62
CNMAD	32	11	58

What the Court Would Decide.

Since these disputes have matured into litigation and the litigation itself is virtually complete but for the trial, the driving force may shift from bargaining in the shadow of the law to bargaining in the shadow of the bench — what would happen if the case went to trial. The outcome of the trial — the principles of law,

the determinations of fact, and all the other factors that affect the outcome of a case — is what, as a practical matter, sets the Best Alternative to a Negotiated Agreement (the now famous "BATNA"⁹²) or settlement as the case might be.

Nearly three quarters of the plaintiffs in mediation and the defendants' lawyers in litigation thought that what the court would likely decide was *very* important. But, less than half of the mediating plaintiffs' lawyers, the non-mediating plaintiffs themselves, and their lawyers concurred. On the other hand, with the exception of the mediating plaintiffs, all the



92. Fisher and Ury, Getting to Yes (1981) at 101.

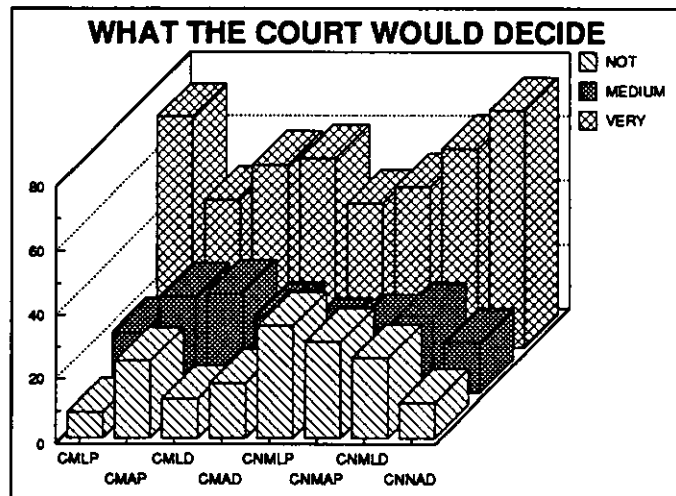
lawyers reacted considerably more positively to what the court would decide than to the principles of law. This would seem to indicate, although not strongly, that the lawyers are indeed pragmatists.

This table *might* indicate that the non-mediating defendants value what the court would decide as defining what they will settle for; their lawyers seem to concur, since of all the attorneys they valued this factor the highest. The mediating plaintiffs, on the other hand, also valued what the court would decide — likely believing in the rectitude of their cause. Less than half of their plaintiffs' lawyers agreed, however, which may indicate that the lawyers do not think their case is quite as strong as do their clients. Less than half of the non-mediating plaintiffs (and exactly half of their lawyers) thought that what the court would do was very important; indeed, nearly a third of them thought it was *not* important. That may reflect a belief that their settlements depend on factors other than the potential judicial outcome — such as the defendants' avoidance of time or cost.

WHAT THE COURT WOULD DECIDE			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	8	19	72
CMAP	24	30	46
CMLD	12	31	57
CMAD	17	24	59
CNMLP	35	19	45
CNMAP	30	20	50
CNMLD	25	24	62
CNMAD	11	16	74

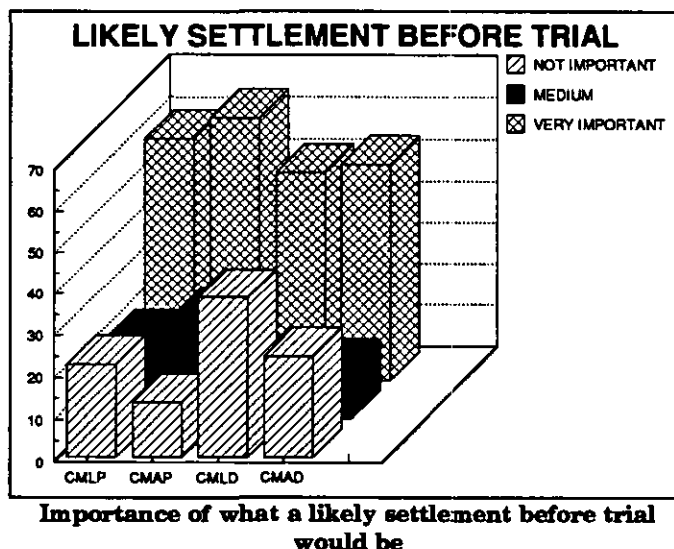
What a Settlement Before Trial Would Likely Be. For those in mediation, perhaps the most important "shadow" in which the bargaining takes place is what would happen if the mediation broke down and a settlement were attempted shy of trial. The mediating plaintiffs and their counsel were slightly more impressed with this — roughly 60%

said it was very important — than the defense, where close to half thought so. Indeed, a higher percentage of plaintiffs' counsel in mediation regarded this as "very important" than any other factor. Thus, it would appear that these lawyers look over their shoulder in mediation and compare how it is going to what they would get without the neutral — the typical settlement negotiation. In fact, it is likely that mediation is regarded as a *part* of settlement and not as a separate phase of resolving the matter.



LIKELY SETTLEMENT BEFORE TRIAL			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	22	19	58
CMAF	13	24	63
CMLD	38	13	50
CMAD	24	12	52

What Would be Right or Fair. To the extent cases are settled without the court, the parties themselves would be able to craft "justice under the circumstances" without regard to the general principles of law or what a court would decide. 91% of the non-mediating plaintiffs believed doing what is "right" or "fair" is very important; roughly 70% of



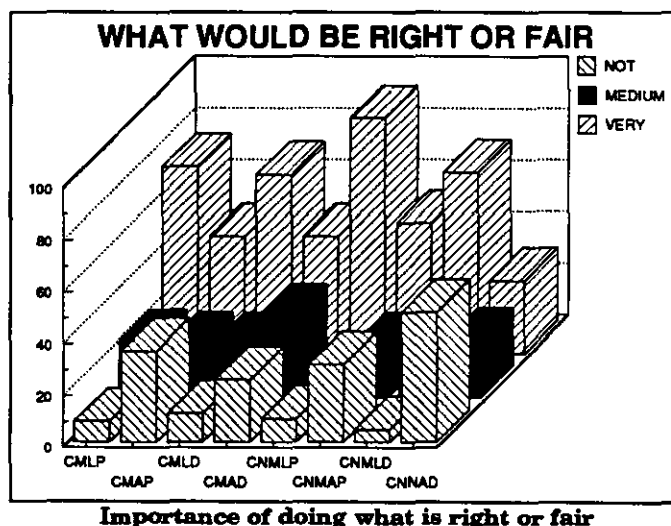
the other parties did. The lawyers again took a more practical view; at the extreme, half of the non-mediating defendants lawyers thought it was not important. The graph shows rather prominently the difference in viewpoints between lawyers and clients.

The interesting question here is why the difference exists between the plaintiffs in mediation and those who did not mediate. It would seem that someone who believed so strongly in "doing right" — as indicated by non-mediating plaintiffs — would choose mediation, a forum thought to be particularly hospitable for this approach. The very low regard the non-mediating defense lawyers had for doing right is also interesting: it is fully consistent with their view that what a court would decide is very important; defendants, in their view, rely on the courts and the law for defining their rights and hence their willingness to settle.

WHAT WOULD BE RIGHT OR FAIR			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	8	21	72
CMAF	35	20	45
CMLD	11	20	69
CMAD	24	31	45
CNMLP	9	0	91
CNMAF	30	20	50
CNMLD	5	25	70
CNMAD	50	22	28

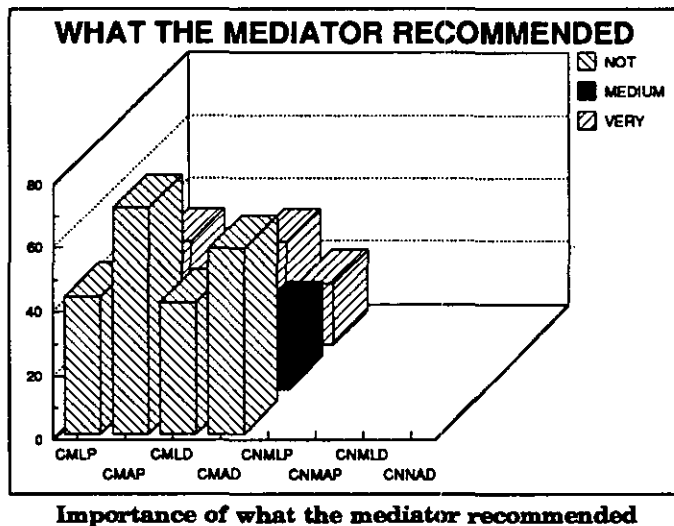
What the Mediator Recommended. In some views and practices, the mediator raises issues to be considered by the parties but takes very little, if any, role in suggesting an outcome; in others, the mediator takes a more active, involved role and recommends a potential solution that might be mutually acceptable. The latter view is not widely ac-

cepted in the literature, and the data indicates that the participants in mediation likewise reject it: less than a third of all respondents reported that the mediator's recommendations were very important. Well over half of the lawyers said they were not important. Thus, the participants appear to be developing their own settlement range and not relying on the mediators to determine it for them.



WHAT THE MEDIATOR SAID TO DO			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	43	24	32
CMAF	71	14	14
CMLD	41	27	32
CMAD	58	23	19

What Would End the Case the Fastest. A BATNA is not entirely substantive: while someone may be able to achieve a certain goal, it may take a long time or cost a lot to do so. Thus, the substantive outcome must be discounted by the potential costs of the process which would be required to achieve the result when calculating whether a settle-

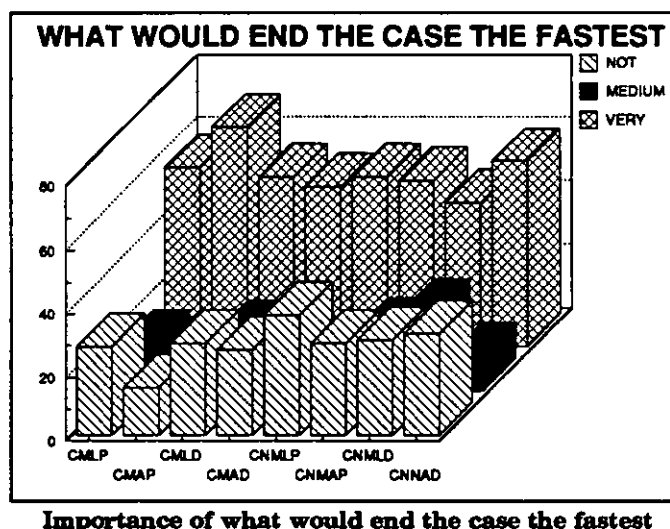


ment is or is not in the party's best interest. One consideration that the participants would need to take into account is how long the litigation will drag on. Thus, they are likely to consider what would end the case the fastest. And, indeed, about half of each category of the participants felt that ending the case the fastest was important. The lawyers for plaintiffs in mediation felt the most strongly, with 69% reporting that speed was very important. This is in keeping with the observation that plaintiffs' lawyers are the most likely to request mediation in the first instance — probably because they believe it will end the matter the soonest.

WHAT WOULD END THE CASE THE FASTEST			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	28	15	56
CMAP	15	15	69
CMLD	29	18	53
CMAD	27	23	50
CNMLP	38	9	53
CNMAP	29	19	52
CNMLD	30	25	45
CNMAD	32	11	58

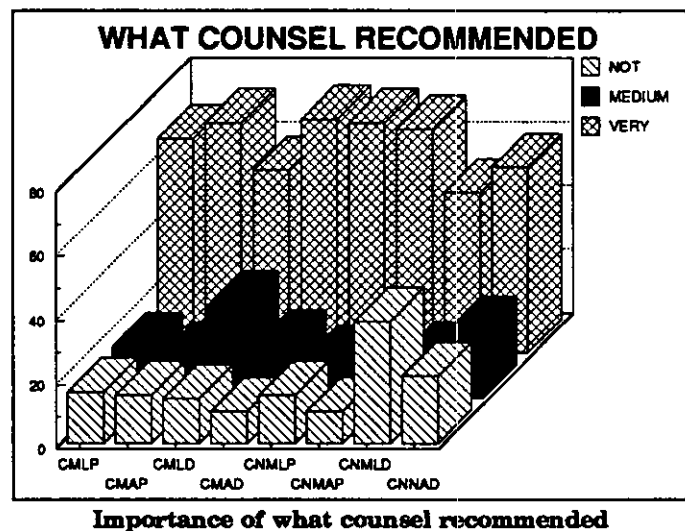
What Counsel Recommended. In keeping with lawyers as the guides to litigation, the participants found that the recommendations of counsel in deciding what to accept were important. Defendants, however, clearly exercise independent judgement: only half of the non-mediating defendants thought the recommendations of counsel were very impor-

tant, and only slightly more of their mediating counterparts did. Indeed fully 38% of the non-mediating defendants thought their counsel's advice was **not** important! Non-mediating defendants are the most experienced of the parties, and it shows here since they felt fully capable of making their own determination as to what a good settlement is.



WHAT COUNSEL SUGGESTED TO THE CLIENT			
	NOT IMPORTANT (1-2)	MEDIUM	VERY IMPORTANT (4-5)
CMLP	16	16	67
CMAF	15	13	72
CMLD	14	29	57
CMAD	10	17	73
CNMLP	15	12	72
CNMAF	10	20	70
CNMLD	38	13	50
CNMAD	21	21	58

Summary. To test the extent to which settlements occur in the shadow of the law or are shaped by other concerns, the parties and their lawyers were asked how important various factors were in their settlement decisions. Plaintiffs in mediation ranked equally the principles of law, what the court would decide, and what would be "right or fair" — 72% said



these principles were important. Although they did not feel quite as strongly, the defendants in mediation likewise ranked these principles as the most important. Their lawyers, however, were pragmatists: The most important factor to the plaintiffs' lawyers was what would happen in an unassisted settlement. The defendants' bar looked to what a court would do, with settlements ranking closely behind.

Counter-intuitively, the plaintiffs who did not mediate valued the principles of law less than did those who mediated. Moreover, they did not think what a court would decide was very important. The most important factor to the non-mediating plaintiffs was what would be

right or fair. The most important factor to non-mediating defendants and their lawyers was what a court would do.⁹³

What the mediator recommended was not regarded as important, but advice of counsel was, except for non-mediating defendants who appear to be more independent minded. While the parties themselves may think they valued the general principles highly, the importance of the advice of counsel — and counsel's quite practical orientation — more than likely mean that the practical components in fact play quite a large role in settlement negotiations. Thus, our results verify the influence of the BATNA on outcomes. But what the court would decide or what would be obtained in settlement negotiations is also driven by the principles of law and what would happen in a trial. The result of these interviews would seem to indicate that society's norms continue to play an important role indeed in shaping the agreements of mediation.

RELATIVE STRENGTHS OF THE PARTIES

We also tried to determine the relative strengths and weaknesses of the parties. Our goal was to determine if and how they vary between mediation and litigation and whether they influence the parties' satisfaction with the process used to resolve their dispute. We tried to determine the party's sophistication, and hence ability to make informed, reasonable judgements about whether or not to enter into mediation, to settle, or to force the issue into litigation.

One inquiry turned on how the party fared financially compared to the other side. One hypothesis is that someone who feels at a financial disadvantage may be less willing to take risks and hence be more likely to rely on the formal procedures of litigation; a counter hypothesis is that the financial underdog may be forced into whatever procedure is the least expensive, and that may well be mediation.

93. The lawyers thought the principles of law were equally important.

The second line of questions probed how sophisticated the parties are in business affairs. They were asked both how sophisticated they viewed themselves (or their lawyers viewed them) and how sophisticated they thought their opponents were. Thus, the views of both sides can be contrasted. Someone who is experienced and capable of making routine business judgements is likely to be more able to negotiate a satisfactory settlement and be able to recognize an attractive offer when made. Someone who is not may be nervous and hence reluctant to close a deal resolving the issues in controversy. Or, if an agreement is reached, they may remain skeptical about whether they did the right thing.

We also asked about bargaining power, and again, we sought the views of both sides. One would think that those who felt they had strong bargaining power would be more likely to request mediation to achieve their goal without the expense and delay of trial. But, the parties would reach closure only if the two sides agreed on the relative strength of that power.

Finally we probed the parties' willingness to take risks. Someone who is risk-averse is likely to be more willing to accept an offer — any offer in the ballpark — for fear they would do less well in future negotiations or if the case went to trial. Someone who is a risk-taker, on the other hand, is more likely to push for a better, stronger agreement.

We explore below how these factors compare between mediation and non-mediation.

Finances. In mediation, all parties agreed that, on the whole, the defendants are better off financially than the plaintiffs, and that the plaintiffs are worse off. To a degree, that is not surprising given the nature of the issues resolved in Civil II litigation: generally personal injuries or contract breaches. Thus, the issues are likely to be an individual against an organization or established professional practitioner. That assumption evaporates when the non-mediated cases are examined. In those cases, the parties thought the **plaintiffs** were better off. The lawyers, however, continued to believe that defendants had the financial edge, although not quite as distinctly as in mediation. What looks like a paradox is explained by the

nature of the cases that were resolved in the different systems: The non-mediated cases often involved defective merchandise or services. There were very few of these in mediation — only one of which involved a plaintiff. Significantly more of the plaintiffs in the merchandise-related cases were companies than individuals. In contrast, the mediated cases were dominated by personal injuries — of necessity the plaintiffs were individuals — which were likely to be defended by an insurance company. Hence the reversal of fortune.

HOW DO YOU STAND FINANCIALLY COMPARED TO OTHER PARTY			
	WORSE	MEDIUM	BETTER
CMLP	45	35	19
CMAP	40	29	31
CMLD	21	26	52
CMAD	22	17	61
CNMLP	36	12	52
CNMAP	48	14	38
CNMLD	37	23	40
CNMAD	27	18	55

Sophistication in Business Affairs. 61% of the plaintiffs in mediation believed themselves to be sophisticated in business affairs. Their lawyers were not quite so sure, as only 46% concurred in that view. The striking feature, however, is that both the defendants and their lawyers agreed that less than a third of the plaintiffs exhibited a high level of sophistication, and indeed that more than 40% had low sophistication levels. There is rough agreement as to the sophistication of the defendants, however. On the whole, defendants in mediation appear to have the edge on business sophistication. Indeed, it may be by a considerable margin if the views of the defendants and their lawyers are credited. One could speculate that when the plaintiffs view themselves as sophisticated and the defendants disagree rather strongly, that the defendants may well try to take advantage of the situation.

As with the mediating cases, the non-mediating plaintiffs had a far higher estimate of their sophistication than did their lawyers: in fact the differential is greater here than in mediation. **But**, the defendants were not as harsh on the plaintiffs here as in mediation. Over half of the defendants themselves thought the plaintiffs were very sophisticated, and the defense lawyers thought more of the plaintiffs than did the plaintiffs' own lawyers. The parties themselves believed that the plaintiffs in non-mediated cases were more sophisticated than the defendants, but all of the lawyers disagreed.

SOPHISTICATION IN BUSINESS AFFAIRS			
	LOW	MEDIUM	HIGH
CMLP	10	29	61
CMLP**	47	22	31
CMAP	27	27	46
CMAP**	40	27	33
CMLD	17	20	63
CMLD**	28	25	47
CMAD	20	23	57
CMAD**	37	11	51
CNMLP	15	18	68
CNMLP**	23	23	53
CNMAP	47	14	39
CNMAP**	35	19	46
CNMLD	11	31	57
CNMLD**	40	19	42
CNMAD	23	27	50
CNMAD**	26	19	56
Two questions were asked: (1) How the party viewed his/her/its own sophistication and (2) how the party viewed his/her/its opponent's sophistication. The ** indicates the response to the second question by the respondent's counterpart; that is, CMLP** is the response to the second question by CMLD. As such, it reflects the opponent's views of the party's sophistication.			

Bargaining Power. Both the plaintiffs and their lawyers in non-mediation thought their bargaining power in mediation was greater than their counterparts'. Defendants, on the other hand, believed they had greater bargaining power in mediation, although the margin is closer.

This could, of course, be testimony to the common assertion that those with weak cases choose mediation: plaintiffs who have strong cases do not mediate, while those with weaker cases do.

There is more to the story, however. First, the views of plaintiffs as to their bargaining power and the views of the defendants as to theirs were closer for cases in mediation. That is, although the plaintiffs in mediation believed they had more bargaining power than the defendants, it was not by much. In non-mediated cases, it was. Second, and more importantly, in mediation the parties themselves were closer in their assessments of relative bargaining power. Thus, it would appear that the cases in mediation are closer calls — there is less disparity of bargaining power in mediation than in litigation.

HOW STRONG WAS YOUR BARGAINING POWER			
	LOW	MEDIUM	HIGH
CMLP	12	27	61
CMLP**	33	30	26
CMAP	5	33	63
CMAP**	32	29	39
CMLD	15	32	53
CMLD**	54	15	32
CMAD	13	48	39
CMAD**	45	30	25
CNMLP	10	10	80
CNMLP**	27	33	39
CNMAP	6	24	70
CNMAP**	24	48	28
CNMLD	31	31	37
CNMLD**	69	13	18
CNMAD	25	38	38
CNMAD**	66	16	19
Two questions were asked: (1) How the party viewed his/her/its own bargaining power and (2) how the party viewed his/her/its opponent's bargaining power. The ** indicates the response to the second question by the respondent's counterpart; that is, CMLP** is the response to the second question by CMLD. As such, it reflects the opponent's views of the party's bargaining power.			

Willingness to Take Financial Risk. Given the divergence in views revealed by the preceding tables, the parties and their lawyers agreed as to risk aversion to a remarkable

extent. Seven of the eight categories of respondents believed that 35-45% of the parties were very willing to take risks. The responses of defense lawyers differed: 59% believed their clients were very willing to take risks whereas only 39% of the clients viewed themselves that way. This *may* mean — and surely it is only conjecture — that the defense lawyers believed their clients were risk-takers and hence were prepared to risk the outcome of litigation, as opposed to attempting to settle the case.

Significantly, the **individuals** who participated in mediation were substantially more risk adverse (not willing to take risks) than those who did not mediate. Although not nearly as pronounced, the non-mediating individuals were also greater risk-takers than their mediating colleagues. As for organizations, their risk aversion was virtually identical whether or not the case was mediated. As between companies and individuals in mediation, a higher percentage of companies were risk takers than individuals: about half as many of the companies reported being risk-adverse as individuals.

Without more, these emotions could well affect the outcome of the negotiations: a risk taker could push for a better deal while those who are risk-adverse will accept an offer far quicker for fear of losing something tangible.

WILLINGNESS TO TAKE FINANCIAL RISK			
	NOT	MEDIUM	VERY
CMLP	35	30	35
CMAP	19	41	41
CMLD	31	24	44
CMAD	19	41	41
CNMLP	32	32	36
CNMAP	36	29	36
CNMLD	21	39	39
CNMAD	9	32	59

WILLINGNESS TO TAKE FINANCIAL RISK — BY INDIVIDUAL AND BY ORGANIZATION			
	NOT	MEDIUM	VERY
CML-INDIVIDUAL	41	24	35
CML-ORGANIZATION	24	34	44
CNML-INDIVIDUAL	27	32	41
CNML-ORGANIZATION	24	38	38

Summary. The plaintiffs in mediation appeared to be underdogs in terms of financial strength, sophistication in business affairs, bargaining power, and willingness to take financial risks as compared to those who did not mediate.

With respect to bargaining power, the mediating respondents viewed the parties' bargaining power as relatively close. For non-mediated cases, however, the spread was considerably greater. This difference appears to lend credibility to the common assertion that one seeks to mediate a weak case. Since the mediated cases appear to be closer calls, it could also be that mediation is employed to help the parties resolve issues that would otherwise be difficult, in which case mediation does indeed help the weaker reach agreements short of litigation. The view is likely to be that those with strong cases do not need to mediate — the disparity will be clear enough to lead to a settlement.

The individuals who participated in mediation appear to be significantly more risk adverse than individuals who did not mediate and organizations that did. This could affect the outcome of the bargaining, since someone who is risk adverse is far more likely to accept a first offer, and not negotiate a better deal, than someone more willing to take risks.

HOW THE PARTIES ASSESS THE DIFFERING DISPUTE RESOLUTION PROCESSES

This section examines how the participants felt about the processes used to resolve their controversies. It describes the extent to which parties were satisfied with the **process** that was used. Were they satisfied with the **outcome**? These two factors measure the overall

satisfaction of the parties with settlement negotiations, mediation, and trials; although the measure is controversial, it is nevertheless important. Further questions probe whether the parties thought justice was done, whether the party believed the other side acted in bad faith during the proceeding, whether the full story was told or something was suppressed. Finally, we inquire into whether parties felt pressured by the court to resolve the matter short of trial.

For these purposes, the three means of resolving cases — unassisted settlement negotiations, mediation, and trial — need to be examined separately. The three categories are therefore differentiated in this section. Thus, each category, such as mediating plaintiffs or non-mediating defense attorneys, is further broken down by whether their case settled (as indicated by an "S") or was resolved by the court (in which case it is indicated by an "NS").

A **major** word of caution must be added here: Since between 80 and 90% of all cases settle, very few cases in the sample went all the way to trial, generally fewer than 10 for each category. Thus, little hard reliance should be placed on these numbers. But because the responses reflect contrasting views of the process, they may reflect a possible trend that should be explored in future research.

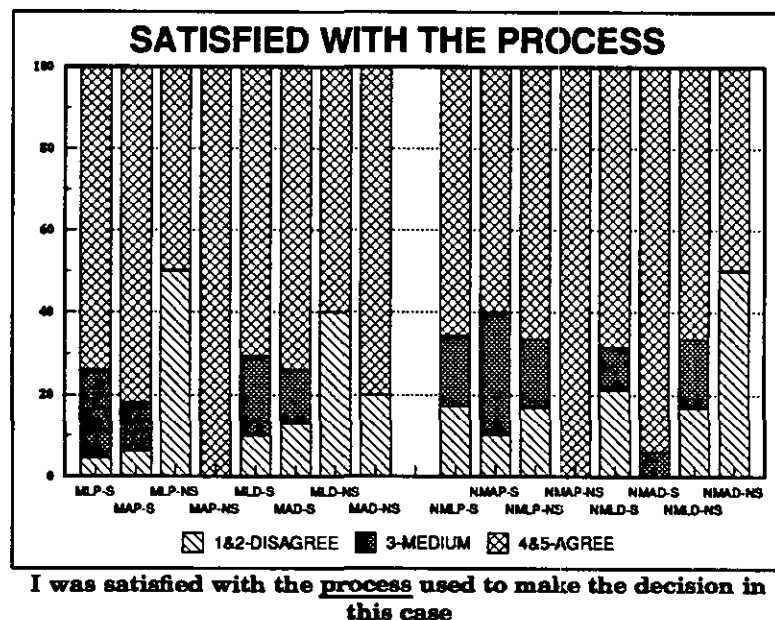
Satisfied with the Process. The reactions of the parties and their lawyers to the **process** used to resolve the case was probed. For those cases that settled, the satisfaction of the parties was about the same — roughly 70% of the parties were satisfied with the process, whether or not mediation was employed. For those who were able to settle their controversies, the parties preferred mediation to unassisted settlements. That view is reinforced when the level of *dissatisfaction* is examined. Over twice the percentage of parties who did not mediate answered that they were dissatisfied with the process used to make the decision. Thus, among those who settled, the non-mediation route engendered twice the level of dissatisfaction as mediation with regard to the process used to resolve the matter.

But, a whopping 50% of the mediating plaintiffs who were unable to resolve their case reported that they were dissatisfied, and 40% of the defendants concurred.⁹⁴ On the other side — those who did not mediate — under 20% of the parties expressed dissatisfaction. Indeed, their level of dissatisfaction was very close to that of non-mediating parties who were able to settle short of trial. Thus, it appears that the parties who mediated got their expectations raised that they would be able to settle the case short of trial and hence were disappointed when that did not happen. On the other hand, those on the litigation track recognized that the case may or may not settle and took that into account when assessing the process.

94. These views were not shared by their attorneys, however.

SATISFIED WITH THE PROCESS			
	DISAGREE		AGREE
CMLP-S	4	22	74
CMAP-S	6	12	82
CMLP-NS	50	0	50
CMAP-NS	0	0	100
CMLD-S	10	20	71
CMAD-S	13	13	74
CMLD-NS	40	0	60
CMAD-NS	20	0	80
CNMLP-S	17	17	66
CNMAP-S	10	30	60
CNMLP-NS	17	17	67
CNMAP-NS	0	0	100
CNMLD-S	21	11	68
CNMAD-S	0	6	94
CNMLD-NS	17	17	67
CNMAD-NS	50	0	50

Race. Black and white litigants whose cases were mediated recorded identical 65% satisfaction and 26% dissatisfaction rates. The attorneys who participated in mediation were even more pleased, as 78% of lawyers with black clients and 88% of those with white clients claimed to be very satisfied with the process.



Significant racial differences exist, however, among those who were involved in cases which did not use mediation. Fully 40% of the white litigants who did not mediate and 27% of their attorneys expressed **dissatisfaction** with the process. The comparable numbers are 19% and 7% for black litigants and their attorneys, respectively. This difference is, predictably, also reflected in recorded levels of satisfaction. 66% of black litigants who did not use mediation and 80% of their attorneys were very satisfied with the process; only 40% of white litigants who bypassed mediation and 55% of their attorneys felt the same way.

Attorneys were consistently more pleased with the process than litigants. On average, the lawyers recorded satisfaction levels roughly 16 percentage points higher than their clients.

SATISFIED WITH PROCESS — BY RACE			
	NOT (1-2)	MED	VERY (4-5)
CML-BLACK	26	9	65
CML-WHITE	26	9	65
CMA-BLACK	4	17	78
CMA-WHITE	6	6	88
CNML-BLACK	19	14	66
CNML-WHITE	40	20	40
CNMA-BLACK	7	13	80
CNMA-WHITE	27	18	55

Financial Position. Among respondents who rated themselves as being in relatively "worse" financial positions, those who mediated their cases were much more satisfied with the process than those who did not. Poorer litigants who did not mediate expressed the greatest degree of unhappiness of any subgroup — 48% were not satisfied with the process. Contrariwise, 66% of the litigants in poor financial situations who did participate in mediation were very satisfied with the process.

Those litigants who considered themselves "better off" financially were satisfied with the process more often when they did not mediate. 73% of the *non-mediating* litigants in good financial positions were very satisfied with the process, whereas only 52% of those who did mediate were similarly satisfied.

On the whole, those with more money seemed to be happier with the process when it did not involve mediation, while the opposite is true for those with less money. The views of the attorneys followed the same trend — they preferred mediation if their clients had less money and non-mediation if their clients had more money. Attorneys again showed higher levels of satisfaction with the process across the board than their clients, here by an average of 17 percentage points.

SATISFIED WITH PROCESS — RELATIVE FINANCIAL POSITION			
	NOT (1-2)	MED	VERY (4-5)
CML-WORSE (1-2)	22	11	66
CML-BETTER (4-5)	28	24	52
CMA-WORSE (1-2)	11	6	83
CMA-BETTER (4-5)	13	8	79
CNML-WORSE (1-2)	48	4	48
CNML-BETTER (4-5)	7	20	73
CNMA-WORSE (1-2)	6	31	63
CNMA-BETTER (4-5)	6	11	83

Individual or Organization. The level of satisfaction varied as between people who appeared in the case in their individual capacity and those who appeared on behalf of an organization. Fully 28% of those who participated in mediation as individuals reported being unhappy with the process used to resolve their case; that compared to only 6% of the organizations. The percentages of those reporting high levels of satisfaction were virtually identical, however. On the non-mediation side, the level of individual dissatisfaction remained

about the same, but that of the organizations more than doubled. Offsetting that, however, nearly three quarters of the organizations reported being fully satisfied with the non-mediation route, but only 57% of the individuals shared that view. Thus, although more organizations were unhappy in non-mediation than mediation, their level of satisfaction in mediation was also higher. And, importantly, more individuals were unhappy and fewer were happy in the non-mediated cases.

SATISFIED WITH PROCESS — BY INDIVIDUAL OR ORGANIZATION						
	INDIVIDUAL			ORGANIZATION		
	NOT	MEDIUM	VERY	NOT	MEDIUM	VERY
CML	28	9	64	6	30	63
CNML	31	12	57	14	14	73

Satisfied with the Outcome. Responses to the statement: "I was satisfied with the outcome of the case" yielded undramatic results. As for those who reached agreement, the plaintiffs in mediation were slightly more satisfied and less dissatisfied than those in litigation; precisely the opposite was true for the defendants. The same holds for their lawyers. That would seem to vindicate the choices we saw earlier: plaintiffs chose mediation. Although more than half of the non-mediating plaintiffs who settled were satisfied with the outcome, nearly one quarter of them were not. The highest percentage of the parties who are satisfied with the outcome are the non-mediating defendants who settled. This would appear to vindicate their reluctance to mediate.

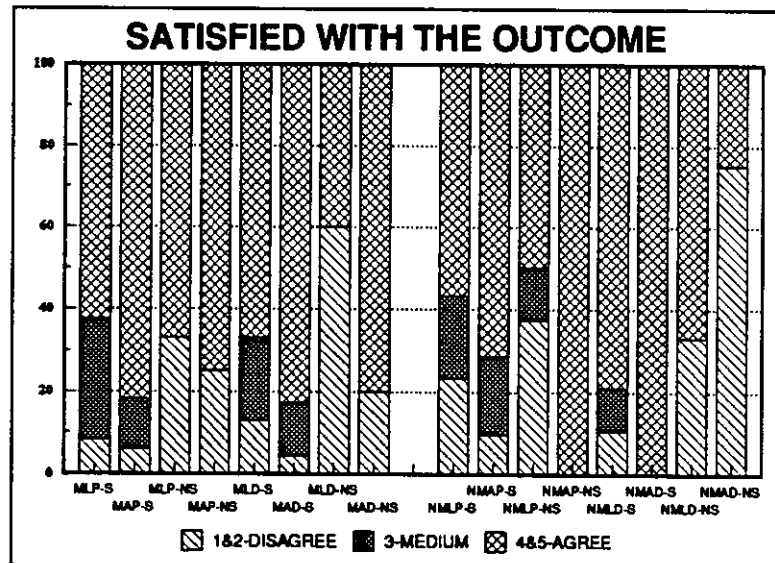
As for those who went to trial, their responses tended to be more polarized, either a 1 or a 5. Thus, for example, a higher percentage of mediating defendants who had to go to trial were fully satisfied (5) with the outcome than either settling plaintiffs or defendants; but 60% of them were highly dissatisfied (1). Again, although there are too few cases to place reliance on these numbers, the graph shows rather clearly that the parties who were unable to settle

were more likely to be dissatisfied with the result. Fully a third of all the parties who went to trial were dissatisfied with the outcome, with 60% of the non-settling, mediating defendants feeling that way.

All in all, the responses show rather clearly that parties and their attorneys were significantly more satisfied by settling the case than by facing a decision by the court. Since presumably the lawyers were relatively experienced and able to assess prevailing norms, that finding alone should give pause to those who advocate *trials* as the only legitimate measure of justice.

SATISFIED WITH THE OUTCOME			
	DISAGREE		AGREE
CMLP-S	8	29	63
CMAP-S	6	12	82
CMLP-NS	33	0	67
CMAP-NS	25	0	75
CMLD-S	13	21	67
CMAD-S	4	13	83
CMLD-NS	60	0	40
CMAD-NS	20	0	80
CNMLP-S	23	20	57
CNMAP-S	10	19	71
CNMLP-NS	38	13	50
CNMAP-NS	0	0	100
CNMLD-S	11	11	79
CNMAD-S	0	0	100
CNMLD-NS	33	0	67
CNMAD-NS	75	0	25

Gender. Female litigants who participated in mediation were "very satisfied" with the outcome far more often than their male counterparts (70% to 56%), and their colleagues who did not mediate (44%). When mediation was not involved, however, it was the males who were satisfied with the outcome more often (56% to 44%).



Participation in mediation evidently did not affect male litigants' satisfaction with the outcome, however: Those who did not mediate posted the exact same 56% rate of satisfaction as did those who mediated their cases. The rate of *dissatisfaction* was slightly lower among those who mediated, 26% to 28%. Nearly a third of the women who did not mediate expressed dissatisfaction with the outcome.

The responses of attorneys with female clients who mediated form an interesting subset of the data. As has been typical of their responses to other questions, the attorneys for male litigants who mediated as well as those for males and females who did not mediate indicated that they were more commonly satisfied with the outcome than their clients, here by an average of 24 percentage points. The attorneys for women who mediated, however, reported that they were satisfied with the outcome of their cases *less* often than their clients (67% as compared to 70%). This represents a distinct deviation from the established pattern of lawyers being more satisfied than their clients with the various aspects of the litigation process. It may, of course, indicate that women value settlement for its own right.

SATISFIED WITH OUTCOME — BY GENDER			
	NOT (1-2)	MED	VERY (4-5)
CML-MALE	26	19	56
CML-FEMALE	20	10	70
CMA-MALE	4	15	81
CMA-FEMALE	20	13	67
CNML-MALE	28	16	56
CNML-FEMALE	31	25	44
CNMA-MALE	11	0	89
CNMA-FEMALE	17	17	67

Race. The use of mediation does not seem to affect the satisfaction with the outcome of cases among black litigants. The responses were virtually identical, with 57% of both those

who participated in mediation and those who did not reporting that they were satisfied with the outcome of their cases.

Among white litigants, however, mediation does seem to play a significant role in raising the level of satisfaction with the outcome of cases. When mediation was not used, only 33% of white litigants reported being very satisfied with the outcome of their case, while 40% reported being *dissatisfied*. When mediation was used, the percentage of white litigants who were satisfied with their outcomes rose to 64%, while the percentage of those who were dissatisfied fell to 27%.

The attorneys were again more commonly satisfied with the outcome of the cases than were their clients, this time by an average of 22 percentage points. 93% of the attorneys for black clients who did not participate in mediation were very satisfied with the outcome of their cases while none were dissatisfied. This is of particular note since only 57% of the black litigants in non-mediated cases expressed strong satisfaction with the case outcomes and nearly one-fourth (23%) of them were actually dissatisfied.

SATISFIED WITH OUTCOME — BY RACE			
	NOT (1-2)	MED	VERY (4-5)
CML-BLACK	22	22	57
CML-WHITE	27	9	64
CMA-BLACK	9	22	70
CMA-WHITE	12	6	82
CNML-BLACK	23	19	57
CNML-WHITE	40	27	33
CNMA-BLACK	0	7	93
CNMA-WHITE	36	9	55

Individual or Organization. Parties appearing as individuals or as representatives of organizations reacted differently to the resolution of their cases: while they had a similar

satisfaction rate in mediation, the individuals were more likely to be unhappy with the outcome in mediation than were organizations. The major difference, however, comes in the non-mediated cases. There, nearly 30% more organizations reported being satisfied than did individuals; indeed, only 50% of the respondents who appeared as individuals reported being satisfied. At the same time, 31% of individuals reported being dissatisfied in non-mediated cases while only 12% of organizations did so. Thus, although the satisfaction level with the outcome in mediation is roughly comparable, organizations seem more likely to be satisfied with outcomes in non-mediated cases.

SATISFIED WITH OUTCOME — BY INDIVIDUAL AND ORGANIZATION						
	INDIVIDUAL			ORGANIZATION		
	NOT	MEDIUM	VERY	NOT	MEDIUM	VERY
CML	23	15	62	13	27	62
CNML	31	18	50	11	8	81

Financial Position. Litigants in better relative financial positions than their opponents were satisfied with the outcome of their cases much more often than those with less money than their adversaries. Among the respondents in better financial situations, 72% of those who mediated and 80% of those who did not described themselves as very satisfied with the outcome of their cases. Among those in comparatively worse financial shape, only 52% of the respondents who mediated and 40% of those who did not reported that they were similarly satisfied. 52% of non-mediating relatively poor litigants reported being *dissatisfied* with their cases' outcomes. Only 3% of the non-mediating litigants in better financial condition were similarly discontented.

Lawyers were yet again more commonly satisfied with the outcomes of the cases than their clients, here by an average of 13 percentage points. The difference would be greater but for

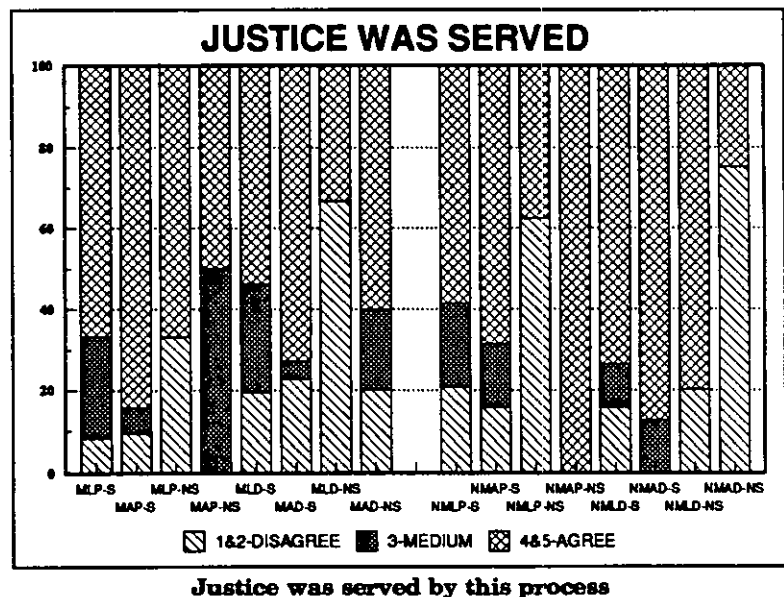
the fact that almost as large a percentage of non-mediating litigants in good financial condition were satisfied (80%) as their lawyers (83%).

SATISFIED WITH THE OUTCOME — RELATIVE FINANCIAL POSITION			
	NOT (1-2)	MED	VERY (4-5)
CML-WORSE (1-2)	21	26	52
CML-BETTER (4-5)	20	8	72
CMA-WORSE (1-2)	11	17	72
CMA-BETTER (4-5)	5	5	90
CNML-WORSE (1-2)	52	8	40
CNML-BETTER (4-5)	3	16	80
CNMA-WORSE (1-2)	6	31	62
CNMA-BETTER (4-5)	5	11	83

Justice was Served. In addition to being asked whether or not they were satisfied with the outcome of the case, the respondents were asked whether they thought "Justice was served by this process." The answers are consistent with the preceding: A higher percentage of both plaintiffs and defendants who settled registered strong agreement. Plaintiffs liked mediation better, while defendants liked litigation. So too for their lawyers.

JUSTICE WAS SERVED			
	DISAGREE		AGREE
CMLP-S	8	25	67
CMAP-S	9	6	84
CMLP-NS	33	0	67
CMAP-NS	0	50	50
CMLD-S	20	27	54
CMAD-S	23	5	73
CMLD-NS	67	0	33
CMAD-NS	20	20	60
CNMLP-S	21	21	59
CNMAP-S	16	16	68
CNMLP-NS	63	0	38
CNMAP-NS	0	0	100
CNMLD-S	16	11	74
CNMAD-S	0	13	88
CNMLD-NS	20	0	80
CNMAD-NS	75	0	25

Good Faith. The respondents were asked if "The other party did *not* act in good faith throughout the process." Nearly 50% of all settling plaintiffs, whether or not they mediated, responded that they thought their adversary did not act in good faith. In contrast, around 20% of the defendants who settled and



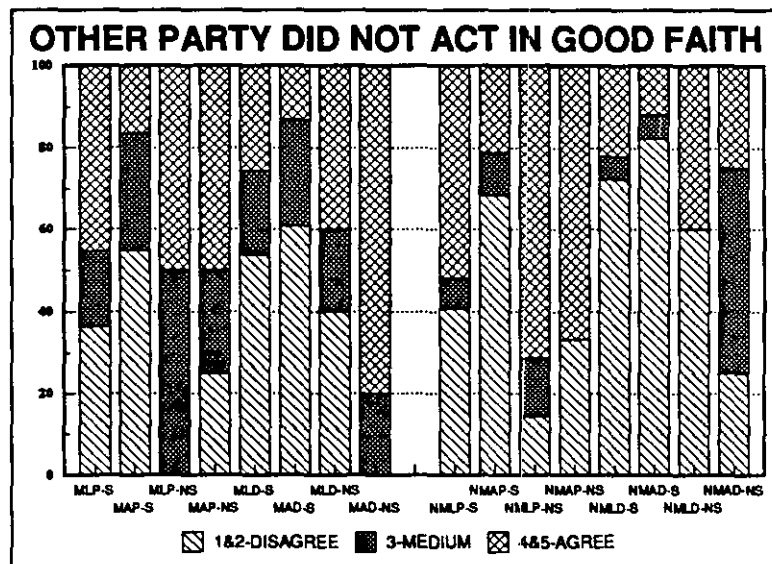
their counsel felt the other side acted in bad faith. The harshest view was that of non-

mediating, non-settling plaintiffs and their lawyers: more than two thirds of them felt strongly that the other side did not act in good faith. 50% of the non-settling plaintiffs who mediated and their lawyers felt the other side acted in bad faith. Defendants were less likely to report bad faith.

Clearly those unable to settle their cases are much more likely to feel the other side did not act in good faith. In contrast to Domestic Relations cases, mediating parties in Civil II were less likely to accuse their adversaries of bad faith. Plaintiffs were more likely to allege bad faith on the part of defendants than the other way around, but lawyers for non-settling, mediating defendants were the *most* likely to think their opponents acted in bad faith.

OTHER PARTY DID <u>NOT</u> ACT IN GOOD FAITH			
	DISAGREE		AGREE
CMLP-S	36	18	46
CMAP-S	55	29	16
CMLP-NS	0	50	50
CMAP-NS	25	25	50
CMLD-S	54	21	26
CMAD-S	61	26	13
CMLD-NS	40	20	40
CMAD-NS	0	20	80
CNMLP-S	41	7	52
CNMAP-S	68	11	21
CNMLP-NS	14	14	71
CNMAP-NS	33	0	67
CNMLD-S	72	6	22
CNMAD-S	82	6	12
CNMLD-NS	60	0	40
CNMAD-NS	25	50	25

Pressure to Resolve Case Short of Trial. To determine whether the parties were pushed into settlement, they were asked if they felt pressure by the court to resolve their case short of trial. Responses would likely reflect whether the mediation was in fact voluntary or whether the parties felt coerced into avoiding a trial.



The other party did not act in good faith throughout the case

The responses reveal that those in mediation and their counsel did not feel pushed: more than

70% of each category of those who settled in mediation disagreed that they felt pressure to end the case without a trial. The lawyers for mediating, non-settling defendants were a bit more ambiguous, but none responded that they agreed they felt pressure to resolve the case short of trial.

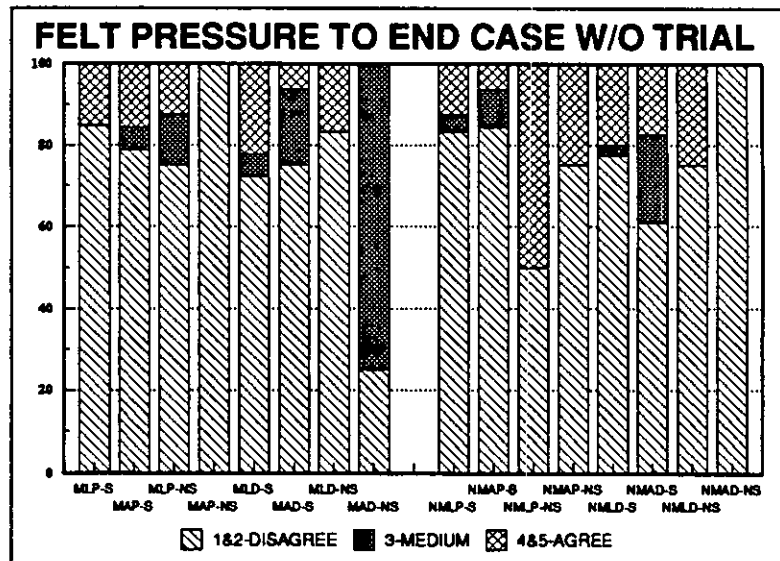
Those who did report pressure were non-settling, non-mediating plaintiffs: 50% of the plaintiffs and 25% of their lawyers agreed strongly that they felt pressured; 25% of the defendants, but none of their lawyers, concurred.

FELT PRESSURE BY THE COURT TO END CASE W/O TRIAL			
	DISAGREE		AGREE
CMLP-S	85	0	15
CMAP-S	79	5	16
CMLP-NS	75	13	13
CMAP-NS	100	0	0
CMLD-S	72	6	22
CMAD-S	75	19	6
CMLD-NS	83	0	17
CMAD-NS	25	75	0
CNMLP-S	83	4	13
CNMAP-S	84	9	6
CNMLP-NS	50	0	50
CNMAP-NS	75	0	25
CNMLD-S	78	3	20
CNMAD-S	61	22	17
CNMLD-NS	75	0	25
CNMAD-NS	100	0	0

Able to Tell the Full Story.

One of the putative benefits of mediation is that it enables the parties to address the underlying problem without being inhibited by forcing their issues into pre-cast legal doctrines or stifled by the rules of evidence. To test this common assertion, the respondents were asked whether "the

full story was *not* told in this case." Comparing the responses for those who mediated as

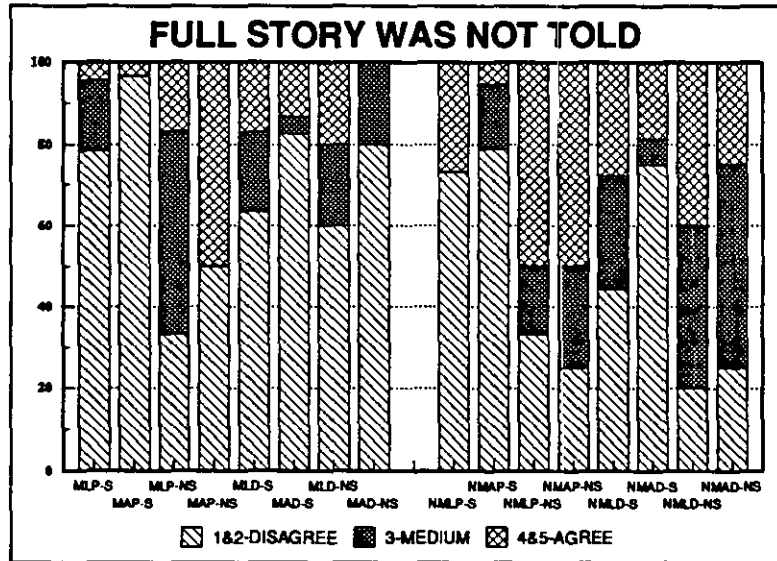


Felt pressured by the court to resolve this case without a trial

contrasted to those who did not, *every* category of respondent — whether plaintiff, defendant, or attorney, settling and non-settling — agreed that the full story was more likely to be told in mediation than when it was not used.

FULL STORY WAS <u>NOT</u> TOLD			
	DISAGREE		AGREE
CMLP-S	78	17	4
CMAP-S	97	0	3
CMLP-NS	33	50	17
CMAP-NS	50	0	50
CMLD-S	63	20	17
CMAD-S	83	4	13
CMLD-NS	60	20	20
CMAD-NS	80	20	0
CNMLP-S	73	0	27
CNMAP-S	79	16	5
CNMLP-NS	33	17	50
CNMAP-NS	25	25	50
CNMLD-S	44	28	28
CNMAD-S	75	6	19
CNMLD-NS	20	40	40
CNMAD-NS	25	50	25

Summary. All in all, the responses show rather clearly that the parties who settled preferred mediation to unassisted negotiations — they were more satisfied both as to the outcome and the process. Moreover, the lawyers — who presumably have both the procedural and substantive experience against which to



judge — generally concurred.⁹⁵ Parties who were unable to resolve their matter consensually were less satisfied both as to the process and the outcome in mediation. Their lawyers, however, were more satisfied with mediation than the lawyers who did not mediate.

With respect to the process used to resolve their controversies, blacks were equally satisfied with mediation and litigation. Whites, on the other hand, clearly preferred mediation. Those in worse financial shape far preferred mediation to litigation. Those in better shape had the opposite preferences. Individuals favored mediation; the picture for organizations was more mixed, however, since they both liked and disliked litigation more than mediation. Thus, with the exception of race, those who would be expected to be at a disadvantage seemed to prefer mediation.

Satisfaction with the outcome of the case produced similar results: with the exception of race, those who traditionally are regarded as having less power preferred mediation. Women favored mediation significantly, although men had similar reactions to both processes. Although blacks did not express a strong preference, their lawyers strongly favored mediation. Whites had a definite preference for mediation (only a third of those who did not mediate were satisfied with the outcome, while 40% were dissatisfied). Individuals were happier and less unhappy mediating than not, while organizations preferred not to mediate. Those who were better off were happier with their outcomes in both mediation and litigation than those who were worse off. That said, those who were worse off were significantly happier in mediation than not (indeed, of those not mediating, 52% were dissatisfied with the outcome). Those who were comparatively better off were happier and less unhappy not mediating.

Thus, with respect to the revealed satisfaction level, mediation appears to even out power imbalances. The only characteristic that did not fit this finding is race. Indeed, the lawyers for blacks preferred mediation. And, the racial composition of Washington, DC, may also have

95. The lawyers for non-mediating defendants were more pleased as to the process than were those who mediated.

a bearing on the traditional power imbalances within the court system as a whole. It may be that *whites* feel at a disadvantage when before the court, in which case the results would be uniform in finding that mediation smoothes power differentials.

When asked whether justice was done, the plaintiffs in mediation were more inclined to agree than plaintiffs who did not mediate. For defendants the opposite was the case.

As for relationships, those who mediated were less likely to allege that the other side acted in bad faith. The charge of bad faith escalated when the parties were unable to resolve their differences. Finally, everyone seemed to agree that the full story was more likely to be told when the case was mediated than when not.

SUMMARY: IMPROVING SATISFACTION AND ACCESS TO JUSTICE, BUT WITHOUT SUBSTANTIAL EFFECT ON THE COURT

Building on the questions raised earlier in the report, we summarize the findings concerning the impact of the mediation of Civil II disputes on the courts, the disputants, and society.

Impact on the Court. On first blush it appears that the mediation has a major effect on the court's workload by stimulating far more settlements than would occur without it. By looking only to the parties themselves, an impressive 7% fewer cases required a decision by the court if the case was mediated than if not. The benefit largely disappears, however, when the responses of the lawyers are examined: there was very little difference in the trial rates whether or not mediation was employed. The potential discrepancy in the responses is explained by pro se litigants. Very few of them used mediation, and they were far less likely to settle their controversies. Thus, unfortunately, it appears that for comparable cases, mediation does not save a significant amount of judicial resources by encouraging more settlements.

On the other hand, mediation does appear to be quite useful in resolving automobile related personal injury cases and breach of contract matters. Both had higher settlement rates when mediation was used than when not.

Mediation was typically used successfully to resolve emotionally difficult cases that did not involve complex legal issues. These cases can be disproportionately time consuming to try by the court, so mediation appears to help by siphoning them away to a more sympathetic forum.

A fair number of parties indicated that they would have either not brought the case in the first place or would have abandoned a matter if mediation had not been available. Thus, at least to some extent, mediation does appear to attract additional cases into the system that otherwise would not be there, just as Professor Sander predicted.

The parties were more likely to abide by a mediated agreement, but for some reason they appear to be less durable, in that there was more subsequent litigation over similar issues for cases in mediation.

In this program, mediation came late in the process, and hence it generally started *after* serious settlement negotiations began. To an extent, the mediation may therefore simply replace unassisted negotiations, but it should be emphasized that the lawyers thought there was a qualitative difference between mediation and lawyer/lawyer settlement talks. So, mediation should not be viewed as an empty extra step, since it may be useful in resolving cases that would otherwise be difficult to settle on their own.

Although a strict accounting is impossible, mediation does not appear to have a dramatic effect on the court's caseload.

Impact on the Disputants. For those cases that settled, the parties were more satisfied with both the outcome and the process in mediation than in unassisted negotiations or when their case was resolved by the court. Their lawyers — who have the experience and expertise against which to judge — concurred in this assessment. But, when the parties were not able

to resolve their dispute consensually, so that a decision of the court was necessitated, the parties were more satisfied not mediating.

Mediation appears to resolve cases somewhat faster than unassisted negotiations. Although we lack hard data on the matter, the lawyers indicated that mediation may actually be more expensive for the clients than not mediating. Countering this assertion is the fact that many lawyers who are paid contingent fees chose mediation presumably because it is faster; that results in a net savings, although it may not be passed on to the client.

Mediation is commonly used for cases that are particularly bitter or emotionally involved but which do not involve major legal issues. In short, the plaintiffs appear to feel wronged. Since the parties in Civil II cases rarely have to deal with each other again, improving an on-going relationship is not a relevant measure. But, the reported level of satisfaction indicates that mediation does appear to help the parties discharge this animosity. Indeed, the parties felt that "justice was done" more often in mediation, and that the full story was told. Further, parties in mediation were less likely to accuse the other side of acting in bad faith.

Mediation does not appear to make the justice system more accessible in terms of not needing a lawyer: Few parties appear pro se in mediation. Indeed, it appears that mediation is customarily selected by the lawyers, not the clients.

Impact on Society. The plaintiffs in mediation appear to be those usually regarded as disenfranchised or as having less overall power. That is, they seem more likely to be women, worse off financially, less sophisticated in business affairs, have less bargaining power, and be more risk averse. Blacks do not appear to choose mediation as parties, but their lawyers do.

On the other hand, sophisticated parties — those who are more educated, wealthier, hold professional or salaried positions, and are experienced in litigation — appear far less likely to choose mediation when they are plaintiffs.

This profile has all the earmarks of "second class justice" — the vulnerable are shuttled off to another forum. But that does not bear analysis: with the exception of race, the traditionally disenfranchised preferred mediation. Thus, women and those with less financial strength, less bargaining power, and greater risk aversion preferred mediation, as did individuals opposed to organizations. The only factor that is inconsistent with this finding is that blacks were relatively neutral as to which process is followed, but whites preferred mediation. Lawyers for blacks preferred mediation. During mediation these parties are at a par with their stronger adversaries before an officer of the court. Thus, mediation appears to increase the access to justice for traditionally weaker parties.

Defendants continued to prefer litigation — they appear to rely extensively on the principles of law and the judicial process for defining their rights.

Plaintiffs in mediation valued the principles of law, what a court would decide, and doing what is "right or fair" as very important. In fact, they viewed the principles of law as being more important than the plaintiffs who did not mediate. The plaintiffs' lawyers in mediation thought the most important factor in reaching a settlement is what would happen in unassisted negotiations; the defendants' bar looked to what a court would decide. Thus, it seems clear that the parties do indeed bargain in the shadow of the law, and society's norms are incorporated at least as much as in unassisted settlement negotiations.

Given the views of the parties that justice is more likely to be done in mediation than when the case is not mediated, that the full story is more likely to be told, and that the other side is less likely to act in bad faith, it certainly appears that mediation increases the level of and access to justice.

APPENDIX I: THE RESEARCH PROTOCOL

This section briefly reviews our research strategy, its rationale, and some of the implementation problems we faced carrying it out. In general, our objective here will be to focus on issues bearing on the administration of the study and not the substantive issues addressed. In short, this section is about the "how" — not the "what" — of the research, to the extent the two can be disentangled. The substantive issues addressed should be clear from the content of the report and the survey instruments, which are set out as Appendix II. Our hope is that the chapter can help the reader interpret the report and that it might provide some guidance for future researchers.

SELECTING THE "DOORS" OF THE MULTI-DOOR COURTHOUSE FOR STUDY.

Many early evaluations of ADR compared ADR to litigation on an aggregated basis.⁹⁶ That is, they tested the outcomes of the litigation process against mediation or arbitration, without decomposing by the area of law or characteristics of the cases or disputants. This type of analysis fails to differentiate between varying types of parties and cases, giving little, if any, indication of what qualities are most appropriate for ADR processes. Our own strategy was to disaggregate mediated cases by broad program areas, and within them by type of case, issues and parties.

At the time the study began, the Multi-Door Courthouse (MDCH) contained at least five programs that employed mediation: Small Claims, Civil II, Civil I, Settlement Week, and Domestic Relations. Each was administered under its own guidelines, some with separate staff. Indeed, the independence of the several programs was striking.

After some deliberation, we chose to focus on Civil II and Domestic Relations for a number of reasons. In the first place, a sufficient volume of cases (approximately 100 per year per

96. See, e.g., Roehl, Hersch, and Kapsak, Evaluation of New Jersey Complementary Dispute Resolution Programs Final Report, Institute for Social Analysis (1988).

program) had entered mediation under each program to make a study feasible. Second, each of the programs was in essence voluntary. In contrast to Small Claims mediation or mediation within Settlement Week, relevant cases were not routinely ordered into mediation by the court but rather entered at the request of one or more of the parties, changing the dynamics of entry, and, perhaps the experience and assessment of the parties.

Third, by selecting Civil II and Domestic Relations we would be able to examine how mediation works in rather different types of cases and contexts. Civil II includes moderately complex civil disputes. Further, the Civil II caseload involves both private and institutional parties who are typically represented by counsel. Domestic relations cases are less complex, often involving low to moderate income clients who frequently appear pro se. An examination of domestic relations mediation, then, would better reflect the use of mediation in a high volume, people's court-type setting.

THE GENERAL RESEARCH STRATEGY: INTERVIEWS AND TELEPHONE SURVEY.

The research approach we decided to pursue was straightforward: We would begin by interviewing the founders and principals involved in the Multi-Door Courthouse, court personnel, notably the directors of the Family and Civil Divisions of the Court, and selected mediators. The interviews were intended to give us perspective on the operation of the MDCH, the goals of the founders, its relation to the Court as a whole, the character of the individual programs, and the data sources available.

The in-person interviews were then complemented at the end of the research project by other interviews with court personnel, mediators, judges, and attorneys. These interviews were intended to help us interpret the results of the telephone survey.

Our explorations made clear that reliance upon "hard copy" court records would be functionally impossible given the demands placed upon the records office of the Court. Gaining access to hundreds or even thousands of files either to assess outcomes or even to develop a

sample of non-mediated cases would simply not be feasible given the press of daily business in a busy urban court. The inaccessibility of the files reinforced the need for a telephone survey.

As our report indicates, our telephone survey was intended to assess the process of mediation and the ways in which it differs from litigation, as well as the relative impacts of the two "systems" on costs, access, speed, satisfaction, durability and the quality of justice.

In order to compare and, if relevant, aggregate responses across both Civil II and Domestic Relations cases, the instruments used for Civil II and Domestic Relations respondents asked parallel questions to the maximum extent possible.

THE PERIOD EXAMINED

The cases we selected for examination were filed during the years 1987, 1988, and 1989. As interviewing took place in the late spring and early summer of 1990, this meant that most cases would likely be completed (i.e. an agreement had been reached and signed by the parties or the court or the dispute had been abandoned) and that some time would have elapsed since the dispute's resolution. This would permit the survey to test for the separate issues of compliance, durability and autonomy (i.e. the parties' capacity to resolve related disputes without resort to the court).

As we indicate elsewhere, focusing heavily on cases entering the MDCH during this period had important implications for the feasibility of the study as well. First, it would make it possible to assemble a comparison group of cases entering both the Family and Civil Divisions of the D.C. Superior Court as court records for both were being automated at this time. This would mean that the process of drawing a comparison sample could be done by computer and not by hand — an approach that was clearly not feasible.

Second, it meant that many of the litigants and attorneys would still be at the addresses or phone numbers where they could be reached. Given the nature of urban court systems and

the especially transient character of the Washington, D.C. population, these were important considerations.

Third, during the period examined, the Civil II and Domestic relations mediation programs were largely voluntary, in that at least one of the parties, if not all, had to request mediation (although, to be sure, it was sometimes suggested by those in authority). Both have recently changed as all cases appearing on both Civil II and Domestic Relations calendars are now reviewed for their appropriateness for mediation or other form of ADR with court personnel. The character of both programs has changed substantially, becoming more directive and, as a result, handling a much larger volume of cases.

THE RESPONDENTS

We chose to focus the telephone interviews on parties to the litigation and mediation processes (i.e. attorneys and litigants) and not on the neutrals or decisionmakers in the process (i.e. mediators, judges, and commissioners). The views of the latter were obtained through in person interviews.

By focusing only on parties to the disputes, we have the capacity to disaggregate our respondents into sixteen separate cells for the purposes of analysis:

CIVIL II	
MEDIATED CASES	UNMEDIATED CASES
Litigant Plaintiff	Litigant Plaintiff
Litigant Defendant	Litigant Defendant
Attorney for Plaintiff	Attorney for Plaintiff
Attorney for Defendant	Attorney for Defendant

DOMESTIC RELATIONS	
MEDIATED CASES	UNMEDIATED CASES
Litigant Plaintiff	Litigant Plaintiff
Litigant Defendant	Litigant Defendant
Attorney for Plaintiff	Attorney for Plaintiff
Attorney for Defendant	Attorney for Defendant

Our goal was to complete 800 interviews, evenly distributed across Civil II and Domestic Relations. Six hundred interviews were to be conducted with litigants; 300 from Civil II and 300 from Domestic Relations, evenly divided between mediated and non-mediated cases. Similarly, 200 interviews were to be conducted with attorneys: 100 from Civil II and 100 from Domestic Relations, again, evenly divided between mediated and non-mediated cases. It should be emphasized that the large size of this sample distinguishes this study from most other surveys of participants in ADR programs.

In practice, the interviews came very close to an even distribution of respondents across Civil II and Domestic Relations, mediated and non-mediated cases, and plaintiffs and defendants. The only significant exception was the disproportionally low distribution of attorneys for defendants in unmediated cases.

We chose our respondents on the strength of their involvement with a specific case. Thus, in many instances we interviewed several or all of the parties to an individual civil or domestic relations dispute. As a result we have the capacity to make intra-case comparisons of the differing views of parties on such issues as satisfaction, relative power, etc. However, because of resource constraints we have not exploited the data base to get at these issues.

But while attorneys and respondents were drawn from individual cases — and were asked to respond to the questions in terms of that specific case — the attorneys and the litigants were

not necessarily drawn from the same cases. In many instances we have only one respondent from a specific case.

The data base also permits us to examine the responses of plaintiffs and defendants and their attorneys. This approach to disaggregating the data is particularly helpful in analyzing the Civil II cases. It is less helpful in the domestic relations context, where being the moving or responding party is less significant.

Finally, while the overall response rate we achieved was quite high, it varied by respondent category. In the broadest terms, it was highest for litigants and attorneys in mediated cases and was lower for parties to non-mediated cases.

HOW THE SAMPLE OF RESPONDENTS WAS DRAWN

We attempted to reach *all* parties to cases that mediated in Civil II and Domestic Relations that were filed in 1987, 1988 and 1989. Our strategy was to examine all cases entering (versus completing) the mediation process in order to capture the full range of possible outcomes that could eventuate once a case had been registered with the MDCH. By focussing on all cases filed with the MDCH, in theory a significant share of our "mediated cases" could involve parties who had never attended a mediation session — a fact that in and of itself might have significant policy implications. As it turns out, however, the vast majority of both the litigants and attorneys who answered the relevant questions indicated that at least one mediation session had been held that the party attended. Hence our sample of mediating respondents is drawn almost entirely from those who had actively begun the process, actually attending a mediation session.

We discuss the way in which the comparison samples for Domestic Relations and Civil II were drawn in those respective sections of the report as well as the implications of the sampling procedure for the make-up of the comparison cases. Hence, we will only summarize those discussions here.

We drew our comparison sample of non-mediated cases for domestic relations randomly from the cases filed with the Family Division of Superior Court in 1988 and 1989 (1988 was the first year that the Division's files had been computerized). We excluded cases that had been filed with the MDCH or that would have otherwise been ineligible for mediation (paternity cases that raise no ancillary issues, e.g.).

Cases that were filed with the Family Division during this period were classified by the court in several rather obscure ways for the purposes of case-monitoring and data-retrieval: (a) divorce and support; (b) paternity; (c) reciprocal support; (d) custody; and (e) intrafamily. Our interviews with program and computer service staff at the Courthouse clearly indicated that the cases in the "divorce and support" file most closely resembled the cases filed within the MDCH.

However, our survey revealed that cases filed with the MDCH differ in some ways from those that were not mediated. In the first place, parties to mediated cases were much more likely to have children: a difference that could be controlled for by stratifying the non-mediated cases to include only those where the parties had children. Second, mediated cases tended to be more complex and raise more issues. And third, mediated cases contained a larger share of never-married parties (i.e. never-married to each other) than non-mediated cases. These typically involve the unmarried parents of one or more children.

In Civil II, we drew a set of comparison cases randomly from all cases that were filed with the Civil Division in the years 1987, 1988 and 1989 that fell within the broad categories of "personal injury," "breach of contract" or "negligence." Our preliminary analyses have demonstrated that these categories of cases represented the vast majority of cases filed with the MDCH.

HOW THE TELEPHONE SURVEY WAS ADMINISTERED

After initially considering hiring part time staff and conducting the telephone survey ourselves, we decided to contract the survey to a professional outside firm that conducts telephone surveys. This proved a sound decision as costs were manageable and the firm was able to complete the 800 interviews needed within a comparatively brief period.

The firm we chose was extremely competitive on price grounds. It had had some experience in conducting surveys for social science purposes but it did not have the experience of more established research-oriented firms such as WESTAT (which we contacted) or university-based survey firms like the National Opinion Research Center in Chicago. However, the firm had an important attribute: substantial experience administering surveys to central city populations. A day-long training session was conducted by the Principal Investigators (PIs) with the staff of the firm, and the PIs periodically visited the firm to monitor the calling and answer questions as they arose. Close contact was maintained throughout the survey period (which lasted a month and a half) between the PIs and the firm.

Potential respondents were sent a copy of a letter from the Chief Judge of the D.C. Superior Court on Court stationary, urging them to respond to the survey. The letter indicated that the recipients' responses would be confidential, giving them names of contact persons at the Court and within the Urban Institute if they had any questions. We believe the high response rate we achieved among attorneys and parties owes in some measure to the Court's formal endorsement.

The questionnaire itself was long by survey research standards, taking between 25 and 30 minutes to complete. Few respondents, though, failed to finish.

CONFIDENTIALITY

Two threshold implementation questions that we faced were related to the issue of confidentiality. The first was whether the fact of mediation, per se, was confidential, especially

within the context of domestic relations, making it impossible to get the names of the participants. As we suspected, this was not the case.

The second confidentiality issue we faced was whether attorneys would refuse to discuss individual cases with us because of the attorney-client privilege. Again, this did not prove to be a problem. We suspect that the letter from the Court's Chief Judge urging attorneys' cooperation with the study helped substantially in this regard.

At the same time we sought to preserve the confidentiality of the respondents to the survey. We did so by having the survey research firm detach the cover sheets to the questionnaires that contained all information identifying the respondents. The questionnaires were then assigned a number that made it possible to identify questionnaires as being from several parties involved in a common case but neither the case nor the parties.

DIFFERENT TYPES OF RECORDS WITHIN THE COURT

The study's progress was slowed by what might be described as the balkanization of the court and its operating divisions. At the time the research was being conducted, the three divisions of the court with which we worked — the Multi-Door, the Civil Division and the Family Division — all maintained separate records containing different data elements. This created especially complex implementation problems when it came to obtaining phone numbers for the respondents from the mediated and non-mediated samples.

The Multi-Door, reflecting its client orientation, routinely maintained the addresses and phone numbers of the litigants in mediation but not their attorneys. By contrast, the Civil and Family Divisions were more attorney-oriented. Hence their records contained the phone numbers of the parties' attorneys, but not those of the litigants themselves. The upshot of this was that we needed to undertake a large and unanticipated effort to locate many of our respondents. More than 6,000 calls were placed to directory assistance over the course of the survey.

ANALYZING THE RESULTS

Many of the questions asked of the respondents were cast in the form of continuous variables. For example, we asked parties to describe how friendly or bitter their relationships were on a scale of 1 to 5 with one being "generally friendly" and five being "very bitter." In our analysis of many of these continuous variable we chose to make comparisons aggregating the two low value responses: 1 and 2 or the two high value responses 4 and 5.

After some deliberation we chose not to express our results in terms of their statistical significance or their predictive power. This decision owes in large part to the fact that our respondents were necessarily drawn by using two rather different strategies. That is, because of the comparatively small number of cases processed by the MDCH in Civil II and Domestic Relations in the years examined, we tried to reach all of the participants in the program. Our strategy for selecting respondents from non-mediated cases was quite different. They were randomly drawn from a stratified sample of cases filed with the Superior Court.

Further, in the most practical terms, it is not clear what would be proven with statistical significance tests since the essential character of the programs under investigation has changed since the study was conducted. And we are aware of no other program in the country that matches the characteristics of the MDCH during the period of examination. While the results provide insights into the operation and impact of court annexed mediation programs, and how they compare to their conventional counterparts, the programs examined here are unique in some important ways. Hence the effect of the "treatment," if you will, cannot be extrapolated to mediation programs generally, or, given recent policy changes, even to cases currently being mediated within the Superior Court.

GENERAL OBSERVATIONS AND ASSESSMENT

We learned a number of lessons from the research strategy we adopted. In the first place, it became clear as we coded and analyzed the data that closed-ended questions clearly worked

much better and were most helpful. The received wisdom of survey research was certainly borne out by our study. Moreover, the size of our survey made the tasks of recording, coding, and analyzing narrative responses to questions difficult and the responses of little value. It would have been helpful to run a "pilot" survey, inasmuch as some problems with the phraseology of the questions could have been corrected before "going final." Luckily, this proved to be of remarkably little consequence. But the pilot would have picked up some of the difficulties in coding the responses. For example, some response numbers were duplicated in the questionnaire. And, it would have also demonstrated vividly the need for recording the responses in a more structured database; we had to construct ours after the fact, and that was both time consuming and not as productive as it might have been.

Our questionnaire also failed to distinguish between cases that were referred to mediation on the day of trial and those that were scheduled for mediation. While we did include questions that helped us get at these differing ways of entering mediation, a more direct question would have been advisable.

One of the most useful aspects of the research approach taken — one that had not been planned — was the conduct of interpretive interviews with a few well-informed sources following the analysis of the survey and other data. These proved quite valuable in helping us understand the meaning of some of our results.

Finally, we would note that despite the length and complexity of our report, we have not fully exploited the analytic possibilities of the data base that was assembled by this project. Specifically, analysis examining intra-case differences between respondents has not been exploited to the extent possible. For that reason we believe that it is important to view the data base that we have enclosed as one of the central "products" of the research.

APPENDIX II: THE QUESTIONNAIRES

Eight separate but related questionnaires were used to probe the reactions of the various players —

- Domestic relations litigants using mediation
- Domestic relations litigants not using mediation
- Domestic relations attorneys using mediation
- Domestic relations attorneys not using mediation
- Civil II litigants using mediation
- Civil II litigants not using mediation
- Civil II attorneys using mediation
- Civil II attorneys not using mediation.

Rather than including all of them in this report, the questionnaires for the mediating litigants are attached. Anyone desiring a full set of the questionnaires should contact the authors.

Note to interviewer: If the person you are interviewing appeared on behalf of an organization, such as a company or agency, you will need to ask if he or she is the right person in the organization to discuss this case; if not, ask who is so you can interview that person instead.

Please read each possible answer for those questions printed in italics.

For any question that is to be answered 1-5, please write in the number "9" if the question is not relevant or there is no answer.

Coding
Column

1. Were you a

- ____ (1) Plaintiff
____ (2) Defendant

2. How many

- ____ Plaintiffs were there
____ Defendants were there

3. Was the other party (the primary one if more than one) an individual

- ____ (1) Yes **Skip to Next Question.**
____ (2) No

What type of organization or firm was it

- ____ (3) Individual
____ (4) Contractor
____ (5) Bank or other financial institution
____ (6) Insurance company
____ (7) Retail business
____ (8) Federal government
____ (9) DC government
____ (10) Automobile related (service, sales, parts)
____ (11) Other: _____
____ (99) No answer

4. How would you describe your relationship with the other party (if more than one, the primary party), e.g. arms-length business relationship [*Interviewer: please read potential answers*]

- ____ (1) No relationship prior to the event that gave rise to this suit
____ (2) Impersonal, arms-length business relationship
____ (3) Personal relationship
____ (4) Intimate relationship, e.g. family
____ (99) No answer

5. How long have you had that relationship

6. Will you have to deal with the other party very much in the future

- ____ (1) Yes
 ____ (2) No
 ____ (3) Don't know
 ____ (9) No answer

Friendly	1	2	3	4	5	Bitter
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8. *What was the case about (check all that apply) [Interviewer: please read potential answers.]*

- _____ Personal injury, traffic (e.g., automobile, truck, bus) related
 _____ Personal injury, not related to traffic (e.g. medical malpractice, injured while at someone's home)
 _____ Assault and battery
 _____ Payment for merchandise or services
 _____ Defective merchandise or services
 _____ Breach of contract, other than for the purchase of merchandise or services (e.g., business deal or loan)
 _____ Employer/employee issues (e.g., wrongful discharge or denial of promotion)
 _____ Civil rights (e.g., discrimination on basis of race, sex, age, religion, handicap)
 _____ Other: _____
 _____ Don't know
 _____ (99) No answer

____ (1) Yes
____ (2) No

Skip to Question 10.

- ____(3) What amount did you think would be appropriate before this case was filed
____(4) What amount did the other party offer to settle for before the case was filed
____(5) What was the amount in the final decision

☐ (6) Settled in mediation
☐ (7) Lawyers settled outside of mediation and without much direct involvement of the parties
☐ (8) The parties settled without a mediator or without much help from lawyers
☐ (9) The court made the decision
☐ (10) Don't know

____(99) No answer

Has the original decision been changed either by agreement or by order of the court

____(11) Yes

____(12) No

____(13) Don't know

____(99) No answer

If relevant, to what extent have **you** complied with the decision that was in effect

____(14) Not relevant

____(15) Fully

____(16) Partially (describe): _____

____(17) No compliance

____(99) No answer

If relevant, to what extent has the **other** party complied with the decision that was in effect

____(18) Not relevant

____(19) Fully

____(20) Partially (describe): _____

____(21) No compliance

____(99) No answer

10. Was a claim made in this case that one of the parties should be required to do something other than pay money – known technically as specific performance

____(1) Yes

____(2) No

Skip to Question 11.

What did you think would be appropriate before the case began

____(3) Make repairs

____(4) Exchange merchandise

____(5) Provide services

____(6) Reinstatement/promotion

____(7) Other: _____

____(8) Nothing

____(99) No answer

What did the other party offer before the case began

____(9) Make repairs

____(10) Exchange merchandise

____(11) Provide services

____(12) Reinstatement/promotion

____(13) Nothing

____(14) Other: _____

____(99) No answer

On a scale of 1 to 5, to what extent did the final decision agree with your initial position or that of the other party

My position

1

2

3

4

5

Other party's position

34

- 35

____ (20) Yes
 ____ (21) No
 ____ (22) Don't know
 ____ (99) No answer

36

- 37

___ (27) Not relevant
 ___ (28) Fully
 ___ (29) Partially (describe): _____
 ___ (30) No compliance
 ___ (99) No answer

38

- ____ (1) Yes
 ____ (2) No
 ____ (3) Don't know
 ____ (9) No answer

39

Not important	1	2	3	4	5	Very important
---------------	---	---	---	---	---	----------------

40

- ____ (1) Yes
 ____ (2) No
 ____ (3) Don't know
 ____ (9) No answer

14. If yes, have you taken further legal action against the other party

- 41
____(1) Yes
____(2) No
____(9) No answer

15. Was the other party represented by a lawyer

- 42
____(1) Yes
____(2) No
____(9) No answer

16. Were you represented by a lawyer in this case

- 43
____(1) Yes
____(2) No

Skip to Question 22.

17. What is your relationship with your lawyer

- 44
____(1) Regular family/business lawyer
____(2) Furnished by insurance company
____(3) In-house counsel
____(4) Represented the client in the past, but not on a regular basis
____(5) Hired for the first time for this case
____(6) Provided by some other organization, such as Legal Services or a union
____(7) A friend
____(9) No answer

18. How did you pay your lawyer

- 45
____(1) A fixed charge for the case (flat rate)
____(2) Contingent fee (i.e. a percentage of the amount you received from the resolution of the case)
____(3) Salary
____(4) Hourly rate
____(5) Retainer
____(6) Nothing
____(9) No answer

19. If you paid either a flat rate or a contingent fee, did the amount you would have to pay go up if the case went to trial

- 46
____(1) Not applicable
____(2) Yes
____(3) No
____(4) Don't know
____(9) No answer

20. How much did you pay your lawyer by the time this case was finished

47 \$ _____ [9 if no answer]

21. Considering everything, on a scale of 1 to 5, how satisfied were you with your lawyer once the case was over

48 Not Satisfied 1 2 3 4 5 Very Satisfied

We would now like to ask you some questions about the mediation program.

22. Before this case was filed, were you aware that mediation services were available without charge from the Court

- 49 _____ (1) Yes
_____ (2) No
_____ (9) No answer

23. How did you learn of the mediation program

- 50 _____ (1) My lawyer
_____ (2) A friend
_____ (3) The other party in the case, or their lawyer
_____ (4) An official of the court, including a judge or commissioner, suggested it
_____ (5) The court required it in this case
_____ (6) I have used mediation before
_____ (7) Brochure
_____ (8) Notice in the Courthouse
_____ (9) The Bar Association or lawyer referral service
_____ (10) Other _____
_____ (99) No answer

24. Did you have a fairly clear understanding of what mediation would be like

- 51 _____ (1) Yes; I have used mediation before
_____ (2) Yes; it was adequately explained
_____ (3) No
_____ (9) No answer

25. Did your lawyer discourage or encourage you to mediate

- 52 _____ (1) Not represented by a lawyer
_____ (2) Encouraged
_____ (3) Discouraged
_____ (4) Neither
_____ (5) Not sure
_____ (9) No answer

Skip to Question 28.

26. Did your lawyer attend the mediation sessions

- ___ (1) Not represented by lawyer
___ (2) Yes, most or all of them
___ (3) Some, but not all
___ (4) None
___ (9) No answer

27. Who led the discussion for your side during the mediation

- ___ (1) Not represented by a lawyer, so I did
___ (2) I did
___ (3) My lawyer did
___ (4) About the same
___ (5) Not sure
___ (9) No answer

28. Did either you or your lawyer request that the case be mediated

- ___ (1) Yes
___ (2) No
___ (3) Don't know
___ (9) No answer

Skip to Question 31.

Skip to Question 31.

29. Who first suggested that you use mediation in this case

- ___ (1) My lawyer
___ (2) I did
___ (3) The other party
___ (4) The other party's lawyer
___ (5) An official of the court, including a judge
___ (6) Other _____
___ (9) No answer

30. Please rank what you thought the benefits of mediating the case were (i.e., 1 for the most important, 2 for the second, etc) [Interviewer: please read potential answers]

- ___ Cheaper
___ Faster
___ Better results
___ Better relationship with the other party
___ I thought I would have a better chance of getting what I wanted
___ Other _____

Skip to Question 32, 33.

31. Since you did not ask to have your case mediated, how do you view your decision to use it [Interviewer: please read potential answers]

- 63 ☐ (1) I agreed to it voluntarily
 ☐ (2) I felt pressure to use it, so agreed to it reluctantly
 ☐ (3) I was ordered to use it by the court
 ☐ (9) No answer

32. How many times had you been before a judge or commissioner before your first mediation session was held

- 64 ☐ (1) 0; we did not appear before a judge or commissioner before starting mediation
 ☐ (2) 1
 ☐ (3) 2
 ☐ (4) 3 - 5
 ☐ (5) More than 5
 ☐ (9) No answer

33. How many times did you appear before a judge or commissioner after your last mediation session was held

- 65 ☐ (1) 0; we did not appear before a judge or commissioner after concluding mediation
 ☐ (2) 1
 ☐ (3) 2
 ☐ (4) 3 - 5
 ☐ (5) More than 5
 ☐ (9) No answer

34. What do you think would have happened if mediation was not available

- 66 ☐ (1) We would have dropped the case
 ☐ (2) We would have settled before trial
 ☐ (3) We would have gone to trial
 ☐ (4) We would not have filed the case
 ☐ (9) No answer

35. How many mediation sessions did you attend

- 67 ☐ Number
68 ☐ Number of hours total

36. Did the mediator ever suggest that you not attend a mediation session

- 69 ☐ (1) Yes
 ☐ (2) No

Concerning the factual development of your case --

37. What discovery or factfinding had taken place when mediation began

- ☐ (1) Interrogatories (written answers to written questions)
☐ (2) Depositions (oral responses under oath to oral questions)
☐ (3) Exchange of documents
☐ (4) Don't know
☐ (9) No answer

38. Had discovery or factfinding been completed before mediation began

- ☐ (1) Yes
☐ (2) No
☐ (3) Don't know
☐ (9) No answer

39. Did you feel you had enough information to make good decisions during the mediation

- ☐ (1) Yes
☐ (2) No
☐ (9) No answer

On a scale of 1 (Not Important) to 5 (Very Important), please indicate how important each of the following factors was in helping you decide what you would agree to in the mediation.

40. The principles of law

Not Important 1 2 3 4 5 Very Important

41. What the court or jury would likely decide

Not Important 1 2 3 4 5 Very Important

42. What I would get if I or the lawyers settled the case before trial

Not Important 1 2 3 4 5 Very Important

43. What would be "right" or "fair" under the circumstances

Not Important 1 2 3 4 5 Very Important

44. What would be best for my emotional well being

	Not Important	1	2	3	4	5	Very Important
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45. What the mediator told me to do

78	Not Important	1	2	3	4	5	Very Important
----	---------------	---	---	---	---	---	----------------

46. What would end the case the fastest

79	Not Important	1	2	3	4	5	Very Important
----	---------------	---	---	---	---	---	----------------

47. What my lawyer told me to do

80	Not Important	1	2	3	4	5	Very Important
----	---------------	---	---	---	---	---	----------------

For the next series of questions, please answer on a scale of 1 (low) to 5 (high).

48. How do you stand financially compared to the other party

81	Low (worse)	1	2	3	4	5	High (better)
----	-------------	---	---	---	---	---	---------------

49. How sophisticated in business affairs do you regard yourself

82	Low	1	2	3	4	5	High
----	-----	---	---	---	---	---	------

50. How sophisticated in business affairs do you regard the other party

83	Low	1	2	3	4	5	High
----	-----	---	---	---	---	---	------

51. How strong did you feel your bargaining power was in this case

84	Low	1	2	3	4	5	High
----	-----	---	---	---	---	---	------

52. How strong did you feel the other party's bargaining power was in this case

85	Low	1	2	3	4	5	High
----	-----	---	---	---	---	---	------

53. Compared to other people, how willing are you to take financial risks

86	Low (not willing)	1	2	3	4	5	High (very willing)
----	-------------------	---	---	---	---	---	---------------------

54. How was your case resolved

- ☐ (1) We reached an agreement in mediation **Skip to Question 57.**
☐ (2) We settled after mediation had ended **Skip to Question 57.**
☐ (3) The court/jury decided
☐ (4) We dropped the case **Skip to Question 75.**
☐ (5) Does not know
☐ (9) No answer

55. Did you reject an offer during mediation or settlement that would have been better for you than the outcome of the trial

- ☐ (1) Yes
☐ (2) No
☐ (3) Don't know
☐ (9) No answer

56. Was there one, major reason why you were not able to settle this case

- ☐ (1) Yes, explain: _____
☐ (2) No single reason
☐ (9) No answer

Please rank on a scale of 1 (strongly disagree) to 5 (strongly agree) the extent to which you agree with the following statements.

57. The outcome of the case was about as I expected

Strongly disagree	1	2	3	4	5	Strongly agree
-------------------	---	---	---	---	---	----------------

58. I was satisfied with the **process** used to make the decision in this case

Strongly disagree	1	2	3	4	5	Strongly agree
-------------------	---	---	---	---	---	----------------

59. I was satisfied with the **outcome** of the case

Strongly disagree	1	2	3	4	5	Strongly agree
-------------------	---	---	---	---	---	----------------

60. I was able to tell my side of the story

Strongly disagree	1	2	3	4	5	Strongly agree
-------------------	---	---	---	---	---	----------------

61. Justice was served by this process

94	Strongly disagree	1	2	3	4	5	Strongly agree
62. I was treated with dignity during the mediation process							
95	Strongly disagree	1	2	3	4	5	Strongly agree
63. Going through the process has helped me deal with the other party							
96	Strongly disagree	1	2	3	4	5	Strongly agree
64. The mediator was fair and effective							
97	Strongly disagree	1	2	3	4	5	Strongly agree
65. I was treated with dignity throughout the case							
98	Strongly disagree	1	2	3	4	5	Strongly agree
66. The other party did not act in good faith throughout the case							
99	Strongly disagree	1	2	3	4	5	Strong agree
67. I got more than I would have if we had not used mediation							
100	Strongly disagree	1	2	3	4	5	Strongly agree
68. Mediation just added another step to resolving this case and was not helpful							
101	Strongly disagree	1	2	3	4	5	Strongly agree
69. I felt pressured by the court to resolve this case without a trial							
102	Strongly disagree	1	2	3	4	5	Strongly agree
70. Mediation helped resolve some issues in this case, but not all							
103	Strongly disagree	1	2	3	4	5	Strongly agree
71. The process used to decide the case was confusing to me							
104	Strongly disagree	1	2	3	4	5	Strongly agree

72. The full story was not told in this case

Strongly disagree 1 2 3 4 5 Strongly agree

73. Participating in the case was convenient to me

Strongly disagree 1 2 3 4 5 Strongly agree

74. *Considering everything -- cost, time, convenience, fairness -- how would you prefer to have a case like this resolved next time [Interviewer: please read potential answers]*

- ____ (1) Judge
- ____ (2) Settlement discussions among the parties
- ____ (3) Mediation
- ____ (4) Settlement discussions among the lawyers, without much involvement of the parties
- ____ (5) Have no opinion
- ____ (9) No answer

Skip to Question 76.

75. Did you consciously decide to abandon the case because continuing it would cost more than you would be likely to win or save

- ____ (1) Yes
- ____ (2) No, no explicit decision was made, it just happened
- ____ (3) Not applicable, the other party quit
- ____ (9) No answer

To conclude this interview, we would like to develop an understanding of just who uses the courts and its mediation programs. We would therefore appreciate it if you would answer some questions about yourself or the organization you represented in the case.

76. What is your occupation

- ____ (1) Student
- ____ (2) Employee of DC Government
- ____ (3) Employee of Federal Government
- ____ (4) Hourly employee in business
- ____ (5) Salaried employee in business
- ____ (6) Self employed in business
- ____ (7) Professional
- ____ (8) Not employed
- ____ (9) Take care of home, children; not employed outside the home
- ____ (10) Other _____
- ____ (99) No answer

77. Did you appear in the case --

- 110 ☐ (1) As an Individual
 ☐ (2) On behalf of an organization **Skip to Question 84.**

78. How old are you

- 111 ☐ (1) Under 21
 ☐ (2) 21-30
 ☐ (3) 31-40
 ☐ (4) 41-50
 ☐ (5) 51-60
 ☐ (6) 61-70
 ☐ (7) 71 +

79. What is your gender

- 112 ☐ (1) Male
 ☐ (2) Female

80. What is your race/ethnicity

- 113 ☐ (1) Black
 ☐ (2) White
 ☐ (3) Hispanic
 ☐ (4) Asian
 ☐ (5) Other _____

81. What is the highest grade you completed

- 114 ☐ (1) Eighth grade or less
 ☐ (2) Some high school but no diploma
 ☐ (3) High school diploma or equivalency
 ☐ (4) Vocational school
 ☐ (5) Some college, but no degree
 ☐ (6) Bachelor's degree
 ☐ (7) Graduate or professional school
 ☐ (9) No answer

82. *What was the range your annual family income before taxes during 1988 -- [Interviewer: please read potential answers]*

- 5 ☐ (1) less than \$10,000
 ☐ (2) \$10,001 - \$25,000
 ☐ (3) \$25,001 - \$40,000

- ___ (4) \$40,001 - \$60,000
___ (5) \$60,000 +
___ (9) No answer

83. Were you a party to this suit only because your insurance company required it

- ___ (1) Yes
___ (2) No
___ (3) Insurance had nothing to do with this law suit

Read the thank you at the end.

84. What type of organization did you represent

- ___ (1) Contractor
___ (2) Bank or other financial institution
___ (3) Insurance company
___ (4) Retail business
___ (5) Federal agency
___ (6) DC agency
___ (7) Transportation
___ (8) Automobile related (service, sales, parts)
___ (9) Utility
___ (10) Other: _____
___ (99) No answer

85. How many employees does it have?

- ___ (1) 1-9
___ (2) 10-50
___ (3) More than 50
___ (4) Don't know

86. How many lawsuits has the organization been a party to in the past five years?

- ___ (1) This is the only one
___ (2) 2-5
___ (3) More than 5
___ (4) Don't know

87. Was the organization a party to this suit only because its insurance company required it to be?

- ___ (1) Yes
___ (2) No
___ (3) Insurance had nothing to do with this

Thank you for your cooperation and help. We very much appreciate your time and attention. We will be preparing a report on the Superior Court's Multi-Door Courthouse program based on the information you and others provide. It will help the District of Columbia improve its services.

Note to interviewer: The term "other party" is used throughout the questionnaire to refer to this person's opponent in the litigation; almost always, that "other party" will be a former spouse, boyfriend, or girlfriend. You may want to ask who that person is and refer to him or her by a more personal title or name than the "other party" which appears here.

Please read each possible answer for those questions printed in italics.

For any question that is to be answered 1-5, please write in the number "9" if the question is not relevant or there is no answer.

Coding
Column

1. Who first filed the case in the Superior Court or its mediation program

- 1
____ (1) I did
____ (2) The other party did

2. How were you related to the other party when this case was first filed

- 2
____ (1) Married
____ (2) Divorced
____ (3) Separated
____ (4) Unmarried Parents
____ (5) Grandparent/parent
____ (6) Other: _____
____ (9) No answer

3. What is your relationship today

- 3
____ (1) Married
____ (2) Divorced
____ (3) Separated
____ (4) Unmarried Parents
____ (5) Grandparent/parent
____ (6) Other: _____
____ (7) No answer

4. How long did you and the other party live together before this case was filed

- 4
____ (1) Never
____ (2) less than a year
____ (3) 1-2 years
____ (4) 2-5 years
____ (5) 5-10 years
____ (6) More than 10 years
____ (9) No answer

Skip to Question 6.

5. If you did live together and are now separated, when did you separate

- 5
- ☐ (1) We are still living together
 - ☐ (2) More than a year before the case began (i.e. first paper was filed with the court or mediation program of the court)
 - ☐ (3) Within a year before the case was filed
 - ☐ (4) Within a year after the case was filed
 - ☐ (5) More than a year after the case was filed
 - ☐ (6) No answer

6. Can you say which of you is closer to the children

- 6
- ☐ (1) I am
 - ☐ (2) The other party is
 - ☐ (3) About the same
 - ☐ (4) Not relevant, no children
 - ☐ (9) No answer

7. Will you have to deal with the other party very much in the future

- 7
- ☐ (1) Yes
 - ☐ (2) No
 - ☐ (3) Don't know
 - ☐ (9) No answer

8. On a scale of 1 to 5, with 1 being generally friendly and 5 being very bitter, how would you describe your relationship with the other party at the time the case was filed

8 Friendly 1 2 3 4 5 Bitter

9. Violence is a common problem in relationships; has there ever been any physical violence between you and the other party

- 9
- ☐ (1) Yes
 - ☐ (2) No
 - ☐ (9) No answer

Do you have any reason to fear the other party

- 10
- ☐ (3) Yes
 - ☐ (4) No
 - ☐ (9) No answer

We would now like to turn to what was involved in your case. We will go down a list of issues that are frequently involved in Domestic Relations matters, and we would like to ask whether that issue was involved in your case, what you thought would be appropriate, what the other party offered, what the outcome was, and how you reached the decision.

10. Child Support

Was child support an issue in this case

- ☐ (1) Yes
☐ (2) No

Skip to Question 11.

Did you expect to pay or receive support

- ☐ (3) Receive
☐ (4) Pay

How many dollars per month

- ☐ What amount did you think would be appropriate
☐ What amount did the other party initially offer/request
☐ What was the final decision

How was the final decision made

- ☐ (5) Settled in mediation
☐ (6) Lawyers settled outside of mediation and without much direct involvement of the parties
☐ (7) The parties settled without a mediator or without much help from lawyers
☐ (8) The court made the decision
☐ (9) Does not know
☐ (99) No answer

Has the original decision been changed either by agreement or by order of the court

- ☐ (10) Yes
☐ (11) No
☐ (12) Don't know
☐ (9) No answer

If relevant, to what extent have you complied with the decision in effect at the time

- ☐ (13) Fully
☐ (14) Partially (describe): _____
☐ (15) No compliance
☐ (16) Not relevant
☐ (9) No answer

If relevant, to what extent has the other party complied with the decision in effect at the time

- ☐ (17) Fully
☐ (18) Partially (describe): _____
☐ (19) No compliance
☐ (20) Not relevant
☐ (9) No answer

11. Custody

Was child custody an issue in this case

___(1) Yes

___(2) No

Skip to Question 12.

What did you think would be appropriate

___(3) You have custody of all your children

___(4) The other party have custody of all his/her children

___(5) We have joint custody of all our children

___(6) We split custody, with one having primary custody of some children and the other having primary custody of other children

___(7) Other: _____

___(9) No answer

What did the other party initially offer

___(8) You have custody of all your children

___(9) The other party have custody of all his/her children

___(10) We have joint custody of all our children

___(11) We split custody, with one having primary custody of some children and the other having primary custody of other children

___(12) Other: _____

___(99) No answer

What was the final decision

___(13) You have custody of all your children

___(14) The other party has custody of all his/her children

___(15) We have joint custody of all our children

___(16) We split custody, with one having primary custody of some children and the other having primary custody of other children

___(17) Other: _____

___(9) No answer

How was the final decision made

___(18) Settled in mediation

___(19) Lawyers settled outside of mediation and without much direct involvement of the parties

___(20) The parties settled without a mediator or without much help from lawyers

___(21) The court made the decision

___(22) Don't know

___(9) No answer

Has the original decision been changed either by agreement or by order of the court

___(23) Yes

___(24) No

___(25) Don't know

___(9) No answer

To what extent have you complied with the decision

___(26) Not relevant

___(27) Fully

___(28) Partially (describe): _____

___(29) No compliance

___(9) No answer

To what extent has the other party complied with the decision

- ☐ (30) Not relevant
☐ (31) Fully
☐ (32) Partially (describe): _____
☐ (33) No compliance
☐ (9) No answer

12. Visitation

Was visitation an issue in this case

- ☐ (1) Yes
☐ (2) No Skip to Question 13.

If the dispute was over more than one child and different arrangements were proposed or made with respect to visitation rights, we would appreciate your answer as to the youngest child so that we may understand the nature of the dispute without having to go into too much detail.

With respect to the number of days per month you or the other party has visitation rights

- ☐ Number of days per month that you thought would be appropriate
☐ Number of days per month the other party initially offered
☐ Number of days in the final decision

With respect to the number of weeks of vacation

- ☐ Number of weeks that you initially thought were appropriate
☐ Number of weeks the other party initially offered
☐ Number of weeks in the final decision

How was the final decision made

- ☐ (3) Settled in mediation
☐ (4) Lawyers settled outside of mediation and without much direct involvement of the parties
☐ (5) The parties settled without a mediator or without much help from lawyers
☐ (6) The court made the decision
☐ (7) Don't know
☐ (9) No answer

Has the original decision been changed either by agreement or by order of the court

- ☐ (8) Yes
☐ (9) No
☐ (10) Don't know
☐ (99) No answer

To what extent have you complied with the decision that was in effect

- ☐ (11) Not relevant
☐ (12) Fully
☐ (13) Partially (describe): _____
☐ (14) No compliance
☐ (9) No answer

To what extent has the other party complied with the decision that was in effect

- ☐ (15) Not relevant

- ____ (16) Fully
____ (17) Partially (describe): _____
____ (18) No compliance
____ (9) No answer

13. Property Division

Was the division of property an issue in this case

- 39 ____ (1) Yes
____ (2) No **Skip to Question 14.**

What was the range of the net worth of you and the other party when the case was filed, including the value of your home after deducting the mortgage, all your personal property such as furniture and jewelry [Interviewer: Please read all potential answers]

- 40 ____ (3) \$0 - \$10,000
____ (4) \$10,001 - \$25,000
____ (5) \$25,001 - \$50,000
____ (6) \$50,001 - \$100,000
____ (7) More than \$100,000
____ (8) No answer

How was that property divided between you and the other party

- .2 ____ Percentage that you initially thought would be appropriate
43 ____ Percentage the other party initially offered to you
____ Percentage awarded to you in the final decision

How was the final decision made concerning the division of property

- 44 ____ (9) Settled in mediation
____ (10) Lawyers settled outside of mediation and without much direct involvement of the parties
____ (11) The parties settled without a mediator or without much help from lawyers
____ (12) The court made the decision
____ (13) Don't know
____ (99) No answer

To what extent have you complied with the decision

- 45 ____ (14) Not relevant
____ (15) Fully
____ (16) Partially (describe): _____
____ (17) No compliance
____ (9) No answer

To what extent has the other party complied with the decision

- 46 ____ (18) Not relevant
____ (19) Fully
____ (20) Partially (describe): _____
____ (21) No compliance
____ (9) No answer

14. Support of former partner

Was the support of a former partner an issue in this case

___(1) Yes

___(2) No

Skip to Question 15.

Did you expect to pay or receive support

___(3) Pay

___(4) Receive

How are the support payments to be made

___(5) One lump sum

___(6) Monthly installments

___(7) Both

With regard to a lump sum payment

___ Amount you initially thought would be appropriate

___ Amount the other party initially offered

___ Amount in the final decision

With regard to monthly payments

___ Amount you initially thought would be appropriate

___ Amount per month the other party initially offered

___ Amount in the final decision

Is any amount of money taken out of your or the other party's paycheck to make these payments

___(8) Yes

___(9) No

___(99) No answer

How was the final decision made

___(10) Settled in mediation

___(11) Lawyers settled outside of mediation and without much direct involvement of the parties

___(12) The parties settled without a mediator or without much help from lawyers

___(13) The court made the decision

___(14) Don't know

___(9) No answer

Has the original decision been changed either by agreement or by order of the court

___(15) Yes

___(16) No

___(17) Don't know

___(9) No answer

If relevant, to what extent have you complied with the decision

___(18) Fully

___(19) Partially (describe): _____

___(20) No compliance

___(21) Not relevant

___(9) No answer

60

- 61

Not important	1	2	3	4	5	Very important
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62

- 63

- 64

- 65

- 66

- ____ (1) A fixed charge for the case (flat rate)
 ____ (2) Contingent fee
 ____ (3) Salary
 ____ (4) Hourly rate

- ☐ (5) Retainer
☐ (6) Nothing
☐ (9) No answer

21. If you paid either a flat rate or a contingent fee, did the amount you would have to pay go up if the case went to trial

- ☐ (1) Yes
☐ (2) No
☐ (3) Don't know
☐ (9) No answer

22. How much did you pay your lawyer by the time this case was finished

\$ _____ [9 if no answer]

23. Considering everything, on a scale of 1 to 5, how satisfied were you with your lawyer once the case was over

Not Satisfied 1 2 3 4 5 Very Satisfied

24. Before this case was filed, were you aware that mediation services were available without charge from the Court

- ☐ (1) Yes
☐ (2) No
☐ (9) No answer

25. How did you learn of the mediation

- ☐ (1) My lawyer
☐ (2) A friend
☐ (3) The other party, or his/her lawyer
☐ (4) An official of the court, including a judge, suggested it
☐ (5) The court required me to use it in this case
☐ (6) I have used mediation before
☐ (7) Brochure
☐ (8) Notice in the Courthouse
☐ (9) The Bar Association or lawyer referral service
☐ (10) Other _____
☐ (99) No answer

26. Did you have a fairly clear understanding of what mediation would be like

- ☐ (1) Yes; I have used mediation before
☐ (2) Yes; it was adequately explained

- ☐ (3) No
☐ (9) No answer

27. Did your lawyer discourage or encourage you to mediate

73

- ☐ (1) Not represented by a lawyer **Skip to Question 30.**
☐ (2) Encouraged
☐ (3) Discouraged
☐ (4) Neither
☐ (5) Not sure
☐ (9) No answer

28. Did your lawyer attend the mediation sessions

74

- ☐ (1) Not represented by lawyer
☐ (2) Yes, most or all of them
☐ (3) Some, but not all
☐ (4) None
☐ (9) No answer

29. Who led the discussion for your side during the mediation

75

- ☐ (1) Not represented by a lawyer, so I did
☐ (2) I did
☐ (3) My lawyer did
☐ (4) About the same
☐ (5) Not sure
☐ (9) No answer

30. Did either you or your lawyer request that the case be mediated

76

- ☐ (1) Yes
☐ (2) No **Skip to Question 33.**
☐ (3) Don't know **Skip to Question 33.**

31. Who first suggested that you use mediation in this case

77

- ☐ (1) My lawyer
☐ (2) I did
☐ (3) We shared a lawyer, and he/she did
☐ (4) The other party
☐ (5) The other party's lawyer
☐ (6) An official of the court, including a judge
☐ (7) Other _____
☐ (9) No answer

32. Please rank what you thought the benefits of mediating the case were (i.e., 1 for the most important, 2 for the second, etc) [Interviewer: Please read all potential answers]

- 78 _____ Cheaper
79 _____ Faster
80 _____ Better results
81 _____ Better relationship with the other party
82 _____ I thought I would have a better chance of getting what I wanted
83 _____ Other _____

Skip to Question 34.

33. Since you did not ask to have your case mediated, how do you view your decision to use it [Interviewer: Please read all potential answers]

- 84 _____ (1) I agreed to it voluntarily
_____ (2) I felt pressure to use it, so agreed to it reluctantly
_____ (3) I was ordered to use it by the court
_____ (9) No answer

34. How many times had you been before a judge or commissioner before your first mediation session was held

- 85 _____ (1) 0; we did not appear before a judge or commissioner before starting mediation
_____ (2) 1
_____ (3) 2
_____ (4) 3 - 5
_____ (5) More than 5
_____ (9) No answer

35. What do you think would have happened if mediation was not available

- 86 _____ (1) We would have dropped the case
_____ (2) We would have settled before trial
_____ (3) We would have gone to trial
_____ (4) We would not have filed the case
_____ (9) No answer

36. How many mediation sessions did you attend which the other party also attended

- 87 _____ Number
88 _____ Number of hours total

37. Did the mediator ever suggest that you not attend a mediation session

- 89 _____ (1) Yes

___(2) No

Concerning the factual development of your case --

38. What kind of information was exchanged before the mediation concluded

I submitted financial information, such as bank statements

- 90 ___(1) Yes
___(2) No
___(9) No answer

I submitted tax forms

- 91 ___(3) Yes
___(4) No
___(9) No answer

The other party submitted financial information, such as bank statements

- 92 ___(5) Yes
___(6) No
___(9) No answer

The other party submitted tax forms

- ___(7) Yes
___(8) No
___(9) No answer

Other material (e.g. blood tests if a paternity case): _____

- 94 ___(9) Yes
___(10) No
___(99) No answer

39. Did you feel you had enough information to make good decisions during the mediation

- 95 ___(1) Yes
___(2) No
___(9) No answer

On a scale of 1 (Not Important) to 5 (Very Important), please indicate how important each of the following factors was in helping you decide what you would agree to in the mediation.

40. The of principles of law

96 Not Important 1 2 3 4 5 Very Important

41. What the court would likely decide

	Not Important	1	2	3	4	5	Very Important
--	---------------	---	---	---	---	---	----------------

42. What I would get if I or the lawyers settled the case before trial

98	Not Important	1	2	3	4	5	Very Important
----	---------------	---	---	---	---	---	----------------

43. What would be "right" or "fair" under the circumstances

99	Not Important	1	2	3	4	5	Very Important
----	---------------	---	---	---	---	---	----------------

44. What would be best for my emotional well being

100	Not Important	1	2	3	4	5	Very Important
-----	---------------	---	---	---	---	---	----------------

45. What would be best for the emotional well being of my family

101	Not Important	1	2	3	4	5	Very Important
-----	---------------	---	---	---	---	---	----------------

46. What the mediator told me to do

102	Not Important	1	2	3	4	5	Very Important
-----	---------------	---	---	---	---	---	----------------

47. What would end the case the fastest

103	Not Important	1	2	3	4	5	Very Important
-----	---------------	---	---	---	---	---	----------------

48. What my lawyer told me to do

104	Not Important	1	2	3	4	5	Very Important
-----	---------------	---	---	---	---	---	----------------

For the next series of questions, please answer on a scale of 1 (low) to 5 (high).

49. How do you stand financially compared to the other party

105	Low (worse)	1	2	3	4	5	High (better)
-----	-------------	---	---	---	---	---	---------------

50. How sophisticated in business affairs do you regard yourself

106	Low	1	2	3	4	5	High
-----	-----	---	---	---	---	---	------

107	Low	1	2	3	4	5	High
-----	-----	---	---	---	---	---	------

108	Low	1	2	3	4	5	High
-----	-----	---	---	---	---	---	------

109	Low	1	2	3	4	5	High
-----	-----	---	---	---	---	---	------

110	Low (not willing)	1	2	3	4	5	High (very willing)
-----	-------------------	---	---	---	---	---	---------------------

111

<input type="checkbox"/> (1)	We reached an agreement in mediation	Skip to Question 58.
<input type="checkbox"/> (2)	We settled, but after mediation had ended	Skip to Question 58.
<input type="checkbox"/> (3)	Judgement by the court	
<input type="checkbox"/> (4)	We dropped the case	Skip to Question 76.
<input type="checkbox"/> (5)	Does not know	
<input type="checkbox"/> (9)	No answer	

112 (1) Yes
 (2) No
 (3) Don't know
 (9) No answer

113

____ (1) Yes, explain: _____

____ (2) No single reason

____ (9) No answer

	Strongly disagree	1	2	3	4	5	Strongly agree
114							

59. I was satisfied with the **process** used to make the decision in this case

Strongly disagree 1 2 3 4 5 Strongly agree

60. I was satisfied with the **outcome** of the case

Strongly disagree 1 2 3 4 5 Strongly agree

61. I was able to tell my side of the story

Strongly disagree 1 2 3 4 5 Strongly agree

62. Justice was served by this process

Strongly disagree 1 2 3 4 5 Strongly agree

63. I was treated with dignity during the mediation process

Strongly disagree 1 2 3 4 5 Strongly agree

64. Going through the process has helped me deal with the other party

Strongly disagree 1 2 3 4 5 Strongly agree

65. The mediator was fair and effective

Strongly disagree 1 2 3 4 5 Strongly agree

66. I was treated with dignity throughout the case

Strongly disagree 1 2 3 4 5 Strongly agree

67. The other party did not act in good faith throughout the process

Strongly disagree 1 2 3 4 5 Strong agree

68. I got more than I would have if we had not used mediation

Strongly disagree 1 2 3 4 5 Strongly agree

69. Mediation just added another step to resolving this case and was not helpful

125 Strongly disagree 1 2 3 4 5 Strongly agree

70. I felt pressured by the court to resolve this case without a trial

126 Strongly disagree 1 2 3 4 5 Strongly agree

71. Mediation helped resolve some issues in this case, but not all

127 Strongly disagree 1 2 3 4 5 Strongly agree

72. The process used to decide the case was confusing to me

128 Strongly disagree 1 2 3 4 5 Strongly agree

73. The full story was not told in this case

129 Strongly disagree 1 2 3 4 5 Strongly agree

74. Participating in the case was convenient to me

130 Strongly disagree 1 2 3 4 5 Strongly agree

75. *Considering everything – cost, time, convenience, fairness – how would you prefer to have a case like this resolved next time [Interviewer: Please read all potential answers]*

- 131 ___ (1) Judge
 ___ (2) Settlement discussions among the parties
 ___ (3) Mediation
 ___ (4) Settlement discussions among the lawyers, without much involvement of the parties
 ___ (5) Have no opinion
 ___ (9) No answer

Skip to Question 77.

76. Did you or your attorney consciously decide to abandon the case because continuing it would cost more than you would likely win or save

- 132 ___ (1) Yes
 ___ (2) No, no explicit decision was made, it just happened
 ___ (3) Not applicable, the other party quit
 ___ (9) No answer

To conclude this interview, we would like to develop an understanding of just who uses the courts and its mediation programs. We would therefore appreciate it if you would answer some questions about yourself.

77. What is your occupation

- 33
- ☐ (1) Student
 - ☐ (2) Employee of DC Government
 - ☐ (3) Employee of Federal Government
 - ☐ (4) Hourly employee in business
 - ☐ (5) Salaried employee in business
 - ☐ (6) Self employed in business
 - ☐ (7) Professional
 - ☐ (8) Not employed
 - ☐ (9) Take care of home, children; not employed outside the home
 - ☐ (10) Other _____
 - ☐ (99) No answer

78. What is the occupation of the other party in this case

- 34
- ☐ (1) Student
 - ☐ (2) Employee of DC Government
 - ☐ (3) Employee of Federal Government
 - ☐ (4) Hourly employee in business
 - ☐ (5) Salaried employee in business
 - ☐ (6) Self employed in business
 - ☐ (7) Professional
 - ☐ (8) Not employed
 - ☐ (9) Takes care of home, children; not employed outside the home
 - ☐ (10) Other _____
 - ☐ (99) No answer

79. How old are you

- 35
- ☐ (1) Under 21
 - ☐ (2) 21-30
 - ☐ (3) 31-40
 - ☐ (4) 41-50
 - ☐ (5) 51-60
 - ☐ (6) 61-70
 - ☐ (7) 71 +

80. What is your gender

- 36
- ☐ (1) Male
 - ☐ (2) Female

81. What is your race/ethnicity

- 137 ☐ (1) Black
☐ (2) White
☐ (3) Hispanic
☐ (4) Asian
☐ (5) Other _____

82. What is the highest grade you completed

- 138 ☐ (1) Eighth grade or less
☐ (2) Some high school but no diploma
☐ (3) High school diploma or equivalency
☐ (4) Vocational school
☐ (5) Some college, but no degree
☐ (6) Bachelor's degree
☐ (7) Graduate or professional school
☐ (9) No answer

83. What is the highest grade the other party completed

- 139 ☐ (1) Eighth grade or less
☐ (2) Some high school but no diploma
☐ (3) High school diploma or equivalency
☐ (4) Vocational school
☐ (5) Some college, but no degree
☐ (6) Bachelor's degree
☐ (7) Graduate or professional school
☐ (8) Don't know
☐ (9) No answer

84. What range was your annual income in before taxes during – [Interviewer: Please read the income ranges]

1986 1988 1990

- | | | | |
|--------------------------|--------------------------|--------------------------|-------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (1) less than \$10,000 |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (2) \$10,001 - \$25,000 |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (3) \$25,001 - \$40,000 |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (4) \$40,001 - \$60,000 |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (5) \$60,000 + |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (9) No answer |

[Coding: 1986 = Column 140; 1987 = Column 141; 1988 = Column 142]

85. What range was the annual income of the other party in before taxes during – [Interviewer: Please read the income ranges]

1986 1988 1990

___	___	___	(1) less than \$10,000
___	___	___	(2) \$10,001 - \$25,000
___	___	___	(3) \$25,001 - \$40,000
___	___	___	(4) \$40,001 - \$60,000
___	___	___	(5) \$60,000 +
___	___	___	(6) Unknown
___	___	___	(9) No answer

[Coding: 1986 = Column 143; 1987 = Column 144; 1988 = Column 145]

Thank you for your cooperation and help. We very much appreciate your time and attention. We will be preparing a report on the Superior Court's Multi-Door Courthouse program based on the information you and others provide. It will help the District of Columbia improve its services.

HARD CASES, VULNERABLE PEOPLE---
Fix.

[illegible]

[illegible]



DEMCO